Standard Jury Instructions- Criminal Cases

NEXT CASE ON THE COURT'S DOCKET WILL BE STANDARD JURY INSTRUCTION CIVIL CASES.

I APPRECIATE THAT. THANK YOU VERY MUCH. NOW, WELL PROCEED WITH THE STANDARD JURY INSTRUCTION CRIMINAL CASES. JUDGE PADOVANO.

MAY IT PLEASE THE COURT. I AM PHIL PADOVANO FOR THE COMMITTEE. IF WE PROPOSE A REVISION TO THE REASONABLE DOUBT INSTRUCTION, I WANT TO SAY, BEFORE I BEGIN, THAT THIS IS SOMETHING THAT THE COMMITTEE HAS HAD UNDER CONSIDERATION FOR SOME TIME, AT LEAST SIX OR SEVEN YEARS THAT I KNOW OF, AND HAS ENTERTAINED SUBMISSIONS BY A REPRESENTATIVE OF THE PROSECUTION AND DEFENSE IN THE PAST, BUT THIS IS THE FIRST TIME THAT THE COMMITTEE HAS BEEN ABLE TO PREPARE A PROPOSAL FOR THE COURT. THE REASON WE HAVE BEEN CONSIDERING IT, I THINK, FOR SUCH A WHILE, IS THAT IT IS AN INSTRUCTION THAT HAS BEEN THE SUBJECT OF A GREAT DEAL OF CRITICISM. MOSTLY I WOULD SAY, BY JUDGES, TRIAL JUDGES, AND I THINK THE CRITICISMS THAT ARE TYPICAL OF THE INSTRUCTION ARE THOSE ARTICULATED BY JUDGE LAWRENCE JOHNSTON OF MIAMI, WROTE A BAR JOURNAL ARTICLE, WHICH I HAVE ATTACHED.

WHY DID THE COMMITTEE UNDERTAKE TO LOOK AT THIS PARTICULAR RULE INITIALLY?

JUSTICE QUINCE, I WOULD HAVETO GO BACK A LITTLE BEFORE MY TIME AS THE CHAIR OF THE COMMITTEE, BECAUSE, WHEN CHAIRMAN FREDERICA SMITH WAS THE CHAIR, THEY ENTERTAINED THE SUBJECT FOR TWO OR THREE YEARS, AND I COULDN'T TELL YOU FOR SURE, BUT I DO KNOW THAT THERE HAS BEEN A LOT OF CRITICISM ABOUT IT, PARTICULARLY BY JUDGES.

WELL, NOW, YOU SAID THEY ENTERTAINED IT FOR THREE OR FOUR YEARS. DOES THAT MEAN THAT THEY DECIDED TO LOOK AT IT THEN DECIDED NOT, AND THEN -- AT SOME POINT --

NO. IT IS A GOOD QUESTION, AND, IN FACT, I THINK THE ANSWER IS GOING TO MIRROR A LOT OF WHAT WE WILL SEE TODAY. THE WAY THAT JUDGE SMITH WENT ABOUT IT WAS TO INVITE SUBMISSIONS BY THE PROSECUTION AND THE DEFENSE. THIS WENT ON, DEBATES AND MEETINGS AND REMEETINGS, OVER THE KOURINGS COURSE -- OVER THE COURSE OF A FEW YEARS, AND APPARENTLY THE COMMITTEE CENTRALIZED ITSELF WITH THE DEBATE. WE DECIDED TO HANDLE IT DIFFERENT THIS TIME. WE DIDN'T INVITE THOSE SUBMISSIONS. OF COURSE WE SENT IT OUT FOR PUBLIC COMMENT AND WE RECEIVED THE COMMENT AND DISCUSSED IT, BUT WE HAVE ESSENTIALLY MOVED THE DEBATE HERE, AND I THINK YOU ARE GOING TO HEAR, NOW, WHAT WE HAVE, AND I THINK WHAT IT BOILS DOWN TO, IN A VERY SIMPLE WAY, IS THAT NOBODY, ON THE PROSECUTION OR DEFENSE SIDE, THINKS THAT THE INSTRUCTION THAT WE HAVE IS ANY GOOD, BUT THEY CAN'T AGREE ON WHAT TO DO TO REPLACE IT. THE PROSECUTORS ARE AFRAID THAT ANY POTENTIAL DRAFT THAT WE HAVE TO REPLACE IT MAKE IT EASIER TO FIND REASONABLE DOUBT, AND THE DEFENSE LAWYERS, CONVERSELY, ARE CONCERNED.

I GUESS WHAT I WAS LOOKING FOR IS WHAT, SPECIFICALLY, ABOUT THE PRESENT INSTRUCTION, WAS SO BOTHERSOME TO COMMITTEE MEMBERS THAT THEY DECIDED THEY NEEDED TO REVAMP IT?

LET ME MOVE DIRECTLY TO THAT, BECAUSE I THINK THAT IS VERY IMPORTANT, AND I THINK THAT IS WHAT THIS COURT, REALLY, NEEDS TO KNOW. LET ME JUST GO THROUGH THE

INSTRUCTION WITH YOU. IF YOU ARE ONE WHOS DOES BETTER BY LOOKING AT IT, IT IS ON PAGE 8 OF THE REPORT, BUT I WILL TELL YOU WHAT SENTENCES I THINK WERE THE MOST, AND IT IS THE DEFINITION OF REASONABLE DOUBT. WHENEVER THE WORDS REASONABLE DOUBT ARE USED, YOU MUST CONSIDER THE FOLLOWING. A MERE REASONABLE DOUBT IS NOT A POSITIVE DOUBT, A SPECULATIVE, IMAGINARY OR FORCED DOUBT. IT DESCRIBES SOMETHING IN TERMS OF THE NEGATIVE. IT IS LIKE DEFINING A HORSE BY SAYING A HORSE IS NOT A COW. WE DON'T KNOW WHAT REASONABLE DOUBT IS. WE HAVEN'T SAID. WE JUST KNOW WHAT IT IS NOT. THE NEXT SENTENCE, SUCH A DOUBT, IF YOU RETURN A VERDICT OFING IN, IF YOU HAVE AN ABIDING CONVICTION OF GUILT. THIS SENTENCE DOES NOTHING TO TELL YOU WHAT TO DO IF YOU HAVE A REASONABLE DOUBT. IT TELLS YOU WHAT TO DO IF YOU HAVE SPECULATIVE DOUBT, AND THE SENTENCE THAT PROMOTES THE MOST DISSENSION, IS THE NEXT ONE, WHICH HAS 28 COMMAS, THREE CLAUSES, SOME OF THEM SEPARATING ONLY A COUPLE OF WORDS. THIS ONE SAYS IF, AFTER CAREFULLY CONSIDERING, COMPARING THE EVIDENCE, IT IS NOT AN ABIDING CONVICTION OF GUILT OR CONVICTION, AND IS ONE WHICH VACILLATES AND CHARGES ARE NOT PROVED BEYOND A REASONABLE DOUBT, YOU MUST FIND THE DEFENDANTING IN, BECAUSE THE DOUBT IS REASONABLE. DESPITE THE FACT THAT THE AVERAGE JUROR WOULD HAVE A HARD TIME FOLLOWING THE BACK AND FORTH OF THAT SENTENCE, WE HAVE THREE PROBLEMS THERE. ONE, WE ARE USING THE TERM "CONVICTION" TO SIGNIFY THE STRENGTH OF THE JUROR'S BELIEF, WHICH IS A VERY ODD TERM TO USE IN A CRIMINAL CASE, WHERE THE PROCEEDING, AT LEAST FROM THE PROSECUTION'S POINT, IS TO OBTAIN A CONVICTION OF THE DEFENDANT. THE USE OF THESE TERMS MUST BE VERY DISTRACTING AND VERY CONFUSING. THE USE OF THE TERM "ABIDING" IS, FIRST OF ALL, I THINK AN ARCHAIC TERM THAT I THINK PEOPLE DON'T USE IN EVERYDAY ENGLISH ANYMORE, BUT SECONDLY IT IS A SELF-CANCELING DEFINITION, BECAUSE YOU SAY SUCH A DOUBT MUST NOT INFLUENCE YOU TO RETURN A VERDICT OFING IN, IF YOU HAVE AN ABIDING CONVICTION OF GUILT. IF, ON THE OTHER HAND, IF, AFTER CAREFULLY CONSIDERING, YOU DON'T HAVE AN ABIDING CONVICTION OF GUILT BUT, RATHER, YOU HAVE A CONVICTION WHICH WAIVERS AND VACILLATES, THEN YOU HAVE TO FIND THE DEFENDANTING IN. IF YOU THINK ABOUT THE SYNTAX OF THIS AND THE MEANING OF THIS, IT IS, REALLY, A SELF-CANCELING DEFINITION. IF YOU HAVE AN ABIDING CONVICTION OF GUILT, THEN BY DEFINITION IT IS NOT GOING TO WAIVER. IT IS NOT GOING TO VACILLATE. SO WE HAVE USED A LOT OF TERMS HERE. BY THE WAY, VACILLATE IS ANOTHER WORD THAT MOST COMMITTEE MEMBERS BELIEVE THAT THE JURORS SIMPLY DON'T FOLLOW, SO THE OTHER ASPECT OF IT IS THAT IT DOESN'T DESCRIBE THE LARGER CONCEPT, UNLIKE MANY OR INSTRUCTIONS, THE LARGER CONCEPT OF PROOF BEYOND A REASONABLE DOUBT, SO WHAT WE HAVE DONE IS TO TAKE THESE CONCEPTS AND REWORK THEM INTO SIMPLE, DECLARATIVE SENTENCES, FOCUSING MORE ON THE POSITIVE THAN THE NEGATIVE, AND WE HAVEN'T DONE, IN MY VIEW, WE HAVE NOT MADE THE STANDARD ANY GREAT ERROR ANY LESS. OUR GOAL WAS SIMPLY TO PUT THIS IN PLAIN LANGUAGE. THIS IS NOT THE ONLY INSTRUCTION THAT IS WRITTEN IN ARCHAIC TERMS, BUT IT IS ONE THAT WE REALLY WANT TO TRY TO FIX.

IF WE LOOK AT 50 STATES, AND I KNOW ARIZONA HAS BEEN THE LEADER IN TRYING TO GET A LOT OF THINGS SO THEY ARE IN PLAIN ENGLISH. DID YOU USE ANY OTHER STATES FOR GUIDANCE, AND IN THIS REGARD, I THINK THAT I, FOR ONE, AM CONCERNED ABOUT THIS ISSUE. HOWEVER CONFUSED THIS INSTRUCTION MIGHT SEYMOUR ARCHAIC, IT HAS BEEN UPHELD AS CONSTITUTIONAL, AND THERE IS ALL THESE CONCERNS, FROM BOTH SIDES, THAT THERE IS SOME PROBLEMS WITH THIS INSTRUCTION IS THERE SOME GUIDANCE YOU CAN GIVE US THROUGH THIS INSTRUCTION, THAT HAS BEEN UPHELD --

THIS PARTICULAR INSTRUCTION HAS NOT, BUT PARTS OF IT, MUCH OF IT IS DRAWN FROM THE NINTH CIRCUIT COURT OF APPEALS INSTRUCTION, AND SOME OF IT IS DRAWN FROM THE FEDERAL JUDICIAL INSTRUCTION, WHICH WAS COMMENTED, VERY FAVORABLY, UPON BY THE COURT IN NEBRASKA, BUT LET ME ADDRESS ONE OTHER CONCERN, BECAUSE I KNOW --

BEFORE YOU MOVE FROM THAT POINT, I THINK JUSTICE SHAW HAS A QUESTION.

I AM SORRY.

THIS IS ONE OF THE FEW TIMES WHERE DEFENSE COUNSEL AND THE PROSECUTORS AGREE ON SOMETHING, AND ON BALANCE, I RECOGNIZE WHAT YOU ARE SAYING, THAT, AS WORDED, DRAMATICALLY IT IS ATROCIOUS, BUT IT HAS BEEN USED FOR YEARS, AND IT HAS STOOD THE TEST OF TIME, AND JUDGES HAVE BECOME FAMILIAR WITH IT. PROSECUTORS HAVE BECOME FAMILIAR WITH IT. DEFENSE LAWYERS HAVE. SO ON BALANCE, AREN'T WE HEADED FOR MORE TROUBLE THAN WE ACTUALLY HAVE? IT IS A DIFFICULT THING TO EXPLAIN, NO MATTER HOW YOU DO IT DRAMATICALLY, SO -- GRAMATICALLY, SO WHY SHOULDN'T WE STICK WITH WHAT WE HAVE AND THAT HAS BEEN EXPLAINED TO MOST JUDGES AND PEOPLE THAT DEAL IN IT, DEFENSE LAWYERS AND PROSECUTORS. IT SEEMS THAT THAT WOULD BE THE WISER COURSE, ALTHOUGH IT UP ENDS -- IT OFF ENDS YOU, GRAMITICALLY AND IT, POSSIBLY, OFF ENDS ME.

I THINK YOU HIT RIGHT AT THE HEART OF THE PROBLEM. THE LACK OF OR THE KIND OF MOMENTUM THAT IT WOULD TAKE TO CHANGE THIS IS DIFFICULT, BECAUSE WE ARE USED TO IT, AND THAT IS REALLY, BUT, REALLY THAT, IS THE ONLY PROBLEM, I THINK. THE ONLY PROBLEM HIS LAWYERS, THEY ARE COMFORTABLE. THEY HAVE THEIR LITTLE VOIR DIRE SPEECHES DOWN PAT. THEY HAVE HEARD THIS THING A THOUSAND TIMES. THEY LIKE T BUT COMPLACENCY AND FAMILIARITY ARE, REALLY, IN MY VIEW NOT REASONS TO AVOID PROGRESS, AND I THINK WHAT WE REALLY NEED TO LOOK AT IN THIS CASE AND WHAT THE COURT NEEDS TO LOOK AT IN THIS CASE IS WHAT CAN WE DO TO BETTER SERVE OUR JURORS AND THE CONCEPTS THAT WE GIVE TO THESE JURORS AND NOT WHAT AND EASES PROSECUTORS AND DEFENSE LAWYERS. YES, I AM HERE BY MYSELF. THE ONE PERSON WHO SUPPORTED ME, I AM NOT SURE IS STILL WITH ME, BUT ULTIMATELY, JUSTICE SHAW, SOMETHING THAT IS GOOD FOR THE JUSTICE SYSTEM AND FOR JUDGES AND JURIES, AS A WHOLE, MIGHT NOT NECESSARILY BE GOOD FOR PROSECUTORS OR FOR DEFENSE LAWYERS, SO YOU KNOW, THAT IS WHY WE HAVE TAKEN INITIATIVE TO DO THIS. I THINK THAT IT IS NOT JUST A QUESTION -- THE OTHER THING, ON THE CONSTITUTION AL --.

BUT AREN'T WE ASKING, ON LITIGATION, LAWYERS BEING WHAT LAWYERS ARE, AREN'T THEY GOING TO TEST IT?

YOU MAY GET THE LITIGATION, BUT IT WILL BE TOTALLY WITHOUT MERIT. TOTALLY WITHOUT MERIT. YOU CAN READ VICTOR VERSUS NEBRASKA. YOU CAN READ PAIGE VERSUS LOUISIANA. YOU CAN SEE THAT THERE IS ABSOLUTELY NOTHING THIS INSTRUCTION THAT DEFENDS THE DUE PROCESS CLAUSE. PART OF WHAT YOU HAVE, HERE, IS WHAT A STUDENT OF LOGIC WOULD CALL AN APPEAL TO FEAR. DON'T DO THIS, BECAUSE YOU WILL BE PHASED WITH A LONG ROAD OF LITIGATION.

ONE OF THE THINGS, JUDGE PADOVANO, THAT DOES STRIKE ME, IS THAT, IN FOLLOW-UP TO JUSTICE PARIENTE'S QUESTION, IS I NOTICE IN THE MATERIALS THAT THE FEDERAL COURTS USE A LITTLE BIT DIFFERENT STANDARD. THERE HAS BEEN SOME CRITICISM OF THAT, BUT HAS THE COMMITTEE GONE THROUGH WHAT IS DONE IN THE FIFTH OTHER STATES -- IN THE FIFTY OTHER STATES, AND IT SEEMS TO ME THAT WE, REALLY, EVERYBODY IS CONFRONTED WITH THE SAME PROBLEM. WE OUGHT NOT TO TRY TO INVENT, OURSELVES, SOMETHING THAT HASN'T BEEN TESTED, BUT IF WE COULD PLUC SOMETHING THAT HAS BEEN TESTED, THEN WE WOULD BE ON SAFER GROUND, AND AS A COMMITTEE -- HAS THE COMMITTEE OFFERED US ANYTHING THAT WOULD BE FROM ANOTHER STATE THAT HAS BEEN UPHELD?

TO ANSWER THAT QUESTION, THE COMMITTEE AND THE SUBCOMMITTEE PREPARING THE INSTRUCTION DID EXAMINE THE INSTRUCTIONS FROM ALL OF THE OTHER STATES AND FROM ALL OF THE FEDERAL JURISDICTIONS. NOW, OUR PROPOSAL IS NOT VERBATIM, LIKE ANY OTHER ONE EXACTLY. BUT IT CONTAINS ELEMENTS OF OTHERS THAT HAVE BEEN UPHELD. NOW, LET ME EXPLAIN THAT. I, PERSONALLY, I WOULD LIKE TO SEE THE COURT ADOPT THE NATIONAL, THE FEDERAL JUDICIAL CENTER INSTRUCTION, WHICH WAS SO -- RECEIVED SUCH A WARM WELCOME

IN THE VICTOR VERSUS NEBRASKA CASE. THE PROBLEM WITH IT IS IT HAS A SENTENCE IN IT, PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU FIRMLY CONVINCED THE DEFENDANT IS GUILTY. DEFENSE LAWYERS FEEL THAT THAT IS NOT A HIGH ENOUGH BURDEN, AND SO WE HAVE TRIED TO CHANGE THAT, TO SATISFY THE DEFENSE BAR, BY SAYING PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU WITH A FIRM, STABLE, AND UNWAVERING CONCLUSION THAT THE DEFENDANT IS GUILTY, INCORPORATING THE ELEMENTS OF THE EXISTING INSTRUCTION, BUT TO ANSWER YOUR QUESTION, PARTS OF THIS HAVE BEEN UPHELD, AND I HAVE NO DOUBT THAT, IF A COURT WERE TO LOOK AT THIS, IT WOULD NOT BE -- IT WOULD WITHSTAND CONSTITUTIONAL SCRUTINY.

ONE OF THE OTHER QUESTIONS I HAD IS THAT THERE IS A STATEMENT MADE THAT THIS IS CONFUSING TO JURORS. I MUST ADMIT THAT WHEN I FIRST READ "THE BAR JOURNAL" ARTICLE BY JOHNSON, I LOOKED AND SAID THIS CAN'T REALLY BE WHAT WE ARE INSTRUCTING JURORS. THIS IS VERY CUMBERSOME. I GUESS, AS JUSTICE SHAW JUST SAID, IT IS DRAMATICALLY ATROCIOUS, BUT DO WE HAVE INDICATIONS THAT IT IS, IN FACT, CONFUSING TO JURORS, THAT THEY ARE GOING TO COME BACK WITH QUESTIONS, THAT THEY DON'T UNDERSTAND IT, BECAUSE THAT, IN TERMS OF FULFILLING OUR RESPONSIBILITY, THAT IS THE ROLE OF THE JURY INSTRUCTION, WHICH IS TO INSTRUCT, AND IF WE HAD EVIDENCE THAT THIS WAS CONFUSING, THEN THAT WOULD BE SOMETHING VERY IMPORTANT TO CORRECT, TO MAKE IT JUST FIT INTO THE 21st CENTURY OR WHATEVER CENTURY WE ARE IN.

WHATEVER WE ARE IN. I DON'T THINK, TO ANSWER YOUR QUESTION, NO, I DON'T THINK THERE IS ANY EMPIRICAL EVIDENCE. NOBODY HAS DONE EXIT SURVEYS, OR MOST OF WHAT WE HAVE, HERE, IS BASED ON THE OPINIONS OF TRIAL JUDGES.

YOU WERE A TRIAL JUDGE, AND AS A CRIMINAL TRIAL JUDGE, DID JURORS, WHEN YOU READ THAT QUESTION, DID THEY --

YES. NO. I SAW A LOT OF WHAT I REGARDED AS BLANK STARES. WHAT IS HE TALKING ABOUT. BUT NOBODY LATER SAID CAN YOU EXPLAIN THAT AGAIN. I THINK THE REASON FOR THAT IS THAT MOST PEOPLE DO HAVE A FAIRLY GOOD CONCEPT OF WHAT A REASONABLE DOUBT IS, WITHOUT YOUR TELLING THEM. MY PROBLEM, WITH THIS INSTRUCTION --

YOU MEAN BY POPULAR CULTURE?

EXACTLY RIGHT. YOU KNOW, IN FACT, THERE IS NO CONSTITUTIONAL REQUIREMENT THAT YOU GIVE A REASONABLE DOUBT INSTRUCTION AT ALL, AND MANY, NOT MANY BUT THERE IS ONE FEDERAL APPELLATE CIRCUIT THAT DOESN'T GIVE IT AT ALL. THEY SIMPLY SAY YOU HAVE TO PROVE BEYOND A REASONABLE DOUBT, AND THE JURORS, THEN, USE THEIR COMMON SENSE, TO FIGURE OUT WHAT THAT IS. SO, NO, REALLY, THE IMPETUS FOR THIS COMES FROM COMMENTS BY -- THEY ARE IN THE MATERIALS. THESE WERE SENT AROUND. JUDGES LIKE JUDGE REESE IN COLLIER COUNTY, SAID HE WAS ALMOST EMBARRASSED TO GIVE THIS THIS INSTRUCTION TO JURORS. JUDGE BLAKE. JUDGE TURNER. VARIOUS OTHERS HAVE MADE COMMENTS ABOUT WHAT THEY PERCEIVED THE IMPROVEMENT BY THIS DRAFT OF THE INSTRUCTION, BUT TO ANSWER YOUR QUESTION, NO, THERE IS NO EMPIRICAL PROOF OF THAT AT ALL. IT IS JUST WHAT JUDGES SAY.

WAS THERE ANY THOUGHT GIVEN BY THE COMMITTEE, TO JUST TAKING THIS LONG SENTENCE THAT YOU HAVE THE REAL PROBLEM WITH OR THE COMMITTEE HAS THE REAL PROBLEM WITH, AND BREAKING IT INTO SMALLER SENTENCES BUT USING, BASICALLY, THE SAME CONCEPTS THAT ARE IN IT, AS OPPOSED TO REWORK THE WHOLE INSTRUCTION?

WELL THAT, IS KIND OF WHAT WE DID. WE TOOK THE CONCEPT OF THE VERY FIRST SENTENCE, PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU WITH A FIRM, STABLE, AND UNWAVERING CONCLUSION THAT THE DEFENDANT IS GUILTY. THAT SENTENCE INCORPORATES

NEARLY ALL OF THE CONCEPTS THAT ARE IN THAT LONG, CONFUSING SENTENCE. NOW, THAT WAS OUR GOAL. IF YOU THINK WE DIDN'T ACHIEVE IT, I WILL BE GLAD TO TRY TO REVISIT THAT. I DO THINK, THOUGH, THAT WE OUGHT TO GIVE SERIOUS CONSIDERATION TO TRYING TO IMPROVE THIS, AND I KNOW I SHOULD, IF THERE ARE NO OTHER QUESTIONS, GIVE A FEW MINUTES, HERE, TO MY COLLEAGUES.

YOU ARE IN YOUR REBUTTAL TIME ON THIS SIDE.

YES. MAY IT PLEASE THE COURT. I AM JIM MILLER FROM JACKSONVILLE. I REPRESENT THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, BUT JUDGE PADOVANO IS RIGHT. IT IS THE OFFICIAL POSITION HERE, TODAY, MY APOLOGIES NOT ONLY TO HIM BUT TO THIS COURT, IF THIS CAUSED ANY INCONVENIENCE. I AM GOING TO WITHDRAW OUR OFFICIAL COMMENTS, ON BEHALF OF FACDL, THE REASON BEING, AFTER OUR BOARD OF DIRECTORS VOTED TO SUPPORT MY COMMENTS, A LOT OF OUR MEMBERS HAVE FILED OTHER COMMENTS WITH THIS COURT, AND I JUST GET THE FEELING, WITH MY ORGANIZATION, BECAUSE THIS IS SUCH AN IMPORTANT MATTER, I DON'T WANT TO STAND HERE AND REPRESENT THE VIEWS OF AN ENTIRE ORGANIZATION, WHEN THERE IS A SIGNIFICANT, PERHAPS A MAJORITY DISSENT FROM MY POSITION, SO I, PERSONALLY, AGAIN, APOLOGIZE ON TO THE COURT FOR THIS, BUT THIS IS SO IMPORTANT, AND SINCE I FILED MY COMMENTS, THERE HAVE BEEN SO MANY MEMBERS OF MY ORGANIZATION THAT SIMPLY DON'T AGREE WITH THE POSITION THAT I TAKE.

BUT DO YOU AGREE THAT, AS PRESENTLY WRITTEN, IT IS CONFUSING TO THE JURY?

YES. I WAS JUST GOING TO SAY, IF I MAY, JUDGE PARIENTE, HOWEVER, AS AN INDIVIDUAL MEMBER OF THE BAR, I STANDBY THE COMMENTS THAT I FILED WITH THIS COURT TODAY, AND AS AN INDIVIDUAL, JAMES T MILLER, I THINK THAT THIS PRESENT INSTRUCTION IS CONFUSING. I CERTAINLY APPRECIATE YOUR CONCERNS ABOUT POSSIBLE CONSTITUTIONAL CHALLENGES. HOWEVER, I THINK JUDGE PADOVANO IS ABSOLUTELY RIGHT. WHILE THE PRESENT PROPOSED INSTRUCTION IS NOT ACTUALLY PATTERNED DIRECTLY FROM ANY ONE INSTRUCTION OUT THERE THAT THE COURT HAS UPHELD, IF YOU WOULD JUST SIMPLY LOOK AT ALL OF THE COMMENTS, YOU WILL SEE THAT ALL OF THE PARTS OF THIS HAVE, ALREADY, BEEN UPHELD, AND SPEAKING AS AN INDIVIDUAL, NOW, I, REALLY, AS A DEFENSE ATTORNEY, HAVE NO DOUBT THIS INSTRUCTION WOULD BE UPHELD. THE COURTS HAVE SAID YOU DON'T HAVE TO DEFINE REASONABLE DOUBT, TO BEGIN WITH, AND IT SEEMS TO ME THAT THIS HAS BEEN DEFINED IN A REASONABLE, COMMON SENSE, PLAIN ENGLISH WAY. THE ONLY OTHER, AND I WON'T TAKE TOO MUCH TIME, THE ONLY OTHER CONSTITUTIONAL CONCERN FROM THE DEFENSE BAR, AND I AM GREATLY CONCERNED ABOUT THIS, IS THAT ANY JURY INSTRUCTION DOES NOT DIMINISH, IN ANY WAY, THE HIGH BURDEN OF PROOF OF REASONABLE DOUBT, AND MY PERSONAL VIEW IS, AGAIN, BASED ON MY COMMENTS, IS THAT THIS SATISFIES THAT. AND WITH THAT, THERE IS NO QUESTIONS. I WILL SIT DOWN.

THANK YOU, MR. MILLER.

THANK YOU, YOUR HONOR.

IN OPPOSITION, WE HAVE FIVE COUNSEL WHO HAVE SIGNED UP. PLEASE BE MINDFUL OF YOUR DIVISION OF TIME, BECAUSE WE WILL STRICTLY ADHERE TO THE 20 MINUTES.

YES, CHIEF JUSTICE. WE WILL DIVIDE OUR TIME ACCORDINGLY. MAY IT PLEASE THE COURT. GOOD MORNING. MY NAME IS SCOTT FINGER HUT. I AM HERE, BOTH AS A MEMBER OF THE FLORIDA BAR AND AS A MEMBER OF THE BAR OF FLORIDA CRIMINAL DEFENSE LAWYERS, MIAMI CHAPTER. IT IS A PRIVILEGE TO BE HERE, WITH YOU, BEFORE YOU THIS MORNING. IN AN ONGOING EFFORT TO CULTIVATE, AS BEST WE CAN, A CRIMINAL JUSTICE SYSTEM WHICH FAIRLY PROSECUTES GUILTY PEOPLE AND HOPES, AS BEST WE CAN, TO EXTRICATE INNOCENT PEOPLE THE SYSTEM, THERE IS

NO MORE IMPORTANT MOMENT THAN WHEN JURORS ARE INSTRUCTED ON THE MEANINGS OF REASONABLE DOUBT AND THEN TO APPLY THAT IN DEFINING WHAT PROOF BEYOND A REASONABLE DOUBT IS, NOT TO MENTION THE FACT THAT IT IS, ALSO, AN IMPORTANT MOMENT, WHEN THE STATE MAKES ITS FILING CHARGES. THE DECISION IS BASED ON WHETHER THEY CAN PROVE THE CASE BEYOND A REASONABLE DOUBT. THIS, AND THE PRESUMPTION OF INNOCENCE, ARE THE BEDROCK PRINCIPLES OF OUR VERY UNIQUE AMERICAN CRIMINAL JUSTICE SYSTEM. I WOULD TAKE ISSUE WITH THE HONORABLE JUDGE PADOVANO FOR ONE MOMENT. THERE IS A CONSTITUTIONAL REQUIREMENT, STATE AND FEDERAL, THAT REASONABLE DOUBT BE DEFINED, AND IN THE FOOTNOTE THAT I INCLUDED IN MY PRESENTATION, AT PAGE 7, FOOTNOTE 6, FROM VICTOR VERSUS NEBRASKA, COURTS ARE NOT MARRIED TO ANY PARTICULAR FORM OF INSTRUCTION ON REASONABLE DOUBT, BUT THERE IS NO QUESTION THAT DEFINING IT IS A DUE PROCESS REQUIREMENT IN OUR STATE AND FEDERAL CONSTITUTION CONSTITUTIONS. FIRST AND FOREMOST, LET ME SAY THAT WE APPLAUD THE EFFORT OF JUDGE PADOVANO AND HIS COMMITTEE, OF JUDGE SMITH BEFORE HIM, OF THE COURT, IN UNDERTAKING IT THIS MORNING, TO REDEFINE REASONABLE DOUBT IN A MORE POSITIVE, MORE CONCISE, MORE RATIONAL, MORE LOGICAL TERMS, IF THAT IS POSSIBLE. THAT IS, CERTAINLY, APPLAUDABLE EFFORT, BUT I RESPECTFULLY SUGGEST TO THE COURT THAT, HERE, LESS IS NOT MORE, AND IT IS IMPORTANT THAT WE KEEP THAT IN MIND, CERTAINLY NOT WHEN IT COMES DO THIS POTENTIALLY AND HIGHLY-SUSCEPTIBLE GOSSAMER CONCEPT THAT IS REASONABLE DOUBT. THE NUMBER TWO PROPOSED INSTRUCTION, AS IT IS PARED DOWN, AS IT IS HERE, DANGEROUSLY ENCOACHES ON REASONABLE DOUBT, AND IT IS ALL THAT WE ARE ASKING FOR THE STATE AND COURTS ALIKE. FIRST INSTRUCTION THAT THE EXPLANATION OF WHAT REASONABLE DOUBT IS, BECAUSE IT FAILS TO EXPLAIN WHAT REASONABLE DOUBT IS NOT. THAT MAY BE TOO SIMPLE A CONCEPT, AT FIRST BLUSH, BUT FROM CHILDREN, WE ARE TAUGHT TO DISCERN THINGS, BY WAY OF ANALOGY. HOT AND COLD, DARK AND LIGHT, FRAMES OF REFERENCE ARE CRITICAL, ESPECIALLY FOR ABSTRACT CONCEPTS, AND ALTHOUGH REGRETTABLY, REASONABLE DOUBT IN CRIMINAL TRIALS IS, PERHAPS, ONE OF THE MOST ABSTRACT CONCEPTS YOU CAN COME UP WITH, AS HELD IN VICTOR VERSUS NEBRASKA AND AS IS POINTED OUT ON PAGE 9 EVER MY PRESENTATION, JURORS MAY LEGITIMATELY A QUIT AN ACCUSED IF, BASED -- ACQUIT AN ACCUSED, IF, BASED ON ON THE COMPETENT EVIDENCE OR LACK OF EVIDENCE, THEY GLEAN A POSSIBILITY THAT GUILT HAS NOT BEEN PROVED. THEY NEEDN'T PINPOINT A SPECIFIC SOURCE FOR THEIR DOUBT. INDEED, ANY APPLICATION FOR REASONABLE -- FOR REASON AND COMMON SENSE THAT WE ASK JURORS TO APPLY, WOULD NECESSARILY ENTAIL THESE JURORS TO CONSTRUE, LIKE SPECULATIVE AND IMAGINARY, AS THEY WOULD IN EVERYDAY APPLICATIONS, BUT WHAT DO THEY DO? TAKE OUT ALL OF THE ADJECTIVES, AT THIS POINT, TO DISCERN WHAT REASONABLE DOUBT IS NOT.

IS THERE ANY WAY THAT WE COULD SAVE THIS PROPOSED INSTRUCTION? IS THERE ANYTHING THAT YOU PROPOSE TO PUT, IN THIS IN STRUS INSTRUCTION, THAT -- IN THIS INSTRUCTION, THAT WOULD CURE THE PROBLEMS THAT YOU SEE? SURELY, JUSTICE QUINCE. I PROPOSE TWO THINGS. ONE IS IGNORE THE PRESENT PROPOSAL AND GO BY A SIXTH CIRCUIT PATTERN INSTRUCTION, BUT LET'S TALK ABOUT THIS PROPOSED INSTRUCTION, BY JUDGE PAT VAN-'S COMMITTEE. FIRST, WE INSIST THAT YOU RESUBMIT ALL OF THE DEFINING ADJECTIVES THAT WERE TAKEN OUT, TO DEFINE WHAT REASONABLE DOUBT IS AND IS NOT. BEFORE THAT, AS A MATTER OF SHEER SYNTAX, WE REQUEST THAT YOU FIND A REASONABLE DOUBT BEFORE YOU PROVE WHAT REASONABLE DOUBT IS NOT. THE CURRENT INSTRUCTION DOESN'T DO. THAT DEFINED IN MY PROPOSED INSTRUCTION, IN ORDER TO APPLY THE CONCEPT OF PROOF BEYOND A REASONABLE DOUBT, I WOULD LIKE THEM TO KNOW WHAT REASONABLE DOUBT IS FIRST.

SO THE SECOND PARAGRAPH HAS A REASONABLE DOUBT PORTION. YOU ARE SAYING PUT THAT BEFORE.

I SUGGEST TO PUT THAT FIRST. HOWEVER, DON'T PUT IT IN, WITHOUT MODIFICATIONS AND ADJECTIVES LIKE MERE, FORCED, PURE, AND BEAR, ALL CRITICAL -- AND BARE, ALL CRITICAL, RESPECTFULLY I WOULD SUBMIT, IN AGGRAVATED CIRCUMSTANCE CASES, WHERE THIS COURT

HAS HELD THAT THIS INSTRUCTION IS NO LONGER TO BE GIVEN IN AGGRAVATED CIRCUMSTANCE CASES.

MR. FINGER HUT, I HATE TO INTERRUPT YOU, BUT YOU MUST HONOR YOUR TIME, BECAUSE WE ARE NOT GOING TO EXTEND THE TIME FOR THE OTHER COUNSEL.

THANK YOU.

MAY IT PLEASE THE COURT. I AM DAN CIENER. ACTUALLY WE HAVE, IN THE MIDDLE OF A TEN-HOUR ROUND TRIP DRIVE UP HERE, FOR THIS TWO MINUTES I GET, I AM PLEASED TO BE HERE. I WOULD LIKE TO POINT OUT THAT A NEW INSTRUCTION IS BAD. FATALLY BAD. AND I THINK EVERYONE HAS AGREED, EXCEPT ONE PERSON -- I THINK THAT IS WHAT THEY SAID EARLIER, OUT HERE THIS MORNING THAT, THE OLD ONE, LET'S GO BACK TO THAT, AND NOT HAVE THIS ONE. IN OTHER WORDS, BETWEEN THE TWO, THE OLD ONE IS MUCH BETTER. THE PROBLEM WITH THE NEW ONE IS THAT IT HAS GOT A PHRASE IN IT THAT I HAVE NEVER SEEN IN ANY INSTRUCTION, DOUBT BASED ON IMAGINATIONS ARE NOT REASONABLE DOUBTS. THE JUDGE WILL TELL THE JURY THAT? EVERYTHING WE IMAGINE, ALL OF OUR HYPOTHESIS, ALL OUR THINGS THAT PEOPLE THINK ABOUT ARE IMAGINATIONS, PICTURES, IMAGES IN OUR MIND, SO A QUICK EXAMPLE, THE DECEASED, RIGHT BEFORE SHE DIES, SAYS, WELL, THE GUY THAT SHOT ME WAS A BLACK MALE, 150 POUNDS, SIX FEET TALL, AND THEY ARREST MY CLIENT, AND I SAY TO THE JURY CAN YOU IMAGINE ALL OF THE OTHER PEOPLE THAT THAT DESCRIPTION WOULD FIT? PROSECUTOR JUMPS UP. NO. NO. NO. YOU CAN'T ARGUE THAT. YOU LISTEN TO THE JUDGE TELL YOU A REASONABLE DOUBT CANNOT BE BASED ON IMAGINATION. WHAT? OF COURSE IT IS. THAT IS WHY HYPOTHESIS OF INNOCENCE ARE US IMAGING A SITUATION WOULD FIT THE FACTS AND HE IS STILL NOT GUILT. IT HAS TO BE -- GUILTY. IT HAS TO BE THAT. EVERYTHING WE DO. WHEN WE GO TO LUNCH, TODAY, WE IMAGINE HOW IT IS GOING TO TASTE OR HOW GOOD IT IS GOING TO LOOK OR WHATEVER. WHEN YOU BUY SOMETHING FOR A CHILD, OH, I IMAGINE SHE WOULD LIKE THAT, OR A REASONABLE DOUBT DOUBT. I DON'T THINK HER MOTHER WOULD LIKE THAT, SINCE THE DRESS CAME FROM PARIS AND IT COST $100, AND HER MOTHER DOESN'T HAVE A JOB. WE DO THINGS BASED ON HYPOTHESIS OF DOUBT IN OUR MINDS, BUT THEY ARE TOLD IMAGINATION IS NOT BASED ON REASONABLE DOUBT. THAT HAS TO BE STRICKEN OUT OF THE NEW ONE. AS I THINK THIS COURT GOT RIGHT, 78 YEARS AGO, IN THE CASE --

BUT NOW IT SAYS THE REASONABLE DOUBT IS NOT A POSSIBLE OR SPECULATIVE, SPECULATIVE, IMAGINARY --

EXACTLY. WHAT THEY HAVE DONE IS IMAGE AREA DOUBT, IMAGINARY DOUBT IS USED LIKE A LITTLE GREEN MAN IN A FLYING SAUCER CAME DOWN AND DID IT. THAT WOULD BE AN IMAGINARY DOUBT, BUT A DOUBT BASED ON IMAGINATION, WHEN A JUROR SAYS YOU KNOW, I CAN IMAGINE THAT DESCRIPTION FITS MY NEIGHBOR DOWN THE STREET. I IMAGINE HIM TO BE THE MURDERER. HE FITS THAT DESCRIPTION. AND THE PROSECUTOR SAYS THAT CANNOT COME FROM THE DEFENSE ATTORNEY OR THE JURORS. IT IS NONSENSE, WHEN YOU THINK ABOUT IT. THAT CAN'T BE IN THERE.

SO IF YOU CHANGE THAT WORD TO IMAGE AREA DOUBT, YOU HAVE NO -- IMAGINARY DOUBT, YOU HAVE NO PROBLEM WITH IT, BUT IMAGINATION, THAT IS WHAT YOU DO.

IMAGINATION, NONE OF THE JURORS WERE THERE. WE HAVEN'T SEEN IT, AND BASED ON IMAGINATION OR LACK OF IT, BASED ON WHAT HAPPENED, THE JUDGE SAYS, LISTEN TO THE JUDGE TELL YOU YOU CANNOT BASE REASONABLE DOUBT ON IMAGINATION.

IF THIS INSTRUCTION WE HAVE, NOW, IS PROPOSED, WITH THE FIRST SENTENCE, STARTING WITH A REASONABLE DOUBT, IS NOT A POSSIBLE OR SPEULATIVE, IMAGINARY OR FORCED DOUBT, WOULDN'T YOU HAVE, WOULDN'T ALL OF THE ARGUMENTS THAT THE DEFENSE LAWYERS ARE MAKING, BE THERE IN THREE FOLD, BECAUSE IT STARTS OUT WITH WHAT IT IS NOT AND USES ALL

OF THOSE TERMS, LIKE POSSIBLE, SPECULATIVE, THAT YOU SAY THE JURY IS ALLOWED TO DO?

I AGREE. THE OLD ONE ISN'T PERFECT, BUT I AM HERE. THE REASON I CAME IS TO SAY THE NEW ONE DOESN'T FIX IT. IT MAKES IT WORSE. MUCH WORSE. THEY ARE PUTTING IN THINGS, NOW, TELLING THEM THAT THE JURY CANNOT HAVE AN IMAGINATION OF WHAT THE FACTS REALLY WERE. THEY CAN'T USE THEIR IMAGINATION.

LET ME WARN YOU ABOUT YOUR TIME.

YES, SIR. THE ONLY OTHER THING I SAY IN THE NEW ONE THEY WANT TO STRIKE OUT THE PRESUMPTION OR BELIEF THE PERSON IS NOT GUILTY. THEY SAY SAY UP-FRONT YOU MUST TAKE OUT THE BELIEF THAT YOU PRESUME HE IS GUILTY, UNTIL THE IMPORT? HALF OF THE PEOPLE DON'T EVEN KNOW WHAT THE WORD -- I PRESUME YOU ARE MR. LIVING TON, WHEN THEY FOUND THE GUY IN AFRICA, THEY SAY I PRESUME? WHAT DOES THAT MEAN? PEOPLE IN THE DICTIONARY DON'T TALK ABOUT. THAT PEOPLE WANT TO STRIKE OUT THE BELIEF AND USE THAT ARC I -- ARCHAIC BELIEF ONLY. I CAN THAT IS IMPROPER AND I BELIEVE THAT VERY MUCH.

MR. ALVAREZ.

I AM APPEARING, HERE, TODAY, ON BEHALF THE FLORIDA PUBLIC DEFENDER ORGANIZATION, AND GIVEN THE TIME LIMITATION, I WILL TRY TO BE AS PRECISE AND CLEAR AS POSSIBLE. OUR PRINCIPLE CONCERNWITH THE PROPOSED INSTRUCTION IS IT DOES ELIMINATE THE REASONABLE DOUBT STANDARD, AND THE PROPOSED INSTRUCTION, COMPARED WITH THE CLEAR AND CONVINCING EVIDENCE INSTRUCTION, WHICH THIS COURT PROVED IN THE JIMMY ALBRIGHT CASE, AND I WILL READ YOU THAT CASE, THE CLEAR AND CONVINCING EVIDENCE IS EVIDENCE THAT IS CONCISE, PRECISE AND CONSISTENT, AND LACKING HESITATION ABOUT THE MATTER IN ISSUE, WITHOUT HESITATION. THERE ARE TWO DEFINITIONS OF REASONABLE DOUBT. THERE IS THE MENTAL COMPONENT WHICH THE JUROR MUST FEEL BUT CERTAINLY A REASONABLE DOUBT WHICH ARISE, WHICH DO NOT ARISE IN A VACUUM. THEY ARISE FROM A DEFICIENCY I OR A DEFECT IN THE EVIDENCE. THE TRADITIONAL INSTRUCTION THAT WE HAVE BEEN USING FOR A CENTURY, TALKS ABOUT THE QUALITY OF THE EVIDENCE, WHICH, FROM REASONABLE DOUBT, CAN AND MUST ARISE. THIS DOES ELIMINATE THE LANGUAGE CONCERNING THE QUALITY OF THE EVIDENCE AND MERELY TALKS ABOUT THE FIRMNESS OF THE CONVICTION THAT A JUROR MUST HAVE. AND IN DOING SO, IT ACTUALLY IS WEAKER, IN COMPARISON, TO THE CLEAR AND CONVINCING EVIDENCE INSTRUCTION THAT THIS COURT HAS PREVIOUSLY APPROVED.

IS YOUR ASSOCIATION HAPPY WITH THE INSTRUCTION, OR DO YOU FIND THAT IT IS CONFUSING, AS CURRENTLY WRITTEN?

WE FEEL THAT THE INSTRUCTIONS CERTAINLY CAN BE IMPROVED UPON.

DOUBTFUL IT IS CONFUSING AS IT IS CURRENT?

I DO NOT BELIEVE, YOUR HONOR, THAT IT IS SO CONFUSING THAT IT ABSOLUTELY BE CHANGED.

I AM ASKING THAT AS A DEFENSE LAWYER IN COURT.

HONESTLY, YOUR HONOR, I HAVE NEVER FOUND IT TO BE CONFUSING, AND I THINK THERE IS VERY VALUABLE LANGUAGE IN THERE THAT HELPS ILLUSTRATE FOR A JURY HOW IT IS THEY SHOULD APPROACH AND ANALYZE THE EVIDENCE, AND I WILL RESERVE THE REST OF THE TIME FOR MY COLLEAGUES. THANK YOU.

MR. COHEN.

THANK, YOUR HONORS. MY NAME IS BARRY COHEN. I AM HERE AS A PRIVATE DEFENSE

ATTORNEY. I DO PRIVATE DEFENSE WORK. I DO CRIMINAL A LONG TIME AGO AND STILL DO SOME, BUT BASICALLY, YOUR HONORS, THIS PRINCIPLE IS SO IMPORTANT THAT, IN THE LOVETT CASE, CHIEF JUSTICE RAINY WROTE A BEAUTIFUL OPINION, IN 1892, AND THAT OPINION HAS BEEN FOLLOWED IN THE COURTS OF THIS STATE, FOR ALL THIS TIME. WE SHOULD NOT DEVIATE FROM WHAT HE TALKED ABOUT, FROM ALL THE COURTS THAT, ALL THE CASES THAT THIS COURT HAS APPROVED. CASE AFTER CASE, YOU BASE PEOPLE'S LIFE AND DEATH ON THIS INSTRUCTION. IT SHOULD NOT BE CHANGED. IF YOU ELIMINATED THE CIRCUMSTANTIAL EVIDENCE INSTRUCTION IN THIS STATE, ON THE STRENGTH OF THE REASONABLE DOUBT INSTRUCTION, THE TWO EQUALLY CREDITABLE HYPOTHESIS. I SAW IT APPLIED IN THIS VERY COURT TODAY, WHEN QUESTIONS WERE RAISED ABOUT REASONABLE HYPOTHESIS, BECAUSE OF THE STRENGTH OF THE INSTRUCTION THAT WE HAVE, NOW, WHICH IS NOT CONFUSING, YOUR HONOR, WHICH IS NOT CONFUSING. WHAT IT DOES, IT BRINGS TO THE ATTENTION AND THE FEELING OF THE JURY THAT, BEFORE WE CONVICT A CITIZEN IN THIS STATE HAD, THERE IS GOING TO BE THE EXACT QUALITY AND QUANTITY OF PROOF THAT IT IS SUPPOSED TO BE. THE EXACT CERTITUDE. WHEN WE CONVICT SOMEBODY AND THEY COME BEFORE THIS COURT, THIS COURT KNOWS THAT WE DON'T HAVE A WATERED DOWN VERSION, CONCERNED ABOUT A FEW WORDS HERE AND THERE, TO TRY TO MAKE IT PERFECT. WE HAVE A SYSTEM THAT HAS WORKED, AND I ASK THIS COURT, THIS GENTLEMAN OVER HERE SAYS THIS IS A GREAT STATE, WHEN HE INTRODUCED YOU. TWO OR THREE TIMES. ONE REASON IT IS A GREAT STATE IS BECAUSE YOU HAVE DEMONSTRATED, THROUGH EFFORTS OF BEING FAMILIAR WITH THESE CASES. I LISTEN TO YOU TIME, AT NIGHTS, WEEKENDS, TO BECOME SENSITIVE TO WHAT DUE PROCESS IS ALL ABOUT. YOU ALLOW DEPOSITIONS IN THIS STATE. YOU REQUIRE STRICT ADHERENCE TO BRADY. WE HAVE GOT A GREAT INSTRUCTION OF REASONABLE DOUBT. UNFORTUNATELY, THE FACDL, THE CRIMINAL LAWYERS, SAID THEY WANTED TO COMPROMISE THEIR OWN POSITION, BECAUSE THEY ARE WORRIED ABOUT WHAT THIS COURT WAS GOING TO DO THE. THE LETTER OF JUNE 21 IS IN THE FILE. THAT IS SAD. THIS COURT HAS NEVER COMPROMISED, TO MY KNOWLEDGE, AND I DON'T THINK YOU ARE GOING TO COMPROMISE NOW. THIS IS A IMPORTANT INSTRUCTION. IT IS IMPORTANT TO PEOPLE THAT YOU AND I WILL NEVER KNOW, PEOPLE THAT JUST COME UP AND FACE THEIR LIBERTY BEING TAKEN AWAY. WE HAVE GOT A GOOD INSTRUCTION. AS THE LATE LAWTON CHILES SAID, IN HIS OWN COUNTRY WAY, IF IT AIN'T BROKEN, DON'T FIX IT, AND I ASK YOU GENTLEMEN AND LADIES OF THIS COURT, TO PLEASE DON'T MESS WITH THIS REASONABLE DOUBT INSTRUCTION, IN THE NAME OF A FEW LITTLE WORDS HERE AND THERE. JURIES GET THE IMPORT OF HOW IMPORTANT IT IS TO OUR SYSTEM. THEY GET, THEY GET VACILLATE AND WAIVER. THEY GET EVERYTHING THEY NEED AND THEY HAVE GOTTEN IT.

THANK YOU VERY MUCH, MR. COHEN. MR. JACOBS.

GOOD MORNING. MAY IT PLEASE THE COURT. I KNOW YOU ALL ARE NERVOUS TO SEE THAT WE ARE ALL ON THE SAME SIDE. I WANT TO ASSURE YOU THAT I AM NERVOUS AS WELL. I WANT TO SAY TO YOU THAT THE CASES CITED HERE, VICTOR VERSUS NEBRASKA, ARGUED ALONG WITH SANDOVALL VERSUS CALIFORNIA, IN MARCH OF '94, AT THAT TIME THE SUPREME COURT SAID THAT, REALLY, JUDGES DON'T HAVE TO DEFINE REASONABLE DOUBT. THEY JUST HAVE TO INSTRUCT THAT THEY MUST CONVICT BEYOND AND TO THE EXCLUSION OF REASONABLE DOUBT. THIS COURT, IN ITS WISDOM, IN AUGUST OF '94, IN ESTE, AFFIRMED, AS WELL, THAT EVEN THOUGH THE ISSUE IS NOT RESERVED -- NOT PRESERVED, AT THE TIME OF THE ARGUMENT IN THE LOWER COURT, BUT IT WAS RAISED IN THE SUPREME COURT, THEY SAID TAKEN AS A WHOLE, INSTRUCTIONS CORRECTLY CONVEY THE CONCEPT OF REASONABLE DOUBT TO THE JURY. THERE IS NO REASONABLE LIKELIHOOD THAT THE JURIES WHO DETERMINE ESTE'S GUILT APPLIED THE INSTRUCTIONS IN A WAY THAT VIOLATED THE CONSTITUTION, AND THAT IS, REALLY, THE ISSUE, WHETHER OR NOT THE JURORS ARE AWARE OF WHAT THE REASONABLE DOUBT INSTRUCTION IS. THIS COURT, AGAIN, IN JUNE OF '95, IN OCCURS, REAFFIRMED THAT, AND -- IN CURS, REAFFIRMED THAT, ---IN CURSE, REAFFIRMED THAT AND THEN IN DAVIS, AND SO WE ASKED YOU, WITHIN THE PROVINCE OF THE COURT, ASK YOU NOT TO CHANGE THIS INSTRUCTION. WE DON'T THINK THERE IS ANY REAL PROBLEM WITH IT, FROM OUR STANDPOINT OF IT AND OUR USAGE OF IT. I, ALWAYS,

HIM PLEASED TO BE A PART OF ANYTHING THAT JUDGE PADOVANO IS INVOLVED WITH, AND I WOULD SAY TO HIM, AGAIN, AND I SAID TO HIM EARLIER, DEEDS GO UNPUNISHED, AND I APPRECIATE THE EFFORT OF HIS COMMITTEE, BUT AT THIS TIME WE FEEL THAT IT IS NOT NECESSARY TO MAKE THIS CHANGE.

THANK YOU VERY MUCH. JUDGE PADOVANO?

I THINK WHAT WE, REALLY, HAVE, I AM SORRY, WHAT WE, REALLY, HAVE, HERE, IS A DEBATE ABOUT LANGUAGE. ACTUALLY I LIKE SOME OF THE -- IN THE COMMENTS, SOME OF THE ASSOCIATIONS MADE VARIOUS PROPOSALS. THE CRIMINAL DEFENSE LAWYERS ASSOCIATION MADE A GREAT PROPOSAL. SO DID THE PROSECUTING ATTORNEYS ASSOCIATION. THE PROBLEM IS THAT THERE IS LANGUAGE IN THE PROPOSALS THAT THE OTHER SIDE WOULD OBJECT TO, AND ULTIMATELY WHAT I THINK WE GET DOWN TO IS CAN WE IMPROVE THIS, CAN WE AGREE ON LANGUAGE THAT WILL ACTUALLY IMPROVE THIS INSTRUCTION? WHAT YOU HAVE TO DECIDE, I THINK, IS IF, FIRST OF ALL, WHETHER YOU LIKE THE EXISTING INSTRUCTION. IF YOU THINK THAT IT IS ADEQUATE OR IF YOU THINK THAT IT IS GOOD, THEN, PERHAPS, YOU SHOULD REJECT THE COMMITTEE'S RECOMMENDATION. IF YOU DON'T, THEN I THINK THE QUESTION YOU HAVE TO DECIDE IS WHETHER YOU SHOULD SHY AWAY FROM IMPROVING IT, SIMPLY BECAUSE THERE IS A CONTROVERSY, AND I WILL TELL YOU THIS. I THINK THERE WILL ALWAYS BE A CONTROVERSY ABOUT HOW THIS IS WORDED. YOU WILL NEVER SATISFY EVERYONE, AND TO QUOTE MAJOR HARDING ONE TIME, JUSTICE MAJOR HARDING ONE TIME, ON SOMETHING THE COURT DID, ABOUT THE FACT, I THINK, THE DEATH PENALTY RULE, IF BOTH SIDES WERE UNHAPPY, MAYBE THE COURT DIDN'T DO SUCH A BAD JOB. THE COMMITTEE IS, REALLY, IN THE SAME POSITION HERE. ONE OTHER THING I WOULD LIKE TO ASK YOU, WHEN YOU GO BACK TO THE CONFERENCE ROOM, ASK YOURSELVES WHY YOU DIDN'T HEAR ANY TRIAL JUDGES COMING HERE TO OPPOSE THIS. YOU DON'T HEAR A SINGLE TRIAL JUDGE IN THE STATE OF FLORIDA COMING HERE AND SAYING WE THINK THIS PROPOSAL IS BAD. FROM A NEUTRAL STANDPOINT, FROM A NEUTRAL STANDPOINT, WHEN WE GET OUT FROM UNDER THE ADVOCACY, IT IS NOT BAD, SO I URGE YOU TO GIVE IT YOUR CONSIDERATION. I HAVE, REALLY, URGED THE COURT TO EMBARK ON A COURSE OF MAKING SOME CHANGE. IF YOU DON'T CARE FOR THE ONE WE SUGGEST, I AM NOT OFFENDED BY THAT. WE WILL BE GLAD TO GO BACK TO THE DRAWING BOARD, BUT I THINK IT SHOULD BE SOMETHING THAT WE SHOULD PURSUE. THANK YOU.

THANK YOU. AND I WOULD LIKE TO EXPRESS THE COURT'S APPRECIATION TO THE COMMITTEE, FOR ITS DILIGENT WORK, AND TO EACH OF YOU WHO HAVE TAKEN TIME FROM YOUR BUSY SCHEDULES TO SHOW SUCH A DILIGENT INTEREST IN WHAT IS RECOGNIZED BY THE COURT, TO BE A VIOLATION PART OF THE CRIMINAL JUST -- A VITAL PART OF THE CRIMINAL JUSTICE INSTRUCTIONS, AND IT, CERTAINLY, A CREDIT TO THE BAR OF THIS STATE, THAT YOU HAVE DONE THAT ON YOUR OWN TIME. THE COURT IS VERY APPRECIATIVE. THE COURT WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.