No._____

IN THE SUPREME COURT OF THE UNITED STATES

RALPH LEROY MENZIES, Petitioner,

vs.

ROBERT POWELL, Warden, Utah State Correctional Facility, Respondent.

****CAPITAL CASE****

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

VOLUME 5 OF 6

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Appendix Index

/ / /

Volume V

Volume VI

Appendix M

Appendix M

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

STATE OF UTAH,

Plaintiff,

vs.

RALPH LEROY MENZIES,

Defendant.

CASE NO. CR 86887

* * * * *

BEFORE THE HONORABLE RAYMOND S. UNO

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SALT LAKE CITY, UTAH

DECEMBER 3, 1990 MOTION HEARING

DECEMBER 4, 1990 TELEPHONE CONFERENCE

DECEMBER 5, 1990 SCHEDULING CONFERENCE

* * *

COMPUTERIZED TRANSCRIPT

CR 86887

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

STATE OF UTAH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. CR 86887
	)	
RALPH LEROY MENZIES,	)	
	)	
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* * * * *

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* * *

ORIGINAL

COMPUTERIZED TRANSCRIPT

A P P E A R A N C E S

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* * *

I N D E X

SALT LAKE CITY, UTAH; DECEMBER 3, 1990; A.M. SESSION

THE COURT: This morning we have the State of Utah versus Ralph LeRoy Menzies, and today is the date that was set to have this matter decided, and we have a renewed motion to set aside judgment, and for new trial in addition.

MR. UDAY: That's correct, Your Honor. If I could introduce the parties, Richard Uday from Salt Lake Legal Defenders on behalf of Mr. Menzies, along with cocounsel Joan Watt and Elizabeth Holbrook, and trial counsel Brooke Wells is also present this morning. And as usual, we'd ask that Mr. Menzies be unshackled. Which is already taken care of.

MR. LARSEN: Dan Larsen appearing for the State of Utah, for the plaintiff. Rick MacDougall is not present, but he will be here through the proceedings. He has other matters to also handle.

MR. UDAY: Your Honor, we have filed the renewed motion to grant Mr. Menzies a new trial. Initially what we propose this morning is, if I could just give you a brief introduction of what we had in mind, Your Honor.

Initially I'll make some comments and have some exhibits that we would like to introduce to the court. After which we would plan on calling Miss Brooke Wells as a witness and examining her about the transcript pages and

the events as they occurred in California.

We would then have some comments by Miss Watt. Mr. Menzies has indicated that he has a comment or two that he would like to make to the court, after which we would try to close, and I would have some final argument for the court.

I think at the beginning it's important, as indicated in our renewed motion in point 1, Your Honor, that we make a continuing objection to the time constraints that have been placed on us in this matter. And I will address in more detail at the close of the motion today some of the problems we have had.

But I think it's important to note that from the beginning of this hearing, as we've evolved from almost a year ago, or actually over a year ago in this process, that it was always contemplated that once we reached the point where the transcripts were, in fact, worked on and actually prepared for the first time by Miss Tauni Lee, that we would then have an opportunity to sit down with Mr. Menzies and go over those alleged errors and make a proposition to the state, after which time they would respond.

If we were unable to reach any agreement, we would then go into a second phase, as the court actually called it, and spend some time talking about the exact changes and making decisions, and Your Honor would be

ruling on those.

That's all been circumvented recently because of the Supreme Court's involvement, and the time restraints that have been put on us. And we would make a continuing objection to the difficulties that has caused.

We were unable, prior to filing our renewed motion, to meet with Mr. Menzies, and that caused Mr. Menzies a great deal of grief, as the court would probably be aware, as well as us. We were able to meet with him on one occasion after filing the memorandum, but we were not able to provide him with a copy of the transcripts, and I think he will speak to that a little bit later in the motion this morning.

Additionally, Your Honor, because of the time constraints that we've had, we would like to indicate to the court that we do not intend that which we've alleged in the motion, or that which we will discuss today, to be totally inclusive, or to make the total of everything we will be claiming as error in this case.

We will reserve the right to find additional errors as the time prevails it to us. The more we look at this transcript, the more problems we find.

In fact, this morning one of the reasons we're getting a little bit later start is over the evening, as we had spent some time yesterday, the three attorneys, working

on this matter, it started jelling some information, there were problems that we remembered that occurred, and additional things we found in the transcripts that the three of us needed to get together and talk about this morning. And I think that's been one of the problems we've had with this case from the beginning.

The only other comment I would like to make is to remind the court at the beginning of this hearing that initially, over a year ago, as we were preparing the appellate brief in this matter, is when we ran into difficulty working with the transcript that had been prepared and filed by Miss Lee. And it was under those circumstances that we filed a motion to the court to explain the difficulties we had with the uniqueness of the transcript, the inability to actually understand that which it said, to Miss Watt as she prepared some of the appellate issues, as we were able to discover the difficulty working with that transcript, and it was based on that that we filed a motion.

It was only after filing the initial motion, before filing our reply, that we found out about the problems with Miss Lee herself, her lack of certification and the problems that she herself has in taking down notes and transcribing notes, which has brought us eventually to this point today.

Other than preserving those objections, Your Honor, I would take no additional time this morning, other than to admit, or move to admit five exhibits that we've prepared for the court.

The first exhibit that we'd want to introduce, Your Honor, which has been marked as Defendant's Exhibit 1, is an affidavit prepared by Miss Joan Watt from our office. I've given copies of this to the state.

Exhibit 2, Your Honor, would be a set of transcripts as prepared by Miss Lee, but with those corrections that were marked down by both our law clerk, and then later, Miss Brooke Wells as she was in California making the changes.

I should indicate to the court that this exhibit, Defense Exhibit Number 2, contains eleven volumes of transcripts. We are actually missing one volume that we believe to, as we were prepared and working for this, we believe it to be in the office. So there again, we would ask the court, and reserve the right to add to this exhibit in particular the other volume that is outstanding.

Defendant's Exhibit Number 3, Your Honor, is the accusation that was filed by the attorney general's office of California against Miss Lee. Again, a copy of that to the state.

Defendant's Exhibit Number 4 is an amended

accusation which was later filed again, against Miss Lee to remove her from her, remove the certification from her.

And Defendant's Exhibit 5 is an affidavit from Mr. Rick Black, who is the executive officer of the California Certified Shorthand Reporters Board, as he discusses those hearings relating to Miss Lee's licensure in California.

It would be my motion at this time, Your Honor, that we admit those five exhibits into evidence, again, subject to adding to the Exhibit Number 2 that other volume.

MR. LARSEN: The State would object to that motion, Your Honor, on the particular grounds that three of the exhibits, I believe, are irrelevant.

First of all, I believe it's irrelevant to enter all the transcripts that have been interlineated by Miss Wells in California into evidence. This court certainly does not have time to read those transcripts. The case either needs to be sent to the Supreme Court today, or a new trial granted.

The state certainly will resist strenuously their renewed motion for a new trial. There's simply no benefit from having that in the court's hands today. We have the original transcripts, the court has those, and that's sufficient.

I would also point out that they're not requesting the court to make any changes in the original transcripts, and they're not offering that, their interlineated transcripts for that purpose.

I would also object to the exhibits regarding- - Excuse me, there should be four exhibits I'm objecting to. The only exhibit I'm not objecting to is Joan Watt's affidavit. The other three are regarding Miss Lee's California Court Reporter's status. I believe those are irrelevant because what they contain are allegations that she did not prepare transcripts in California courts, that actually this all occurred subsequent to the trial and proceedings in this case.

It does not shed any new light on Miss Lee's ability to report, or the status of her license at the time she reported in this case. And, in fact, this court's had a full hearing on that, the witnesses have testified, it changes nothing. And I don't believe it is helpful or relevant to the issues to be considered by the court, or helpful to the appellate court. So I would object on those grounds, Your Honor.

MR. UDAY: Well, Your Honor, if I could respond briefly to the transcripts first. Later in argument I'm prepared to address the procedures that we had outlined in this motion that Your Honor had outlined in this motion

long ago, and the court itself indicated on at least three occasions that I could find that what would be important for the court to do was to read Tauni's version of the transcripts. And that's both in making a determination of her fitness to decide, or to be involved as the court reporter in this case, and as well, to actually prepare the final transcript to be presented to the court.

I think for those two reasons alone, Exhibit Number 2, the transcripts making, or interlineating the changes, are extremely relevant. I think the court needs to be aware, Judge, that we're before the court in a capital homicide case, we have an obligation as defense counsel to build and maintain a record in this matter. That this case, if not reversed today, or on direct appeal, will be followed, these transcripts, if not addressed today directly or on direct appeal, will be following this case for some time, both on collateral attack and in the federal courts.

Because of that, I think it would be extremely important that the reviewing courts have an opportunity to look at the changes that were made for the two reasons I just discussed. To be able to make a decision as to Tauni's fitness as a court reporter, and also to make a decision as to what the actual record will be. I think they're extremely relevant.

As far as counsel indicating that we have not actually requested changes, I think that's untrue. The court will recall our earlier motion, we filed some proposed changes which, in fact, they've actually stipulated to. I think these transcripts address that question directly.

Additionally, Your Honor, today we'll be talking about many of the pages in here, as Your Honor has directly requested that we provide some examples of prejudice. I think the court will need a copy of the transcripts to be able to find those pages and look at those changes as they bear themselves out. So I would submit Exhibit 2 on that question.

As far as- -

THE COURT: Let me ask you something. How many people have actually read all of the transcript that's involved in this case? The entire transcript. How many people have read it?

MR. UDAY: I think from cover to cover, is that Your Honor's question?

THE COURT: Right.

MR. UDAY: In our office I believe that would be two people. Miss Watt has done that, and I believe Miss Wells has done that. I have read portions, as well as Miss Palacios. Did she ever finish all of them? Miss Palacios

hasn't finished all of them cover to cover, but she also has read portions of those transcripts, and had input as to the changes that have gone on.

Now, again, as I indicated earlier, Mr. Menzies, unfortunately, has not read them cover to cover, and that is something he intended to do, and would have like to have done. And I think the court at one point indicated he would be able to do.

THE COURT: I understand that Mr. MacDougall has read the whole transcript; is that right?

MR. LARSEN: That's my understanding.

THE COURT: I've read the whole transcript.

MR. UDAY: My understanding of Mr. MacDougall reading the whole transcript has not necessarily been from the changes that was made. I know he indicated in court one of the last times we was here that he had read the prior transcripts. But I think we need to distinguish right off the bat, here, this morning, that there's a difference between the transcripts that Your Honor has read cover to cover, and these that we're presenting this morning.

These are Tauni's version, something that the court indicated a long time ago that you would need to see before making a ruling on it. Because this is her work, both what she took down in court and what she later

transcribed to make a record.

What the court has read, and I think you'll hear testimony today, is a great deal of additions that were made by a note reader. Also not licensed as a court reporter. And so I think that's why these transcripts are imperative for the court to have, and to be admitted into evidence.

MR. LARSEN: For the record, Your Honor, on that point, Mr. MacDougall has read also all the changes that have been interlineated by the state's representative. I would also point out that it appears that Mr. Uday is entering this exhibit into evidence for the purpose of appellate argument, to the appellate court, that these particular changes could or should have been made, or that there was substantive error on the record.

We have never had a chance to look through their transcripts, we don't have copies of their transcripts, and certainly Miss Wells has interlineated more than simply Tauni's changes, but also notes to herself. As did our representative. And that's one reason why the state had not intended to offer our copy of the transcripts, because oftentimes it has the handwritten explanation of the representative from the particular party as to why a particular change was made. And anything related to it regarding exhibits being entered, or explanations that

Tauni did, those aren't particularly part of the record. Those are the words of Brooke Wells, or Brenda Stubbs for our side.

I would object, and also on those grounds, that they should not have the opportunity to admit this to an appellate court without our review, and with those possible prejudicial statements to the state.

THE COURT: I didn't mean to interrupt you. I just thought I'd ask.

MR. UDAY: Your Honor, I think from what I've argued, it's not merely an appellate argument. It's something that this court had indicated it would need to take a look at. I think the problem that I understand the state's saying is something that I would agree with. That this is not the set of transcripts that we had originally agreed upon submitting to the court.

What was initially proposed, Your Honor, is that we would make our set of copies, they would make their set of copies, we would then sit down and have an exchange, and then what we were able to decide on would be fine. What we were not able to decide on, we'd come to the court and then the three of us together would be able to actually come up with a copy that we were going to pass on to the Supreme Court.

Because of the time constraints that have been

placed on us, Your Honor, that procedure has been short-circuited. What we had often referred to in this courtroom as the second step, or the second phase of the Rule 11 procedure, has been short-circuited.

Because of that, we would at least move to admit the copies as we made changes on to the court, and I think the state would have leave to do the same if that's what they wanted to do. You know, it would be my motion to admit them.

I am concerned this morning because Miss Wells has some engagements in some other court rooms, and maybe what we could do is table the motions of these exhibits for now, and get to her testimony, and perhaps that'll shed some additional light as to why the court will need these copies. And so perhaps you could take these motions under advisement, and we could move on to her testimony.

THE COURT: Let's proceed.

MR. UDAY: Thank you, Your Honor. We'd call Brooke Wells to the stand, then, Judge.

BROOKE WELLS

called as a witness by and on behalf of the Defendant, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

MS. WATT: May I proceed, Your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MS. WATT:

Q Would you state your name, please?

A My name is Brook C. Wells.

Q Where are you employed, Miss Wells?

A I'm employed at the Salt Lake Legal Defenders Association.

Q And how long have you been employed there?

A Eleven years in January of '91.

Q And what is your position?

A I'm an attorney in the felony and homicide divisions.

Q You are, then, licensed to practice law?

A I am licensed to practice law in the state of Utah, and I hold an inactive license in the state of Texas.

Q When were you licensed in the state of Utah?

A I was licensed in Utah in October, I believe it was, of 1977.

Q And what about in Texas?

A I was licensed in February of 1978.

Q Thank you. Do you belong to any professional committees or organizations, as a result of your status as an attorney?

A I do. For three years I've been a member of the

Supreme Court Advisory Committee on Criminal Procedure, I also have been a member of the State Bar Courts and Judges Committee. I'm also currently a member, and have been for almost four years, of the Bar Examination Review Committee, and I am an adjunct professor at the University of Utah College of Law in trial advocacy, where I've taught for the last two years.

Q And have you been a criminal trial attorney for your entire employment at the Legal Defenders Association?

A At the Legal Defender office I've practiced entirely criminal defense.

Q And how many trials, approximately, have you done during that time?

A I've never counted them up, but I would expect in the area of approximately 100 jury trials.

Q In addition to that, have you done bench trials?

A I have done bench trials.

Q And how many capital cases have you, how many capital defendants have you represented?

A As either lead counsel or co-counsel, somewhere in the area of fifteen. Two of those were as co-counsel, and so I've been lead counsel, or had responsibility as lead counsel in, I believe, thirteen capital cases.

Q Are you familiar with Ralph Menzies?

A I am.

Q And how are you familiar with him?

A I was lead counsel in the representation of Mr. Menzies from about the time of his preliminary hearing through his trial, which concluded, I believe, in March of 1986.

Q And do you see him in the courtroom today?

A '87. '88. Yes, I do see Mr. Menzies, he's at defense table.

Q Thank you. Did you recently have occasion to go to California as the result of an order from this court?

A I did.

Q Could you briefly describe the nature of that order for us?

A We received notification that the court had ordered representatives from the state and the defense to go to California to be present when Ms. Tauni Lee went through her notes. That apparently was a reversal of an earlier order which required Ms. Lee to come here.

We received word of that on Monday, which would have been, I think the 22nd of October. I left, then, by car, on the morning of Wednesday, October 24th, and arrived in San Jose, California, late on the evening of Wednesday, October 24th.

Q Did anyone else go to California for the purpose of meeting with Ms. Lee?

A Yes, the state's representative was Miss Brenda Stubbs, and she flew, and we met for the first time at our hotel on that Wednesday evening.

Q And what arrangements were made for the completion of the work in California?

A My understanding at the time that we left was that Ms. Lee was to come to our hotel. Miss Stubbs had been given a larger room- - We had connecting rooms, and she'd been given a larger room with facilities for a table. And that Ms. Lee would travel to and from the hotel on a daily basis, and we would conduct our work in the hotel.

Q And when was this supposed to begin?

A It was to begin on Thursday morning, October the 25th, at 8:00 o'clock.

Q And did it begin on that date?

A It did not.

Q And why's that?

A That evening when I met Miss Stubbs, I was informed that Ms. Lee had called her, indicating that she had not really expected us ever to come, and that she had not informed Mr. Larsen, but that she was getting a divorce from her husband. That they were separated, but that he would not leave the premises, and retained a key. And that she had made no child care arrangements, and would be unable to come to the hotel.

Q As a result of that conversation were any modifications in the arrangements made?

A They were made after several other telephone calls. Initially the plan was, then, that Ms. Lee would come to the hotel the next day. We received another call, or Ms. Stubbs received another call earlier that morning, and it was conveyed to me that Ms. Lee had forgotten that she had an appointment, I believe it was at the Red Cross that morning to help her apply for additional help with rent expenses, and that she would call us, or that she would have her husband drop her off at the hotel sometime before 12:00 o'clock.

Q So that would have been on what date?

A That would have been on Thursday, the 25th, I believe.

Q And did she arrive, then?

A No she didn't. When we didn't hear anything from her, at approximately noon, or perhaps a little after, Ms. Stubbs placed a call to her, found she was home, and she indicated that she would not be able to start work that day. And again, asked us if we could change the plans and come to her apartment to conduct the work, indicating that she would be prepared to begin work on Friday, which would have been the 26th.

Q As a result of that conversation with Ms. Lee,

were there any modifications made to the arrangements?

A Well, not for a while. We did go for the first time to conduct work on Friday, October 26th, and we went to Ms. Lee's home, where we did succeed in getting through approximately, I think 142 pages of transcript that day.

Q While you were there, were you aware whether Miss Lee was employed as a court reporter in- -

A I was made aware- - That she was currently employed?

Q Currently employed as a court reporter?

A No, she was not currently employed.

Q Was she currently employed anywhere?

A No, to my knowledge, she was employed nowhere, and had applied for and was receiving state assistance.

Q Can you briefly describe the procedure that you followed when you met with Miss Lee to go over the transcripts?

A My understanding was that Ms. Lee had not before gone through her shorthand notes verbatim. And so Miss Stubbs had all of the notes, which she kept custody of, in a box, and she would provide Ms. Lee with her notes. Ms. Stubbs and I each then had a transcribed portion of those same notes.

Ms. Lee then would read through her shorthand notes without the benefit of the transcribed portion, and

Ms. Stubbs and I would make corrections, additions, deletions, whatever, as necessary, as Ms. Lee read through. And we would do that by interlineation on to our respective transcripts.

I additionally did something else. Do you wish to know that?

Q And what would that have been?

A Because of the time constraints, and my feeling that I would be unable at a later time to have the time to go back and read through these transcripts verbatim after the changes were made, I read them for context at the same time. And in addition to making corrections, I would make notations in the margins, generally by use of brackets and my initials, indicating portions of the transcript which, to me, didn't make sense, or were inaccurate.

Q Could you describe the work conditions during the time that you were in California?

A We conducted our work for the first two weeks in the living room of Ms. Lee. She basically sat on the floor, I sat on a love seat, Miss Stubbs lay down on the floor, and we worked under those conditions for that entire two weeks of time.

During much of the time, not always, but much of the time there were anywhere from one to four children present in the household who were otherwise unattended,

except by each other, and Ms. Lee's husband was in and out at various times during the entire period of time.

Q Did you encounter any problems or interruptions during that two-week period?

A Yes, we did. There were several days where we were unable to complete work because of the problems with the children, or with the problems with Ms. Lee's husband. It became known to us that they were incurring continual marital problems, and that sometimes there was a high degree of tension which made the work unable to proceed. Several, I think there were one or two occasions, and I may be wrong as to the exact number, when we left because of problems either with child care or problems with the husband.

An additional problem encountered was Miss Lee's having premature labor pains. On one day causing us to leave because she had to go to the hospital and be checked, because there was some concern over whether or not she was beginning premature labor.

Q Did there come a time when the procedure utilized was changed so that you were no longer meeting at Miss Lee's apartment?

A There was.

Q Could you describe how that came about?

A Let me give you the evening.

MS. WATT: For the record, Your Honor, I believe maybe you could tell the judge what it is that you're referring to.

THE WITNESS: During the course of the work in California, I kept a notebook where I made notes of time and dates and number of pages that were completed, as well as notes concerning problems. I believe Miss Stubbs kept a similar type of notebook, and I am referring to that right now.

On the evening of Sunday, November 11th, Miss Stubbs informed me that she had received a call from Ms. Lee requesting that when we came over the next morning that we bring film with us. And we weren't told exactly what the reason for bringing the film was. However, we learned the next day after Mr. Lee had left, that Ms. Lee apparently had been physically abused at some point in time over the weekend, and the purpose of bringing the film was to take pictures of any of the injuries which she had incurred.

After he left that morning, I think it was around 10:30 or 11:00 o'clock, I don't recall, Ms. Lee indicated to us that she felt that she could no longer stay with her children in this household environment, and that she needed to move, and had found a place to live with some people in a local church congregation that she was associated with.

As a result of that, and our feeling that there was danger potentially to Miss Lee and her children, and also out of concern for our own safety, we assisted her in packing up her children and her immediately necessary items, and we moved her with a police escort out of her home.

As a result of that, that evening we went and picked her up from the placement where she was living, and brought she and the children back to the hotel. We worked quite late into the evening that night, attempting to complete portions of the transcript. And the next two days were spent with Miss Lee and her children, without the benefit of any child care, in our two hotel rooms.

On the final evening, we kept Ms. Lee, not kept, we invited Miss Lee and her children to stay at the hotel with us. She and the four children stayed in Miss Stubbs' room. Miss Stubbs stayed with me, and we worked that evening until we completed the assignment.

Q (BY MS. WATT) And how many children does Miss Lee have?

A She has four, and at this time, or as of today, would probably be about seven and a half months pregnant with a fifth.

Q And what are the ages of the four children?

A I believe they would be nine, seven, four,

twenty to twenty-two months--almost two, the youngest one is--and then the unborn child.

Q How long were you in California?

A We completed the work three weeks to the day after we arrived there. Some days we did not work.

MS. WATT: Your Honor, may I approach?

THE COURT: Yes.

Q (BY MS. WATT) Directing your attention to Defendant's Exhibit Number 1, do you recognize these?

A I have reviewed those, those are the copies, absent one volume, that I took with me to California, and which I marked as I previously indicated.

Q And do you then recognize this handwriting that is contained within them?

A I do. Any of the markings in those volumes are mine. That is true, with the exception, I believe, of the first two volumes, which were reviewed by Miss Lee when she came to Salt Lake City some months earlier. We had law clerks from our office who were present during the actual review of those notes, and their corrections or indications may be there, in addition to mine. My review of those first, I think it's three volumes, was after the corrections were made. But with exception of those, any additional bits of handwriting are mine.

Q So these volumes, then, contain your original

interlineations, along with the original interlineations of the clerks?

A That's correct. Yes.

Q And you are familiar with the trial proceedings in this case?

A I am.

Q And to the extent that these transcripts are covering something, it is these trial proceedings that were covered?

A That's correct.

Q During the course of your review- - Well, how much of the transcript have you read in this case?

A I've read the entire transcripts.

Q And during the course of your review of the transcript, have you found any errors or inaccuracies?

A Yes, I have.

Q And when you found any errors or inaccuracies, did you then enter those into the transcripts that are Defendant's Exhibit Number 1?

A If there were corrections to be made, in other words if Ms. Lee read something that was different in the transcript, I would mark out the printed word, and interlineate the words of Ms. Lee.

In addition to that, at the same time, if Ms. Lee was unsure of some word, I, I think Miss Stubbs, as well,

attempted to secure from her some indication of what the word or words might have meant, and to indicate those as best we could within the margins.

In addition, I found that there were omissions of Ms. Lee's work in the transcript, and I would add in anything that had been omitted in the place where it should have belonged in the transcript.

On the other hand, we found things that were additions to what Ms. Lee had dictated, and in those instances I would mark out the excess wording that apparently had been added by the note reader.

Q Can you describe the types of errors that you encountered in going through the transcripts?

A I can. Would you like- - How would you like me to handle that?

Q Maybe at the outset I'll ask you whether you saw any persistent problems throughout the transcripts?

A Yes. There were some persistent, easily-identifiable problems. Throughout the transcript there continued to be problems with numbers. Numbers were quite often transcribed differently by the note reader than read by Ms. Lee. In some instances those may have been unimportant areas. In some instances I felt they were exceedingly important, that there was a difference in the numbers that were dictated by Miss Lee and that were

transcribed, then, by the note reader.

Q Did any other persistent problems appear?

A Yes. There seemed to be a persistent problem with names. Names were either, because I had knowledge of who these people were, I knew them to be just wrong, or there appeared to be consistently mix-ups between, for instance, prospective jurors' names. Some seemed to be interposed where the note reader who had apparently had written copies of the jury list, had indicated other names.

Witnesses who may have been referred to throughout the trial proceedings were often referred to by different names. There would be no continuity as to the name of the particular witness.

Additional problems involved identification of speakers. It would not have been necessarily noted unless you saw Miss Lee's version, but oftentimes things that I would say would be attributed to Mr. Jones or to Mr. MacDougall, things Mr. MacDougall would say could be attributed to the court. Things the court said may have been attributed to me. And that was a problem throughout.

Additionally, case cites were almost uniformly inaccurate. Oftentimes being, or giving- - You couldn't tell what a case cite or a case name actually was. I can give you particular examples of that later, but there are- -

Q We'll get to that, stated or agreed to, and yet appeared. Additionally, it appeared that there were quotation marks attributed throughout the entirety of the transcript to certain portions of testimony, and yet in Ms. Lee's notes, there was never any indication that these were quotes. Either from cases or from individuals.

Early in the voir dire process, it became apparent, I think, to all trial counsel, that we were having difficulty in explaining to the prospective jurors during the individual voir dire information concerning what capital homicide was. And as a result of that, I prepared a script, for lack of a better word, for the court to utilize in initiating each of the individual jurors into the process we were involved in.

We agreed, and stipulated after a point that Ms. Lee need not take down any further that actual preface which was given by the court each time to a prospective juror. And so I expected to find in the transcript that that would be repeated. And in fact, it was.

However, throughout the voir dire process, which encompassed two volumes and a week's worth of testimony, it appeared that Ms. Lee, or the note reader, stopped taking down other remarks that were generally given by the court, and apparently added in a, into the word processor a standardized format.

That was never stipulated or agreed to, and yet appeared in the transcript at the preface of each individual juror's questioning. So that became a recurrent type of problem.

Q Excuse me for interrupting, but are you saying that the note reader created statements for the court in the transcript that she prepared?

A That would be my opinion. Because they did not exist in Ms. Lee's notes.

Q Did you find anything unusual about Ms. Lee's use of asterisks in your notes?

A Yes.

Q Could you describe that.

A Throughout the entire six weeks' volumes of the transcript, I guess it would include pretrial hearings, as well, it became clear from her dictation of the notes that Ms. Lee utilized a procedure involving asterisks. And she would dictate her notes, and then she would indicate that there appeared an asterisk at some point.

She would indicate to us, or she had indicated when we asked her, "What does an asterisk mean?" She indicated that it was a key to her that something was occurring, but that was generally the explanation. She said in some instances it could mean someone was coming in or out, it could mean that a recess was going on. It could

mean bench conference, it could mean a number of different things. But it signified to her that something was happening in the courtroom.

But what we found is that asterisks would appear in the body, as she dictated she would dictate an asterisk, and then we would find in the body of the transcript some indication that Ms. Lee did not have in her notes, but that apparently the note reader had added. Including such things as recess, bench conference, jurors entering or leaving.

Admonitions. Admonitions became- - Would you like me- - There was a particular problem with the use of asterisks and admonitions.

Q Would you elaborate on those?

A I would. During the voir dire examination, the court had generally admonished people about discussing any of the questioning or anything about the case with others. But after a period of time Ms. Lee stopped taking down those admonitions, and began to indicate only that an asterisk appeared. Sometimes there would be, after the asterisks in her notes, the word "admonition," sometimes there would not.

However, there would appear in the transcript throughout a statement purportedly made by the court, to which I cannot recall if the court actually made those

admonitions. I certainly can't remember the content of them if they, in fact, were made.

Asterisks also took the portion of other parts of the voir dire examination. As defense counsel we had prepared a set of voir dire questions, and the court, as a general practice, would go through one by one and ask the potential jurors these questions. After a period of time in the voir dire examination, Ms. Lee began not taking down those questions, but rather indicating some sort of asterisk, at which time the note reader would fill in from what I believe to be a portion that had been put in the word processor, which then appeared over and over and over again as each individual juror was voir dired.

The reason that I believe that to be true is that there were some, there was an initial inaccuracy taken down by Ms. Lee in an original form of that question, which then that inaccuracy appeared over and over and over again through the next sixty jurors that we voir dired.

Q So in other words, it appears that significant portions of the voir dire were not being taken down word for word by Ms. Lee?

A That is correct.

Q In preparing for today's hearing, have you reviewed portions of the transcript?

A I have reviewed portions of the transcript.

I've reviewed the whole thing while we were there. In preparation for this hearing, I have reviewed, again, some of it.

Q And let me ask you this. Are you familiar with the memo that we filed on behalf of Mr. Menzies in this court last Monday?

A Yes, I am. I am familiar with that.

Q And in that memorandum, have we raised all of the problems with this transcript as you see it?

A No.

Q I'd like to direct your attention to certain pages in the transcript, and ask you about them. Do you have a volume of transcript up there with you?

A I do not have- - I do have one volume.

Q Do you happen to have page 152 of the transcript in front of you?

A I have pages 151 and 152.

Q Just for the record, would you identify that as- - Tell us what you have in front of you.

A In front of me I have a copy of the transcript of proceedings dated February 1st and 10th of 1988, and it includes pages 1 through 168.

Q Directing your attention to page 151 and 152 of that volume, can you briefly describe, in general, what is occurring during the trial.

A We are involved at that point in a portion of individual voir dire, and I believe it's the voir dire of prospective juror Linda Sillito.

Q Is there anything significant that you see on those pages in relation to the changes that Ms. Lee made in the transcript?

A Yes, there is. Beginning on page, or excuse me, line 15- - I'm sorry, on line 17, there is in the printed transcript approximately one-third of a page of transcript that continues on to the next page and completes on line 13 of page 152. The written portion indicates a series of questions and answers between the court and the prospective juror, Miss Sillito.

However, when this was dictated by Ms. Lee, in place of the questions, she had written the phrase "BLRB," B-L-R-B. And did not undertake to, apparently did not take down any questions included in that juror exchange between line 17 on 151 and line 13 on page 152.

Q But there are, in fact, questions and answers contained in the transcript?

A There are questions and answers contained in the transcript that, if you did not hear Ms. Lee dictate what she had, you would not know that they did, were not taken down.

Q By listening to Ms. Lee's notes and reviewing

the transcript, it appears that the note reader made up those questions and answers?

A Inserted them from- - Yes. Either made up or inserted them from previous similar questions, I have no idea.

Q What prejudicial impact would this problem with the transcript have on Mr. Menzies' case?

A Well, we had approximately eighty prospective jurors. We took some notes concerning those jurors, but when we got to the portion of interviewing them concerning the individual voir dire questions and the particular views that they may have held concerning the death penalty, we did not necessarily take specific notes down. And certainly would not have made note of particular questions asked.

Therefore it becomes impossible, from my point of view, to reconstruct a series of questions and answers with any accuracy without guessing, and therefore it would be impossible for purposes of appeal to determine whether or not there were questions and answers given to that prospective juror and responded to by her that would have, or would impact upon challenges for cause or other challenges.

Q Are juror voir dire issues important in capital cases?

A They're extraordinarily important.

Q Are they important issues in this case?

A They are very important issues in this case.

Q In reviewing the transcript and ascertaining that Ms. Lee apparently did not take down portions of questions and answers that the note reader apparently then inserted questions and answers that had not been there, does that raise concerns for you that perhaps this has happened in other portions of the transcript?

A Yes, it does.

Q I'd like to direct your attention to page 1604 of the transcript. Do you have a copy of that in front of you, Ms. Wells?

A I do.

Q Is there anything significant about this page of the transcript?

A I'm paying particular attention to line 18 of that page. This involves the testimony of, I believe, the jailer's name was Valdez. He's one of the jailers who had located the identification cards of Ms. Hunsaker and had kept them for a period of time in the desk of the booking area of the jail, and then turned them over to investigative personnel.

The question as prepared by the note reader asked if, the question was, quote, "Did you work on the" and she

puts 26th of February. Ms. Lee has changed that and corrected that to be the 22nd of February. I have no particular recall of which of the dates is accurate, but that becomes significant, because in this particular, or set of facts and issues, it goes to the period of time in which Mr. Menzies would have been isolated as a suspect.

It would also have, or would bear on the issue of how long it was before these items of identification were turned over to other police officials, and the date on which they were actually located. All of those being significant factors in terms of whether Mr. Menzies was, in fact, an appropriate suspect.

Q And Ms. Lee heard and recorded that number as the 22nd?

A That's correct.

Q Directing your attention to page 1612 of the transcript. Do you have that in front of you?

A I do.

Q Is there anything significant about this page?

A Yes. In this page, this is taken from a portion of Dr. Sweeney, the medical examiner's testimony, and there is, on line 2, there's a description of the wounds to Ms. Hunsaker. The transcribed portion says, "Wounds extended as 30 centimeters." Ms. Lee corrects that to indicate 3 centimeters. I don't have specific recollection of what

Dr. Sweeney said, but there's a significant difference between a 3 centimeter wound and a 30 centimeter wound.

Additionally, on line 5, there is a reference to a word, and this is going to be difficult for me to say, but it is transcribed as "curvilinear." And I have questions as to whether that is, in fact, the word that Dr. Sweeney said. And therefore can't address that, because I'm not convinced of the accuracy of it.

On line 22 of that page, there's, again, a reference to "a .3 centimeter band of tissue between the two," and the words as transcribed are "notches." The word that is interjected by Miss Lee is "inches." That is a significant difference in interpretation, in my estimation, and I do not recall which one is correct, and therefore would be unable to address any issues concerning Dr. Sweeney's testimony as it relates to appeal.

Q Just for the record, you were not present when this particular page was gone over by Ms. Lee; is that correct?

A No, I was not.

Q Directing your attention to page 1703. Do you have that in front of you?

A This is, again, a problem with a date. This involves the testimony of Detective Dick Judd of the Salt Lake County sheriff's office concerning when he may have

made a composite drawing as a result of meeting with Mr. Tim Larrabee, who was the state's witness, who allegedly identified Mr. Menzies as the person seen with Miss Hunsaker in Big Cottonwood Canyon.

On line 11, the answer to the question proposed to Detective Judd was, "What day would that have been?" That's referring to when he made the composite. The written portion is, "That was on the 28th." And the corrected indication is that it was completed on the 26th.

The reason that that- - And I don't have recollection of what the actual date of that was. The reason that that would be significant is, because lawyers understand, and would argue that the length of time between one seeing something and then attempting to remember it, as time goes on it becomes a more difficult process and procedure.

In this case, the difference between two days may have been significant in terms of Mr. Larrabee's testimony, and how accurate it might have been. And I cannot reconstruct that.

Q Directing your attention to page 1734. Is there anything significant about this page?

A There is. On line 18 through 20, during this examination of Detective Dennis Couch of the Salt Lake County sheriff's office, he is asked the question by me,

"What day did you conduct the search of the packets in the jail area?" The answer, as typed, was, "On the morning of the 27th." The answer which was included by Ms. Lee was "On the morning of the 12th."

That is significant in that it again goes to the issue of when Mr. Menzies might have been looked at as a suspect, and whether there was reason to look particularly at him. That's a twenty-four or twenty-five day difference.

Q Do you have any recollection of which would have been the accurate answer?

A I don't have a specific recollection, no.

Q Directing your attention to page 1875 of the transcript, is there anything significant about this page?

A This involves the testimony of sheriff's Detective Jerry Thompson, in which he was asked when he may have spoken to Mr. Menzies and taken a statement from him. On line 8 he was asked if he remembered when he had his first interview with Mr. Menzies. The answer, as typed, was, "On the 26th of February." The answer as changed by Ms. Lee was to the 20th of February.

The 20th of February has to be wrong, because Ms. Lee, I'm sorry, Miss Hunsaker was not reported missing until the 23rd, I believe, and her body was not found until the 24th. Therefore that is clearly inaccurate, but I do

not know the actual accurate date of the interview.

Q Thank you. Directing your attention to page 1888 of the transcript. Is there something significant about this page?

A At the bottom of that page, there is a discussion, apparently between Mr. Jones and myself, regarding the actual time of booking that Mr. Menzies was booked into jail after his arrest on the unrelated matter. On the date of his arrest. Mr. Jones' question or comment, beginning on line 22 is this, "All right, maybe we can stipulate, then, to the rest of the booking record which shows that the booking process was completed at 19- -" And what is written in here is 1929 hours, which is 7:29 p.m. Ms. Lee corrected that and says that it was completed at 1959 hours, which is 7:59.

That is significant, because it goes to the issue, again, of the attempt to isolate Mr. Menzies as a suspect in this, based upon alleged times of noticing the identification in laundry baskets.

Q I'd like to direct your attention to page 2039 of the transcript. Are there any significant errors on this page?

A I believe there are. On line 21, the question is posed, I believe, to Mr. Bruce Savage, who was the attorney for state's witness Walter Britton as to what the

date was that he was contacted by, or whether- - The date he contacted or was contacted by, I just don't remember, someone from the county attorney's office concerning assistance by the county attorney's office on behalf of Mr. Britton in his Rule 35 motion.

The answer, as typed, is July the 3rd, 1986. The date as corrected by Ms. Lee is July 30th, 1986. That all becomes significant in terms of what action was taken on behalf of Mr. Britton by the state, and when parties were notified. And that became an issue at many times during the course of the trial.

Q And is that an issue that is being raised on appeal, to your knowledge?

A I believe so, yes.

Q Is there another problem with that page at lines 1 and 2?

A Yes. At the top of the page, there appears to be a question that was asked, by the questioner, I can't tell who it is, there, but which was left out in the written portion, or the typed portion of the transcript, and is now added in. And so it's one of those indications where the printed transcript does not indicate what was actually taken down, and had to be added later.

Q Is there also a problem concerning whether a word says "notes" or "notice"?

A There is, I'm sorry. On line 1, actually there's the end of a sentence, which this again refers to Mr. Britton, the typed portion says, "Which is my notes for testimony." It has been changed by Ms. Lee to, "Which is my notice for testimony."

That becomes significant, I think, on the issue of what was done on behalf of the county attorney's office for Mr. Britton, and the difference in meaning between notes and notice, I think, is self-evident.

Q Directing your attention to page 2620 of the transcript. Is there anything of significant on this page?

A This is another problem with numbers that goes to a specific issue raised during the course of the trial. During the trial a main theory of the defense, and argument of the defense, was that the state had been unable to establish evidence of a theft or a robbery from the Gasamat.

In this instance, or during the trial, the state attempted to prove up the existence of one or the other of these offenses by indicating the amounts of money that had been taken from the Gasamat, and add additional amounts of money that were located in Mr. Menzies' home.

On line 1 of that page, the typed portion indicates that, talking about money, and it then says quote, "determined that there was somewhere between," the

typed portion is "$115 and $116 missing." Ms. Lee changes that amount to $114. And I believe that that's significant to the very crucial factual issue of whether or not the state was able to prove the existence of a robbery or theft.

And the difference in monetary values goes directly to that issue. And I have no recollection as to what this witness said, and would indicate, too, that throughout the course of the testimony there were changes, significant changes by the witnesses as to amounts that their audits showed were gone.

Q Is that true, not only as to the money that was missing, but also the number of cigarette packages, if any, that were missing?

A That's correct. And that's addressed on page 2652, line 21. Again, there was a great deal of discussion and argument over, or with the witnesses, about what their audit showed concerning missing items. Cigarettes were significant items.

On line 21, it's indicated through the typed portion, during argument, it says, "If there were 223 packs of cigarettes." Miss Lee creates that to change it to 220 packs of cigarettes. That is all significant as it relates to the ability of the state to be able to prove the existence of a theft. Or robbery, I'm sorry.

Q Most of the examples that we have looked to up till now have had to do with problems with the numbers; is that not correct?

A Yes.

Q Are there additional problems with the numbers throughout this transcript?

A There's another significant one on page 2665. This is a discussion of the testimony of Timothy Larrabee, who was the eye witness. On line 13 there's a statement saying, "There was observation of these people up to," the typed portion is, "thirty-five to thirty yards away." Miss Lee corrected that to say, "twenty-five to thirty yards away."

That becomes significant as to the issue of the ability of the state's eye witness to be able to recognize and identify Mr. Menzies or any other person that might have been there.

Q On page 2665, there are a number of other discrepancies between what the note reader has and what Ms. Lee had in her notes, are there not?

A There are.

Q Could you briefly describe during the first five lines what your notations mean?

A Yes. On lines 1 through 5 there's a discussion, apparently in argument--and I'm sorry, out of context I

can't tell whose argument it is--concerning the effect of the lineup procedure. And the transcribed, or the typed portion says as follows. "Those two young people gave to the police officers." Period. "The lineups that were conducted were done thoroughly with those individuals indicating that they could make identification of a tentative nature, or of a positive nature."

My notes indicate that that is wrong. My recollection is that at the lineup no identifications were made whatsoever. Therefore this portion of the transcript, I believe to be in error, and apparently taken down in error.

Q And how is the issue of identification important to this case?

A The issue of identification is critical, in that Mr. Menzies was subsequently at court identified as, by at least one person, I think, as a person seen in Big Cottonwood Canyon with Miss Hunsaker.

Q And to your knowledge is an issue regarding the lineup proceedings being raised on appeal in this case?

A Yes, it is.

Q Directing your attention to page 2960 of the transcript, is there anything of significance on this page?

A This involves the testimony of a witness called by the defense who was presented as an expert. I believe

his name was Dr. Winkleman.

Q Just for a moment, is there anything interesting about Dr. Winkleman in regard to this transcript?

A There is in this particular page. On 2960, it is written, or it is typed that Mr., or Dr. Winkleman testified that he had worked on a project at the Oregon State Penitentiary system with 100 clients during a pilot project.

That is changed by Ms. Lee to indicate one client. That would certainly go to the issue of the credibility of Dr. Winkleman. And I have no specific recollection of what Dr. Winkleman would have said.

Q Thank you. Directing your attention to page 3035 of the transcript, is there anything significant on this page?

A Yes, this is very significant, in my estimation. There was a discussion by the witness as to the I.Q. of Mr. Menzies. Written, or typed- -

Q This is by the note reader?

A This is by the note reader. Typed by the note reader on both lines 9 and line 12, are that Mr. Menzies would have been functioning in the fifth percentile.

Q I'm sorry, is that the note reader- -

A I'm sorry, written that he was functioning in the fiftieth percentile, I'm sorry, of intellectually

functioning. Ms. Lee changes that in both instances to indicate the fifth percentile.

Q And why would that be significant in a capital case?

A If what she put down is accurate--and I have no specific recollection of what the accurate thing would have been--and Mr. Menzies operates in the fifth percentile of intellectual functioning, then that would be significant mitigating evidence which should have been raised by counsel at, or during a penalty phase, and which was clearly not raised.

Q And a lawyer reviewing this transcript for error, plain error, or ineffective assistance of counsel, and saw the fifth percentile, and saw that you had not mitigating evidence, what would such a lawyer do?

A I would raise that as ineffective assistance in failing to raise that as mitigating evidence.

Q Do you have a specific recollection?

A I do not.

Q Are there any other significant problems on that page?

A There's also an indication, a problem with numbers, again, in which it is indicated that on line 13 and 14 the typed portion reads, "The typical college graduate has a score of 114, which is about the eighty-

fifth percentile."

That is changed by Miss Lee to read, "The typical college graduate has a score of 115, which is about the eightieth percentile. It's a problem, again, with numbers, and I have no recollection of whether, what Ms. Lee corrected it to is correct or not.

Q Backing up a minute to the fifth percentile problem. A person with an intellectual functioning at the fifth percentile would be considered mentally retarded, would he not?

A I believe so, yes.

Q And the mental retardation of a capital defendant is an important issue in capital cases, is it not?

A Yes, it is.

Q Directing your attention to page 3259, are there significant problems with this page?

A For several reasons, there are. At a time during the reading, or the dictation by Ms. Lee of her notes, she indicated to us that in several areas she had trouble reading the notes, and therefore she secured from witnesses their notes.

In this instance, this appears to be the court's recitation of its findings during the penalty phase of the trial. She indicates that she then gave the court's notes

to the note reader, and it appeared that the note reader then copied them from the court's written notes, rather than from her transcription.

Q In other words, the court notes were used to prepare the transcript, rather than the notes of the shorthand recorder.

A Yes.

Q Is there anything else on this page?

A There's also a reference by the court to a psychological assessment conducted of Mr. Menzies, the date typed is the 9-4 of 1980. It is changed by Miss Lee to indicate that that was conducted on September 4th of 1988.

The obvious significance of that, based upon what is then said after that, is that if Ms. Lee is correct, and the psychological assessment was conducted in September of 1988, that it indicates some very positive things about the defendant which should have been argued and looked at in mitigation. Particularly as changed by Ms. Lee.

It now indicates, "Psychological assessment, 9-4-88, A. L. Carlisle, Ph.D., clinical psychologist. Strong antisocial background, habitual patterns of behavior. Trying to change, sincere in doing so. Shown definite improvement. Prognosis much better than initially. Ralph is Ralph, does job, cooperative, respectful unless he is pushed."

If, in fact, that was conducted in 1988, that would be contrary to the court's later stated findings, I believe, that Mr. Menzies was not able to be rehabilitated.

Q On line 2 of that page, there also is a problem in regard to the number on the I.Q.

A That's correct. Again, the typed portion indicates, and this is some recitation that the court is reading concerning I.Q., it says, "I.Q.," and it's typed 95. It is changed by Miss Lee to indicate, "I.Q., find," the word, "find, five."

Q Directing your attention to page 41 of the transcript, do you have that in front of you?

A I do.

Q What, if anything, is significant on that page?

A This page is the beginning of, or shows the calling by the clerk of the prospective jurors. The clerk apparently called the juror's assigned number and then called the name.

In numerous places on this page, the names are either, are incorrect, and the numbers which the clerk allegedly called out are changed from the typed version to the version taken down by Ms. Lee. And so it is impossible to tell there whether or not they were called in a correct order, or whether improper numbers had been associated with wrong names.

Q We've gone over, now, a number of problems with the taking down of numbers. We also raised a number in our memorandum. In your estimation are there additional problems throughout this transcript involving the use of numbers?

A It seemed to be a continual problem.

Q Can we rely with any certainty on a number that is contained in this transcript as being accurate?

A I don't believe so.

Q Directing your attention to page 1665 of the transcript. Is there a problem of significance on this page?

A This, again, is a portion of Dr. Sweeney's medical testimony in which there was a description of injuries. On line 9, Dr. Sweeney was asked, "And they were not fractured; isn't that true?" The answer as written is, "The hyoid, yes." However, Miss Lee has gone back and indicated that phonetically the word is "pyoid." I do not know which, if either of those is correct.

Q Thank you. Page 1668. Do you have a copy of that in front of you?

A I do.

Q Is there something of significant about this page?

A There is. There appears to be an answer that

was changed by the note reader. On line 11, the question is asked of the witness, quote, "If I can call your attention to the second paragraph of the autopsy report describing external examination." The typed answer is, "I didn't."

The answer included by Miss Lee is, quote, "Yes," unquote, or, quote, "I didn't," unquote. The note reader appears to have chosen one, and added in. Miss Lee was unsure as to which she wrote down.

Q Directing your attention to page 1713- -

A Excuse me, if I could go back and indicate that the answer, "I didn't," makes no sense in context with the question above it.

Q Okay, 1713. Is there something of significance on this page?

A The last question on the page, on line 23, as changed by Miss Lee, makes no sense. As originally written, the question is, quote, "Okay, in the year that you spent investigating the case, did you find any evidence to support that theory?"

Q That's the note reader's version you just read?

A That's the note reader's version. Miss Lee changes that to say, "Okay, in the year that you spent investigating the case did you find any evidence to sort that theory?"

Q And does that make any sense?
A No.
Q Directing your attention to page 1783.
A This involves a, the testimony, and I believe it's by Charles Illsley of West Valley City police department. And I think it's during his testimony. He is describing findings concerning fingerprints. The portion- - And you must understand that in discussing fingerprint problems, there are several, there's terminology that is specific to the discussion of fingerprint evidence. It involves rings, it involves ridges. Those are two different particulars as they relate to fingerprint evidence.

In this case, beginning on, well, I'll just have to read from the beginning of line 12. The answer, as typed, is, "I'm sure all of you know, if you look at the ends of your fingers, soles of your feet, there are," and the typed portion is, "rings there." That has been changed to "ridges." I do not know- -

Q Excuse me, changed by Ms. Lee?
A Changed by Miss Lee to "ridges." I do not know which of those is accurate, but they are different terminologies used in the presentation of that evidence. That, again, happens on line 19, where the word "ring," which has been typed, is changed by Miss Lee to "ridges."

It happens again on line 20, where "rings" is changed to "ridges," and "digits" is changed to "dots." I've never heard of anything in, as it concerns fingerprint evidence, that relates to dots.

Q Isn't there also a problem with transposing "rings" and "ridges" on lines 21 and 17?

A There, it also appears on line 21.

Q And 17 as well?

A On 17 as well.

Q Directing your attention to page 1829 of the transcript, do you have that in front of you?

A I do.

Q Is there anything of significance about this page?

A As changed from the typed portion to the corrected portion by Ms. Lee, I make no sense of this certain paragraph.

Q Could you tell us what paragraph that is that you're speaking?

A It's Mr. MacDougall, and it begins on line 5, and the problem areas begin on approximately line 9. Do you wish me to indicate how it, as changed, reads?

Q Or if, briefly, you could tell us what it is that's being discussed.

A This has to do with the issue of whether or not

Mr. MacDougall could be under subpoena power by the defense as a result of his having appeared in front of the federal court on behalf of Mr. Britton. And this was a hotly debated issue during the course of the trial.

Q To your knowledge is the issue of Mr. Britton's preliminary hearing transcript being raised on appeal?

A Yes, it is.

Q And as part of that issue, is the issue of Mr. MacDougall's account, or need to testify, being raised?

A It is being raised. And the problem with the nonsensical interpretation, then, is it becomes difficult to raise that issue properly in argument, because you can't tell what position, according to this, that was taken by Mr. MacDougall.

Q Thank you. Directing your attention to page 1870 of the transcript. Is there anything of significance on this page?

A Well, this points out another one of the recurring problems which I did not mention earlier. At the beginning of the trial, some witnesses were brought forward, sworn, and admonished as to the implications of the exclusionary rule. I have no particular recollection of which of those witnesses would have been brought in, sworn, and excluded.

In this, on this page, 1870, beginning on line

15, it appears from Ms. Lee's notes that she began paraphrasing, at this point, portions of the comments by the court. In this case, originally the typed portion indicates that the court says, "You have already been sworn." However, there's a parenthetical added by Ms. Lee indicates that it is unclear in her notes, and that she's then paraphrasing.

This occurs throughout the transcript as the only, an asterisk would appear before a witness started testifying, and it is, you are unable then to determine if somebody was sworn at the beginning of the testimony, or whether or not they were sworn at all later. I could not vouch for that accuracy.

Q Directing your attention to page 1913. Is there a problem with this page of the transcript?

A This is indicative of some of the problems with state, or with case cites. On line 8 there's a reference to the case of, and it indicates Firo versus State. But she indicates that that's only a phonetic spelling, and that she doesn't know what it actually is.

Q Is there also a portion on that page where Miss Lee would not read her notes?

A There is. On line 2 there's a portion of argument discussing other state's statutory schemes, and the original typed portion by the note reader states, "The

Pennsylvania statute differs from that of the Utah statute." That has been changed by Miss Lee to read, "The Pennsylvania statute seems diverse from that of the Utah scheme." I believe that those have contrary meanings.

Q Directing your attention to page 1992 of the transcript. Is there a problem with this page?

A This involves technical testimony. I can't tell exactly- - Oh, I think this is the testimony of Martha Kerr. On line 12, or starting on line 11, a sentence reads, this is the typed portion. "It's possible on a cigarette butt to first of all identify an enzyme amylase."

When we got to the portion where Miss Lee was reading that, she could not read her notes as to the portion written by the note reader as an enzyme amylase. So I do not know whether or not the inserted portion is correct, or whether it has been made up and added by the note reader.

Q Thank you. Page 2019. Is there anything of significance on this page?

A This is another quote by Mr. MacDougall that in my estimation doesn't make sense, and is not illustrative of his usual speech patterns. On line 8, it quotes Mr. MacDougall, and this is what is in. This has not been changed. This is indicated by me as not making sense.

"Mr. MacDougall: Calling an attorney is calling

himself as a witness on behalf of the attorney." That is either a fragmented or nonsensical sentence, and does not sound like Mr. MacDougall to me, and I do not recall what he said.

Q Do your notes indicate it?

A Yes, it does indicate for that entire period she doesn't know what was there.

Q And again, this relates to the issue being raised on appeal regarding the use of the preliminary hearing transcript?

A Yes, it does.

Q Of Walter Britton?

A Yes, it does.

Q Directing your attention to page 2085?

A On line 2085, line 4, I don't know who the witness is, but it is discussing whether or not Mr. Britton could have learned from television news reports information that he could then have utilized in fabricating a confession by Mr. Menzies. The question on line 2 is, "How did the subject of the woman's identification come up?"

The answer is, as typed, is, "That came up from the news hearings they had Friday night." The answer is, that Tauni inserted, and indicated she was unsure of, was that, quote, "That came up from the news hearings that he had Friday night."

Q So this is an indication of the note reader attempting to make sense of the notes when they don't make sense?

A That was my interpretation, yes. In many cases where Tauni was unable to read, or was unsure of the words, they appear in a certain type of fashion within the typed transcript which indicated to me that the note reader attempted to clarify and fix areas problematic with Ms. Lee's notes.

Q And again, this relates to the Britton issue that's been raised on appeal?

A It does.

Q Directing your attention to page 2116 of the transcript, is there anything significant on this page?

A This involves, again, some discussion over Mr. Britton. On line 8, a question is posed to a witness, and I don't know the identity of the witness, "Did any of the inmates make any complaint to the jailer, to your knowledge?"

The answer as typed is, "The only one I can say that may have was David Kling." However, at that point in time, Tauni indicated to us as reading it that she didn't know the name. Therefore that indicates to me that the note reader had to have guessed, and inserted that name.

Q Is there anything else on that page that's been

inserted?

A Additionally there is a question and an answer that were omitted from the typed portion of the note reader that were added in by Ms. Lee as she dictated it to us. And that would have been, the question as added was, "What? Wrote a kite?" "Answer: His name David Kling." That portion was not included in the typed transcript.

Q An attorney reviewing this transcript for appellate purposes would be interested in the names of anyone else who might have heard this conversation, wouldn't they?

A Absolutely.

THE COURT: Can we take a break here for the reporter?

(Brief recess.)

THE COURT: You may proceed.

MR. LARSEN: Excuse me, Your Honor, before we begin again, I'd like to offer the court copies of the state's transcripts that have been interlineated to which Miss Watt is referring. And I thought the court might like to look along to a transcript.

THE COURT: If you have an extra copy.

MS. WATT: Your Honor, we would object to that. We have our version here before the court, and available for the court to look at. The state has taken issue with

us putting ours into evidence even at this point. I plan to renew our motion to admit these, I can renew it at this point.

I think it's appropriate for Your Honor to look through the actual transcripts. It's our position that Your Honor should be looking at all of the transcripts we're offering. The examples here today as to the state of the transcript.

There's no we can go through in testimony every area in 3,300 pages. We'd like Your Honor to pick up the transcripts and look at them if Your Honor wishes to follow along.

MR. LARSEN: We're just offering them for your information. Her position seems to be consistent.

THE COURT: I think I ought to look at everything you have, if you have it. Because time is of the essence, and anything that will expedite it, I think will be helpful.

MS. WATT: May I proceed, then, Your Honor?

THE COURT: Yes, you may do so.

Q (BY MS. WATT) Miss Wells, directing your attention to page 1622 of the transcript, and what I would actually direct your attention to is page 1622 through 36. Do you have a copy of that?

A Since we're going out of order, could you- -

MS. WATT: Could I approach the witness, Your Honor?

THE COURT: You may do so.

Q (BY MS. WATT) For the record, would you identify what I've just handed to you?

A This is a portion of the transcript which includes notes by the law clerk who was reading along with Ms. Lee, as well as my own notes when I reviewed this portion. It covers pages 1622 to 1636, and covers the period in the trial where, during Dr. Sweeney's testimony, one of the jurors fainted.

Q Is there anything of significance on page 1622?

A There is.

Q And what is that?

A The first indication of a problem is on page 2, the court apparently says, and this is the part that is typed, "Have them take the juror out." And then in parentheses it says, "One juror fainted." Ms. Lee, in going back over there indicated, "Have them take the jury out."

I do not know, and cannot recall whether only one juror left the courtroom, or whether the entire jury left the courtroom. And it, I cannot tell the accuracy of either of those.

Q What would be the significance of either one, or

all of the jurors leaving the courtroom?

A Well, because then certain additional argument takes place. And it is argument about another issue, as well as, I think, about the particular juror. And it is important to know whether this argument was made for the benefit of the remaining jurors, whether no jurors were present, or whether eleven, or I guess there would be thirteen jurors remained in the courtroom, or whether they did not. And there is no way to tell from the transcription who was present in the courtroom when the arguments then continued on a different issue.

Q Do you recall specifically what occurred when the juror fainted?

A My only recollection of when the juror fainted was that Mr. Klekas started walking from the far end of the room over to the juror, and I couldn't really see what was occurring. And then I recall the court stopping the proceedings, but I do not recall from that point on exactly what occurred. I believe that we went into chambers and had discussions about the implications of this juror fainting, but that is not indicated in this.

I also recall that the paramedics were called to administer to the juror who was ill, and there is no indication in the ensuing about twenty pages or fifteen pages here of any of that occurring.

There was also discussion, I recall, and I believe it was in chambers, concerning Ms. Lee's conduct herself during the course of the testimony of Dr. Sweeney, in which it appeared to several of us that she cried. And we talked about that in chambers, and there is no indication in this transcript of any discussions about that.

There was one other additional important portion of this section of transcript, and that is that I make note, or I don't make note, I make a comment which is addressed in the transcript, indicating that the defendant is not present during the ensuing arguments that occur on page 1622, or begin on page 1622. And yet there is no indication in my review as to when the defendant would have been taken out of the proceedings, and when he would have left, and what he would have been present for.

Q So from line 4 on, on page 1622, it's unclear who is present?

A It is unclear who is present, it is unclear where we are, and that's unclear as to whether, or when the defendant's presence started and stopped, and whether or not any of this was conducted in the presence of any jurors, or the jury in its entirety.

Q I'd like to direct your attention to page 1633 that you have in front of you. On line 16 to 25 I believe

there is a reference to Ms. Lee's crying episode; is that correct?

A Yes.

Q And so that in reviewing this transcript, there is no other reference to that episode, is there?

A Between the time that the juror fainted and we began discussing that at some point in time, in some place, in front of some parties, the issue of Ms. Lee crying, there is no reference to that until my comments on 1633.

Q And that incident, do you recall whether that, in fact, took place at about the time the juror fainted?

A My recollection is, is that it did take place during that same period of time, and was discussed by the parties at some point, which is not indicated in this record.

Q In reviewing pages 1622 through 34, or the entire record, did you see any place where you made a record of this incident? Well let's just talk about 1622 there through 34, since you have that in front of you. Is there any place in there where there is a record made of what actually occurred when the juror fainted?

A No.

Q In your experience as a trial lawyer, would you say this is the type of thing you would want on the record?

A It would be the type of thing you would want on

the record, yes.

Q Do you recall specifically whether you made a record of this?

A I have no specific recollection of whether I did or did not. I can only say that it is the type of situation in which I would have expected that I would, or that Frances would have made some sort of objection. Because as trial lawyers we're very conscious of the behaviors or occurrences within the course of a trial that may affect other jurors, and in effect taint them.

Q In reviewing this portion of the transcript that I've handed you, 1622 through 34, does it appear to you that the transcript does not flow in terms of what went on in court?

A That's correct.

Q Does it appear that portions may well be missing of what occurred in the court?

A I cannot say, because it does not flow. And because I have recollections of conversations concerning the juror and concerning Tauni that do not appear in the record, I have question as to whether or not there are portions that are missing.

Q On page 1622, immediately after the juror faints, the discussion that we're not sure who was present for has to do with something totally unrelated to the juror

fainting, does it not?

A That's correct. After the court says, "Have them take the juror," or "the jury out," Mr. Jones then begins immediately talking about something. He says, "Judge, with reference to which exhibit is it?" That does not flow, and seems out of context with what has just occurred.

Q And during the course of that discussion about the exhibit, directing your attention to page 1624, does there then appear to be some sort of non sequitur that occurs?

A Yes, there is. And unfortunately Mr. MacDougall, this is attributed to you. On page 1624, line 4, the typed portion of the transcript indicates that the court states as follows. "What particularly happened during the jurors, during the course of the trial. Rick would be a little more subtle or sophisticated." Well, that make no sense to me. And it certainly doesn't have anything to do with the context of anything that we had been talking about up to that point.

Q Immediately after that sentence, what is indicated in the transcript?

A "We will be in recess until 2:00 o'clock."

Q Is there any indication at what time the recess was taken?

A There is, there's no indication that Miss Lee put any kind of an asterisk, but it states in parentheses that there's a recess until 2:00 p.m.

Q To your knowledge, is the issue of the tainting of the jury as a result of a number of incidents, including the fainting of this juror, an issue that's being raised on appeal in this case?

A Yes, it is.

Q And would a record of that occurrence be important to appellate counsel trying to raise that issue on appeal?

A Well, yes, it was. And one of the other reasons why I would have expected to have found some portion dealing with objections, or at least discussions, is that in the later course of the trial, for different reasons, we lost two additional jurors. And it continued to be an important issue then. And we were very, some people would say too fastidious about making our objections. And that was the subject of numerous other objections and mistrial motions.

Q Do you have any specific recollection what the statement on page 1624 about Rick being more subtle or sophisticated might have referred to?

A I have no idea what that refers to, or why it is in there. But as I say, it makes no sense in the context

of the other testimony.

Q Do you see anything else of significance in this volume I've given you, 1622 through 34?

A On page 1625, Lieutenant Wayman, on line 10, in the typed portion responds to a question by answering, "To my knowledge, Judge, nothing was taken to his- -" I'm sorry, "was taken from his cell, with the exception of forty-one paperback books." That refers to a search that was conducted of Mr. Menzies' cell during the course of the trial.

However, the note reader has, I'm sorry, Ms. Lee's notes indicate that what he said was, "To my knowledge, Judge, nothing was taken to his jail, with the exception of forty-one paperback books." Again, those are her notes as she read them, and they indicate to me that she took a portion of that down incorrectly, as that makes no sense.

Q Do you see anything else in that volume that's of significance, in those few pages?

A With regard to additional problems in taking matters down on 1626, line 4, the typed version of my comments are, "Perhaps I can just ask Lieutenant Wayman, did you see any warrant there all the time?" I would indicate that, and my notes indicate that that makes no sense.

Q 1628 also contains some problems with taking down what occurred in this- -

A Contains- -

Q Some problems with taking down what occurred in the courtroom.

A On line 12, this is apparently a quote from Mr. Menzies during the period of time we were discussing the search of his cell, and I believe this occurred in chambers. Mr. Menzies, in the typed portion, says, "In fact when I was in the library recreation area, they brought a gray-silver garbage bag- -" And then it goes on to say, "I asked if I could go through it, see what they took."

Ms. Lee's notes indicate that this is what they took down. "In fact when I was in the library recreation man carry can brought a gray-silver garbage bag in, and I said, 'What is that?' I asked if I could go through it, she what they took."

Q Again, this is an example of the note reader attempting to fix an incomprehensible portion of the notes?

A In my estimation that's what occurred.

Q Directing your attention to page 2238 of the transcript, do you have a copy of that before you?

A I do.

Q What if anything is significant about this page?

A This is one of two instances in which important areas of testimony concerning descriptions of Mr. Menzies by witnesses were added to in the written transcript. For instance, what occurred on this page, and occurred then on a second page, which we just can't locate at the moment, is, that as Ms. Stubbs and I were reading along in the typewritten portion, a question was asked of the witness to describe the person that they saw. Ms. Lee then gave us a short, shorter description than that which appeared in the written transcript.

For instance, on page 2238, starting on line 13, the witness testifies, or I'm sorry, the typed portion says, "When asked who the victim was with, she stated it was a man, and gave the following description. Male, white, five-ten to six feet, medium build, sandy brown hair with a shaggy pork chop," in quotes, "beard and moustache." That was what was typed.

However, Ms. Lee read a description that was shorter than that, and she stated, "Male, white, five-ten to six feet, medium build, sandy beard, moustache." There was no mention in Ms. Lee's notes of anything about a shaggy pork chop beard and moustache.

When I asked her, Ms. Stubbs, I don't recall which of us asked her, why that could be such a

which she had wrapped around her notes, and which she said she had given to the note reader.

I read, and Miss Stubbs read the police report, and the portion included in the typed transcript was verbatim from the police report. But that is not what the witness testified to, and was added to by the note reader.

Q The police reports were actually with the notes, then?

A The police reports were with and around the notes when we saw it. We saw them in California. There was a second instance in which this same thing occurred, and I'm sorry, I can't refer to the page right now. But it dealt with either the eye witness testimony of Mr. Tim Larrabee, or the testimony of Beth Brown, the two individuals who were up at Storm Mountain on the day that Miss Hunsaker was seen.

As Ms. Lee dictated the description of the man, her description, and I think I'm correct on this, was approximately two lines long. However, the typed portion in the transcript was approximately five to six lines long. And again, when I asked her how there could be that much of a difference in description, the typed portion being much more detailed, she showed me the police report, and again, the typed portion matched the information contained in the police report.

Q Did Ms. Lee indicate that she might not have taken down all of the testimony regarding the description?

A I don't recall what she said with that, with regard to why there was a discrepancy. She merely indicated that in these two instances, as well as in the court's findings, she supplied the note reader with copies.

Q Did she also supply the note reader with a copy of the autopsy report?

A She also supplied the note reader with a copy of the autopsy report, and with jury lists.

Q And when these, this particular set of notes relating to page 2238 were found, there was some handwriting on the notes that was not Miss Lee's, was it not? Do you recall that?

A That's what she indicated. I don't have a specific recollection of what my notes are on, on this copy that's cut off, and it just doesn't refresh my recollection as to what she said in that regard. But- -

Q In regard to the appeal in this case, an issue being raised is the identification evidence of Mr. Menzies, not only in regard to the sufficiency of it, but also in regard to some incidents that occurred during the trial?

A Absolutely. Identification is a crucial issue, and the fact that the transcript was supplemented to include more detailed descriptions, I find to be

significant. And I cannot recall with any certainty which of the two versions was truthful. Not truthful, which was accurate.

Q Directing your attention to page 2309 of the transcript. Is there anything significant on this page?

A On line 1, the sentence as typed states, "It's done away with, but a Rule 35 motion at the time that I filed, it was a motion which asked the judge to in effect stay the imposition of a sentence- -"

When it was read to us, Ms. Lee indicated the following. "It's been done away with." And then she indicated that there was a word there that she could not read. And in the typed portion that has just been deleted, and the sentences have been apparently changed to make sense. I don't know what the missing word was; she does not either.

Q Further down on that page there's two handwritten "B.C.W." with a bracket around certain things and a question mark.

A Yes.

Q For Your Honor's elucidation, since he is following on the state's copy, would you indicate, number one, whether the judge would have anything to that effect on his copy?

A Miss Stubbs and I took our notes separately, and

because the assumption was I was at the trial and would understand, or have a better understanding of those things which made sense than Miss Stubbs could because she was not at the trial, I wouldn't expect that her copy would indicate any of those areas where I felt that there may have been substantive errors or contextual errors.

Q So a "B.C.W." with a question mark means that you believe there's substantive errors?

A It means that it didn't make sense to me when I read it.

Q And those are contained throughout the transcript, not just in the pages- -

A They're contained through our copies of the transcript. I wouldn't expect they would be in hers unless there was some reason that she wanted to note because it didn't make sense to her. But we did not do that in conjunction with each other.

Q And if the court were then to read the entire transcript, the court would have additional information about substantive areas where we have concerns?

A Yes.

Q Directing your attention to page 2311, is there anything significant on this page?

A This is another example of Ms. Lee's notes that don't make sense, where it appears that the note reader has

attempted to make some sense out of it. On line 2, a part of a sentence begins, "Walter Dean Britton was committed to the custody of the attorney general of the United States." That's the typed portion.

Ms. Lee's notes indicated this. "Walter Dean Britton was committed to the custody of the attorney," and then her notes do not say general. They are something to the effect of "den gene." It was something that she could not read.

Q Direct your attention to page 2400, is there anything significant on this page?

A This concerns another juror problem that we had with Miss Helen Gass, or Helene Gass, who was excused during the trial. And on line 12, Ms. Lee quoted me as saying, "We have come who is in distress in there." That doesn't make any sense. What's written is, by the note reader is, "We have to calm who is in distress in there." Another illustration of the note reader, I believe, cleaning up Miss Lee's problems.

Q And again, this issue regarding the tainting of the jurors, the fainting and the problem that Juror Gass had is being raised on appeal in this case, is it not?

A It is.

Q Directing your attention to page 2497. On this page we have another example of the "B.C.W." with a

question mark that perhaps Your Honor would not have?

A That's correct. On line 22, the typed portion says, and it's quoting Mr. MacDougall, "Well, the difficulty, quite honestly, is we are relying on conclusions. He calls it hypothesis." When she read it, it changed to, "Well, the difficulty is, quite honestly, is we are relying on so scant what we say by conclusion he." And unless Miss Stubbs was able to get that down in any better form than I was, the corrections leave that sentence making no sense.

Q And how is the argument of counsel important to an appeal?

A Well, obviously the issue of preserving for appeal and dealing with issues of waiver can't be addressed if the record can't be looked at and the arguments of counsel deciphered.

Q Directing your attention to page 2575, is there anything unusual about this page? I should call it significant, rather than unusual.

A Well, we just have another example of Ms. Lee's inability to read portions of her notes. On line 6 there's a fragment of a sentence that begins, "I would be picking up the," and this is the typed portion, "things that would be consistent in depression from the other parts of the interview."

Ms. Lee's dictation indicates, "I would be picking up the," and the word that she describes is a K-long U, S-H-E-R, but she cannot read that. And I do not know what that signifies.

Q Directing your attention to page 2624, is there anything significant to that page?

A There's another example of a portion of the transcript which Ms. Lee was not able to read to us. On line 9, the typed portion is, "What was a little unusual about this was that he found multiple pieces of identification."

Tauni was not able to read the word "multiple," and in fact, the words I have in parentheses is something to the effect of "P-U-L-T-I-N." And I do not know what that signifies.

Q Just for the record, the accuracy of testimony, what role does that play in the appellate review of a capital case?

A Well, it's just that if you don't have accurate testimony, you obviously are in a position of not being able to argue whether it was accurate or credible information. You're left without that knowledge. I think that's particularly true as it relates to identification type issues, and in very technical type of issues. Where you cannot otherwise reconstruct or piece it together.

Q This appears actually to be argument, however, so that your previous and answer regarding importance of argument would apply?

A Yes, thank you.

Q Directing your attention to page 2637 of the transcript. Is there anything significant on this page?

A The paragraph beginning on line 18 as dictated by Miss Lee leaves it nonsensical, I believe. And it's during a period where we are arguing about the state's, whether the state has proved its case as to the lesser counts. And whether or not there is sufficient evidence to elevate this to a capital homicide. And so the argument itself is important.

The typed version says, "It's clear that the circumstances in count 1 pertaining to first-degree murder are inter-related in the sense that that evidence is also to be considered when you are considering count 2 and count 3."

Q That's the note reader's version?

A That's the note reader's version, the typed version. However, Ms. Lee states as follows. "It's clear that the circumstances in count 1 pertaining to first-degree murder are inter-related in the sense that that evidence is also to be considered when you," and then there are words which she cannot read, which appear to be

R, long E, S-E-P, K-L-L, or something to that effect. And I cannot tell you what the significance of that is, or whether or not it changes the context of the argument just made.

Q Directing your attention to page 2653.

A Yes.

Q Is there anything significant on this page?

A There had been a discussion, or there had been testimony presented by the state concerning the fingerprints of Miss Hunsaker appearing on the window of the car of Troy Denter, which had been at some point in the possession of Mr. Menzies.

And the discussion in argument on line, beginning on line 22, is typed as follows. "The door handles were the open type, and were unmarked." Ms. Lee's version is, "The door handles were the open type and were unmarked or," and then there is a word which she could not read. And which I've put down the shorthand notes for, as I understood them, which were U-N-A-S-K, long A-B. I do not know what that is, or what significance it has.

Q A lawyer that was reviewing this transcript for error, plain error, and wished to attack the fingerprint evidence, would be interested in the precise description of that door, wouldn't they?

A Yes.

Q Directing your attention to page 2970 of the transcript. Is there anything significant on this page?

A This must be some discussion, again, of a technical matter. I can't identify from this one page who the speaker is, but on line 2, there is a change from what is typed to what is added by, or corrected by Ms. Lee, which I believe changes the meaning of the sentence.

The sentence as originally typed is, "They did, Your Honor, there's a number of them which will parallel the same systems as people who are having psychological problems." Ms. Lee changes the word "systems" to "symptoms." I can't tell exactly which of those is correct.

In addition, on line 8, there is a description of a number of types of- - I'm getting tired, I can't think. Descriptions of character, apparently, that are being described, and it, as typed, indicates, "Clues, impulsiveness, difficulties in interpreting social morass."

Miss Lee changes that to, "Clues, impulsiveness, difficulties in interpreting social mores, and no," and then she cannot read the remainder of it. And apparently those words were deleted by the note reader, and we are left with a sentence that says, "Problems of self-confidence."

Q On the next line there, doesn't she, in fact,

put the word "systems"?

A She does. Although changing it up above to "symptoms," she changed on line 10 the word "symptoms" back to "systems."

Q And for the court's information, there are actually three portions in there that you have question marks next to, as possibly containing substantive- -

A On that page I have marked three areas where I didn't believe that contextually it made sense. Those would be between lines 4 and 7, lines 8 and 9, and on the bottom of the page, at line 24, as corrected, the question reads, "What does P.E.P. stand for?" And the answer as corrected says "Peptographic Ideptic." But Ms. Lee indicates that she does not know if that's correct.

Q Directing your attention to 3003, is there anything of significance on this page?

A What was that page number?

Q I'm sorry, 3003. Do you have that in front of you?

A No, I don't.

MS. WATT: If I could approach the witness, Your Honor.

THE COURT: You may do so.

Q (BY MS. WATT) Is there anything significant about that page?

A There is. I think this occurred during the course of the penalty phase of the hearing, where discussions concerning Mr. Menzies' record, or prison record were being discussed. There is an answer from some speaker that, as typed, says, "If my memory is correct, and it's been several years, Ralph did not have a dismissal the last two years he was there." I indicated at the time I read that, that that made no sense to me, and Ms. Lee indicated that she was unsure of the word. However, I don't believe "dismissal" is correct.

Q How would this testimony be important?

A Well, that would be important as to the issue of mitigating evidence, as it regarded a penalty phase. Dismissal seems to refer to charges, rather than anything else. And if there had been a dismissal of some charges, there's certainly something that we would want to bring up. But I cannot reconstruct that.

Q Directing your attention to page 3079, do you have that in front of you?

A I do.

Q Is there anything significant about that page?

A Yes, there is. On line 2, a question was asked to the witness, "Did he include any other diagnosis?" The answer, as typed, is, "Alcohol abuse and another disorder."

When Ms. Lee read that, the words were not

"another disorder," but she had shorthand notes that looked like they were M, long A-C, and then the word "struck." Which appears to me that the note reader could not decipher or read the notes either, and substituted into the testimony "another disorder."

Q A lawyer reviewing this case on appeal would be interested in the diagnosis?

A Absolutely. And that "another disorder" is substituted for something that may have been concrete. A concrete type of diagnosis is significant. We don't know what it was supposed to be.

Q Directing your attention to page 3085 of the transcript. Is there anything significant about this page?

A This is an illustration, I believe, of Ms. Lee's lack of understanding of some vocabulary. In two instances there was discussion about whether or not a person would exhibit, and the word, I believe, should have been "bravado." And throughout she indicates that the word is "provado." That would have been on lines 16 and on 18.

Q There's a problem with that word also on line 7, is there not?

A There is. And on line 7, although the note reader includes the word "bravado, her notes would read "ravado."

Q And on lines 17 through 20, could you describe

what occurs there?

A The original typed portion of that answer states, "The probability would be that it would be more towards bravado intent than actual intent, so that someone is at immediate risk."

Ms. Lee's dictation indicates that that answer should read, "The probability would be that it would be more towards provado in the individual than actual," and there's a word there that she could not read, "so that someone is at immediate risk." She indicates she's unsure.

Q And again, a psychiatric diagnosis or testimony regarding Mr. Menzies would be important to mitigating and/or aggravating evidence in this case?

A Yes.

Q Directing your attention to page 7 of the transcript, is there anything of significance on that page?

A In two places on this page, there are indications of names which were apparently taken down wrong, and there's no way that I can determine what is the correct name. On line 5, the typed name is Maria Thayer. However, Ms. Lee indicates that she does not know what that name is.

Q I'm sorry, what page are you on?

A 3256.

Q Let's talk about 3256. You indicated she didn't

know what the name was?

A She indicated that she could not tell what the last name was. But it was Thayer on the typed portion.

Q And are there any other problems on that page?

A Yes, on line 21 there is a name that is typed as Lewis L. Boone. Ms. Lee's dictation was "Lewis B.," and it looks like L-long U-M.

Q Is this page an example of a persistent problem of getting names transcribed?

A Yes, it is. There's one example we can skip over later where it refers to attorney Carl Nessett. Well, I thought that was a fairly obvious one, because we know the name, of the inability to take names down correctly.

Q You're referring to Jo Carol Nessett-Sale?

A Yes.

Q Directing your attention to page 7, is there anything of significance on this page?

A This page refers to an argument that we had concerning the state's ability to establish the offense of theft. And we talk about one of the cases, and I think the case referred to is Morehouse, Your Honor. And the issue in Morehouse was whether or not there was a distinction between crimes of theft and crimes of, quote, "stealth and dishonesty."

In reference to the discussion in this

transcript, Ms. Lee repeatedly wrote the word down of stelt, which is not a word, but the note reader then changed that to theft, which changes the entire meaning of that argument, because that argument turns on the very narrow definition of stealth and fraud. And that was not taken down correctly on this page, and apparently was changed by the note reader to make it an inaccurate argument.

Q Directing your attention to page 26, is there anything of significance on this page?

A This is during some argument, I can't tell if I'm the speaker or someone else is. But if I could call the court's attention to lines 3 through 9. The portion that is typed is, "There the court held it was proper to allow that type of question on voir dire because there are widely-held misconceptions about the actual effect of imposing life sentences, and the courts believe that that could raise an unacceptable risk of the death penalty being imposed on defendants largely, or a basis mistaken notion of parole law."

Well I noted initially that that paragraph as written made no sense, and I cannot reconstruct what the argument was, assuming that I was the speaker. But when it is changed, then, by Ms. Lee's corrections, it makes even less sense. Do you want me to read that?

Q That's fine, I think we've- -

A Also on that page there is a case cite, which is an example of problems with case cites, in that it is apparently not only incorrect, but refers to no case cite I'm familiar with.

The case cite on lines 17 and 18 is 828, it looks like Fed 2d, Lanier. I'm not aware of any case cite that could follow that format.

Q Directing your attention to page 74, is there anything significant on this page?

A Yes, this is a portion of the voir dire examination of potential jurors, and the juror on line 1 states, in response to some question, "I don't think so."

The court then asked the question, according to the typewritten portion, "Do you feel you would consider the evidence," dashes.

Ms. Lee's correction to that is, "Do you feel," and the word is W-long U-K, "reach evidence?" "Do you feel W-U-K reach evidence?" That makes no sense.

Q Again, in reviewing a transcript for plain error, the questions and responses of jurors are critical?

A Yes, they are.

Q I believe we're on page 41, if I could direct your attention to that; is that correct?

A Yes.

Q I'll direct your attention to page 159 of the transcript.

A On line 19 of that page, a juror was referred to as, by Ms. Miss Lee's corrected version on line 19, as Julia '84.

Q And that appears to be erroneous?

A Yes.

Q There's also a portion that's been added on that page.

A There is. At the top of the page, line 1 ends with the typed portion, "If so, please raise your hand." And then Ms. Lee added in the words, "in a grand jury." I don't know the accuracy of that.

Q Directing your attention to page 1841, this is the page that you were referring to before, where there's the problem with names, in particular with Jo Carol Nessett-Sale.

A Yes. On line 20, there is a reference to two attorneys, and it says, "And I can't remember the case name, Ginger Fletcher." And then there's a period, and then it said, "One of Karl Nessett's," and I can only assume that the correct name in context with attorneys who would have done those cases is that it should be Jo Carol Nessett-Sale.

Q Directing your attention to page 1912, is there

anything of significance on this page?

A Yes. On page 23, the typed version refers to Officer Salmon, but Ms. Lee indicates that the name phonetically is Solomon. I do not know which police officer she's thus referring to.

Q And page 1928, is there- -

A On 1928 there's another problem with case names on line 13. The typed portion is State versus Valardy. Ms. Lee's notes indicate that phonetically it's "Valards." Which doesn't give us an indication of which is accurate, or how to find it.

Q 1929 gives another example of problems with case names?

A There are two problems with case names on that page. One on page, or on line 5, refers to typewritten State versus Moldrum. Her notes indicate Molstrom or Holstrom. She's unsure.

On line 17, the typed case name is Renfree, but her notes indicate that phonetically it's Rinfro.

Q A lawyer handling this appeal would be interested in the cases for the purposes of seeing what was argued in them, and seeing what was preserved by- -

A Yes, because if they were cited during an argument, and that were raised at a later time on an appeal, if you could not find that cite again, you could

not determine what the case stood for.

Q It would also help with your preservation of issues, wouldn't it, if a case made a certain argument, and that argument wasn't clearly made in the transcript?

A Yes.

Q Directing your attention to page 16 of the transcript, is there anything of significance on this page?

A There is. There is, again, a discussion about the introduction of the preliminary hearing transcript of Mr. Walter Britton on line 5, I'll start. The typed portion is, "Filed it on the same day that they filed this motion to permit use of the preliminary hearing transcript."

Miss Lee has corrected that to, "Filed it on the same day that they filed this motion to prevent use of the preliminary hearing transcript." Those words have opposite meanings.

Q Is there another problem on that page?

A Yes, there's also a reference on line 15 to another case. The typed portion is, "However, in the Banner versus Page case, which is a U.S. Supreme Court case." And Ms. Lee indicated that she was unsure of the case name, would have to check on it, but believed it was Barber or Bashed. None of those make sense.

The Banner case, of course, is knowledgeable to

me, or I'm familiar with it, but not in terms of anything called Banner versus Page, or anything of that nature.

Q And Banner is not a United States Supreme Court case?

A And Banner is not a United States Supreme Court case, so I don't know what case was being referred to there. And that is significant to the ability to preserve and argue, or reemphasize those arguments on appeal.

Q Directing your attention to page 2040. Do you have that in front of you?

A Yes.

Q Is there anything significant about this page?

A I believe this is an illustration of Ms. Lee's inability, or failure to take down testimony properly, then having it being fixed by the note reader.

On line 3- - Let me start on line 2. "I have the name Ernie Jones, and then" and then the note reader has in quotations, "WCBWCB," unquote, "which stands for 'will call back, will call back.'"

If you look at the initials, or the letters, they do stand for "Will call back, will call back." However, Ms. Lee wrote down the letters "WCWWCW." Those do not translate to, "Will call back, will call back."

Q Directing your attention to page 1628- - I believe we have covered this page.

A I think we have, yeah.

Q Directing your attention to 1710. Is there anything significant on this page?

A On line 9, Ms. Lee corrected a description of a car from "'69 Dodge Polaris," which was written by the note reader, to "'69 Dodge Filera."

Q So this is an example of her inability to hear correctly in the courtroom?

A Yes.

Q Directing your attention to page 1845. Is there anything significant about this page?

A This is an example, I believe, of the inability or failure to write down by Ms. Lee correctly what was testified to.

On line 17, Miss Palacios states, and this is what is typed, "What they said is it will take a day. I had Mr. Loyola tell him to call again and tell him that we need it in a day. That is as soon as he gets it. He had to go down to the basement or artifacts or something to get it."

Ms. Lee changes that and says, that, "As soon as he gets it, he is going, he had to go down to the basement or a cave." That makes no sense.

Q Isn't there also a problem in terms of getting the name down of Mr. Loyola?

A Apparently phonetically she wrote the name as "Goyola."

Q Directing your attention to page- - We've already done 1713, have we not?

A I think so.

Q Is that a yes? Directing your attention to page 2001, is there anything significant about this page?

A I noted lines 15 through 18 as not making sense to me. Those are words that were stated apparently by Miss Palacios, and I don't believe that that paragraph makes sense.

Beginning on page, or on line 19, Mr. MacDougall says, and this is the typed portion, "Your Honor, I think under the state of the law, particularly where there are tangible objects like this, not functionable objects such as blood or something of that sort."

There was no change made to the word "functionable" by Ms. Lee. However, I believe that word to be "fungible," and I believe that that's indicative of her inability to have heard that correctly.

Q And that change of word would be important to understanding the argument?

A Yes.

Q Directing your attention to page 2972, is there anything significant on that page?

A As changed by Miss Lee, the following sentence makes no sense to me. "Yes, analyze auditory discriminations process of the individual. We test to see if his ability to utilize eyesight, phonics which we commonly decoding through eyesight or sounding out words, is equal to auditory," and then there's a word, "phonesic skill. We want to know if idenic memory is appropriate and a number of other things." That paragraph does not make sense to me.

Q Is there another example on that page of Ms. Lee's inability to accurately hear what is said in court?

A Yes. On line 14, the question is posed, "And do you also conduct an interview along with the testing?" The typed answer is, "We do a thorough history on each individual." The corrected version by Miss Lee is, "We do a sure row history on each individual."

Q So the notes actually say "sure row"?

A The notes say "sure row," and that makes no sense to me.

Q Directing your attention to page 3061, is there anything significant on that page?

A There was testimony, I believe this is by Dr. DeCaria, in which he refers to having given Mr. Menzies Rorschach tests. And I'm paraphrasing what's on the page. But Ms. Lee, in reading that back to us, continually

referred to that as a "four shock block test."

Q And what's the accurate name?

A It's Rorschach test. And she continued throughout the discussion of that to refer to blocks, rather than blots.

Q In filling out the transcript in California, you actually included on that page six question marks, did you not, where you had questions about the substance?

A Yes, I did.

Q And there are also a number of changes on that page between what the note reader had written and what Miss Lee had?

A Yes. For instance, on line 23, the note reader, or the typed version was, "It appears you came up with schizotypal." Ms. Lee's corrected portion of that is, "It appears you came up with schizotyo."

Q What about on line 2? Is there anything significant on that one?

A Yes. The typed portion of the answer on line 2 says, "The projective tests are usually," and then it has dashes and goes on. Her corrected portion says, "Projective tests are unusual." And those are two opposite meanings.

Q For purposes of time I'm not going to ask you about all the other changes, but there are a number of

changes on that page?

A Yes, there are.

Q Directing your attention to page 3230, is there anything unusual on this page?

A Yes. The paragraph that begins on line 2 and ends on line 9 is part, I believe, of my death penalty argument, during the penalty phase.

On line 9 of that, the typed version- - Well, so that it makes sense, the sentence above that begins, "If those are considerations, and we know that they are, then the question arises as to whether or not the death penalty is administered in an arbitrary and capricious manner and is, therefore, appropriate." I changed that myself.

When reading it, Ms. Lee does not change that. I know I would have not argued that the death penalty was appropriate under any circumstance. So that is an indication there of something that was taken down and transcribed incorrectly.

Q Directing your attention to page 150.

A This is another problem with names. On line 11, a juror cites, I believe, properly, that she was related to a highway patrolman in Panguitch. Ms. Lee corrected that to "Bank Ridge."

Q So this is another example of Miss Lee's inability to hear correctly what's going on in court?

A I think so.
Q And the fact that we know the name of the town makes it easier for us to correct?
A And makes it easier to recognize the error.
Q And directing your attention to page 1775, is there anything significant on this page?
A On this page, as corrected, on line 7, it appears to attribute to me words that I believe the court would have said. I don't believe I would have said to the witness that they were subject to recall, and to make themselves available. I believe that would have been said to, or said by the court. And that's not indicated in the corrected version on this page.
Q On this page the note reader, in fact, inserted "The Court."
A The note reader inserted "The Court," but Ms. Lee did not have that down.
Q So the notes did not reflect that that happened?
A No.
Q And there's another problem with the names of the speakers on that page as well, isn't there, at line 10?
A Her corrected version deletes my name, indicating that the court would have said to itself, "I guess, Your Honor, before we go on, or maybe at break we will have some of those things. We are burying the

reporter." That was attributed to, or it was deleted to me, therefore attributing it to the speaker above, which would have been the court.

Q Directing your attention to page 1853, is there anything significant on this page?

A Yes. In two places, the speakers' names were transposed. On line 7, in the typed version, Mr. MacDougall was the speaker. That was corrected to Miss Palacios. And on line 20, Miss Palacios' name was deleted to attribute the comments that were stated as coming from her to Mr. MacDougall.

Q Do you have any recollection as to who, in fact, was speaking?

A I have absolutely no recollection as to that.

Q And whether Miss Palacios or Mr. MacDougall was speaking was important in terms of whether the issues were actually preserved and/or waived?

A Exactly. And the reason for that is that you certainly couldn't, you need to be able to attribute arguments correctly to the appropriate speaker in order to determine whether objections have been preserved and/or waived, and what the substance of those arguments was.

Q If you could back up a minute to 1775. Is there anything significant on that page?

A Well, there is a notation that the court took a

recess, and there were no asterisks indicating that such a recess was taken. But the words are included indicating the court took a recess.

In addition to that, the court is attributed as saying- - Well, no, I don't think- - The bottom portion of this is, again, there's no asterisks, but there's an indication that the court said, "Call your next witness," and that Mr. Jones replied by naming the witness, and that a witness was called who had previously been sworn and testified as follows. None of that was included in Miss Lee's notes.

Q So that those last five lines were all- -

A The last five lines all had to be added by the note reader without any kind of indication or mark.

Q Directing your attention to page 1859, is there anything significant on this page?

A Beginning on line 7, I am quoted as making some argument with regard to the Walter Britton issue. However, on line 16, the context of that argument changes. And I believe that the speaker changed, and that it should have indicated that that was either Mr. Jones or Mr. MacDougall speaking, because the whole tone of the argument changes and it appears to have come from someone else. But it is, and remains attributed to me.

Q This page also offers an example of Ms. Lee

being unsure about what her notes said at lines 8 through 11, doesn't it?

A That's correct. There's a portion there where the interlineations indicate that she was unsure whether the words were, "any investigator goes to conduct an interview of a witness," or, "to contact a witness." And it's unclear.

Q Directing your attention to page 2031, what if anything is significant on this page?

A On line 2 of this Ms. Lee corrected the transcript by deleting Mr. MacDougall's name. That would indicate that the argument, then, from lines 2 through, it looks like 11 on the next page are attributed to me, when, in fact, in reading that, I don't believe that that's correct, and that it could be some member of the county attorney's office who was speaking. But by deleting his name, it infers those comments to me.

Q This again relates to the Britton issue that's been raised on appeal?

A It does.

Q And I've been neglecting to point out for the court where you have question marks, have I not, on various pages?

A Yes.

Q This page is another example of three areas

that, 2031, where you have questions about the substance of what was said?

A I have noted three areas on that page where I had questions about whether or not it made sense.

Q And moving into 2032, it's not clear whether the speaker changes back again to someone else?

A That's correct.

Q Directing your attention to 2075, what if anything was significant on this page?

A Again, there's a problem with designating speakers. On page 12 in the typed version, Mr. MacDougall is attributed with saying the following. "We are, Your Honor. We just need to take care of one thing."

As it was corrected, that becomes a sentence attributed both to Mr. MacDougall and then to me. I have no recollection as to which is appropriate.

On line 14, they just inserted comments, or she has inserted comments allegedly made by me, and then would leave me calling, as the state's witness, Byron Stark. I didn't call Byron Stark, and that would be, should include Mr. MacDougall's name at that point.

Q An attorney reviewing this transcript on appeal, if they came across a statement attributed to you that you needed to take care of one more thing and that was not reflected in the transcript, that attorney would be

interested in finding out what that one more thing was?

A Of course.

Q Whether it was taken care of? Directing your attention to page 1633 of the transcript.

A 1633?

Q I'm sorry, we've covered that as part of the bulk. Is that not correct? 1622 through 34, we covered? Well, if you would just look at it quickly and make sure we've covered everything on 1633 and 34?

A I think we did.

Q Directing your attention to 1673, is there anything of significance on this page? Do you have that in front of you?

A I'm sorry, I don't have that.

MS. WATT: If I may approach the witness.

THE COURT: Yes. Do you have any idea how much longer you're going to be?

MS. WATT: I'm not certain, Your Honor. I have a number of more pages. I imagine that we'll go beyond the noon hour.

THE COURT: Because I have another case that was supposed to be starting at 10:00, and an expert witness is coming in from North Carolina. So I told them to come back at 1:30, and we'll go from 1:30. And then we have the 2:00 o'clock afternoon calendar. And I'm not sure what time

that'll finish, but we'll probably have to resume again in the afternoon.

MS. WATT: Resume from now, or- -

THE COURT: Well, I don't know how much longer she's going to take. So- -

MS. WATT: I assume- - I've got still a stack of examples that I want to go through, and I recognize that this is taking some time, but I think it's important that we do that. I really don't have an estimate. I just have a few more questions for her, once I get through the stack of examples.

THE COURT: Let's see how far we get.

Q (BY MS. WATT) All right.

A On page 1673, on line 7, there are no asterisks, but there is parenthetically stated, "Defendant's Exhibits Number 64, 77, 78, 79, 80, 81, and 82 admitted." And that appears to be added by the transcriber, the note reader.

Q By the note reader. Directing your attention to 1676, is there anything significant on this page?

A There's an additional problem where, without asterisks it indicates that Defendant's Exhibit Number 65 was admitted.

Also on line 11 begins a question that, as corrected by Ms. Lee, does not make sense to me. And it says, "May I ask you if they appear to be in subject to,

let's say, forensic examination and can you tell us? Do they appear to be in the same condition that they were on the day of the autopsy?"

I believe that the problem is, is that she cannot tell what the word "cuts" should be. If it's "can you tell us," or something about briefs. I'm sorry, I'm just not able to tell from this. I don't believe these are my notes, and I can't reconstruct that.

Q 1678 offers another example of the note reader inserting exhibits?

A 1678 and 1679 both have exhibits being admitted which are not otherwise indicated in the notes.

Q 1678 also has a discrepancy as to the number of an actual exhibit that- -

A That's correct, on line 70 of page 1678 the court asked regarding an exhibit, "What number is that?" The clerk responds in the typewritten portion, "Ninety." But it's changed to "eighty-nine." I do not know which one is correct, and I think that that is somewhat significant in terms of keeping track of exhibits and knowing which exhibit we're talking about with regard to the argument presented.

Q For clarification, that was line 7 you were referring to?

A Yes.

Q And 1780 offers another example of problems with exhibit numbers?

A 1680.

Q I'm sorry, 1680.

A 1680 presents another one. 1681 presents another example of showing that exhibits have been admitted when there's no indication in the notes.

Q Directing your attention to 1716, is there anything of significance on that page?

A Yes. According to Ms. Lee, at the top of the page, she had an asterisk listed, but no other explanation as to what the asterisk was for. The note reader has inserted an indication that there was a discussion held at the bench. I have no idea as to the accuracy of that or not.

Q And again, for the purposes of somebody reviewing this case on appeal, what would be the importance of a bench discussion?

A Well, there have been many recent, or at least some recent decisions discussing the necessity of putting on the record bench conferences, and there we don't have an indication of whether one actually occurred or not.

Q 1717 offers another example of the unclear us of asterisks?

A It does. It also shows that there was a

taken, and there's only an asterisk to indicate that. There's also an addition that a witness has been called, and has been sworn, when there's nothing more than an asterisk to indicate any of that in Ms. Lee's notes.

Q And 1730?

A It's the same problem.

Q 1774?

A There's an answer that has been included in the transcript that was not in Ms. Lee's notes. On line 16, the question was posed, "Would you look through this packet and see if maybe I've just overlooked that?"

There is a typed answer, "(Looking through packet.)" That did not appear in Ms. Lee's notes, and was apparently added by the note reader.

Q 1869, is there anything of significance?

A In 1869, it's again, there is an indication that exhibits were being marked, that a recess had been taken, and there is, there's only an asterisk to indicate that that's correct.

Q And 1880?

A This is an illustration of Ms. Lee's decision to stop taking down verbatim what the court said. What apparently she did was to, when the court would begin an admonishment, she would stop taking down the words, put in an asterisk, and the note reader would fill in some sort of

admonishment. There's no way of knowing whether that was the admonishment that the court gave, or if, in fact, it actually gave a full admonishment.

Q And 2365?

A Again, an indication of asterisks in Ms. Lee's notes, and the note reader inserting that the jury returned to the courtroom, when there's no other indication that that, in fact, is what occurred.

Q And 2402 is another example of that?

A It's the same example, and I would indicate that probably in many of the next pages, and throughout the entire voir dire process, there were sometimes asterisks, which then were followed in the transcript by indication that a juror was leaving or exiting the courtroom. But not in all cases were there even asterisks, even though those were included in the transcript.

Q On page 2430 at the bottom, is there anything significant about that?

A There's a portion here that doesn't make sense, and it has to do with the sequestering process of the jury. On line 23- - Well, let me go to the question before. On line 21, Mr. Jones poses a question, "Are you explaining why they are being sequestered?" The court responds as follows. "I explained that this is a very important part of the case. She indicated that it would not." That

doesn't make any sense to me, and indicates that either something is left out or taken down incorrectly.

Q And the way in which the sequestration of these jurors was handled is an issue being raised on appeal, is it not?

A It is.

Q And how the jurors were questioned is important in preparing the appeal?

A Yes, it is.

Q Directing your attention to 2281. Is there anything significant about this page?

A Yes, I've just been talking about how the asterisks were used to indicate something was happening, and that the note reader then included various things, such as people being sworn or coming in and out.

On 2281, there are no asterisks by Miss Lee, but there is an indication that, in this case, Detective Judd was called as a witness, that I called him, and that he testified as follows. Having been sworn. And none of that was indicated in her notes.

Q On 2450 we have another example of problems with asterisks; is that right?

A Yes. The court is talking, to whom, I'm not sure, but then there are no asterisks in the notes. But there's an indication that a juror enters the room and the

court begins speaking to someone. We cannot tell whether the juror actually entered the room at that time, or under what circumstances.

Q And 2452?

A 2452?

Q Uh-huh. Do you have that in front of you?

A I don't have that.

MS. WATT: May I approach the witness, Your Honor?

THE COURT: Yes.

Q (BY MS. WATT) Could you describe what I've just handed to you?

A This is page 2452 of the corrected transcript, indicating my notations. There are two indications here where there are asterisks, and- - I'm sorry, there are no asterisks indicating anything occurred in Ms. Lee's notes, but the transcript indicates that a juror was leaving the courtroom.

It also, further, indicates on line 14 that after that sentence Ms. Lee would have had asterisks, and the clerk then calls James Hampshire, but there's no indication that that juror entered. Or the indication would be from the asterisks that he did enter at that time, but there's no indication in the transcript he entered.

Q And it would be important to know who was in the

room, whether argument was inadvertently made in front of jurors, and also just who was in the room for purposes of- -

A Yes, obviously. And it seems to have dissolved to guess work.

One other indication of something I don't think that we had, and you were asking me about earlier, problems with speakers. If I could just indicate, we don't have a page in here, but there was a portion, when we were having discussions in chambers, concerning the sequestration of the jury, in which the press indicated that they wished to come in.

Throughout the discussions with the press, those persons were never identified, but only were identified by the general nomenclature, "press." So we never knew in that case who was actually in the courtroom, or what remarks to attribute to what person.

Q There are repeated instances in this transcript where the jurors are not identified by name?

A That's correct.

Q Directing your attention to page 52, is there anything significant on this page?

A The significance of the problems on this page are with taking down names of prospective jurors, and getting correct information about them.

On page, or on line 52, the typed portion says that a juror indicates that she's a divorced, presently. It's corrected to say "divorced parent." Those are different, and certainly the issues of whether jurors were parents in this case was significant to us in determining which jurors to choose and which not to choose.

Q This page also, page 52, the last line represents another problem with who was the speaker, doesn't it?

A I do not understand what happened in this particular instance at all. But on line 22, a juror states that, "My name is William A. Geist the second. I am a teacher for Jordan School District. My wife, Evelyn Geist, is area manager in the southern department of ZCMI."

I don't think we have a southern department of ZCMI. But I'm more concerned with the next answer. And that is, attributes to me the question, "South Towne?" And yet that was not in Ms., I don't believe that was in Miss Lee's notes. And so I don't know where that question would have come from.

On the next page, which- - I'm sorry, I thought those continued. It does not.

Q Page 130 would be the next page I asked you about.

A On page 130, on line 2, the typed portion of the

transcript indicates that a juror nods in the affirmative. According to Ms. Lee's notes, the juror merely nods. It appears that the note reader has added in the portion, "Nodding in the affirmative," which changes the meaning significantly. We don't know in what manner the juror nodded, but the note reader added that portion.

Q Directing your attention to page 461.

A There is, on page 461, approximately four lines which are included in this transcript that were not included in Ms. Lee's notes. And that is the exchange between the court and an apparent juror. Lines 11 through 15 are not included in Ms. Lee's notes. I'm sorry, it would be through 13. Lines 11 through 13.

Q So those were created by the note reader?

A Apparently.

Q Directing your attention to page 557, is there anything significant on this page?

A Yes. This, I believe, starts a series of pages wherein portions of the court's comments to jurors as they left was not in Ms. Lee's notes, but that she would indicate by an asterisk-something. Sometimes I think she would say admonishment, and the note reader would then add in the entire court's admonishment.

Q So Miss Lee did not take down the admonishment verbatim?

A She did not.

Q Was there an agreement to allow her to do that?

A There was no agreement to allow her to not take down anything, except the prepared preface which the court was to give to the jurors as they began their questioning during individual voir dire.

Q So the last five lines on page 557 were apparently created by the note reader?

A Yes.

Q And Tauni did not take down things that were said in court?

A She did not.

Q What is the importance of an admonishment?

A The importance of an admonishment is to remind jurors of their responsibility not to discuss the case with anyone else. The problem, as I see it, with creating an admonishment, is that people do not necessarily speak the same way twice. And a failure to give an admonishment in a, let's say a correct or complete or accurate fashion, couldn't be discerned from looking at this, where the note reader has added them on her own.

Q Were there concerns in this case about publicity reaching jurors?

A There was enormous concern about that, as we had had at least one juror contacted improperly, and causing

him to be excused, and additionally, because we were sequestering the jury, to keep them from being exposed to any additional information such as the juror who was excused had been.

Q In order to do an adequate job of representing Mr. Menzies on appeal, an attorney would review this record to make sure that admonishments were appropriately given?

A Yes.

Q Directing your attention to page 594 of the transcript?

A It's the same thing. Miss Lee indicated in her notes an asterisk, and the note reader added one in.

Q And 624?

A It's the same situation, and the same admonishment appears, only upon Miss Lee's asterisks.

Q How about 638?

A The same problem exists with regard to lines 17 through 20 as it involves the admonishment. But there are additional portions added in which are not indicated by anything other than, I suppose, one general asterisk. And that is on line 21, "Juror leaving the room." On line 24, "Juror entering the room." Same thing occurring on line 9, indications that a juror leaves the jury room, but is not indicated in notes.

Q The note reader then added portions of this

admonition at 17 through 20?

A Apparently.

Q And also is there a problem with line 23?

A The response by Miss Palacios- - Well, on line 22, the court states, "Next, Colleen Richards." Miss Palacios is then quoted as saying, "She also, I have heard something." That makes no sense to me.

Q Directing your attention to page 663.

A Again, on lines, from line 2 to line 7, there's an admonition added by the note reader that was not contained in Ms. Lee's notes. Lines 11 and 12 indicating that people were leaving and entering the jury room was not indicated in Ms. Lee's notes by, even by asterisks.

Q And 681?

A 688?

Q I'm sorry, 681. Do you have that in front of you?

A I'm sorry, I don't have that.

MS. WATT: If I may approach the witness.

THE COURT: Yes.

THE WITNESS: The same situation occurs. There's no indication in the notes that anyone left or entered the jury room, or the room where we were conducting these inquiries. Although it's contained in typewritten form in the transcript.

Additionally, on line 9, the court begins an admonition. Ms. Lee stopped taking the admonition after the court said, "2:00 p.m." But there's an additional four and a half lines added by the note reader.

Q (BY MS. WATT) Directing your attention to 688, is there anything significant on this page?

A Yes. Line 1. According to Ms. Lee's notes, after the word "phase," the words, "that is, is already gone through the guilty phase," should appear with a question mark.

The next four and a half lines were not included in Ms. Lee's notes. That is, "Would you follow the court's instructions and vote for the death penalty only if the state has proved beyond a reasonable doubt," et cetera, et cetera. That entire four-and-a-half-line portion was not included in Ms. Lee's notes, and I have no idea where it came from.

Q And the correct question, of course, is necessary to understand the juror's response?

A Well, that's correct. Because the juror "I wanted to read it. Yes, I agree with that." I know what it is that he or she is allegedly agr

Q Is there anything of interest abo reference to the guilty phase that you fou this transcript?

A Throughout the transcript, Ms. Lee referred to the two phases of the trial as the guilty phase and the penalty phase. We changed that throughout. My concern about that was that the use of the word "guilty," as opposed to "guilt," or innocence phase, indicated a predisposition that this was a, you know, this dealt with guilty, a guilty person. And I was concerned about that.

Q Would you ever refer to a guilt or innocence phase of a capital trial as the guilty?

A I will never refer to it at as the guilty phase, no.

Q And there are portion of transcript that show you referring to it as the guilty phase?

A That's correct.

Q Just as an aside, there are also portions of this where Miss Lee has substituted her grammar for that of the speakers; is that correct?

A It does appear that there were times in reviewing her notes the grammar would be incorrect, although the note reader's version would be the corre usage of grammar. And it appeared that the note re cleaning that up.

Q And that is significant in showing t not taking down a verbatim transcript?

A Well, I would think so. And yo

like to think that their arguments are articulable, and grammatically correct. And in many cases, all of us were attributed with saying things that were not our usual speech patterns.

Q But a repeated example has all of you saying things like, "I seen," without using "have"?

A Correct, yes.

Q Directing your attention to page 694 of the transcript. Is there anything significant?

A I don't have it.

MS. WATT: If I may approach the witness, Your Honor?

THE COURT: Yes.

THE WITNESS: On 694, there are additional illustrations of indications without asterisks that people were entering or leaving the courtroom. Also there's, she stops taking the court's admonishment after the words "2:00 p.m.," and additional words are added.

Q (BY MS. WATT) So we have no idea what the court actually said at that point?

A No.

Q Directing your attention to page 709. Do you have that in front of you?

A I do. On line 7- - Well, let me start before that. On line 4, in the transcribed portion, the

typewritten statement of the court is, "State of Utah versus Ralph LeRoy Menzies. We are continuing on with the individual voir dire." According to Ms. Lee's notes, there was no such statement made by the court, leaving the impression that the note reader added this.

The court then is attributed with saying, "Your name is Harry Rinquest?" On line 8, an answer from the juror is stated as yes, although Ms. Lee indicated that no answer was elicited from the juror. Indicating that the note reader added that response.

Q So that this page offers more examples of the note reader embellishes on what was in the notes?

A Yes, and we have no idea what that person actually said, if anything.

Q Page 766.

A I don't have that.

MS. WATT: If I may approach the witness, Your Honor.

THE COURT: Yes.

THE WITNESS: This is another example of Ms. Lee adding, stopping the taking of notes, indicating an asterisk with the word "admonishment," and then an admonishment being added by the note reader. I would indicate that the admonishment on this particular page appears different than the admonishments added in other

portions of the transcript.

It also indicates, again, although there are no asterisks, that jurors leave and then enter the courtroom.

Q (BY MS. WATT) So this is another example of Ms. Lee stopping taking notes during the course of the proceedings?

A Yes.

Q Directing your attention to page 740.

A I think- - I'm sorry, what's the number?

Q Do you have that in front of you?

A What's the number?

Q 740.

A No.

MS. WATT: If I may approach the witness, Your Honor.

THE COURT: Yes.

THE WITNESS: On page 740, on line 7, the juror responds to the court's question above. The court's question was, "How do you feel about the psychiatric profession?" The typewritten portion indicates that th juror states, "I think they have," and that's all Mi Lee's notes indicate.

However, the sentence apparently has completed by the note reader, and it now s they have done some good."

On line 12, the typewritten question is, "Does the fact that questions concerning the death penalty have been asked raise doubts in your mind as to the innocence or guilt of Mr. Menzies?"

However, when Miss Lee read it, the sentence changes and becomes this. "Does the fact that questions concerning the death penalty have been asked, dashes, have been asked- - Let me read that over again. Does the fact that questions concerning the death penalty have been asked raise doubts in your mind as to the innocence or guilt of Mr. Menzies?" In that case the note reader apparently chose not to report the entire thing, and to shorten it.

Q (BY MS. WATT) And a question such as this is critical in determining whether a juror should have been excused or challenged for cause?

A Well, yes it does. Because it goes directly to the issue of whether or not the juror is going to continue to presume the innocence of Mr. Menzies. And so we cannot vouch for the accuracy of the question as it relates to that answer.

Q Are you getting tired in terms of our proceeding?

A Kind of, but- -

Q I just have a few more.

A Let's go ahead.

Q Directing your attention to page 3261 of the transcript.

A Page 3261 has been referred to before, but this is where it appears that Ms. Lee supplemented the note reader with notes she received from the judge, and they have apparently been utilized in the preparation of this. My note at the bottom is that Ms. Lee gave the judge's notes to the typist because she couldn't read them herself.

Q And the findings and rulings of the trial court? What impact do they have on appeal?

A Oh, well, that may be what the appeal directly goes to. I mean if the findings of the court are stated inaccurately, then that would have an immense effect on the appellate process.

Q And on this page we have problems with a date that's changed, with a word that can't be read, two areas where you have date indicated, three areas actually where you have indicated a concern about substance; is that accurate?

A Yes.

Q Page 1605, is there anything significant about this page?

A There's an admonition included where there are no asterisks to indicate it should be. And that's on line 20.

Q So again, this was created by the note reader?
A Yes.
Q Page 1857.
A Line 5, as corrected, makes no sense. It's a comment attributed to Mr. MacDougall which says "They already had testified to cross examine him on this as to why you're refusing to testify." It makes no sense.
Q 1628, I believe we've talked about 1628.
A We have.
Q 1731?
A On 1731 there's a question as to whether the words supplemented by Miss Lee is correct, or whether the word substituted by the note reader could be correct, or whether either of them are correct. On line 21, it indicates the answer, "Well, it was the identification, that the identification had been found in the patrol room."
It has been changed to, "information" by Miss Lee. I believe that the correction is wrong, which indicates that she heard or took it down incorrectly. We were clearly talking about identification, pieces of identification, Social Security cards, drivers licenses, things like that.
Q And page 2207.
A Line 19, as corrected, does not make sense. As corrected, the question is, "Are you in this- - You've

been in that apartment," et cetera. That doesn't make any sense. It was corrected by the note reader to a sentence that did make sense.

Q If you could back up a second to 1857. The non sequitur in that case- -

A I'm sorry, I don't think I have 1857.

MS. WATT: If I could approach the witness, Your Honor.

THE COURT: Yes.

THE WITNESS: Oh, I do have it, yes.

Q (BY MS. WATT) The non sequitur on that page relates directly to the Britton issue which we're raising on appeal?

A Yes, that's on line 5 through 7.

Q And adequate argument is critical on that issue?

A Yes.

Q Page 2307.

A On line 11, there's an answer by Mr. Savage concerning his law practice. As corrected by Ms. Lee, the answer reads, "I'm member of California Bar, although I do not maintain accurate practice."

Q So this is another example of her inability to hear what's been- -

A Yes, the note reader changed that to "active practice," which is probably correct, but "accurate

practice" as taken down and changed by Ms. Lee is not- -

Q And there are a number of examples on that case of discrepancies?

A Yes, there are.

Q Page 2399.

A Beginning on line 4, the typed portion of the court's response here, is, "The problem is the situation like this is a new trial kind of a thing, because we don't know what effect it would have one way or the other as far as the jurors are concerned."

Ms. Lee changed the words "new trial" to "neutral." "The problem is the situation like this is a neutral kind of thing." That completely changes the meanings of the court's statement, and I do not know which is accurate or correct.

Q And 3055.

A This is the part that talks about Mr. Menzies being in the fifth percentile intellectually. I think we dealt with it.

Q I think on line 11. Do you have 3055 in front of you?

A I'm sorry, what was your question?

Q Line 11.

A Uh-huh.

Q Is there a change from "unusual" to "usual"?

A Not on 3035.

Q I'm sorry, 3055.

A Yes. The question posed on line 10 of 3055 is, "Isn't that a little bit unusual?" The answer is, "What do you mean, 'usual'? To have a multiple diagnoses?" She deleted the "U" to make "unusual" "usual," which changes the meaning.

That, again, is restated by her down on line 23, where the comment made by the witness is, "It's not unusual at all." She changed that to "usual," and then my note indicates that she acknowledged that "unusual" makes more sense, but that that's not what her notes indicate.

Q And again, that is important to the presentation of mitigation evidence in this case?

A Yes.

Q On page 584.

A On 584, beginning on line 18, an asterisk appeared in Ms. Lee's notes, an admonishment was added by the note reader, and a response was included by the juror. On line 4 it states, "Juror: Okay." And then indicates, "A juror leaves the jury room." Neither of those were indicated in Ms. Lee's notes, indicating that the juror's answer was added by the note reader.

Q In the memo that we filed last Monday, we make reference to a number of unintelligible portions. Have you

gone back and reviewed those portions?

A I've reviewed some of them. I've not been able to review all of them since the preparation of your memo.

Q And in reviewing those, have you found that your memory of what occurred has changed any?

A I find that if you read things, your memory can be jogged as to how the trial may have proceeded chronologically, and procedurally. But it's impossible, after almost three years, to recall the substance of comments and/or testimony. Or arguments.

Q So you end up guessing on those portions as to what might have been said or what might have been reasonable?

A If I were to go back and to try and change these to make those things make sense that I felt didn't make sense, I would be engaging in guess work, because I do not know what, I cannot recall what was said.

Q And in fact, throughout these proceedings, hasn't that been a problem that you have encountered in dealing with me when I've asked you specific questions about portions of the transcript?

A Yes, I've had to tell you that I don't recall.

Q Are you aware of any missing portions of transcript in this case?

A I'm aware of two missing portions.

Q And what are they?

A When we were going through the transcript, probably, maybe a week into the process in California, I recalled a portion of transcript which I did not see appearing in there, and that was a portion in which we conducted a hearing with Mr. Menzies, and defense counsel and I alone, in which we dealt with the issue of a waiver of a particular juror's, not juror's, particular witness' appearance on his behalf.

I realized that we were into the transcript, and into the defense's case, and that that did not appear. At that time I notified Miss Stubbs, and Ms. Lee. Ms. Lee remembered that portion, but indicated that she had not transcribed it. We then contacted either the attorney general's office or our office to indicate that that portion did not exist.

My understanding is, is that those notes were subsequently located, they were mailed to Miss Stubbs in California, and she left them with Ms. Lee to transcribe. They've never been transcribed.

Q So she received those before you left California?

A She received them before we left. She, to my knowledge, had not begun work on them before we left.

Q And we have not received a copy of those yet?

A No, we have not.

Q And a lawyer reviewing this case for appellate purposes would be concerned about that particular witness and why she- -

A They would be particularly concerned about that particular witness, because it dealt with our advice to Mr. Menzies that he not call on his behalf a particular witness, and his waiver on the record that he would agree not to have that witness called. If that were not there, then I think we could be open to assertions of ineffective assistance on the grounds that we did not call a witness that Mr. Menzies wanted called.

Q And a lawyer reviewing this for either plain error or ineffective assistance would be particularly concerned about the exact words that were stated during the course of that hearing; is that not correct?

A Yes.

Q Okay, there's another hearing that's missing?

A There is.

Q That would be the- -

A It was literally the very last portion of the transcripts that we were completing, and it dealt with the exercise of peremptory challenges. We got to a point in the transcript, and Ms. Lee indicated that her notes, she'd completed her notes. There was another small set of notes

there, and also in our written transcript there was an additional portion of the transcript.

She said that those appeared to be the notes of Carlton Way, and that she, I cannot recall if she said that she could or could not read them, but she had never looked at them before. And we did not attempt to have her read Mr. Way's notes, and we concluded our work at that time.

Q As part of her certification, she had certified Mr. Way's work, had she not?

A She did certify at the end of that volume that this was her work, but acknowledged that there was a portion in there that was done by someone else.

Q And Mr. Way has since transcribed those notes?

A To my knowledge, yes.

Q Have you reviewed those notes?

A Only briefly.

Q There's another hearing that has not been transcribed at all that occurred on January 25th of 1988; is that right?

A That's correct.

Q Have you made any efforts to attempt, or did you make any efforts to attempt to locate the notes of that hearing?

A Yes. Well, we contacted the Salt Lake, respective Salt Lake offices by phone, indicating that, I

think, that those had still not been sent to us.

Q By "we," do you mean Miss Stubbs and yourself?

A I think Miss Stubbs may have called her office, and I think we talked about it over the phone. When we returned, I think it was the following Friday after my return, you and I came to the district court building and contacted Mr. Byron Stark, who led us through three storage areas in this building where shorthand reporters' notes were stored.

Although we looked in each of those areas, we could locate no notes belonging to Ms. Lee at all. Although it is my understanding that subsequently Miss Stubbs found them.

Q During that search he indicated to us that if the notes existed they would be one of the three places we went?

A That's what Mr. Stark indicated. Those are the only three places he knew of where those old notes were stored.

Q Okay. And subsequently Ms. Stubbs apparently located those notes?

A Apparently, yes.

Q And is it your understanding that they've been- -

A My understanding is they've been sent to

California, but likewise, they have not been transcribed by Miss Lee and returned.

Q So we have not seen any transcript of either of those hearings?

A No, we haven't.

Q And are you aware of what that hearing covers?

A Only I have the vague recollection that it dealt with the discovery, our discovery motion, and the state's response to our discovery motion prior to the beginning of the trial. I have no recollection as to what occurred during that hearing.

Q The details of the discovery hearing would be critical in assessing certain arguments made on behalf of- -

A They would be critical, they are critical. Because the state, during the penalty phase, introduced evidence which we objected to, indicating that we had not been given prior notice that they were intending to introduce. So what occurred at that hearing is crucial to that argument and issue.

Q How long did you say you were in California?

A I was there three weeks, and a couple of days. After I left, I went to Los Angeles and stayed a couple of days with my son.

Q And while you were with Ms. Lee, were you aware

of any other legal proceedings that were pending against her?

A I was.

Q And what was that?

MR. LARSEN: Objection, Your Honor, this is irrelevant. It's not relevant to Miss Lee's ability to have proofread the transcripts, nor transcribe the trial.

MS. WATT: Your Honor, we've repeatedly argued that it is relevant. The only license that she was relying on was a California license that she was found incompetent to act in California in April of 1988. That has never been reinstated. She prepared these transcripts after that occurred. Her license fees had also lapsed at that point.

The proceedings in California that have been instituted, as shows in the various exhibits that we've introduced this morning, involve transcripts that she was responsible for prior to her being hired by this court, prior to transcribing the Menzies transcript. I think it's highly relevant what happens in California.

THE COURT: The only thing I can see, going through those affidavits, is that she did not prepare them on the time that they were supposed to be prepared. It doesn't say anything in regards to the nature of the transcripts. I've got the affidavits here, and I don't know if she's going to testify in addition to it, because

she wouldn't know.

MS. WATT: Your Honor, if you look closely at the accusation, there are allegations of fraud and misconduct throughout them. And I think it's critical- -

THE COURT: I've read that.

MS. WATT: - -to the assessment of these transcripts that we've repeatedly argued that not only the skills, in terms of taking things down, but also the credibility of, the honesty of the court reporter is critical.

THE COURT: I have those affidavits. I don't know if there's anything in addition, but the fraud and the other charges essentially that she was reporting without having her license during the time that they were supposed to be, she was supposed to be actually licensed in that one area.

MS. WATT: Those allegations involve after she returned to California. There's other allegations involving transcripts prior to her coming to Utah. I think there's actually five allegations in there.

THE COURT: Is she going to add anything to that?

MS. WATT: Well if Your Honor would like a proffer, I think she's basically going to say that there was a hearing scheduled that Miss Lee chose not to attend.

THE COURT: Most of that would be essentially, I

guess, hearsay. But the affidavits here I think would indicate what the problems are that she's having in California.

MS. WATT: I would just indicate for the court that in terms of the time restraints, we're in a real bind in terms of getting Ms. Lee back here to testify. And I think everyone's aware of that, and it puts us in a real Catch 22 when I say it's hearsay, something that Tauni has said, when we have no opportunity to get her here. As Mr. Uday argued earlier, our understanding all along had been that she would be back for that second phase, and things have changed that posture.

I'm simply trying to establish she had did have a hearing that she chose not to attend while they were there. Other than if that, if Your Honor would just rule whether she can answer the question.

MR. LARSEN: The state would additionally object on hearsay grounds, and defense, as far as I know, has not made an effort to get Miss Lee here. If they wanted Miss Lee to testify and bring this hearsay. Although I- -

THE WITNESS: I understand she's in the hospital.

MR. LARSEN: That is correct. She is in the hospital, pre-term labor as of Friday. We had expected her to be released over the weekend.

THE COURT: If there's anything in addition to

what we have in the affidavits that she can testify to, we'll admit it on the basis of the circumstances of this particular case.

MS. WATT: Well I think the other thing is- -

Q (BY MS. WATT) Was there a hearing that was held on a specific date while you were there?

A There was a hearing scheduled in San Francisco which Ms. Lee did not attend.

Q And was that while you were meeting with her?

A Yes, it was.

Q Ms. Wells, was Tauni sworn while you were in California, prior to reading her notes?

A No.

Q And to your knowledge was she ever sworn as part of this proceeding?

A No, and I must indicate that never crossed my mind.

MS. WATT: I have nothing further.

MR. LARSEN: Your Honor, we would have some cross examination, but I understand we've been doing this for approximately four hours, and perhaps we could take a break. Could we convene at a time that would be convenient?

THE COURT: Well see, I have a 1:30 hearing, these people will be coming in with an expert witness, and

then after that we have the afternoon calendar, and there'll be quite a number of attorneys involved in that. And if we can just dispose of the afternoon calendar and we can get all the attorneys here, then we can proceed after that. That would be probably, what, 3:00 o'clock if we were lucky.

MR. LARSEN: We would recess now, reconvene at 3:00 o'clock?

THE COURT: Until 3:00.

MS. WATT: Well, Your Honor, I have an afternoon calendar as well. I will try to get rid of that, or get through that as quickly as possible, but I don't know when I can do that.

THE COURT: I think we can probably make arrangements with the other judges, because of the nature of this case, they'll probably either put you up in front or back or something like that.

MR. UDAY: So we'll be back at approximately 3:00 o'clock?

THE COURT: 3:00 o'clock. We'll be in recess until 3:00.

(Noon recess.)

THE COURT: If we can have the defendant brought out.

THE COURT: This is the case of State of Utah

versus Ralph LeRoy Menzies, and this is a continuation from the hearing from this morning. And I believe that the state is prepared at this time to cross examine; is that correct?

MR. LARSEN: Yes, Your Honor. Dan Larsen appearing for the state.

CROSS EXAMINATION

BY MR. LARSEN:

Q Miss Wells, this morning when you were testifying, you explained that oftentimes names were mis-heard by Miss Lee, or mis-transcribed, and they hadn't been changed. Can you point to any particular name in the record that was changed that cannot be corrected, where we don't know who the witness was, or the person who was speaking?

A I think I can, if- - It may take a few moments, though, and part of it may not be in the particular pages that I referred to. But let me try and locate that. Do you want me to take the time to do that?

Q Go ahead, if you can find a name to which you would not be able to identify who the speaker was.

A If I may just ask a question of Ms. Watt, under what category was that section regarding names?

MS. WATT: Your Honor, if I could approach the witness, perhaps- - I have her notes and that might be

helpful.

THE COURT: You may do so.

THE WITNESS: On page 41, where the clerk was calling the names of the individual jurors by numbers, the changing of the numbers after the name draws into focus whether or not that name is correctly associated with the number. In that case, I do not know if those can be rectified by comparison with the jury list or not, because it draws into question whether the numbers were inaccurate, or whether the names were inaccurate.

Q (BY MR. LARSEN) But it would be easy to look at the jury list to determine whether the number transcribed in Miss Tauni's notes are the same as on the jury list, wouldn't it?

A I can't answer that. I don't know.

Q Have you looked at the jury list?

A No, I have had no opportunity to look at the jury list up until now.

Q Do you know that the record has been available for the last week for view by your office?

A I understand that, Mr. Larsen. But when I returned I had to resume my regular duties as trial counsel, and I've not had the opportunity to go through these and make comparisons to determine whether the problems can be rectified or not.

Q I understand that. So you haven't had the opportunity to see whether or not we can correct it because of the time constraints?

A I've had no opportunity to do so. I also cannot point to, out of the entire transcript, a particular situation. But I recall one incident in which a juror is called by one name, and there are indications in the answers that it was in reference to another juror. And I don't believe that we called that into question this morning, but I do recall that a specific situation like that, wherein I don't know whether or not it could be determined exactly which juror that was.

Q And this was in the individual juror voir dire, or talking, or when the names were simply being read to the jury panel?

A My recollection is that it would have been during the individual jury voir dire.

Q Going on, can you name a particular number that was in error that would have, that cannot be corrected, or at least through investigation by the court, by the state, or by your office, cannot be determined whether or not it is correct?

A One immediately comes to mind, and that is the incident I referred to this morning, wherein Mr. Larrabee gives testimony as to the distance from which he saw Ms.

Hunsaker and the individual who was with her. There were no police reports that contained that information, to my recollection, and there would be no way to reconstruct that. And that goes, again, to the critical issue of identification.

Q I do not recall you speaking of that number this morning. Do you recall what page that was on, and do you recall whether that had been corrected to Miss Lee?

A My recollection is, is I did testify to it. And the changes had, as typed, Mr. Larrabee reported having viewed the persons from, I believe thirty, from thirty to thirty-five yards away. When it was changed by Ms. Lee, it was changed to twenty-five yards, which would be a significant closer distance than what had been reported by the note reader.

I have no recollection as to the accurate number of feet to be recalled, but that would be one wherein I don't think that that could be reconstructed.

Q So because of time constraints, you have not tried to investigate that, and perhaps look at the police statements that Mr. Larrabee had given as to the distance between he and the defendant?

A No, that's not included in the police reports. Therefore any attempt to determine whether the note reader's statement or the corrected statement was correct

would be guess work on the part of those who were attempting to correct it. It's not included in any police report.

Q And that's based on your recollection?

A Yes.

Q Was it- - Can you recall whether or not it was included in the preliminary hearing testimony?

A I do not recall.

Q But you have not investigated that?

A I haven't compared them, no.

Q Are there any inaccurate case cites that you can point to that we cannot decipher to what case a particular attorney or the judge was referring to?

A I believe I gave you an example of one of those this morning, which was the case cited as Banner versus Kraft or something like that, that was cited as a United States Supreme Court case. There were no numerical cites that you could refer to.

The Banner case, which is well known in this state, is clearly a state case, and would not have included the second name. Therefore I have no way of knowing what that case referred to.

Q Have you looked at your notes or your memorandum to try to determine whether there was another case that was similar in phonetics that could have been mis-spelled by

Miss Lee?

A No, I have not. I do not believe that was our case. I don't believe it was cited by us.

Q So have you, if it was cited by the state, have you attempted to determine whether that was in any of the state's memorandums that they were arguing from?

A I have not looked at their memorandum, no. But generally we would rely on numerical citations to attempt to do that. But it is not a case that I'm familiar with under any circumstances.

Q So basically what you have done is, then, tried to identify changes in the transcript, but you have not attempted to try to correct those; is that a fair statement?

A Well, again, what I would indicate to you is that I returned on, what day- - I believe I returned on the 15th, and have returned to my duties as trial counsel, which I had to leave on two days' notice for almost a three-and-a-half-week period. I had to return to my duties, and under these time constraints, no, I have not made any attempt to go through the six weeks' worth of trial materials, as well as other materials, to try to identify that.

But my recollection is that in those situations, that may have been a state's case, and I would not

necessarily have, they would not necessarily be contained in memorandum, and may have just been cited orally.

Q This morning you said that Tauni, or excuse me, that the note reader had apparently copied some of the questions, the voir dire questions?

A Correct.

Q Isn't it true, though, that Tauni, in reading her notes, actually made corrections to the note reader's insertion of the word processing portion that had been inserted, and actually put what was the true and accurate questions according to her notes, rather than the word processing version?

A You would have to point to a specific page reference for me to be able to answer that. In some instances, that may have been correct. In others, particularly where I indicated that she stated, for instance, "blurb," that clearly becomes the note reader's additions, because there was no way to determine from Ms. Lee's notes what "blurb" referred to.

Q And that was referring to the portion where she had inserted question number 6, I believe, of the jury voir dire questions that were being read by the judge?

A I don't believe it was ever referred to by number.

Q There was a list of questions that were being

asked each juror, and she simply was saying by "blurb" to insert the next question?

A I can't tell you what she intended, or whether that the note reader's additions were in compliance with any prearranged or numerical list. I can't tell you that.

Q Miss Lee didn't explain that to you?

A No, she did not.

Q You didn't ask her?

A I wasn't attempting to ask her to explain additions, corrections, or deletions. Sometimes extemporaneously those were given, but I did not feel that it was my objective, or it was my responsibility to get an explanation each time there was a problem.

Q So all you did was note the differences between Miss Lee's note-read version, to the note reader's transcript version?

A Yes, generally that was my understanding of the responsibility we were to fulfill.

Q And you did not explain to Miss Lee what the note reader had inserted into the transcript; is that correct, in general?

A In general, no. There were occasions when the note reader would have added or deleted information, and I believe that on occasion we indicated to her that we needed her to stop and go back, and give us this word by word,

because the note reader had either deleted it, or had added additional material that was not included.

Q So Miss Lee never had the opportunity to compare what she read from her notes to what the note reader had put, to try to determine which was correct; is that right?

A That's absolutely correct, and that's my understanding, that that was the procedure that had been adopted by the parties and the court.

Q And in many of the instances the note reader's version made much more sense; isn't that correct?

A That's very correct.

Q For instance, I believe we cited, or you cited on page 2311, where the note reader had "attorney dean gene," or "den gen"? Excuse me, that was what Tauni had in her notes, and the note reader had put "attorney general"?

A That's correct.

Q And which was obviously correct, but Miss Lee didn't know that the note reader- -

A Miss Lee did not know, apparently, what was correct in that particular instance, I can assume that, and I can guess that "attorney general" was the appropriate resolution. But that was not true in many of the cases where meanings were changed, or where the distinction between words was more blurred. That was an obvious example where you could go back and probably, without much

disagreement--although with guessing--resolve the matter. But that was the extreme example that you just cited.

Q But Miss Lee was never given the opportunity to make those corrections; isn't that right? She was just required to read what was in her notes, whether it had been typed in incorrectly or not?

A By agreement, that's correct. That was the agreement of the parties, that she would not be given the opportunity to review those. That's correct.

Q Well not to argue, but that was not by agreement. That was by court's order.

MS. WATT: Objection, Your Honor, to counsel testifying at this point. I'd move that that be stricken, Your Honor.

THE COURT: It may be stricken.

Q (BY MR. LARSEN) I'd like to go through some of the examples that you cited this morning. You argued that on page 151- -

A Could I explain something, here? When we put these together, we did them by category, and therefore you're going to have sequences of pages that begin at 1 and maybe end at 3000, and then you're going to start over with that. So I need you to call my attention to the particular example or the subject matter so I can find it.

Q I see, I understand. I'd like to refer to the

numbers section, and page 1612.

A Yes.

Q On page 1612 you testified this morning that the note reader on line 2 had used the number 30, when referring to centimeters, and that Tauni had changed that to 3, referring to centimeters.

A Yes.

Q Isn't that correct, when you said that- -

A Yes.

Q And you said that that is a substantial difference?

A It could be, yes.

Q Can you read from your transcript the sentence right after 3 centimeters, or the words right after 3 centimeters?

A "A little over one inch."

Q And that clearly explains how long, how long the measurement was that the witness was referring to?

A If you can relate back to centimeters, it would probably explain that, yes.

Q And 3 centimeters is, in fact, a little over one inch?

A I must tell you that math is not my high point, and I couldn't tell you that. I'll take your word for it, for that. But I can't, I've never been able to make those

changes.

Q But what we were describing here was the size of a neck wound; is that correct?

A That's correct.

Q And so in referring to the context of that particular measurement, even though that is technically incorrect, it's easily understandable from the context, wouldn't you say?

A Well, not necessarily. Because if you'll notice, the word up there refers to wounds, not wound. And then it says, "extended as 3 centimeters. A little over one inch." So it's a little unclear, because it appears to be talking about wounds, when the 3 centimeters could be only one wound.

In addition to that, I would indicate that there was an issue in this case as to the constant referral by certain police officers that Ms. Hunsaker's neck was slashed. If you were to look at it in terms of that, there may be more of a question as to whether the correct number was three or thirty.

Q But the fact that it says, "A little over one inch," should explain what 3 centimeters means; isn't that correct?

A Not necessarily.

Q I'd like to refer to, again, in the numbers

area, to page 2620.

A Yes.

Q And this morning you testified that on page 2620 there was some discrepancy as to the amount of money that was taken, and the number of cigarette cartons that were taken; isn't that correct?

A That's correct.

Q Now, in fact, this is read from the argument of Mr. MacDougall, isn't it?

A I have this page out of context, I can't tell who the speaker is.

Q Apparently argument of counsel?

A It's argument of counsel. I'm not sure whose it was.

Q And the discrepancy you have is that the difference is between saying a range of $114 to $116, as opposed to saying a range of money from $115 to $116; isn't that correct?

A Yes.

Q So the discrepancy is one dollar?

A The discrepancy is one dollar, but that does not erase the significant problems with numbers. The reason for that is, is that a certain amount of money was located in an umbrella in Mr. Menzies' apartment. That was totalled and was entered into evidence as a direct evidence

of an amount of money, I believe, that was supposed to match the amount of money alleged to be taken. If there is now a discrepancy in that, then that casts doubt on the evidence concerning the amount of money contained in the umbrella in Mr. Menzies' apartment.

Q But this is not evidence. This is argument; isn't that correct?

A I understand that, but I can't tell you what is correct, and if the argument is being made, and the argument contains information that is incorrect, then it has the same force and effect.

Q Depending on whether it's to the judge or the jury; isn't that correct?

A If it's inaccurate to the judge, it's inaccurate to the judge.

Q And the jury is only to consider evidence that's presented to them, and not arguments of counsel?

A This wasn't an argument that dealt with a jury question, I don't believe. I think that what this argument went to is whether or not the state had established the offenses of theft and/or robbery, or aggravated robbery.

Q And regarding the number of cigarettes taken, the discrepancy is between 230, or excuse me, 220 packs of cigarettes, as opposed to 223 packs of cigarettes; is that correct?

A That's correct.

Q So the discrepancy is the number of three cigarettes?

A Yes. The discrepancy is among three packs of cigarettes. But here, if you were familiar with what occurred at the trial, you would understand that audits had been completed by the employees of the Gasamat in which their audits differed from time to time. And the state was attempting to utilize the audits to establish the existence of a theft and/or a robbery. Therefore, again, what the state was able to present in terms of actual amounts taken became critical to the issue as to whether the state could establish the offenses of theft or robbery.

Q How does that really make a difference in the state meeting its burden of proof between 220 packs and 223? If either one is correct, it's sufficient to establish that a theft occurred; isn't that correct?

A I think you would have had to have been familiar with what went on at the trial to understand why that was significant. But you would have to understand that in previous testimony, the witnesses had been unable to determine what had exactly, what exactly had been taken, and what the value of that was. And so it remained significant for that reason.

Q On, again, on the numbers category, on page

3035.

A Yes.

Q You testified this morning that there was an error, an apparent error on line 9 regarding the I.Q. range of Mr. Menzies, particularly whether he was in the fifth percentile on the fiftieth percentile. Is that correct?

A Yes.

Q In reading through the context of it, of that particular page, can you read page, or lines 18 through 21, please?

A Do you want me to read those out loud?

Q Yes, please.

A Starting on line 18, "It's significant with Ralph that his potential level of functioning is about 115, about the eighty-fifth percentile, even though actual functioning is closer to the middle of the range now."

Q So does that help at all in trying to determine when Tauni puts in the fifth percentile, that it actually should, most likely would have been the fiftieth percentile, which would have been in the middle of the range?

A Not necessarily. Because 50 percentile would not necessarily be in the middle range of I.Q. functioning. There's no evidence to indicate that. I would further cite that not only was that correction to fifth percentile made

one time by Ms. Lee, but it was made a second time on line 12, adding some credence to the fact that she may have taken that down incorrectly.

The other issue on that is, is to assume that the note reader was correct in putting in fiftieth percentile would be no more than guess work. And I can't, on behalf of a client facing this kind of a penalty, accept that 50 percent is correct.

Q Did you raise the issue, or argue at the trial level that Mr. Menzies was functioning at a low I.Q. level?

A No, we did not.

Q Was there any evidence that he was functioning at a low I.Q. level?

A No, I have not- -

Q Particularly at the fiftieth percentile?

A I have no particular recollection of that. But certainly if someone was operating even in the fiftieth percentile, I might have raised that issue. And it was not raised by either Miss Palacios or I during the penalty phase of the hearing.

Q So if the witness had testified that he was functioning at fifth percentile, wouldn't you have pursued perhaps a possible defense of low intelligence?

A Absolutely. I don't agree that fifth percentile is correct. I absolutely believe that that is wrong. The

issue here is what is correct, and I can't tell you what is correct. And I do not agree that fiftieth percentile would be correct.

I call your attention to the line 13, which indicates that he has a score of 115, and then talks about the eightieth percentile. That doesn't in any way coincide with what the note reader put in as fiftieth percentile. Therefore I have to assume that both of those are incorrect, and I cannot, by guessing, substitute the appropriate percentile.

Q Now you said that the key issue here is whether this is correct or incorrect; is that right? Whether the five or fifty is correct or incorrect?

A I can't tell you. I can tell you that I do not believe that the fifth, from recollection and knowledge of other evidence, is correct. I cannot tell you what is.

Q But you have not tried to correct that particular error, have you?

A I have no way of correcting that error.

Q Are you saying that it's uncorrectable?

A I'm saying that I won't engage in guessing to try and substitute in a percentage amount that cannot otherwise be verified.

Q And are you under the belief that the procedures under Rule 11 require basically guessing in order to

reconstruct the record? Is that what you're saying; they're inadequate?

A I'm saying that we have not had an opportunity to engage in a Rule 11 proceeding, but that if it did involve guessing, that I would indicate on the record it involved guessing. And I would not, or could not compromise as to something that I could not independently verify as being correct.

Q So the purpose of you being here today is not a Rule 11 proceeding to try to correct the transcript, but instead to just point out the errors; is that right?

A I don't believe that, in many of these instances I don't believe that we can correct them. I'm not trying to correct them. I am merely here to point out to you and to the court those areas where problems exist, and to indicate why they are problems and what prejudicial nature I believe they have.

Q Now you've noted several times that there were instances where asterisks were used to refer to several different subjects.

A Yes.

Q And you've made note that oftentimes that may be a jury entering or leaving the room, or witness entering or leaving; is that correct?

A No, I indicated that Ms. Lee told us that an

asterisk indicated to her that something was occurring. And she told us it could mean that a person was entering the courtroom, or exiting the courtroom, or it could be a note to her as to something particular going on. However, in many of the instances in which there were asterisks, she had no explanatory note along with those to indicate what the asterisk was supposed to represent.

Q And did you ask her whether she knew what the meaning of the asterisk was?

A In some cases she would indicate that she suspected that this would be reflected by the note reader as a juror entering or a juror exiting. But she only indicated that they would have had to have guessed, because other than those instances where she put an asterisk with the word "admonition," I don't recall any instances in which she explained an asterisk by, or an asterisk as indicating anything particular.

Q Miss Lee was not actually there to explain her asterisks; isn't that correct? She was just there to explain what was in her notes?

A She could have explained her asterisks, I suppose. We didn't prohibit her from doing that.

Q But you were just interested in what was in her notes, and not what the particular meaning was, and- -

A Well, I felt that they spoke for themselves. If

you have an asterisk, and then there is some indication in the body of the testimony, there, that has been added in, it means that the note reader read that asterisk, and inserted something. It does not mean that what the note reader inserted was correct.

Q Okay, well let's take a look at a couple of those. On page 1678. That's referring to the asterisks being inserted, and it's regarding an exhibit.

A May I ask for a clue from my peers as to what category that would have been in?

MS. WATT: Might I suggest that since Mr. Larsen has the papers in front of him, that he proceed by simply showing those pages to you? That would make much more sense. With a record of this size, to continue to approach it in this manner just further complicates these issues.

THE WITNESS: That would be helpful.

THE COURT: If he's agreeable to that.

MR. LARSEN: I'd be glad to accommodate her in this particular instance.

Q (BY MR. LARSEN) I'm approaching the witness and handing her a page. Can you tell us what page that is, and then read from line 21, down?

A It's page 1678, and from what line?

Q Twenty-one.

A "The court. No objection, they will be

admitted." Then there's a portion that has been crossed out that says, "State's Exhibits Number 19 through 30, and 90 admitted."

Q And those are in parentheses?

A They're in parentheses, but they're marked out.

Q They were marked out, so apparently the note reader had added those in; is that correct?

A That's what appears to me to be, but Ms. Lee apparently did not have any such indication in her notes. And I'm assuming this comes from Miss Stubbs' notes, and she has marked them out, which indicates that they did not exist in the, in Tauni's notes.

Q But Tauni was not requested, and it was not actually the purpose to insert parenthetical explanations; isn't that correct? That were not in her notes?

A Would you repeat the question? I'm not sure what you're asking.

Q I said it wasn't Tauni's job in reading her notes to insert parenthetical explanation; is that correct?

A I disagree with you, I think it was Tauni's job.

Q And so if there was an asterisk, it was Tauni's job, then, to insert what the meaning of the asterisk was, and put that in parentheses?

A It's the only way that a third person who would be asked to interpret notes would know what would be

expected there. Otherwise it would become the guess work of the person who was then reading the notes and typing it.

Q But she wasn't asked to do that, was she?

A Who wasn't asked?

Q Tauni.

A By whom?

Q By either yourself or our representative?

A No, but I don't think that's the issue. The record itself indicates that by the existence only of an asterisk, followed by something added by a note reader, that the note reader would have had to have guessed as to what the asterisk meant. There's no other interpretation.

Q Well perhaps the note reader could have guessed, but Miss Lee could have certainly explained what the meaning of her asterisks?

A She did not.

Q Because she was not requested to do so, apparently?

A Well, at the time the note reader prepared the transcript, she apparently did not ask.

Q In the same area, the same category, on page 1681, which I'm approaching the witness and handing a copy of, can you read from line 3 down through, I believe it's line 5?

A On line 3 the court states, "May be admitted."

On line 4, there is, in parenthetical, states, "Exhibit Number 47 admitted," which has been crossed out.

Q Okay. May I approach the witness? That's another example of the note reader indicating that something has occurred in this particular case. It's the admission of the exhibit in parenthesis, but that was not indicated in Tauni's notes?

A Which means there was not even an asterisk in Tauni's notes.

Q But you said earlier that she did not always point out what the parenthetical explanation was?

A That's correct. Sometimes there were asterisks, sometimes there were not. But there appeared parenthetical additions throughout.

Q You testified this morning that you would not refer to a portion of a capital trial as the guilty phase; is that correct?

A I've never referred to it in this manner, no.

Q Have you ever referred to it in the context of guilt phase?

A Guilt or innocence phase, guilt phase, yes. That is more common. But I don't believe I've ever referred to it as a guilty phase.

Q And so there was a "Y" that had been added, apparently, to your words?

A Not only to my words, to every person's words who spoke them throughout the entire trial. That was an error that was included in Miss Lee's notes throughout the entirety of the transcript. No matter who the speaker was.

Q And so the jurors would have never heard anybody refer to it, then, as a guilt phase. That was simply an error by the reporter?

A I don't know.

Q You just said that you didn't refer to it as that, ever. So they would never have heard you refer to it in that context.

A They would not have heard me refer to it. They may have heard someone else refer to- - I just can't say. It's not a pattern of speech, or it's not a word that I would utilize. But everybody was attributed to have said it.

MR. LARSEN: May I have a minute, Your Honor?

THE COURT: Yes, you may.

Q (BY MR. LARSEN) Miss Brooks, you referred this morning to the fact sometimes there were no asterisks.

A It's Wells, but that's okay.

Q Excuse me. I apologize. But you have referred to the fact that sometimes there was no indication by Miss Lee whether a juror was leaving while the next juror was coming in for the jury voir dire; is that correct?

A That's correct.

Q And that there sometimes were argument or discussion between counsel and the court during the interim period of time waiting for the juror, the new juror to enter; is that correct?

A I don't recall citing that particular incident, but that's clearly plausible, yes.

Q Okay. But you would not, in fact, make argument to the court in front of the juror; is that correct?

A I can't say that. And the one particular incident which I pointed out today which was particularly significant in that regard is when it appeared that one juror was removed from the jury box for fainting, but that an argument proceeded at that point without any indication in the transcript that either the entire jury was removed, or that we adjourned to chambers. There's no way of telling. I have no idea of- -

Q So you have no recollection of exactly what events occurred after the juror fainted; is that correct?

A No. I recall at some point going into chambers and having discussions in chambers, and talking about the paramedics coming, et cetera. But if you will note, and I'm sorry, I can't refer to that page right at the moment, I don't have it at my fingertips. But on that very page I indicated on the record that Mr. Menzies was not present,

and that we couldn't go forward without having him back. And I think I also indicated to you that in that same instance, I could not tell when Mr. Menzies would have left, and therefore cannot tell you whether he was present even for any arguments, much less any jurors.

Q But it's clear when you said, "He's not present," that at that point in time, he was not present.

A Very clear.

Q And have you done anything to try to rehabilitate your memory, or enhance it in any way other than rereading the transcript?

A I know of no way to do that.

Q No way to do that. Have you- - So if the judge and Mr. MacDougall had a clear memory of what had transpired, you have not discussed that, of course, with either one of them?

A No, I have not.

Q But you're not saying that they may not have a memory of the particular event and be able to reconstruct an accurate, everything that occurred?

A I'm not saying that they couldn't attempt to reconstruct things, but I would not concede in any way that it would necessarily be accurate. As we all know, we remember things differently, and we would be attempting to reconstruct occurrences almost three years after they

happened.

Q And so if Mr. MacDougall testified that after the juror fainted, the entire- - The juror fainted, the entire jury left the room, Mr. Menzies had left, there was a brief discussion in chambers, which was recorded, and then there was an early lunch taken. Would that be inconsistent with what you do recall regarding that event?

A It would be inconsistent only insofar as I have no particular recollection at all. And therefore I cannot tell you whether or not his recollection is accurate or inaccurate. I recall being in chambers, having discussions. That's the portion that I would have expected to find on the record, and it was not present. And I cannot tell you if his memory is accurate or not.

Q But in doing one hundred jury trials and thirteen capital cases, would you expect that you would have gone forward with argument in front of a jury inadvertently?

A No, I would not have expected that. But just because I wouldn't have expected it to happen, doesn't mean that it didn't. One of the things that, one of the few things that we agreed about during the course of this trial was that it was very tension filled. There was a lot of anxiety, a lot of tension in the courtroom, and things occurred during this trial that I've not experienced in any

other trial before or since.

Q And so the tension and the stress that you were exhibiting, is that a factor in your lack of memory in this particular case?

A No, I don't think that's it at all. I'm just indicating that things occurred during the trial which would not normally have occurred in other trials.

Q You're saying so that you may have made a mistake, but it may not be reflected in the transcript?

A I'm sure that I've made some mistakes in my recollection of what went on, and what is correct, or incorrect in this transcript. I certainly wouldn't attempt to tell you that my interpretations are necessarily accurate. I'm attempting to tell you that I can't tell you what is accurate.

Q And do you have any suggested way to correct the transcript to make it accurate?

A No.

MR. LARSEN: Nothing else, Your Honor.

THE WITNESS: I think the errors are too large.

MR. LARSEN: No question, Your Honor.

MS. WATT: May I proceed, Your Honor?

THE COURT: Yes, you may.

MS. WATT: If I may approach the witness, Your Honor.

THE COURT: You may do so.

REDIRECT EXAMINATION

BY MS. WATT:

Q Ms. Wells, I've just handed you page 2665 of the transcript. I believe that Mr. Larsen was asking you some questions about the distance testified to on that page. Does that refresh your recollection?

A It does, and the testimony that I made this morning referred to a portion of testimony found on page 2665 at line 13. And as I indicated this morning, the typed version says, "There was observation of these people up to thirty-five to thirty yards away." That was changed by Miss Lee to reflect "twenty-five to thirty yards away." The difference in that is ten yards, which would be thirty feet, which could have a significant impact on a person's ability to render an accurate description.

Q I believe that you testified that that information was not in the police reports, true?

A I don't recall it being in any police report.

Q Even if it had been in the police report, there would be no way of ascertaining whether that was what was, whether what was in the police report was, in fact, testified to at trial?

A That's correct.

Q In other words, something can occur in a police

report that is testified to differently at trial?

A Often the case.

Q And so we could not use the police reports for reconstruction of testimony in that manner?

A I wouldn't rely on them for containing accurate information. It's what comes from the witnesses themselves.

Q You testified that you did not have an opportunity to look at the jury list contained in the district court pleadings file prior to either preparing the memorandum or to testifying today.

A That's right.

Q Are you familiar with the circumstances surrounding the district court pleadings files as it relates to our preparation of the memorandum?

A Yes, I believe now that that has been unable to be located until just a day or so ago.

Q And so when our memorandum was being prepared, it was not something that we had possession of?

A It wouldn't have been available, and we were not in possession of it.

Q I believe that you testified that your understanding of the court's order in regard to the California proceedings was that Miss Lee was to read her notes without looking at the note reader's version of the

transcript; is that correct?

A That was my understanding, and that was my understanding from being present in, I think at least several court hearings where that matter was discussed here.

Q And did you also have the understanding, then, that Ms. Lee would later be given an opportunity to make changes in this courtroom by coming back here for the second phase of some sort of an attempt to reconstruct this record?

A I'm sorry, I really don't have any recollection regarding that portion.

Q Okay. Did you believe there was going to be a second phase to this reconstruction process that has not occurred?

A Yes, initially I did. I recall early on having lengthy discussions in this courtroom concerning what procedure would be undertaken once those, or when the corrections were made. Initially I recall that there was discussion about the state's representatives and the defense representatives and Mr. Menzies being present with Ms. Lee while she reviewed her notes. And that has never occurred.

MS. WATT: If I could approach the witness, Your Honor.

THE COURT: You may do so.

Q (BY MS. WATT) Calling your attention to page 3035 of the transcript, there's a portion that is circled at, I think at about lines 17 through 21 that Mr. Larsen asked you about.

A Yes.

Q In order to give, to rely on that testimony in any way, you would have to rely on those numbers as being accurate that are contained in that testimony; is that not correct?

A I think so, yes.

Q And so again, this raises the problem in terms of the reliability of the numbers? Isn't Mr. Larsen actually asking you to rely on some other numbers by Miss Lee in order to speculate as to what the numbers above it say?

A Yes, I think he was, and that's why I attempted to explain to him why I could not do that.

Q In regard to Mr. Larsen's suggestions that you go back through police reports and go back through files and do various other things in an attempt to reconstruct a verbatim transcript of these proceedings, how realistic do you believe that to be?

A Well in terms of time, it's impractical and unrealistic. It also raises the additional issue of

whether or not the information contained in the police reports was itself accurate.

Q You and Mr. Larsen had- - There was some suggestion during your, or some disagreement during your testimony about what occurred with regard to the asterisks. Is it your understanding that a court reporter's responsibility is to include parentheticals referring to what occurs in the courtroom?

A I would expect that.

Q And when you were testifying regarding the asterisks- - Strike that. In regard to the questioning about the guilt, the use of the guilty phase. Isn't one of the problems with that, that we simply cannot tell whether Tauni inserted the "Y," or whether someone else inserted it?

A I cannot tell you who did.

Q And isn't that reflective of the problems throughout this transcript, that we simply cannot tell whether it is Tauni that made the error, or whether the error was actually something that was stated to the jury?

A I cannot assess who was responsible.

MS. WATT: I have nothing further, Your Honor.

RECROSS EXAMINATION

BY MR. LARSEN:

Q Briefly. On page 2665 that was referred to on

redirect examination, do you have a copy of that?

A Yes.

Q There's some question as to whether or not the witness had said that they had viewed the defendant from twenty-five to thirty yards away, or from thirty-five to thirty yards away; is that correct?

A Yes.

Q Isn't this actually argument of counsel?

A It appears to be argument of counsel, yes.

Q And so it's not evidence?

A Well, it's evidence in terms of the transcript and what's accurate in the transcript. It was not during a witness' testimony, that's correct.

Q And right after it says "twenty-five to thirty yards away" in the corrected version, can you read the next sentence?

A "In any instance, no more than thirty feet."

Q Can you read that again on line 14?

A "In any instance, no more than ninety feet."

Q Just a moment ago you said thirty feet, and I believe that you made an error.

A I'm sure I did.

Q But ninety, when it says no more than ninety feet, that clearly explains that thirty yards was the maximum; isn't that correct?

A No, it doesn't explain that at all, or else you wouldn't have a difference of twenty-five to thirty-five.

Q But you understand- - Well, I know you said that you're not adept at mathematics, but thirty yards is approximately ninety feet?

A That I can handle. Thirty yards would be ninety feet. However, twenty-five yards would be less than ninety feet, and thirty-five yards would be more than ninety feet.

Q And this was simply argument of counsel trying to describe the evidence that had been presented to the jury; isn't that correct?

A It appears to be argument, yes.

Q And because of that discrepancy and the argument of counsel, you're claiming that Tauni's numbers, as corrected, cannot be trusted?

A No, counsel, you asked me to give you an example of a number situation which could not be corrected from memory or from looking at something else. And this was the one that came to my mind immediately.

Q Well let's take a look at this, then. If it says thirty-five to thirty yards away, thirty-five yards would be more than ninety feet; isn't that correct?

A That's correct.

Q So obviously thirty-five is the incorrect number.

A Ninety is the multiple of thirty yards, all right? If this didn't have any importance, it wouldn't be in there at all. But I don't know whether the correct number is thirty-five, I don't know whether the correct number is twenty-five, or I don't know whether it is some other number. The fact that it then states, "No more than ninety feet," only refers to the thirty yards. It doesn't address the other distance.

Q But the question is not what you know. It's whether it's correctable or understandable, isn't it?

A I don't believe it's correctable, and I don't believe it's understandable.

Q Referring to page 3035, which was discussed on redirect examination, can you read lines, the corrected, or excuse me, the uncorrected version of lines 11 through 17? Do you have a copy of the uncorrected version?

A I do. Do you want me to read those out loud?

Q Yes, please.

A The uncorrected version?

Q Uncorrected version.

A "Typical- -" No, I'm sorry, I've got to read the uncorrected version. "Typically a high school graduate has a score of about 105, which is about the fiftieth percentile. The typical college graduate has a score of 114, which is about the eightieth percentile, and typically

a person with a graduate degree, such as a J.D., Ph.D., doesn't matter, masters degree, usually has a score of about 125, which is about the ninetieth percentile."

Q Okay. And from that explanation does it seem clear that the answer of a particular witness in this case was that a high school graduate would typically have a 105 I.Q., college graduate 115, post-graduate 125; is that correct?

A Summarizing that, that appears right.

Q And that gives us some kind of a skill on how to measure Mr. Menzies' intelligence level; is that right?

A No, I disagree with that.

Q Well apparently that was the purpose of the testimony, wasn't it, to give you some idea of the typical I.Q. values of educated persons?

A I suppose that was the purpose of eliciting that testimony, yes.

Q And then the next line, lines 18 through 21, can you read that.

A I believe I already have. Do you want me to read it again?

Q Yes, please.

A "It's significant with Ralph that his poten[illegible] level of functioning is about 115, about the eight[illegible] percentile, even though actual functioning is

middle of the range now."

Q Now, that has not been corrected at all by Miss Lee; is that right?

A It has not been corrected.

Q So that gives us a clear indication that the evidence from this particular witness was that Mr. Menzies was functioning, his potential level of functioning was about 115, in the eighty-fifth percentile?

A No, I disagree with that. Because if you look up at line 14, she has corrected that to indicate eightieth percentile. So there's a disagreement there.

Q The eightieth percentile is referring to the college graduate; is that right?

A That's correct, yes.

Q And so apparently the note reader had looked at those two, just like you did, and determined there was an inconsistency, and corrected that?

A I would point out that on line 13, the corrected version of 115, there, is referred to as being in the eightieth percentile, when in lines 18 through 21 the same score is assessed in the eighty-fifth percentile score. So there's a deviation and an inaccuracy there.

MR. LARSEN: Nothing further, Your Honor.

(Brief recess.)

THE COURT: You may proceed.

MS. WATT: Thank you Your Honor. Your Honor, I have no further questions of this witness. However, at this time I would like to renew our motion to admit the transcripts that Ms. Wells took with her to California, and in which she included by interlineation the changes from Ms. Lee's notes.

I think we've laid adequate foundation for the admission of those transcripts, Your Honor has actually been looking at the state's version of portions of those transcripts, and we have indicated there are numerous changes in those transcripts that we have not had the time to cover today. And I think it's appropriate for not only Your Honor to look at them, but for them to remain part of the record in this case.

THE COURT: Okay.

MR. LARSEN: Your Honor, I would voice the same objection to having that admitted into evidence in this case and evidence upon appeal. I don't have objection to Your Honor viewing it. I don't think there will be time for that, since you have to make that ruling today. But I don't think that that needs to be sent up to an appellate court. This court simply needs to interlineate on the original transcript those changes that Your Honor feels need to be made.

And to send that up and create a duplicate record

could be confusing to the appellate court. And they're only offering it, I believe, in order to bolster their ability to raise all of these issues again on appeal. And I think that can be done with the original record.

MS. WATT: Your Honor, Mr. Larsen's argument points out precisely why we need to admit these into evidence. They're a critical part of these proceedings. The whole point of going to California is not in existence for the record in this case if they're not admitted into evidence. We certainly do need to raise the issues on appeal should we not be successful in this court.

The record in this case includes that trip to California, and to attempt to erase it at this point and say that they're not relevant does not make sense in the context of this case.

They're highly relevant, as Ms. Wells testified to. There are portions that we have not covered today. There's further examples of problems in this transcript that she has included with her notations. I think it's critical that the entire transcript be included.

What the note reader created, the testimony today has established that the note reader created significant portions of this transcript. The note reader was not there, the note reader guessed, speculated on what went on, and gave her version. We need to see what it was Miss Lee

took down in the court, and we need that record to trail with this case.

MR. LARSEN: I don't want to beat this issue any further, other than to point out Miss Wells has indicated in her testimony that she did make interlineations and explanations, notes to herself, et cetera. I just don't think it's fair to send that up to the Supreme Court where all those changes, the state hasn't had a chance to review that.

The state is not moving to admit its side, which also contains its notes of Miss Stubbs, and I think that the appellate court can review these proceedings that have been pointed out, and testimony and oral argument today, against the original transcript, and we don't need three copies up in the Supreme Court.

THE COURT: Let me just take that under advisement for whatever time I have, and I'll maybe review that myself today, tonight, or whatever time I have.

MR. UDAY: Your Honor, at this juncture we don't have any other witnesses that we would call. We would ask if Miss Wells could be excused at this point.

THE COURT: I appreciate you taking time to be up here all this long. Even some of the witnesses that you examined were not that long.

THE WITNESS: That's true. Thank you.

THE COURT: She may be excused.

MR. UDAY: Your Honor as indicated at the outset this morning of what our intentions were. At this juncture what we'd like to do is have Miss Watt address the court as to the appellate problems that she has faced in this endeavor. And I'd turn the remainder of the time over to her.

THE COURT: I'm just wondering, before we do any argument, does the state have anything in- - I guess they should have a chance to address the court in terms of any- -

MR. LARSEN: I'd like to do that, in fact, Your Honor. I'm not sure whether Miss Watt is pursuing their burden, or whether she is summing up in argument. The state would like to offer, and I believe we have a stipulation to this effect, the six pages of transcript which Carlton Way had transcribed from his original notes. He has given a certification that it's true and accurate, and I'd like to hand that to the court as the state's exhibit to be admitted. It's not marked as the state's exhibit. It is attached to my response to their motion.

I would point out that Mr. Carlton Way, if he appeared to testify, would state that he used the same shorthand reporter as Tauni Lee, and that he transcribed this particular transcript from his own notes without

reviewing the note reader's version. And that there may be, and in fact in our reading, are some differences between Mr. Carlton's explanation and, or excuse me, his transcription, and the note reader's.

Excuse me, Your Honor, I said shorthand reporter, I meant note reader. Mr. Way, of course, is a shorthand reporter. We'd move to have that admitted, and substitute for the six pages which Tauni Lee had included in her transcript, or at least supplemented it to the record.

MR. UDAY: That is the stipulation, Your Honor. For the record, that, those transcript pages begin at page 888 and are dated February 17th, 1988.

THE COURT: It may be accepted.

MR. UDAY: By clarification, Your Honor, we have not completed our motion this morning. There will be argument that will follow. And I would do that. But as part of the motion that we're presenting to the court today, is what Miss Watt will speak to regarding the appellate problems that she- -

THE COURT: You may do so.

MS. WATT: Thank you, Your Honor. I will try to be as brief as possible. As Your Honor is well aware, I'm the appellate attorney assigned to oversee this case, and I have been working with this case for well over a year. I've been working with this transcript for well over a

year.

Just briefly, in regard to reviewing a capital case, Your Honor is probably also aware that I have represented a number of other capital clients. For appellate review of a capital case, I do a number of things that are not always done in a regular appeal. Basically I divide them into separate areas.

First of all I look at the issues that are raised in the docketing statement. In our office the trial attorney actually prepares the docketing statement. I look at those issues to see the nature of the argument, what is raised, how it's raised, whether it's preserved, if there's any issues with preservation, and how it is that it's been approached in the trial court.

In regard to this transcript, I have faced significant problems with issues that are raised in the docketing statement. Those include the Britton issue, where there are portions of argument that make absolutely no sense to me. That is a critical issue on appeal, there's well over a hundred pages of argument in the transcript on this issue.

There are issues regarding the lineup and testimony of Tim Larrabee that he allegedly made to the prosecutor following the lineup. These issues are unclea to me.

The issue, as Ms. Wells testified, regarding the juror fainting, in reading that portion of the transcript at 1622, it appears apparent to me that there's portions missing from the transcript, that it does not make sense, that there is a non sequitur where we go from the argument about Wayman, I believe his name was, to the statement about Rick being subtle, that just does not tie together.

The sequestration issues, and then, as we've pointed out, the voir dire issues. All of these issues we intend to raise on appeal.

In working with this transcript I have had significant difficulty in making sense of what is said. I find myself guessing and speculating, and doing what it appears the note reader did. I have no sense that this is an accurate or reliable transcript. I have no sense that my lawyers, that the lawyers for Mr. Menzies, said what is in there, that that's a verbatim transcript of what they said.

A good example is, of course, the parole/patrol issue. I was the one that discovered that issue in reading through the- - And I believe the state has stipulated to that correction as part of our Rule 11 proceedings that we underwent, I believe last spring. But that issue, in reading through the transcript I had heard of that issue and was aware of the mistrial motions and had read the

docketing statement.

I got to a portion of the transcript where Officer Iovino was testifying, and he testified that he was a parole officer, and I was very concerned because I wondered what we were doing eliciting that type of testimony, when we had a later issue coming up about Mr. Menzies being on parole.

And I talked to trial counsel about it, and they said, "Well, that didn't come up. He's a patrol officer." And then of course I discovered Detective Thompson's testimony. Now that error is fixable, but that is an important error that should not have been made, should not have been missed in a transcript like this, in a case like this, where the mistrial motion is argued three or four times, I believe.

The second step that I do is I look for issues that are not raised in the docketing statement. That's my obligation, to see whether there's issues that trial counsel raised that they either didn't put in the docketing statement because they didn't believe they were significant, or forgot about. And so I review the record for that.

In at least one case Ms. Lee included an objection that was not included by the note reader. That's significant, of course, to me. Was an objection made by

our people here or not? Again, the unclear arguments are a problem for me in assessing whether these are issues that I should be raising on appeal.

There's a particular portion of the sentencing proceedings that I would point the court out to, and I don't have a transcript cite, but it's during Your Honor's sentencing. As Your Honor is aware, Mr. Menzies was convicted of robbery, and the transcript does not reflect any sentence for the robbery. The judgment does.

We've had testimony today that the note reader was using Your Honor's notes in preparing that portion. There is just no certainty as to how much of the proceedings Ms. Lee took down. And there is a significant portion, I believe, missing there.

In the third step that I look at is issues that are apparent from the face of the transcript but have not been raised by trial counsel. And again, if I have a transcript that has significant problems in terms of who is asking questions, who is making arguments, what types of arguments they're making, if I can't get to cases. A lot of times trial lawyers will rely on a case without going into detail for the argument. And appellate lawyers then go to the case and say, "This case says this." And that's what they were arguing. I can't do that with large portions of this case.

Finally, I have an obligation to look at the transcript for ineffective assistance of counsel. That's a critical issue in capital cases, and I need to know whether the trial lawyers made a prejudicial error, that requires some sort of conflict counsel, whether there's something that needs to be done at this juncture about that. I cannot do that from this transcript.

Of course a perfect example of that is the missing transcript regarding the not calling of a witness. My reaction to reading the transcript was, "Why wasn't this witness called?" There's nothing in the record to that effect, and it was a red flag for me. At this point that is not clarified in the record.

And so, in working with this record, I have faced significant problems. It has taken me significantly longer to read portions, to make sense of portions. I read and reread pages. There are pages that are absolutely unintelligible. In my experience I have not seen transcripts like this. Certainly court reporters do make mistakes, but not to this magnitude.

As Your Honor is aware, I was not there for the trial, and so I'm left to asking the trial attorneys, which I have done on numerous occasions, both Miss Palacios and Ms. Wells. I have repeatedly asked, "Do you recall such-and-such?" And the response I get is, "I do not

recall. It's been a long time, I've had a lot of cases. This was a lengthy and detailed case." Which, again, leaves me to guess and speculate as to what was said.

I'd like to just briefly address the time constraints in preparing our most recent memorandum. I was the lawyer that did that, I've prepared all of the memoranda to date on this case, and I am the lawyer, other than Ms. Wells at this point, who is most familiar with this transcript.

I had a week from the time I got the entire corrections of Ms. Lee's. The transcript of the note reader is not usable for these purposes. The note reader created portions of transcript. I needed to look at what Tauni had done to see what was in the notes.

When Your Honor issued the order that we prepare our memo by last Monday. I think, as I argued, I had a vacation scheduled that I cancelled. It was a holiday week and I worked around the clock to catalog the errors and to try to get as many down on paper as I can. There are numerous other errors there.

There are errors that Ms. Wells testified to this morning that I did not include in the memo. And there will be more errors that surface as this trial goes on. It simply is not a reliable transcript, and as it gets worked with more and more closely, as it's reviewed the way death

penalty cases are reviewed, those errors will continue to surface.

I briefly need to address the district court's pleadings file, because the state suggested in their memo that that was available to us, when, in fact, the state was aware that we did not have access to that. While I was attempting to prepare my memorandum I called Your Honor's clerk and asked if I could check out the copies of the district court pleadings files.

I was told that they could not be found, that you had one volume, Volume 3, which includes our memoranda from the time we filed the motion to set aside judgment. I have all of those. What I wanted to look at was what had gone on in trial and compare it against some of the things in the transcript. I was told that it could not be located. I think I called a couple or three times, I was told that the covers could be located but not the pleadings files themselves.

I then spoke to Dan Larsen, who indicated that he was aware that there might be some sort of problem because he had tried to find it himself, that he had seen the cover files, that he'd seen the file in Your Honor's possession at some point, and then later seen the cover files themselves.

The Monday that our memo was due, which of course

is too late for me to use it for purposes of the memorandum, I was informed that it had been found in a closet someplace. And so for the purposes of preparing the memorandum I did not have access to it. I do not have a copy of it in my possession.

And since that date, two things have prevented me from looking at it. One, I was informed that Your Honor was not going to let it be checked out, and the second was that I have other cases, too, that I need to attend to. And obviously this has pushed back a number of my cases, and so I actually had two briefs that I had to get out this week, and so I have not looked at the pleadings file since that time.

But the suggestion by the state that we did not have, or that the file was available, is inaccurate. We did not have access while we were preparing this.

In regard to the missing portions, I think I've touched briefly on the issue of Nikki as a witness. I would also like to talk a little bit about the January 25th, 1988 hearing. From the very beginning, I guess not our first couple of memos, but I think our third filing back last January, I believe, we became aware that this was missing.

We have referred to this date and this record cite persistently. We have been repeatedly told by the

state that it didn't exist, that it was a vague reference. At one point just recently I was told by the state that it was their belief that it did not occur. And then suddenly it's found.

And I guess the reason I'm bringing this up to Your Honor is that I think it's important for Your Honor to note that it's easy with these issues to wave one's hand and say they're simply not important, they didn't happen, whatever. In this case it's a significant hearing that happened, and we have repeatedly pointed out that it happened. The state was willing to say that it had not. They now recognize that it has.

We still do not have those transcripts. They are important. One of the issues we're raising on appeal is the admission of the entirety of Mr. Menzies' prison file. That hearing relates directly to that issue, and that is, in fact, how we discovered that it was missing. And so I would just point out that those are two critical areas of transcript that are still missing as of today's date.

Finally I would like to just briefly address Ralph's input, Mr. Menzies' input in these proceedings. It had been our intent all along to meet with Mr. Menzies, go over what Ms. Lee had done with the transcript, see if he had a recollection. Ralph shows a great interest in his case, has some recollections of what went on that exceed

those of counsel, and I had intended to go through everything with him.

Because of time constraints I did not have the opportunity to. For the first time since I have been working in appeals I found myself in a position where I felt I wasn't going to meet a court's deadline, and I made the choice to meet this court's deadline rather than go out to the prison and spend half the day, at least, getting out there and meeting with Ralph. So he did not have any input into that memo or into the proceedings.

And I would just like to briefly point out some of the things that he has told me just today, that he remembers happening that aren't in there. I think there's a couple of critical areas. He has a number of other ones that I will not go into at this point.

But a couple of critical areas that I would like to call the court's attention to. He has some recollections about the juror fainting. That's at 1622 of the transcript.

He remembers the bailiff's jumping up and yelling, he believes the bailiff actually called, "Recess, recess," or yelled something. He remembers discussions about the incident, he remembers the paramedics coming, he remembers being in chambers. So he has some specific memories about things that occurred that are not reflected

in the record.

He also has some concerns, he pointed out to me an area where a witness was reminded that he or she, I'm not sure which it was, was still under oath. It's at 2597 of the transcript. And I've not gone back and looked at this, but the witness was reminded that he or she was still under oath. There's no indication in the record where, apparently, where this witness was initially sworn. Ralph tells me that three witnesses were sworn in the beginning, but the record does not reflect who those witnesses might have been.

In addition he remembers details of the state's closing argument in penalty phase that he has not seen in that argument. Some of those issues would relate to potential Eighth Amendment arguments under the case of Booth versus Maryland.

Others would relate to any possible issues of prosecutorial misconduct, specifically two of them that he remembers are an argument that Ralph was the evil, and to kill the evil. And that is not in the argument portion.

And another portion that he remembers is an argument by the prosecutor that the jury should feel sorry for the victim's family, and not for Ralph. And of course depending on what may or may not have been said, that could be victim impact testimony that would be critical for us to

know on appeal.

As Mr. Uday indicated, he is going to argue our portion of this, but we felt that it was critical for me to give Your Honor some perspective of what I have wrestled with during the past year in attempting to work with this transcript, and some of the problems that I've encountered. And I appreciate Your Honor letting me do that.

MR. UDAY: Your Honor, as I indicated also previously, Mr. Menzies has prepared a statement that he would like to read to the court that addresses his concerns regarding the transcript.

THE COURT: You may do so.

MR. MENZIES: Your Honor, throughout the proceedings- - Your Honor, throughout the proceedings these past few months, you told me that I would be allowed to go over the transcripts, after the changes were made, with my attorneys prior to this hearing. And because only one week was available after the transcripts were returned from California for my attorneys to draft and file the supporting memorandum, I was not able to meet and go over the transcripts with them.

I feel that this is extremely detrimental to my case, and this hearing in particular. And it definitely goes totally against what you've ordered. My attorneys did come out to see me briefly after the memorandum was filed,

and given the time limits placed on them I think they did an excellent job, and a lot better than could be expected.

I honestly believe that because I was not allowed to go over the transcripts with my attorneys prior to this hearing, that I am not getting a fair and adequate hearing.

I also want this court to know that I'm not complaining about my attorneys, but with not being able to go over the transcript with them, there is only so much they can do. And I just, I don't think it's right. You give everyone else all the time, but you don't give me the time to deal with it as you ordered. That's all I have.

MR. UDAY: Your Honor, what I'd prefer to do initially, if I could, is handle a couple of clarification matters that we need to clean up prior to argument.

First being, I was a little bit unclear earlier this morning when I indicated that Mr. Menzies did not have a copy of the transcripts. He did have a copy of the original set of transcripts. He has not, as of yet, received a copy of those with the changes interlineated by Miss Wells. And so I'd like to clarify that.

Secondarily, I think it's important to bring to the court's attention that in preparation for today's hearing, we did not have the answer responding to our renewed motion from the state until after 5:00 p.m. on Friday. And I believe why that's important, and I

appreciate the court's indulgence in letting Miss Watt address the court, because that, in essence, comes by way of a reply to their answer, in that we were unable to show prejudice. I think she adequately addressed that concern.

But I think it's important for the court to know the kind of time limitations and constraints that have been placed on us, both in preparing the memorandum in the first place, and also in getting ready for the hearing today. We had but the two days on the weekend to respond to their concerns.

Additionally, Your Honor, what I'd like to do is move to admit the exhibits that we had talked about again. I know Your Honor said that you'd like to take that under advisement. I have one comment I'd like to add regarding the transcript issue. I believe that they are not only relevant, but they are essential.

In the court hearing that we've had today, Miss Watt spoke with Miss Wells of numerous pages of transcript that she had, in fact, interlineated herself while in California. The transcripts now become the only source for the court of those pages of information. I believe that alone is why they're essential for the court to have them.

Additionally, I believe that because we've always made a two-pronged attack in this case, which merits a new trial for Mr. Menzies, that being one, that Miss Lee's

talents are so inadequate as a court reporter, her licensure problem, her inability to take down notes, her inability to transcribe notes, have always been such a problem that he deserves a new trial.

The transcripts in toto, I think, support that situation, and I think the court must have those available to him to look at. Again I'll address that a little bit later in argument, as I indicated previously, citing some of the court's prior rulings as to what your intent was to do procedurally in this case.

Secondarily, the other prong we've always argued in this case why Mr. Menzies should get a new trial is because there is prejudice in this case. And we believe that, as we've indicated with both Miss Wells today on the witness stand, and Miss Watt here at the podium, that there is sufficient prejudice to merit the new trial. Again, another reason for the transcripts to be introduced into evidence and admitted into evidence, that is. So I would move to, ask the court to admit those.

Additionally, Your Honor, for the same reasons I just spoke about, the three affidavits from California should also be admitted into evidence. They address directly concerns that we raised back in, I believe the March hearings, where we put witnesses on the stand here talking about the abilities of Miss Lee to transcribe, to

take down notes, while in court.

Again, as indicated by Miss Watt earlier today, those affidavits speak directly to the situation that she finds herself in in California, which was occurring at the same time she was a court reporter in this courtroom. Not only that, but also it's the situation she finds herself in while she completed her revision of the transcripts, which we discussed today here in court.

And I think prior to beginning the argument, I would once again move to admit--I think Exhibit 1 is in, the affidavit of Joan Watt--and I would officially move to admit Exhibits 2, 3, 4, and 5, Your Honor.

THE COURT: He made a motion to admit 3, 4, and 5. Exhibits.

MR. LARSEN: Objection on the same grounds, Your Honor.

THE COURT: The court's going to overrule the objection. I think that there's some relevance, because of the nature of this particular proceeding, and the work that had to go into it, and this sort of reflects some of the problems that I think Miss Wells encountered when she was in California in regards to Miss Lee and missing a hearing, and with some of the background regarding her difficulties in meeting with Miss Wells, as far as the representative of the state. So the court is going to allow those to come

in, and they will be admitted, 3, 4, and 5.

(WHEREUPON Defendant's Exhibits Numbers 3, 4, and 5 were received into evidence.)

MR. UDAY: Thank you, Your Honor. That's the sum of the clarification matters I would have, and would move into argument. I would like to indicate for the record that we began this hearing this morning at 8:00 o'clock. It's now a few minutes after 5:00- -

THE COURT: Just for the record, too, or I should say for the benefit of the staff, I didn't ask them how long they can stay, and it's always a problem for me, because when we go after 5:00 then I have to account to the staff. And I've not asked any of them, you know, what their time frame- -

MR. UDAY: Perhaps what I could propose is we take a short recess. You were mentioning, that reminds me the prison transportation officer is going to need to make a phone call, as well.

THE COURT: I think everybody is going to need to make a phone call to let people know they're not going to be where they're supposed to be after 5:00. Why don't we take a recess.

MR. LARSEN: Your Honor, may I ask that we can limit our closing argument? Is ten minutes- -

MR. UDAY: I believe ten minutes would be

inadequate. I would hope not to take more than a half hour, Judge. But in the kind of hearing that we have today, with the kind of issue that is before the court, I would object to any limitation at all.

MR. LARSEN: Well I understand that they need to have their full and fair hearing. If they need a half hour, then they're entitled to take it.

MR. UDAY: I don't want to limit myself to a half hour either. I will try to do that.

THE COURT: We should probably pry to determine that now, because people are going to have to let other people know what time they're going to be home.

MR. LARSEN: Ten minutes.

THE COURT: And you want a half hour at least?

MR. UDAY: I would try to keep it to a half hour, but I make no promise.

THE COURT: We'll be in recess, then.

(Brief recess.)

THE COURT: You may resume.

MR. UDAY: Thank you, Judge. Again, before I start, I want to make one more clarification. And that's that I didn't understand the court's ruling that the admission of the exhibits was only as to 3, 4, and 5. I just have a comment, or two comments, as to the transcripts.

First, that the court has indicated that he intends to read the transcripts. I think, therefore, they ought to be a part of the record as an exhibit. And if the court decides to deny their admission into evidence, I would ask that, we would indicate that we would object to that denial, and ask that they trail the case as an exhibit, inasmuch as that would be an additional issue we have for appeal, and would be part of the record at least in that sense.

THE COURT: All right.

MR. UDAY: With that having been said, Your Honor, I would begin arguing. And I think I want to begin argument this afternoon, or this evening, Judge, indicating that it's twenty minutes after 5:00, and this has been a long day.

With an observation is how I'd like to begin. And that that's that this morning we had Miss Wells on the stand for about three and a half hours. This afternoon when we resumed she was back on the stand again for at least an hour and a half, or perhaps a little more, doing cross examination and redirect examination.

I think what's important for the court to realize, that in our renewed motion and accompanying memoranda we filed with the court, we cited a number of pages where the prejudicial errors occur in this

transcript. Those that were dealt with on the stand today with Miss Wells were probably not even half of those that we actually do enumerate in the memorandum.

Further, I would like to indicate that in preparation for today's hearing, and for the memorandum, as Miss Watt was going through the transcripts as they arrived from California and when they totally arrived, she ended up sharing with me a copy of some forty pages of notes citing additional errors.

The point I'm trying to make, to begin the argument, Your Honor, is today we have touched but on a few of the pages that we could bring to the court's attention. And I believe that's why reading of this box of transcripts will reveal to the court the two problems we have.

That Tauni Lee was inept as a court reporter. And I know that's a kind, and perhaps dirty word, but I think that's the truth. She was inept at her job. She couldn't take the notes properly, she couldn't read the notes properly.

Further, we've learned in this process, that we have a note reader that really liked her job. And she did much more than note reading. She did some note creating, Your Honor. And I think that that goes both to the prejudicial nature of the transcripts as a whole, and specifically to those issues that we will be raising on

appeal that have been discussed by both Miss Wells this morning and this afternoon, and by Miss Watt this afternoon.

I believe that's what we've learned in the hearing today, and that's what the court will learn as it reviews the transcripts. And I think that the court can do that from those pages that were introduced by the state today, as well as by the box that's before the court on the bench as Exhibit 2.

In response to that, on cross examination, Miss Wells was dealt with for a very short period of time by Mr. Larsen. And I think it was obvious to me and to the court, as well, that Mr. Larsen spent comparably a very little amount of time as what Miss Watt did. He did not focus on the number of pages that were focused on by Miss Watt during her cross examination of Miss Wells.

And I think why that's important is throughout this situation, throughout this motion requesting a new trial on behalf of Mr. Menzies, we have found problems in preparing the appeal. We have found problems in preparing our arguments for the appeal, because of the nature of the transcript.

We've brought those before the court in motion form, and memorandum form in argument. We've introduced evidence through the witnesses that we subpoenaed in the

two hearings that we had talking about the talents of the court reporter, talking about what a court reporter should do, and whether they, having known Miss Tauni Lee, would have employed her in the capacity of a court reporter for a capital homicide case. And I think the answers, as the court will remember, is that they would not do that. That they would not do that at all.

When Mr. Larsen today cross examined Miss Wells, he spent, again, very little time on very few pages. Did not even touch on the full complement of issues that we raised in out memorandum. And I think for the court, paraphrasing or trying to do a synopsis at this particular moment would give little benefit, or will give benefit, but will give little attention, if you will, to the amount and kinds of errors there are in the transcript.

But I do want to focus on what I think are seven sets of circumstances of problematic areas in this transcript that require that this court grant our motion for a mistrial.

The first issue that I'd like to bring to the court's attention is that of identification. I believe that Miss Watt spent considerable time with Miss Wells this morning talking to her about the problems on specific pages that bear directly on prejudice in our ability to do the appeal for Mr. Menzies.

I can, I have written down in my notes here only three such pages, but I know that there were many more cited in our memorandum, there are much more than that. Yet I believe, when Mr. Larsen took the podium and cross examined, we had but one question regarding one page on the identification question.

I don't think that the state can take the position that this transcript is adequate to answer our concerns for the appeal, when they don't address our concerns fully. And I know that time is a problem, and that's something that I intend on speaking about as I close.

But specific to this case, on appeal, Your Honor, you will recall the identification testimony at trial. We had problems both in terms of an individual identifying Mr. Menzies who hadn't done that before at a lineup. Yet we learn that as he crossed the street after that lineup he then did make an identification. We learned that for the first time.

We have two issues, at least two issues in our appellate brief, that address the identification question. That being any prosecutorial misconduct by way of discovery problems in the case. We also have a direct identification issue, and at least, if not only in the direct sense, it again appears in an insufficiency of the evidence argument.

So the pages that were discussed by Miss Watt and Miss Wells this morning bear directly on our ability to do that appeal. And therein lies the prejudice that the state has requested in their answer that we've been able to show prejudice.

Another topic that I think the court should consider for prejudice is the area of the Britton issue. His first name escapes me now. But the court will recall that we had a witness who was in federal custody at the time, who had testified at the prelim. He appeared in this court, testified very briefly, then refused to testify any further, and his preliminary hearing transcript was then admitted into evidence.

We cited, at least by my count this morning, or excuse me, Miss Watt and Miss Wells addressed at least, by my count, no fewer than eight different pages in the transcript that bear directly on the Britton issue. The court will recall at least one of those pages where a substantive error occurred, depending on whose version you look at, where the word, the distinction was between the words "prevent" and "permit." Two words that mean exactly the opposite meaning. And I think that shows the prejudice.

We've yet to determine which of those we will be using in the appeal, but I believe Miss Wells, as she's

testified this morning, said that she couldn't remember which was accurate, which was actually testified to, or which was actually stated in court. Again, therein lies the prejudice mandating that Mr. Menzies receive a new trial in this case.

I don't believe the state, at the podium, addressed one page of the transcript that talked about the Britton issue. And I believe they need to do that to let this court know that there are no problems with the transcript. A task that I do not believe that they can do.

Again, Your Honor, another issue of significance that I think the court needs to be aware of are those issues that deal with the jurors and the jury as a whole. Miss Watt and Miss Wells spent substantial time this morning, the court will recall, talking about the voir dire process. Talking about the issue of a juror fainting. Talking about the issue of a juror who, for lack of a better word at this late hour, wigged out in the jury room, and was also required to be dismissed.

Your Honor, I think that specifically to this issue of jurors, there are a number of questions raised on appeal. I know we have an issue regarding the death qualification itself, which bears directly upon Miss Wells' concern that she would never have said the guilty phase. And I think the court's recollection will help the court in

that area to determine that there's got to be some prejudice when we're talking about that kind of a situation.

And again, and this actually moves me into the next big area of prejudice I believe I find, but in the jury situation we had a number of situations, one that I've marked down occurring on page 1774, where the note reader supplied an answer for a juror during voir dire. And that was not the only instance where that occurred. But the court is well aware of the case law in this jurisdiction that protects defendants, when it comes to questions of juries.

There's the Pike case where, as the court will recall the facts, an officer intermingled with a juror, there was some discussion. The court then, I believe, found no error. But on appeal the appellate court reversed the case because of the appearance of impropriety, I believe, is an accurate assessment of that case. Also indicating, Your Honor, that the burden was too much of a burden to place on the defendant for him to actually come into court and show some kind of prejudice.

That when something like that occurs, prejudice is presumed, and I believe that's what the Pike case says, just citing that from recollection, Your Honor.

There's also a case that I recall in the jury

situation when it talks about challenges for cause. And I believe our appellate court has long told us that it's a very easy matter for the trial judge, if there's a question as to the propriety of this particular juror sitting on the panel, it's an easy matter for the trial judge to excuse that juror and just bring in a new one and have them qualified. And that's the standard that's been upheld continually on appeal by our Supreme Court and by our court of appeals.

Now, when we have a court reporter, and then especially a note reader that's adding answers to the transcript to jury voir dire questions, we cannot help but presume prejudice. I think, recognizing the kinds of protections that our appellate courts have afforded these kinds of issues with jury questions, that the court needs to know that prejudice inheres in that situation. It can't be avoided.

The note reader is to do just that, read the notes, Your Honor. But time and again today in court we've testified, or we've heard testimony where the note reader has created transcript. The attorney for the state has tried to indicate those situations really are not problematic because up above it indicates that, for example, an exhibit had been admitted, and so in a parenthetical she added that such-and-such an exhibit was

admitted.

And I think on its face that probably is no big deal. But if you look at the situation with what the note reader is actually doing, it becomes a very big deal. She's exceeded her position by creating transcript, and we've seen it occur in situations more dangerous. Specifically, again, that of answering jury voir dire questions, creating the answer that did not exist in Miss Tauni Lee's notes.

Following up on that the fourth issue, I've noted all the add-ins, or the made-up answers or the makeup transcripts that this note reader has provided to the court that's in the current transcript as we now have it. Particularly offensive, I believe, is the idea that the note reader had access to a police report and filled in when a witness was testifying as to the description of a suspect, she filled in physical descriptions that were provided in a police report. Again, exceeding her capacity.

She's not entitled to do that, she's to read the notes. But she took a police report that was somehow provided to her, and I question the propriety of that, but she takes that police report and directly, verbatim, cites that as transcript. In other words, as testimony that occurred in court, which is inaccurate.

I do believe, Your Honor, that if there is not a better example, that's an example of the prejudice that inheres in this situation, trying to use this transcript to have Mr. Menzies affect his Constitutional and statutory right to automatic appeal. Prejudice inheres in there.

There was another situation, I believe, again, in a voir dire situation where she added five lines that were nowhere to be found in the transcript. Again, I would indicate that while Mr. Larsen, from the state, examined Miss Wells, he did not once ask her any questions about these additions that were provided by the court, by the note reader.

He did not ask her one question about that. Although I take that back. He probably did ask a question regarding the exhibits. But he did not delve into the idea that she took a police report and added that as transcript, that she took Your Honor's own notes from the penalty phase, your findings, and added that as transcript.

One comment, while it's fresh in my mind, regarding that was a point brought to my attention by Mr. Menzies himself. That during the transcript, nowhere is it found that he was sentenced to a zero to five, excuse me, a five-to-life sentence for the aggravated kidnapping charge, Your Honor. Yet in the judgment and commitment signed by Your Honor that accompanies this case in the pleadings,

that does exist.

And so it brings to my mind, Your Honor, why, or how can we believe that if she did use your notes, did she use them verbatim? Did she use portions? What did she do? We don't know the answer to that question, and I think therein lies the prejudice. Because we have a transcript that is not accurate, we have a transcript that is not, that does not repeat what occurred during trial. Mr. Menzies' motion for a new trial should be granted because of that prejudice.

Briefly, Your Honor, there are three other areas, and I won't spend as much time on those. But I think it's important to note that discussed between Miss Watt and Miss Wells, and then again when Miss Watt addressed the court a few minutes ago, she spoke of a penalty phase, and they spoke of the penalty phase this morning. A number of pages were directly addressed regarding critical information that goes to the penalty phase. We talked about mitigation evidence.

We have Tauni Lee, the court reporter, or who knows, maybe the note reader in this case, on page 3230 of the transcript, where Miss Lee again has Miss Wells arguing that death is the appropriate sentence. And while again, we all know that that obviously did not occur, and I think while the state would even stipulate to that if they

haven't already under our earlier Rule 11-h filing, I believe that it indicates much more than a problem with that particular page.

And I think that's the point that the state has appeared to miss in this motion, Your Honor, is they're saying this problem can be corrected. We know she didn't say he deserves the death penalty. So they're willing to stipulate. But I think the bigger problem we have is that which I addressed earlier.

The first point that we have, is the transcript is wholly unreliable. We have a reporter and a note reader who are not functioning as they should be in this instance, and we end up with a transcript that is part police report, part judge's findings of his own notes, part made up out of whole cloth, and part incoherency. And I think that again shows the prejudice.

There are critical terms in this case that are incorrectly transcribed. The state may have trouble telling us which term is correct. Miss Wells took the stand and says she didn't know which term is correct. Why that's important, I think was brought to bear clearly for the court when Miss Watt started asking Miss Wells the questions about what would a lawyer do who came into this case brand new for the first time?

The significance of that question shouldn't be

lost on the court. It's common knowledge that the court is hearing a habeas corpus matter in a death penalty case, the Ronnie Lee Gardner case. I think what the court should give some attention to in this case that is before the court today is what's going to happen if this motion is not granted and ends up being attacked collaterally in state courts, and then again in federal courts.

The kind of record that we have is going to be a monster for an attorney coming in to deal with, and for the judge who's going to have to make these kinds of decisions. The attacks that that attorney will make, will make the Ronnie Lee Gardner hearing that was held over a couple of days, a couple of weeks ago, look like a friendly exchange, Your Honor.

And I think that the problems with the collateral attacks specifically that I recall, there was a 609 issue where the court reporter, or the note reader interchanged the words "stealth" and "theft," making that whole issue oblivious, or not intelligible, not knowing what was meant, what was said.

Again, there was an issue of fingerprints. When terms technically used in that kind of a situation were mis-transcribed, one was substituted for the other, mugging up the issue. Not allowing for competent appellate review. And I think that at this juncture it is appropriate, Your

Honor, that we consider that this record is going to trail the case.

We have an inmate on death row in Utah right now that I believe has been sitting out there twelve or thirteen or fourteen years. If this record follows this case, it'll take that long to make the cleanup. It'll take that long to determine what word was used and the significance of that word, and it'll become an issue for that long.

I believe another area that's of significance that was discussed briefly, Your Honor, is the admonishments of the court. And this technique that was used by Miss Lee to place asterisks in her tapes. Not further identifying the significance of those asterisks, but then letting a note reader, who wasn't even present, some two years later try to determine what an asterisk meant. Conceded, she does that by context. And I'd concede that at times she may get that right.

Obviously when Miss Wells, or excuse me, when Your Honor starts talking a brand new death qualification introduction that you use with every juror, with every juror, we must know that a new juror entered the courtroom. Or the jury room, as I recall where we were meeting at that time, Your Honor.

But again, I don't think that's the point. The

point is not, "Did she guess right what that asterisk meant?" The point is, she guessed. This is a capital case, we should not be speculating as to what occurred. We should not be speculating whether the jury was in or the jury was out when we were arguing. We should not be guessing.

Mr. Menzies' life deserves more. Any capital defendant's life deserves more. And again, I think that's one of those examples where the individual note reader makes up part of the transcript, which is prejudicial on its face, I believe, Your Honor, and totally, totally unprofessional.

A couple of comments that I have in response to Mr. Larsen's cross examination of Miss Wells, which I, again, believe illustrates that the state does not have a grasp of the issue we're presenting before the court. And which I think will lead me into the next issue that I have before the court.

But he indicates, Your Honor, I believe it was on page 3035 of the transcript. And can you find that? I'm not really sure in the context of what was happening, but I believe that quote that the state's attorney made was that the note reader looked at the inconsistencies, I think it's coming back, I believe it's coming back, I believe we were talking about the mental abilities of the high school or

college graduate, or masters graduate.

But his comment was the note reader looked at the inconsistencies and corrected it. And he passes that off like that's okay. Well I think that's exactly the kind of problem we have here. We have a note reader who's supposed to be reading notes. She's supposed to be telling us what was testified to in court.

And I think one of the first things you learn as going to law school, or watching TV, even, is that witnesses will take the stand, they will testify inconsistently, and that inconsistent testimony will be used to either impeach them or to make a point with the court that they're not credible. Which I guess is to impeach them.

But in this instance we have an appeal issue which will probably deal in the penalty phase with Mr. Menzies. We're going to argue the insufficiency of the evidence in the guilt phase as well as in the penalty phase. I think that's an issue that bears directly on that. But more importantly shows that the state doesn't understand the issue we're presenting.

If we have a note reader who is changing words so that a person's testimony is inconsistent, we're way out of line. We've a transcript that cannot be trusted, a transcript that cannot be used on appeal, Your Honor.

That was further evidenced, I believe, by the state's discussion with Miss Wells when he said Miss Wells, or excuse me, Miss Lee never had an opportunity to go over her version with the note reader's version. And then later explained that Miss Lee was really not there to explain her asterisks. And I know those are two different statements, but I believe it's the same thought. That as they were in California doing this job, the point that he tries to get to here is that she had one job to do, and one alone. And that was to transcribe and give us her version.

And so when Miss Wells takes the stand and says there's problems with that version, he tries to explain it away by saying we didn't get together and go over it.

Which leads into my next issue, Judge. That the reason, perhaps the most important issue that I want to present to the court today which provides prejudice to Mr. Menzies and a right for a new trial, is that we have not followed the proper Rule 11 procedure.

The proper Rule 11 procedure as outlined by your court, by this court, by yourself, Your Honor, was that what we would do would be to get Tauni Lee's version for the first time. Once we had Tauni Lee's version, we would then sit down with Mr. Menzies, with the opposing counsel, and we would make a determination as to what was actually said, what the transcript should actually be.

We've circumvented that whole process now because of the time constraints that have been placed on us. And I think because of that, Mr. Larsen's questions to Miss Wells points out the prejudice that Mr. Menzies is now suffering. He's suffering a prejudice because we're not able to get an accurate transcript.

We've decided that what we will do at this point is we have actually three versions of the transcript now. We have what the note reader provided originally, we have what the state corrected, and we have what we corrected. Somewhere along the line, I agree with Mr. Larsen that one transcript should be sent up there. But we have circumvented that now, and I can only hope that all three would go to the court for them to make that decision. Yet I'll address some other options that we have later.

Backing up a bit, Your Honor, I think that there's one other concern that the court must consider, and must address, and that's the question of the missing transcripts. As Miss Watt articulated earlier, since our filing of our first motion over a year ago, and we indicated that there was a hearing noted in a minute entry that prior to trial there was a discovery hearing regarding the penalty phase.

The court will recall that during the penalty phase the state introduced the total prison record of Mr.

Menzies. And that the defense screamed. They objected, they didn't have notice. We do not, as of yet, have the transcript for the January 25th, 1988 penalty phase discovery hearing.

I believe that this court has previously ruled that until the court gets an opportunity to see the completed transcripts- - And I'm reading directly from a September 17th hearing of this year, when you indicated that, "Until the court gets an opportunity to see the completed transcripts, I don't think I can make a determination as to whether the transcript is accurate enough to be submitted to the Supreme Court for appellate review."

Again, therein lies the prejudice. We're at the eleventh hour today, if not the twelfth hour, trying to make a decision whether Mr. Menzies gets a new trial. Trying to make a decision today whether Mr. Menzies gets an accurate transcript for appeal. And we still don't have the transcripts to review, to look at, to determine so that we can prepare an issue for appeal, so that we can see if there needs to be some corrections made.

I believe what Miss Watt commented regarding the circumstances of this hearing and how we had continued to ask for it, and the state continued to point out that it did not exist until it magically appeared about a week ago,

are very important. And I think also suggests prejudice to Mr. Menzies.

The second transcript that is missing is that of the in camera hearing we held with Your Honor regarding the waiver of a witness that was sealed initially, and unsealed only recently and sent to Miss Lee to be transcribed. With these two missing portions of transcript, I think it would be improper for the court to send the transcript to the court, to the Supreme Court.

Your Honor, Section 76-3-2062 of the Utah code allows for automatic review of the death penalty. Our Constitution requires no less. Mr. Menzies is entitled to an appeal of first right, he's entitled to fundamental fairness, due process, and I believe that the transcript falls short in that area.

I believe that because of the arguments that have been heard by Miss Wells, by Miss Watt today, and those that I've presented, that the court is left with two options today. I believe the court has but those two options. Option one, Your Honor, would be to grant our motion for the new trial. Finding prejudice from two sources, one, that the transcripts are a joke, that they do not let us know accurately what happened, that we cannot depend on them.

The basis for that finding is Miss Lee's

licensure problems, the basis for that finding is a note reader who exceeded her abilities and job duties, and the prejudice that becomes of that.

The second reason is because of the particular problems that we've outlined, both in testimony and Miss Watt's presentation, and what I've reiterated here this evening. That there are specific prejudices in the area of the Britton and in the area of jurors, in the area of the augmenting to the transcript by the note reader, and those others that I have left out.

Based on those missing transcripts that we still do not have, based on the hearing that's occurring in Tauni's licensure status- - And I think that I need to make one observation before closing about that, Judge. And that is that I find it past ironic that the state of California is after Miss Lee's license, making charges of fraud, trying to strip her of the ability to court report.

The attorney general's office of California, and the attorney general's office of Utah is doing what they can to hide that information, doing what they can to protect Miss Lee, and to support the same kind of lousy court reporting and untimeliness that she did in California. And they're doing that at the cost of executing a man. I find that past ironic.

Your Honor, I think you have two options at this

point. The first is to grant our motion for a mistrial, to order that Mr. Menzies be given a new trial.

The second is, based on the missing transcripts, on what's happening with Tauni's licensure, her ability to do the transcripts, the note reader's problems, her exercise of talents and abilities that she was not intended to use, based on those arguments that I've presented as far as the prejudice, I think the only other option the court has, primarily because of the missing transcripts, is to ask the court for a continuance until those transcripts arrive. And by court, I mean the Supreme Court.

It would be premature for the court to deny our motion, inasmuch as all the transcripts are not in. It would be wrong, on the contrary. And based on that, Your Honor, I'd submit it.

MR. LARSEN: May it please the court, counsel. As Your Honor is well aware, it's been over a year since we've been going through these proceedings trying to find out what, if any, errors were in the transcripts, whether they can be corrected, and what kind of prejudice could be attributed to those alleged errors.

The state's response can be summed up in basically two words. And that is, "So what?" After the defense counsel has come forward and testified, Miss Wells, and explained all the trivial mistakes in the record, in

looking at the context of the record as it did come out on cross examination, it showed that those errors, or those mis-statements or transpositions or number errors, in the context of the case, or even in the context of the page that it's contained on, are not substantive. They're easily understood, they're easily explained. Something an appellate court can review.

It's telling that the defense, on this side, or the defense in this case has come forward with nothing in the way of proposed changes. Instead they have just, they're just asking for a new trial. They want all or none. They're saying, "We want a new trial, or else we will want the record to go up as is," and they're not proposing any modifications to the record. At least that's my understanding of the argument.

They are claiming there's no time to do this, but I think that that's true. I think they filed a motion on Monday, they have the opportunity to propose changes on all of the pages that they cited to in that particular memorandum. It didn't, perhaps it would not have been exhaustive if they had had more time. But at some point we have to say, "This is enough."

It's been a year that they've had to read the transcripts, the uncorrected version, they've had a significant amount of time beginning in August to reread

the corrected version of the transcript. And yet they still have not come forward with anything that would show that Mr. Menzies is entitled it a new trial, that this trial that he had somehow was unfair, and there cannot be a fair appellate review of it.

The state would request that this court transmit the record with the modifications proposed by the state and modifications stipulated to at the previous hearing. Those modifications are minor. The modification as proposed by the state is to add Mr. Carlton Way's transcript, and also to add regarding the aggravated robbery charge the jury's verdict of not guilty, instead of, as the transcript refers to as him being found guilty. And that obviously did not occur. Those are the only two modifications that the state is proposing, other than the ones that the defendant has come forward with.

The defense in this particular case has continued to try to shift the burden back to the state. I'm offended at Mr. Uday, and he getting up and inferring from my cross examination that somehow we have a misconception of the issue before the court, and that somehow we're trying to slight the importance of this hearing.

My cross examination was actually much longer, and asked many more questions than Mr. MacDougall would have, and he suggested it would be much shorter. The only

purpose of the cross examination was to show some examples of the claims of errors that Miss Wells had made in the examination by Miss Watt, and to show how actually ridiculous those claims are when you read those in context.

Case in point are the numbers regarding the I.Q. It's clear when you read the entirety of the page that you can understand that the witness was not saying that Mr. Menzies had a fifth percentile I.Q., and that he was substandard. The context was that he was somewhere in the college graduate range.

I also pointed out some of the other errors regarding the yardage and pointed out it was actually in the argument portion of the transcript. It was simply a restatement of the evidence. And it's interesting they did not cite to the actual testimony of the witness, and what the actual yardage was the jury was considering.

All these points are nothing but smoke screens that have been thrown out by the defense, and the state does not have to get up here at this podium and shoot back a response to every claim that they've made. And I don't think that Your Honor has the time or the interest to also do that.

I think it's telling, from looking at the context, as Your Honor has had the opportunity, as during at least half of the examination of Miss Wells, to be able

to determine that most of the inaccuracies can be easily explained or understood.

For instance, when there's an addition into the record that an exhibit is admitted, or a juror enters or leaves. Well it's clear from the context that a juror left, or that a juror must have entered, because they're being questioned. It's clear from the context that Your Honor has just ruled that the exhibit has been admitted, and all the note reader is putting in the parenthetical.

And Miss Lee was not asked to put in all of the parentheticals and the hyphens and the quotation and punctuation marks. That she would have done if she was trying to proofread the note reader's transcript. And that was the reason that the state requested before we went to California that Miss Lee be given the opportunity to perform the proofreading process, if she'd have done it right the first time.

And what we have instead are exactly what her notes read, without any benefit of the additions as, like punctuation, or the fact that a witness is nodding, or a witness is pointing to a diagram, or a juror is entering or leaving. But those are things that a court reporter would commonly put in after they have gone over their notes and are putting it into the transcript. And her notes simply don't reflect that, and she was not requested to reflect

that.

I would point out that it's very interesting that Carlton Way's transcript that he's provided to this court, which is about six pages, is from the same note reader, and similar changes are in Carton Way's transcript. Carlton Way's credibility and his competency is not at issue in this particular case. But I think it shows that it's common for note readers and for court reporters to add punctuation and add other words, and that there can often be a conflict between the two. And that's something for the court reader to be able to call the shot as to what exactly should be included or not.

They have made quite some argument about the fact that there were additions and insertions by the note reader, that she took her job too seriously, and she was a note creator, not a note reader. And again, that evaporates, Your Honor, when you realize that Tauni deleted all those additions by the note reader, and now what we have is a version of what Tauni actually put down.

We don't have any additions of Your Honor's notes in the transcript as Tauni Lee came, or as they allege. We don't have any additions from the police reports. Those were deleted by Tauni Lee. We don't have any additions to the description of the defendant, the chopped beard, the brown hair, or the additions that were in the police report

that were not explained by the witness, or described by the witness.

Those were all taken out. So what's the harm? We have actually what the jury heard, and what Tauni put down, without the deletions. And the appellate court can review that.

But Legal Defenders has not come forward and asked this court to make those changes. Or make those deletions. They have not come forward with a Rule 11 modification. And for some reason they're trying to be excused from that, saying that they don't have enough time. They had enough time to file a twenty-one-page memorandum. I don't think that relieves them of their Rule 11 burden.

They're saying that they've been denied a Rule 11 hearing? I don't think that that's true. They've had an opportunity in the last year to have a Rule 11 hearing, and we've actually referred to the Rule 11 hearing that we had previously before this had occurred. And the state has been ready and willing to stipulate to most of those changes. The changes from "cave" to "archive," or the changes in the numbers. Or at least to discuss those particular changes, and discuss those with the court, and make those.

As the court had requested, before in the other hearings, it appeared that you wanted them to come forward

with the substantive changes, and not which "I" had not been dotted and which "T" had not been crossed. Well they've simply come forward with that, but they're not requesting us to dot the "I" or cross the "T." They're just trying to say, "Look at the errors, throw the whole thing out."

The question is, it's not whether the defendant is entitled to a perfect trial, but whether he's entitled to a fair trial. And he's only entitled, as the courts say, to a fair trial. He's only entitled to a fair transcript, not a perfect transcript. We could go on infinitely trying to correct all of the errors in this particular transcript. But at some point the court has to stop and say, "This is enough. This is sufficient. It is substantively correct. It can be reviewed on appeal."

I think that if they had a particular issue, there would be reversible error on appeal, we would have heard it today. I didn't hear it. None of the issues that I've heard them bring up are anything that I believe would be automatic reversal on appeal. Otherwise I would not be at this podium today. Because I would be confessing error. Rather than putting the state through that expense.

This particular transcript, Your Honor has read it, Mr. MacDougall has read it. It's sufficient enough for an appellate court to read it and understand it and know

what happened.

MR. UDAY: Well let me interpose my objection at this point, Your Honor. Because I think what's being done by the state is they're citing hearsay about something that we don't have a transcript of. And I don't think they're entitled to do that, and I would move that that comment would be, regarding what Rick MacDougall had to say, be stricken from the argument.

MR. LARSEN: My response to that is that we've been arguing hearsay all day, Your Honor. We've been arguing- - Miss Watt had extensive hearsay in her argument, or her explanation, as to what had been said and told. Mr. MacDougall had to leave.

I don't have any problem with that portion actually being stricken, but the purpose of my statement is to try to explain that the minute entry speaks for itself, gives us an idea of what occurred, and we can infer from that, that there's no harm.

THE COURT: Okay, objection sustained. It may be stricken.

MR. UDAY: Thank you, Your Honor.

MR. LARSEN: Regarding Exhibit Number 2, which are the defendant's interlineated transcripts along with our notations, Your Honor, what they, I think they have done here is purposely decided not to come forward with a

Rule 11 statement of proposed modifications as the rule requires, saying, "We don't have enough time," and they want to submit their changes and their version of what they think the transcript could show. And that's what they've done, is they've offered this into evidence. The state hasn't had a chance to take a look at their transcripts, and I think that would have been necessary if that was going to be done.

Sure, under ideal circumstances we would have liked to have put together one copy and send it to the Supreme Court. But what they're attempting to do is send up their own hearsay statements, their own notations, up to the Supreme Court, and have that reviewed by the Supreme Court as the record. I think that that is unfair. I don't think that it comports with Rule 11 that they were required to come forward with a statement of proposed changes.

And that's the language that the rule uses. That the person who is attacking the transcript and says that there is an inconsistency, inadequacy, misrepresentation, to come forward with a statement of proposed changes, and that the other side has an opportunity then to respond to those, either with their own statement or proposed changes regarding those, or else to stipulate to it.

We've not had an opportunity to do that. As a fact, as I said, we would have stipulated to most of those

changes. But what they're trying to do is enter the whole thing in, in one fell swoop, and I just don't think that that's what should be sent up to the Utah Supreme Court.

The memo that they filed last Monday, as pointed out by my response, does not set forth a clear case of prejudice on their part from the alleged inaccuracies. And today they've come forward and they've tried to put together a case of prejudice. But yet the things that they have brought forward arguing prejudice do not show that there was a denial of a fair trial.

They've argued vaguely about the eye witness testimony somehow prejudicing them, without nailing down exactly what it was that cannot be corrected, and why the Rule 11 procedures cannot be used, to be able to correct those.

I'd point out that the two cases cited in the state's response, Moosman, and I can't recall the name of the other case, both discuss Rule 11 procedures, and basically say that the defendant, or the person who's attacking the transcript, has to have, or has to come forward with some kind of case showing that Rule 11 procedures are completely inadequate to supplement or correct the record before they can show that there was a denial of the direct appeal.

And they've not done that. They've not even

attempted to come forward with that kind of emphasis, and they have not focused their argument on Rule 11, trying to show the inadequacies of Rule 11. They've simply said, "Well, we can't guess." And if that's true, that a court can never try to reconstruct the record, then Rule 11 should be stricken from the rules of appellate procedure, and should never be utilized. And that any time there's an error in the transcript, or a reporter's notes are lost, then it should be automatically reversible error, according to their argument.

But that's just not the case. And the Supreme Court's not said that. And in the Moosman case, there was a complete hearing that was untranscribed that the judge and the two attorneys got together, they discussed, the judge gave his recollection of the events, the attorneys gave theirs, the judge made a ruling as to what he believed occurred in that particular case. It was the waiver of a right to a jury trial. And there was a clear explanation, the judge ruled it was voluntary and knowing. None of this had been in the record, and then it was sent back up to the Supreme Court, and the Supreme Court affirmed.

And also in the cases where reporter notes have been completely lost, where there's no opportunity to construct a transcript, the Supreme Court has allowed Rule 11 procedures for the judge and the attorneys to get

together and either by stipulation, by argument, and finding, reconstruct the record as to what occurred so the appellate court could review that.

That could have been done in this case. But they have not attempted to do that, because they would rather just send up their version of the events to try to shoot holes in the transcripts before this court, and on appeal.

As I said, Mr. MacDougall had to leave, but he did want me to express to this court that he had read the record. And this is argument, and this is not hearsay. He had read the record, he could not find any uncorrectable error in the record, and he wanted to express that to the court, that he- -

MR. UDAY: Again, Your Honor, I am going to object, because if Mr. MacDougall wanted the court to know this, they had the right to put him on the stand, and we could have examined him and cross examined him, as they had the right with Miss Wells. Again I ask that this be stricken.

MR. LARSEN: Your Honor, this is argument.

MR. UDAY: I think he can argue it. I think he's trying to testify.

MR. LARSEN: I'll say it for myself, Your Honor. Mr. MacDougall has read the record, and the court is aware of that. But in reviewing all the changes that Legal

Defenders has proposed, and I've gone through their entire memo and looked at all their citations, there's nothing in there that shows that Mr. Menzies was denied a fair trial.

Certainly, as I said, the transcript is not perfect. No transcript is perfect, and I think that that's been borne out many times on direct appeal. But on this particular case, the substance is there, the appellate court can review it, and there's no issue that the defendant has pointed out that cannot be raised and argued on appeal that has, as a record, is a basis of that issue, something that's uncorrectable.

And the state would request this court to transmit that to the Supreme Court as soon as possible, to make a ruling today, and notify the parties of the ruling, and to deny the motion to admit State's Exhibit Number 2.

In the event that State's Exhibit Number 2 is to be admitted by this court, then the state would want the equal opportunity to send up its exhibit, and in that alternative would then move to admit our copies of the transcripts and the changes, which I believe would probably be very similar in most ways, but would include all of the relevant portions that our representative thought should be noted in the margins, as well. Thank you.

MR. UDAY: Your Honor, let me indicate right off the bat that we do not adopt these transcripts as our

version of what occurred. To the contrary, that's what we're arguing about, is what occurred in those transcripts does not accurately reflect what occurred at trial. Therefore Mr. Menzies is entitled to a new trial. That's our point.

We would have no objection whatsoever for the state's version, if that's what we're using, the terminology, for the transcript prepared by the state, to also be a part of the record. In fact I think that would be appropriate.

I do find it ironic, however, that when Mr. Larsen indicates that the note reader's additions are stricken from that transcript, and that that is the version, that he's actually asking Your Honor to rely on those transcripts that he's objected to being admitted. And that's the only way that information gets to the appellate court, is if that transcript, or his transcript, is admitted up there. That's the only way the note reader's additions get stricken. And so I think it would be appropriate for both versions to go up.

Your Honor, I need to make a couple of comments that I don't think are very substantive in nature, but the court needs to be aware of.

The first is that Miss Brooke Wells and Miss Watt, both as she testified, and Miss Wells indicated

earlier, that they hunted for the January 25th transcript here in this court house. That they met with Byron Stark and was showed three different places where they could try to find it. An effort was made.

But as counsel for the state indicates, only once an effort was made by them were the transcripts found. I think the court needs to be aware that we had looked for those. We didn't just allege over a year ago. We looked and reminded and urged this court that there were missing transcripts.

A comment regarding Carton Way's transcripts that should be of interest to the court, is that that transcript prepared by him, but as corrected by the note reader, or when compared with the note reader's transcripts, points out the same kinds of problems that we have with Tauni Lee's transcript. And Mr. Way's transcripts, you'll find at least three or four times where the speakers are interchanged, and I think that's of importance. Again, illustrating the kind of behavior the note reader was involved in in this case, by creating transcript, an alternate transcript.

Your Honor, the reason for the in camera review that was held regarding the witness, I think Miss Watt adequately addressed to this court. The reason that's prejudicial, that is, as she explained, is that it's

relevant to the appeal. And let me just stop right there and indicate that that's the issue that's before the court today. Is whether these transcripts will provide Mr. Menzies an adequate and Constitutional appeal. Not a fair trial. Whether he's entitled to an appeal is the issue. And the Constitution and statutes say that he is. And that's the question that we're looking at.

But regarding the in camera hearing, Miss Watt explained that what was important for that hearing was that she had to make an assessment initially as to whether what occurred there, whether it was in fact a waiver, whether it was a situation that would require her, as appellate counsel, to handle the case herself within the office, or to farm it out on an ineffective assistance claim to opposing counsel, or to another attorney to handle the brief.

And I think therein, again, lies the present difficulties to Mr. Menzies. If he's going to have counsel doing an appeal for him, an initial determination needs to be made, in this case by Miss Watt, as to the substance of that transcript. And that's why it being missing is prejudicial.

Your Honor, I think what's important in this case that the state has overlooked, and again it may be because he has come into the case late, but we have, he indicates

that we have never proposed changes to this court under Rule 11-h. And he says that we have purposely not come forward with the Rule 11-h process. And that's totally inaccurate. The court is aware that very early on we went through the transcript as it existed at that time and proposed a number of changes pursuant to Rule 11-h. Many of which the state had stipulated to.

The balance of which we indicated in that motion were of such a situation that we could not go forward and make an assessment one way or the other. That therein lied the prejudice requiring the reversal. So it's inaccurate to say that we haven't done that. We've done it.

It would make no sense for us today, based on these transcripts with the revisions, to do the same things, and again have the state stipulate to the word "parole" instead of "patrol." And the other errors that were stipulated and agreed upon in that situation. We have done our Rule 11-h. What we are saying is, from this point forward, there are too many problems with the transcript for us to do any more.

What the state, and apparently the court would have us do is, at this point they've placed upon us an impossible burden. To actually prepare, or repair this transcript, or go through this transcript and indicate to a greater degree than that which we've done the kind of

prejudice inheres from those kinds of errors. Those kinds of blatant mistakes by the transcriber and mistakes by the note reader.

Your Honor, Miss Wells took the stand and testified that there were many instances when she recalled, when looking at a discrepancy in the transcript, when she could not recall which was actually testified to at trial. That's the problem that we have. The court should be able to recognize that as a problem, when you consider the size of the transcript of over 3,300 pages, when you consider the few weeks that we've had since returning from California with these corrected transcripts, if you will, to actually examine and to prepare any additional responses.

Along that line, I think before I move on to a different topic, it's important to point out that the Moosman case, cited by the state, is not a capital case, Your Honor. And as it talks about the transcript and the hearing that was held, it wasn't a hearing as we've had since last November in this case. There wasn't a two-day evidentiary hearing as we've had prior in this case, and the full day that we've now explained, or that we've now had with all the hearings in between there, Judge.

The state takes the position here that I have shifted the burden to the state. That I have required them

to show why there is a prejudice. I have two comments regarding that.

The first, I believe, would be to cite a couple of statutes for the court to again consider. Section 78-56-2, and 78-56-6. Which require that a transcript, Your Honor, be certified as a true and correct transcript. And in subsection 6, which requires that that certification be done by a court reporter, and if so, there's a presumption that it's accurate. If not, that the burden shifts to the state to show the adequacy of the transcript. So my first comment would be that the court needs to be aware that it is the state's burden to begin with.

The second comment is, even if it were to be our burden, we have met that burden today. We've met it for the past year when we've indicated the problems we've had substantively with the transcript. Not regarding the fair trial, whether or not he got one, but regarding whether he's going to get a fair appeal. Whether we're going to be able to raise those issues on appeal, to actively and effectively review whether he got a fair trial. And we need to do that, Judge. I think those statutes placed in proper perspective realize that the state at least shares the burden, if not has the burden.

And again, that's why I believe it's inaccurate for the state to get up here, or of no benefit for the

state to get up here and speak in generalities. What we have tried to cite substantive error. Again, Miss Wells was not on the stand for three and a half hours today during direct examination because she didn't have anything to else to do, Judge.

She was here today because we were dealing with specific problems of substantive import. And again, as I indicated, not to be exhaustive. But in problems with identification, with the Britton testimony, that is going to be at least one issue on appeal. With issues of the jury, the jury voir dire, with jurors fainting, being sequestered, those kinds of problems.

The additions that were added by the note reader, the penalty phase problems, and the critical terms and the admonishments that this court has given, or did not give, that were actually provided by the note reader. I think these are the substantive kind of problems, some of those we've addressed to the court. There were others in the memorandum, and others that were testified to here today.

I think that based on those errors that we have cited, rather than talking in generalities, we have provided some substantive errors. We've provided the court with page numbers, we've provided the court with a copy of the transcripts to review those in context. The state says that out of context or in context there's no problem. We

believe if the court looks at those pages and checks, you'll find the prejudice as it inheres to Mr. Menzies' appeal.

The state quotes that Mr. Menzies is not entitled to a perfect trial, and I believe that to be the case law. He is, however, entitled to a fair trial, and more importantly for this hearing, he's entitled to a fair appeal. The only way he's going to get that fair appeal, Your Honor, would be if we were to retry this case and he were to lose again. Mr. Menzies merits a new trial because of the status of this transcript, and I would submit it and ask the court to grant our motion for a new trial.

Alternatively, for the court to request from the Supreme Court a continuance of this issue until the transcripts that are outstanding are returned to the court so they can be reviewed and discussed. Thank you, Judge.

THE COURT: Based on what I've heard, I'm just wondering what the procedure would be for the court to ask the Supreme Court to get a short continuance, because I think we're so close now to either repairing what can be repaired, or if it can't be repaired, that it'll be at least some benefit to the court to know that there are areas where we cannot agree upon, and I would have to make the decision as to whether that's prejudicial or not. So- -

MR. LARSEN: Your Honor, the last time we got an extension, the state took it upon itself to file a motion. The other side would not stipulate to it, and it took oral argument with five justices present. The state is not suggesting that that happen again.

THE COURT: That's my understanding that that's one of the recommendations that the defense is making, so I assume there'll be a stipulation if the state doesn't object.

MR. UDAY: Your Honor, I believe we would stipulate to that for the reason that I stated. I think probably the best way to approach it would be for Your Honor to make a phone call. I would think that if the Supreme Court were aware that the transcripts that we've alleged all along have been found and are outstanding, that they would find that sufficient reason to grant the extension.

THE COURT: I could do that first thing in the morning if I could get hold of Justice Hall and communicate that problem. And my feeling is we're so close to getting a lot of the issues that have been raised taken care of, if there's some way that, you know, as I indicated, both parties can get together to stipulate to changes that are not in dispute, or can be reconstructed- - And what I want to do is just get to those specific areas where there's an

issue that neither of you can agree upon as far as any stipulation is concerned as to repairing or reconstructing the transcript.

And I'm, I guess by case law, required to, if possible, assist in the reconstruction, and I've not been involved in the reconstruction at all up to this point. So if the two sides can at least get it to the point where those things that are stipulated to can be stipulated to, and those that you have issue with, then get together with the court, and I'd like to do that by the 31st of this month.

MR. LARSEN: I would too, Your Honor. But that was supposed to be the purpose of the hearing today.

THE COURT: Right.

MR. LARSEN: And it didn't happen. And I was disappointed, as I'm sure you were, to see that their motion was not a statement of proposed changes.

THE COURT: I think that Miss Watt explained to the court the constraints upon which the defense have had to operate, and the difficulty in trying to prepare adequate reconstruction of the transcripts for the court. Because the problems that Miss Lee had, the problems that the attorneys, or the attorney and the clerk had when they went to California with Miss Lee, I think is indicative of the difficulties that we've had all along with trying to

get anything from Miss Lee.

But now that we have almost all of it, and the question is just trying to reconstruct and to repair whatever we can for the court to make a determination as to whether the record is accurate enough to be transmitted up to the Supreme Court, or if there's substantive error, that you know, it's better to grant the new trial than to have it reversed on appeal.

MR. LARSEN: Well I think we'll just have a repeat of what we had today. They're going to come forward with more changes and saying, "Please grant a new trial." And- -

THE COURT: What I'm saying is that what you have to do, just get those that we have already up to this point, that you can agree upon. If you can't agree upon, I'm sure I can read through the transcript myself of just those issues that you bring up. Because I won't have to go through the whole transcript, I'll just be going over pages that there are issues about. So it won't take as long. But I'm willing to spend the time to do that.

MR. LARSEN: Maybe I could propose this, Your Honor. And that is on all the pages that they have cited in their memorandum, we have a list of those, and we've made a photocopy of those, and you're in custody of those. And perhaps we could make a list of proposed changes for

those particular pages and submit that.

THE COURT: Now you've indicated that you've not had an opportunity to go over their changes, and I guess they've not had a chance to go over any changes that you may, you know, stipulate to. If the two of you can get together so that we can just narrow this down as much as possible.

MR. LARSEN: Your Honor, I don't think it would be necessary for us to go over their proposed changes, if they came forward and said, "We propose it on this page from this to this." If you want this change to that. Then we'd be able to look at our copy and either stipulate to it, or discuss why we would object to that particular change. Which would probably be unlikely.

But for us to read all of theirs to compare them now to ours, for the purpose of simply creating one perfect transcript to send up, I think that would be impractical. It seems like they should come forward, as Rule 11 requires, explain what they want changed, have us stipulate or submit it, and have the court rule.

That's what was supposed to happen today. I think they knew that, and I think they had the opportunity to do that. And I think that continuing this any longer is against the wishes of the Supreme Court. And perhaps you'll find that out tomorrow in your discussion with

Justice Hall whether that's true or not.

MR. UDAY: Your Honor, we've had a chance to confer briefly here at counsel table, and I think we can clarify our position as to what I indicated earlier.

Our problem is with the transcript as a whole right now. Those things that we think can be changed, we have proposed to the state, and they have stipulated to most of them. That's why I believe our position is that the court should grant the motion for the new trial now, if persuaded by the substantive problems we have pointed out. If not, the court should wait for the two new transcripts to arrive, and let us find the substantive prejudice in those.

I think that the state points out the impracticability of what the court is proposing, because it is impractical. We have been at odds on this issue for some time, now. Reviewing the transcript as a whole, I think would enlighten the court as to the kind of problems, and why we cannot do that.

Again, I think, just recall the one situation that Miss Wells talked about on an issue regarding Britton where the one-word change," prevent" or "permit," changes the whole context of that part of the transcript. Yet, because of the time factor, this is over almost three years old now, and because of the other cases that have gone on,

the length of this transcript, she does not know whether it was said "prevent" or "permit."

And I think that's the problem we have at this date. That's why we cannot come forward with other proposals. We believe there to be significant substantive errors that we've illustrated today to merit the new trial.

So I don't think that we could actually get together, I don't think that would be of any benefit. I think that the one of two things we need to do, grant the motion for the new trial on what you've heard, or wait for the two new transcripts to get here, and see if those two allow for the court to grant the mistrial.

MR. LARSEN: Your Honor, their explanation of their position has simply validated what my perception was, and that is if we come back here on December 31st we're going to be right back to where we started, only they're going to add to their motion to say, "Now throw the whole thing out." And they're not suggesting proposed changes. They're suggesting the whole thing be thrown out.

That's why the state's response is, send it up to the Utah Supreme Court, as is, with the few changes that have been suggested and stipulated to, and simply say that, to the Utah Supreme Court, "They did not come forward with proposed changes. They had an opportunity. No matter how much time was given to them, that's going to be their

position."

MR. UDAY: Well, first off, we had no chance to get together, and second off, it would be impractical, as the state just recognized. We can't get the four attorneys together, with Mr. Menzies, and as the court ordered previously on September 17th, as I indicated, have Miss Lee be a party to that, to the second phase. We can't now get her back up here, as well. That's the practical problem that we have. That's why our position has been forced to be one of the transcript as a whole is unusable.

THE COURT: Well, Miss Lee being present is not as critical as it used to be before, where the parties were there when the transcription was made, and her changes have been documented, and it's up to us now to try to reconstruct what her version is with what the note reader's, plus what the transcript is right now.

And after hearing everything that I've heard, I'm not convinced that that transcript cannot be made, I mean repaired to a point where it can be reviewed by the Supreme Court. Because I've listened to what Miss Wells has said, and I took notes on many of the things in which there was some issue about, and I have some recollection of some of the things, like the jurors and the fainting and the, you know, what happened after that, that Mr. Menzies mentioned.

And I have kind of a clear recollection of some

of those things, because I was directly involved right here. And so some of those things that you feel that maybe can't be repaired, I kind of have some input into that and I think we can repair it to a point where I think that the record, at least it won't be perfect, but it will be accurate enough that I can send it up.

If I can get the parties together. But that all depends on the issues that you think are most critical for the court to make a decision on. That's what I need. There are a lot of things that I've heard that I'm sure that can be repaired.

MR. LARSEN: Your Honor, I think until you make a ruling that's in writing that says, "Your renewed motion for new trial is denied, now let's get together and come forward with some corrections and send this up to the Utah Supreme Court," until you do that they're not going to change their position, and we're not going to get any cooperation in trying to correct the record. Because they simply want the whole thing thrown out in total.

MR. UDAY: Your Honor, I think perhaps what would be best done at this point, because we're putting the cart before the horse, maybe what the court should do is contact the Supreme Court tomorrow and see if they're even willing to give us a continuance while we wait for the transcripts. Once they acquiesce to that, or tell us no, then we can

decide what else would need to be done at that point. And I think that would also give counsel for both sides an opportunity to- -

THE COURT: But I'll call first thing in the morning, and this evening I will try to go over those transcripts and see what my impressions are of the changes that have been made in light of the testimony of Miss Wells, and see if there are things that I think may be a waste of time for everybody, or else if it's not then I'll talk with the Supreme Court, tell them I've gone over the changes, and that with just a little more time that we could probably work this out.

MR. LARSEN: Your Honor, I would request that Your Honor make a ruling today on whether their renewed motion for new trial is denied or not. But I think unless we have that, until we have that in place, they're going to continue with their position that the whole thing should be thrown out. And I think that's a requirement before we get together and try to cooperate to get a record corrected and sent up. And they had their hearing today. It was set for today, they had fair notice and fair time. They did not come forward with those proposed changes, and they did that as a matter of strategy.

THE COURT: Well, what I'm going to do is call the Supreme Court, talk with Justice Hall, and see what

kind of a time frame that I can operate under, and if I don't have any, I'll just have to make a ruling, and I'll just let you know tomorrow that I've made the ruling. But I'll read this tonight and I'll- -

MR. UDAY: Your Honor, Miss Wells would like to make a comment, I think that would be appropriate.

MS. WELLS: Your Honor, I gave up three weeks of my normal practice and case load to go to California. The reason that it was determined that I was the appropriate person to go was so that, because I was present at the trial, I would have the ability to read for context at the same time. The state resisted sending a trial attorney there. But I suggest to you that now, on December 3rd, while I have two cases in custody set for the next two days, I cannot, nor do I expect that the state's attorneys are going to be able to get their two trial attorneys together with Miss Palacios and I, and go over a transcript which took Miss Stubbs and I three weeks to get through 2,300 pages on. And I suggest to you that that is not likely to practically happen within the time constraints that you've indicated.

MR. UDAY: And one final comment closely related, Your Honor. Is that I think that- - I'm not in opposition to what Mr. Larsen says that the court should decide today. And the reason I'm not is, as I have indicated, is the only

decision the court can make today is to grant our motion. Because without the other two transcripts here the court can't rule on a motion unless you grant it based on what you've already heard.

In line with that, I will reiterate what I argued here at the podium a couple of months ago, I believe it was, when we talked about the hearing that was had at the Supreme Court. The hearing, the Supreme Court itself had ordered the Rule 11 proceedings. They knew where we were. Miss Watt explained the position we were in, yet they ordered with such a tight date, such a tight time frame for us to work in, I think was a mandate for this court to grant the motion. A mandate for this court not to spend good money after bad by continuing with the reparations.

Because it did not allow in time management the kind of time that we needed to do the rest of this Rule 11 stuff. And I think that, again, is a reason to follow the state's advice and make an order, the only one being, grant the motion.

MR. LARSEN: I agree with Miss Wells, that I think that it's a practical impossibility to complete the Rule 11 procedures, as you had pointed out, by December 31st. Which would be your retirement date.

I disagree with Mr. Uday that the inference from the Supreme Court is that this court should grant the

motion for a new trial. I think the inference from the Supreme Court was frustration at the delay that has occurred in this matter. And that's why I think that the inference is that they will not take kind to a request for more time.

I think they expected a ruling to be made today, and they expected their case to be prepared today. They did not come forward, apparently for strategic purposes, with the requested corrections. I think that this whole matter has been a colossal waste of time and money. And I think it's sad that we may have to send up a transcript without the benefit of the corrections that occurred in California.

THE COURT: What I'm going to do is just take it under advisement, and I'm going to call the Supreme Court. And in the meantime I'll be reading as much of that transcript as I can before tomorrow when I talk to Justice Hall so I can get a feel of the total amount of the changes that have been made as much as possible, and go over the notes that I have.

But as I mentioned, I feel that we're at a point where with just a little more time that we can reconstruct the most important parts that have been brought up in regards to the jurors, in regards to the notes, in regards to the various issues that Mr. Uday has brought up. So on

the basis of that, I'll just take it under advisement, go over those, and I'll call Justice Hall first thing in the morning.

MR. UDAY: The one other concern we would bring to the court's attention is that when talking with Mr. Hall, I don't know that there's any idea of what kind of time frame we can give the Supreme Court on when these transcripts will be finished. We don't know if she's even started on the sealed portion, I don't believe, and with her being in the hospital as of last week, and I think what, in the seven and a half month in her pregnancy, I mean I think it could be some time. And I think that's something the court was aware of, as I indicated, prior, and needs to be brought to their attention tomorrow, as well.

THE COURT: I think when the Supreme Court made that ruling, they were trying to give us some kind of a time frame in which to try to get this done. And I'm not sure that they were totally aware of all the problems that we had with trying to get the transcripts done with everybody's schedule here, with- -

MR. UDAY: They were brought aware of the place where we were and what needed to be done. I think that's a matter of record, Judge.

THE COURT: But I'm sure that they're not going

to ask us to do the impossible.

MR. LARSEN: I would also point out that as I suggested, that the record can simply be supplemented with the other transcripts. The Supreme Court did not send those down to be corrected. We do not have the problem with the note reader in those particular cases, because we're going to have Tauni Lee's original product from day one, once we get it. So those can be sent up, and they don't need to be argued as to what changes should be made.

THE COURT: Okay. All right.

MR. UDAY: Your Honor, at this point we'd just submit it.

MR. LARSEN: Thank you, Your Honor.

THE COURT: Well I'll let you know as soon as I get in touch with Justice Hall tomorrow morning. We'll be in recess.

(Evening recess.)

SALT LAKE CITY, UTAH; DECEMBER 4, 1990;
TELEPHONE CONFERENCE

THE COURT: I have the reporter, Cecilee, here, so could you just identify yourselves.

MS. WATT: Joan Watt for Mr. Menzies.

MR. LARSEN: Dan Larsen appearing for the state.

THE COURT: This is the state of Utah versus Ralph LeRoy Menzies. I've had an opportunity to talk with Justice Hall this morning, and he realizes a sense of urgency, and he has indicated that he'll give us some time to get this matter taken care of. But we have to do it as soon as possible.

I went home and I took all the corrections that you handed me. I started going through the file, and I figured that it's easier for me to go through all the different corrections, and I went over it and my notes, and it's my opinion that most of the errors that have been made are correctable, but I would need to have the assistance of both counsel in order to do that.

I've reviewed the context in which some of the statements that were made that there's some problem with, and I think that if we can get the parties together, that those matters can be reconstructed.

MR. LARSEN: How do you propose do that, Your Honor?

THE COURT: I want to do that right away. I was thinking it shouldn't take over a day to go over the substantive parts that may be at issue, and I was wondering if there's some way, in order for the Supreme Court to get one clean copy of all the corrections, to have the grammar, the spelling, the names that can be corrected, done by either law clerks or someone, because this is going to just be a mechanical thing of just making those corrections. And those areas in which there's some dispute about, and which all the parties should be present, if we can spend- - And I'm willing to spend one Saturday or some evening to do that. And I'm sure it can be done.

MR. UDAY: Your Honor, as we indicated yesterday, we don't believe that all of the errors are mechanical. If Your Honor is simply talking about grammar, that's one thing.

THE COURT: That's what I'm saying. The grammar part, we know where the spelling is obvious or the punctuation is obvious, or the quotation where Brooke has got those all checked out. Those are just the mechanical things where it requires nothing but someone, you know, just even a clerk can do that, make those changes.

And then those parts where I've read over some things where it might mean one or two different things, and maybe the whole context may be a little bit different, in

order to reconstruct that we need to have all the attorneys and myself present to do that. And everybody bring their notes or whatever they have in order to make sure that we get the correct meaning or interpretation of anything.

MR. UDAY: Your Honor, I think that the best approach might be to do a scheduling conference. I think we need to have Ralph there, and we need to have a hearing. And if this is the approach that needs to be taken, I think we need to do a scheduling conference to see when we can get the various attorneys in.

As we indicated yesterday, we think there are errors throughout the transcript. That's why we put the entire transcript into evidence. I think it's going to require more than just a few hours to go through and correct the problems that we think exist with the transcript. And if it's going to be done, I think we need to get everyone in there for a scheduling conference so we can figure out when they're available.

I have no idea when Miss Wells is available. She said yesterday she's got two in-custody trials. I think the best idea is to maybe quickly set a scheduling conference.

THE COURT: I'm going to set everything else aside that I have, I don't care how important it is, to have this, to get it done. The urgency is, the Supreme

Court is waiting. They know what the problem is. I told them I have a commitment.

MR. LARSEN: Your Honor, I agree the scheduling conference should occur, but until the court rules on their motion for new trial their position is going to be the same, that they don't think it's correctable.

MR. UDAY: I think we can speak to our own position, Your Honor. Mr. Larsen did that repeatedly yesterday, and again, that's not the position that we're taking. I think that in order to, if we're going to sit down and attempt to correct this transcript, we're going to have to go through it page by page. And as we've been saying last spring, and as we suggested doing as part of Ms. Lee's reading of her notes.

THE COURT: I'm not going to go over page by page. I'm only going to go over what you feel is a substantive material change or error that has to be corrected. Because I've gone over, you know, the whole thing, and I've gone over all the corrections that have been pointed out yesterday. And in going over it, there are just a few errors which I have some concern about. Otherwise I'm prepared at this time to deny the new trial, and to just have the transcript sent up.

So the burden is going to be on the defense to show the court, and demonstrate to the court that there are

areas which you feel are incorrect, cannot be corrected, or cannot be reconstructed.

MR. UDAY: I would request that Your Honor also look at the things that we set forth in our memo. We did not go over everything in court yesterday.

THE COURT: Yes, I realize that.

MR. UDAY: And other than that, I think we ought to set a scheduling conference.

THE COURT: I'm ready tomorrow for the scheduling conference.

MR. UDAY: We'd request that Ralph be brought up.

MR. LARSEN: That's fine. Your Honor, somebody has to come forward with the proposed changes. That should be the burden of the defendant. We can use their memorandum as a statement of proposed changes, and the state can go through their memorandum and their citations of names and numbers that are allegedly incorrect and either stipulate to a particular change, changing a number from thirty to twenty-five, and those portions that cannot be agreed upon, then we can deal with those.

THE COURT: This is what I suggested yesterday, that you do that. You go over those that you can stipulate to, and if you would just go ahead and go through all those that they've already pointed out and review that and see those matters which you don't have any dispute about, or if

you can get together and correct it, do that.

And then the ones that I need to get together with you on are the substantive matters which I feel that the Supreme Court needs to have an accurate record on, and which they can make a correct ruling on this particular, on any issue that's brought up on this case.

MR. UDAY: So tomorrow at what time do we need to be in court?

THE COURT: Can we do this at 2:00 o'clock?

MR. LARSEN: Yes.

MR. UDAY: Okay, I'll have all of my parties there.

THE COURT: Thanks very much.

(Recess.)

SALT LAKE CITY, UTAH; DECEMBER 5, 1990; A.M. SESSION

THE COURT: This is the case of state of Utah versus Ralph LeRoy Menzies. If we can have the parties identify themselves for the record.

MR. UDAY: Your Honor, Richard Uday from Salt Lake Legal Defenders, along with cocounsel Joan Watt and Elizabeth Holbrook, and trial counsel Frances Palacios, who's present here on behalf of Mr. Menzies.

MR. LARSEN: Dan Larsen appearing for the state of Utah, along with Rick MacDougall from the county attorney's office.

THE COURT: All right. When we concluded last time, I advised the parties that I would contact the Supreme Court, since we had word from the court that we should conclude it on December the 3rd, and it was past, I guess 6:30 or so when we finished, so we didn't really have time to do too much except to place ourselves at the mercy of the Supreme Court.

And I did call the Supreme Court, had an opportunity to talk with Justice Hall. And my understanding is that he would like to have this concluded as soon as possible, with no further delay. So I told him that I would get a scheduling conference with the parties, and if possible, try to have this done before the 1st of January. So that would be the 31st of this month.

I've gone through all of the material that we had last time that was submitted to the court with the different changes, and after going through that and hearing the testimony, it's my opinion that if a representative from each side could go through and get all of the mechanical things that has nothing to do with the substantive part done, so we can have one clean transcript.

And then those in which the defendant feels that there's some substantive objections to the record, that between the counsels and the court we can go over that to see if we can either repair or reconstruct anything in which, any portion in which it appears that there's some error, or transcription that may not make sense. But what I thought we should do is confine that just to the substantive part.

There are a lot of errors that I found that could be taken care of very easily by someone who could just make those corrections on the transcript. Otherwise I'd like to just concentrate on the few areas in which there's some real serious questions.

MR. LARSEN: Your Honor, the state has already done that process. The paralegal from our office, Brenda Stubbs, has begun to go through page by page in numerical order all the pages that have been cited by the defense as their examples of alleged errors, and trying to decipher

what the actual word or words should be.

Some examples of those are like on page 7, line 1, there's a citation to the Cindron case. Well actually that's the Cintron case. The citation to the Banner versus Page case that Miss Wells said we could not decipher what it was and find out and correct it, that was a citation to the Barber versus Page case. These errors can be easily identified and corrected.

I am concerned about trying to put together alleged unintelligible portions of the record, and I believe those are the ones that Your Honor would like to concentrate on. Perhaps they're unintelligible because the speaker was unintelligible and it was actually taken down correctly. We don't know that. But I think that we can respond to their memorandum by coming out with our version of proposed changes, and submitting that to them.

I've talked with Mr. Uday, he said he's also going to try to supplement their memorandum with other possible changes and corrections, by reading cover to cover the entirety of the transcript, trying to pick up any others, and they'll supplement their citations to pages with that.

I think we can do this very quickly, within at least a week or two-week period of time. Perhaps Legal Defenders would like to respond to the time and what they

would plan to do.

MR. UDAY: Yes, Your Honor, we would like to respond. I think the initial response is I have to draw a pragmatic concern by completing by the end of the month for a couple of reasons. The most obvious reason, I believe we need to remind the court, is that we still have two transcripts that are outstanding. I don't know that there's going to be any conceivable way that those will be completed by the 31st.

Tauni has been in the hospital, she's late in her pregnancy. I don't even know if she's started on those. We would need to review those and have those be completed before we could even begin to make suggestions as to problems or corrections that needed to be made.

THE COURT: I'm thinking those that we have already, we can complete those, even if we don't get the other ones. Then all we'd have to do is wait for those to be completed to go over.

MR. UDAY: I think that's a lofty goal. There's some other practical problems that we need to address, however. For example, Miss Wells has given me her court schedule for the rest of the month, and the next week, December 10th through the 14th, is she indicates a total impossibility for her to be involved. I think her assistance in this procedure is going to be mandatory. It

is she who went to California and spent the three weeks there, at a great personal sacrifice to herself, as well as the clients that she was presently representing.

She's actually involved in an in-custody trial in Judge Daniels' court Monday and Tuesday, has some vacation scheduled that's long overdue, and will be gone the rest of the week.

Which I think brings to mind another problem that we have. Because the transcripts are still outstanding, because this is December, and the holiday season, I would recommend that yes, we get started as soon as possible. Brooke has indicated that she has some available times during the week of the 17th. I will be available during that week, as well, and I believe Miss Palacios is here to speak to her schedule, so I'll let her do that directly.

But I guess what I'm saying is, as was put on the record the other day when we were here, that Miss Watt had to cancel some schedules, some holiday and vacation time during the Thanksgiving holiday to prepare what we had done today. I think with the other problems we have with transcripts coming, there's no reason to further those kinds of hardships.

I myself have two weeks of vacation still remaining from the year, and in our position, if we don't use that vacation, we lose it. I don't intend to do that,

and will intend to clear next week for this purpose, but I don't think we should make Miss Wells sacrifice the vacation that she has put off when she did go to California to handle this.

But what I would propose is that we begin on this, the week of the 17th, and it was my understanding as we talked the other day that we would be doing this as a group, that we would have the parties involved that would participate in the corrections. And we, as we talked, we believed that it would be better proposed that we could actually do that on the record to eliminate any further problems.

We would have the parties involved, meaning specifically trial counsel for the state, trail counsel for the defense, Mr. Menzies, himself, has obviously expressed a desire to the court to be there and to participate. I think that's of use. Since he recalls particular events during the course of trial, as was indicated at our last hearing, particularly the juror fainting incident, which is going to be an issue on appeal. And I think that those five people and myself who was present at trial, will be able to add some ideas or some memory as to what occurred there that will fashion part of the restoration of the transcript.

And as indicated, I think that the first time the

defense team will be able to get its parties there will be the week of the 17th. Brooke has indicated that that particular week, Monday will be very difficult because of the criminal calendars in the court, here, but Tuesday she would be free during the noon hour from 11:00 o'clock to 2:00 o'clock, and after a particular preliminary hearing is over.

On Wednesday she would be available all day, Thursday all morning, and Friday all afternoon. And I think, knowing her calendar and case load, that that illustrates our willingness to get this started right away. But I think this approaching week will not be possible.

In response to what the state has indicated, I think maybe that'll be appropriate, because it would probably take someone from our office at least a good portion of that week to go through and make these proposals as to the practical kinds of problems that the court has pointed out. And I think that that's a good idea and will help make the stuff starting on the 17th proceed much quicker and cleaner.

If that proposal is acceptable to the court, then we'd have nothing further to add, other than Miss Palacios needs to address the court.

MS. PALACIOS: Your Honor, the 17th I have my Monday calendar. On the 18th I have five in-custody, four

of them are in custody, prelims that I continued because I was in trial on November 27th. I am available Tuesday morning. I have a hearing, but I could reschedule that. I have a trial set before Judge Daniels on the 19th, and as far as I know that's going to go, no offers have been made. But then I would have the 20th, and then I'd have Friday morning, the 21st.

I'm going to be gone the last week in December on vacation. Well, assuming I go to trial, I don't go to trial on Wednesday the 14th. Friday I have my morning calendar. But otherwise- -

MR. UDAY: Your Honor, I think one of the reasons that we had talked about recommending to the court to actually schedule this for perhaps a conference in the jury room with the court reporter would be that it then be a hearing that will be held on the record, the court could order those parties to be there at that time, and that may help, for example, Miss Palacios in working with Judge Daniels to be able to clear some calendar if we need to do that.

But it appears from what he she has said that the soonest she'd be able to get involved would be the 17th as well, with the problems that she's indicated. And as we approach that date, we might be able to address that if we have this court's order to proceed in that fashion.

MR. LARSEN: In response, Your Honor, I think that the defense is unnecessarily complicating this, and I think we can simplify that. Miss Wells, or excuse me, Miss Stubbs has already gone through, started the process of identifying the changes, as I mentioned. And what she has done is cited the page, the line, what the error was, or the alleged error was, and what the proposed change is to be.

That can be done simply, printed out, and we can have a long list. The state puts that together, has Mr. MacDougall review that, including areas that are allegedly unintelligible, allow the Legal Defenders to review that, then we can get together on the 18th, or whatever date is convenient, and then talk about just those areas, as you have mentioned, that we cannot agree on.

I expect that we'll be able to agree on most of those, as I pointed out, case names, numbers, names of persons that are speaking, those kind of things. And I think that would probably be the most efficient process. It would not require really any response at this point from Legal Defenders other than trying to supplement their memorandum with other pages that they allege there are errors that need to be corrected on.

The only fear that I have in this is that it is actually putting the burden on the state to make these

corrections, when it actually should be a defense burden. I want to make clear we're only doing this to expedite the process, we're not taking that burden on, it is still the burden of the defense to come forward with pages and examples of errors that need to be corrected, and they're also supposed to come forward with proposed changes. We will assist in that process for those portions where we think there will be no problem.

THE COURT: In some way you're responding to the changes that they have pointed out to the court, because we have most of that on the record. So those changes that you have no objection to, it will be by stipulation. So we won't have to worry about those. Those changes that you may make that may modify what they have suggested in their testimony, and in the drafts that they have given us, will be something that maybe the two of you can go over to see if you can compromise and come to some agreement.

And if you can't, those are the ones I'd like to sit down on with all of us together and put our collective thoughts and memories to see if we can reconstruct and repair.

MR. LARSEN: The other fear that I have is that when we propose that the number should be twenty-five yards instead of thirty-five yards, I'm not sure whether their response will be, "Well, it's a mere guess that it's

twenty-five, and so we can't stipulate," or they'll say, "Yes, twenty-five is reasonable based on the context that it's in, therefore we'll stipulate to twenty-five." I'm not sure of their position on that.

MR. UDAY: Well, Your Honor, initially let me respond to the idea that it's our burden, and not theirs. I think we've carried forward with our burden, and as you correctly indicated, we've filed a memo, a renewed memo, we filed a motion with proposed changes. I think we've gone forward.

As we indicated the other day at the beginning of the hearing, that our main complaint was that we were proceeded to the December 3rd date without being able to do this Rule 11 process. So we would, at this juncture, inasmuch as our motion hasn't been granted, we're very willing to do the Rule 11 procedure. I don't think that the state has any legitimate concerns about how we'll behave in that process, and I think under Rule 11 it's pretty clear what happens.

If we reach a situation where they believe that the transcript would better read this way, but we're unable to say that that's the way it was testified to, then we're at an impasse, and I think the rule provides that Your Honor will make the decision. And I think that's clear. I don't think that we should be about the business of

creating testimony, and so I know that that will be our position. But if there's a dispute as to what was said, Your Honor will have the last say, and I think that's clear.

THE COURT: My understanding is that- -

MR. UDAY: It's also important, excuse me for interrupting, Judge, but I do want to clarify that we are definitely not conceding that the burden is ours. We've indicated that, to the extent we filed a motion, that we have at least brought to the attention of the court the errors and problems. But as I concluded in an argument the other day, we believe the statute places the burden on the state, inasmuch as there's not a certified court reporter? And that would maintain to be our position.

THE COURT: I think at the point we're at right now, with your putting on in evidence and live testimony the various errors, omissions, and corrections that need to be made, that that sort of advises the state that these are the questions that they have that they want some response to. And so you're doing that right now in having Miss Stubbs going over, and you'll probably go over that yourself. So a lot of things you'll probably just concede.

Because I see a lot of things that you pointed out that should be done. And I think the state probably recognizes that too. So once that's done, then we'll get

to the nitty-gritty of what ones you can't agree upon, and which ones are really substantial that we should all get together and see if we can either repair or reconstruct.

MR. UDAY: I agree. And I don't think that we're trying to complicate this. In fact I think we're proposing exactly what the state is. I mean they have Miss Stubbs working on the technical corrections, that is what we'll be doing during the week of the 10th. And so as Mr. Larsen indicated, along about the 18th or 19th, whatever date we eventually agree upon today, would be the time when we can first come and deal with some of the substantive issues.

THE COURT: What is the earliest date that we can get together on with everybody present that we can start going over the substantive material?

MR. UDAY: From the notes I've just taken, based on what Frances Palacios has indicated, it looked like it would be Tuesday, probably during the late morning to 2:00 p.m., according to Miss Wells. Again, however, on Wednesday, Miss Wells would be available all day. Miss Palacios has indicated that she has a trial scheduled, but it is an out-of-custody case so she might be able to move that, especially if we have the court's order here that we're required to be here on the record, and to handle it in that fashion.

THE COURT: I think most of the judges in this

district are aware of the time constraints, and I'm sure that they'll be willing to accommodate their schedule to allow attorneys to change dates of cases or representation, or whatever has to be done.

MR. UDAY: Based on that, I think probably maybe what we could do is set aside the Wednesday of that week, which would be the 19th, and plan on spending all day and seeing how this progresses and how far along we get.

THE COURT: All right. Wednesday, all day?

MR. UDAY: I believe that we could come prepared for dealing initially with those, all those technical situations that Miss Stubbs is looking at, and that we will have completed at that time, and we can deal with those summarily and move right into- -

And what I think we would propose to do is actually cite the page that we have the problem with, and then as a group of all the trial counsel, and Mr. Menzies and myself, we could try to fashion the- -

THE COURT: If, prior to that time, before we get to a joint meeting to discuss that, if the two of you could get together, if you can kind of give some preliminary notification to them of what the issues would be so they'll be prepared to discuss it on the basis of the merits, and they'll be able to do any research that's necessary.

MR. UDAY: In essence I think we've done that by

listing the pages already. But I think what might even be a better way to approach it is I can be in contact with Miss Stubbs directly and maybe we can exchange the technical corrections that we have, and then if we can maybe better articulate those pages that we'll want to deal with directly.

THE COURT: That seems like kind of a smooth way to go, because you'll always be communicating, and there won't be any duplication.

MR. LARSEN: Your Honor, if I could suggest that we set a particular date that we can file basically a response, then, with Legal Defenders with our proposed changes, and set a time for counsel to get together and discuss those and come up with a stipulation sometime before the hearing.

I would suggest that we file a response to them by the 14th, and that we get together on the 18th, just counsel, off the record, to be able to discuss which pages and lines we will stipulate to corrections, so that we can come into court on the 19th, we'll know exactly which pages are in issue.

THE COURT: In the meantime, from what I gather, Mr. Uday will be communicating with Miss Stubbs so- -

MR. LARSEN: I prefer that he communicated with me.

THE COURT: Either way.

MR. UDAY: That would be fine, Judge. The concern I have is regarding filing something by the 14th. I would indicate that we've filed our renewed motion which indicates the pages that we have some concern about. In that motion we indicated that that wasn't the sum and total of the possible pages we would find, inasmuch as Mr. Menzies hasn't, didn't have a chance to review, or whatever.

I think that as I go through that in preparation for the week of the 17th, I can maybe narrow some of that down, but at this point I wouldn't want to file a more specific motion for concerns of waiving anything or because of the time constraints that we do have. I will still have a calendar next week to deal with.

THE COURT: What Mr. Larsen is saying is that he's going to give you the response to what he feels would be in response to what all the errors, omissions, and so forth that's been pointed out already.

MR. UDAY: Understood.

MR. LARSEN: Also, if maybe perhaps we could set a date for Mr. Uday to serve us with any supplemental pages that they're requesting corrections on, and that that be done prior to the 14th.

MR. UDAY: That, again, I'd be very happy to do

that. Again, with the one week and the 3,300 page transcript, part of that filing would include the idea that I am not waiving anything I'd overlooked. But I would try to get to him any additional pages that I was concerned about, Your Honor.

THE COURT: We'll give both sides an opportunity to preserve anything that, you know, because of the time constraints and also the urgency that I know that all of you are working under pressure, so if anything should come up and we have to have a special hearing for it, we'll set it up so that you can bring that up to the attention of the court.

MR. UDAY: Will we set the 19th, then?

THE COURT: The 19th will be the day. And what time would that be?

MR. UDAY: I think we're prepared to donate our time for the whole day, Judge.

THE CLERK: 8:30.

THE COURT: 8:30?

MR. UDAY: I think that would be fine.

THE COURT: I'm just going to cancel whatever I have, and whoever is on is just going to have to be moved over. But we'll spend all day on it, then. Wednesday at 8:30.

MR. UDAY: And Mr. Menzies will be requesting to

be brought up.

THE COURT: He will be here.

MR. LARSEN: So for the record, Your Honor, is it my understanding that their renewed motion is now being basically considered a Rule 11-h motion for proposed changes, and we're treating it as such, rather than just a renewed motion?

MR. UDAY: Your Honor, I'll respond to that by indicating I believe there are two separate and distinct motions. Nonetheless, the pages that we have cited in there are our concern and illustrate problems that we will have to be discussing. So I think that it can serve that function, those pages, or that motion can serve notice that yes, those are the pages we're concerned about. And as he indicated earlier, I'll try to get something to him by the 14th which would indicate any supplemental pages that I'm concerned about.

MR. LARSEN: Are you referring to a separate motion when you say there are two separate and distinct motions?

MR. UDAY: I think the issue of the renewed motion for mistrial and the Rule 11 are two separate issues. I don't want to mesh the two together. But I think that in articulating the concerns we have had on those pages for the new trial motion, also indicates that

those are the pages we have a problem with that need to be corrected.

THE COURT: Let me just tell you this. That your new trial motion will be taken under advisement until we go through the Rule 11. Because unless I rule on the Rule 11, I won't know how to rule on the new trial.

MR. UDAY: Obviously.

THE COURT: So after the Rule 11 is completed and we have a completed transcript, which I will have to review to determine whether it's one in which the appellate court should review or not, I'll make that determination after we go through the Rule 11 process. And that will be on the 19th.

MR. LARSEN: Okay. I just want to make it clear for the record that the defendant still has the burden to initially propose the changes. A change in the record, Rule 11 says that they need to propose that. Even though we're going to attempt to stipulate to most of those, if they want to.

THE COURT: Well on the 19th I am assuming that all the changes that have to be made, outside of the transcripts that we don't have, will be submitted for us to either repair or reconstruct.

MR. LARSEN: What I'm saying is I would like them to come forward with the proposed changes that we cannot

stipulate to, rather than the state coming forward with the proposed changes.

THE COURT: It may be both of you may make the proposed changes. Because if you can't agree on it, you're going to have your version of what you're going to have done, and that's when we get together and the court will have to make a decision as to which one to accept.

MR. LARSEN: Okay.

MR. UDAY: Thank you, Judge.

(Discussion held off the record.)

THE COURT: Just one additional thing. Who's communicating with Tauni Lee?

MR. LARSEN: We are.

THE COURT: So will you advise all of us of what the progress is so we know about how to maybe schedule any further kind of a hearing?

MR. LARSEN: Yes, I will.

(Recess.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
: SS.
SALT LAKE COUNTY)

I, CECILEE WILSON, an official court reporter for the Third Judicial District Court in and for Salt Lake County, State of Utah, do hereby certify that I reported stenographically the proceedings in the matter of STATE OF UTAH VS. RALPH LeROY MENZIES, Case No. CR 87887, and that the above and foregoing is a true and correct transcript of said proceedings.

Dated this 7th day of January, 1991.

Cecilee Wilson

Cecilee Wilson
Utah License No. 167

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Appendix N

Appendix N

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

BEFORE THE HONORABLE RAYMOND S. UNO

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FILMED

STATE OF UTAH,	:	
PLAINTIFF,	:	CIVIL NO. CR86-887
-VS-	:	
RALPH LEROY MENZIES,	:	
DEFENDANT.	:	

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REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD

FEBRUARY 1 & 10, 1988

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A P P E A R A N C E S

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FILED IN CLERK'S OFFICE
Salt Lake County Utah

REPORTED BY: TAUNI D. LEE, CSR, RPR.
#6770

MAY 31 1988

H. Dixon Hindley, Clerk 3rd Dist. Court
By Ladleen Parker
Deputy Clerk

001152

SEP 10 1988

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ADDENDUM 80

THE COURT: WOULD THAT PREVENT YOU FROM SITTING IN ON THIS CASE AND TRYING THIS CASE ON ITS MERITS?

A JUROR: NO.

THE COURT: DO YOU FEEL YOU CAN LISTEN TO THE EVIDENCE AND THE EVIDENCE ALONE TO REACH A FAIR AND IMPARTIAL VERDICT?

A JUROR: YES.

THE COURT: NEXT.

A JUROR: LINDA SILLITO. YEARS AGO MY FATHER, ROBERT ~~BRULLER~~ Bueller, ~~WAS A~~ SERGEANT WITH THE SALT LAKE CITY POLICE DEPARTMENT, AND PROFESSIONALLY DURING THE LAST TWO YEARS, I HAVE SPENT A GREAT DEAL OF TIME WITH FOUR INVESTIGATORS ON ANOTHER CASE INTERVIEWING.

THE COURT: WHAT ARE THEIR NAMES?

A JUROR: DETECTIVE T. KEN FARNSWORTH, JIM BALLER, SERGEANT MIKE GEORGE, AND SERGEANT DICK FORBES.

THE COURT: WOULD THAT PREVENT YOU FROM SITTING IN ON THIS CASE AND TRYING IT ON ITS MERITS?

A JUROR: NO.

THE COURT: DO YOU FEEL YOU CAN LISTEN TO THE EVIDENCE AND THE EVIDENCE ALONE TO REACH A FAIR AND IMPARTIAL VERDICT?

A JUROR: YES.

THE COURT: NEXT.

A JUROR: TONI VELASQUEZ. MY FATHER IS A

Jane ?. Blrb. Blrb.

* Blrb - T began 19A2a not taking exact words for repeated Qs.

LIEUTENANT WITH THE PRICE CITY POLICE DEPARTMENT. I AM CLOSE FRIENDS WITH A DETECTIVE WILLY ON THE PRICE CITY POLICE DEPARTMENT.

THE COURT: WOULD THAT PREVENT YOU FROM SITTING IN ON THIS CASE AND TRYING IT ON ITS MERITS?

A JUROR: NO.

THE COURT: DO YOU FEEL YOU CAN LISTEN TO THE EVIDENCE AND THE EVIDENCE ALONE TO REACH A FAIR AND IMPARTIAL VERDICT?

A JUROR: YES.

THE COURT: ~~ANYONE ELSE?~~

~~THE RECORD SHOULD SHOW THAT NO ONE ELSE HAS RAISED HIS OR HER HAND.~~

FOR THOSE WHO RESPONDED, IS THERE ANYTHING ABOUT THE FACT THAT YOU HAVE RELATIVES AND FRIENDS WHO ARE POLICE OFFICERS OR ASSOCIATED WITH LAW ENFORCEMENT AGENCIES THAT WOULD INFLUENCE YOU IN ANY WAY HERE TODAY? IF SO, PLEASE RAISE YOUR HAND.

THE RECORD SHOULD SHOW THAT NO ONE RAISED HIS OR HER HAND.

WE WILL HAVE TO TAKE A FIVE-MINUTE BREAK, STANDING BREAK. THE REPORTER JUST NEEDS TO CHANGE HER REPORTER PAPER.

(SHORT BREAK.)

THE COURT: I WILL JUST ASK A FEW MORE

STATE OF UTAH)
SS
SALT LAKE COUNTY)

C E R T I F I C A T E

I, TAUNI D. LEE, OFFICIAL REPORTER OF THE STATE OF UTAH, COUNTY OF SALT LAKE, HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE WITHIN-ENTITLED MATTER.

DATED: 5-27-88

Tauni D. Lee

TAUNI D. LEE, CSR, RPR.
LICENSE #6770