

1 THE COURT: Ladies and Gentlemen of the  
2 Jury I will now read to you, the  
3 Jury Instructions which is the law  
4 that applies in this case.

5 AT THIS TIME, the Court read to the Jurors, the Instructions  
6 given by the Court in this matter, being 29 in number,  
7 and after which time, the following proceedings were had:

8 THE COURT: At this time, counsel will  
9 give their closing statements to the  
10 Jury. You may proceed, Mr. Racicot.

11  
12 CLOSING STATEMENT GIVEN BY MR. RACICOT

13  
14 BY MR. RACICOT: This has been a long week I am sure for  
15 everybody in this trial and I would like to thank all of you  
16 for your attention to all of the matters that have been  
17 presented here and to take time out of your own schedule  
18 and sacraficing your time for our system of justice that you  
19 all believe in, and I also thank you for your patience with  
20 all of us. I realize that we not only try the facts in a  
21 case, but many times lawyers will try your patience on  
22 occasions, and we all here appreciate your patience and  
23 your consideration here. The Judge this morning has read to  
24 you the law that applies to this case. What we, as lawyers  
25 say about the facts, you are to remember, is not evidence.

1 You, the jurors in this case, are the sole judges of the facts,  
2 and to these facts, you must apply the law as read to you by  
3 Judge Sorte. Now secondly, the Judge also told you about  
4 setting aside any thoughts of sympathy, prejudice, passion,  
5 mercy and public opinion or anything like that with arriving  
6 at your decision, your verdict, in this case. Again, that is  
7 very important. I ask you to keep that in mind in your  
8 deliberations. Thirdly, the Judge has instructed you that  
9 what you believe as men or women is important, in considering  
10 your verdict in this case. Remember what I say here, what  
11 Mr. Moses says here or what the Judge has commented upon, has  
12 nothing to do with the evidence in this case. The evidence  
13 that you are to consider came from this witness stand here  
14 (pointing to the witness stand). Those are the facts in this  
15 case. I have nothing to do with it, Mr. Moses doesn't nor  
16 does Judge Sorte. You are to decide the facts in this case.  
17 It is in your sole province. Now then, what you have to  
18 determine here is "Did the Defendant commit this crime, and  
19 in so doing, you must set aside thoughts of sympathy, passion,  
20 prejudice, mercy and public opinion. Your decision must be  
21 based only on the evidence that has been adduced from this  
22 witness stand. So then, this all boils down, essentially, to  
23 two essential questions; and depending on how you answer those  
24 two simple questions, everything else is dispensed with. Those  
25 two questions concerns the defendant and his confession and as

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1 the Judge instructed you, "If the confession is voluntarily  
2 made" and "if his confession is true", and there is simply  
3 nothing left to determine. Now there has been attempts to  
4 divert your attention away from your consideration. There  
5 has been evidence offered or suggested to you that the  
6 footprints at the railroad park area are significant to this  
7 case. There has been efforts to suggest to you that a bloody  
8 towel is important to the determination of this case. The  
9 palm prints found on the truck will provide some clue to the  
10 viciousness slaying of Kimberly Ann Nees and the defendant  
11 wants you to think that because the defendant's blood and  
12 fingerprints were not found in the pickup that there is no  
13 connection between the death of Kimberly Nees and the  
14 defendant and then also, the attempted character assassination  
15 on occasion of some of the witnesses or the frame up or the  
16 attempted frameup of Albert Goose Kirn or Greg Norgaard. Now  
17 then all that type of evidence is designed to deflect your  
18 attention away from the two essential questions involved here,  
19 concerning the confession. Was it voluntarily made? And is  
20 it true? Now as was pointed out to you by the testimony of  
21 Sheriff Mahlum in this case, the facts of the matter are that  
22 because of jurisdictional problems involved and the failure  
23 of some persons to direct this investigation, the footprints  
24 at the scene of the crime have actually no value whatsoever.  
25 Nobody knows what kind of shoes the different police officers

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1 had on from five different agencies. Nobody knows whether  
2 those footprints were from Kimberly Nees, or the defendant,  
3 and nobody knows who all walked through the drag trail and  
4 so the footprints at the scene of the crime, although they  
5 may have been significant had they properly been treated at  
6 the scene, have no probable value here at all, unfortunately.  
7 The blood in the pickup and at the scene as Sheriff Mahlum  
8 testified yesterday was that of Kimberly Nees. All of it.  
9 The blood on the towel was not that of either Kimberly Nees  
10 or the Defendant. Nobody knows when the towel was found,  
11 where it was found and then after it was placed in custody,  
12 it became contaminated and essentially useless. As far as  
13 the lack of blood in the pickup, what would one expect? The  
14 defendant's blood, of course, would not be there. It was not  
15 he who was savagely beaten and attacked. He was the one  
16 wielding the weapon. It was the blood of the victim, Kimberly  
17 Nees that was in the pickup. I don't believe that is too  
18 hard to understand. Another suggestion he made to you, is  
19 that the bloody palm print on the exterior of the pickup  
20 is somehow related to some unknown phantom killer or mystery  
21 man other than the defendant that we don't know about. Mr.  
22 Mahlum pointed out to you that that palm print, was not only  
23 the print of the twelve suspects, but that it could very  
24 well have been the palm print of Kimberly Nees. The examiner  
25 could not exclude her as having left that print. In additon,



1 the fact that the defendant's fingerprints were not in or on  
2 the pickup is not so hard to understand when you consider  
3 his statement to Sgt. Via, that he wiped the pickup off with  
4 the sleeve of his shirt. He made a specific effort to remove  
5 that kind of evidence from the scene of the crime, and there  
6 is even some evidence through the testimony of Red Wilson  
7 that there was this bloody fingerprint on the interior of the  
8 pickup and so the fact is that the footprints, the fingerprints  
9 and the blood evidence didn't provide a clue as to who killed  
10 Kimberly Nees. Maybe they could have, and maybe they should  
11 have but the fact is, they were not properly collected. That  
12 is why it took three and a half years to find out who killed  
13 Kimberley Nees. All of the attempts to eliminate the  
14 defendant from participation in this crime by stating that  
15 the physical evidence doesn't tie him into the crime, means  
16 nothing. The physical evidence, meaning the bloody fingerprints,  
17 and the footprints that I just talked about, couldn't have  
18 linked anybody to the crime because of the way they were  
19 secured and treated. And that is a fact, and it was stated  
20 by Sheriff Mahlum. Now the attempt to frame Goose Kirn or  
21 Greg Norgaard as the killers in this case, is equally  
22 ludicrous. The only evidence that was presented was an  
23 attempt through Calib Gourneau and Joanne Jackson and even as  
24 it was suggested to them, didn't point the truth to Goose  
25 Kirn, or Alberg Goose Kirn and Joel Sparvier provided an

1 absolute alibi defense for Greg Norgaard. He said he saw  
2 him within minutes after he heard the screams in the park  
3 area, if he heard the screams, so all of that testimony  
4 illustrated, on the cross examination of the state's witnesses,  
5 and Joanne Jackson, and there was Joel Sparvier and there  
6 was Maybelle Sparvier, even though by good intentions, that  
7 testimony illustrated just how the rumor mill in a small  
8 town operates. One rumor stacked on top of another rumor.  
9 Everybody wanted to be in the know., filling in the details  
10 themselves and they told the police certain things, and you  
11 saw and heard them testify here yesterday, but remember, when  
12 they came in here, they weren't sure, maybe it was something  
13 else. How could they hear a whisper a half a mile away  
14 when they were watching a musical variety program on television?  
15 Everybody wants to help, but they allowed these rumors to  
16 multiple geometrically, each person contributing his own  
17 little bit and that is all of the testimony, everybody sitting  
18 around and picking out their own suspects without any factual  
19 basis whatsoever and then calling the police, and being  
20 interviewed by the police and telling them what they thought.  
21 But that is really what all of that testimony demonstrated.  
22 That's why there were twelve different suspects to this ✓  
23 thing and that's why there were over eighty-five documents  
24 and interviews generated by the FBI, because there was no  
25 physical evidence linking anybody and because of the wild

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1 speculation on the part of the highschool kids and the people  
2 of Poplar. So all of that, that I have just discussed really  
3 has very little to do with this case. This was merely an  
4 effort to deflect attention way from the essential and central  
5 issue, which are, was there a confession given, and was it  
6 given voluntarily. Now preliminarily, I would like to point  
7 out to you and I refer to Instruction Number 24 where Judge  
8 Sorte instructed you that you are instructed that the guilt  
9 of the defendant cannot be established alone by any confession  
10 or admission made by him outside of this trial. Before any  
11 person can be convicted of the criminal offense there must be  
12 proof that the crime in question was committed. Now what that  
13 means is that before a confession can serve as a basis for  
14 conviction, you had to be convinced that a crime occurred.  
15 And the rule for that is simple because if a person comes in  
16 and confesses to a murder when there is no body, the law  
17 simply states that we will not punish for that kind of a  
18 confession. You can't base your conviction on someone coming  
19 in and confessing to something that didn't happen. What that  
20 instruction says is that a death must have occurred by criminal  
21 means. I think that we did that, proved that, through Doctor  
22 Pfaff. Then, the confession can serve as a basis for  
23 conviction, and I think that it is important to point that out  
24 because I am not sure that the instruction is all that clear,  
25 and so with that in mind, let's proceed through an analysis

1 of the defendant's confession, which is the focal point of  
2 this whole inquiry. There is no doubt about the voluntarilness  
3 of that confession. The defendant was warned over and over  
4 and over again, as you heard the officers from the State of  
5 Louisiana testify, of his rights. That he had a right to  
6 remain silent. That he had the right to have an attorney  
7 present during questioning; that if he couldn't afford an  
8 attorney, one would be appointed for him, without cose, by  
9 the court; he was advised that with or without counsel, that  
10 during the questioning that he could stop at any time he  
11 wanted to without saying why he wanted to stop. He was  
12 advised of those rights over and over and over again. The  
13 law enforcement officers down in Louisiana did everything  
14 possible in advising him of these rights. There is absolutely  
15 no evidence of any threats made to the defendant, no promises  
16 made to the defendant. You remember the other day when Sgt.  
17 Via was on the stand and this confession was read to you by  
18 him and I. "Now Barry, are you aware that everything we are  
19 saying is being recorded?" Answer: "Yes sir". Question: "Is  
20 that with your consent?" "Yes sir". "Are you also aware that  
21 you have not been arrested, but that you are a suspect and we  
22 are going to question you regarding this homicide in Montana?";  
23 Answer: "Yes sir.". "Prior to any questioning regarding this  
24 particular homicide, have you been advised of your  
25 constitutional rights?" Answer: "Yes sir". "Did I personally

1 advise you of those rights?" "Yes sir". "And have you been  
2 advised of those rights on numerous occasions?" "Yes sir".  
3 "Barry, before we actually into the body of the statement,  
4 I need to know a little background about you. How far did  
5 you go in school?" "The twelfth grade.". "And did you  
6 complete the twelfth grade?" "Yes sir, I graduated from  
7 Poplar High School.". "Are you able to read, write and  
8 understand the English language" "Yes sir"; "Can you pick  
9 up a newspaper and read it and understand what is in it?".  
10 "Yes sir" "Do you have any difficulty in understanding  
11 anything that is going on?". "No, sir!". "Okay, are you  
12 presently under the influence of any alcohol or narcotic?";  
13 "No Sir". "Okay, and is it your desire to continue with this  
14 statement at this time?" "Yes sir". "Now Barry, has anyone  
15 forced you in any way to give this statement?" "No sir".  
16 "Has anyone threatened you in any way to give this statement?"  
17 "No sir". "Has anyone promised you anything in return for  
18 giving this statement?" "No sir". "And again, is it your  
19 desire to continue?". "Yes sir". Now then, these same rights  
20 were advised him even before this recorded statement was  
21 given, and he understood them. When the statement was  
22 recorded, he was again advised of those rights, and he under-  
23 stood them. He was advised of his rights over and over again,  
24 and so there is no question at all about the voluntariliness  
25 of the Defendant's confession. Then later on, on January 8th,

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1 when Sergeant Via talked to him again, and advised him of his  
2 rights again, at that time he didn't want to talk to him.  
3 This was after he had given his confession. He had a lawyer  
4 now and at that time he didn't wish to make any statement.  
5 It also demonstrates just how clearly the Defendant under-  
6 stood his rights, he was knowledgeable in his rights, other-wise  
7 why did he exercise his right not to talk on the 8th when he  
8 got his lawyer? Thirdly, consider his knowledge and under-  
9 standing of his rights and the voluntarilness of his labor,  
10 in view of the fact that four days after he confessed to this  
11 crime and three days after he had secured a lawyer on January  
12 11th, 1983 he waived his rights again and spoke very clearly  
13 about the homicide; in his interview, with Lt. Joe Cumming  
14 he related again, his involvment in the homicide in Montana.  
15 There was also mention made as to January 7th, when the  
16 confession was taken, that this interview was for six hours  
17 and that it was too long. It has also been suggested to you  
18 that perhaps the defendant may have had a mental problem and  
19 somehow, it is not clear to me yet, that effected either his  
20 waiver of his rights, or his recollection of the events. Now  
21 if you look closely to the statement I am sure you will  
22 realize the context of that statement. The appropriatness  
23 of his responses to the questions, the language that he used,  
24 demonstrates his articulate and lucid responses to all of the  
25 questions. There is no question about that. Similarly,

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1 when you consider the fact of the six hour interview was  
2 broken up for coffee breaks, rest room breaks, rest breaks,  
3 cigarette breaks, snack breaks throughout the entire time,  
4 voluntariness becomes self evident; and thirdly, when you  
5 consider that fact that on the 11th of January, 1983, the  
6 defendant, with his lawyer sat through another five and a  
7 half hour interview, from around four o'clock up until around  
8 9:30 as Sgt. Via said, his lawyer, the defendant's lawyer  
9 made no mention of the interview being too long, then it  
10 doesn't take long to realize that six hours is not a lengthy  
11 time; and so that the voluntariness of the confession  
12 becomes very self evident, and that is the first question  
13 that you must determine, whether the confession was voluntarily  
14 given. If it wasn't voluntary, then you can't consider it,  
15 and so this seems to me is the priority of business here, to  
16 first determine voluntariness. Now there are three  
17 statements or three circumstances that we are talking about,  
18 as to the defendant's confession, and I am not sure if all of  
19 it is clear to you from the testimony. First of all, the  
20 defendant was interviewed on January 7th, and the tape was  
21 transcribed and it was read to you here in court by Sergeant  
22 Via and myself. It was a lengthy statement and we will  
23 discuss it in detail in a moment. Secondly, on the 11th  
24 of January, 1983, and at his lawyer's request, and with his  
25 lawyer present, the defendant on more than one occasion admitted

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1 involvement in the death of Kimberly Nees to Sgt. Via, who  
2 heard it several times, and to Lt. Joe Cumming; now the  
3 third incident we are talking about here involved the  
4 supposed confession of the defendant to the three Louisiana  
5 homicides. That occurred on January 20th. The defendant  
6 never said any of those things, the defendant's lawyer in  
7 Louisiana told the police that his client had a split  
8 personality and that he had committed the three homicides down  
9 in Louisiana and then went on to allow, foolishly, that this  
10 was designed as a ploy to shore up the defendant's defense  
11 of mental disease or defect insanity plea here in Montana.  
12 So that is what we had here, we have a mass murderer and  
13 anybody that would do these kind of things was obviously  
14 crazy. Those are the three circumstances that we have; we have  
15 the January 7th statement, the January 11th admission and then  
16 the lawyer from Louisiana boldly and outlandish attempt to  
17 present this ploy of defense to the death of Kimberly Nees.  
18 Now if you take a look at the confession of the defendant to  
19 determine whether it is true it becomes inescapable. He  
20 cooperated over and over and over again and by other evidence.  
21 The defendant's confession -- in his confession, the defendant  
22 confessed that he was out with Calib Gourneau and Shannon  
23 O'Brien on the afternoon of June 15th, 1979; that he was  
24 drinking; that he was at Sandy Beach near Poplar and that his  
25 car got somehow disabled. That he beat on the car with his

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1 fists, and threw beer bottles at his car, and then walked  
2 back to town, got cleaned up and then he found Kimberly Nees  
3 and that he talked to her, and that they went together down  
4 to the park area west of Poplar, that he made advances toward  
5 her and she resisted his advances and it resulted in a  
6 struggle with him hitting her over and over again, that  
7 she escaped from the pickup and went around to the other  
8 side of the pickup, and then even in her damaged condition,  
9 he tried to make advances to her; she resisted and she was  
10 choked by him, struck by the defendant tried to escape from  
11 him, he tackled her and beat her over and over again on the  
12 passenger's side of the pickup. That he checked to see if  
13 she was still alive, and she was motionless, and that he  
14 tried to put her into a garbage bag, and then dragged her to  
15 the edge of the river bank and pushed her over the edge and  
16 then coming back and destroying the evidence. All of the  
17 wounds on the head and on the hands, over thirty areas of  
18 wounds; he intended to kill in the very beginning. There were  
19 no other injuries on the trunk and limbs. This was no  
20 mistake. It was this desire to kill from the very beginning;  
21 and he described all of this in the minutest detail. First  
22 of all, Sheriff Mahlum testified yesterday that the defendant  
23 knew facts that had never been revealed to the public. He  
24 knew facts that even the law enforcement officers didn't know  
25 because the FBI had the investigative reports and files. In  
addition, Red Wilson to you that the defendant's mother told

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1 him that the defendant, on the morning after the homicide  
2 occurred, that her son came hom with blood on him. That of  
3 couse, she did deny here on the stand. Of course whe would  
4 deny that. You don't have to make much of a determination  
5 here as to who is telling the truth. You should judge their  
6 interest in the case, their appearance on the witness stand,  
7 and you will have to decide 'just who is telling the truth  
8 here in this case. His confession is corroborated over and  
9 over again by the independent evidence in this case. The  
10 defendant, in his statement, said he saw Kimberly Nees at  
11 the Exxon Station and that that was where he got into the  
12 pickup she was driving. Steve Schagunn testified that he  
13 saw Kim Nees at the Exxon Station in Poplar, approximately  
14 12:30, and he was the last one to see Kimberly Nees alive,  
15 with the exception of the Defendant. The defendant stated  
16 that he killed Kim Nees before he threw her into the river.  
17 Doctor Pfaff confirmed that. That there was no evidence of  
18 drowning. The defendant attempted to have sexual intercourse,  
19 and he stated that in his confession, with Kim Nees but she  
20 refused him and he killed her because she resisted his sexual  
21 advances. Doctor Pfaff confirmed this, because there was no  
22 sexual intercourse. The defendant said in his statement,  
23 that he hit Kim Nees over and over and over again with a  
24 crescent wrench on the head, inside the pickup. Not just a  
25 crescent wrench, he described it as a twelve inch chrome

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1 crescent wrench. He knew specifically, the intimate details  
2 about this crime. Doctor Pfaff confirmed that these wounds  
3 and these contusions and injuries were consistent with  
4 injuries from a 12 inch crescent wrench. Red Wilson testified  
5 about the gouge marks in the ceiling of the pickup and on  
6 the steering wheel. The defendant in his statement said he  
7 first hit Kimberly Nees inside of the pickup and he had pulled  
8 her over to him and then hit her. There was blood all over  
9 the inside of that pickup. This is corroborated with all of  
10 the other evidence. Ted Nees that there was a 12 inch chrome  
11 crescent missing after his daughter's death. The defendant  
12 stated that he was on the passenger's side of the pickup,  
13 and Kimberly Nees was behind the steering wheel. Doctor Pfaff  
14 confirmed that confirmed this, that the injuries were caused  
15 by someone seated in the passenger's side of the vehicle. The  
16 defendant stated there was a struggle inside the truck and  
17 that he was hitting Kim Nees inside the pickup. Doctor Pfaff  
18 confirmed this, that the injuries to Kim Nees indicate a close  
19 struggle and that the injuries were inflicted by short blows  
20 indicating a close struggle but that these short blows were  
21 capable of literally fracturing bone every time it was done.  
22 The defendant stated that he pounded the defendant, ~~K~~excuse  
23 me, Kim Nees with a tire iron. Doctor Pfaff confirmed that  
24 these injuries to the back of the neck and some of these  
25 other injuries were consistent with being inflicted with a tire

1 iron. In his statement, the defendant said -- in his  
2 statement he said, when asked where he hit her and he said  
3 anywhere and everywhere he could. He was asked how he was  
4 positioned in the vehicle, and he said he was on the  
5 passenger's side of the pickup and asked where he had hit  
6 her and he said on the side and the back of the head. Again,  
7 corroborating. Ted Nees testified that there was such a tire  
8 iron in his truck and that it was missing; and the Defendant  
9 said when he was beating Kimberly Nees, she was screaming and  
10 covering up her head, and Doctor Pfaff testified to you about  
11 these defensive wounds on her hands; the defendant stated  
12 that after he had killed Kimberly Nees, he drug her to the  
13 edge of the river bank, and he rolled her over the edge. Doctor  
14 Pfaff demonstrated to you the post mortem injury, the one  
15 that was inflicted after death on Kim's back. Red Wilson told  
16 you that there were no footprints down the side of the bank,  
17 and that there was no splattered blood marks down the edge  
18 of the bank, again, the minutest details, which was confirmed  
19 by the observations of the officers. The defendant in his  
20 statement told about putting this garbage bag over the head  
21 and shoulders of Kimberly Nees, and obviously then there would  
22 be no blood along the drag trail. Remember that the officers  
23 found blood spots by the pickup and then over by the river  
24 bank, which makes it obvious the presence of the garbage bag  
25 that the defendant spoke about. All this shows someone that

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1 was very very intimate and knowledgable with this particular  
2 crime. Only the person who committed this crime would have  
3 known all of these details. He said that they were parked  
4 down by this river park area, and the pickup truck when it  
5 was found, was in park, the radio was on, the CB was off,  
6 and the heater was on, and all of those were consistent with  
7 two people sitting in a pickup in a stationary position.  
8 The defendant said he took the keys from the pickup and the  
9 weapons that he had used on Kimberly Nees and threw them into  
10 the river, and that explains why law enforcement officers were  
11 unable to find them. The defendant said he removed Kim Nees'  
12 purse from the pickup and laid it outside the pickup and that  
13 has been confirmed where it was found by independent evidence  
14 in this case. All of these things he said in his confession.  
15 He said he wiped his fingerprints off the vehicle, and none  
16 of his prints were found. On each of these things, the  
17 defendant mentioned something about it in his confession, and  
18 in each area it is corroborated by other evidence. There is  
19 simply no question about the truth of his confession; and he  
20 said he wiped all of his fingerprints off, and none of his  
21 were found. On each of these details that I have just  
22 related to you, the defendant stated something about it in  
23 his confession, again, these were corroborated by other  
24 evidence. This confession by the defendant explains in minute  
25 detail all of these things and the attempt to try to explain

1 it away by confessing to three other murders in Louisiana  
2 really stinks. He and his lawyer down in Louisiana must  
3 take us up here in Montana to be fools! The bottom line,  
4 Ladies and Gentlemen, is that the Defendant has been afforded  
5 due process and a fair trial. It has been proved beyond any  
6 doubt, much less a reasonable doubt, that he condemned  
7 Kimberly Ness at the age of seventeen, to death. He grasped  
8 for what he wanted and when he did that, he didn't get it,  
9 he repeatedly and unmercifully beat her to death. Decent  
10 men and women cannot explain nor understand how one person  
11 can be so cruel or inhuman to another person, but decent men  
12 and women can hold that person accountable and that is what  
13 we are asking you to do here today, by bringing in a verdict,  
14 holding the defendant accountable. Thank you.

15 THE COURT: Let's take a short recess  
16 here, we've been at it for way over  
17 an hour. (Court admonishes the Jury)

18 COURT STOOD IN RECESS from the hour of 10:05 o'clock AM  
19 until the hour of 10:15 o'clock A.M., after which time,  
20 the following proceedings were had:

21 THE COURT: Court is in session, May  
22 it be stipulated that the jury is all  
23 present and that the defendant is  
24 present?

25 MR. RACICOT: Yes, we so stipulate, Your Honor.

MR. MOSES: Yes, we so stipulate.