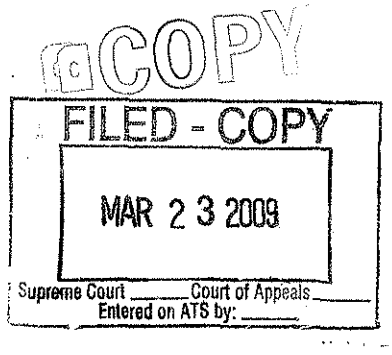
3-23-2009

State v. Eldred Respondent's Brief Dckt. 34718

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 34718
	)	
vs.	)	
	)	
SHARON KAY ELDRED,	)	
	)	
Defendant-Appellant.	)	
	)	



BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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Eldred said something unintelligible to Mr. Jones, shut her door, re-started her car, and left the parking lot, running over some flower beds on her way. (Trial Tr., p.54, Ls.13-17, p.57, L.1 – p.58, L.15.) Mr. Jones again followed Eldred in his car, re-contacting the 911 dispatcher to update law enforcement on Eldred's route. (Trial Tr., p.58, L.16 – p.59, L.21.) Mr. Jones continued to observe Eldred's erratic driving as she drove from Nampa to Middleton, where she pulled up to a house, got out of her car and walked into the house. (Trial Tr., p.59, L.2 – p.67, L.5.)

At about the same time, Canyon County Sheriff's Office Corporal Chamberlain arrived, parked and called to Eldred, "sheriff's department" several times as Eldred continued to walk toward and into the house. (Trial Tr., p.66, L.12 – p.67, L.18, p.96, L.1 – p.100, L.13.) Corporal Chamberlain followed Eldred into the house and found her sitting in a chair. (Trial Tr., p.101, L.1 – p.102, L.7.) After speaking with Eldred and noting the odor of an alcoholic beverage coming from her, as well as observing her glossy and red eyes and slurred speech, Corporal Chamberlain asked Eldred to perform field sobriety evaluations. (Trial Tr., 103, L.17 – p.108, L.25.) After escorting Eldred out of the house, Corporal Chamberlain attempted to perform the horizontal gaze nystagmus but could not get Eldred to stop leaning against her car and stand in the beginning position for the test. (Trial Tr., p.110, Ls.4-23.) As Corporal Chamberlain repeatedly tried to administer the field sobriety evaluations, Eldred failed to comply with the instructions and became argumentative. (Trial Tr., p.110, Ls.12-22.) When Corporal Chamberlain attempted to place her in

ISSUE

Eldred states the issue on appeal as:

> Did the State violate Ms. Eldred's right to a fair trial, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 13 of the Idaho Constitution, by committing multiple acts of prosecutorial misconduct during the *closing arguments*?

(Appellant's brief, p.4.)

The state rephrases the issue on appeal as:

Has Eldred failed to show error, much less fundamental error, in relation to the prosecutor's closing arguments?

evidence" or "implicate[s] other specific rights of the accused such as the right to counsel or the right to remain silent." Id. at 181-82.

However, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1, 11 (1985). Thus, the Court must consider the probable effect that the prosecutor's argument "would have on the jury's ability to judge the evidence fairly." Id. at 11-12.

With respect to prosecutorial misconduct in the context of closing argument the United States Supreme Court has stated:

> Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-47 (1974).

The Idaho Supreme Court has recently reiterated the importance of reviewing closing arguments in light of their improvisational nature, noting that "in reviewing allegations of prosecutorial misconduct [the appellate court] must keep in mind the realities of trial." State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007) (*quoting* State v. Estes, 111 Idaho 423, 427-28, 725 P.2d 128, 132-33

> Prosecutorial misconduct rises to the level of fundamental error if it is calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. More specifically, prosecutorial misconduct during closing arguments will constitute fundamental error only if the comments were so egregious or inflammatory that any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded.

State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003) (citations, quotations, and brackets omitted).

Application of the foregoing standards to Eldred's claims of prosecutorial misconduct reveals she has failed to establish error, much less fundamental error.

D. None Of The Prosecutor's Statements Eldred Complains Of Were Improper, Much Less So Egregious Or Inflammatory That Any Consequent Prejudice Could Not Have Been Cured By A Curative Instruction

Eldred claims the prosecutor struck "multiple foul blows" that "amounted to fundamental error." (Appellant's brief, pp.5, 7.) The comments that Eldred complains of were not improper, much less "foul blows" or misconduct amounting to fundamental error. All of Eldred's misconduct claims lack merit.

1. The Prosecutor Did Not Misstate The Burden Of Proof, Express Her Own Belief In Eldred's Guilt Or Make An Impermissible Reference To The "Cloak Of Innocence"

Eldred claims the prosecutor misstated the burden of proof, impermissibly expressed her personal opinion regarding Eldred's guilt and impermissibly referred to the "cloak of innocence" being lifted. (Appellant's brief, pp.8-9.) All of these claims fail, as the prosecutor's statements were proper. The comments

The authority from other jurisdictions relied on by Eldred is largely unsupportive of her claim in this case. In People v. Brooks, 803 N.E.2d 626 (Ill. App. 2004), for example, the prosecutor simply told the jury, without reference to the evidence or having met his burden of proof, that the "cloak of innocence is *gone*." *803 N.E.2d at 630.* The Appellate Court of Illinois condemned the remarks of the prosecutor in part because "the argument did not indicate that after hearing the evidence the defendant was no longer cloaked in innocence." 803 N.E.2d at 630 (emphasis *supplied*). *In doing so, it distinguished the* comments made by Brooks' prosecutor with those made by the prosecutor in People v. Cisewski, 514 N.E.2d 970 (Ill. 1987). In that case, the Supreme Court of Illinois found no error in the prosecutor's closing statement that "[n]ow is the time, Ladies and Gentlemen, to remove the cloak of innocence from this defendant ...,", in large part because it considered the prosecutor's comments in their entirety and noted that, immediately prior to making this statement, the prosecutor exhorted the jury to "consider all of the evidence...." 514 N.E.2d at 977. *See also* People v. Weatherspoon, 637 N.E.2d 651, 657 (Ill. App. 1994) ("The record read in its entirety shows the prosecutor committed no error by relating to the jury that although every defendant comes to trial cloaked with a presumption of innocence, the evidence presented in this case lowered the cloak to reveal defendant committed the crimes at issue.").

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prosecutor's comment could be misconstrued by a jury... any ambiguity could easily have been remedied on objection by a clarification from the trial court. Thus, we will not consider this issue further.").

discussing the evidence the state had presented that satisfied its burden. (Trial Tr., p.218, L.24 – p.225, L.24.) The prosecutor's statements were not improper or misconduct.

Eldred next claims that the prosecutor's statement, in the same set of remarks, that "Eldred is guilty" is an improper expression of her own belief in Eldred's guilt. (Appellant's brief, p.9.) However, Idaho law is clear that a prosecutor may make such a statement when it is based upon the evidence. State v. Pizzuto, 119 Idaho 742, 753 n.1, 810 P.2d 680, 691 n.1 (1991), *overruled on other grounds by* State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991). The Idaho Supreme Court further cautioned prosecutors making such a statement to take care to avoid interjecting their own personal belief, and "should explicitly state that the opinion is based solely on inferences from evidence presented at trial." Id. The prosecutor in Eldred's case did just that, first providing the context that the state had the burden to prove Eldred's guilt by the presentation of evidence, then stating that it had been so proven, and immediately discussing the evidence that established Eldred's guilt. (Trial Tr., p.218, L.12 – p.226, L.19.) As with the prosecutor's much more emphatic statements in State v. Wolfrum, 145 Idaho 44, 175 P.3d 206 (Ct. App. 2007) ("If this man is not convicted of perjury, who can be?"), "[n]ot only are the prosecutor's statements not fundamental error, they are non-objectionable." Wolfrum, 145 Idaho at 49, 175 P.3d at 211.

Finally, Eldred claims that the prosecutor's statements regarding its burden of proof are improper. More particularly, Eldred claims the prosecutor's

discussion of the state's burden in State v. Romero-Garcia, 139 Idaho 199, 75 P.3d 1209 (Ct. App. 2003): "Romero-Garcia has failed to persuade this Court that any misconduct occurred. The prosecutor reiterated what the district court had already instructed – that the state bears the burden of proving every element beyond a reasonable doubt and that the defendant has no obligation to present evidence." Romero-Garcia, 139 Idaho at 203, 75 P.3d at 1213. *See also* Darden v. Wainwright, 477 U.S. 168, 182 n.15 (1986) (comments that lead the jury to minimize the importance of its role are improper, but where "[i]f anything, the prosecutors' comments would have had the tendency to increase the jury's perception of its role," no error). The prosecutor in Eldred's case emphasized that the presumption of innocence was significant and that the state alone has the burden of presenting evidence to remove that presumption. The prosecutor did not engage in misconduct. Eldred's claim fails.

2. The Prosecutor Did Not Misrepresent The Evidence

Eldred claims that the prosecutor, in her rebuttal closing argument, "misrepresented the evidence" when she said that Eldred "refused to blow" when the officer administered the BAC test. (Appellant's brief, p.9.) Because the prosecutor was entitled to discuss the evidence presented at trial, and the reasonable inferences that can be derived from that evidence, the prosecutor did not engage in misconduct by these statements. Eldred's claim fails.

Eldred's closing argument put forth two theories: first, that her erratic driving was due to her fright at being followed by Mr. Jones, and second, that her .264 BAC was artificially high because the printout from the Intoxilyzer 5000

> And why? Because she didn't want to blow properly. She refused to blow properly.
>
> He would start to get the tone, and then it would drop off.

(Trial Tr., p.233, L.15 – p.234, L.14.) Deputy Chamberlain testified that when he and his backup first attempted to place Eldred under arrest, "she became combative." (Trial Tr., p.110, Ls.12-23.) Deputy Chamberlain testified that later, when Eldred was asked to blow into the mouthpiece of the Intoxilyzer 5000, "she was attempting to blow, but she was doing an exaggerated, you know, cheeks puffed out. It looked like she was blowing extremely hard, but the machine was indicating to me that it was not receiving." (Trial Tr., p.120, Ls.20-23.)

The prosecutor's statements were a fair discussion of the testimony and the reasonable inferences to be drawn therefrom. As the Idaho Supreme Court has made clear, "[b]oth sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom." State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003). The prosecutor's statements discussing Corporal Chamberlain's observations of Eldred's efforts at providing a breath sample, and the inferences to be drawn therefrom, were not improper and did not constitute misconduct. Eldred's claim fails.

3. The Prosecutor Did Not Impermissibly Appeal To The Jurors' Emotions

Eldred claims that the state attempted to appeal to the juror's emotions and urged the jury to convict Eldred "because she could have injured or killed

> She finally takes the Garrity exit, and he stops her, he and another car, another citizen, don't even know who he is. He is just another average citizen like Mr. Jones. Please, please take the keys out of the ignition and put them on the dashboard, and let us get you help.
>
> What is her reaction? She guns it, drives over a flower bed at the Wal-Mart, and gets back out on the road.
>
> She slams on her brakes, throws the car in reverse, and comes flying backwards, and then starts driving again.
>
> And at this point as she drives down Garrity and it turns into Can-Ada, there are cars swerving out of the way to miss being hit by Ms. Eldred.
>
> She finally stops in Middleton, reaches down to get something and almost falls, gets back into her car and drives to Mr. Ashby's house.
>
> All of this time, the defense would have you believe she is scared. It is that fear that is making her drive in a manner that could kill somebody.

(Trial Tr., p.220, L.3 – p.221, L.23.) By this argument, the prosecutor is clearly referencing Mr. Jones' testimony that he believed he was saving lives by calling 911, putting on his flashers to alert other drivers, and following Eldred until law enforcement could locate her, as well as his testimony that her driving had endangered others on the road. (Trial Tr., p.47, L.20 – p.49, L.10, p.50, L.3 – p.52, L.5, p.59, L.4 – p.62, L.10.) It was not improper for the prosecutor to refer to this evidence during closing argument. *See* Sheahan, *139 Idaho at 280, 77* P.3d at 969 (the parties "are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom") (citation omitted).

should decline to consider her arguments. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.").

Even if this Court considers Eldred's claim of fundamental error, because she has failed to establish any error, she has necessarily failed to establish fundamental error. Even if this Court finds some of the prosecutor's arguments were improper, Eldred has failed to articulate any basis for concluding the arguments were so egregious or inflammatory that "any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded." Sheahan, 139 Idaho at 280, 77 P.3d at 969.

CONCLUSION

The state respectfully requests that this Court affirm Eldred's conviction.

DATED this 23rd day of March, 2009.

REBEKAH A. CUDÉ
Deputy Attorney General

APPENDIX A

MS. KALLIN: Permission to walk about the well?

THE COURT: Certainly.

MS. KALLIN: Ladies and gentlemen, I want to start by thanking you again. I'm sure that each and every one of you have other things that you would rather be doing this last day and a half, rather than sitting in this little courtroom in those chairs. I appreciate your attentiveness to the facts in this case, and I'm sure that Ms. Eldred also appreciates you listening closely to the facts.

I talked a little bit during voir dire about a cloak of innocence being placed on Ms. Eldred's shoulders when she walked in that door, and it was a heavy cloak, because it is a heavy burden to remove it. And it is a burden that I, and I alone, must suffer. And it is a burden that I must present my testimony and I must show you my exhibits. And only through that, can that cloak be lifted.

Ladies and gentlemen, the cloak has been lifted. Ms. Eldred is guilty of driving under the influence. And not just barely over the legal limit, but quite a bit over the legal limit.

.08, that's the legal limit in the state of Idaho.

Middleton, multiple streets in the town of Middleton, ultimately ending up on Hawthorne.

Mr. Jones testified that this whole process took almost two hours. For almost two hours, he followed Ms. Eldred hoping she wouldn't kill somebody, to the point he puts his flashers on, and talks about the fact that he was put there for a reason. There was a reason he was following her, and it was so cool -- I believe were his words -- it was so cool, because none of the cars went by me. He truly believes he saved lives, and all because Ms. Eldred is driving that white Ford Tempo under the influence.

Mr. Jones had never met Ms. Eldred before that day, hadn't met her since then. Did not know her. He was just an everyday, average guy trying to save lives, and trying to prevent somebody from being hit as Ms. Eldred swerves across four lanes of traffic and almost hits the median.

Swerves across four lanes of traffic, goes like she is going to take an exit.

Goes through the dirt, swerves across a couple lanes of traffic, goes back over, and gets ready to take the next exit.

Swerves back across. At this point in time, we are driving two lanes down the interstate. It is

Two times that would be .16.

Three times the legal limit would be .24.

Ms. Eldred - .264. Over three times the legal limit.

Now, Judge Petrie has given you some instructions with regards to the elements I have to prove. I would like to take a minute and go through each of those elements.

That on or about May 5, 2007, we have heard testimony from every witness that May 5, 2007 is the day we are talking about, in the state of Idaho.

Officer Chamberlain testified that it did, in fact, happen in the State of Idaho.

And, for that fact, while the driving may have started in Ada County, it finished in Canyon County.

You will remember Mr. Jones' testimony, David Jones, going from Cole to the interstate, and driving from the Cole exit behind Ms. Eldred all the way to the Garrity exit.

And then there is a brief stint at the Wal-Mart at that new exit.

Then she gets in her car again, and she drives down Garrity as it turns into Can-Ada, she goes [illegible], she goes into Middleton, drives around

the afternoon. People are just driving the roads you or I.

She finally takes the Garrity exit, and he stops her, he and another car, another citizen. I don't even know who he is. He is just another average citizen like Mr. Jones. Please, please take the keys out of the ignition and put them on the dashboard, and let us get you help.

What is her reaction? She guns it, drives over a flower bed at the Wal-Mart, and gets back out on the road.

She slams on her brakes, throws the car in reverse, and comes flying backwards, and then starts driving again.

And at this point as she drives down Garrity and it turns into Can-Ada, there are cars swerving out of the way to miss being hit by Ms. Eldred.

She finally stops in Middleton, reaches down to get something and almost falls, gets back into her car and drives to Mr. Ashby's house.

All of this time, the defense would have you believe she is scared. It is that fear that is making her drive in a manner that could kill somebody.

It is that fear that is making her drive in a manner that is making her swerve out of the [illegible]

from Dave Laycock at the state lab, .26 is approximately 12 drinks in the average body at the time of the test.

Does this look like what we are talking about?

Mr. Laycock went on to say how those drinks got there.

We don't know. We don't know. We don't know how much she drank that day. We don't know how much she had before she got in her car and got on the interstate, and backed up traffic a half mile back.

What we do know is that she certainly never had time to consume that drink. And even if she had, this is not the result we would have.

Ladies and gentlemen, each and every one of you came into court today with your common sense. You didn't leave it in your car, and you didn't leave it back in the jury room. I am asking that each and every one of you use that common sense, and find Ms. Eldred guilty of driving under the influence. Thank you.

THE COURT: Ms. Reynolds.

MS. REYNOLDS: Permission to move about the well?

THE COURT: Sure.

MS. REYNOLDS: Jury members, I know it's been

a long couple of days. I know you are tired and want to go home, but I'm glad you came. I'm glad you paid attention during the whole trial, and I hope you make the right decision today.

My closing statement will make reference to various facts admitted into evidence and testified to. I am testifying -- or I am doing my closing statement to the best of my ability and my recollection. If your recollection is different from mine, please use your own recollection.

We have heard testimony from all the witnesses today and the last couple of days, and it is up to you as jury members to determine their credibility. As individual persons, you know how to determine credibility. You know when someone is telling the truth, and when someone is a good or bad witness.

Our first witness was Mr. Jones. Mr. Jones was very excited to be here, perhaps unnaturally so. He seemed very agitated to me. I did not question him on whether he was on any sort of substances, but he did appear unnaturally excited and jittery to me.

Mr. Jones proceeded to tell us that he followed a car, staying one to two car-lengths behind it all the way from Boise to Middleton, a distance of

roughly 19 miles. I did a little math this morning, so I know that's roughly what the distance was.

He said this took two hours, a two-hour drive for this 18 miles to happen.

He also testified that there was a procession of cars almost a mile long behind this car with flashing lights, and everyone was staying back. Yet, somehow in this two-hour interval, not one police officer showed up until she arrived at the other house.

I hope that makes you think about Mr. Jones' credibility. I think he potentially watches "Law and Order."

Additionally, Mr. Jones could not understand why someone would be terrified that a car was following a driver for, I guess, two hours for the entire drive through this small town of Middleton with the twists and turns to get through the residential streets. He could not understand why my client, Ms. Eldred, would be terrified of someone following her that closely without telling her what they wanted, and following her, and following her. And then parking outside the house when she arrives at a safe place, and remaining outside the house for some time.

When asked, Mr. Jones did not recall any smell of intoxicating substance coming from Ms. Eldred

when he had contact with Ms. Eldred.

He did not testify he saw beer cans or vodka bottles rolling around the car.

He did not testify as to any potential intoxicating substance that she had on her person, in her car, on her breath, anything along those lines.

You have also heard testimony about the condition of the interstate, and I think you can probably draw from your own experiences as to the condition of the interstate and the road.

Mr. Ashby did testify that Ms. Eldred's car wasn't running very well. That he had difficulty navigating it when he drove it.

Mr. Ashby, who does know my client well, he testified that she appeared sober when she arrived, although terrified. She was terrified. She was asking him about the car that was following her. She wanted to know if it had connections with the break-ins at her house.

To calm her nerves, Mr. Ashby poured a coffee cup, that we have all been looking at, the coffee cup of vodka, which she promptly consumed to soothe her nerves, to calm her down.

Mr. Ashby testified that roughly 10 to 15 minutes later, the officer showed up at the house.

Ms. Reynolds made a big deal about the deficient sample. But, she said a deficient sample is not an accurate reading.

That's not the testimony I heard. And, in fact, that's not consistent to what is printed on the breath slip. A deficient sample is highest obtained.

[redacted]

Deputy Barlin talked about the good bottom breath that could have resulted in a higher blow.

And, why? Because she didn't want to blow properly. She refused to blow properly.

He would start to get the tone, and then it would drop off.

Ms. Reynolds is right, though. There was not any signs of alcohol in her car.

Are there signs of alcohol in cars when people go to the bar to drink?

Are there signs when people drink at their house?

We don't know how much she drank, and we don't know how it got there?

What we do know is that she was driving under the influence on May 5, 2007.

And Ms. Reynolds talked some about the tape.

Does she sound like a .26, or is her tolerance something that Ms. Reynolds asked multiple witnesses about? Is her tolerance at a level that she can function at a .26?

The law simply says if you are above a .08, you are under the influence of alcohol.

Ladies and gentlemen, beyond a reasonable doubt does not mean beyond all doubt. Nothing can be proven beyond all doubt. But this case is simply beyond a reasonable doubt.

Beyond a reasonable doubt, she was driving under the influence on that day.

Beyond a reasonable doubt, she is guilty of that crime. Thank you.

THE COURT: Thank you. Madam Clerk, at this time I am going to ask you to draw one number. This is the Court's version of a lottery, and this is the deal: You are going to coordinate with the bailiff on where you can be contacted, whoever the individual is whose number is drawn, hopefully you have a hard line number and a cell phone number, or at least one of those, so that we can contact you to say, You know, one of those strange events have happened, and we need to have you come back and help this jury decide the case because one of the jurors had to go home sick - heaven forbid - but

some circumstance like that. That's why we have the alternate juror in case there is an emergency.

So, implied in that -- in fact, it's not implied, I am going to tell you right now -- whoever the person is, the alternate juror drawn, that gets to leave now, still may not discuss this case with anyone else or form or express an opinion about this matter, or decide the case until we give you the call.

That's why we need your number, so we can call you right away and say, We have a verdict and this was the verdict.

When you get that call, then you can say, Hey, honey, guess what I have been doing the last two days. Alright? Until you get that call, don't be saying, Hey, honey, about anything that was going on. Alright?

You say, Hey, honey, how come you didn't mow the lawn?

Does that make sense?

I wish I had a drum roll. Madam Clerk, will you draw the number.

THE CLERK: 133.

THE COURT: 133. Wait, wait. You will get some parting gifts from the bailiff before you leave.

Now, the rest of you, you are going to go

back to the jury room to deliberate.

You will have at the outset those two exhibits that are there at the witness' stand.

We have the other exhibit out here. So, Madam Clerk, we will need to lock the door.

And if you need to hear that recording -- in fact, I'm going to have you take possession of that so that if they need to hear that recording, let us know and we will all come back here.

So the bailiff will have possession of that exhibit, you will have the other two, the paper exhibits, if you will, plus the verdict form, and the official pen for recording your decision.

You will also have the instructions that I just gave you, simply called, Instructions to the Jury.

And then way back yesterday, if you can remember back that far -- I have difficulty with that, maybe you can -- the general instructions. And you will say, We heard those, Judge.

Well, that's right, but general instruction 3 had the definition of reasonable doubt. You can review them all if you want, but the one for purposes of deliberation that you may find useful is the instruction on what the standard is for reasonable doubt.