

1 VAN NUYS, CALIFORNIA; FRIDAY, DECEMBER 1, 1995

2 9:55 A.M.

3 DEPARTMENT NW "N" HON. STANLEY M. WEISBERG, JUDGE

4 (APPEARANCES AS HERETOFORE NOTED.)

5

6 (PAGE 42517 WAS SEALED.)

7

8 (THE FOLLOWING PROCEEDINGS WERE

9 HELD IN OPEN COURT OUT OF THE

10 PRESENCE OF THE JURY:)

11

12 THE COURT: IN THE TRIAL, THE DEFENDANTS ARE

13 IN COURT; THEIR LAWYERS ARE HERE; THE PEOPLE ARE

14 HERE.

15 MS. ABRAMSON.

16 MS. ABRAMSON: YOUR HONOR, I FOLLOWED THE

17 COURT'S ADVICE, BUT I'M NOT FEELING BETTER. I'M

18 FEELING WORSE. I BELIEVE I'M RUNNING A FEVER. I'M

19 VERY NAUSEATED. MORE IMPORTANTLY, I'M VERY DIZZY

20 AND HAVE BLURRED VISION. IT'S VERY DIFFICULT FOR ME

21 TO STAND UP.

22 SO I AM ASKING THE COURT'S INDULGENCE TO

23 RECESS.

24 THE COURT: YOU DON'T FEEL YOU CAN FUNCTION

25 TODAY?

26 MS. ABRAMSON: I DON'T FEEL I CAN FUNCTION

27 TODAY.

28 THE COURT: OKAY. THERE'S NOT MUCH WE CAN DO

1 WITH THE JURY PRESENT.

2 IS THERE ANYTHING THAT COUNSEL FEEL THAT
3 WE CAN DO WITH THE JURY WITHOUT MS. ABRAMSON'S
4 PARTICIPATION THIS MORNING?

5 MR. GESSLER: I CAN'T SEE HOW WE CAN, YOUR
6 HONOR.

7 MS. ABRAMSON: TRY OUT OUR FINAL ARGUMENTS.

8 THE COURT: SOMETHING SOMEONE WOULD LIKE TO
9 TRY OUT, PERHAPS.

10 MS. ABRAMSON: WE CAN TRY OUT OUR FINAL
11 ARGUMENTS.

12 THE COURT: ALL RIGHT. THEN WE'LL HAVE THE
13 JURY COME OUT AND I'LL EXPLAIN THE SITUATION TO
14 THEM. AND I AM GOING TO INQUIRE OF THEM AS FAR AS
15 ANY EXPOSURE THEY'VE HAD TO THE CASE OUTSIDE OF THE
16 COURTROOM. SO WE'LL DO THAT THIS MORNING.

17 (THE JURY ENTERED THE
18 COURTROOM AND THE FOLLOWING
19 PROCEEDINGS WERE HELD:)

20

21 THE COURT: OKAY. THE JURORS ARE ALL HERE.

22 LADIES AND GENTLEMEN, I'M SORRY FOR THE
23 DELAY. MS. ABRAMSON HAS NOT BEEN FEELING WELL THIS

24 MORNING AND SUFFERING FROM WHAT SOUNDS LIKE FLU-LIKE
25 SYMPTOMS, AND IT'S GOTTEN WORSE RATHER THAN BETTER,
26 AND SHE DOESN'T FEEL THAT SHE CAN CONTINUE WITH THE
27 DIRECT EXAMINATION OF THE WITNESS, AND THAT IS ALL
28 THAT WAS SCHEDULED TODAY. AND WE WERE ALSO

42520

1 SCHEDULED TO TAKE A BREAK AT NOON TO ACCOMMODATE THE
2 SCHEDULING OF ONE OF THE JURORS AND ALSO OF
3 COUNSEL.

4 SO THERE'S NOT MUCH WE CAN DO TODAY. SO
5 IT LOOKS LIKE WE'RE GOING TO GET AN EARLY START, AT
6 LEAST YOU WILL, ON THE WEEKEND.

7 BUT BEFORE I EXCUSE YOU FOR THE WEEKEND,
8 LET ME GO BACK TO THE INQUIRY I'VE MADE OF YOU ON
9 EARLIER OCCASIONS, WHETHER OR NOT ANY OF YOU HAVE
10 BEEN EXPOSED TO ANYTHING ABOUT THE CASE IN ANY FORM
11 OUTSIDE OF THE COURTROOM, THAT WE HAVE YET TO TALK
12 ABOUT OR THAT THIS OCCURRED SINCE WE LAST SPOKE?

13 IF YOU HAVE, WOULD YOU RAISE YOUR HANDS
14 SO WE CAN DISCUSS IT.

15 OKAY. NOBODY HAS.

16 ALL RIGHT. THEN, UNFORTUNATELY, WE
17 CAN'T PROCEED TODAY. I'M SORRY FOR THE
18 INCONVENIENCE. HOPEFULLY, EVERYBODY WILL BE HEALTHY

19 AND HAPPY AND WISE AND READY TO GO ON MONDAY.
20 SO HAVE A GOOD WEEKEND.
21 DON'T DISCUSS THE CASE WITH ANYONE.
22 DON'T FORM ANY FINAL OPINIONS ABOUT IT. DON'T
23 PERMIT YOURSELVES TO BE EXPOSED TO ANYTHING ABOUT
24 THE CASE OUTSIDE OF THE COURTROOM AND WE'LL SEE YOU
25 ALL BACK HERE ON MONDAY, 8:30.
26 (THE JURY EXITED THE
27 COURTROOM AND THE FOLLOWING
28 PROCEEDINGS WERE HELD:)

42521

1
2 THE COURT: OKAY. THE JURY HAS LEFT.
3 THERE HAS BEEN HELD IN ABEYANCE A
4 HEARING AND ARGUMENT ON THE DEFENSE MOTION PURSUANT
5 TO SECTION 1118.1.
6 IS COUNSEL GOING TO PROCEED WITH THAT
7 TODAY?
8 MS. ABRAMSON: MAY I HAVE A MOMENT, YOUR
9 HONOR?
10 (DEFENSE ATTORNEYS GESSLER AND
11 ABRAMSON CONFERRING SOTTO VOCE.)
12
13 MS. TOWERY: WHILE THEY'RE CONFERRING, YOUR

14 HONOR, WE HAD A DISPUTE ABOUT THE -- I THINK IT WAS
15 EXHIBIT 153 THAT THE COURT ORDERED REDACTED. AND
16 MS. NAJERA HAD AN OBJECTION. WHAT I DID IS LEFT IN
17 THE FIRST SENTENCE --

18 THE COURT: YEAH, THAT'S TOO MUCH.

19 MS. TOWERY: LET ME JUST EXPLAIN MY
20 REASONING. THAT I INQUIRED ABOUT THE BIRD, WHICH IS
21 REFERENCED IN THE FIRST SENTENCE, AND IT LOOKED SO
22 STRANGE TO REDACT THAT OUT THAT I THOUGHT THE COURT
23 MIGHT PREFER TO LEAVE THAT IN SINCE IT'S NOT
24 PREJUDICIAL AND IT LOOKS SO WEIRD TO HAVE ONE
25 SENTENCE ON THE PAGE.

26 SO IF THE COURT WANTS IT REDACTED,
27 THAT'S FINE. I JUST THOUGHT IT MIGHT BE LESS
28 PREJUDICIAL TO LEAVE IT THE WAY IT IS.

42522

1 THE COURT: NO. I THINK IT SHOULD JUST BE AS
2 I INDICATED, THAT ONE QUOTATION THAT WAS REFERRED TO
3 IN THE TRANSCRIPT.

4 MS. TOWERY: OKAY. IF I CAN HAVE THAT
5 RETURNED, I'LL JUST TAKE THAT SENTENCE OUT.

6 THE COURT: OKAY. LET ME INQUIRE OF COUNSEL,
7 THEN. IS THE DEFENSE ABLE TO PROCEED WITH THE
8 1118.1 MOTION AT THIS POINT?

9 MR. GESSLER: YES, YOUR HONOR.

10 THE COURT: YOU'LL MAKE THE ARGUMENTS FOR
11 BOTH DEFENDANTS?

12 MR. GESSLER: YES, YOUR HONOR. I THINK THAT
13 THE PROCEEDINGS ARE BASICALLY FOR BOTH DEFENDANTS,
14 AT LEAST CONCERNING THE CONSTITUTIONAL PRINCIPLES
15 INVOLVED, OF THE NARROWING FUNCTION OF LYING IN
16 WAIT. THE 1118.1 AS TO HOW THE EVIDENCE IS
17 INSUFFICIENT TO SUPPORT IT IS SLIGHTLY DIFFERENT AS
18 TO EACH DEFENDANT, BUT NOT TO A GREAT DEGREE.

19 THE COURT: OKAY. IS IT THEN AGREED BY ALL
20 DEFENSE COUNSEL THAT WE PROCEED WITH THE MOTION AT
21 THIS TIME?

22 MR. GESSLER: IT'S AGREEABLE ON BEHALF OF
23 JOSEPH LYLE MENENDEZ.

24 MS. ABRAMSON: YES, YOUR HONOR.

25 THE COURT: OKAY. GO AHEAD.

26 MR. GESSLER: THE FIRST THING I'D LIKE TO DO,
27 PRECEDING THE 1118.1, IS THAT I HAD OBJECTED TO THE
28 CHARTS, AS THE COURT KNOWS, THE 24 EXHIBITS THAT ARE

1 CALLED 1-A THROUGH 12-B, AND THE COURT DID FIND
2 UNDER 352 THAT THEY HAVE RELEVANCE AND ALSO THAT
3 THEY MET ENOUGH EXPERTISE, APPARENTLY OVER MY
4 OBJECTION, TO BE ADMITTED.

5 I JUST WANTED TO MAKE SURE THAT THE

6 COURT UNDERSTOOD THAT THOSE OBJECTIONS WERE ALSO
7 MADE ON CONSTITUTIONAL GROUNDS OF DUE PROCESS, THAT
8 THESE PICTURES ARE, IN OUR OPINION, SO INVALID FROM
9 ANY SCIENTIFIC BASIS WHATSOEVER, GIVEN THE TESTIMONY
10 OF DR. MC CARTHY, AND SO MISLEADING TO THE JURY,
11 INASMUCH AS THEY PORTRAY VISUALLY WITH SO-CALLED
12 RODS, NUMBER ONE, A STRAIGHT LINE INSTEAD OF WHAT WE
13 ALL KNOW IS A CONICAL-TYPE DISTRIBUTION OF SHOT AS
14 IT EMITS FROM THE SHOTGUN AND GOES AT A DISTANCE.
15 NOBODY MAY BE ABLE TO SAY WHEN THAT CONE TAKES A
16 CERTAIN SHAPE, BUT CERTAINLY IT IS CONICAL AND GETS
17 BIGGER AS IT GOES FORWARD, WHICH IS NOT DISPLAYED BY
18 THE GREEN RODS THAT DR. MC CARTHY HAS USED ON HIS
19 EXHIBITS.

20 IN THAT RESPECT IT IS MISLEADING TO THE
21 JURY; AS WELL AS, IN OUR VIEW, THE ANGLES ARE
22 MISLEADING TO THE JURY IN THAT DR. MC CARTHY SAID,
23 FINALLY, THEY REPRESENT ONLY ONE OF MANY VARIABLES
24 DEPENDING ON WHERE THE LIMBS WERE, THE POSITION THE
25 HEAD WAS IN, THE POSITION IN WHICH THE SHOOTER WAS.
26 THEY PORTRAY VISUALLY ONE OUT OF NUMEROUS
27 POSSIBILITIES, AND THAT IS ONE OF THE REASONS THAT
28 WE FEEL THAT THEY SHOULD NOT BE ADMITTED UNDER 352,

1 AS WELL AS NO SCIENTIFIC BASIS FOR THAT PARTICULAR
2 ONE THAT'S DISPLAYED AS WELL AS THE OTHERS.

3 THE REASON THAT IT'S ALSO, I BELIEVE, A
4 VIOLATION OF THE FEDERAL DUE PROCESS CLAUSE OF THE

5 CONSTITUTION IS THAT THIS IS A MATTER OF SUCH MOMENT
6 TO THE JURY THAT IT DENIES THE DEFENDANTS DUE
7 PROCESS OF LAW IN A FAIR TRIAL BECAUSE WE'RE TALKING
8 ABOUT 24 EXHIBITS. GRANTED, WE'VE HAD 320-SOME
9 EXHIBITS MARKED, BUT EVEN THEN, 24 EXHIBITS IS A
10 SUBSTANTIAL PART OF IT, NOT TO MENTION THE
11 SUBEXHIBITS THAT WERE USED BY DEFENSE COUNSEL IN
12 ORDER TO TRY TO DISCREDIT THE MAJOR EXHIBITS.

13 SO WE'RE TALKING A SUBSTANTIAL PORTION
14 OF THE CASE AS DISPLAYED VISUALLY BY THESE
15 EXHIBITS. AND I THINK IT HAS AN IMPACT ON THE JURY
16 THAT IS HIGHLY PREJUDICIAL; AND ADMITTING THOSE,
17 IT'S HIGHLY PROBABLE THAT IT WILL HAVE A SUBSTANTIAL
18 AND INJURIOUS EFFECT IN DETERMINING THE JURY'S
19 VERDICT. AND THAT'S UNDER KOTTEAKOS,
20 K-O-T-T-E-A-K-O-S, 328 U.S., AND THAT'S AT PAGE
21 776.

22 IT'S THE PHILOSOPHY, AND IT HAS BEEN
23 ADOPTED BY THE 9TH CIRCUIT IN A MORE RECENT DECISION
24 OF MC KINNEY VERSUS REES, R-E-E-S. THAT IS AT 993
25 FED.RPTR.2D AT PAGE 1378. THAT DID NOT HAVE TO DO
26 WITH CHARTS. THAT HAD TO DO WITH EVIDENCE
27 CONCERNING A KNIFE THAT THEY FOUND WAS -- SHOULD HAVE
28 BEEN INADMISSIBLE. BUT THE PURPOSE OF THAT CASE IS

1 THAT IT DOES SHOW THAT THE FEDERAL COURTS DO LOOK AT
2 CONSTITUTIONAL VIOLATIONS UNDER STATE LAW EVEN
3 THOUGH THE ADMISSION OF EVIDENCE IS NORMALLY

4 CONSIDERED TO BE A STATE LAW FUNCTION; THAT
5 ADMISSIBILITY OF IRRELEVANT EVIDENCE THAT RISES TO
6 THE STATUS OF HARM AND OF BEING LARGELY CONSIDERED
7 BY THE JURY IN THE SENSE OF THE KOTTEAKOS CASE, THAT
8 IT HAS A SUBSTANTIAL AND INJURIOUS EFFECT OR
9 INFLUENCE, IS THEN A VIOLATION OF THE FEDERAL
10 CONSTITUTION PROCESS CLAUSE.

11 AND I WANTED TO MAKE SURE THAT THAT WAS
12 UNDERSTOOD BY THE COURT TO BE A PART OF THE
13 OBJECTIONS THAT I WAS MAKING TO THE EXHIBITS OF
14 DR. MC CARTHY.

15 THE COURT: OKAY. I NOW DO UNDERSTAND THAT
16 THAT'S PART OF THE OBJECTION.

17 LET ME INQUIRE, THOUGH. YOU WITHDREW
18 THE OBJECTION TO HIS TESTIMONY THAT YOU INITIALLY
19 MADE THAT CAUSED US TO CONDUCT AN EVIDENTIARY
20 HEARING, AND THEN PRIOR TO HIS ACTUAL TESTIMONY
21 BEFORE THE JURY, AS I RECALL, YOU OBJECTED TO
22 BASICALLY TESTIMONY OF MC CARTHY AS TO TWO SHOTS AND
23 NOT AS TO ALL THE OTHER EXHIBITS AND TESTIMONY THAT
24 HE WAS GOING TO OFFER. YOU DIDN'T STATE AN OVERALL
25 OBJECTION TO HIS TESTIMONY WHEN HE TOOK THE STAND
26 BEFORE THE JURY. AND THEN DURING HIS TESTIMONY
27 THERE WERE PERIODIC OBJECTIONS TO SPECIFIC QUESTIONS
28 THAT WERE ASKED AND RULINGS WERE MADE. AND THEN ALL

1 OF THESE EXHIBITS WERE SHOWN TO THE JURY AT GREAT
2 LENGTH DURING HIS TESTIMONY.

3 EVEN ASSUMING YOU WANT TO PURSUE THE
4 OBJECTION BY NOT HAVING THE EXHIBITS RECEIVED BY THE
5 JURY AND TAKING IT TO THE JURY ROOM, THEY'VE SEEN
6 THEM FOR DAY UPON DAY HERE, REFERRED TO DURING THE
7 TESTIMONY OF MC CARTHY AND THE OTHER WITNESSES.

8 HOW IS IT THAT AT THIS POINT YOU CAN
9 REMOVE THAT FROM CONSIDERATION?

10 MR. GESSLER: I THINK, YOUR HONOR, THAT
11 TAKING AWAY THE PHYSICAL EXHIBITS, THE ORAL -- I
12 MEAN, THE VISUAL PRESENTATION IN A PICTORIAL OR
13 DIAGRAMMATIC FORM STILL HAS VALUE IN THAT THEN IT
14 LEAVES THEM TO HAVING SEEN THINGS, YES, AND HAVING
15 HEARD ORAL TESTIMONY, BUT IT DOESN'T RAISE IT MUCH
16 ABOVE THE VALUE THAT ANY OTHER ORAL TESTIMONY HAS.

17 I THINK THE VICE HERE THAT WE'RE TRYING
18 TO DEFEAT -- AND THIS DIDN'T COME UP UNTIL VERY CLOSE
19 TO THE END OF MC CARTHY'S TESTIMONY WHEN HE FINALLY
20 BACKED OFF HIS POSITION AT THE 801
21 HEARING -- WHICH IS I AM THE TRUE SAVIOUR WHO CAN
22 GIVE YOU THE ONE AND ONLY WAY IT HAPPENED, IS HE
23 FINALLY SAID THIS IS JUST AN ILLUSTRATION; AND YES,
24 THERE ARE MANY WAYS WHERE THAT VECTOR OR THAT ANGLE
25 COULD BE DRAWN DEPENDING ON WHERE THE THINGS ARE
26 MOVED.

27 THE VICE OF THOSE PHYSICAL EXHIBITS

42527

1 TWO MONTHS FROM NOW, AND SEEING THE PHYSICAL
2 REPRESENTATION THERE AND FORGETTING THE FINAL ORAL
3 PASSAGE IN WHICH HE SAID THIS IS JUST ONE OF
4 NUMEROUS WAYS IT COULD HAPPEN, THAT WE'RE TRYING TO
5 AVOID THAT, WHERE THE JURY THEN HAS WITH THEM IN THE
6 JURY ROOM THE ONE THAT IS PORTRAYED RATHER THAN THE
7 ORAL IDEA THAT IT'S ONE OF MANY.

8 THE COURT: WELL, MY RESPONSE IS THAT BY
9 FOREGOING OR ABANDONING YOUR MOTION UNDER 801 OF THE
10 EVIDENCE CODE, YOU, IN ESSENCE, WAIVED THE
11 OBJECTIONS THAT YOU'RE NOW MAKING TO THE RECEIPT OF
12 THOSE EXHIBITS.

13 MR. GESSLER: WELL, I WONDER, YOUR HONOR, IF
14 WE DID. AND I STATE IT THIS WAY: ARE WE REALLY IN
15 ANY DIFFERENT POSITION, HAVING GONE THROUGH TWO DAYS
16 OF TESTIMONY ON AN 801 HEARING, AND THEN ABANDONING
17 IT, THAN IF WE'D NEVER RAISED 801 AT ALL?

18 ASSUME, FOR THE PURPOSES OF THIS
19 PROCEEDING, THAT THAT WAS USED AS AN OFFER OF PROOF,
20 OR WHATEVER, BUT THERE WAS NO 801 HEARING, THEN OR
21 EVER, JUST OUR 402 HEARING THAT -- OUR 402 MOTION,
22 WHICH WAS NOT REALLY A HEARING, THAT WAS STATED

23 BEFORE THE JUDGE.

24 ARE WE REALLY IN A WORSE POSITION

25 LEGALLY AND ON A RELEVANCE GROUND THAN IF WE'D NEVER

26 MADE AN 801 HEARING? I DON'T THINK THE 801 HEARING

27 REALLY AFFECTS THE RELEVANCE OF THE PICTURES THAT

28 ARE BEING SOUGHT, THE DIAGRAMS THAT ARE BEING

42528

1 PRESENTED. I DON'T THINK IT AFFECTS THE 352 ASPECTS

2 OF IT. ALL IT DOES IS SAY: WE WITHDREW OUR

3 OBJECTION UNDER 801, AS THOUGH IT HAD NEVER BEEN

4 MADE.

5 THE COURT: WHY DID YOU DO THAT?

6 MR. GESSLER: DOES IT MAKE A DIFFERENCE, YOUR

7 HONOR?

8 THE COURT: I THINK IT DOES. I THINK IT SET

9 THE STAGE FOR ALL THESE EXHIBITS TO THEN BE SHOWN TO

10 THE JURY AND HAVE ALL THIS TESTIMONY PRESENTED TO

11 THE JURY WITH THE ISSUES AS THEY WERE PRESENTED.

12 HOW CAN YOU THEN SAY WE HAD OUR MOTION, WE WERE

13 PURSUING IT, BUT WE ABANDONED IT, BUT WE NOW WANT TO

14 REMAKE IT? WE WERE ON FULL NOTICE AS TO REALLY WHAT

15 IT WAS THAT WAS GOING TO BE OCCURRING.

16 MR. GESSLER: YOUR HONOR, WE'RE NOT REMAKING

17 IT. I'M NOT REMAKING AN 801 HEARING. I'M MAKING A

18 352 MOTION AND A RELEVANCE MOTION AND A MOTION THAT
19 THE PROMISE THAT HE MADE, WHETHER WE'D HAD AN 801 OR
20 NOT, THAT THIS WAS GEOMETRY AND MATHEMATICS AND
21 SUCH; ON CROSS-EXAMINATION THAT CAME OUT THAT'S NOT
22 SO.

23 NOW, WITH OR WITHOUT AN 801 MOTION, WITH
24 OR WITHOUT ONE THAT WAS ABANDONED, WITH OR WITHOUT
25 ONE THAT WAS EVER TALKED ABOUT, WHETHER IT HAD EVER
26 BEEN MADE, NOT MADE, WE'RE IN THE SAME POSITION THAT
27 WHEN FINALLY HE SAID, UNDER CROSS-EXAMINATION, THERE
28 IS NO MATHEMATICAL BASIS FOR THIS, THERE IS NO

42529

1 FORMULAS, I HAVE NO FIGURES, THIS IS JUST MY
2 REPRESENTATION OF ONE OF MANY WAYS. THAT'S THE
3 POINT, AT THAT POINT, WHEN IT BECAME 352 EXCLUDABLE
4 AND IRRELEVANT. AND IT WOULD HAVE MADE NO
5 DIFFERENCE HOW WE GOT THAT FAR. THAT'S THE POINT AT
6 WHICH, FOR THE FIRST TIME, I THINK WE HAD A TENABLE
7 352 MOTION AND MOTION TO EXCLUDE ON RELEVANCE AND
8 LACK OF SCIENTIFIC FOUNDATION.

9 THE COURT: I THINK ALL OF THOSE ISSUES COULD
10 HAVE EASILY BEEN CRYSTALLIZED AND ADDRESSED DURING
11 THE HEARING THAT HAD BEEN COMMENCED AND WAS
12 ABANDONED. THERE WAS SOME REASON WHY THE DEFENSE

13 CHOSE TO ABANDON IT AND PROCEED AS YOU HAVE. AS YOU
14 SAID, IT'S NOT REALLY RELEVANT TO THIS DISCUSSION,
15 BUT THE BOTTOM LINE IS YOU DID ABANDON IT. AND
16 REGARDLESS OF THE COURT'S ANALYSIS OF YOUR OTHER
17 ARGUMENTS, I DO FIND THAT YOU DID WAIVE THE
18 OBJECTIONS BY ABANDONING THAT HEARING. BUT --

19 MR. GESSLER: WE WAIVED --

20 THE COURT: BUT ALSO.

21 MR. GESSLER: I THINK, YOUR HONOR --

22 THE COURT: I THINK UNDER 352 OF THE EVIDENCE
23 CODE, THAT WAS ALSO CLEARLY SOMETHING ENVISIONED BY
24 THAT HEARING THAT WAS BEING CONDUCTED BEFORE THE
25 OPENING STATEMENTS. IT WASN'T SOMETHING THAT SOLELY
26 WAS AS YOU DEVELOPED IT DURING THE TESTIMONY OF
27 MC CARTHY. HE WAS IN THE MIDDLE OF
28 CROSS-EXAMINATION WHEN YOU ABANDONED YOUR HEARING.

42530

1 IT WASN'T AS THOUGH YOU HAD COMPLETED THE
2 CROSS-EXAMINATION AND WERE UNAWARE OF WHAT IT WAS HE
3 WAS GOING TO SAY. YOU STOPPED AND YOU HAD YOUR
4 WITNESSES HERE READY TO PROCEED WITH THEM AND
5 DECIDED NOT TO PUT THEM ON. YOU DECIDED TO PUT IT
6 ALL ON IN FRONT OF THE JURY.

7 MR. GESSLER: THAT'S ALL TRUE, YOUR HONOR.

8 THE COURT: AND THEN YOU MAKE A 352 OBJECTION
9 AFTER YOU'VE PUT IT ON IN FRONT OF THE JURY. HOW
10 CAN YOU DO THAT?

11 MS. ABRAMSON: CHARLIE, CAN I BE HEARD?

12 MR. GESSLER: LET ME FINISH THIS THOUGHT,
13 THEN YOU'RE ON.

14 YOUR HONOR, THE FIRST MOTION, AND I
15 THINK IT WAS CHARACTERIZED AS AN 801 MOTION AND ALSO
16 WITH KELLY-FRYE ASPECTS, THAT'S WHAT WE WERE
17 PREPARING TO DO.

18 AND AS I'VE SAID, WHETHER IT WAS
19 WITHDRAWN, OR FOR WHATEVER REASON, OR HAD NEVER BEEN
20 HEARD, I DON'T THINK THAT PRECLUDES LATER FINDINGS
21 UNDER THE -- OR AN APPROACH TO THE COURT TO APPLY 352
22 AND RELEVANCE AND WHETHER OR NOT THERE IS SCIENTIFIC
23 PRINCIPLES THAT WERE REALLY USED AT THE TIME THAT WE
24 DID HEAR IT IN THE COURTROOM. I'VE NEVER HEARD OF A
25 WAIVER OF OTHER OBJECTIONS BY PERHAPS ABANDONING OR
26 NOT MAKING ONE OBJECTION.

27 AND I JUST -- I RESPECTFULLY TAKE ISSUE
28 WITH THE COURT AS TO WHETHER OR NOT WE ABANDONED THE

42531

1 352 AND ALL OTHER APPROACHES BY LEAVING THE 801
2 MOTION. LIKE I SAY, IT'S JUST AS THOUGH WE NEVER

3 MADE IT. I KNOW MS. ABRAMSON WANTS TO ADDRESS THE
4 COURT. CAN SHE REMAIN SEATED?

5 THE COURT: SURE. BUT THE -- WHAT I'M SAYING
6 IS THAT I ENVISION THE HEARING THAT WAS CONDUCTED
7 BEFORE OPENING STATEMENTS, WHERE WE TOOK TESTIMONY,
8 AS A HEARING DEALING WITH THE OVERALL ABILITY OF
9 MC CARTHY'S TESTIMONY.

10 MS. ABRAMSON: THAT'S NOT WHAT WE --

11 THE COURT: AND THEN THEREAFTER, WHEN THAT
12 WAS WITHDRAWN, WE WERE LEFT WITH SPECIFIC OBJECTIONS
13 TO PORTIONS OF HIS TESTIMONY OR QUESTIONS THAT WERE
14 ASKED AND THINGS OF THAT NATURE, NOT THE OVERALL
15 ADMISSIBILITY OF HIS TESTIMONY.

16 MR. GESSLER: I DON'T THINK, YOUR HONOR, THAT
17 WE EVEN HAD THE 24 EXHIBITS THAT I AM NOW TALKING
18 ABOUT AT THE TIME OF THE 801 HEARING. THOSE WERE
19 REVISED BY DR. MC CARTHY AT THE TIME THAT WE BEGAN
20 THE TRIAL, NOT AT THE TIME OF THE 801. THOSE 24
21 SPECIFIC EXHIBITS WERE NOT EVEN IN EXISTENCE. WE
22 HAD A PRECURSOR TO THEM OR PRECURSORS THROUGH THE
23 DEVICE OF THE SHOW-BOX THERE AND THE COMPUTER. AND
24 WE HAD SOME OTHER DRAWINGS --

25 MS. ABRAMSON: I'M VERY FRUSTRATED.

26 MR. GESSLER: I KNOW.

27 -- OF PEOPLE SITTING THERE, BUT NOT THE
28 SAME OF THE 24 EXHIBITS THAT I AM NOW ADDRESSING.

1 NOW I'LL LET MS. ABRAMSON CLEAR IT UP.

2 MS. ABRAMSON: THANK YOU.

3 YOUR HONOR, WE ALL WENT THROUGH AN
4 EVOLUTIONARY AND EDUCATIONAL PROCESS CONCERNING WHAT
5 IT WAS THAT DR. MC CARTHY WAS GOING TO TESTIFY TO.

6 WHAT WE WERE ORIGINALLY PRESENTED WITH,
7 WHICH WAS THE BASIS FOR OUR MAKING AN 801 OBJECTION,
8 AN OBJECTION THAT WHAT HE WAS GOING TO DO WAS BEYOND
9 WHAT WAS ACCEPTABLE IN ANY SCIENTIFIC COMMUNITY, IT
10 WAS BASED ON A REPORT IN WHICH HE PURPORTED TO KNOW
11 WHAT WAS IN THE MINDS OF THE SHOOTERS AT THE TIME OF
12 THE SHOOTING, IN WHICH HE PURPORTED TO KNOW WHAT WAS
13 BEING AIMED AT BASED ON WHAT WAS HIT, IN WHICH HE
14 HAD THEORIES OF WHY THE SHOOTING WAS DONE IN A
15 PARTICULAR WAY, AND IN WHICH HE OFFERED -- AND WE
16 KNEW HE HAD CONSULTED WITH NO MEDICAL EXPERTS,
17 MEDICAL OPINIONS THAT WERE CONTRARY TO WHAT THE
18 CORONER'S OFFICE WAS SAYING -- IN WHICH HE OFFERED
19 OPINIONS ABOUT BALLISTICS AND SHOT PATTERNS THAT
20 WERE CONTRARY TO WHAT BALLISTICS EXPERTS THAT WE HAD
21 CONSULTED WERE GOING TO SAY.

22 SO THERE WAS -- AT THAT POINT WHEN WE
23 ASKED FOR THAT HEARING, THERE WAS A WIDE RANGE OF
24 PSEUDO-SCIENTIFIC STUFF IN HIS -- AND PSYCHOLOGICAL
25 STUFF IN HIS REPORT, WHICH IS WHAT WE WERE SEEKING

26 TO PREVENT HIM TESTIFYING TO, BECAUSE HE AND JUST
27 ABOUT ANYBODY, WITH THE EXCEPTION, PERHAPS, OF THE
28 ALMIGHTY, WERE NOT IN A POSITION TO RENDER THOSE

42533

1 POSITIONS. THAT'S WHEN WE SCHEDULED THE HEARING,
2 YOUR HONOR.

3 WHEN THE HEARING BEGAN, WE LEARNED, FOR
4 THE FIRST TIME, THAT HE HAD CREATED THESE LITTLE
5 CARTOONS, NOW CALLED ILLUSTRATIONS. AND THE WAY HE
6 PRESENTED THEM IN THAT HEARING, WHICH IS THE FIRST
7 WE EVER SAW OF THEM, WAS THAT THESE WERE
8 REENACTMENTS BASED ON ENGINEERING PRINCIPLES.

9 NOW, WHATEVER ELSE I MAY HAVE LEARNED
10 ABOUT DR. MC CARTHY, I DO BELIEVE HE IS A QUALIFIED
11 MECHANICAL ENGINEER; AND IF, INDEED, HE WAS GOING TO
12 PRESENT THINGS THAT WERE BASED ON VALID ENGINEERING
13 PRINCIPLES, I DID NOT BELIEVE THAT AN 801 LIES
14 TOWARDS THOSE THINGS.

15 WHAT I WAS CONCERNED WITH, WHAT WE WERE
16 CONCERNED WITH, WAS PREVENTING A MECHANICAL ENGINEER
17 FROM BEING A BALLISTICS EXPERT, FROM BEING A MEDICAL
18 EXPERT, FROM BEING A BLOOD SPATTER EXPERT, AND ALL
19 THESE OTHER AREAS OF EXPERTISE THAT HE DIDN'T HAVE.

20 AS THE COURT MAY RECALL, IT WAS ONLY

21 AFTER HIS LITTLE SHOW AND TELL ON DIRECT IN THE 801
22 HEARING THAT WE OBTAINED OUR FIRST SET OF IMAGES OF
23 THESE ILLUSTRATIONS, AND WE WERE ASKING EVEN AT THAT
24 POINT FOR THE ENGINEERING CALCULATIONS, OR AS
25 DR. MC CARTHY CALLS THEM, THE GEOMETRY, THAT LAY
26 BEHIND THE CREATION OF THESE DRAWINGS. AND WE WERE
27 MISLED INTO BELIEVING SUCH A GEOMETRY EXISTED,
28 BECAUSE THE ENGINEER WAS CLAIMING THESE WERE A

42534

1 PRODUCT OF, YOU KNOW, ALL THIS WORK FOR OVER A YEAR,
2 AND THE CONTRIBUTION OF EVERY DEPARTMENT OF THE MOST
3 GENIUS-LADEN ORGANIZATION IN AMERICA'S
4 JURIS PRUDENCE.

5 IN ANY EVENT, WHAT BECAME OBVIOUS DURING
6 THE COURSE OF THE HEARING WAS THAT THIS COURT WAS
7 NOT GOING TO ALLOW DR. MC CARTHY TO OFFER OPINIONS
8 ON MEDICAL AREAS WHERE HE WASN'T QUALIFIED, BECAUSE
9 YOU SUSTAINED OBJECTIONS DURING THE HEARING ON THAT
10 BASIS. WHAT BECAME OBVIOUS FROM REMARKS THAT THE
11 COURT MADE, AND ALSO FROM SUSTAINING OBJECTIONS, WAS
12 THAT THE COURT WASN'T GOING TO ALLOW HIM TO TALK
13 ABOUT WHAT PEOPLE ARE THINKING; AND WHAT ALSO BECAME
14 OBVIOUS DURING THE COURSE OF THE HEARING WAS THAT
15 THE PROSECUTION WAS GOING TO TRY TO PROTECT HIS

16 CREDIBILITY BY NOT GOING INTO THE MORE OUTRAGEOUS
17 AND OUTLANDISH ASPECTS OF HIS REPORT, WHICH ARE THE
18 THINGS THAT MADE US BRING THE HEARING.

19 NOW, IN ALL CANDOR, YOUR HONOR, WHAT WE
20 BELIEVED WOULD BE THE OUTCOME OF THE HEARING, IF WE
21 HAD CARRIED IT THROUGH, WAS THAT THIS COURT MAY HAVE
22 RULED THAT THERE WAS CERTAIN KINDS OF OPINIONS THAT
23 DR. MC CARTHY COULD NOT OFFER; BUT WE HAD NO REASON
24 TO BELIEVE, AND WE CERTAINLY COULDN'T KNOW, THAT THE
25 COURT WAS GOING TO EXCLUDE HIM FROM TESTIFYING
26 ALTOGETHER, BECAUSE THE WAY HE WAS PORTRAYING IT AT
27 THAT HEARING, THERE WAS SOMETHING THAT ENGINEERING
28 HAD TO CONTRIBUTE TO THIS SO-CALLED RECONSTRUCTION.

42535

1 AND WE CAME AWAY -- AND RATHER THAN
2 CONTINUE OUR CROSS-EXAMINATION AND REVEAL TO THIS
3 WITNESS ALL THE WAYS IN WHICH WE INTENDED TO SHOW HE
4 WAS WRONG, WE DECIDED, OKAY, WE CAN GET HIM LIMITED
5 SO HE WON'T GO OUT OF RANGE AND THEN DEAL WITH THE
6 SO-CALLED ENGINEERING. AND THAT IS WHY WE WITHDREW
7 IT. NOTHING SINISTER.

8 AND SUBSEQUENT TO THAT WE MADE THE POINT
9 WITH THIS COURT, WHICH THIS COURT ADOPTED, THAT HE
10 COULD NOT RENDER MEDICAL OPINIONS ON HIS OWN; THAT

11 THERE HAD TO BE A MEDICAL FOUNDATION FOR THOSE
12 OPINIONS. AND AS A CONSEQUENCE, THE PROSECUTION
13 WENT OUT AND FOUND HIM A DOCTOR, OR RATHER, HE WENT
14 OUT AND FOUND THE PROSECUTION A DOCTOR, SOMEONE WHO
15 COULD BE SUFFICIENTLY FLIPPY-FLOPPY AS TO GIVE HIM --
16 AS THE COURT ULTIMATELY RULED, EVEN THOUGH WE
17 OBJECTED THAT DR. MC CARTHY WAS NOT REALLY RELYING
18 ON THE EXPERT MEDICAL EXPERTISE OF DR. LAWRENCE OR
19 DR. GOLDEN; NEVERTHELESS, DR. LAWRENCE, THE COURT
20 RULED, GAVE HIM ENOUGH ROOM SO THAT THERE WAS SOME
21 MEDICAL BASIS FOR SOME OF THE THINGS HE WAS TRYING
22 TO SHOW IN THE RECONSTRUCTIONS.

23 BUT, IN FACT, IT WAS ONLY DURING HIS
24 TESTIMONY AT TRIAL THAT WE LEARNED THAT THE CARTOONS
25 ARE PURELY IMAGINATION ON HIS PART. THERE IS NO
26 SCIENTIFIC BASIS FOR THE ILLUSTRATIONS. AND CLEARLY
27 OUR 801 WAS NOT AIMED AT ILLUSTRATIONS THAT WE
28 DIDN'T EVEN KNOW EXISTED UNTIL WE WERE IN THE MIDDLE

42536

1 OF THE HEARING. AND THEY'VE BEEN CHANGED. WE NEVER
2 DID GET THE DATA OF ANY CALCULATIONS OR
3 COMPUTATIONS. ALL OF THAT DISCOVERY WAS SUPPOSED TO
4 BE GOING ON AFTER THE 801 HEARING ENDED.

5 WHAT WE FINALLY LEARNED WAS THAT THEY

6 WITHDREW THEM BY ACCEPTING THE MEASUREMENTS THAT THE
7 BEVERLY HILLS POLICE DEPARTMENT HAD MADE; THAT IN
8 SPITE OF DR. MC CARTHY'S ASSERTIONS TO THE CONTRARY,
9 HIS COMPUTER DOESN'T SCALE THINGS ACCURATELY AND
10 HADN'T SCALED THE FURNITURE ACCURATELY. AND,
11 BASICALLY, THAT'S THE ONLY SCIENCE THAT WAS EVER
12 INVOLVED, AS WE LEARNED ONLY DURING HIS EXAMINATION,
13 IN THE CREATION OF THE ILLUSTRATIONS; THAT IS,
14 GETTING THE COMPUTER TO TAKE NUMBERS AND THEN SCALE
15 THE IMAGES TO THE NUMBERS THAT IT'S FED.

16 AND SO IT'S ONLY REALLY AFTER HE WAS
17 FULLY EXAMINED THAT IT COMES OUT THAT THIS IS NO
18 MORE THAN ROGER MC CARTHY'S IMAGINATION DRAWN UP
19 THIS WAY. AND BECAUSE THEY ARE VISUAL IMPRESSIONS,
20 BECAUSE THEY ARE VERY LARGE, BECAUSE THEY PURPORT TO
21 SHOW NOT JUST POSITIONS, BUT A SEQUENCE, THAT IT
22 BECAME OBVIOUS HE COULDN'T REALLY SUPPORT
23 SCIENTIFICALLY, THAT'S WHY WE'RE OBJECTING TO THE
24 ILLUSTRATIONS.

25 SO IT'S REALLY NOT -- IT'S REALLY NOT
26 FAIR, I GUESS, TO SAY THAT WE JUST PULLED A TACTICAL
27 TRICK OR THE IMPLICATION THAT WE JUST PULLED A
28 TACTICAL TRICK IN THE 801. THE ONLY TACTICAL TRICK

1 IS WE THOUGHT HE'D BE LIMITED TO TESTIFY IN SOME
2 LIMITED WAY AND I DIDN'T WANT TO REVEAL TO HIM ALL
3 THE THINGS WE COULD HIT HIM WITH, FRANKLY. BUT THE
4 PROBLEM OF THE ILLUSTRATIONS IS DIFFERENT THAN THE
5 PROBLEM OF HIS TESTIMONY. THE COURT DID RULE HE
6 NEEDED A MEDICAL FOUNDATION. THE COURT DID SUSTAIN
7 OBJECTIONS THROUGH TRIAL TO HIS GOING TOO FAR AFIELD
8 OF WHATEVER HIS QUALIFICATIONS MAY BE.

9 THE ILLUSTRATIONS, I THINK, ARE
10 SEPARATE -- ARE A SEPARATE ISSUE.

11 THANK YOU, YOUR HONOR.

12 THE COURT: ALL RIGHT. ANY RESPONSE?

13 MR. CONN: YES. CLEARLY, WHAT WE HAVE HERE
14 ON THE PART OF DEFENSE COUNSEL IS A SERIES OF
15 TACTICAL DECISIONS THAT THEY MADE WITH THEIR EYES
16 OPEN AT ALL TIMES, KNOWING EXACTLY WHAT THEY WERE
17 DOING AND SEEKING, ESSENTIALLY, TO HAVE THEIR CAKE
18 AND EAT IT TOO. THEY WANT TO FIRST ALLOW IN THE
19 TESTIMONY, PUT IN THEIR REBUTTAL, AND THEN ONCE
20 THEIR REBUTTAL IS IN, TO THEN HAVE THE TESTIMONY
21 THROWN OUT.

22 MS. ABRAMSON: WE'RE NOT MOVING TO STRIKE THE
23 TESTIMONY.

24 MR. CONN: IF I CAN PLEASE SPEAK.

25 AND I DON'T THINK THAT THE COURT SHOULD
26 FALL FOR THIS TACTICAL MANEUVER ON THEIR PART. THEY
27 WERE PROVIDED NOT ONLY WITH THE REPORT -- AS MUCH AS
28 THEY WANT TO CLAIM IGNORANCE AND NOT UNDERSTAND

1 FULLY WHAT WAS IN THE REPORT, DR. MC CARTHY PROVIDED
2 SUFFICIENT INFORMATION IN THAT REPORT TO PUT COUNSEL
3 ON NOTICE AS TO WHAT HE WAS GOING TO TESTIFY TO, AND
4 THEN THE COURT ALSO ALLOWED A HEARING.

5 AND IT WAS IN THE THAT HEARING THAT THEY
6 HAD A FULL OPPORTUNITY TO CROSS-EXAMINE
7 DR. MC CARTHY AND THE BASIS FOR HIS OPINIONS, AND
8 THEY DID SO, AND THEY DID SO AT LENGTH. WE HAD A
9 LENGTHY HEARING IN WHICH THEY HAD -- IN WHICH THEY
10 WERE ABLE TO QUESTION HIM CONCERNING THE BASIS FOR
11 HIS OPINIONS.

12 AND ONCE AGAIN, THEY WANT TO FEIGN
13 IGNORANCE AND SAY WE HAD NO IDEA WHAT THIS MAN WAS
14 TAKING ABOUT; WE HAD NO IDEA WHAT HE WAS GOING TO BE
15 TESTIFYING TO; WE HAD NO IDEA WHAT THE BASIS FOR HIS
16 OPINIONS WERE.

17 AND I DON'T SEE HOW COMPETENT DEFENSE
18 COUNSEL CAN SIT THERE AND SAY THAT THEY HAD NO
19 BASIS, AFTER DAYS OF CROSS-EXAMINATION OF THIS
20 WITNESS, AS TO THE BASIS FOR HIS OPINION. IT WAS
21 THEIR JOB TO ELICIT FROM HIM THE BASIS FOR HIS
22 OPINION. THAT WAS THE WHOLE PURPOSE OF THE HEARING,
23 TO FIND OUT THE BASIS FOR HIS OPINION. AND NOW,
24 AFTER HAVING DAYS TO DO SO, THEY SIT THERE AND

25 PRETEND THAT THEY'RE IGNORANT AND SAY, GEE WHIZ, WE
26 DIDN'T KNOW WHAT THIS MAN'S OPINION WAS BASED UPON.
27 WELL, THE TRUTH OF THE MATTER IS, THEY
28 HAD PLENTY OF OPPORTUNITY TO CROSS-EXAMINE HIM, AND

42539

1 IT SHOULD HAVE BEEN CLEAR TO ANY ATTORNEY AND TO
2 ANYONE IN THE AUDIENCE, AT THAT POINT, WHAT THE
3 BASIS OF HIS OPINION WAS DURING THE COURSE OF THAT
4 HEARING. AND IT WAS THEIR RESPONSIBILITY AT THAT
5 TIME TO MAKE A TACTICAL DECISION TO PURSUE THE
6 MOTION UNDER 801 OR TO WITHDRAW THE MOTION UNDER
7 801. AND THEY CHOSE, WITH THEIR EYES FULLY OPEN, AS
8 COMPETENT DEFENSE COUNSEL, TO WITHDRAW THE MOTION
9 UNDER 801.

10 THEN WE HAVE THE TESTIMONY PRESENTED AT
11 TRIAL. AND AFTER THEY'VE LISTENED TO THE TESTIMONY
12 AT TRIAL, THEN THEY HAVE ANOTHER TACTICAL DECISION
13 TO MAKE, AND THAT TACTICAL DECISION IS, DO WE MOVE
14 TO STRIKE HIS TESTIMONY AT THIS TIME OR DO WE GO
15 AHEAD AND REBUT IT? SO WHAT DO THEY DECIDE TO DO?
16 THEY GO AHEAD AND REBUT IT. WE HAVE BEEN LISTENING
17 TO DAYS OF TESTIMONY NOW FROM VARIOUS DEFENSE
18 WITNESSES TALKING ABOUT HOW RECONSTRUCTION IS NOT
19 POSSIBLE. THEY MADE THEIR TACTICAL DECISION. THEY

20 HAVE TO LIVE WITH THAT TACTICAL DECISION. AND NOW
21 THEY'RE SAYING, OH, BY THE WAY, NOW THAT WE HAVE ALL
22 OF OUR EVIDENCE IN, ALL OUR REBUTTAL IN, WE WANT TO
23 GO BACK AND STRIKE THE TESTIMONY.

24 THAT I THINK THAT MOTION IS SIMPLY NOT
25 TIMELY; THAT THE COURT SHOULD DENY THE MOTION. AND
26 WHEN YOU LOOK AT THE TACTICAL DECISIONS THAT WERE
27 MADE IN THIS CASE AND THE TIMING OF THOSE TACTICAL
28 DECISIONS, I THINK THAT THE MOTION SHOULD BE

42540

1 DENIED.

2 MR. GESSLER: I THINK THAT COUNSEL MISSED A
3 POINT, YOUR HONOR. I'M SORRY IF HE THOUGHT WE WERE
4 MOVING TO STRIKE TESTIMONY, WE'RE NOT. WE'RE MOVING
5 TO OBJECT TO 24 EXHIBITS. THAT'S HOW THIS CAME UP,
6 THAT'S HOW IT'S STILL UP. TESTIMONY, THAT'S OKAY.
7 WE HAVE DECIDED TO FIGHT THE TESTIMONY, I THINK
8 SUCCESSFULLY. THE DISTRICT ATTORNEY MAY THINK
9 UNSUCCESSFULLY. IT MAKES NO DIFFERENCE. BUT THE 24
10 EXHIBITS STAND ON THEIR OWN AND THEY DO NOT HAVE
11 FOUNDATION TO BE ACCEPTED, YOUR HONOR, UNDER THE
12 FEDERAL CONSTITUTION OR UNDER STATE LAW.

13 THE COURT: ALL RIGHT. SO YOU'RE NOT ASKING
14 THAT HIS TESTIMONY, MC CARTHY'S TESTIMONY, BE

15 STRICKEN?

16 MR. GESSLER: NO. I'M ASKING THAT THE 24
17 EXHIBITS BE DENIED ENTRY.

18 MR. CONN: IF I MAY RESPOND TO THAT.

19 AS FAR AS THE EXHIBITS ARE CONCERNED,
20 THE EXHIBITS DO NOTHING MORE THAN ILLUSTRATE HIS
21 TESTIMONY; AND THE IMPORTANT THING TO NOTE ABOUT THE
22 EXHIBITS IS THAT THEY DO NOT COME WITHOUT
23 CLARIFICATION OR EXPLANATION.

24 WE HEARD FROM DR. MC CARTHY, AND HE
25 EXPLAINED THE LIMITATIONS OF EACH AND EVERY SINGLE
26 ONE OF THOSE EXHIBITS. HE EXPLAINED THAT THE GREEN
27 BAR DOES NOT REPRESENT A STREAM OF PELLETS, BUT IT
28 IS DESIGNED TO REPRESENT A CONE. AND COUNSEL ARGUES

42541

1 THAT THAT'S INSUFFICIENT BECAUSE WHEN THE JURY
2 DECIDES THE CASE, THEY'RE GOING TO FORGET HIS
3 TESTIMONY IN THAT REGARD. WELL, THAT'S THE JOB OF
4 DEFENSE COUNSEL, TO MAKE CLOSING ARGUMENT IN THIS
5 CASE AND TO REMIND THE JURY OF WHAT HE SAID. NONE
6 OF THIS TESTIMONY COMES IN WITH GUARANTEES THAT THE
7 JURY IS GOING TO REMEMBER EVERYTHING THAT A WITNESS
8 SAYS. THAT'S WHY COUNSEL HAS ARGUMENT. COUNSEL CAN
9 DO HIS JOB, REMIND THE JURY OF THAT, AND THEY'LL BE

10 ABLE TO RECALL ALL OF THE LIMITATIONS THAT
11 DR. MC CARTHY PLACED ON THOSE ILLUSTRATIONS.
12 MR. GESSLER: THAT'S NOT THE POINT, YOUR
13 HONOR. THE POINT IS THAT THE EXHIBITS, AS NOW SET
14 FORTH, WITH THE RODS AND WITH THE TESTIMONY OF
15 DR. MC CARTHY, ARE MISLEADING. THEY DO NOT SHOW
16 WHAT THEY PURPORT TO SHOW.

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1 THE COURT: ALL RIGHT. WE DID HAVE A SIMILAR
2 DISCUSSION ON MONDAY, WHEN THE EXHIBITS WERE OFFERED
3 AND RECEIVED, AND AT THAT TIME THE COURT INDICATED
4 THAT THE EXHIBITS WERE, IN FACT, ILLUSTRATIVE OF THE

5 TESTIMONY OF DR. MC CARTHY AND GIVE MEANING TO HIS
6 TESTIMONY AND GIVE MEANING TO THE TESTIMONY OF,
7 BASICALLY, EVERY WITNESS WHO HAS TESTIFIED SINCE HE
8 WAS ON THE WITNESS STAND, BECAUSE EVERYBODY HAS
9 REFERRED TO THOSE EXHIBITS. AND IT WOULD BE
10 MEANINGLESS FOR ANY PERSON REVIEWING THE TESTIMONY
11 OF MC CARTHY, OR THOSE WHO FOLLOWED, IF THEY DIDN'T
12 HAVE ACCESS TO THESE EXHIBITS. THEY WOULDN'T
13 UNDERSTAND WHAT IT WAS THAT WAS BEING SAID AND WHY
14 IT WAS BEING SAID, AND WHAT THE TESTIMONY MEANT, AND
15 THAT'S THE PURPOSE OF EXHIBITS, DEMONSTRATIVE
16 EVIDENCE TO ASSIST IN UNDERSTANDING THE TESTIMONY
17 AND UNDERSTANDING WHAT IT IS THAT IS DESCRIBED, AND
18 THAT WAS WHY THESE ILLUSTRATIONS WERE UTILIZED.

19 AND SO MY STATEMENT OF REASONS AT THE
20 TIME THE EXHIBITS WERE RECEIVED THIS PAST MONDAY
21 REMAIN VALID REASONS. THEY ARE ILLUSTRATIVE. I
22 DON'T FIND THEM TO BE MISLEADING. THEY CERTAINLY
23 ARE SUBJECT TO CLARIFICATION AND LIMITATION BASED
24 UPON THE TESTIMONY OF MC CARTHY AND THOSE WITNESSES
25 WHO HAVE TESTIFIED ABOUT THEM, AND IT'S CLEAR THAT
26 THESE ARE NOT DESIGNED TO BE DEPICTIONS OF THE
27 EVENTS AS THEY ACTUALLY HAPPENED, ONLY ILLUSTRATIONS
28 OF DR. MC CARTHY'S THEORY OF HOW THESE EVENTS

1 HAPPENED, WITH THE UNDERSTANDING THAT THE
2 ILLUSTRATIONS DON'T DEPICT THE PRECISE POSITIONS OF
3 INDIVIDUALS AND PRECISE ANGLES, BUT APPROXIMATIONS.

4 WITH THOSE MODIFICATIONS THAT HAVE BEEN
5 AMPLY BROUGHT OUT BY COUNSEL IN THE EXAMINATION OF
6 WITNESSES, THESE ILLUSTRATIONS ARE NOT PREJUDICIAL
7 AND ARE NOT CONFUSING OR MISLEADING; AND, THEREFORE,
8 THE RESTATED OBJECTIONS OF THE DEFENSE TO THEIR
9 RECEIPT ARE OVERRULED, AS THEY WERE ON MONDAY.

10 MR. GESSLER: I WOULD LIKE TO MAKE ONE
11 COMMENT, YOUR HONOR. THE COURT HAS SAID THAT
12 REVIEWING AUTHORITY MUST BE ABLE TO HAVE ACCESS TO
13 THESE 24 EXHIBITS TO KNOW WHAT THEY'VE BEEN TALKING
14 ABOUT. DENYING THEM ADMISSION INTO EVIDENCE WOULD
15 NOT DEPRIVE THE REVIEWING AUTHORITY FROM SEEING
16 THOSE. THEY WOULD STILL BE AVAILABLE TO AN
17 APPELLATE COURT, CERTAINLY.

18 THE COURT: I WAS REFERRING TO THE 12 PEOPLE
19 WHO WILL REVIEW ALL OF THE EVIDENCE IN THIS CASE AND
20 MAKE A DECISION, AND THOSE PEOPLE ARE SITTING IN THE
21 JURY BOX. I WASN'T TALKING ABOUT A REVIEWING COURT
22 REVIEWING THE RECORD, BUT THE JURY, WHO HAS SEEN ALL
23 THESE WITNESSES TESTIFY; AND GOING INTO A JURY ROOM
24 AND TRYING TO PIECE TOGETHER WHAT IT WAS THEY WERE
25 SAYING WITHOUT THE EXHIBITS WOULD BE AN INSURMOUNTABLE
26 TASK. THEY NEED THOSE EXHIBITS TO ILLUSTRATE THE
27 TESTIMONY THAT HAS BEEN PRESENTED HERE.

42544

1 MY OBJECTION. THEY WILL SEE ONE ILLUSTRATION THAT
2 IS NO MORE MEANINGFUL THAN MANY OTHER
3 NON-ILLUSTRATED VERSIONS OF WHAT THESE SHOTS MIGHT
4 BE. I UNDERSTAND THAT THE COURT HAS RULED. I WILL
5 SHUT UP.

6 THE COURT: WELL, NO, DON'T SHUT UP. LET'S
7 GO ON TO THE 1118 MOTION.

8 MR. GESSLER: MAY WE HAVE JUST A COUPLE OF
9 MINUTES?

10 MS. ABRAMSON: I JUST WANT TO TAKE SOME
11 ASPIRIN.

12 THE COURT: SURE, SURE.

13 (BRIEF PAUSE IN THE TESTIMONY.)

14

15 MR. GESSLER: I MEANT I WILL SHUT UP ON THAT
16 SUBJECT.

17 THE COURT: OKAY. LET'S GO ON THEN TO THE
18 MOTION PURSUANT TO SECTION 1118.

19 MR. GESSLER: YES, YOUR HONOR. MY MOTION
20 PURSUANT TO 1118.1 ACTUALLY GOES TO THE
21 LYING-IN-WAIT SPECIAL CIRCUMSTANCE, AND AT THIS
22 POINT THAT'S THE ONLY THING THAT I AM ADDRESSING.

23 AND I'M ADDRESSING IT ON TWO GROUNDS.

24 THE FIRST IS ON THE 6TH, 8TH AND 14TH

25 AMENDMENTS, YOUR HONOR, THAT THE LYING-IN-WAIT

26 SPECIAL CIRCUMSTANCE, AS PRESENTLY ENACTED BY

27 STATUTE AND BY JUDICIAL INTERPRETATION OF THAT

28 STATUTE IN CALIFORNIA, DO NOT SERVE THE REQUIRED

42545

1 NARROWING PURPOSE THAT QUALIFIERS FOR A DEATH

2 PENALTY MUST HAVE UNDER THE UNITED STATES SUPREME

3 COURT LAW, PARTICULARLY ZANT VERSUS STEPHENS, AND

4 OTHER CASES THAT HAVE FOLLOWED IT; THAT A SPECIAL

5 CIRCUMSTANCE IN CALIFORNIA, OR WHATEVER WE CALL IT

6 IN SOME OTHER STATE, WHATEVER IT IS THAT IS GOING TO

7 SEPARATE AN ORDINARY FIRST-DEGREE MURDER FROM THAT

8 THAT MAKES SOMEBODY DEATH-ELIGIBLE, MUST SERVE A

9 NARROWING PURPOSE. IT MUST DO SOMETHING TO

10 DISCRIMINATE FROM THOSE WHO ARE WORTHY TO BE

11 CONSIDERED FROM DEATH FROM THOSE WHO ARE NOT.

12 AND ALTHOUGH LYING IN WAIT, AS WORDS MAY

13 HAVE SOME MEANING IN SERVING AS A QUALIFIER, THE

14 CALIFORNIA STATE SUPREME COURT'S INTERPRETATION OF

15 WHAT THAT MEANS, OR WHAT CAN CONSTITUTE LYING IN

16 WAIT, HAVE NOW COME TO THE POINT WHERE IT DOESN'T

17 EVEN TAKE A VERY IMAGINATIVE DISTRICT ATTORNEY TO

18 TAKE ANY FIRST-DEGREE MURDER THEY WANT TO AND TURN
19 IT INTO A DEATH-ELIGIBLE FIRST-DEGREE MURDER BY
20 ADDING THE SPECIAL CIRCUMSTANCE OF LYING IN WAIT.
21 TRADITIONALLY, OF COURSE, LYING IN WAIT
22 WAS CONSIDERED TO BE MORE HEINOUS THAN OTHER CRIMES
23 BECAUSE IT CONNOTED, AND REALLY MEANT IN THE LAW,
24 THE GUY WHO WAS LYING DOWN CONCEALED BY THE
25 SAGEBRUSH AND SHOT THE RIOTER AS HE WAS COMING BY; A
26 CONCEALMENT NOT ONLY OF PURPOSE, BUT OF THE PERSON
27 FROM THE INTENDED VICTIM, AN ACTUAL WAITING FOR HIM
28 TO COME BY, AND THEN KILLING HIM FROM AMBUSH. AN

42546

1 AMBUSH KILLING IN THAT SENSE HAS BEEN CONSIDERED TO
2 BE MORE HEINOUS THAN OTHERS.
3 THEN WE HAD THE MORALES CASE; AND, OF
4 COURSE, THAT WAS A PERSON WHOSE PURPOSE WAS
5 CONCEALED, EVEN THOUGH THE PERSON WASN'T CONCEALED.
6 HE WAS IN A CAR SITTING BEHIND THE PERSON THAT HE
7 INTENDED TO KILL, THAT HE SAID HE WAS GOING TO KILL
8 TO OTHERS, AND THEN HE TRIED TO HAMMER HER, STRANGLE
9 HER, BEAT HER, EVERYTHING THAT IT TOOK IN ORDER TO
10 KILL HER, AND SUCCEEDED, AND THE SUPREME COURT SAID
11 WELL, THAT'S ALL RIGHT FOR LYING IN WAIT TOO,
12 BECAUSE WE HAVE THE CONCEALED PURPOSE AND THE

13 WATCHFUL WAITING.

14 BUT EVEN THEN THE WATCHFUL WAITING AND
15 THE CONCEALED PURPOSE AND THE KILLING ALL HAVE TO BE
16 TEMPORALLY RELATED. THEY HAVE TO OCCUR IMMEDIATELY
17 AS THE WATCHFUL WAITING ENDS. AND THEN WE GET INTO
18 PEOPLE VERSUS HARDY. AND IN HARDY THE ONLY REAL
19 REASON THAT THAT WAS FOUND TO BE A LYING IN WAIT IS
20 THE CRIME OCCURRED AT 3:30 IN THE MORNING; AND SO,
21 THEY INFERRED THAT THERE WAS WATCHFUL WAITING,
22 PRESUMABLY WAITING FOR DARK AND THE PEOPLE TO BE
23 ASLEEP SO THAT THE KILLERS COULD UNSCREW A LIGHT
24 BULB, GAIN ENTRANCE INTO THE HOUSE, CREEP DOWN A
25 PASSAGEWAY, AND KILL THE SLEEPING VICTIMS.

26 AGAIN, THIS DID NOT NARROW, IN ANY
27 SENSE, ANY FIRST-DEGREE MURDER IN WHICH THERE'S
28 PREMEDITATION AND DELIBERATION. PREMEDITATION AND

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1 DELIBERATION ALMOST ALWAYS INCLUDE WAITING AND
2 WATCHING.

3 AND THEN WE GET INTO THE EDWARDS CASE,
4 AND IN THAT ONE IT JUST SAID: WELL, IT DOESN'T HAVE
5 TO BE A VERY LONG PERIOD OF WATCHFUL WAITING; SEEING
6 A POTENTIAL VICTIM FROM THE CAMPER AND THEN GETTING
7 THAT VICTIM AND KILLING THEM, THAT'S ENOUGH FOR

8 LYING IN WAIT. THE PROBLEM IS NOW THAT ANYBODY WHO
9 DOES NOT CALL UP THE POTENTIAL VICTIM IN ADVANCE AND
10 SAY: I'M COMING OVER TO KILL YOU AND HERE'S HOW I'M
11 GOING TO DO IT, AND WHEN I'M COMING, WOULD BE
12 THOUGHT TO BE A WATCHFUL WAITING AND LYING IN WAIT
13 AND WOULD MEET THE TEST AS IT'S PRESENTLY
14 NON-DEFINED BY THE CALIFORNIA SUPREME COURT.

15 THERE IS ALMOST NOTHING THAT WOULD NOT
16 MAKE IT -- IT DOESN'T GIVE ANY NOTICE UNDER THE DUE
17 PROCESS CLAUSE. IT DOES NOT GUIDE OR GIVE ANY
18 PRINCIPLED METHOD, OR IDENTIFY A CLASS OF MURDERERS
19 MORE DESERVING OF DEATH THAN ANYBODY ELSE WHO
20 PREMEDITATES AND DELIBERATES THEIR CRIME. IT DOES
21 NOT SERVE A CONSTITUTIONAL NARROWING PURPOSE.

22 AND FOR THAT REASON, I THINK THAT THE
23 SPECIAL CIRCUMSTANCE, REGARDLESS OF THE FACTS OF ANY
24 CASE AS THEY ARE NOW TO CALIFORNIA, NOT JUST THIS
25 CASE -- THIS CASE IS IRRELEVANT TO THIS PARTICULAR
26 MOTION -- IT IS THAT THE TERM "LYING IN WAIT," THE
27 SPECIAL CIRCUMSTANCE LYING IN WAIT IS VOID FOR
28 VAGUENESS, VOID FOR LACK OF JUDICIAL DEFINITION TO

42548

1 SERVE THE NARROWING FUNCTION. IT'S VOID UNDER THE
2 6TH, 8TH, AND 14TH AMENDMENTS AND STEVENS VERSUS

3 ZANT, BECAUSE IT IS JUST TOO AMORPHOUS, COVERS TOO
4 MANY SITUATIONS; AND ALL IT MEANS IS, GEE, I'M NOT
5 TELLING YOU THAT I'M COMING TO KILL YOU. THAT IS
6 INSUFFICIENT UNDER THE CONSTITUTIONAL PROVISIONS TO
7 SERVE AS A QUALIFIER FOR THE DEATH PENALTY UNDER
8 CALIFORNIA LAW OR UNDER FEDERAL LAW.

9 THAT'S THE FIRST PRONG OF THE MOTION,
10 YOUR HONOR. IF THE COURT WISHES, I WILL GIVE THE
11 SECOND PRONG AT THIS POINT.

12 THE COURT: LET ME RESPOND TO THIS ASPECT
13 FIRST.

14 ALL OF THE ARGUMENTS THAT YOU MAKE TO
15 THIS COURT HAVE BEEN MADE TO THE CALIFORNIA SUPREME
16 COURT AND HAVE BEEN REJECTED, AND THIS COURT --

17 MR. GESSLER: THEY BLEW IT.

18 THE COURT: THIS COURT IS BOUND BY THE RULING
19 OF THE CALIFORNIA SUPREME COURTS, WHICH HAVE HELD
20 THAT THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS
21 SUFFICIENTLY DEFINED TO MEET CONSTITUTIONAL
22 STANDARDS; AND THEREFORE, THIS COURT IS BOUND BY
23 THOSE RULINGS. AND ON THAT GROUND, YOUR MOTION IS
24 DENIED.

25 MR. GESSLER: YOUR HONOR, I THINK THIS COURT
26 IS ALSO BOUND BY THE UNITED STATES CONSTITUTION AND
27 THE AMENDMENTS THERETO; AND ALTHOUGH THE UNITED
28 STATES SUPREME COURT HAS NOT RULED DIRECTLY ON THIS

1 POINT IN OUR FAVOR, AND IT DENIED CERT IN MORALES, I
2 THINK, BUT THAT'S JUST A DENIAL OF CERT. YOU CAN'T
3 READ MUCH INTO THAT. THERE IS NO DEFINED DECISION
4 ON THIS PARTICULAR PORTION OF CALIFORNIA LAW AS YET
5 BY THE UNITED STATES SUPREME COURT; AND WE CERTAINLY
6 HAVE BEEN INVITED BY THE TUILAEP, DECISION, THE
7 CONCURRING OPINION BY JUSTICE BLACKMAN. EVEN THOUGH
8 HE'S NO LONGER THERE, HE CERTAINLY INVITED US -- HE
9 SAID, WHY AREN'T YOU ATTACKING THE NARROWING
10 FUNCTION? WHY WAS THAT CONCEDED IN THIS CASE? AND
11 THAT WAS UNDER THE 21 SPECIAL CIRCUMSTANCES JUST AS
12 A GENERIC CLASS. LYING IN WAIT IS THE ONE MOST
13 SUSCEPTIBLE TO THIS ARGUMENT OF ALL OF THOSE
14 DIFFERENT SPECIAL CIRCUMSTANCES, BECAUSE IT ALONE IS
15 CONSTITUTIONALLY UNFIRM. SO...

16 THE COURT: I UNDERSTAND THAT THIS IS AN
17 ISSUE OF FEDERAL, AS WELL AS STATE, CONSTITUTIONAL
18 BASIS, BUT AT THE SAME TIME, THE COURT IS BOUND BY
19 PRECEDENT, AND THE RULING OF THE COURT IS AS I'VE
20 STATED. THE MOTION ON THAT GROUND IS DENIED.

21 MR. GESSLER: THERE IS A FURTHER GROUND, YOUR
22 HONOR, UNDER 1118.1.

23 AGAIN, AS TO THE LYING-IN-WAIT SPECIAL
24 CIRCUMSTANCES, AND THAT IS FOR INSUFFICIENCY OF THE
25 EVIDENCE IN THIS CASE, AT THE CONCLUSION OF THE
26 PEOPLE'S CASE, TO PROVE THE LYING-IN-WAIT SPECIAL

27 CIRCUMSTANCE OR TO BE UPHOLD ON APPEAL. AGAIN, THE
28 REASONS FOR THAT ARE THAT IF IT IS TO BE FOUND THAT

42550

1 THERE IS SUFFICIENT EVIDENCE TO SUPPORT IT ON
2 APPEAL, IT HAS TO MEET THE CONSTITUTIONAL TEST OF
3 WHAT IS SUFFICIENT EVIDENCE TO MEET A
4 CONSTITUTIONALLY DEFINED LYING-IN-WAIT QUALIFIER OR
5 SPECIAL CIRCUMSTANCE. AND IN THIS CASE ALL WE KNOW
6 FROM THE PEOPLE'S CASE IS THAT THESE TWO YOUNG MEN,
7 OR AT LEAST -- ARGUABLY THESE TWO YOUNG MEN WENT
8 DOWN TO A BIG-5 STORE IN THE LA JOLLA AREA, A
9 HUNDRED MILES FROM THE AREA OF THEIR HOME, PASSING
10 UP OTHER STORES; USED A FALSE IDENTIFICATION TO BUY
11 TWO SHOTGUNS; AND THAT THEIR PARENTS WERE FOUND
12 SHOTGUNNED TO DEATH, WITH MULTIPLE SHOTGUNS, IN
13 THEIR LIVING ROOM. AT THE TIME THEY WERE FOUND
14 MR. MENENDEZ WAS SEATED ON A COUCH AND MRS. MENENDEZ
15 WAS LYING WITH NUMEROUS SHOTGUN -- FATAL SHOTGUN
16 WOUNDS, BETWEEN THE COUCH AND THE TABLE.

17 AND THAT THERE IS A STATEMENT, A
18 TAPE-RECORDED STATEMENT TO A DR. OZIEL TALKING ABOUT
19 HAVING DONE THE KILLING, FOR WHATEVER REASONS, MERCY
20 KILLING CREPT IN. DR. OZIEL USED THE WORD "CONTROL."
21 THERE WAS SOME TALK ABOUT NOT LETTING IT HAPPEN

22 UNTIL THEY'D SLEPT ON IT. THERE MIGHT BE SOME PROOF
23 OF PREMEDITATION AND DELIBERATION. THERE MIGHT BE
24 SOME PROOF THAT THIS COURT COULD FIND EVEN SOME TYPE
25 OF WATCHFUL WAITING, ALTHOUGH IT STRETCHES IT
26 GREATLY TO SAY THERE WAS WATCHFUL WAITING FOR TWO
27 DAYS AND NIGHTS BETWEEN THE TIME OF THE PURCHASE OF
28 THE SHOTGUNS AND THE KILLINGS.

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1 WE DO NOT KNOW THE POSITIONS OF THE
2 PARTICULAR DECEDENTS AT THE TIME THAT THE SHOTGUN
3 BLASTS WERE FIRST DELIVERED. THERE MIGHT BE SOME
4 CIRCUMSTANTIAL EVIDENCE IN THE PEOPLE'S CASE AT THE
5 TIME THAT THEY PRESENTED, FROM THE BLOOD AND THE
6 DIFFERENT PICTURES THAT HAVE BEEN PRESENTED, THAT IT
7 OCCURRED IN A REASONABLY CONFINED AREA OF THE SOFA,
8 THE COFFEE TABLE, THAT AREA OF THE DEN. BUT THAT'S
9 ALL WE HAVE. WHAT WE DO NOT HAVE IS THE NEXUS
10 BETWEEN WATCHFUL WAITING, IF THERE WAS ANY, AND THE
11 ACTUAL KILLINGS. WE HAVE NO KNOWLEDGE AS TO WHAT
12 PRECIPITATED THESE PARTICULAR KILLINGS AT THE TIME
13 THAT THEY OCCURRED IN THAT ROOM.

14 AND I BELIEVE, YOUR HONOR, THAT THERE IS
15 INSUFFICIENT EVIDENCE UNDER 1118.1 TO FIND A VALID
16 CONSTITUTIONAL LYING-IN-WAIT PROVISION AT THIS

17 POINT.

18 MS. ABRAMSON: I JOIN IN COUNSEL'S REMARKS ON
19 BEHALF OF ERIK MENENDEZ.

20 THE COURT: OKAY. DID THE PEOPLE WISH TO
21 RESPOND?

22 MR. CONN: YES. HERE WE HAVE -- IT CAN BE
23 INFERRED FROM THE CRIME SCENE THAT FROM PHOTOGRAPHS
24 OF THE VICTIMS AT THE CRIME SCENE, AS WELL AS FROM
25 FACTS THAT THE DEFENDANTS PURCHASED THE SHOTGUNS TWO
26 DAYS EARLIER, AS WELL AS FROM THE FACT THAT -- FROM
27 THE ADMISSION OF THE DEFENDANTS IN THE DECEMBER 11TH
28 TAPE, WHAT THE DEFENDANTS DID WAS PURCHASE THE

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1 SHOTGUNS TWO DAYS EARLIER; THAT THEY PREMEDITATED
2 DURING THAT PERIOD OF TIME; AND THAT THEY WAITED FOR
3 THE OPPORTUNE MOMENT TO KILL THEIR PARENTS.

4 WE KNOW THAT THE VICTIMS IN THIS CASE
5 WERE KILLED ON A SUNDAY EVENING AT 10:00 P.M., OR
6 WHILE RELAXING IN THEIR HOME WATCHING TELEVISION.
7 WE KNOW THAT THE POSITION OF THE BODIES,
8 PARTICULARLY THAT OF JOSE MENENDEZ, STRONGLY LENDS
9 ITSELF TO THE CONCLUSION THAT THEY WERE TOTALLY
10 CAUGHT OFF GUARD AND TAKEN BY SURPRISE AT THIS,
11 THEIR VULNERABLE MOMENT.

12 WE HAVE THE ADMISSIONS OF THE DEFENDANTS
13 ON THE DECEMBER 11TH TAPE THAT THEY DID PREMEDITATE
14 THIS CRIME FOR A COUPLE OF DAYS. IT COULD
15 REASONABLY BE CONCLUDED THAT FOLLOWING THE TWO-DAY
16 PERIOD OF PREMEDITATION, THEY WAITED FOR THE RIGHT
17 OPPORTUNITY TO STRIKE; AND ALSO, WE HAVE THE
18 TESTIMONY OF DR. MC CARTHY, AS WELL AS PART OF OUR
19 CASE, THAT THE VICTIMS, IN HIS OPINION, WERE SITTING
20 DOWN AT THE TIME THAT THE FIRST SHOT TO THE VICTIMS
21 WERE FIRED.

22 SO GIVEN THE CIRCUMSTANCES OF THE
23 SHOOTINGS; THAT IS, A SUNDAY NIGHT, 10:00 AT NIGHT,
24 RELAXING IN FRONT OF THE TELEVISION, THAT AFTER THE
25 DEFENDANTS HAD TWO DAYS TO PREMEDITATE THIS CRIME,
26 IT CAN REASONABLY BE CONCLUDED THE PREMEDITATION WAS
27 FOLLOWED BY WATCHING AND WAITING, AND THEY DID
28 STRIKE THE VICTIM AT A MOST VULNERABLE TIME, AND

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1 THAT SUPPORTS SUFFICIENT EVIDENCE TO SUPPORT THE
2 CHARGE.

3 MR. GESSLER: MAYBE I MISSED SOMETHING, YOUR
4 HONOR. WHERE ARE THE WORDS "THEY WAITED FOR THE
5 OPPORTUNITY" IN THE DECEMBER 11TH TAPE?

6 THE COURT: YOU'RE ASKING ME OR MR. CONN?

7 MR. GESSLER: WELL, I'M ASKING YOU BECAUSE I
8 CAN'T TALK DIRECTLY TO MR. CONN. BUT I HAVE
9 REVIEWED THAT TAPE, AND THAT MIGHT BE AN INFERENCE
10 THAT HE IS SOMEHOW STRETCHING FROM THAT TAPE, BUT I
11 DON'T REMEMBER THE WORDS OF EITHER ERIK MENENDEZ NOR
12 LYLE MENENDEZ SAYING WE WAITED FOR THE OPPORTUNITY
13 TO GET OUR PARENTS, OR THAT WE CAUGHT 'EM LAYING OUT
14 IN FRONT OF THE TV SET, OR ANY OF THAT.

15 WHAT MR. CONN HAS SAID IS EXACTLY WHAT
16 I'VE BEEN ARGUING ON A CONSTITUTIONAL BASIS
17 EARLIER. HE HAS TAKEN PREMEDITATION AND
18 DELIBERATION, SAID WE HAVE SOME PROOF OF THAT FROM
19 THE TAPE, WE HAVE SOME PROOF OF THAT FROM THE CRIME
20 SCENE, AND THEN HE HAS EQUATED THAT TO MEAN LYING IN
21 WAIT, AND THAT COVERS IT.

22 THE OBJECTION I HAVE IS THERE IS NO
23 EVIDENCE FOR A VALID CONSTITUTIONAL LYING-IN-WAIT
24 SPECIAL CIRCUMSTANCE. I'M NOT TALKING ABOUT WHETHER
25 THERE'S ENOUGH TO GO FORWARD ON A FIRST-DEGREE
26 THEORY.

27 THE COURT: ALL RIGHT. THE ISSUE IS WHETHER
28 OR NOT THERE IS SUFFICIENT EVIDENCE TO SUSTAIN A

2 AS ADDRESSED BY COUNSEL, WHETHER OR NOT THERE IS
3 SUFFICIENT EVIDENCE TO SUSTAIN A FINDING BY THE JURY
4 BEYOND A REASONABLE DOUBT THAT THE SPECIAL
5 CIRCUMSTANCE OF LYING IN WAIT HAS BEEN PROVED.

6 THE COURT DOES NOT EVALUATE IT BASED
7 UPON PROOF BEYOND A REASONABLE DOUBT, BUT JUST
8 WHETHER OR NOT THERE'S SUFFICIENT EVIDENCE, IF THE
9 JURY WAS TO FIND AGAINST THE DEFENDANTS AND FOR THE
10 PROSECUTION ON THIS SPECIAL CIRCUMSTANCE, WHETHER OR
11 NOT AN APPELLATE COURT WOULD SUSTAIN THAT FINDING ON
12 APPEAL. AND THE COURT CONCLUDES THAT AN APPELLATE
13 COURT WOULD DO SO, AND THERE IS SUFFICIENT EVIDENCE
14 PRESENTED BY THE PROSECUTION TO SUSTAIN A CONVICTION
15 ON APPEAL ON THE SPECIAL CIRCUMSTANCE OF LYING IN
16 WAIT; THEREFORE, THE MOTION UNDER 1118.1 IS DENIED.

17 ALL RIGHT. ANYTHING ELSE?

18 MR. GESSLER: NO, YOUR HONOR.

19 THE COURT: WE HAVE ONE ISSUE THAT WE TALKED
20 ABOUT YESTERDAY WITH MR. LEVIN. WE CAN PURSUE THAT.
21 ANY OTHER ISSUES HERE THAT WE CAN ADDRESS BEFORE WE
22 TAKE OUR BREAK?

23 SCHEDULE-WISE, I TALKED TO YOU ABOUT
24 THAT BRIEFLY YESTERDAY. THE PEOPLE WEREN'T PRESENT
25 SO PERHAPS -- I DON'T KNOW IF THEY'RE AWARE OF WHAT
26 YOUR SCHEDULE IS, WITNESS SCHEDULE.

27 MR. ABRAMSON: RIGHT NOW WE'RE GOING TO HAVE
28 DR. WECHT BACK. WE KEEP RE-INTERRUPTING WITNESSES.

1 I HAVE TO HAVE DR. WECHT ON MONDAY AND, I IMAGINE,
2 PART OF TUESDAY. MR. MORTON WILL BE AVAILABLE, WE
3 HOPE, RIGHT AFTER DR. WECHT. SO WE'LL LET HIM KNOW
4 MONDAY NIGHT IF WE WANT HIM IN TUESDAY OR WEDNESDAY.
5 AND SO THEY'RE NEXT; AND THEN, AS WE CALL THEM, THE
6 BOAT PEOPLE, AND THEN ERIK MENENDEZ.

7 THE COURT: HOW MUCH LONGER DID YOU THINK YOU
8 HAD ON MR. MORTON?

9 MS. ABRAMSON: I THOUGHT I ONLY HAD AN HOUR
10 AND A HALF OR SO, BUT I CAN'T PREDICT WHAT MR. CONN
11 HAS. AND MY INTENTION WITH DR. WECHT IS TO BE
12 RELATIVELY BRIEF. WE'RE ONLY -- I'VE ALREADY TOLD
13 YOU WHAT MY PLAN WAS WITH -- TOLD THE COURT WHAT MY
14 PLAN WAS WITH DR. WECHT. I'M NOT GOING TO TAKE VERY
15 LONG WITH HIM EITHER. IT'S THE CROSS-EXAMINATION
16 THAT MIGHT TAKE UP A LOT OF TIME.

17 THE COURT: OKAY. ALL RIGHT. THEN LET'S
18 TAKE OUR RECESS AND WE'LL HAVE A CONTINUATION OF
19 THAT CLOSED HEARING WITH THE DEFENSE, AND WE'LL BE
20 IN RECESS UNTIL MONDAY AT 8:30.

21 MS. ABRAMSON: THANK YOU, YOUR HONOR.

22 (PAGES 42556 THROUGH 42558 WERE
23 SEALED BY ORDER OF THE COURT.)

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF LOS ANGELES

3 DEPARTMENT NW "N" HON. STANLEY M. WEISBERG JUDGE

4 THE PEOPLE OF THE STATE OF)

5 CALIFORNIA,)

6 PLAINTIFFS,)

7)
8 VS.) NO. BA 068880

9 ERIK GALEN MENENDEZ, AND)

JOSEPH LYLE MENENDEZ,)

10 DEFENDANTS.)

11
12 REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

13 FRIDAY, DECEMBER 1, 1995

14 VOLUME 254

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16 (PAGES 42517 AND 42556-42558 WERE SEALED.)

17
18
19
20
21 APPEARANCES:

(SEE APPEARANCE PAGE)

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MARILYN FADALE,

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9 ILLUSTRATION EXHIBITS 32542

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19

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26

LEGEND:

27 A = MS. ABRAMSON C = MR. CONN
G = MR. GESSLER L = MR. LEVIN
28 N = MS. NAJERA T = MS. TOWERY

1 EXHIBITS INDEX

2 EXHIBITS: MARKED RECEIVED VOL.

3 (NONE THIS VOLUME.)