

1 VAN NUYS, CALIFORNIA; WEDNESDAY, NOVEMBER 22, 1995

2 9:10 A.M.

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

4 (APPEARANCES AS HERETOFORE NOTED.)

5

6 (THE FOLLOWING PROCEEDINGS WERE

7 HELD IN OPEN COURT, OUT OF THE

8 PRESENCE OF THE JURY:)

9

10 THE COURT: IN THE TRIAL, THE DEFENDANTS ARE

11 IN COURT WITH THEIR LAWYERS; THE PEOPLE ARE HERE.

12 AND WE'RE READY TO PROCEED. THE JURY IS

13 HERE.

14 LET'S HAVE THE JURY OUT.

15 MR. CONN: BEFORE WE BRING OUT THE JURY, YOUR

16 HONOR, IN REGARD TO THE REPORT PROVIDED -- PREPARED

17 BY THE WITNESS, WE HAD A HEARING LAST WEEK TO

18 DETERMINE WHAT PORTION OF THAT REPORT WE'D BE

19 ENTITLED TO, AND I UNDERSTAND, AS A MATTER OF

20 DISCOVERY PRIOR TO THE TIME THE WITNESS TOOK THE

21 STAND, THE COURT RULED WE WERE ENTITLED TO A

22 REDACTED VERSION OF THE REPORT, WHICH WE RECEIVED.

23 YESTERDAY, AS I EXAMINED THE WITNESS, I

24 SOUGHT TO OBTAIN FROM HIM A COMPLETE UNREDACTED COPY

25 OF THE REPORT; AND I STILL HAVE SIMPLY THE REDACTED

26 COPY.

27 IT'S MY UNDERSTANDING OF THE LAW, ONCE

28 THE WITNESS HAS NOW TESTIFIED, WE WOULD BE ENTITLED

1 TO A COMPLETE COPY OF ANY COMMUNICATION BETWEEN HIM
2 AND COUNSEL. AND I CAN'T THINK OF ANY LEGAL REASON
3 WHY WE WOULD NOT BE ENTITLED TO THAT REPORT.

4 SO I WOULD ASK AT THIS TIME THAT THE
5 COURT ORDER THE WITNESS TO PROVIDE THE PROSECUTION
6 WITH A COPY OF THE UNREDACTED REPORT.

7 THE COURT: AND WHAT IS THE DEFENSE
8 POSITION?

9 MS. ABRAMSON: I'VE NEVER HEARD OF THE RULE
10 MR. CONN'S TALKING ABOUT. THE COURT IS FAMILIAR
11 WITH THE NATURE OF THE INFORMATION REDACTED. IT WAS
12 COMMUNICATIVE IN NATURE, AND IN ONE RESPECT, HAD TO
13 DO WITH SOMETHING THAT WASN'T AN ISSUE IN THE CASE,
14 AND WE DID NOT INTEND TO DISAPPROVE IT. IT'S NOT
15 EVIDENCE WE INTEND TO PROVE, AND THE WITNESS HASN'T
16 MADE REFERENCE TO ANY OF THOSE MATTERS, AND I DON'T
17 SEE THEY'RE ENTITLED TO IT.

18 MOREOVER, IT GIVES THE JURY THE
19 IMPRESSION -- IT WOULD GIVE THE JURY THE FALSE
20 IMPRESSION THAT SOMETHING WAS WITHHELD FROM THE
21 PROSECUTION, WHEN THE COURT SPECIFICALLY RULED ON
22 EVERY WORD THAT COULD BE REDACTED.

23 SO WE WOULD OBJECT TO RAISING THAT RED

24 HERRING OF AN ISSUE.

25 THE COURT: THAT'S A SEPARATE ISSUE

26 ALTOGETHER FROM THE ONE THAT THE PROSECUTION IS

27 ADDRESSING, WHICH IS THEIR ARGUMENT THAT ONCE THE

28 WITNESS HAS TESTIFIED, THIS IS --

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1 MS. ABRAMSON: NOT COMMUNICATION FROM ME.

2 THE COURT: BELIEVE IT OR NOT, I'M STILL

3 TALKING.

4 MS. ABRAMSON: I'M SORRY.

5 THE COURT: THAT THIS IS SOMETHING DIFFERENT

6 THAN A DISCOVERY ISSUE RELATED TO PROSPECTIVE

7 TESTIMONY OF A WITNESS. BUT THE WITNESS HAS ALREADY

8 TESTIFIED AND SOMEHOW THIS IS NOW DISCOVERABLE.

9 WHAT IS YOUR AUTHORITY FOR THAT,

10 MR. CONN, THAT ANY COMMUNICATION BETWEEN THE WITNESS

11 AND A LAWYER IS THEREAFTER DISCOVERABLE?

12 MR. CONN: SIMPLY, WE'RE NOT SEEKING TO

13 DISCOVER A DOCUMENT THAT APPARENTLY HAS NO BEARING

14 ON THIS CASE. IF THERE WERE A SEPARATE DOCUMENT,

15 THERE WAS A PERSONAL COMMUNICATION BETWEEN COUNSEL

16 AND THE WITNESS, THAT MAY OR MAY NOT BE SOMETHING

17 THAT WE SHOULD OBTAIN ONCE THE WITNESS TAKES THE

18 STAND. THAT'S A SEPARATE ISSUE WHICH I WON'T SPEAK

19 TO AT THIS TIME.

20 I THINK WHAT WE'RE TALKING ABOUT HERE IS
21 A REPORT. WE'RE TALKING ABOUT INFORMATION WHICH
22 APPARENTLY HE WAS -- HE REVIEWED THE CASE. HE SAT
23 DOWN FOR THE PURPOSE OF PREPARING A REPORT TO ADVISE
24 COUNSEL IN REGARD TO CERTAIN THINGS, AND HE ISSUED A
25 REPORT CONCERNING HIS FINDINGS; AND IT SEEMS TO ME
26 THAT IN ORDER TO CROSS-EXAMINE THE WITNESS, TO
27 EXPLORE ANY AREAS OF BIAS, IT'S NECESSARY TO FIND
28 OUT THE NATURE OF THAT COMMUNICATION THAT HE DECIDED

41786

1 TO PUT IN A REPORT TO COUNSEL.

2 THE COURT: LET ME INTERRUPT YOU HERE
3 BECAUSE, IN ESSENCE, THAT MATERIAL WAS CONSIDERED BY
4 THE COURT AT THE TIME THE MATTER WAS BROUGHT TO MY
5 ATTENTION LAST FRIDAY, FRIDAY AFTERNOON, WHEN THE
6 REPORT WAS TURNED OVER TO THE PROSECUTION. THOSE
7 MATTERS THAT WERE REDACTED IN NO WAY CHANGED THE
8 NATURE OF THE REPORT, CHANGED THE TENOR OF THE
9 REPORT, CHANGED THE ISSUES OF BIAS THAT YOU ARE NOW
10 ADDRESSING. THERE'S NO MATERIAL CHANGE WHATSOEVER
11 IN THE CONTENT OF THE REPORT OR THE TENOR OF THE
12 REPORT. THE MATTERS REDACTED WERE REALLY
13 INCONSEQUENTIAL TO THE PURPOSES THAT YOU'RE TALKING

14 ABOUT. AND THE ABILITY OF THE PROSECUTION TO
15 EXAMINE THIS WITNESS FULLY ON THE SUBJECTS THAT
16 YOU'VE NOW ADDRESSED WERE NOT IN ANY WAY DIMINISHED
17 BY THE REDACTIONS FROM THIS REPORT.

18 MR. CONN: I'M SURE THE COURT IS CORRECT ON
19 THAT. MY ONLY CONCERN IS THAT I CAN'T THINK OF ANY
20 LEGAL REASON WHY WE WOULD NOT BE ENTITLED TO VIEW A
21 REPORT FROM THE WITNESS TO COUNSEL. I JUST DON'T
22 SEE ANY BASIS. I DON'T UNDERSTAND WHY THE COURT IS
23 STILL RULING THAT THE PROSECUTION IS NOT ENTITLED TO
24 THE MATERIAL. I CAN'T THINK OF ANY REASON WHY WE
25 WOULD NOT BE ENTITLED TO VIEW THE MATERIAL.

26 THE COURT: WELL, IF A WITNESS DOESN'T
27 TESTIFY ON A CERTAIN SUBJECT AND IT'S NEVER ASKED OF
28 HIM, ARE YOU THEN ENTITLED TO THE ENTIRETY OF THE

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1 REPORT, EVEN THOUGH IT'S NOT PART OF HIS TESTIMONY?

2 MR. CONN: WELL, I FIND IT SOMEWHAT
3 ANALOGOUS, FOR EXAMPLE, TO DR. MC CARTHY WHEN HE
4 GAVE THE OPINION IN HIS REPORT THAT -- IN MY OPINION,
5 I THINK THE DEFENDANTS PROBABLY CAME IN THROUGH THE
6 FRENCH DOOR. THAT WAS REALLY SOMEWHAT SPECULATIVE,
7 AND WE DIDN'T SEEK TO ELICIT THAT IN ANY WAY DURING
8 HIS EXAMINATION; AND YET, THAT WAS AN AREA WHERE

9 COUNSEL WAS ENTITLED TO CROSS-EXAMINE UPON. AND
10 CERTAINLY SHE WAS ENTITLED TO THE REPORT.
11 I WOULD NEVER CONSIDER TAKING ONE OF MY
12 REPORTS AND REDACTING WORDS OR SENTENCES FROM ANY OF
13 MY REPORTS PREMISED UPON THE ARGUMENT THAT IT'S NOT
14 REALLY NECESSARY FOR COUNSEL TO HAVE THIS PARTICULAR
15 WORD OR SENTENCE. I JUST DON'T UNDERSTAND HOW WE
16 CAN BE ENTITLED TO ONLY A PORTION OF THE DOCUMENT
17 AND NOT THE ENTIRE DOCUMENT.
18 THE COURT: WELL, THIS PARTICULAR DOCUMENT
19 REFLECTS, BASICALLY, WORK PRODUCT AND DISCUSSION
20 BETWEEN COUNSEL AND THE WITNESS IN PREPARATION FOR
21 TESTIMONY; AND TO THE EXTENT THAT YOU HAVE SOUGHT TO
22 OR WILL SEEK FURTHER TO USE IT TO IMPEACH THE
23 WITNESS AND ESTABLISH HIS BIAS, IT'S STILL THERE.
24 MUCH OF THAT IS STILL THERE. PORTIONS OF IT THAT
25 WERE REDACTED, OR A PORTION OF IT THAT WAS REDACTED
26 WAS A PORTION THAT WAS NOT A SUBJECT OF QUESTIONING
27 OF THIS WITNESS, AND IT'S NOT PART OF THE
28 QUESTIONING OF THE WITNESS. IT'S NOT A REPORT OF

41788

1 HIS PROPOSED TESTIMONY OR HIS TESTIMONY. IT'S JUST
2 SOME EXTRANEIOUS MATERIAL THAT WAS INCLUDED IN THE
3 REPORT.

4 SO AT THIS POINT I DON'T SEE THAT
5 THERE'S A LEGAL JUSTIFICATION FOR TURNING OVER THE
6 UNREDACTED VERSION AT THIS POINT.
7 LET'S GET THE JURY OUT.
8 (THE JURY ENTERED THE COURTROOM
9 AND THE FOLLOWING PROCEEDINGS
10 WERE HELD:)
11
12 THE COURT: THE JURY IS IN COURT.
13 GOOD MORNING, LADIES AND GENTLEMEN.
14 WE'RE NOW READY TO RESUME WITH THE
15 TRIAL.
16 WE HAVE A WITNESS STILL ON THE STAND.
17 WOULD YOU STATE YOUR NAME AGAIN FOR US,
18 PLEASE.
19 THE WITNESS: YES. DR. FACKLER, F-AS-IN-FRANK-
20 C-K-L-E-R.
21 THE COURT: I'LL REMIND YOU YOU'RE STILL
22 UNDER OATH.
23 YOU MAY CONTINUE YOUR REDIRECT.
24 MR. CONN: THANK YOU.
25
26 MARTIN FACKLER,
27 THE WITNESS AT THE TIME OF ADJOURNMENT, RESUMED THE
28 STAND, AND TESTIFIED FURTHER AS FOLLOWS:

1

2 REDIRECT EXAMINATION (CONTINUED)

3 BY MS. ABRAMSON:

4 Q DR. FACKLER, IN YOUR PREPARATION ON THIS

5 CASE WERE YOU -- STRIKE THAT.

6 DID YOU FOCUS UPON CERTAIN WOUNDS AND

7 INJURIES HERE THAT HAD SIGNIFICANCE TO YOU FROM A

8 WOUND BALLISTICS STANDPOINT?

9 A YES, I DID.

10 Q AND WERE THERE OTHER WOUNDS AND INJURIES

11 HERE THAT DID NOT HAVE PARTICULAR SIGNIFICANCE IN

12 THE CONTEXT OF THIS IMAGINED SCENARIO THAT ROGER

13 MC CARTHY DESIGNED?

14 MR. CONN: I'M GOING TO OBJECT AS

15 ARGUMENTATIVE.

16 THE COURT: SUSTAINED AS TO THE FORM OF THE

17 QUESTION.

18 Q BY MS. ABRAMSON: WERE THERE OTHER

19 WOUNDS AND INJURIES THAT DID NOT APPEAR TO YOU TO

20 HAVE WOUND BALLISTIC SIGNIFICANCE IN THE

21 RECONSTRUCTION SCENARIO THAT ROGER MC CARTHY

22 DESIGNED?

23 A YES.

24 Q DURING THE DIRECT EXAMINATION DID WE

25 FOCUS ON THOSE WOUNDS THAT YOU FELT, FROM YOUR

26 STANDPOINT OF WOUND BALLISTICS EXPERTISE, YOU COULD

27 MOST PROPERLY ADDRESS?

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1 Q YOU'RE NOT A FORENSIC PATHOLOGIST,

2 CORRECT?

3 A THAT'S CORRECT.

4 Q THERE ARE FORENSIC PATHOLOGISTS WHO HAVE

5 BEEN CONSULTING ON THIS CASE FOR THE DEFENSE, RIGHT?

6 MR. CONN: OBJECTION. LEADING.

7 THE COURT: SUSTAINED.

8 Q BY MS. ABRAMSON: ARE THERE FORENSIC

9 PATHOLOGISTS THAT YOU HAVE TALKED TO WHO ARE

10 CONSULTING WITH THE DEFENSE IN THIS CASE?

11 A YES.

12 Q AND IS IT YOUR UNDERSTANDING THAT A

13 FORENSIC PATHOLOGIST WILL TESTIFY FOR THE DEFENSE TO

14 COVER ALL THE WOUNDS?

15 MR. CONN: OBJECTION. IRRELEVANT.

16 THE COURT: SUSTAINED.

17 Q BY MS. ABRAMSON: DID YOU UNDERSTAND IT

18 TO BE YOUR ROLE TO TALK ABOUT AND EXPLAIN EACH AND

19 EVERY WOUND IN THE CASE?

20 MR. CONN: OBJECTION. IRRELEVANT.

21 THE COURT: SUSTAINED.

22 MS. ABRAMSON: WELL, YOUR HONOR, I THINK --

23 Q WAS THAT YOUR PURPOSE IN YOUR DIRECT
24 TESTIMONY, TO EXPLAIN EVERY WOUND IN THE CASE?
25 MR. CONN: OBJECTION. CALLS FOR SPECULATION
26 AND IRRELEVANT.
27 THE COURT: SUSTAINED. HE WAS ASKED
28 QUESTIONS AND HE GAVE ANSWERS.

41791

1 Q BY MS. ABRAMSON: WERE YOU ASKED
2 QUESTIONS BY MR. CONN ABOUT WOUNDS THAT YOU HAD NOT
3 SPECIFICALLY FOCUSED ON?

4 A YES.

5 Q AND IN ADDITION WERE YOU -- BEFORE YOU
6 CAME HERE TO TESTIFY IN THE TRIAL, DID YOU HAVE A
7 SET OF THE ILLUSTRATIONS THAT MR. MC CARTHY
8 PREPARED?

9 A NO.

10 Q AND DID YOU, THEREFORE, EXAMINE THEM
11 BEFORE THEY WERE SHOWN TO YOU DURING YOUR
12 EXAMINATION?

13 A NO, I HAD NOT.

14 Q HAVE YOU NOW HAD AN OPPORTUNITY TO
15 REVIEW AND EXAMINE ALL OF THE ILLUSTRATIONS?

16 A YES.

17 Q AND HAVE YOU -- HAVE YOU ALWAYS HAD A

18 COMPLETE SET OF THE SCENE PHOTOGRAPHS?

19 A SCENE PHOTOGRAPHS, YES. THESE -- THE --

20 I DON'T KNOW WHAT YOU CALL THEM. WITH THE LITTLE

21 ANTHROPOMORPHIC DUMMIES, I GUESS YOU'D CALL THEM,

22 THAT WERE PREPARED. THAT WHOLE SET, I THINK IT'S 12

23 OF THEM, I DID NOT HAVE ANY OF THOSE. BUT THE SCENE

24 PHOTOGRAPH I DID HAVE.

25 Q THE ACTUAL PHOTOGRAPHS OF THE ACTUAL

26 SCENE WITH THE ACTUAL PEOPLE?

27 A I HAD THAT, YES.

28 Q AND YOU HAD X RAYS AS WELL THAT WERE

41792

1 MADE FOR YOU FROM MICROFICHE?

2 A YES, I DID.

3 Q NOW, YOU WERE ASKED ON CROSS-EXAMINATION

4 WHETHER YOU ATTEMPTED A RECONSTRUCTION OF THE SHOTS

5 AND THE WOUNDS AND THE POSITIONS AND THE SEQUENCE IN

6 THIS CASE.

7 A YES.

8 Q DID YOU DO SUCH A THING?

9 A I DID NOT ATTEMPT A RECONSTRUCTION.

10 Q AND DURING THE COURSE OF TIME THAT YOU

11 HAVE BEEN WORKING ON THIS CASE, HAVE YOU CONSULTED

12 WITH FORENSIC CRIMINALISTS?

13 A YES.

14 Q HAVE YOU CONSULTED WITH A FIREARMS

15 EXAMINER?

16 A YES.

17 Q HAVE YOU CONSULTED WITH DR. WECHT?

18 A YES.

19 Q HAVE YOU CONSULTED WITH DR. GOLDEN?

20 A YES.

21 Q HAVE YOU CONSULTED WITH DR. MICHAEL

22 BODEN?

23 A YES.

24 Q DID YOU CONSULT WITH AN -- I'M

25 FORGETTING HIS NAME -- ANOTHER FORENSIC PATHOLOGIST

26 FROM HERE IN CALIFORNIA?

27 A YES. DR. RICHARD MASON FROM SAN JOSE.

28 Q IS DR. MASON A FORENSIC PATHOLOGIST

41793

1 WHO'S KNOWN FOR HIS EXPERTISE IN BALLISTICS?

2 A I DON'T KNOW HOW WELL KNOWN HE IS KNOWN,

3 BUT HE SHOULD BE IN MY VIEW. HE PROBABLY KNOWS MORE

4 ABOUT BALLISTICS THAN ANY FORENSIC PATHOLOGIST I

5 KNOW.

6 Q SO, WITH ALL THOSE OTHER EXPERTS

7 CONSULTING WITH YOU, WHY DIDN'T YOU ATTEMPT TO DO A

8 RECONSTRUCTION?

9 A WELL, WE DIDN'T EVEN CONSIDER IT. WHEN
10 I BROUGHT UP THE FACT THAT SUCH HAD BEEN DONE, THE
11 FIRST RESPONSE WAS USUALLY LAUGHTER, BECAUSE IT WAS
12 RECOGNIZED BY ALL OF THESE PEOPLE WHO HAVE TRUE
13 EXPERTISE IN THE FIELD THAT SUCH A THING WOULD BE
14 IMPOSSIBLE AND FOOLHARDY.

15 MR. CONN: OBJECTION. CALLS FOR HEARSAY.
16 MOTION TO STRIKE.

17 THE COURT: OBJECTION SUSTAINED. THE ANSWER
18 IS STRICKEN. THE JURY IS ADMONISHED TO DISREGARD
19 IT.

20 Q BY MS. ABRAMSON: THE QUESTION IS WHY
21 DIDN'T YOU ATTEMPT A RECONSTRUCTION GIVEN THAT YOU
22 HAD AVAILABLE TO YOU ALL OF THESE EXPERTS IN THE
23 FIELD?

24 A BECAUSE I COULD NOT DO SO WITH ANY
25 DEGREE OF ACCURACY. THERE ARE FAR TOO MANY
26 VARIABLES AND IT'S FAR TOO COMPLICATED.

27 Q ARE YOU AWARE, DR. FACKLER, THAT THE
28 POSSIBILITY FOR THE POSSIBLE NUMBER OF SHOT

41794

1 COMBINATIONS AND SEQUENCES, WHEN YOU'RE TALKING
2 ABOUT 10 BUCKSHOT ROUNDS FIRED, IS IN EXCESS OF

3 3,600,000 POSSIBLE SCENARIOS?

4 A YES. I HEARD THE PORTION -- I THINK

5 YOU'RE SPEAKING OF WHAT SOME NUMBER FACTORIAL -- I

6 HEARD THAT POSITION. I DIDN'T KNOW WHAT NUMBER IT

7 WAS, BUT I KNEW IT WAS AN ASTRONOMICAL NUMBER, YES.

8 Q AND TO BE ABSOLUTELY ACCURATE, WOULD ONE

9 HAVE TO CONSIDER, IF NOT ALL, ONE OF 3,600,000

10 POSSIBILITIES?

11 A AT LEAST A LOT OF THEM.

12 Q IN YOUR OPINION IS WHAT ROGER MC CARTHY

13 HAS PROJECTED HERE NO BETTER THAN ONE IN 3,600,000,

14 IF THAT?

15 A I'M NOT SURE I KNOW EXACTLY -- REPHRASE --

16 I'M NOT --

17 Q HE'S COME UP WITH SOME SCENARIO BASED ON

18 AN ASSUMPTION OF 12 SHOTS, OKAY?

19 A YES.

20 Q DO YOU HAVE ANY EVIDENCE THAT THERE WERE

21 IN FACT 12 SHOTS FIRED?

22 A NO.

23 Q EVEN ASSUMING, HYPOTHETICALLY, THAT

24 THERE WERE 12 SHOTS FIRED, HE HAS COME UP WITH ONE

25 SCENARIO THAT'S SUPPOSED TO EXPLAIN ALL THESE SHOTS,

26 CORRECT?

27 A YES, HE HAS.

28 Q IS THAT ONE OUT OF 3,600,000 PLUS?

1 A WELL, NO, IT'S NOT, BECAUSE I THINK THE
2 THREE MILLION THAT WE'RE TALKING ABOUT ARE REALISTIC
3 SCENARIOS. THE SCENARIO HE'S COME UP WITH IS JUST
4 DOWNRIGHT IMPOSSIBLE.

5 Q WITH RESPECT TO SOME OF THE THINGS THAT
6 HE DESCRIBES AND SOME OF THE THINGS THAT HE
7 PORTRAYS, ARE THEY FLAT WRONG?

8 A YES, THEY CERTAINLY ARE.

9 Q AND CANNOT HAVE HAPPENED?

10 A THAT'S TRUE.

11 Q AND IF ONE SEGMENT OF THE SCENARIO IS
12 WRONG, DOES ALL THE REST OF IT FALL?

13 A EXCUSE ME?

14 Q IF ONE PART OF THIS SUPPOSED SEQUENCE
15 ACCOUNTING FOR 12 SHOTS IS WRONG, DOES THE WHOLE
16 SEQUENCE FALL?

17 A OH, YES, YES.

18 Q NOW, I WANT TO FOCUS YOUR ATTENTION ON
19 WHAT THE CORONER CALLED WOUND NO. 7 -- I'M SORRY --
20 WOUND NO. 5. LET ME DOUBLE CHECK THESE NUMBERS.
21 WOUND NO. 5 TO MR. MENENDEZ, THAT MR. MC CARTHY
22 ILLUSTRATES AS WOUND 7, SHOT 7. OKAY?

23 THIS IS THE LEFT THIGH WOUND.

24 A JUST A SECOND. I NOW HAVE A SET OF
25 THESE. IF I COULD GET MY SHOT NO. 7 OUT, AND I ALSO

26 HAVE THE AUTOPSY REPORT. THEN I'LL HAVE IT RIGHT
27 BEFORE ME.
28 YES. HE HAS IT 7A AND 7B.

41796

1 Q ALL RIGHT.

2 A I HAVE THEM BOTH.

3 Q OKAY. NOW, THIS HAS TO DO WITH A WOUND
4 THAT HE ILLUSTRATES OCCURRING AFTER DEATH, AFTER
5 MR. MENENDEZ HAS BEEN SHOT IN THE BACK OF THE HEAD,
6 WHILE THE BODY IS SITTING IN A POSITION ON THE COUCH
7 WHERE IT WAS ULTIMATELY DISCOVERED BY THE POLICE,
8 CORRECT?

9 A YES.

10 Q HAVE YOU REVIEWED ALL OF THE SCENE
11 PHOTOGRAPHS, THE X RAY PHOTOGRAPHS, AND THESE
12 DIAGRAMS BEFORE COMING TO COURT TODAY?

13 A YES.

14 Q DO YOU HAVE AN OPINION AS TO WHAT
15 POSITION MR. MENENDEZ WAS IN WHEN HE RECEIVED THE
16 WOUND TO THAT LEFT LEG?

17 A I FEEL HE WAS STANDING WHEN HE RECEIVED
18 THE WOUND TO THE LEG.

19 Q AND JUST TO STATE THE OBVIOUS. IF HE
20 WERE STANDING WHEN HE RECEIVED THE WOUND TO THE LEG,

21 HE WAS ALIVE WHEN HE RECEIVED THE WOUND TO THE LEG,
22 CORRECT?
23 A YES.
24 Q AND IS THERE EVIDENCE IN THE AUTOPSY
25 REPORT THAT SUPPORTS THE NOTION THAT HE WAS ALIVE
26 WHEN HE RECEIVED THAT WOUND?
27 A YES. THERE'S A SMALL CAPILLARY AND
28 SMALL VESSELS BLEEDING ALONG THE ENTIRE PATH OF THE

41797

1 PROJECTILE.
2 Q NOW, THIS IS AN AREA IN HIS LEG WHERE
3 THERE IS ONLY ONE WOUND PATH, CORRECT?
4 A THAT'S CORRECT.
5 Q THIS IS -- IS THIS DIFFERENT THAN TRYING
6 TO TRACK THE WOUND PATH THROUGH THE HEAD OF
7 MRS. MENENDEZ?
8 A YES. THERE'S ONE WOUND PATH HERE.
9 Q AND YOU RECALL THAT DR. GOLDEN INDICATES
10 DIFFICULTY IN SEPARATING OUT THREE SEPARATE WOUND
11 PATHS IN THE HEAD OF MRS. MENENDEZ?
12 A YES. I RECALL THAT.
13 Q THERE'S NO CONFLICTING WOUND PATH IN
14 MR. MENENDEZ' LEFT LEG THOUGH, IS THERE?
15 A THERE'S ONE WOUND PATH ONLY.

16 Q AND IS IT A DIFFICULT THING OR AN EASY
17 THING FOR A FORENSIC PATHOLOGIST TO TELL, BLEEDING
18 ALONG A WOUND PATH VERSUS NO BLEEDING ALONG THE
19 WOUND PATH?

20 A WELL, I WOULD THINK IT WOULD BE RATHER
21 BASIC TO A FORENSIC PATHOLOGIST AND RATHER EASY;
22 ALTHOUGH I MYSELF DON'T DO THIS, I AM NOT A FORENSIC
23 PATHOLOGIST.

24 Q THAT'S A VERY COMMON FINDING?

25 A YES.

26 Q THAT'S ONE OF THE STANDARD FINDINGS THAT
27 A PATHOLOGIST WILL PUT ON AN AUTOPSY REPORT TO GIVE
28 AN INDICATION OF ANTEMORTEM INJURY?

41798

1 A YES.

2 Q NOW, UPON WHAT DO BASE YOUR OPINION --
3 STRIKE THAT.

4 IS THERE MORE THAN ONE REASON WHY YOU
5 HAVE THE OPINION THAT MR. MENENDEZ WAS STANDING UP
6 WHEN HE RECEIVED THAT LEG WOUND?

7 A YES. WELL, THERE'S A REASON I HAVE THAT
8 HE WAS STANDING UP AND THERE ARE -- IN THE NEGATIVE
9 SENSE THERE ARE REASONS THAT HE COULDN'T BE SITTING
10 WHERE HE IS SO...

11 Q WHICH ONE DO YOU WANT TO TELL US FIRST?

12 A WELL, WHY DON'T WE FIRST LOOK AT THE
13 REASONS HE COULDN'T HAVE BEEN SITTING WHERE HE IS.

14 IF THIS PROJECTILE CAME ACROSS HIS LEG,
15 THE COUCH, THE LEADING EDGE OF THE COUCH -- IF WE
16 COULD ILLUSTRATE THIS WITH ONE OF THE PHOTOS HERE,
17 IT WOULD PROBABLY BE BETTER, ONE OF THE SCENE
18 PHOTOGRAPHS OF MR. MENENDEZ SITTING THERE.

19 Q WELL, WE HAVE SEVERAL UP ON THE BOARD
20 RIGHT NOW.

21 A THIS ONE HERE I THINK -- WELL, THIS ISN'T
22 QUITE AS GOOD AS --

23 Q WHY DON'T YOU TAKE A LOOK AT WHAT IS ON
24 304.

25 A THAT'S THE BEST. THAT'S THE BEST.
26 EITHER OF THESE TWO.

27 Q RIGHT.

28 A THIS ONE OR THIS ONE. THIS ONE -- WELL,

41799

1 EITHER ONE.

2 Q YOU'RE POINTING TO -- WE'VE GOT TO MAKE A
3 RECORD HERE.

4 304-A AND 304-F SHOW MR. MENENDEZ' LEGS
5 AND THE WHITE ARM OF THE COUCH.

6 A YES.

7 Q AND HOW DO THOSE PHOTOGRAPHS PROVE YOUR
8 POINT?

9 A WELL, AS WE CAN SEE VERY CLEARLY FROM
10 THE BLOWN-OUT NATURE OF THE EXIT WOUNDS HERE, THERE
11 WAS CONSIDERABLE TEMPORARY CAVITATION ASSOCIATED
12 WITH THIS WOUND AS WE SPOKE ABOUT EARLIER. A
13 TEMPORARY CAVITY IS A FORCE AT RIGHT ANGLES TO THE
14 DIRECTION OF THE PROJECTILE. IT'S A SPLASH WHERE
15 THE TISSUE GOES SIDEWAYS.

16 NOW, WHEN THAT HAPPENS IT SPLITS THE
17 SKIN, AND WHENEVER YOU SEE RADIAL SLITS IN THE SKIN,
18 THAT MEANS IT WAS STRETCHED Laterally. IN ORDER TO
19 SPLIT THE SKIN -- AND IN THIS CASE IT ALSO BROKE THE
20 FEMUR -- THERE HAD TO BE CONSIDERABLE FORCE GOING
21 Laterally AWAY FROM THE PROJECTILE PATH.

22 SO IF THE PROJECTILE PATH WENT ACROSS
23 ANYWHERE NEAR THE FRONT OF THIS COUCH, THIS LEADING
24 EDGE HERE OF THE COUCH WOULD HAVE TO BE MULTIPLE --
25 THERE WOULD HAVE TO BE BLOOD SPATTER PLUS TISSUE
26 SPATTER ON THAT, CONSIDERABLE BLOOD AND TISSUE
27 SPATTER, BECAUSE IT'S GOING AWAY FROM THE BULLET
28 PATH, THE CAVITY FORCES. AND IT'S JUST AFTER IT

1 LEFT THE SKIN; SO IT WOULD HAVE TO BE VERY OBVIOUS

2 AND IT'S -- THERE'S NOTHING THERE.

3 Q NOTHING AT ALL?

4 A NO.

5 Q AND THAT'S IN ADDITION TO THE FACT THAT

6 THERE'S NOTHING IN THE CARPET AREA DEMONSTRATING THE

7 REMNANTS OF A FULL ROUND OF -- 27-PELLET ROUND OF

8 BUCKSHOT GOING THROUGH THAT LEG?

9 A THAT'S A SECOND REASON. PROJECTILES

10 ALSO HAVE TO GO SOMEWHERE AS WELL AS THE TISSUE.

11 Q NOW, IN ADDITION TO THIS REASON, BASED

12 ON THE PHYSICAL EVIDENCE AT THE SCENE, IS THERE A

13 PURELY MEDICAL REASON THAT SUPPORTS YOUR OPINION

14 THAT MR. MENENDEZ WAS STANDING AT THE TIME HE

15 RECEIVED THAT WOUND TO THE LEG?

16 A YES, THERE IS. THE REASON HERE IS ONE

17 THAT IS SHOWN ON --

18 MS. ABRAMSON: I HAVE TO MARK THOSE

19 PHOTOGRAPHS. YOUR HONOR, WE HAVE TWO ADDITIONAL

20 PHOTOGRAPHS. THE X RAYS HAVE ALREADY BEEN MARKED.

21 THESE ARE TWO PHOTOGRAPHS. THEY HAVE

22 NUMBERS ON THE BOTTOM. ONE IS 5-62, AND THE OTHER

23 IS 5-64.

24 WITH RESPECT TO 5-62 YOUR HONOR, THAT'S --

25 WHAT'S THE NEXT IN ORDER?

26 THE COURT: 321.

27 MS. ABRAMSON: 321? THANK YOU. I DON'T

28 THINK IT WILL WRITE ON THE PLASTIC. I'LL WRITE ON

1 THE BACK, NOT ON THE PLASTIC.

2 THE SECOND ONE IS 5-64. I'LL MARK THAT

3 322.

4 Q DOES YOUR EXPLANATION DEPEND UPON 321,

5 322, AND THE X RAY THAT'S PREVIOUSLY BEEN MARKED

6 176?

7 A YES. THESE ILLUSTRATE IT WELL.

8 Q SHOULD WE PUT THEM UP ON THE BOARD?

9 A YES.

10 Q PUTTING UP 176, IS THIS THE X RAY OF

11 MR. MENENDEZ' LEFT LEG THAT YOU PREVIOUSLY TALKED

12 ABOUT?

13 A YES, IT IS.

14 Q NO, THESE TWO NEW PHOTOGRAPHS -- WHY

15 DON'T WE DO THEM THIS WAY. COULD I HAVE ONE MORE

16 TACK. OKAY.

17 YOU'VE GOT -- 321 IS THE LOWER ONE AND

18 322 IS THE HIGHER ONE.

19 A YES.

20 Q WHAT DO THOSE PHOTOGRAPHS AND THAT X RAY

21 ILLUSTRATE THAT INDICATES THAT MR. MENENDEZ WAS

22 STANDING UP?

23 A WELL, THEY INDICATE A SHORTENING OF THE

24 LEG AT THE FRACTURE SITE. AND ONE FIRST SEES AN

25 INDICATION OF THIS WITH REDUNDANCY AND FOLDING OF
26 THE SKIN JUST ABOVE THE KNEE. THERE ARE FOLDS AND
27 VALLEYS INDICATING THAT THERE'S TOO MUCH SKIN.
28 IN OTHER WORDS, IF YOU SHORTEN THAT LEG

41802

1 IN THAT AREA BY TWO INCHES, YOU'D GET SOMETHING LIKE
2 THAT; AND SEEING THAT, THEN ONE GOES TO THE X RAY.
3 THIS IS VERIFIED THAT, IN FACT, IF YOU FIT THESE
4 PIECES TOGETHER AS I DESCRIBED EARLIER, I BELIEVE.
5 THIS BASICALLY IS SIMPLY A FRACTURE FROM CAVITATION
6 WHERE YOU HAVE AN UPPER AND LOWER END AND ONE
7 INTERMEDIATE PIECE AND THESE ALL HAVE TO LINE UP.
8 IF YOU PUT THE INTERMEDIATE PIECE, IT
9 APPEARS THERE'S A DEFECT IN THE X RAY RIGHT HERE
10 WHERE THIS INTERMEDIATE FRAGMENT WOULD FIT. THAT
11 WOULD BRING THE LOWER END OF THIS DOWN ABOUT A
12 QUARTER OF AN INCH MORE, AND ALSO REALIZING THAT
13 THIS X RAY IS REDUCED FROM THE SIZE -- THE PHOTOGRAPH
14 IS REDUCED FROM THE SIZE OF X RAY THAT YOU'D SEE IN
15 THE HUMAN. THIS WOULD GO DOWN A QUARTER OF AN INCH
16 AND THIS AREA FROM HERE HAS TO BE PLACED UP HERE
17 (POINTING).
18 SO IF MEASURED ON THE FULL-SIZE X RAY,
19 THIS IS AT LEAST A TWO-INCH SHORTENING OF THE FEMUR

20 IN THE UPPER LEG OF MR. MENENDEZ.

21 NOW, THERE ARE -- THE CAVITATION FORCES
22 ARE IN ALL DIRECTIONS. THEY WOULD TEND TO BLOW THE
23 BONE AS WELL AS BREAK IT, BLOW IT UPWARD AND BLOW
24 THE LOWER END DOWNWARD. THEY WOULD TEND TO SEPARATE
25 THEM. THESE ARE ACTUALLY NOT JUST TOGETHER.
26 THEY'RE OVERLAPPING BY TWO INCHES, SO THERE HAS TO
27 BE A FORCE, SOME FORCE THAT WOULD DO THAT. AND I
28 MAINTAIN THAT THE MOST LOGICAL EXPLANATION IS THE

41803

1 BODY'S WEIGHT OF MR. MENENDEZ STANDING ON THAT WHEN
2 IT WAS BROKEN WOULD JUST TELESCOPE DOWN.

3 THIS IS VERY COMMON WHEN A PERSON FALLS
4 ON AN OUTSTRETCHED ARM OR SOMETHING, YOU CAN GET
5 TELESCOPING OR THAT SORT OF THING, WHERE THERE IS A
6 FORCE THAT NOT ONLY BREAKS, BUT PUSHES TOGETHER LIKE
7 STANDING, THEN YOU COULD GET THIS TELESCOPING. I
8 CAN'T SEE ANY OTHER EXPLANATION FOR IT.

9 Q NOW, WITH RESPECT TO THE HYPOTHESIS, THE
10 FAILURE ANALYSIS HYPOTHESIS, IS THERE ANY REASON WHY
11 THAT TELESCOPING WOULD HAVE OCCURRED IF MR. MENENDEZ
12 WAS DEAD AT THE TIME THAT WOUND OCCURRED, AND IF HIS
13 BODY WAS IN THIS SEATED POSITION WHERE THERE'S NO
14 WEIGHT ON THE BREAK?

15 A NO. IN THAT SITUATION, HAD IT BEEN A
16 DEAD LEG AT THE TIME, THEN THE FORCES PUSHING IT
17 APART WOULD HAVE BEEN UNOPPOSED AND THERE WOULD BE
18 NOTHING TO PUSH TOGETHER.

19 Q AND THIS FOLDING OVER BECOMES EVIDENT IN
20 THE PHOTOGRAPHS WHEN THE LEG IS STRETCHED OUT AT THE
21 CORONER'S OFFICE, CORRECT?

22 A YES.

23 Q THAT'S WHERE YOU SEE IT?

24 A YES. I SEE -- IT IS NOT OBVIOUS HERE
25 BECAUSE THE KNEE IS BENT AT GREATER THAN A 90-DEGREE
26 ANGLE, WHICH ESSENTIALLY PUTS A STRETCH ON THAT
27 AREA. AS YOU CAN SEE, WHEN I BEND MY LEG MORE THAN
28 90 DEGREES, YOU NO LONGER SEE A CREASE IN MY

41804

1 TROUSERS BECAUSE THERE'S A STRETCH AND IT STRETCHES
2 IT OUT. WHEN I PUT IT DOWN YOU CAN SEE THERE'S A
3 CREASE.

4 Q THAT JUST STRETCHES SKIN, NOT THE BONE,
5 CORRECT?

6 A WELL, YEAH. I'M TALKING ABOUT THE
7 REASON THAT YOU DON'T -- YOU SEE THIS REDUNDANCY OF
8 THE SKIN VERY CLEARLY WHEN THE LEG IS STRETCHED
9 OUT. BUT WHEN THE LEG IS BENT AT OVER 90 DEGREES,

10 IT IS NOT OBVIOUS BECAUSE THE STRETCH OCCURS

11 NATURALLY.

12 Q INTO THE SKIN?

13 A TO THE SKIN.

14 Q THANK YOU. NOW I WANT TO TURN TO

15 SCENARIO NO. 1.

16 JUST TO SUM UP THEN, DR. FACKLER, IS IT

17 YOUR OPINION THAT THIS SCENARIO NO. 7 IS JUST FLAT

18 WRONG?

19 A WHAT IS SCENARIO NO. 7?

20 Q THAT'S WHAT WE'VE BEEN TALKING ABOUT.

21 A YES. CLEARLY.

22 Q YOU UNDERSTAND, IN THIS PHOTOGRAPH, THE

23 ASSUMPTION IS WITH THE HEAD BENT THAT MEANS MR. --

24 THAT'S THE SYMBOL THAT MR. MENENDEZ IS DEAD?

25 A YES.

26 Q AND ALSO HE'S SEATED?

27 A YES. AND THE ANGLE IS WRONG AND THERE

28 ARE OTHER THINGS ALSO.

41805

1 Q THERE'S A LOT THAT'S WRONG WITH THIS?

2 A YES.

3 Q BASICALLY, HE IS NOT SEATED AND HE IS

4 NOT DEAD IN YOUR OPINION, CORRECT?

5 A THAT IS CORRECT. IN MY OPINION HE'S

6 NEITHER SEATED NOR DEAD.

7 Q NOW, I'VE PUT UP ON THE BOARD 295, WHICH

8 IS A BOARD CONCERNING SUPPOSED SHOT 1.

9 AND HAVE YOU STUDIED NOW THAT

10 ILLUSTRATION, THE TWO ILLUSTRATIONS, 1A AND 1B, AND

11 ALL OF THE PHOTOGRAPHS THAT RELATE TO THE WOUNDS

12 DEPICTED THERE?

13 A JUST A SECOND. MAY I REPLACE THESE SO I

14 CAN KEEP THESE IN ORDER?

15 Q YES.

16 A OKAY. NOW WE'RE SPEAKING OF SHOT 1A AND

17 B?

18 Q YES.

19 A OKAY. I'M READY NOW. WHAT WAS THE

20 QUESTION?

21 Q ALL RIGHT. HAVE YOU STUDIED THE

22 PHOTOGRAPHS, THE SCENE PHOTOGRAPH, THE AUTOPSY

23 PHOTOGRAPHS, THE CORONER'S REPORTS, AS THEY RELATE

24 TO THE WOUNDS THAT ARE DEPICTED IN 1A AND 1B?

25 A YES.

26 Q DO YOU HAVE AN OPINION, DR. FACKLER, AS

27 TO WHETHER OR NOT WHAT IS PURPORTED TO BE

28 ILLUSTRATED AS SHOT NO. 1, LINKING UP WOUNDS TO

1 MR. MENENDEZ' LEFT ELBOW, HIS RIGHT CHEST, HIS RIGHT
2 ARM, MRS. MENENDEZ' LEFT CHEST, COULD HAVE HAPPENED?

3 A CERTAINLY NOT IN THE WAY DEPICTED.

4 Q DO ALL THOSE WOUNDS LINK UP, NUMBER ONE?

5 A WELL, PROBABLY -- I THINK IT WOULD BE
6 DIFFICULT TO LINK THEM ALL UP. YOU MIGHT BE ABLE TO
7 LINK UP THE LOWER -- THERE ARE TWO SEPARATE WOUNDS TO
8 MR. MENENDEZ' RIGHT ARM. AND MAYBE THE LOWER ONE
9 MIGHT, THE FEW PELLETS IN THE LOWER ONE MIGHT LINK
10 UP. BUT THERE'S ONLY ONE THAT WOULD. CERTAINLY NOT
11 THE BRUISE ON THE CHEST. AND IF THEY DID LINK UP,
12 THEY WOULD ONLY -- THEN WE GET TO MRS. MENENDEZ, WHO
13 MUST BE TURNED AT RIGHT ANGLES FROM THE WAY SHE IS,
14 BECAUSE AS WE EXPLAINED YESTERDAY, BECAUSE OF THE
15 COLLAPSED LUNG AND BECAUSE OF THE MOBILITY OF THE
16 BREAST TISSUE, IT IS MY OPINION THAT THAT'S A
17 VERY -- CLOSE TO DIRECTLY FRONT TO BACK, AND HERE
18 IT'S DEPICTED AS 90 DEGREES, SHOT TO THE SIDE.

19 Q ALL RIGHT. SO, FIRST OF ALL, FROM THE
20 STANDPOINT OF THE ANGLE OF THE TRAJECTORY, ARE THESE
21 ILLUSTRATIONS IN YOUR OPINION WRONG?

22 A YES, IT'S WRONG.

23 Q SECOND OF ALL, CONCERNING MR. MENENDEZ'
24 UPPER RIGHT ARM, IS IT YOUR OPINION THAT THAT WOUND
25 WAS BACK TO FRONT AND LATERAL TO MEDIAL?

26 A OH, YES, CLEARLY IT WAS.

27 Q AND COULD THAT WOUND HAVE BEEN INFLICTED

41807

1 A I DON'T SEE HOW.

2 Q SO GIVEN THE POSITIONING OF THAT WOUND,
3 BACK TO FRONT, AND WHAT CAME ACROSS HIS CHEST, IS IT
4 MORE LIKELY THAT HE WAS STANDING UP WHEN HE RECEIVED
5 THAT WOUND THAN SITTING DOWN?

6 A I WOULD THINK SO, YES.

7 Q AND IS THERE, IN YOUR OPINION, ANY WAY,
8 EVEN ASSUMING HE'S STANDING UP, TO LINK THAT
9 RIGHT-TO-LEFT WOUND WITH THE ELBOW SHOT WHICH WAS
10 LEFT TO RIGHT?

11 A YOU MEAN THE ELBOW SHOT ON THE SAME
12 ARM?

13 Q NO. ON THE OTHER ARM, THE LEFT ARM.

14 A OH, ON THE LEFT -- WELL, NO. THEY WOULD
15 BE GOING THE WRONG DIRECTION.

16 Q THEY'RE GOING ACROSS EACH OTHER,
17 CORRECT?

18 A YES.

19 Q SO EVEN IF STANDING, HE COULD NOT HAVE
20 RECEIVED -- THOSE TWO WOUND AREAS ARE NOT CONNECTED
21 IN YOUR OPINION; IS THAT CORRECT?

22 A THAT IS CORRECT, YES.

23 Q AND MR. CONN ASKED YOU TO LINK UP SOME
24 WOUNDS YESTERDAY, AND I WANT TO REFER YOU TO THOSE.
25 HE OFFERED YOU A HYPOTHETICAL LINKING
26 MR. MENENDEZ' LEFT ELBOW, THE INNER RIGHT ARM
27 DEFECTS IN THE INNER ELBOW AREA, MRS. MENENDEZ'
28 BREAST.

41808

1 DO YOU RECALL HE ASKED YOU THAT?

2 A YES.

3 Q AND DO YOU RECALL HE ALSO LEFT OUT OF
4 THAT HYPOTHETICAL ANY WOUNDS TO MRS. MENENDEZ'
5 FOREARM?

6 A YES.

7 Q LET ME ASK YOU A HYPOTHETICAL,
8 DR. FACKLER.

9 FIRST, LET'S FOCUS ON -- STRIKE THAT.

10 LET'S FOCUS ON MR. MENENDEZ' LEFT
11 ELBOW.

12 YOU WERE ASKED BY MR. CONN YESTERDAY
13 WHETHER PELLETS COULD HAVE STRUCK THAT ELBOW AND
14 BOUNCED BACK.

15 DO YOU RECALL THAT?

16 A YES, I DO.

17 Q DO YOU UNDERSTAND FROM YOUR READING OF

18 PRIOR TESTIMONY IN THIS CASE, THAT IT IS DR. LAWRENCE
19 WHO SUGGESTED THAT FOUR PELLETS MIGHT HAVE STRUCK
20 THE ELBOW AND THEN BOUNCED AWAY?
21 MR. CONN: OBJECTION. MISSTATES THE
22 TESTIMONY.
23 THE COURT: SUSTAINED.
24 Q BY MS. ABRAMSON: DID YOU READ
25 DR. LAWRENCE'S TESTIMONY CONCERNING THE LEFT ELBOW?
26 A YES.
27 Q DID YOU READ HIS TESTIMONY WHERE HE
28 INDICATED THAT FOUR PELLETS MIGHT HAVE HIT THE ELBOW

41809

1 AND THEN FALLEN AWAY?
2 MR. CONN: OBJECTION. MISSTATES THE
3 TESTIMONY AND ASSUMES FACTS NOT IN EVIDENCE.
4 THE COURT: WELL, THIS WITNESS CAN ANSWER THE
5 QUESTION AS TO HOW HE READ THAT TESTIMONY.
6 THE WITNESS: YES. THE WAY I READ THE
7 TESTIMONY -- HE DEPICTED -- I THINK HE PROBABLY USED
8 THE WORD "BOUNCE," ALTHOUGH I'M NOT ABSOLUTELY
9 SURE. BUT IT WENT IN AND HIT THE BONE AND BOUNCED
10 OUT THE SAME HOLE, IS WHAT I GOT FROM THE
11 TESTIMONY.
12 Q BY MS. ABRAMSON: THAT IS NOT POSSIBLE,

13 IS IT?

14 A IN MY OPINION -- CERTAINLY NOT A DIRECT

15 BOUNCE BACK. THERE'S A DIFFERENCE BETWEEN A BOUNCE

16 AND A RICOCHET.

17 Q I WANT TO POSIT TO YOU A HYPOTHETICAL

18 ABOUT THE ELBOW WOUNDS. I DON'T THINK ANYTHING IS

19 CONNECTED AT THE MOMENT.

20 MR. LEVIN: THERE'S PINS RIGHT THERE,

21 MS. ABRAMSON.

22 MS. ABRAMSON: I KNOW THERE'S PINS. PINS ARE

23 NOT THE BEST. LET'S TAKE ONE PIECE OF PAPER OFF. I

24 HAVE A BETTER IDEA. I HAVE A BETTER IDEA. LET'S

25 USE ONE OF THESE. THESE STICK. OKAY.

26 I'M JUST GOING TO PUT "LEFT ELBOW, J.M."

27 FOR JOSE MENENDEZ.

28 I'D LIKE TO MARK THIS, YOUR HONOR, NOW,

41810

1 SO I DON'T FORGET. 323?

2 THE COURT: YES.

3 MS. ABRAMSON: THANK YOU.

4 Q WAS IT DR. GOLDEN'S FINDING IN HIS

5 REPORT THAT THERE WERE NINE PELLET DEFECTS TO THE

6 LEFT ELBOW?

7 A THAT'S MY RECOLLECTION, YES.

8 Q WAS IT YOUR OBSERVATION ON THE X RAY
9 THAT THERE WERE FIVE PELLETS IN THE LEFT ELBOW?

10 A BOTH ON THE X RAYS. AND ALSO HE REMARKS
11 THAT HE RECOVERED FIVE.

12 Q SO THERE WERE FIVE PELLETS IN THE ARM.

13 A YES.

14 Q AND IS IT YOUR UNDERSTANDING OF THE
15 AUTOPSY, AND BASED ON THE PHOTOGRAPHS AS WELL, THAT
16 THERE'S NO EXIT WOUND ON THE OPPOSITE SIDE OF THAT
17 ELBOW?

18 A YES, THAT'S CORRECT.

19 Q ALL RIGHT. NOW, IF WE SUBTRACT THE FIVE
20 IN THE ARM FROM THE NINE DEFECTS, WE WIND UP WITH
21 FOUR DEFECTS, CORRECT?

22 A THAT IS CORRECT.

23 Q COULD THOSE FOUR DEFECTS, DR. FACKLER,
24 BE EXPLAINED IN TERMS OF TWO PELLETS STRIKING THE
25 ELBOW, RICOCHETING AND CAUSING TWO EXIT HOLES?

26 A YES. AND THAT'S WHY I MENTIONED A
27 RICOCHET IS VERY DIFFERENT FROM A BOUNCE.

28 Q SO THE FOUR DEFECTS COULD BE ATTRIBUTED

41811

1 TO TWO PELLETS, EACH OF WHICH CREATED ONE ENTRY AND
2 ONE EXIT?

3 A YES, THAT'S CORRECT.

4 Q CORRECT?

5 A THAT'S CORRECT.

6 Q SO THAT, IN FACT, YOU WIND UP WITH SEVEN
7 PELLETS TOTAL HAVING ACTUALLY HIT THE ELBOW.

8 A YES.

9 Q NOW, IF YOU HAVE AN OPINION, WHAT DO YOU
10 BELIEVE WOULD HAPPEN TO TWO PELLETS THAT HIT THE
11 ELBOW, RICOCHETED, CREATED EXIT WOUNDS, AT THAT
12 POINT ARE THEY STILL PART OF THE SAME SHOT PATTERN
13 THAT'S COMING ACROSS AND CATCHING THAT ELBOW, OR ARE
14 THEY DIFFERENT?

15 A WELL, THEY'D HAVE BEEN -- RICOCHET
16 IMPLIES THAT THEY COME OFF AT A DIFFERENT ANGLE THAN
17 THE OTHER WOUND THAT WENT STRAIGHT. A RICOCHET
18 IMPLIES A CHANGE IN ANGLE.

19 Q AND IS THERE ANY WAY THAT YOU COULD
20 ASSUME THAT THOSE RICOCHETED-OUT PELLETS WOULD
21 SOMEHOW REJOIN ITS 20 FORMER COLLEAGUES IN THIS SHOT
22 COLUMN AND COMBINE TO CONTINUE ON TO CAUSE MORE
23 WOUNDS AND INJURIES?

24 A NO. THAT WOULD NOT HAPPEN.

25 Q SO, WITH ANY SHOT COLUMN THAT IMPACTED
26 THAT LEFT ELBOW, BASED ON THE FIVE IN THE ELBOW AND
27 THE TWO RICOCHETED, THOSE SEVEN ARE OUT OF THE
28 PICTURE, CORRECT?

1 A THAT IS CORRECT.

2 Q SO, IF YOU'RE GOING TO COUNT PELLETS
3 ATTRIBUTABLE TO THAT LEFT ELBOW, YOU HAVE TO COUNT
4 ALL SEVEN, NOT JUST THE FIVE THAT ARE STILL THERE,
5 CORRECT?

6 A THAT'S CORRECT.

7 Q OKAY. I WANT TO DRAW A LINE ACROSS THE
8 BOTTOM OF THIS.

9 AND GETTING BACK TO THE HYPOTHETICAL
10 THAT MR. CONN GAVE YOU YESTERDAY, THE FIRST TRYING
11 TO CONNECT UP A SERIES OF THESE WOUNDS, THE FIRST
12 BEING THE LEFT ELBOW.

13 YOU'RE INDICATING NOW THAT SEVEN PELLETS
14 ARE ATTRIBUTABLE TO THAT ELBOW, CORRECT?

15 A CORRECT.

16 Q NOW, MR. CONN WANTED YOU TO LINK THAT UP
17 TO SIX DEFECTS IN THE ANTECUBITAL FOSSA, THE INNER
18 ELBOW ON MR. MENENDEZ' RIGHT ARM, CORRECT?

19 A YES.

20 Q I'M JUST GOING TO PUT "A.F., RIGHT ARM."
21 AND I JUST -- I WAS JUST LOOKING FOR A DIFFERENT
22 PHOTOGRAPH. WE'LL GET BACK TO IT.

23 THEN HE WANTED YOU TO LINK THIS SHOT
24 COLUMN UP WITH MRS. MENENDEZ' LEFT BREAST WHERE
25 THERE ARE 16 PELLET HOLES.

26 A YES.

27 Q WE'RE ALREADY IN EXCESS OF 27 PELLETS,
28 AREN'T WE?

41813

1 A YES.

2 Q BUT, IN ADDITION, YOU'VE INDICATED, AS
3 HAS DR. GOLDEN IN HIS REPORT, DR. LAWRENCE IN HIS
4 TESTIMONY, AND EVEN DR. MC CARTHY IN HIS, THAT
5 MRS. MENENDEZ' LEFT FOREARM HAS A PATTERN THAT
6 MATCHES THE PATTERN ON THE LEFT BREAST, CORRECT?

7 A YES.

8 Q AND THERE ARE FOUR DEFECTS ON THAT
9 FOREARM, CORRECT?

10 A YES.

11 Q THERE'S TWO PELLETS IN HER LEFT ARM.

12 A YES, I BELIEVE THERE ARE.

13 Q IF THE ARM WAS LINKED UP TO THE BREAST,
14 WOULD YOU COUNT BOTH OF THOSE PELLETS IN HER LEFT
15 ARM OR WOULD YOU JUST PICK ONE?

16 A EXCUSE ME? I DIDN'T --

17 Q THERE ARE TWO PELLETS IN HER RIGHT ONE
18 AT THE ELBOW AREA, ONE FARTHER DOWN.

19 DO YOU RECALL?

20 A I SEE.

21 Q WOULD YOU COUNT BOTH? WOULD YOU COUNT

22 ONE? WOULD YOU COUNT THE FOUR DEFECTS? TO BE MOST
23 ACCURATE, HOW WOULD YOU COUNT?
24 A I THINK YOU HAVE TO COUNT THE FOUR
25 DEFECTS BECAUSE THOSE ARE THE ONES THAT WERE
26 SUPPOSEDLY LINKED UP. WITH A PATTERN YOU HAVE TO
27 HAVE MORE THAN JUST ONE.
28 Q THAT IS THE TERMINUS SUPPOSEDLY OF THIS

41814

1 IMAGINED SHOT?
2 A SUPPOSEDLY.
3 Q SO IT DOESN'T MATTER IF THEY'RE ON HER
4 ARM OR NOT; SOMETHING HIT THE FOREARM, CORRECT?
5 A CORRECT.
6 Q SO, IF YOU COUNT THOSE FOUR -- 33?
7 A LOOKS LIKE 33 TO ME TOO.
8 Q DID YOU EVER HEAR OF A ROUND OF NO. 4
9 BUCKSHOT THAT HAD 33 PELLETS IN IT?
10 A NOT THE ROUNDS THAT WERE USED IN THIS
11 CASE.
12 Q NOW, APART FROM PELLET COUNTING, ARE
13 THERE OTHER REASONS WHY YOU BELIEVE THAT THE
14 SCENARIO DEPICTED IN NO. 1 COULD NOT HAVE HAPPENED?
15 A WELL, YES. I THINK WE'VE SPOKEN OF MOST
16 OF THEM.

17 Q LET ME ASK YOU THIS: I THINK YOU'VE
18 INDICATED MRS. MENENDEZ COULD NOT HAVE BEEN SEATED
19 THE WAY SHE'S DEPICTED TO RECEIVE THE BREAST WOUNDS,
20 CORRECT?

21 A YES. THAT'S, I THINK, A VERY IMPORTANT
22 ONE.

23 Q MR. MENENDEZ COULD NOT HAVE BEEN SEATED
24 ON THE COUCH AT ALL TO RECEIVE THE UPPER RIGHT ARM
25 WOUND, CORRECT?

26 A OH, THE UPPER RIGHT ARM?

27 Q YES.

28 A NO. THE ONE THAT COMES FROM RIGHT TO

41815

1 LEFT, NO. I DON'T SEE HOW HE COULD HAVE BEEN SEATED
2 ON THE COUCH TO RECEIVE THAT ONE.

3 Q AND EVEN WITH RESPECT TO HIS LEFT ELBOW,
4 IS THE PATTERN ON HIS LEFT ELBOW DIFFERENT THAN THE
5 PATTERN ON MRS. MENENDEZ' LEFT BREAST?

6 A YES. THAT'S THE FIRST THING THAT STRUCK
7 ME. THE PATTERN OF THE LEFT ELBOW IS A MORE
8 WIDESPREAD PATTERN THAN THE PATTERN IN MRS. MENENDEZ'
9 BREAST AND --

10 Q SO THAT'S INCONSISTENT WITH THEM BEING
11 SHARED EVEN IF THEY BYPASS HIS ARM, CORRECT?

12 A YES. HER BREAST PATTERN WOULD HAVE TO
13 BE LARGER BECAUSE IT'S AT LEAST 304 FEET MORE
14 DISTANCE. IT HAS TO BE LARGER AND, ACTUALLY, IT'S
15 SMALLER.

16 Q SO THAT'S ANOTHER REASON WHY THAT
17 SCENARIO IS ONE THAT, IN YOUR OPINION, IS WRONG?

18 A YES.

19 Q NOW, HAVING LOOKED OVER THE PHOTOGRAPHS,
20 DR. MC CARTHY, I WANT TO FOCUS YOU FOR A MOMENT --

21 A DR. FACKLER.

22 Q I'M SORRY. IT WAS DAYS WITH MC CARTHY.

23 THIS IS EXHIBIT 301-D.

24 DR. FACKLER, YOU OBSERVED THIS
25 PHOTOGRAPH IN YOUR SET THAT YOU'VE HAD FOR SEVERAL
26 MONTHS NOW, DID YOU NOT?

27 A YES. THE SCENE PHOTOGRAPHS, YES, I
28 HAVE.

41816

1 Q AND THIS PARTICULAR SCENE PHOTOGRAPH,
2 THIS IS A PHOTOGRAPH THAT'S TAKEN RIGHT IN THE DEN?

3 A YES.

4 Q WHERE THE SHOOTING OCCURRED.

5 A YES.

6 Q AND THIS PHOTOGRAPH SHOWS, DOES IT NOT,

7 WHAT APPEARED TO BE DISTINCT PELLET DEFECTS ON

8 MR. MENENDEZ' RIGHT FOREARM?

9 A YES.

10 Q NOW, MR. CONN ASKED YOU A WHOLE SERIES

11 OF QUESTIONS ABOUT WHETHER, IN THE AMENDMENT THAT

12 DR. GOLDEN WROTE, HE DELETED THE PARAGRAPH THAT

13 DESCRIBED THESE WOUNDS.

14 A YEAH. I RECALL THAT. YES.

15 Q DO YOU HAVE ANY DOUBTS THAT THE WOUNDS,

16 HOWEVER, EXISTED WHETHER THE PARAGRAPH IS THERE OR

17 NOT?

18 MR. CONN: OBJECTION. CALLS FOR

19 SPECULATION. NO FOUNDATION.

20 THE COURT: OVERRULED.

21 THE WITNESS: I CAN ANSWER?

22 MS. ABRAMSON: YOU MAY ANSWER.

23 THE WITNESS: VERY CLEARLY. ONE CANNOT DENY

24 THAT THEY'RE THERE, WHETHER OR NOT THEY'RE DESCRIBED

25 THERE.

26 Q BY MS. ABRAMSON: DO YOU KNOW WHETHER OR

27 NOT IN 1995, OR, IN FACT, AT ANY TIME, DR. GOLDEN

28 HAD A SET OF THE SCENE PHOTOGRAPHS?

41817

1 A I DON'T KNOW IF HE DID OR NOT. I HAVE

2 NO WAY OF KNOWING THAT.

3 Q YOU DO UNDERSTAND, DO YOU NOT, THE SCENE

4 PHOTOGRAPHS WERE TAKEN AT THE SCENE BY THE POLICE

5 DEPARTMENT?

6 A WELL, I UNDERSTAND THAT, BUT I DON'T

7 KNOW IF THE POLICE DEPARTMENT WOULD GIVE A SET TO

8 DR. GOLDEN. I DON'T KNOW THE WAY THINGS WERE

9 INVESTIGATED HERE.

10 Q AND YOU DON'T KNOW WHETHER OR NOT WHEN

11 HE WAS AMENDING THAT REPORT, THE FACT THAT HE MIGHT

12 NOT HAVE HAD A PHOTOGRAPH OF THAT WOUND -- FIRST OF

13 ALL, IS THAT THE ONLY PHOTOGRAPH OF ALL THE HUNDREDS

14 OF PHOTOGRAPHS THAT ACTUALLY SHOWS THOSE WOUNDS TO

15 THE RIGHT FOREARM?

16 A IF THERE'S ANOTHER, IT'S ALMOST

17 IDENTICAL TO THAT. I REMEMBER SEEING THIS ONE.

18 THERE ARE MANY -- I'VE SEEN MANY, MANY PHOTOGRAPHS.

19 THERE COULD BE ONE OTHER THAT IS VERY SIMILAR, BUT I

20 DON'T RECALL. I KNOW THIS ONE APPEARS -- AND I

21 HAVEN'T SEEN IT IN MORE THAN ONE OTHER, AND I'M NOT

22 SURE IF ANOTHER ONE EXISTED.

23 Q IF IT DOES, IT'S CERTAINLY THE SCENE

24 PHOTOGRAPHS?

25 A CLEARLY, IT'S IN THE SCENE PHOTOGRAPHS.

26 Q AND YOU DON'T KNOW, OF THE HUNDREDS OF

27 PHOTOGRAPHS, WHETHER THOSE TWO WERE ACTUALLY IN

28 DR. GOLDEN'S POSSESSION IN SEPTEMBER OF '95 WHEN HE

1 AMENDED THE REPORT?

2 A I HAVE NO WAY OF KNOWING.

3 Q AND THERE'S NO OTHER PHOTOGRAPH --

4 THERE'S NO PHOTOGRAPHS FROM THE CORONER'S OFFICE

5 THAT SHOWS THESE WOUNDS, CORRECT?

6 A NO.

7 Q THIS IS THE PHOTOGRAPH ON 301-C, WHICH

8 IS UP HERE, THAT SHOWS SOME OTHER DEFECTS TO THE

9 RIGHT ARM, IN ADDITION TO THESE DEFECTS THAT ARE

10 SHOWN IN 301-D, CORRECT?

11 A YES. THIS IS TRUE. THESE ARE ON THE

12 OTHER SIDE OF THE ARM, HOWEVER.

13 Q RIGHT. NOW, WITH RESPECT TO THE

14 BRUISING ON MR. MENENDEZ' CHEST, AS APPEARS AND AS

15 YOU'VE MARKED IN 295-A, DOES THAT BRUISING -- WELL,

16 FIRST OF ALL, YOU'RE AWARE OF DR. GOLDEN'S -- BOTH

17 ORIGINAL AND SUPPLEMENTAL REPORT THAT LINKS THAT

18 BRUISING TO THE EXIT WOUNDS OF THE UPPER RIGHT ARM

19 WOUNDS?

20 A YES.

21 Q FROM A MEDICAL STANDPOINT IS THAT

22 LINKAGE, IN YOUR OPINION, CORRECT?

23 A YES.

24 Q DOES THAT BRUISE PATTERN FIT WITH AN

25 EXIT WOUND FROM THE UPPER ARM WITH THE ARM PRESSED

26 AGAINST THE CHEST?

27 A YES.

28 Q AND HOW CLOSELY, IN YOUR OPINION,

41819

1 DR. FACKLER, DOES IT FIT?

2 A IT FITS PERFECTLY.

3 Q IS THERE ANY REASON THAT YOU CAN -- THAT

4 YOU ARE AWARE OF FROM ANY OF THE EVIDENCE IN THIS

5 CASE, TO DISCOUNT THE CONNECTION BETWEEN THAT AREA

6 OF WOUNDING WHICH DR. GOLDEN CALLS NO. 6, AND THE

7 EXIT WOUNDS FROM THE UPPER ARM THAT DR. GOLDEN CALLS

8 NO. 3?

9 A NO.

10 Q AND IS THERE ANY EVIDENCE WHATSOEVER

11 THAT YOU HAVE BEEN MADE AWARE OF THAT MR. MENENDEZ

12 WAS KICKED OR HIT OR STRUCK WITH ANYTHING OTHER THAN

13 HIS OWN ARM TO CAUSE THAT BRUISING?

14 A I'M UNAWARE OF ANY EVIDENCE.

15 Q NOW, WITH RESPECT TO THE NOTION OF

16 SHARING WOUNDS ZONES BETWEEN MR. AND MRS. MENENDEZ,

17 DOES THE HYPOTHESIS THAT THEY ARE SEATED ON THE

18 COUCH INDICATE WHEN WOUNDS ARE SHARED, LIMITING THE

19 POSSIBILITIES TO A GREATER EXTENT THAN IF THEY'RE

20 STANDING UP WHEN THEY'RE SHARING WOUNDS?

21 A OH, CERTAINLY IT MUST LIMIT IT BECAUSE
22 THEIR POSTURE AND FREEDOM TO MOVE IS MUCH MORE
23 RESTRICTED IF THEY'RE IN A SEATED POSITION ON THE
24 COUCH.
25 Q WITH RESPECT TO THE POSSIBILITY OF THEM
26 SHARING WOUNDS, BASED ON THE WOUNDS THAT YOU'VE
27 SEEN, IS IT MORE LIKELY OR LESS LIKELY THAT ANY
28 SHARED WOUNDS OCCURRED WHEN THEY ARE BOTH STANDING

41820

1 UP?

2 A I THINK BOTH STANDING UP IS THE MOST
3 LIKELY POSSIBILITY FOR SHARED WOUNDS BECAUSE OF THE
4 UNLIMITED FREEDOM OF MOTION OF BOTH BODIES.

5 Q NOW, DR. FACKLER, DO YOU HAVE ANY --
6 STRIKE THAT.

7 IS THERE ANY EVIDENCE THAT'S BEEN
8 PRESENTED TO YOU THAT INDICATES THAT THE SHOTS THAT
9 WERE FIRED HERE WERE FIRED INDIVIDUALLY AND
10 SEQUENTIALLY RATHER THAN SIMULTANEOUSLY?

11 LET ME ASK YOU THIS: YOU'RE AWARE THERE
12 WERE TWO GUNS?

13 A YES.

14 Q AND TWO PEOPLE SHOOTING?

15 A YES.

16 Q IS THERE ANY EVIDENCE WHATSOEVER THAT
17 THOSE TWO PEOPLE WERE NOT SHOOTING AT THE SAME TIME?

18 A NO.

19 Q AND IF I WERE TO OFFER YOU A
20 HYPOTHETICAL THAT NEIGHBORS HEARING THE SHOTS FIRED
21 HEARD A STRING OF SHOTS LIKE FIRECRACKERS IN VERY
22 RAPID SUCCESSION, WOULD THAT SUPPORT THE NOTION THAT
23 THERE WAS SIMULTANEOUS FIRING GOING ON?

24 A YES.

25 Q AND WOULD THAT BE FURTHER SUPPORTED IF
26 NONE OF THOSE NEIGHBORS HEARD AS MANY AS 11, LET
27 ALONE 12 SEPARATE POP, POP, POP, POP, POP, POPS?

28 MR. CONN: I WOULD OBJECT. GOES BEYOND THE

41821

1 EXPERTISE OF THIS WITNESS.

2 THE COURT: AS PHRASED IT'S NOT A PROPER
3 HYPOTHETICAL QUESTION.

4 Q BY MS. ABRAMSON: WELL, IF NEIGHBORS
5 WERE TO TESTIFY THAT THEY HEARD A STRING OF SHOTS,
6 IN THE RANGE OF SIX TO EIGHT, AND IF FURTHER THERE
7 WAS TESTIMONY THAT, IN FACT, 11 SHOTS WERE FIRED,
8 WOULD THAT INDICATE THAT THERE WAS SIMULTANEOUS
9 SHOOTING?

10 A WELL, YES. IN ANY ONE OR TWO OR THREE

11 OF THOSE SHOTS, IF YOU HAVE TWO SHOTGUNS GOING OFF
12 SIMULTANEOUSLY, IT WOULD SOUND AS ONE. IT WOULD
13 COMBINE THEM.

14 Q NOW, CONCERNING THE WHOLE NOTION OF
15 SEQUENCING SHOTS HERE, WITH RESPECT TO EACH
16 DECEDENT; FIRST, WITH RESPECT TO MR. MENENDEZ, IS IT
17 YOUR OPINION THAT AFTER HE SUSTAINED THE HEAD WOUND
18 HE WAS NOT CAPABLE OF FURTHER VOLUNTARY MOVEMENT?

19 A THAT IS MY OPINION.

20 Q SO, IS IT YOUR OPINION THAT IT IS
21 APPROPRIATE TO DESIGNATE THE HEAD WOUND AS LAST FOR
22 HIM?

23 A YES.

24 Q NOW, WITH RESPECT TO MRS. MENENDEZ, IS
25 IT YOUR OPINION THAT WITH RESPECT TO THE CONTACT
26 WOUND TO HER LEFT CHEEK, THAT SHE WAS PROBABLY NOT
27 CAPABLE OF VOLUNTARY MOVEMENT AFTER THAT WOUND?

28 A YES.

41822

1 Q SO, WOULD IT BE REASONABLE TO DESIGNATE
2 THAT WOUND AS PROBABLY LAST FOR HER?

3 A YES.

4 Q APART FROM THOSE TWO SEQUENCING
5 DESIGNATIONS, LAST FOR HIM, LAST FOR HER, IN YOUR

6 OPINION, IS THERE ANY VALID, ACCURATE WAY TO

7 DESCRIBE THE SEQUENCE OF ALL THE OTHER SHOTS HERE?

8 A CERTAINLY NOT IN THIS CASE.

9 Q NOW, MR. CONN ASKED YOU WHETHER YOU

10 COULD ACCOUNT FOR WHATEVER PELLETS MIGHT HAVE EXITED

11 FROM THE EXIT WOUNDS OF MR. MENENDEZ' UPPER RIGHT

12 ARM, THE WOUND NO. 3, ACCORDING TO DR. GOLDEN.

13 REMEMBER THOSE QUESTIONS?

14 A YES.

15 Q NOW, YOU'RE AWARE THAT DR. GOLDEN HAS

16 ACCOUNTED FOR ONE SUCH PELLET IN THE STERNAL AREA OF

17 MR. MENENDEZ?

18 A YES, I'M AWARE OF THAT.

19 Q AND IS THAT A REASONABLE PROBABILITY IN

20 YOUR MIND, THAT ONE PELLET MIGHT HAVE LODGED IN THE

21 STERNUM?

22 A YEAH. I THINK THAT'S REASONABLE. SURE.

23 Q WITH RESPECT TO ACCOUNTING FOR THE OTHER

24 PELLETS, IF YOU TAKE INTO CONSIDERATION YOUR OPINION

25 THAT MR. MENENDEZ WAS PROBABLY STANDING WHEN HE

26 RECEIVED THIS WOUND, IS THERE ANY WAY TO KNOW WHAT

27 DIRECTION OR WHAT ANGLE HE WAS STANDING IN IN ORDER

28 TO GO LOOK FOR PELLETS?

1 A I CAN SEE NONE WHATSOEVER.

2 Q NOW, IS THERE -- BASED ON YOUR VIEW OF
3 THE SCENE PHOTOGRAPHS, IS THERE A LARGE AREA ON THE
4 COUCH CUSHION THAT'S OBSERVABLE AFTER HIS BODY IS
5 REMOVED THAT CONTAINS BLOWOUT, PELLETS, BLOOD AND
6 TISSUE?

7 A YES. THERE'S A LARGE AREA WHICH I DON'T
8 THINK FROM THE PHOTOGRAPHS I'VE SEEN -- I DON'T KNOW
9 WHAT IT CONTAINED. CERTAINLY, I KNOW IT CONTAINS
10 BLOOD AND A FAIR AMOUNT OF BLOOD. WHATEVER ELSE IT
11 MIGHT CONTAIN IS CERTAINLY NOT CLEAR FROM THE
12 PHOTOGRAPHS.

13 Q ARE YOU AWARE OF THE TESTIMONY IN THIS
14 CASE THAT THE POLICE DID NOT ATTEMPT TO RETRIEVE ANY
15 PELLETS IF THEY WERE IN BLOODY AREAS?

16 A I DON'T KNOW IF I RECALL THAT, NO.

17 Q LET ME ASK THAT AS A HYPOTHETICAL. IF
18 THE POLICE MADE NO EFFORT TO RETRIEVE PELLETS FROM A
19 BLOODY AREA, DOES THAT INDICATE THAT THERE COULD
20 HAVE BEEN PELLETS IN THOSE BLOODY AREAS THAT WERE
21 NOT RETRIEVED?

22 A WELL, CERTAINLY. BLOOD BEING OPAQUE, IF
23 YOU HAVE -- YOU COULD TAKE A HOLE HANDFUL OF PELLETS
24 AND DROP IT IN A POOL OF BLOOD AND YOU WOULDN'T SEE
25 THE PELLETS.

26 Q IF THE TESTIMONY WAS THEY HAD NO
27 INTEREST IN GATHERING THEM UP -- IF THEY SAW THEM IN
28 BLOOD THEY LEFT THEM, OKAY? SO IS THAT AREA OF THE

1 COUCH AT LEAST A POTENTIAL PLACE WHERE BLOWOUT FROM
2 MR. MENENDEZ' ARM WOUND COULD HAVE WOUND UP?

3 A WELL, ANY AREA WHERE'S THERE'S ENOUGH
4 BUILDUP OF BLOOD TO HIDE THEM, SURELY.

5 Q OKAY. AND IN ADDITION, YOU'VE INDICATED
6 THAT BLOOD BLOWOUT FROM THAT WOUND APPEARS TO BE
7 SPATTERED, BOTH ON HIS SHIRT AND ON HIS LEFT ARM,
8 CORRECT?

9 A YES.

10 Q ARE YOU ALSO AWARE OF THE FACT THAT THE
11 FLOOR AREA UNDER WHERE MRS. MENENDEZ WAS FOUND HAS --
12 THERE APPEARS TO BE HEAVY AREAS OF BLOOD AND OTHER
13 MATERIAL THERE?

14 A YES.

15 Q AND, AGAIN, HYPOTHETICALLY, IF THE
16 POLICE MADE NO EFFORT WHATSOEVER TO GATHER PELLETS
17 FROM THAT AREA, IS THAT ANOTHER POSSIBLE PLACE WHERE
18 THE BLOWOUT OF PELLETS FROM MR. MENENDEZ' UPPER
19 RIGHT ARM MIGHT HAVE GONE?

20 A CERTAINLY.

21 THE COURT: IF WE'RE GOING TO MOVE EXHIBITS,
22 WE'LL TAKE A RECESS, AND WE'LL RESUME AT 25 AFTER
23 THE HOUR.

24 MS. ABRAMSON: THANK YOU, YOUR HONOR.

25 (A RECESS WAS TAKEN FROM

26 10:05 A.M. TO 10:30 A.M.)

27

28

41825

1 THE COURT: EVERYBODY IS PRESENT. WE'LL HAVE

2 THE JURY OUT, PLEASE.

3 (THE JURY ENTERED THE

4 COURTROOM AND THE FOLLOWING

5 PROCEEDINGS WERE HELD:)

6

7 THE COURT: OKAY. THE JURY IS BACK.

8 YOU MAY CONTINUE YOUR REDIRECT

9 EXAMINATION.

10 Q BY MS. ABRAMSON: DR. FACKLER, IN

11 EXAMINING ALL OF THE ILLUSTRATIONS THAT HAVE BEEN

12 MARKED AS EXHIBITS HERE REFLECTING FAILURE ANALYSIS'

13 PROPOSED RECONSTRUCTION, DID YOU PARTICULARLY NOTE,

14 AMONG OTHER THINGS, THE ANGLES OF THE TRAJECTORIES

15 THAT PURPORTED TO CREATE THE WOUNDS IN THIS CASE ON

16 THOSE ILLUSTRATIONS?

17 A YES.

18 Q AND OF THE 12 DIFFERENT POSITIONS OF

19 EACH OF THE DECEDENTS THAT WAS ILLUSTRATED IN THESE,
20 ON HOW MANY DID IT APPEAR TO YOU, BASED ON THE
21 MEDICAL EVIDENCE AND THE BALLISTICS EVIDENCE AND THE
22 SCENE EVIDENCE, WERE THE ANGLES SHOWN POTENTIALLY
23 CORRECT?

24 A WELL, IF I MIGHT SUGGEST THAT THERE WERE
25 ONLY 11 THAT INVOLVED BODIES.

26 Q OKAY.

27 A AND THOSE ARE THE ONES I CONCENTRATED
28 ON. I DIDN'T HAVE ANYTHING TO DO WITH ONES UNLESS

41826

1 THEY HIT BODIES.

2 Q OF THE 11 THAT HIT BODIES, HOW MANY ARE
3 AT LEAST PLAUSIBLE ANGLES?

4 A WELL, 8 OUT OF THE 11 HAD VERY LARGE
5 ERRORS. I COULD BREAK THAT DOWN. FIVE HAD -- I
6 DEFINE LARGE AS ANYWHERE FROM 45 TO 90-DEGREE
7 ERRORS. AND THREE OF THEM HAD SMALLER ERRORS, WHICH
8 I WOULD DEFINE AS 20 TO 30 DEGREES.

9 SO OF THE 11, ONLY THREE HAD WHAT I FELT
10 WERE PLAUSIBLE ANGLES.

11 Q AND EVEN THOSE YOU FELT WERE IN ERROR OF
12 ABOUT 30 DEGREES?

13 A NO. THE THREE I HAD NO DIFFICULTY

14 WITH. I HAD THREE NO DIFFICULTY, THREE ERRORS OF 20

15 TO 30 DEGREES, AND FIVE ERRORS OF 45 TO 90.

16 Q AND WOULD EVEN AN ERROR OF 20 OR 30

17 DEGREES COMPLETELY CHANGE THE POSITION OF THE

18 SHOOTER OR THE POSITION OF THE BODY?

19 A YES.

20 Q NOW, JUST TO GO THROUGH THESE AS QUICKLY

21 AS WE CAN, I WANT TO GO THROUGH THESE ILLUSTRATIONS

22 AND POSING THE QUESTION TO YOU WITH EACH ONE, BASED

23 ON ALL OF THE MEDICAL EVIDENCE AND BALLISTICS

24 EVIDENCE AND SCENE EVIDENCE AND YOUR EXPERIENCE, TO

25 POSE THE QUESTION: WHAT'S WRONG WITH THIS PICTURE?

26 AND LET'S START WITH SHOT 2 WITH RESPECT

27 TO THAT PICTURE.

28 FIRST OF ALL, IS THERE ANY WAY TO KNOW

41827

1 THAT MR. MENENDEZ' HEAD WAS IN PRECISELY THAT

2 POSITION?

3 A NO.

4 Q IF HIS HEAD IS IN A DIFFERENT POSITION,

5 DOES THAT CHANGE ENTIRELY THE TRAJECTORY?

6 A YES.

7 Q IS THERE EVIDENCE THAT CONTRADICTS THE

8 NOTION THAT MRS. MENENDEZ IS SEATED NEXT TO HIM WHEN

9 THAT WOUND IS INFLICTED?

10 A YES.

11 Q AND WHAT IS THAT EVIDENCE?

12 A THERE WAS A PIECE OF BRAIN TISSUE THAT
13 APPEARS ON THE COUCH RIGHT UNDERNEATH WHERE SHE'S
14 SITTING.

15 Q NOW, MOVING ON TO SHOT 4. WHAT'S WRONG
16 WITH THAT PICTURE?

17 A THAT'S 4B YOU HAVE UP THERE. I HAVE
18 4A. OKAY, I HAVE IT HERE.

19 YES. THIS IS ONE THAT I CONSIDERED ONE
20 OF THE VERY LARGEST ERRORS BECAUSE THE -- IT DEPICTS
21 THE SHOT COMING INTO HER UPPER FACE FROM THE SIDE
22 AND THIS SHOT VERY CLEARLY CAME IN FROM STRAIGHT
23 AHEAD. SO IT'S ABOUT A 90-DEGREE ANGLE DIFFERENCE
24 ON THIS ONE.

25 Q SO THE ANGLE SHOWING -- THIS IS WHAT
26 DR. GOLDEN CALLS WOUND NO. 2, CORRECT?

27 A YES. THE ONE THAT GOES STRAIGHT INTO
28 HER HEAD, YES.

41828

1 Q IT CAME STRAIGHT IN. SO THE ANGLE HERE
2 IS WRONG?

3 A YES.

4 Q IS THERE ANY EVIDENCE TO SUPPORT THE
5 NOTION THAT HER BODY IS EVEN POSITIONED IN THE
6 POSITION SHOWN THERE AT THE TIME THAT THAT WOUND IS
7 INFLICTED?

8 A NO.

9 Q IS -- AND YOU UNDERSTAND THAT THE
10 REPRESENTATION IN THIS ILLUSTRATION OF MR. MENENDEZ
11 PURPORTS TO SHOW HIM DEAD BEFORE THE LEG WOUND,
12 WHICH IS NUMBERED 7, IS INFLICTED?

13 A YES.

14 Q IS THAT ALSO A MISTAKE?

15 A THAT'S A MISTAKE.

16 MS. ABRAMSON: MR. LEVIN, IT WOULD BE HELPFUL
17 IF YOU STAY HERE SO I DON'T HAVE TO DO THIS. WE
18 COULD GO FASTER.

19 Q SHOWING YOU WHAT PURPORTS TO BE AN
20 ILLUSTRATION OF SHOT NO. 5, IS THERE ANY REASON
21 WHATSOEVER TO BELIEVE THAT THE INJURIES TO HER LOWER
22 ARM AND UPPER ARM WERE INFLICTED WHEN SHE WAS ON THE
23 GROUND?

24 A NO.

25 Q IS THAT INJURY, THE DOUBLE-ARM INJURY,
26 ENTIRELY CONSISTENT WITH HER STANDING UP?

27 A YES.

28 Q AND AGAIN, IN THIS SHOT NO. 5 DEPICTION,

1 DOES THIS PURPORT TO REPRESENT MR. MENENDEZ DEAD?

2 A YES.

3 Q IN YOUR OPINION, IS HE DEAD BEFORE THE

4 LEG WOUND IS INFLICTED?

5 A NO.

6 MS. ABRAMSON: OKAY, MR. LEVIN, LET'S GO TO 6.

7 Q WITH RESPECT TO THIS, WHICH IS SUPPOSED

8 TO BE SHOT 6, YOU UNDERSTAND THAT THIS IS SUPPOSED

9 TO REPRESENT DR. GOLDEN'S WOUND NO. 3, MANDIBLE,

10 CLAVICLE, AND WOUND NO. 10, RIGHT HAND?

11 A YES.

12 Q IS THERE ANY EVIDENCE WHATSOEVER THAT

13 SUPPORTS THE NOTION THAT MRS. MENENDEZ IS LYING DOWN

14 WHEN SHE RECEIVES THAT WOUND?

15 A NO.

16 Q ARE YOU AWARE OF -- NOT YET.

17 IN FACT, IF SHE WERE LYING DOWN WHEN SHE

18 RECEIVED THAT WOUND, WOULD YOU EXPECT THE WOUNDS IN

19 HER HEAD TO DISTRIBUTE DIFFERENTLY THAN THEY DO?

20 A WELL, YES. THERE'S ANOTHER -- THERE'S A

21 MAJOR ANGLE PROBLEM HERE ALSO. THIS ANGLE IS SHOWN

22 HITTING AND GOING UP THE -- ALMOST THE LONG AXIS OF

23 HER HEAD. AND ACTUALLY IT'S DESCRIBED IN BOTH THE --

24 THERE'S A GRAZE WOUND UNDER THE CHIN THAT VERIFIES

25 THIS AND ALL THE EVIDENCE INDICATES IT'S GOING FRONT

26 TO BACK RATHER THAN LOW TO HIGH.

27 Q IS THIS WOUND, THEREFORE, MORE

41830

1 A I THINK SO.

2 Q AND IF, INDEED, SHE HAD BEEN SHOT IN
3 THIS POSITION, WOULD YOU HAVE EXPECTED PELLETS TO
4 TRAVEL UPWARD TOWARDS THE TOP OF HER HEAD?

5 A CERTAINLY.

6 Q AND THE ONE POSSIBLE BUCKSHOT PELLET
7 THAT YOU IDENTIFIED IN HER X RAY WAS NOT AT THE TOP
8 OF THE HEAD; IT WAS THE LOWER BACK PART?

9 A LOWER IN THE HEAD.

10 Q AND AGAIN, THIS SHOT PURPORTS TO DEPICT
11 MR. MENENDEZ DEAD BEFORE HE RECEIVED THE LEG WOUND;
12 IS THAT WRONG?

13 A NO. IT'S NOT WRONG. IT SHOWS THAT -- IT
14 DOES SHOW THAT, BUT THAT IS WRONG.

15 Q THAT'S WHAT'S WRONG?

16 A YES.

17 Q SHOWING THAT. OKAY.

18 CAN WE MOVE ON. WE'VE ALREADY DEALT
19 WITH 7. WE'RE GOING TO GO AHEAD TO 8.

20 WITH RESPECT TO 8, DO YOU UNDERSTAND
21 THAT THAT PURPORTS TO REPRESENT THE THIGH WOUND TO
22 MRS. MENENDEZ THAT DR. GOLDEN CALLS WOUND NO. 7?

23 A YES.

24 Q AND IT'S YOUR OPINION THAT THE DIRECTION
25 OF THAT WOUND IS FROM BACK TO FRONT AND FROM BOTTOM
26 UP?

27 A YES.

28 Q AND DOES THIS DEPICTION SHOW IT IN THE

41831

1 ENTIRELY OPPOSITE DIRECTION?

2 A YES, IT DOES.

3 MS. ABRAMSON: AND IF YOU WOULD, COULD YOU
4 HOLD THAT ASIDE AND THEN PUT 9 UP NEXT TO IT.

5 MR. LEVIN: YOU WANT THEM SIDE BY SIDE?

6 MS. ABRAMSON: THAT'S FINE.

7 Q WITH RESPECT TO SHOT 9A, THAT'S THE
8 GUTTER WOUND TO THE LEFT CALF, YOU AFFILIATED THAT,
9 POTENTIALLY, POSSIBLY, WITH THE LEG WOUND, CORONER'S
10 NO. 7, CORRECT?

11 A YES.

12 Q NOW, THE CORONER CALLS THAT GUTTER
13 WOUND 9 ALSO, SO WE CAN USE THAT NUMBER FOR BOTH.

14 A NO. 9.

15 Q OBVIOUSLY, IN THOSE TWO ILLUSTRATIONS
16 THE TWO WOUNDS ARE BEING SHOWN COMING IN OPPOSITE
17 DIRECTIONS; IS THAT RIGHT OR WRONG?

18 A WRONG.

19 Q EVEN THE DIRECTION SHOWN ON SHOT 9A, IS
20 THAT ACCURATE WITH RESPECT TO THE GUTTER WOUND
21 ALONE?

22 A NO. THERE'S A LARGE ERROR IN THE
23 ANGLE.

24 Q AND IS THERE ANY EVIDENCE TO ESTABLISH
25 THAT EITHER OF THESE PARTICULAR WOUNDS WERE ACTUALLY
26 INFLECTED WHILE MRS. MENENDEZ WAS LYING ON HER BACK
27 ON THE FLOOR?

28 A NO.

41832

1 MS. ABRAMSON: YOU CAN TAKE THOSE DOWN,
2 MR. LEVIN.

3 Q IN FACT, MR. FACKLER, ARE THOSE WOUNDS
4 CONSISTENT WITH MRS. MENENDEZ ON THE COUCH LEANING
5 ON HER RIGHT SIDE WITH HER LEFT LEG ELEVATED?

6 A THAT PARTICULAR WOUND YOU'RE TALKING
7 ABOUT?

8 Q IS THAT COMBINATION OF 9 AND 7, COULD
9 THAT HAVE BEEN INFLECTED WHILE SHE WAS LEANING ON
10 HER RIGHT SIDE UP ON THE COUCH WITH HER LEG BENT IN
11 THE WAY WE DEMONSTRATED?

12 A YES. I THINK IT'S A VERY PLAUSIBLE WAY

13 FOR IT TO HAVE OCCURRED.

14 Q AND, IN FACT, IF SHE WERE UP ON THE
15 COUCH LEANING IN SUCH A WAY AS TO EXPOSE THAT LEG TO
16 THE LINE OF FIRE, THE GUN WOULD HAVE BEEN HELD
17 HIGHER THAN WHAT WOULD HAVE BEEN NECESSARY TO CAUSE
18 THOSE WOUND AFFILIATIONS IF SHE WERE ON THE GROUND,
19 CORRECT?

20 A YES.

21 Q NOW, WITH REGARD TO SHOT 10, IS THERE
22 ANYTHING IN THE PHYSICAL EVIDENCE THAT REQUIRES HER
23 TO BE IN THAT SPECIFIC POSITION IN ORDER TO RECEIVE
24 THAT DOUBLE IN-AND-OUT WOUND TO HER LEFT LEG?

25 A NO.

26 Q AND, IN FACT, LET ME JUXTAPOSE WITH THIS
27 11B.

28 DO YOU NOTE IN 11B THAT FOR SOME REASON

41833

1 MRS. MENENDEZ IS PORTRAYED AS HAVING TURNED OVER ON
2 TO HER RIGHT SIDE AND MOVED HER BODY BACK TO THE
3 COUCH BETWEEN SHOT 10 AND SHOT 11?

4 A YES, I NOTE THAT.

5 Q NOW, IT'S TRUE, IS IT NOT, DR. FACKLER,
6 THAT WHEN MRS. MENENDEZ' BODY WAS SEEN BY THE POLICE
7 IT WAS IN A POSITION WHERE HER BACK WAS RIGHT UP

8 AGAINST THE COUCH?

9 MR. CONN: OBJECTION. LEADING.

10 THE COURT: SUSTAINED.

11 MS. ABRAMSON: I CAN REPHRASE IT, YOUR HONOR.

12 THE COURT: OBJECTION SUSTAINED.

13 Q BY MS. ABRAMSON: IN VIEWING THE SCENE

14 PHOTOGRAPHS, WHAT POSITION DOES IT SHOW

15 MRS. MENENDEZ' BODY VIS-A-VIS THE COUCH?

16 A I THINK IT SHOWS IT CLOSER TO THE COUCH

17 THAN WE SEE HERE.

18 Q DOES IT SHOW THAT SHE'S ON HER RIGHT

19 SIDE?

20 A IT SHOWS SHE'S ON HER RIGHT SIDE, YES.

21 Q DOES IT SHOW HER RIGHT LEG PROTRUDING

22 THROUGH WHAT'S KNOWN AS THE STRINGER OR THE SHELF OF

23 THE COFFEE TABLE?

24 A YES.

25 Q DOES IT SHOW HER LEFT LEG BENT ROUGHLY

26 IN THE WAY THAT IT'S SHOWN IN 11B?

27 A YES.

28 Q AND IS THERE ANY MEDICAL REASON THAT

41834

1 COMPELS THE NOTION THAT WHEN MRS. MENENDEZ WENT TO

2 THE GROUND SHE WENT TO THE GROUND IN A POSITION

3 OTHER THAN HER FINAL POSITION?

4 A CERTAINLY NOT.

5 Q NOW, WITH -- IF SHE WERE ALWAYS ON HER
6 RIGHT SIDE ON THE GROUND, COULD A SIMPLE VARIATION
7 IN THE POSITION OF HER LEFT LEG ACCOUNT FOR SHOT 10,
8 WHICH IS THE ONE --

9 PULL THAT BACK FOR A MOMENT, MR. LEVIN.

10 THANK YOU.

11 A WHAT WAS THAT QUESTION AGAIN?

12 Q ALL RIGHT. IF SHE'S ON HER RIGHT SIDE
13 BUT HER LEFT LEG IS OPEN -- I'M NOT GOING TO GET
14 DOWN AND DO IT -- BUT LET'S SAY SHE'S ON HER RIGHT
15 SIDE BUT THE LEFT LEG IS CROPPED UP AS 10A. SHE
16 COULD HAVE RECEIVED THAT ON HER RIGHT SIDE, CORRECT?

17 A I SEE. CERTAINLY.

18 Q IN FACT, SHE COULD HAVE RECEIVED -- WELL,
19 COULD SHE HAVE RECEIVED 10A SITTING ON THE COUCH
20 WITH HER LEG BENT?

21 A YES. I THINK THERE ARE MANY, MANY
22 DIFFERENT POSITIONS SHE COULD HAVE RECEIVED 10A
23 OTHER THAN WHAT'S SHOWN.

24 MS. ABRAMSON: YOU MAY PUT THAT DOWN,
25 MR. LEVIN.

26 Q DR. FACKLER, YOU TESTIFIED ABOUT THE
27 PHENOMENON THAT'S BEEN STUDIED CONCERNING THE
28 ABSENCE OF IMMEDIATE PAIN IN THOSE WHO RECEIVE

1 GUNSHOT WOUNDS, CORRECT?

2 A YES.

3 Q DO YOU UNDERSTAND THE ILLUSTRATIONS THAT
4 WERE MADE BY FAILURE ANALYSIS SUGGEST, GIVEN THE
5 SEQUENCE, THEY SUGGEST THAT MRS. MENENDEZ ROLLED
6 OVER ON TO HER RIGHT SIDE AT A TIME WHEN HER RIGHT
7 UPPER ARM AND SHOULDER, HER RIGHT FOREARM, AND HER
8 RIGHT HAND, WERE SHATTERED BY SHOTGUN BLASTS?

9 A YES.

10 Q NOW, IS WHAT IS TRUE ABOUT GUNSHOT
11 WOUNDS AND THEIR IMMEDIACY OF PAIN ALSO TRUE ABOUT
12 SHATTERED BONES AND THE PAIN THAT THAT CAUSES?

13 A NO, NOT IN SLOW MOVEMENTS. THE ABSENCE
14 OF PAIN THAT I WAS TALKING ABOUT, WHICH IS
15 WELL-SUPPORTED IN THE LITERATURE, REFERS SIMPLY TO
16 GUNSHOT WOUNDS AND ALSO BLAST WOUNDS.

17 Q IN YOUR OPINION, THEN, FOR SOMEONE TO
18 ROLL OVER ON TO THEIR RIGHT SIDE PURPOSELY WHEN THEY
19 HAVE ALL THE SHATTERED BONE MATERIAL ON THE RIGHT
20 SIDE, WOULD THAT BE A PAINFUL PROCESS?

21 A MOST LIKELY.

22 Q NOW, WITH RESPECT TO -- WITH RESPECT TO
23 SHOT 11, IF WE CAN MOVE 10 --

24 JUST TO BACK UP. AT SOME POINT

25 OBVIOUSLY, DR. FACKLER, MRS. MENENDEZ WENT FROM AN

26 UPRIGHT POSITION TO ONE ON THE FLOOR, CORRECT?

27 A YES.

28 Q AND THE -- IS THERE ANYTHING IN THE

41836

1 MEDICAL EVIDENCE THAT INDICATES THAT SHE DID NOT OR
2 COULD NOT HAVE RECEIVED WOUND 2 TO THE UPPER FACE,
3 WOUND 3 TO THE CLAVICLE AND COLLAR BONE, WOUND 5 --
4 THESE ARE DR. GOLDEN'S WOUNDS -- TO THE ARM, ALL OF
5 THOSE STANDING UP?

6 A CERTAINLY.

7 Q SHE COULD HAVE RECEIVED THEM ALL
8 STANDING UP?

9 A CERTAINLY.

10 Q AND WHEN SOMEONE IS WOUNDED AND GOES
11 DOWN, THEY DON'T GO DOWN BECAUSE OF THE IMPACT OF
12 THE VELOCITY OF THE SHOT, CORRECT?

13 A YES, THAT IS CORRECT.

14 AND THERE WAS ONE ESPECIALLY HERE THAT
15 IN THE REPORT DR. MC CARTHY SPECIFICALLY SAID -- I
16 THINK IT WAS SHOT 4 TO THE HEAD -- WHICH WOULD CAUSE
17 HER TO FALL DOWN ON HER BACK. HE VERY SPECIFICALLY
18 STATED THAT SHE WOULD NOT ONLY FALL DOWN BUT SHE
19 WOULD FALL DOWN ON HER BACK. AND TO ME THAT
20 INDICATED THAT HE THOUGHT SHE WOULD HAVE HAD TO BE

21 PUSHED BACKWARD, BECAUSE IF YOU HAVE A SHOT THAT
22 HITS A PERSON IN ANY POSITION, THE HEAD, AND THEY
23 BECOME IMMEDIATELY UNCONSCIOUS, THERE'S REALLY FOUR
24 POSSIBILITIES: THEY CAN FALL ON THEIR BACK, ON
25 THEIR LEFT SIDE, RIGHT SIDE OR FRONT. AND FOR HIM
26 TO SAY THAT SHE HAD TO FALL ON HER BACK IMPLIES TO
27 ME THAT HE THINKS SHE'S BEING PUSHED BACKWARD BY THE
28 BULLET TO GET ON HER BACK IS THE ONLY PLAUSIBLE

41837

1 EXPLANATION.

2 Q IS IT MORE LIKELY THAT SOMEONE WOULD GO
3 FLAT OVER LIKE A -- YOU KNOW, LIKE A CARDBOARD CUTOUT
4 OF A PERSON, OR IS IT MORE LIKELY SOMEONE CRUMPLES
5 WHEN THEY WERE SHOT?

6 A IF A PERSON IS STATIONARY WHEN THEY HAVE
7 A SHOT THAT DISRUPTS THE BRAIN IN A SITUATION THAT
8 CAUSES THEM TO BECOME INSTANTANEOUSLY UNCONSCIOUS,
9 THEY CRUMPLE IN THAT THEIR MUSCLES NO LONGER HAVE
10 ANY WAY TO SUPPORT THEM. THE MUSCLES CRUMPLE AND
11 THEY GO STRAIGHT DOWN.

12 Q WHEN YOU SAY STRAIGHT DOWN, YOU DON'T
13 MEAN BACKWARDS; THEY COLLAPSE?

14 A NO. STRAIGHT DOWN. IN ORDER TO FALL
15 BACKWARDS YOU HAVE TO -- IF YOU FALL BACKWARDS AS YOU

16 DESCRIBED, THEN YOU HAVE TO ASSUME THERE'S CERTAIN
17 TONE IN THE MUSCLES WHEN YOU DO THAT BECAUSE THE
18 LEGS -- THE WEIGHT IS PUSHING DOWNWARDS ON THE LEGS
19 WHEN YOU'RE STANDING UPRIGHT. OKAY?

20 NOW, IN ORDER FOR THE KNEES TO REMAIN
21 STRAIGHT AS THEY ARE WHEN YOU'RE STANDING UPRIGHT,
22 THE MUSCLES HAVE TO CONTINUE TO HAVE SOME POWER AND
23 SOME TONE. AND WHEN YOU GET A WOUND SUCH AS THE ONE
24 TO THE BACK OF THE HEAD OF MR. MENENDEZ, THE MUSCLES
25 DON'T HAVE ANY TONE ANYMORE. IT'S A CRUMPLING, A
26 STRAIGHT-DOWN MOVEMENT, A FALLING OVER, LIKE A TREE,
27 MOVEMENT CERTAINLY IMPLIES A CONTINUING FEW SECONDS
28 OF TONENESS OF THE MUSCLE. AND, YOU KNOW, IT'S

41838

1 STRAIGHT DOWN, NOT BACK.

2 Q IS THERE ANYTHING IN THE MEDICAL OR
3 PHYSICAL OR BALLISTICS EVIDENCE HERE THAT
4 CONTRADICTS THE NOTION THAT MRS. MENENDEZ WAS SHOT
5 ON THE RIGHT SIDE, THOSE THREE WOUNDS I'VE
6 DESCRIBED, AND HAD ALREADY SUSTAINED PERHAPS OTHER
7 INJURIES, AND CRUMPLED DOWN ON TO HER RIGHT SIDE?
8 ANYTHING THAT CONTRADICTS THAT FROM HAPPENING?

9 A I COULDN'T SEE A THING THAT WOULD
10 CONTRADICT THAT.

11 Q NOW, THERE WERE A WHOLE SERIES OF
12 QUESTIONS YESTERDAY BY MR. CONN ABOUT THE ANGLE
13 SHOWN IN SHOT 11A.
14 DID YOU TAKE A CLOSE LOOK AT THE SCENE
15 PHOTOGRAPHS THIS MORNING TO SEE THAT IF THE WAY THAT
16 MRS. MENENDEZ' BODY IS DEPICTED BY THE
17 ANTHROPOMORPHIC DUMMY IS ACCURATE?
18 A YES. I LOOKED AT THIS AND THERE ARE A
19 FEW THINGS THAT ARE PROBLEMATIC HERE. THE SCALE IS
20 OFF. I COMPARED THE SCENE PHOTOGRAPH WITH THIS AND
21 IN THE SCENE PHOTOGRAPH HER SHOULDER DOESN'T COME TO
22 THE TOP OF THE COUCH AND HERE HER SHOULDER COMES
23 OVER THE TOP OF THE COUCH.
24 AND ALSO THE ANGLE AS DEPICTED IN THIS
25 WOULD BASICALLY GRAZE HERE THE TOP OF HER HEAD AND
26 DOES NOT HIT ANYWHERE NEAR BELOW THE EAR AS IT
27 SHOWS. SO THE ANGLE WAS WRONG.
28 ALSO, MR. MENENDEZ IS SHOWN DEAD AT THIS

41839

1 TIME AND I DON'T THINK --

2 Q HE'S SUPPOSED TO HAVE RECEIVED 7, SO HE
3 COULD BE DEAD AT THIS POINT?

4 A ACCORDING TO THE -- I'M JUST SAYING
5 ACCORDING TO -- ACCORDING TO WHAT I WOULD THINK VALID

6 EVIDENCE TO ME THERE'D BE NO WAY OF KNOWING --

7 Q YOU STILL DON'T KNOW.

8 A I WOULDN'T KNOW IF HE'S DEAD. HE'S
9 DEPICTED AS DEAD HERE.

10 Q AT SOME POINT HE'S DEAD, BUT YOU DON'T
11 KNOW WHERE IN THE SEQUENCE?

12 A IN MY VIEW I CAN'T SEE ANY EVIDENCE THAT
13 WOULD INDICATE THAT HE'D BE DEPICTED AS DEAD WHEN
14 SHE RECEIVES THIS SHOT.

15 Q OKAY. LET'S TALK, THEN, THOUGH, ABOUT
16 THE BASIC CONCEPT THAT THE LEFT SHOULDER AND THE
17 LEFT NECK AREA ARE AFFILIATED. YOU HAVE NO QUARREL
18 WITH THAT?

19 A NO.

20 Q YOU HAVE NO QUARREL THAT THAT COULD HAVE
21 OCCURRED WHILE SHE WAS LYING ON THE GROUND?

22 A CERTAINLY.

23 Q JUST THAT THE WAY THIS DEPICTS IT THE
24 ANGLE IS WRONG?

25 A THAT'S RIGHT.

26 Q AND LOOKING AT THE SCENE PHOTOGRAPH, IS
27 THERE A MORE REALISTIC ANGLE THAT SUGGESTS ITSELF
28 FROM THE WAY HER REAL BODY IS DEPICTED IN THE SCENE

1 PHOTOGRAPH?

2 A IT'S EASIER TO LINE UP AN ANGLE WITH
3 HER -- IN THE SCENE PHOTOGRAPHS THAN IT IS WITH THIS,
4 YES.

5 Q IS IT EASIER TO LINE UP AN ANGLE THAT
6 WOULD NOT REQUIRE THE SHOOTER TO EITHER BE DANGLING
7 FROM THE CEILING OR STANDING ON THE COFFEE TABLE?

8 A YES.

9 MS. ABRAMSON: THANK YOU, MR. LEVIN. WE'RE
10 THROUGH WITH THOSE.

11 MR. LEVIN: DO YOU WANT ANY OTHERS BEFORE I
12 LEAVE?

13 MS. ABRAMSON: NO. THANK YOU.

14 Q ALL RIGHT. NOW, YOU HAD MENTIONED --
15 WELL, FIRST OF ALL, YOU HAD MENTIONED A PHENOMENON
16 THAT YOU WERE FAMILIAR WITH, WITH RESPECT TO HOW
17 PEOPLE WHO ARE PRESENTED WITH THE THREAT OF GUNFIRE,
18 THE FEW THINGS THAT ARE KNOWN ABOUT THEIR POTENTIAL
19 MOVEMENTS.

20 DO YOU RECALL THAT TESTIMONY? I THINK
21 IT WAS DURING CROSS-EXAMINATION BY MR. CONN.

22 A NO, I DON'T RECALL THAT RIGHT OFFHAND.

23 Q DO YOU REMEMBER TESTIFYING THAT THERE IS
24 A PHENOMENON WHERE PEOPLE TEND TO ROTATE THEIR
25 BODIES AWAY FROM THE GUN, TRYING TO IN THE OPPOSITE
26 DIRECTION?

27 A WELL, I'M NOT SURE I CAN SAY THIS IS A
28 PHENOMENON. THIS IS MERELY A -- SOMETHING THAT I

1 HAVE NOTICED OFTEN IN THE CASES THAT I HAVE BEEN
2 INVOLVED IN IN THE LAST FOUR OR FIVE YEARS; THAT IT
3 IS VERY COMMON FOR A PERSON TO BE HIT ONCE AND THEN
4 ROTATE RAPIDLY. I'VE SEEN IT IN AT LEAST FIVE OR
5 SIX CASES.

6 Q I'D LIKE TO GIVE YOU A HYPOTHETICAL AND
7 DEMONSTRATE SOME COMPONENTS OF IT TO YOU.

8 NOW, YOU UNDERSTAND, HYPOTHETICALLY
9 HERE, THERE ARE TWO SHOOTERS AND TWO GUNS?

10 A YES.

11 Q LET ME PUT -- YOU KNOW, THERE IS
12 SOMETHING I WANT UP, 24.

13 I AM SORRY, MR. LEVIN. I WASN'T
14 THINKING.

15 DR. FACKLER, I WANT YOU TO CONSIDER FOR
16 THIS HYPOTHETICAL THE FOLLOWING HYPOTHETICAL FACTS.

17 FIRST OF ALL, DO YOU UNDERSTAND THAT TO
18 BE A DIAGRAM OF THE DEN?

19 A YES.

20 Q AND I WANT TO CALL YOUR ATTENTION TO THE
21 LEFT-HAND SIDE OF THE DIAGRAM CLOSE TO WHERE THE
22 NO. 1 APPEARS AND SUGGEST TO YOU, HYPOTHETICALLY,
23 THAT THOSE ARE THE DOUBLE ENTRY DOORS TO THIS ROOM.

24 A YES.

25 Q AND I WANT TO SUGGEST TO YOU THAT MY
26 CLIENT, ERIK MENENDEZ, AND HIS BROTHER, LYLE
27 MENENDEZ, WHO ARE THE PEOPLE WHO DID THE SHOOTING IN
28 THIS CASE, ENTERED THIS ROOM WITH SHOTGUNS THROUGH

41842

1 THOSE DOORS.

2 A YES.

3 Q OKAY?

4 NOW, I WANT TO FURTHER SUGGEST A
5 HYPOTHETICAL TO YOU THAT RIGHT AFTER ENTERING, BOTH
6 ERIK MENENDEZ AND LYLE MENENDEZ COMMENCED FIRING IN
7 THE DIRECTION OF THE COUCH TOWARDS WHAT THEY SAW WAS
8 A STANDING FIGURE OF MR. MENENDEZ AND ULTIMATELY A
9 STANDING FIGURE OF MRS. MENENDEZ.

10 A YES.

11 Q OKAY?

12 I WANT YOU ALSO TO IMAGINE -- NOT
13 IMAGINE, BUT CONSIDER HYPOTHETICALLY, THE
14 FOLLOWING: THAT ERIK MENENDEZ, PROCEEDED ALONG A
15 PATHWAY THAT I AM MARKING WITH BROKEN LINES AND
16 WOUND UP IN A FINAL POSITION WHERE I AM MARKING WITH
17 AN X.

18 A YES.

19 Q AND FROM THAT PATHWAY, WITHOUT TRYING TO

20 SHOW THE ANGLES AT ALL, BUT FROM THAT PATHWAY HE IS
21 FIRING TOWARDS THE COUCH RANDOMLY.
22 A HE'S FIRING AS HE'S MOVING?
23 Q AS HE'S MOVING, RANDOM FIRE TOWARDS THE
24 GENERAL AREA OF THE TWO PEOPLE ON THE COUCH.
25 A YES.
26 Q TWO PEOPLE IN FRONT OF THE COUCH.
27 A STANDING IN FRONT OF THE COUCH?
28 Q RIGHT.

41843

1 I ALSO WANT YOU TO IMAGINE,
2 HYPOTHETICALLY, THAT THE SECOND PERSON -- AND I'M
3 GOING TO MARK THIS "E.M." FOR ERIK MENENDEZ.
4 THE SECOND PERSON WHO ENTERS IS LYLE
5 MENENDEZ, AND HE SIMILARLY IS FIRING TOWARDS THE
6 STANDING PERSON AND PERSONS, THE AREA OF THE COUCH,
7 AND HE ULTIMATELY VEERS OFF IN THIS DIRECTION BUT
8 CONTINUES FIRING TOWARDS THE PEOPLE. OKAY?
9 A YES.
10 Q AND AT SOME POINT HE FIRES THE CONTACT
11 WOUND TO THE BACK OF MR. MENENDEZ' HEAD.
12 A YES.
13 Q AGAIN, I'M GOING TO SHOW THE GENERAL
14 DIRECTION OF FIRE. OKAY?

15 A YES.

16 Q NOW, WITH RESPECT TO THE WOUNDS TO
17 MR. MENENDEZ AND THIS THING THAT YOU HAVE OBSERVED
18 ABOUT ROTATION, I WANT YOU TO ASSUME,
19 HYPOTHETICALLY, THAT I AM MR. MENENDEZ.

20 A YES.

21 Q ALTHOUGH A GOOD DEAL SHORTER.
22 AND THAT I AM STANDING IN THE AREA
23 BETWEEN -- ROUGHLY IN THE AREA WHERE YOU SEE ITEMS 14
24 AND 15 ON THIS DIAGRAM.

25 A YES.

26 Q BETWEEN THE COUCH AND THE COFFEE TABLE.

27 A YES.

28 Q NOW, I OFFER THIS AS ONE OF THE

41844

1 3,600,000 POSSIBILITIES. OKAY? THAT AS HE'S
2 STANDING THERE THE SHOOTERS ENTER TO HIS RIGHT, HIS
3 SONS ENTER FROM THE RIGHT; THAT THEY ARE FIRING;
4 THAT HE RECEIVES THE WOUND IN THE BACK OF HIS RIGHT
5 ARM FROM THAT DIRECTION; THAT HE RECEIVES THE WOUND
6 IN HIS LEFT LEG AS HE IS STANDING IN THAT
7 DIRECTION --

8 A YES.

9 Q -- THAT HE DOES EXACTLY WHAT YOU SAID

10 PEOPLE DO, HE ROTATES?

11 A YES.

12 Q AND RECEIVES THE WOUND IN HIS LEFT ELBOW

13 STANDING.

14 A YES.

15 Q AND THEN HE COLLAPSES.

16 A YES.

17 Q AND THERE ARE, MEANWHILE, OTHER SHOTS

18 BEING FIRED. HE COLLAPSES BACK INTO THE COUCH AND

19 THAT LEAVES HIS FEET IN THE POSITION I'M

20 DEMONSTRATING THEM.

21 DO YOU SEE THEM?

22 A YES.

23 Q IS THE POSITION OF MY FEET, BOTH CROSSED

24 AND ON THE OUTER EDGES, THE POSITION THAT

25 MR. MENENDEZ' FEET ARE SEEN IN IN THE SCENE

26 PHOTOGRAPHS? IF YOU WANT TO CHECK, I'LL SHOW YOU

27 THAT.

28 A YES, I'D LIKE TO SEE THAT. I DON'T

41845

1 REMEMBER THAT.

2 Q I DON'T KNOW IF WE HAVE A FULL SHOT

3 HERE.

4 YOU HAVE ONE OF THE SCENE PHOTOGRAPHS IN

5 FRONT OF YOU. YOU CAN'T SEE IT IN THAT ONE.

6 JUST ASSUME, HYPOTHETICALLY, THAT IN THE
7 SCENE PHOTOGRAPHS HE'S SEEN WITH THE FEET CROSSED ON
8 THE OUTER EDGE OF EACH FOOT.

9 A ON THE OUTER EDGE OF EACH FOOT.

10 Q AND THAT'S SOMETHING THAT HAPPENS WHEN
11 THE BODY ROTATES BUT THE FEET DON'T MOVE?

12 A YES. I CAN'T SEE THE FEET ON THIS ONE
13 AND I REALLY DIDN'T CONCENTRATE ON THE FEET.

14 Q WE HAVE NUMEROUS PHOTOGRAPHS, HOWEVER.
15 YOU HAVE ALL THE SCENE PHOTOGRAPHS?

16 A I KNOW, BUT I DIDN'T CONCENTRATE ON THE
17 FEET. I'M SORRY.

18 Q IS WHAT I JUST DEMONSTRATED TO YOU
19 ENTIRELY CONSISTENT WITH THE WOUND EVIDENCE AND THE
20 PHYSICAL EVIDENCE AT THE SCENE?

21 A YES, IT IS.

22 Q WITH RESPECT TO MR. MENENDEZ?

23 A YES.

24 Q AND THE HYPOTHETICAL THAT I HAVE
25 SUGGESTED BY MARKING EXHIBIT 24 OF THESE -- ERIK AND
26 LYLE MENENDEZ COMING IN AND FIRING RANDOMLY TOWARDS
27 THE COUCH IN VERY RAPID SUCCESSION, POP, POP, POP,
28 POP, POP, IS THAT ENTIRELY CONSISTENT WITH THE

1 PHYSICAL AND MEDICAL EVIDENCE IN THIS CASE?

2 A YES.

3 MS. ABRAMSON: I HAVE NOTHING FURTHER, YOUR
4 HONOR.

5 THE COURT: RECROSS.

6

7 RECROSS-EXAMINATION

8 BY MR. CONN:

9 Q LET'S FOCUS FIRST ON THIS SCENARIO THAT
10 YOU'VE JUST CONSIDERED, DOCTOR.

11 IS THIS RECONSTRUCTION THAT YOU HAVE
12 JUST POSTULATED YOUR IDEA?

13 A NO.

14 Q WAS THIS MORNING THE FIRST TIME YOU
15 HEARD THIS RECONSTRUCTION?

16 A NO. I'VE -- I READ A SUMMARY, A ONE-PAGE
17 SUMMARY, WHICH REALLY OUTLINES IT IN WORDS. THIS IS
18 THE FIRST TIME I HAVE SEEN A -- THIS DIAGRAM OF IT.

19 Q A ONE-PAGE SUMMARY OF WHAT?

20 A OF WHAT WE'RE SEEING DIAGRAMED HERE.

21 Q THE RECONSTRUCTION I'M ASKING YOU
22 ABOUT.

23 IS THIS RECONSTRUCTION OF THE WOUNDS TO
24 JOSE MENENDEZ, THE SEQUENCE IN WHICH THEY WERE
25 INFLICTED, IS THAT SOMETHING THAT YOU HEARD FOR THE
26 FIRST TIME TODAY?

27 A YES.

41847

1 A NO.

2 Q BUT YOU AGREE THAT THAT IS A POSSIBLE
3 RECONSTRUCTION?

4 A YES.

5 Q AND IS THAT RECONSTRUCTION CONSISTENT
6 WITH ALL OF THE ESTIMATES THAT YOU HAVE GIVEN IN
7 THIS PROCEEDING CONCERNING DISTANCES AT WHICH THESE
8 WOUNDS WERE INFLICTED?

9 A YES, I THINK IT IS.

10 Q OKAY. THE WOUND TO JOSE'S LEFT ARM, HOW
11 FAR AWAY WAS THE SHOOTER AT THE TIME THAT THE WOUND
12 TO JOSE'S LEFT ARM WAS INFLICTED?

13 A LET'S SEE. HIS LEFT ARM.

14 I THINK I SAID ABOUT 12 FEET ON THAT.

15 Q TWELVE FEET AWAY?

16 A APPROXIMATELY.

17 Q OKAY. NOW, IN THIS RECONSTRUCTION THAT
18 HAS JUST BEEN SUGGESTED TO YOU BY COUNSEL, OF THE
19 SHOTS FIRED TO JOSE MENENDEZ, JOSE MENENDEZ WOULD
20 HAVE TO BE STANDING WHERE IN ORDER FOR HIM TO END UP
21 IN THAT SEATED POSITION IN WHICH HE APPEARS IN THAT
22 DIAGRAM?

23 A BASICALLY, RIGHT IN FRONT OF THAT AREA.

24 Q OKAY. HE WOULD BE STANDING RIGHT IN
25 FRONT OF THAT SOFA; IS THAT CORRECT?

26 A NEAR IN FRONT OF IT, YES.

27 Q DO YOU KNOW HOW FAR AWAY FROM THAT SOFA
28 HE WOULD HAVE TO BE IN ORDER FOR HIM TO END UP IN

41848

1 THAT SEATED POSITION?

2 A WELL, ONE OF THE PROBLEMS IS I DON'T
3 THINK IT WAS A STATIC SCENE. I DON'T THINK HE STOOD
4 AND REMAINED STATIONARY DURING THIS. I THINK HE WAS
5 MOVING, THE BOYS WERE MOVING, AND, THEREFORE,
6 DISTANCES CHANGE AND --

7 Q BY "THE BOYS" --

8 A POSITIONS CHANGE.

9 Q BY "THE BOYS" ARE YOU REFERRING TO THE
10 TWO MEN ON TRIAL HERE?

11 A THE TWO SHOOTERS, YES.

12 Q ALL RIGHT. IN THE INITIAL POSITION IN
13 WHICH HE WAS STRUCK IN THE RIGHT ARM, CAN YOU TELL
14 US WHERE HE WAS IN RELATIONSHIP TO THIS -- IN
15 RELATION TO THE SOFA AT THE TIME THAT THAT SHOT WAS
16 INFLICTED?

17 A NOW YOU'RE ASKING -- YOU JUST ASKED ABOUT

18 THE LEFT ARM, NOW YOU'RE ASKING ABOUT THE RIGHT ARM.

19 Q YES. I'M ASKING ABOUT THE RIGHT ARM.

20 A WHICH SHOT TO THE RIGHT ARM?

21 Q HOW MANY SHOTS DID HE RECEIVE TO THE

22 RIGHT ARM?

23 A TWO, AT LEAST.

24 Q OKAY. CAN YOU TELL US WHICH WOUND TO

25 THE RIGHT ARM HE RECEIVED FIRST?

26 A NO.

27 Q IN THE RECONSTRUCTION THAT WAS JUST

28 SUGGESTED TO YOU, DOES IT MAKE ANY DIFFERENCE AS --

41849

1 IN ORDER FOR THAT TO BE POSSIBLE, WHICH WOUND WAS

2 RECEIVED FIRST?

3 A ONE WOULD THINK THAT THE ONE IN THE

4 ANTECUBITAL FOSSA WOULD PROBABLY HAVE BEEN RECEIVED

5 FIRST.

6 Q YOU'RE REFERRING TO THE INSIDE PART OF

7 THE RIGHT ARM?

8 A YES.

9 Q OKAY. SO THAT THE -- SO THAT THE -- JOSE

10 MENENDEZ WOULD HAVE BEEN FACING THE SHOOTER AT THAT

11 TIME?

12 A NOT NECESSARILY. THE ARM IS VERY

13 MOVABLE, SO YOU DON'T KNOW REALLY WHERE THE ARM IS
14 IN RELATION TO THE WAY HE'S FACING.

15 Q OKAY. YOU'RE SAYING THAT THE ARM COULD
16 HAVE BEEN FACING TOWARD HIS BACK LIKE THIS, THIS IS
17 ONE POSSIBILITY?

18 A THERE'S LOTS OF POSSIBILITIES WITH BOTH
19 ARMS. I MEAN, YOU CAN RAISE THEM OVER YOUR HEAD.
20 YOU CAN LEAN OVER AND TOUCH YOUR TOES. YOU CAN
21 EXTEND THEM STRAIGHT OUT. YOU CAN EXTEND THEM
22 BACK. YOU CAN EXTEND THEM FORWARD. THERE'S ALMOST
23 AN INFINITE NUMBER OF POSSIBILITIES.

24 Q IN THE RECONSTRUCTION THAT WAS JUST
25 SUGGESTED TO YOU BY COUNSEL RIGHT HERE RIGHT NOW,
26 WHAT WAS YOUR UNDERSTANDING, BASED UPON THAT
27 HYPOTHETICAL, AS TO WHERE HIS -- THE POSITION OF HIS
28 RIGHT ARM AT THE TIME THAT THE FIRST SHOT WAS

41850

1 FIRED?

2 A NOT A WORD WAS MENTIONED IN THE
3 HYPOTHETICAL ABOUT THE POSITION OF HIS ARMS.

4 Q IN ORDER FOR THAT RECONSTRUCTION TO
5 WORK, WHERE DOES HIS RIGHT ARM HAVE TO BE RELATIVE
6 TO THE SHOOTERS?

7 A I DON'T -- YOU MEAN DISTANCEWISE OR WHAT

8 ARE YOU SPEAKING OF?

9 Q THIS PORTION OF HIS RIGHT ARM HAS TO BE
10 FACING THE SHOOTERS?

11 A WHEN THAT SHOT HITS, YES. IT HAS TO BE
12 ACTUALLY -- I THINK WE'RE GETTING CONFUSED ABOUT
13 STATIC POSITIONS AND MOVING. IF HE'S MOVING THIS
14 ARM RAPIDLY AND THE SHOT COMES FROM THE SHOOTER AND
15 THE SHOT HAPPENS TO IMPACT AT THIS POSITION, THAT
16 WOULD BE ABOUT RIGHT. BUT IT DOESN'T MEAN THAT HE
17 HAS TO BE STANDING IN ANY ONE POSITION BECAUSE
18 THERE'S RAPID MOVEMENT GOING ON HERE AND THAT'S WHY
19 IT'S SO VERY, VERY DIFFICULT TO PIN DOWN A DEFINITE
20 POSITION AND TRY TO DEPICT IT IN STATIC PHOTOGRAPHS.

21 Q NOW, WHY IS IT YOUR OPINION THAT THE
22 SHOT TO THE INSIDE OF THE RIGHT ARM PROBABLY
23 PRECEDED THE SHOT TO THE BACK OF THE RIGHT ARM?

24 A THE DISTANCE WAS FURTHER FOR THE SHOT
25 FOR THE INSIDE.

26 Q WHAT IS THE DIFFERENCE IN DISTANCE
27 BETWEEN THE SHOT TO THE INSIDE OF THE RIGHT ARM AND
28 THE SHOT TO THE BACK OF THE RIGHT ARM?

41851

1 A WELL, THE SHOT TO THE BACK OF THE -- THE
2 SHOT TO THE INSIDE OF THE RIGHT ARM IS A FURTHER

3 DISTANCE, MAYBE 10, 12 FEET OR MORE. BUT THE SHOT
4 TO THE BACK OF THE RIGHT ARM OUT THE FRONT IS MUCH
5 CLOSER, MAYBE THREE TO FOUR FEET.

6 Q ARE YOU SUGGESTING THAT THE SHOT TO THE
7 INSIDE OF THE RIGHT ARM PRECEDED THE SHOT TO THE
8 BACK OF THE RIGHT ARM BECAUSE THE SHOOTER NEEDED
9 ADDITIONAL TIME TO GET CLOSER TO THE VICTIM?

10 A THAT -- LOOKING AT THE DIAGRAM HERE,
11 THAT WOULD SEEM TO BE THE LOGICAL REASON, YES.

12 Q SO IT IS YOUR OPINION IN THIS CASE THAT
13 JOSE MENENDEZ WAS SHOT FIRST TO THE INSIDE OF THE
14 RIGHT ARM AND THEN TO THE BACK OF THE RIGHT ARM; IS
15 THAT CORRECT?

16 A I CERTAINLY COULDN'T BE CERTAIN ABOUT
17 THAT BECAUSE WE HAVE TWO SHOOTERS AT DIFFERENT
18 DISTANCES FROM HIM. COULD HAVE BEEN SIMULTANEOUS
19 WITH ONE BEHIND HIM AND ONE IN FRONT OF HIM. IT'S
20 IMPOSSIBLE TO SAY THAT.

21 Q WELL, IN THE HYPOTHETICAL THAT COUNSEL
22 WAS GIVING YOU JUST NOW, DID YOU UNDERSTAND THAT
23 HYPOTHETICAL TO INCLUDE THE POSSIBILITY THAT THERE
24 WAS ONE SHOOTER IN FRONT OF HIM AND ONE SHOOTER
25 BEHIND HIM?

26 A I UNDERSTOOD IT TO CONFORM TO THE WAY
27 THIS IS DRAWN AND THE FINAL POSITION OF THE SHOOTERS
28 IS EXACTLY THAT.

1 Q AND ACCORDING TO THIS DRAWING HERE,
2 COUNSEL IS HYPOTHESIZING THAT ERIK MENENDEZ ENTERED
3 HERE ALONG THIS ROUTE THAT IS IN RED AND FIRED ALL
4 OF HIS SHOTS ALONG THIS ROUTE; IS THAT CORRECT?

5 A THAT'S CORRECT, YES.

6 Q AND SHE'S ALSO HYPOTHESIZING THAT THERE
7 WAS A SECOND SHOOTER OVER HERE WHO MOVED ALONG THIS
8 BLUE ROUTE; IS THAT CORRECT?

9 A YES.

10 Q NOW, YOU INDICATED THAT JOSE MENENDEZ,
11 AT THE TIME FOR THIS SHOOTING TO HAVE TAKEN PLACE,
12 WOULD HAVE BEEN IMMEDIATELY IN FRONT OF THE SOFA; IS
13 THAT CORRECT?

14 A AT THE -- AT THE TIME THAT A PORTION OF
15 IT OCCURRED, NOT THE ENTIRE SHOOTING.

16 AS I MENTIONED, HE WOULD BE MOBILE, I
17 WOULD EXPECT.

18 Q WELL, FOR THE SHOOTERS TO BE ON BOTH
19 SIDES OF HIM, WHERE WOULD HE HAVE TO BE?

20 A HE WOULD HAVE TO BE SOMEWHERE BETWEEN
21 IMMEDIATELY IN FRONT OF THE COUCH TO IN FRONT OF
22 THE -- THAT SQUARE BROWNISH TABLE. SOMEWHERE IN THAT
23 GENERAL AREA.

24 Q SO ARE YOU -- ARE YOU CONSIDERING THE
25 POSSIBILITY THAT THERE WERE TWO SHOOTERS THAT WERE
26 ON EITHER SIDE OF HIM HERE AND HERE AND THAT HE WAS

27 IN THE MIDDLE THERE AND THESE TWO SHOOTERS ARE BOTH
28 FACING HIM AND SHOOTING AT THE SAME TIME?

41853

1 A THAT'S SOMETHING ONE MUST CONSIDER.

2 Q AND THEN AFTER BEING SHOT HERE YOU -- IS
3 IT YOUR BELIEF THAT HE WALKED OVER TO THE COUCH AND
4 SAT DOWN ON THE SOFA?

5 A HE STAGGERED, WALKED, ROTATED, TURNED;
6 HE GOT THERE SOMEHOW.

7 I'M JUST SAYING WHERE YOU PLACED HIM OUT
8 THERE, I CAN'T SAY HE WASN'T THAT FAR AWAY. HE
9 MIGHT HAVE BEEN CLOSER, HE MIGHT HAVE BEEN THAT FAR
10 AWAY. THERE ARE INFINITE POSSIBILITIES AND I CAN'T
11 TELL YOU WHICH ONE IS CLOSER.

12 Q BUT YOU ARE -- YOU DO NOT RULE OUT THE
13 POSSIBILITY, YOU'RE TELLING US, THAT THERE ARE
14 SHOOTERS ON EITHER SIDE OF HIM SHOOTING HIM AT THE
15 SAME TIME; IS THAT CORRECT?

16 A YES.

17 Q OKAY. AND IF THERE ARE TWO SHOOTERS ON
18 EITHER SIDE OF HIM SHOOTING HIM AT THE SAME TIME,
19 THEN THE SHOT TO THE INTERIOR OF THE ARM DOES NOT
20 HAVE TO PRECEDE THE SHOT TO THE BACK OF THE ARM; IS
21 THAT CORRECT?

22 A I NEVER SAID IT DID.

23 Q SO YOU HAVE NO IDEA AS TO HOW THE SHOT

24 TO THE -- WHETHER OR NOT THE SHOT TO THE INTERIOR OF

25 THE ARM PRECEDED THE SHOT TO THE BACK OF THE ARM; IS

26 THAT CORRECT?

27 A THAT'S CORRECT, YEAH.

28 Q THAT WOULD BE PURELY SPECULATIVE ON YOUR

41854

1 PART; IS THAT CORRECT?

2 A YES. I SAID THE -- BECAUSE OF THE FACT

3 THERE ARE TWO SHOOTERS, YOU COULD HAVE ONE POSITION

4 IN A DIFFERENT -- ALL I SAID WAS THE DISTANCE OF THE

5 FIRE IS DIFFERENT. I DIDN'T SAY -- I DIDN'T

6 SPECULATE ON ANY ORDER OF THE SHOTS.

7 Q ALL RIGHT. BUT NOW IS IT YOUR OPINION

8 THEN THAT THE -- AS FAR AS SEQUENCING IS CONCERNED,

9 YOU DO HAVE THE OPINION THAT THE SHOTS TO THE ARMS

10 PRECEDED THE SHOT TO THE LEG; IS THAT CORRECT?

11 A I THINK THEY PROBABLY DID, YES.

12 Q WELL, YOU DON'T REALLY THINK THAT HE WAS

13 SHOT FIRST IN THE LEG OVER BY THE COFFEE TABLE AND

14 THEN HE WALKED OVER TO THE SOFA ON THAT LEG AND WAS

15 THEN SHOT IN THE ARMS, DO YOU?

16 A NO, I DON'T THINK THAT.

17 Q OKAY. SO WOULDN'T A SHOT TO THE LEG
18 LIKE THAT HAVE CAUSED HIM TO COLLAPSE IMMEDIATELY?
19 A VERY CLOSE TO IMMEDIATELY, YES,
20 DEPENDING ON WHICH LEG HE HAD HIS WEIGHT ON, IT
21 WOULD CERTAINLY -- HE WOULD HAVE BEEN FAIRLY CLOSE TO
22 HIS FINAL RESTING PLACE.
23 Q AND YOU SAID THAT THE SHOT TO THE HEAD
24 WOULD HAVE BEEN THE LAST SHOT; IS THAT CORRECT?
25 A YES.
26 Q SO YOU ARE CERTAIN ABOUT THE FACT, THEN,
27 IN TERMS OF SEQUENCING, THAT THE SHOTS TO THE ARMS
28 PRECEDED THE SHOT TO THE LEG AND THAT THE SHOT TO

41855

1 THE LEG PRECEDED THE SHOT TO THE HEAD; IS THAT
2 CORRECT?
3 A I WOULDN'T USE THE WORD "CERTAIN."
4 Q OKAY. WELL, ARE YOU TELLING US THAT
5 PERHAPS HE WAS SHOT TO THE HEAD WHILE HE WAS OVER BY
6 THE COFFEE TABLE AND THEN AFTER BEING SHOT TO THE
7 HEAD HE WALKED OVER TO THE SOFA AND SAT DOWN ON THE
8 SOFA?
9 A NO. I THINK WHEN HE WAS SHOT IN THE
10 HEAD HE WAS EITHER STANDING RIGHT NEXT TO THE SOFA
11 OR WAS ALREADY IN THE POSITION HE'S IN.

12 Q OKAY. WHEN HE WAS SHOT WHERE?

13 A IN THE HEAD.

14 Q OKAY. SO YOU THINK THAT PERHAPS HE WAS
15 STANDING WHEN HE WAS SHOT TO THE HEAD AND HE THEN
16 SAT DOWN AFTER BEING SHOT TO THE HEAD?

17 A I WOULD NOT USE THE WORDS "SAT DOWN"
18 BECAUSE THAT IMPLIES A VOLUNTARY ACT AND I DON'T
19 THINK HE HAD ANY VOLUNTARY ACTS. HE WOULD HAVE
20 COLLAPSED IN THAT POSITION.

21 Q BUT DO YOU THINK IT'S POSSIBLE THAT
22 FIRST HE WAS SHOT TO THE HEAD AND THEN SOMETIMES
23 AFTER BEING SHOT TO THE HEAD HE WAS SHOT TO THE
24 ARMS?

25 A I THINK THAT'S UNLIKELY.

26 Q AND YOU RULE THAT OUT, DON'T YOU?

27 A I DON'T RULE ANYTHING IN OR OUT, BUT I
28 THINK IT'S HIGHLY UNLIKELY.

41856

1 Q SO THERE IS NOTHING ABOUT THESE WOUNDS,
2 INDICATIONS AS TO WHETHER THEY'RE ANTEMORTEM OR
3 POSTMORTEM, THAT WOULD CAUSE YOU TO RULE OUT THE
4 POSSIBILITY THAT FIRST HE WAS SHOT TO THE HEAD AND
5 SOMETIME LATER HE WAS THEN SHOT TO THE ARMS?

6 A I SEE NO EVIDENCE TO INDICATE THAT.

7 Q DO YOU THINK THAT THE WOUND TO THE BACK

8 OF THE HEAD WAS A FATAL WOUND?

9 A EXCUSE ME. I DIDN'T HEAR THE QUESTION.

10 Q DO YOU THINK THAT WAS A FATAL WOUND?

11 A I'VE TESTIFIED TO THAT, YES.

12 Q HOW FAST DO YOU THINK THAT DEATH WOULD

13 HAVE OCCURRED AFTER HE WAS SHOT TO THE BACK OF THE

14 HEAD?

15 A INSTANTANEOUSLY.

16 Q WHEN DEATH IS INSTANTANEOUS, THE HEART

17 STOPS BEATING?

18 A NO, THAT'S NOT TRUE.

19 Q THE HEART CONTINUES TO BEAT?

20 A IT MAY WELL, YES.

21 Q AND YOU CONTINUE TO HAVE ANTEMORTEM

22 WOUNDS AFTER DEATH?

23 A THE DEFINITION OF DEATH IS DIFFICULT.

24 IN SOME OF THE TESTIMONY THAT I HAD READ PREVIOUSLY,

25 THE COURT HAD ASKED A QUESTION IN THIS TRIAL WHICH

26 WENT UNANSWERED, AND THAT WAS: DOES THE HEART

27 CONTINUE TO BEAT AFTER THE BRAIN CAN BE DESTROYED?

28 AND THE ANSWER IS VERY DISTINCTLY YES.

41857

1 THE HEART IS SUPPLIED BY TWO SETS OF

2 NERVES, ONE WHICH SPEEDS IT UP AND THE OTHER WHICH
3 SLOWS IT DOWN. BUT THEY'RE BASIC REGULATORY
4 NERVES. THE HEART DOES NOT DEPEND ON THESE NERVES
5 FOR ITS BEATING. THE HEART CAN BEAT INDEPENDENTLY
6 OF THESE NERVES.

7 NOW, THE LUNGS, THE RESPIRATION
8 MOVEMENT, IS ENTIRELY DIFFERENT. THE SHOT TO HIS
9 HEAD WOULD HAVE CAUSED BREATHING TO STOP
10 IMMEDIATELY. HOWEVER, IT IS LIKELY THAT THE HEART
11 WOULD HAVE KEPT BEATING. WE'VE SEEN THIS IN MANY
12 CASES -- WE HAVE CLEAR EVIDENCE THAT THIS HAPPENS.

13 FOR INSTANCE, IF YOU TAKE A PERSON WHO
14 HAS TREMENDOUS DAMAGE TO HIS BRAIN, YOU CAN PUT THIS
15 PERSON ON LIFE SUPPORT AND KEEP THIS PERSON ALIVE AS
16 AN ORGAN DONOR. AND WHAT I MEAN IS, HIS HEART
17 CONTINUES TO BEAT IF YOU SUPPLY RESPIRATORY
18 MOVEMENTS THAT ARE NO LONGER POSSIBLE. SO YES, THE
19 HEART IS LIKELY TO KEEP BEATING FOR SOME TIME, MAYBE
20 UP TO FIVE MINUTES AFTER DEATH; OTHER TIMES IT MAY
21 STOP SHORTLY. NO WAY TO KNOW.

22 Q GETTING BACK TO THIS RECONSTRUCTION THAT
23 WAS SUGGESTED TO YOU BY COUNSEL, IS IT YOUR OPINION
24 THAT THE SHOT TO THE LEG NECESSARILY CAME AFTER THE
25 SHOTS TO THE ARMS?

26 A NECESSARILY, NO.

27 Q SO FOR YOU ANYTHING IS POSSIBLE? YOU'RE
28 NOT RULING OUT ANY POSSIBLE SEQUENCE OF SHOTS; IS

1 THAT CORRECT?

2 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.

3 THE COURT: OVERRULED.

4 YOU CAN ANSWER THE QUESTION.

5 THE WITNESS: I'M RULING OUT VERY, VERY
6 LITTLE. I WAS ASKED IN THIS HYPOTHETICAL IF THE
7 EVIDENCE THAT I KNOW OF IN ANY WAY CONTRADICTS IT,
8 AND MY ANSWER WAS NO, THE EVIDENCE DOES NOT
9 CONTRADICT IT; IT IS POSSIBLE, AND I WOULD PROBABLY
10 GIVE THE SAME ANSWER TO A THOUSAND MORE
11 HYPOTHETICALS THAT WERE DIFFERENT THAN THIS.

12 MR. CONN: OKAY.

13 THE WITNESS: IT'S JUST IMPOSSIBLE TO KNOW
14 AND I'VE SAID THAT FROM THE VERY BEGINNING IN THIS
15 CASE.

16 Q BY MR. CONN: OKAY. SO YOU'VE BEEN A
17 DOCTOR --

18 AN ALTERNATE JUROR: I'M HAVING TROUBLE
19 UNDERSTANDING WHAT IS BEING DISPLAYED AS INFORMATION
20 HERE.

21 THE COURT: YOU WANT TO ASK A QUESTION OR
22 SOMETHING LIKE THAT?

23 AN ALTERNATE JUROR: I WOULD, YOUR HONOR.

24 THE COURT: YOU HAVE TO PUT IT IN WRITING.

25 Q BY MR. CONN: SIR, YOU'VE BEEN A DOCTOR

26 FOR 31 YEARS; IS THAT CORRECT?

27 A ABOUT THAT, YEAH.

28 Q OKAY. AND YOU'RE TELLING US THAT WITH

41859

1 YOUR MEDICAL TRAINING YOU CANNOT SHED ANY LIGHT

2 WHATSOEVER ON THE SEQUENCE OF WOUNDS IN THIS CASE

3 ANY MORE THAN A LAYMAN CAN; IS THAT CORRECT?

4 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.

5 THE COURT: OVERRULED.

6 THE WITNESS: I DON'T BELIEVE I SAID THAT.

7 Q BY MR. CONN: OKAY. THEN WHAT CAN YOU

8 TELL US CONCERNING THE SEQUENCE OF WOUNDS, THE

9 PROBABILITY OF THAT SEQUENCE, TO JOSE MENENDEZ BASED

10 UPON YOUR MEDICAL TRAINING AS A DOCTOR?

11 A I CAN TELL YOU THAT HE LOST ALL

12 VOLUNTARY MOVEMENT AND ALL CAPACITY TO BREATHE

13 IMMEDIATELY UPON RECEIVING THE SHOT TO THE BACK OF

14 THE HEAD.

15 AND I CAN TELL YOU THAT IF HE WAS

16 STANDING AND SUPPORTING HIS WEIGHT EQUALLY ON BOTH

17 LEGS, HE WOULD HAVE COLLAPSED ALMOST IMMEDIATELY

18 AFTER RECEIVING THE SHOT TO THE LEG.

19 I CAN TELL YOU ON MRS. MENENDEZ THAT SHE

20 WOULD HAVE LOST ALL VOLUNTARY MOTION --

21 Q LET'S JUST STAY ON JOSE MENENDEZ FOR ONE
22 MOMENT.

23 A WE'VE ENDED WITH HIM, THEN. THAT'S ALL
24 I CAN TELL YOU.

25 Q GETTING BACK TO MY QUESTION OF THE
26 SEQUENCING, THE SEQUENCING OF THE WOUNDS TO HIS
27 BODY. THAT WAS THE QUESTION I WAS ASKING YOU.

28 WHAT CAN YOU TELL US CONCERNING THE

41860

1 SEQUENCING OF WOUNDS TO JOSE MENENDEZ BASED UPON
2 YOUR MEDICAL TRAINING AS A DOCTOR? CAN YOU TELL US
3 ANYTHING?

4 MS. ABRAMSON: ASKED AND ANSWERED AND THIS
5 FORM IS ARGUMENTATIVE.

6 THE COURT: OVERRULED.

7 YOU CAN ANSWER THE QUESTION.

8 THE WITNESS: I THOUGHT I ANSWERED IT. I
9 THOUGHT I ANSWERED IT. I TOLD YOU WHAT I CAN TELL
10 YOU ABOUT FROM MY TRAINING WHAT HAPPENED, WOULD
11 HAPPEN, AFTER CERTAIN WOUNDS THAT ARE WITH
12 CERTAINTY, AND THAT'S THE ONE TO THE BACK OF THE
13 HEAD WHICH CAUSED HIM TO BECOME IMMEDIATELY
14 UNCONSCIOUS AND LOSE THE CAPACITY TO BREATHE.

15 Q BY MR. CONN: BY SEQUENCING, I AM ASKING

16 YOU TO MAKE REFERENCE TO THE VARIOUS DIFFERENT SHOTS
17 IN THIS CASE AND TELL US, IF YOU CAN, IF YOU CAN
18 SHED ANY LIGHT ON WHICH SHOTS PRECEDED OTHER SHOTS
19 AND TO WHAT DEGREE OF CERTAINTY YOU CAN EXPRESS SUCH
20 AN OPINION.

21 A WELL, I COULD EXPRESS TO A HIGH DEGREE
22 OF CERTAINTY THAT THE SHOT TO THE BACK OF THE HEAD
23 DID NOT OCCUR WITH HIM IN FRONT OF THE BROWN TABLE.
24 IT WOULD HAVE HAD TO OCCUR WITH HIM STANDING
25 IMMEDIATELY IN FRONT OF THE COUCH, IF HE WAS
26 STANDING. IT COULD HAVE OCCURRED WITH HIM SITTING
27 IN THE POSITION HE'S ALREADY IN.

28 Q ONCE AGAIN, DOCTOR, I'M ASKING YOU TO

41861

1 TELL US IF YOU HAVE ANY OPINION CONCERNING THE
2 RELATIVE SEQUENCE -- YOU UNDERSTAND WHAT I MEAN BY
3 THE RELATIVE SEQUENCE OF SHOTS? I'M ASKING YOU TO
4 CONNECT THE SHOTS IF YOU CAN.

5 A I'M TELLING YOU WHAT I CAN TELL YOU
6 ABOUT WHAT WE COULD EXPECT FROM THE ACTIONS OF JOSE
7 MENENDEZ AFTER THE SHOTS THAT I CAN TELL YOU WITH A
8 HIGH DEGREE OF CERTAINTY; AND THAT IS THE ONE TO THE
9 BACK OF THE HEAD AND THE ONE TO HIS LEG. AND I JUST
10 TOLD YOU THAT AND I CAN'T TELL YOU ANYTHING MORE

11 ABOUT SEQUENCE.

12 Q WHAT CAN YOU TELL US CONCERNING THE
13 SEQUENCE OF THE SHOT TO HIS LEG AND THE SHOT TO THE
14 BACK OF HIS HEAD?

15 A I CAN'T TELL YOU THE SEQUENCING OF THE
16 TWO, BUT I CAN TELL YOU THE -- HE WAS NEAR THE COUCH
17 WHEN HE GOT BOTH OF THEM, IF NOT ON THE COUCH WHEN
18 HE GOT THE ONE TO THE BACK OF THE HEAD.

19 Q SO YOU CANNOT SHED ANY LIGHT WHATSOEVER
20 ON WHETHER OR NOT THE SHOT TO THE LEG PRECEDED OR
21 FOLLOWED THE SHOT TO THE HEAD; IS THAT CORRECT?

22 A YES, THAT'S CORRECT.

23 Q OKAY. NOW, IN YOUR -- IN THE
24 HYPOTHETICAL RECONSTRUCTION THAT WAS SUGGESTED TO
25 YOU BY COUNSEL, WERE YOU NECESSARILY INCLUDING AS
26 PART OF THAT HYPOTHETICAL THE FACT THAT JOSE
27 MENENDEZ WAS IN A MOVING POSITION?

28 A I DON'T THINK THE MOVEMENT WAS MENTIONED

41862

1 DURING THE HYPOTHETICAL. I WAS ASSUMING THAT THE
2 MOTION WAS, THEREFORE, NOT RULED OUT BY THE
3 HYPOTHETICAL; AND, THEREFORE, I'VE TOLD YOU WHAT I
4 COULD DO WITH CERTAINTY.

5 NOW, IN YOUR QUESTIONING YOU HAVE ASKED

6 ME TO TELL YOU WHAT I COULD -- WHAT I CAN ESTABLISH
7 WITH A HIGH DEGREE OF CERTAINTY AND I HAVE TOLD YOU
8 WHAT I CAN TELL YOU WITH A HIGH DEGREE OF CERTAINTY.

9 IF YOU WANT TO ASK ME WHAT MY OPINION
10 IS, FOR INSTANCE, MY OPINION IS THAT THE WOUNDS --
11 WOUND TO THE LEG CAME WHILE HE WAS STANDING AND HE
12 COLLAPSED AND GOT THE HEAD WOUND LATER. BUT I CAN'T
13 TELL YOU THAT WITH A HIGH DEGREE OF MEDICAL
14 CERTAINTY.

15 Q ALL RIGHT. CAN YOU TELL US WHICH WAY
16 JOSE MENENDEZ WAS STANDING DURING THIS
17 RECONSTRUCTION SUGGESTED TO YOU BY COUNSEL; THAT IS,
18 WAS HE FACING THE SHOOTERS DURING THE ENTIRE
19 HYPOTHETICAL THAT YOU CONSIDERED OR DID HE HAVE HIS
20 BACK TO THE SHOOTERS DURING THE ENTIRE
21 HYPOTHETICAL?

22 A HE WAS MOVING AND THE SHOOTERS WERE
23 MOVING. I THINK WHAT YOU'VE ASKED -- THE QUESTION
24 YOU'VE ASKED IS IMPOSSIBLE TO ANSWER.

25 Q OKAY. NOW, FOR THE SHOT TO THE BACK OF
26 THE ARM, I TAKE IT THAT HE HAD HIS BACK TO THE
27 SHOOTERS AT THAT MOMENT IN TIME, TO THE SHOOTER WHO
28 ACTUALLY SHOT HIM?

1 A HE -- WELL, NOT NECESSARY -- YEAH, HIS --
2 RELATIVELY, THE SHOOTER WAS IN BACK OFF TO HIS RIGHT
3 SIDE AT THE TIME THAT THAT SHOT WAS FIRED AND HE MAY
4 WELL HAVE BEEN MOVING. SO THAT MAY HAVE BEEN A STOP
5 FRAME ON A CONTINUOUS MOVEMENT AT THAT POINT.

6 SO ONE OF THE SHOOTERS HAD TO BE
7 SOMEWHERE BEHIND HIM FOR THAT PARTICULAR SHOT.

8 Q THE PERSON WHO SHOT HIM HAD TO BE
9 SOMEWHERE BEHIND HIM AT THAT MOMENT OF THE SHOOTING;
10 IS THAT CORRECT?

11 A SOMEWHERE BEHIND HIM RELATIVE TO HIS
12 MOVING, YES.

13 Q OKAY. AND NOW FOR THE SHOT TO THE
14 INSIDE OF THE RIGHT ARM, CAN YOU TELL US THE RANGE
15 THAT HE WOULD HAVE BEEN FACING RELATIVE TO THE
16 SHOOTER IN ORDER FOR THAT SHOT TO TAKE PLACE?

17 MS. ABRAMSON: OBJECTION, YOUR HONOR.
18 CONFUSING QUESTION. IT'S VAGUE.

19 THE COURT: DO YOU UNDERSTAND THE QUESTION?

20 THE WITNESS: I THINK SO.

21 THE COURT: OKAY.

22 THE WITNESS: WHEN WE ARE TALKING ABOUT THE
23 PREVIOUS SHOT TO THE UPPER PART OF THE RIGHT ARM,
24 WE'RE TALKING WITH A GREAT DEAL MORE CERTAINTY AS TO
25 WHERE THE SHOOTER WOULD BE IN RELATION TO HIM,
26 BECAUSE I BELIEVE THAT THIS ARM WAS IN A FIXED
27 POSITION IN CONTACT WITH HIS CHEST AT THAT TIME. SO
28 I KNOW WHERE THE ARM WAS AT THAT TIME.

1 BECAUSE OF THE UNLIMITED -- PRACTICALLY
2 UNLIMITED SCOPE OF MOVEMENT OF THE ARM, WHEN WE'RE
3 TALKING ABOUT THE OTHER SHOT OF THE ARM IT BECOMES
4 HIGHLY PROBLEMATICAL.

5 Q BY MR. CONN: OKAY. WHEN YOU SAY
6 "HIGHLY PROBLEMATICAL," ARE YOU SAYING THAT FOR
7 THAT SHOT TO THE RIGHT INNER ARM, HE COULD HAVE BEEN
8 WITHIN A RANGE OF THE FULL 360 DEGREES RELATIVE TO
9 THE SHOOTER?

10 A COULD YOU RESTATE THAT QUESTION. I'M
11 NOT CLEAR ON IT.

12 Q YES. IN OTHER WORDS, FOR THE SHOT TO
13 THE -- FOR THE INSIDE OF THE RIGHT ARM, YOU HAVE --
14 THERE IS NO LIMITATION TO THE NUMBER OF POSITIONS
15 THAT HE COULD HAVE BEEN RELATIVE TO THE SHOOTER, SO
16 HE COULD HAVE BEEN ANYWHERE WITHIN A FULL RANGE OF A
17 360-DEGREE CIRCLE; THAT IS ASSUMING DEPUTY DISTRICT
18 ATTORNEY NAJERA IS THE SHOOTER HERE, HE COULD HAVE
19 BEEN ANYWHERE WITHIN THIS FULL 360-DEGREE CIRCLE AT
20 THE TIME THAT THIS SHOT TO THE RIGHT INNER ARM IS
21 FIRED IN?

22 A NO, I DIDN'T SAY THAT.

23 Q CAN YOU TELL US WHAT THE POSSIBLE RANGE

24 COULD HAVE BEEN RELATIVE TO THE SHOOTER IF IT WAS
25 NOT THAT FULL 360-DEGREE CIRCLE THAT I JUST
26 SUGGESTED TO YOU.

27 A WELL, THE EASIEST WAY TO DEMONSTRATE
28 THIS -- AND I DON'T THINK WE HAVE ONE OF THESE IN

41865

1 THE COURTROOM -- THERE ARE SMALL ARTIST MODELS THAT
2 YOU HAVE ARTICULATED JOINTS AND I USE THESE
3 FREQUENTLY IN THE COURTROOM, WHERE YOU CAN TAKE A --
4 AND THIS WOULD BE PERFECT TO ILLUSTRATE -- TO ANSWER
5 YOUR QUESTION.

6 THE COURT: WE HAVE THOSE HERE.

7 THE WITNESS: DO YOU HAVE THEM? IF I COULD
8 HAVE ONE, I COULD ANSWER THIS QUESTION MUCH BETTER.

9 THANK YOU, YOUR HONOR.

10 NOW, WITH THIS WE'RE SPEAKING OF THIS
11 ONE RIGHT HERE, SO ANYWHERE -- ANYWHERE WE CAN MOVE
12 THIS ARM WHICH WOULD CORRESPOND TO A POSITION YOU
13 CAN MOVE A HUMAN ARM, AND THIS IS A LITTLE BIT
14 DIFFERENT.

15 THE COURT: THIS IS EXHIBIT 204 THAT HE IS
16 USING.

17 THE WITNESS: PARDON ME?

18 THE COURT: I'M JUST IDENTIFYING THE EXHIBIT

19 NUMBER. THAT'S EXHIBIT 204.

20 THE WITNESS: SO WHETHER OR NOT, IF YOU NOTE,
21 IF I PUT THE MODEL IN THIS POSITION AND JUST ROTATE
22 THE ARM, HOW FAR THE SPREAD IS -- IT'S ABOUT A
23 HUNDRED-AND-SIXTY DEGREE SPREAD JUST FROM ROTATING
24 IT. I CAN PUT THE ARM IN VARIOUS OTHER POSITIONS.
25 AND THERE'S ALMOST AN INFINITE NUMBER OF POSITIONS.
26 THIS ARM DOESN'T GO AS FAR IN FRONT AS THE HUMAN ARM
27 DOES. BUT I THINK YOU CAN GET THE IDEA OF WHAT I'M
28 TRYING TO SAY OF THE UNLIMITED ALMOST -- NOW IT IS

41866

1 LIMITED IN THAT IT'S NOT 360 DEGREES WITH A PERSON
2 STANDING IN THIS ONE POSITION. IN OTHER WORDS, IF I
3 HAD THROUGH MY ARM -- IF I WERE HIT HERE IN MY ARM
4 AND THE JURY WERE THE SHOOTER, I COULD TURN MY BODY
5 IN VARIOUS POSITIONS AND PUT MY ARM UP AND DOWN IN
6 VARIOUS WAYS. AS LONG AS THEY COULD SEE THIS
7 PORTION OF THE ARM, ANY OF THOSE WOULD BE POSSIBLE.
8 HOWEVER, IF I TURN MY BACK LIKE THIS AND HOLD MY ARM
9 LIKE THIS WHERE THEY CAN'T SEE THESE ENTRANCE
10 WOUNDS, THAT IS IMPOSSIBLE. SO I THINK THAT'S THE
11 LIMITATION POSSIBLY YOU'RE SEEKING.

12 Q BY MR. CONN: WELL, BUT YOUR OPINION
13 CONCERNING THE WOUND TO THE RIGHT ARM, WASN'T IT

14 ALSO PART OF YOUR OPINION THAT THERE WAS AN EXIT AND
15 THAT EXIT WAS ON THE FOREARM, THE BACK OF THE RIGHT
16 FOREARM?

17 A YES.

18 Q SO THAT WOULD ALSO LIMIT THE RANGE; IS
19 THAT CORRECT?

20 A WELL, NO. I MEAN, THE PATH THROUGH THE
21 ARM -- THIS IS -- UNFORTUNATELY, THIS IS THE -- THIS IS
22 THE -- WHAT WAS DEPICTED HERE IS CLOSER TO THE WOUND
23 OF THE UPPER ARM. ACTUALLY, WE'RE TALKING FOREARM
24 ABOUT THE ONE YOU'RE ASKING ME ABOUT HERE WHICH
25 FURTHER INCREASES YOUR -- BUT IF THE ENTRANCE IS HERE
26 AND YOU HAVE SOMEWHAT OF AN ANGLE LIKE SO;
27 THEREFORE, YOU NOT ONLY HAVE TO SEE THIS, BUT IT
28 WOULD HAVE TO LINE UP THE ANGLE TOWARD YOU. AND SO

41867

1 THAT SOMEWHAT LIMITS IT, YES. AND THIS ONE DOES NOT
2 SHOW UP WELL BECAUSE THIS IS JUST A VERY GROSS
3 ESTIMATE, BUT WE DON'T HAVE A -- ANY PROBE THROUGH
4 THE ARM AT THE ELBOW AREA IN THIS DUMMY.

5 Q AND IS IT YOUR OPINION THAT THE GUNSHOT --
6 THAT THE SHOTGUN WOUND TO THE RIGHT INNER ARM WAS
7 THE ENTRANCE WOUND AND THE EXIT WAS ON THE DORSAL
8 ASPECT OF THE RIGHT FOREARM RATHER THAN VICE VERSA?

9 A PROBABLY. BUT THERE'S CERTAINLY NO WAY
10 OF KNOWING FOR SURE.

11 Q OKAY. AND AT LEAST, ACCORDING TO
12 DR. GOLDEN, WHO HAS DESCRIBED THE WOUNDS IN THIS
13 CASE, THE SHOTGUN WOUND TO THE RIGHT INNER ARM IS,
14 IN FACT, AN ENTRY WOUND?

15 A THAT WAS HIS OPINION, YES.

16 Q AND THAT WAS HIS OPINION IN BOTH THE '89
17 REPORT AS WELL AS THE '95 SUPPLEMENT; IS THAT
18 CORRECT?

19 A YES, THAT IS CORRECT. BUT THE PROBLEM
20 IS THAT IT IS VERY, VERY DIFFICULT TO TELL ENTRANCE
21 FROM EXIT WHEN YOU'RE TALKING ABOUT A SMALL DISTANCE
22 OF TRAVEL LIKE AN EXTREMITY BECAUSE THE BULLET OR
23 PROJECTILE LOSES VERY LITTLE VELOCITY. IF YOU'RE
24 TALKING ABOUT A HANDGUN WOUND THROUGH A TORSO,
25 THAT'S DIFFERENT BECAUSE YOU'LL HAVE A FAIRLY ROUND
26 ENTRANCE WOUND AND MORE SLIGHT LIKE EXIT BECAUSE IT
27 LOST VELOCITY COMING OUT. IF IT'S GOING A SHORT
28 PATH IT'S CRUSHING TISSUE THE WHOLE WAY THROUGH AND

41868

1 THESE TWO CAN RESEMBLE ONE ANOTHER.

2 Q NOW, WHILE YOU TOLD US THAT JOSE
3 MENENDEZ MIGHT HAVE BEEN STANDING OVER BY THE COFFEE

4 TABLE, FOR ALL YOU KNOW, AT THE TIME THAT HE
5 RECEIVED THE WOUNDS TO HIS RIGHT ARM, WOULD YOU
6 AGREE THAT JOSE MENENDEZ HAD TO BE EITHER SITTING ON
7 THE SOFA OR STANDING IMMEDIATELY IN FRONT OF THE
8 SOFA AT THE TIME THAT HE RECEIVED THE WOUND TO HIS
9 LEG?

10 A HE WOULD HAVE HAD TO BE VERY CLOSE TO
11 THE SOFA, DEPENDING ON THE POSITION OF AND SPREAD OF
12 BOTH HIS LEGS. IF HE HAD HAD HIS LEGS SPREAD APART
13 AND WAS FACING SIDEWAYS, HE COULD HAVE ROTATED AND
14 MOVED THE BODY A FEW FEET. BUT HE WOULD HAVE HAD TO
15 HAVE BEEN VERY CLOSE TO THAT AREA, YES.

16 Q OKAY. BECAUSE THAT SHOT TO THE LEG
17 WOULD CAUSE HIM TO COLLAPSE; ISN'T THAT CORRECT?

18 A YES, IT WOULD. UNLESS HE HAD SOMETHING
19 TO SUPPORT HIMSELF ON, HE WOULD HAVE HAD TO COLLAPSE
20 FROM THAT; OR UNLESS HE HOPPED, WHICH I THINK IS
21 UNLIKELY.

22 Q SO THERE ARE CERTAIN THINGS CONCERNING
23 HUMAN BEHAVIOR THAT YOU DO RULE OUT IN FORMING AN
24 OPINION CONCERNING THE SHOTS IN THIS CASE; IS THAT
25 CORRECT?

26 A I DON'T KNOW WHAT YOU'RE REFERRING TO.

27 Q IN OTHER WORDS, HOPPING, THAT'S
28 SOMETHING THAT YOU'RE RULING OUT. EVEN THOUGH IT'S

1 MEDICALLY POSSIBLE THAT HE COULD HAVE BEEN HOPPING
2 AROUND AFTER BEING SHOT IN THE LEG, YOU RULED THAT
3 OUT?

4 A NO, I DIDN'T. I SAID IT'S UNLIKELY. I
5 DIDN'T RULE IT OUT.

6 Q OKAY. NOW, TURNING TO THE WOUND TO HIS
7 LEFT ELBOW, YOU SAID THAT ONCE AGAIN THE WOUND TO
8 HIS LEFT ELBOW COULD HAVE BEEN INFLICTED CONSISTENT
9 WITH THE HYPOTHETICAL THAT WAS GIVEN TO YOU THIS
10 MORNING BY COUNSEL IN WHICH ERIK MENENDEZ GOES INTO
11 THE CENTER OF THE ROOM AND THE OTHER SHOOTER
12 APPROACHES TOWARD THE SOFA; IS THAT CORRECT?

13 A YES.

14 Q OKAY. NOW, YOUR ESTIMATE FOR THE WOUND
15 TO THE LEFT ELBOW YESTERDAY WAS 14 FEET; IS THAT
16 CORRECT?

17 A PLUS OR MINUS FOUR, YES.

18 Q OKAY. DO YOU THINK THAT THERE IS 14
19 FEET, IF JOSE MENENDEZ WAS STANDING OVER BY THE
20 COFFEE TABLE HERE, ON THE LEFT SIDE OF THIS COFFEE
21 TABLE AS WE'RE LOOKING AT THIS DIAGRAM, DO YOU THINK
22 THAT THERE'S 14 FEET FROM THERE OVER TO ANY OF THE
23 PATHS OF ERIK MENENDEZ OR 14 FEET TO THE DOOR?

24 A I THINK THERE'S PROBABLY 10 FEET TO THE
25 DOOR AND I USED 14 FEET AS A GROSS ESTIMATE AND
26 SPECIFICALLY SAID THAT WAS PLUS OR MINUS FOUR.

27 Q SO IN ORDER FOR THE SCENARIO TO TAKE

41870

1 MUST HAVE FIRED -- IF HE WAS STANDING NEAR THE COFFEE
2 TABLE, THE SHOOTER MUST HAVE FIRED IMMEDIATELY UPON
3 ENTERING THE DOOR, STRIKING HIM IN THE LEFT ELBOW
4 FOR US TO GET THAT -- WHAT YOU BELIEVE TO BE A
5 10-FOOT DISTANCE; IS THAT CORRECT?

6 A NO, THAT'S NOT CORRECT. THAT'S ONE
7 POSSIBILITY.

8 IN THE FIRST PLACE, WE DON'T KNOW WHERE
9 HE WAS. HE COULD HAVE BEEN CLOSER TO THE COUCH.
10 SECOND, IF HE WERE CLOSER TO THE COUCH, WHERE THIS
11 E.R. (SIC) IS IS CERTAINLY 10 FEET AWAY. I THINK
12 THERE'S SEVERAL POSSIBILITIES.

13 Q WHERE THE E.R. -- WHAT ARE YOU REFERRING
14 TO?

15 A THE E.R. (SIC) AT THE END OF THE PATH --
16 THE X AND THEN THE E.R. (SIC) RIGHT ABOVE IT. IF
17 HE'S AT THE COUCH THERE'S 10 FEET FROM THERE.

18 Q YOU BELIEVE THERE'S 10 FEET THERE?

19 A I THINK SO.

20 Q SO IN ORDER FOR THAT SHOT TO TAKE PLACE,
21 YOU WOULD HAVE TO GO TO THE LOWEST PART OF YOUR
22 14-FOOT ESTIMATE, THAT IS THE 10-FOOT RANGE; IS THAT

23 CORRECT?

24 A WELL, NOT NECESSARILY. I DON'T THINK

25 THE HYPOTHETICAL WAS MEANT TO IMPLY THAT ERIK

26 MENENDEZ HAD TO BE IN EXACTLY THAT POSITION. HE MAY

27 HAVE BEEN A COUPLE FEET FURTHER ON. I DON'T THINK

28 WE CAN SAY THAT THAT WAS -- I WAS GIVEN THAT AS A

41871

1 ROUGH IDEA. MAYBE THE ANGLE WENT UP MORE TOWARD THE

2 TV. I JUST DON'T KNOW, BUT I ASSUME THERE WAS SOME

3 VARIATION IN IT.

4 Q NOW, CAN YOU TELL US WHY YOU CONCLUDED

5 THAT IT WAS MORE LIKELY THAT THE SHOTS TO THE RIGHT

6 ARM PRECEDED THE SHOTS TO THE LEFT ARM?

7 A SHOTS TO THE -- GO THROUGH THAT AGAIN

8 NOW.

9 Q YES. CAN YOU TELL US WHY YOU CONCLUDED

10 THAT IT WAS MORE LIKELY THAT THE SHOTS TO THE RIGHT

11 ARM OF JOSE MENENDEZ PRECEDED THE SHOTS TO HIS LEFT

12 ARM?

13 A WHEN DID I SAY THAT?

14 MS. ABRAMSON: OBJECTION, YOUR HONOR. HE

15 NEVER SAID THAT.

16 THE WITNESS: I DON'T RECALL SAYING THAT.

17 Q BY MR. CONN: IS THAT YOUR OPINION?

18 A I DON'T HAVE AN OPINION ON THAT.

19 Q SO COUNSEL WAS JUST EXPRESSING TO YOU
20 ONE POSSIBILITY WHICH YOU SAID IS POSSIBLE; IS THAT
21 CORRECT?

22 A THAT IS CORRECT.

23 Q OKAY. AND IT'S YOUR OPINION THAT FIRST
24 JOSE MENENDEZ COULD HAVE RECEIVED TWO SHOTS TO THE
25 RIGHT ARM, COULD THEN HAVE BEEN SHOT TO HIS LEG AND
26 COULD THEN HAVE BEEN SHOT TO HIS LEFT ARM, WHICH WAS
27 FOLLOWED BY A SHOT TO HIS HEAD; IS THAT THE SEQUENCE
28 THAT YOU SAID IS POSSIBLE?

41872

1 A I DON'T -- I HAVE, FROM THE VERY
2 BEGINNING OF THIS CASE, REFUSED TO GIVE A SEQUENCE
3 BECAUSE I THINK IT IS VERY LIKELY TO MISLEAD. I
4 DON'T THINK IT'S POSSIBLE FOR ANYONE TO SEQUENCE
5 THIS ACCURATELY AND I'LL NOT GIVE YOU A SEQUENCE.

6 Q ANYTHING IS POSSIBLE; IS THAT WHAT
7 YOU'RE SAYING?

8 A NO. I TOLD YOU WHAT THE CERTAINTY --
9 THERE'S CERTAIN FACTS IN THIS CASE I CAN GIVE YOU
10 WITH CERTAINTY AND I'VE MENTIONED THEM.

11 I'LL MENTION THEM AGAIN. ONE IS THE
12 SHOT TO THE BACK OF THE HEAD; THE OTHER IS THE SHOT

13 TO THE LEG. I THINK BOTH OF THOSE OCCURRED WHEN HE
14 WAS NEAR HIS FINAL RESTING PLACE. AND IF YOU'RE --
15 IF YOU WANT TO LIMIT IT TO HIM, THAT'S ABOUT IT.

16 Q OKAY. NOW, FOR KITTY MENENDEZ, DO YOU
17 HAVE ANY IDEA CONCERNING THE SEQUENCE OF SHOTS THAT
18 WAS FIRED TO HER?

19 A I WOULD SUSPECT THAT THE ONE -- THE
20 CONTACT WOUND TO HER CHEEK WAS PROBABLY THE LAST.

21 Q AND WHY WOULD YOU SUSPECT THAT THAT WAS
22 THE LAST?

23 A BECAUSE I DON'T THINK SHE COULD HAVE HAD
24 ANY CONSCIOUS MOVEMENT AFTER THAT SHOT.

25 Q AND YOU HAVE NO FURTHER OPINION
26 CONCERNING SEQUENCING; IS THAT CORRECT?

27 A THAT'S CORRECT.

28 Q NOW, DID YOU SAY THAT YOU DID NOT SEE

41873

1 THE ILLUSTRATIONS IN THIS CASE PRIOR TO TESTIFYING?

2 A THE ILLUSTRATION THAT YOU SHOWED ME
3 YESTERDAY, I DIDN'T HAVE ANY CHANCE TO -- I NEVER
4 SAW THE COMPLETE SET. I THINK I SAW JUST THE LAST
5 VERY SMALL PORTION OF DR. MC CARTHY'S TESTIMONY AND
6 I THINK YOU MAY HAVE USED A FEW DURING THAT. AND I
7 KNEW THEY WERE UP THERE. I HAD NEVER -- I HAD NOT A

8 SET UNTIL AFTER -- AFTER YOU PRESENTED THEM TO ME --
9 WE WENT THROUGH THEM YESTERDAY. AND THE FIRST TIME
10 I GOT ANY CHANCE TO STUDY THEM WAS WHEN I SAW THEM
11 WHEN YOU PRESENTED THEM AND ASKED ME YOUR
12 HYPOTHETICAL QUESTIONS TO ASSUME THAT IF THE ANGLES
13 AREN'T EXACTLY RIGHT, IS THIS MEDICALLY POSSIBLE,
14 THAT TYPE OF QUESTIONING.

15 AND SO I DID NOT -- HAD NOT STUDIED THEM
16 AT ALL AND HAD NEVER SEEN THEM, BUT I DID GET A SET
17 OF THEM THEN AND I DID STUDY THEM LAST NIGHT.

18 Q OKAY. SO ALL OF THE CONVERSATIONS THAT
19 YOU HAD WITH OTHER PEOPLE -- I BELIEVE THAT YOU SAID
20 THAT YOU SPOKE TO DR. BODEN AND CYRIL WECHT AND SO
21 ON AND SO FORTH. ALL OF THESE CONVERSATIONS THAT
22 YOU HAD WITH THESE PEOPLE ARE CONVERSATIONS YOU HAD
23 BEFORE YOU EVEN LOOKED AT THE ILLUSTRATIONS IN THIS
24 CASE; IS THAT CORRECT?

25 A BEFORE I LOOKED AT THESE PARTICULAR
26 ILLUSTRATIONS? I HAD LOOKED AT THE REPORT THAT
27 MR. MC CARTHY HAD SENT, WHICH DOES HAVE
28 ILLUSTRATIONS ON IT. I HAD ALSO READ HIS -- THERE

41874

1 WAS SOME -- I THINK IT MIGHT HAVE BEEN -- I'M NOT SURE
2 IF IT WAS A PERSON-TO-PERSON MEETING OR WHAT TYPE OF

3 DISCOVERY, BUT IT WAS A QUESTION-AND-ANSWER

4 SESSION.

5 Q YOU SAID DR. MC CARTHY'S REPORT HAD THE

6 ILLUSTRATIONS ATTACHED TO IT?

7 A NOT THESE ILLUSTRATIONS. IT HAD

8 ILLUSTRATIONS. IT HAD ILLUSTRATIONS WHERE HE'D

9 TAKEN THE HUMAN FORM OF THE MALE AND THE FEMALE FROM

10 THE FRONT AND FROM THE BACK AND HAD HIS TECHNICIANS

11 OR HE HIMSELF PUT ON THERE THE PLACES WHERE HE

12 ESTIMATED THE DAMAGE TO BE AND HE NUMBERED IT AND

13 THEN HE USED THAT NUMBERING AND THOSE ILLUSTRATIONS

14 TO ILLUSTRATE HIS REPORT. AND SO THAT'S WHAT I HAD

15 AVAILABLE AND THAT'S WHAT I STUDIED.

16 Q SO YOU'RE TALKING ABOUT A CHART WHICH

17 SHOWS THE PLACEMENT OF THE WOUNDS; IS THAT CORRECT?

18 A YES, HIS CHART.

19 Q OKAY. BUT AS FAR AS THIS SHOT SEQUENCE

20 ILLUSTRATIONS, YOU HAD NEVER EVEN SEEN THE SHOT

21 SEQUENCE ILLUSTRATIONS AS YOU WERE DISCUSSING

22 DR. MC CARTHY'S THEORY WITH PEOPLE SUCH AS DR. BODEN

23 AND DR. GOLDEN AND SO ON AND SO FORTH; IS THAT

24 CORRECT?

25 A AS I JUST MENTIONED, I WAS DISCUSSING

26 THE SEQUENCING AS VERY CLEARLY STATED IN HIS

27 REPORT. I HAD NOT SEEN THESE PARTICULAR DEPICTIONS

28 OF IT BEFORE.

1 Q OKAY. NOW, YOU INDICATED IN YOUR
2 TESTIMONY THIS MORNING THAT THERE WAS NO EVIDENCE
3 THAT 12 SHOTS WERE FIRED IN THIS CASE; IS THAT
4 CORRECT?

5 A YES.

6 Q WHAT IS YOUR OPINION CONCERNING THE
7 NUMBER OF SHOTS THAT WERE FIRED?

8 A I DON'T KNOW.

9 Q NO IDEA WHATSOEVER? CAN YOU GIVE US A
10 RANGE?

11 A WELL, I THINK -- I THINK NINE OR TEN.
12 MAYBE 11. MAYBE 12. I DON'T KNOW. SOMEWHERE IN
13 THAT RANGE.

14 Q NINE TO TWELVE, IS THAT THE BEST YOU CAN
15 PIN IT DOWN?

16 A I DON'T THINK I CAN GET ANY CLOSER THAN
17 THAT.

18 Q OKAY.

19 A MAYBE 13. I MEAN, IT JUST -- IT'S JUST
20 IMPOSSIBLE TO KNOW.

21 Q OKAY. AND DID YOU MAKE AN EFFORT TO TRY
22 TO DETERMINE THE NUMBER OF SHOTS THAT WERE FIRED IN
23 THIS CASE?

24 A NO. I JUST SAID I THOUGHT IT WAS
25 IMPOSSIBLE TO KNOW. SO WHY WOULD I MAKE AN EFFORT

26 TO FIND OUT SOMETHING I DIDN'T THINK IS POSSIBLE TO

27 FIND OUT?

28 Q SO WHAT YOU'RE SAYING IS YOU SIMPLY LOOK

41876

1 AT THE COMPLEXITY OF THE SHOOTING AND YOU SAY THIS

2 IS TOO DIFFICULT TO FIGURE ANYTHING OUT, I'M NOT

3 EVEN GOING TO TRY, I'M NOT EVEN GOING TO TRY TO

4 ASSOCIATE WOUNDS OR CONSIDER THE PELLET EVIDENCE OR

5 CONSIDER WHICH WOUNDS CAN -- COULD HAVE BEEN CAUSED

6 BY THE SAME SHOT. YOU SIMPLY SAY IT'S TOO

7 COMPLICATED, I'M NOT GOING TO TRY; IS THAT CORRECT?

8 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.

9 COMPOUND.

10 THE COURT: SUSTAINED.

11 Q BY MR. CONN: IN LOOKING AT THE EVIDENCE

12 IN THIS CASE, DID YOU RULE OUT THE POSSIBILITY OF

13 FIGURING OUT THE NUMBER OF WOUNDS BEFORE YOU MADE AN

14 EFFORT TO COMPUTE THE NUMBER OF WOUNDS?

15 A COULD YOU RESTATE THAT? THAT'S UNCLEAR

16 TO ME.

17 Q YES.

18 DID YOU RULE OUT THE POSSIBILITY OF

19 DETERMINING THE NUMBER OF SHOTS FIRED BEFORE YOU

20 EVEN ATTEMPTED TO DETERMINE THE NUMBER OF SHOTS

21 FIRED?

22 A DID I RULE OUT THE POSSIBILITY? I

23 DIDN'T EVEN REALLY THINK OF IT. THAT'S NOT

24 SOMETHING THAT PRESENTED WITH THIS CASE THAT --

25 TRYING TO DETERMINE THE NUMBER OF SHOTS WOULD BE WAY

26 DOWN THE LINE OF SOMETHING I WOULD TRY TO DO. I

27 WOULD BE LOOKING AT THE AUTOPSY REPORT. I WOULD BE

28 LOOKING AT THE SCENE PHOTOGRAPHS. I WOULD BE

41877

1 LOOKING AT THE -- ALL THE PHOTOGRAPHS AND TRYING TO

2 SEE IF THERE IS ANY ASSOCIATION. THEN LATER MAYBE I

3 WOULD GIVE A ROUGH ESTIMATE, WHICH I HAVE JUST GIVEN

4 YOU. AND IF YOU'RE SAYING THAT I DIDN'T MAKE ANY

5 EFFORT TO TRY TO DO ANY -- TO RELATE ANY SHOTS, I

6 THINK, COUNSEL, YOU MUST KNOW THAT'S FALSE. I DO

7 THINK YOU HAVE MY REPORT, DON'T YOU?

8 Q DO I HAVE YOUR REPORT?

9 A I BELIEVE YOU DO, DON'T YOU?

10 Q I DON'T KNOW.

11 LET ME ASK YOU THIS: IN LOOKING AT THE

12 TESTIMONY OF DR. MC CARTHY, WERE YOU LOOKING FOR

13 AREAS OF DISAGREEMENT WITH HIM?

14 A I WAS LOOKING FOR AREAS IN WHICH HE MADE

15 DECLARATIONS THAT WERE JUST FLAT OUTRIGHT FALSE.

16 Q AND ONE OF THE THINGS THAT HE DID IN HIS
17 TESTIMONY WAS HE GAVE AN OPINION CONCERNING THE
18 NUMBER OF SHOTS THAT WERE FIRED; IS THAT CORRECT?

19 A YES, HE DID THAT.

20 Q OKAY. AND DID YOU THINK AT THAT POINT,
21 WELL, MAYBE IT'S TIME FOR ME TO TAKE A HARD LOOK AT
22 THIS EVIDENCE AND DETERMINE IN MY OWN MIND IF I CAN
23 COME UP WITH A NUMBER OF SHOTS FIRED?

24 A NO. I NEVER CONTRADICTED
25 DR. MC CARTHY'S NUMBER OF SHOTS FIRED BECAUSE THERE
26 WAS SO MUCH OTHER FERTILE GROUND FOR CONTRADICTION
27 THAT I NEVER REALLY CONTRADICTED IT. IT MAY WELL BE
28 12 AND THAT WAS WITHIN MY RANGE. I DON'T ARGUE WITH

41878

1 THAT. WE HAD VERY BLATANT CONTRADICTIONS, LIKE THE
2 FACT THAT BREAST TISSUE IS MUCH SOFTER THAN MUSCLE
3 TISSUE AND EASIER TO PENETRATE, WHICH IS FLAT
4 OUTRIGHT WRONG, WHICH HE SWEARS TO A HIGH DEGREE OF
5 CERTAINTY, WITHOUT ANY EQUIVOCATION, IS TRUE.

6 AND WE HAD OTHER THINGS. HE SAYS THAT
7 HE COULD LOOK AT THE WOUND ON JOSE'S LEG AND
8 DECLARE, DESPITE WHAT THE AUTOPSY FORENSIC
9 PATHOLOGIST SAID, THAT HE CAN LOOK AT THIS WOUND AND
10 DECLARE THAT IT IS A POSTMORTEM WOUND WHEN HE HAS

11 ABSOLUTELY NO TRAINING TO DO THIS. THESE WERE
12 SUCH -- AND DECLARE THIS UNEQUIVOCALLY.
13 THESE WERE SUCH FERTILE GROUND FOR
14 DISAGREEMENT THAT I REALLY DIDN'T GET TO THE NUMBER
15 OF SHOTS.

16 SO, YEAH, MAYBE 12 -- MAYBE 12 IS THE
17 NUMBER OF SHOTS.

18 Q AND YOU HAVE NO WAY OF DETERMINING,
19 BASED UPON YOUR OWN EXPERIENCE; IS THAT CORRECT?

20 A I HAVEN'T TRIED.

21 Q DOCTOR, YOU SPENT 50 HOURS WORKING ON
22 THIS CASE; IS THAT CORRECT?

23 A AT LEAST.

24 Q AND WAS IT YOUR INTENTION, BEFORE YOU
25 CAME IN HERE AS A WITNESS, TO TRY TO SHED SOME LIGHT
26 ON THIS SHOOTING IF YOU COULD; OR WAS IT YOUR
27 INTENTION WHEN YOU CAME IN HERE TO LEAVE THIS
28 SHOOTING AS COMPLICATED AND AS UNASCERTAINABLE AS

41879

1 POSSIBLE SIMPLY FOR THE PURPOSE OF DISCREDITING
2 DR. MC CARTHY?

3 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.

4 THE COURT: OVERRULED.

5 THE WITNESS: NOT AT ALL. MY PURPOSE WAS TO

6 ESTABLISH AND SHARE WITH YOU WHAT I THOUGHT I COULD
7 WITH CERTAINTY. AND -- WHICH I HAVE DONE. AND ALSO
8 TO POINT OUT TO YOU THE MANY GROSS ERRORS MADE BY
9 DR. MC CARTHY. AND ALSO SHARE WITH YOU THE FACT
10 THAT NONE OF MY VERY ABLE FRIENDS IN FORENSIC
11 PATHOLOGY THINK THAT THIS IS -- IT IS POSSIBLE WITH
12 TWO SHOOTERS AND TWO VICTIMS TO SEQUENCE SHOTS.

13 MR. CONN: I WOULD OBJECT AS HEARSAY, YOUR
14 HONOR.

15 THE COURT: OVERRULED.

16 THE ANSWER WILL STAND.

17 Q BY MR. CONN: LET ME SHOW YOU THE
18 EXHIBIT THAT HAS BEEN MARKED AS 299.

19 NOW, HERE IN THE -- ON THE FLOOR NEAR THE
20 DOOR IS AN OBJECT THAT WAS CIRCLED.

21 AND DID YOU HEAR THE TESTIMONY OF
22 DR. MC CARTHY CONCERNING THAT PARTICULAR OBJECT?

23 A NO, I DIDN'T.

24 Q OKAY. ASSUMING THAT THAT IS A PIECE OF
25 BODY PART THERE, AND ASSUMING THAT THAT WAS
26 TESTIFIED TO BY THE INVESTIGATING OFFICER IN THIS
27 CASE, DO YOU HAVE ANY OPINION CONCERNING HOW THAT
28 BODY PART COULD HAVE GOTTEN OVER THERE?

1 A DO YOU WISH TO SHARE WITH ME WHAT BODY
2 PART IT WAS DETERMINED TO BE?

3 Q SOME PIECE OF FLESH, WHAT APPEARED TO BE
4 A PIECE OF FLESH.

5 MS. ABRAMSON: OBJECTION. THERE'S BEEN NO
6 SUCH TESTIMONY DESCRIBING IT AS FLESH.

7 THE COURT: SUSTAINED.

8 THE WITNESS: YOU'RE ASKING ME TO ASSUME IT'S
9 A BODY PART, ANY BODY PART?

10 Q BY MR. CONN: A PIECE OF TISSUE.

11 A A PIECE OF TISSUE FROM A HUMAN BODY IS
12 WHAT YOU'RE ASKING ME TO ASSUME?

13 Q CORRECT.

14 A THIS MEANS ALSO A BLOOD CLOT ALSO,
15 RIGHT? IT COULD BE A BLOOD CLOT?

16 Q NO. NOT A BLOOD CLOT. A PIECE OF
17 TISSUE.

18 A BLOOD IS TISSUE.

19 Q HOW LARGE WOULD A BLOOD CLOT BE?

20 A WELL, A BLOOD CLOT COULD BE ANY SIZE
21 FROM MINUTE TO HUGE. IT'S SOMEWHAT LIMITED BY THE
22 BODY OF BLOOD IN THE BODY. BUT A BLOOD CLOT CAN BE
23 REALLY ANY SIZE. IT DEPENDS ON HOW MUCH BLOOD.

24 WHAT I SEE HERE -- AND I HAVE LOOKED AT
25 THIS. I COULDN'T TELL IF THIS IS A BLOOD CLOT OF
26 APPROXIMATELY -- I DON'T KNOW, APPEARS TO BE MAYBE A
27 LITTLE OVER AN INCH LONG AND MAYBE LESS THAN HALF AN
28 INCH WIDE. IT COULD BE A BLOOD CLOT. IT COULD BE A

1 PIECE OF MUSCLE. IT COULD BE A BLOOD-STAINED PIECE
2 OF ALMOST ANYTHING.

3 Q ALL RIGHT. ASSUMING THE TESTIMONY IN
4 THIS CASE IS THAT IS TISSUE, ARE YOU SAYING THAT A
5 BLOOD CLOT IS NOTHING MORE THAN TISSUE?

6 A BLOOD IS CERTAINLY A KIND OF TISSUE.

7 Q HUMAN TISSUE FROM THE FLESH?

8 MS. ABRAMSON: YOUR HONOR, I THINK THE
9 QUESTION'S ARGUMENTATIVE.

10 THE WITNESS: BLOOD IS HUMAN TISSUE. NOW,
11 THERE ARE VARIOUS KINDS OF HUMAN TISSUE, MUSCLE,
12 BRAIN, CONNECTIVE TISSUE. THERE'S BREAST TISSUE.
13 THERE'S MANY -- THERE'S -- BONE IS TISSUE.
14 FINGERNAILS ARE TISSUE. THE EYES ARE TISSUE. THE
15 HAIR IS TISSUE. ANYTHING IN THE HUMAN BODY IS
16 TISSUE. BLOOD IS ALSO TISSUE. SO IF YOU CAN DEFINE
17 IT A LITTLE MORE CLOSELY. IF YOU WANT TO SAY IT'S
18 MUSCLE, WOULD YOU LIKE TO SAY IT'S MUSCLE?

19 Q BY MR. CONN: ASSUMING THAT THAT IS
20 MUSCLE --

21 MS. ABRAMSON: I'M GOING TO OBJECT TO THAT,
22 YOUR HONOR. THERE'S NO FOUNDATION FOR THAT
23 QUESTION.

24 THE COURT: SUSTAINED. I THINK THE TESTIMONY

25 WAS IT WAS SOME SORT OF BODY MATTER.

26 Q BY MR. CONN: ALL RIGHT. ASSUMING

27 FURTHER TESTIMONY IS GOING TO ESTABLISH THAT THAT IS

28 NOT JUST BLOOD --

41882

1 MS. ABRAMSON: OBJECTION, YOUR HONOR.

2 THERE'S BEEN NO OFFER OF ANY SUCH FURTHER TESTIMONY.

3 THE COURT: YOU CAN REPHRASE THE QUESTION.

4 LET ME ASK THIS JUST TO CLARIFY: YOU'RE

5 TALKING ABOUT A BLOOD CLOT.

6 WAS THERE ANY EVIDENCE THAT THERE WAS

7 BLOOD CLOTTING THAT WOULD HAVE BEEN IN THAT POSITION

8 FROM WHAT YOU'VE SEEN IN THE EVIDENCE?

9 THE WITNESS: WELL, A -- THERE'S LOTS OF BLOOD

10 CLOT AROUND THE SCENE, AND WHETHER OR NOT A SMALL

11 PIECE OF THIS BLOOD CLOT COULD HAVE BEEN CARRIED

12 OVER THERE, I DON'T KNOW, YOUR HONOR.

13 THE COURT: YOU MEAN BY A TECHNICIAN OR

14 SOMEBODY WALKED OVER THERE OR MOVED IT OVER THERE

15 AFTER THE SHOOTINGS HAD BEEN COMPLETED?

16 THE WITNESS: THAT'S A POSSIBILITY.

17 THE COURT: DURING THE SHOOTING ITSELF,

18 THOUGH, COULD THE SHOOTING HAVE ACCOUNTED FOR THAT

19 BEING A BLOOD CLOT IN THAT POSITION IS MY QUESTION?

20 THE WITNESS: WELL, IT'S DIFFICULT TO KNOW.
21 IT'S -- IT DEPENDS ON THE RELATIVE POSITIONS. I
22 DON'T KNOW. IT'S POSSIBLE THAT A -- IN ONE OF THE
23 SHORT-RANGE BLASTS WHERE THERE'S AN EXPLOSIVE EXIT
24 WOUND A PIECE OF MUSCLE THAT LARGE COULD BE
25 EXPELLED. THAT'S VERY UNUSUAL, BUT I CAN'T SAY IT
26 CAN'T HAPPEN. BONE, A LOT OF BONE HAS BEEN MISSING
27 IN THIS CASE AND THAT COULD BE A PIECE OF BONE THAT
28 IS -- HAS BLOOD ON IT; AND, THEREFORE, YOU CAN'T

41883

1 IDENTIFY THE ARCHITECTURE AS BONE. AND THERE ARE
2 LOTS OF PIECES OF BONE THAT HAVE BEEN KNOCKED OUT OF
3 VARIOUS PARTS IN THIS CASE. SO I DON'T KNOW WHAT IT
4 IS.

5 Q BY MR. CONN: WHEN --

6 THE COURT: OKAY. LET'S STICK WITH THE
7 CLOTTING HERE FOR A MOMENT TO PURSUE IT.

8 CLOTTING TAKES A LITTLE BIT OF TIME TO
9 BE ACCOMPLISHED, DOES IT NOT?

10 THE WITNESS: USUALLY, YES.

11 THE COURT: HOW LONG DOES IT TAKE FOR BLOOD
12 TO CLOT?

13 THE WITNESS: WELL, IT DEPENDS ON THE STATE
14 OF THE INDIVIDUAL AND A LOT OF THINGS, BUT IT MIGHT

15 TAKE A FEW MINUTES.

16 THE COURT: OKAY. ALL RIGHT. YOU MAY

17 PROCEED.

18 Q BY MR. CONN: BASED UPON THE SCENARIO

19 THAT WAS GIVEN TO YOU BY COUNSEL THIS MORNING, THE

20 HYPOTHETICAL, CAN YOU TELL US HOW THAT TISSUE,

21 WHATEVER THAT TISSUE CONSISTS OF, COULD HAVE ENDED

22 UP IN THAT POSITION?

23 A AS I JUST MENTIONED, IT COULD BE A PIECE

24 OF TISSUE BLOWN OUT OF ONE OF THE EXPLOSIVE-TYPE

25 WOUNDS WE'VE HAD, ONE THAT HIT BONE OR MAYBE EVEN

26 ONE THAT DIDN'T HIT BONE.

27 Q WHICH ONES ARE YOU REFERRING TO AS THE

28 EXPLOSIVE-TYPE WOUNDS?

41884

1 A ANY OF THE ONES THAT WERE THE

2 CLOSE-RANGE WOUNDS, THE ONE OF HIS UPPER ARM, THE

3 ONE OF HIS LEG, AND SEVERAL ON MRS. MENENDEZ.

4 Q OKAY. IN THE HYPOTHETICAL THAT WAS

5 GIVEN TO YOU THIS MORNING, DID YOU NOT CONTEMPLATE

6 AS PART OF THAT HYPOTHETICAL, THAT THE -- LET ME

7 DIRECT YOUR ATTENTION BACK TO THIS DIAGRAM -- THAT

8 DID YOU NOT CONTEMPLATE AS PART OF THIS HYPOTHETICAL

9 THAT THE SHOOTERS WOULD EITHER HAVE BEEN CLOSER TO

10 THE TOP PART OF THE ROOM AS IT APPEARS HERE, WHICH
11 WOULD BE NORTH; OR THAT THE SHOOTERS WOULD HAVE BEEN
12 TO THE LEFT SIDE OF THIS DIAGRAM AT ALL TIMES DURING
13 THE SHOOTING?

14 MS. ABRAMSON: OBJECTION, YOUR HONOR. VAGUE.

15 THE WITNESS: I DON'T QUITE UNDERSTAND THAT.

16 THE COURT: OKAY. HE DOESN'T UNDERSTAND THE
17 QUESTION.

18 MR. CONN: LET ME REPHRASE IT.

19 Q WITHIN THE RANGE OF MOVEMENT THAT YOU
20 GAVE US TO MAKE THE HYPOTHETICAL OF COUNSEL WORK,
21 YOU WERE CONTEMPLATING, WERE YOU NOT, A MOVEMENT OF
22 JOSE MENENDEZ SOMEWHERE BETWEEN IMMEDIATELY IN FRONT
23 OF THE SOFA THERE OVER TO SOMEWHERE IN THE IMMEDIATE
24 VICINITY OF THE COFFEE TABLE, IS THAT CORRECT, TO
25 THE LEFT SIDE OF THE COFFEE TABLE?

26 A YES, THAT WAS MY ESTIMATE.

27 Q OKAY. AND WITHIN THAT RANGE OF
28 MOVEMENT, DIDN'T YOU ALSO CONTEMPLATE THAT THE

41885

1 SHOOTERS WOULD HAVE BEEN SOMEWHERE IN THE PATHS
2 ILLUSTRATED BY THOSE RED MARKS AND BLUE MARKS THAT
3 COUNSEL GAVE TO YOU AS PART OF HER HYPOTHETICAL?

4 A WELL, THAT I WAS -- THE HYPOTHETICAL SAID

5 THAT WAS THEIR ENTRANCE. IT DOESN'T SAY THAT THEY
6 CAME IN, STOP AND STAYED THERE.

7 Q SO WERE YOU CONSIDERING AS PART OF THE
8 HYPOTHETICAL THAT COUNSEL GAVE YOU THIS MORNING THAT
9 IN ADDITION TO THE ROUTES DESCRIBED HERE IN HER
10 HYPOTHETICAL, THAT THEY WERE ALSO TRAVELING AROUND
11 THE SOFA AND SHOOTING AT HIM FROM OTHER ANGLES?

12 A WELL, I WOULD ASSUME THAT AFTER THEY
13 REACHED THESE POSITIONS THAT THEY WOULDN'T HAVE
14 REMAINED THERE STABLE. I DON'T KNOW WHERE THEY
15 WOULD HAVE GONE. BUT THEY MIGHT HAVE. I DON'T
16 THINK THEY -- WELL, WHO KNOWS. IT'S JUST IMPOSSIBLE
17 TO SAY.

18 Q WELL, DIDN'T YOU UNDERSTAND THE
19 HYPOTHETICAL OF COUNSEL TO BE REFERRING TO ONE
20 SHOOTER COMING IN FROM THE DOOR AND GOING OVER TO
21 THE POINT INDICATED HERE AND FIRING DURING THIS
22 SPECIFIC ROUTE? WASN'T THAT THE HYPOTHETICAL THAT
23 WAS GIVEN TO YOU?

24 A UNTIL HE GOT THERE, YES. BUT THEN THE
25 HYPOTHETICAL WAS SORT OF DISCONTINUED AT THAT
26 POINT. I DIDN'T -- I WOULDN'T THINK HE WOULD JUST
27 WALK IN STRAIGHT FIRING AND STOP. I WOULD THINK HE
28 WOULD DO SOMETHING AFTER THAT, THE SAME WITH THE

1 OTHER SHOOTER. AND I DON'T KNOW WHAT THEY WOULD
2 HAVE DONE.

3 Q THE QUESTION THAT WAS PUT TO YOU BY
4 COUNSEL DIDN'T INCLUDE -- DIDN'T ASK YOU TO MAKE
5 ASSUMPTIONS CONCERNING MOVING AROUND THE ROOM, DID
6 IT?

7 A IT GAVE ME WHAT WE SEE UP HERE, AND I
8 ASSUME THAT THAT WAS TO BE THE ENTRANCE OF THE TWO
9 BOYS. I DID NOT HEAR THIS AS SAYING THAT WAS THE
10 LIMITATION OR THAT WAS THE EXACT SPOT. I MEAN, I
11 LOOKED AT THIS AS A -- THIS WAS THE BASIC DIRECTION
12 THEY'RE COMING IN AND THEY -- YOU KNOW, THE BASIC
13 AREA.

14 Q AND BY --

15 A RATHER THAN COMING STRAIGHT IN THERE
16 JUST -- YOU KNOW, WALKING RIGHT ON THAT LINE AND
17 STOPPING AT THAT X AND NOT DOING ANYTHING MORE.

18 Q AND BY "BOYS" ARE YOU REFERRING TO THE
19 TWO MEN ON TRIAL?

20 A YES. I'M SORRY, YES.

21 Q NOW, WHAT I WOULD LIKE -- POINTING --
22 DIRECTING YOUR ATTENTION TO WHERE THAT PIECE OF
23 TISSUE WAS LOCATED WITHIN THAT ROOM, IT WOULD BE
24 LOCATED SOMEWHERE IN THE VICINITY OF HERE; THAT IS --
25 AND YOU CAN LOOK AT THIS -- YOU CAN LOOK AT THAT
26 DIAGRAM THERE. IF YOU CAN INDICATE -- PERHAPS YOU
27 CAN MAKE A RED MARK ON THE CHART ON THE DIAGRAM AS

41887

1 TISSUE.

2 A THERE'S ALREADY A CIRCLE AROUND IT IN
3 RED.

4 Q I'M NOT TALKING ABOUT THE PHOTOGRAPH.
5 I'M TALKING ABOUT UP HERE, SIR.

6 A OH.

7 Q PERHAPS IF YOU CAN TAKE A MARKER AND
8 MAKE A MARK WHERE IT APPEARS THAT THAT PIECE OF
9 TISSUE IS LOCATED WITHIN THE ROOM.

10 A SOMEWHERE -- SOMEWHERE IN THIS
11 NEIGHBORHOOD.

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41888

1 Q ALL RIGHT. THANK YOU. YOU MAY RETURN
2 TO YOUR SEAT.

3 ALL RIGHT. NOW, CAN YOU TELL US, BASED
4 UPON THE FACT THAT THERE WAS SOME TISSUE THERE,
5 WHERE THE SHOOTER WOULD HAVE HAD TO BE RELATIVE TO
6 THE VICTIM IN ORDER FOR A PIECE OF TISSUE TO END UP
7 IN THAT LOCATION?

8 A WELL, YOU'RE MAKING THE ASSUMPTION THAT
9 THIS IS A PIECE OF TISSUE THAT WAS KNOCKED OUT OF
10 ONE OF THE VICTIMS BY A SHOT. AM I SUPPOSED TO MAKE
11 THAT ASSUMPTION?

12 Q ASSUMING THAT AS A HYPOTHETICAL, CAN YOU
13 TELL US WHERE THE VICTIM WOULD BE RELATIVE TO THE
14 SHOOTER IN ORDER FOR THAT TO END UP THERE?

15 A WELL, I THINK IT'S -- MAY I GET UP AND
16 INDICATE ON THE CHART?

17 Q YES, SURE.

18 A AS I SAY, I THINK HE WAS OVER HERE
19 (POINTING). I THINK, YOU KNOW, IF HE WAS SOMEWHERE
20 IN THIS GENERAL AREA AT ONE POINT, AND ONE OF THE
21 CLOSE-RANGE SHOTS HIT HERE, IT COULD HAVE GONE OUT
22 THERE FROM, SAY, A SHOOTER BACK HERE BEING SOMETHING
23 OF THIS SORT. SO HE WOULD HAVE HAD TO HAVE BEEN -- I
24 THINK THIS WOULD -- RIGHT IN FRONT OF THE TABLE IS
25 PROBABLY A LONG DISTANCE FOR IT, BUT IF WE GOT HIM
26 OVER ABOUT WHERE THE TWO IS, I THINK IT'S POSSIBLE,
27 IF, IN FACT, WE'RE TALKING ABOUT -- YOU ASKED ME --
28 COULD IT BE FROM EITHER VICTIM?

41889

1 Q OKAY. LET ME ASK YOU THIS: WHAT I'M
2 ASKING IS, WOULD IT HAVE TO BE IN A STRAIGHT LINE;
3 IN OTHER WORDS, FOR THAT PIECE OF TISSUE TO END UP
4 THERE, WOULD THE VICTIM AND THE SHOOTER HAD TO HAVE
5 BEEN IN A STRAIGHT LINE SO IT WOULD BE BLOWN OUT IN
6 THAT LOCATION?

7 A DEPENDING ON THE TYPE OF TISSUE. IF IT
8 IS BLOOD-SOAKED BONE, IT'S A SOLID TISSUE AND COULD
9 BOUNCE SOME. IF IT IS A SOFT TISSUE, WHICH WOULD
10 TEND TO HIT AND LAND, IT WOULD BE A RELATIVELY
11 STRAIGHT LINE, BUT BEING A CURVED LINE GOING
12 DOWNWARD.

13 Q UH-HUH. OKAY. NOW, IT'S YOUR -- A
14 MOMENT AGO, DOCTOR, YOU SAID IT WAS YOUR OPINION
15 THAT JOSE MENENDEZ WAS OVER HERE ON THE LEFT SIDE OF
16 THE COFFEE TABLE WHEN HE WAS SHOT; IS THAT CORRECT?
17 A I SAID THAT WAS ONE OF THE
18 POSSIBILITIES. I DIDN'T SAY THAT WAS WHERE I
19 THOUGHT HE WAS.
20 Q RIGHT. YOU HAVE NO EVIDENCE THAT HE WAS
21 EVER THERE BY THAT SIDE OF THE COFFEE TABLE?
22 A THAT'S CORRECT.
23 Q AND YOU HAVE NO EVIDENCE THAT HE WAS
24 EVER CLOSER TO THAT PIECE OF TISSUE SUCH AS YOU SEE
25 IN THE NO. 2 AS YOU SUGGESTED; IS THAT CORRECT?
26 A THAT'S CORRECT.
27 Q LET'S GET BACK TO THE -- IN THE EXAMPLE
28 GIVEN TO YOU BY COUNSEL IN THE HYPOTHETICAL, YOU

41890

1 AGREE THAT WHATEVER THE SEQUENCE OF SHOTS, JOSE
2 MENENDEZ ENDED UP IN A SEATED POSITION; IS THAT
3 CORRECT, AT THE CONCLUSION OF THE SHOOTING?
4 A YES.
5 Q AND CAN YOU TELL US, IN YOUR OPINION,
6 HOW, IF HE WAS SHOT IN THE LEG BEFORE THE TIME THAT
7 HE SAT DOWN, HE WOULD HAVE ENDED UP WITH HIS LEGS

8 CROSSED AS INDICATED?

9 A WELL, I THINK COUNSEL DEMONSTRATED THAT
10 BY THE ROTATION SHE SHOWED RIGHT HERE IN FRONT OF
11 THE JURY. I THINK THAT'S ONE PLAUSIBLE EXPLANATION
12 FOR IT.

13 Q AND IN THAT SCENARIO DID YOU UNDERSTAND
14 THAT COUNSEL WAS REFERRING TO A COMPLETE ROTATION OF
15 180 DEGREES?

16 A WELL, A HUNDRED AND EIGHTY DEGREES IS A
17 HALF ROTATION. A COMPLETE ROTATION IS 360 DEGREES,
18 I THINK YOU'LL FIND.

19 Q AND DID YOU CONTEMPLATE IN YOUR
20 AGREEMENT WITH THAT HYPOTHETICAL THAT HE ROTATED 360
21 DEGREES OR 180 DEGREES?

22 A HE MAY WELL HAVE GONE 360 DEGREES OR
23 LOWER, PROBABLY MORE THAN 180 DEGREES; MAYBE
24 SOMEWHERE NEAR THE TWO.

25 Q LET ME DIRECT YOUR ATTENTION TO THE
26 WOUND NOW TO LEFT THE LEG OF JOSE MENENDEZ. I'M
27 SORRY. LET ME DIRECT YOUR ATTENTION TO THE WOUND TO
28 THE LEFT ELBOW OF JOSE MENENDEZ.

41891

1 YOU MADE A DETERMINATION IN REGARD TO
2 THAT WOUND THAT THE SHOOTER WAS 14 FEET AWAY AT THE

3 TIME THAT THE SHOT WAS FIRED, GIVE OR TAKE FOUR; IS

4 THAT CORRECT?

5 A YES. THAT'S THE APPROXIMATION I GAVE

6 YOU.

7 Q AND CAN YOU TELL US WHAT WAS THE SPREAD

8 OF THE PELLETS THAT YOU ASSUMED TO BE CORRECT FOR

9 PURPOSES OF THAT CALCULATION, THAT IS, THE PELLET

10 DEFECTS ON HIS ARM?

11 A YOU'RE ASKING ME FOR WHAT NOW? THE --

12 Q THAT IS, IN ORDER TO REACH A

13 DETERMINATION THAT THE SHOT WAS FIRED FROM 14 FEET

14 AWAY YOU REACHED A CONCLUSION -- YOU MADE AN

15 OBSERVATION FIRST CONCERNING A PELLET DEFECT IN THE

16 LEFT ARM; IS THAT CORRECT?

17 A YES, YES.

18 Q AND YOUR ESTIMATE THAT THE SHOT WAS

19 FIRED FROM 14 FEET AWAY WAS BASED UPON THE SPREAD OF

20 THOSE DEFECTS; IS THAT CORRECT?

21 A YES.

22 Q AND CAN YOU TELL US WHAT THAT SPREAD

23 WAS?

24 A SOMEWHAT OVER TWO INCHES, TWO TO THREE

25 INCHES.

26 Q DID YOU MEASURE IT?

27 A NO. I ESTIMATED.

28 Q JUST VISUALLY?

1 A WELL, YES.

2 Q DID YOU FEEL IT WAS NECESSARY TO TAKE
3 MORE ACCURATE MEASUREMENTS THAN THAT?

4 A NO.

5 Q CONSIDERING THE CURVATURE OF THE ELBOW,
6 DID YOU TAKE THE CURVATURE INTO CONSIDERATION IN
7 COMING UP WITH THAT ESTIMATE?

8 A NO.

9 Q WHY NOT?

10 A I DIDN'T THINK IT WOULD REALLY CHANGE IT
11 MUCH.

12 Q BUT YOU DIDN'T MAKE ANY MEASUREMENTS IN
13 THAT REGARD TO TEST THAT HYPOTHESIS?

14 A I ANSWERED THAT I DID NOT MAKE ANY
15 MEASUREMENTS, NO.

16 Q DID YOU EXAMINE THE WOUND OR THE
17 PHOTOGRAPH OF THE WOUNDS TO DETERMINE HOW MANY OF
18 THOSE DEFECTS COULD HAVE BEEN ENTRANCE AND HOW MANY
19 OF THEM COULD HAVE BEEN EXITS?

20 A AS I MENTIONED EARLIER, IT'S ALMOST
21 IMPOSSIBLE TO TELL FROM A PHOTOGRAPH WHICH IS WHICH
22 ON A SHOTGUN BLAST TO AN EXTREMITY. SO I DID NOT.

23 Q AND YOU SAID THAT THIS MORNING, YOU SAID
24 THAT TWO OF THOSE PELLET DEFECTS COULD HAVE BEEN
25 CAUSED BY PELLETS WHICH PASSED THROUGH THE ARM,
26 PASSED THROUGH THE ELBOW, CAUSING TWO EXITS; IS THAT

27 CORRECT?

28 MS. ABRAMSON: OBJECTION. MISSTATES THE

41893

1 TESTIMONY.

2 THE COURT: REPHRASE THE QUESTION.

3 Q BY MR. CONN: WAS IT YOUR TESTIMONY THIS
4 MORNING THAT OF THE NINE PELLET DEFECTS THAT
5 APPEARED IN THE LEFT ELBOW OF JOSE MENENDEZ, TWO OF
6 THOSE PELLET DEFECTS COULD HAVE BEEN CAUSED BY
7 PELLETS WHICH PASSED THROUGH THE ARM AND THE ELBOW
8 AND WENT ON TO CAUSE TWO EXITS?

9 MS. ABRAMSON: OBJECTION. MISSTATES THE
10 TESTIMONY.

11 THE COURT: OVERRULED.

12 THE WITNESS: I DON'T BELIEVE I SAID THAT. I
13 SAID THAT I THOUGHT THERE'S A POSSIBILITY THAT THEY
14 COULD HAVE HIT THE BONE AT AN ANGLE AND RICOCHETED
15 OFF AND CAUSED AN ENTRANCE/EXIT IN THE SAME AREA;
16 NOT HITTING AND BOUNCING BACK OUT THE SAME HOLE, BUT
17 A RICOCHET-TYPE THING, HITTING AT AN ANGLE, IS
18 POSSIBLE.

19 Q BY MR. CONN: OKAY. SO TWO OF THOSE
20 DEFECTS THEN, ACCORDING TO THAT HYPOTHESIS, COULD
21 HAVE BEEN EXIT WOUNDS; IS THAT CORRECT?

22 A YES. I THINK THAT'S TRUE.

23 Q AND TWO PELLETS COULD HAVE PASSED ON TO
24 STRIKE ANOTHER SURFACE; IS THAT CORRECT?

25 A THAT'S TRUE.

26 Q AND CONSIDERING THE FACT THAT TWO OF
27 THOSE PELLET DEFECTS COULD HAVE BEEN EXIT WOUNDS,
28 DID YOU, ONCE AGAIN, RECONSIDER THE SPREAD, THE

41894

1 PELLET SPREAD OF THE WOUNDS TO THE LEFT ELBOW, TO
2 SEE WHETHER THAT CHANGED YOUR ESTIMATE OF THE PELLET
3 SPREAD FOR THE PELLETS ENTERING THE LEFT ELBOW?

4 A NO, I DIDN'T. BUT I'D BE HAPPY TO DO IT
5 RIGHT NOW FOR YOU IF YOU WISH. WE DON'T KNOW WHICH
6 OF THOSE WOULD BE THE EXITS. IF WE WANT TO ASSUME
7 THE MOST WIDESPREAD ARE EXITS, THEN I WOULD HAVE TO
8 REVISE MY ESTIMATE OF THE DISTANCE DOWNWARD.

9 Q UH-HUH. YOU HAVE NOT DONE THAT SO FAR.
10 YOU HAVE NOT RECALCULATED THAT?

11 A NO.

12 Q I'D LIKE TO DIRECT YOUR ATTENTION TO A
13 SMALL PHOTOGRAPH I HAVE AT THIS TIME, 309, WHICH
14 SHOWS THE BODY OF JOSE MENENDEZ LYING ON THE PLASTIC
15 SHEET.

16 DO YOU SEE IN THAT PHOTOGRAPH WHAT

17 APPEARS ON HIS RIGHT SIDE TO BE ANY SMALL BLACK
18 MARKS THAT ARE ABOUT THE SIZE OF PELLET DEFECTS?

19 A IT'S DIFFICULT --

20 MS. ABRAMSON: I'M GOING TO OBJECT TO THE
21 QUESTION AS ASSUMES FACT NOT IN EVIDENCE.

22 THE COURT: OVERRULED.

23 THE WITNESS: ARE YOU REFERRING TO THE ONES
24 THAT WERE MARKED -- CIRCLED IN RED?

25 MR. CONN: NO. NO.

26 Q JUST LOOKING AT THE ENTIRE RIGHT SIDE AS
27 SHE'S LYING ON A SHEET OF PLASTIC, DO YOU SEE ANY
28 MARKS THERE WHICH ARE SMALL ROUND BLACK MARKS

41895

1 CONSISTENT WITH THE SIZE OF PELLET DEFECTS?

2 A WELL, I SEE SEVERAL THAT ARE SMALL ROUND
3 DARKISH, AND THEY APPEAR TO ME TO HAVE THE
4 APPEARANCE OF BLOOD CLOTS. THERE ARE A COUPLE
5 THINGS ON THE SHEET HERE THAT MAY BE DARKER THAN THE
6 RED, BUT IT'S VERY DIFFICULT TO TELL WHEN YOU SAY
7 DARK. THE DARK RED LOOKS VERY SIMILAR TO, YOU KNOW,
8 A BLOOD CLOT, FOR INSTANCE. IT WOULD BE VERY
9 DIFFICULT TO TELL FROM -- BECAUSE BLOOD CLOTS ARE
10 PRETTY DARK. SO THERE ARE LOTS OF THINGS THAT MIGHT
11 MEET THE CRITERION FOR WHAT YOU'RE SPEAKING OF.

12 Q SO YOU DO SEE SOME SMALL BLOOD CLOTS
13 WHICH ARE VERY DARK, ALMOST BLACK, AND APPEAR TO BE
14 ABOUT THE SIZE OF PELLET DEFECTS; IS THAT CORRECT?
15 A THAT'S CORRECT, YEAH.
16 Q ON THE RIGHT ARM, THE DORSAL FOREARM OF
17 JOSE MENENDEZ, DO YOU ALSO SEE WHAT APPEARS TO BE
18 SMALL BLACK MARKS ON HIS ARM?
19 A YES.
20 Q OKAY. NOW, LOOKING AT THOSE, CAN YOU
21 TELL US HOW MANY OF THOSE ARE BLOOD CLOTS AND HOW
22 MANY ARE PELLET DEFECTS?
23 A NO, I CAN'T.
24 Q IS IT DIFFICULT TO DISTINGUISH BETWEEN
25 BLOOD CLOTS AND PELLET DEFECTS?
26 A IT CAN BE.
27 Q NOW, WAS IT YOUR TESTIMONY THIS MORNING
28 THAT IF JOSE AND KITTY MENENDEZ RECEIVED ANY SHARED

41896

1 WOUNDS, THAT IT WAS MOST LIKELY THAT THEY WERE
2 STANDING AT THE TIME OF THE SHARED WOUNDS?
3 A I THOUGHT POSSIBLY OF RANDOM MOVEMENT OF
4 BOTH INDIVIDUALS WHEN STANDING WOULD PRESENT MUCH
5 MORE LATITUDE FOR SHARED WOUNDS THAN THE FIXED --
6 RELATIVELY FIXED POSITIONS OF THEM SEATED SIDE BY

7 SIDE, YES.

8 Q WHY WOULD THE POSSIBILITY OF THEM MOVING
9 INCREASE THE LIKELIHOOD OF SHARED WOUNDS OVER THE
10 LIKELIHOOD THAT THEY WERE SITTING TOGETHER WHEN A
11 SHARED WOUND WAS RECEIVED?

12 A WELL, BECAUSE OF THE -- IF YOU FIT THEM --
13 SIT THEM IN A STATIC POSITION SEATED SIDE BY SIDE,
14 THERE ARE VERY LIMITED POSSIBILITIES. HOWEVER, IF
15 THEY'RE STANDING, MOVING, BOTH MOVING, THEN AND --
16 BEING FIRED AT, THE POSSIBILITIES ARE ALMOST
17 INFINITE. THAT'S WHAT I MEAN.

18 Q BUT THE ACTUAL WOUNDS THAT WERE
19 INFLECTED IN THIS CASE WERE NOT AN INFINITE NUMBER
20 OF WOUNDS, BUT A CERTAIN NUMBER OF WOUNDS TO EACH
21 BODY; IS THAT CORRECT?

22 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.

23 THE COURT: OVERRULED.

24 THE WITNESS: I DIDN'T SAY THE WOUNDS WERE
25 INFINITE. I SAID THE NUMBER OF POSSIBILITIES FOR
26 THE LOCATIONS OF THE WOUNDS WOULD BE INFINITE.

27 Q BY MR. CONN: AND DO YOU ASSOCIATE ANY
28 WOUNDS ON KITTY MENENDEZ WITH WOUNDS TO JOSE

2 A I THINK THERE'S SOME POSSIBILITIES. I
3 CAN'T -- THERE'S NO WOUND THAT I CAN SAY ABSOLUTELY
4 THIS IS AN ASSOCIATED WOUND. THERE ARE CERTAIN
5 POSSIBILITIES.

6 Q LET ME SHOW YOU THE EXHIBIT THAT HAS
7 BEEN MARKED 323.

8 NOW, YOU AGREED WITH A PELLET COUNT
9 THERE OF 33 ON THAT EXHIBIT; IS THAT CORRECT?

10 A THIS WAS A HYPOTHETICAL, ASSUMING THAT
11 THIS WAS LINED UP; AND YES, I AGREED TO, WHEN YOU
12 ASSUME IN A HYPOTHETICAL FORM, THAT A SINGLE
13 PROJECTILE DID ALL THESE AND LINED IT UP, THIS 33
14 CERTAINLY RULES IT OUT. SO I DIDN'T AGREE WITH IT.
15 I AGREED TO IT BEING POSSIBLE.

16 Q WHAT YOU AGREED TO IN THIS DIAGRAM WAS
17 THAT THERE WERE 33 PELLET DEFECTS; IS THAT CORRECT?
18 OR 33 PELLETS INVOLVED?

19 A THERE WERE 33 PELLETS INVOLVED, IF YOU
20 LINE UP ALL THESE FOUR AREAS, YES; AND THAT'S WHY
21 LINING UP ALL THESE FOUR AREAS AND SHARING A SINGLE
22 SHOT, TO DO IT IS IMPOSSIBLE. I REPEAT, THAT CAN'T
23 BE, BECAUSE YOU CAN'T GET 33 PELLETS IN A STANDARD
24 .12-GAUGE NON-MAGNUM LOAD.

25 Q WERE YOU ASSUMING THAT EACH OF THOSE
26 FIGURES, EXCEPT 6, 16, AND 4, ALL REPRESENTED
27 SEPARATE PELLETS?

28 A OR PELLET HOLES.

1 Q AND IS IT POSSIBLE THAT SOME OF THE
2 PELLETS ENTERED ONE PART OF THE BODY AND WENT ON TO
3 STRIKE ANOTHER PART OF THE BODY?

4 A CERTAINLY IT'S POSSIBLE.

5 Q ALL RIGHT. SO IF THAT HAPPENED, THEN
6 THAT 33 WOULD BE WRONG; IS THAT CORRECT?

7 A I JUST SAID THAT, YES.

8 Q OKAY.

9 A IF ALL THESE FOUR GIVEN PARTS, YES.

10 Q HOW, FOR THE FOUR PELLET DEFECTS TO THE
11 LEFT FOREARM OF KITTY MENENDEZ, DO YOU HAVE
12 INFORMATION THAT THOSE FOUR PELLET DEFECTS
13 REPRESENTED FOUR SEPARATE PELLETS HITTING THE SKIN?

14 A WELL, WE HAVE FOUR HOLES, IS WHAT I
15 SAID.

16 Q WERE ANY OF THOSE KNOWN TO BE OR
17 BELIEVED TO BE EXITS AS OPPOSED TO ENTRANCES?

18 A I'M NOT SURE IF THAT WAS DETERMINED. I
19 THINK THEY WERE ALL ENTRANCES BUT -- NOT SURE IF
20 ANYBODY SPECIFICALLY DETERMINED THAT.

21 Q WELL, DID YOU READ THE -- DID YOU READ
22 THE '92 SUPPLEMENT TO DR. GOLDEN'S REPORT?

23 A YES.

24 Q AND HOW MANY PELLET WOUNDS DOES HE REFER
25 TO IN THE LEFT FOREARM OF KITTY MENENDEZ?

26 A YOU'RE SPEAKING OF THE SUPPLEMENTAL
27 REPORT TO THE AMENDED AUTOPSY REPORT OF 23 AUGUST --
28 OF SEPTEMBER -- 15TH DAY OF SEPTEMBER, 1995.

41899

1 Q I'M REFERRING TO THE 1992 AMENDMENT. DO
2 YOU HAVE A TWO-PAGE 1992 AMENDMENT?

3 A JUST A SECOND.

4 THE COURT: WE'RE GOING TAKE OUR RECESS AND
5 RESUME AT 1:30.

6 DON'T DISCUSS THE MATTER WITH ANYONE,
7 AND DON'T FORM ANY FINAL OPINIONS ABOUT IT. RETURN
8 AT 1:30.

9 (AT 12:23 P.M. PROCEEDINGS WERE
10 ADJOURNED UNTIL 1:30 OF THE SAME
11 DAY.)

1 VAN NUYS, CALIFORNIA; WEDNESDAY, NOVEMBER 22, 1995
2 1:40 P.M.

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

4 (APPEARANCES AS HERETOFORE NOTED.)

5

6 THE COURT: WE'RE IN COURT WITH EVERYBODY.
7 IS THERE SOMETHING YOU WANTED TO TALK ABOUT?

8 MS. NAJERA: YES, YOUR HONOR. I BELIEVE THE

9 COURT HAD BASICALLY TOLD THE DEFENSE THAT TODAY WAS

10 THE DAY TO GET US THE REPORT FROM MR. MORTON.

11 COUNSEL NOW TELLS ME THEY DON'T HAVE A REPORT.

12 THE COURT: WE'LL TALK ABOUT THAT --

13 MS. ABRAMSON: THAT'S WHAT I SUGGESTED.

14 THE COURT: -- AFTER WE FINISH WITH THIS

15 WITNESS, BECAUSE I WANT TO GET THE TESTIMONY OF THIS

16 WITNESS COMPLETED.

17 MS. NAJERA: ALL RIGHT. THAT'S FINE.

18 THE COURT: LET'S GET THE JURY OUT, PLEASE.

19 (THE JURY ENTERED THE COURTROOM

20 AND THE FOLLOWING PROCEEDINGS

21 WERE HELD:)

22

23 THE COURT: JURORS ARE BACK.

24 AND YOU MAY CONTINUE YOUR

25 RECROSS-EXAMINATION.

26 MR. CONN: THANK YOU.

27 ///

28 ///

41901

1 RECROSS-EXAMINATION (CONTINUED)

2 BY MR. CONN:

3 Q DOCTOR, I THINK, AS WE BROKE FOR LUNCH,

4 WE WERE GOING OVER THIS PELLET COUNT THAT IS
5 REFLECTED ON THE CHART THERE, AND I HAD ASKED YOU IF
6 YOU HAD REVIEWED THE 1992 AMENDMENT TO THE AUTOPSY
7 REPORT THAT WAS WRITTEN BY DR. GOLDEN.

8 DO YOU RECALL THAT?

9 A YES, I DO. AND I HAVE IT BEFORE ME.

10 Q OKAY. IN THAT 1992 AMENDMENT DOES HE
11 MAKE REFERENCE TO FOUR WOUNDS TO THE -- OR FOUR
12 PELLET DEFECTS TO THE LEFT FOREARM OF KITTY
13 MENENDEZ?

14 A HE SAYS THERE ARE THREE SHOTGUN PELLET
15 WOUNDS.

16 Q THREE WOUNDS. DO YOU KNOW WHERE WE GET
17 THE NO. 4 FROM THAT IS REFLECTED ON THAT CHART?

18 A I THINK WE GET IT FROM THE PHOTOGRAPH,
19 BUT HE ALSO TALKS HERE -- THAT'S THE POSTERIOR
20 ASPECT.

21 NO, I DON'T KNOW WHERE WE GET THE FOUR
22 FROM, EXCEPT THAT'S WHAT IT LOOKED LIKE TO ME WHEN I
23 COUNTED THEM ON THE PHOTOGRAPH. SO POSSIBLY --

24 Q YOU'RE SAYING THAT ON THE PHOTOGRAPH YOU
25 OBSERVE FOUR WOUNDS, EVEN THOUGH DR. GOLDEN ONLY
26 INDICATES IN HIS REPORT THAT THERE WERE THREE
27 WOUNDS?

28 A WELL, I THOUGHT I HAD.

1 Q WE'LL GET TO THAT PHOTOGRAPH.

2 DOES DR. GOLDEN DESCRIBE AS PART OF THAT
3 CLUSTER OF WOUNDS AN EXIT LACERATION?

4 A YES.

5 Q AND WHERE DOES HE PLACE THAT EXIT
6 LACERATION?

7 A YES. HE SAYS EXAMINATION OF POSTERIOR
8 ASPECT -- ACTUALLY, HE SAYS THAT'S IN THE POSTERIOR
9 ASPECT OF THE LEFT FOREARM.

10 AND THESE OTHERS, THE THREE, ARE IN THE
11 ANTERIOR ASPECT OF THE FOREARM.

12 Q UH-HUH. SO BY THE POSTERIOR ASPECT,
13 THAT REFERS TO THIS PART OF THE FOREARM (INDICATING)?

14 A NO. THAT'S THE ANTERIOR.

15 Q WHERE'S THE POSTERIOR ASPECT?

16 A IT WOULD BE ON THE OPPOSITE SIDE.

17 Q COULD YOU POINT FOR US AND SHOW THE JURY
18 WHAT YOU'RE REFERRING TO.

19 THE WITNESS: CAN I STAND UP, YOUR HONOR?

20 THE COURT: SURE. GO AHEAD.

21 THE WITNESS: THAT'S A POSITION THAT'S A
22 SO-CALLED ANATOMIC POSITION, WHICH IS A STANDARD
23 POSITION USED TO DESCRIBE THESE. THE ANATOMIC
24 POSITION IS LIKE SO, (DEMONSTRATING), WITH PALMS
25 FACING UPWARDS; AND THE ANTERIOR ASPECT WOULD BE
26 HERE AND THE POSTERIOR ASPECT MEANING BACK -- WOULD
27 BE HERE (INDICATING).

41903

1 GOLDEN, THERE WAS ONLY ONE -- OR THAT THERE WAS ONE
2 EXIT LACERATION ON THE POSTERIOR ASPECT; IS THAT
3 CORRECT?

4 A WELL, HE SAYS ONE EXIT LACERATION; AND
5 THEN TALKS ABOUT TWO ABRASIONS THERE, BUT ONLY TALKS
6 ABOUT ONE EXIT LACERATION, THAT IS CORRECT.

7 Q AND HE SAYS THAT THE THREE SHOTGUN
8 PELLETS WOUNDS ARE ON THE INTERIOR ASPECT OF THE
9 LEFT FOREARM; IS THAT CORRECT?

10 A YES, THAT'S WHAT HE SAID.

11 Q THAT WOULD BE ON THE INSIDE OF THE ARM;
12 IS THAT CORRECT?

13 A YES. YES. THAT'S WHAT THEY WOULD
14 INDICATE.

15 Q OKAY. NOW, THE PHOTO THAT YOU WERE
16 REFERRING TO JUST A MOMENT AGO, WAS THAT 187 THAT
17 DEPICTS THE LEFT ARM OF KITTY MENENDEZ?

18 A YES.

19 Q AND WHAT DO YOU SEE?

20 MR. LEVIN: KITTY MENENDEZ?

21 THE WITNESS: WELL, WHAT I SEE IS WHAT I
22 THOUGHT WERE FOUR PELLET WOUND HOLES; AND THE FOUR

23 I'M TALKING ABOUT HERE WOULD BE ON THE DORSAL

24 ASPECT, POSTERIOR ASPECT.

25 Q BY MR. CONN: SO IS THAT IN CONFLICT

26 WITH THE AUTOPSY REPORT, THE '92 AMENDMENT BY DR.

27 GOLDEN?

28 A YES.

41904

1 Q AND YOU DIDN'T HAVE A CHANCE TO EXAMINE

2 THESE FOUR MARKS, DID YOU?

3 A I DON'T UNDERSTAND -- EXAM IT ON THE

4 PERSON?

5 Q YOU NEVER LOOKED AT THE BODY, DID YOU?

6 A NO. OF COURSE NOT.

7 Q SO WHAT YOU SEE HERE ARE SIMPLY DARK

8 MARKS; IS THAT CORRECT?

9 A YES.

10 Q AND GOING BY THE REPORT OF DR. GOLDEN,

11 THOUGH, THESE DARK MARKS THAT YOU SEE IN THIS

12 PHOTOGRAPH ARE NOT PELLET DEFECTS; IS THAT CORRECT?

13 A WELL, THEY MAY OR MAY NOT BE. ACCORDING

14 TO DR. GOLDEN, THEY'RE NOT; AND I'D HAVE TO DEFER TO

15 HIM. I DON'T THINK -- THIS IS NOT A WOUND I

16 CONCENTRATED ON AND DESCRIBED IN MY REPORT.

17 SO, YOU KNOW...

18 Q WELL, DOCTOR --

19 A I DIDN'T PURSUE IT ANY FURTHER.

20 Q DOCTOR, WHETHER OR NOT YOU CONCENTRATED
21 ON IT IN YOUR REPORT, YOU TESTIFIED TO THAT A LITTLE
22 WHILE AGO ON THAT CHART, DIDN'T YOU?

23 A NO, I DID NOT. THAT WAS A HYPOTHETICAL,
24 AND I WAS ASKED, ASSUMING THERE WERE FOUR HOLES IN
25 THE FOREARM, TO ADD THEM UP. THAT'S ALL I WAS
26 ASKED. I WASN'T ASKED IF I VERIFIED THERE WERE FOUR
27 IN THE FOREARM.

28 Q LET'S GO THROUGH THIS. DO YOU VERIFY

41905

1 ANY OF THIS INFORMATION BY WHICH COUNSEL CAME UP
2 WITH A TOTAL OF 33?

3 A CERTAINLY THE LEFT BREAST, I CLEARLY
4 VERIFY THAT. THE LEFT ELBOW AND THE RIGHT ARM, AND
5 THE LEFT -- THE LOWER ONE, I CAN'T VERIFY 4, NO, I
6 CANNOT.

7 Q OKAY. AND IN ADDITION TO NOT VERIFYING
8 THAT LAST ONE, WHEN WE SPEAK ABOUT SEVEN FOR THE
9 LEFT ELBOW, WHAT ARE YOU REFERRING TO THERE?

10 A WELL, I THINK WE COUNTED IT UP WITH -- UP
11 ABOVE. WE'RE TALKING ABOUT TWO -- IN THE ARM THERE
12 ARE ACTUALLY FIVE PELLETS THERE AND THERE'S NINE

13 DEFECTS; AND WE POSTULATED THAT TWO OF THESE MIGHT
14 BE ENTRANCE AND RICOCHETTED OFF THE BONE TO EXPLAIN
15 THE OTHER TWO.

16 Q OKAY. SO ARE WE TOTALING PELLET -- WHEN
17 YOU SAY THAT YOU CAN VERIFY 7, 6, AND 16, WHICH
18 WOULD GIVE US A TOTAL OF ONLY 29, ARE YOU SAYING
19 THAT YOU ARE VERIFYING 29 SEPARATE PELLETS, OR ARE
20 YOU REFERRING TO PELLET DEFECTS?

21 A PELLET DEFECTS IN THE BREAST. I MEAN, I
22 THOUGHT WE MADE THAT CLEAR.

23 Q OKAY.

24 A THAT WE HAD HOLES GO -- 16 HOLES IN THE
25 BREAST RATHER THAN BEING ABLE TO COUNT -- ACCOUNT FOR
26 EVERY ONE OF THEM.

27 Q THIS INFORMATION THAT YOU VERIFY HERE,
28 THIS TOTAL OF 20, IS NOT 29 PELLETS. IT'S 29 PELLET

41906

1 DEFECTS; IS THAT CORRECT?

2 A YES. THAT'S CORRECT.

3 Q AND, IN FACT, OF THE SEVEN THAT WENT
4 INTO THE ELBOW, YOU SAID THAT TWO OF THEM COULD HAVE
5 GONE ON AND PASSED INTO ANOTHER SURFACE; IS THAT
6 CORRECT?

7 A THAT'S A POSSIBILITY.

8 Q THE TWO THAT COULD HAVE PASSED ON INTO
9 ANOTHER SURFACE COULD HAVE WENT INTO THE RIGHT ARM
10 OF JOSE MENENDEZ OR THEY COULD HAVE WENT INTO THE
11 BREAST OF KITTY MENENDEZ; IS THAT CORRECT?

12 A WELL, NO. I THINK WE ALSO MENTIONED
13 THAT RICOCHETING OFF THE BONE WOULD CAUSE ENOUGH
14 CHANGE IN ANGLE TO PRECLUDE THAT.

15 Q THE RICOCHETING OFF THE BONE WOULD
16 PRECLUDE THAT?

17 A YES.

18 Q AND WHY WOULD THAT PRECLUDE THAT?

19 A BECAUSE IT WOULD CHANGE THE ANGLE OF
20 THOSE FROM THE OTHER WOUNDS IN THE PELLET GROUP.

21 Q ALL RIGHT. FIVE REMAINED INSIDE.

22 A YES.

23 Q AND TWO RICOCHETED OFF?

24 A YES.

25 Q AND YOU'RE SAYING IT'S IMPOSSIBLE FOR
26 THAT RICOCHET TO HAVE THEN STRUCK THE RIGHT ARM OF
27 JOSE MENENDEZ?

28 A NO. I NEVER USED -- I DON'T THINK THE

41907

1 WHOLE TRIAL I'VE USED THE WORD "IMPOSSIBLE." I
2 THINK IT'S HIGHLY UNLIKELY.

3 Q WHY IS THAT HIGHLY UNLIKELY THAT THE TWO
4 THAT RICOCHETED OFF COULD HAVE STRUCK HIS RIGHT ARM?

5 MS. ABRAMSON: OBJECTION. ASKED AND
6 ANSWERED.

7 THE COURT: OVERRULED.

8 YOU CAN ANSWER THE QUESTION.

9 THE WITNESS: WELL, I JUST THINK THE WAY
10 THEY'RE LINED UP, ANGLE, WITH THE BONE, GIVING -- I
11 DON'T THINK THE ANGLE WOULD LINE UP. I MEAN, I
12 THINK IT WOULD RICOCHET OFF. I DON'T THINK IT WOULD
13 LINE UP. I CAN'T SAY IT'S IMPOSSIBLE THAT IT
14 WOULD. I'M SAYING IT'S MY OPINION THAT IT PROBABLY
15 WON'T.

16 Q BY MR. CONN: WHAT DO YOU MEAN IT
17 WOULDN'T LINE UP? WHAT ARE YOU REFERRING TO?

18 MS. ABRAMSON: OBJECTION. ASKED AND
19 ANSWERED.

20 THE COURT: OVERRULED.

21 THE WITNESS: HAVE TWO RICOCHETS FOLLOW A
22 PARALLEL TRAJECTORY AFTER THEY LEAVE AN ARM, WHEN
23 THE THING THAT IT RICOCHETTED OFF IS A CYLINDRICAL
24 OBJECT, WOULD BE EXTREMELY UNLIKELY BECAUSE THE
25 ANGLE WHICH THEY WOULD HITTING IT WOULD HAVE TO BE
26 EXACTLY THE SAME, AND I THINK THIS WOULD BE HIGHLY
27 UNLIKELY.

28 Q BY MR. CONN: TWO PELLETS COULD NOT HIT

1 THE SAME SURFACE AT A SIMILAR ANGLE AND RICOCHET OFF
2 AT A SIMILAR ANGLE; IS THAT WHAT YOU'RE TELLING US?

3 A COUNSELOR, NO. I NEVER SAID THAT. I
4 SAID I IT WAS HIGHLY UNLIKELY. I DID NOT SAY IT
5 COULD. I DID NOT SAY IT'S IMPOSSIBLE. I SAID IT
6 WAS HIGHLY UNLIKELY.

7 Q WHY IS IT UNLIKELY FOR TWO PELLETS TO
8 HIT A SURFACE AND RICOCHET OFF AT THE SAME ANGLE?

9 A BECAUSE, COUNSELOR --

10 MS. ABRAMSON: OBJECTION. ASKED AND
11 ANSWERED.

12 THE COURT: OVERRULED.

13 YOU CAN ANSWER THE QUESTION.

14 THE WITNESS: BECAUSE COUNSELOR, WE'RE NOT
15 TALKING OF A SURFACE LIKE A WALL. WE'RE TALKING OF
16 A SURFACE LIKE A CYLINDRICAL OBJECT, A BONE; AND
17 THEREFORE, RANDOM HITS ON THIS BONE -- IF YOU HIT
18 ABOVE THE CENTRUM YOU'RE GOING TO HIT LOW; IF YOU
19 HIT BELOW THE CENTRUM YOU'RE GOING TO RICOCHET LOW.

20 I THINK IT'S UNLIKELY YOU'D HAVE TWO HIT
21 IN THE SAME POSITION, BUT IT'S NOT IMPOSSIBLE.

22 Q BY MR. CONN: SO, IF TWO PELLETS WERE TO
23 RICOCHET OFF AND GO INTO ANOTHER SURFACE, SUCH AS
24 THE RIGHT ARM OF JOSE MENENDEZ, OR THE BREAST OF
25 KITTY MENENDEZ, THEN THAT TOTAL OF 29 PELLETS DEFECTS

26 WOULD MEAN THAT WHAT WE HAVE IS A TOTAL OF 27

27 PELLETS; IS THAT CORRECT?

28 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.

41909

1 THE COURT: OVERRULED.

2 THE WITNESS: IF THAT -- IF THAT DID, IN FACT,
3 HAPPEN, YES.

4 Q BY MR. CONN: ALL RIGHT. LET ME NOW
5 TURN TO THE X RAY OF JOSE MENENDEZ, WHICH IS 176.

6 NOW, THIS YOU SAID IS AN X RAY OF THE
7 LEFT LEG OF JOSE MENENDEZ; IS THAT CORRECT?

8 A YES.

9 Q LET ME PUT THAT UP ON THE BOARD FOR THE
10 JURY TO SEE.

11 AND YOU SAID THAT IT IS YOUR OPINION
12 THAT JOSE MENENDEZ WAS NOT STANDING -- WELL, WAS
13 STANDING AT THE TIME THAT HE RECEIVED THE WOUND TO
14 HIS LEFT LEG BECAUSE OF THE POSITION OF THE BONES AS
15 THEY APPEAR IN THAT X RAY; IS THAT CORRECT?

16 A YES.

17 Q AND THAT IS BECAUSE IT APPEARS TO YOU
18 THAT THE WEIGHT OF JOSE MENENDEZ FORCED THIS UPPER
19 BONE DOWN ALONGSIDE THE LOWER BONE RATHER THAN
20 REMAINING UP HERE ON TOP OF THAT BONE; IS THAT

21 CORRECT?

22 A THAT IS CORRECT.

23 Q OKAY. NOW, WHEN THE BODY OF JOSE

24 MENENDEZ WAS BEING TRANSPORTED FROM THE CRIME SCENE,

25 DO YOU KNOW HOW MANY PEOPLE WERE MOVING THAT BODY?

26 A NO.

27 Q WHEN THE BODY WAS BEING LIFTED UP FROM

28 THE SOFA AND PLACED ON THE PLASTIC IN FRONT OF THE

41910

1 COFFEE TABLE, DO YOU KNOW HOW MANY MEN LIFTED UP

2 THAT BODY?

3 A NO.

4 Q DO YOU KNOW WHICH LIMBS THEY WERE

5 PUSHING OR PULLING AT AT THE TIME THAT THEY LIFTED

6 THE BODY?

7 MS. ABRAMSON: OBJECTION. ASSUMES FACTS NOT

8 IN EVIDENCE.

9 THE COURT: OVERRULED.

10 THE WITNESS: NO.

11 Q BY MR. CONN: DO YOU KNOW ANYTHING ABOUT

12 THE MOVEMENT OF THE BODY FROM THE CRIME SCENE TO THE

13 TIME THAT THAT X RAY WAS TAKEN?

14 A NO.

15 Q DO YOU KNOW WHEN THAT X RAY WAS TAKEN?

16 A SOMETIME BEFORE THE AUTOPSY. IT'S ONE
17 OF THE AUTOPSY X RAYS.
18 Q OKAY. AND IN THIS CASE DO YOU KNOW HOW
19 MUCH TIME ELAPSED FROM THE TIME OF THE KILLING UP
20 UNTIL THE TIME OF THE AUTOPSY?
21 A NO.
22 Q OKAY. WELL, YOU READ THE REPORTS,
23 DIDN'T YOU?
24 A OH, YES, I DID. I DIDN'T -- I ASSUMED
25 ONE OR TWO DAYS, AND I --
26 Q AND DO YOU KNOW THAT THE CORONER'S
27 OFFICE WAITED TWO FULL DAYS BEFORE THEY DID THE
28 AUTOPSY IN THIS CASE?

41911

1 MS. ABRAMSON: OBJECTION. ASSUMES FACTS NOT
2 IN EVIDENCE.
3 THE COURT: SUSTAINED.
4 Q BY MR. CONN: CAN YOU TELL US WHEN THE
5 AUTOPSY TOOK PLACE BASED UPON THE REPORTS?
6 A I'LL LOOK AND FIND OUT. TALKING ABOUT
7 JOSE, RIGHT?
8 THIS AUTOPSY ON JOSE MENENDEZ WAS
9 REPORTED TO HAVE BEEN DONE ON THE 23RD OF AUGUST AT
10 0930 HOURS, 1989.

11 Q OKAY. AND DO YOU KNOW WHEN THOSE

12 CRIME-SCENE PHOTOGRAPHS WERE TAKEN?

13 A NO, I DON'T. IT HAD TO BE AFTER THE

14 CRIME, BUT I'M NOT SURE HOW LONG AFTER THE CRIME.

15 Q SO, IS IT YOUR UNDERSTANDING THAT 48

16 HOURS AT LEAST, TWO DAYS, ELAPSED FROM THE TIME OF

17 THE POLICE INVESTIGATION AT THE CRIME SCENE TO THE

18 TIME THAT THE AUTOPSY BEGAN?

19 A I DON'T KNOW THAT FOR A CERTAINTY, BUT

20 IT SEEMS LIKE WHAT ONE WOULD EXPECT. IT'S ABOUT THE

21 USUAL TIME.

22 Q AND THIS X RAY HERE, DOES IT APPEAR THAT

23 THERE'S A TIME PRINTED ON THIS X RAY UP IN THE UPPER

24 LEFT-HAND CORNER?

25 A YES.

26 Q AND WHAT IS THE DATE AND TIME THAT

27 APPEARS ON THAT X RAY?

28 A 8/23/89, ABOUT SEVEN OR EIGHT IN THE

41912

1 MORNING.

2 Q OKAY. YOU DON'T KNOW WHO TOUCHED THAT

3 LEG OR HOW MANY PEOPLE TOUCHED THAT LEG OR WHAT WAS

4 DONE WITH THAT LEG PRIOR TO THE TIME THAT THAT X RAY

5 WAS TAKEN; IS THAT CORRECT?

6 MS. ABRAMSON: OBJECTION. ASSUMES FACTS NOT
7 IN EVIDENCE.

8 THE COURT: OVERRULED.

9 THE WITNESS: NO, I DON'T.

10 Q BY MR. CONN: OKAY. NOW, LET ME SHOW
11 YOU TWO ADDITIONAL X RAYS HERE. ONE IS 168, AND THE
12 OTHER IS 177.

13 A YES.

14 Q NOW, IN THESE X RAYS DO YOU ALSO SEE THE
15 SAME PHENOMENA THAT YOU OBSERVED IN THIS X RAY,
16 WHICH IS THE BONES, RATHER THAN REMAINING SEPARATE
17 FROM EACH OTHER, HAVE COME ALONGSIDE EACH OTHER?

18 A WELL, MOST MARKEDLY ON THIS ONE. THIS
19 ONE IT'S DIFFICULT TO SAY. A LITTLE BIT ON THIS
20 ONE, YEAH. ON THIS ONE THERE'S AN OVERRIDING.

21 Q YOU SAY THERE'S A LITTLE BIT ON THIS
22 ONE, WHICH IS 177, AND WHICH IS THE LEFT ARM OF JOSE
23 MENENDEZ; AND THAT IT IS MOST MARKEDLY APPARENT IN
24 168, WHICH IS THE LEFT LEG OF KITTY MENENDEZ; IS
25 THAT CORRECT?

26 A YES, THAT'S CORRECT.

27 Q AND SO, IF THIS PHENOMENA, AS OBSERVED
28 IN THE LEFT LEG OF JOSE MENENDEZ, WOULD CAUSE YOU TO

1 CONCLUDE THAT HE WAS STANDING AT THE TIME THAT THE
2 SHOT WAS FIRED, WOULD WHAT APPEARS TO BE A SIMILAR
3 PHENOMENA IN 168, IN THE LEFT LEG OF KITTY MENENDEZ,
4 CAUSE YOU TO CONCLUDE THAT SHE WAS ALSO STANDING AT
5 THE TIME THAT THAT SHOT WAS INFLICTED?

6 A I THINK ONE WOULD BE HIGHLY SUGGESTIVE
7 OF THAT; HOWEVER, THAT'S A MUCH MORE COMPLICATED
8 WOUND BECAUSE THERE'S TWO SHOTS INVOLVED RATHER THAN
9 ONE.

10 Q BUT IT IS SUGGESTIVE OF THAT; IS THAT
11 CORRECT?

12 A YES.

13 Q AND YOU SAID THAT YOU DO OBSERVE SOME
14 OVERLAP OVER HERE WHERE ONE BONE COMES DOWN TO WHERE
15 I'M POINTING MY PEN, AND THE OTHER BONE COMES WAY UP
16 HERE WHERE I'M NOW POINTING MY PEN; IS THAT CORRECT?

17 A IF I CAN --

18 THE COURT: YES. PERHAPS YOU CAN CLARIFY THE
19 X RAY.

20 MR. CONN: THIS IS 177 I'M POINTING TO NOW.

21 THE WITNESS: YES. WE'RE -- IF WE'RE TALKING
22 OVERLAP, THAT'S CERTAINLY OVERLAP THERE. AS FAR AS
23 FORESHORTENING, THERE'S MINIMUM FORESHORTENING,
24 MAYBE A HALF INCH OR CERTAINLY OVERLAP OF --

25 Q BY MR. CONN: CAN YOU TELL US WHAT THE
26 DIFFERENCE IS BETWEEN FORESHORTENING AND OVERLAP?

27 A OVERLAP MEANS IF YOU HAVE TWO BONE ENDS
28 THAT GET -- YOU HAVE TWO SEPARATE BONE ENDS, AND WHEN

1 YOU SEE THEM ON X RAY ONE IS BEHIND THE OTHER.

2 NOW, IN THE LOWER ARM YOU HAVE TWO
3 BONES; AND SO IF THOSE BONES ARE BROKEN, ONE BONE
4 COULD BE OVERLAPPING THE OTHER ON THE X RAY WITHOUT
5 THERE BEING ANY FORESHORTENING.

6 HOWEVER, WHEN YOU HAVE A SINGLE BONE,
7 LIKE YOU HAVE IN THE FEMUR, IN THE UPPER LEG, UPPER
8 TO THE KNEE, THERE'S ONLY ONE. SO IF THERE IS ANY
9 OVERLAP, THEN THAT MEANS THERE'S FORESHORTENING
10 ALSO.

11 Q WHAT DO YOU MEAN BY FORESHORTENING?

12 A I'M SORRY. LET ME SAY JUST SHORTENING
13 OF THE LEG.

14 Q BUT DON'T YOU SEE SHORTENING IN BOTH
15 PHOTOGRAPHS?

16 A I SEE VERY MINIMAL SHORTENING IN THE
17 ELBOW. I SEE MORE OF AN OVERLAP. BECAUSE THERE ARE
18 TWO BONES, THERE'S AN OVERLAP THERE. HERE WE HAVE
19 ONLY ONE BONE; AND SO THERE'S A SEPARATE PIECE IN
20 THERE, AND I THINK THERE IS CONSIDERABLE SHORTENING
21 OF THE EXTREMITY IN THIS ONE OF THE LEG OF KITTY
22 MENENDEZ.

23 Q OKAY. HOW DO YOU DETERMINE THAT WHAT
24 YOU ARE LOOKING AT IN 177 IS MORE INDICATIVE OF

25 OVERLAP RATHER THAN FORESHORTENING?

26 A IF LOOKING AT THE ANATOMY OF THE TWO
27 BONES, IF I PUT THIS PORTION, THIS TIP DOWN HERE
28 INTO THIS GROOVE, I THINK THAT WOULD LINE UP VERY

41915

1 WELL.

2 Q PERHAPS YOU CAN MARK THAT FOR THE JURY.
3 HERE.

4 A PUT AN ARROW? WHAT DO YOU WANT ME TO
5 DO?

6 Q JUST MAKE LINES INDICATING WHAT YOU ARE
7 REFERRING TO.

8 A OKAY. I'M TALKING TO -- THIS IS A
9 PORTION OF THE ULNA, THE UPPER PORTION OF THE ULNA,
10 WHICH IS BROKEN RIGHT HERE. THAT'S THE LOWER TIP OF
11 IT NOW. IT'S DIFFICULT -- I'LL TRY TO SHOW AN
12 ARROW. OKAY. THAT'S THE TIP OF THAT.

13 NOW, IT APPEARS TO ME THAT THIS TIP FITS
14 RIGHT IN HERE (POINTING), AND IF YOU FIT THAT
15 TOGETHER, THAT WOULD PUT THE BONE BACK TOGETHER AND
16 YOU HAVE A SHORTENING HERE, I'D ESTIMATE, AS A
17 HALF-INCH SHORTENING.

18 HERE, ON THE OTHER HAND, ON THE LEG YOU
19 HAVE THIS FREE SEGMENT HERE AND I WOULD -- YOU WOULD

20 HAVE TO ADD THIS SEGMENT BETWEEN THOSE TWO, AND I
21 WOULD ESTIMATE A THREE-INCH SHORTENING OF THE LEG
22 BECAUSE OF THAT.

23 Q ALL RIGHT. NOW, WHEN YOU LOOK AT THIS
24 X RAY HERE, 176, WHICH IS OF THE LEG, YOU CONCLUDED
25 THAT BECAUSE OF THE RELATIVE POSITIONS OF THOSE TWO
26 FRAGMENTED PORTIONS OF THE BONES, THAT THERE WAS
27 NECESSARILY A PRESSURE FROM TOP TO BOTTOM OR FROM
28 BOTTOM TO TOP SQUEEZING THOSE TWO BONES TOGETHER; IS

41916

1 THAT CORRECT?

2 A I POSTULATE THAT AS A LIKELY REASON FOR
3 THOSE TO COME TOGETHER, YES.

4 Q OKAY. NOW, WHEN YOU LOOK AT THE BONES
5 IN 177, ISN'T IT ALSO POSSIBLE THERE THAT WHAT
6 CAUSED THAT PARTICULAR WOUND WAS THE SAME TYPE OF
7 PHENOMENA, THAT IS, A PRESSURE FROM TOP TO BOTTOM
8 PUSHING TOGETHER?

9 A WELL, SOME, BUT AS I'VE TRIED TO POINT
10 OUT, THE MAGNITUDE OF THE DIFFERENT -- YOU CAN GET
11 SOME OVERRIDING FROM MUSCLE SPASM, FOR INSTANCE; AND
12 THIS AMOUNT OF OVERRIDING I WOULD SAY WOULD NOT BE
13 UNUSUAL AND COULD BE EXPLAINED BY THAT PHENOMENON.
14 WHEN YOU GET THIS MUCH OVERRIDE, I WOULD SUGGEST

15 THAT ANOTHER PHENOMENA IS PROBABLY THERE, WHICH IS

16 THE WEIGHT OF THE BODY.

17 Q WELL, WHAT IS THE RELATIVE AMOUNT OF

18 DISPLACEMENT THERE THAT CAUSED THAT FORESHORTENING?

19 A WELL, I SUGGESTED IT WOULD BE ON THE

20 MAGNITUDE OF TWO INCHES, MAYBE A LITTLE MORE.

21 Q WHAT IS THE AMOUNT OF DISPLACEMENT THERE

22 THAT WOULD CAUSE THAT FORESHORTENING?

23 MS. ABRAMSON: ASKED AND ANSWERED, YOUR

24 HONOR.

25 THE COURT: OVERRULED.

26 THE WITNESS: A LITTLE -- HALF INCH OR A

27 LITTLE BIT LESS.

28 Q BY MR. CONN: WHAT IS THE AMOUNT OF

41917

1 DISPLACEMENT IN 168 THAT WOULD HAVE CAUSED THAT

2 FORESHORTENING?

3 MS. ABRAMSON: ASKED AND ANSWERED, YOUR

4 HONOR.

5 THE COURT: OVERRULED.

6 YOU CAN ANSWER THE QUESTION.

7 THE WITNESS: I THINK WE HAVE TWO TO THREE

8 INCHES THERE.

9 MR. CONN: OKAY.

10 Q SO WOULD THE TWO OR THREE INCHES THERE
11 IN THAT PHOTOGRAPH CAUSE YOU TO CONCLUDE THAT YOU
12 HAD A SIMILAR-TYPE PRESSURE CAUSED TO THE LEG OF
13 MARY MENENDEZ, THAT IS, THAT SHE WAS STANDING AT THE
14 TIME OF THE SHOOTING?

15 MS. ABRAMSON: ASKED AND ANSWERED, YOUR
16 HONOR.

17 THE COURT: OVERRULED.

18 THE WITNESS: I THINK YOU WOULD HAVE TO
19 CONSIDER IT, YES.

20 Q BY MR. CONN: WHEN YOU LOOK AT THE
21 CRIME-SCENE PHOTOGRAPHS OF THE LEFT LEG, DO YOU SEE
22 THE PUSHING TOGETHER OF THE LEG THAT YOU ARE
23 INDICATING TOOK PLACE IN THIS CASE?

24 A I DON'T UNDERSTAND YOUR QUESTION.

25 Q IN OTHER WORDS, WHEN YOU LOOK AT THE LEG
26 OF JOSE MENENDEZ AS HE APPEARS AT THE CRIME SCENE,
27 DO YOU SEE ON THAT -- IN THAT PHOTOGRAPH, THIS -- THE
28 EFFECT OF THE FORESHORTENING?

41918

1 A NO, YOU DON'T SEE IT ON THAT PHOTOGRAPH.
2 I THINK IT'S MASKED BY THE FACT HE HAS HIS KNEE BENT
3 AT MORE THAN A 90-DEGREE ANGLE, WHICH PUTS A STRETCH
4 ON THE SKIN UP THERE AND MASKS IT.

5 Q THERE'S NOTHING IN THOSE PHOTOGRAPHS AT
6 THE CRIME SCENE THAT WOULD VERIFY YOUR THEORY THAT
7 THERE WAS, IN FACT, A FORESHORTENING THAT WAS CAUSED
8 BY HIS WEIGHT BEING PRESSED ON HIS LEG AS OPPOSED TO
9 SOME MOVEMENT OF THE LEG BY PEOPLE WHO TRANSPORTED
10 THE BODY, IS THERE?

11 MS. ABRAMSON: OBJECT, YOUR HONOR. CALLS FOR
12 SPECULATION. ASSUMES FACTS NOT IN EVIDENCE.

13 THE COURT: OVERRULED.

14 THE WITNESS: COULD YOU STATE THAT AGAIN.

15 MR. CONN: YES.

16 Q JUST FROM LOOKING AT THE CRIME-SCENE
17 PHOTOS, THERE IS NOTHING THERE THAT WOULD
18 CORROBORATE THE THEORY YOU'RE NOW SUGGESTING, WHICH
19 IS THE FORESHORTENING WAS CAUSED BY THE WEIGHT BEING
20 PLACED ON THE LEG RATHER THAN THIS MOVEMENT OF THE
21 BODY SOMETIME AFTER THE CRIME TOOK PLACE?

22 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.

23 THE COURT: OVERRULED.

24 THE WITNESS: NO.

25 Q BY MR. CONN: ALL RIGHT. TURNING --
26 TURNING TO THE POSITION -- TURNING TO THE SHOTS THAT
27 WERE FIRED AT KITTY MENENDEZ, I BELIEVE THAT YOU
28 INDICATED THAT MANY OF THE SHOTS COULD HAVE BEEN

1 FIRED WHILE -- AT KITTY MENENDEZ WHILE SHE WAS
2 STANDING; IS THAT CORRECT?

3 A YES.

4 Q I'M PUTTING UP ON THE BOARD PHOTOGRAPHS
5 I'VE ALREADY SHOWN YOU PREVIOUSLY, 197 AND 194.

6 194 DEPICTS THE FACE OF KITTY MENENDEZ
7 AND 197 DEPICTS THE RIGHT ARM AREA. NOW, I BELIEVE
8 THAT YOU INDICATED THAT, IN YOUR OPINION, IN
9 RESPONSE TO A QUESTION BY COUNSEL, THAT KITTY
10 MENENDEZ COULD HAVE RECEIVED THIS WOUND TO HER RIGHT
11 EYE AND REMAINED STANDING AFTER THAT WOUND; IS THAT
12 CORRECT?

13 A IT'S POSSIBLE, CERTAINLY.

14 Q AND IT IS ALSO YOUR OPINION THAT KITTY
15 MENENDEZ COULD HAVE RECEIVED THIS SERIES OF WOUNDS,
16 OR THESE TWO WOUNDS TO HER RIGHT ARM, AND STILL
17 REMAINED STANDING AFTER RECEIVING THE WOUND TO HER
18 RIGHT EYE; IS THAT CORRECT?

19 A YES.

20 Q AND PERHAPS MAYBE SHE STILL DIDN'T EVEN
21 FEEL PAIN; IS THAT CORRECT?

22 A YES.

23 Q AND YOU FEEL THAT IN ADDITION TO THOSE
24 TWO WOUNDS, THAT SHE COULD HAVE ALSO RECEIVED -- LET
25 ME SHOW YOU 199, A PHOTOGRAPH THAT I'VE PREVIOUSLY
26 SHOWED YOU, WHICH DEPICTS THE WOUND TO HER CLAVICLE
27 AREA AND MANDIBLE AREA OF HER RIGHT SIDE. AND YOU

41920

1 WELL AND STILL REMAINED STANDING; IS THAT CORRECT?

2 A CERTAINLY POSSIBLE.

3 Q AND YOU FEEL THAT EVEN AFTER ALL OF
4 THOSE WOUNDS THAT WE ARE NOW LOOKING AT ON THAT
5 BOARD, THAT PERHAPS SHE STILL DIDN'T EVEN FEEL THE
6 PAIN; IS THAT CORRECT?

7 A IT'S POSSIBLE.

8 Q PERHAPS SHE WASN'T EVEN BLEEDING; IS
9 THAT CORRECT?

10 A IT --

11 MS. ABRAMSON: OBJECTION. THERE'S BEEN NO
12 TESTIMONY ABOUT BLEEDING.

13 THE COURT: WELL, HE'S ASKED A QUESTION NOW.

14 THE WITNESS: SHE WOULDN'T BE -- SHE MIGHT NOT
15 BE BLEEDING MASSIVELY AND SHE MIGHT BE BLEEDING
16 INTERNALLY, ESPECIALLY FROM THE ONES IN THE
17 CLAVICULAR AREA.

18 Q BY MR. CONN: OKAY. AND THEN I BELIEVE
19 THAT YOU INDICATED THAT AFTER SHE RECEIVED -- IT'S
20 POSSIBLE THAT AFTER SHE RECEIVED ALL OF THOSE WOUNDS
21 SHE MAY HAVE POSITIONED HERSELF ON THE -- I THINK THE
22 TERM WAS LEANING ON THE COUCH WITH HER LEG BENT WHEN

23 SHE RECEIVED ALL OF THE -- ALL OF THE GUNSHOT WOUNDS
24 TO HER LEFT LEG; IS THAT CORRECT?
25 MS. ABRAMSON: OBJECTION. MISSTATES THE
26 TESTIMONY.
27 THE COURT: REPHRASE THE QUESTION.
28 MR. CONN: YES.

41921

1 Q WELL, DIRECTING YOUR ATTENTION TO THE --
2 LET ME SHOW YOU THREE ADDITIONAL PHOTOGRAPHS. 198
3 IS THE PHOTOGRAPH TO THE CALF; 200 IS THE PHOTOGRAPH
4 OF THE WOUNDS TO THE UPPER THIGH, AND 189 IS THE
5 PHOTOGRAPH DEPICTING WHAT HAS BEEN DESCRIBED AS AN
6 ENTRY AND ENTRANCE WOUND (SIC) TO HER LEFT LEG. LET
7 ME PUT THOSE UP FOR THE JURY TO SEE.

8 THOSE THREE PHOTOGRAPHS WHICH I'VE JUST
9 PUT UP ON THE BOARD SHOW THE WOUNDS TO KITTY'S LEFT
10 LEG; IS THAT CORRECT?

11 A YES.

12 MS. ABRAMSON: YOUR HONOR, I'M GOING TO
13 OBJECT TO COUNSEL REFERRING TO PEOPLE BY THEIR FIRST
14 NAMES.

15 THE COURT: YES.

16 MR. CONN: I'M SORRY.

17 Q THOSE THREE PHOTOGRAPHS REFLECT THE

18 WOUNDS TO THE LEFT LEG OF KITTY MENENDEZ; IS THAT

19 CORRECT?

20 A YES.

21 Q AND WAS IT YOUR TESTIMONY THAT ALL OF

22 THOSE WOUNDS COULD HAVE OCCURRED WHILE KITTY

23 MENENDEZ HAD HER -- WAS LEANING ON THE COUCH WITH HER

24 LEG BENT?

25 MS. ABRAMSON: OBJECT TO THE FORM OF THE

26 QUESTION. THERE'S BEEN NO SUCH TESTIMONY.

27 THE COURT: OVERRULED.

28 THE WITNESS: I DON'T RECALL THE LEANING.

41922

1 BUT SHE COULD HAVE -- YEAH. I DON'T SEE ANY PROBLEM

2 WITH THE LEANING. SHE MIGHT HAVE BEEN IN THE

3 PROCESS OF COLLAPSING AND THESE WOUNDS, ONE OR TWO

4 OR MORE OF THEM, COULD HAVE BEEN INFLICTED WHILE SHE

5 WAS DOWN.

6 I CAN SAY ABOUT THESE WOUNDS THAT

7 CERTAINLY SHE WOULD NOT BE ABLE TO SUPPORT ANY

8 WEIGHT ON HER LEFT LEG AFTER THE ENTRANCE/REEXIT

9 WOUNDS THAT SEVERELY BROKE HER FEMUR; AND IN MY

10 OPINION, THE SECOND-- THE WOUND IN THE MIDDLE ALSO,

11 I THINK, PROBABLY BROKE HER FEMUR TOO.

12 SO I THINK EITHER ONE OF THOSE PROBABLY

13 WOULD HAVE CAUSED HER TO LOOSE SUPPORT OF THAT LEG
14 AND THEREFORE SHE WOULD HAVE TO FALL.

15 THE ONE ON THE FAR SIDE NEAREST ME,
16 HOWEVER, WOULD HAVE NOTHING TO DO WITH THE
17 STRUCTURAL INTEGRITY OF HER SKELETON AND THEREFORE
18 WOULD NOT AFFECT WHETHER SHE WAS STANDING OR NOT.

19 Q BY MR. CONN: WHEN YOU SAY THAT THOSE
20 WOUNDS WOULD HAVE, OR ONE OR MORE OF THOSE SHOTS
21 MIGHT HAVE CAUSED HER TO FALL, ARE YOU ASSUMING THAT
22 SHE WAS STANDING AT THE TIME THAT SHE RECEIVED THE
23 LEG WOUNDS?

24 A I'M NOT ASSUMING ANYTHING. I'M JUST
25 TELLING YOU WHAT I CAN TELL YOU FROM THESE WOUNDS.
26 I'M TELLING YOU THAT IF SHE WERE STANDING SHE WOULD
27 NOT BE STANDING VERY LONG AFTER RECEIVING TWO --
28 WELL, AT LEAST -- CERTAINLY AT LEAST ONE FOR SURE

41923

1 AND THE MIDDLE ONE PROBABLY.

2 Q LET ME CLARIFY FOR THE RECORD WHICH ONE
3 YOU'RE REFERRING TO WHEN YOU SAY THE LEFT ONE AND
4 THE MIDDLE ONE.

5 ON THE LEFT WE HAVE 189, THE MIDDLE ONE
6 THAT YOU REFERRED TO WAS 200. AND THE ONE ON THE
7 RIGHT IS 198.

8 IN ORDER FOR THE WOUNDS -- IN ORDER FOR
9 KITTY MENENDEZ TO HAVE BEEN STANDING AT THE TIME
10 THAT THE WOUND ON THE LEFT WAS INFLICTED, THAT IS,
11 189, CAN YOU TELL US WHERE THE SHOOTER WOULD HAVE TO
12 BE?

13 A I THINK, IN ORDER FOR THAT TO HAVE BEEN
14 INFLICTED WHILE SHE'S STANDING, THE DIRECTION OF
15 FIRE WOULD HAVE TO BE REVERSED, WHICH IS CERTAINLY
16 NOT AN UNLIKELY THING. IT'S EXTREMELY DIFFICULT TO
17 TELL FROM THAT WOUND WHICH WOULD BE THE ENTRANCE AND
18 EXIT. SO I THINK THERE IS A POSSIBILITY HERE WE
19 MUST CONSIDER THAT MAYBE IT WENT THE OPPOSITE WAY,
20 IN WHICH CASE IT WOULD BE POSSIBLE IF SHE WERE
21 STANDING, BUT I CAN'T SAY FOR SURE.

22 Q WELL, SO FAR I THINK THAT YOU'VE
23 EXPRESSED THE OPINION THAT YOU AGREE WITH THE
24 PREVIOUS OPINIONS EXPRESSED IN THIS CASE THAT THE
25 WOUND WAS FROM THE BOTTOM OF THE LEG THROUGH THE
26 BACK OF THE LEG. THE PELLET DEFECTS ARE SHOWN HERE
27 IN 200, AND HERE ON THE TOP OF THE LEG; IS THAT
28 CORRECT?

41924

1 A YES. I SEE NO REASON TO DISAGREE WITH
2 THAT. BUT I MIGHT POINT OUT TO YOU THAT IN THE

3 INITIAL AUTOPSY PHOTOGRAPH BOTH OF THOSE WOUNDS
4 WERE -- WE SEE FACING US WERE DEPICTED AS EXIT
5 WOUNDS; AND THEREFORE, THERE HAS BEEN PREVIOUS
6 CONFUSION ABOUT THIS WOUND. AND I, MYSELF, LOOKING
7 AT THOSE TWO WOUNDS, COULD NOT DIFFERENTIATE
8 ENTRANCE FROM EXIT.

9 SO I THINK IN THAT KIND OF A WOUND, THAT
10 BLOWN-OUT WOUND, I THINK THERE IS ROOM FOR
11 MISINTERPRETATION. THESE ARE VERY DIFFICULT TO TELL
12 ENTRANCE FROM EXIT MANY TIMES.

13 Q AND THE WAY THAT THE -- THOSE TWO WOUNDS
14 HAVE BEEN PREVIOUSLY DESCRIBED AS POSSIBLY BEING ALL
15 PART OF A SINGLE SHOT TO THE LEFT LEG, ONLY IF THE
16 LEG, HER LEFT LEG, WAS BROUGHT TOGETHER THE WAY THAT
17 IS REFLECTED IN THIS DOLL HERE, EXHIBIT 205; IS THAT
18 CORRECT?

19 A YES, THAT'S CORRECT.

20 Q OKAY. SO IN ORDER FOR HER TO BE
21 STANDING AT THE TIME THAT THAT SHOT COULD HAVE BEEN
22 FIRED, THEN WHAT THE SHOOTER WOULD HAVE TO BE DOING,
23 ACCORDING TO WHAT YOU'RE SAYING, IS THE SHOOTER
24 WOULD HAVE TO COME OVER TO HER AND HOLD THE SHOTGUN
25 LIKE I AM NOW HOLDING IT AND FIRE IT DOWN INTO HER
26 LEG; IS THAT CORRECT?

27 A NO, COUNSELOR. YOU'RE TOTALLY
28 MISINTERPRETING WHAT I SAID. IF I COULD TAKE THE

1 DOLL --

2 Q YES.

3 A -- AND SHOW YOU.

4 I THINK WE TEND TO BE LOOKING AT THIS
5 CASE MORE IN STATICS; SHE IS STANDING OR SHE IS
6 SITTING. THERE ARE A LOT OF PEOPLE THAT ARE MOVING.
7 AND IF SHE'S MOVING, SHE'S MOVING ONE LEG BEFORE
8 ANOTHER AND ONE BEND AT THE KNEE, AND ONE COULD HAVE
9 VARIOUS POSITIONS SUCH AS THAT WHICH WOULD MAKE IT
10 NOT AT ALL DIFFICULT.

11 Q OKAY.

12 MS. ABRAMSON: LET THE RECORD SHOW, YOUR
13 HONOR, WHAT THE WITNESS JUST DID TO THE DOLL SO
14 THERE'S A RECORD AS TO WHAT HE SHOWED.

15 THE COURT: HE JUST BENT THE LEG BACK AT THE
16 KNEE.

17 MR. CONN: OKAY.

18 Q AND YOUR OPINION THEN IS THAT THE WOUND
19 COULD HAVE GONE THROUGH THE TOP OF THE LEG AND
20 PASSED THROUGH TO THE BOTTOM OF THE LEG, WOULD BE
21 INCONSISTENT SO FAR WITH THE OPINION REFLECTED OF
22 DR. GOLDEN AS REFLECTED IN HIS '95 AMENDMENT; IS
23 THAT CORRECT?

24 A YES, THAT OPINION WOULD. I'M NOT SAYING
25 THAT IS MY OPINION. I'M SAYING THAT IS A
26 POSSIBILITY THAT I CAN'T RULE OUT. AND I'M SAYING

27 MY OPINION PROBABLY IS IT CAME THE OTHER WAY.

28 BUT YOU ASKED ME IF IT'S POSSIBLE.

41926

1 YEAH, IT'S POSSIBLE.

2 Q YOUR OPINION IS THAT IT CAME WHAT WAY?

3 A FROM BELOW UPWARD.

4 Q AND WHY IS IT YOUR OPINION THAT IT CAME
5 FROM BELOW UPWARD RATHER THAN UPWARD DOWNWARD?

6 A ACTUALLY, DR. GOLDEN WAS THE ONE THAT
7 DID THE AUTOPSY, AND I SEE NO REASON TO DISAGREE
8 WITH HIM ON THAT UNLESS I HAD SOLID FOUNDATION TO,
9 AND I DON'T HAVE SOLID FOUNDATION TO.

10 Q OKAY.

11 A YOU'VE ASKED ME IF IT'S POSSIBLE TO COME
12 IN THE OTHER WAY; AND, YES, IT IS POSSIBLE.

13 Q OKAY. NOW, ASSUMING THAT DR. GOLDEN IS
14 CORRECT IN HIS OPINION THAT IT WAS AN UPWARD -- A
15 SHOT THAT GOES UPWARD INTO THE BODY RATHER THAN
16 DOWNWARD, AN OPINION WHICH DR. LAWRENCE ALSO
17 TESTIFIED TO.

18 MS. ABRAMSON: OBJECT TO THE FORM OF THE
19 QUESTION, YOUR HONOR.

20 MR. CONN: ASSUME --

21 THE COURT: LET'S REPHRASE THE QUESTION.

22 Q BY MR. CONN: DID YOU ALSO READ THE
23 TESTIMONY OF DR. LAWRENCE IN WHICH HE INDICATED THAT
24 HE IS OF THE SAME OPINION?

25 A YES.

26 Q OKAY. NOW, ASSUMING THAT DR. GOLDEN AND
27 DR. LAWRENCE ARE CORRECT, THAT THAT WAS HOW THE SHOT
28 OCCURRED FROM THE BOTTOM OF THE LEG TOWARD THE TOP.

41927

1 IN ORDER FOR KITTY MENENDEZ TO HAVE RECEIVED THAT
2 SHOT WHILE IN A STANDING POSITION, WHERE WOULD THE
3 SHOOTER HAVE TO BE?

4 A IF IT CAME FROM THE BOTTOM UP, IF THE --
5 IF THE POSITION WAS AS YOU'VE INDICATED HERE, IT
6 WOULD NOT BE POSSIBLE BECAUSE IT WOULD HAVE TO BE
7 DOWN BELOW THE FLOOR.

8 Q OKAY. SO ASSUMING THAT DR. GOLDEN AND
9 DR. LAWRENCE ARE RIGHT IN REGARD TO THE DIRECTION OF
10 THAT WOUND, WOULD YOU AGREE THEN THAT KITTY MENENDEZ
11 WAS NOT STANDING AT THE TIME THAT SHE RECEIVED THAT
12 WOUND?

13 A I'VE SAID ALL ALONG I THOUGHT SHE
14 PROBABLY WASN'T. I'M TELLING YOU, LOOKING AT THE
15 EVIDENCE I CAN'T RULE OUT THAT SHE MIGHT HAVE BEEN.

16 Q BECAUSE YOU CAN'T RULE OUT THE

17 POSSIBILITY THAT THERE WAS A SHOOTER DOWN TO THE
18 FLOOR SHOOTING UP AT HER; IS THAT CORRECT?

19 A NO, THAT'S NOT CORRECT.

20 Q WHY IS THAT?

21 A THE DISTANCE -- YOU'RE ASKING ME TO
22 ASSUME A SHOOTER IS DOWN THERE LYING ON HIS BACK
23 WITH A SHOTGUN PRACTICALLY ON THE FLOOR SHOOTING
24 UPWARD? NO.

25 Q I'M ASKING YOU WHY YOU CAN'T RULE OUT
26 THE FACT THAT THE -- KITTY MENENDEZ WAS STANDING --
27 WAS STANDING UP IF, IN FACT, DR. LAWRENCE AND
28 DR. GOLDEN ARE CORRECT IN THEIR CONCLUSION THAT THE

41928

1 SHOT WAS FIRED IN AN UPWARD -- THAT IS, FROM THE
2 BOTTOM OF THE LEG TOWARD THE TOP.

3 A WELL, SHE'D HAVE HAD TO HAVE HAD HER LEG
4 UP IN AN ABNORMALLY HIGH POSITION, THE KNEE, IN
5 ORDER TO MAKE ANY REASONABLE SENSE. I CAN'T EVEN
6 GET THIS MODEL TO DO THAT. BUT --

7 SO, THEREFORE, I THINK IT IS UNLIKELY
8 THAT THE SHOT WAS FIRED FROM BELOW UPWARD.

9 Q OKAY. AND NOW, IS IT YOUR CONCLUSION
10 THAT SHE MAY HAVE BEEN ON THE SOFA AT THE TIME THE
11 SHOT WAS FIRED?

12 A I THINK THAT'S THE MOST LIKELY.

13 Q THE MOST LIKELY OF WHAT?

14 A OF THE POSSIBILITIES WE'VE BEEN

15 DISCUSSING.

16 Q IT'S MORE LIKELY SHE WAS ON THE SOFA

17 THAN SHE WAS ON THE FLOOR?

18 A YES.

19 Q WHY?

20 A WELL, BECAUSE IF SHE WAS ON THE SOFA,

21 HER LEG LYING PARALLEL TO THE SOFA, THE SHOT COULD

22 HAVE EASILY COME STRAIGHT ACROSS AT A HEIGHT THAT

23 WOULD NOT BE INCONSISTENT WITH A SHOOTER HOLDING A

24 SHOTGUN. IF YOU'RE TALKING ABOUT HER ON THE FLOOR,

25 THEN IT HAS TO GET MUCH LOWER, IF YOU'RE TALKING

26 ABOUT PARALLEL.

27 NOW, DEPENDING ON -- YOU CAN PUT HER ON

28 VARIOUS POSITIONS ON THE FLOOR ON HER BACK WITH THE

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1 LEG UP IN THE AIR AND IT'S POSSIBLE TO MAKE A

2 DOWNWARD ANGLE. THERE'S AN INFINITE NUMBER OF

3 ANGLES POSSIBLE IN THIS.

4 Q IF IT'S POSSIBLE SHE WAS LYING ON THE

5 FLOOR ON HER BACK WHILE THE SHOOTER FIRED THAT SHOT

6 INTO HER LEG, WHY THEN IS IT MORE LIKELY THAT SHE

7 WAS ON THE SOFA?

8 A I THOUGHT I JUST EXPLAINED THAT.

9 MS. ABRAMSON: ASKED AND ANSWERED, YOUR
10 HONOR.

11 THE COURT: HE'S ASKING YOU WHY YOU CHOOSE
12 ONE OVER THE OTHER, IF YOU DO.

13 THE WITNESS: WELL, YES, YOUR HONOR. I SAID
14 IN ANSWER TO THE LAST QUESTION THE REASON I DID IS --
15 VERY SPECIFICALLY, IS BECAUSE OF THE HIGHER AREA AND
16 IT WOULD PUT HER LEG IN MUCH MORE OF A TRAJECTORY
17 THAT COULD BE HIT, BECAUSE IT'S UP OFF THE FLOOR;
18 AND IF ON THE FLOOR, SHE HAS TO BE -- IN ORDER FOR
19 THAT SHOT TO BE LANDED, SHE ALMOST HAS TO BE ON HER
20 BACK WITH HER LEG ANGLED UPWARD.

21 SHE'S FOUND ON HER RIGHT SIDE; AND IF
22 SHE'S ON HER RIGHT SIDE, THEN THE SHOOTER HAS TO BE
23 DOWN MUCH CLOSER TO THE FLOOR.

24 SO FOR THIS REASON, I THOUGHT OF THE TWO
25 I WOULD HAVE TO THINK THE LEG ON THE SOFA WAS MORE
26 LIKELY. BUT YOU CERTAINLY CAN'T RULE OUT EITHER
27 ONE.

28 Q BY MR. CONN: SO, ARE YOU SAYING THAT

1 THIS WOUND THAT WE ARE NOW TALKING ABOUT, THAT IS,

2 THE WOUND THAT WENT THROUGH OR THE WOUND DEPICTED
3 HERE THAT WENT JUST BELOW HER KNEE AND THEN ABOVE
4 HER KNEE COULD ONLY HAVE BEEN INFLICTED WITH THE
5 SHOOTER CLOSE TO THE FLOOR?

6 MS. ABRAMSON: OBJECTION, YOUR HONOR.
7 ARGUMENTATIVE.

8 THE COURT: SUSTAINED.

9 Q BY MR. CONN: ARE YOU SAYING THAT THE
10 SHOOTER WOULD HAVE HAD TO NECESSARILY HOLD HIS GUN
11 LOW TO SHOOT THAT SHOT?

12 MS. ABRAMSON: OBJECTION. MISSTATES THE
13 TESTIMONY. ARGUMENTATIVE.

14 THE COURT: ARE YOU ASKING IF SHE WAS IN A
15 CERTAIN POSITION?

16 MR. CONN: YES.

17 Q WHAT I'M ASKING YOU IS: IF SHE WERE ON
18 THE FLOOR WITH HER LEG BENT, WOULD THE SHOOTER
19 NECESSARILY HAVE TO HOLD THE GUN LOW TO CREATE THAT
20 WOUND?

21 A IF SHE'S ON THE FLOOR ON HER BACK WITH
22 HER LEG BENT, NO; IF SHE'S ON THE FLOOR, AS SHE IS
23 FOUND, WITH HER LEGS RELATIVELY PARALLEL, LYING ON
24 HER RIGHT SIDE, YES.

25 Q OKAY. YOU DON'T SEE ANY REASON TO RULE
26 OUT THE POSSIBILITY THAT SHE MIGHT HAVE BEEN ON THE
27 FLOOR ON HER BACK AT THE TIME THAT THAT SHOT WAS
28 FIRED; IS THAT CORRECT?

1 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.

2 THE COURT: OVERRULED.

3 YOU CAN ANSWER THE QUESTION.

4 THE WITNESS: I CERTAINLY HAVE NOT RULED IT
5 OUT AT ALL. I HAVE MERELY SAID, BASED ON EVERYTHING
6 WE'VE TALKED ABOUT THUS FAR, THAT SHE'S FOUND ON HER
7 RIGHT SIDE. IT WOULD BE SEEMINGLY TOO UNLIKELY THAT
8 SHE HAD VOLUNTARILY ROLLED ON TO HER RIGHT SIDE IF
9 SHE WAS ON HER BACK IN THE FIRST PLACE. AND THE
10 REASON THAT WE HAD FOR GETTING HER ON HER BACK IN
11 FIRST PLACE, IS, FRANKLY, NONSENSICAL; THAT SHE WAS
12 KNOCKED BACKWARDS BY A SHOT IN THE FACE. SO THAT'S
13 WHAT GOT HER ON HER BACK, AND I DON'T THINK THAT
14 MAKES ANY SENSE WHATSOEVER. I THINK IT'S MUCH MORE
15 LIKELY THAT WHEN SHE FELL SHE FELL ON HER RIGHT SIDE
16 AND REMAINED ON HER RIGHT SIDE.

17 Q BY MR. CONN: WELL, ARE YOU SAYING THAT
18 WHEN SHE WENT TO THE SOFA, IF INDEED SHE DID GO TO
19 THE SOFA, SHE FELL ON THE SOFA?

20 A AND THEN FROM THE SOFA ONTO THE FLOOR.

21 Q IS IT YOUR OPINION THAT BOTH SHOTS TO
22 HER LEFT LEG WHICH YOU HAVE TESTIFIED TO OCCURRED
23 WHILE SHE WAS ON THE SOFA?

24 A BOTH SHOTS? NO. I DIDN'T TESTIFY BOTH
25 SHOTS OCCURRED WHILE SHE WAS ON THE SOFA. I DIDN'T

26 TESTIFY ONE OCCURRED. I JUST POINTED IT OUT AS A
27 POSSIBILITY.

28 Q YOU'RE SAYING BOTH SHOTS OCCURRED WHILE

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1 SHE WAS ON THE SOFA?

2 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.

3 THE COURT: REPHRASE THE QUESTION.

4 Q BY MR. CONN: ARE YOU SAYING THAT BOTH
5 SHOTS TO THE LEG, HER LEFT LEG, OCCURRED WHILE SHE
6 WAS ON THE SOFA?

7 A NO, I'M NOT.

8 Q WHY NOT?

9 A BECAUSE I'M NOT. WE WERE TALKING ABOUT
10 ONE SHOT. AND NOW THE NEXT QUESTION IS WERE BOTH
11 SHOTS.

12 Q MY QUESTION IS DIRECTED TO THE SECOND
13 SHOT; THAT IS, THE SHOT THAT WENT THROUGH THE CALF
14 AND THEN WENT THROUGH THE THIGH.

15 ARE YOU SAYING THAT THAT SHOT OCCURRED
16 TO HER, OR MAY HAVE OCCURRED TO HER, WHILE SHE WAS
17 ON THE SOFA?

18 A YES.

19 Q AND ARE YOU SAYING THAT BOTH OF THOSE
20 TWO SHOTS THAT I PREVIOUSLY DESCRIBED, THAT IS, THE

21 ONE AROUND THE KNEE WHICH WE ALREADY DISCUSSED, AS
22 WELL AS THE ONE THAT I'M NOW REFERRING TO WHICH WENT
23 THROUGH THE CALF AND INTO THE THIGH, MAY ALSO HAVE
24 OCCURRED TO HER WHILE SHE WAS ON THE SOFA?

25 A I HADN'T THOUGHT OF THAT. I'LL HAVE TO
26 WORK IT OUT HERE. I THINK IT'S UNLIKELY THAT BOTH
27 WOULD HAVE OCCURRED. I THINK MAYBE ONE OR THE
28 OTHER.

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1 Q AND WHY IS THAT?

2 A ACTUALLY, NOW THAT I'M LOOKING AT MY OWN
3 ANATOMY AND RECONSTRUCT IT, YEAH, I THINK IT'S
4 POSSIBLE MAYBE BOTH OF THEM DID.

5 Q TO GET THAT TRAJECTORY, THAT IS, FOR
6 BOTH SHOTS TO STRIKE HER IN THE LEG WHILE SHE WAS ON
7 THE SOFA, WOULD SHE HAVE TO KEEP HER LEG IN A
8 RELATIVELY FIXED POSITION?

9 A ACTUALLY, BOTH OF THEM ARE -- BOTH OF THE
10 ANGLES ARE PRETTY PARALLEL. AND DEPENDING ON HOW
11 FAST THE SHOTS WERE COMING, WELL, I WOULDN'T SAY A
12 FIXED POSITION FOR VERY LONG. IT COULD HAVE JUST
13 BEEN INSTANTANEOUS AND TWO SHOTS WOULD HAVE
14 OCCURRED. IT'S A POSSIBILITY.

15 Q DID YOU SEE ANY EVIDENCE ANYWHERE IN THE

16 CRIME SCENE, IN YOUR REVIEW OF THE MATERIAL IN THIS
17 CASE, THAT KITTY MENENDEZ WAS EVER FAR FROM WHERE
18 HER BODY WAS FOUND DURING ANY OF THE SHOTS FIRED IN
19 THIS CASE?

20 A NO.

21 MS. ABRAMSON: OBJECT TO THE QUESTION AS
22 VAGUE.

23 THE COURT: YOU'RE REFERRING TO WHEN HER BODY
24 WAS FOUND WHEN THE POLICE ARRIVED?

25 MR. CONN: YES, YOUR HONOR.

26 THE COURT: OVERRULED.

27 THE WITNESS: NO.

28 Q BY MR. CONN: AS FAR AS YOU CAN SEE, ALL

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1 OF THE SHOTS THAT WERE INFLICTED UPON KITTY MENENDEZ
2 WERE INFLICTED WHEN SHE WAS IN BETWEEN THE COFFEE
3 TABLE AND THE SOFA OR ON THE SOFA?

4 A THEY MIGHT HAVE BEEN.

5 Q DO YOU SEE ANY EVIDENCE THAT SHE WAS
6 EVER IN ANY OTHER PLACE WHEN ANY OF THE SHOTS WERE
7 INFLICTED?

8 A I'M UNAWARE OF ANY.

9 Q TURNING TO JOSE MENENDEZ NOW, LET ME,
10 ONCE AGAIN, PUT UP THAT PHOTOGRAPH OF THE CRIME

11 SCENE.

12 YOU'VE TESTIFIED TO JOSE MENENDEZ

13 POSSIBLY MOVING FROM THE AREA IMMEDIATELY TO -- AS

14 IT APPEARS IN THIS PHOTOGRAPH -- TO THE RIGHT OF THE

15 COFFEE TABLE AND WHERE HE IS FOUND AT THE TIME OF

16 THE ARRIVAL OF THE POLICE; IS THAT CORRECT?

17 A YES.

18 Q OTHER THAN BETWEEN THESE TWO LOCATIONS,

19 THAT IS, WHERE HE WAS FOUND AT THE TIME THAT THE

20 POLICE ARRIVED, TO THE RIGHT OF THE COFFEE TABLE AS

21 IT APPEARS IN THIS PHOTOGRAPH, DO YOU HAVE ANY

22 EVIDENCE THAT -- FROM THE CRIME SCENE OR YOUR REVIEW

23 OF THE MATERIAL IN THIS CASE -- THAT JOSE MENENDEZ

24 WAS EVER IN ANY OTHER POSITION?

25 A NO.

26 Q NOW, YOU SAID THAT IT WAS POSSIBLE THAT

27 TWO SHOTS -- POSSIBLE THAT THERE WERE TWO SHOTS TO

28 THE RIGHT ARM OF JOSE MENENDEZ WHICH PRECEDED THE

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1 OTHER SHOTS FIRED TO HIS BODY; IS THAT CORRECT?

2 A THAT'S POSSIBLE.

3 Q OKAY. YOU SAID IT IS ALSO POSSIBLE THAT

4 THE SHOT TO HIS RIGHT INNER ARM PRECEDED THE BACK OF

5 THE RIGHT ARM; IS THAT CORRECT?

6 A THAT'S POSSIBLE.

7 Q FOR THE FIRST SHOT, THAT IS THE SHOT TO
8 THE RIGHT INNER ARM, YOU TESTIFIED THAT THAT WAS
9 FROM A DISTANCE OF ABOUT 14 FEET AWAY.

10 MS. ABRAMSON: YOUR HONOR, I'M GOING TO
11 OBJECT TO THIS AS CUMULATIVE AND REASKING OF THE
12 SAME QUESTION.

13 THE COURT: WE HAVE GONE OVER THIS.

14 THE WITNESS: UNBELIEVABLE.

15 MR. CONN: AS FAR AS THIS MATERIAL IS
16 CONCERNED, IT'S JUST FOUNDATION.

17 THE COURT: LET'S GET TO THE QUESTION.

18 Q BY MR. CONN: MY QUESTION IS: WERE YOU
19 CONTEMPLATING IN HER SCENARIO OF THAT POSSIBILITY
20 THAT THERE WAS ONE SHOOTER MOVING BACK AND FORTH OR
21 THAT THERE WERE TWO SHOOTERS FIRING FROM DIFFERENT
22 POSITIONS?

23 A I WASN'T EVER TRYING TO FORM A SCENARIO
24 OR RECONSTRUCTION OF THIS CASE, AS I'VE SAID MANY
25 TIMES.

26 Q YES. BUT YOU DID ACCEPT THAT AS A
27 POSSIBILITY; IS THAT CORRECT?

28 MS. ABRAMSON: OBJECTION. ARGUMENTATIVE.

1 THE WITNESS: ACCEPT WHETHER OR NOT --

2 THE COURT: IT'S UNCLEAR AS TO WHAT YOU
3 MEANT.

4 Q BY MR. CONN: WHAT I'M REFERRING TO IS
5 THE FACT THAT THE FIRST SHOT TO JOSE MENENDEZ MAY
6 HAVE BEEN TO THE RIGHT INNER ARM FROM 14 FEET AWAY;
7 AND THE SECOND SHOT WAS TO THE BACK OF HIS RIGHT ARM
8 FROM THREE FEET AWAY; IS THAT CORRECT?

9 A IT'S A POSSIBILITY, YES.

10 Q AND IN ACCEPTING THAT AS A POSSIBILITY
11 IN THIS CASE -- DID YOU ASSUME, DID YOU MAKE ANY
12 ASSUMPTIONS REGARDING WHETHER THAT WAS ONE SHOOTER
13 MOVING BACK AND FORTH ACROSS THE ROOM, OR DID YOU
14 MAKE ANY ASSUMPTIONS AS TO WHETHER IT WAS TWO
15 SHOOTERS FIRING FROM DIFFERENT LOCATIONS?

16 A I WOULD THINK MORE LIKELY TO BE TWO
17 SHOOTERS.

18 Q NOW, YOU TESTIFIED THAT SHOTGUN SHOTS
19 DON'T NECESSARILY KNOCK A PERSON DOWN; IS THAT
20 CORRECT?

21 MS. ABRAMSON: OBJECTION, YOUR HONOR. THIS
22 HAS BEEN ASKED AND ANSWERED.

23 THE COURT: LET'S GET TO THE ACTUAL QUESTION.

24 Q BY MR. CONN: SHOTGUN SHOTS DOESN'T MAKE
25 A PERSON SPIN AROUND, DOES IT?

26 A IT DOES NOT PHYSICALLY IMPEL A PERSON TO
27 SPIN AROUND, AND I NEVER SAID IT DID.

28 Q RIGHT. YOU SAID THAT THOSE SHOTS TO

1 JOSE'S ARM COULD HAVE PRECEDED -- THAT THOSE TWO
2 SHOTS TO HIS RIGHT COULD HAVE PRECEDED SHOTS TO HIS
3 LEFT LEG; IS THAT CORRECT?

4 MS. ABRAMSON: ASKED AND ANSWERED, YOUR
5 HONOR.

6 THE COURT: SUSTAINED.

7 Q BY MR. CONN: IN ACCEPTING THE SCENARIO
8 OF COUNSEL, OF DEFENSE COUNSEL, THAT THE SHOT TO THE
9 LEFT LEG COULD HAVE PRECEDED THE SHOT TO THE LEFT
10 ELBOW OF JOSE MENENDEZ, DID YOU ASSUME, FOR PURPOSES
11 OF ACCEPTING THAT POSSIBILITY, THAT JOSE MENENDEZ,
12 AFTER BEING SHOT IN THE LEFT LEG, WOULD HAVE KEPT
13 TURNING TOWARD THE LOCATION IN THE DIAGRAM WHERE
14 COUNSEL DEPICTED THE POSITION OF ERIK MENENDEZ?

15 MS. ABRAMSON: I'M GOING TO OBJECT TO THAT
16 AS --

17 THE WITNESS: I DON'T UNDERSTAND THAT
18 QUESTION. IT'S TOO VAGUE AND FAR TOO COMPLEX.

19 THE COURT: THE WITNESS DOESN'T UNDERSTAND
20 IT. YOU'LL HAVE TO REASK IT.

21 Q BY MR. CONN: OKAY. YOU'LL RECALL THAT
22 COUNSEL POSED TO YOU A SCENARIO IN WHICH JOSE
23 MENENDEZ WAS SHOT IN HIS LEFT LEG AND THAT SHOT WAS

24 FOLLOWED BY A SHOT TO HIS LEFT ELBOW; IS THAT

25 CORRECT?

26 A YES.

27 Q AND YOU ACCEPTED THAT AS A POSSIBILITY?

28 A AS A POSSIBILITY, YES.

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1 Q OKAY. IN ORDER FOR THAT SHOT, THAT IS,
2 THE SHOT TO HIS LEFT ELBOW TO HAVE TAKEN PLACE, DID
3 YOU ASSUME FOR PURPOSES OF THAT HYPOTHETICAL THAT
4 JOSE MENENDEZ WAS STILL SPINNING AROUND?

5 MS. ABRAMSON: OBJECT TO THE QUESTION. YOUR
6 HONOR, THERE'S NO TESTIMONY ABOUT SPINNING.

7 THE COURT: REPHRASE THE QUESTION.

8 Q BY MR. CONN: YES. DID YOU ASSUME FOR
9 PURPOSES OF THAT HYPOTHETICAL THAT JOSE MENENDEZ WAS
10 TURNING IN BETWEEN THE TIME HE WAS SHOT IN THE LEFT
11 LEG AND THE TIME THAT HE WAS SHOT IN THE LEFT ELBOW?

12 A DURING THE TIME I THINK IT'S VERY --
13 COULD BE VERY LIKELY. HE WOULD, IF STANDING EVENLY
14 BALANCED, NOT MOVING, AND BEING SHOT IN THE LEFT
15 LEG, WOULD HAVE FALLEN DOWN. HOWEVER, IF HE HAD HIS
16 LEG -- IF HE HAD BEEN IN THE PROCESS OF TURNING WITH
17 HIS WEIGHT ON THE OPPOSITE LEG AT THE TIME, HE WOULD
18 HAVE KEPT TURNING BEFORE HE FELL, AND I THINK THAT'S

19 A LIKELY POSSIBILITY.

20 Q AND CAN YOU TELL US, LOOKING AT THIS
21 PHOTOGRAPH OF JOSE MENENDEZ, HOW FAR HE WOULD HAVE
22 KEPT TURNING BEFORE HE ULTIMATELY CAME TO REST IN
23 THE POSITION INDICATED IN THAT PHOTOGRAPH?

24 A I THINK HE WOULD HAVE BEEN VERY CLOSE TO
25 THE FRONT OF THE COUCH WHERE HE CAME TO REST.

26 Q AND IN ORDER FOR THAT SHOT TO HAVE TAKEN
27 PLACE, IN ORDER FOR THAT SHOT TO HIS LEFT ELBOW TO
28 HAVE BEEN THE LAST SHOT TO HIS -- IN ORDER FOR THE

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1 SHOT TO HIS LEFT ELBOW FOLLOWING THE SHOT TO HIS
2 LEFT LEG, COULD YOU TELL US WHERE THE SHOOTER MUST
3 HAVE BEEN --

4 A NO.

5 Q -- IN THE HYPOTHETICAL POSED BY COUNSEL
6 IN WHICH SHE PLACES ERIK MENENDEZ IN FRONT OF THE
7 COFFEE TABLE?

8 MS. ABRAMSON: YOUR HONOR, I'M GOING TO
9 OBJECT ALREADY TO THE QUESTION BECAUSE IT MISSTATES
10 THE HYPOTHETICAL.

11 THE COURT: WELL, HE'S GOING TO PUT UP A
12 DISPLAY HERE.

13 AND PERHAPS, MR. CONN, YOU CAN REPHRASE

14 THE QUESTION.

15 MR. CONN: YES.

16 Q DIRECTING YOUR ATTENTION NOW TO THE
17 DIAGRAM DEPICTING THE DEN. IN ORDER FOR JOSE
18 MENENDEZ TO HAVE RECEIVED THAT SHOT TO HIS LEFT
19 ELBOW AFTER BEING SHOT IN HIS LEFT LEG, CAN YOU TELL
20 US WHERE HIS LEFT ELBOW WOULD HAVE BEEN RELATIVE TO
21 THE SHOOTER?

22 A COUNSEL, THE PROBLEM HERE IS WE'VE SAID
23 HE WAS TURNING; AND, THEREFORE, WE WOULD SWING A
24 WIDE ARC OF MAYBE A HUNDRED AND EIGHTY DEGREES,
25 WHICH WOULD INCLUDE A GREAT VARIETY OF POSITIONS.

26 Q UH-HUH. AND YOU DON'T HAVE ANY EVIDENCE
27 IN -- JUST FROM LOOKING AT THE CRIME-SCENE
28 PHOTOGRAPHS AND ALL OF THE MATERIAL THAT YOU

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1 REVIEWED IN THIS CASE THAT HE WAS EVER TURNING, DO
2 YOU?

3 MS. ABRAMSON: OBJECT TO THAT AS
4 ARGUMENTATIVE.

5 THE COURT: OVERRULED.

6 YOU MAY ANSWER THE QUESTION.

7 THE WITNESS: NO.

8 MR. CONN: ALL RIGHT.

9 THANK YOU. I HAVE NO FURTHER QUESTIONS.

10 THE COURT: ANY REDIRECT?

11 MS. ABRAMSON: RE-RE, YOUR HONOR. VERY
12 BRIEFLY.

13

14 FURTHER REDIRECT EXAMINATION

15 BY MS. ABRAMSON:

16 Q DIDN'T BOTH ROGER MC CARTHY AND

17 DR. LAWRENCE INDICATE THAT THEY BELIEVED THAT

18 PELLETS PENETRATED MRS. MENENDEZ' FOREARM FROM THE
19 POSTERIOR TO ANTERIOR?

20 MR. CONN: OBJECTION. LEADING.

21 THE COURT: IT'S ARGUMENTATIVE AS PHRASED.

22 Q BY MS. ABRAMSON: YOU READ DR. LAWRENCE'S
23 TESTIMONY?

24 A YES, I DID.

25 Q YOU READ MR. MC CARTHY'S TESTIMONY?

26 A YES, I DID.

27 Q DIDN'T BOTH -- WELL, DID BOTH OF THEM

28 COUNT AT LEAST ONE PELLET APIECE FOR MRS. MENENDEZ'

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1 LEFT ARM?

2 MR. CONN: OBJECTION. LEADING.

3 THE COURT: OVERRULED.

4 THE WITNESS: TO THE BEST MY RECOLLECTION,
5 YES. AT THIS POINT I'D HAVE TO READ THE TESTIMONY
6 TO BE ABSOLUTELY SURE.

7 Q BY MS. ABRAMSON: TO THE BEST OF YOUR
8 RECOLLECTION, THEY EACH COUNTED AT LEAST ONE PELLET,
9 CORRECT?

10 A YES.

11 Q AND TO THE BEST OF YOUR RECOLLECTION,
12 THEY EACH INDICATED AN AFFILIATION, DID THEY NOT,
13 BETWEEN HER LEFT ARM AND HER LEFT BREAST WOUNDS?

14 A YES.

15 Q AND IS THERE ANY PHOTOGRAPH WHATSOEVER
16 THAT SHOWS ANY DEFECTS OR PELLET WOUNDS ON THE
17 ANTERIOR, AS YOU'VE DESCRIBED IT, THE FRONT
18 PORTION -- OF THE FRONT PORTION OF MRS. MENENDEZ'
19 LEFT ARM?

20 A I'M UNAWARE OF ANY.

21 Q DR. FACKLER, IF I WERE TO LIFT YOU UP
22 UNDER YOUR ARMS FROM BEHIND, AND I HAD MR. CONN HERE
23 LIFT YOU UP BY YOUR ANKLES AND PULL, WOULD THAT LEAD
24 TO THIS DISPLACEMENT OR SHORTENING OF THE LEG OR
25 WOULD IT STRAIGHTEN IT BACK OUT?

26 A IT WOULD STRAIGHTEN IT BACK OUT.

27 Q DOES THE ABILITY TO MOVE AND CHANGE THE
28 LINEUP OF THE LIMBS OF THESE DECEDENTS DEPEND ON

1 WHETHER OR NOT AT THE TIME THEY WERE MOVED THEY WERE
2 IN FULL RIGOR MORTIS OR NOT?

3 A I KNOW VERY LITTLE ABOUT FULL RIGOR
4 MORTIS AND THE TIME IT TAKES TO SET IN. IT'S REALLY
5 OUT OF MY FIELD.

6 Q OKAY.

7 A I THINK IF THEY ARE IN FULL RIGOR
8 MORTIS, I THINK THAT WOULD HAVE AN EFFECT, BUT
9 THAT'S REALLY NOT AN OPINION I CAN GIVE YOU WITH ANY
10 GREAT CERTAINTY BECAUSE I'M NOT EXPERT.

11 MS. ABRAMSON: I HAVE NOTHING FURTHER.

12 MR. CONN: NOTHING FURTHER, YOUR HONOR.

13 THE COURT: OKAY. LET ME SEE COUNSEL ABOUT
14 OUR SCHEDULING HERE.

15 (THE FOLLOWING PROCEEDINGS

16 WERE HELD AT THE BENCH:)

17

18 THE COURT: OKAY. WE HAVE A JUROR THAT HAS
19 TO LEAVE AT 3:15. I SEE YOU HAVE DEPUTY VAN HORN IN
20 THE AUDIENCE.

21 MS. ABRAMSON: YES.

22 THE COURT: HOW LONG IS HIS TESTIMONY GOING
23 TO TAKE?

24 MS. ABRAMSON: IT'S GOING TO TAKE A COUPLE OF
25 HOURS.

26 THE COURT: YOU HAVE THE OPTION OF STARTING
27 WITH HIM OR DOING IT FRESH ON MONDAY.

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1 MONDAY.

2 I WANTED TO TALK TO THE COURT ABOUT
3 WHETHER OR NOT WE'RE GOING TO BE RECESSED WHEN THE
4 JURY RECESSES. I WOULD LIKE TO BE. I HAVE ALL
5 THREE MEMBERS OF MY FAMILY WHO ARE SICK AND MY
6 DAUGHTER HAD A CAR CRASH.

7 THE COURT: I INTEND TO LEAVE AT 3:15.

8 MS. ABRAMSON: IF I DON'T START WITH HIM, WE
9 CAN LEAVE SOONER.

10 THE COURT: I'D LIKE TO RESOLVE ANY ISSUES
11 THAT ARE STILL KICKING AROUND HERE BEFORE THAT.

12 MS. ABRAMSON: OKAY. WE CAN DO THAT. LET ME
13 ASK DEPUTY VAN HORN.

14 THE COURT: IS HE AVAILABLE ON MONDAY? WHAT
15 IS YOUR SCHEDULE?

16 MS. ABRAMSON: MY EXPERTS ARE IN DUAL BATTLES
17 TO SEE WHO GETS ON FIRST. RIGHT NOW I HAVE WECHT OR
18 MORTON FOR MONDAY; SECOND OF THAT TEAM FOR TUESDAY
19 OR WEDNESDAY OR THURSDAY, DEPENDING ON HOW LONG IT
20 TAKES, AND VAN HORN AND LINHART ARE ON CALL TO ME.

21 SO THOSE FOUR ARE MY NEXT FOUR WITNESSES
22 IN WHATEVER ORDER I CAN --

23 MR. CONN: WE HAVEN'T RECEIVED --
24 MS. ABRAMSON: IT'S LIKE THE BOSNIAN PEACE
25 TREATY, WHICHEVER ONE I CAN GET.
26 THE COURT: THERE'S STILL SOME ISSUE OF
27 REPORTS?
28 MS. ABRAMSON: I JUST HAVE TO MAKE A CALL.

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1 THE COURT: I JUST WANT TO GET AN IDEA OF
2 SCHEDULING.
3 HAVE YOU DECIDED ON GOLDEN?
4 MS. ABRAMSON: I'M NOT GOING TO DECIDE ON
5 DR. GOLDEN UNTIL I HAVE A CHANCE TO GO BACK TO HIM
6 WITH EVERYONE'S CRITICISMS OF HIS WORK AND FIND OUT
7 WHAT HE WOULD SAY ABOUT IT ALL, FRANKLY.
8 THE COURT: IF NOT GOLDEN?
9 MS. ABRAMSON: SOME OF THE NEIGHBORS WHO
10 HEARD POP, POP, POP, POP, POP. THE NEXT WOULD BE
11 THE BOAT PEOPLE.
12 THE COURT: AND THEN WHAT?
13 MS. ABRAMSON: AND THEN MY HOPE IS MARTA
14 CANO.
15 THE COURT: AND THEN WHAT?
16 MS. ABRAMSON: AND THEN MY CLIENT. DIDN'T WE
17 GIVE YOU THE LIST?

18 THE COURT: I'M JUST TRYING TO SEE IF THERE'S
19 ANY CHANGE SINCE THEN.
20 MS. ABRAMSON: NO. THE ONLY THING ABOUT
21 MARTA CANO IS HER DAUGHTER IS EXPECTING ANOTHER
22 BABY. SO I'VE GOT TO SEE IF I CAN GET HER OUT HERE
23 ON TIME.
24 THE COURT: IF SHE DOESN'T DO IT, THEN YOUR
25 CLIENT?
26 MS. ABRAMSON: YES.
27 COULD I JUST HAVE A MINUTE TO SPEAK TO
28 DEPUTY VAN HORN?

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1 THE COURT: SURE.
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1 (THE FOLLOWING PROCEEDINGS WERE
2 RESUMED IN OPEN COURT IN THE
3 PRESENCE OF THE JURY:)
4
5 THE COURT: JUST TAKING A MOMENT HERE TO
6 DISCUSS SOMETHING WITH ONE OF THE WITNESSES WHO'S
7 HERE.

8 MS. ABRAMSON: OKAY, YOUR HONOR.

9 THE COURT: ALL RIGHT. THE NEXT WITNESS,

10 THERE IS A WITNESS HERE WHO WE COULD START WITH BUT

11 WOULDN'T FINISH, AND IT GETS INTO MOVING EXHIBITS

12 AROUND AND DEALING WITH DIFFERENT THINGS THAT WOULD

13 TAKE SOME TIME AND WE WOULDN'T FINISH HIS TESTIMONY,

14 AND THEN OTHER WITNESSES ARE SCHEDULED NEXT WEEK.

15 SO RATHER THAN START NOW WITHOUT BEING

16 ABLE TO FINISH, BECAUSE ONE JUROR HAS TO LEAVE AT

17 3:15 TO CATCH A FLIGHT, SO RATHER THAN START NOW, I

18 THINK WE'LL JUST, AS FAR AS THE JURY IS CONCERNED,

19 TAKE OUR RECESS NOW. THE LAWYERS AND I WILL DISCUSS

20 SOME ISSUES AND THEN WE'LL BE TAKING OUR RECESS.

21 SO WE'LL BE LETTING YOU GO WITH THE SAME

22 INSTRUCTION I'VE GIVEN YOU ALL ALONG, NOT TO DISCUSS

23 THIS CASE AMONG YOURSELVES OR WITH ANYONE ELSE; NOT

24 TO FORM ANY FINAL OPINIONS ABOUT IT; NOT TO PERMIT

25 YOURSELF TO BE EXPOSED TO ANYTHING AT ALL ABOUT THIS

26 CASE OUTSIDE THE COURTROOM IN ANY FASHION, WHETHER

27 IT'S THE NEWS COVERAGE, CONVERSATIONS, ANYTHING.

28 AND WITH THAT, WISH YOU ALL A HAPPY

41947

1 THANKSGIVING AND WE'LL SEE YOU BACK HERE MONDAY AT

2 8:30.

3 (THE JURY EXITED THE
4 COURTROOM AND THE FOLLOWING
5 PROCEEDINGS WERE HELD:)

6
7 THE COURT: THE JURY HAS LEFT. THERE WAS
8 SOME DISCUSSION REGARDING REPORTS.

9 MS. NAJERA: YES, YOUR HONOR.

10 MS. ABRAMSON: LET ME MAKE A STATEMENT AND
11 WE'LL CUT THROUGH, I THINK, VERY QUICKLY.

12 I HAD ASKED MR. MORTON IF HE COULD -- I
13 HAVEN'T TALKED TO HIM MUCH RECENTLY AND I DIDN'T
14 KNOW IF HE HAD ANY ADDITIONAL FINDINGS OVER WHAT HE
15 HAD SENT TO ME IN MEMO FORM SIMILAR TO WHAT
16 DR. FACKLER HAD DONE, MAINLY A CRITIQUE OF THE WORK
17 OF FAILURE ANALYSIS. AND I ASKED HIM TO WRITE A
18 REPORT WITH ANY ADDITIONAL FINDINGS IN CLASSIC
19 REPORT FORMAT. AND WHEN I LAST SPOKE TO HIM
20 YESTERDAY, HE HAS BEEN ALSO TIED UP IN LITIGATION
21 AND HE DIDN'T THINK, UNLESS I COULD GET BACK TO HIM
22 LATE LAST NIGHT, THAT HE WOULD BE ABLE TO GET A NEW
23 REPORT TO ME. BUT I WANT TO CALL MY OFFICE AND FIND
24 OUT IF INDEED HE DID. AND IF HE DIDN'T, I AM HAPPY
25 TO TURN OVER UNREDACTED THE NOTES THAT HE HAD AT
26 THE -- AT AN EARLY STAGE OF HIS INVESTIGATION IN THIS
27 CASE, WHICH IS THE ONLY WRITTEN NOTES I HAVE, UNLESS
28 HE HAS SENT ANOTHER REPORT. AND THAT'S SOMETHING

1 THAT WAS FAXED TO ME ON OCTOBER 1ST. I'M HAPPY TO
2 GIVE IT TO THE PROSECUTION IF HE HAS NOT PREPARED A
3 MORE COMPREHENSIVE REPORT. THAT'S WHERE WE'RE AT.

4 THE COURT: OKAY. IS THAT THE ONLY ISSUE
5 THAT WE'RE NOW WAITING FOR IS MORTON?

6 MS. ABRAMSON: RIGHT.

7 MR. CONN: BUT I WOULD ASK, IF THERE IS NO
8 REPORT AT THIS TIME, THAT COUNSEL NOT CALL
9 MR. MORTON ON MONDAY THEN. WE NEED SOME TIME TO
10 REVIEW THIS MATERIAL. WE WOULD LIKE TO SEE HIS
11 FINAL REPORT BEFORE HE TESTIFIES.

12 MS. ABRAMSON: THERE WON'T BE A FINAL
13 REPORT. IF THERE IS NO REPORT TODAY, THERE WON'T BE
14 A FINAL REPORT. AND WE WERE ORDERED TO GIVE YOU
15 WHAT WE HAD ON TODAY'S DATE IN ORDER TO CALL HIM ON
16 MONDAY AND THAT'S WHAT WE'RE GOING TO DO.

17 THE COURT: WITHOUT GETTING INTO A DISCUSSION
18 THAT MIGHT NOT BE NECESSARY, LET'S SEE IF THERE IS
19 ANYTHING ELSE. IF NOT, THIS WILL BE TURNED OVER AND
20 THEN WE'LL SEE IF -- WHAT YOUR POSITION IS ONCE YOU
21 GET IT.

22 ALL RIGHT. LET'S TAKE A SHORT BREAK AND
23 GIVE MS. ABRAMSON A CHANCE TO MAKE A PHONE CALL.

24 MS. ABRAMSON: THANK YOU, YOUR HONOR.

25 (PAUSE IN PROCEEDINGS.)

26

27 MS. ABRAMSON: YOUR HONOR, THE RECORD SHOULD
28 REFLECT THAT I HAVE TURNED OVER SOME DISCOVERY FROM

41949

1 MR. MORTON, WHICH WERE HIS TARGETS, HIS
2 TEST-TARGETS, SIX TEST-TARGETS THAT HE DID, PLUS A
3 CHART THAT HE PREPARED THAT I RECEIVED ON NOVEMBER
4 9TH, AND I DID TURN THOSE MATERIALS OVER TO THE
5 PROSECUTION, YOUR HONOR.

6 THE COURT: OKAY.

7 (A RECESS WAS TAKEN FROM
8 2:45 P.M. TO 3:05 P.M.)

9

10 THE COURT: OKAY. WE'RE BACK IN SESSION.

11 MR. CONN: YES. WE REVIEWED THE THREE PAGES
12 OF WHAT COUNSEL HAS CALLED NOTES. IT APPEARS TO BE
13 A TYPEWRITTEN EVALUATION CRITICIZING THE
14 RECONSTRUCTION THAT WAS CONDUCTED BY DR. MC CARTHY
15 IN THIS CASE, AND IT'S MY UNDERSTANDING THAT THIS
16 THREE-PAGE DOCUMENT RELATES TO SOMETHING PREPARED BY
17 MR. MORTON.

18 I THINK THE FIRST ISSUE THAT WE'LL NEED
19 TO DISCUSS WITH THE COURT IS WHETHER THE DEFENSE
20 WILL BE ABLE TO PRESENT CUMULATIVE TESTIMONY

21 CRITICIZING THE RECONSTRUCTION OF DR. MC CARTHY.
22 WE'VE ALREADY TAKEN TESTIMONY FROM A
23 WOUND BALLISTICS EXPERT AND SPENT A COUPLE DAYS,
24 SEVERAL DAYS, EXAMINING THIS WITNESS CONCERNING HIS
25 CRITICISMS OF THE RECONSTRUCTION. AND NOW I THINK
26 THAT WHAT COUNSEL'S PROPOSING TO DO IS GETTING INTO
27 A SERIES OF WITNESSES WHO ARE GOING TO SIMPLY MAKE
28 THE SAME ARGUMENTS OVER AND OVER AND OVER AGAIN.

41950

1 SO I DON'T THINK THAT THEY SHOULD BE
2 PERMITTED TO DO SO SIMPLY BECAUSE ONE CALLS HIMSELF
3 A CRIMINALIST AND ANOTHER ONE LIKES THE TITLE OF
4 WOUNDS BALLISTIC EXPERT. I THINK AT A CERTAIN POINT
5 WHAT EACH PERSON WOULD DESIGNATE, WOULD GET INTO
6 HIMSELF, WE GET INTO THE ISSUE OF CUMULATIVE
7 TESTIMONY.

8 THE COURT: ALL RIGHT.

9 MS. ABRAMSON: I DIDN'T THINK WE WERE HERE
10 FOR THAT POINT, YOUR HONOR.

11 THE COURT: WELL, NUMBER ONE, THE REPORT THAT
12 YOU NOW HAVE, IS THAT -- LET ME ASK THE DEFENSE: THE
13 REPORT THAT HAS BEEN TURNED OVER TO THE PROSECUTION,
14 IS THAT A REPORT REFLECTIVE OF THE PROPOSED
15 TESTIMONY OF THIS WITNESS?

16 MS. ABRAMSON: IN PART.
17 THE COURT: WHAT DOES THAT MEAN?
18 MS. ABRAMSON: THAT MEANS THAT REFLECTS --
19 NOT ALL OF HIS TESTIMONY IS GOING TO BE CRITICISM OF
20 FAILURE ANALYSIS. IN FACT, I DON'T EXPECT HIS
21 TESTIMONY WILL BE FRAMED IN THOSE TERMS.
22 HIS TESTIMONY, BECAUSE HE IS A BLOOD
23 SPATTER EXPERT, WHICH NONE OF THE PREVIOUS WITNESSES
24 HAVE BEEN, AND ALL OF THE PREVIOUS WITNESSES, BOTH
25 DEFENSE AND PROSECUTION, HAVE ACKNOWLEDGED THEY'RE
26 NOT BLOOD SPATTER EXPERTS, HIS TESTIMONY WILL HAVE
27 TO DO WITH BLOOD SPATTER PATTERNS AND PURE
28 BALLISTICS AND CRIMINALISTICS IN ORDER TO EXPLAIN

41951

1 CERTAIN SHOTS, CERTAIN WOUNDS, THAT WERE INFLICTED
2 UPON THE VICTIMS IN THIS CASE.

3 AND HIS EXPERTISE BEING DIFFERENT THAN
4 DR. FACKLER'S, HE HAS A RIGHT TO TESTIFY ABOUT BLOOD
5 SPATTER --

6 THE COURT: I'M NOT ASKING WHETHER HE HAS A
7 RIGHT OR NOT. I'M JUST ASKING WHETHER OR NOT THAT
8 REPORT WAS REFLECTIVE OF ALL OF HIS TESTIMONY.

9 MS. ABRAMSON: WELL, I'M NOT -- THAT'S WHY I
10 ASKED HIM IF HE HAD ANYTHING SUPPLEMENTAL. I'D HAVE

11 TO LOOK AT IT AGAIN TO SEE IF IT'S EVERYTHING. I
12 THINK IT COVERS ALL THE TOPICS HE'S GOING TO TESTIFY
13 ABOUT.

14 THE COURT: AS FAR AS THE OBJECTION ON
15 GROUNDS OF BEING CUMULATIVE, IT'S PREMATURE AT THIS
16 POINT TO ADDRESS THAT. FROM THE BRIEF COMMENTS OF
17 COUNSEL, IT DOES APPEAR THAT THIS WITNESS' TESTIMONY
18 WOULD BE ON SUBJECTS OTHER THAN THOSE DIRECTLY
19 TOUCHED UPON BY DR. FACKLER, SO IT WOULD NOT BE
20 CUMULATIVE.

21 MS. ABRAMSON: HE'S NOT GOING TO OFFER
22 MEDICAL OPINIONS, YOUR HONOR. TO ANY EXTENT THAT
23 HIS CONCLUSIONS ON CRIMINALISTICS AND BLOOD PATTERNS
24 HAVE TO DO WITH MEDICAL OPINIONS, HE'S OBVIOUSLY
25 GOING TO BE RELYING ON THE TESTIMONY OF THE MEDICAL
26 EXPERTS.

27 THE COURT: AS I SAID, I'M NOT NOW CONCERNED
28 WITH THE OBJECTION OF IT BEING CUMULATIVE. I'M JUST

41952

1 CONCERNED ABOUT DISCOVERY.

2 MS. ABRAMSON: I JUST WANT TO QUICKLY REVIEW
3 IF IT HAS EVERYTHING THAT I'M AWARE OF THAT HE'S
4 GOING TO TALK ABOUT.

5 YOU CAN WAIT AND I CAN TELL YOU. I CAN

6 ANSWER THE QUESTION IF YOU CAN BE STILL.

7 MR. CONN: I JUST WANT TO CLARIFY FOR THE
8 RECORD WHAT WE'RE -- WHAT WE HAVE IN OUR HAND.

9 WHAT WE HAVE IN OUR HAND IS SIMPLY
10 NOTHING MORE THAN A RECONSTRUCTION OF THE SHOOTING
11 AND IT --

12 MS. ABRAMSON: IT'S A CRITICISM OF THE
13 RECONSTRUCTION. IT ISN'T A RECONSTRUCTION.

14 MR. CONN: CRITICISM OF A RECONSTRUCTION. WE
15 HAVE NO DISCOVERY WHATSOEVER CONCERNING ANYTHING
16 ABOUT THE BLOOD -- THE PROPOSED BLOOD SPATTER
17 TESTIMONY EXPERT OF THIS WITNESS.

18 I WOULD ASK, FIRST OF ALL, THAT WE BE
19 GIVEN DISCOVERY IN REGARD TO THAT AREA OF THAT
20 TESTIMONY; IF, INDEED, THAT IS GOING TO BE THE AREA
21 OF TESTIMONY, AND THAT TESTIMONY -- AND THAT THIS
22 TESTIMONY, THIS PROPOSED TESTIMONY OF WHICH WE HAVE
23 A SUMMARY IN OUR HAND, NOT BE PRESENTED AS
24 CUMULATIVE.

25 MS. ABRAMSON: I THINK IT'S VERY OBVIOUS, IF
26 COUNSEL JUST READ IT, THAT YOU'LL SEE THE WORD
27 "BLOOD" APPEARS, LET'S SEE, ONE, TWO --

28 THE COURT: I DON'T WANT A COUNT OF THAT. I

1 WANT TO KNOW WHETHER OR NOT THIS REPORT REFLECTS

2 WHAT THIS WITNESS WILL SAY.

3 MS. ABRAMSON: IT DOESN'T REFLECT EVERY WORD

4 HE'S GOING TO SAY, JUST LIKE DR. MC CARTHY'S REPORT

5 HARDLY REFLECTED EVERYTHING.

6 THE COURT: LET'S NOT GET INTO DISPUTES ABOUT

7 OTHER WITNESSES. LET'S FOCUS ON THIS VERY SIMPLY:

8 DOES THIS REPORT REFLECT WHAT THIS WITNESS WILL

9 SAY?

10 MS. ABRAMSON: YES.

11 THE COURT: NOT EVERY WORD, BUT THE SUBSTANCE

12 OF WHAT HE'S GOING TO SAY. THERE'S NOT SOMETHING

13 NEW OR CONTROVERSIAL THAT HE'LL SAY.

14 MS. ABRAMSON: YOUR HONOR, IF I COULD BE

15 GIVEN TWO MORE MINUTES TO FINISH READING. I HAVE

16 SOMETHING IN MIND THAT I WANT TO SEE IF IT'S IN

17 HERE. VIRTUALLY EVERYTHING IN THIS REPORT HAS

18 ALREADY BEEN UTILIZED IN CROSS-EXAMINATION SO NONE

19 OF IT SHOULD BE A SURPRISE.

20 THE ONLY THING I'M NOT SEEING ON FIRST

21 GLANCE, BUT SHOULD BE OBVIOUS THAT WE'RE GOING TO

22 TALK ABOUT, IS THE BLOOD SPATTER PATTERNS ON

23 MR. MENENDEZ' SHIRT AND THE BLOOD SPATTER PATTERN

24 INSIDE HIS LEFT ARM. AND THERE WILL BE TESTIMONY

25 THAT BLOOD SPATTER APPEARS ON THE CUSHION TO THE

26 RIGHT OF THE SECOND CUSHION OF THE COUCH, WHICH HAS

27 ALSO BEEN UTILIZED IN CROSS-EXAMINATION.

28 AND THERE WILL BE TESTIMONY, AS THIS

1 REPORT INDICATES, ABOUT BLOOD DROPLETS AND SPATTER
2 ON THE CARPET, IN FRONT OF MR. MENENDEZ' POSITION,
3 ABOUT BLOOD SPATTER ON THE SHOES OF MRS. MENENDEZ.
4 ALL OF THAT IS IN HERE. THIS IS ALMOST ALL BLOOD
5 SPATTER EVIDENCE. I JUST WANTED TO MAKE SURE THAT
6 IT ALSO INVOLVES -- I DON'T SEE THE SPECIFIC
7 REFERENCE TO THE LEFT SIDE OF HIS SHIRT AND HIS
8 INNER ARM. BUT HE'S GOING TO TESTIFY CONCERNING
9 THOSE.

10 AND IF I DETERMINE, PRIOR TO HIS TAKING
11 THE STAND, THAT THERE'S ANY OTHER ADDITIONAL POINTS
12 THAT HE'S GOING TO MAKE ABOUT THE BLOOD EVIDENCE OR
13 THE BALLISTICS EVIDENCE, I'LL TELL COUNSEL THAT HE'S
14 GOING TO SAY THOSE THINGS SO THEY WON'T BE
15 SURPRISED.

16 BUT I DON'T THINK THERE'S ANYTHING
17 SURPRISING ABOUT WHAT HE'S GOING TO TESTIFY TO GIVEN
18 THE CROSS-EXAMINATION OF THE PEOPLE'S WITNESSES AND
19 THE TESTIMONY OF DR. FACKLER.

20 MR. CONN: YES. ONCE AGAIN, I THINK WE
21 SHOULD GIVE A COPY OF THIS REPORT TO THE COURT
22 BECAUSE IT MAKES PASSING REFERENCES TO BLOOD. IT
23 DOESN'T INDICATE WHAT HIS OPINION IS IN REGARD TO
24 THE BLOOD THAT IS OBSERVED AT DIFFERENT LOCATIONS,

25 AND IT IS, FROM ANY OBJECTIVE EVALUATION OF IT, MORE
26 OF A CRITICISM OF THE RECONSTRUCTION THAN IT IS A
27 REPORT OF HIS CONCLUSIONS CONCERNING THE BLOOD THAT
28 WAS OBSERVED AT THE CRIME SCENE.

41955

1 SO, AGAIN, I DON'T THINK THAT WE HAVE
2 ANY DISCOVERY TO THE SUBSTANCE OF WHAT HE'S GOING TO
3 BE TESTIFYING TO. WE CANNOT DECIPHER FROM THIS
4 REPORT WHAT HIS POSITION IS IN REGARD TO ANY OF THE
5 EVIDENCE ABOUT WHICH HE WILL BE TESTIFYING; AND TO
6 THE EXTENT THAT HE DOES CRITICIZE THE
7 RECONSTRUCTION, I DON'T THINK THAT THEY SHOULD BE
8 ABLE TO CALL THE WITNESS FOR THAT PURPOSE. HE
9 SHOULD BE ABLE TO TESTIFY TO HIS CONCLUSIONS
10 CONCERNING THE BLOOD AT THE SCENE WITHOUT GETTING
11 INTO CRITICISMS OF THE RECONSTRUCTION OF THE
12 SHOOTING. AND WE DON'T KNOW WHAT HIS TESTIMONY'S
13 GOING TO BE CONCERNING THE BLOOD AT THE SCENE.

14 MS. ABRAMSON: COUNSEL IS NOT BEING CANDID
15 WITH THE COURT. THIS IS ENGLISH AND IT'S EASY TO
16 UNDERSTAND WHAT HE'S SAYING.

17 MOREOVER, I'VE NEVER HEARD ANY RULE THAT
18 THE PEOPLE PROPOSE TO PUT THEIR ENTIRE PREMEDITATION
19 THEORY ON THROUGH THE TESTIMONY OF A ROGER MC CARTHY

20 AND A RECONSTRUCTION THAT THEY CLAIM OF THIS CRIME.

21 WE HAVE A RIGHT TO ATTACK IT FROM THE EXPERTISE OF

22 AS MANY EXPERTS --

23 THE COURT: AGAIN, I'M NOT ADDRESSING THAT

24 ISSUE.

25 MS. ABRAMSON: THE POINT IS IT --

26 THE COURT: WHAT I'M TRYING TO DO IS VERY

27 SIMPLY DETERMINE WHETHER OR NOT THE PROSECUTION HAS

28 BEEN THE BENEFICIARY OF THE SAME SORTS OF DISCOVERY

41956

1 AS HAS THE DEFENSE.

2 MS. ABRAMSON: YES. I WOULD ASK THE COURT TO

3 COMPARE THIS TO THE PRELIMINARY AND ONLY REPORT WE

4 GOT FROM DR. LAWRENCE AND COMPARE HIS PRELIMINARY

5 AND ONLY REPORT TO WHAT HE TESTIFIED TO ON THE

6 WITNESS STAND.

7 THE COURT: OKAY. BOTH SIDES WANT ME TO LOOK

8 AT THIS REPORT, SO I'LL LOOK AT IT.

9 MS. ABRAMSON: FINE.

10 THE COURT: SOMEBODY GIVE IT TO ME.

11 MS. ABRAMSON: THEY HAVE TO GIVE UP ONE OF

12 THE TWO COPIES WE GAVE THEM.

13 APPARENTLY THEY GAVE IT TO THEIR FAILURE

14 ANALYSIS ASSOCIATE.

15 THE COURT: THANK YOU.

16 (PAUSE IN PROCEEDINGS.)

17

18 THE COURT: OKAY. I'VE REVIEWED THIS AND
19 MOST OF THIS REPORT JUST APPEARS TO BE THE REVIEW OF
20 THE FAILURE ANALYSIS REPORT AND AN ANALYSIS OF IT.

21 I DON'T KNOW EXACTLY WHAT MR. MORTON'S
22 BACKGROUND IS AS TO HIS BACKGROUND VERSUS THAT OF
23 THE WITNESS WHO JUST TESTIFIED OR ANY OTHER WITNESS
24 THAT THE DEFENSE IS CALLING ON THIS SUBJECT. BUT
25 THERE'S VERY LITTLE IN HERE THAT REFERS TO BLOOD
26 SPATTERS OR BLOOD EVIDENCE.

27 MS. ABRAMSON: HE TALKS ABOUT THE BLOOD ON
28 MR. MENENDEZ' LEFT KNEE. HE TALKS ABOUT THE BLOOD

41957

1 ON THE CARPET IN FRONT OF HIS BODY AND HE'S AN
2 EXPERT IN THE SHAPE OF -- HE'S A BLOOD SPATTER
3 EXPERT. HE'S A BALLISTICS FIREARMS EXPERT. HE'S A
4 HAIR AND FIBER EXPERT AND HE'S A CRIMINALIST, WHICH
5 MEANS HE'S AN EXPERT ON THE COMBINATION OF THINGS.
6 TALKS ABOUT THE BLOOD ON HIS BODY.

7 HE WOULD ALSO TESTIFY, AS HAS BEEN
8 BROUGHT OUT THROUGH CROSS-EXAMINATION, THAT THERE
9 ARE BLOOD SMEARS ON THE DORSAL ASPECT OF

10 MR. MENENDEZ' LEFT HAND AND BLOOD SMEARS INSIDE OF
11 HIS THIGHS THAT INDICATE THAT HE MOVED HIS HANDS
12 ACROSS THOSE THIGHS AT SOME POINT AFTER HE HAD BEEN
13 SHOT IN THE LEG WHICH SUPPORTS THE NOTION THAT THE
14 LEG IS AN ANTEMORTEM WOUND.

15 HE TALKS ABOUT THE BLOOD PATTERNS ON
16 MRS. MENENDEZ' SHOES THAT INDICATES THAT SHE WAS
17 STANDING UP AT A TIME WHEN SHE WAS SHOT AND THAT SHE
18 ALSO STEPPED IN BLOOD.

19 I'VE ALREADY INDICATED HE'S GOING TO
20 TALK ABOUT THE FACT THAT THERE IS A BLOOD PATTERN
21 SPRAY ON THE CUSHION ON THE COUCH THAT INDICATES
22 THAT SOMEONE WAS SHOT WHO WAS ABOVE THAT POSITION.

23 HE'S ALSO GOING TO TESTIFY THAT AS THIS
24 REPORT INDICATES, THAT THE FACT THAT A PIECE OF HER
25 BRACELET AND A PIECE OF WADDING AND A PELLET AND A
26 BLOOD SPRAY IS AT THE HOLE IN THE EAST DOOR, THAT
27 THAT INDICATES THE LIKELIHOOD THAT MRS. MENENDEZ WAS
28 STANDING WHEN SHE RECEIVED THE SHOTS TO HER RIGHT

41958

1 ARM. I MEAN, THAT'S ALL IN HERE.

2 THE COURT: WHAT ELSE IS HE GOING TO TESTIFY
3 ABOUT?

4 MS. ABRAMSON: AND HE'S ALSO GOING TO

5 CRITIQUE CERTAIN CONCLUSIONS THAT FAILURE ANALYSIS
6 IS INDICATING BASED ON THE BLOOD EVIDENCE AND THE
7 PELLET AND WADDING EVIDENCE AS INDICATED IN THIS
8 REPORT.

9 HE'S ALSO GOING TO TESTIFY TO THE
10 ABRASIONS ON MR. MENENDEZ' RIGHT LEG AS BEING
11 RELATED TO THE WADDING THAT'S ON HIS RIGHT LEG,
12 WHICH NO ONE HAS TESTIFIED TO BECAUSE APPARENTLY
13 MR. MC CARTHY AND DR. LAWRENCE WEREN'T -- DIDN'T
14 REALIZE THAT, THAT THERE WAS WADDING FOUND ON HIS
15 RIGHT LEG.

16 AND I ALSO ANTICIPATE, YOUR HONOR -- I
17 JUST REMEMBERED THE OTHER THING -- HE EXAMINED ALL
18 OF THE CLOTHING IN THIS CASE AND I BELIEVE HE'S
19 GOING TO TESTIFY WITH RESPECT TO THE HOLES IN THE
20 SHIRT AND THE POSSIBLE CAUSE OF THOSE HOLES, AND I
21 KNOW HE'S GOING TO TESTIFY THAT WITH RESPECT TO ANY
22 SO-CALLED PELLET HOLES ON THE SLEEVE, THAT IT IS
23 IMPOSSIBLE, EVEN FOR A BLOOD SPATTER AND FIBER
24 EXPERT, TO INDICATE DIRECTION OF ENTRY OR EXIT
25 THROUGH SLEEVE HOLES ON A GARMENT THAT HAS BEEN
26 REMOVED FROM THE BODY OF A VICTIM, THAT HAS BEEN
27 HANDLED BY OTHER PEOPLE, AND WHICH CONTAINS DRIED
28 BLOOD AND BODILY FLUIDS BECAUSE THOSE FLUIDS AND

1 BLOOD DISTORT WHATEVER ANGLE OR PATTERN THE FIBERS
2 ORIGINALLY HAD.

3 AND THAT IS A RECITATION NOW BOTH FROM
4 HIS REPORT AND FROM MY MEMORY OF ALL OF THE POINTS
5 THAT MR. MORTON HAS RAISED WITH ME OVER THE PAST FEW
6 WEEKS.

7 AND, YOU KNOW, I DID TRY TO GET FROM HIM
8 A REPORT THAT CONTAINED ALL OF THIS IN ONE PLACE AND
9 I WILL STILL ENDEAVOR TO DO SO. AND I INTENDED TO
10 TALK TO HIM LATER TODAY WHEN HE GETS OUT OF COURT.
11 AND I WILL BE HAPPY IF HE WILL SEND ME THESE
12 ADDITIONAL POINTS IN WRITING TO PASS THEM ON TO THE
13 PROSECUTION IF THEY BOTHER TO GIVE ME A WAY TO REACH
14 THEM OVER THE NEXT FOUR DAYS.

15 LAST WEEKEND WE HAD DR. WECHT'S REPORT,
16 AND I TOLD THEM I WOULD HAVE IT FOR THEM ON SUNDAY,
17 AND THEY WERE SUPPOSED TO GIVE ME A WAY TO GET IT TO
18 THEM AND THEY NEVER DID.

19 BUT I'M MORE THAN HAPPY TO GET THEM
20 WHATEVER OTHER INFORMATION MR. MORTON -- I CAN GET
21 MR. MORTON TO REDUCE TO WRITING AND GET IT TO THEM
22 BEFORE MONDAY IF THEY'LL JUST LET ME KNOW WHERE TO
23 FAX IT.

24 THE COURT: AND MR. MORTON IS GOING TO BE THE
25 NEXT WITNESS OR IS STILL UP IN THE AIR --

26 MS. ABRAMSON: IT'S STILL UP IN THE AIR.
27 IT'S EITHER DR. WECHT OR MR. MORTON. I'LL BE HAPPY

41960

1 THEY HAVE IT IN ADVANCE.

2 THE COURT: WELL, YOU ALREADY HAVE WECHT'S
3 REPORT; IS THAT IT? IS THAT TRUE, MR. CONN?

4 MS. NAJERA: YOUR HONOR, WE DO HAVE
5 DR. WECHT'S REPORT. AND THE PROBLEM WITH
6 DR. WECHT'S REPORT, ONCE AGAIN, IS SOMETHING MAYBE
7 THE COURT'S GOING TO HAVE TO DO, IS IT IS SIMPLY
8 GOING OVER DR. GOLDEN'S REPORT SAYING I AGREE WITH
9 THIS WOUND, I AGREE WITH THIS WOUND.

10 MS. ABRAMSON: THERE'S TWO REPORTS.

11 MS. NAJERA: WHO IS GOING TO TESTIFY FIRST?
12 BECAUSE THERE'S GOING TO BE AN OBJECTION TO
13 WHICHEVER -- MOST CERTAINLY TO DR. WECHT IF THIS IS
14 HIS WHOLE REPORT. HIS REPORT CONSISTS OF -- THE
15 FIRST REPORT, WHICH I ALREADY MENTIONED TO THE
16 COURT, FROM NOVEMBER 13TH, BASICALLY SAYING I'M
17 ESSENTIALLY IN AGREEMENT, AGREEMENT WITH THE
18 INTERPRETATION OF THIS WOUND. THERE'S LIKE TEN
19 LINES FOR MRS. MENENDEZ AND SIX LINES FOR
20 MR. MENENDEZ. THEN THERE'S A SUPPLEMENTAL REPORT
21 BECAUSE THERE WERE SOME THINGS THAT HE COULDN'T HAVE
22 AN OPINION ON IN THE FIRST REPORT THAT HE THEN IN

23 THE SUPPLEMENTAL REPORT SAYS THIS IS WHAT I'M

24 CLEARING UP IN THE SUPPLEMENTAL REPORT.

25 MS. ABRAMSON: NO, THAT'S NOT WHAT IT IS,

26 CAROL. HE DIDN'T HAVE TO GIVE --

27 THE COURT: LET'S NOT GET INTO THESE LITTLE

28 DISCUSSIONS.

41961

1 MS. ABRAMSON: SHE'S MISREPRESENTING WHAT --

2 THE COURT: LET HER FINISH.

3 MS. NAJERA: ESSENTIALLY, WHAT I'M SAYING IS --

4 I CAN GIVE YOU A COPY OF THESE. THE BOTTOM LINE IS

5 THERE'S NO INFORMATION THERE OF WHAT -- OF ANY

6 SUBSTANCE AS TO WHAT HE IS GOING TO ADD TO THIS

7 CASE, I GUESS IS WHAT I'M TRYING TO TELL THE COURT.

8 AND IF THERE'S GOING TO BE A QUESTION OF THEIR

9 PUTTING ON DR. WECHT BEFORE DR. MORTON, THERE MIGHT

10 BE A QUESTION OF WHETHER OR NOT DR. MORTON WOULD

11 TESTIFY OR WHETHER OR NOT DR. WECHT WOULD TESTIFY

12 BECAUSE I THINK THERE'S GOING TO BE A REAL PROBLEM

13 WITH THEM TESTIFYING AFTER THIS DOCTOR JUST

14 TESTIFIED.

15 THE COURT: ALL RIGHT. I'LL HAVE TO WAIT

16 UNTIL WHICHEVER ONE TESTIFIES TO RULE UPON A MOTION

17 THAT HAS YET TO BE MADE.

18 MS. NAJERA: THE SECOND PROBLEM IS WE NEED TO
19 KNOW WHO'S GOING TO TESTIFY NEXT BECAUSE THERE'S
20 GOING TO BE A LARGE AMOUNT OF INFORMATION THAT NEEDS
21 TO BE DIGESTED.

22 THE COURT: THEY'RE BOTH GOING TO TESTIFY
23 NEXT WEEK, SO WHICHEVER IT IS YOU'LL HAVE TO GET
24 READY. A LOT OF THIS IS BECAUSE THE PROSECUTION
25 PRODUCED THIS RECONSTRUCTION EVIDENCE AT THE
26 BEGINNING OF JURY SELECTION AND IT WASN'T BEFORE
27 THEN. SO THE DEFENSE IS IN THE POSITION OF HAVING
28 TO REBUT IT AND GATHER THEIR EVIDENCE TO REBUT IT

41962

1 DURING THE TRIAL; AND THAT'S WHY THIS MATERIAL IS
2 BEING PRODUCED AS IT IS.

3 SO I CAN'T FAULT THE DEFENSE FOR THE
4 LATENESS OF DISCOVERY BECAUSE THE PROSECUTION DIDN'T
5 PRODUCE ITS MATERIAL UNTIL JURY SELECTION WAS IN
6 PROGRESS.

7 MS. NAJERA: YOUR HONOR, IT'S NOT THE
8 LATENESS OF DISCOVERY THAT HAS US CONCERNED; IT'S
9 THE LACK OF SUBSTANCE OF DISCOVERY I THINK IS THE
10 ISSUE HERE.

11 THE COURT: WELL, AGAIN, THAT HAS TO DO WITH
12 THE LATENESS OF THEIR ABILITY TO RESPOND OR THE LACK

13 OF TIME TO RESPOND TO WHAT IT IS THAT THEY ARE

14 DEALING WITH.

15 AT THIS POINT IT APPEARS TO ME THAT

16 THERE IS SUFFICIENT INFORMATION HERE GIVEN TO THE

17 PROSECUTION, WITH THE ADDENDUM MATERIAL THAT HAS

18 BEEN RECITED BY MS. ABRAMSON, TO GIVE YOU A

19 REASONABLE EXPECTATION OF WHAT IT IS MR. MORTON

20 WOULD TESTIFY ABOUT.

21 AND AS TO ANY OBJECTIONS THAT THINGS ARE

22 CUMULATIVE, I'LL JUST HAVE TO WAIT UNTIL THE

23 EVIDENCE IS PRODUCED. OBVIOUSLY, IF THINGS CAN BE

24 FOCUSED AND SEPARATED FOR ONE WITNESS TO DEAL WITH

25 CERTAIN THINGS AND ANOTHER WITNESS TO DEAL WITH

26 OTHER THINGS, RATHER THAN EVERYONE COVERING THE SAME

27 TERRITORY, THAT WOULD BE OF HELP.

28 THE DEFENSE APPARENTLY ATTEMPTED TO DO

41963

1 THAT TO SOME EXTENT WITH DR. FACKLER, BUT CLEARLY

2 FROM THE NATURE OF THE DIRECT EXAMINATION IT WAS

3 WITHIN THE SCOPE OF THE DIRECT EXAMINATION TO PERMIT

4 CROSS-EXAMINATION ON THE ENTIRETY OF HIS ANALYSIS OF

5 THE FAILURE ANALYSIS REPORT AND THE TESTIMONY OF

6 DR. MC CARTHY. AND THAT OPENED THE WHOLE TESTIMONY

7 OF DR. FACKLER UP TO THE ENTIRETY OF THE CRIME SCENE

8 AND ALL OF THE ISSUES RELATING TO IT. THAT WAS DONE
9 BY COMBINATION OF THE SCOPE OF THE DIRECT
10 EXAMINATION AND THE NATURE OF THE
11 CROSS-EXAMINATION. THAT BY ITSELF SHOULDN'T
12 FORECLOSE THE DEFENSE FROM PUTTING ON ADDITIONAL
13 WITNESSES TO COVER AREAS THAT THEY DID NOT DIRECTLY
14 COVER IN THEIR DIRECT EXAMINATION.

15 BUT, AGAIN, IF THINGS ARE GOING TO BE
16 REPEATED OVER AND OVER THAT ARE NOT IN DISPUTE, THEN
17 THERE VERY WELL COULD BE GOOD VALID OBJECTION ON THE
18 GROUNDS OF IT BEING CUMULATIVE. IF THINGS ARE STILL
19 IN DISPUTE AND THINGS ARE IN CONTROVERSY, THEN THE
20 COURT WOULD HAVE TO EVALUATE ANY OBJECTIONS AS
21 THEY'RE BEING MADE. I CAN'T RULE IN THE ABSTRACT ON
22 THAT.

23 SO, ANYWAY, AS FAR AS THE DISCOVERY
24 ISSUES ARE CONCERNED, I THINK THEY'RE RESOLVED AT
25 THIS POINT. THE PROSECUTION WILL JUST HAVE TO BE
26 READY FOR WHICHEVER WITNESS IS AVAILABLE ON MONDAY
27 TO TESTIFY; AND THERE'S SOME UNCERTAINTY ON THE PART
28 OF THE DEFENSE AS TO WHICH IT WILL BE. AND THE

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1 PROSECUTION SHOULD MAKE ITSELF AVAILABLE TO GET MORE
2 INFORMATION FROM THE DEFENSE, IF THEY HAVE IT, AS TO

3 WHICH WITNESS WILL ACTUALLY BE CALLED TO TESTIFY.

4 MS. ABRAMSON: WE HAVE TO CALL THEM UP ON

5 FRIDAY AND LET THEM KNOW.

6 THE COURT: SO THAT YOU CAN HAVE SOME MEANS

7 OF COMMUNICATION, CHANNEL OF COMMUNICATION, THAT

8 WOULD BE OF BENEFIT.

9 AS FAR AS OTHER ISSUES HERE THAT STILL

10 ARE IN THE STATE OF FLUX, ONE OF THEM HAS TO DO WITH

11 EXHIBITS. THE TESTIMONY OF DR. MC CARTHY HAS BEEN

12 COMPLETED. I'LL EXPECT THAT COUNSEL WILL DO AS YOU

13 DID BEFORE, MEET AND CONFER AND RESOLVE AS MANY

14 DISPUTES AS POSSIBLE ON EXHIBITS THAT HAVE SO FAR

15 BEEN MARKED AND UTILIZED SO THAT WE CAN NEXT WEEK

16 RESOLVE ISSUES OF ADMISSIBILITY OF THE EXHIBITS THUS

17 FAR MARKED SO THAT WE CAN MOVE ON TO OTHER ISSUES.

18 ALSO, THERE IS THE MOTION THAT THE

19 DEFENSE INDICATED IT WAS GOING TO MAKE UNDER 1118.1

20 AND ARGUE IT.

21 WHEN DID YOU WANT TO ARGUE THAT MOTION?

22 MR. GESSLER: I THINK IT MAKES THE MOST SENSE

23 TO ARGUE IT AFTER WE'VE DECIDED ON EXHIBITS, YOUR

24 HONOR, BECAUSE THERE'S TWO PARTS TO THE MOTION, ONE

25 IS THE NARROWING FUNCTION WHICH IS AN ISSUE OF LAW

26 NOT HAVING TO DO WITH THE SPECIFIC EVIDENCE IN THE

27 CASE; THE SECOND PART, OF COURSE, IS SUFFICIENCY OF

28 EVIDENCE FOR A LYING-IN-WAIT SPECIAL CIRCUMSTANCE

1 UNDER 1118.1.

2 THE COURT: SO YOU DON'T FEEL YOU'RE IN A
3 POSITION TO DO IT UNTIL AFTER YOU'VE DEALT WITH
4 EXHIBITS?

5 MR. GESSLER: I DON'T THINK SO, YOUR HONOR,
6 BECAUSE IT DEPENDS ON WHAT EXHIBITS THE COURT ADMITS
7 THAT MIGHT BE IN DISPUTE; MOST PARTICULARLY, THE
8 CHARTS OF DR. MC CARTHY OR THE ILLUSTRATIONS OR
9 WHATEVER WE NOW WANT TO CALL THEM.

10 THE COURT: ALL RIGHT. WELL, I'LL GIVE YOU
11 UNTIL WE ARGUE THE EXHIBITS TO THEN ARGUE YOUR
12 MOTION UNDER 1118.1. BUT I DON'T WANT TO GET THESE
13 THINGS DELAYED TOO MUCH.

14 MR. GESSLER: I DON'T EITHER, YOUR HONOR. I
15 JUST -- LIKE I SAY, THE PART ABOUT THE
16 CONSTITUTIONALITY UNDER THE SIXTH, EIGHTH AND
17 FOURTEENTH AMENDMENTS IS INDEPENDENT OF ANY EVIDENCE
18 THAT IS PRESENTED IN THIS CASE OR AT THIS TIME OR
19 ANY OTHER.

20 THE COURT: THAT'S THE ARGUMENTS THAT HAVE
21 PREVIOUSLY BEEN MADE BASICALLY?

22 MR. GESSLER: THEY'VE BASICALLY PREVIOUSLY
23 BEEN MADE, BUT IT'S ON THE OVERBREATH OF
24 LYING-IN-WAIT SPECIAL CIRCUMSTANCE AS WRITTEN AND AS
25 INTERPRETED BY OUR STATE SUPREME COURT AND
26 DECISIONS.

27 AND I DO TAKE A DIFFERENT POSITION FROM
28 THAT OF MR. BURT IN 1993. AT THAT TIME --

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1 THE COURT: OKAY. RATHER THAN GETTING INTO
2 IT, IF YOU WANT TO ARGUE IT, I'LL CERTAINLY GIVE YOU
3 THE OPPORTUNITY TO DO THAT. BUT IF IT'S DIFFERENT
4 THAN WHAT WAS PRESENTED BEFORE, THEN WE'LL DO IT ALL
5 AT ONCE.

6 MR. GESSLER: ALL RIGHT. I JUST WANTED TO
7 LET THE COURT KNOW IT'S DIFFERENT IN BREADTH AND
8 THAT I DO NOT CONCEDE THAT MORALES, IF YOU FOLLOW
9 MORALES, THAT THAT SATISFIES THE PROBLEM BASICALLY.
10 I THINK EVEN THAT MORALES IS SUSPECT UNDER
11 CONSTITUTIONAL TESTS, BOTH IT AND ITS PRODIGIES.

12 THE COURT: OKAY. ALL RIGHT.

13 MR. GESSLER: THE OTHER THING, YOUR HONOR,
14 HAS THE COURT RULED OR BEEN ABLE TO RULE ON THE
15 OUT-OF-STATE WITNESS REQUEST?

16 THE COURT: I LOOKED AT IT. I REALLY DIDN'T
17 STUDY IT IN DEPTH. THERE ARE ACTUALLY TWO REQUESTS.

18 MR. GESSLER: THEY'RE ALTERNATIVE, YOUR
19 HONOR. THE FIRST IS REQUEST FOR ATTENDANCE OF
20 OUT-OF-STATE WITNESS. THE SECOND ONE IS ACTUALLY
21 ALMOST A FALL-BACK POSITION BECAUSE I BELIEVE ONE OF

22 THE REQUIREMENTS FOR THE OUT-OF-STATE COMMISSION IS
23 UNAVAILABILITY, AND THE UNAVAILABILITY WOULD BE IF
24 THE COURT DENIES OUR FIRST ONE, WHICH IS THE ONE
25 THAT WE'RE ASKING FOR FIRST; THAT IS, THE ATTENDANCE
26 OF THE OUT-OF-STATE WITNESS. EVEN THOUGH IT'S FOR A
27 VERY QUICK TESTIMONY, IT IS ESSENTIAL SINCE THE
28 PROSECUTION IS OBJECTING TO IT.

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1 THE COURT: WELL, AS I SAID, I HAVEN'T READ
2 THE DECLARATION. I READ THE DOCUMENT ITSELF, THE
3 HANDWRITTEN DOCUMENT, BUT I DIDN'T READ THE
4 DECLARATION AND WHATEVER ARGUMENT YOU'VE PUT IT IN
5 AS FAR AS MATERIALITY AND RELEVANCE. I DON'T KNOW
6 IF THERE IS ANY IN THERE.

7 MR. GESSLER: YES, THERE IS, YOUR HONOR. THE
8 MATERIALITY AND RELEVANCE GOES LARGELY TO THE
9 GENUINENESS OF ANY DOCUMENT WRITTEN BY LYLE MENENDEZ
10 BECAUSE OF OTHER ASPECTS OF DOCUMENTS WRITTEN BY
11 HIM, MOST PARTICULARLY THE BRIAN ESLAMINIA EVIDENCE
12 PRESENTED BY THE PEOPLE.

13 THE COURT: OKAY. LET ME ASK YOU THIS: I
14 HAVEN'T READ THE MATERIAL, SO I'M A LITTLE BIT IN
15 THE DARK. BUT ASSUMING YOUR CLIENT DOESN'T TESTIFY,
16 HOW WOULD THIS BE ADMISSIBLE EVIDENCE?

17 MR. GESSLER: IT, I BELIEVE, IS ADMISSIBLE
18 BECAUSE OF THE PROPOSED TESTIMONY OF DR. JOHN WILSON
19 WHO IS ALSO LOOKING AT AND RELYING UPON THIS
20 DOCUMENT FOR SOME OF HIS OPINIONS.

21 THE COURT: AND HOW DOES HE COME TO AN
22 INTERPRETATION OF IT OTHER THAN THROUGH STATEMENTS
23 OF YOUR CLIENT?

24 MR. GESSLER: THROUGH ALSO STATEMENTS OF ERIK
25 MENENDEZ, YOUR HONOR.

26 THE COURT: AND HOW DOES ERIK MENENDEZ KNOW
27 THE MEANING OR SIGNIFICANCE OF THAT DOCUMENT?

28 MR. GESSLER: WELL, I BELIEVE THAT HE HAS

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1 DISCUSSED THIS DOCUMENT WITH DR. WILSON, YOUR HONOR.

2 THE COURT: WELL, I MEAN, HOW DOES HE KNOW
3 THE SIGNIFICANCE? WHAT IS IT -- HE WASN'T THE AUTHOR
4 OF IT.

5 MR. GESSLER: HE WAS NOT THE AUTHOR OF IT,
6 YOUR HONOR, BUT HE HAS KNOWLEDGE OF IT.

7 THE COURT: AS OF WHEN?

8 MR. GESSLER: YOUR HONOR, I THINK WE'RE
9 GETTING INTO DISCOVERY OF PROPOSED TESTIMONY OF A
10 DEFENDANT.

11 THE COURT: I'M JUST TRYING TO -- I'M JUST

12 TRYING TO FIND OUT IF IT'S RELEVANT.

13 MR. GESSLER: I KNOW.

14 THE COURT: AND AT THIS POINT THE ONLY WAY I
15 COULD SEE IT BEING RELEVANT WOULD BE IF LYLE
16 MENENDEZ WAS TO TESTIFY AND WAS TO AUTHENTICATE THIS
17 DOCUMENT AND IT BECAME RELEVANT DURING HIS
18 TESTIMONY.

19 MR. LEVIN: I THINK WHAT I CAN SAY, YOUR
20 HONOR, WITH RESPECT TO ERIK MENENDEZ, IS THAT ERIK
21 MENENDEZ IS AWARE OF THE CONTENTS OF THIS PARTICULAR
22 DOCUMENT LONG BEFORE AUGUST 20TH, 1989; AND THERE IS
23 CERTAIN INFORMATION THAT IS RELIED UPON OR BELIEVED
24 TO BE TRUE WITHIN THAT DOCUMENT THAT HAS A DIRECT
25 BEARING UPON ERIK MENENDEZ' STATE OF MIND WITH
26 RESPECT TO THE EVENTS PRECEDING THE HOMICIDE ON THE
27 20TH.

28 THE COURT: I'D HAVE TO HEAR THAT TESTIMONY

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1 BEFORE I CAN RULE ON THIS.

2 MR. GESSLER: THE PROBLEM THEN BECOMES, YOUR
3 HONOR, A DELAY THAT MIGHT BE NECESSITATED IN THE
4 TRIAL IF THE COURT DID NOT RULE IT RELEVANT UNTIL
5 SUCH TIME AS DR. WILSON HAD TESTIFIED. WE THEN
6 WOULD HAVE TO GET THE DOCUMENTS BACK TO NEW JERSEY,

7 SET UP A HEARING IN NEW JERSEY FOR THE WITNESS WHO'S
8 ENTITLED TO CERTAIN NOTICE AND REPRESENTATION THERE,
9 AND THEN DECIDING WHETHER OR NOT SHE SHALL BE
10 ORDERED TO COME OUT TO CALIFORNIA TO GIVE THE
11 TESTIMONY.

12 THE COURT: WELL, AGAIN, I COULDN'T SIGN A
13 DECLARATION SAYING THAT THIS IS MATERIAL EVIDENCE
14 BECAUSE I CAN'T FIND AT THIS POINT THAT IT IS FROM
15 WHAT'S BEEN PRESENTED TO ME. I WOULD BE
16 HARD-PRESSED TO SAY THAT IT WOULD BE ADMISSIBLE OR
17 RELEVANT EVIDENCE. SO I COULDN'T SIGN THE
18 DOCUMENT. I WOULD HAVE TO DECLINE OR RULE AGAINST
19 YOU ON IT. I JUST DON'T SEE HOW IT'S ADMISSIBLE OR
20 RELEVANT AT THIS POINT FROM WHAT'S BEEN PRESENTED TO
21 ME.

22 MR. GESSLER: IF THE COURT IS GOING TO RULE
23 AGAINST BRINGING THE WITNESS OUT, WOULD THE COURT
24 THEN CONSIDER THE ALTERNATIVE OF THE
25 INTERROGATORIES-TYPE PROCEDURE, WHICH THEN, IF THE
26 COURT RULES IT'S IRRELEVANT, IT'S NOT A GREAT WASTE
27 OF TIME AND EFFORT BY EVERYBODY IN NEW JERSEY; IT'S
28 SIMPLY AN INTERROGATORIES PROCEDURE OR COMMISSIONED

1 PROCEDURE. AND IT WOULD THEN TAKE AWAY THE

2 NECESSARY DELAY IF THE COURT, AFTER HEARING THE
3 DEFENSE EVIDENCE, DOES AGREE WITH US THAT IT'S
4 RELEVANT.

5 THE COURT: WELL, IS THIS WOMAN RESISTENT TO
6 COMING HERE?

7 MR. GESSLER: SHE BASICALLY IS RESISTENT,
8 YOUR HONOR. WE HAVE NOT SPECIFICALLY ASKED HER TO
9 COME OUT HERE, BUT FROM PRIOR CONVERSATIONS I CAN
10 TELL THE COURT SHE'S RESISTENT.

11 THE COURT: OKAY. WELL, AT THIS POINT I'LL
12 READ YOUR MATERIAL AND GET A BETTER FEEL FOR IT.
13 I'LL HAVE TO GIVE YOU INFORMATION ON MONDAY AS TO
14 HOW I FEEL.

15 MR. GESSLER: I WOULD ASK THE COURT TO
16 CONSIDER THE DECLARATION.

17 THE COURT: AS I SAID, I'M JUST GIVING YOU MY
18 OFF-THE-TOP-OF-MY-HEAD REACTION TO LOOKING AT THE
19 DOCUMENT ITSELF, THE HANDWRITTEN DOCUMENT, AS TO HOW
20 I REACTED TO IT WITHOUT READING YOUR DECLARATION.

21 I HAVEN'T HEARD THE PEOPLE'S POSITION
22 YET AS TO -- THEIR POSITION AS TO AUTHENTICATION OF
23 THE DOCUMENT OR ITS ADMISSIBILITY. BUT I'LL
24 CERTAINLY HEAR FROM THEM AS WELL. I WANT TO READ IT
25 FIRST. I JUST GOT IT THIS AFTERNOON. AND I'LL LET
26 YOU KNOW ON MONDAY.

27 MR. GESSLER: THANK YOU VERY MUCH, YOUR
28 HONOR.

1 THE COURT: ANYTHING ELSE NOW?

2 MS. ABRAMSON: NO, YOUR HONOR.

3 THE COURT: OKAY. WE'LL BE IN RECESS UNTIL
4 MONDAY AT 8:30.

5 (AT 3:40 P.M., AN ADJOURNMENT
6 WAS TAKEN UNTIL MONDAY,
7 NOVEMBER 26, 1995, AT 8:30 A.M.)

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
5 THE PEOPLE OF THE STATE OF)
6 CALIFORNIA,)

7)
8 PLAINTIFFS,)

9)
10 VS.) NO. BA 068880

11)
12 ERIK GALEN MENENDEZ, AND)
13 JOSEPH LYLE MENENDEZ,)

14)
15 DEFENDANTS.)

16)

17 REPORTERS' DAILY TRANSCRIPT OF PROCEEDINGS

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1 APPEARANCES:

2

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AND

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G = MR. GESSLER L = MR. LEVIN
N = MS. NAJERA T = MS. TOWERY

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