

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DOCKET
No. 88DA0269
Entered by _____
Date _____

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
PLAINTIFF-RESPONDENT,)
)
VS.)
)
JOE HUNT, AKA JOSEPH HUNT,)
AKA JOSEPH HENRY GAMSKY,)
)
DEFENDANT-APPELLANT.)

SUPERIOR COURT
NO. A-090435

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE LAURENCE J. RITTENBAND, JUDGE PRESIDING
REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: JOHN K. VAN DE KAMP
STATE ATTORNEY GENERAL
3580 WILSHIRE BOULEVARD
ROOM 800
LOS ANGELES, CALIFORNIA 90010

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

VOLUME 77 OF 101
(PAGES 12499 TO 12667, INCLUSIVE)

COPY

ROSEMARIE GOODBODY, CSR NO. 932
SALLY YERGER, CSR NO. 2008
OFFICIAL REPORTERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WEST C

HON. LAURENCE J. RITTENBAND, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
) PLAINTIFF,)
)
) VS.)
)
) JOSEPH HUNT,)
)
) DEFENDANT.)

NO. A-090435

REPORTERS' DAILY TRANSCRIPT

THURSDAY, APRIL 9, 1987

VOLUME 79

PAGES 12499 TO 12667 INCL.

APPEARANCES:

FOR THE PLAINTIFF: IRA REINER, DISTRICT ATTORNEY
BY: FREDERICK N. WAPNER, DEPUTY
1725 MAIN STREET
SANTA MONICA, CALIFORNIA 90401

FOR THE DEFENDANT: ARTHUR H. BARENS, ESQ.
10209 SANTA MONICA BOULEVARD
LOS ANGELES, CALIFORNIA 90067

AND

RICHARD C. CHIER, ESQ.
10920 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90024

ROSEMARIE GOODBODY, CSR NO. 932
SALLY YERGER, CSR NO. 2008
OFFICIAL REPORTERS

COPY

1 SANTA MONICA, CALIFORNIA; THURSDAY, APRIL 9, 1987; 10:55 A.M.
2 DEPARTMENT WEST C HON. LAURENCE J. RITTENBAND, JUDGE
3 (APPEARANCES AS NOTED ON TITLE PAGE.)
4

5 (THE FOLLOWING PROCEEDINGS WERE HELD
6 IN CHAMBERS:)

7 THE COURT: ALL RIGHT. 100, IS THERE ANY DIFFERENCE
8 BETWEEN THE PRINTED INSTRUCTION AND THE ONE THAT YOU HAVE
9 SUBMITTED?

10 MR. BARENS: YOUR HONOR, I WOULD DEFER TO MR. CHIER,
11 WHO PREPARED THIS PAPERWORK, SIR.

12 THE COURT: IS THERE ANY DIFFERENCE BETWEEN THAT AND
13 THE OTHER INSTRUCTION?

14 MR. CHIER: NO. I TOOK IT STRAIGHT FROM THE BOOK,
15 YOUR HONOR.

16 THE COURT: THEN THERE IS NO QUESTION ABOUT THAT.

17 MR. CHIER: IS THAT GIVEN?

18 THE COURT: YES, THAT WILL BE GIVEN.

19 MR. BARENS: WHAT NUMBER IS THAT?

20 MR. CHIER: THAT IS REQUEST NO. 1.

21 THE COURT: THAT IS 100.

22 ALL RIGHT. 101, IS THERE ANY DIFFERENCE
23 BETWEEN THEM?

24 MR. CHIER: NO.

25 THE COURT: ALL RIGHT, EXCEPT THAT THERE IS A
26 GRAMMATICAL ERROR THAT I WILL CHANGE, THAT IS IN THE LAST
27 SENTENCE:

28 "THE ORDER IN WHICH THE INSTRUCTIONS

1 IS GIVEN" INSTEAD OF "ARE."

2 ALL RIGHT, THERE IS NO DISPUTE AS TO THAT.

3 NOW THE NEXT IS 102. IS THERE ANY DIFFERENCE
4 IN YOURS?

5 MR. CHIER: NO, NO.

6 THE COURT: ALL RIGHT, THAT IS 102.

7 HOW ARE WE GOING TO DO THAT OR ARE WE GOING TO
8 DO IT IN THE PLURAL, THESE OFFENSES, BECAUSE ONE IS MURDER
9 AND THE OTHER IS ROBBERY, ISN'T THAT RIGHT, AREN'T THERE TWO
10 COUNTS?

11 MR. WAPNER: IS THIS 102?

12 THE COURT: NO, 100.

13 "AS JURORS YOU MUST NOT BE INFLUENCED
14 BY PITY FOR A DEFENDANT OR BY PREJUDICE AGAINST
15 HIM. YOU MUST NOT BE BIASED AGAINST THE DEFENDANT
16 BECAUSE HE HAS BEEN ARRESTED FOR THIS OFFENSE" OR
17 "THESE OFFENSES," ISN'T IT MURDER, ISN'T THAT RIGHT?

18 MR. WAPNER: THAT IS FINE, YEAH, IT WAS DEFINITELY.

19 THE COURT: THERE ARE TWO CHARGES, AREN'T THERE?

20 MR. WAPNER: HE IS DEFINITELY CHARGED WITH TWO CHARGES
21 IN THE INFORMATION.

22 THE COURT: ALL RIGHT, "OR BECAUSE HE HAS BEEN CHARGED
23 WITH CRIMES."

24 ALL RIGHT, THAT IS 100.

25 NOW, 102. ALL RIGHT --

26 MR. CHIER: I SUBMITTED A SET OF CLEAN COPIES, ALONG
27 WITH THE REQUESTED COPIES, YOUR HONOR.

28 THE COURT: YES, BUT THESE CHANGES HAVE TO BE MADE IN

1 ANY EVENT.

2 MR. CHIER: I UNDERSTAND. I JUST WANTED YOU TO BE AWARE
3 OF THAT.

4 THE COURT: I HAVE TAKEN THE PRINTED INSTRUCTIONS BECAUSE
5 THE REASON FOR THAT IS THE CLERK TAKES OFF THIS PART RIGHT
6 HERE AND ONLY THIS PART IS GIVEN TO THE JURY AND THEN THIS
7 SHOWS WHAT THE DISPOSITION OF THAT PARTICULAR INSTRUCTION IS
8 SO YOURS DOESN'T CONTAIN THAT. SO, THEREFORE, WE USE THIS
9 FORM INSTEAD.

10 MR. BARENS: THAT IS CLEVER.

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1 THE COURT: ALL RIGHT, ON 110, YOU DIDN'T SUBMIT
2 ANYTHING. 110, FOR THE SAKE OF CONVENIENCE, THE MASCULINE
3 PRONOUN APPLIES EQUALLY TO ALL PERSONS -- SO, WE HAVE THE
4 PRINTED FORM. YOURS IS JUST A MIMEOGRAPHED THING.

5 MR. WAPNER: RIGHT.

6 THE COURT: I WILL GET THAT.

7 NOW, 200, IS THERE ANY DIFFERENCE BETWEEN
8 THE PRINTED INSTRUCTION AND YOUR REQUESTED INSTRUCTION?

9 MR. CHIER: NO, YOUR HONOR.

10 THE COURT: ALL RIGHT. THE NEXT THAT YOU HAVE IS
11 202. WE'LL COME TO YOURS LATER.

12 DO YOU HAVE A 202? I DON'T SEE --

13 MR. WAPNER: I HAVE A 202, BUT YOU GUYS DON'T
14 HAVE A 201.

15 MR. BARENS: I'LL LOOK OVER YOUR SHOULDER, IF YOU DON'T
16 MIND.

17 THE COURT: THEY HAVE NOT GOT A 201. IS THERE
18 ANYTHING THAT YOU OBJECT TO IN 201?

19 MR. CHIER: YOUR HONOR --

20 THE COURT: CIRCUMSTANTIAL EVIDENCE GENERALLY?

21 MR. CHIER: NO, YOUR HONOR. DIDN'T WE REQUEST THAT?

22 THE COURT: NO. I DON'T SEE ANYTHING HERE.

23 THE NEXT ONE IS 209. IT MAY BE DOWN THE
24 LINE. BUT I DON'T SEE IT.

25 ALL RIGHT. THERE IS NO OBJECTION THEN TO
26 201.

27 THE NEXT IS 202. WHICH YOU DON'T HAVE.
28 THAT IS SPECIFIC INTENT. ROBBERY IS SPECIFIC INTENT.

1 MR. WAPNER: SO IS MURDER, MALICE.

2 THE COURT: DO YOU HAVE ANY OBJECTION TO 202?

3 MR. CHIER: 202 IS FROM --

4 THE COURT: HERE. WHY DON'T YOU FOLLOW THAT?

5 MR. CHIER: I HAVE IT RIGHT HERE.

6 MR. WAPNER: I GAVE COUNSEL A COPY OF ALL OF THE
7 INSTRUCTIONS.

8 MR. CHIER: IS IT JUST A ONE-PAGE INSTRUCTION?

9 MR. WAPNER: YES.

10 THE COURT: YES. ALL RIGHT. WHAT I DO IS, I CROSS
11 OUT THE "OR MENTAL STATE" ALL THROUGHOUT WHERE "MENTAL STATE"
12 IS STATED.

13 MR. CHIER: CHARGED IN COUNTS I AND II -- THAT WOULD
14 BE IT?

15 THE COURT: YES. "THE SPECIFIC INTENT WITH WHICH AN
16 ACT IS DONE MAY BE SHOWN BY THE CIRCUMSTANCES SURROUNDING
17 THE COMMISSION OF THE ACT BUT YOU MAY NOT FIND THE DEFENDANT
18 GUILTY OF THE OFFENSES CHARGED IN COUNTS I AND II UNLESS
19 THE PROVED CIRCUMSTANCES ARE NOT ONLY ..." ET CETERA, ET
20 CETERA.

21 OKAY, THEN?

22 MR. CHIER: THE FIRST PARAGRAPH?

23 THE COURT: YES. THE FIRST PARAGRAPH.

24 MR. CHIER: YES.

25 THE COURT: THE SECOND PARAGRAPH, WE CROSS OUT ALL
26 "MENTAL STATES". ALL RIGHT?

27 MR. CHIER: YES.

28 THE COURT: ALL RIGHT. NOW, ON 203 YOU HAVE

1 NOT GOT --

2 MR. CHIER: I HAVE NOT GOT IT. I DON'T THINK IT IS
3 APPLICABLE. THE PEOPLE HAVE THAT.

4 MR. WAPNER: I PUT THAT IN HERE SPECIFICALLY WITH
5 REFERENCE TO THE TESTIMONY BY DETECTIVE ZOELLER THAT HE
6 SHOWED THE DEFENDANT THE SEVEN PAGES OF YELLOW PAPER OR COPIES
7 OF THEM AND ASKED HIM, "WHAT DO YOU KNOW ABOUT THOSE?" AND
8 HE SAID, "I DON'T KNOW ANYTHING ABOUT THOSE."

9 AND TO THE EXTENT THAT THERE IS OTHER EVIDENCE
10 THAT IN FACT, HE WROTE THEM AND THEY HAVE HIS FINGERPRINTS,
11 I THINK A REASONABLE INFERENCE CAN BE DRAWN THAT THAT WAS
12 A FALSE STATEMENT, TO WIT, THAT HE DID NOT KNOW ANYTHING
13 ABOUT THEM.

14 AND WHAT HE KNEW ABOUT THEM IS MAYBE, OPEN TO
15 QUESTION. BUT THE REASON I PUT IN HERE ABOUT CONSCIOUSNESS
16 OF GUILT AND FALSEHOOD IS BASED ON HIS REACTION, THE
17 DEFENDANT'S REACTION AND THE STATEMENT.

18 MR. CHIER: WELL --

19 THE COURT: ANY OBJECTION?

20 MR. CHIER: I DON'T THINK THAT THAT IS THE FACT PATTERN
21 THAT SUPPORTS THIS INSTRUCTION, YOUR HONOR. I WOULD OBJECT
22 TO THIS INSTRUCTION.

23 THE COURT: ALL RIGHT. LET THE RECORD INDICATE THAT
24 HE IS OBJECTING TO .203. I WILL GIVE IT.

25 NEXT, YOU HAVE AN INSTRUCTION. WHERE DID YOU
26 GET THIS 209?

27 MR. CHIER: I HAVE JUST USED 209 AS A KIND OF
28 A TEMPLATE HERE.

1 THE COURT: EVIDENCE LIMITED AS TO PURPOSE?

2 MR. CHIER: IT IS A SUBSTANTIAL REVISION OF 209.

3 THE COURT: THIS DOES NOT HAVE THE REMOTEST RESEMBLANCE
4 TO 209.

5 MR. CHIER: AS I STARTED TO SAY --

6 THE COURT: 209 IS WHERE EVIDENCE IS RECEIVED
7 AS TO A LIMITED PURPOSE AND THE JURY IS INFORMED AT THE TIME
8 THAT IT IS LIMITED FOR A PARTICULAR PURPOSE.

9 THIS ONE THAT YOU HAVE, 209 HAS NOT THE
10 SLIGHTEST RESEMBLANCE TO WHAT WAS INTENDED UNDER
11 AS PRINTED.

12 MR. CHIER: WELL, THE PROBLEM IS --

13 THE COURT: HERE, YOU GET FORMULA INSTRUCTIONS AND
14 ALL REFERENCES TO CHICAGO MERCHANTILE EXCHANGE AND ALL
15 REFERENCES TO THE MANNER IN WHICH THE INVESTORS WERE TREATED
16 BY HUNT -- THAT IS NOT AN INSTRUCTION.

17 THEN YOU TELL ME THAT YOU WANT ME TO INSTRUCT
18 THEM THAT CERTAIN EVIDENCE WAS ADMITTED IN ERROR. YOU MEAN
19 I CAN -- DO YOU WANT ME TO SAY THAT IT IS ERROR FOR ME TO
20 HAVE ADMITTED IT?

21 IF I ADMITTED IT IN ERROR, I SHOULD HAVE STRICKEN
22 IT.

23 MR. CHIER: COULD I BE HEARD?

24 THE COURT: GO AHEAD.

25 MR. CHIER: THOSE MATTERS WERE ADMITTED OVER THE
26 OBJECTION OF THE DEFENDANT. WE REQUESTED THE LIMITING
27 INSTRUCTION BE GIVEN WITH RESPECT TO THE ADMISSION OF THOSE
28 THINGS.

1 THESE ARE IN THE NATURE OF EITHER NEGATIVE
2 CHARACTER REFERENCES AND THEY SHOULD NOT BE ADMITTED IN THIS
3 CASE FOR THE PURPOSE OF PROVING THE DEFENDANT'S GUILT OR
4 THAT HE HAD GENERALLY A BAD PREDISPOSITION.

5 SO IF THERE WAS A CORRECT BASIS FOR THEIR BEING
6 RECEIVED INTO EVIDENCE, I DON'T KNOW WHAT IT IS.

7 THE COURT: WHAT DO YOU WANT ME TO DO NOW? INSTRUCT
8 THE JURY BY THIS INSTRUCTION THAT ALL OF THE EVIDENCE WHICH
9 I ADMITTED ON THESE PARTICULAR SUBJECTS IS INCORRECT AND
10 THEY SHOULD DISREGARD IT?

11 MR. CHIER: EITHER THAT OR STATE THE SPECIFIC BASIS
12 FOR WHICH THEY WERE ADMITTED.

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1 THE COURT: ALL RIGHT, I HAVE MARKED IT "REFUSED."

2 MR. BARENS: COULD I BE JUST HEARD BRIEFLY JUST AS TO
3 ONE THING ON THAT, SIR?

4 THE COURT: GO AHEAD.

5 MR. BARENS: SIR, FOR THE LIFE OF ME, I CANNOT UNDERSTAND
6 WHY THE JURY SHOULD BE PERMITTED TO CONSIDER THAT RAMBO
7 BUSINESS IN REACHING A DECISION ON THE GUILT OR INNOCENCE OF
8 MR. HUNT.

9 THAT RAMBO BUSINESS, I BELIEVE YOUR HONOR SHOULD
10 JUST SAY TO THE JURY HAS BEEN STRICKEN, BECAUSE IT WAS NEVER
11 CONNECTED UP IN ANY WAY AS FORMING A TEMPLATE FOR THE ALLEGED
12 HOMICIDE IN THIS CASE.

13 THE COURT: WHAT WAS THAT AGAIN? REFRESH MY MEMORY.

14 MR. BARENS: SOME OF THE BBC YOUNG MEN SAID THEY WERE
15 WATCHING A MOVIE AT THE OFFICES ONE DAY AND THERE WAS A PART
16 OF THE MOVIE WHERE A YOUNG BOY --

17 THE COURT: I REMEMBER THAT.

18 MR. BARENS: DO YOU REMEMBER THAT?

19 THE COURT: YES.

20 MR. BARENS: I DON'T SEE WHERE THAT HAS ANY RELEVANCY,
21 HUNT'S COMMENTS OR ANYBODY ELSE'S COMMENTS WHEN WATCHING A
22 MOVIE. THERE WAS NO TYING THAT UP THAT THERE WAS ANYTHING
23 ABOUT THAT THAT HAD TO DO WITH HOW LEVIN MAY OR MAY NOT
24 HAVE MET HIS FATE, OR ANYBODY ELSE IN THIS SETTING HERE.

25 MR. WAPNER: I CAN'T POINT TO THE SPECIFIC TESTIMONY
26 RIGHT NOW, BUT MY RECOLLECTION IS THERE WAS TESTIMONY BY AT
27 LEAST ONE OF THE MEMBERS OF THE BBC THAT THIS EXAMPLE FROM
28 THE MOVIE WAS USED BY WAY OF AN EXPLANATION OF THE PARADOX

1 PHILOSOPHY TO THEM. I CAN'T PUT MY FINGER ON THE EXACT
2 TESTIMONY AT THE MOMENT.

3 MR. BARENS: YOUR HONOR, IN SENSITIVITY TO MR. WAPNER'S
4 POINT, I RECALL WHAT HE IS TRYING TO RECALL AND THE ANSWER
5 IS, IT WAS NOT MENTIONED IN TERMS OF THE PARADOX PHILOSOPHY
6 BUT RATHER --

7 THE COURT: IT HAD TO DO WITH THE PARADOX PHILOSOPHY,
8 THE ATTITUDE OF THE DEFENDANT TOWARDS THE PHILOSOPHY THAT THE
9 ENDS JUSTIFIED THE MEANS, THAT IRRESPECTIVE OF WHO IS GOING
10 TO BE HURT BY ANYTHING, THAT THE END IS A DESIRABLE THING,
11 IT SHOULD BE DONE AND I THINK THAT WAS THE ILLUSTRATION.

12 IF I REMEMBER CORRECTLY, HE SAID HE SHOULD HAVE
13 BEEN KILLED SO, THEREFORE, ALL OF THE OTHER PEOPLE WOULDN'T
14 HAVE BEEN WIPED OUT OR INVADED OR FOUGHT WITH THE GUY.

15 MR. BARENS: THE SECOND THING ON THIS SAME PAGE, NO. 5,
16 CONCERNING MR. HUNT'S INVOLVEMENT --

17 THE COURT: YES, LET'S GET THAT OUT IN THE OPEN.

18 MR. BARENS: HOW IS THE JURY TO EVALUATE THAT?

19 THE COURT: YOUR COLLEAGUE HAS SUBMITTED AN INSTRUCTION
20 TWO FIFTY. I THINK, IN WHICH HE CLAIMS THAT ALL OF THAT SHOULD
21 BE ADMITTED FOR THAT ONE SPECIFIC PURPOSE AND LIMIT IT TO THAT
22 ONE PURPOSE.

23 MR. BARENS: I DON'T THINK THAT THIS JURY, IN DECIDING
24 THE GUILT OR INNOCENCE OF JOE HUNT, SHOULD CONSIDER ANYTHING
25 EXCEPT THIS TRIAL AND WHAT HE DID OR DID NOT DO IN SOUTHERN
26 CALIFORNIA, IF HE HAS TO RECONCILE WITH THAT IN ANOTHER TRIAL,
27 YOUR HONOR, FOR WHICH HE IS HELD TO ANSWER, I DON'T THINK THAT
28 THIS JURY SHOULD BE SITTING IN THAT JURY ROOM SAYING TO EACH

1 OTHER "GEE, I DON'T KNOW WHAT" --

2 THE COURT: WHAT ABOUT YOURS, YOUR COLLEAGUE SUBMITTED
3 AN INSTRUCTION ON THAT, THAT IS TWO FIFTY.

4 MR. BARENS: YOUR HONOR, I AM GOING TO DISAVOW IT.

5 MR. CHIER: WHERE IS THAT?

6 THE COURT: IT IS TWO FIFTY, TAKE A LOOK AT IT.

7 MR. WAPNER: NO. 12.

8 THE COURT: NO. 12.

9 MR. BARENS: YOUR HONOR, I HAVEN'T SEEN THAT BUT BEFORE
10 IT IS EVEN DISCUSSED BY THIS COURT, I AM GOING TO SAY, AND
11 I BELIEVE MR. HUNT, AS I JUST EVEN SKIM THAT, I BELIEVE 12
12 IS REFERENCING OTHER THINGS THAT WERE ATTRIBUTED TO MR. HUNT
13 DURING THE TRIAL.

14 MR. CHIER: COULD I SAY WHY NO. 12 IS IN THERE?

15 THE COURT: IT IS INTRODUCED FOR THE PURPOSE OF SHOWING
16 THE DEFENDANT COMMITTED THE CRIME OTHER THAN THAT FOR WHICH
17 HE IS ON TRIAL.

18 MR. BARENS: YES, YOUR HONOR, THERE WAS TESTIMONY ABOUT
19 BAD THINGS HUNT HAD DONE.

20 MR. CHIER: COULD I SAY WHY THIS IS IN THERE?

21 THE COURT: OTHER CRIMES, YOU ARE TALKING ABOUT?

22 MR. BARENS: YES, THERE WERE.

23 THE COURT: WHAT THINGS?

24 MR. BARENS: LYING, CHEATING AND STEALING, YOUR HONOR.

25 THE COURT: IT HAS NOTHING TO DO WITH THAT.

26 MR. BARENS: I BELIEVE THAT IS WHAT THIS IS HERE FOR.

27 THE COURT: NO.

28 I ASSUME THE SPECIFIC CRIME THIS HAS REFERENCE

1 TO IS THE NORTHERN CALIFORNIA CASE.

2 MR. CHIER: NO, NO, YOUR HONOR.

3 THESE ARE OTHER MISCONDUCT MATTERS THE COURT
4 ADMITTED.

5 THE COURT: LIKE WHAT?

6 MR. CHIER: CONCERNING HIS ALLEGED CHEATING OF THE
7 INVESTORS IN BBC, THE CHICAGO MERCANTILE EXCHANGE AND THERE
8 WERE SOME OTHERS.

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1 MR. BARENS: THERE WAS ALL KINDS OF DIALOGUE, YOUR HONOR,
2 ABOUT HIM PUTTING MONEY IN HIS POCKET THAT THE INVESTORS GAVE
3 HIM.

4 MR. CHIER: EMBEZZLEMENT.

5 THE COURT: YOU WANT THIS WITHDRAWN, TWO FIFTY?

6 MR. BARENS: WELL, YOUR HONOR, UNTIL I GET -- I WOULD
7 LIKE TO FIRST ADDRESS THE PARAGRAPH NO. 5.

8 THE COURT: LET'S FIRST HEAR FROM THE PROSECUTION.

9 MR. BARENS: I SUBMIT VIGOROUSLY, YOUR HONOR, THAT IT
10 IS NOT FAIR FOR THAT JURY TO SIT IN THERE AND SAYING, "WELL,
11 LISTEN, WHAT ABOUT THIS STUFF UP NORTH? DID YOU HEAR ABOUT
12 THAT GUY AND THE GUY'S SON WAS INVOLVED WITH HIM AND THE GUY
13 IS DEAD AND HIS PICTURE WAS IN THE NEWSPAPER?"

14 BECAUSE YOU KNOW THEY HEARD ALL OF THAT KIND OF
15 TALK.

16 THE COURT: DON'T YOU RECALL THAT YOU WERE THE ONE THAT
17 ASKED THE QUESTIONS EVEN ON CROSS-EXAMINATION OF KARNY ABOUT
18 GETTING IMMUNITY FOR A CRIME THAT WAS COMMITTED UP IN
19 NORTHERN CALIFORNIA?

20 MR. BARENS: YES, SIR.

21 MR. CHIER: BUT THE FACT OF THE IMMUNITY WAS --

22 THE COURT: LET'S HEAR FROM THE DISTRICT ATTORNEY, WHOSE
23 SILENCE IS LESS THAN ELOQUENT.

24 MR. WAPNER: I AM JUST WAITING FOR AN OPPORTUNITY.

25 MR. BARENS: I AM SORRY.

26 THE COURT: GO AHEAD.

27 MR. WAPNER: I HAVE NO PROBLEM WITH DRAFTING AN
28 INSTRUCTION TO THE EFFECT THAT THE EVIDENCE OF THE DEFENDANT'S

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1 BEING CHARGED WITH THE CRIME IN NORTHERN CALIFORNIA WAS
2 RECEIVED FOR THE PURPOSE OF PRESENTING A TRUE AND ACCURATE
3 PICTURE OF THE IMMUNITY AGREEMENT TO WHICH HE ENTERED.

4 THE PURPOSE OF TRYING TO LIMIT THE EVIDENCE OF
5 THE NORTHERN CALIFORNIA THING WAS SO THAT WE COULD PLAY THE
6 GAME OF PAINTING DEAN KARNY OUT TO BE A MURDERER IN THIS CASE,
7 AS ANOTHER ALTERNATIVE THEORY OF THE DEFENSE. THE DEFENSES
8 ARE ALREADY IN THE ALTERNATIVE, AS WITNESSED BY THE
9 INSTRUCTIONS THAT ARE SUBMITTED BY THE DEFENSE, THAT WE WILL
10 GET TO, TO WIT, THE ALIBI INSTRUCTION.

11 THE COURT: WHY DON'T YOU DRAFT AN INSTRUCTION ALONG
12 THE LINES YOU HAVE SUGGESTED, IT IS LIMITED FOR THE PURPOSE
13 OF EXPLAINING THE IMMUNITY UP NORTH.

14 MR. BARENS: CAN'T WE SAY TO THE JURY: "LADIES AND
15 GENTLEMEN, YOU ARE NOT TO CONSIDER WHETHER MR. HUNT COMMITTED
16 A CRIME IN NORTHERN CALIFORNIA OR NOT IN DETERMINING WHETHER
17 HE COMMITTED A CRIME IN THIS CASE."

18 THE COURT: NO, I CAN'T SAY IT THAT WAY.

19 MR. CHIER: THAT IS THE LAW, JUDGE.

20 MR. BARENS: WHY NOT?

21 THE COURT: THE LAW IS THAT ONCE YOU MAKE AN ISSUE OF
22 A CRIME COMMITTED OUTSIDE OF THIS PARTICULAR CRIME, WHICH YOU
23 DID, IT MAY BE CONSIDERED BY THE JURY, AS INDICATED, FOR THE
24 PURPOSE OF SHOWING --

25 MR. CHIER: INTENT?

26 THE COURT: YOU DRAFT IT THE WAY I HAVE INDICATED IT
27 TO YOU.

28 MR. BARENS: COULD WE, THOUGH, BEFORE IT IS GIVEN, HAVE

1 FURTHER COMMENT ON THAT?

2 THE COURT: YES.

3 MR. BARENS: THANK YOU.

4 THE COURT: OF COURSE.

5 MR. BARENS: YOUR HONOR, THIS BUSINESS ABOUT -- JUST
6 WHILE WE ARE HERE ON THIS -- MAYBE WE SHOULD REFERENCE TO IT
7 SPECIFICALLY BECAUSE THIS COULD BECOME A BIG THING LATER,
8 YOUR HONOR REMEMBERS THOSE REFERENCES ABOUT HIM GETTING KICKED
9 OFF THE CHICAGO MERCANTILE EXCHANGE, AND I DON'T KNOW WHY THAT
10 SHOULD BE CONSIDERED BY THIS JURY.

11 MR. WAPNER: I DON'T REMEMBER IN WHAT CONTEXT IT FIRST
12 CAME UP, BUT MR. KARNY WAS CERTAINLY EXAMINED AND, AT THE VERY
13 LEAST, CROSS-EXAMINED ABOUT THAT AND IT CAME OUT AGAIN AS
14 ANOTHER EXAMPLE OF HOW MR. HUNT USED THE PARADOX PHILOSOPHY,
15 TO TAKE SOMETHING THAT WAS INITIALLY BAD AND TURN IT INTO
16 SOMETHING THAT WAS GOOD AND IT WAS THE FOCUS OF THE CROSS-
17 EXAMINATION, OR ONE OF THE FOCUSES OF THE CROSS-EXAMINATION
18 OF MR. KARNY.

19 THE COURT: ALL RIGHT, I WILL REFUSE REQUEST NO. 5 IN
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1 THE COURT: EXCEPT YOU ARE TO DRAFT AN INSTRUCTION
2 WITH REFERENCE TO THE NORTHERN CALIFORNIA INCIDENT.

3 MR. WAPNER: OKAY. I WILL DRAFT AN INSTRUCTION WITH
4 RESPECT TO THE NORTHERN CALIFORNIA INCIDENT AND ALSO, DOES
5 THE COURT WANT TO CONTINUE GIVING -- WELL, LET ME SAY THIS.
6 I DIDN'T PUT IT ON MY LIST OR INCLUDE IT IN THE INSTRUCTIONS
7 BUT I AM REQUESTING NOW THAT THE COURT GIVE 2.09, CALJIC.

8 THE COURT: EVIDENCE LIMITED AS TO A PURPOSE?

9 MR. WAPNER: RIGHT. WE HAD SOME EVIDENCE. I DON'T
10 REMEMBER WHAT IT WAS, TO TELL YOU THE TRUTH.

11 BUT I KNOW THERE WERE AT LEAST A FEW INSTANCES
12 DURING THE TRIAL --

13 THE COURT: SUPPOSE THE JURY ASKS ME WHICH EVIDENCE
14 YOU HAVE REFERENCE TO IN THAT INSTRUCTION? WHAT AM I GOING
15 TO SAY TO THEM? I NEVER TOLD THE JURY THAT THEY WERE LIMITED
16 TO ANY PARTICULAR -- AS TO WHY EVIDENCE WAS LIMITED TO ANY
17 PARTICULAR PURPOSE.

18 DO YOU REMEMBER ANY?

19 MR. BARENS: I AM TRYING TO REMEMBER.

20 MR. CHIER: WE REQUESTED THAT YOU DO SO.

21 THE COURT: WHERE?

22 MR. CHIER: WE SUBMITTED A FORMAL REQUEST THAT YOU
23 GIVE THEM LIMITING INSTRUCTIONS AS TO THE PURPOSE --

24 THE COURT: YOUR 209 HAS NOTHING TO DO WITH
25 THIS PRINTED INSTRUCTION.

26 MR. BARENS: NO. I THINK MR. CHIER IS ADDRESSING SOME-
27 THING ELSE. I REMEMBER THAT NOW.

28 WE DID SUBMIT SOME LIMITING INSTRUCTIONS IN

1 WRITING.

2 MR. CHIER: I DON'T KNOW THAT THERE WAS A DISPOSITION
3 OF THE REQUEST. ONE HAD TO DO WITH THE PATRICIDE ISSUE AND
4 THE OTHER ONE HAD TO DO WITH THE --

5 MR. BARENS: IT WAS THE SAME DAY --

6 MR. CHIER: THE BAD CHARACTER THING ABOUT YOUR HONOR
7 READING --

8 MR. BARENS: THAT WAS THE NEWSPAPER ARTICLE THAT --

9 MR. CHIER: CROSS-EXAMINING THE WITNESS, MRS. LYNN
10 ROBERTS CONCERNING THIS --

11 THE COURT: DID I MAKE A LIMITING INSTRUCTION?

12 MR. CHIER: WE ASKED FOR IT. I DON'T THINK IT HAS
13 EVER BEEN RESOLVED.

14 THE COURT: I KNOW. I DENIED THAT. DO YOU WANT
15 209? I DON'T KNOW THAT I TOLD THE JURY ABOUT WHAT THE
16 EVIDENCE WAS TO BE LIMITED TO.

17 MR. WAPNER: I CAN'T POINT YOU TO A SPECIFIC INSTANCE.
18 I DON'T THINK THERE IS ANY. I DON'T REMEMBER ANY TESTIMONY
19 DURING THE TRIAL.

20 BUT I KNOW THAT THERE WERE OCCASIONS DURING THE
21 FEW MONTHS --

22 THE COURT: ALL RIGHT. WHY DON'T YOU PREPARE A
23 209 INSTRUCTION, THEN?

24 MR. CHIER: THERE WAS NEVER A LIMITING INSTRUCTION
25 GIVEN DURING THE TRIAL.

26 THE COURT: THEN WE DON'T HAVE TO PREPARE IT. HE SAYS
27 THERE WAS.

28 MR. CHIER: IT WOULD MISLEAD THE JURY.

1 MR. WAPNER: THEN I WITHDRAW THE REQUEST.

2 MR. BARENS: EXCUSE ME, YOUR HONOR. WHILE WE ARE STILL
3 AT THIS JUNCTURE, YOUR HONOR, I REMAIN EXTREMELY CONCERNED
4 THAT ALTHOUGH WE ARE NOW GOING TO HAVE AN INSTRUCTION TO
5 LIMIT THE NORTHERN CALIFORNIA CONSIDERATION, THAT THE JURY
6 BE INSTRUCTED IF THEY ARE GOING TO CONSIDER THAT ONLY IN
7 TERMS OF ENLIGHTENING THEMSELVES ON THE IMMUNITY DEAL FOR
8 MR. KARNY, WHICH IS WHAT I UNDERSTAND YOUR HONOR IS SAYING
9 NOW -- THAT THERE BE SOME REFERENCE MADE TO CLEAN UP THAT
10 PATRICIDE THING.

11 THAT, WE DIDN'T BRING ON OURSELVES. THAT PATRICIDE
12 BUSINESS IS SO OBSCENE AND SO OFFENSIVE IN OUR SOCIETY, I
13 THINK THAT IT HAS TO BE DISTILLED FOR THIS JURY.

14 IT WAS, I MEAN, I SAW EVERY ONE OF THEM FLINCH.
15 I LOOKED OVER WHEN THAT HAPPENED. THEY FLINCHED MARKEDLY
16 WHEN THEY HEARD THAT. I DID, TOO.

17 MR. WAPNER: WHAT DO YOU PROPOSE, COUNSEL?

18 MR. BARENS: WELL, I DON'T KNOW. I SEEK GUIDANCE FROM
19 HIS HONOR.

20 THE COURT: YOU MEAN, I SHOULD INSTRUCT THE JURY THAT
21 IN CONNECTION WITH THE DEATH OF ESLAMINIA, THAT THE FACT
22 THAT HIS SON WAS A MEMBER OF THE BBC -- HOW DO YOU WANT ME
23 TO DO IT? YOU ARE MAKING A BIG MISTAKE BY GOING OVER IT
24 AGAIN AND EMPHASIZING IT.

25 MR. WAPNER: THE TESTIMONY IS --

26 MR. CHIER: WELL, I THINK THAT THAT IS LIKE A SUBISSUE
27 OF THE MAIN ISSUE, WHICH IS, THAT EVEN UNDER THE COURT'S
28 THEORY OF THE ADMISSIBILITY OF THE NORTHERN CALIFORNIA HOMICIDE

4-4

1 TO SHOW THE TRUE PICTURE OF THE IMMUNITY AGREEMENT, THAT
2 EVIDENCE STILL MUST NOT BE ALLOWED TO BE CONSIDERED BY THE
3 JURY AS PROOF OF HIS INTENT OR GUILT ON THE ISSUE OF GUILT.

4 IT CANNOT BE. A DEFENDANT CANNOT EXPOSE HIMSELF
5 TO BEING CONVICTED ON THE BASIS OF ANOTHER CRIME BECAUSE
6 HE BRINGS OUT THE NATURE OF AN IMMUNITY AGREEMENT. THAT
7 CAN'T BE THE LAW.

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1 THE COURT: I WILL DRAFT AN INSTRUCTION. ALL RIGHT?

2 MR. BARENS: THANK YOU, YOUR HONOR. COULD WE REVIEW
3 IT WITH YOUR HONOR?

4 THE COURT: ABSOLUTELY. ALL RIGHT?

5 MR. BARENS: YOUR HONOR, YOU STILL DO NOT WANT TO COMMENT
6 TO THE JURY AT ALL THAT YOUR HONOR DOES NOT HAVE THE BELIEF
7 THAT MR. ROBERTS WAS COMPENSATED IN ANY WAY --

8 THE COURT: NO. I WON'T DO THAT.

9 MR. BARENS: ALL RIGHT.

10 THE COURT: AND I DIDN'T SAY HE WAS. ALL I DID WAS
11 ASK IT BECAUSE YOU BROUGHT IT UP AS TO WHETHER THEY ARE
12 RECEIVING ANY COMPENSATION.

13 MR. CHIER: BUT THERE IS NO EVIDENCE THAT THERE IS
14 ANY COMPENSATION, JUDGE, OTHER THAN THE INNUENDO.

15 THE COURT: SHE DENIED IT. THERE IS EVIDENCE THAT
16 SHE DENIED IT.

17 SHE DENIED THERE WAS ANY. YOU CAN COMMENT ON
18 THAT, IF YOU WANT TO.

19 MR. CHIER: BUT, THERE IS INNUENDO AS A RESULT OF THIS
20 SOMEWHAT AGGRESSIVE QUESTIONING BY YOUR HONOR.

21 THE COURT: NO. I DIDN'T ASK ANY AGGRESSIVE QUESTIONS
22 IN THE SENSE THAT YOU MEAN.

23 LET'S GO ON, ALL RIGHT? NOW, NUMBER 211,
24 NO DIFFERENCE?

25 MR. CHIER: IT IS BOILERPLATE.

26 THE COURT: I WILL GIVE THE PRINTED INSTRUCTION. NOW,
27 YOU HAVE GOT THE FORMULA INSTRUCTION BUT THEN YOU ARE NAMING
28 PITTMAN. WE GIVE THE OTHER INSTRUCTIONS WHICH I PREFER.

4B

1 211.5. "THERE HAS BEEN EVIDENCE IN THIS CASE
2 INDICATING A PERSON OTHER THAN THE DEFENDANT WAS OR MAY HAVE
3 BEEN INVOLVED IN THE CRIME FOR WHICH THE DEFENDANT IS ON
4 TRIAL. YOU MUST NOT DISCUSS OR GIVE ANY CONSIDERATION AS
5 TO WHY THE OTHER PERSON IS NOT BEING PROSECUTED OR WHETHER
6 HE HAS BEEN OR WILL BE PROSECUTED --"

7 MR. CHIER: WELL, I THOUGHT THAT IT WAS NECESSARY TO
8 TAILOR THIS TO THIS CASE BECAUSE OF THE RECEIPT INTO EVIDENCE --
9 THE REFERENCES TO OTHER DEFENDANTS IN OTHER CASES. AND TO
10 BE ABSOLUTELY -- SO THE RECORD CAN BE ABSOLUTELY --

11 THE COURT: YOU CAN ARGUE THAT TO THE JURY. WE DON'T
12 LIKE FORMULA INSTRUCTIONS GIVING SPECIFIC NAMES OF PEOPLE
13 IN THERE.

14 PITTMAN HAS TWO T'S, DOESN'T IT?

15 MR. BARENS: YES, YOUR HONOR.

16 THE COURT: ALL RIGHT.

17 MR. BARENS: WELL YOUR HONOR -- I SUPPOSE -- WOULD
18 YOUR HONOR TAKE EXCEPTION IF WE WERE TO COMMENT THAT MR.
19 PITTMAN HAS NOT BEEN CONVICTED OF COMMITTING --

20 THE COURT: NO. THERE IS NOTHING IN EVIDENCE.

21 MR. CHIER: WHAT IS THE OBJECTION TO GIVING THIS?

22 THE COURT: I WILL GIVE THE INSTRUCTION BECAUSE I WOULD
23 RATHER GIVE INSTRUCTIONS WHICH ARE PRINTED, CALJIC INSTRUCTIONS
24 THAN HAVING TAILORED INSTRUCTIONS WHICH DON'T IN ANY WAY
25 ASSIST THE JURY.

26 MR. WAPNER: THAT'S RIGHT. BECAUSE THE COURT IS GOING
27 TO GIVE THIS INSTRUCTION AND IT WOULD BE IMPROPER TO ARGUE
28 THAT EITHER HE HAS OR HAS NOT BEEN CONVICTED OR MAKE ANY

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1 COMMENT ONE WAY OR THE OTHER IN ARGUMENT AS TO WHAT HIS STATUS
2 IS.

3 THE COURT: THERE IS NO EVIDENCE THAT HE HAS BEEN
4 CONVICTED OR ACQUITTED OR --

5 MR. BARENS: WELL, THEY SAW HIM HERE IN CHAINS. HE
6 DIDN'T LOOK LIKE HE HAD BEEN ACQUITTED, DID HE?

7 THE COURT: YOU AND I KNOW, DESPITE THE ADMONITION,
8 THERE HAS BEEN A PLETHORA OF COMMENTS IN THE NEWSPAPERS ABOUT
9 THE FACT THAT PITTMAN HAD BEEN TRIED AND A DISAGREEMENT.

10 THIS IS ALL ACADEMIC, I THINK.

11 MR. BARENS: WELL, WAIT UNTIL YOU SEE THE TV TONIGHT.

12 THE COURT: DID YOU SEE IT?

13 MR. BARENS: BUT WE HEARD THAT THERE WAS A COMMERCIAL
14 ON CHANNEL 7. THEY ARE GOING TO DO THIS BIG BBC THING ON
15 20/20. I DON'T BELIEVE THEY ARE GOING TO DO IT BEFORE THE
16 JURY DELIBERATES.

17 DO YOU HAVE ANY POWER TO INTERVENE?

18 THE COURT: NONE WHATEVER.

19 MR. BARENS: I THOUGHT I WOULD ASK.

20 THE COURT: WHAT ABOUT THE FIRST ADMENDMENT?

21 MR. WAPNER: PRIOR RESTRAINTS?

22 MR. BARENS: I THINK IT IS UNCONSCIONABLE, THEIR SENSE
23 OF TIMING. IT IS UNCONSCIONABLE WHEN YOU HEAR THE PROMO.

24 THE PERSON WHO HEARD IT TOLD ME THAT THEY SAY
25 THE SHOW IS ABOUT MURDER AND GREED AND ALL THAT BAD STUFF
26 IN BEVERLY HILLS.

27 THE COURT: WELL, I TOLD THE JURY NOT TO LISTEN TO
28 IT. DIDN'T I?

29 MR. BARENS: YES.

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1 THE COURT: ALL RIGHT, LET'S TAKE TWO THIRTEEN NEXT.

2 MR. WAPNER: THAT IS PRIOR INCONSISTENT STATEMENTS.

3 THE COURT: ALL RIGHT, I WILL GIVE THAT.

4 MR. CHIER: WHAT IS IT?

5 THE COURT: (READING:)

6 "EVIDENCE THAT ON SOME FORMER OCCASION" --

7 TAKE A LOOK AT TWO THIRTEEN.

8 MR. CHIER: I AM LOOKING AT IT. I DIDN'T REQUEST IT.

9 THE COURT: NO. THE PEOPLE REQUESTED IT.

10 MR. CHIER: I KNOW THAT.

11 AS I SEARCH MY MIND, I REALLY DIDN'T COME UP WITH --

12 THE COURT: YES, WEREN'T THERE SOME?

13 MR. WAPNER: WELL, STARTING WITH THE END OF IT FIRST,
14 THERE WERE PLENTY OF TIMES WHERE THESE WITNESSES FROM ARIZONA
15 WERE IMPEACHED BY STATEMENTS THEY MADE ON SEVERAL DIFFERENT
16 OCCASIONS AND THEY WERE INCONSISTENT.

17 MR. BARENS: THEY DIDN'T REMEMBER WHERE THE COKE MACHINE
18 WAS, THAT IS RIGHT.

19 MR. CHIER: THAT IS GIVEN AS REQUESTED?

20 THE COURT: YES.

21 MR. CHIER: REQUESTED BY THE PEOPLE?

22 THE COURT: THAT'S RIGHT.

23 DO YOU HAVE ANY OBJECTION TO IT?

24 MR. BARENS: ONLY AS TO THE COKE MACHINE, YOUR HONOR.

25 THE COURT: ALL RIGHT, TWO THIRTEEN, THAT IS A BOILER-
26 PLATE INSTRUCTION.

27 DID WE HAVE ANY WITNESS WHO SAID HE NO LONGER
28 REMEMBERS A CERTAIN EVENT, SO I CAN CROSS OUT THAT BRACKETED

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1 PARAGRAPH?

2 MR. BARENS: I DON'T RECALL ANYBODY SAYING THEY DIDN'T.

3 THE COURT: ALL RIGHT.

4 MR. BARENS: RICHARD, MR. CHIER, DO YOU REMEMBER?

5 MR. CHIER: WHAT?

6 THE COURT: OH, YES, SHE DID.

7 MR. WAPNER: BOTH OF THEM SAID THEY DIDN'T REMEMBER
8 PARTS OF DIFFERENT THINGS.

9 THE COURT: YES, THAT'S RIGHT, CARMEN DIDN'T.

10 MR. BARENS: WHAT DIDN'T SHE REMEMBER?

11 THE COURT: AND THE OTHER WITNESS SAID HE DIDN'T REMEMBER
12 WHETHER HE MADE THOSE STATEMENTS.

13 MR. BARENS: OH, THAT IS RIGHT, WHEN WE WERE DOING THE
14 TRANSCRIPT OF THE TAPE.

15 THE COURT: ALL RIGHT. THE NEXT, TWO TWENTY YOU BOTH
16 HAVE TWO TWENTY, IS THERE ANYTHING IN THE PRINTED INSTRUCTION
17 WHICH YOU FIND OBJECTIONABLE?

18 MR. CHIER: NO.

19 THE COURT: ALL RIGHT. I AM CROSSING OUT THE BRACKETED
20 PORTION ON THE SECOND PAGE: "THE CHARACTER OF THE WITNESS
21 FOR HONESTY OR TRUTHFULNESS," WE DIDN'T HAVE ANY CHARACTER
22 TESTIMONY, DID WE?

23 MR. WAPNER: NO.

24 MR. CHIER: I THINK IN MY INSTRUCTION I DO LEAVE THAT
25 OUT. YES, I LEFT IT OUT SO THERE IS A PRINTED INSTRUCTION
26 WITH NO AUTHORITY ON IT IN THE PACKET.

27 THE COURT: YOU ARE CROSSING THAT OUT?

28 MR. CHIER: YES, I AM, I LEFT IT OUT OF THE ONE I

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1 SUBMITTED, THE CLEAN ONE I SUBMITTED LEAVES THOSE OUT.

2 THE COURT: YOU SEE, YOU DON'T HAVE THE FORM.

3 MR. CHIER: ALL RIGHT, I TRIED. YOU CAN SCOTCH TAPE
4 IT TO IT.

5 MR. BARENS: SO THEY DON'T SEE IT AT ALL.

6 THE COURT: THERE IS ANOTHER WAY.

7 ANOTHER THING IS THIS WAY OF CHECKING THESE THINGS,
8 YOU HAVE MIMEOGRAPHED IT THAT WAY.

9 MR. WAPNER: THAT IS PROBABLY THE SECOND PAGE, THAT IS
10 PAGE 2 YOU ARE LOOKING AT.

11 THE COURT: YOU HAVE GOT THAT MIMEOGRAPHED TOO, ALL RIGHT.
12 THE CLERK CAN CUT IT OFF.

13 MR. CHIER: SO THAT IS GIVEN AS MODIFIED? IN MY CASE,
14 IT WOULD GIVEN AS REQUESTED, I GUESS, BECAUSE I LEFT THAT ON
15 THERE?

16 MR. WAPNER: WHAT ABOUT THE BRACKETED PARAGRAPH WHERE
17 IT SAYS, "ADMISSION OF THE WITNESS OF UNTRUTHFULNESS"?

18 THE COURT: WHO?

19 MR. BARENS: WHO DID?

20 MR. WAPNER: THAT IS WHAT I AM ASKING. I DON'T RECALL
21 ANY OF THAT.

22 MR. CHIER: THAT IS RIGHT.

23 THE COURT: I AM GOING TO CROSS OUT: "THE CHARACTER
24 OF THE WITNESS FOR HONESTY OR TRUTHFULNESS OR THEIR OPPOSITES
25 OR THE ADMISSION BY THE WITNESS ~~OF~~ UNTRUTHFULNESS" --

26 MR. CHIER: THAT WILL BE MINE, GIVEN AS SUBMITTED THEN?

27 THE COURT: NO. I AM GIVING THE ONE BY THE PEOPLE,
28 EXCEPT AS I CROSSED THOSE THINGS OUT.

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1 WHAT I AM GOING TO DO, I HAVE GOT A PEN UP ON THE
2 BENCH THAT I RUN THROUGH SO YOU CAN'T ABSOLUTELY READ
3 ANYTHING OF THAT.

4 I AM NOT GOING TO LEAVE IT THIS WAY. I HAVE GOT
5 THE PEN WHERE I WILL INK IT OUT COMPLETELY AND IT WILL BE
6 EXACTLY AS YOURS.

7 MR. BARENS: THANK YOU.

8 THE COURT: ALL RIGHT, NUMBER TWO TWENTY-ONE.

9 MR. CHIER: I HAVE IT IN HERE BUT I HAD SECOND THOUGHTS
10 ABOUT IT, YOUR HONOR, AND I THOUGHT THE ONLY PERSON IT MIGHT
11 HAVE APPLIED TO WAS MR. BROWNING BUT --

12 THE COURT: THERE IS ANOTHER INSTRUCTION WHICH IS USUAL
13 IN EVERY CRIMINAL CASE.

14 MR. CHIER: BUT MR. WAPNER ADVISES ME THAT IN THE
15 PROLOGUE TO CALJIC, THIS IS A "MUST GIVE" INSTRUCTION.
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1 THE COURT: YES, I HAVE TO GIVE IT. I DO GIVE IT ALL
2 THE TIME.

3 MR. CHIER: I GUESS THAT IS WHY IT ENDED UP IN THIS
4 PACKET HERE.

5 THE COURT: YOU PUT IT IN ALSO.

6 MR. CHIER: THE COMPUTER KNEW BETTER THAN THAT.

7 THE COURT: THAT IS THE SAME THING.

8 MR. CHIER: NO, IT ISN'T. I JUST TOOK IT RIGHT OUT OF
9 THERE.

10 THE COURT: ALL RIGHT, 222. THOSE ARE EXACTLY THE SAME.

11 MR. BARENS: I THINK WE OUGHT TO HAVE 222.

12 THE COURT: ALL RIGHT, BY THE PEOPLE AND THE DEFENDANT,
13 GIVEN AS REQUESTED.

14 MR. CHIER: REQUESTED BY EVERYBODY.

15 THE COURT: THE TESTIMONY OF ONE WITNESS IS SUFFICIENT,
16 THAT IS THE SAME ON BOTH OF THEM; IS THAT RIGHT?

17 MR. WAPNER: YES.

18 MR. BARENS: I HOPE SO.

19 THE COURT: IT LOOKS LIKE IT IS CROSSED OUT. I AM GOING
20 TO HAVE HER GET ME A BETTER ONE THAN THIS.

21 MR. WAPNER: I APOLOGIZE FOR THE CONDITION OF SOME OF
22 THE COPIES.

23 MR. CHIER: WILL DEFENSE COUNSEL BE FURNISHED WITH A
24 COPY OF THE INSTRUCTIONS THE COURT IS GOING TO GIVE TO THE
25 JURY?

26 THE COURT: DID YOU GIVE THEM A COPY OF THE INSTRUCTIONS?

27 MR. CHIER: I MEAN THE ONES THAT YOU ARE ACTUALLY GIVING
28 WITH THE AMENDMENTS AND EVERYTHING BECAUSE THE ONES WE HAVE

5A-7
1 BOTH SUBMITTED ARE BEING MODIFIED BY YOUR HONOR.

2 THE COURT: THEY AREN'T BEING MODIFIED. JUST LITTLE
3 CORRECTIONS, AND SO FORTH, WHICH ARE COMPLETELY IMMATERIAL.

4 MR. WAPNER: I HAVE THE COMPLETE PACKAGE.

5 MR. CHIER: I HAVE THAT.

6 THE COURT: AS I GO THROUGH THESE, I WILL TELL YOU WHICH
7 CORRECTIONS I AM GOING TO MAKE AND I HAVE BEEN DOING THAT.

8 MR. CHIER: ALL RIGHT.

9 THE COURT: 227, I WILL GET A NEW FORM FOR THAT.

10 MR. CHIER: 227?

11 THE COURT: YES, THAT IS THE SAME THING THAT YOU HAVE
12 THERE.

13 NOW WE COME TO 250. DO YOU WANT ME TO GIVE IT?

14 MR. BARENS: YES.

15 MR. CHIER: NO. WAIT A MINUTE.

16 MR. BARENS: A MOMENT, YOUR HONOR.

17 THE COURT: (READING:)

18 "EVIDENCE HAS BEEN INTRODUCED FOR THE
19 PURPOSE OF SHOWING THAT THE DEFENDANT COMMITTED
20 CRIMES OTHER THAN FOR WHICH HE IS ON TRIAL.

21 "SUCH EVIDENCE, IF BELIEVED, WAS NOT
22 RECEIVED AND MAY NOT BE CONSIDERED BY YOU TO PROVE
23 THAT HE IS A PERSON OF BAD CHARACTER OR THAT HE HAS
24 A DISPOSITION TO COMMIT CRIMES."

25 MR. BARENS: ABSOLUTELY, WE WOULD REQUEST IT BE GIVEN.

26 THE COURT: FINE.

27 DO YOU HAVE ANY OBJECTION?

28 MR. WAPNER: I JUST WANT TO UNDERSTAND WHERE WE ARE.

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I THOUGHT WE JUST DISCUSSED THAT BEFORE AND THAT THAT WAS THE
ONE THAT --

1 THE COURT: THAT HAS NOTHING TO DO WITH THIS. THIS
2 APPLICATION TO THE FACT THAT HE ALLEGEDLY PERPETRATED A LOT
3 OF FRAUDS AND GOT A LOT OF PEOPLE IN THE PONZI SCHEME THAT
4 YOU TALKED ABOUT, THOSE ARE CRIMES AND FRAUDULENT TRANSACTIONS
5 AND ET CETERA OR THE FACT THAT HE TOOK INVESTOR'S MONEY AND
6 LIVED ON IT --

7 MR. BARENS: WELL, I DON'T THINK THAT THIS IS A FACT
8 THAT HAS BEEN ESTABLISHED.

9 THE COURT: WELL, THAT MAY BE ARGUED BY THEM.

10 MR. BARENS: YES, YOUR HONOR.

11 THE COURT: ALL RIGHT. THEREFORE, THESE ARE CRIMES
12 FOR WHICH -- TELL ME WHY --

13 MR. WAPNER: WELL, IF THAT IS THE PURPOSE OF GIVING
14 THIS INSTRUCTION, THEN WE HAVE TO DECIDE WHICH OF THESE
15 BRACKETED PARAGRAPHS APPLY.

16 THE FIRST BRACKETED PARAGRAPH DOES NOT APPLY.
17 IT WAS NOT OFFERED AS M.O. EVIDENCE.

18 THE COURT: WHICH ONE ARE YOU TALKING ABOUT?

19 MR. WAPNER: I AM TALKING ABOUT THE PARAGRAPH THAT
20 STARTS, "A CHARACTERISTIC METHOD, PLAN OR SCHEME ..."

21 THE COURT: YES. THAT'S RIGHT. THAT IS ANOTHER DIFFICULTY.
22 GO AHEAD. ALL RIGHT.

23 MR. WAPNER: OKAY.

24 THE COURT: THE IDENTITY OF A PERSON --

25 MR. BARENS: HOW ABOUT THE INTENT?

26 THE COURT: THAT THE CRIME CHARGED IS PART OF A LARGER
27 PLAN, SCHEME OR -- IS THAT CORRECT?

28 MR. WAPNER: IT WAS NOT INTRODUCED FOR THAT PURPOSE.

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1 THE EVIDENCE OF HIS PONZI SCHEME WAS INTRODUCED SPECIFICALLY
2 ON THE ISSUE OF MOTIVE, WHERE IT SAYS "A MOTIVE FOR THE
3 COMMISSION OF THE CRIME CHARGED."

4 THAT WAS THE WHOLE PURPOSE OF GOING INTO ALL
5 OF THAT STUFF.

6 THE COURT: ALL RIGHT. I WILL READ IT THEN. I WILL
7 READ THAT IT THEN TENDS TO SHOW A CHARACTERISTIC METHOD,
8 PLAN OR SCHEME. IS THAT IT?

9 MR. CHIER: NO.

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1 MR. WAPNER: NO.

2 MR. BARENS: HE IS AT LINE 25.

3 THE COURT: IDENTITY OF THE PERSON? NO.

4 MR. CHIER: LINE 25, YOUR HONOR.

5 THE COURT: NO. WE GO DOWN TO LINE 19, CRIME CHARGED
6 OR PART OF A LARGER CONTINUING PLAN, SCHEME OR CONSPIRACY?

7 MR. CHIER: HE SAYS THAT THAT IS NOT THE PURPOSE. THAT
8 IS NOT THE PURPOSE.

9 THE COURT: ALL RIGHT. THE EXISTENCE OF INTENT? NO.
10 THE IDENTIFY TO THE PERSON? NO. MOTIVE FOR COMMISSION OF
11 THE CRIME CHARGED?

12 MR. WAPNER: YES. SO --

13 THE COURT: IF IT TENDS TO SHOW MOTIVE FOR THE COMMISSION
14 OF THE CRIME CHARGED? IS THAT IT?

15 MR. WAPNER: RIGHT.

16 THE COURT: ALL RIGHT. HOW ABOUT NO CONSPIRACY? HUH?
17 ALL RIGHT.

18 FINE. SO I WILL X OUT EVERYTHING EXCEPT A MOTIVE
19 FOR THE COMMISSION OF THE CRIME CHARGED. ALL RIGHT?

20 OR SHOULD WE HAVE A NEW ONE? ALL RIGHT. I WILL
21 TELL YOU WHAT YOU DO. YOU PREPARE THE INSTRUCTION AND LEAVE
22 OUT ALL OF THIS EXCEPT FOR THAT ONE PART ON A TYPEWRITTEN
23 INSTRUCTION.

24 MR. WAPNER: ALL RIGHT.

25 THE COURT: SO THEN THEY WON'T HAVE TO LOOK AT ALL
26 OF THE OTHER STUFF AND TRY TO MAKE IT OUT, AS THEY USUALLY
27 DO.

28 OKAY. WILL YOU MAKE A NOTE OF THAT, PLEASE?

1 MR. WAPNER: YES.

2 THE COURT: ALL RIGHT. THE NEXT ONE THAT THE PEOPLE
3 HAVE IS THE ONE WHICH IS FOLLOWING 250, WHICH IS 251, MOTIVE.

4 MOTIVE IS NOT AN ELEMENT OF THE CRIME CHARGED
5 AND IT NEED NOT BE SHOWN. HOWEVER, YOU MAY CONSIDER MOTIVE
6 OR LACK OF MOTIVE AS A CIRCUMSTANCE IN THIS CASE. ALL RIGHT.

7 DO YOU OBJECT TO IT?

8 MR. CHIER: I DON'T OBJECT TO IT, YOUR HONOR, AS LONG
9 AS THE DEFENSE INSTRUCTIONS ON MOTIVE CLARIFY IT.

10 THE COURT: I WILL COME TO THAT. BUT THIS PARTICULAR
11 INSTRUCTION, NO OBJECTION?

12 MR. CHIER: NO OBJECTION.

13 THE COURT: ALL RIGHT, FINE.

14 WE'LL COME TO THE NEXT ONE. THAT IS 251.

15 YOU HAVE NOTHING IN 260. NOW WE COME TO 260.
16 I WILL GIVE THAT.

17 MR. BARENS: YOUR HONOR --

18 THE COURT: BOTH SIDES WANT IT?

19 MR. BARENS: YOUR HONOR, I AM SURE THAT YOUR HONOR --
20 JUST TO UNDERScore AS I FEEL OBLIGED TO DO PERSONALLY, THAT
21 MR. WAPNER WOULD NOT BE MAKING ANY COMMENT IN CLOSING ARGUMENT
22 ABOUT THE DEFENDANT'S DECISION NOT TO TESTIFY.

23 MR. WAPNER: NO. I WILL CALL MILLER LEVY IN.

24 THE COURT: WHAT DO YOU MEAN?

25 MR. BARENS: DIRECTLY OR INDIRECTLY ABOUT HE COULD
26 HAVE SAID THIS OR HE MIGHT HAVE TOLD US THAT OR HE MIGHT
27 HAVE TOLD US THIS BUT HE DIDN'T. NONE OF THAT BUSINESS --

28 THE COURT: YOU MEAN SOMETHING LIKE THE SEVEN PAGES?

1 OF COURSE, NOBODY CAME IN TO CONTRADICT WHAT APPEARS ON THERE.

2 MR. WAPNER: ALL OF THAT STUFF IS VERY, VERY MARGINAL
3 GROUNDS. I MEAN, I DON'T KNOW IF THAT CAN BE SAID OR NOT.

4 MR. CHIER: IT IS GRIFFIN ERROR.

5 MR. BARENS: IT IS REAL GRIFFIN.

6 MR. WAPNER: WITH THOSE PAGES TO THE EXTENT THAT HE
7 IS PROBABLY THE ONLY --

8 THE COURT: OF COURSE, NOBODY CAME HERE TO EXPLAIN
9 WHAT WAS SAID IN THERE AND SO FORTH. THAT IS THE OBLIQUE
10 WAY OF GETTING IN TESTIMONY, WHEN HE DIDN'T TESTIFY.

11 MR. BARENS: DO YOU THINK IT IS PROPER TO DO?
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1 THE COURT: I DON'T KNOW AT THE MOMENT. DO YOU INTEND
2 TO DO THAT? THEN I WILL RULE ON IT.

3 MR. WAPNER: I HAVE NOT FORMULATED EXACTLY WHAT I INTEND
4 TO SAY ABOUT THAT. I AM --

5 THE COURT: WELL, LET US KNOW ABOUT IT BEFORE YOU
6 DO IT.

7 MR. WAPNER: I AM VERY CONSCIOUS OF THE PROBLEM COUNSEL
8 IS MENTIONING. I DON'T WANT TO MAKE ANY ERROR IN THIS CASE.

9 I HAVE TOLD COUNSEL FROM THE TIME WE STARTED
10 THIS CASE IN NOVEMBER THAT I DIDN'T WANT TO MAKE ANY ERROR.

11 THE COURT: I THINK THAT YOU HAVE BEEN VERY SCRUPULOUS
12 IN AVOIDING ERROR ALMOST TO THE POINT OF OBSESSION.

13 MR. BARENS: WELL, JUDGE, OBVIOUSLY AGAIN, JUST FOR
14 THE RECORD HERE, THE DEFENSE IN MAKING ITS DECISION NOT TO
15 HAVE THE DEFENDANT TESTIFY, CERTAINLY RELIED ON THE STATE
16 OF THE LAW AS THE DEFENSE UNDERSTANDS IT AND MR. WAPNER'S
17 GOOD FAITH IN APPLYING THE LAW.

18 THE COURT: I AM SURE YOU WILL. HE WON'T COMMENT ON
19 IT.

20 ALL RIGHT. THAT WAS HIS CONSTITUTIONAL RIGHT.
21 YOU HAVE THAT IN DECIDING WHETHER OR NOT TO TESTIFY. IT
22 IS THE SAME IN BOTH.

23 IS THAT RIGHT?

24 MR. CHIER: 2.61?

25 THE COURT: YES.

26 MR. CHIER: YES.

27 THE COURT: NOW WE COME TO THE CONFESSION AND ADMISSION
28 OF WHICH THERE SEEMS TO BE A LITTLE DIFFERENCE OF OPINION.

1 WHAT THE DEFENDANT HAS HAD INTERPOLATED ON THE PRINTED
2 INSTRUCTION IS LINE 22 OF THE DEFENDANT'S REQUESTED INSTRUCTION.

3 EVIDENCE OF AN ORAL OR WRITTEN CONFESSION. WHERE
4 DO YOU GET THE LAW FOR THAT, THAT A WRITTEN CONFESSION MAY
5 BE VIEWED WITH CAUTION?

6 MR. BARENS: OBVIOUSLY, THE PEOPLE WOULD LIKE US TO
7 BELIEVE THAT. I THINK THAT MR. CHIER CAN CORRECT ME IF I
8 AM WRONG, THAT SOMEHOW OR OTHER, THE SEVEN PAGES IS A WRITTEN
9 CONFESSION OR ADMISSION.

10 THE COURT: THOSE ARE ADMISSIONS, NOT CONFESSIONS.

11 MR. BARENS: WELL, IN THIS INSTANCE, IT CERTAINLY --

12 THE COURT: THERE HAS BEEN NO WRITTEN CONFESSION THAT
13 I CAN SEE.

14 MR. CHIER: YES. THAT WAS A MISTAKE. IT IS EVIDENCE
15 OF AN ORAL ADMISSION A DEFENDANT SHOULD BE --

16 THE COURT: CROSS OUT "OR WRITTEN"?

17 MR. CHIER: YES. THAT IS INAPPROPRIATE THERE.

18 THE COURT: ALL RIGHT.

19 MR. CHIER: NOW THE PART THAT I HAVE ADDED HERE IS
20 BASICALLY ON THIS CASE THAT I HAVE HERE, JUDGE.

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1 MR. WAPNER: WHICH INSTRUCTION ARE YOU LOOKING AT?

2 THE COURT: HIS NUMBER 15.

3 MR. CHIER: REQUEST NO. 15.

4 THE COURT: IT IS NO. 15.

5 HE SAID HE DIDN'T INTEND TO PUT IN "EVIDENCE
6 OF AN ORAL OR WRITTEN CONFESSION" ON LINE 22, DO YOU SEE IT?

7 MR. WAPNER: YES.

8 THE COURT: (READING:)

9 "A WRITTEN CONFESSION OF A DEFENDANT
10 SHOULD BE VIEWED WITH CAUTION."

11 AT ANY RATE, THE DEFENDANT IS WITHDRAWING THE
12 FOLLOWING LANGUAGE FROM YOUR INSTRUCTION 2.70 AT HIS REQUEST
13 AT LINE 22, THE FOLLOWING IS TO BE OMITTED: "OR WRITTEN
14 CONFESSION"; IS THAT CORRECT?

15 MR. BARENS: MR. CHIER?

16 MR. CHIER: ON LINE 22 "OR WRITTEN CONFESSION" SHOULD
17 BE STRICKEN, YES.

18 THE COURT: ALL RIGHT, THAT IS STRICKEN.

19 MR. CHIER: I AM LOOKING FOR CAL.2D.

20 HERE IT IS. IT IS A DUSTY OLD TOME.

21 MR. BARENS: IS THE POINT YOU ARE MAKING, MR. CHIER,
22 ON THIS SAME INSTRUCTION?

23 MR. CHIER: YES.

24 THE MATTER WHICH APPEARS AT LINE 24 THROUGH AND
25 INCLUDING LINE 1 OF THE FOLLOWING PAGE HAS BEEN ADDED, YOUR
26 HONOR, TO THIS, AND I HAVE RELIED ON THIS CASE, L-I-S-S.

27 THE COURT: WHAT DOES THAT MEAN?

28 MR. CHIER: WHAT DOES IT MEAN?

7-2
1 THE COURT: "A FALSE CONFESSION CANNOT SUPPORT AN
2 INFERENCE OF THE TRUTH", I DON'T KNOW WHAT YOU MEAN BY A FALSE
3 CONFESSION.

4 MR. CHIER: ALL RIGHT, THERE IS EVIDENCE IN THIS CASE --

5 THE COURT: (READING:)

6 "A FALSE CONFESSION CANNOT SUPPORT AN
7 INFERENCE OF THE TRUTH OF THE MATTER UNTRUTHFULLY
8 STATED."

9 WHAT DOES THAT MEAN?

10 MR. CHIER: JUDGE --

11 THE COURT: YOU TELL ME, WHAT DOES THAT MEAN?

12 MR. BARENS: I CAN TELL YOU. THERE HAS BEEN EVIDENCE
13 THAT BASICALLY, HUNT ALLEGEDLY CONFESSED TO THESE BAD THINGS,
14 THAT HE KILLED MR. LEVIN, AND YOU CAN'T USE A FALSE CONFESSION
15 TO MAKE A TRUTH.

16 THE COURT: THE JURY THEN DETERMINES WHETHER OR NOT IT
17 WAS MADE OR WASN'T MADE.

18 MR. BARENS: I BELIEVE THE LISS CASE, WHICH MR. CHIER
19 IS GOING TO REFER TO NOW, WILL SHED SOME LIGHT ON THIS
20 SUBJECT, IF WE COULD HEAR IT.

21 THE COURT: LET'S HEAR IT.

22 MR. BARENS: ONE OF MY FAVORITES, JUDGE.

23 MR. CHIER: ALL RIGHT, JUST A MOMENT.

24 I AM READING FROM PAGE 574, PEOPLE V. LISS, L-I-S-S,
25 CALIFORNIA SUPREME COURT CASE, VOLUME 35, PAGE 570 AT PAGE
26 574:

27 "AS IS TRUE OF ANY OTHER FALSE EVIDENCE,
28 A FALSE CONFESSION CANNOT SUPPORT AN INFERENCE OF

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1 THE TRUTH OF THE MATTER UNTRUTHFULLY STATED.
2 OBVIOUSLY, THE FALSE CONFESSION OF GUILT OF A
3 SPECIFIC ACT CANNOT BE USED AS PROOF OF THE
4 COMMISSION OF THAT ACT."

5 SO SINCE THERE IS EVIDENCE IN THIS CASE, WHICH
6 IS CERTAINLY ARGUABLE AS TO WHETHER THE STATEMENTS OF THE
7 DEFENDANT WERE --

8 THE COURT: WELL, YOU CAN ARGUE THAT TO THE JURY IF YOU
9 WANT, THAT HE NEVER INTENDED IT, HE WAS JUST DOING IT, SAYING
10 IT, WHATEVER YOU WANT.

11 MR. CHIER: IT DOESN'T DO ANY GOOD IF YOU DON'T GIVE
12 THE INSTRUCTION ON IT.

13 THE COURT: I AM NOT GOING TO GIVE THE INSTRUCTION THE
14 WAY YOU HAVE IT.

15 MR. CHIER: COULD I SHOW THIS BOOK TO YOUR HONOR, IF
16 YOU WOULD LOOK AT IT?

17 THE COURT: I WILL READ IT AGAIN. THAT IS PEOPLE V. LISS,
18 35 CALIFORNIA REPORTER .

19 MR. CHIER: I AM LEAVING IT ON TOP OF YOUR OTHER OPEN
20 VOLUME.

21 THE COURT: ALL RIGHT. THE NEXT IS 272

22 MR. CHIER: SO THERE IS NO DISPOSITION ON THAT AT THE
23 PRESENT TIME?

24 MR. WAPNER: YOUR HONOR, I DID NOT INCLUDE 271 IN MY --

25 MR. BARENS: YOU HAVE TO. REMEMBER, YOU ARE REQUESTING --

26 THE COURT: OH, SURE, 271.

27 MR. BARENS: YOUR HONOR, WE ARE REQUESTING 271, YES.

28 THE COURT: 271, THAT WILL BE GIVEN, SO YOU WILL PRODUCE

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1 IT, WILL YOU?

2 MR. BARENS: THAT IS OUR 16, MR. CHIER.

3 MR. CHIER: THIS IS OUR 16.

4 I HAVE ALSO ADDED --

5 THE COURT: NO, NO, THAT IS WRONG. YOU SAY "AN ADMISSION
6 IS A STATEMENT EITHER WRITTEN OR ORAL." WHERE DO YOU GET THAT
7 FROM?

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1 MR. CHIER: THIS IS WISHFUL THINKING.

2 NO, NO, THIS IS CORRECT, A CONFESSION CAN BE EITHER
3 ORAL OR WRITTEN, YOUR HONOR.

4 MR. BARENS: SURE.

5 MR. WAPNER: THAT PART OF IT IS OKAY.

6 THE COURT: THAT IS ALL RIGHT.

7 MR. WAPNER: BUT THE PART OF IT THAT SAYS "EVIDENCE OF
8 AN ORAL OR WRITTEN ADMISSION OF THE DEFENDANT SHOULD BE VIEWED
9 WITH CAUTION," THAT IS THE WISHFUL THINKING.

10 THE COURT: ALL RIGHT, NOT THAT.

11 ALL RIGHT, YOU PRODUCE 271, WILL YOU, PLEASE?

12 ALL RIGHT, NOW 272.

13 MR. CHIER: WOULD YOUR HONOR NOTE THAT I REQUEST NO. 16,
14 LINES 18 AND 19 AND WE ALSO HAVE APPENDED TO THAT THE LANGUAGE
15 FROM PEOPLE V. LISS.

16 THE COURT: THAT FALSE ADMISSION YOU MEAN?

17 MR. CHIER: YES.

18 THE COURT: ALL RIGHT, I AM NOT GOING TO GIVE IT UNLESS
19 I AM PERSUADED AFTER I READ THE CASE THAT IT SHOULD BE GIVEN.

20 MR. CHIER: HERE, JUST FOR YOUR HONOR --

21 THE COURT: AT THIS POINT, UNTIL I TELL YOU TO THE
22 CONTRARY, I AM NOT GOING TO GIVE IT.

23 MR. CHIER: ARE WE GOING TO ARGUE?

24 THE COURT: NO -- YOU CAN ARGUE THAT HE WAS KIDDING WHEN
25 HE MADE THAT STATEMENT, HIS INTENTION OF DOING THAT WAS TO
26 TEST THE LOYALTY OF HIS FOLLOWERS. BUT I AM NOT GOING TO GIVE
27 THE INSTRUCTION THE WAY YOU HAVE GOT IT HERE.

28 ALL RIGHT, THE NEXT IS 272:

"EVIDENCE WHICH MERELY TENDS TO PROVE

1 THE IDENTITY OF AN ALLEGED PERPETRATOR ALSO MUST
2 NOT BE CONSIDERED WHEN DETERMINING WHETHER THERE
3 IS SOME PROOF OF THE ELEMENTS OF THE CRIME."

4 THAT IS NOT IN THE PRINTED INSTRUCTION.

5 MR. CHIER: THIS HAS BEEN MODIFIED BY PEOPLE V. TAPIA.

6 THE COURT: MODIFIED BY TAPIA? THAT IS A 1901 DECISION,
7 AND LONG AFTER -- MANY TIMES THIS INSTRUCTION HAS BEEN TAKEN
8 UP BY CALJIC.

9 MR. CHIER: NO. LET ME EXPLAIN, YOUR HONOR, THIS IS
10 THE HEART OF OUR CASE. THE CASE OF THE DEFENDANT IS PRIMARILY
11 THAT THERE IS NO CORPUS HERE AND THAT YOU CANNOT CONSIDER
12 EVIDENCE, MODE OF EVIDENCE TO ESTABLISH THE CORPUS OF THE
13 CRIME, THAT IS ALL THAT THIS IS SAYING AND THAT IT IS SIMPLY,
14 I THINK, AN ENHANCEMENT OR AN ENLARGEMENT OF THE MOTIVE
15 INSTRUCTION.

16 THE COURT: TELL ME WHAT THAT MEANS.

17 MR. WARNER: I DON'T BELIEVE THAT IS A CORRECT STATEMENT
18 OF THE LAW.

19 THE COURT: IT SAYS, "EVIDENCE WHICH MERELY TENDS TO
20 PROVE THE IDENTITY OF AN ALLEGED PERPETRATOR ALSO MUST NOT
21 BE CONSIDERED WHEN DETERMINING WHETHER THERE IS SOME PROOF
22 OF THE ELEMENTS OF THE CRIME."

23 WHAT DOES THAT MEAN? TELL ME WHAT IT MEANS.

24 MR. CHIER: THAT MEANS YOU CANNOT USE, FOR EXAMPLE, THE
25 SEVEN PAGES TO PROVE THE DEFENDANT'S GUILT UNTIL YOU ESTABLISH
26 THE CORPUS.

27 THE COURT: YOU MADE SUCH A MOTION BEFORE AND I SAID --
28 AND THE DISTRICT ATTORNEY PROPERLY POINTED OUT THAT EVEN

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1 SLIGHT EVIDENCE IS ENOUGH TO PROVE THE ADMISSION OF THE
2 CORPUS HAS BEEN ESTABLISHED.

3 MR. CHIER: EXCUSE ME, YOUR HONOR. THE MOTION THAT WAS
4 DENIED WAS A MOTION TO EITHER DISMISS OR TO BAR ADMISSION OF
5 THE EVIDENCE CONCERNING THE SEVEN PAGES, BUT WE DID NOT MAKE
6 A MOTION FOR A JUDICIAL DECLARATION AS TO THE LEGAL EFFECT
7 OF THE SEVEN PAGES INSOFAR AS THE ISSUE OF MOTIVE IS
8 CONCERNED.

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1 THE COURT: I PASSED UPON THAT ARGUMENT UP AT THE
2 BENCH. I WON'T DISCUSS IT ANY FURTHER.

3 MR. BARENS: YOUR HONOR, YOU WILL GIVE LINES 6 THROUGH
4 11 HOWEVER, SIR?

5 THE COURT: I AM GIVING IT THE WAY IT IS PRINTED,
6 "NO PERSON MAY BE CONVICTED OF A CRIMINAL OFFENSE UNLESS
7 THERE IS SOME PROOF OF EACH ELEMENT OF THE CRIME INDEPENDENT
8 OF ANY CONFESSION OR ADMISSION MADE BY HIM OUTSIDE OF THE
9 TRIAL. THE IDENTITY OF THE PERSON ALLEGED TO HAVE COMMITTED
10 A CRIME IS NOT AN ELEMENT OF THE CRIME NOR IS THE DEGREE
11 OF THE CRIME. SUCH IDENTITY OR DEGREE OF CRIME MAY BE
12 ESTABLISHED BY AN ADMISSION OR CONFESSION."

13 MR. CHIER: AND CAN WE STRIKE DEGREE, SINCE IT IS NOT
14 AN ISSUE IN THE CASE?

15 THE COURT: WELL, AM I GOING TO INSTRUCT ON SECOND
16 DEGREE MURDER?

17 MR. WAPNER: I DON'T KNOW. WE HAVE TO GET TO THAT.

18 MR. BARENS: COULD WE GO FOR MANSLAUGHTER?

19 THE COURT: WELL, THAT IS ANOTHER ONE.

20 MR. WAPNER: WELL, THERE IS CLEAR EVIDENCE IN THIS
21 CASE, FROM WHICH THE JURY COULD FIND EITHER THAT IT WAS A
22 MURDER IN THE COURSE OF A ROBBERY OR THAT IT WAS A DELIBERATE
23 AND PREMEDITATED MURDER. IN WHICH CASE, THEY COULD FIND
24 FIRST DEGREE MURDER AND CHOOSE NOT TO FIND THE ROBBERY OR
25 THE SPECIAL CIRCUMSTANCES TRUE.

26 I DIDN'T PUT ANY SECOND DEGREE MURDER INSTRUCTIONS
27 IN THE INSTRUCTIONS THAT I SUBMITTED BECAUSE I DIDN'T FEEL
28 THERE WAS ANY THEORY UNDER WHICH THEY COULD FIND IT TO BE

1 A SECOND DEGREE MURDER.

2 MR. CHIER: HOW ABOUT A VOLUNTARY MANSLAUGHTER, HEAT
3 OF PASSION?

4 MR. BARENS: ABSOLUTELY. WHEN YOU TALK ABOUT PASSION
5 EXISTENT IN THIS SETTING HERE --

6 THE COURT: WHAT EVIDENCE IS THERE TO INDICATE A HEAT
7 OF PASSION?

8 MR. CHIER: HE WAS RIPPED OFF FOR \$4 MILLION, MINIMUM.
9 IT WOULD EXCITE THE PASSIONS OF THIS MAN.

10 THE COURT: WELL, THAT WAS MONTHS AGO. AND THE LETTER
11 WHICH THE PEOPLE SAY WAS PLANTED IN THAT PACKAGE, SAYS THAT --
12 WHAT WAS THE WORD?

13 MR. WAPNER: I FORGIVE YOUR DUPLICITY.

14 MR. BARENS: NICELY STATED.

15 THE COURT: HE FORGAVE HIM. THERE WAS NO QUESTION
16 OF --

17 MR. BARENS: BUT IF YOU WILL --

18 THE COURT: SUDDEN IMPULSE OR --

19 MR. BARENS: WELL, I THINK THAT -- WELL, I THINK IT
20 IS POSSIBLE THAT A JUROR COULD THINK THAT HE MIGHT HAVE BEEN
21 DISCUSSING THE NEW DEAL AND THINGS GOT OUT OF HAND.

22 THE COURT: WELL, HAVE YOU SUBMITTED ANY INSTRUCTIONS
23 ON SECOND DEGREE?

24 MR. CHIER: WE WILL. I WAS UP UNTIL 1:30 DOING THESE,
25 JUDGE. I DID THE BEST I COULD.

26 THE COURT: THEN YOU CAN DO IT AND I WILL PASS ON IT.
27 IN THE MEANTIME, I AM NOT DOING IT.

28 MR. WAPNER: WELL, AS TO THIS INSTRUCTION 217, ARE

1 YOU GOING TO --

2 THE COURT: DO YOU WANT ME TO CROSS OUT "NOR IS THE
3 DEGREE OF CRIME"?

4 MR. WAPNER: I THINK YOU SHOULD LEAVE IT IN THERE.
5 THEN WE CAN CROSS IT OUT LATER.

6 MR. CHIER: WHERE AM I? IS THIS 272? WHAT DID WE
7 DO WITH 272? DID WE CROSS ANYTHING OUT?

8 THE COURT: NO. WE ARE GOING TO LEAVE IT THE WAY IT
9 IS FOR THE MOMENT.

10 MR. CHIER: ALL RIGHT.

11 MR. WAPNER: IF COUNSEL WANTS INSTRUCTIONS ON LESSERS
12 OR A SECOND DEGREE MURDER AND VOLUNTARY, I HAVE NO OBJECTION
13 TO THAT.

14 THE COURT: THEY HAVE GOT TO SUBMIT THEM, THOUGH.
15 OKAY?

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1 MR. BARENS: HOW ABOUT INVOLUNTARY?

2 THE COURT: 280 ON EXPERT TESTIMONY. WHAT WAS THE
3 TESTIMONY? THE HANDWRITING?

4 MR. BARENS: DR. CHOI.

5 MR. WAPNER: HANDWRITING EXPERTS AND FINGERPRINT PEOPLE
6 AND DR. CHOI.

7 THE COURT: DO YOU HAVE ANY OBJECTION?

8 MR. CHIER: NO, YOUR HONOR.

9 THE COURT: ALL RIGHT. OPINION EVIDENCE OF LAY WITNESS?
10 BOTH OF YOU HAVE GIVEN THAT?

11 MR. CHIER: YES.

12 THE COURT: ALL RIGHT. NEXT IS -- WE DIDN'T HAVE ANY
13 HYPOTHETICAL QUESTIONS, DID WE?

14 WHO WAS AN EXPERT WHO TESTIFIED ON HYPOTHETICALS?

15 MR. BARENS: DR. CHOI. BUT WHAT HE DID --

16 THE COURT: WAS THAT A HYPOTHETICAL?

17 MR. BARENS: SURE. THAT ORIENTAL GENTLEMAN THAT
18 TESTIFIED YOUR HONOR --

19 THE COURT: YES. THERE WEREN'T FACTS GIVEN TO HIM
20 THAT WOULD CONSTITUTE A HYPOTHETICAL.

21 MR. BARENS: WE BOTH DID.

22 THE COURT: WHAT?

23 MR. BARENS: HE SAID WHAT IF A GUY USED A PILLOW IN
24 THE HYPOTHETICAL -- THE GUY USES A PILLOW OR HE DOESN'T USE
25 A PILLOW AND --

26 THE COURT: WELL, YOU DIDN'T REQUEST IT BUT I WILL
27 GIVE IT.

28 MR. BARENS: I APPRECIATE IT. MR. CHIER, DO YOU AGREE?

1 MR. CHIER: I WAS NOT HERE FOR THAT PART. I HAVE NOT
2 READ THE TRANSCRIPT.

3 MR. BARENS: I WOULD LIKE THAT, YOUR HONOR.

4 THE COURT: OKAY. I WILL GIVE IT.

5 MR. CHIER: BY THE PEOPLE AND GIVEN? ALL RIGHT.

6 THE COURT: YES. 209, THAT WILL BE GIVEN BY BOTH UNLESS
7 THE DEFENDANT DOESN'T WANT IT.

8B 8 MR. BARENS: YOUR HONOR, COULD WE GIVE IT TWICE? ONCE
9 FOR EACH SIDE?

10 MR. CHIER: ONCE FOR EACH OFFENSE? SO, FOR THE
11 ROBBERY HE IS ENTITLED --

12 MR. BARENS: NO.

13 MR. CHIER: NO.

14 THE COURT: ALL RIGHT. THE NEXT ONE WE HAVE --

15 MR. BARENS: WE WENT FROM 209 TO 450?

16 THE COURT: WAIT A MINUTE. NOW WE GO TO YOURS, 300.

17 MR. CHIER: THIS IS TOTALLY INAPPOSITE.

18 MR. WAPNER: NOT AT ALL. THE REASON THAT THIS ONE
19 AND 301 ARE IN THERE YOUR HONOR, IS SO THAT THE JURY IS
20 INSTRUCTED ON THE LAW OF PRINCIPALS AND AIDERS AND ABETTORS.
21 THAT IS SO WE DON'T GET ANY QUESTIONS FROM THE JURY LATER
22 ABOUT WHAT HAPPENED IS MR. PITTMAN WAS THE ONE WHO PULLED
23 THE TRIGGER AND WE FIND THE DEFENDANT DIDN'T.

24 THE COURT: YES. ALL RIGHT.

25 "ALL PERSONS CONCERNED WITH THE
26 COMMISSION OR ATTEMPTED COMMISSION "

27 AND DO WE HAVE ANYTHING ABOUT ATTEMPTED
28 COMMISSION?

1 MR. WAPNER: NO.

2 THE COURT: CROSS THAT OUT.

3 MR. BARENS: WELL, WAIT A MINUTE.

4 MR. WAPNER: UNLESS THERE IS GOING TO BE SOME REQUEST
5 FOR LESSER INCLUDED ON COUNTS OF ATTEMPTED ROBBERY.

6 MR. BARENS: WAIT A MINUTE. WAIT A MINUTE. ATTEMPTED
7 COMMISSION? JUST A MINUTE.

8 MR. CHIER: JUST A MOMENT, THE PROFESSOR IS THINKING.

9 MR. BARENS: COULD I JUST SEE THIS FOR A MOMENT?

10 THE COURT: WELL, I WILL LEAVE IT IN. IT WILL SAVE
11 A LOT OF TIME.

12 MR. BARENS: YES. I WOULD LIKE THAT LEFT IN.

13 THE COURT: LEFT IN?

14 MR. BARENS: YES.

15 THE COURT: WHAT WOULD BE THE ATTEMPTED COMMISSION?
16 WHAT ARE YOU GOING TO ARGUE IS AN ATTEMPTED COMMISSION?

17 MR. CHIER: YOU ARE GOING TO HAVE TO ARGUE THIS. DON'T
18 FRY YOUR BRAIN AT THIS EARLY STAGE.

19 MR. BARENS: WHAT ABOUT THE STUFF ABOUT OTHER THINGS
20 THEY WERE THINKING ABOUT DOING?

21 THE COURT: HE IS NOT CHARGED WITH THAT.

22 MR. BARENS: LET'S LEAVE IT. GO ON.

23 I WAS NOT SUPPOSED TO BE HERE AT THIS POINT,
24 YOUR HONOR.

25 THE COURT: WELL, I AM GLAD YOU ARE HERE. ALL RIGHT?

26 MR. CHIER: WAIT A MINUTE. I GOT BEHIND, HERE.

27 MR. BARENS: HE IS AT 301.

28 MR. CHIER: AS MODIFIED?

1 THE COURT: WELL, I WILL CROSS IT OUT IF IT IS ALL
2 RIGHT WITH YOU, "OR ATTEMPTED COMMISSION".

3 MR. CHIER: YEAH.

4 THE COURT: AGREEABLE TO BOTH, HUH?

5 MR. WAPNER: OKAY. AIDING AND ABETTING?

6 MR. BARENS: WHAT IS BEING AIDED AND ABETTED HERE?

7 MR. WAPNER: AGAIN, THE REASON FOR THIS IS SO THAT
8 THE JURY HAS THE UNDERSTANDING THAT A PERSON CAN BE CONVICTED
9 OF MURDER, EVEN IF HE IS NOT THE ONE WHO PULLS THE TRIGGER.

10 MR. CHIER: WHAT ABOUT CARLOS?
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1 MR. WAPNER: CARLOS SAYS YOU HAVE TO HAVE AN INTENT TO
2 KILL.

3 THE COURT: CARLOS WILL BE FORGOTTEN WITH THIS NEW
4 SUPREME COURT THAT WE HAVE GOT.

5 MR. BARENS: THAT IS A BAD THING, YOUR HONOR. IT MAKES
6 LIFE MUCH MORE DIFFICULT. IT WILL ALMOST MAKE DEATH MORE
7 DIFFICULT.

8 MR. CHIER: WELL, WHERE ARE WE? WE ARE GIVING 301?

9 THE COURT: 301 WILL BE GIVEN AS MODIFIED.

10 MR. CHIER: THAT IS WITH THE INSTRUCTION OF THE ATTEMPTED
11 COMMISSION?

12 THE COURT: THAT IS CORRECT.

13 ACCOMPLICE, WHERE DO WE HAVE AN ACCOMPLICE IN HERE?

14 MR. CHIER: THERE IS NO ACCOMPLICE EVIDENCE IN THIS
15 CASE.

16 MR. WAPNER: THERE IS NO ACCOMPLICE EVIDENCE IN THIS
17 CASE?

18 IF YOU DON'T WANT THESE INSTRUCTIONS IN HERE, I
19 AM HAPPY TO HAVE YOU LEAVE THEM OUT.

20 THE COURT: NO, NO. IT IS A QUESTION OF ONE WHO AIDS
21 AND ABETS.

22 MR. WAPNER: WHAT ARE YOU LOOKING AT?

23 THE COURT: (READING:)

24 "AN ACCOMPLICE IS ONE WHO IS SUBJECT
25 TO PROSECUTION FOR THE IDENTICAL OFFENSE CHARGED
26 AGAINST THE DEFENDANT ON TRIAL."

27 MR. WAPNER: IF COUNSEL DOESN'T WANT ANY OF THESE
28 INSTRUCTIONS --

1 MR. CHIER: COULD I SPEAK TO THE PROFESSOR FOR A MINUTE
2 HERE?

3 THE COURT: THE ACCOMPLICE WOULD BE DEAN KARNY.

4 (PAUSE IN PROCEEDINGS.)

5 MR. CHIER: JUST A MOMENT, YOUR HONOR. DON'T BE HASTY.

6 THE COURT: I AM NOT BEING HASTY. I AM GOING TO GIVE
7 IT.

8 MR. CHIER: WE DON'T WANT IT, YOUR HONOR.

9 MR. BARENS: WHY DON'T YOU SPEAK?

10 MR. CHIER: IT IS COMPLETELY ANTITHETICAL TO OUR DEFENSE
11 AND WE WOULD OBJECT STRENUOUSLY TO THIS INSTRUCTION BEING GIVEN.

12 THE COURT: ALL RIGHT, THEN I AM GOING TO GIVE IT,
13 DESPITE THE STRENUOUS OBJECTION.

14 MR. BARENS: WELL, WE HAVE MADE OUR RECORD.

15 THE COURT: I THINK THERE MIGHT BE SOME ARGUMENT MADE --
16 I AM SURE THERE MIGHT BE SOME ARGUMENT MADE THAT DEAN KARNY
17 HIMSELF PARTICIPATED, THAT HE PARTICIPATED IN SOME WAY AND
18 HE FELT HIMSELF MORALLY, IF NOT LEGALLY, RESPONSIBLE AND MIGHT
19 BE CONSIDERED AN ACCOMPLICE.

20 MR. WAPNER: THAT IS TRUE.

21 AND IF THE JURY CONVICTS MR. HUNT, IT WOULD
22 CERTAINLY BE HELPFUL TO HAVE THESE INSTRUCTIONS IN HERE TO
23 KNOW THAT THEY PROPERLY EVALUATED THE TESTIMONY OF SOME OF
24 THE WITNESSES.

25 MR. CHIER: WE ARE SPECIFICALLY ASKING THAT IT NOT BE
26 GIVEN.

27 THE COURT: YOUR OBJECTION IS ON THE RECORD. I AM GOING
28 TO GIVE IT.

1 THE NEXT ONE, "TESTIMONY OF ACCOMPLICE MUST BE
2 CORROBORATED," YOU ALSO OBJECT TO THAT, 311? _

3 MR. BARENS: YES.

4 MR. WAPNER: ALL OF THESE NEXT SERIES OF INSTRUCTIONS --

5 THE COURT: ALL RIGHT, 312.

6 MR. BARENS: WHAT WAS THAT LAST ONE YOUR FINGER WENT
7 BY? HE IS GOING TO GIVE THIS ONE?

8 MR. WAPNER: HE HAS TO GIVE ALL OF THEM.

9 MR. BARENS: 318, HE WILL GIVE THEN.

10 MR. CHIER: 318?

11 MR. BARENS: SURE. IF HE IS GOING TO GIVE ANY OF THEM,
12 HE HAS TO GIVE ALL OF THEM.

13 MR. CHIER: YOU ARE GOING TO GIVE 313?

14 THE COURT: 312. HE WENT OVER THESE SEVEN SHEETS, TOO,
15 THAT MADE HIM AN ACCOMPLICE.

16 MR. WAPNER: I DID NOT PUT IN, I THINK IT IS 316, WHICH
17 COUNSEL MIGHT WANT TO CONSIDER IN LIGHT OF THE COURT'S RULING
18 THAT IT IS GOING TO GIVE THE ACCOMPLICE INSTRUCTIONS AND 316,
19 I THINK IS --

20 THE COURT: WHAT ABOUT 313. WHAT IS THE POINT OF THAT?

21 MR. WAPNER: MAY I HAVE JUST A MOMENT?

22 THE ONLY POINT OF THAT IS THAT --

23 MR. CHIER: YOU HAVE TO GIVE IT AS A PACKAGE.

24 THE COURT: ALL RIGHT.

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1 MR. WAPNER: IT COMES AS PART OF THE THING, IF THEY FEEL
2 EVERYBODY ELSE WHO WAS INVOLVED WERE ALSO ACCOMPLICES, THEN
3 THERE HAS TO BE SOME EVIDENCE TO CORROBORATE THAT.

4 THE COURT: ALL RIGHT, THEN I WILL GIVE THAT.

5 AND 314 ALSO:

6 MR. CHIER: IS THAT GIVEN?

7 THE COURT: YES.

8 MR. CHIER: REQUESTED BY THE PEOPLE?

9 THE COURT: YES, 314.

10 WHAT DO YOU SAY ABOUT 316?

11 MR. WAPNER: I THINK IF I CAN HAVE A MINUTE, THAT 316
12 IS THE "ACCOMPLICE AS A MATTER OF LAW" INSTRUCTION AND I DIDN'T
13 PUT THAT IN THERE BECAUSE --

14 THE COURT: HOW ABOUT 318?

15 MR. WAPNER: BECAUSE I DIDN'T WANT TO MAKE THAT DECISION.

16 MR. BARENS: WE ARE GIVING 318, YES.

17 THE COURT: 316, WHAT DID YOU SAY, IT WAS A MATTER OF
18 LAW?

19 MR. WAPNER: YES. IT SAYS: "IF THE CRIME OF BLANK WAS
20 COMMITTED BY ANYONE, THE WITNESS BLANK WAS AN ACCOMPLICE AS
21 A MATTER OF LAW AND HIS TESTIMONY IS SUBJECT TO THE RULE
22 REQUIRING CORROBORATION."

23 AND I DIDN'T PUT THAT IN THERE BECAUSE I DIDN'T
24 FEEL THAT WAS A DETERMINATION FOR ME TO MAKE.

25 MR. CHIER: I AM SORRY. I WAS CONFERRING WITH COUNSEL.

26 MR. BARENS: YOU SAID 316? LET ME JUST SEE IT.

27 THE COURT: WHO WAS SUPPOSED TO BE THE ACCOMPLICE IN
28 THIS CASE, DEAN KARNY?

9A-2
1 MR. WAPNER: I ASSUME --

2 I PUT THESE INSTRUCTIONS IN THERE BECAUSE I ASSUME
3 THAT THERE MIGHT BE -- IT MIGHT APPLY TO 316.

4 THE COURT: HOW ABOUT 319?

5 I THINK WE OUGHT TO GIVE THE GIRLS A CHANCE TO
6 GO TO LUNCH. WE WILL TAKE A BREAK.

7 MR. BARENS: YOUR HONOR, MIGHT I BE EXCUSED THIS
8 AFTERNOON?

9 THE COURT: NO. IT IS IMPORTANT FOR YOU TO BE HERE SO
10 YOU KNOW WHAT TO ARGUE AT THE TIME.

11 MR. BARENS: YES, YOUR HONOR.

12 THE COURT: I AM REALLY SERIOUS ABOUT IT.

13 MR. BARENS: I UNDERSTAND THAT, YOUR HONOR.

14 THE COURT: I THINK YOU WOULD NOT BE DOING YOUR CLIENT
15 A GOOD SERVICE BY NOT BEING HERE.

16 MR. BARENS: YES, YOUR HONOR.

17 THE COURT: ALL RIGHT.

18 MR. CHIER: I DON'T THINK THIS SHOULD BE GIVEN.

19 MR. BARENS: 319?

20 MR. CHIER: IF WE ASK FOR 316, THEN WE WAIVE OUR
21 OBJECTION TO THE WHOLE SERIES OF ACCOMPLICE INSTRUCTIONS.

22 MR. BARENS: WELL, OKAY, THEN WE DON'T ASK FOR IT.

23 THE COURT: ALL RIGHT, THEN 318 WON'T BE GIVEN.

24 MR. BARENS: WAIT A MINUTE, YOUR HONOR. YOU ARE NOT
25 GOING TO GIVE 318?

26 THE COURT: I DON'T KNOW.

27 MR. BARENS: IF YOU ARE GOING TO GIVE ANY OF THEM --

28 THE COURT: I AM GIVING 318, YES.

9A-7
1 MR. CHIER: WAIT A MINUTE, ARTHUR.

2 THE COURT: 316 IS THE ONE WE ARE TALKING ABOUT, AREN'T
3 WE?

4 MR. WAPNER: RIGHT.

5 MR. CHIER: YOU KNOW, THIS ONE SAYS "IF THE CRIME OF
6 MURDER WAS COMMITTED BY ANYONE, THE WITNESS KARNY IS AN
7 ACCOMPLICE AS A MATTER OF LAW AND HIS TESTIMONY IS SUBJECT
8 TO THE RULE REQUIRING CORROBORATION."

9 WITH THE UNDERSTANDING THAT WE OBJECT TO THIS
10 WHOLE SERIES, WE WOULD OBJECT TO THIS WHOLE SERIES OF
11 ACCOMPLICE INSTRUCTIONS, BUT IF YOU ARE GOING TO OVERRULE OUR
12 OBJECTION, THEN THIS SHOULD OBVIOUSLY BE INCLUDED.

13 THE COURT: I THINK 316 SHOULD BE GIVEN.

14 MR. WAPNER: THAT IS FINE.

15 THE COURT: ALL RIGHT, YOU WILL PRODUCE IT, WILL YOU,
16 PLEASE?

17 ALL RIGHT, WE WILL TAKE A RECESS.

18 MR. BARENS: WHAT TIME, YOUR HONOR?

19 THE COURT: ANY TIME YOU WANT.

20 MR. CHIER: 12:30?

21 MR. WAPNER: 1:30.

22 MR. BARENS: 1:30, JUDGE, IF WE COULD.

23 THE COURT: 1:30 WILL BE FINE.

24 (AT 12:05 P.M. A RECESS WAS TAKEN
25 UNTIL 1:30 P.M. OF THE SAME DAY.)
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9B
1 SANTA MONICA, CALIFORNIA; THURSDAY, APRIL 9, 1987; 1:35 P.M.

2 DEPARTMENT WEST C HON. LAURENCE J. RITTENBAND, JUDGE

3 (APPEARANCES AS NOTED ON TITLE PAGE.)

4
5 (THE FOLLOWING PROCEEDINGS WERE HELD

6 IN CHAMBERS:)

7 MR. CHIER: I AM WITHDRAWING A FEW, YOUR HONOR.

8 THE COURT: ALL RIGHT. THE NEXT WE HAVE IS 319 AND THAT
9 IS WHETHER OR NOT THE WITNESS, THAT IS DEAN KARNY, IS THAT
10 IT, IS AN ACCOMPLICE?

11 MR. WAPNER: YES, YOUR HONOR, BUT BEFORE YOU START
12 FILLING THAT IN, IF YOU ARE GOING TO GIVE 316, WHERE YOU ARE
13 TELLING THEM HE IS AN ACCOMPLICE AS A MATTER OF LAW --

14 THE COURT: I AM NOT SAYING THAT HE IS AN ACCOMPLICE
15 AS A MATTER OF LAW, DID I?

16 MR. WAPNER: I DON'T KNOW. I THOUGHT THE COURT --

17 MR. BARENS: I DID NOT HEAR YOUR HONOR SAY THAT.

18 MR. WAPNER: I THOUGHT THE COURT SAID IT WAS GOING TO
19 GIVE THAT INSTRUCTION?

20 THE COURT: NO, NO.

21 LET THEM DETERMINE THAT.

22 MR. CHIER: 316 IS AN ACCOMPLICE AS A MATTER OF LAW AND
23 YOUR HONOR INDICATED YOU WERE GOING TO GIVE THAT, DIDN'T YOU?

24 THE COURT: DID I?

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10 1 MR. WAPNER: I THOUGHT THAT YOU SAID THAT THIS MORNING.

2 THE COURT: I DID?

3 MR. WAPNER: RIGHT.

4 THE COURT: THEN I WILL GIVE IT. IS HE AN ACCOMPLICE
5 AS A MATTER OF LAW?

6 MR. WAPNER: I AM NOT TAKING THAT POSITION.

7 MR. CHIER: WE SAY NO.

8 THE COURT: IT IS A QUESTION OF WHAT THEY DID. I THINK
9 THAT HE WAS AN ACCOMPLICE AS A MATTER OF LAW.

10 MR. WAPNER: I DON'T THINK HE IS.

11 THE COURT: HE MIGHT HAVE GIVEN ADVICE AS TO WHAT TO
12 PUT IN THE SEVEN SHEETS. I THINK HE SAID SOMETHING ABOUT THAT.
13 HE KNEW WHAT WAS GOING ON.

14 BUT, HE WAS NOT AN ACCOMPLICE AS A MATTER OF LAW.
15 LET THE JURY DETERMINE THAT.

16 MR. WAPNER: THAT IS BASICALLY --

17 THE COURT: HIS OWN ADMISSION WAS THAT HE FELT THAT HE --

18 MR. CHIER: ISN'T THE FACT THAT HE WAS IMMUNIZED FOR
19 THE OFFENSE, MAKING HIM AN ACCOMPLICE AS A MATTER OF LAW?

20 THE COURT: NO.

21 MR. WAPNER: MY POSITION IS THAT THE JURY SHOULD BE
22 ALLOWED TO DECIDE. THE ONLY REASON THAT I BROUGHT THAT
23 SUGGESTION UP IS OBVIOUSLY, YOU CAN'T GIVE 316 AND 319. IT
24 IS ONE OR THE OTHER.

25 THE COURT: I WON'T GIVE 316. IT IS NOT IN HERE, ANYWAY.

26 WE HAVE NOT GOT IT. ALL RIGHT.

27 MR. CHIER: YOUR HONOR, CAN I TALK TO YOU ABOUT 319?

28 THE COURT: SURE.

10- 1 MR. CHIER: THIS TALKS ABOUT THE DEFENDANT PROVING
2 SOMETHING WITH RESPECT TO --

3 THE COURT: WELL, THAT IS THE LAW.

4 MR. CHIER: BUT WE DON'T HAVE TO PROVE ANYTHING. IT
5 SAYS THAT IN THE EVENT THE DEFENDANT HAS NOT PROVED BY A
6 PREPONDERANCE OF THE EVIDENCE THAT DEAN KARNY IS AN ACCOMPLICE --
7 THAT IMPLIES THAT THERE IS SOME BURDEN ON THE DEFENDANT TO
8 PROVE THAT DEAN KARNY IS AN ACCOMPLICE WHEN WE DON'T EVEN TAKE
9 THE POSITION IN THE FIRST PLACE, THAT AN ACCOMPLICE INSTRUCTION
10 SHOULD BE GIVEN.

11 MR. BARENS: NOT TO MENTION THAT THE DEFENSE -- HOW COULD
12 WE CLAIM HE IS AN ACCOMPLICE ON A CRIME WE SAY DID NOT OCCUR?

13 HOW COULD WE HAVE A BURDEN TO PROVE THAT HE IS
14 NOT AN ACCOMPLICE WHEN WE SAY THERE IS NO UNDERLYING CRIMINAL
15 ACTIVITY?

16 THE COURT: THAT'S TRUE. I DON'T THINK I OUGHT TO GIVE
17 IT AT ALL. DO YOU?

18 MR. WAPNER: WELL, YES. I DO THINK YOU OUGHT TO GIVE
19 IT. BECAUSE THE PEOPLE, DESPITE WHAT THE DEFENSE POSITION
20 IS -- THE PEOPLE'S POSITION OBVIOUSLY IS THAT THERE WAS A
21 MURDER COMMITTED.

22 AND IF THE JURY BELIEVES THERE WAS A MURDER
23 COMMITTED AND THAT THERE WAS TESTIMONY OF SOMEONE WHO COULD
24 BE AN ACCOMPLICE, THEY HAVE TO DECIDE WHETHER THAT PERSON WAS
25 AN ACCOMPLICE AND WHETHER THERE IS CORROBORATION FOR THAT
26 TESTIMONY.

27 MR. CHIER: THIS IS AN INSTRUCTION REQUESTED BY THE
28 DEFENDANT, NOT BY THE PEOPLE. THE PEOPLE NEVER REQUEST IT.

10-
1 THE COURT: THE POINT THAT MR. WAPNER MAKES IS THAT IF
2 THERE WAS A MURDER AND THERE WAS SOMEBODY WHO PARTICIPATED
3 OR IS SUPPOSEDLY AN ACCOMPLICE, IN ORDER TO MERIT THE
4 INSTRUCTION THAT ANY OF HIS TESTIMONY SHOULD BE VIEWED WITH
5 CAUTION, YOU HAVE GOT TO TELL THE JURY --

6 MR. CHIER: BUT YOUR HONOR --

7 THE COURT: WHAT WAS THE PURPOSE? SUPPOSE THAT YOU DID
8 HAVE AN ACCOMPLICE AND SO THE ACCOMPLICE WAS TESTIFYING AGAINST
9 THE DEFENDANT?

10 MR. WAPNER: THEN THE LAW SAYS THAT THERE ARE CERTAIN
11 RULES THAT THE JURY IS REQUIRED TO APPLY TO THE TESTIMONY OF
12 SOMEONE THAT THEY FIND TO BE AN ACCOMPLICE.

13 THE COURT: WELL, THE TESTIMONY OF THE --

14 MR. CHIER: IF WE REQUEST IT.

15 THE COURT: DIDN'T YOUR TESTIMONY TEND TO SHOW THAT HE
16 PARTICIPATED?

17 MR. BARENS: NO. MY WHOLE THING IS TO SHOW THAT THERE
18 WAS NO UNDERLYING CRIME. I TRIED TO IMPEACH KARNY TO THE
19 EFFECT THAT HE NEVER SAW ANY OF THIS HAPPEN, THAT HE WAS MAKING
20 IT UP.

21 AND MY WHOLE SITUATION YOUR HONOR, IS THAT HOW
22 CAN I SAY HE IS AN ACCOMPLICE TO A MURDER THAT WE SAY THE
23 MURDER DIDN'T OCCUR IN THE FIRST PLACE.

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1 MR. CHIER: YOUR HONOR, MR. WAPNER IS SAYING TO YOU THAT
2 HE WANTS THE JURY TO BE INSTRUCTED THAT THE TESTIMONY OF AN
3 ACCOMPLICE SHOULD BE VIEWED WITH DISTRUST IF KARNY IS AN
4 ACCOMPLICE. THAT IS A REQUEST THAT A DEFENDANT MAKES AND
5 THAT IS A DECISION THAT IS UP TO A DEFENDANT.

6 IF OUR DEFENSE IS THAT THERE WAS NO CRIME AND,
7 THEREFORE, THERE CAN BE NO ACCOMPLICE AS A MATTER OF LAW, THEN
8 WHAT IS MR. WAPNER DOING THEN, YOU KNOW, STICKING HIS OAR IN
9 OUR INSTRUCTIONS?

10 THE COURT: YOU WANT TO SHOW HE WASN'T AN ACCOMPLICE?

11 MR. WAPNER: I THINK IF THE JURY BELIEVES THAT THERE
12 WAS IN FACT A MURDER, THEN THEY HAVE TO -- THE LAW REQUIRES
13 THAT THEY HAVE THESE INSTRUCTIONS. IT IS NOT WHAT I WANT TO
14 SHOW.

15 THE COURT: PARDON ME. SUPPOSE YOU DIDN'T HAVE ANY OF
16 THESE INSTRUCTIONS ON ACCOMPLICE, IS THAT WHAT YOU WANT?

17 MR. BARENS: THAT IS WHAT WE ARE ASKING.

18 THE COURT: NO INSTRUCTIONS ON ACCOMPLICE? HOW ARE YOU
19 AFFECTED BY IT?

20 MR. CHIER: WE ARE NOT GOING TO ARGUE THAT.

21 MR. WAPNER: I SUPPOSE ON ANY APPEAL --

22 THE COURT: IT IS THAT THEY WANT TO BE DISCREDITING HIM,
23 THAT THEY WOULD WANT TO SHOW HE PARTICIPATED IN THIS THING.

24 MR. CHIER: CORRECT, CORRECT.

25 THE COURT: WHAT DO YOU NEED ACCOMPLICE TESTIMONY FOR?

26 MR. WAPNER: WELL, I ASSUME THAT ANY ERROR --

27 THE COURT: SUPPOSE IN LAW, SUPPOSE HE IS AN ACCOMPLICE
28 AND HE ADMITTED THAT HE HAD SOMETHING TO DO WITH THIS, HE FELT

1 HIMSELF GUILTY, PARTIALLY RESPONSIBLE, THAT WOULD MAKE HIM
2 AN ACCOMPLICE; IS THAT RIGHT?

3 MR. WAPNER: RIGHT.

4 MR. CHIER: WE DON'T INTEND TO ARGUE THAT HIS TESTIMONY
5 SHOULD BE VIEWED WITH DISTRUST OR THAT HE IS AN ACCOMPLICE.

6 MR. WAPNER IS BASICALLY PUTTING IN DEFENSE
7 INSTRUCTIONS OUT OF AN ABUNDANCE OF SOME CAUTION.

8 THE COURT: WHY?

9 MR. WAPNER: THE LAW SAYS THAT ACCOMPLICE TESTIMONY HAS
10 TO BE CORROBORATED AND THAT THE JURY CAN'T --

11 THE COURT: LOOK, THEY DON'T WANT ANY INSTRUCTION ON
12 ACCOMPLICE AND THEY ARE NOT GOING TO ARGUE THAT HE IS AN
13 ACCOMPLICE IN THE CASE, SO WHAT DIFFERENCE DOES THAT MAKE TO
14 YOU IF IT IS HELD OUT ALTOGETHER?

15 MR. WAPNER: WELL, I THINK IN ANY EVENT, THE RECORD IS
16 GOING TO BE ABUNDANTLY CLEAR THAT IF THEY HAD FOUND HE WAS
17 AN ACCOMPLICE, THERE IS MORE THAN ADEQUATE CORROBORATION SO
18 I WILL SUBMIT IT TO THE COURT.

19 THE COURT: BUT I MEAN IF THE DEFENSE SAY THEY DON'T
20 WANT ANY INSTRUCTION ON ACCOMPLICE "AND I AM NOT GOING TO CALL
21 HIM AN ACCOMPLICE OR ARGUE TO THE JURY HIS TESTIMONY SHOULD
22 BE VIEWED WITH CAUTION," WHY SHOULD YOU BE CONCERNED ABOUT THE
23 INSTRUCTIONS TO THAT EFFECT?

24 MR. WAPNER: BECAUSE I BELIEVE THAT THE STATE OF THE
25 LAW IS THAT JUST BECAUSE THEY ARE NOT GOING TO SAY HE IS AN
26 ACCOMPLICE DOESN'T MEAN THAT THE JURY CAN'T FIND THAT HE WAS
27 AN ACCOMPLICE AND IF THEY DO, THEN THEY WOULD BE REQUIRED BY
28 LAW TO APPLY CERTAIN RULES.

1 THE COURT: IT WOULD BE TO YOUR ADVANTAGE TO SAY HE WAS
2 AN ACCOMPLICE AND HIS TESTIMONY SHOULD BE VIEWED WITH CAUTION
3 AND THEY DON'T WANT THAT AT ALL.

4 MR. BARENS: FOR THE DEFENSE TO SAY THAT KARNY IS AN
5 ACCOMPLICE IS TANTAMOUNT TO A GUILTY PLEA.

6 MR. CHIER: THAT IS WHY MR. WAPNER WANTS IT. I MEAN
7 LET'S NOT KID OURSELVES.

8 THE COURT: NO. I KNOW WHY HE WANTS IT. BECAUSE IF
9 THERE IS ANY IDEA IN THE MINDS OF THE JURORS THAT HE IS AN
10 ACCOMPLICE AND THEY WANT TO TREAT HIM AS SUCH, HE WANTS AN
11 INSTRUCTION TO TREAT IT AS SUCH.

12 MR. CHIER: THAT IS NOT SUA SPONTE STUFF.

13 THE COURT: NOW IF COUNSEL FOR THE DEFENDANT DOESN'T
14 WANT THESE INSTRUCTIONS ON ACCOMPLICE, WHY DO YOU WANT THEM?

15 MR. WAPNER: BECAUSE I BELIEVE THAT IS THE STATE OF THE
16 LAW, THAT THEY ARE REQUIRED AND I HAVE SUBMITTED --

17 THE COURT: YOU MEAN SUA SPONTE, I HAVE GOT TO DECIDE
18 THAT IF THEY REFUSE THOSE INSTRUCTIONS, THAT I HAVE GOT TO
19 SAY, YES, THE INSTRUCTIONS MUST BE GIVEN?

20 MR. CHIER: OVER OUR OBJECTION.

21 MR. WAPNER: I AM LOOKING NOW IN APPENDIX A TO CALJIC
22 ABOUT SUA SPONTE INSTRUCTIONS.

23 THE COURT: YOU WON'T FIND IT.

24 MR. WAPNER: I MAY NOT.

25 THE COURT: I DOUBT IT.

26 MR. CHIER: I MEAN THIS IS OUR DECISION, NOT YOURS, FRED.

27 (UNREPORTED COLLOQUY BETWEEN MR. WAPNER
28 AND MR. CHIER.)

1 THE COURT: IF THE ACCOMPLICE IS CALLED AS A WITNESS
2 BY THE PEOPLE, THIS INSTRUCTION SHOULD BE GIVEN SUA SPONTE.

3 MR. WAPNER: THAT IS 313 YOU ARE LOOKING AT?

4 THE COURT: 313.

5 MR. BARENS: THE PEOPLE NEVER CALLED HIM AS AN ACCOMPLICE
6 WITNESS.

7 THE COURT: BY THE PEOPLE. BY THE PEOPLE.

8 MR. BARENS: THE PEOPLE DIDN'T CALL HIM AS AN ACCOMPLICE
9 WITNESS.

10 THE COURT: SURE, THEY CALLED HIM AS AN ACCOMPLICE
11 WITNESS. HE TESTIFIED AS TO WHAT HE DID IN CONNECTION WITH
12 THE SEVEN PAGES.

13 MR. CHIER: BUT THEY DIDN'T CALL HIM --

14 THE COURT: YES. THEY DON'T HAVE TO DESIGNATE HIM AS
15 AN ACCOMPLICE WITNESS.

16 MR. CHIER: HE IS NOT AN UNCHARGED CODEFENDANT. HE
17 NEVER --

18 MR. BARENS: THEY NEVER SAID THAT.

19 THE COURT: HE WASN'T CHARGED WITH THE DEFENDANT BECAUSE
20 HE WAS GIVEN IMMUNITY.

21 MR. BARENS: NO.

22 THEY NEVER CHARGED HIM IN THE FIRST INSTANCE.
23 THERE WAS NO EVIDENCE WHATSOEVER THAT HE WAS FACING A
24 PROSECUTION IN THIS CASE.

25 THE COURT: (READING:)

26 "HOWEVER, IF AN ACCOMPLICE IS CALLED
27 AS A WITNESS BY THE DEFENDANT, THIS INSTRUCTION
28 SHOULD NOT BE GIVEN UNLESS REQUESTED BY THE

1 DEFENDANT."

2 MR. BARENS: YOUR HONOR, I THINK IT IS HIGHLY
3 PREJUDICIAL TO CREATE A BURDEN OF PROOF FOR A DEFENDANT IN
4 THIS PARTICULAR FACT SETTING WHERE THE DEFENDANT IS SAYING
5 THE MURDER DIDN'T OCCUR AND THEN HE GIVES YOU 3.18, WHICH
6 THEN IMPOSES A DUTY ON US TO PROVE SOMETHING ABOUT THE
7 ACCOMPLICE.

8 I DON'T SEE WHERE THE INTERESTS OF JUSTICE AND
9 A FAIR TRIAL ARE BEING SERVED BY THESE ACCOMPLICE INSTRUCTIONS.
10 IT SERVES NO PURPOSE, OTHER THAN TO WEIGHT THE SCALE AGAINST
11 THE DEFENDANT.

12 MR. CHIER: COULD I TELL YOU WHAT THE FACTUAL SETTING
13 FOR THIS IS, JUDGE? THAT MR. KARNY WAS NEVER REALLY LIABLE
14 AS A PRINCIPAL OR AN ACCESSORY IN THIS CASE IN THE FIRST PLACE.

15 HIS IMMUNITY DEAL WAS ESSENTIALLY IN NORTHERN
16 CALIFORNIA AND THEY THREW THIS IN, THIS CASE, AS BASICALLY
17 A BONE OR A BONUS, THAT IS HOW IT HAPPENED, JUDGE. HE WAS
18 NEVER LIABLE IN THE SENSE THAT AN ACCOMPLICE IS LIABLE FOR
19 THE SAME CHARGES AS A PRINCIPAL AND THIS IS LIKE A FALSE
20 ARGUMENT HERE THAT HE IS AN ACCOMPLICE AND, THEREFORE, THAT
21 THE JURY SHOULD BE INSTRUCTED ON THE LAW REGARDING ACCOMPLICES
22 AND WE DON'T --

23 THE COURT: DON'T YOU THINK BY HIS TESTIMONY THAT HE
24 IS LABELED AS AN ACCOMPLICE WHEN HE TESTIFIED THAT HE KNEW
25 WHAT WAS GOING DOWN AND THAT HE ASSISTED IN CONNECTION WITH
26 THE PREPARATION OF THESE SEVEN SHEETS OF PAPER?

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1 MR. BARENS: EXCEPT YOUR HONOR, THE SEVEN PAGES AND
2 THEIR LANGUAGE DON'T SAY ANYTHING ABOUT KILL, MURDER, SHOOT
3 OR ET CETERA.

4 AND NOT ONLY THAT, EVEN ASSUMING HE DID -- YOU
5 KNOW, SOMEONE SAID TO HIM, "I AM GOING TO COMMIT A MURDER."
6 THAT DOESN'T MAKE HIM AN ACCESSORY OR AN ACCOMPLICE.

7 MERE PRESENCE OR KNOWLEDGE? THERE IS NO LAW
8 TO THAT EFFECT.

9 MR. CHIER: AND HE ALSO WAS ASKED WHAT HE CONTRIBUTED --
10 THE COURT: HE PARTICIPATED IN CONNECTION WITH THE PLAN.
11 AND HE SAID THAT THEY WERE PLANNING THE MURDER OF LEVIN.
12 HE KNEW WHAT WAS GOING DOWN.

13 HE PARTICIPATED IN THAT.

14 MR. BARENS: WHEN HE WAS ASKED -- SIR, WHEN HE WAS
15 ASKED WHAT HE PARTICIPATED IN, HIS RECOLLECTION OTHER THAN
16 SAYING THAT HE WAS WATCHING HUNT DRAFT THE PAGES --

17 THE COURT: AND HE ASSISTED.

18 MR. BARENS: NO. HE SAID THAT HE WAS A SOUNDINGBOARD
19 FOR HUNT'S INITIATION OF THE LANGUAGE ON THE SEVEN PAGES.

20 MR. CHIER: HE SPECIFICALLY DECLINED TO ENUMERATE THE
21 MANNER IN WHICH HE ASSISTED.

22 MR. BARENS: HE DIDN'T IN ANY WAY INDICATE OR ARTICULATE
23 WHAT HE HAD PUT INTO IT, AND SO, HOW COULD HE HAVE CRIMINAL
24 LIABILITY?

25 MR. CHIER: IT WAS CLEAR FROM HIS WHOLE TESTIMONY ON
26 CROSS-EXAMINATION AS WELL AS DIRECT, THAT THAT WAS TO PUT
27 HIM OUT OF THE POSTURE AS AN ACCOMPLICE, YOUR HONOR.

28 IT WAS IN A KIND OF SELF-SERVING EFFORT TO ASSURE

1 HIS FUTURE AS AN ATTORNEY. HE DIDN'T SAY ANYTHING WHICH
2 WOULD CAST HIM IN THE ROLE OF AN ACCOMPLICE.

3 THE COURT: WELL, LET'S SEE WHAT THE DEFINITION IS.

4 "AN ACCOMPLICE IS ONE WHO IS OR WAS
5 SUBJECT TO PROSECUTION FOR THE IDENTICAL OFFENSE
6 CHARGED AGAINST THE DEFENDANT ON TRIAL."

7 MR. BARENS: FIRST DEGREE MURDER YOUR HONOR, BECAUSE
8 HE WITNESSED THE PREPARATION OF THE SEVEN-PAGE LIST?

9 THE COURT: NO. HE KNEW WHAT WAS GOING ON. HE ASSISTED
10 IN CONNECTION WITH THE PLANNING.

11 MR. CHIER: THERE IS NO EVIDENCE THAT HE ASSISTED.

12 THE COURT: YES, HE DID. SURE.

13 DIDN'T HE TESTIFY THAT HE WENT OVER THE THING
14 PAGE BY PAGE?

15 MR. WAPNER: HE TESTIFIED ABOUT BEING THERE DISCUSSING
16 IT WITH HIM AND ABOUT HELPING HIM WITH CERTAIN THINGS,
17 SPECIFICALLY ABOUT PUTTING ON THE LIST ITEMS FOR EXAMPLE,
18 THAT WERE TO GO IN THE SUITCASES.

19 THE COURT: AND FURTHER, DIDN'T HE TESTIFY AS TO TAKING
20 THESE PEOPLE TO THE MOVIES TO FURNISH AN ALIBI?

21 MR. WAPNER: RIGHT.

22 MR. BARENS: YOUR HONOR, THE ARGUMENT ABOUT THE MOVIE
23 THING I THINK, HAS BEEN TOTALLY DISCREDITED. AND NOTWITH-
24 STANDING --

25 THE COURT: WHY HAS IT BEEN?

26 MR. BARENS: YOUR HONOR, I BELIEVE NOT BECAUSE HE
27 SUBMITTED IT WASN'T TRUE BUT I THINK THE CONTEXTURAL EVIDENCE,
28 THE FACT THAT NO ONE EVER CAME INTO COURT HERE AMONG THE

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1 OTHER PEOPLE THAT SUPPOSEDLY WERE ALIBIING HIM -- JEFF RAYMOND
2 NEVER SAID THAT HE WENT WITH DEAN KARNY TO THE MOVIES THAT
3 NIGHT IN AN EFFORT TO ALIBI JOE HUNT.

4 THE COURT: WHO TESTIFIED THAT THAT WAS PLANNED TO
5 GO TO THE MOVIES SO THAT HE COULD COVER UP?

6 MR. WAPNER: DEAN KARNY. BUT, HE DIDN'T TESTIFY THAT
7 THE PLAN WAS THAT THEY WERE GOING TO TELL JEFF RAYMOND IT
8 WAS PART OF AN ALIBI.

9 MR. CHIER: EVEN IF IT WERE TRUE THAT KARNY WAS PROVIDING
10 AN ALIBI FOR HUNT, THAT DOESN'T MAKE HIM LIABLE FOR THE SAME
11 CRIME AS MR. HUNT.

12 MR. WAPNER: MAY I DIRECT THE COURT'S ATTENTION TO
13 APPENDIX A OF CALJIC, VOLUME 1, PAGE 309?

14 THE COURT: APPENDIX 1?

15 MR. WAPNER: APPENDIX A, NOT THE POCKET PART. IT IS
16 THE MAIN VOLUME. IT IS PAGE 309.

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12-4

1 MR. BARENS: NO. PAGE 309 WILL BE TOWARD THE BACK
2 OF VOLUME 1.

3 MR. WAPNER: NOT CALJIC 3.09, BUT PAGE 309.

4 MR. BARENS: TO YOUR RIGHT, SIR.

5 THE COURT: 309?

6 MR. WAPNER: IS THAT VOLUME 1 OR VOLUME 2 THAT YOU
7 HAVE? IT IS VOLUME 2. I APOLOGIZE TO THE COURT.

8 THE COURT: SUA SPONTE INSTRUCTIONS?

9 MR. WAPNER: RIGHT.

10 MR. CHIER: IF HE IS AN ACCOMPLICE. WE ARE RIGHT NOW
11 ON THE THRESHOLD ISSUE AND --

12 THE COURT: WELL, HE CERTAINLY FITS THE ACCOMPLICE
13 DEFINITION.

14 "THE ACCOMPLICE IS THE ONE WHO IS
15 SUBJECT TO PROSECUTION FOR THE IDENTICAL OFFENSE."

16 THAT IS WHY HE HAS GOT TO BE AN ACCOMPLICE.

17 "THE PERSON MUST HAVE AIDED, PROMOTED
18 AND ENCOURAGED OR INSTIGATED BY ACT OR ADVICE THE
19 COMMISSION OF SUCH OFFENSE WITH KNOWLEDGE OF THE
20 UNLAWFUL PURPOSE OF THE PERSON WHO COMMITTED THE
21 OFFENSE WITH THE INTENT OR PURPOSE OF COMMITTING,
22 ENCOURAGING OR FACILITATING THE COMMISSION OF
23 THE OFFENSE."

24 BY DEFINITION, HE IS AN ACCOMPLICE.

25 MR. BARENS: IN THIS SETTING, WHEN KARNY WAS ON THE
26 STAND, HE COULD NOT OFFER ANY EVIDENCE AS TO WHAT HE DID.

27 AND SECONDARILY, THE LANGUAGE THAT HE HAS TO
28 BE LIABLE FOR PROSECUTION UNDER THE SAME CRIME AND CONVICTION

12-5

1 THEREFORE ON THE SAME CRIME -- COULD YOUR HONOR IN OUR
2 WILDEST IMAGINATION, IMAGINE A TRIAL IN THIS COURT WHERE
3 THE PROSECUTION ONLY PUTS ON THAT THIS GUY SUPPOSEDLY WATCHED
4 ANOTHER GUY WRITING A SEVEN-PAGE LETTER AND SAID, "I THINK
5 YOU OUGHT TO PUT SOCKS IN THE SUITCASE." THAT IS ALL THAT
6 WENT DOWN.

12B

7 THE COURT: HE KNEW EXACTLY WHAT THE PLAN WAS. HE
8 KNEW HOW IT WOULD BE ACCOMPLISHED. HE ADVISED US OF THE
9 CONTENTS OF THAT.

10 HE WENT OVER IT WITH HIM. HE KNEW THE PURPOSE
11 FOR WHICH THIS WAS DESIGNED. HE KNEW THERE -- HE KNEW IT
12 WAS GOING TO BE THAT NIGHT.

13 AND HE ALSO TESTIFIED THAT TO FURNISH AN ALIBI
14 FOR THE DEFENDANT, THEY WENT TO THE THEATER. THEY WERE
15 GOING TO TESTIFY THAT THEY WENT TO THE THEATER WITH HIM.

16 MR. WAPNER: HE FURTHER TESTIFIED THAT IN PREPARATION
17 FOR SETTING UP THE COVER-UP, THAT HE TOOK THE LETTERS OUT
18 OF THE MAIL AND BROUGHT THEM BACK TO THE DEFENDANT SO THEY
19 WOULD NOT BE MAILED. AND THOSE WERE LETTERS -- ONE OF THEM
20 LATER AT LEAST, SHOWED UP IN MR. LEVIN'S APARTMENT.

21 MR. BARENS: I BELIEVE IN A RELEVANT PART OF THAT
22 TESTIMONY, HE ALSO SAID THAT AT THAT DATE, WE WEREN'T SURE
23 WHAT WAS GOING TO HAPPEN. AND THEY WERE -- THEY WEREN'T
24 SURE WHAT THEY WERE GOING TO DO AND NOT DO.

25 MR. CHIER: BUT YOUR HONOR --

26 THE COURT: I THINK THAT IF EITHER WERE CHARGED WITH
27 THIS OFFENSE, THE JURY WOULD HAVE TO DECIDE WHETHER OR NOT
28 HE WAS AN ACCOMPLICE.

12-6

1 MR. BARENS: WELL YOUR HONOR, THEN IF YOU ARE GOING
2 TO USE -- I WOULD THEN PREFER THAT -- I MEAN, IF YOU ARE
3 SAYING TO ME THAT I HAVE NO CHOICE THAT YOU ARE GOING TO
4 PERMIT OR REQUIRE THESE ACCOMPLICE INSTRUCTIONS OVER THE
5 DEFENSE'S OBJECTION, WHICH IS NOW THE SENSE THAT I HAVE IS
6 HAPPENING, THEN WE HAVE GOT TO MAKE A CHOICE -- IT IS NOT
7 THAT I AM SAYING I WANT TO BE IN THIS UNENVIABLE POSITION
8 BUT THEN WE HAVE TO MAKE A CHOICE BETWEEN 3.16 AND 3.19.

9 IT IS NOT THAT I AM SAYING I WANT TO DO THIS,
10 BUT IF I AM IN THIS CORNER, I WOULD RATHER BE CORNERED WITH
11 316 THAN 319.

12 THE COURT: I DON'T SEE WHY YOU DON'T WANT TO HAVE
13 ANY INSTRUCTIONS ON ACCOMPLICE TESTIMONY, SINCE YOU ARE --

14 MR. WAPNER: I AM INSISTING ON IT BECAUSE I THINK THAT
15 IS THE STATE OF THE LAW. I THINK ESPECIALLY AFTER READING
16 THE CALJIC APPENDIX A VOLUME 2, PAGE 309 ON ACCOMPLICES AND
17 THEN IT SAYS,

18 "ORDINARILY, INSTRUCTIONS ON ACCOMPLICE
19 TESTIMONY NEED BE GIVEN SUA SPONTE ONLY WHEN THE
20 ACCOMPLICE WITNESS IS CALLED BY THE PEOPLE."

21 MR. BARENS: EXCUSE ME.

22 MR. CHIER: THERE IS A LEGAL PROBLEM HERE --

23 THE COURT: GO AHEAD. FINISH UP. YOU TWO CAN TALK.

24 MR. WAPNER: THE POINT IS, THAT I BELIEVE THIS WITNESS
25 CAN BE CLASSIFIED AS AN ACCOMPLICE. AND SINCE THE LAW
26 APPARENTLY SAYS THE COURT IS SUPPOSED TO GIVE THESE SUA SPONTE,
27 I BELIEVE IT WOULD BE ERROR NOT TO DO IT.

28 THE COURT: EVEN IF THERE IS A WAIVER FROM THE DEFENDANTS?

12-7

1 MR. BARENS: NOT ONLY DO I WAIVE IT, I PROTEST. I
2 THINK --

3 MR. CHIER: I OBJECT.

4 MR. BARENS: I THINK IT WOULD BE ERROR FOR YOUR HONOR
5 TO GIVE AN ACCOMPLICE INSTRUCTION WHICH IS TANTAMOUNT TO
6 SAYING THE DEFENDANT IS GUILTY BECAUSE YOU CAN'T FIND
7 ACCOMPLICE IF THE JURY HAS GOT TO SAY TO THEMSELVES, "IF THE
8 JUDGE IS TELLING US THAT THERE WAS AN ACCOMPLICE THAT WE
9 NEED TO BE CONCERNED ABOUT, THEN HE HAD TO BE AN ACCOMPLICE
10 TO A MURDER."

11 I THOUGHT THAT WE WERE HERE TO DECIDE WHETHER
12 THERE WAS A MURDER OR NOT. THE MERE SAYING TO A JURY THAT
13 THERE IS AN ACCOMPLICE, TELLS THEM THAT THEY DON'T HAVE TO
14 CONCERN THEMSELVES WITH WHETHER THERE WAS A MURDER OR NOT.

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1 MR. CHIER: DEAN KARNY GETS TO MAKE THE DECISION AS
2 TO THIS? HE SAYS THERE IS A MURDER. I AM THE ACCOMPLICE.
3 THE ONLY EVIDENCE OF HIS BEING AN ACCOMPLICE IS HIS OWN
4 STATEMENT, WHICH IS NOT SUFFICIENT TO MAKE A CORPUS.

5 THE COURT: THE DEFENDANT SAYS HE HAD NOTHING TO DO
6 WITH THE MURDER. THAT IS HIS DEFENSE, NO MURDER?

7 MR. BARENS: WE ARE SAYING THERE IS NO MURDER.

8 THE COURT: WELL, IN COMES A WITNESS WHOM YOU ADMIT
9 HAD GOTTEN IMMUNITY. IN COMES THE WITNESS.

10 THE PEOPLE SAY, "WHAT DO YOU KNOW ABOUT THIS
11 CASE?" AND HE SAYS, "I PARTICIPATED IN THIS PARTICULAR MURDER
12 THIS WAY, BY AIDING AND COMFORTING AND ADVISING AND INSTIGATING
13 AND SO ON AND SO FORTH IN THIS PARTICULAR MURDER."

14 MR. BARENS: THEN THE JURY HAS TO DECIDE WHETHER HE
15 IS TELLING THE TRUTH OR NOT, THAT A MURDER TOOK PLACE AND
16 HE WAS REALLY A PARTY TO SOME ALLEGED MURDER.

17 THE COURT: WELL, OF COURSE.

18 MR. BARENS: YOUR HONOR --

19 THE COURT: YOU HAVE TO ARGUE THAT HE IS LYING AND
20 THAT THERE NEVER WAS A MURDER. HE NEVER WAS AN ACCOMPLICE.

21 MR. BARENS: THE ONLY POSITION I CAN TAKE, YOUR HONOR,
22 IS THAT AS SOON AS THE JURY HEARS THE JUDGE SAY TO THEM,
23 "LISTEN, PEOPLE, WE HAVE TO TALK ABOUT ACCOMPLICES WITH YOU
24 NOW AND YOU HAVE TO DECIDE IF THIS IS ACCOMPLICE TYPE
25 TESTIMONY," YOU HAVE ALREADY SAID TO THEM THAT YOU ARE ASSUMING
26 THE MURDER HAS OCCURRED. THE UNFAIRNESS OF THESE INSTRUCTIONS

27 THE COURT: WELL, THE BASIS OF THIS TESTIMONY IS THAT
28 HE SAYS HE PARTICIPATED IN IT.

12-9

1 MR. WAPNER: IF THERE IS A WAIVER BY COUNSEL AND ON
2 MONDAY BY MR. HUNT OF ANY RIGHT TO OBJECT THAT THERE WAS
3 ANY ERROR NOT TO GIVE THESE INSTRUCTIONS AND IF THE COURT
4 DOESN'T WISH TO GIVE IT, I WON'T ASK FOR IT TO BE GIVEN.

5 BUT I WOULD LIKE NOT ONLY THE WAIVER OF APPEAL
6 ON THIS GROUNDS, BUT A PERSONAL WAIVER FROM THE DEFENDANT.

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1 MR. BARENS: I WILL REPRESENT TO THE COURT THAT
2 MR. HUNT WILL PROVIDE SUCH A WAIVER.

3 THE COURT: ALL RIGHT, I WON'T GIVE THEM.

4 MR. BARENS: THANK YOU, GENTLEMEN.

5 THE COURT: YOUR ARGUMENT, I ASSUME, WILL BE THAT HE
6 IS JUST LYING AND MAKING IT ALL UP.

7 MR. BARENS: YES, YOUR HONOR, OBVIOUSLY OF NECESSITY,
8 I MAKE THAT ARGUMENT.

9 IF I CONCEDE IT WAS TRUTHFULLY, WHY WAS I HERE
10 FOR FIVE MONTHS?

11 THE COURT: ALL RIGHT, THEN 310 THROUGH 319 WILL NOT
12 BE GIVEN.

13 ALL RIGHT, 331, REGARDING REQUIREMENT OF SPECIFIC
14 INTENT.

15 MR. WAPNER: YOUR HONOR, I THINK THE EASIEST WAY TO DO
16 THIS, IN THE BLANKS, OBVIOUSLY, WE PUT IN THE NUMBERS OF THE
17 CHARGES AND THAT IS IN EACH OF THE CRIMES CHARGED IN COUNT I
18 AND II OF THE INFORMATION, NAMELY, MURDER AND ROBBERY, THERE
19 MUST -- AND THEN READ THE REST OF IT AND THEN INSTEAD OF
20 TELLING THEM WHAT THE SPECIFIC INTENT IS, JUST TO USE THAT
21 PARAGRAPH.

22 THE COURT: I SAY "THE SPECIFIC INTENT REQUIRED,
23 INCLUDING THE DEFINITION OF THE CRIMES CHARGED."

24 MR. WAPNER: YES, THAT IS THE BEST WAY TO DO IT.

25 THE COURT: THAT IS WHAT I ALWAYS DO.

26 ALL RIGHT, NO OBJECTION TO THAT?

27 MR. CHIER: SO YOU ARE STRIKING THE LAST TWO PARAGRAPHS?

28 THE COURT: THAT'S RIGHT.

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1 OKAY, IS THAT AGREEABLE?

2 MR. WAPNER: COUNSELOR, HE IS ASKING YOU.

3 MR. BARENS: MR. CHIER, IS THAT AGREEABLE?

4 MR. CHIER: YES, I HAVE NO OBJECTION.

5 IT IS NOT AGREEABLE, BUT I HAVE NO OBJECTION.

6 THE COURT: ALL RIGHT, THEN BEFORE WE COME TO 810, WHICH
7 IS MURDER DEFINED, WE COME TO THESE OTHER INSTRUCTIONS ON ALIBI
8 STARTING WITH 450.

9 MR. WAPNER: IS THIS DEFENSE --

10 THE COURT: AS I UNDERSTAND THE QUESTION OF ALIBI, IS
11 IT THE PEOPLE'S POSITION THAT THIS MURDER DIDN'T TAKE PLACE
12 BEFORE 10 O'CLOCK?

13 MR. WAPNER: THE PEOPLE'S POSITION IS --

14 THE COURT: HE WAS ALLEGEDLY AT HOME WITH HIS GIRLFRIEND.

15 MR. WAPNER: THE PEOPLE'S POSITION IS THAT IT TOOK PLACE
16 SOMETIME THAT EVENING, 9:00 OR AFTER.

17 THE COURT: AND HIS ALIBI IS THAT HE WAS HOME AT
18 10 O'CLOCK OR SHORTLY THEREAFTER.

19 MR. BARENS: 9:30.

20 THE COURT: HE WAS AT HOME AT 9:30?

21 MR. BARENS: YES, YOUR HONOR.

22 THE COURT: SHE DIDN'T SAY 9:30.

23 MR. WAPNER: SHE DIDN'T SAY 9:30.

24 MR. BARENS: SHE SAID BETWEEN 9:30 AND 10:00.

25 THE COURT: THEY CAME HOME FROM THE MOVIE AFTER
26 10 O'CLOCK.

27 MR. BARENS: NO, YOUR HONOR.

28 THE COURT: WHEN WAS THE MOVIE OVER?

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1 MR. BARENS: THE MOVIE WAS OVER AT 9:15, ACCORDING TO
2 THE RUNNING TIME, THE MOVIE STARTED AT 7:45 AND THE MOVIE WAS --

3 MR. WAPNER: WAIT A SECOND. LET'S TALK ABOUT THE
4 EVIDENCE THAT WAS IN COURT.

5 MR. BARENS: WE GOT THE EVIDENCE ABOUT THE STARTING TIME
6 OF THE MOVIE FROM THE NEWSPAPER.

7 MR. WAPNER: AND IT WAS 7:45.

8 MR. BARENS: I AM SORRY. 7:45.

9 MR. WAPNER: AND THE NEXT SHOW STARTED, I THINK, AT
10 10 O'CLOCK, I THINK.

11 MR. BARENS: 10 O'CLOCK, SO THE MOVIE HAD TO BE OVER
12 BY 10:00 AND SHE TESTIFIED THEY LIVED FIVE MINUTES AWAY FROM
13 THE MOVIE.

14 THE COURT: THEN SHE HAD TO GO DOWN AND GET HER CAR AND
15 DRIVE HER CAR TO THE APARTMENT.

16 MR. BARENS: PAY THE \$3 AND --

17 THE COURT: THEN GO UPSTAIRS, AFTER PAYING THE \$3 AND
18 GO UPSTAIRS.

19 MR. BARENS: BUT YOUR HONOR USED THE WORD TO MRS. ROBERTS,
20 YOU SAID TO MRS. ROBERTS IN FRONT OF THE JURY, "DO YOU
21 REALIZE THE GRAVITY OR SERIOUSNESS" --

22 THE COURT: YES, THAT'S RIGHT.

23 MR. BARENS: -- "OF WHAT YOU ARE DOING?"

24 THE COURT: THAT IS RIGHT, THE ALIBI.

25 MR. BARENS: THEN YOU SAID "YOU ARE FURNISHING HIM WITH
26 AN ALIBI".

27 THE COURT: ALL RIGHT, THEN I HAVE TO GIVE THE INSTRUCTIONS
28 ON THE ALIBI IF THEY SAID HE WASN'T THERE AT THE TIME OF THE

1 OFFENSE.

2 MR. BARENS: YES, WE HAVE TO GIVE THE ALIBI INSTRUCTIONS,
3 THE WORD HAS BEEN PUT BEFORE THE JURY.

4 THE COURT: WHAT TIME WAS IT THAT THE TELEPHONE CALL
5 WAS MADE TO THE HOUSE, NINE WHAT?

6 MR. WAPNER: NO.

7 THE TELEPHONE CALL WAS NOT UNTIL 10:15 TO 10:45.

8 THE COURT: NO, NOT THE MOTHER.

9 MR. WAPNER: THE TELEPHONE CALL TO THE MOTHER?

10 THE COURT: NO. THE ONE TO LEVIN.

11 MR. WAPNER: 9:30.

12 THE COURT: 9:30, HE WAS THERE AND HE WAS STILL ALIVE.

13 MR. BARENS: QUITE SO.

14 THE COURT: ISN'T THAT RIGHT?

15 MR. WAPNER: YES.

16 MR. BARENS: WE MAY ALL HAVE THE WRONG STORY.

17 THE COURT: NO, WE HAVEN'T. IF HE WASN'T AT THE
18 APARTMENT AT 10 O'CLOCK, IT IS NOT A WRONG STORY.

19 MR. BARENS: I DON'T KNOW, YOUR HONOR. I JUST LISTEN
20 TO STORIES.

21 MR. WAPNER: IN ANY EVENT, I DON'T WANT TO REVEAL ANY
22 MORE THAN I HAVE TO.

23 THE COURT: ALL RIGHT, THE ALIBI INSTRUCTION SHOULD BE
24 GIVEN.

25 ANY OBJECTION TO IT?

26 MR. WAPNER: NO.

27 THE COURT: ALL RIGHT, BECAUSE THAT IS THE DEFENSE.

28 MR. WAPNER: ALL I WANT TO KNOW --

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1 THE COURT: ALL RIGHT, SO YOU PULL 450. WAIT A MINUTE.
2 THE CLERK HAS GOT EVERYTHING OUT THERE. WHY DON'T I GET HER
3 HERE TO GET IT?

4 (PAUSE IN PROCEEDINGS.)

5 THE COURT: MAKE A NOTE OF THE FOLLOWING INSTRUCTIONS
6 THAT I WANT YOU TO PULL.

7 THE CLERK: OKAY.

8 THE COURT: 271, 316.

9 MR. BARENS: NO. I THINK 316 IS ACADEMIC NOW,
10 YOUR HONOR.

11 THE COURT: NO. FORGET ABOUT 316.

12 450.

13 ANY OTHERS?

14 MR. BARENS: WE JUST HAVE ONE ALIBI INSTRUCTION,
15 MR. CHIER?

16 MR. CHIER: NO. THERE ARE SEVERAL.

17 MR. BARENS: WHAT IS THAT ONE?

18 THE COURT: 451 ONLY APPLIES TO AIDER AND ABETTOR OR
19 CO-CONSPIRATOR.

20 COULD IT POSSIBLY BE THAT IF THIS MURDER DID GO
21 DOWN, THAT PITTMAN PUT HIM IN THE CAR AND WENT AND BURIED HIM
22 AND THAT HUNT CAME HOME?

23 MR. WAPNER: WELL, ALL OF THESE THINGS ARE -- I DON'T
24 WANT TO SHOW ANY OF MY CARDS.

25 THE COURT: YES. I AM TALKING NOW ABOUT 451. "HOWEVER,
26 IF THE EVIDENCE ESTABLISHES BEYOND A REASONABLE DOUBT THAT
27 THE DEFENDANT WAS A CO-CONSPIRATOR IN THE COMMISSION OF THE
28 OFFENSE CHARGED, THE FACT, IF IT IS A FACT, THAT HE WAS NOT

1 PRESENT AT THE TIME OF THE COMMISSION OF THE ABOVE OFFENSE
2 WHICH IS BEING TRIED IS IMMATERIAL AND DOES NOT IN AND OF
3 ITSELF ENTITILE HIM TO AN ACQUITTAL."
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1 MR. CHIER: WHAT EVIDENCE IS THERE IN SUPPORT OF THIS
2 THEORY?

3 THE COURT: NO EVIDENCE EXCEPT SPECULATION.

4 MR. BARENS: THAT IS JUST TOTAL SPECULATION, YOUR HONOR.
5 I DON'T THINK THAT WE ARE TO START SPECULATING.

6 THE COURT: WELL, I THINK THEY ARE CLAIMING ALIBI.

7 MR. BARENS: THAT IS ALL WE CLAIM.

8 THE COURT: ALL OF THE FACTS IN CONNECTION WITH IT.
9 HE WAS HOME --

10 MR. BARENS: HE STATED NONE OF IT HAPPENED.

11 MR. CHIER: IT DIDN'T HAPPEN. IF IT DID HAPPEN, THE
12 DEFENDANT WAS NOT THERE WHEN IT HAPPENED.

13 THE COURT: WELL CERTAINLY, THE DEFENDANT WAS THERE
14 AT THE TIME THEY WERE NEGOTIATING THE CONTRACT. HE GOT THE
15 CHECK.

16 MR. CHIER: WHEN WAS THAT, JUDGE?

17 THE COURT: DID HE GO TO LEVIN'S PLACE TO GET THE CHECK?

18 MR. BARENS: DID ANYBODY SAY THAT HERE?

19 MR. CHIER: YOU WERE THERE.

20 THE COURT: HOW ELSE COULD HE GET IT, THEN?

21 MR. BARENS: DO YOU REMEMBER THAT HE WAS IN THE OFFICE?
22 PEOPLE SAW HIM IN THE OFFICE THERE, JUDGE.

23 THE COURT: IS THAT YOUR THEORY? THAT IS FINE. OKAY.

24 MR. BARENS: I AM NOT SURE IT IS MY THEORY. I AM
25 GIVING YOU A POSSIBILITY. HE MIGHT HAVE GOTTEN A POST-
26 DATED CHECK, YOUR HONOR.

27 THE COURT: WELL, WE DON'T KNOW WHAT TIME IT WAS. HOW
28 CAN I GIVE THAT INSTRUCTION ON ALIBI WHEN WE DON'T KNOW WHAT

1 TIME THE MURDER WENT DOWN?

2 MR. BARENS: YOUR HONOR USED THE WORD "ALIBI" IN FRONT
3 OF THE JURY, SIR.

4 THE COURT: WELL, APART FROM WHAT I USED --

5 MR. BARENS: YOUR HONOR --

6 THE COURT: CAN I GET INPUT FROM YOU?

7 MR. WAPNER: I AM HAPPY TO HAVE THIS INSTRUCTION GIVEN,
8 YOUR HONOR.

9 THE COURT: ALL RIGHT. VERY GOOD.

10 MR. WAPNER: I TOLD YOU BEFORE THAT I DIDN'T OBJECT
11 TO IT.

12 THE COURT: THEN YOU WANT 451?

13 MR. CHIER: 451?

14 THE COURT: NO, 450. ALL RIGHT. THAT IS ALL FOR THE
15 MOMENT, THANK YOU.

16 (THE CLERK EXITS CHAMBERS.)

17 THE COURT: THANK YOU.

18 MR. BARENS: WE JUST CROSSED OVER 450. SO NOW OUR
19 NEXT ORDER --

20 THE COURT: WAIT A MINUTE. WHERE ARE THE REST OF YOUR
21 INSTRUCTIONS?

22 MR. WAPNER: THEY SHOULD ALL BE THERE, YOUR HONOR.

23 THE COURT: HERE WE ARE, RIGHT HERE. BEFORE WE GO
24 TO THESE INSTRUCTIONS, LET'S GO TO THE OTHERS IN BETWEEN.

25 LET'S SEE -- ADMISSIONS OR CONFESSIONS? WHAT
26 IS THIS?

27 MR. CHIER: WHAT NUMBER?

28 MR. BARENS: OUR 21.

1 THE COURT: YES, QUESTION NUMBER 21. I THOUGHT WE
2 WENT OVER ALL OF THAT.

3 MR. CHIER: IS REQUEST NUMBER 20 GIVEN AS REQUESTED?

4 MR. WAPNER: THE PREVIOUS ONE? ON THE PREVIOUS PAGE,
5 YOUR HONOR.

6 THE COURT: WELL, THERE IS NOTHING ON THE PREVIOUS
7 PAGE. IT HAS TO DO WITH ALIBI.

8 MR. CHIER: YOU ARE GIVING 450?

9 THE COURT: YES. I WILL GIVE 450.

10 THIS IS NOW REQUEST 21. I THOUGHT WE WENT OVER
11 ADMISSIONS AND CONFESSIONS.

12 MR. CHIER: WITHDRAW, YOUR HONOR.

13 THE COURT: ALL RIGHT. THERE YOU ARE. 22?

14 MR. WAPNER: OBJECTION TO THAT ONLY BECAUSE IT IS
15 SUPERFLUOUS WITH ALL THE OTHER INSTRUCTIONS TELLING THE JURY
16 HOW THEY HAVE TO EVALUATE CREDIBILITY OF WITNESSES.

17 THE COURT: DO YOU WANT TO WITHDRAW IT?

18 MR. CHIER: I DON'T WANT TO WITHDRAW IT.

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1 THE COURT: ALL RIGHT. THEN IT IS REFUSED. THAT IS
2 ADMISSIONS AND CONFESSIONS JURY TO DETERMINE VALIDITY.

3 MR. BARENS: I THINK THAT IS A GOOD ONE.

4 THE COURT: WELL, WE TELL THEM BEFORE THAT THEY ARE
5 TO DETERMINE THE TRUTH OR FALSITY OF IT.

6 MR. CHIER: WHICH INSTRUCTION IS THAT?

7 THE COURT: THAT IS THE ORIGINAL INSTRUCTION ON
8 ADMISSIONS AND CONFESSIONS.

9 MR. BARENS: LOOK AT 23.

10 THE COURT: THIS IS YOUR OWN. THIS IS NOT A CALJIC
11 INSTRUCTION. ALL RIGHT. TO SAVE TIME, I WILL REFUSE IT.
12 ALL RIGHT?

13 MR. BARENS: THAT WAS ONE OF MINE?

14 THE COURT: THIS IS A BLANK PAGE.

15 MR. BARENS: YES.

16 THE COURT: ALL RIGHT. NOW THE NEXT ONE?

17 MR. CHIER: WITHDRAWN. NUMBER 24?

18 THE COURT: YES.

19 MR. CHIER: WITHDRAWN.

20 THE COURT: NUMBER 25 IS WITHDRAWN, TOO?

21 MR. CHIER: NO, YOUR HONOR.

22 MR. WARNER: THE COURT IS ALREADY GOING TO TELL THEM
23 THAT IT SHOULD BE TREATED WITH CAUTION AND SO GIVING THEM
24 ANY REASON FOR THAT, TO ME, IS SUPERFLUOUS.

25 MR. CHIER: WELL, THERE SHOULD BE A REASON FOR IT.

26 MR. BARENS: I THINK YOUR HONOR, THE REASON STATED
27 HERE -- IT IS HISTORICALLY ARTICULATED, THE REASONS FOR THE
28 CAUTIONARY RULE.

1 AND I FEEL IN THE INTEREST OF JUSTICE, THE COURT
2 SHOULD ARTICULATE THE HISTORICALLY RECOGNIZED REASONS FOR
3 THE JURY.

4 MR. WAPNER: THIS IS TANTAMOUNT TO THE COURT MAKING
5 AN ARGUMENT.

6 THE COURT: ALL RIGHT. THIS APPEARS IN THE OPINION
7 AS TO REASONS WHY IT SHOULD BE GIVEN. BUT IT DOESN'T SAY
8 IT HAS TO BE GIVEN TO THE JURY. DO YOU WANT IT?

9 MR. CHIER: YES.

10 THE COURT: REFUSED.

11 ALL RIGHT. NEXT? ALIBI, DATE CERTAIN FIXED
12 BY THE PROSECUTION. WHAT IS THAT, 26?

13 MR. WAPNER: THE DEFENDANT OFFERED AN ALIBI.

14 THE COURT: THE JURY DETERMINES WHETHER OR NOT AN ALIBI
15 HAS BEEN GIVEN. THAT WILL BE REFUSED. YOU DON'T HAVE TO
16 ARGUE THIS.

17 MR. CHIER: WE ARE ENTITLED TO THIS AS A MATTER OF
18 LAW.

19 THE COURT: ALL RIGHT. 27 IS REFUSED, TOO.

20 MR. CHIER: WITHDRAWN.

21 THE COURT: WHICH?

22 MR. CHIER: 27.

23 MR. BARENS: YOU CAN'T REFUSE THAT. WE HAVE WITHDRAWN
24 IT. WHAT WAS THE REASON YOU ARE SAYING YOU HAD LEFT 26?

25 MR. CHIER: IT WAS REFUSED.

26 THE COURT: ALL RIGHT. 28?

27 MR. CHIER: THIS IS ESSENTIALLY OUR GRENADOS.

28 THE COURT: HAVE YOU GOT THE CITATION?

1 MR. CHIER: THIS IS THE CITATION THAT TALKS ABOUT THE
2 ALIBI. THAT IS WHERE THE ALIBI LAW WAS TAKEN FROM.

3 BUT IN TERMS OF THE FORMULA, WE ARE ENTITLED
4 AS YOUR HONOR KNOWS, TO A GRENADOS OR SEARS INSTRUCTION ON
5 OUR THEORY OF THE DEFENSE.

6 THE COURT: YES. I KNOW. YOU HAVE GIVEN A THEORY
7 OF THE DEFENSE. THAT IS ALIBI, THAT YOU WEREN'T THERE AT
8 ALL.

9 ALL RIGHT. I WILL DENY 28.

10 MR. BARENS: WHY IS THAT, YOUR HONOR, 28?

11 THE COURT: I WON'T GIVE A WHOLE, LONG -- CALJIC
12 CONSIDERED ALL OF THE DECISIONS AT THE TIME THAT THEY WERE
13 TO BE GIVEN.

14 I WAS ON THE BAJI COMMITTEE BUT NOT ON THE CALJIC
15 COMMITTEE.

16 WHAT THEY DO, AND -- WHAT WE DID WAS CONSIDER
17 ALL THE DECISIONS AND EVERYTHING THAT HAD ANY EFFECT AT ALL
18 ON WHAT SHOULD BE GIVEN TO THE JURY.

19 THIS CASE IS -- IT IS 93 CAL.APP. AND THEY
20 DECIDED THAT THE JURY -- WELL, THAT THIS IS A SUFFICIENT
21 INSTRUCTION. WE HAVE PUT THIS IN. BUT WE ARE NOT PUTTING
22 THAT IN. ALL THAT IS ARGUMENT.

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1 MR. BARENS: ALL RIGHT.

2 THE COURT: AND THIS IS AN OLD CASE.

3 MR. BARENS: ALL RIGHT, YOUR HONOR.

4 THE COURT: I HAVE GOT THIS ALIBI INSTRUCTION OF 450
5 AND THAT INCORPORATES THIS THAT YOU HAVE NOW IN YOUR NO. 29.

6 MR. CHIER: WITHDRAW THAT, YOUR HONOR.

7 THE COURT: I HAVE GOT THIS.

8 MR. BARENS: I WOULD THINK THAT 30 GETS INTO AN AREA THAT
9 WE SHOULD HAVE IN FRONT OF THE JURY.

10 MR. CHIER: IT IS ABSOLUTELY CRITICAL TO THE DEFENSE.

11 MR. BARENS: WHICH IS THE BURDEN OF PROOF.

12 MR. CHIER: THE BURDEN OF PROOF IS NOT CONTAINED IN
13 CALJIC, AND THE JURY HAS TO BE INSTRUCTED ON IT AND THIS IS
14 THE CORRECT STATEMENT OF THE LAW AS TO THE BURDEN OF PROOF
15 WITH RESPECT TO ALIBI.

16 THE COURT: THIS IS A FORMULA INSTRUCTION THAT I DON'T
17 LIKE.

18 MR. BARENS: YOUR HONOR, WE NEED SOME INSTRUCTION ON
19 BURDEN OF PROOF ON ALIBI.

20 THE COURT: WHAT IS THE RULE ON THAT? DO YOU HAVE
21 ANYTHING ON THAT?

22 MR. WAPNER: I AM JUST CHECKING SOMETHING.

23 450 COVERS THIS. IT SAYS:

24 "THE DEFENDANT IN THIS CASE HAS
25 INTRODUCED EVIDENCE FOR THE PURPOSE OF SHOWING
26 THAT HE WAS NOT PRESENT AT THE TIME AND PLACE OF
27 THE COMMISSION OF THE ALLEGED OFFENSE FOR WHICH HE
28 IS HERE ON TRIAL. IF, AFTER A CONSIDERATION OF ALL

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1 OF THE EVIDENCE, YOU HAVE A REASONABLE DOUBT THAT
2 THE DEFENDANT WAS PRESENT AT THE TIME THE CRIME
3 WAS COMMITTED, HE IS ENTITLED TO AN ACQUITTAL."

4 WHICH BASICALLY SAYS THAT THE ONLY BURDEN THE
5 DEFENDANT HAS IS TO RAISE A REASONABLE DOUBT.

6 MR. CHIER: IT DOESN'T SAY THAT SPECIFICALLY.

7 THE COURT: ALL RIGHT, I WILL REFUSE THAT.

8 ALL RIGHT, NOW NO. 31, BURDEN OF PROOF:

9 "NEITHER FALSE STATEMENTS OF THE DEFENDANT,
10 IF THERE WERE ANY, NOR SUSPICIOUS CIRCUMSTANCE ARE
11 TO SUPPORT A VERDICT OF GUILTY IN A CRIMINAL
12 CASE."

13 THAT WILL BE DENIED.

14 AND 32 WILL ALSO BE DENIED.

15 ALSO TALKING ABOUT SUSPICION AGAIN, THAT IS 34,
16 THAT IS DENIED.

17 MR. BARENS: ONE MOMENT, YOUR HONOR.

18 (UNREPORTED COLLOQUY BETWEEN MR. BARENS
19 AND MR. CHIER.)

15A-1

1 THE COURT: "BURDEN OF PROOF -- PREPONDERANCE OF
2 SUSPICION IS INSUFFICIENT TO CONVICT," WE HAVE ALL OF THOSE
3 INSTRUCTIONS IN CALJIC WHICH COVER ALL OF THESE SUBJECTS WHICH
4 YOU HAVE HERE IN DETAIL.

5 "BEFORE YOU CAN LAWFULLY CONVICT, YOU
6 MUST BE CONVINCED OF THE DEFENDANT'S GUILT BEYOND
7 ALL REASONABLE DOUBT."

8 WE HAVE GOT THAT, HAVEN'T WE?

9 MR. BARENS: YOUR HONOR, WE ARE MOVING QUITE QUICKLY.
10 I AM STILL ON 31. YOUR HONOR, THERE ARE FALSE STATEMENTS OF
11 THE DEFENDANT THAT WERE ALLEGEDLY SHOWN TO THE JURY. THE FALSE
12 STATEMENT PORTION OF THIS SHOULD NOT BE USED BY THE JURY TO
13 SUPPORT A CONVICTION.

14 THE FACT THAT HE MADE A FALSE STATEMENT ALLEGEDLY
15 ABOUT THE KNOWLEDGE OF THE SEVEN PAGES IN AND OF ITSELF, I
16 THINK, WE NEED AN INSTRUCTION THAT THE FACT HE MADE A FALSE
17 STATEMENT IN AN INSTANCE IS NOT SUPPORT FOR A CONVICTION.

18 THE COURT: ALL RIGHT.

19 MR. WAPNER: IT IS CONTRADICTORY TO ANOTHER INSTRUCTION
20 THE COURT HAS ALREADY INDICATED IT IS GOING TO GIVE, WHICH
21 IS 2.03.

22 THE COURT: ALL RIGHT, 32, THAT WILL BE REFUSED.

23 NOW 34 --

24 MR. CHIER: 31 IS REFUSED?

25 THE COURT: YES.

26 MR. CHIER: 32 IS REFUSED?

27 THE COURT: YES.

28 34 IS REFUSED.

5 1 33 COMES AFTER 34 HERE.

2 MR. BARENS: COULD YOUR HONOR SLOW DOWN. I HAVEN'T SEEN
3 THAT BEFORE.

4 MR. WAPNER: I DON'T HAVE A COPY OF 34.

5 MR. BARENS: HERE.

6 THE COURT: THE ORDER IN WHICH IT WAS PUT, 34 COMES
7 BEFORE 33 IN THE ORDER IN WHICH IT WAS PUT IN.

8 MR. WAPNER: 34, TO ME, IS CONFUSING AND IT IS
9 INCONSISTENT WITH THE INSTRUCTION THAT THE COURT IS GOING TO
10 GIVE ON REASONABLE DOUBT. I DON'T THINK IT SHOULD BE GIVEN.

11 MR. BARENS: ARE WE GOING TO ELIMINATE SOMEHOW ON THE
12 REASONABLE DOUBT INSTRUCTION THAT IS GIVEN, DO WE REFERENCE
13 OUT THE WORDS "STRONG SUSPICION BY CONTRADICTION"?

14 THE COURT: THERE ARE HUNDREDS AND HUNDREDS OF DECISIONS
15 DEALING WITH MURDER OR ANY OTHER TYPES OF CRIMES AND STATEMENTS
16 MADE BY JUDGES IN CONNECTION WITH THEM IN DISCUSSING THE
17 QUESTIONS IN THOSE DO NOT MEAN THAT EVERY SINGLE ONE OF THOSE
18 HAVE TO TAKE THE FORM OF AN INSTRUCTION.

19 MR. BARENS: I UNDERSTAND THAT.

20 THE COURT: THE CALJIC COMMITTEE HAVE EXTRAPOLATED FROM
21 EVERYTHING THAT HAS BEEN DECIDED, THAT WHICH THEY FELT WAS
22 IMPORTANT FOR A JURY TO HEAR AND DETERMINE, UNLESS THERE IS
23 SOME UNUSUAL CIRCUMSTANCES WHERE AN ADDITIONAL INSTRUCTION
24 MAY BE REQUIRED.

25 NOW, I DOUBT VERY, VERY SERIOUSLY THAT IT WAS EVER
26 INTENDED BY THE CALJIC COMMITTEE TO HAVE INSTRUCTIONS OF THE
27 KIND HERE THAT HAVE BEEN INDICATED.

28 DID ANY ONE OF THOSE DECISIONS SAY THAT THIS

5A-3
1 INSTRUCTION IN THAT FORM MUST BE GIVEN?

2 MR. BARENS: MR. CHIER, ON RESEARCHING THAT, WHAT DID
3 WE GET ON THAT REDMOND CASE?

4 MR. CHIER: WE ARE ENTITLED TO INSTRUCTIONS, TAILORED
5 INSTRUCTIONS, FORMULA INSTRUCTIONS, AS YOU CALL THEM, ON OUR
6 THEORY OF THE CASE.

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7 THE COURT: YES, BUT THE INSTRUCTION ALWAYS APPEARS IN
8 CALJIC UNLESS THERE IS SOMETHING PECULIAR ABOUT IT.

9 MR. CHIER: CALJIC CAN'T GIVE US A THEORY OF THE CASE
10 INSTRUCTIONS BECAUSE EACH CASE IS DIFFERENT, YOUR HONOR, AND
11 THERE IS A PROLOGUE IN CALJIC WHICH SAYS THAT THE COURT IS
12 ADMONISHED TO GIVE THE FORMULA INSTRUCTION.

13 THE COURT: I DON'T THINK THERE IS ANY NECESSITY FOR
14 DOING THAT BECAUSE THIS IS REPETITIOUS.

15 NOW LOOK AT 33:

16 "BEFORE YOU CAN LAWFULLY CONVICT THE
17 DEFENDANT YOU MUST BE CONVINCED OF HIS GUILT TO
18 A MORAL CERTAINTY AND BEYOND ALL REASONABLE
19 DOUBT."

20 THE INSTRUCTION ON REASONABLE DOUBT CONTAINS ALL
21 OF THIS.

22 MR. CHIER: ALL RIGHT, BUT --

23 MR. WAPNER: NOT ONLY DOES IT CONTAIN IT BUT THE COURTS
24 ARE VERY, VERY CAREFUL TO SAY THAT ANY DEVIATION FROM THE
25 STANDARD REASONABLE DOUBT INSTRUCTION IS ERROR.

26 MR. CHIER: IT IS NOT A DEVIATION FROM IT.

27 IT IS JUST AN AUGMENTATION OF IT. THE REASONABLE
28 DOUBT INSTRUCTION DOESN'T COVER EVERY ASPECT OF REASONABLE

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1 DOUBT.

2 COULD I SEE VOLUME 1 OF CALJIC, PLEASE, MR. WAPNER,
3 MR. FREDERICK NATHAN WAPNER?

4 MR. WAPNER: ALSO, THIS INSTRUCTION 33 HAS LANGUAGE THAT
5 IS NOT IN THE OTHER INSTRUCTION, WHICH TALKS ABOUT BEYOND ALL
6 REASONABLE DOUBT AND IT IS TANTAMOUNT TO GIVING A SECOND
7 AND DIFFERENT INSTRUCTION ON REASONABLE DOUBT AND THERE IS
8 A GREAT CHANCE OF CONFUSING THE JURY.

9 THE COURT: I AM GOING TO REFUSE IT.

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1 THE COURT: 35? THAT HAS OTHERWISE BEEN GIVEN. THE
2 CIRCUMSTANTIAL EVIDENCE INSTRUCTION IS 201 OR 202 OR 203.

3 MR. CHIER: WITHDRAWN, YOUR HONOR.

4 THE COURT: ALL RIGHT.

5 MR. CHIER: AS WELL AS 36. NO. WAIT A MINUTE, WAIT
6 A MINUTE, WAIT A MINUTE.

7 MR. BARENS: I LIKE 36.

8 MR. CHIER: THAT WAS A MISTAKE.

9 MR. BARENS: WE WOULD LIKE A RULING ON 36.

10 MR. CHIER: 35 IS WITHDRAWN. 36 IS NOT WITHDRAWN. WE
11 WANT 36.

12 THE COURT: REFUSED. 36 IS PART OF THE MORAL CERTAINTY
13 BEYOND A REASONABLE DOUBT INSTRUCTION. THAT IS THE INSTRUCTION
14 ON REASONABLE DOUBT AND THE DEFINITION.

15 MR. WAPNER: WELL, 36 IS ALSO GROSSLY MISLEADING BECAUSE
16 IT SAYS THAT THE ACCUSED AND NO OTHER PERSON COMMITTED THE
17 CRIME.

18 DOES THAT MEAN THAT IF HE DID IT WITHBODY ELSE,
19 THEY ARE SUPPOSED TO FIND HIM NOT GUILTY?

20 MR. BARENS: THAT IS OBVIOUSLY NOT --

21 THE COURT: WHAT DO YOU MEAN?

22 MR. WAPNER: THAT IS WHAT THE LANGUAGE SAYS.

23 MR. BARENS: IT IS OBVIOUS TO ME.

24 THE COURT: ALL RIGHT. NO. 37, PROOF INDEPENDENT OF
25 ADMISSION OR CONFESSION IS REQUIRED. WE HAVE GIVEN THAT
26 BEFORE, HAVE WE NOT?

27 MR. BARENS: NOT THIS SPECIFICALLY.

28 THE COURT: NOT THIS LANGUAGE BUT IN EFFECT, WE HAVE

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1 GIVEN THIS.

2 MR. WAPNER: YOU HAVE, WITHOUT THE ARGUMENTATIVE
3 LANGUAGE THAT THEY PUT IN HERE. THIS IS EXACTLY COVERED BY
4 THEIR INSTRUCTIONS THAT YOU ARE GOING TO GIVE.

5 THE COURT: THEN, THERE IS THE POSSIBILITY OF FABRICATED
6 TESTIMONY WHICH MIGHT WRONGFULLY ESTABLISH THE CRIME -- THAT
7 IS ALL ARGUMENT.

8 MR. WAPNER: THIS IS ARGUMENT.

9 THE COURT: ALL RIGHT. THAT WILL BE REFUSED.

10 MR. WAPNER: THAT IS ALSO COVERED BY OTHER INSTRUCTIONS
11 THAT TELL THEM HOW TO EVALUATE CREDIBILITY.

12 THE COURT: YES.

13 MR. BARENS: HOW ABOUT THAT?

14 THE COURT: POLICE OFFICERS' TESTIMONY --

15 MR. BARENS: YES, YOUR HONOR.

16 THE COURT: THAT IS ALSO COVERED BY OTHER INSTRUCTIONS.

17 MR. WAPNER: THERE IS ALSO LANGUAGE IN HERE ABOUT THE
18 AVERAGE WITNESS. WHO IS THE AVERAGE WITNESS?

19 MR. BARENS: THE AVERAGE NON-POLICE OFFICER.

20 MR. CHIER: YES, SUCH AS AN IMMUNIZED PERSON.

21 THE COURT: DENIED.

22 40 IS OTHERWISE TAKEN CARE OF BY OTHER INSTRUCTIONS.
23 THAT WILL BE REFUSED.

24 TESTIMONY WHICH YOU BELIEVE GIVEN BY ONE WITNESS --
25 WE HAVE SUCH AN INSTRUCTION.

26 MR. BARENS: WAIT A MINUTE. COULD WE JUST HAVE A MOMENT?

27 (PAUSE.)

28 THE COURT: 41, ISN'T THAT EXACTLY THE SAME AS THE ONE

1 THAT WE ARE ALREADY GIVING?

2 MR. WAPNER: IT SHOULD BE 227.

3 THE COURT: YES IT IS.

4 MR. BARENS: JUST A MOMENT, YOUR HONOR.

5 THE COURT: GO AHEAD.

6 (PAUSE.)

7 MR. BARENS: THANK YOU.

8 THE COURT: 227 IS EXACTLY THE SAME AS 41, TESTIMONY
9 WHICH YOU BELIEVE GIVEN BY ONE WITNESS IS SUFFICIENT FOR THE
10 PROOF OF ANY FACT.

11 MR. CHIER: WELL, WE TALKED ABOUT THAT EARLIER. I WAS
12 GOING TO WITHDRAW IT, MR. WAPNER --

13 THE COURT: ALL RIGHT.

14 MR. WAPNER: WE DIDN'T TALK ABOUT IT.

15 THE COURT: ALL RIGHT. THE NEXT ONE? THAT ONE IS
16 REFUSED. 42.

17 43, THAT IS OTHERWISE GIVEN. THAT IS REFUSED.

18 ALL RIGHT. NOW WE COME TO MURDER DEFINED. WE
19 ARE ON THE SUBJECT NOW OF MURDER.

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6P 1 MR. BARENS: ARE WE, YOUR HONOR? MURDER?

2 THE COURT: YES, MURDER.

3 MR. BARENS: WHOSE MURDER? WHOSE MURDER IS IT?

4 THE COURT: THIS IS ONLY AN ASSUMPTION THAT MURDER WAS
5 COMMITTED AND THE ASSUMPTION IS THAT THE DEFENDANT COMMITTED
6 THE MURDER.

7 MR. BARENS: I WAS JESTING A BIT, MYSELF. I HAD HOPED
8 THAT THIS HAD BEEN A LONG ACCIDENT CASE. IN ANY EVENT, WHAT
9 NUMBER IS THIS?

10 THE COURT: WAPNER'S 8.10.

11 HE IS CHARGED IN COUNT 1 --

12 MR. WAPNER: RIGHT.

13 MR. CHIER: REQUESTED AND GIVEN AS REQUESTED?

14 MR. BARENS: WE WOULD LIKE THAT ONE, TOO.

15 THE COURT: WHAT, MURDER?

16 MR. BARENS: YES, YOUR HONOR.

17 THE COURT: MURDER DEFINED? YES. WHAT ABOUT THIS BLANK?
18 THE KILLING WAS DONE WITH MALICE AFORETHOUGHT DURING THE
19 COMMISSION OF A FELONY INHERENTLY DANGEROUS TO HUMAN LIFE.
20 WHAT IS YOUR THEORY?

21 MR. WAPNER: HE IS AT THE BOTTOM OF 810.

22 THE COURT: THAT DOESN'T BELONG IN THERE, DOES IT?

23 MR. WAPNER: MAY I JUST HAVE A MOMENT? BECAUSE THERE
24 IS ALSO AN INSTRUCTION IN HERE ON FIRST DEGREE FELONY MURDER.

25 THE COURT: THAT THE KILLING WAS DONE WITH MALICE
26 AFORETHOUGHT? WHERE IS THE FELONY?

27 MR. BARENS: NOT IN 26 YEARS HAS HE SEEN A MISDEMEANOR
28 MURDER.

1 MR. WAPNER: NO. I THINK FOR THE PURPOSE OF THESE
2 INSTRUCTIONS, JUST THE MALICE AFORETHOUGHT IS WHAT IS
3 APPROPRIATE. THERE IS AN INSTRUCTION ON FELONY MURDER WHICH
4 IS 821.

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1 THE COURT: ALL RIGHT, WHAT WE WILL DO ON 810 IS STOP
2 WITH "MALICE AFORETHOUGHT," IS THAT IT?

3 MR. WAPNER: YES.

4 MR. CHIER: STRIKING FROM THIS "IN ORDER TO PROVE" THROUGH
5 "HUMAN LIFE"?

6 THE COURT: YES OR "OCCURRED DURING THE COMMISSION OR
7 ATTEMPT TO COMMIT A FELONY INHERENTLY DANGEROUS TO HUMAN LIFE."

8 MR. WAPNER: IT IS IN THE BOTTOM PARAGRAPH.

9 THE COURT: LATER ON, THEY TALK ABOUT FELONY MURDER.

10 MR. CHIER: OKAY. WE ARE NOW ON 811?

11 THE COURT: 811 IS "MALICE AFORETHOUGHT."

12 MR. CHIER: IS THAT THE ONE YOU ARE ON NOW?

13 THE COURT: YES. WE STOP WITH "MALICE IS IMPLIED WHEN
14 THE KILLING RESULTS FROM AN INTENTIONAL ACT INVOLVING A HIGH
15 DEGREE OF PROBABILITY THAT IT WILL RESULT IN DEATH, WHICH ACT
16 IS DONE FOR A BASE, ANTISOCIAL PURPOSE AND WITH A WANTON
17 DISREGARD FOR HUMAN LIFE" AND YOU STOP THERE "OR WHEN THE
18 KILLING RESULTS FROM AN INTENTIONAL ACT, THE NATURAL
19 CONSEQUENCES OF WHICH ARE DANGEROUS TO LIFE" AND SO FORTH,
20 AND STOP THERE.

21 HOW ABOUT THE BRACKETED PORTION?

22 MR. WAPNER: THE LAST PARAGRAPH?

23 THE COURT: YES.

24 MR. WAPNER: I THINK THAT THAT SHOULD STAY IN.

25 MR. CHIER: ARE YOU ASKING FOR THE 1979, MALICE
26 AFORETHOUGHT?

27 MR. WAPNER: YOUR HONOR, I THINK THERE IS A PAGE
28 MISSING FROM THAT 811 INSTRUCTION, AT LEAST IT IS MISSING FROM

1 MY PACKET.

2 THE COURT: ON WHAT?

3 MR.. WAPNER: 811 HAS TWO PAGES AND I THINK I HAVE ONLY
4 PROVIDED YOU WITH ONE.

5 MR. CHIER: THE SECOND PAGE APPEARS TO BE THE '79
6 PROVISION OF 8.20.

7 THE COURT: 811, YOU ARE TALKING ABOUT?

8 MR. WAPNER: YES, 811.

9 MAYBE WE CAN HAVE THE CLERK BRING US THAT SECOND
10 PAGE.

11 I APOLOGIZE TO THE COURT. THERE IS A 1983
12 REVISION.

13 THE COURT: THERE IS A '84 REVISION.

14 MR. WAPNER: NO, IT IS A '83 REVISION. IT WAS PRINTED
15 IN 1984.

16 DO YOU HAVE A '84 REVISION?

17 THE COURT: IT SAYS HERE "PRINT DATE 1984."

18 MR. WAPNER: BUT AT THE TOP IT SAYS "'83 REVISION."

19 THE COURT: THAT IS THE ONE WE WANT.

20 MR. WAPNER: MAYBE I CAN JUST GET IT FROM THE CLERK,
21 THE SECOND PAGE.

22 THE COURT: THERE IS NO SECOND PAGE, IS THERE?

23 MR. WAPNER: YES, THERE IS BECAUSE THERE ARE TWO MORE
24 PARAGRAPHS AFTER THE LAST BRACKETED ONE.

25 THE COURT: YES, THAT'S RIGHT.

26 MR. WAPNER: MAY I HAVE JUST A MOMENT?

27 THE COURT: YES, GET THE 811 REVISION.

28 (PAUSE IN PROCEEDINGS.)

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1 THE COURT: ALL RIGHT.

2 MR. CHIER: DID YOU GET A SECOND PAGE, WHAT DOES IT SAY?

3 (PAUSE IN PROCEEDINGS.)

4 MR. CHIER: IT SAYS DON'T USE IT AS A FELONY-MURDER
5 INSTRUCTION.

6 THE COURT: YES.

7 MR. WAPNER: THERE ARE TWO THEORIES, COUNSEL --

8 MR. CHIER: WHAT?

9 MR. WAPNER: -- ON WHICH THIS COULD BE A FIRST DEGREE
10 MURDER AND FELONY-MURDER IS ONLY ONE OF THEM.

11 MR. CHIER: WHAT HAPPENS IF IT IS -- SO YOU ARE ENTITLED
12 TO USE IT IN ANY CASE WHERE THERE IS A FELONY-MURDER, IF YOU
13 CHARGE SOMETHING ELSE?

14 WHAT IS THIS OTHER THEORY?

15 MR. WAPNER: THAT IT IS A DELIBERATE, PREMEDITATED MURDER.
16 IT IS LIKELY THAT IF THEY ARE GOING TO FIND IT IS A DELIBERATE
17 MURDER, THEY ARE ALSO GOING TO FIND FELONY-MURDER BUT IT IS
18 POSSIBLE THEY WON'T.

19 THE COURT: ALL RIGHT.

20 MR. WAPNER: SO THE BRACKETED PARAGRAPH THAT STARTS WITH
21 "WHEN IT IS SHOWN" IS GOING TO BE GIVEN AS WELL AS THE LAST
22 TWO PARAGRAPHS ON THE SECOND PAGE.

23 THE COURT: WHICH ONE ARE YOU TALKING ABOUT NOW?

24 MR. CHIER: 8.11.

25 THE COURT: 820?

26 MR. WAPNER: NO. I AM TALKING ABOUT 811.

27 THE COURT: I DON'T THINK WE NEED THAT, DO WE?

28 MR. WAPNER: WHICH?

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1 THE COURT: THE BRACKETED PARAGRAPH.

2 MR. WAPNER: WELL, WHICH ONE?

3 THE COURT: WELL, NO. THAT GOES OUT, TOO, DOESN'T IT?

4 MR. WAPNER: WHICH ONE ARE YOU TALKING ABOUT, JUDGE?

5 THE COURT: I AM TALKING ABOUT 811.

6 MR. WAPNER: WHICH BRACKETED PARAGRAPH?

7 THE COURT: AT THE BOTTOM OF THE PAGE, THE FIRST PAGE.

8 MR. WAPNER: I THINK THAT SHOULD BE IN.

9 THE COURT: ALL RIGHT, I WILL LEAVE THAT IN.

10 MR. WAPNER: AND THE TWO PARAGRAPHS ON THE SECOND PAGE
11 WILL ALSO BE GIVEN?

12 THE COURT: YES, ALL RIGHT.

13 THE NEXT ONE IS 821.

14 MR. CHIER: 821?

15 WHAT HAPPENED TO 820?

16 THE COURT: 820, WE JUST HAD THAT.

17 MR. CHIER: I THOUGHT WE JUST HAD 811.

18 THE COURT: NO, 820.

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1 MR. CHIER: I MUST HAVE BEEN ASLEEP AT THE SWITCH.
2 WHAT HAPPENED WITH 820? GIVEN AS REQUESTED?

3 MR. BARENS: YES, INCLUDING THE BRACKETED PARAGRAPH.

4 THE COURT: THE BRACKETED PARAGRAPH. THE OTHER ONE?

5 MR. BARENS: IT WAS IN 811. ALL RIGHT.

6 THE COURT: ALL RIGHT. FIRST DEGREE FELONY MURDER.
7 THAT IS 821?

8 MR. WAPNER: IT SHOULD BE ROBBERY IN THE BLANK SPOT.

9 MR. CHIER: DON'T YOU HAVE TO MAKE AN ELECTION AT THIS
10 POINT OF WHAT YOUR THEORY IS?

11 THE COURT: WELL, YOU MADE IT FOR HIM. YOU MADE A
12 MOTION TO CUT OUT FINANCIAL GAINS.

13 MR. CHIER: BUT IT IS EITHER --

14 MR. WAPNER: NO.

15 THE COURT: EITHER WHAT?

16 MR. WAPNER: THAT IT IS DELIBERATE AND PREMEDITATED
17 MURDER OR MURDER IN THE COURSE OF A ROBBERY. THERE IS NO
18 REQUIREMENT THAT THERE BE AN ELECTION MADE.

19 MR. BARENS: I THINK THAT TO CUT OUT THE FINANCIAL
20 GAIN WAS A GOOD THING, JUDGE.

21 THE COURT: ACTUALLY, THERE WAS A FINANCIAL GAIN.
22 THERE IS EVIDENCE HERE THAT MIGHT HAVE LED THEM TO BELIEVE
23 THAT IT WAS DONE FOR FINANCIAL GAIN. IT WAS TO GET THAT
24 MILLION FIVE HUNDRED THOUSAND DOLLARS.

25 THE ROBBERY CONSISTS OF A STEALING OF THE CHECK
26 FOR THAT AMOUNT. BUT THE FINANCIAL GAIN IS CASHING IN ON
27 THE CHECK.

28 MR. CHIER: WELL, THAT IS SUBSUMED BY ANY ROBBERY,

1 THE FINANCIAL GAIN ASPECT.

2 THE COURT: NOT NECESSARILY.

3 MR. WAPNER: WELL, IN ANY EVENT, IT IS IRRELEVANT AT
4 THIS POINT.

5 THE COURT: ANYWAY, SPECIFIC INTENT TO COMMIT ROBBERY.
6 IS THAT IT?

7 MR. CHIER: THEY HAVE ASKED THAT ROBBERY BE PUT IN
8 THE BLANK.

9 THE COURT: THAT IS WHAT WE HAD IN THERE, ROBBERY.

10 MR. WAPNER: RIGHT.

11 THE COURT: AIDER AND ABETTOR?

12 MR. CHIER: HERE, AN ELECTION IS REQUIRED. YOU HAVE
13 TO TAKE A POSITION WHETHER HE IS A PRINCIPAL OR AN AIDER
14 AND ABETTOR.

15 WE CAN'T GO TO ARGUMENT WITHOUT KNOWING THAT.

16 MR. WAPNER: SURE YOU CAN. YOU CAN GO TO THE JURY
17 NOT KNOWING. THAT IS FOR THEM TO DECIDE.

18 THE COURT: AS LONG AS IT IS WITHIN THE PARAMETERS
19 OF THE EVIDENCE, YOU HAVE TO GIVE THEM ALL. ALL RIGHT.

20 HAVE YOU GOT ANY INSTRUCTIONS ON IDENTIFICATION?

21 MR. WAPNER: YES. IT IS A SPECIAL THAT WE SUBMITTED
22 THERE.

23 THE COURT: WHERE? WHICH ONE IS IT?

24 MR. WAPNER: I GAVE IT TO YOU THIS MORNING.

25 THE COURT: WELL, THIS ONE, YOU MEAN?

26 MR. WAPNER: PEOPLE'S SPECIAL INSTRUCTION NUMBER 1.

27 MR. BARENS: A MOMENT?

28 (PAUSE.)

1 MR. CHIER: ARE WE ON 827 NOW?

2 THE COURT: 880.

3 MR. CHIER: 827 WAS GIVEN ALREADY?

4 THE COURT: THAT IS FIRST DEGREE FELONY MURDER, AIDING
5 AND ABETTING.

6 MR. CHIER: WAS GIVEN AS REQUESTED?

7 THE COURT: YES.

8 MR. CHIER: 880 NOW?

9 THE COURT: 880, YOU ONLY HAVE ONE UNDER THAT, RIGHT?
10 THEREFORE, YOU CROSS OUT "ONE OR MORE OF" AND "ROBBERY" IS
11 THAT RIGHT?

12 MR. WAPNER: RIGHT. I THINK WE BETTER HAVE IN THERE
13 IF THE DEFENDANT IS NAMED -- "IF THE DEFENDANT HUNT WAS AN
14 AIDER OR ABETTOR BUT NOT THE ACTUAL KILLER, IT MIGHT BE PROVED
15 BEYOND A REASONABLE DOUBT HE INTENDED TO AID IN THE KILLING
16 OF A HUMAN BEING. BEFORE YOU ARE PERMITTED TO FIND THE
17 ALLEGED SPECIAL CIRCUMSTANCE OF THE FIRST DEGREE MURDER --"

18 THE COURT: IS THAT RIGHT?

19 MR. WAPNER: RIGHT.

20 MR. BARENS: YES.

21 THE COURT: HOW DO YOU WANT TO DESIGNATE HIM?
22 ACCOMPLICE OR AIDER OR ABETTOR?

23 MR. WAPNER: AIDER AND ABETTOR.

24 THE COURT: ALL RIGHT. ALL RIGHT.

25 AND THEN THE NEXT TWO PARAGRAPHS, I DON'T THINK
26 APPLY.

27 MR. WAPNER: DECIDING SEPARATELY AS TO EACH DEFENDANT
28 THE EXISTENCE OF THE SPECIAL CIRCUMSTANCES AND DECIDING

1 SEPARATELY AS TO EACH SPECIAL CIRCUMSTANCE.

2 THE COURT: WHERE IS THAT?

3 MR. CHIER: SECOND PAGE.

4 THE COURT: I HAVE NOT GOT A PAGE 2. YES, SPECIAL
5 CIRCUMSTANCES YES. ALL RIGHT.

6 NEXT PAGE.

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1 YOU MUST DECIDE SEPARATELY -- NOW, THAT GOES
2 OUT. YOU MUST DECIDE SEPARATELY THE SPECIAL CIRCUMSTANCES.
3 AND THAT GOES OUT.

4 MR. CHIER: SO THIS WILL BE REVIEWED?

5 MR. WAPNER: NO. THIS IS ALL A PART OF THE SAME
6 INSTRUCTION.

7 THE COURT: NO. THE SECOND PARAGRAPH? THE LAST
8 PARAGRAPH GOES IN. IN ORDER TO FIND THE SPECIAL CIRCUMSTANCES
9 CHARGED IN THIS CASE --

10 MR. BARENS: YES. I AGREE.

11 MR. WAPNER: THEN THERE IS A THIRD PAGE WHICH IS JUST
12 TELLING THEM TO INCLUDE IN THEIR VERDICT --

13 THE COURT: ALL RIGHT.

14 MR. BARENS: SO --

15 THE COURT: IS THAT A THIRD PAGE? YES?

16 MR. BARENS: YES.

17 THE COURT: ALL RIGHT. TO FIND THE SPECIAL
18 CIRCUMSTANCES -- IT MUST BE PROVED THAT THE MURDER WAS
19 COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN -- THE COMMISSION
20 OF A ROBBERY, IS THAT RIGHT?

21 MR. CHIER: ARE YOU UP TO 8.81.17?

22 THE COURT: YES.

23 MR. CHIER: WOULD YOU TELL US WHAT YOU ARE DOING?

24 THE COURT: SURE. YOU CAN DO IT, YOURSELF.

25 THE MURDER WAS COMMITTED WHILE THE DEFENDANT
26 WAS ENGAGED IN THE COMMISSION OF A ROBBERY.

27 MR. CHIER: YOU HAVE A ROBBERY IN THE FIRST PARAGRAPH?

28 THE COURT: YES. THE FIRST PARAGRAPH IS ROBBERY, TOO.

1 MR. CHIER: ROBBERY. AND IN THE THIRD PARAGRAPH?

2 THE COURT: NO. IT GOES OUT ALTOGETHER.

3 THE MURDER WAS COMMITTED DURING THE IMMEDIATE
4 FLIGHT AFTER THE COMMISSION AND SO FORTH? THAT DOESN'T APPLY
5 HERE. THAT GOES OUT.

6 MR. CHIER: 2 IS OUT?

7 MR. WAPNER: NO. 2 IS IN.

8 THE COURT: 3, ROBBERY, GOES IN.

9 MR. CHIER: I DON'T THINK --

10 THE COURT: THE MURDER WAS COMMITTED IN ORDER TO CARRY
11 OUT OR ADVANCE THE COMMISSION OF THE CRIME OF ROBBERY.

12 MR. CHIER: I DON'T THINK THAT IS CORRECT, YOUR HONOR.

13 MR. WAPNER: WELL, THAT HAS TO GO IN BECAUSE IN PEOPLE
14 V. GREEN, WHICH IS THAT MURDER THAT WAS IN THE COURSE OF
15 A ROBBERY, AS OPPOSED TO THE ROBBERY BEING IN THE COURSE
16 OF A MURDER. THAT IS WHY IT IS IN THERE.

17 THE COURT: THAT'S RIGHT. WE CROSS OUT, "OR TO
18 FACILITATE THE ESCAPE AND EVADE DETECTION." THAT GOES OUT.

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1 MR. WAPNER: YOUR HONOR, I THINK THE AVOIDING DETECTION
2 MIGHT -- WELL, I WOULD JUST ASSUME YOU LEAVE ALL OF THE
3 LANGUAGE IN AND LET THE JURY DECIDE IT. THE AVOIDING DETECTION
4 MIGHT CERTAINLY BE PART OF IT.

5 THE COURT: HOW? HE SAID THE MURDER WAS COMMITTED IN
6 ORDER TO AVOID DETECTION.

7 MR. WAPNER: WELL, TO THE EXTENT THAT A PERSON IS GOING
8 TO ROB SOMEONE THAT HE KNEW AND IF YOU GO TO HIS HOUSE AND
9 PUT A GUN TO HIS HEAD AND SAY "LEVIN, GIVE ME THE CHECK" AND
10 THEN HE GIVES THEM THE CHECK AND THEY SAY "THANK YOU" AND THEY
11 WALK OUT AND THEN LEVIN CALLED THE POLICE AND SAYS "GUESS WHO
12 WAS HERE AND ROBBED ME?"

13 THE COURT: ALL RIGHT.

14 MR. WAPNER: SO I THINK THAT PART SHOULD BE IN.

15 MR. CHIER: THE BLANKS WILL BE FILLED IN "ROBBERY"?

16 THE COURT: YES.

17 MR. CHIER: AND YOU WILL STRIKE --

18 THE COURT: "ATTEMPTED."

19 MR. BARENS: DO WE HAVE AN INSTRUCTION ON WHAT ROBBERY
20 IS?

21 MR. WAPNER: IT IS COMING. IT IS 910.

22 THE COURT: SO WE CROSS OUT HERE "COMMISSION OF THE
23 CRIME IS NOT PREVIOUSLY DEFINED."

24 MR. WAPNER: YES, THAT PART CERTAINLY SHOULDN'T BE
25 READ TO THE JURY. THAT IS JUST KIND OF AN INSTRUCTION TO THE
26 COURT.

27 MR. CHIER: THE NEXT INSTRUCTION SHOULD, THEREFORE, BE
28 THE DEFINITION OF ROBBERY; IS THAT CORRECT?

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1 THE COURT: NO. WE FINISH THE SPECIAL SITUATION.

2 MR. CHIER: IT SAYS "GIVE DEFINITION OF CRIME IF NOT
3 PREVIOUSLY DEFINED."

4 THE COURT: WE WILL GIVE THIS 910, IT COMES RIGHT AFTER
5 THAT.

6 MR. WAPNER: I DIDN'T TRY AND PUT THESE IN ANY SEQUENCE,
7 OTHER THAN NUMERICAL SEQUENCE.

8 THE COURT: ALL RIGHT, THAT IS WHAT, IS THAT EIGHT WHAT?

9 MR. BARENS: 883.

10 MR. WAPNER: 883.

11 THE COURT: IT IS NOT THERE, IS IT?

12 MR. WAPNER: THE NUMBER GOT CUT OFF.

13 THE COURT: ALL RIGHT, 883.

14 ALL RIGHT, THE NEXT IS:

15 "THE DEFENDANT IS CHARGED IN COUNT II
16 WITH THE CRIME OF ROBBERY IN VIOLATION OF SECTION
17 211."

18 THERE IS NO PROBLEM ON THAT, IS THERE?

19 MR. WAPNER: NO.

20 WHAT DID YOU DO WITH 883, ARE YOU JUST GOING TO
21 GIVE THE WHOLE THING?

22 THE COURT: YES, UNLESS THERE IS ANY PART THERE THAT
23 DOESN'T APPLY.

24 MR. BARENS: WE ARE AT 9.10?

25 THE COURT: PARDON ME?

26 MR. BARENS: WE ARE AT 9.10?

27 THE COURT: YES, 9.10, ROBBERY.

28 NOW THE REST IS EASY.

1 1702, SEVERAL COUNTS, THE JURY MUST FIND ON EACH.
2 ALL RIGHT, ON 17.02, CROSS OUT "ANY OR ALL" AND
3 LEAVE "EITHER OR BOTH."

4 AND YOU WANT 17.3?

5 MR. BARENS: QUITE SO, YOUR HONOR.

6 I BELIEVE YOUR HONOR INDICATED THAT YOU MAY EVEN
7 GIVEN AN ADDITIONAL COMMENT TO THE JURY.

8 THE COURT: OH, YES, I AM GOING TO CHANGE THAT.

9 MR. BARENS: WOULD YOU INDICATE WHAT YOU MIGHT BE SAYING?

10 THE COURT: YES.

11 ALL I AM GOING TO SAY IS THAT I HAVE NOT INTENDED
12 BY ANYTHING I HAVE SAID OR DONE OR BY ANY QUESTIONS I MAY HAVE
13 ASKED OR BY ANY RULING THAT I MAY HAVE MADE OR ANY DISCUSSIONS
14 OR DIFFERENCES WHICH MAY HAVE ARISEN BETWEEN COUNSEL, TO
15 INTIMATE OR SUGGEST WHAT YOU SHOULD FIND TO BE THE FACTS ON
16 ANY QUESTION SUBMITTED TO YOU.

17 IS THERE ANYTHING ELSE YOU WANT ME TO ADD?

18 MR. BARENS: OR ANY BELIEF ABOUT THE GUILT OR INNOCENCE
19 OF THE DEFENDANT BY THE COURT.

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1 THE COURT: I DIDN'T GIVE THEM ANY INDICATION I FEEL
2 HE IS GUILTY OR NOT GUILTY.

3 MR. BARENS: WHY NOT JUST SAY THAT, YOUR HONOR?

4 THE COURT: BECAUSE IT ISN'T TRUE.

5 MR. BARENS: NO, NO. I AM SAYING THAT JUST TO SAY THAT
6 AS AN AFFIRMATIVE STATEMENT, THAT NOTHING YOUR HONOR SAID OR
7 DIDN'T SAY SHOULD BE INTERPRETED.

8 THE COURT: YES, I HAVE NOT INTENDED TO INTIMATE OR
9 SUGGEST WHAT YOU SHOULD FIND TO BE A FACT ON ANY QUESTION
10 SUBMITTED TO YOU OR THAT I BELIEVE OR DISBELIEVE ANY WITNESS
11 OR, AS I SAID BEFORE, OR HAVE ANY OPINION.

12 MR. BARENS: ABOUT THE GUILT OR INNOCENCE OF THE DEFENDANT

13 THE COURT: ALL RIGHT.

14 MR. BARENS: THANK YOU, YOUR HONOR.

15 THE COURT: ALL RIGHT, I WILL MAKE A NOTE HERE, I WILL
16 HAVE IT TYPED UP, REVISING IT.

17 1731, "ALL INSTRUCTIONS NOT NECESSARILY APPLICABLE."

18 MR. BARENS: 1740 IS NO PROBLEM, YOUR HONOR.

19 THE COURT: ALL RIGHT, 1740.

20 1741.

21 MR. BARENS: MR. CHIER, HAVE YOU LOOKED AT 1742, I
22 PRESUME?

23 MR. CHIER: I WAS ON --

24 MR. BARENS: WHERE ARE YOU?

25 MR. CHIER: 1741.

26 MR. BARENS: DO YOU HAVE ANY ISSUE WITH 1741?

27 MR. CHIER: DO I HAVE ANY ISSUE WITH IT? NO. THAT IS
28 LIKE BOILERPLATE.

1 MR. BARENS: AND 1742, I BELIEVE, IS THE SAME.

2 MR. CHIER: IT SAYS "NON-CAPITAL CASE."

3 MR. WAPNER: IT DOES SAY "NON-CAPITAL CASE" BUT THERE
4 IS NO USE NOTE THAT SAYS IT SHOULDN'T BE GIVEN EXCEPT IN CASES
5 WHERE THE JURY FIXES THE PUNISHMENT, WHICH THEY DON'T IN THIS
6 PHASE OF THE CASE.

7 MR. BARENS: WAIT A MINUTE. MR. CHIER, DO WE HAVE
8 ANYTHING ON THIS, ON A CAPITAL CASE WHERE THEY ARE SUPPOSED
9 TO BE TOLD THAT?

10 MR. CHIER: I DON'T THINK THAT IS CORRECT AND I OBJECT
11 TO IT.

12 THE COURT: OBJECT TO WHAT?

13 MR. BARENS: COULD YOUR HONOR PLEASE ADDRESS 17.42,
14 SIR?

15 THE COURT: SEVENTEEN POINT WHAT?

16 MR. BARENS: 17.42.

17 COULD WE HAVE THE BOOK ON THIS?

18 MR. WAPNER: YES. IT DOESN'T HELP BUT YOU ARE WELCOME
19 TO IT.

20 MR. CHIER: WE OBJECT, FOR THE RECORD.

21 THE COURT: WHAT DOES IT SAY ON THAT?

22 MR. BARENS: WELL, WHY DON'T YOU READ IT, OR 17.42,
23 MR. CHIER?

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1 MR. CHIER: THE QUESTION IS -- THE INSTRUCTION IS
2 CAPTIONED "JURY MUST NOT CONSIDER PENALTY-NON-CAPITAL CASE."

3 THE COURT: IT SAYS "NON-CAPITAL CASE."

4 MR. WAPNER: IT DOES SAY THAT, YOUR HONOR. BUT I DON'T
5 KNOW THE PRINT DATE -- THE PRINT DATE ON THIS INSTRUCTION
6 IS 1970. BUT THE QUESTION IS WHETHER THEY CAN CONSIDER
7 PENALTY OR PUNISHMENT IN THE GUILT PHASE, WHICH IT IS NOT
8 APPROPRIATE FOR THEM TO DO. THEY CAN ONLY CONSIDER THE
9 PENALTY IF THEY GET TO THE PENALTY PHASE.

10 I THINK THAT THIS INSTRUCTION IS -- THERE IS
11 NO USE NOTE THAT TELLS YOU ANYTHING.

12 MR. BARENS: EXCEPT THE CAPTION THAT YOU ARE NOT
13 SUPPOSED TO USE IT IN A CAPITAL CASE.

14 MR. WAPNER: WELL, ALL IT SAYS IS "--NON-CAPITAL CASE."

15 THEY ARE NOT READ THE CAPTION. THEY DON'T GET
16 THAT.

17 MR. CHIER: WELL, IT SAYS THAT THIS INSTRUCTION MUST
18 NOT BE GIVEN IN CASES IN WHICH THE JURY DOES FIX OR
19 RECOMMEND PUNISHMENT.

20 MR. WAPNER: BUT THEY DON'T FIX OR RECOMMEND PUNISHMENT
21 IN THIS PHASE OF THE CASE.

22 MR. CHIER: WELL, IT DOESN'T SAY, "IN THIS PHASE OF
23 THE CASE." IT SAYS "IN CASES."

24 MR. WAPNER: BUT IN THIS CASE AT THIS STAGE, THEY DON'T
25 DO IT. IN THIS CASE AT THIS POINT, THEY DON'T FIX PUNISHMENT.
26 I THINK IT IS APPROPRIATE.

27 THE COURT: YES. THAT'S RIGHT BECAUSE OF THE OTHER
28 OCCASION THEY MENTION THEY HAVE TO FIX THE PUNISHMENT.

1 MR. WAPNER: AT THE TIME THEY ARE DELIBERATING.

2 THE COURT: THAT'S RIGHT.

3 MR. WAPNER: ON THIS ONE THEY DON'T. THEY FIX IT LATER,
4 IF AT ALL.

5 THEY MAY NOT GET TO THAT POINT OF FIXING THE
6 PUNISHMENT.

7 MR. BARENS: WELL, LET'S HOPE SO.

8 MR. WAPNER: WE DON'T KNOW WHETHER THEY ARE GOING TO
9 BE ASKED TO FIX IT.

10 THE COURT: WELL, IN FACT, WE TOLD THEM SO MANY TIMES --

11 MR. BARENS: WHY TELL THEM THAT AGAIN?

12 THE COURT: WELL, WE TOLD IT TO THEM. JUST TO REMIND
13 THEM --

14 MR. WAPNER: WELL, IT IS ONE THING FOR THE LAWYERS --

15 THE COURT: THEY MUST NOT CONSIDER THE QUESTION OF
16 PENALTY IN DETERMINING THE GUILT OR INNOCENCE.

17 MR. WAPNER: I THINK THAT IS THE STATE OF THE LAW.

18 MR. BARENS: CAN I BEG FOR MERCY?

19 THE COURT: ALL RIGHT. 1741 WE HAVE.

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1 MR. CHIER: WE ARE NOT ALLOWED TO BRING A MODEL OF
2 THE GAS CHAMBER IN THAT WE ARE GOING TO USE FOR CLOSING
3 ARGUMENT?

4 MR. BARENS: PROBABLY WON'T BE PERMITTED, MR. CHIER?

5 MR. CHIER: I AM ON 1742. WHAT HAPPENED WITH 1742?

6 MR. BARENS: IT WILL REMIND THEM ABOUT THE --

7 MR. CHIER: IS THAT BEING GIVEN?

8 MR. WAPNER: YES.

9 MR. CHIER: YES? GIVEN AS REQUESTED. ALL RIGHT.
10 1747 IS BEING GIVEN?

11 THE COURT: WAIT A MINUTE. DON'T RUSH ME NOW, WILL
12 YOU? LET ME GET THESE IN ORDER.

13 NO. WE DON'T NEED 1747. I NEVER GIVE IT.

14 MR. WAPNER: I ASSUME THE COURT WILL THEN ONLY GIVE
15 1747 --

16 THE COURT: I AM NOT GOING TO GIVE IT.

17 MR. WAPNER: IF THEY INDICATE THEY ARE DEADLOCKED AND
18 THEN YOU BRING THEM OUT?

19 THE COURT: YES.

20 MR. WAPNER: OKAY.

21 THE COURT: USE OF MULTIPLE VERDICT FORMS? I EXPLAIN
22 THE VERDICT FORMS TO THEM. I DON'T NEED THIS ONE, EITHER.

23 MR. WAPNER: SO YOU ARE NOT GOING TO GIVE THAT EITHER?

24 THE COURT: NO. WHAT I DO IS, I GO OVER ALL THE
25 VARIOUS FORMS AND EXPLAIN THEM.

26 MR. BARENS: WHEN YOU SAY TO THEM, YOUR HONOR, ABOUT
27 THE FORM FOR THE SPECIAL CIRCUMSTANCES, DO YOU USE LANGUAGE
28 WHICH YOU SAY, "YOU WILL ONLY USE THAT FORM IF YOU HAVE FOUND

20B-2

1 THE DEFENDANT GUILTY IN THE FIRST INSTANCE?"

2 THE COURT: THIS IS AN INSTRUCTION --

3 MR. BARENS: WELL, I AM A LITTLE SENSITIVE ABOUT THE
4 SUGGESTION. PSYCHOLOGICALLY, I HAVE HEARD THIS DISCUSSED
5 THAT IF THEY ARE GIVEN FORMS --

6 THE COURT: YOU MEAN THE VERDICT FORMS?

7 MR. BARENS: YES.

8 THE COURT: WELL, THE VERDICT FORM SAYS THEY DO OR
9 DO NOT FIND THE SPECIAL CIRCUMSTANCES --

10 MR. BARENS: WELL, THE POINT I AM TRYING TO MAKE IS
11 THAT -- IT IS A BIT SUBTLE -- THEY ARE GIVEN THE SECOND FORM.
12 AS I UNDERSTAND IT, THEY HAVE TO CHECK THE SECOND FORM IF
13 THEY FIND THE DEFENDANT NOT GUILTY --

14 THE COURT: IT IS THE SAME WAY WITH GUILTY. THEY DON'T
15 HAV TO CHECK THE SECOND FORM FOR NOT GUILTY.

16 MR. WAPNER: THE TRUTH OR FALSITY OF THE SPECIAL
17 CIRCUMSTANCES ONLY GOES ON THE GUILTY VERDICT FORM.

18 MR. BARENS: OKAY.

19 THE COURT: AFTER THEY FIND HIM GUILTY OF MURDER, "AND
20 WE FURTHER FIND THAT THE MURDER TOOK PLACE IN THE COURSE
21 OF A ROBBERY." THAT IS TRUE OR NOT TRUE.

22 MR. BARENS: SO THE NOT GUILTY FORMS STANDS BY ITSELF,
23 YOUR HONOR?

24 THE COURT: YES.

25 MR. WAPNER: DOES THE COURT HAVE A COPY OF THE
26 INFORMATION IN FRONT OF IT?

27 THE COURT: NO. WHAT ARE YOU THINKING OF?

28 MR. WAPNER: BECAUSE I THINK THAT THERE IS AN ALLEGATION

1 THAT A GUN WAS USED IN THE COMMISSION OF THE OFFENSE IN THE
2 INFORMATION.

3 MR. CHIER: ABSOLUTELY NOT. THE LAST TIME I LOOKED
4 AT IT, IT WAS NOT THERE.

5 MR. BARENS: YOU HAVE YOUR LONG-NUMBERED THING THAT
6 YOU DO, THE ENHANCEMENT THING --

7 MR. WAPNER: NO. I AM NOT CONCERNED ABOUT THE
8 ENHANCEMENT.

9 I AM ONLY CONCERNED ABOUT GIVING THE APPROPRIATE
10 INSTRUCTION.

11 MR. CHIER: THERE IS NO USE ALLEGATION.

12 THE COURT: NO. THERE IS NO USE ALLEGATION. THAT
13 I REMEMBER.

14 MR. CHIER: WE WOULD HAVE ATTACHED IT AT A 995, TO
15 BE SURE.

16 THE COURT: ALL RIGHT.

17 MR. BARENS: I THINK WE SHOULD FOCUS ON ENHANCEMENTS,
18 THOUGH, FOR A WHILE.

19 THE COURT: NOW, THIS IS THE ONE, "YOU SHALL RETIRE
20 AND SELECT ONE OF YOUR NUMBER" AND --

21 MR. CHIER: THAT IS GIVEN AS REQUESTED?

22 THE COURT: YES. NOW WE COME TO THE FURTHER
23 INSTRUCTIONS ON THE IDENTITY.

24 MR. BARENS: HAVE YOU GOT THOSE?

25 MR. CHIER: YES. I HAVE THE PROPOSED INSTRUCTIONS
26 SUBMITTED BY MR. WAPNER. BUT THESE INSTRUCTIONS ARE
27 CONTAINED IN -- I GUESS THEY HAVE BEEN MODIFIED FROM CALJIC.
28 THESE ARE INSTRUCTIONS THAT ARE GIVEN TYPICALLY IN THE CASE --

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THE COURT: AGAINST THE DEFENDANT, YOU MEAN?

MR. CHIER: YES, YOUR HONOR.

1 THE COURT: ONLY WHERE THE DEFENDANT IS SUPPOSED TO
2 BE IDENTIFIED. IT DOESN'T LIMIT IT TO JUST THE DEFENDANT,
3 DOES IT? WHAT IS THE NUMBER?

4 MR. WAPNER: 2.92. THE PRINCIPLES ARE EXACTLY THE
5 SAME. IT HAS TO DO WITH THE PRINCIPLES OF EYEWITNESS
6 IDENTIFICATION, REGARDLESS OF WHO IT IS THAT IS BEING
7 IDENTIFIED.

8 MR. CHIER: THERE IS -- I WAS TRYING TO RUN DOWN A
9 CASE CALLED PEOPLE V. WRIGHT, WHICH GAVE AN ADMONITION, A
10 REQUIRED ADMONITION CONCERNING EYEWITNESS TESTIMONY.

11 MR. WAPNER: THAT IS AN EXCELLENT CASE. UNFORTUNATELY,
12 A HEARING HAS BEEN GRANTED IN THAT CASE.

13 MR. CHIER: I UNDERSTAND THAT JUDGE LUCAS OR JUSTICE
14 LUCAS MADE A DISSENT. NOW THAT HE IS ON --

15 THE COURT: ALL RIGHT. HOWEVER, THE OPPORTUNITY OF
16 THE WITNESS TO OBSERVE THE ALLEGED -- WELL, THAT WILL GO
17 OUT.

18 MR. WAPNER: YOUR HONOR, I MODIFIED -- I TOOK THE
19 LANGUAGE OF THAT INSTRUCTION AND --

20 MR. BARENS: LET'S GO WITH MR. WAPNER'S VERSION.

21 MR. WAPNER: IN THE INSTRUCTION THAT I PROPOSE, THE
22 ONLY DIFFERENCE BETWEEN MY PROPOSED INSTRUCTION AND THE ONE
23 THAT IS IN 2.92, IS --

24 THE COURT: THE PERPETRATOR?

25 MR. WAPNER: I CHANGED THE WORD "PERPETRATOR" AND I
26 ALSO ADDED ONE SENTENCE. AND THAT IS IN 2.92. AND IT IS
27 THE SENTENCE THAT IS THE SECOND SENTENCE OF THIS INSTRUCTION
28 WHICH SAYS, "THE EYEWITNESS TESTIMONY IS AN EXPRESSION
29 OF BELIEF OR IMPRESSION BY THE WITNESS." AND I TOOK THAT.

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1 THE COURT: WHERE DO YOU GET THAT?

2 MR. WAPNER: IT IS NOT IN THAT -- IT IS NOT IN THE CALJIC
3 INSTRUCTION AND I WILL TELL YOU WHERE I TOOK IT FROM.

4 I TOOK IT FROM LANGUAGE OF PROPOSED INSTRUCTIONS
5 THAT WERE APPROVED IN THE CASES OF PEOPLE V. GUZMAN,
6 G-U-Z-M-A-N, 47 CAL.APP.3D 380, PEOPLE V. WEST, 139 CAL.APP.3D,
7 606 AND PEOPLE V. PALMER, 154 CAL.APP.3D, PAGE 79.

8 CALJIC DID SEE FIT TO PUT IT IN THEIR INSTRUCTIONS
9 BUT IT IS LANGUAGE THAT APPEARS IN THE INSTRUCTIONS APPROVED
10 IN THOSE.

11 MR. CHIER: YOUR HONOR, WE JUST TALKED ABOUT --

12 MR. BARENS: BY THE SAME TOKEN, YOUR HONOR JUST
13 REFERENCED THAT IF CALJIC DIDN'T PUT IT IN, THEY HAD A REASON
14 FOR NOT PUTTING IT IN. WHY WOULD WE NOW REVERSE FIELD AND
15 PUT SOMETHING IN THEY HAVE EXCLUDED, SIMPLY BECAUSE IT HELPS
16 THE PROSECUTION'S VIEW OF THE CASE?

17 I DON'T THINK WE SHOULD BE UNILATERAL IN THAT
18 REGARD.

19 WE HAVE HAD THREE OR FOUR INSTANCES HERE WHERE
20 WE WANTED SOMETHING CALJIC DIDN'T PROVIDE AND IF THEY DIDN'T
21 PROVIDE THIS LANGUAGE, WHY ARE WE NOW BY FIAT GOING TO
22 INSTALL IT?

23 MR. CHIER: I VOTE FOR SYMMETRY ALSO.

24 MR. WAPNER: I AM TELLING THE COURT THAT IS WHERE I GOT
25 THE LANGUAGE. I FELT IT WAS APPROVED IN THOSE CASES AND I
26 WILL SUBMIT IT.

27 THE COURT: WELL, IN ANY CRIMINAL CASE WHERE THEY HAVE
28 AN EYEWITNESS INSTRUCTION, THEY TEND TO USE IT WHERE SOMEBODY

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1 WITNESSED THE DEFENDANT IN A CRIMINAL ACT BY EYEWITNESS
2 TESTIMONY AND THEY PROVIDED IT BY EYEWITNESS TESTIMONY
3 ALLEGEDLY.

4 MR. WAPNER: BECAUSE THE PURPOSE OF THE INSTRUCTION IS
5 TO FOCUS THE JURY ON EYEWITNESS IDENTIFICATION AND THOSE
6 FACTORS ARE NOT GOOD OR NOT BAD. IT DOESN'T HAVE TO GO TO
7 THE FACT OF WHO IS IDENTIFYING THE PERSON BUT IT HAS TO DO
8 WITH THE FACT OF EYEWITNESS IDENTIFICATION.

9 THE SUBJECT OF THE IDENTIFICATION ISN'T RELATIVE
10 TO THIS.

11 MR. BARENS: YOUR HONOR, WE DON'T PROTEST THIS. WE
12 DON'T PROTEST ANYTHING ABOUT THE INSTRUCTION.

13 WHAT I DO PROTEST IS THE SUDDEN URGE TO HAVE
14 SOMETHING IN THAT CALJIC DOESN'T PROVIDE FOR, WHEN WE HAVE
15 NEVER DONE THAT IN ANY OTHER INSTANCE THROUGHOUT THESE
16 INSTRUCTIONS EXCEPT FOR YOUR HONOR'S AGREEMENT AS FAR AS THE
17 JUDGE'S COMMENTS TO THE JURY.

18 BUT WHY SHOULD WE MAKE AN EXCEPTION NOW TO
19 ACCOMMODATE THE PROSECUTION, WHEN WE HAVE HAD DIALOGUE THAT
20 "IF CALJIC INTENDED IT, CALJIC WOULD HAVE HAD IT HERE."

21 MR. CHIER: I HAVE TRIED TO MODIFY THE INSTRUCTION WITH
22 PEOPLE V. LISS, THE CALJIC INSTRUCTION. YOUR HONOR FOUND IT
23 WAS INAPPROPRIATE AND NOW HE WANTS TO MODIFY WITH PEOPLE V.
24 PALMER, AND I FIND THAT INAPPROPRIATE.

25 MR. WAPNER: THE MATTER IS SUBMITTED TO THE COURT.
26 I TOLD THE COURT WHERE I GOT THE LANGUAGE AND THE COURT CAN
27 READ THE CASES, AS IT SAID IT WOULD DO LISS.

28 IF YOU WANT TO STRIKE THAT LANGUAGE OUT, THAT IS

1 FINE WITH ME.

2 MR. BARENS: I THINK IT IS OBVIOUS WHY CALJIC DIDN'T
3 EXCLUDE IT.

4 THE COURT: THE INSTRUCTION GOES "EYEWITNESS TESTIMONY
5 RECEIVED IN THIS CASE FOR PURPOSE OF IDENTIFYING THE
6 DEFENDANT AS THE PERPETRATOR OF THE CHARGED CRIME."

7 MR. WAPNER: I LEFT THAT IN --

8 THE COURT: I KNOW IT IS OBVIOUS TO YOU --

9 MR. WAPNER: RIGHT.

10 THE COURT: -- THE PURPOSE OF THIS IS IT WAS DESIGNED
11 FOR THE BENEFIT OF THE DEFENDANT TO GIVE HIM THE BENEFIT OF
12 THE REASONABLE DOUBT. THIS WAS DESIGNED ONLY IF SOMEBODY
13 IDENTIFIES THE DEFENDANT, ANY EYEWITNESS, AND THESE ARE
14 PRECAUTIONARY INSTRUCTIONS FOR THE BENEFIT OF THE DEFENDANT.

15 MR. WAPNER: I UNDERSTAND THAT.

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1 THE COURT: NOT FOR THE BENEFIT OF THE PROSECUTION.

2 MR. WAPNER: BUT THE THEORY OF GIVING THE INSTRUCTION
3 IS THAT IT POINTS OUT TO THE JURY CERTAIN FACTORS THAT THEY
4 ARE TO CONSIDER OR NOT CONSIDER IN DETERMINING WHETHER OR NOT
5 THE IDENTIFICATION IS ACCURATE.

6 THE COURT: YOU DON'T HAVE TO HAVE AN INSTRUCTION.
7 YOU ARGUE IT TO THE JURY.

8 MR. WAPNER: WELL, YOUR HONOR, I THINK, SURE, YOU CAN
9 ARGUE THESE THINGS TO THE JURY BUT THIS POINTS OUT, AND IT
10 HAS BEEN APPROVED BY CALJIC, IT POINTS OUT THE FACTORS.

11 THE COURT: YOU KNOW THE REASON WHY THAT WAS PUT IN THERE
12 IS BECAUSE THEY WANTED TO BE SURE IF THERE WAS SOME DOUBT ABOUT
13 EYEWITNESS IDENTIFICATION, THEY WANTED THIS FOR THE BENEFIT
14 OF THE DEFENDANT.

15 MR. WAPNER: I WANT IT FOR EXACTLY THE SAME REASON, TO
16 PUT IN DOUBT ABOUT EYEWITNESS IDENTIFICATION AND IT IS FOR
17 THAT EXACT SAME REASON.

18 THE COURT: BUT IT IS NOT INTENDED FOR THE BENEFIT OF
19 THE DEFENDANT, IS IT?

20 MR. WAPNER: IT IS NOT A QUESTION OF WHO IT IS INTENDED
21 FOR THE BENEFIT OF.

22 IT IS PUT IN THERE TO PROVIDE FAIRNESS IN
23 EVALUATING EYEWITNESS TESTIMONY.

24 HOW OFTEN DOES THE OPPOSITE SITUATION APPLY WHERE
25 SOMEBODY IS TRYING TO IDENTIFY A VICTIM OF A CRIME? I MEAN
26 THIS IS A ONE IN A MILLION THING. I AM SURE THE COURT WOULDN'T
27 FIND ANY CASES ON IT BUT THE PRINCIPLE IS WHAT IS VERY
28 IMPORTANT, THAT THEY SHOULD EVALUATE THESE FACTORS IN

1 DETERMINING EYEWITNESS IDENTIFICATION.

2 THE COURT: THIS IS BASED ON THE CASE OF PEOPLE V. WEST
3 AND THESE ARE THE HEADNOTES:

4 "THE DEFENDANT WAS FOUND GUILTY OF
5 ROBBERY AND WAS GRANTED PROBATION. THE SOLE
6 ISSUES IN THE CASE WAS THE IDENTIFICATION OF THE
7 DEFENDANT AS THE PERPETRATOR OF THE CRIME AND
8 THE EVIDENCE ON THAT ISSUE WAS CONFLICTING.

9 "THE COURT OF APPEAL REVERSED, HOLDING
10 THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN
11 REFUSING TO GIVE THE SPECIAL JURY INSTRUCTION
12 THE DEFENDANT REQUESTED, WHICH STATED THAT IN
13 DETERMINING WHETHER REASONABLE DOUBT EXISTED IN
14 REGARD TO THE IDENTIFICATION OF THE DEFENDANT, THE
15 JURY SHOULD CONSIDER CERTAIN SPECIFIED FACTORS."

16 WELL, THE TRIAL COURT DID GIVE AN INSTRUCTION
17 CONCERNING REASONABLE DOUBT AND IDENTIFICATION AND CREDIBILITY
18 OF WITNESSES AND THE DEFENDANT'S PROPOSED INSTRUCTIONS
19 MENTIONED SEVERAL FACTORS RELATIVE TO THE CASE WHICH WERE NOT
20 MENTIONED IN THE INSTRUCTION GIVEN AND UNDER THE CIRCUMSTANCES
21 OF THE CASE, THE TRIAL COURT'S ERROR COULD NOT BE DEEMED
22 HARMLESS.

23 SO PURSUANT TO THIS CASE, THEY DRAFTED CALJIC
24 INSTRUCTIONS ON IDENTIFICATION.

25 MR. WAPNER: RIGHT.

26 THE COURT: BECAUSE OF THE FACT THESE WERE THE
27 INSTRUCTIONS WHICH WERE GIVEN IN THE CASE WHICH THE COURT
28 REFUSED TO GIVE, SO THE FRAMERS ON THE CALJIC COMMITTEE THOUGHT

1 IT SUFFICIENTLY IMPORTANT TO HAVE A JURY INSTRUCTION DESIGNED
2 FOR THE BENEFIT OF THE DEFENDANT AS TO WHAT FACTORS MIGHT BE
3 CONSIDERED IN EYEWITNESS IDENTIFICATION AGAINST HIM.

4 MR. WAPNER: RIGHT.

5 THE COURT: IT WASN'T DESIGNED FOR THE PURPOSE THAT YOU
6 THINK IT WAS DESIGNED FOR, ANY IDENTIFICATION.

7 MR. WAPNER: WELL, BUT IT NEVER COMES UP IN ANY OTHER
8 CONTEXT EXCEPT IN THE VERY UNUSUAL CASE WHICH THIS IS, THAT
9 THERE IS EYEWITNESS TESTIMONY ABOUT SOMEBODY OTHER THAN THE
10 DEFENDANT, I MEAN IN 99.99 PERCENT OF THE CASES, THE ONLY TIME
11 YOU HAVE EYEWITNESS TESTIMONY IS BASED ON SOMEBODY TRYING TO
12 IDENTIFY THE PERPETRATOR OF A CRIME. YOU NEVER HAVE EYEWITNESSES
13 TRYING TO IDENTIFY A VICTIM.

14 THE COURT: RIGHT.

15 MR. WAPNER: BUT THE POINT IS, THE PRINCIPLE THEY ARE
16 TALKING ABOUT, IN ORDER TO GIVE FAIRNESS TO THE DEFENDANT,
17 ARE PRINCIPLES THAT WOULD LEAD OR CREATE DOUBT ON EYEWITNESS
18 IDENTIFICATION AND THAT IS THE SAME THING THAT IS IMPORTANT
19 IN THIS CASE AND THAT IS, IN ORDER TO BE FAIR TO THE DEFENDANT,
20 OR IN THIS CASE, TO BE FAIR TO THE PROSECUTION, ALL OF THE
21 FACTORS WHICH BEAR ON THE VALIDITY OR THE CORRECTNESS OF
22 AN IDENTIFICATION ARE SET OUT THERE. IF THE SAUCE IS FOR THE
23 GOOSE, THE SAUCE IS FOR THE GANDER, SO IF IT IS FAIR TO THE
24 DEFENDANT WHEN THE IDENTIFICATION IS OF THE DEFENDANT, IT IS
25 FAIR AGAINST THE DEFENDANT WHEN THE EYEWITNESS IS IDENTIFYING
26 THE ALLEGED VICTIM OF A CRIME. BECAUSE THE POINT OF THE
27 INSTRUCTION IS NOT WHO IT IS THAT THEY ARE BEING CALLED ON TO
28 IDENTIFY BUT WHAT FACTORS ARE IMPORTANT IN EVALUATING WHETHER

1 A WITNESS IN IDENTIFYING A PERSON IS ACCURATE, AND WHETHER
2 THE PERSON MAKING THE IDENTIFICATION IS ACCURATE DOESN'T
3 DEPEND ON WHETHER THEY ARE IDENTIFYING A DEFENDANT OR WHETHER
4 THEY ARE IDENTIFYING THE VICTIM. WHAT DIFFERENCE DOES THAT
5 MAKE, LOGICALLY?

6 THE COURT: WELL, I AM JUST GIVING YOU THE HISTORY OF
7 THIS PARTICULAR INSTRUCTION.

8 MR. WAPNER: WELL, I KNOW THAT.

9 THE COURT: THAT PARTICULAR INSTRUCTION WAS TAKEN
10 VERBATIM FROM THE CASE WHERE THE DEFENSE SUBMITTED THE
11 PROPOSED INSTRUCTIONS ON EYEWITNESS IDENTIFICATION AND CALJIC
12 COMMITTEE ADOPTED EVERY SINGLE ONE OF THEM.

13 MR. CHIER: YOUR HONOR, COULD YOUR HONOR --

14 MR. WAPNER: I DON'T KNOW THAT THEY ADOPTED --

15 THE COURT: ALMOST EVERY ONE OF THEM, THEY DID. HERE
16 IS THE OPINION RIGHT HERE: "THE DEFENDANT'S PROPOSED
17 INSTRUCTIONS READ AS FOLLOWS: 'IN DETERMINING WHETHER OR NOT
18 THERE IS A REASONABLE DOUBT IN POSITIVE IDENTIFICATION, THE
19 DEFENDANT DAN WEST USED, AMONG OTHERS, THE FOLLOWING FACTORS.'"

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1 MR. BARENS: WE CERTAINLY DON'T HAVE MR. WAPNER'S NEXT
2 SENTENCE IN --

3 THE COURT: "ANY EVIDENCE RELATING TO THE DEFENDANT"--
4 AND THEN "THE OPPORTUNITY TO OBSERVE THE ALLEGED CRIMINAL
5 ACT."

6 AND THEN "THE PERSONS COMMITTING THE ACT, ANY
7 EVIDENCE RELATING TO THE STRESS UNDER WHICH THE WITNESS MADE
8 THE OBSERVATIONS AND ANY EVIDENCE RELATING TO WHETHER THE
9 WITNESS WAS ABLE TO PROVIDE A DESCRIPTION OF THE PERPETRATOR
10 OF THE ACT."

11 ALL OF THOSE ARE SUBSTANTIALLY CONTAINED IN THE
12 INSTRUCTION, THE NEW INSTRUCTION WHICH WAS DRAFTED AND
13 INCORPORATED.

14 MR. CHIER: YOUR HONOR, WE DON'T KNOW WHETHER THIS
15 MAY BE A CORRECT EXEGESIS OF THE EYEWITNESS DYNAMIC.

16 WHAT WE OBJECT TO IS THE SECOND SENTENCE HERE,
17 IN THAT MR. WAPNER HAS INSERTED IN THIS MODIFICATION OF
18 CALGIC --

19 MR. WAPNER: IF THAT IS ALL THERE IS AN OBJECTION TO,
20 IF THE COURT WANTS TO STRIKE THAT SENTENCE, I DON'T HAVE
21 A PROBLEM.

22 MR. CHIER: WE DON'T KNOW WHAT THE LAW IS RESPECTING
23 THE USE OF THIS INSTRUCTION IN A NON-PERPETRATOR SITUATION.

24 IF THE COURT IS GOING TO GIVE IT, WE ASK THAT
25 IT STRIKE THE SECOND SENTENCE THAT MR. WAPNER HAS --

26 THE COURT: WHICH ONE IS THAT?

27 MR. CHIER: "EYEWITNESS TESTIMONY IS AN EXPRESSION
28 OF BELIEF OR IMPRESSION BY THE WITNESS," IN WHICH IT IS

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1 MR. WAPNER'S BELIEF THAT --

2 THE COURT: WELL, THE QUESTION IS, IF YOU BELIEVE IT,
3 THIS IS THE WAY IT IS DRAFTED. OR, DO WE TAKE IT OUT
4 ALTOGETHER?

5 MR. CHIER: IT WAS NOT DRAFTED WITH THAT SENTENCE.

6 MR. WAPNER HAS --

7 THE COURT: "EYEWITNESS TESTIMONY HAS BEEN RECEIVED
8 IN THIS CASE FOR THE PURPOSE OF ..."

9 MR. WAPNER: MAY I SEE THE WEST OPINION?

10 THE COURT: THAT IS PAGE 606.

11 MR. WAPNER: THANK YOU.

12 MR. CHIER: MR. WAPNER HAS INDICATED THAT HE HAS ADDED
13 THE SECOND SENTENCE.

14 MR. BARENS: DRAFTED THE SECOND SENTENCE ONTO THE
15 LANGUAGE THAT YOUR HONOR SEES BOTH IN CALJIC AND IN WEST.

16 MR. CHIER: AS MR. BARENS POINTS OUT, IF IT IS NOT
17 ALL RIGHT FOR THE DEFENDANT TO FIDDLE AROUND WITH CALJIC,
18 THEN IT SHOULDN'T BE ALL RIGHT FOR THE PEOPLE TO FIDDLE AROUND
19 WITH CALJIC.

20 MR. WAPNER: I DON'T HAVE ANY -- THE LANGUAGE THAT
21 I GOT THAT FROM CAME FROM PALMER AND ALSO AN INSTRUCTION,
22 A DEFENSE INSTRUCTION ON PALMER AND GUZMAN. BUT I HAVE NO
23 OBJECTION IF THE SECOND SENTENCE IS TAKEN OUT.

24 THE COURT: WAIT A MINUTE. NOW, PALMER AND GUZMAN
25 HAD TO DO WITH DEFENDANTS' IDENTIFICATIONS --

26 MR. WAPNER: ALL OF THE CASES YOU WILL EVER FIND
27 REPORTED HAVE TO DO WITH IDENTIFICATION OF A DEFENDANT, NOT
28 THE VICTIM.

1 ALL I HAVE DONE IS CHANGE THE LANGUAGE IN THIS
2 INSTRUCTION SO THAT IT DOESN'T HAVE TO DO WITH THE DEFENDANT.
3 IT HAS TO DO WITH IDENTIFYING SOMEONE IN GENERAL.

4 MR. BARENS: YOUR HONOR, I WILL REPLACE YOUR VOLUME,
5 SIR.

6 THE COURT: THANK YOU.

7 MR. BARENS: YOUR HONOR, TO SAVE TIME HERE, I BELIEVE
8 WE CAN ACCEPT THE PROPOSED INSTRUCTIONS WITH MR. WAPNER'S
9 AGREEMENT THAT THE COURT WILL FOLLOW -- THAT THE SECOND
10 SENTENCE WILL BE REMOVED.

11 THE COURT: WHICH IS THAT?

12 MR. CHIER: THE "EYEWITNESS TESTIMONY."

13 MR. BARENS: MR. WAPNER'S SECOND SENTENCE THAT HE HAS
14 VOLUNTEERED HERE, THAT IS NOT A PART OF CALJIC OR WEST. IT
15 IS STARTING WITH THE WORDS, "EYEWITNESS TESTIMONY IS AN
16 EXPRESSION OF BELIEF OR IMPRESSION ..."

17 THE COURT: WHAT IS THAT?

18 MR. BARENS: SIR, MIGHT I APPROACH? IT IS THIS LINE
19 RIGHT HERE (INDICATING).

20 THE COURT: I SEE.

21 MR. BARENS: STARTING WITH THE WORDS --

22 THE COURT: THAT DOESN'T APPEAR IN HERE?

23 MR. BARENS: NO.

24 THE COURT: THAT WILL GO OUT.

25 MR. BARENS: THANK YOU, SIR.

26 THE COURT: ALL RIGHT.

27 MR. BARENS: WHAT IS NEXT?

28 MR. WAPNER: WELL, THE NEXT THING IS --

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1 THE COURT: WAIT A MINUTE.

2 MR. WAPNER: WE CAN FINISH THE DEFENSE PROPOSED
3 INSTRUCTIONS. BUT WE ALSO HAVE TO TALK ABOUT LESSER INCLUDED
4 OFFENSES.

5 MR. BARENS: LIKE A MOVING VIOLATION?

6 THE COURT: WHAT LESSER INCLUDED? WHAT DO YOU WANT
7 TO GIVE? WHAT DO YOU WANT TO GIVE?

8 THE RECORD SHOULD INDICATE THAT YOU WILL -- DON'T
9 REQUEST ANY LESSER UNLESS THEY ARE INCLUDED OFFENSES.

10 MR. BARENS: MR. CHIER, DO YOU HAVE IN MIND POSSESSION
11 OF A FIREARM IN A FEDERAL PARK?

12 MR. CHIER: VOLUNTARY MANSLAUGHTER WE WERE TALKING
13 ABOUT.

14 MR. WAPNER: WELL, IF THE DEFENSE IS REQUESTING
15 INSTRUCTIONS ON VOLUNTARY MANSLAUGHTER, THEN THE COURT SHOULD
16 GIVE LESSER INSTRUCTIONS OR INSTRUCTIONS ON ALL OF THE LESSER
17 INCLUDED OFFENSES, INCLUDING SECOND DEGREE MURDER.

18 I DON'T SEE ANY EVIDENCE IN THIS CASE FROM WHICH
19 THE JURY COULD POSSIBLY REACH SUCH A VERDICT.

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1 THE COURT: ARE THERE ANY? AN INSTRUCTION HAS TO BE
2 BASED ON SOME EVIDENCE IN THE CASE.

3 MERELY BECAUSE MURDER MAY VERY WELL BE SECOND
4 DEGREE OR MANSLAUGHTER OR VOLUNTARY MANSLAUGHTER OR
5 INVOLUNTARY MANSLAUGHTER, DOESN'T MEAN THAT YOU HAVE GOT
6 TO GIVE INSTRUCTIONS TO THAT OFFENSE.

7 YOUR THEORY OF THE CASE IS THAT HE DIDN'T COMMIT
8 A MURDER AT ALL.

9 MR. BARENS: THAT'S CORRECT.

10 THE COURT: NOW, IF HE COMMITTED THE MURDER, IT IS
11 ONE THING. IT IS PREMEDITATED AND DELIBERATE MURDER.

12 MR. BARENS: NOT NECESSARILY.

13 THE COURT: WHAT ELSE COULD IT BE?

14 MR. CHIER: WELL, THERE IS A THEORY THAT HE WAS --

15 MR. BARENS: A HEAT OF PASSION.

16 THE COURT: THERE IS NO EVIDENCE.

17 MR. CHIER: IT WAS A REVENGE MURDER. THERE WAS THE
18 TESTIMONY OF DEAN KARNY.

19 MR. BARENS: DEAN KARNY SAID THAT THEY ASKED HIM IF
20 THAT WAS ALL. AND THAT WAS NOT ENOUGH.

21 MR. CHIER: AND BLAM.

22 THE COURT: NO. IT WAS DELIBERATE AND PREMEDITATED
23 LONG BEFORE HE EVER GOT THERE, IF THE EVIDENCE IS TO BE
24 BELIEVED.

25 IF IT ISN'T TO BE BELIEVED, HE IS NOT GUILTY OF
26 MURDER.

27 MR. CHIER: THERE IS NO REQUIREMENT THAT HEAT OF PASSION
28 BE LIMITED TO A CERTAIN AMOUNT OF TIME.

1 THE COURT: THERE IS NO EVIDENCE OF A HEAT OF PASSION.

2 MR. CHIER: THERE IS EVIDENCE.

3 THE COURT: POINT IT TO ME.

4 MR. WAPNER: I ALSO THINK MR. CHIER'S STATEMENT THAT
5 THERE IS NO EVIDENCE THAT HEAT OF PASSION IS TO BE LIMITED
6 TO ANY AMOUNT OF TIME, IS AN INCORRECT STATEMENT OF THE LAW.

7 MR. CHIER: YOU CAN BE ANGRY FOR A LONG TIME. IT
8 JUST DEPENDS UPON THE --

9 THE COURT: THE LETTER SAYS HE FORGAVE HIM FOR IT.

10 MR. BARENS: I -- I REPRESENT THAT IN THE PANACOST
11 CASE, THEY HAD A PROBLEM WITH THIS ISSUE ABOUT HOW LONG A
12 HEAT OF PASSION HAD TO BE. AND JUDGE HOROWITZ --

13 THE COURT: WELL, THERE IS NO EVIDENCE THAT THERE IS
14 ANY HEAT OF PASSION.

15 MR. CHIER: WELL, I EXPLAIN THAT IN MY VIEW --

16 THE COURT: GO AHEAD.

17 MR. CHIER: MR. KARNY IN RECOUNTING THIS LURID TALE,
18 POINTED TO A POINT IN THE STATEMENT FROM MR. HUNT WHERE THE
19 ALLEGED VICTIM -- WHERE MR. HUNT AND MR. PITTMAN WERE THERE
20 WITH MR. LEVIN AND AFTER HAVING GOTTEL MR. LEVIN TO SIGN
21 THE CHECK, MR. LEVIN OR MR. HUNT SUPPOSEDLY SAID TO MR.
22 PITTMAN, "IS THAT ENOUGH," OR WORDS TO THAT EFFECT.

23 AT THAT POINT, THE OTHER ONE SAID NO. AND THEN
24 THE EXECUTION TOOK PLACE.

25 AND IF THE JURY WERE TO FIND IN FAVOR OF THAT
26 SET OF FACTS YOUR HONOR, THERE IS CONTAINED WITHIN THAT AND
27 WITHIN THE ENTIRE EVIDENCE OF THIS CASE, EVIDENCE TO THE
28 EFFECT THAT MR. HUNT WAS ANGRY ABOUT BEING GYPED OUT OF

1 \$4 MILLION WHICH IS SOMETHING THAT WOULD, TO USE THE
2 VERNACULAR, "PISS OFF THE GOOD HUMOR MAN."

3 THE COURT: VOLUNTARY MANSLAUGHTER? HEAT OF PASSION?

4 MR. BARENS: NO, SIR.

5 THE COURT: I DON'T WANT TO SAY THAT. THAT IS NOT
6 A PART OF OUR CASE. HOW CAN I GIVE THAT INSTRUCTION?

7 MR. BARENS: OUT OF AN ABUNDANCE OF CAUTION.

8 THE COURT: ARE YOU GOING TO ARGUE IT?

9 MR. BARENS: OUT OF AN ABUNDANCE OF CAUTION, YOU MIGHT
10 CONSIDER GIVING THE INSTRUCTION.

11 THE COURT: HOW CAN I GIVE AN INSTRUCTION WHEN THERE
12 IS NO EVIDENCE TO SUPPORT IT?

13 MR. BARENS: WELL, YOU SEE, AS MR. CHIER SAID, IT IS
14 POSSIBLE THAT REASONABLE MINDS COULD COME TO THAT CONCLUSION,
15 THAT -- LET ME GIVE YOU THIS SET OF FACTS, SIR. THAT HE
16 MIGHT HAVE GONE OVER THERE TO EXTORT MONEY AND IN SOME WAY
17 OR ANOTHER -- FROM MR. LEVIN -- AND THE EXTORTION STARTS TO
18 GET OUT OF HAND.

19 THE COURT: WHO DID THE SHOOTING? HUNT?

20 MR. BARENS: IT DOESN'T MATTER.

21 THE COURT: HUNT DID THE SHOOTING OR THE OTHER GUY?

22 MR. BARENS: IT DOESN'T MATTER.

23 THE COURT: HE WAS NOT GYPED OUT OF ANYTHING.
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23-1
1 MR. BARENS: NO, YOUR HONOR, IT DOESN'T MATTER ON MY
2 THEORY WHO DID THE SHOOTING AND I WILL TELL YOU WHY: YOU ARE
3 OVER THERE EXTORTING MONEY, FOR INSTANCE, HYPOTHETICALLY, AND
4 THE SITUATION STARTS GETTING OUT OF HAND AND THE MAN SAYS,
5 A CONVERSATION ENSUES AND HE SAYS, "YOU ARE HOLDING BACK MONEY,
6 YOU ARE LYING WHEN YOU SAY YOU DON'T HAVE MORE MONEY" AND IT
7 BECOMES EXPLOSIVE AND SOMEBODY GETS SHOT. I THINK THAT A JURY
8 COULD MAYBE COME TO A CONCLUSION --

9 THE COURT: IS THERE ANY EVIDENCE OF VOLUNTARY
10 MANSLAUGHTER?

11 MR. WAPNER: I DON'T SEE ANY.

12 THE COURT: BY THE WILDEST STRETCH OF YOUR IMAGINATION,
13 THERE IS NONE.

14 MR. WAPNER: I DON'T SEE THERE IS ANY EVIDENCE OF
15 SECOND DEGREE MURDER, EITHER.

16 THE COURT: I DON'T EITHER.

17 MR. WAPNER: BUT I WOULD LIKE TO HAVE A STATEMENT ON
18 THE RECORD BY COUNSEL THAT THEY EITHER ARE OR ARE NOT REQUESTING
19 AN INSTRUCTION ON THAT.

20 MR. BARENS: I THINK IT WOULD BE MALPRACTICE FOR A COUNSEL
21 FACING FIRST DEGREE MURDER NOT TO ASK FOR AN INSTRUCTION FOR
22 A LESSER, INCLUDED OFFENSE.

23 THE COURT: ALL RIGHT. WHAT DO YOU WANT?

24 MR. BARENS: WE WANT SECOND DEGREE AND VOLUNTARY.

25 THE COURT: PREPARE YOUR INSTRUCTIONS ON THAT.

26 MR. BARENS: MR. CHIER? THANK YOU.

27 THE COURT: I WILL TELL YOU AT THIS STAGE, I AM NOT
28 INCLINED TO GIVE IT BECAUSE THERE IS NO EVIDENCE ON THAT.

23-2
1 MR. BARENS: ANYTHING ABOUT DISTURBING THE PEACE?

2 MR. WAPNER: YOUR HONOR, I HAVEN'T CHECKED, IT WASN'T
3 MENTIONED TO ME, BUT MAYBE WHEN YOU GET THE INSTRUCTIONS, YOU
4 WILL CHECK TO SEE IF THE SECOND DEGREE MURDER INSTRUCTIONS
5 ARE REQUIRED SUA SPONTE, IF THE COURT INSTRUCTS ON THE
6 DELIBERATE AND PREMEDITATED MURDER THEORY. I LOOKED BRIEFLY
7 AND I COULDN'T FIND THAT.

8 MR. BARENS: OFF THE RECORD.

9 (UNREPORTED COLLOQUY.)

10 MR. CHIER: THE MULTIPLE VICTIMIZATION BY A CON MAN OF
11 A PERSON ON ESCALATING LEVELS CULMINATING IN THE LOSS OF A
12 FOUR AND A HALF MILLION DOLLAR PROFIT IS ENOUGH TO AROUSE
13 THE PASSION OF ANY RED-BLOODED MAN.

14 THE COURT: DO YOU MEAN THAT SERIOUSLY?

15 MR. BARENS: IF I LOST \$4 MILLION, I WOULD BE AROUSED.

16 THE COURT: WHY DIDN'T HE TELL HIM THEN?

17 MR. BARENS: IT PERHAPS TOOK TIME TO SINK IN, YOUR HONOR.

18 THERE WAS ALWAYS HOPE FOR RECOVERY.

19 MR. CHIER: IT IS SORT OF LIKE IT SORT OF BUILDS AND
20 THE MORE YOU THINK ABOUT IT, THE ANGRIER YOU GET.

21 THE COURT: WHAT IS THE NECESSARILY INCLUDED OFFENSE?

22 LET ME SEE THAT.

23 MR. BARENS: YOUR HONOR, TO SAVE TIME, I AM WILLING TO
24 SUBMIT THIS WHOLE THING TO THE COURT.

25 THE COURT: LISTEN TO WHAT IT SAYS HERE, AND THIS IS
26 THE LATEST REVISION AND THIS IS FROM 35 CAL.3D, 1984.

27 "WHICH HELD THAT A DEFENDANT, AT HIS
28 REQUEST, HAS A RIGHT TO HAVE THE JURY INSTRUCTED

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1 ON A LESSER-RELATED OFFENSE WHEN IT IS WITHIN THE
2 SCOPE OF THE EVIDENCE PRESENTED IF SUCH LESSER-
3 RELATED OFFENSE IS 'ONE CLOSELY RELATED TO THAT
4 CHARGED AND SHOWN BY THE EVIDENCE.' SUCH EVIDENCE
5 MUST HAVE AN 'INHERENT RELATIONSHIP' WITH THE
6 CHARGED OFFENSE."

7 MR. WAPNER: I DON'T THINK THAT HAS TO DO WITH THIS
8 CASE, THOUGH.

9 THE COURT: WHY? IT SAYS HERE "MUST HAVE WHEN IT IS
10 WITHIN THE SCOPE OF THE EVIDENCE PRESENTED."

11 MR. WAPNER: WHAT PAGE IS THE COURT READING?

12 THE COURT: 1710, THE SUPPLEMENTAL, THE BACK OF THE
13 BOOK.

14 MR. WAPNER: RIGHT. I THINK THAT INSTRUCTION HAS TO
15 DO WITH RELATED OFFENSES AS OPPOSED TO INCLUDED OFFENSES AND
16 THEY CHANGED THE LAW.

17 THE COURT: (READING:)

18 "THE COMMITTEE RECOMMENDS THAT THE TRIAL
19 JUDGE STATE ON THE RECORD WHETHER THE LESSER OFFENSE
20 SPECIFIED IN THE BLANK SPACE IS A LESSER NECESSARILY
21 INCLUDED OFFENSE OR A LESSER RELATED OFFENSE."

22 WELL, I NOTE IT IS A NECESSARILY INCLUDED
23 OFFENSE, BUT WHETHER OR NOT IT SHOULD BE GIVEN, THAT HAS GOT
24 TO BE WITHIN THE SCOPE OF THE EVIDENCE AND OTHERWISE, YOU COULD
25 GIVE ALL KINDS OF INSTRUCTIONS.

26 MR. BARENS: I THINK YOUR HONOR SHOULD GIVE A SECOND
27 DEGREE MURDER INSTRUCTION, THE DEFENSE REQUESTS.

28 MR. WAPNER: I HAVE NO PROBLEM WITH THE COURT GIVING

23-"
1 IT. I MEAN I CAN'T PERSONALLY --

2 THE COURT: ALL RIGHT, SUBMIT A SECOND DEGREE MURDER
3 INSTRUCTION.

4 MR. WAPNER: THAT IS 830, I THINK. AND THEN WE HAVE
5 TO GIVE 870.

6 THE COURT: NO, THERE IS A SPECIFIC INSTRUCTION THAT
7 SAYS "LESSER, NECESSARILY INCLUDED OFFENSES."

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24A-1
1 MR. BARENS: AND ONCE WE HAVE SAID THAT, THEN WE HAVE
2 TO GIVE THE INSTRUCTION.

3 THE COURT: 1710? I WILL HAVE TO GIVE THE INSTRUCTION
4 OF SECOND DEGREE MURDER?

5 MR. BARENS: I BELIEVE SO.

6 MR. WAPNER: THAT IS 830.

7 MR. BARENS: LET ME SEE IT.

8 MR. WAPNER: NOW YOU HAVE TO GIVE 870.

9 THE COURT: 1710, IF THE JURY IS NOT SATISFIED BEYOND
10 A REASONABLE DOUBT, WE DON'T HAVE TO GIVE THAT BECAUSE IT IS
11 JUST READING FROM THE -- THAT THE DEFENDANT IS GUILTY OF THE
12 OFFENSE CHARGED AND IT SO UNANIMOUSLY FINDS, IT MAY CONVICT
13 HIM OF ANY LESSER OFFENSE IF THE JURY IS CONVICTED BEYOND A
14 REASONABLE DOUBT THAT HE IS GUILTY OF SUCH LESSER OFFENSE.

15 THE OFFENSE OF MURDER IS A LESSER OFFENSE TO THE
16 OFFENSE CHARGED IN COUNT I. THE OFFENSE OF SECOND DEGREE
17 MURDER IS A LESSER OFFENSE TO THE OFFENSE CHARGED IN COUNT I.

18 MR. WAPNER: IS THAT RIGHT?

19 MR. BARENS: I THINK WE SHOULD GIVE 8.30 AS AN INSTRUCTION,
20 SIR.

21 THE COURT: WHAT IS THAT?

22 MR. BARENS: THE SECOND DEGREE INSTRUCTION.

23 THE COURT: WELL, I HAVE TO IF I AM GOING TO GIVE THE
24 LESSER INCLUDED OFFENSE UNDER 1710.

25 MR. BARENS: YES, SIR.

26 MR. WAPNER: I DON'T KNOW IF IT CONSTITUTES --

27 THE COURT: WELL, SECOND DEGREE MURDER IS A LESSER
28 INCLUDED OFFENSE, OBVIOUSLY.

1 MR. BARENS: I WOULD SUBMIT THAT WE WOULD BE SKATING
2 ON VERY THIN ICE IF WE DO NOT GIVE 8.30.

3 MR. WAPNER: I WON'T OBJECT. AND MAYBE I AM ONLY BEING
4 NIT-PICKY ABOUT LANGUAGE.

5 BUT JURY INSTRUCTION 8.70 SAYS THAT MURDER IS
6 CLASSIFIED INTO TWO DEGREES. IF YOU SHOULD FIND THE DEFENDANT
7 GUILTY OF MURDER, IT WILL BE YOUR DUTY TO DETERMINE AND STATE
8 IN YOUR VERDICT WHETHER YOU FIND THE MURDER TO BE FIRST OR
9 SECOND DEGREE.

10 MR. BARENS: I BELIEVE WE HAVE TO GIVE THAT.

11 MR. WAPNER: ALL I AM SAYING IS THAT INSTEAD OF CALLING
12 IT A LESSER INCLUDED, THAT IT IS A DIFFERENT DEGREE OF THE
13 SAME CRIME. THEREFORE, MAYBE IF YOU GIVE 8.70, YOU DON'T HAVE
14 TO GIVE 17.10.

15 MR. BARENS: I DON'T CARE ABOUT THAT.

16 THE COURT: 810?

17 MR. WAPNER: 830 AND 870.

18 MR. BARENS: WE MUST DO BOTH.

19 MR. CHIER: THE JUDGE DIDN'T LIKE OUR VOLUNTARY?

20 MR. BARENS: NOT PRECISELY, MR. CHIER.

21 THE COURT: SO SECOND DEGREE MIGHT COME INTO PLAY BECAUSE
22 OF THE DEFINITION, THE END OF IT SAYS "UNLAWFULLY KILLED A
23 HUMAN BEING BUT THE EVIDENCE IS INSUFFICIENT TO ESTABLISH
24 DELIBERATION AND PREMEDITATION."

25 HEAT OF PASSION COULDN'T BE. VOLUNTARY
26 MANSLAUGHTER COULDN'T BE GIVEN BECAUSE OF THAT.

27 MR. BARENS: WELL, I CERTAINLY WANT THE SECOND DEGREE,
28 YOUR HONOR

1 THE COURT: ALL RIGHT. I WANT TO HAVE THE APPROVAL OF
2 YOUR CLIENT.

3 MR. BARENS: YES, YOUR HONOR.

4 MR. CHIER: ARTHUR, WE'LL TALK ABOUT THAT.

5 THE COURT: YES. BECAUSE YOU MAY WANT TO GO FOR ALL
6 OR NOTHING.

7 MR. CHIER: THAT WAS MY POINT, ARTHUR. THE JUDGE MADE
8 IT FOR ME.

9 MR. BARENS: BUT IS YOUR HONOR SAYING THAT IF THE
10 DEFENDANTS REQUEST, YOU WILL GIVE IT? WELL, LET'S ASK.

11 MR. WAPNER: I THINK IF THE COURT GIVES 830 AND 870,
12 THAT YOU DON'T HAVE TO GIVE 1710.

13 THE COURT: ALL RIGHT.

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1 MR. BARENS: WE BETTER DO THAT, YOUR HONOR. EITHER
2 WAY, YOUR HONOR, I WOULD LIKE THAT ON THE RECORD WITH THE
3 DEFENDANT.

4 MR. CHIER: ARE WE NOT EVEN GOING TO TALK ABOUT
5 VOLUNTARY ANYMORE?

6 MR. BARENS: I DON'T THINK SO.

7 THE COURT: VOLUNTARY I WON'T DO.

8 MR. BARENS: BUT YOUR HONOR, I WOULD LIKE THE COURT
9 TO INQUIRE ON THE RECORD FOR AN EITHER-WAY DISPOSITION BY
10 THE CLIENT HIMSELF.

11 THE COURT: VERY GOOD.

12 MR. BARENS: THANK YOU, YOUR HONOR.

13 THE COURT: I WILL TELL HIM THAT YOUR ATTORNEYS HAVE
14 REQUESTED AN INSTRUCTION ON UNPREMEDITATED MURDER OF THE
15 SECOND DEGREE. IS THAT YOUR WISH, ALSO?

16 MR. BARENS: WELL, WHY NOT YOUR HONOR, SAY TO THE
17 DEFENDANT, MR. HUNT, I HAVE DETERMINED THAT IF YOU REQUEST
18 A SECOND DEGREE INSTRUCTION, THAT I AM DISPOSED TO PROVIDE
19 THE SAME, RATHER THAN SAYING THAT YOUR LAWYERS HAVE REQUESTED
20 IT.

21 MR. CHIER: I WILL TALK IT OVER WITH HIM.

22 MR. BARENS: I DON'T WANT HIM TO HAVE AN IMPRESSION
23 THAT I AM RECOMMENDING.

24 MR. WAPNER: WELL, THE CLIENT SHOULD NOT COME IN BLIND
25 ON MONDAY AND HAVE THE COURT PRESENT IT TO HIM.

26 MR. CHIER: I WILL TALK IT OVER WITH HIM.

27 MR. BARENS: ALL RIGHT. WE'LL DISCUSS IT WITH HIM.

28 MR. CHIER: WHAT IS THE PENALTY FOR SECOND?

24B-2

1 MR. WAPNER: FIFTEEN YEARS TO LIFE.

2 THE COURT: THAT'S RIGHT.

3 MR. WAPNER: WE HAVE ALSO THE DEFENDANT'S REQUESTED
4 INSTRUCTIONS 44 THROUGH 57 TO GO OVER.

5 MR. BARENS: WE PROBABLY WANT TO STIPULATE TO THOSE.

6 MR. CHIER: WHAT? 44, WE'LL WITHDRAW.

7 THE COURT: ALL RIGHT. 44 IS WITHDRAWN.

8 MR. CHIER: THAT IS WITHDRAWN AS BEING COVERED IN OTHER
9 INSTRUCTIONS.

10 45 IS COVERED IN --

11 THE COURT: THOSE ARE WITHDRAWN?

12 MR. BARENS: 45 IS WITHDRAWN?

13 MR. CHIER: 45 IS BEING COVERED IN OTHER INSTRUCTIONS.
14 WITHDRAWN.

15 46 IS WITHDRAWN AS BEING PREVIOUSLY COVERED.

16 47 IS JUST --

17 MR. WAPNER: ANOTHER RESTATEMENT OF WHAT REASONABLE
18 DOUBT IS AND ARGUMENT.

19 MR. BARENS: WELL, I DON'T KNOW.

20 THE COURT: ALL RIGHT. THEN I WILL REFUSE IT.

21 MR. BARENS: DO YOU REFUSE 47?

22 THE COURT: YES. IT ALSO IS REPEATED IN 48.

23 MR. CHIER: NO, IT IS NOT, YOUR HONOR. THIS IS --

24 THE COURT: I WILL REFUSE THAT.

25 MR. CHIER: ALL RIGHT.

26 THE COURT: HOW ABOUT ROBBERY?

27 MR. WAPNER: THAT IS INCLUDED IN THE ROBBERY INSTRUCTION.

28 THE COURT: SURE.

1 MR. CHIER: I THOUGHT IT WAS A VARIATION OF THAT.

2 THE COURT: WILL YOU TAKE IT OUT?

3 MR. CHIER: ALL RIGHT. YOU ALREADY HAVE IT OUT, YOUR
4 HONOR.

5 THE COURT: NUMBER 50?

6 MR. BARENS: WELL, 50 IS IMPORTANT.

7 THE COURT: I WILL NEVER GIVE THAT.

8 MR. BARENS: NEVER?

9 THE COURT: NEVER. NOBODY EVER ASKED IT OF ME BEFORE.

10 MR. BARENS: NEVER IS A LONG TIME. HOW ABOUT THE LAST
11 SENTENCE OF THIS, YOUR HONOR?

12 MR. WAPNER: IT SHOULD BE OFFERED BY OTHER INSTRUCTIONS
13 THAT ARE --

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48-4

1 THE COURT: IS THAT THE ONE THAT I GIVE, THAT YOU HAVE
2 TO UNDERSTAND --

3 MR. CHIER: COULD I JUST SAY NOW THAT WE HAVE JUSTICE
4 LUCAS AS HEAD OF THE COURT --

5 THE COURT: I WILL NEVER APPROVE THIS.

6 MR. CHIER: THIS IS FROM THE FEDERAL INSTRUCTIONS,
7 YOUR HONOR. THIS IS AN APPROPRIATE CASE TO GIVE SUCH AN
8 INSTRUCTION, SINCE A LARGE SEGMENT OF THE PEOPLE'S CASE RESTS
9 AS I SEE IT --

10 THE COURT: HOW ANYBODY CAN CONCEIVABLY GIVE AN
11 INSTRUCTION, SUCH AN INSTRUCTION, ANY COURT -- WELL, AS A
12 MATTER OF FACT, EVEN -- WHAT WAS HER NAME? ROSE BIRD?

13 IT SAYS "AFTER TAKING A DEFENDANT INTO CUSTODY,
14 ARRESTING OFFICERS SOMETIMES MAKE ACCUSATORY STATEMENTS TO
15 HIM OR IN HIS PRESENCE WITH A VIEW TO PROMPTING SOME
16 ADMISSION OF GUILT."

17 DID YOU EVER HEAR OF ANYBODY GIVING SUCH AN
18 INSTRUCTION?

19 MR. CHIER: IT WAS TAKEN WORD FOR WORD, VERBATIM FROM
20 DEVITT AND BLACKMAR, THE FEDERAL JURY INSTRUCTIONS.

21 THE COURT: THE TESTIMONY OF AN INFORMANT WHO PROVIDES
22 EVIDENCE, YOU MEAN?

23 MR. CHIER: YES, YOUR HONOR.

24 THE COURT: "AGAINST THE DEFENDANT FOR PAY OR IMMUNITY
25 FROM PUNISHMENT OR PERSONAL ADVANTAGE OR VINDICATION MUST
26 BE EXAMINED"-- WELL, WE ALREADY HAVE AN AIDING AND ABETTING.
27 YOU DIDN'T WANT ANY ACCOMPLICE TESTIMONY.

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25-1
1 MR. CHIER: BECAUSE THAT IS NOT OUR THEORY, YOUR HONOR.

2 THE COURT: I DON'T CARE WHAT YOUR THEORY IS. HE IS
3 AN INFORMER OR HE ISN'T.

4 MR. BARENS: AN IMMUNIZED INFORMANT, AN IMMUNIZED PERSON
5 DOES NOT NECESSARILY HAVE TO HAVE CULPABILITY IN THE CASE FOR
6 WHICH HE IS TESTIFYING. I THINK THIS IS VERY IMPORTANT, YOUR
7 HONOR.

8 WE SAID THROUGHOUT WHEN WE WERE VOIR DIRING THE
9 JURY, THAT AN IMMUNIZED WITNESS IS TO BE VIEWED WITH GREATER
10 CAUTION THAN AN AVERAGE WITNESS, TO USE THAT EXPRESSION, YOUR
11 HONOR, AND I BELIEVE THE COURT HAS TO MAKE AN INSTRUCTION AS
12 TO THAT.

13 THE COURT: AREN'T WE GOING TO GIVE AN INSTRUCTION TO
14 THAT EFFECT?

15 MR. CHIER: NO.

16 MR. WAPNER: I DON'T RECALL WHETHER THAT WAS IN THERE
17 OR NOT.

18 I DON'T BELIEVE THAT IS THE STATE OF THE LAW.

19 MR. CHIER: THAT IS THE STATE OF THE LAW ACCORDING TO
20 THE NINTH CIRCUIT.

21 THE COURT: I DON'T CARE ABOUT THE NINTH CIRCUIT.

22 MR. CHIER: WELL, THEY ARE RELYING ON THE NINTH CIRCUIT
23 INCREASINGLY.

24 THE COURT: NOT THE NINTH CIRCUIT, THEY HAVE A
25 REPUTATION FOR BEING REVERSED MORE THAN ANY OTHER CIRCUIT IN
26 THE UNITED STATES BY THE SUPREME COURT.

27 MR. CHIER: THAT IS ALSO THE SECOND --

28 THE COURT: YOU SAID IT COMES FROM THE NINTH CIRCUIT.

25-2
1 MR. CHIER: THIS COMES FROM A PATTERN OF JURY INSTRUCTIONS
2 THAT THEY GIVE IN THE FEDERAL COURT NATION-WIDE AND THIS IS
3 GIVEN, YOUR HONOR.

4 THE COURT: I AM NOT GIVING THEM.

5 MR. CHIER: COULD I BE HEARD ON THIS SUBJECT, YOUR HONOR?

6 THE REASON WE ARE ASKING FOR THIS IS BECAUSE WE
7 DO NOT FEEL THAT THE ACCOMPLICE INSTRUCTION, WHICH PROVIDES
8 A CAVEAT THAT THE ACCOMPLICE TESTIMONY OUGHT TO BE VIEWED
9 WITH CAUTION, IS APPLICABLE IN THIS CASE.

10 THIS MAN IS IN A SPECIAL CATEGORY AS FAR AS OUR
11 THEORY IS, WHICH IS HE IS NOT AN ACCOMPLICE BUT AN IMMUNIZED
12 WITNESS IN A MURDER CASE. HE IS AN IMMUNIZED MURDERER. THERE
13 SHOULD BE SOME KIND OF A CAVEAT GIVEN TO THE JURY WITH
14 RESPECT TO THIS MAN'S TESTIMONY.

15 IF YOU DON'T LIKE THIS INSTRUCTION, WHICH I TOOK
16 FROM DEVITT AND BLACKMAR, YOUR HONOR, THEN ALLOW US TO SUBMIT
17 ANOTHER ONE.

18 THE COURT: DID DEVITT AND BLACKMAR MENTION DEAN KARNY
19 AND MENTION THE FACT THAT HE HAD BEEN PROMISED BY THE STATE
20 OF CALIFORNIA HE WOULD NOT BE PROSECUTED FOR A MURDER IN
21 SAN MATEO COUNTY AND MENTIONS THE WITNESS KARNY AND REGARDING
22 THE ADMISSION TO THE STATE BAR OF CALIFORNIA?

23 MR. BARENS: YOUR HONOR, I AM STILL ON 51. IS YOUR HONOR
24 ON 52?

25 MR. CHIER: 51 AND 52 ARE JUST VARIATIONS OF THE SAME.

26 MR. BARENS: I KNOW, BUT YOUR HONOR, I FEEL --

27 MR. CHIER: COULD I FINISH WHAT I WAS SAYING?

28 MR. BARENS: I AM SORRY.

25-7
1 MR. CHIER: I WAS SAYING, YOUR HONOR, IF YOU DO NOT LIKE
2 THIS PARTICULAR ONE BECAUSE OF THE FACT THIS MAN WAS IN A
3 SPECIAL CATEGORY AS A WITNESS AND HE DOES NOT FIT IN THE
4 ACCOMPLICE CATEGORY, ALLOW US TO SUBMIT AN INSTRUCTION THAT
5 WOULD PUT A CAVEAT ON HIS TESTIMONY WHICH WE ARE ENTITLED TO.
6 HE IS NOT AN ORDINARY WITNESS AND THE ORDINARY CREDIBILITY
7 OF WITNESS INSTRUCTION DOES NOT COVER IMMUNIZED WITNESSES,
8 YOUR HONOR.

9 AND THE FEDERAL COURTS HAVE RECOGNIZED THIS, YOUR
10 HONOR, AND THEY HAVE FITTED INTO THEIR PATTERN, JURY
11 INSTRUCTIONS SUCH AS CALJIC HERE, THE INSTRUCTION CONCERNING
12 AN INFORMER, NOT NECESSARILY AN ACCOMPLICE -- IN THIS CASE,
13 MR. KARNY IS NOT NECESSARILY AN ACCOMPLICE IN THIS CASE SO
14 I BEG YOUR HONOR --

15 THE COURT: HE IS NOT AN ACCOMPLICE? OF COURSE HE IS.

16 MR. CHIER: WELL, NOT IN THIS PARTICULAR CASE, YOUR HONOR.

17 IT MAY BE IN SAN MATEO, ON THE FACTS ALLEGED IN
18 THIS CASE, HE MAY BE.

19 THE COURT: HE MAY BE IN THIS PARTICULAR CASE, TOO.

20 MR. CHIER: WELL, BUT --

21 THE COURT: ACCORDING TO HIS OWN TESTIMONY.

22 MR. BARENS: YOUR HONOR, UNDER ANY THEORY OF THE CASE
23 IT WOULD BE AN ABSOLUTE MISCARRIAGE OF JUSTICE, IN MY OPINION,
24 RESPECTFULLY, YOUR HONOR, IF THERE IS NOT SOME CAVEAT PUT ON
25 THIS WITNESS'S TESTIMONY TO THE JURY.

26 THE COURT: ALL RIGHT, HERE IS WHAT WE WILL SAY:

27 "THE TESTIMONY OF DEAN KARNY, WHO HAS
28 BEEN IMMUNIZED FROM PROSECUTION IN THIS CASE" --

1 MR. CHIER: JUST A MOMENT.

2 MR. BARENS: "THE TESTIMONY OF DEAN KARNY, WHO HAS BEEN
3 IMMUNIZED FROM PROSECUTION IN THIS CASE."

4 THE COURT: ALL RIGHT, IMMUNIZED FROM PROSECUTION IN
5 THIS CASE.

6 MR. CHIER: FROM PROSECUTION IN THIS CASE.

7 THE COURT: "SHOULD BE VIEWED WITH CAUTION."

8 MR. CHIER: THANK YOU, YOUR HONOR.

9 THE COURT: IS THAT ALL RIGHT?

10 MR. CHIER: YES.

11 MR. BARENS: THANK YOU, YOUR HONOR.

12 MR. WAPNER: YOUR HONOR, I THINK I WOULD PREFER THAT
13 THE LANGUAGE OF THE INSTRUCTION BE IN MUCH MORE GENERAL
14 LANGUAGE.

15 THE WAY THEY HAVE IT HERE, THE WAY YOU MAKE IT
16 SOUND IS "WELL, VIEW DEAN KARNY'S TESTIMONY WITH CAUTION."
17 BUT IT DOESN'T NECESSARILY APPLY TO INFORMERS IN OTHER CASES
18 OR WITNESSES IN OTHER CASES.

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25A-1
1 MR. CHIER: THE WAY THE LANGUAGE OF 51, OF OUR REQUESTED
2 INSTRUCTION READS, YOUR HONOR --

3 THE COURT: 51?

4 MR. CHIER: YES.

5 MR. WAPNER: AND ALSO, I DON'T THINK --

6 THE COURT: 51 HERE?

7 MR. CHIER: YES.

8 THE COURT: I AM READING FROM THAT.

9 MR. CHIER: MR. WAPNER IS SAYING THAT IF YOU ARE GOING
10 TO GIVE A CAUTIONARY INSTRUCTION OF SOME KIND, HE PREFERENCES
11 GENERAL LANGUAGE AS OPPOSED TO SPECIFIC REFERENCES TO
12 MR. KARNY.

13 THE COURT: WELL, HE IS NOT AN INFORMER AS SUCH.

14 MR. BARENS: I THINK WHAT YOUR HONOR HAS COME UP WITH
15 IS THE TRUTH, YOUR HONOR JUST SPOKE THE TRUTH AND DISTILLED
16 THE LAW AND WE OUGHT TO GO WITH THE SIMPLE TRUTH.

17 THE COURT: WELL, HE DOESN'T LIKE IT.

18 MR. WAPNER: THE FACT THEY ARE SINGLING OUT ONE WITNESS.

19 MR. CHIER: WE CAN CHANGE "INFORMER."

20 THE COURT: I DIDN'T SAY "INFORMER." HE IS NOT AN
21 INFORMER.

22 MR. BARENS: HE JUST SAID IT. WHY DO WE HAVE TO MAKE
23 ANOTHER RESOLUTION?

24 MR. WAPNER: JUST SAY "PERSON."

25 MR. BARENS: JUST DO IT LIKE THE JUDGE JUST SAID.

26 MR. CHIER: THE TESTIMONY OF A WITNESS.

27 THE COURT: "TESTIMONY OF A WITNESS WHO HAS BEEN
28 GRANTED" --

1 MR. CHIER: TO PROVIDE EVIDENCE -- TESTIMONY AGAINST --
2 THE COURT: NO.

3 "TESTIMONY OF A WITNESS WHO HAS BEEN
4 IMMUNIZED FROM PROSECUTION IN THIS CASE."

5 MR. CHIER: WELL, AS A GENERAL STATEMENT, YOU DON'T EVEN
6 HAVE TO SAY "IN THIS CASE, THE TESTIMONY OF ANY IMMUNITED
7 WITNESS OUGHT TO BE VIEWED WITH CAUTION."

8 MR. BARENS: THAT IS ALL WE ARE SAYING. THAT IS ALL
9 WE ARE SAYING.

10 THE COURT: WELL, THAT IS THE LAW, ISN'T IT, FRED?

11 MR. WAPNER: I DON'T KNOW IF THAT IS THE STATE OF THE
12 LAW OR NOT, TO TELL YOU THE TRUTH, BUT I MEAN --

13 THE COURT: WHY DON'T YOU CHECK IT?

14 MR. WAPNER: IN ANY EVENT, NOW MAYBE I AM NIT-PICKING
15 BUT WHAT I WOULD LIKE TO DO --

16 THE COURT: THE LANGUAGE OF THIS INSTRUCTION "SHOULD
17 BE VIEWED WITH CAUTION."

18 MR. BARENS: I WILL AGREE WITH THAT.

19 MR. CHIER: FRED IS HAVING PROBLEMS WITH THE FIRST PART
20 OF IT.

21 MR. WAPNER: NOW I AM HAVING PROBLEMS WITH THE SECOND
22 PART, WHICH I GUESS I AM NIT-PICKING TO A CERTAIN EXTENT, BUT
23 IF YOU ARE GOING TO USE THIS CAUTIONARY INSTRUCTION, I PREFER
24 THE LANGUAGE THAT WE HAVE HERE IN 51, WHICH IS "WITH GREATER
25 CARE THAN THE TESTIMONY OF AN ORDINARY WITNESS" AS OPPOSED
26 TO "WITH CAUTION."

27 THE COURT: ALL RIGHT.

28 MR. WAPNER: MAYBE THAT IS NIT-PICKING.

1 THE COURT: ALL RIGHT, I WILL PUT THAT IN THERE.
2 "WITH GREATER CARE."

3 MR. BARENS: ARE WE TO RESUBMIT 51, YOUR HONOR?

4 THE COURT: YES, EXACTLY AS I HAVE INDICATED.

5 MR. BARENS: MR. CHIER? GIVE IT.

6 MR. CHIER: WE JUST CAN'T CHANGE 51?

7 THE COURT: NO. PUT IT THE WAY WE JUST SUGGESTED IT.

8 MR. CHIER: "SO THE TESTIMONY OF A WITNESS WHO PROVIDES
9 EVIDENCE AGAINST THE DEFENDANT" --

10 THE COURT: NO, NO.

11 "THE TESTIMONY OF THE WITNESS
12 WHO HAS BEEN GRANTED IMMUNITY FROM PROSECUTION."

13 MR. BARENS: SHOULD BE VIEWED?

14 THE COURT: "SHOULD BE VIEWED" --

15 MR. BARENS: WITH GREATER CARE, PERIOD.

16 MR. CHIER: THAN THE TESTIMONY OF AN ORDINARY WITNESS,
17 JUST LIKE THE THING SAYS.

18 THE COURT: ALL RIGHT.

19 MR. BARENS: OKAY.

20 THE COURT: "THE TESTIMONY OF ANY OTHER WITNESS" INSTEAD
21 OF ORDINARY.

22 WHAT IS AN ORDINARY WITNESS?

23 MAKE IT "ANY OTHER WITNESS."

24 MR. BARENS: ORDINARY WITNESS?

25 THE COURT: ANY OTHER WITNESS.

26 MR. BARENS: ANY OTHER WITNESS.

27 WELL, THE PROBLEM WITH THAT, WE DO HAVE EXPERT
28 WITNESSES THAT ARE OTHER THAN AN ORDINARY WITNESS.

1 MR. WAPNER: THEY ARE NOT COMPARING DEAN KARNY'S
2 TESTIMONY TO ANY EXPERT WHO TESTIFIED.

3 MR. BARENS: DR. CHOI, THAT IS RIGHT, BECAUSE DR. CHOI
4 WAS WEARING BROWN SHOES.

5 THE COURT: ALL RIGHT, GIVEN AS MODIFIED.

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1 MR. BARENS: THAT IS --

2 MR. WAPNER: THAT IS 51.

3 MR. BARENS: WHAT ARE WE DOING MR. CHIER, WITH 52?

4 MR. CHIER: WELL, THE JUDGE HAS ALREADY EXPRESSED HIS --

5 THE COURT: AS MODIFIED?

6 MR. WAPNER: WHICH ONE?

7 THE COURT: NO, NO. 52 IS REFUSED. 51 IS AS MODIFIED.

8 MR. WAPNER: RIGHT.

9 MR. CHIER: THE NEXT INSTRUCTION IS OUR SEARS/GRENADOS,
10 REASONABLE DOUBT INSTRUCTION.

11 THE COURT: WE HAVE GOT THAT. THAT IS COURT TESTIMONY
12 GIVEN BY ONE WITNESS -- WE HAVE GOT THAT ONE.

13 MR. CHIER: WE ARE ENTITLED TO A SPECIFIC, FORMULA
14 INSTRUCTION ON REASONABLE DOUBT WHICH EXPRESSES OUR THEORY
15 OF THE CASE. THIS IS IT.

16 THE LAW REQUIRES YOU TO GIVE IT ON REQUEST. IF
17 WE HAVE A SPECIFIC THEORY OF THE CASE WHICH --

18 MR. BARENS: WHICH WE DO --

19 MR. CHIER: THAT POINTS TO --

20 THE COURT: WHAT IS YOUR THEORY OF THE CASE? THERE
21 WASN'T A MURDER? ISN'T THAT WHAT YOUR THEORY OF THE CASE IS?

22 THIS MAN WHO WAS ALLEGEDLY MURDERED, ACTUALLY
23 APPEARED IN TUCSON. THAT ISN'T A THEORY OF THE CASE. THAT
24 IS EVIDENCE AS TO THE FACT THAT THERE HAS NOT BEEN A MURDER.

25 MR. CHIER: WE ARE ENTITLED TO A FORMULA INSTRUCTION
26 EXPRESSING THE FACTS.

27 THE COURT: WHICH CASE DO YOU WANT ME TO LOOK AT?

28 49 CAL.2D? GRENADOS?

1 MR. CHIER: OR SEARS.

2 THE COURT: WHICH IS THE LAST CASE?

3 MR. CHIER: SEARS.

4 THE COURT: SEARS? 14 CAL.3D AND RINCON AND PINEDA?

5 ALL RIGHT.

6 MR. CHIER: HERE IT IS.

7 HERE IT IS IN GRENADOS, YOUR HONOR. IT IS PAGE
8 491, HEADNOTE NUMBER 7.

9 THE COURT: NUMBER 7?

10 MR. CHIER: I BELIVE SO. IT IS HEADNOTE NUMBER 7.

11 THE COURT: NUMBER 7?

12 MR. CHIER: YES, YOUR HONOR.

13 THE COURT: I DON'T UNDERSTAND. YOUR THEORY OF THE
14 CASE IS THAT HE DIDN'T COMMIT A MURDER, IS THAT RIGHT?

15 MR. CHIER: YES. BUT WE HAVE A SPECIFIC THEORY OF
16 REASONABLE DOUBT BASED ON THE FACT THAT TWO WITNESSES HAVE
17 TESTIFIED TO HAVING OBSERVED MR. LEVIN IN TUCSON, ARIZONA.
18 THAT IS --

19 THE COURT: ALL RIGHT. DO YOU WANT AN INSTRUCTION
20 TO THAT EFFECT? I UNDERSTAND THAT IF THE JURY BELIEVES --
21 IF THE JURY BELIEVES THAT THE ALLEGED VICTIM, RON LEVIN,
22 WAS SEEN BY TWO WITNESSES IN TUCSON, ARIZONA, THEN --

23 MR. BARENS: EITHER OR BOTH.

24 MR. CHIER: NO. THAT IS NOT CORRECT. IT IS A QUESTION
25 OF WHETHER THEY BELIEVE IT.

26 THE COURT: WHAT DO YOU MEAN THEY HAVE TO BELIEVE IT?
27 OTHERWISE WE COULDN'T DO IT? I WON'T GIVE IT YOUR WAY.

28 MR. CHIER: IT MERELY HAS TO RAISE A REASONABLE DOUBT.

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1 THAT IS WHAT 1096 IS ALL ABOUT.

2 REASONABLE DOUBT ITSELF -- IT IS NOT WHETHER --
3 THERE IS NO BURDEN ON US TO PROVE THAT HE WAS THAT PERSON
4 THEY SAW.

5 ALL WE HAVE TO DO IS --

6 MR. BARENS: I BELIEVE YOUR HONOR, MR. CHIER IS CORRECT.
7 IF THE DEFENSE HAS RAISED A REASONABLE DOUBT BY THE TESTIMONY
8 OF EYEWITNESSES, THAT IS ALL THE JURY HAS TO FIND. THEY
9 DON'T HAVE TO FIND SOME BELIEF BEYOND SOMETHING.

10 THE COURT: ALL RIGHT. IF YOU HAVE A REASONABLE DOUBT
11 WHETHER THE ALLEGED VICTIM, RON LEVIN --

12 MR. BARENS: WHETHER OR NOT.

13 THE COURT: WHETHER OR NOT? NO. IT IS WHETHER --

14 MR. CHIER: WE ARE ENTITLED TO THIS SPECIFIC --

15 THE COURT: WAIT A MINUTE. REASONABLE DOUBT THAT RON
16 LEVIN, THE VICTIM RON LEVIN WAS NOT SEEN AT THE GAS STATION --

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1 MR. BARENS: THIS IS THE DEFENDANT'S REQUEST, YOUR
2 HONOR. WE CAN'T ASK IN THE DOUBLE NEGATIVE WHEN IT IS THE
3 DEFENDANT, SIR?

4 THE COURT: NO. NO. IF YOU HAVE A REASONABLE DOUBT
5 THAT THE PERSON SEEN AT THE GAS STATION WAS -- WHAT?

6 MR. BARENS: NO. IF YOU HAVE A REASONABLE DOUBT --
7 IF THE TESTIMONY OF THE EYEWITNESS HAS CREATED A REASONABLE
8 DOUBT IN YOUR MIND THAT THEY SAW THE ALLEGED VICTIM, RON
9 LEVIN, IN TUCSON --

10 THE COURT: NO. THAT IS WRONG.

11 MR. WAPNER: YOUR HONOR, I THINK THAT WE HAVE GONE
12 A LITTLE BIT FAR AFIELD HERE. BECAUSE WHILE I AGREE WITH
13 MR. CHIER'S GENERAL STATEMENT OF THE DEFENSE MAY BE ENTITLED
14 TO AN INSTRUCTION TAILORED TO THEIR THEORY OF THE CASE, IF
15 THE THEORY OF THE CASE IS, WELL, WE HAVE SOMETHING THAT RAISES
16 A REASONABLE DOUBT, I DON'T THINK THAT THAT IS NECESSARILY
17 A SPECIFICALLY TAILORED INSTRUCTION.

18 THAT IS JUST SAYING THAT IF YOU HAVE A REASONABLE
19 DOUBT, FIND HIM NOT GUILTY.

20 MR. BARENS: WELL, I THINK THAT THE LAW IN ALL OF THE
21 CASES -- IF THAT IS OUR THEORY, THAT WE GET THE ONE THAT
22 THE DEFENDANT REQUESTS.

23 MR. CHIER: THIS IS PROBABLY THE SINGLE-MOST REVERSED --

24 THE COURT: LET ME SEE RINCON AND PINEDA. WHAT IS
25 THE OTHER ONE NOW?

26 MR. WAPNER: GRENADOS.

27 MR. BARENS: GRENADOS.

28 MR. WAPNER: WELL, WOULD YOU BE SATISFIED WITH THE

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1 FIRST PARAGRAPH OF 57, INSTEAD?

2 MR. BARENS: I WANT THE THIRD PARAGRAPH OF 53, ONE
3 WAY OR ANOTHER. I SUBMIT THAT OTHERWISE IT WOULD BE BLATANT
4 ERROR IF WE DON'T GET THAT.

5 MR. CHIER: WELL, 57 IS OUR RESPONSE TO THE
6 IDENTIFICATION. IN OTHER WORDS --

7 MR. WAPNER: WELL, YOU DON'T GET BOTH OF THOSE.

8 MR. BARENS: LET'S DO ONE THING AT A TIME.

9 MR. CHIER: WELL, ALL RIGHT.

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1 THE COURT: IT SEEMS TO ME THAT --

2 MR. CHIER: THERE MAY BE AN ERROR THERE. YOU KNOW, THIS
3 WAS DONE AT 1 O'CLOCK THIS MORNING AND I GOT --

4 MR. BARENS: WELL, POINT IT OUT TO HIM, MR. CHIER. JUST
5 FIND IT FOR THE JUDGE.

6 THE COURT: JUST A MINUTE.

7 MR. BARENS: READ IT INTO THE RECORD.

8 MR. CHIER: THE JUDGE IS READING IT.

9 MR. BARENS: READ IT FROM THE OTHER CASE THEN. READ
10 IT FROM GRANADOS.

11 THE COURT: YOU DON'T NEED TO. I HAVE GOT RINCON-PINEDA
12 AT 885.

13 MR. BARENS: 864 AND 885?

14 THE COURT: 885 AND THERE IS NOTHING IN THERE.

15 MR. CHIER: WELL, IT WAS LATE. AS I SAID, I HAD A
16 BUNCH OF PAPERS I WAS PUTTING TOGETHER.

17 MR. BARENS: LET'S LOCATE IT FOR MR. CHIER.

18 MR. CHIER: IT WAS AT 1:00 IN THE MORNING.

19 MR. BARENS: CAN I TELL YOU SPECIFICALLY THE SENTENCES
20 WE WANT?

21 (PAUSE IN PROCEEDINGS.)

22 MR. CHIER: HERE IT IS AGAIN IN PEOPLE V. SEARS AT
23 2 CAL.3D, 180.

24 THE COURT: THIS CASE CITES SEARS.

25 MR. BARENS: WHY DON'T YOU SHOW THE SENTENCE IN SEARS
26 TO THE JUDGE?

27 MR. CHIER: JUDGE, HERE IS A CASE WHERE THE DEFENSE
28 ATTORNEY SUMMED UP HIS CASE ON AN INSTRUCTION ON REASONABLE

1 DOUBT AND THE COURT WOULDN'T GIVE IT AND THEY SAID IT WAS
2 ERROR NOT TO GIVE THAT. TAKE A LOOK AT THAT.

3 MR. BARENS: THAT IS, YOUR HONOR, THE LOWER RIGHT-HAND
4 PAGE RIGHT WHERE YOU ARE, SIR.

5 (FURTHER PAUSE IN PROCEEDINGS.)

6 THE COURT: DO YOU HAVE ANY OBJECTION TO THAT?

7 MR. WAPNER: I HAVE SOME OBJECTION TO THE LANGUAGE OF
8 THE LAST PARAGRAPH OF THIS INSTRUCTION.

9 THE COURT: HOW WOULD YOU CHANGE IT?

10 MR. WAPNER: AND IF I MIGHT --

11 THE COURT: YES, GO AHEAD.

12 MR. WAPNER: IT SAYS "THE DEFENDANT IS ENTITLED TO AN
13 ACQUITTAL IF AFTER A CONSIDERATION OF THE ENTIRE TESTIMONY" --

14 MR. CHIER: NO, IT DOESN'T SAY THAT.

15 MR. WAPNER: WELL, THEN LET ME CHANGE IT.

16 THIS IS WHAT I WOULD PROPOSE:

17 "THE DEFENDANT IS ENTITLED TO AN
18 ACQUITTAL IF, AFTER A CONSIDERATION OF THE
19 ENTIRE TESTIMONY, YOU HAVE A REASONABLE DOUBT
20 WHETHER THE ALLEGED VICTIM, RON LEVIN, IS ACTUALLY
21 DEAD."

22 BECAUSE I DON'T THINK THAT IT IS FAIR TO SINGLE
23 OUT THE PARTICULAR TESTIMONY OF PARTICULAR WITNESSES AND SAY
24 "WELL, ONLY CONSIDER THEIR TESTIMONY."

25 MR. CHIER: WE ARE ENTITLED UNDER SEARS, RINCON-PINEDA
26 AND GRANADOS, TO SINGLE OUT THE TESTIMONY OF THAT WITNESS OR
27 WITNESSES WHO WE CONSIDER RAISE A REASONABLE DOUBT.

28 THE COURT: ALL RIGHT, I WILL TRY TO FASHION AN

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INSTRUCTION.

MR. BARENS: YOUR HONOR, HE HAS ALREADY GIVEN US THE
FIRST TWO PARAGRAPHS, HE DOESN'T DISAGREE WITH.

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1 THE COURT: ALL RIGHT. "IF YOU HAVE A REASONABLE DOUBT
2 THAT THE ALLEGED VICTIM, RON LEVIN, WAS NOT THE PERSON SEEN" --
3 HE GIVES IT TO YOU.

4 MR. BARENS: PLEASE, YOUR HONOR.

5 THE COURT: WHAT ELSE IS IT YOU WANT ME TO SAY? THAT
6 GIVES IT TO YOU.

7 MR. BARENS: WE WANT THE LANGUAGE THAT IS HERE.

8 THE COURT: I WANT MY LANGUAGE, I PREFER IT BECAUSE THAT
9 MORE NEARLY EXPRESSES WHAT THE ISSUE IS.

10 IF THE JURY BELIEVES THAT RON LEVIN WAS THE PERSON
11 SEEN BY THESE TWO WITNESSES --

12 MR. CHIER: THAT MAKES US HAVE THE BURDEN OF PROVING
13 THAT IT WAS HIM.

14 THE COURT: NO. WAIT A MINUTE NOW.

15 MR. WAPNER: YOUR HONOR, I THINK JUST WITH THE
16 MODIFICATION OF THE LANGUAGE IN THE LAST PARAGRAPH, TO SAY
17 THAT "YOU HAVE TO CONSIDER ALL OF THE EVIDENCE AND NOT JUST
18 THE TESTIMONY OF THESE TWO WITNESSES, IF YOU HAVE A REASONABLE
19 DOUBT," THEN THIS INSTRUCTION IS ALL RIGHT.

20 MR. BARENS: CERTAINLY, WE HAVE NO DISAGREEMENT WITH
21 THE PROSECUTOR, YOUR HONOR, ON THE FIRST TWO PARAGRAPHS OF
22 REQUEST NO. 53 SUBMITTED BY THE DEFENDANT. SO THAT THERE IS
23 NO MISUNDERSTANDING OF WHAT WAS BEING DISCUSSED HERE, WE HAVE
24 NO DISAGREEMENT ON THE FIRST THREE PARAGRAPHS ON REQUEST NO.
25 53 OF THE DEFENDANT. BUT, RATHER, WE ARE SOLELY DISCUSSING
26 THE LANGUAGE OF THE FOURTH PARAGRAPH COMMENCING AT LINE 14
27 THROUGH LINE 17 AND THAT IS THE LANGUAGE WE ARE TRYING TO AGREE
28 UPON RIGHT NOW.

1 THE DEFENSE VIGOROUSLY CONTENDS WE ARE ENTITLED
2 TO THE SPECIFIC LANGUAGE CONTAINED IN THOSE FOUR SENTENCES.

3 MR. CHIER: OR LINES, YOU MEAN.

4 MR. BARENS: THE FOUR LINES AT LINE 14 THROUGH LINE 17
5 OF THE REQUESTED INSTRUCTION.

6 THE COURT: THE LAST PARAGRAPH READS:

7 "THE DEFENDANT IS ENTITLED TO AN ACQUITTAL
8 IF A CONSIDERATION OF THE ENTIRE TESTIMONY OF EITHER
9 OR BOTH OF SAID DEFENSE WITNESSES RAISES IN YOUR MIND
10 A REASONABLE DOUBT THAT THE ALLEGED VICTIM, RON LEVIN,
11 IS ACTUALLY DEAD."

12 MR. WAPNER: I AM SUGGESTING TO THE COURT THAT THAT
13 LANGUAGE SHOULD BE MODIFIED AS FOLLOWS:

14 "THE DEFENDANT IS ENTITLED TO AN ACQUITTAL
15 IF, AFTER CONSIDERATION OF THE ENTIRE TESTIMONY, YOU
16 HAVE A REASONABLE DOUBT THAT THE ALLEGED VICTIM IS
17 ACTUALLY DEAD."

18 THE COURT: ALL RIGHT, THAT SEEMS FAIR ENOUGH.

19 HAVE YOU GOT IT?

20 MR. BARENS: SO WHAT WE HAVE DONE HERE IS ELIMINATE THE
21 WORDS "OF EITHER OR BOTH OF SAID DEFENSE WITNESSES RAISES IN
22 YOUR MIND."

23 MR. CHIER: THEN THIS --

24 MR. BARENS: BUT WHAT WE ARE TRYING TO DO, JUDGE, AS
25 WE ARE ENTITLED TO, UNDER THESE CASES, IS MAKE KNOWN TO THE
26 JURY BY MEANS OF THIS INSTRUCTION, THE SPECIFIC COMPOSITION
27 OF THE DEFENSE CASE.

1 THE COURT: NO, NO. I AM TALKING ABOUT --

2 MR. WAPNER: WELL, IT IS DONE HERE BUT --

3 MR. CHIER: WHAT HAVE YOU DONE? IT IS SPECIFICALLY
4 UP UNTIL THE END. THEN YOU SAY -- YOU GO BACK TO A GENERAL
5 REASONABLE DOUBT STANDARD. WE ARE --

6 MR. WAPNER: BUT THAT IS EXACTLY THE LAW.

7 MR. CHIER: BUT WE ARE ENTITLED UNDER THESE CASES TO
8 AN INSTRUCTION THAT IS TAILORED AND POINTS TO THE SPECIFIC
9 EVIDENCE ON WHICH WE ARE ASSERTING A REASONABLE DOUBT EXISTS.

10 MR. WAPNER: YOU HAVE GOT IT HERE. BUT IT DOESN'T
11 SAY THAT YOU TAKE IT OUT OF CONTEXT.

12 MR. CHIER: YES, IT DOES. PLEASE READ THE CASES.

13 THE COURT: NO. THE WAY HE STATED IT -- STATE IT AGAIN,
14 WILL YOU? THE DEFENDANT --

15 MR. WAPNER: IS ENTITLED TO AN ACQUITTAL, IF AFTER
16 CONSIDERATION OF THE ENTIRE TESTIMONY, YOU HAVE A REASONABLE
17 DOUBT THAT THE ALLEGED VICTIM, RON LEVIN, IS ACTUALLY DEAD.

18 MR. BARENS: BUT WE ARE NOT SAYING THE ENTIRE TESTIMONY.
19 IT IS THE TWO ARIZONA PEOPLE. THAT IS WHY WE HAVE IT HERE.
20 THAT IS THE ONE THING THAT THE COURTS HAVE UNIFORMLY --

21 THE COURT: WELL, THE ONLY TESTIMONY HERE IS THESE
22 TWO WITNESSES THAT HE IS ACTUALLY ALIVE. HE WANTS TO MAKE
23 SPECIFIC REFERENCE TO THOSE TWO WITNESSES.

24 AGAIN, I WILL SEE HOW I CAN CHANGE THAT. GO
25 AHEAD.

26 THE DEFENDANT IS ENTITLED TO AN ACQUITTAL, IF
27 AFTER CONSIDERATION --

28 MR. BARENS: JUST PUT A BRACKET BEFORE THE WORD "OF"

1 AND AFTER THE WORDS "YOUR MIND" AND THEN YOU JUST --

2 MR. WAPNER: LET ME READ TO THE COURT AGAIN THE WAY
3 I HAVE IT.

4 "THE DEFENDANT IS ENTITLED TO AN
5 ACQUITTAL IF, AFTER CONSIDERATION OF THE ENTIRE
6 TESTIMONY, YOU HAVE A REASONABLE DOUBT ..."

7 THE COURT: NO, NO.

8 MR. WAPNER: "THAT THE ALLEGED VICTIM, RON LEVIN, IS
9 ACTUALLY -- "

10 MR. CHIER: THAT IS WHAT THIS IS ALL ABOUT.

11 MR. BARENS: WHAT IS WRONG WITH THE WAY WE HAVE IT
12 HERE? WE ARE ENTITLED TO IT THIS TIME. THIS IS THE ONLY
13 ENTITLEMENT THAT WE HAVE BROUGHT UP IN THIS WHOLE BUSINESS.

14 THIS IS ONE TIME THAT THE LAW SAYS WE GET TO
15 HAVE THIS.

16 MR. CHIER: THIS IS THE ONE THING THAT THE DEFENDANT
17 GETS, JUDGE. THESE ARE ALL SUPREME COURT CASES. AND THIS
18 IS --

19 MR. WAPNER: IF YOU HAVE THAT INSTRUCTION THE WAY IT
20 IS, IT SOUNDS HERE LIKE THEY SHOULD THROW OUT WHATEVER ELSE
21 YOU HAVE, THAT IS, THE REST OF THE CASE, AND JUST LISTEN
22 TO THESE TWO WITNESSES IF THEY PROVIDE A REASONABLE DOUBT,
23 WITHOUT CONSIDERING THE REST OF THE CASE. THEN --

24 MR. CHIER: WE ARE ENTITLED TO A REASONABLE DOUBT
25 INSTRUCTION ON OUR THEORY OF THE CASE, NO MATTER HOW
26 RIDICULOUS YOU MAY THINK IT IS.

27 IF THIS IS OUR THEORY -- BY THE WAY, WE SAY A
28 REASONABLE DOUBT EXISTS -- AND WE ARE ENTITLED TO A SPECIFIC,

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1 TAILORED INSTRUCTION.

2 MR. BARENS: JUDGE, IF WE WANT TO MAKE OUR STAND ON
3 THIS POSITION, WE ARE ENTITLED TO MAKE OUR STAND ON THIS
4 POSITION.

5 ALL OF THOSE CASE SAY THAT WE GET AN
6 INSTRUCTION. IF THAT IS OUR RUBICON, THEN WE GET TO DEFINE
7 THE TURF. WE GET TO DEFINE THE DEMARCATION OF THE BANKS.

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1 THE COURT: YOU SEE, IF THERE IS ANY OTHER TESTIMONY
2 IN THE CASE THAT HE IS ALIVE -- BY THAT I MEAN, HAVING BEEN
3 SEEN OR EITHER ALIVE OR DEAD, THAT WOULD BE DIFFERENT. THE
4 ONLY EVIDENCE IN THE ENTIRE CASE IS THAT HE WAS ALLEGEDLY SEEN
5 BY THESE TWO PEOPLE AT THE GAS STATION. IF THEY BELIEVE
6 THAT, THEN THERE IS A REASONABLE DOUBT WHETHER HE IS DEAD.

7 MR. WAPNER: RIGHT.

8 THE COURT: IS THAT RIGHT?

9 MR. WAPNER: RIGHT.

10 THE COURT: THE DEFENDANT IS ENTITLED TO AN ACQUITTAL --
11 THAT SHOULD BE A VERDICT OF NOT GUILTY. MAKE IT THAT, WILL
12 YOU?

13 MR. CHIER: TO A VERDICT OF NOT GUILTY?

14 THE COURT: "IF AFTER A CONSIDERATION OF ALL OF THE
15 TESTIMONY --" DO YOU WANT TO MENTION THEIR NAMES?

16 MR. BARENS: YES.

17 THE COURT: ALL RIGHT. "-- OF ALL OF THE TESTIMONY
18 OF CARMEN CANCHOLA AND JESUS ..."

19 MR. BARENS: I WILL REFER TO HIM AS CHINO LOPEZ.

20 THE COURT: CHINO LOPEZ?

21 MR. BARENS: I WILL SAY JESUS CHINO LOPEZ.

22 THE COURT: "THERE ARISES IN YOUR MIND A REASONABLE
23 DOUBT THAT THE ALLEGED VICTIM, RON LEVIN IS DEAD ..."

24 MR. BARENS: WHY NOT ACTUALLY DEAD?

25 THE COURT: WHY ACTUALLY? HE IS DEAD OR HE IS NOT
26 DEAD.

27 MR. BARENS: WELL --

28 MR. WAPNER: DEAD IS BETTER.

1 THE COURT: IS IN FACT, DEAD?

2 MR. WAPNER: NO. I THINK --

3 MR. BARENS: I LIKE, "IN FACT, DEAD," BETTER THAN ANY
4 OF THEM. "IS IN FACT, DEAD," AND I LIKE THAT.

5 MR. CHIER: DO YOU HAVE THAT, MR. BARENS, MY SCRIBE?

6 MR. BARENS: ALL RIGHT. I HAVE GOT IT.

7 THE COURT: THAT IS IT. MEANTIME, DO YOU WANT TO
8 RESEARCH THE CASES ON THE BASIS OF PRESENT LAW, IF THERE
9 IS PRESENT LAW THAT THE FORM OF THESE INSTRUCTIONS NOT BE
10 GIVEN?

11 I WILL FOLLOW THE RECENT LAW.

12 MR. WAPNER: FINE. THAT'S FINE.

13 THE COURT: ALL RIGHT. THEN THAT WILL BE GIVEN AS
14 MODIFIED.

15 MR. BARENS: ALL RIGHT. YOUR HONOR, NUMBER 54, SIR?

16 MR. WAPNER: 54 MUST HAVE BEEN WRITTEN BY MR. CHIER
17 LATE AT NIGHT. IT IS UNINTELLIGIBLE.

18 THE COURT: ALL RIGHT. THAT IS OUT. THAT IS REFUSED.

19 MR. BARENS: SIR, WHAT ABOUT 55?

20 THE COURT: I WILL COME TO THAT NOW. THAT IS OUT.

21 MR. CHIER: ARE WE GOING TO CORRECT THE SITUATION?

22 THE COURT: THERE IS NOTHING TO CORRECT. THERE IS
23 ABSOLUTELY NOTHING TO CORRECT.

24 YOU MEAN DISREGARDING EVERYTHING? GETTING ALL
25 OF THOSE MONEYS AND THEN LOSING ALL OF THOSE MONEYS AND USING
26 IT UP AND SPENDING IT ON HIMSELF? FOUR HUNDRED THOUSAND?

27 MR. BARENS: GIVE OR TAKE, JUDGE.

28 THE COURT: HE TOOK MORE THAN HE GAVE. ALL RIGHT.

1 NOW WE HAVE GOTTEN NUMBER 56.

2 MR. CHIER: REFUSED?

3 THE COURT: YES. YOU HAVE NOT GOT ANYTHING ON THERE
4 AS TO REFUSED OR NOT. IT IS BLANK.

5 MR. WAPNER: 57 IS --

6 MR. CHIER: NEVER MIND THESE. THESE WERE --

7 MR. BARENS: HOW ABOUT 57? WHAT ABOUT THIS?

8 MR. WAPNER: HE JUST RULED ON 56. IT WAS DENIED.

9 MR. CHIER: WITHDRAW 56.

10 MR. BARENS: ALL RIGHT.

11 MR. CHIER: 57 THOUGH IS NOT WITHDRAWN.

12 MR. WAPNER: 57? IT IS EITHER GOT TO BE 53 OR 57 IT
13 SEEMS TO ME.

14 MR. CHIER: THIS IS THE --

15 MR. BARENS: THIS IS OUR IDENTIFICATION INSTRUCTION,
16 JUDGE. NOW, WE ARE INTO OUR SPECIAL I.D. INSTRUCTION.

17 THE COURT: I GAVE YOU THE INSTRUCTION WHICH STATED
18 IF THEY BELIEVE THE TESTIMONY OF THE TWO WITNESSES THAT HE
19 IS DEAD, IF THEY HAVE A REASONABLE DOUBT ABOUT WHETHER HE
20 IS DEAD, THEY HAVE GOT TO ACQUIT HIM. WHAT ELSE DO YOU WANT?

21 MR. BARENS: THAT IS THE REASONABLE DOUBT INSTRUCTION.

22 MR. WAPNER: SO, AS TO THIS ONE --

23 MR. CHIER: AND I ALSO PUT IT UP THERE. IT IS BOTH
24 WAYS.

25 THE COURT: IT IS THE SAME THING.

26 MR. CHIER: IT IS -- I WILL TAKE WHATEVER I CAN GET.

27 MR. WAPNER: WELL, YOU GOT 53.

28 MR. BARENS: WE'LL TAKE 53.

1 THE COURT: ALL RIGHT. FINE. GOOD NIGHT.

2 (AT 4:11 P.M. AN ADJOURNMENT WAS TAKEN

3 TO RESUME MONDAY, APRIL 13, 1987 AT

4 10:30 A.M.)

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