No. S097558

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

TODD JESSE GARTON,

Defendant and Appellant.

**APPELLANT'S OPENING BRIEF**

Automatic Appeal from the Judgment of Death of the
Superior Court for the County of Shasta

Honorable Bradley L. Boeckman, Judge

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## TABLE OF CONTENTS

PAGE

* * * * *

## TABLE OF AUTHORITIES

**Page**

**CASES**

**STATUTES**

## CONSTITUTIONAL PROVISIONS



## OTHER AUTHORITIES

* * * * *

## STATEMENT OF THE CASE

On October 8, 1998, appellant, Todd Jesse Garton, and Lynn Noyes[1] were charged in the Shasta County Superior Court, by information, with conspiring to murder (Counts 3 and 4; Penal Code §§ 182/187)[2] and murdering appellant's wife, Carole, and her human fetus on May 16, 1998. (Counts 1 and 2; Penal Code § 187.) Four overt acts were alleged to have occurred between January 1 and June 29, 1998: 1) A conspirator obtained a handgun; 2) A conspirator provided an envelope containing photographs of Carole and written materials to a co-conspirator; 3) One or more conspirators communicated via computer e-mail; and 4) A conspirator shot and killed Carole and her fetus.

Both were also charged with conspiring to murder Lynn's husband, Dean, in Multnomah County, Oregon. (Count 5; Penal Code §§ 182/187.) Four overt acts were alleged to have occurred between October 1, 1997, and May 30, 1998: 1) A conspirator possessed a photograph of Dean and a house key; 2) Conspirators drove together in a vehicle from Shasta County to Multnomah County; 3) A conspirator possessed a silencer; and 4) Conspirators met together at the Moose Lodge in Anderson, California.

Two special circumstances were alleged: appellant committed multiple murders (Pen. Code § 190.2(a)(3)) and the murders were committed for financial gain. (Pen. Code § 190.2(a)(1).)

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[1] In the interest of brevity, Lynn Noyes will be referred to herein as "Lynn." Her husband, Dean Noyes, will be referred to as "Dean." Carole Garton will be referred to as "Carole."

[2] Unless noted, all statutory references are to California Codes. "RT" refers to the Reporter's Transcript; "CT" refers to the Clerk's Transcript; and "Supp.CT" refers to the Third Supplemental Clerk's Transcript.

It was alleged pursuant to Penal Code section 12022(a)(1) that a principal was armed with a firearm during each of the offenses. (2 CT 86-91; 5 CT 970-972; 29 CT 8407-8409; 1 RT 500; 31 RT 8880-8888; 35 RT 10057-10058.)

Lynn's motion to sever the cases was granted on January 11, 1999. (4 CT 460; 1 RT 557-558.)

The guilt trial commenced on October 24, 2000. (3 RT 1178.) On March 22, 2001, the jury found appellant guilty of all the charges and found each special allegation and special circumstance to be true. (29 CT 8368-8380; 36 RT 10444-10450.)

The penalty trial commenced on March 27, 2001. (30 CT 8754-8756; 37 RT 10506.) Appellant presented no evidence. The jury returned a verdict of death the next day. (30 CT 8772; 37 RT 10752-10754.)

Appellant's motion to modify the jury's verdict was denied on April 27, 2001.[3] (38 RT 10778-10784.)

That day, the trial court imposed death sentences as to Counts 1 and 2, and sentences of 25 years to life with one-year enhancements for being armed with a firearm as to Counts 3, 4, and 5. The sentences as to Counts 3 and 4 were stayed pursuant to Penal Code section 654. A $200 restitution fine was imposed. 1,189 days of custody/conduct credits were awarded. (31 CT 8929-8936; 38 RT 10799-10802.)

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[3] Appellant's counsel did not file a formal motion. Instead, he informed the court, "The defense position has been set forth in our closing argument to the jury." (38 RT 10778.)

## STATEMENT OF JURISDICTION

This appeal is from a final judgment imposing a verdict of death. It is automatic. (Cal. Pen. Code, § 1239(b); Cal. Rules of Court, rule 8.600(a).)

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## STATEMENT OF FACTS

## GUILT TRIAL

### A. Prosecution Case.

#### 1. Lynn Noyes.[4]

Lynn met appellant in 1986 during her sophomore year at Park Rose High School in Portland, Oregon. She had just turned 16; he was a few months older. They were boyfriend and girlfriend within a month or two. (17 RT 5043-5046; 19 RT 5619-5620.) Their relationship lasted about a year. Appellant "just kind of faded." after she was suspended from school. She had only occasional contact with him thereafter. (20 RT 5706-5708, 5710, 5716.)

She carved a heart with a "T" in it above her pelvis, with a razor blade, shortly after they met. (20 RT 5713-5715.) In 1987 or 1988, she bought necklaces with Celtic cross medallions for each of them. Unending knots within the crosses symbolized their love. They wore the necklaces on a daily basis. She only had hers off a couple of times. Each necklace had two beads. He said he found the beads on his necklace in the Belize jungle while he was on a "special military operations thing." (Exhibits 5E-33, 5E-34, 5E-35, 67, 68, 69; 6 Supp.CT. 1333-1335; 17 RT 5082-5086; 18 RT 5106; 20 RT 5711-5712, 5862; 22 RT 6364.)

She spent a weekend with him in Portland in 1990, before he entered

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[4] On June 21, 1999, Lynn pled guilty and admitted certain overt acts in exchange for a sentence of 25 years to life in state prison and the Multnomah County District Attorney's agreement not to prosecute her. She waived her appellate rights and agreed to cooperate and give full and truthful testimony in this case and in the cases against Dale Gordon (Gordon) and Norman Daniels (Daniels). (Exhibits 121, 122; 5 CT 887-892; 24 CT 6870-6881; 17 RT 5035-5042.)

the Marine Corps. He took her jacket when he left and returned it with an engagement ring and a proposal. (17 RT 5065-5066; 18 RT 5129.) He wrote to her during basic training, then called and asked her to attend his boot camp graduation and marry him. When she called to find out when the ceremony was, Carole answered the phone and said that he had also proposed to her. She sent all the letters he had sent her to Carole. (17 RT 5066-5067, 5069-5070; 18 RT 5115.)

She married Dean on May 30, 1992.[5] (17 RT 5043, 5071-5072; 23 RT 6755.) Appellant talked to him on the telephone, but they never met. (19 RT 5628; 23 RT 6755-6756.) Their son, Jorden, was born on November 9th of that year. (17 RT 5071.) Their daughter, Amanda, was born on July 16, 1996. (17 RT 5076; 18 RT 5186.) They lived at 1223 North West Burnside in Gresham, Oregon. (Exhibits 5E-20, 5E-21; 22 CT 6408-6409; 15 RT 4320; 16 RT 4536; 17 RT 5042; 18 RT 5175; 19 RT 5440; 22 RT 6213; 23 RT 6755, 6762.) Dean knew nothing about the necklace she wore. (24 RT 6843-6844.) He divorced her after her arrest. (18 RT 5109.)

She learned in 1992 that appellant had married Carole. She did not believe it until September or October 1993, when she called to ask if he would be Jorden's Godfather and his mother said they were married and had moved. (17 RT 5070-5071.) She had sexual intercourse with him several times after her marriage. She believed that he and Carole were separated. When Carole answered the telephone, he always had excuses like, "I'm going out of town on business. She's watching the dog." (17 RT 5075; 18

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[5] She told appellant that, if he came to the wedding, she would leave the church full of people and go with him. When she asked why he had not come, he said that he "wanted [her] to be strong enough to do it for [herself]." (17 RT 5072-5073.)

RT 5168-5169; 19 RT 5630-5633; 20 RT 5834-5835.)

She did not know Carole well.[6] They talked less than a dozen times and had only a few telephone conversations. They resolved their animosities in 1996, the last time they saw each other, when appellant, Carole, and their dog, "KD," visited her in Troutdale, Oregon. She gave Carole a hug and a kiss on the cheek when they left. (20 RT 5769, 5837-5838.)

She visited her best friend and lover, Sasha Montgomery (Montgomery), in New York, on her 25th birthday.[7] Montgomery paid for a tattoo portraying yin-yang and male and female symbols. The tattoo symbolized a light female side and a dark male side which complemented each other and were one unit when they were together. (Exhibits 5C-9, 85; 22 CT 6512; 23 CT 6750; 18 RT 5213-5215; 19 RT 5438, 5561-5562; 20 RT 5755-5757, 5817-5818, 5862-5863.) She knew that Dean was not going to be happy with the tattoo. (20 RT 5756-5757.) She wanted him to pay to have it removed when she returned to Oregon. (24 RT 6856.)

Collin Colebank met Lynn while he was in a band, Dentante Touch, appellant formed in high school. He thought she was a "leech" who "just hangs on for the sake of pulling whatever natural power somebody has in them out of them." She wanted appellant and showed up any time the band got together. Appellant tolerated her, but no one else would deal with her. (17 RT 5046-5047; 21 RT 6154, 6158-6159, 6163-6164, 6176-6178.) Colebank also knew Carole. Appellant started dating her and they began living together on 39th Avenue in Portland. Lynn continued to come to band

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[6] Dean believed that Lynn and Carole were close. (24 RT 6835-6837, 6839, 6878.)

[7] Dean knew about their homosexual relationship. (20 RT 5756.)

functions, many of which occurred at the house on 39th Avenue, even though appellant and Carole were together. (21 RT 6159-6161, 6173-6175.)

George Korum (Korum) was in the band for three months. (21 RT 6129, 6136-6137.) In his opinion, there was never a real emotional connection between Lynn and appellant. She was extremely attracted to him, and he was just playing with her. Appellant laughed about how he could say or do whatever he wanted and she would come back for more. Korum saw appellant and Lynn together while appellant and Carole were dating, especially at first. (21 RT 6142-6143, 6145-6150.) He recalled a night when he and appellant were in a hot tub with Lynn and a friend. Appellant told Korum that he intended to have sex with both women. Korum had sex with Lynn's friend while appellant had sex with Lynn and made faces and laughing gestures.[8] (21 RT 6138-6139, 6148-614.)

**2. Norman Gerald Daniels, III.**[9]

Daniels was a paratrooper in the U.S. Army for three years, from 1986 to 1989. (14 RT 4132.) He lived in Cottonwood, California, at 20455 Gas Point Road (Exhibit 5C-10; 21 CT 6313; 16 RT 4540), and worked nearby at the Kickin' Mule 76 gas station at 20645 Gas Point Road. (Stipulation 26; Court's Exhibit LXXXIII; 26 CT 7385-7386, 7565-7567; 16 RT 4557, 4565-4566, 4580; 27 RT 7715.) He met appellant at Shasta

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[8] Lynn recalled being in a hot tub with appellant, Korum, and another woman, but they did not engage in sexual intercourse. (20 RT 5705.)

[9] Daniels faced capital murder charges in relation to his role in this case. He rejected an offer of a sentence of life without the possibility of parole in exchange for his testimony. He was represented by counsel, but appeared without his attorney. He hoped the prosecutor would show mercy on him as a result of his testimony. (14 RT 4129-4131; 16 RT 4748-4749.)

College in the spring of 1993 in the computer laboratory. They developed a friendship due largely to their military backgrounds. (14 RT 4131-4132, 4140-4142.) He had the beginning of a computer science degree and was a computer programmer and designer. (14 RT 4135-4136.) He tried, but never got a job related to his computer training. (16 RT 4778.) He developed two computer games, a chess-like game and an action game, and he was working on a third, a war-strategy game. (17 RT 4838-4840.) He met Gordon in August 1997 on his first day at appellant's business, G & G Fencing. (14 RT 4194.)

**3. Dale Gordon.**[10]

Gordon was a mechanic in the Marine Corps for four years, from 1989 to 1993. He went to work at Continental Alignment, a front-end alignment business in Redding, in October 1995, and bought the business in March 1996. He met appellant, his best friend, at Continental Alignment in May 1996. (21 RT 6067-6069; 22 RT 6329-6330, 6390, 6398-6399.)

He or one of the mechanics drove all the vehicles on and off the racks at Continental Alignment. In October 1997, after aligning a truck, he went to wash his hands and do the paperwork. Appellant motioned for the driver to

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[10] Gordon admitted attempting to murder Dean and a special allegation of being armed with a firearm on June 21, 1999, in *People vs. Dale Lee Gordon*, Shasta County Superior Court No. 98F4643, in exchange for a sentence of ten years in state prison. He waived his appellate rights and agreed to cooperate and give full and truthful testimony. (Exhibits 183, 184; 24 CT 6882-6892; 21 RT 6061-6065.) He was medicated during appellant's trial because he thought he was being attacked by different entities, including the devil, in jail. "For a while I was insane. . . . I was seeing visions, hearing voices. I was in the safety cell on two different occasions a week at a time. I was out of my mind." He believed it was the result of sorcery, that someone in his pod had cast spells on him. (22 RT 6380-6382.)

get into the truck. He started it in gear, with the clutch out, and took a "nose-dive" into the pit. Continental Alignment went out of business as a result of the accident. It destroyed Gordon financially. (21 RT 6108; 22 RT 6411-6412; 23 RT 6650.)

He initially blamed himself for the accident, but thought about it in jail and realized it was appellant's fault because he had broken a shop rule. The fact that appellant lied to him about everything helped change his mind. Appellant said that he was a Butte County Sheriff, an EMT, a first lieutenant in the Marine Corps, and a Force Reconnaissance sniper. He also said that he went to paratrooper school, had a college degree, and ran a successful business in Portland. (22 RT 6411-6413; 23 RT 6650-6652.)

Gordon thought that appellant was his friend, and he tried to forgive him for a time, but he realized he had been betrayed after his attorney showed him appellant's DD-214.[11] (22 RT 6382-6383.) He also believed that appellant was responsible for the breakup with one of his girlfriends. He lied to her about destroying appellant's Bronco for insurance money, and it created problems in the relationship. (22 RT 6413-6414.) He blamed appellant for everything that happened to him, and he wanted revenge. He might have told his parents during a jail visit that he was going to devastate appellant in court, and that he wanted to destroy appellant's life. (22 RT 6410-6411, 6414.)

He told the bankruptcy court that he paid appellant $6,200 for building the pit at Continental Alignment. The money actually went "under

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[11] The DD-214 is a certificate of release or discharge from active duty in the military. (27 RT 7757-7758.)

the table" to appellant's father to buy into G & G Fencing in a "handshake-type deal." He tried running the business on his own, but became more of an employee because he had neither the knowledge nor the skills. He moved in with the Gartons around October 1997 because he was "broke." (21 RT 6067, 6114-6115, 6193-6194.)

He loved and considered himself well-versed in guns. (22 RT 6472, 6476.) He owned several, including a Colt .45, 1911 pistol (Exhibit 12; 22 CT 6417; 14 RT 4226-4227; 22 RT 6221); an Intratec 9 millimeter pistol (TEC-9) (Exhibits 10, 10-A; 22 CT 6414-6415; 14 RT 4213-4215; 15 RT 4340-4341; 17 RT 4987-4988; 22 RT 6226); and a semiautomatic Beretta 21A .22 pistol. (Exhibit 11; 22 CT 6416; 22 RT 6226.) He also owned a Ruger 10/22 rifle with two barrels. One was like new. The other, which had a laser sight and was cut off and fitted for a silencer, was appellant's. (Exhibit 5D-16; 24 CT 6833; 22 RT 6226, 6472-6474; 23 RT 6571, 6629-6630, 6665-6666.) Appellant used the rifle whenever he wanted. (23 RT 6500-6503.) He kept it in a silver, aluminum gun case. (Exhibits 5D-15, 5D-16, 5D-20; 24 CT 6832-6833; 26 CT 7429; 22 RT 6355-6356, 6369; 24 RT 7021-7022.) Appellant and Gordon test-fired the rifle, with the silencer attached, in appellant's backyard. (15 RT 4241-4242; 22 RT 6228.) They went shooting several times at a large field south of Cottonwood. (22 RT 6280-6281.)

The silencer was about a foot long and three inches around, with black electrical tape around everything but the ends. A polyvinyl chloride (PVC) adapter reduced the tubing from two inches to about an inch in diameter so that it could be screwed on to a metal adapter which was glued to the end of the barrel. It was stuffed with pieces of white, self-sealing,

plastic-type foam commonly used for archery targets.[12] Both ends of the tubing were smaller than the diameter of the silencer itself so, as the bullet passed through it, not much of the stuffing came out. Electrical tape on one end kept the stuffing from blowing out. About 100 rounds could be shot through it before more material had to be put back in. (Exhibit 48; 14 RT 4221-4222; 16 RT 4749-4752; 17 RT 4922-4924; 22 RT 6227, 6234-6235, 6239.)

Gordon considered himself a computer expert. (22 RT 6391.) One of his computers, a Pentium 166, was in the living room of the Gartons' residence. He saw appellant using it. His other computer, a "386," was never at the house. He moved it to his storage unit around October 1997. (Exhibit 5A-27; 22 CT 6347; 17 RT 4814; 22 RT 6358-6359, 6402-6404, 6442.)

He never communicated with Lynn on the computer. When she called, he usually answered and talked to her, then gave the phone to appellant. He never talked to her when appellant was gone. (22 RT 6418; 23 RT 6604.) He knew Daniels fairly well. They met through appellant and worked together at G & G Fencing. (22 RT 6223.)

He self-published a violent, role-playing game, The Road Rebels, in 1993 or 1994, then began working on a second edition, The World of Total Chaos. The games involved weapons, ammunition, vehicle chases, and assassins. He worked nights and weekends on The World of Total Chaos from 1994 to 1996. (Exhibit 198; 24 CT 6910-7053; 22 RT 6391-6400.)

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[12] Daniels told the police in 1998 that the silencer was packed with some type of paper. He said he did not see anything that would prevent all the material inside it from just flying out. (16 RT 4752-4756; 17 RT 4923, 4925-4926.)

**4. Todd Garton.**

Appellant had a tattoo of American and Irish flags and a Celtic cross on his right shoulder. The words "Patriot" and "One But Not The Same" were above and below the flags, respectively. The latter were lyrics from the song One by the band U-2, which he told Lynn pertained to them. (Exhibit 5C-7; 22 CT 6510; 14 RT 3998-3999; 18 RT 5211-5213, 5219; 19 RT 5437-5438.) He had another tattoo with the letters "IRA" and a Celtic cross, broken at the bottom with a drop of blood coming from it, on his left arm. The blood symbolized the violence in Northern Ireland. He told Lynn that he got the tattoo in Ireland. (Exhibit 5C-8; 22 CT 6458, 6511; 14 RT 3999; 18 RT 5216-5219; 20 RT 5816-5817, 5819.)

He wore a leather jacket with American and Irish flags and a Celtic cross on the back. The words "Eins" and "Patriot" appeared above and below the flags, respectively. (Exhibit 5B-13; 23 CT 6712; 19 RT 5436-5437.) The flags signified his loyalty to Ireland and the United States. He went by the name Patriot long before he had the jacket. Lynn believed that "Eins" was Gaelic for One. (Exhibit 126; 7 Supp.CT 1560-1561; 18 RT 5210-5211.)

He told Lynn that he was an anarchist. He said that he was a member of an organization that committed assassinations, that he earned money killing people, and that he had shot people in South America, Nicaragua, and Ireland. He said that he had been to Northern Ireland a few times and knew how to make Molotov cocktails. He killed for the "glorious cause." He showed her articles and news clippings about the Irish Republican Army (IRA) and said he was an IRA member. (17 RT 5047-5054; 18 RT 5107-5108, 5127; 19 RT 5619-5621; 20 RT 5640-5644, 5647, 5851-5852.) He said that he had killed Korum in 1990 or 1991. (17 RT 5062-5064; 20 RT

5645, 5855.)

He gave her a book called The Anarchist's Cookbook in 1990. He said it showed how to make and sabotage things and how to kill people. The front cover of the book was faded and contained the words "Sinn Fein" and "The Kids Are Not All Right." He said that it pertained to the children in Northern Ireland; since there was a religious, political war going on, the children were not okay. It also contained the Soldier of Fortune magazine emblem, two knives and a beret. Pictures of appellant and articles about Ireland, the IRA, and guns were inside the book. He said that he participated in the events reported in a couple of the newspaper articles in it. The "IRA" letters in his tattoo were in a Soldier of Fortune magazine article in it. Lynn kept things he sent her in it. Minus some Polaroid pictures and plus some pages relating to one of his bands, it was the same as when he gave it to her. She kept it in her hope chest with other things of sentimental value. She showed it to Gordon and appellant in October 1997. Appellant pointed out pictures of himself in his late teens. He said that a picture of a man standing between two buildings, wearing a black ski mask and camouflage utilities, and carrying what looked like an M-16 rifle was him. He said that he wanted the book back, but did not take it because Lynn did not want to part with it. (Exhibits 5E-23, 5E-24, 89; 23 CT 6513- 6115, 6179; 17 RT 5047; 18 RT 5115-5118, 5120-5140; 19 RT 5439-5440; 20 RT 5715-5718; 22 RT 6205-6211.)

The book looked like one Korum saw at appellant's house in Portland in 1986 or 1987. He told Korum that it was a manual on how to make bombs and Molotov cocktails out of household goods. The IRA used it to make homemade bombs. (21 RT 6134-6135.) He told Korum that he had pulled out a homeless man's teeth and replaced them with another man's false

teeth, and then pushed the homeless man over a cliff in the man's car so his wife could collect insurance money. A couple of years later, he said that he had been hired by Portland gang members to cut off the heads of two opposing gang leaders and throw them into the Columbia River. He said that he had traveled to Northern Ireland and had "hooked up" with people who were involved in IRA, terrorist-type activities against the British. He told stories about bombs and throwing Molotov cocktails at cars. Korum did not believe a word of it. (21 RT 6130-6134, 6139-6141.)

He told Colebank that he went to Ireland when he was 12, with a stolen VISA card, to learn more about his father. He ended up in Northern Ireland teaching the IRA how to take care of and clean their weapons. He and Colebank talked jokingly in 1989 or 1990 about how easy it would be to advertise for assassinations in Soldier of Fortune magazine and take people's money, but never perform them. Colebank did not believe him at first but, over years of knowing him, the story was consistent enough that he no longer had any reason to disbelieve him. They never talked about what appellant's parents thought about him leaving in the sixth grade to teach the IRA. (21 RT 6154-6158, 6166-6171.)

He told Daniels that he was affiliated with the IRA and had served in its ranks. He fought for the IRA because of his Irish heritage and loyalty to his blood. He told stories about being in firefights in Northern Ireland as a teenager. (14 RT 4205.) He said that he once opened fire and unloaded his magazine on a troop of British soldiers marching by an alley. He had to shoot them in the face because they were dressed in flack jackets and helmets. He also said that one of his friends was slaughtered because a banana clip in his weapon was bent. A round jammed in the magazine and he was unable to fire his weapon. (14 RT 4207-4208.) He said that Lynn and

Carole worked together luring people into assassinations. They slept in a safehouse and were best friends. He led Daniels to believe that Carole left a bomb in a book store in England. He said that she once was about to be "taken out" by a Colonel Sean, but she got away by shooting him in the leg. (15 RT 4443-4445, 4449.) He mentioned a woman in New York named Sasha who functioned as an information broker, someone who picked up contracts or hits on people and traded underground, black market information. She had been in the IRA and was an assassin. (14 RT 4203-4204; 15 RT 4370.) They talked about going to a Soldier of Fortune convention in Las Vegas, Nevada. Appellant wanted to market and sell "fire and forget" sniper rifles which could be shot once, and then dumped. (16 RT 4632-4633.)

He told Gordon that he had killed people as an assassin and when he was in Ireland. He said he killed as a child; he was out in the woods with a rifle and shot some older men who were raping a little girl. He also said he once received $5,000 for killing a man. He used a cheap .22 pistol. He said that he once got in a fight in a store and killed a man by ramming his head through one of the refrigerators. He ran, trying to get away from the police, and hid in a dumpster under some garbage. The police looked in the dumpster and never found him. Carole came and picked him up. He also said that he and Carole were in a bar once and someone was trying to pick her up, so he took the man behind the bar and killed him. He said that he had traveled to Northern Ireland. There was a war going on and he was helping the Irish fight for their freedom from the British. He smuggled guns and committed assassinations and bombings. He talked about having sex on top of a building there with Lynn. (21 RT 6099-6100, 6103, 6110-6111, 6186-6187, 6189-6191.)

He and Gordon went to kill a man named Clark one night in January or February 1998. Appellant had done a fencing job for Mr. Clark that did not turn out well and he did not want to pay. He said that he got into a fight with the Clarks when he and his attorney went to their house. He said that Mr. Clark once came to his house. He planned to get one of his guns and grind off the serial numbers, then shoot him and place the gun in his hand and call the police, but Carole arrived and scared him off. Gordon was armed with his .45. Appellant had his .357. Mr. Clark was not at home. (22 RT 6349-6353.)

Appellant entered active duty with the United States Marine Corps as a recruit on August 21, 1990. While in recruit training at the Marine Corps Recruiting Depot (MCRD) in San Diego, California, he suffered a leg injury and spent periods of time in the physical condition and medical rehabilitation platoons. He earned his expert rifle badge on or about January 25, 1991, the only award listed on his DD-214. He was enlisted in the Marine Corps during the Gulf War and received the National Defense Service medal, which is given to all honorable active duty military personnel during a period of war. He completed recruit training on or about March 15, 1991. Thereafter, he was transferred to Camp Pendleton and, on or about March 27, 1991, he was enrolled as a student in the School of Infantry. He completed that school. The only service school or specialized skill training he completed was the first week of a three-week dive school at Coronado, California. He received an honorable discharge on September 13, 1991, because of the injury he sustained while in recruit training. At the time of his discharge he was in the Schools Battalion at Camp Pendleton. His grade/rank was E-3, lance corporal. His total period of military service was one year and 23 days, with no prior active, foreign, or sea service.

(Stipulation 19; Court 's Exhibit LXXVI; Exhibit 76; 26 CT 7370-7372, 7402-7422; 27 RT 7679-7680, 7757-7759.)

He told Lynn that he achieved the rank of lance corporal, but was promoted to lieutenant because he was injured when he fell off a tower at boot camp. He said that he went to dive school, knew how to rappel, and earned medals. He said he was a sniper on a reconnaissance team that performed assassinations in South America for a small company within the military. A Colonel Samolin from Quantico was the head of the "black ops" group. She saw a Purple Heart in a picture frame with a picture and other medals. (17 RT 5053-5055, 5058-5061; 20 RT 5650, 5655-5656, 5856-5857.)

After his discharge from the Marines, he told her that he worked for The Company, an assassination group within the military. He said that he was on call, awaiting orders from Col. Samolin. He never told her about assassinations he committed for The Company, but said that he had killed for it many times. He did not say how much he was paid or where the money came from. (17 RT 5055-5056, 5064; 18 RT 5206; 20 RT 5646-5647, 5650, 5655-5657.) He said that Carole was connected to The Company (20 RT 5658), and that Gordon and Daniels wanted to be involved with it. (17 RT 5058; 18 RT 5171-5172.)

Lynn loved him so much that, for the most part, she believed everything he said. She believed that he was an assassin who had traveled to Ireland and had killed people. She never questioned stories he told about being an IRA member or a lieutenant in the Marine Corps, about going to South America as a Marine sniper, or about his involvement in The Company. (20 RT 5647-5648, 5831-5832.) She never talked to Montgomery or Gordon about The Company. (20 RT 5778, 5787.)

Appellant told Gordon that he was in Force Reconnaissance. He was a lance corporal, then became a lieutenant. He displayed a picture of himself in uniform on a shelf in his living room. The Marine Corps insignia was on one side of the picture and a medal was on the other side. He kept an officer's ring and four medals on the shelf in a glass mug that Gordon had stolen. One was a Scuba Bubble he said he earned at dive school. Another was a Purple Heart with a star, which indicated that he had been wounded twice in combat. He said that he earned the medals as a sniper in combat in Nicaragua. He was there in connection with drugs, assassinating people the Marine Corps told him to kill. He said that he was shot in the arm in Nicaragua, and showed Gordon a scar. (Exhibits 5B-11, 5 D-1, 30; 22 CT 6453; 23 CT 6780; 16 RT 4539; 21 RT 6069-6076, 6079; 22 RT 6364; 23 RT 6671-6672, 6690-6692.)

He began talking to Gordon about The Company in January 1998. He said that its members went out in the Nicaragua jungle with him when he was a first lieutenant in the Marine Corps. He said that he was part of The Company. It sent him packages in the mail or called him in the middle of the night and told him who to kill. He talked about a Col. Samolin, who was involved with the Central Intelligence Agency (CIA). Gordon could not recall if Samolin was part of The Company. (21 RT 6108-6110, 6191.)

Gordon never questioned appellant's involvement in the CIA, in sniper type operations in South America, or in an organization that committed assassinations. He believed that appellant was involved with the IRA, the CIA, and The Company because the stories he told were very real. "He would give you smells, sights, [and] everything." (21 RT 6113.) He wondered about a few stories but, when he questioned their validity, appellant would get totally "pissed off." (23 RT 6660-6662.) He did not

think it was unusual that appellant killed people for the Marine Corps. That is what Marines do. He did not think that a Marine would lie because it is "Semper Fi, always faithful." (21 RT 6069, 6077-6078.) He never talked to Lynn about the CIA, the IRA, The Company, or missions on which appellant had been. He never talked to Daniels about Lynn being in the IRA or The Company. He never talked to Carole about her being in the IRA or part of The Company. (23 RT 6605-6606.)

Appellant told Daniels that he was a field-grade lieutenant in the Marine Corps. He was not an officer to begin with, but was promoted for his work with the Drug Enforcement Administration (DEA), which gave him missions to track down and kill drug dealers in Nicaragua, Guatemala, or El Salvador. He commanded a team of five snipers involved in covert operations. He said that he was being rehabilitated because he broke both his legs when a helicopter from which he was rappelling was shot out from above him. (14 RT 4133-4134, 4138-4139, 4142-4145, 4161-4164; 16 RT 4612.) He showed Daniels a picture frame with a few medals and a picture of himself in it and pointed out the Purple Heart, which was awarded for the injuries he suffered. (Exhibit 5B-11; 22 CT 6453; 14 RT 4146-4149.) He described The Company as an assassination ring, a covert government group in Langley, Virginia. A Col. Sean from Langley worked for the military in covert operations and headed up The Company. Patriot was his code name in The Company. (14 RT 4170-4173, 4202-4203; 15 RT 4369-4375.)

Appellant spoke competently about his military experience, and Daniels could see no ambiguities. He believed that appellant was affiliated with the IRA because of his Irish heritage, the Celtic cross on the left handgrip of his .357 pistol, and the tattoo of a Celtic cross on his left shoulder. He had also seen a Celtic cross, a book of Irish poems, a CD of

Irish music, and a map of Ireland at appellant's house. (14 RT 4146, 4205-4212.) He did not question appellant about The Company because he feared he could end up dead. (16 RT 4606-4607.)

Scott McMillan (McMillan) lived in the apartment complex in Anderson where appellant and Carole lived in 1995. Appellant told him that he was in the Special Forces and committed assassinations in South America. He was out for medical reasons because of his knees, but he could be called back at any time, like a reserve. He also said he was in the NRA (sic) and had fought for the Irish. (26 RT 7393-7395, 7397.)

Appellant told Gordon's girlfriend, Sara Mann (Mann), that he was a lieutenant in the Marine Corps and had been a sniper in South America. He was also an emergency medical technician (EMT). She thought he said that he got that license in the Marines. (17 RT 4838; 24 RT 6939, 6959-6960.)

He told Glenn Renfree (Renfree), for whom he was repairing a damaged fence in April 1998, that he was a Marine Seal and had been in Granada for six years. He went up and down in rank and left the service as a private first class (PFC). He said that Daniels had been a Marine Seal in Alaska. He showed Renfree the emblem for a Marine Seal, a silver pin resembling a diver's suit, about two weeks before Carole's death. He did not say where he got it. (Exhibit 5D-1; 23 CT 6780; 24 RT 6888-6895.)

He told Marshall Jones, Jr., a friend who owned Jones' Fort, a gun shop and sporting goods store in Redding, California, that he was in the Marines a second time as a lieutenant and a sniper in South America. (24 RT 7010-7011, 7018-7019, 7034-7035, 7051-7052.)

He married Carole in Reno, Nevada, on March 17, 1991. (Stipulation 6; Court's Exhibit LIII; 23 CT 6706-6707; 18 RT 5328-5329, 5331-5332.) They shared a common interest in Ireland, music, movies, archery, and

hunting. (17 RT 5008-5010, 5013-5014.) They lived in Cottonwood in 1997 and 1998, on Adobe Road. (Exhibits 5A-1, 5A-2; 21 CT 6328-6329; 16 RT 4538; 21 RT 6073.) Their back yard was a large field overlooking public land near Reading Island. (14 RT 4224; 22 RT 6338-6339.) They owned three vehicles: a Ford Ranger; an Isuzu Trooper; and a white Jeep Wrangler. (22 RT 6292-6293.) A sticker on the back of the Jeep had something to do with the IRA. (Exhibits 5A-31, 5A-35; 22 CT 6350; 24 CT 6837; 16 RT 4536-4537; 22 RT 6346, 6369.)

Carole received a pregnancy test on October 16, 1997. The results confirmed that she was pregnant. The expected due date for the birth of her child was June 19, 1998. (Stipulation 11; Court's Exhibit LXIX; 26 CT 7353-7354; 26 RT 7549.) Appellant was the biological father of her fetus. (Stipulation 12; Court's Exhibit LXII; 24 CT 6906-6907; 26 RT 7549.)

According to Lynn, appellant did not like Carole. He said that she was faithful to him like a puppy is to its master, always around regardless of what he did. He put up a front that he was a happy father-to-be, but he was miserable. She resented Carole for making him feel that way. He did not like small children and he did not want the baby. He said that he and Carole had been separated, and it was not his child. The father was either the son of one of the people who owned or managed one of the hotels she worked at or just a "local breeder," someone who liked to get women pregnant and not take responsibility. They talked about why he did not just divorce Carole. He said that he was a prominent figure in the business community, and he did not want to disgrace her. (18 RT 5207-5208; 19 RT 5523-5525; 20 RT 5832-5833, 5838-5839.)

Gordon had many conversations with appellant about the impending birth. They joked that the baby might not be appellant's. Appellant did not

say who he thought the father was. (22 RT 6339-6340, 6466-6468.) According to McMillan, Carole wanted children and appellant did not. They were pains, and he did not want them around because he would not have the freedom to do what he wanted. (26 RT 7395, 7397.)

Amy Streetman attended the sixth grade and junior high school with appellant. Her former husband, Dale Streetman, was in the Marine Corps with him. She had dinner at the Gartons' residence with Carole, appellant, and Daniels on the Tuesday or Wednesday before Carole's death. (15 RT 4465; 17 RT 5003-5006.) Carole and appellant talked about names for their baby. They seemed excited about the impending birth. (17 RT 5017-5019.)

Appellant owned and managed G & G Fencing. (Stipulation 20; Court's Exhibit LXXVII; Exhibit 77; 26 CT 7373-7374, 7531-7540; 27 RT 7759.) He also sold Rancho Safari gilly suits and other merchandise at gun shows. He displayed the suits on a PVC pipe rack which served as a mannequin. (15 RT 4376-4377, 4478; 18 RT 5220; 21 RT 6075; 24 RT 7011, 7066-7067.) He occasionally went to Oregon for business. Lynn once saw a "fluffy, fuzzy camouflage suit" in his vehicle. He said he was selling them and gave her a Rancho Safari business card. (20 RT 5781-5782.) He also had a Patriot business card. (Exhibits 25, 26; 6 Supp.CT 1235-1236; 15 RT 4373-4378; 18 RT 5219-5221; 19 RT 5508-5509; 22 RT 6362.)

He liked guns (19 RT 5397-5398) and owned several, including a Remington 700 .308 rifle. He told Gordon that he liked the rifle because it was like the M-40 sniper rifle he had in the Marine Corps. (Exhibits 5D-16, 5D-21; 24 CT 6833-6334; 16 RT 4629-4631; 21 RT 6103-6108; 22 RT 6356; 23 RT 6600; 24 RT 7022). He also had a stainless steel Rossi .357 pistol with a two-inch barrel and an Irish, crucifix-like symbol on the left handle which he carried in a holster inside a small, leather-covered date

book or planner "with all the guts removed from it" (Exhibit 8, 8A; 22 CT 6413; 14 RT 4209-4212; 22 RT 6221-6222), and a breach-loading, Ram Line .22 target pistol. (Exhibit 50; 22 RT 6239-6240.)

The .22 pistol had a silencer made of PVC tubing 18 inches long and two inches in diameter. It was interchangeable with the silencer for Gordon's Ruger 10/22 rifle. It had black electrical tape wrapped around its length and was stuffed with material that looked like the foam one would find in a couch or a seat. A threaded, one-inch, steel, hexagonal-shaped adapter attached to the silencer. The foresight, which had to be cut off when the gun was modified to fit the silencer, was glued onto the silencer so the gun could be sighted in. Gordon could not recall if the barrel was cut off in his presence or if the steel adapter was already on it. They stuffed the silencer with foam material from archery targets several times.(Exhibits 5A-36, 50, 186, 200, 200A; 23 CT 6787, 6824; 24 CT 6838; 14 RT 4221; 15 RT 4242; 16 RT 4749-4754; 22 RT 6227-6242; 23 RT 6589-6593, 6682-6683, 6695-6697.) Daniels knew how to make silencers, but he did not participate in making the silencer. Appellant did not tell him who made it. (16 RT 4754-4755; 17 RT 4926.)

**5. America Online.**

Appellant, Daniels, and Dean had America Online (AOL) accounts. (33 RT 9511.) AOL accessed the accounts on December 22 and 23, 1998, at the prosecutor's request, and preserved the records as they existed on that date. Further access to or use of the accounts was blocked. (Stipulation 15; Court's Exhibit LXXII; 25 CT 7361; 26 RT 7552-7553.)

To demonstrate various features of the AOL program for the jury, appellant's attorney accessed the prosecutor's AOL account with a password. He opened an e-mail message and corresponded in the

prosecutor's name with someone named "jemCA50" through instant messaging and in a chat room. He saved the chat room conversation to a file, changed its content, and saved it to a different file. (25 RT 7282-7290.) He also accessed USA.Net's web site, logged into an account in the prosecutor's name, greggaul@usa.net, opened one of the messages, and sent a message. (25 RT 7298-7309.) He accessed an AOL account named "RJSATTY." "Gregory Gaul," the prosecutor, was listed as a secondary user on the account. "RJSATTY" and "Gregory Gaul" could not access the account at the same time. (25 RT 7313-7320.)

**a. The Garton Account.**

Appellant opened an AOL account on March 7, 1998. It was closed on June 15, 1998. The primary screen name, "PATR553," was appellant's. "PATR" was an abbreviation for Patriot. "553" is the first three digits of his social security number. There were no listings for buddies or information concerning usage when the account was accessed by AOL. (Stipulation 15; Court's Exhibit LXXII; 25 CT 7361-7362; 15 RT 4461-4462; 18 RT 5209; 26 RT 7553.)

Gordon did not have an account, but was able to access appellant's. He thought that he, Carole, and appellant had screen names. He did not use any other names. There was only one password. He got the number from appellant and wrote it down on some notes, probably next to the computer. He used the Internet more than five and less than ten times. He never went into a chat room. (22 RT 6360. 6405-6406, 6439-6443; 23 RT 6657-6659.) Once, about a month before Carole's death, he could not access appellant's account. Appellant said that he had been trying to access the CIA's computer system with a memorized code, but he was one digit off. The CIA sent a spike or virus and messed up his AOL account so he could not get into it.

(22 RT 6360-6361; 23 RT 6659-6660.)

Appellant gave Daniels his password. Daniels did not know if it was attached to the side of Gordon's computer. (16 RT 4781-4785; 17 RT 4813, 4909-4913, 4954-4955.) He accessed his own AOL account, but did not use appellant's password to access the internet on Gordon's computer. He believed the last time he accessed his AOL account on Gordon's computer was on May 16, 1998. (17 RT 4815-4816, 4955-4958.) He never accessed appellant's AOL account from other computers. (17 RT 4837, 4840.)

Daniels communicated with appellant while he was using his "PATR553" screen name by e-mail, by instant message, and in chat rooms. He was present and watched when appellant was in a chat room and when he communicated through instant messaging. He saw appellant prepare and send e-mail messages. Appellant did not appear to have any problems. He never asked Daniels for assistance. (15 RT 4461-4464.) None of the messages contained information relating to Carole's murder. (17 RT 4822.)

Appellant did not appear to have any trouble with AOL on the night Amy Streetman had dinner at the Gartons' residence. She saw him going in and out of chat rooms and communicating with different people. She saw his screen name when he logged on, "PAT and some numbers." Her AOL screen name was "mame27." (17 RT 5006-5008.) She and Daniels had an instant message conversation later that night. He used the screen name "Valkymer." Appellant contacted her using his screen name and asked what she was doing. She said she was talking to Daniels. He said, "I'll let you go." (17 RT 5011-5013.)

Mann used Gordon's computer to play simple games. She never went on the Internet. (24 RT 6971-6972.)

**b. The Daniels Account.**

Daniels opened an AOL account on April 12, 1998. It was closed on August 5, 1998. His primary screen name was "Normbo." He began using "Devlin666" in April 1998 and "Valkymer" in May 1998. He had several passwords. The screen name "Normbo" listed the names "patr553" and "jozaphine" in a folder named "Family." The screen name "Devlin666" listed the following names in a folder named "Family:" "jozaphine;" "patr553;" and "sean88." The screen name "Valkymer" listed, among others, the following names in a folder named "Family:" "jozaphine;" "pandoora69;" "patr553;" and "mame27." (Stipulation 15; Court's Exhibit LXXII; 25 CT 7362-7363; 15 RT 4458-4459; 17 RT 4814-4815, 4936; 26 RT 7554-7556.)

Daniels used the screen name "Devlin666" to communicate with The Company by e-mail. Appellant suggested the name. He sent e-mail from "Devlin666" to appellant. He used all three screen names to communicate with Lynn. He and appellant were in a chat room with Lynn more than three times between April 28 and May 16, 1998. He used the "Devlin" screen name, Lynn used "Jozaphine," and appellant used "PATR553." They talked about The Company, but not about Carole's murder. (15 RT 4459-4460; 17 RT 4919-4920, 4942-4943.)

He received messages from USA.Net by accessing the Internet via AOL. The first USA.Net message he received was on May 6, 1998. (17 RT 4815-4816, 4955-4958.)

**c. The Noyes Account.**

Dean bought a computer in April 1998. He knew how to use it; Lynn did not have much understanding beyond navigating AOL. The computer was on a desk in the basement, next to their children' play table and play

house. Lynn was often at the desk using the computer while they were watching a movie or playing games. (Exhibit 5E-22; 22 CT 6511; 19 RT 5439; 24 RT 6845-6846, 6848.)

He opened an AOL account on April 14, 1998. It was closed on January 5, 1999. He gave AOL access to his bank account for a trial period of free time. AOL debited his checking account in the amount of $.01 to verify the routing sequence. After the free time, it took the money out of his account automatically. AOL kept taking money out of the account for a period of time after Lynn's arrest. The primary screen name on the account was "DNoyes1408" with secondary screen names "Jozaphine" and "Pandoora69." The latter had a buddy list in a user-created folder named "Playmates" which contained, among others, the following screen names: "normbo;" "patr553;" "devlin666;" and "valkymer." AOL's records showed that the account was accessed by "Jozaphine" for seven minutes on June 16, 1998, at 2:57 p.m. EDT, and for four minutes at 6:28 p.m. EDT; for eight minutes on August 22, 1998, at 8:05 p.m. EDT; and for five minutes on August 30, 1998, at 1:38 p.m. EDT. Dean did not access the account on those dates. (Stipulation 15; Court's Exhibit LXXII; 25 CT 7363a; 24 RT 6796, 6849-6851; 26 RT 7556-7559.) He set up Lynn's "Jozaphine" screen name. He saw her using the account frequently. She asked him to cancel "Jozaphine" and add another name, "Pandoora69." He never correlated the change on the account with Carole's death. (18 RT 5256-5257; 24 RT 6813-6815, 6846-6849.)

Lynn did not have any conversations on the computer until April 1998. Thereafter, she used it to communicate with Daniels and appellant, and to send messages to companyt@usa.net. (18 RT 5340-5341.) She used the screen name "Jozaphine." Appellant called her that at times. (18 RT

5234-5235.) She chose the screen name "Pandoora69." (18 RT 5256.) When they had chat room conversations, appellant usually set up the room. She tried to use instant messaging, but never figured it out. (18 RT 5338.)

She gave appellant the password for her "Jozaphine" screen name. (18 RT 5256.) He told her that he had altered her profile to be more suitable for her involvement in The Company. Her profile had, in fact, been changed by adding a lyric from the song The Murder of One by the band Counting Crows, a love song that appellant felt explained the situation they were in; he always gave her attention and made her feel cared for and Dean did not. The profile also said she was a "cleaner" and an "operator." He explained that a "cleaner" was someone who fixed "botched-up" assassinations. An "operator" was someone to talk to and relay messages through. It said, too, that she was a "mechanic" and a "closer." She did not know the meaning of these terms. (Exhibits 128, 128A, 131, 133; 7 CT 1563-1564; 23 CT 6721-6722; 6 Supp.CT 1237; 19 RT 5497-5508.)

Appellant told Daniels about Lynn's "Jozaphine" screen name in May 1998. Daniels sent e-mail messages to "Jozaphine." None were about Carole's murder. Lynn told him about "Pandoora69" that month. He communicated with her using that name. (17 RT 4821, 4823-4824.)

**6. The Conspiracy to Kill Dean Noyes.**

**a. Dean Noyes.**

Dean worked as Operations Manager and Security Director for the Rouse Corporation from October 1997 to May 1998 at Pioneer Place in downtown Portland. (23 RT 6756-6757; 24 RT 6840.) He drove a Pontiac Fiero to work. Lynn usually drove their Ford Bronco. (Exhibit 5E-5; 22 CT 6393; 15 RT 4317; 18 RT 5176-5177; 19 RT 5438-5439; 22 RT 6213; 23 RT 6760; 24 RT 6785, 6857-6858.) He parked occasionally in Pioneer

Place's garage. (Exhibit 5E-4; 22 CT 6392; 18 RT 5176; 23 RT 6761-6762; 24 RT 6827-6830.) He had a pass for a nearby garage. (Exhibits 118, 119; 22 CT 6499-6500; 15 RT 4317; 24 RT 6801, 6827.)

Appellant told Lynn in April 1997 that Dean was sleeping with another woman. She did not want to believe him. (18 RT 5109-5110, 5185-5186; 19 RT 5629-5631; 20 RT 5840-5841.) The woman's husband told her about the relationship in March 1998. She called Dean at work and he said that the relationship had ended. The affair caused problems in their marriage and, as a result, he resigned from the Rouse Corporation. There never was a question about him taking money from the company. He did not take or tell anyone he took $80,000 or any more than his paycheck from it. (RT 5110-5111; 23 RT 6757-6760; 24 RT 6841-6843, 6875-6876.)

Appellant told Lynn that he knew people who could "take [Dean] out." She told appellant to go ahead and kill him. She did not get specific because she did not want much to do with it. She said she did not want anything to happen in her home because her children were there. She opted to have him killed rather than seeking a divorce because she was so hurt and full of anger that she just went with appellant's suggestion. Her parents had gone through a bitter divorce, and she thought it might be easier in the long run for the children to deal with a loss rather than having to go through a custody battle. (18 RT 5111, 5113-5114; 19 RT 5624, 5626; 20 RT 5841.)

She planned to collect the proceeds of Dean's $125,000 life insurance policy after his death. Appellant said that he needed $10,000 of the proceeds to cover his personal expenses. She responded that, if they ended up together, the relationship should be 50/50. Otherwise, she did not think he needed $10,000. (18 RT 5112-5113; 5172.)

She sent appellant a cardboard box containing pictures of Dean, a key

ring containing keys to all their vehicles and their home, and information about the vehicles he drove, where he parked after he got off work, a couple after-hours pubs he went to, and the gym where they worked out. Appellant knew these things, but asked her to write them down. She did not remember if she had previously sent him a picture of Dean. She did not remember telling officers that he did not need the box because he knew what Dean looked like. (18 RT 5143-5144, 5170, 5173-5174; 19 RT 5627-5629.) Appellant said that The Company was aware of the plan, but it was a "freebie" he would do as a favor for her. She did not communicate with The Company or Col. Sean about his death. (20 RT 5857-5859.) Appellant did not tell her that Gordon or Daniels would be participating until February 1998. (18 RT 5171.) She did not have any conversations with them about it. (20 RT 5786-5787.)

Gordon and appellant first discussed a plan to kill Dean in January 1996. (22 RT 6417, 6479-6480; 23 RT 6504, 6672-6673, 6694.) They had 50 to 100 additional conversations about killing him before February 1998. (23 RT 6506-6507.) Appellant said that Dean was beating Lynn and embezzling money from his company. She wanted out of the marriage, but he would kill her if she tried to leave. (22 RT 6328.) He said that Lynn had sent keys to their house and the Bronco, and pictures of Dean. He needed Gordon to back him up if something got out of hand. They talked about killing him "cowboy style," getting in, killing him sloppy, and getting out quickly. They also talked about taking him from his house and shooting him in his car. (22 RT 6218-6220; 23 RT 6505-6506.)

Gordon was concerned about going to prison, but he agreed to participate. (21 RT 6188-6189.) He made three trips to Oregon with appellant. He helped finance all three. He did not remember going to any

businesses while they were there. (22 RT 6218; 23 RT 6534-6535, 6603-6604.) He suggested that Daniels be involved as a backup. (22 RT 6224.) Appellant said that Daniels could check for police. If they had problems, he could come in and help out. If the police showed up, they would shoot their way out. (23 RT 6673-6674.) Gordon did not talk to Lynn about the hit. (23 RT 6519-6520, 6604-6605.)

The hit had nothing to do with The Company. Appellant wanted to kill Dean for the insurance money. He talked about being paid $25,000. A year-and-a-half later, the price had dropped to $10,000. In October 1997 it was more like $5,000. (21 RT 6116; 22 RT 6480-6481.) He said that the figure dropped because Dean's life insurance policy was not as much as they thought. They were each going to receive basically the same amount. They never talked about who was going to give appellant the money. (21 RT 6194- 6196.) Appellant wanted Gordon to kill a drug addict or a bum to prove that he could kill when the time came. He brought a person named Tony to Continental Alignment and told Gordon to walk in with the silenced .22 pistol, shoot him, and walk out. They also talked about sitting on top of the dumpster across the street and shooting Tony with the Ruger 10/22 rifle. (22 RT 6325, 6327-6328.)

Appellant told Daniels that he needed help with a hit on a man named Dean who lived in Oregon. He was a "dirt bag," and there were several contracts on his life because he was embezzling from the Mercy Hospital Group. He was also cheating on Lynn and mistreating her. He said that he was not contracted to kill Dean, but was doing freelance work. He would kill him and then attempt to collect on the contracts. He asked Daniels to assist by watching Gordon because he might do something crazy and he did not trust him. He said that Lynn would be involved. He showed Daniels a picture

of Dean and some keys, and said that she had sent him keys to her front door and a schedule of Dean's day-to-day activities. Daniels knew that he would be carrying a loaded, high-powered weapon and that he, Gordon, or appellant might have to kill someone other than Dean or his brother. He agreed to help with an alibi and to provide backup and support. Since he "wasn't going to be doing the murdering, . . . I wouldn't have to deal with it. All I was there to be backup for him, for whatever he did. And in case he needed help, then I would be there to help him, you know, for an alibi, et cetera. That was my thing." (14 RT 4178-4183, 4191-4196, 4201-4202, 4229-4232, 4236-4237; 15 RT 4252-4253, 4334-4335.)

**b. San Francisco, CA; Fall 1997.**

Dean planned a business trip to San Francisco in the fall of 1997 which was subsequently cancelled. (24 RT 6868-6870.) Lynn remembered telling someone that he was going to San Francisco. She did not remember talking about the possibility that he could be killed while he was on the trip. (19 RT 5638.)

Appellant and Gordon talked about killing Dean in a motel in San Francisco. Appellant planned to tell motel personnel that he was Dean and he had forgotten his key, and then shoot Dean in his room while Gordon stood cover in the hallway. Gordon bought a map of San Francisco in preparation for the hit. They never made a trip to San Francisco. (Exhibit 185; 23 CT 6786; 22 RT 6282-6285.)

Appellant told Daniels in October 1997 that they planned to "take [Dean] out" at a convention in San Francisco. No details were discussed. The hit was postponed because Dean was not going to the convention. Instead, appellant and Gordon were going to Oregon to scout the area. (14 RT 4193-4197, 4199-4201; 16 RT 4763-4764, 4768.)

**c. Gresham, OR; Oct. 9-11, 1997.**

Appellant and Gordon went to Gresham on October 8, 1997, to talk with Lynn about killing Dean and to "scope out" the house. They went through the house, checking it out, and went by Dean's workplace. Appellant said that he had bugged Dean's phones on an earlier trip with devices he obtained from one of his friends in the CIA. (16 RT 4766; 21 RT 6197-6198; 22 RT 6202-6203, 6211-6213; 23 RT 6630-6631.)

Lynn had not met Gordon. Appellant did not say why he was with him. Appellant stayed in a room at the Hampton Inn at 3039 Northeast 81st Avenue in Gresham. Gordon had another room.[13] (17 RT 5077; 22 RT 6202, 6204, 6215; 27 RT 7716.) They came to her house in the afternoon, before they went to the hotel. They walked around the house and looked around the children's room. They talked about entering through the back, sliding-glass door. Appellant drew a picture of the house. (17 RT 5078; 22 RT 6204-6205, 6211-6212.)

Lynn and appellant had not had a physical relationship for a number of years. She was really hurt by the fact that Dean was cheating on her and she thought it would make her feel better to do the same. She and appellant had sexual intercourse at the Hampton Inn. He said that he and Carole were separated and were not living together. They dropped her off the next morning at a friend's house because she had lied to Dean and said she was

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[13] Rooms 320 and 322 were rented to G & G Fencing on October 10, 1997. Appellant's handwriting and signatures were on the receipts. The guest checked out on October 11, 1997. The cost was charged to the VISA credit card account of Jesse and Patricia Garton. Appellant was an authorized user of the account. (Stipulations 22, 23; Court's Exhibits LXXIX, LXXXVIII; Exhibit 62; 25 CT 7299; 26 CT 7377-7380; 27 RT 7751-7752.)

spending the night with a friend. (17 RT 5076-5079; 18 RT 5114-5115.)

**d. Eugene/Springfield, OR; Jan. 3-4, 1998.**

Lynn met appellant and Gordon in Eugene/Springfield, Oregon, on January 3 and 4, 1998, to plan Dean's death.[14] She brought a friend, Keri Kirkpatrick, because she could not drive. She shared a room at the Courtyard Marriott Hotel with appellant. They had sexual intercourse. Gordon stayed in another room.[15] Kirkpatrick spent the night with a friend. She and Kirkpatrick returned to Portland the next day. (17 RT 5080-5082; 19 RT 5445-5446; 22 RT 6214-6216, 6218; 23 RT 6512-6513, 6516-6517, 6674; 24 RT 6861-6862.) Appellant and Gordon brought Rossi .357, Colt .45 1911, and .22 Ram Line pistols and a Ruger 10/22 rifle with them to show Lynn that they were going to kill Dean. Both of the latter were silenced. They also had ammunition and extra magazines, plastic knives, flex-cuffs, latex gloves, and a first aid kit. (22 RT 6217-6218; 23 RT 6516-6519.)

**e. Training Videos.**

Gordon and appellant watched "Bound," "Grosse Pointe Blanc," "The Jackal," "La Femme Nikita," "Pro Sniper," "Sniper," and "The Day of the Jackal" in preparation for the hit on Dean. While they watched, appellant talked about how to kill someone, what it was like, and how to get away with it. (22 RT 6325-6326; 23 RT 6634-6637.)

Appellant told stories about things he did in South America that

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[14] She recalled that the meeting occurred after the attempt to kill Dean in February 1998. (19 RT 5446.)

[15] Appellant paid for room 121 and the cost of a phone call to Daniels' residence on January 3, 1998, with his VISA debit card. He paid for room 123 with cash. He checked out on January 4, 1998. (Stipulation 21; Court's Exhibit LXXVIII; Exhibits 195, 196; 25 CT 7350-7351; 26 CT 7375-7376; 27 RT 7750-7751.)

seemed similar to the events in "Sniper." He said that he went to shoot someone with a colonel who "locked up" and could not shoot. He was furious, but could not say anything because he was only a first lieutenant. He said that he was using his M-16 to shoot someone in the chest but, because of the elevation difference, shot him through the head. He said that he was with a staff sergeant who got so excited after killing someone that he had an erection when he stood up. He said that he used trains to get into countries, as the movie depicted. He said that characters in the movie were looking through the scope of an M-40, a rifle he had carried, improperly. (23 RT 6637-6638, 6641-6644.)

He pointed out different ways to kill while they watched "Grosse Pointe Blanc." He said that a scene in the movie was the correct way to follow and shoot someone with a rifle, and that throwing someone into a boiler room or furnace, as the movie depicted, was a sloppy way to kill. (23 RT 6637-6638.)

Appellant said that he watched "The Jackal" in sniper school. He had the older version, "The Day of the Jackal," at his house. (23 RT 6638-6639.) He borrowed "Pro Sniper," a training video, from someone. Charles Hathcock was in it. He said that he did not know anything and was doing things wrong. (23 RT 6644-6445.)

They also watched "Patriot Games." A scene in the movie showed a file with the word "Patriot" on it. The file appeared to be the source of appellant's business card. A character named Sean Miller belonged to the IRA. (16 RT 4612-4613; 23 RT 6639-6640; 27 RT 7719-7723, 7787-7789.)

"Whispering Death," a video that showed how to make silencers, was found in the Gartons' residence. None of the silencers were made from PVC pipe or stuffed with foam. (27 RT 7747-7748, 7761-7762, 7844.)

"Sniper" (Exhibit 20A), "Patriot Games" (Exhibits 16, 16A, 26, 205; 26 CT 7441; 6 Supp.CT 1236), and "Whispering Death" (Exhibit 23A) were played for the jury. (27 RT 7789-7795, 7842-7843, 7871, 7873.)

**f. Gresham, OR; Feb. 7-8, 1998.**

Appellant met with Gordon and Daniels in late-January 1998, at the Anderson Moose Lodge, to plan the hit on Dean. They arrived around 6:00 or 7:00 p.m. and stayed 20 minutes while they drank tequila. (16 RT 4760-4764; 22 RT 6281-6282; 23 RT 6510.) Gordon thought it was the first time that Daniels was present during a discussion of the assassination. (22 RT 6483-6484; 23 RT 6507.) He suggested that Daniels be included because he was worried that he could not kill. If they had to shoot their way out, Daniels could kill the police or anyone who got in their way. (23 RT 6510-6511.) They talked about shooting Dean in a parking garage at his work on a Saturday morning or entering his house with the keys Lynn had sent, removing him and his brother, and killing them in his bother's car. (14 RT 4218, 4232-4236; 16 RT 4761, 4766-4768, 4771; 23 RT 6509-6510, 6512-6515, 6523-6524.) Appellant said they would be paid, but no dollar amounts were discussed because they could not determine the exact amount of Dean's insurance policy. (23 RT 6507-6508.)

Appellant and Daniels went to factory outlets in preparation for the hit looking for shoes, rain gear, and wool caps to help them "fit in" in Oregon. (14 RT 4213.)

On Friday, February 7, 1998, appellant picked Daniels up at his trailer and they went to appellant's house and began gathering the equipment they needed. (14 RT 4218-4219; 17 RT 4926-4927.) Appellant called Gordon's work and said that Gordon's mother was having a heart attack, and he needed to go to the hospital. Gordon left work and went to appellant's house.

The Jeep was loaded when he arrived. Appellant was upset because they were running late. (14 RT 4237-4239; 22 RT 6249-6250.)

Appellant called Lynn and said that he was on his way to Oregon for business, that she should know what he was referring to, and that, if she saw him, there was a problem. She panicked because it put what was happening into perspective. She was scared and ashamed of herself for letting things reach that point. (18 RT 5140-5142; 20 RT 5768-5770.)

They arrived in Gresham around 9:00 or 10:00 p.m. and drove by Dean's house, then went to a Quality Inn motel and rented a room. They pulled the screen off the window and unloaded everything in the Jeep through the window, then discussed killing Dean while they cleaned the weapons and ammunition. (Exhibits 5E-2, 5E-3, 5E-19, 211; 22 CT 6390-6391, 6407; 28 CT 8298; 7 Supp.CT 1575; 15 RT 4250-4252, 4264-4265, 4317; 16 RT 4768-4769; 17 RT 4927, 4929; 23 RT 6520-6524, 6569, 6678; 27 RT 7849.) They tested the range of their radios. (Exhibit 5E-3; 22 CT 6391; 15 RT 4253-4254.) Around 10:00 or 11:00 p.m., they went to surveil the shopping mall where Dean worked.[16] They tested the radios in the parking garage and returned to the motel around 1:00 a.m. (17 RT 4928; 23 RT 6525-6527, 6678-6679.)

Around 4:00 or 5:00 a.m., they dressed in their disguises and loaded everything back into the Jeep through the motel window. (15 RT 4254-4255; 22 RT 6249; 23 RT 6528-6529.) They drove by Dean's house to see if he had left for work, then went to Denny's for breakfast. They arrived at Dean's place of work around 5:45 or 6:00 a.m. and parked on the street so he would

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[16] Daniels recalled that they went to the parking garage upon their arrival in Gresham. (Exhibit 5E-4; 22 CT 6392; 15 RT 4256-4258.)

pass them as he entered the garage. They expected him to arrive around 6:00 or 7:00 a.m. They planned to follow him and assassinate him in the garage. (15 RT 4255-4256, 4258-4260, 4264; 22 RT 6249-6250; 23 RT 6529-6531.) They waited about three hours,[17] but did not see him. (23 RT 6531-6533.) Daniels then remembered that he had not seen the Bronco at Dean's house that morning. (15 RT 4264-4266.) Dean had driven it to work instead of the Fiero because Lynn pled with him to take it. It would not fit in the garage where he usually parked, and he would have to park at his work. She did not think that appellant knew about this garage.[18] (15 RT 4267-4268; 18 RT 5177-5178, 5180; 20 RT 5866.)

They returned to the Quality Inn around 9:00 a.m., checked out, and went to the Hampton Inn. Appellant rented one room.[19] (Exhibits 5E-6, 5E-7, 5E-10, 211; 22 CT 6394-6395, 6398; 29 CT 8296-8297; 15 RT 4268-4271, 4317; 22 RT 6251-6252; 24 RT 6834; 27 RT 7849.) They put their weapons on a dolly and wheeled it through the front door and into the elevator. (15 RT 4280-4281.) Appellant shot the Ruger 10/22 rifle out of the room's window at a Styrofoam cup in the parking lot. Gordon saw holes in the window screen. Appellant said, "Look, you can barely notice these holes." (Exhibits 5E-8, 5E-9, 5E-10, 5E-11, 100; 22 CT 6396-6399; 15 RT 4271-

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[17] According to Daniels, they waited an hour. (15 RT 4263.)

[18] Dean did not recall a conversation in which Lynn pressured him to take the Bronco and not the Fiero. (24 RT 6858.)

[19] Room 218 was rented to appellant on February 7, 1998, at 10:07 a.m. He checked out on February 8, 1998, at 10:09 a.m. The cost was charged to the VISA credit card account of Jesse and Patricia Garton. (Stipulations 22, 24; Court's Exhibits LXXIX, LXXXI; Exhibits 62, 63; 25 CT 7299-7300; 26 CT 7377-7378, 7381-7382; 27 RT 7751-7753.)

4278, 4318-4319; 22 RT 6252-6254; 23 RT 6571-6573.) Daniels was in the parking lot and could hear the gun being fired. It sounded like the snapping of fingers, not very loud at all. Appellant could not hit the cup, so he decided to find a more secluded area. (15 RT 4279-4280, 4282.)

They drove to an open field near the Hampton Inn. Appellant got out while Gordon and Daniels circled the area in the Jeep, staying close in case he needed to be picked up. Daniels warned appellant over the radio about a man wearing rain gear and carrying a large plastic bag.[20] They continued to drive and the man disappeared. (Exhibits 5E-1, 100, 211; 22 CT 6389; 28 CT 8298; 7 Supp.CT 1575; 15 RT 4316-4317, 4321-4325; 22 RT 6262-6264; 23 RT 6573-6574; 27 RT 7849.) Daniels then heard appellant say over the radio, "Hot LZ. Extract. Extract." It meant that he was in trouble and needed to be picked up. They could not stop because there were too many cars going by. Appellant was upset when they picked him up that it had taken so long. He said that he had shot the man several times in the chest. (15 RT 4325-4329; 22 RT 6264-6266.)

He had the rifle with him, but a magazine was missing. They went back to the field to search for the magazine. He knew exactly where it was. (15 RT 4328-4330; 22 RT 6266-6267.) When they returned to the hotel, he said that the man had walked up on him as he was firing the rifle. He shot him in the chest, then unloaded the rest of the magazine into his eye and covered his body with a piece of plastic. He had to scrape up his brains with a spoon. (15 RT 4329-4331.) This killing never occurred. (Stipulation 33; Court's Exhibit CXV; 28 CT 8173-8174; 34 RT 9784.)

Appellant called Lynn from the hotel. He told Gordon and Daniels

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[20] Gordon did not remember seeing the man. (22 RT 6263.)

that she was upset they were there. She arrived at the hotel around 6:30 or 7:00 p.m. and had a brief conversation with Daniels, whom she had not met. Gordon and Daniels went to get something to eat so that appellant and Lynn could talk alone. (Exhibit 5E-6; 22 CT 6394; 15 RT 4284-4287, 4359-4363; 16 RT 4769-4771; 17 RT 5079-5080; 18 RT 5142-5143, 5174-5175, 5178-5179; 19 RT 5563; 23 RT 6537, 6565, 6568-6570.)

Appellant was furious. He asked her why Dean had not parked in the garage. He said that they had been up all night waiting for him. She said she did not know what happened. (18 RT 5179-5180.) They argued and she asked, "Well, why don't you go home, then?" He said that other people were involved and a lot of time and money had been invested. It was something that needed to be done, and it was out of his control. He wanted to make it happen and did not care what she thought. They fought and he threw her up against a wall. She left, crying, after about a half-hour. She noticed Gordon and Daniels coming back towards the hotel but did not say hello. She sat in her truck for a few minutes and put herself back together, then stopped at the grocery store and went home.[21] (15 RT 4363-4364; 18 RT 5180-5183; 20 RT 5770.) She talked to appellant on the telephone when she got home and told him that she would get Dean and his brother to go to a movie theater that evening. She did not ask them to go. (18 RT 5183-5184; 20 RT 5770-5771.)

At some point that evening they went to the hotel's swimming pool for two or three hours and talked about killing Dean. Lynn did not want him killed in the house, and suggested taking him out to his vehicle. They talked about flattening one of his tires while he was at the theater and killing him in

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[21] According to Gordon, Lynn did not have a driver's license and said she ran to the hotel. (23 RT 6565, 6568, 6679-6680.)

the parking lot. (15 RT 4283-4284, 4287-4288; 23 RT 6565-6566, 6573-6577.)

Appellant, Gordon, and Daniels went to the Noyeses' house that night to kill Dean. Appellant told Gordon that they were going to get into the house with the keys Lynn had sent. She knew it was going to happen and was going to be in her room with both children. (15 RT 4332-4333, 4346-4347; 22 RT 6268-6270; 23 RT 6577-6578.) Gordon was to help control the situation and, if necessary, shoot Dean. (23 RT 6576.)

Appellant parked the Jeep in front of a vacant house near the Noyeses' residence. Daniels said something about a car pulling out, so they left and drove around the neighborhood. They eventually parked about an eighth-mile away at the 505 Club, exited the Jeep with their weapons, and walked to the Noyeses' house. (Exhibits 5E-19, 100, 211; 22 CT 6407; 28 CT 8297; 7 Supp.CT 1575; 15 RT 4319, 4335-4340; 22 RT 6270-6271; 23 RT 6581-6583, 6675-6676; 27 RT 7847-7848.) They were dressed in the disguises they brought with them. Each of them had a radio. (15 RT 4343; 17 RT 4929-4930; 22 RT 6271.)

Daniels was carrying the .22 Beretta and the TEC-9. He had four magazines for the TEC 9, each loaded with 25 rounds. (Exhibits 10, 10A, 11; 22 CT 6414-6416; 14 RT 4226-4227; 15 RT 4340-4341, 4344; 16 RT 4772; 22 RT 62216222, 6226.) Gordon was carrying his Colt.45 behind his back. The loaded, silenced, Ruger 10/22 rifle was under his coat. He had extra .45 and .22 rounds, and a knife. He pulled the silencer out and appellant was furious. They tied it under his armpit in a plastic bag. (Exhibits 12, 48; 22 CT 6417; 14 RT 4226; 15 RT 4342-4344; 16 RT 4772; 22 RT 6221-6222; 23 RT 6579-6581.) Appellant carried the silenced, Ram Line .22 pistol. His Rossi .357 was on his right hip in a leather holster covered by his

coat. Daniels believed that both weapons were loaded. (Exhibit 8; 22 CT 6413; 14 RT 4225-4226; 15 RT 4342-4343; 16 RT 4772; 22 RT 6221-6222, 6272-6273.)

They had subsonic ammunition (15 RT 4242-4244); two silencers;[22] extra ammunition and magazines; latex gloves; plastic knives; plastic flex-cuffs; two different lock-pick sets; a first aid kit; and three black, battery-operated, two-way radios. Gordon had butterfly and Leatherman knives. (Exhibits 46, 47; 14 RT 4228-4229; 22 RT 6242-6246; 23 RT 6684-6685.) Appellant said that he had removed the serial numbers from the weapons a couple of weeks earlier so they would not be traceable.[23] (23 RT 6598-6600.)

They arrived at the Noyeses' house around 10:00 or 11:00 p.m. Gordon hid under a Jeep Cherokee about 30 feet from the door. Daniels was standing behind him, about 25 feet away, on the opposite side of a tree. (Exhibit 5A-27; 22 CT 6410; 15 RT 4345-4346; 16 RT 4536, 4772-4774; 23 RT 6583-6585.) Appellant went to the front door, unlocked the deadbolt, and said, "Come on, we're ready to go." Gordon tried to chamber a round in the Ruger 10/22 as started towards the door but, before he reached it, appellant said that he could not get the door unlocked and the police had been called.[24] (Exhibit 5E-20; 22 CT 6408; 15 RT 4347-4349; 16 RT 4773-4775; 22 RT 6273-6275; 23 RT 6585-6588.)

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[22] Daniels saw only one silencer. It was on the 10/22 rifle in Gordon's possession. (16 RT 4777; 17 RT 4971-4974.)

[23] Gordon did not see any weapons with the serial numbers removed. (23 RT 6599.)

[24] He did not say how he knew the police had been called. Gordon did not remember seeing any police cars as they were leaving. (23 RT 6681-6682.)

Daniels heard appellant say over the radio, "Abort. Abort. Mission scrubbed." They left the residence and walked hurriedly down Burnside to the Jeep at the 505 Club. (15 RT 4348-4351; 16 RT 4536; 23 RT 6588-6589.) On the way, appellant threw the silencer for his .22 pistol over the wall bordering Burnside. (Exhibit 5E-27; 22 CT 6410; 15 RT 4350; 22 RT 6276-6277; 23 RT 6589, 6593-6594.) When they reached the Jeep, he said that the key to the door did not fit and the lock would not open.[25] (15 RT 4349; 16 RT 4775; 17 RT 4930.)

Appellant handed the Ram Line pistol to Gordon and told him to meet them at the hotel. Gordon walked into the neighborhood behind the 505 Club with the Ruger 10/22 rifle and the Colt .45 and Ram Line pistols.[26] Appellant and Daniels left in the Jeep with the other guns. Gordon was communicating with Daniels on the radio, trying to get them to pick him up.[27] (22 RT 6275-6278; 23 RT 6594-6596.) As they drove around with the lights off, appellant stopped and began throwing the guns into a bush. He said that he wanted to get rid of them because a police officer was following him. Gordon came around the corner, and he reloaded everything. (16 RT 4776-4777; 17 RT 4930-4931, 4976-4977; 22 RT 6278-6279; 23 RT 6596-6598, 6676-6678.)

They drove around trying to get away from the police. Gordon

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[25] The lock on the front door was difficult to open. The handle had to be turned counter-clockwise to disengage the strike mechanism. (23 RT 6762-6763.) Sometimes the lock would stick and one had to "jiggle" the key. (18 RT 5175-5176.)

[26] Daniels recalled that Gordon went into the residential area before they reached the Jeep. (15 RT 4351.)

[27] According to Daniels, they lost track of Gordon for more than 15 minutes and did not communicate via radio. (17 RT 4978-4979.)

mentioned something about going home. Appellant said, "We're keeping this vehicle off the road for the night." They returned to the Hampton Inn and unloaded the vehicle as fast as they could. They carried everything up the stairs to their room. They departed the next morning around 9:00 a.m., went straight home, and unloaded the weapons at appellant's house.[28] (14 RT 4239; 15 RT 4365; 22 RT 6280; 23 RT 6601-6603, 6683-6684.)

Lynn feared that Gordon, Daniels, and appellant were going to kill everyone in the house, including herself, that night. (20 RT 5774-5775.) She woke Dean up after midnight complaining of serious cramps and vaginal bleeding, then called her parents and told them that she needed to go to the hospital. Her parents came and stayed with her children while Dean took her to the hospital.[29] She thought that appellant would know Dean was not at home if the Bronco was gone and her parents' vehicle was there. She did not warn her parents that a group of three armed men were contemplating coming into the house with guns because she assumed there would be no reason for appellant to come to the house if she and Dean left. (20 RT 5774-5776, 5867; 24 RT 6785, 6858.) She checked into the Legacy Mount Hood Medical Center in Gresham at 2:53 a.m. on Sunday, February 8, 1998, and received medical services. (Stipulation 7; Court's Exhibit LIV; 23 CT 6708-

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[28] Gordon knew that they took all the guns out of the Jeep because he was pulled over by the California Highway Patrol after he dropped Daniels off and the officer checked for guns. (22 RT 6477.) He last saw the 10/22 rifle and other guns, including his AR-15, in the back of appellant's Isuzu Trooper in July 1998. (22 RT 6475-6476; 23 RT 6503, 6686-6687, 6693.)

[29] Dean recalled that he took the children to a friend's house. He did not remember if he dropped them off by himself. Lynn was in a great amount of distress and needed to get to the hospital as quickly as possible. He went back to pick them up by himself. (24 RT 6860-6861.)

6709; 18 RT 5330, 5332-5333; 20 RT 5771-5772, 5866-5867.) She talked to appellant a few days later and he told her they had attempted to kill Dean at her house that night. (18 RT 5184-5185; 20 RT 5776.)

Appellant told Glen Renfree about a trip to Oregon during which he, Daniels, and another person sold camouflage gear. They went by a house and rattled the windows and shot off a couple rounds to scare someone in the house. (24 RT 6895-6896.)

**g. Silencers.**

Carol Clunas lived in Gresham near the Noyeses' residence. The wall bordering Burnside abutted her back yard. She was talking on the telephone to her daughter, Jan Cousins, on June 25, 1998, when their conversation was interrupted by a police officer who came to Clunas' door. Cousins heard him ask if Clunas had found anything in her backyard. (16 RT 4516-4517, 4521.)

Cousins had been walking through Clunas' yard in March 1998, making sure there was nothing in the grass before she mowed the lawn. She found what appeared to be a piece of black, plastic pipe, like standard PVC pipe, one and one-half to two inches in diameter and about eight inches long. It was open on both ends, with an inch-long piece of dark green tape, similar in width to electrical tape, hanging off of one end. That end felt sticky, as if there had been more tape around it. There were threads on one end, like a light bulb. It looked like it screwed onto something. It looked like someone had painted a piece of pipe, "sort of a bad spray paint job." Something like paper or paper towels was stuffed inside it. She did not attempt to remove the material because she thought it was garbage someone had thrown over the wall. She associated it with PVC pipe her husband used for things like hot tub plumbing and their sprinkler system. She looked around to see if it had come off of something he had worked on, then threw it away. (16 RT

4517-4520, 4522-4531.)

Marshall Jones was familiar with the construction of silencers, and with their effect on a projectile. A professional, state of the art silencer is mostly stainless steel and consists of a series of ports or holes. If it comes in contact with the bullet, it distorts the bullet's direction, affects its accuracy, and wears out the inside parts. (24 RT 7019, 7052-7053.) A silencer made with two-inch, PVC pipe and stuffed with archery target foam, with electrical tape at one end and a PVC adapter on the other to screw onto a threaded barrel, is a very crude, homemade silencer. (24 RT 7071.)

He had no expertise on foam-filled silencers. He believed that shooting a .22 caliber subsonic bullet through 18 inches of chunks of archery foam stuffed into a two-inch PVC pipe would make the gun very quiet and not very accurate. It probably could be used to kill cats at a distance of up to 25 yards. The first bullet would put a hole in the archery foam. It might tear off pieces of the foam and blow them out along with the bullet. It would eventually begin to create a path that would allow the bullet to pass through more freely, which would improve the accuracy of the bullet. Sealing the end of the PVC pipe would make it quieter. If it was sealed with electrical tape, the bullet would punch a hole in the tape and it would not affect the noise very much after the first shot. (24 RT 7055-7057, 7059, 7068-7069.)

Jones saw a modified rifle barrel in appellant's Isuzu Trooper within a week of Carole's death. An adapter was installed on the muzzle end and the barrel was cut down shorter than factory length. It was a crude, homemade device. The modified barrel would fit on to the action of the 10/22 Ruger rifle. About two weeks after Carole's death, appellant had him install a heavy barrel designed for match or varmint shooting, a large scope, and a Hogue-brand rubber stock on the Ruger 10/22 rifle. He did not know

when appellant came into possession of the rifle. Appellant never told him it belonged to someone else. (Exhibits 5D-34, 5D-20, 5D-33, 48; 26 CT 7429, 7346, 7437; 23 RT 6499, 24 RT 7018, 7020-7023, 7026-7033, 7059-7060.) He did not recall appellant storing pieces of PVC pipe with him. (24 RT 7066.)

Supervising Department of Justice (DOJ) Criminalist James Weigand had examined around a dozen silencers. He had seen PVC used in one other case. (16 RT 4708, 4720, 4730.) He was asked to determine if there was any PVC material on the threaded-end portion of a modified gun barrel. (Exhibits 5D-29, 5D-30, 5D-31, 48; 22 CT 6481-6483; 16 RT 4695-4696.) Some white material in the threads appeared to be residue from a piece of PVC. On August 17, 1998, he removed the material from the end of the barrel and analyzed a small piece of it with an infrared spectrophotometer. He then analyzed a known sample of PVC and confirmed that they were the same. All he could say was that the material was PVC, which is commonly used in irrigation piping and sprinkler systems. He could not say how it got there. Schedule 40 is the thickness used in most residential sprinkler systems. (Exhibit 117; 22 CT 6490-6491; 16 RT 4696-4712, 4718-4722.)

The outer diameter of the threaded area on the muzzle end of the weapon was one inch. It was designed to fit into a metal, styrene, or PVC female receptor. Anything with the appropriate thread diameter and pitch would work. The sample he had most likely came from what one would use on a sprinkler system. He could not say if three-quarter inch PVC pipe would screw on. He did not recall if he fired the silencer and did not know if it would come apart in the process of silencing the first shot. (16 RT 4714-4717-4725.)

David Compomizzo, the supervisor of the Shasta County Sheriff's

Office Property and Identification Unit, observed what appeared to be a piece of foam at the Gartons' residence on May 16, 1998. It was in a slightly different location when he returned on May 21, 1998. (Exhibits 5A-36, 186; 23 CT 6787; 13 RT 3866-3867; 22 RT 6237-6238, 6365-6366, 6369; 24 CT 6838; 26 RT 7507.) Some two-inch diameter, Schedule 40, PVC pipe was in the house. (Exhibits 5A-36, 105, 107, 186; 23 CT 6787; 24 CT 6825-6828, 6838; 14 RT 4038-4039; 22 RT 6232-6234.)

**h. Burglary of the Noyeses' Residence; May 8-10, 1998.**

Lynn believed that Dean was embezzling money from his employer and, if someone had information and held it over his head, he might admit it and end up in trouble with the law and be out of the picture for a while. Appellant and Gordon discussed extorting money from him. (18 RT 5258; 22 RT 6331-6332.) Appellant wanted him to respond to an e-mail about the embezzlement, then lure him to a place where he could get money from and kill him. (16 RT 4588, 4593.)

Appellant went to the Noyeses' residence in May 1998, and took some computer disks, a copy machine, a printer, and Dean's personal organizer. He did not do anything to make it look like there was a burglary. (Exhibits 8A, 114; 22 CT 6412-6413, 6473; 18 RT 5258-5261.) He stayed at the Gresham Hampton Inn.[30] (18 RT 5267.) He told Lynn that the break-in idea had worked well because Daniels was supposed to kill Carole while he

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[30] Room 214 was rented to appellant on May 8, 1998 at 6:34 p.m. He checked out on May 10, 1998, at 11:03 a.m. Phone calls were made from his room to Daniels' residence on May 9, 1998, at 7:36 a.m. and 1:45 p.m. The cost was charged to the VISA credit card account of Jesse and Patricia Garton. (Stipulations 22, 25; Court's Exhibits LXXIX, LXXXII; Exhibit 123; 25 CT 7303-7305, 7333-7334; 26 CT 7377-7378, 7383-7384; 27 RT 7751, 7753-7754.)

was in Portland, and it would give him an alibi. (16 RT 4605-4606; 18 RT 5266-5267.)

Lynn called Dean on May 9, 1998, and said that someone had broken into the house. He did not notice anything missing when he got home. A drawer had been rifled through, but none of the valuables he thought would have been taken during a burglary had been touched. Lynn pointed out several things that were missing: a copy machine; a laptop computer; a zippered black folder; a day planner;[31] and computer disks associated with his work. He spoke to someone at the Gresham Police Department about the burglary. He did not make an insurance claim. (Exhibit 8A; 24 RT 6797-6802, 6809-6810, 6863-6868.)

Appellant called Lynn after the "break-in" and asked her to access a companyt@usa.net account with the password "GrossePointeBlanc." She accessed the account and found a list of messages, but could not retrieve them. Appellant never told her how he knew the password. He said it changed every 24 hours. (18 RT 5268-5270.)

Daniels knew that appellant was going to Oregon. Appellant said that he would kill Dean during his visit if the opportunity arose. (16 RT 4604-4605.) He paged Daniels at work on May 9, 1998. Daniels called back from his trailer. Appellant said he was in Oregon, staying at the Hampton Inn. (16 RT 4579-4581.) He did not tell Daniels to kill Carole during their telephone conversation. (17 RT 4841.) He wanted Daniels to set up an e-mail account, bladerunner@usa.net, and send a message to Dean. Daniels attempted to open the account, but was unable to do so. (16 RT 4584-4585, 4587; 17 RT

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[31] Dean could not say that the day planner in evidence was his. (24 RT 6865.)

4883-4884.) Instead, he set up a bladerunner3@hotmail.com account using the fictitious name "John Carson." He did not provide truthful information because he did not want the account traced back to him. He gave the password, "ATimeToDie," to appellant. It was a line from the movie "Bladerunner." (Exhibit 115; 16 RT 4588-4591, 4593; 17 RT 4831-4833.)

He took notes while appellant told him what to put in the message, including the Hampton Inn's telephone number; room number 214; Dean's AOL screen name; five passwords to try to get into his AOL account; and his address and Social Security and bank account numbers. Appellant asked him to search the Internet to see if Dean's bank did electronic banking so they could access the account electronically. (Exhibit 44; 22 CT 6476-6477; 16 RT 4580-4584, 4591-4592; 17 RT 4902-4904.) He made more notes after the call on another piece of paper. (Exhibit 39; 22 CT 6474-6475; 16 RT 4586-4587; 17 RT 4833-4837, 4884-4888, 4904-4916.) Appellant did not say how he obtained the information. (Exhibit 109; 25 CT 7117-7118; 16 RT 4587-4588.)

Daniels sent an e-mail message from bladerunner3@hotmail.com (John Carson) to Dean dated May 9, 1998, at 8:02 p.m. EDT, containing the information appellant provided. The subject was "Bad Boy."[32]

> someone has not been playing well with others.
> Taking money that does not belong to you is a crime, and blaming it on John is worse.
> Allison and others would be interested in this.
> Want to make a deal, contact imediatly.
> Any involvement with police will threaten Jordan and
> Amandas future.

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[32] Dean had a "Bad Boy" tattoo, a picture of a brush-cut-type character. (18 RT 5264; 24 RT 6802-6803.)

(Exhibit 109; 25 CT 7117-7118; 24 RT 6802.) He did not know bladerunner3@hotmail.com. The message contained typographical errors which made it appear that it was not from someone close to his family. Jorden's name was misspelled. So was that of Alison, his boss at the Rouse Corporation. He thought that it was from a former employee. He did not notify the police. (24 RT 6803-6807.) Lynn had nothing to do with sending the message and did not know who sent it. Appellant said he was confident it was from one of two unidentified people. (18 RT 5263-5266.)

Dean responded in an e-mail message dated May 11, 1998, at 2:55 p.m. EDT:

> As you may know, I'm no longer with the company. As a matter of fact, I am not working anywhere.
> I'm here quite a bit with the exception of some T-ball games. My line is open but I don't know how much help I can be to you.

(Exhibit 111; 25 CT 7121-7122; 24 RT 6806-6807.)

He sent another message on May 14, 1998, at 3:35 p.m. EDT, with the subject "Re: Marbles:"

> As mentioned before, I don't know how I can be of help to you. I have nothing and I don't have the means to get anything. Obviously I have wronged you in some way to make you propose these criminal activities. There was a time when such thoughts wouldn't be that remote to some I knew. A lot of things have changed since I left the company. One thing is for sure, I will never work in that type of environment again. It only leads to contact with individuals that emmulate the unfortunate dispositions that we have discussed in the last week.
> I'm sorry that you felt that there was a wealth of opportunity here, but I can assure you there isn't. Ends don't always meet as it is. I welcome a response to this as I'm sure it is a considerable disappointment, I actually don't know what else to say.

(Exhibit 172; 25 CT 7246; 24 RT 6810-6813.) He received other, rather cryptic e-mail messages from bladerunner3@hotmail.com. One mentioned telling his grandfather, but both his grandfathers were deceased. There were no more threats to anyone in his family. (24 RT 6808.)

When he returned to California, appellant told Daniels that he had not killed Dean in Oregon because he had been recalled by The Company for personal reasons. (16 RT 4606.) He gave Daniels some floppy disks and a black, planner-like portfolio containing Dean's pictures and business cards. Daniels kept it in his room. (Exhibit 113; 22 CT 6472; 16 RT 4594-4597.) Lynn saw the burgundy day planner at appellant's parents' house when she went to Carole's memorial service. (20 RT 5899.)

Redding Police Department investigator Jim Arnold used a forensic computer program to search the hard drive of Gordon's personal computer for key words and to locate and open deleted files. (25 RT 7086-7087, 7093-7094, 7100-7101, 7105.) He found a message sent on May 9, 1998, at 4:29:51 p.m. PDT from John Carson, bladerunner3@hotmail.com, to dnoyes@aol.com, with the same content as the initial message Dean received. Whoever sent it forgot to put "1408" after "dnoyes," and the message apparently was returned to the user. There were slight differences in the messages. The message recovered from Gordon's computer said "Contact me immediately." The one Dean received said "contact immediately." The word "poloce" in the message recovered from Gordon's computer was spelled "police" in the message Dean received. The words "Someone" and "John" were not capitalized in the message Dean received. He could not determine which computer generated the message. (Exhibits 170, 171; 25 CT 7244-7245, 7334-7340, 7368-7369; 26 RT 7365-7366, 7370-7373; 33 RT 9508-9511.)

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An inbox message to bladerunner3@hotmail.com from dnoyes1408@AOL.com was written to the hard drive on Gordon's computer at 9:37:34 p.m. PDT on May 11, 1998. The subject was "RE: Bad Boy." It had the same content as Dean's response. Someone on the computer accessed the bladerunner3@hotmail.com account and read the message.[33] (Exhibit 161; 25 CT 7235; 25 RT 7127-7128; 26 RT 7379-7381.)

What appeared to be the beginning of a reply to a message called "Bad Boy," from bladerunner3@hotmail.com to dnoyes1408@AOL.com, was written to the hard drive on Gordon's computer at 9:37:52 p.m. PDT on May 13, 1998. (Exhibit 162; 25 CT 7236; 26 RT 7381-7382.) A confirmation that a Hotmail message was sent to dnoyes1408@AOL.com was written to the hard drive at 9:40:56 p.m. PDT. (Exhibit 163; 25 CT 7237; 25 RT 7148-7149; 26 RT 7382-7383.) Arnold opined that someone on Gordon's computer accessed and read previously-read e-mail messages and sent a reply to the message. (26 RT 7384-7385.)

A bladerunner3@hotmail.com page was written to the hard drive at 10:19:40 p.m. PDT on May 14, 1998. (Exhibit 168; 25 CT 7242; 26 RT 7373-7374.) Someone went to the Inbox Menu, saw that there were messages and, within about 40 seconds, looked at the incorrectly addressed message. (Exhibits 169, 170, 171; 25 CT 7243-7245, 7340-7342; 25 RT 7154-7155; 26 RT 7366-7370, 7373-7378.) The "Bad Boy" message was brought up within seconds. It had already been read and was being read again. Whoever sent the original mis-directed message at 4:23:51 PDT on

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[33] Someone could have found the messages and web pages on another computer, copied them to a floppy disc, and put them on the hard drive, but the only normal way they could be there was by viewing them on the computer. (25 RT 7128-7129, 7149-7150.)

May 9, 1998, apparently did not delete it from the HotMail server. A new, differently-worded message was sent successfully at 8:02:40 p.m. EDT, about 33 minutes later. He did not find it on Gordon's computer. It is possible that the message was written on another computer and transmitted, but then deleted, from the HotMail account so it could not be retrieved or reread by whoever accessed it. (26 RT 7386-7389.)

A Hotmail message from dnoyes1408@aol.com was written to the hard drive on Gordon's computer at 10:23:14 p.m. PDT on May 14, 1998. The subject was "Re: Marbles." The message was apparently read less than three minutes after someone looked at the incorrectly addressed "Bad Boy" message. (Exhibit 172; 25 CT 7246; 25 RT 7153-7154; 26 RT 7378-7379.)

**i. The Noyeses' Insurance Policies.**

Dean's benefit package at the Rouse Corporation included a life insurance policy in the approximate amount of $100,000. The policy was terminated when he left the company in March 1998. Lynn proposed getting life insurance after Carole's death. On May 19, 1998, they applied for $500,000 policies with Farmers New World Life Insurance Company.Lynn told appellant that, if Dean's policy was approved, there would be about 500,000 reasons to make another attempt on his life. Dean's application was declined on June 8, 1998. (Exhibits 87-87-Y, 88; 25 CT 7065-7116; 19 RT 5399-5405, 5635; 24 RT 6787-6794.)

**j. The Noyeses' Plan to Move to Shasta County.**

Lynn wanted to move to the Redding area to get a fresh start and to be closer to appellant. Appellant suggested that attending Carole's memorial service would lay a foundation for the move. (19 RT 5390-5391.) She attended the service in Cottonwood on May 22, 1998. (19 RT 5379-5380, 5384.) Appellant took her to the Joneses' house and introduced her as his

friend from Oregon. He said that she and her husband were splitting up, and she wanted to move to Redding. He asked if Marshall Jones knew of any houses to rent. (24 RT 7016-7017.) He told Tracie Jones that Lynn's husband was in trouble for embezzlement, and that she and her children were thinking of moving to Redding. (24 RT 6907-6908.)

Appellant's picture appeared in the Noyes's house after Lynn returned from the service. She brought photos of the Redding area with her and told Dean it would be a great place to live. Given their marital circumstances, he thought it made sense to move to a small town. He planned to remain in Portland working while she set up a residence and got established in the Redding area. (24 RT 6845, 6872-6875, 6878-6879.) He and appellant discussed the move and the possibility of working at G & G Fencing. (19 RT 5391; 20 RT 5871-5874; 24 RT 6873-6874.) Appellant told Lynn that he could employ Dean, and he could have an unfortunate accident at work. She understood this to mean that, if she wanted, there could be another attempt on his life. (20 RT 5850-5851.)

Appellant was going to help with the rental deposit, with furnishing the house, and with the move. He contacted rental companies in an effort to find a house. (19 RT 5391, 5512-5513; 24 RT 6873.) Rental Network, a business which helped individuals locate rental properties, received $20 from G & G Fencing on June 5, 1998, for the purpose of obtaining a credit report for a customer named Noyes. (Stipulation 30; Court's Exhibit LXXXIX; Exhibits 73, 75; 26 CT 7439-7440, 7528-7529; 27 RT 7760-7761.) Appellant gave Lynn the address of a house in Redding to which she could move. She made a note of it in her address book. (Exhibit 86-B; 24 CT 6867; 19 RT 5392-5393.) Not long before his arrest, he was upset because he found a three-bedroom house and put up money for her to move in, but

she decided not to move. (24 RT 6908.)

**k. The Newport Bay Restaurant; May 30, 1998.**

Appellant told Daniels during the first two weeks of April 1998 that The Company had put out a contract on Dean. (15 RT 4366-4369.)

Lynn decided that she wanted Dean killed in May 1998. She was contemplating killing him when he applied for life insurance. She was uncertain if she started planning to kill him before Carole's death. She devised a plan to kill him and e-mailed it to appellant. They were going to celebrate their wedding anniversary and a friend's birthday around May 30, 1998, at the Newport Bay restaurant in downtown Portland. Appellant would shoot both of them while they were going to their car after dinner. They went to the restaurant with ten to fifteen people on a Saturday or Sunday during the Portland Rose Festival. (Exhibits 5E-31, 5E-32; 23 CT 6717-6718; 19 RT 5396-5398, 5440, 5635-5638; 20 RT 5849-5850, 5777-5778; 24 RT 6815-6816.) There was never an attempt to kill Dean at the Newport Bay Restaurant. (19 RT 5400.)

**l. The Hampton Inn Window Screen.**

Portland Police Department Detective Kerry Taylor went to the Gresham Hampton Inn on June 10, 1998, and recovered the window screen from Room 218. (Stipulation 10; Exhibit 66; Court's Exhibit LVII; 24 CT 6816-6817; 22 RT 6254-6255.)

Frances Evans, a forensic chemist and criminalist with the DOJ Crime Lab in Redding, examined the screen to see if several holes were caused by lead bullets. (Exhibit 199; 23 RT 6699-6700.) Fibers around the holes were distorted outward from the inside of the screen. (23 RT 6743, 6748-6752.) After testing on July 25, 2000, she formed the opinion that there was lead in the areas of the various holes. This was consistent with lead bullets having

been fired through the screen. (23 RT 6700-6705, 6725-6726.)

She also examined two particles that were removed from one or more of the holes on the inside of the window screen. Infrared spectras showed that they were polyethylene, a simple plastic. (Exhibits 201, 204, 204A, 204B; 24 CT 7054-7055; 23 RT 6705-6706, 6729-6731 6748-6752.) Numerous objects are made out of polyethylene and have the same molecular structure. She could not differentiate between milk jugs and lightweight plastic bags. (23 RT 6725, 6731-6734.) She concluded that the bullet passed through some form of polyethylene before going through the screen. The particles were consistent with a lead bullet having been fired through a silencer stuffed with polyethylene (22 CT 6404; 23 RT 6734, 6741-6742, 6744-6747), but they "could be just particles in the air or blown onto the screen from sources unknown." (23 RT 6738.) She could not exclude polyethylene tape, but the particles were not that smooth, clear, and clean. (23 RT 6739.) She would have found lead and copper if a copper jacketed bullet shot through polyethylene pierced the screen. She did not test for copper; she did not have the ability at her laboratory. (23 RT 6736-6738.)

Two pieces of foam, one white (Exhibit 200) and one gray (Exhibit 200A) were submitted to the laboratory in November 2000. (23 RT 6709-6710.) Infrared tests showed that both pieces of foam were polyethylene. The darker foam contained some anomaly in the spectra that she did not see in the white foam and had absorption similar to what was seen in the particles. (Exhibits 202, 203; 24 CT 7056-7057; 23 RT 6710-6712, 6724.) The foam and the particles could have had a common origin. (23 RT 6715.)

**7. The Conspiracy to Kill Carole Garton and Her Fetus.**

**a. The Gartons' Insurance Policies.**

Carole was a licenced employee of independent insurance

agent/broker Grace Bell. She never attempted to get life insurance through Bell. (31 RT 9073-9074; 32 RT 9075.) She discussed life insurance during a telephone conversation with Steven Rhodes, an insurance agent for Allstate Insurance Company in Anderson. Rhodes sent her a generic proposal with a guaranteed death benefit of $125,000. Carole said that she needed to talk it over with her husband. She never requested that a policy be issued. (Exhibit 264; 26 CT 7644-7652; 32 RT 9076-9081.)

On March 12, 1998, paramedical examiner Angie Williams conducted physical examinations of the Gartons, at their residence, in connection with their applications for life insurance policies with Transamerica Occidental Life Insurance Company (Transamerica). She also collected information and signatures. (17 RT 4796-4811.)

Transamerica issued a life insurance policy to Carole on March 25, 1998, identifying appellant as the primary beneficiary. A policy was issued to appellant on April 1, 1998, identifying Carole as the primary beneficiary. Both policies were in the amount of $125,000. They were in full force and effect at the time of Carole's death. (Stipulation 13-A; Court's Exhibit LXX-A; Exhibits 78A-1, 78A-2, 78B-1, 78C-1, 97B, 97C; 25 CT 7356-7356a; 26 CT 7549-7552, 7558-7560; 27 RT 7851-7854.)

**b. Armando Rossi .44 Magnum Revolver.**

Daniels purchased an Armando Rossi Model 720 Special, a .44 magnum, five-shot revolver, at Jones' Fort on April 17, 1998. (15 RT 4382-4385; 24 RT 7012.) Marshall Jones recommended the gun. (24 RT 7064-7065.) Appellant gave Daniels $20 for the background check. He said that The Company gave him the money to buy the weapon. (15 RT 4388, 4394; 24 RT 7014, 7065.)

Daniels filled out a firearms transaction record identifying the

purchaser on April 27, 1998, the day he received the firearm. (Exhibit 60; 22 CT 6427-6428;15 RT 4388-4390; 24 RT 7012-7013.) Appellant handed him money, and Daniels paid the balance due to Jones.[34] (24 RT 7014-7015, 7060, 7065.) He also bought a black, nylon holster and two boxes of ammunition. Appellant decided what type of ammunition to buy. (15 RT 4396-4398.) The receipt did not list the ammunition or holster. Jones explained that he often gave a holster or a box of ammunition to a friend or a good customer who purchased a gun. He did not list it on the receipt if he did not charge for it. (Exhibit 59; 22 CT 6426; 15 RT 4391; 24 RT 7015-7016.)

Although Daniels was nervous and had some trepidation, he knew that he was going to kill someone when he picked up the gun. (15 RT 4414.) He and appellant fired the gun to break it in at an unsupervised range in Red Bluff (15 RT 4477-4478), and in the BLM area behind appellant's residence. They left a box of ammunition on a bench when they returned. (Exhibits 5B-24, 5B-25, 5B-27; 22 CT 6454-6455, 6457; 16 RT 4539-4540.) Gordon saw appellant and Daniels sitting on the couch in appellant's living room holding the Rossi .44 Special. He heard them shooting it in the BLM area behind appellant's residence. (Exhibit 34; 22 CT 6419; 22 RT 6334-6339.)

**c. The Package.**

Appellant told Lynn in 1997 or 1998 that The Company issued orders to kill by delivering a sealed package containing pertinent information and

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[34] According to Daniels, appellant gave Jones $150 and a 20-gauge, woman's shotgun and said he owed Daniels the money for a fencing job. (15 RT 4395, 4407.) Jones told the police at the time of Carole's death that he received the money from Daniels. A few days later, he said that he saw appellant hand Daniels the money. (24 RT 7060-7065, 7067-7070.) A gun was not traded in for the Rossi. (24 RT 7061.)

pictures. If the package was opened, its recipient had to carry out the orders or, along with his or her family, be killed. (18 RT 5191-5192, 5351; 20 RT 5653-5654.)

Appellant solicited Daniels to be an assassin on Daniels' third day of work at G & G Fencing. (14 RT 4164-4173.) He said that, to become part of The Company, Daniels had to complete one assassination "up close and personal," within talking distance of the victim. A physical examination, administered by a nurse at his home, would be required to make sure he was fit and able. He did not know who the victim was, but it would be someone close to appellant. (15 RT 4417-4418; 16 RT 4602-4603.)

Daniels had declined a previous offer to join The Company (14 RT 4150-4154), but he agreed to participate in the assassination because he was financially distraught and appellant told him he would receive $25,000 from a contract on the person's life. Appellant said that he would receive a package containing information about the person he was to assassinate. He was not sure that he could commit a murder, but he feared that, if he started asking questions or casting doubt as to his capability, his life could be taken. (14 RT 4175; 15 RT 4379-4381, 4407-4408.)

Appellant gave him an 11x14 inch envelope at midnight on April 27, 1998, at his trailer. Labels on the outside of the envelope appeared to have been made by a label maker. One label said "Newbie Recruit."[35] Another said "Patriot Recruiter." He thought that the impression in a wax seal on the envelope was of a ram's head. (Exhibit 35; 15 RT 4408-4411, 4425; 17 RT 4843-4844.)

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[35] Appellant called a recruit who was going to commit his or her first hit a "Newbie." (18 RT 5202-5203.)

Appellant stopped him as he was opening the envelope and warned that, if he opened it, he had to follow through or he would end up dead. Daniels said that he would have to commit the assassination because he had already broken the seal. (15 RT 4410, 4416-4417.) Inside the envelope were three photographs, a pager, and several excerpts from newspapers and magazines. All the documents referenced the IRA and/or Sinn Fein and the turmoil in Ireland over independence from English rule. (15 RT 4411-4416, 4434.)

The first photograph he pulled from the envelope was of Carole, standing on a stage with appellant and another man. Both men had been crossed out and Carole's face was circled with a highlight marker. He had seen a similar picture in a photo album at appellant's house. Appellant said he had not seen it before. (15 RT 4418-4422.) Labels on the back of the picture contained Carole's birth date and Social Security number, and information about appellant. The window of opportunity, the time period he had to complete his mission, was 12:01 a.m. on May 20, 1998. Carole was identified as the target of opportunity, the person to be assassinated. (15 RT 4425-4427.)

Another photograph depicted Carole walking away, looking over her shoulder. The third photograph was a picture of Carole kneeling by a waterfall with a bridge in the background. It reminded him of a place he had been rappelling with appellant. (Exhibit 112; 22 CT 6411; 15 RT 4422-4425; 17 RT 4838.) He had read or heard about all the articles in the news. One, about a bomb found in a bookstore in England, was highlighted with the same marker used to circle Carole. (15 RT 4451-4453.)

He had a bad feeling about what was happening. He said that he was going to get caught, and that appellant needed to call someone. Appellant

was upset that Carole was the intended victim. He picked up Daniels' phone and began to dial, then hung up. Daniels kept telling him, "I can't do this. I'm going to get caught. I'm a dead man." Appellant was depressed and wanted to get drunk. He said, "Well, at least it's not me." (15 RT 4436-4438.) He said that he thought someone in The Company wanted Carole dead because she had turned traitor by changing her IRA affiliation from green to orange. (15 RT 4450-4451.)

Instructions on the picture advised that he could be terminated if he did not complete his mission, which he believed meant that he would be killed. (15 RT 4428-4429.) The instructions directed him not to tell his recruiter who his target was, but appellant was in the room as he opened the envelope and they looked over its contents together. They also directed him to get the pager working and to give his recruiter the pager number. He called and activated the pager the next morning.[36] He wrote Normware and the number Page Mart gave him on the instructions. (Exhibits 41, 42; 22 CT 6422-6425; 15 RT 4428-4433, 4435-4436.)

Appellant told him to study and destroy the materials in the envelope. He thought about keeping the photos, but shredded them and flushed them down the toilet. He burned the documents in a barbecue outside his trailer and left them there believing they were burned beyond repair. (15 RT 4438-4439; 17 RT 4852-4853, 4938-4940.)

He and appellant both told Lynn that he had received a package.

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[36] Pager number 800-807-0255 was assigned to Daniels on April 28, 1998. Pagemart Wireless records showed numeric messages transmitted to that number from April 28 through May 28, 1998. (Stipulation 28; Court's Exhibits LXXXI, LXXXV; Exhibit 81; 25 CT 7325-7332; 26 CT 7389-7390; 27 RT 7755-7756.)

Appellant did not identify the intended victim, but it was obvious from their conversations and, ultimately, without saying it, he admitted it was Carole. He said that she and Col. Sean had a discrepancy in Ireland. Also, she was pregnant, the baby was not his, and he did not want the child. (18 RT 5206-5207, 5209.)

Carole was not Daniels' friend; he knew her, but not well. He felt terrible that he would also be killing her baby. He decided to go through with the hit because he felt he was in a corner due to the documents stating he could end up dead if he did not complete the mission. (15 RT 4441-4442; 16 RT 4549.) He had never committed a murder, but he was set on following through because he had committed to do so. It never crossed his mind before he received the envelope that he should have backed out. When what was going on came to light, he felt trapped. He did not feel excitement or enjoyment. (15 RT 4414-4415.)

**d. The Wax Seal.**

Mann began working at the Gartons' residence, doing housework, in late-April 1998. During her first week she heard appellant and Daniels talking about how it would be neat to get a letter sealed with a wax seal. She said, "Yeah, I guess." Appellant said, "Well, Norman got one." They were laughing about it. (24 RT 6955-6956.)

Daniels knew that something was going to go wrong because of the person he was to kill. He kept the wax seal in his night-stand drawer so he would be able to show some proof if he got caught. (15 RT 4434-4435; 17 RT 4851-4853.) He never talked to appellant about the seal. (17 RT 4843.)

David Compomizzo found two wax candle jars in the Gartons' residence on the night of Carole's death. Purplish-colored wax in the center of the jars was melted and the wick was blackened. There appeared to be a

trail of wax on the lip of one jar. (Exhibits 5B-19, 5B-20, 5B-21, 24A, 24B; 25 CT 7291-7293; 26 RT 7477-7480.) He also found a metal emblem and a piece of wax in which an impression had been made. Wax appeared to be adhered to the back edge of the emblem. (Exhibits 5D-3, 5D-4, 5D-5; 23 CT 6782-6784; 26 RT 7480-7481.) Gordon made candles with wine-colored wax. (22 RT 6464-6465.)

An examination of samples of the seal (Exhibit 35), the candles (Exhibits 24A and 24B), and a foreign substance on the back of the Scuba Bubble (Exhibit 30) showed that they were all wax. (Stipulation 17; Court's Exhibit LXXIV; 26 CT 7366-7367; 26 RT 7482-7483.) Examiner Mark LeBeau of the FBI Chemistry Unit could neither include nor exclude the wax in the jars and that on the back of the Scuba Bubble as having the same source. (Stipulation 18; Court's Exhibit LXXV; 26 CT 7368-7369; 26 RT 7483-7484.)

The seal bore an impression consistent with an object having a physical configuration like appellant's Scuba Bubble but, even under a microscope, it bore insufficient unique characteristics to conclude that it was made by that particular emblem. (Stipulation 16; Court's Exhibit LXXIII; Exhibit 35; 26 CT 7364-7365; 26 RT 7482.) An impression in the seal was consistent with being a portion of a finger or palm print, but there were insufficient details to opine as to the identity of its donor, and it was of no identification value. (Stipulation 31; Court's Exhibit CVII; 27 CT 7867-7868; 32 RT 9263, 9265-9266.)

**e. The Doorway.**

Appellant told Daniels that he should have received a "Doorway," an e-mail message containing orders which The Company sent its new recruits. Daniels said that he had probably deleted it. Appellant said he would contact

The Company and have it resend the "Doorway." Daniels received a message dated May 6, 1998 from companyt@usa.net. He kept it, like he had the wax seal.

> Mr. Devlin,
> We would like to start by welcoming you to the family and hope that you will become a added asset to our company of friends and family.
> First off you have received your package and orders if anything of importance is not address please reply to us at once. Your physical will be required before any payment arrangements will be made.Upon delivery of your package you will received further training, support, and payment.
> We understand that you are having a problem delivering the package, for this reason we have attached a Tagger to insure that delivery is met. Tagger is also in place in the case of Patriot becoming a liability.In such a matter the Tagger will identify himself to you using the code enclosed. You will need to be given the orders to apply use on Patriot, this will come in book form.Please be aware
> that you must meet your window and arrangements for safety and payment to be secured. The following is the terms and agreement you will live by with codes, doorways and book drops.
> THE NAME DEVLIN IS APPROVED
> YOUR NEW BOOK OF CODE IS "THE EAGLE HAS LANDED"-HIGGINS
> YOUR NEW BOOK IF PATIOT BECOMES A LIABILITY IS "A PRAYER FOR THE DYING"
> YOUR NEW CODE IS-6815784008 {this should be an easy number for you to remember, all previous codes are void}
> TO REPLY TO USE 0n-line USE THIS ADDRESS AND PUT CODE IN SUBJECT BOX AND THE FOLLOWING WORDS IN MESSAGE,
> MESSAGE-BOOK,this will mean that you have dropped off a book in a safe drop.and need immediate pickup of the book.
> MESSAGE-EMAIL,this will be a message that is left in vague details on our email, use caution!
> MESSAGE-PERSON,this will mean you must talk in person

with a operator
MESSAGE-OUT OF THE RAIN,this means that you need to come in immediately for safety reasons.
IF YOU GET A PAGE WITH YOUR CODE ON IT YOU MUST CONTACT UP AT ONCE-go home , log on and send us e-mail, if you do not receive a 0n-line link in 15 min. log off and wait for phone call. If you are nowhere near a computer or your home you
will be given another page witha a number to call.
THE DROP OFF POINT FOR THE BOOK IS:the wesr side sub space covered by a screen on the moose lodge anderson ,ca.
[[[[[[[[on line communication is rarley used unless needed]]]]]]]]
All book codes sent start on chapter 2
All messages will have codes attached or will not be accepted

(Exhibits 5C-34 40A; 22 CT 6420-6421, 6465; 15 RT 4466-4468; 16 RT 4614-4616; 17 RT 4844-4849, 4872-4881, 4947-4954, 4958, 4979-4983; 25 RT 7276-7280.)

Appellant explained that one became a liability by doing something against The Company, such as trying to leave its service. In that case, Daniels would be tracked down and killed. A "tagger" was someone who followed him to make sure he was on task. He did not have a "tagger," but one was following appellant and was also watching him. The book of code, The Eagle Has Landed, would contain messages from The Company and would be encoded by poking pinholes under each letter of whatever the code sentence was, starting in the second chapter. He never received such a book. Appellant took him to the Anderson Moose Lodge and pointed out a crawl space on the west side of the building. Appellant told him that the code number was his Patriot pager number in reverse. (Exhibit 3; 15 RT 4470-4474; 16 RT 4625-4627; 27 RT 7712-7713.)

Appellant sent a message to companyt@usa.net at 4:50:21 p.m. EDT

on May 6, 1998, to let The Company know that Daniels had received the "Doorway." The subject was appellant's Patriot pager number in reverse. Daniels watched him type it.

> Newdoorway opened...works well confermerd with devlin and jozaphine on dooropening...both parties are good to go...requesting partal help from jozaphine to part time activation on my orders. . . requesting commancd of new team...would like to pick members...requesting Devlin666 as spotter for training and freelance...request ncic on the following lines...request thomas allen garret,portland ore.....request...Dean,portland oregon.....request christia sam woelfer,portland , or.....request larry clark,redding,ca.....request any info pertaing to activity marked"prayer for the dying ".....request authorization on tail, action being taken to insure scurity....request briefing on devlin wanting contact....request new window,window impossible to meet due to weather,work,and personal involvement...request book delivery to home address....request team be assembled and loaded...request operating money needed for immediate recon....request marshall jones,redding ca. as pick up point your best asset"Patriot "

(Exhibit 90; 23 CT 6764; 16 RT 4616-4617.) The request for briefing concerned Daniels' need for help. He was asking for more time to assassinate Carole. He knew that it was going to be extremely hard to do, and he needed time to think. (16 RT 4617-4619.)

The companyt@usa.net account was created by The Company, 10 Downing Street, Derry Ulster 128549, Ireland, on May 4, 1998, at 1:44 p.m. Mountain Daylight Time (MDT). The password was "loveline." (20 RT 5932-5934; 21 RT 6015-6016.) Daniels did not know how to access the account. He never saw appellant access it. (17 RT 4888.) Several web pages on the hard drive in the Noyeses' computer related to the companyt@usa.net address. (Exhibit 213-217; 25 CT 7264-7270; 25 RT 7268-7269, 7273.)

On or about January 6, 1999, USA.net's postmaster, Kathleen Flannes, retrieved and preserved documents in response to a subpoena seeking the account's transactions. The documents showed the dates and times the subscriber logged in; the ISP and IP addresses used to access the account; a log of the inbound and outbound e-mail transactions; the content of the messages; and the routing messages took as they traveled from one system to another. She examined and made copies of each record and prepared a chart summarizing the information related to each message. (Exhibits 90, 137A-137F, 137I, 137K, 137M-137W, 137Y, 137Z, 178; 23 CT 6759-6769; 25 CT 7163-7190; 7 Supp.CT 1567; 16 RT 4614; 20 RT 5925-5928, 5930-5931; 21 RT 5959-5964, 5974, 5981, 5991-6003, 6042-6043.) On January 21, 1999, at the prosecutor's request, she changed the account's password. (21 RT 6019-6022, 6037.)

Arnold logged into the account on January 21, 1999. Where the message was still available, its text matched the subpoenaed records. (Exhibits 137, 137A-137Z; 25 CT 7163-7190; 25 RT 7162-7163, 7166.) A message sent at 6:55 a.m. PDT on May 6, 1998, to "devlin666" with the subject "RE:MAIL SENT:/DOORWAY/" was the same as the "Doorway" Daniels received. (Exhibits 90, 137F-137H; 23 CT 6763-6764; 25 CT 7170-7173; 21 RT 5964-5965, 6003, 6055-6056; 25 RT 7257-7258.) A message from PATR553@aol.com concerned "newdoorway opened." (Exhibits 90, 137N; 23 CT 6762; 25 CT 7178; 25 RT 7259-7261.) A file with the same content was written to the hard on Gordon's computer drive at 10:34:44 p.m. PDT on May 11, 1998. (Exhibit 155; 25 CT 7229; 25 RT 7122-7123.)

Arnold recovered a page that was written to the hard drive of Gordon's computer at 10:32:44 p.m. PDT on May 5, 1998. It was more or less what the subscriber would see while spell-checking an e-mail message.

Its content was substantially the same as the "Doorway." (Exhibit 138; 25 CT 7191-7193; 25 RT 7105-7108.) Another page, written to the hard drive at 11:29:44 p.m. PDT, was found in unallocated clusters on the hard drive. It was what a USA.Net subscriber would see while sending a message. The fact that nothing was entered in the "To:" column told him it possibly was sent without an address, which probably would have resulted in the message coming back. Yet another message was written to the hard drive at 11:56:24 p.m. PDT. It was the same as the "Doorway." (Exhibits 140, 140A, 141, 141B, 141C, 141D, 141E, 142; 25 CT 7196-7204; 25 RT 7110-7121.)

**f. The Murder of Carole Garton and Her Fetus.**

After the attempt to kill Dean, appellant told Lynn that The Company wanted to kill someone close to Daniels. He asked her to keep tabs on Daniels so he could learn who the target was. He initially thought that he was the target because he was out of shape and could not carry out assassinations, and The Company was irritated. Also, Carole had taken out a life insurance policy and someone was following him. In February or March 1998, he said, "I think it's Carole, and there is nothing that I can do about it." He thought that Sean had a personal vendetta against her because she had worked for the Protestants and had shot him in the leg in Ireland.(18 RT 5187-5191; 20 RT 5659-5661, 5671-5673, 5835-5836.) Her murder was to occur before the baby's due date. He did not express any concern that the baby was going to die. He said that, if Daniels did not kill Carole, he would have to kill both of them because he told Daniels about The Company. (19 RT 5394-5395, 5525.)

He asked her to assist Daniels. (18 RT 5192-5193.) He said that the situation with Dean had put him in an awkward position with The Company and reminded her of what he had said in the hotel room in Oregon, that she

was in over her head and The Company might need her services whether she wanted to be involved or not. If she did not cooperate, her family would be in jeopardy and everyone, including himself, would be harmed. Her job would be to advise and encourage Daniels, to provide information about what he was telling her, and to relay messages. She offered her assistance because she felt she had no option. (18 RT 5203-5204; 19 RT 5504-5506; 20 RT 5836-5837, 5861.) He said it was okay to talk to Daniels on the computer, that he was really into computers, a "technogeek." (18 RT 5194.)

She had instant message and chat room conversations with appellant concerning The Company, including discussions about Daniels carrying out his orders. (18 RT 5339-5340.) She provided information about what Daniels was doing and his work schedule. Arnold located a chat conversation between her and appellant in unallocated clusters on the hard drive in Gordon's computer. He was not able to determine when it was written to the hard drive. It occurred after she learned that Daniels had received the Package. (Exhibits 134, 135; 25 CT 7346-7347; 18 RT 5337-5338, 5341-5360; 27 RT 7698-7699.)

She believed that Sean was either the head of or high up in The Company. She e-mailed him more than once. She could not remember if, when she first wrote to him, she knew that Daniels was planning to kill someone. She talked to him about keeping tabs on Daniels because appellant asked her to. She did not perceive that she was participating in getting someone killed. (20 RT 5661-5665.)

Appellant told Daniels during the first week of May, 1998, that Lynn would be his "profiler." She would psychologically evaluate him and his ability to commit the murder and watch to make sure he did not become wild or unstable. Daniels suspected that she had some involvement in paying for

Carole's death. She never offered him money to kill Carole, but she told him a few times that she really hated her.[37] (15 RT 4442-4443; 16 RT 4563; 17 RT 4937-4938.) He believed that appellant and Lynn were good friends. Appellant said that they had engaged in sexual relations. Daniels did not try to confirm it with her. (16 RT 4556.)

They began communicating before he received the package. (18 RT 5205; 20 RT 5735.) Their first telephone conversation was on May 1, 1998. (16 RT 4740-4741; 17 RT 4829.) There was no talk at first about killing anyone. He told her a little bit about his life and his child. (18 RT 5205.) Most of their conversations were on the computer. The first time he recalled contacting her on the Internet was around May 1, 1998. Appellant provided information about how to contact her through the screen name "Jozaphine." They communicated every day or every other day. (16 RT 4769; 18 RT 5208; 20 RT 5673-5674.)

They talked about sexual intercourse, fellatio, and cunnilingus in their first Internet conversation, and they had cybersex on a number of occasions. (17 RT 4828-4829; 20 RT 5734-5735) They played Vampire Tavern, a game involving seduction and cybersex, for more than two weeks. (16 RT 4739-4740; 20 RT 5719-5722.) Arnold found a document on the hard drive in the computer in Daniels' residence that appeared to be a cybersex session between them. (Exhibit 182; 23 CT 6752-6755; 20 RT 5722-5735; 27 RT 7697-7699.)

The sexual game-playing bled into discussion of The Company. Lynn understood that Daniels' involvement related to killing someone and, for

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[37] He did not recall telling the police that he believed Lynn was going to pay him $25,000, or any amount of money, to kill Carole. (17 RT 4831.)

part of the time, she knew it involved killing Carole. (20 RT 5763-5764.) They did not talk a lot about what he was to do. (18 RT 5349-5350.) He was having problems deciding how to assassinate her, and she offered some alternatives. One was to kill Carole in her vehicle and make it look like a carjacking. Another was to kill her at her residence. She spoke to appellant one afternoon when Daniels was at his house. Appellant said that they were watching training films like "The Jackal." She asked Daniels on the computer why he did not go with something like the training films. She did not think she was specifically encouraging him to kill. (16 RT 4548-4549; 17 RT 4830-4831; 18 RT 5208, 20 RT 5667-5669, 5779-5781, 5860.)

Daniels learned of Col. Sean's involvement in Carole's death about a week before her murder. Appellant said he had discovered that Sean was behind Carole's assassination, and he was agitated at Daniels for not completing his assignment in a timely fashion. He expressed great fear of Sean and said that, if he ever flew out to meet them, he wanted to have the first shot when he got off the plane. As far as Daniels knew, Col. Sean was the head of Company T and was directing him and his activities. He never had any telephone conversations with him. After he received the package, appellant told him to put the name "Sean88" on his AOL buddy list so he could chat with him if he came online. He exchanged e-mail messages with Sean. He could not recall the date he sent the first message. (15 RT 4457; 17 RT 4841-4842; 27 RT 7730-7732, 7738-7740.)

He received a message from companyt@usa.net dated May 11, 1998, at 4:58:24. The subject was the number on appellant's Patriot business card in reverse.

This is Sean,
You must have some real good friends or have sexually

pleased Jozaphine on some sub-atomic level because they are really sticking it out on the line for you. Me, I don't buy this wonder boy crap, you have proved nothing to me and have shown no absolute resoure management abilities in any form yet.
My nerves are waring thin, I am not known to have a great deal of patience in such matters. So you listen good and hard at the following. You know to much and are already on the edge so this extra burst of information will only close the verifycation of your situation if you fail in anyway.
We need you to deliver this package well and quick without any incident. I am one inch away from pulling you down and personally handeling this situation myself. We are in a crunch ! Your package means nothing to us other than controlling Patriot. Patriot has skills that maybe 20 or 30 people in the world have, but he is lazy, out of shape, and unmotivated. We did not spend years of investment and training to have it all lost because he wants to play house with some former wanna be who decided not to follow orders, or a newbee that fucks up what ought to be a joke assinment. Patriot has a real trust problem, we have trainned professionals that he refuses to work with. He accepts our money and support services , but not out members. We need him to become a permanate part of the family. He has packages that are involved on an international level. Prtiot only trust you, sometimes Jozaphine and two others, unfortunatlly non of them are feield operaters. {CONT}

(Exhibit 90; 23 CT 6765; 16 RT 4619.) He took the message to mean that he had better do what he was told or he was going to be in trouble. (16 RT 4619-4621.) A portion of an e-mail message was located in unallocated clusters on Gordon's hard drive. The message said:

> This is Sean, You must have some real great friends or have sexually pleased Jozaphine on some sub-atomic level , because they are really sticking it out on the line for you. Me, I don't buy this wonder boy crap, you have proved n.

(Exhibits 152, 212; 25 CT 7226, 7255-7263; 25 RT 7124-7126, 7152-7153.)

Daniels received another message at 6:04:32. The subject was "6815784008/SEAN/CONT."

> Patriot wants to have his own team and support crew. He has us over a barrel, and we can't say no.
> So hear it is, You unfuck whatevers going on out there and deliver quick, well, and unharmed. Then you and yours can gor to Portland and have a fuckfeast with our people up there until your next assinment. You have proven nothing to me and I sign the checks, but you must bave something going on because Jozaphine and Patriot are keeping you in good terms. You better live up to all the exspectations I have been told of or as I said , I will personally fly there overnight to see you.
> LASTLY YOUR REQUEST TO MEET IN PERSON:
> DENIED....I do not meet newbees they don't last long enough to bother.
> YOUR REQUEST FOR A TRANSPORTATION:
> DENIED....To late in game for such a request...plus you have no license (that's another sore spot with me).
> YOUR REQUEST FOR MONIES:APPROVED...need to be more specific on how much and fund account transfer.
> In the futur make all requests upon getting your package, not at the end of your window.
> Also, I never talk to newbees ,so understand this- PERFORM TO EXSPECTATION OR BECOME A LIABILITY

(Exhibit 90; 23 CT 6765; 16 RT 4621-4624.) He had no transportation, so he requested a vehicle and some money to effect a disguise. The request for a vehicle was denied. Thereafter, appellant offered him money. Daniels declined, saying "Well, you know, I don't have the vehicle, so the money won't do me any good, either." (15 RT 4475-4476; 16 RT 4613-4614, 4624-4625.)

He believed that Company T existed while he was reading these messages. He was trying to talk to Sean personally to get help. He needed to explain that he could not kill Carole and he was going to get caught. Appellant had explained that Sean did not mess around, and he would come

out and kill Daniels and everybody involved. (16 RT 4634-4625.)

He received a copy of a message addressed to jozaphine@aol.com from companyt@usa.net. The subject was "Our boy" and there was a copy to lynn666@aol.com. He was talking to Lynn, who was communicating with The Company about his state of mind. He was very agitated about what he had to do. He kept saying that he would not be able to do it and he would get caught:

> Is there something going on that I'm not aware of? My boy is getting weird on me! He seems to be in a very dark cloud and is becoming very agreeable with orders and comments from us. If this is to break him down so he may become cold and productive, it has worked. You must not push too hard, formittably, he will always break when bent. You must be in contact with me if his mood becomes more aggressive or subtle.

(Exhibit 137O; 27 RT 7734-7737.)

Lynn sent a message on May 14, 1998 at 1:49 p.m. EDT from jozaphine@aol.com to companyt@usa.net account, sent. The subject was "boys."

> greetings , I don't think you should be concerned about devlin. I think hes fine. I haven't upset him im sure of justbeing a friend like I was told.you know its his first deal hes just figuring things out.patriot on the other hand im not sue of , he thinks I wronged him in some way I can't figure out.im just going to givew him some space I know hes going through a lot.ijust have to wait for him like I always do.and always will do.i know all of our personal lives are wearing hard on us I know im ready to blow a fuse.im sure thats the least of your concern though .your boys will be fine im sure . Id also like to assure you remind you you needent remind me about patriot though hes where my loyalty is all the time and my love regardless of how it may seem.

(Exhibits 90, 137P; 23 CT 6763, 6766; 25 CT 7180; 18 RT 5274-5276,

5334-5335; 21 RT 5968-5969.) Daniels never saw the message. (16 RT 4625.)

Daniels took off from work the week before Carole's murder. Appellant was at his trailer just about every day that week. They talked about the plan to kill Carole. Appellant did not express concern about killing her before May 20th. (27 RT 7732-7734, 7740.) Daniels said that he was having a problem with where and how he was going to commit the murder. Appellant suggested that Saturday, May 16th, would be a good day because everyone would be at the gun show at the Anderson fairgrounds. (15 RT 4476-4477.) They talked about what to do with the gun. Appellant said he could keep it, drop it in the Sacramento River, or destroy or bury it, just so it could not be recovered. (15 RT 4440.)

Gordon had no knowledge of the plan to kill Carole prior to her murder. He did not hear anyone discussing a plan to kill her. (22 RT 6334, 6417, 6464.)

**1. May 16, 1998.**

Daniels and appellant went to a gun show at the Anderson fairgrounds on Saturday, May 16, 1998. (15 RT 4478; 24 RT 6902, 6938, 7011-7012.) Gordon was the last person to leave the house that morning. He locked the door when he left. (22 RT 6420, 6447-6448.) Tracie Jones met Carole at the gun show. They drove together to the hospital for a maternity tea and tour and returned to the gun show afterwards. (15 RT 4479-4480; 24 RT 6901-6903.)

Carole left the gun show with Daniels. They had been watching videos the night before, and Daniels said he wanted to finish watching one of the movies and return them. They entered the house and he put the movie on in the front room. She watched part of the movie, then went to her

bedroom to lie down. Daniels finished watching the movie and told her that he was going to return the videos. He left the back door open so he would not make any noise coming in, then drove 50 yards and pulled into Hacienda Road. He thought about jumping the fence and coming in through the back door to shoot Carole, but it was hard to even contemplate. He returned the videos and put gas in the Jeep at the Kickin' Mule 76 station, then went to his trailer to change clothes. (15 RT 4480-4488.)

He stopped at a gate just across from Hacienda Road on his way back to the house. He climbed over it and went through a field behind the house, but stopped at the fence because he could not see the house. Appellant had warned him that Carole would not hesitate to kill if she knew her life was in danger, and he was afraid that she would have a weapon if she saw him coming over the fence. (Exhibit 5B-1; 21 CT 6309; 15 RT 4488-4491; 16 RT 4538.)

He returned to the Jeep and drove to the house. Carole was still lying in bed. He was wet from going through the field and told her that it had started to rain when he got out of the car to urinate.[38] He went back to the front room and turned the computer on. He decided to "get up close to her" and "do it fast," cocked the pistol, and stuck it in his pocket. He stood at the side of the bed, talking to her and contemplating what he was about to do. He thought about his son, his life, and his family and realized, "You know, I got to do this or I got to die." He thought, "Now or never," and turned and shot her in the head. He continued to fire because he did not want her to suffer. (15 RT 4370-4371, 4397, 4492-4498.)

A bullet found in Carole's shirt in an area adjacent to her head

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[38] It was sunny that day, with sporadic showers. (15 RT 4488.)

(Exhibit 9), the bullets removed from her body (Exhibits 55, 56, 57), and the bullet removed from her fetus (Exhibit 58) were all fired from the .44 caliber Rossi five-shot revolver. (Stipulations 3, 4; Court's Exhibits L, LI; Exhibit 34; 22 CT 6484-6487; 16 RT 4680, 4690-4691.) Daniels got the silver tip hollow point ammunition from appellant. (15 RT 4398.) An analysis of the gunpowder patterns on her Carole's body and a blanket showed that, at the time the revolver was fired, the distance between the muzzle and her left cheek was approximately 12 inches. The distance between the muzzle and the back of her neck was less than three inches. The distance between the muzzle and the bullet holes in the blanket was approximately six to nine inches. (Stipulation 5; Court's Exhibit LII; 22 CT 6488-6489; 16 RT 4680, 4691.)

Mann went to the gun show to help Marshall Jones with paperwork. She stayed until it closed at 5:00 p.m.[39] (24 RT 6938.) She and Gordon had planned to spend the evening together, but appellant told her at the gun show that everyone planned to meet at his house and go out. (22 RT 6287, 6416, 6421; 24 RT 6951-6952.) She went to her parents' house in Anderson and left around 5:10 p.m. to drive to the Gartons' house to go to dinner with Gordon, appellant, Carole, and Daniels. She saw Daniels driving Carole's Jeep at a stop sign at the intersection of Panorama Point and Balls Ferry

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[39] Mann realized in May 1998 that she was having memory problems. (24 RT 6976.) She could not keep track of the time on her analog watch. (24 RT 6966, 7007-7008.) She thought that the times she gave when she was interviewed on the evening of the murder may have been inaccurate. (24 RT 6954, 6961, 6976-6977.) She was still experiencing memory lapses and blocks at the time of trial. (24 RT 7009.)

Roads.[40] She waved, but he did not wave back. She assumed he did not see her. She arrived at the Gartons' house between 5:30 and 6:00 p.m. The front door was open, the television was on, and nobody was home. (24 RT 6939-6942, 6955, 6960.) She watched television for ten or fifteen minutes, then played some computer games. She did not notice Carole's body in the bedroom. (24 RT 6943-6944, 7009.)

Gordon clocked out of work at 6:33 p.m. and went straight to the Gartons' residence. It took about 15 minutes. (Exhibit 197; 25 CT 7130; 22 RT 6286; 23 RT 6656-6657.) Mann was playing Centipede on the computer when he arrived. She said that she had been there 10 or 15 minutes. The door was unlocked and the television was on when she arrived. Gordon thought that someone had "robbed" the house and went to his room to check his guns. (22 RT 6287-6289, 6293-6294, 6415, 6421-6424, 6447-6448, 6451-6452.) He did not notice anything unusual in Carole's bedroom. (22 RT 6444-6446.) He wondered where she was. She was supposed to meet them there around 6:00. (22 RT 6449.)

Appellant came in about five or ten minutes later and asked where Carole was. Mann said she thought Carole was with him. He went out the front door, then came back in and said that the Jeep had been stolen.[41] It seemed strange to her that he did not know where Carole was but thought the Jeep had been stolen. Carole usually drove the Jeep. If she was not there, she thought he would have assumed that Carole had it. Appellant wanted her to

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[40] She initially did not remember seeing Daniels in the Jeep. She told the police about the incident in July 1998. (24 RT 6965-6966.)

[41] She remembered this in June, 1999. (24 RT 6960-6964, 7005.) Gordon did not recall appellant expressing any concern about the Jeep. (22 RT 6294, 6354.)

call 911. She refused because she had seen Daniels driving the Jeep. He turned to Gordon, gave him the phone, and said, "Well, then, I guess you'll have to make it." Mann told Gordon it was silly to call when she knew that the Jeep had not been stolen.[42] (22 RT 6289-6292, 6449, 6451-6453; 23 RT 6663-6664; 24 RT 6944-6947, 7007-7008.)

Appellant went into the master bedroom, then came to the door between the kitchen and the living room and yelled out, "Fuck, call 911." He came into the living room and started stammering that someone needed to call 911 and get a helicopter to the house. Mann went into the bedroom while Gordon called 911. She saw Carole's body on the floor on the left side of the bed. Appellant followed her into the room and checked for a pulse. Mann turned on the light and pulled down the blanket and saw a little spot of blood on the bed and on Carole's side. Appellant picked up Carole's head, and she saw a lot of blood. (22 RT 6291-6292, 6453-6454; 24 RT 6946-6949.)

Gordon dialed 911 and walked into the master bedroom. Carole was lying on the left side of the bed. Her hair was soaked in blood and there was blood on the floor. He saw a bruise around her left eyebrow. He thought she had fallen off the bed. Appellant was trying to revive her. He checked her eyes with a flashlight for dilation, attempted cardiopulmonary resuscitation (CPR) for about 15 seconds, and talked about doing a tracheotomy. Gordon cleaned and sterilized his knife, but appellant did not use it. He left it on the bed. He got his Mag light and a battery pack. Neither were working. He left them on the bed. (Exhibits 5A-10, 5A-12, 5A-14, 5A-15; 22 CT 6337, 6339; 24 CT 6835-6836; 13 RT 3882-3885; 14 RT 3989-3990; 22 RT 6294-6298,

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[42] She remembered this in 2000. (24 RT 6966-6967.)

6343-6345, 6368-6369, 6457-6462; 23 RT 6652-6655, 6688-6690; 24 RT 6949-6950.)

Appellant then yelled at them to get out. Mann left and Gordon followed her with the phone in his hand. She stood outside the house trying to figure out what was going on while Gordon walked around talking on the telephone. Appellant told him that Carole had been shot, and to forget the air ambulance and get the sheriff's department. Gordon went to the neighbor's house, then walked back and told Mann to wait on Reading Island for the air ambulance. He went into the house while she went to Reading Island. (Exhibit 95; 7 Supp.CT 1539-1553; 22 RT 6347; 24 RT 6952-6953, 6999.)

Gordon reached 911and had a conversation with the dispatcher. (Court's Exhibit XCII; Exhibits 94, 94A, 95; 26 CT 7556, 7568-7583; 7 Supp.CT 1539-1553; 22 RT 6298-6304, 6340-6343, 6345-6348, 6353.) While he was on the phone, he had a conversation with appellant's neighbor about getting a flashlight and driving Carole to the hospital. The neighbor gave him a yellow flashlight. Appellant used it to look into Carole's eyes for dilation. (Exhibit 5A-12; 22 CT 6339; 22 RT 6343, 6455-6456, 6461; 23 RT 6665, 6688-6689.)

Shasta County Sheriff's Deputy Ronald Smith responded to the residence at approximately 6:50 p.m. in response to a call concerning a possible gunshot victim.[43] (Exhibit 5A-1; 21 CT 6328; 13 RT 3752-3754.) He saw Deputy Blair at the front door, yelling at someone inside, and hurried to his location. Appellant was coming out of the house with blood on his hands and shirt, saying that his wife had been shot and that he was trying to

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[43] Smith's report of the incident indicated that he arrived at the residence at 7:20 p.m. (13 RT 3783-3785.)

do CPR on her. Deputy Foster secured appellant while Smith and Blair searched the house. They discovered a white female in one of the bedrooms, lying on her back on top of some bedding next to the left side of the bed. Blair was unable detect a pulse. They searched the rest of the house and allowed medical personnel in. Smith called the dispatcher to ensure that the detectives had been notified and preserved the scene, then went outside and asked appellant what had happened. (13 RT 3755-3762, 3767-3768.)

Appellant was upset. He said that he had tried to give Carole CPR and to perform a tracheotomy, and that they needed to go back in and provide medical assistance. Smith responded that the medical people were working on her and asked again what had happened. Appellant said something to the effect of "They were here." When Smith tried to clarify, appellant said that he wanted them to assist his wife. Smith called for a chaplain and allowed appellant to call Tracie Jones. When he went back into the house, Carole's body was in the middle of the living room floor, surrounded by medical personnel who were attempting to revive her. They advised that they were unable to do so. (13 RT 3762-3765.)

Part-time Fire Engineer Louis Finck arrived at the residence at 7:09 p.m. (13 RT 3794-3800, 3818-3819.) He observed a female in the bedroom, lying next to the bed with her head against the wall. There was a red area in the corner of the pillow upon which her head was resting. He saw what he believed was a bullet exit wound on the back of her head. (Exhibit 5A-13; 22 CT 6340; 13 RT 3801-3803.) She was cool to the touch. (13 RT 3820.) He did not feel a carotid pulse, and there were no signs of breathing. He and another firefighter moved her to the living room. (Exhibit 5A-7; 22 CT 6334; 13 RT 3804-3806.) He cut off her shirt and bra to expose her sternum and performed CPR for about 15 minutes. When he did compressions, blood

came out of the bullet holes on both sides of her ribs. (Exhibit 5A-4; 22 CT 6331; 13 RT 3815-3816, 3820.)

She had blood on her face, both sides of her body, her upper torso, and her hands. There were bullet hole entry wounds in her left chest (Exhibit 5C-3; 22 CT 6354) and in her upper left rear buttocks. (Exhibit 5C-6; 22 CT 6357; 16 RT 4692.) There was an apparent bullet wound on her right jaw line where stippling could be seen, and another apparent bullet entry just under her left eye, with some bruising of the eye and stippling. (13 RT 3894.) There were two bullet holes in a blanket on the bed. Both of the holes showed a stippling pattern. (13 RT 3931-3932, 14 RT 3989.) Gunpowder residue around both holes was consistent with the blanket being around at least a portion of her body and the bullets penetrating the blanket in those two spots. (Exhibit 5A-6; 22 CT 6333; 16 RT 4692-4693.) A projectile was discovered in her shirt, on the right side of her head. (Exhibit 5A-8; 22 CT 6335; 13 RT 3894-3895; 14 RT 3989.) She was pronounced dead around 7:30 p.m. (13 RT 3817, 3820-3822.)

Deputy Foster spent 20 to 25 minutes with appellant. He was distraught and very upset, and had what appeared to be blood on several locations on his body and extremities. He said several times that he was an EMT, and that his wife needed help. He made crying sounds for two or three minutes, but Foster saw no tears. He asked for drink of water, but only took a couple of sips. He grabbed what Foster believed was a pager from the right-hand side of his belt, looked at it for about two seconds in anger, and threw it into the field next to the driveway. (13 RT 3769-3775, 3783,

3785.)[44]

Appellant told Foster that his Jeep was missing and might have been stolen. Foster broadcast a "be-on-the-lookout" for a white, 1992 Jeep. The vehicle was located at the Park-and-Ride lot south of Cottonwood. Compomizzo went to the Park-and-Ride lot and photographed a white Jeep Wrangler with a black soft top. (Exhibit 5A-31; 22 CT 6350; 13 RT 3775-3779, 3785-3786, 3788, 3867-3869.) (13 RT 3866-3868.) Then he went to the Gartons' residence. (13 RT 3870-3873; 14 RT 4044.) A deceased female in the late stages of pregnancy was on her back on the floor. There were obvious signs of resuscitation efforts. (Exhibit 5A-41; 22 CT 6331; 13 RT 3874-3875.) He and Deputy Sandbloom walked the house together after the coroner arrived and removed Carole's body. (14 RT 4045-4047, 4062-4063.)

Sheeting and blankets appeared to have been drug off the bed into a four-foot-wide area between the bed and the east wall. There was blood on the bedding. Carole's head rested on a pillow. Blood was pooled on the floor and the sheets. (Exhibits 5A-12, 5A-13; 22 CT 6339-6340; 13 RT 3886-3887; 14 RT 3990.) A computer was on a table in the southeast corner of the living room. The computer was on and the game Centipede was on the monitor. A 1998 calendar with a picture of a Moose on its cover was on the table. An "X" was marked through May 20th. (Exhibits 5A-28, 18; 22 CT 6348; 23 CT 6788-6814; 14 RT 3992, 4021.) A picture of appellant and a glass mug with a cigar in it were on a shelf unit. (Exhibits 5A-29, 30, 30A;

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[44] Foster did not include these observations in a report he prepared after the incident, or in a subsequent report, because he had informed Detective Clemens, who he believed was in charge of the investigation, of some of his observations, as was his custom and practice. He brought them to the prosecutor's attention on November 30, 2000, after the trial had begun. (13 RT 3774, 3786-3787, 3789-3791.)

22 CT 6349; 14 RT 3992-3993, 4025.) A label maker with a digital printout was on the built-in shelf in the master bedroom. (13 RT 3942-3944.)

On May 17, 1998, Deputy Carol Burch went to a cattle gate on Adobe Road from which she could see the Gartons' residence. She saw fresh tire impressions in the grass directly in front of the gate. There were also impressions in the wet grass on the other side of the roadway. One in particular appeared as if someone had climbed over the gate and had fallen and landed on his or her knees. There were three or four other impressions in that 30-inch wide area. She followed a trail that looked like someone had walked through the wet grass for about 70 feet. (Exhibits 3, 5B-1, 5B-3, 5B-4; 21 CT 6309, 6311, 6312; 13 RT 3828-3835, 3841-3843.) She measured the tire impressions in the grass. Each measured between seven-and-a-half to eight inches. The inside measurement between the impressions was 48 inches; the outside measurement was 65 inches. The tires on a white Jeep at the Shasta County Jail were eight inches wide. The inside measurement between the tires was 49 inches; the outside measurement was 65 inches. (Exhibits 5B-2, 101; 21 CT 6308, 6310; 13 RT 3835-3841.)

Compomizzo and Supervising District Attorney Investigator Fred Carelli served a search warrant at the Gartons' residence on May 21, 1998. They found a photo of appellant and a glass jar with a cigar in it on the shelf unit in the living room A metal emblem similar to a diving mask and airway for a diver was in the glass mug. (Exhibits 4, 5B-11-5B-12, 30, 30A; 22 CT 6453, 6498; 13 RT 3936-3939; 17 RT 5020-5024.)

Two notebooks (Exhibits 28, 29; 24 CT 6822-6823; 6 Supp.CT 1340-1377; 14 RT 4024-4025); two invoices from North Cal Printing; a bank statement with handwriting on it; and AT&T Wireless Services Messaging Center instructions were found on the computer center in the living room.

(Exhibits 17, 19, 19A, 96, 98, 99; 23 CT 6680-6681, 6700-6701; 26 CT 7556; 27 CT 7831-7832; 13 RT 3939; 14 RT 4021-4022, 4037-4038, 4043-4044.) Lynn's AOL screen name, a portion of her computer code, and an e-mail address were written on the instructions in appellant's hand. (Exhibit 17; 23 CT 6680; 18 RT 5230-5233.)

A Hallmark bag containing two life insurance policies was on the master bedroom floor. (Exhibits 5B-18, 31A; 26 CT 7424, 7514-7515; 13 RT 3945; 14 RT 4035-4037.) Three candles, two in jars and one in an open candle holder, were on a night stand. (Exhibits 5B-19, 24A, 24B; 25 CT 7291; 14 RT 4023-4024.) Patriot and Rancho Safari business cards were on the dresser. (Exhibits 25, 26; 6 Supp.CT 1235-1236; 14 RT 4024.)

A box of Winchester-Western .44 Smith and Wesson special ammunition was on a bench on the front porch. (Exhibits 5A-3, 5B-25, 5B-26, 32, 32A; 22 CT 6330, 6455-6456; 13 RT 3947-3948; 14 RT 3988-3989, 4005-4006, 4008.) A visible impression on an expended shell casing in the box was made by Daniels' left index finger. (Stipulation 1; Court's Exhibit XLVI; Exhibit 32; 2 CT 6371-6372; 14 RT 3984, 4033.)

Detective Steve Grashoff served a search warrant at the Gartons' residence on May 27, 1998. A photo album in the master bedroom contained a photograph of Carole next to a creek with a small bridge in the background. (Exhibits 5, 112; 22 CT 6411; 26 RT 7718-7719.)

**2. Autopsy.**

Shasta County's Forensic Pathologist, Dr. Susan Comfort, reviewed the report of an autopsy performed on Carole's body by her predecessor, Dr. Harold Harrison, on May 18, 1998. She also reviewed diagrams Dr. Harrison prepared as part of the report, photographs taken during the autopsy, an EMT's report of his observations of the victim, and a DOJ ballistics report.

She concluded, as did Dr. Harrison, that the cause of Carole's death was multiple gunshot wounds. (14 RT 4088, 4090, 4092-4093, 4114.) Carole's fetus was eight-and-a-half months old and viable. (14 RT 4099.) It died of a single bullet wound to the head which penetrated the brain. It would have died from lack of oxygen within two minutes of Carole's death. (17 RT 5000-5002.)

Carole had been shot five times. A bullet wound to her left buttocks area perforated her uterus, the amniotic sack surrounding her fetus and the head of the baby, then angled downwards and re-entered the baby's body in the area of the right anterior shoulder and coursed towards the right upper back. The bullet was recovered underneath the baby's skin just below the tip of the scapula. (Exhibits 5C-6, 34, 52, 54, 58; 22 CT 6357, 6418; 14 RT 4014-4015, 4097-4100.)

A bullet wound on the left side of Carole's chest exited on the right side. The exit wound appeared to be about a half an inch in diameter. A bullet was lodged between her body and clothing. (Exhibits 5C-3, 5C-4; 22 CT 6354-6255; 14 RT 3993, 4100-4103.)

A bullet wound to Carole's neck, slightly behind and below her right ear lobe, passed upwards towards the left orbit, going through all of the bones in her face, passed behind the nasal bones, and came to rest within her left eye socket, resulting in a periorbital contusion of her left eye. (Exhibits 5C-2, 5C-5, 53, 55; 22 CT 6353, 6356; 14 RT 3993, 4013-4014, 4106-4107, 4109-4110.)

A bullet wound to her left cheek was consistent with the left side of her head facing the gun when it was fired. A deformed, large-caliber projectile was recovered from the right petrous bone at the base of her skull. (Exhibits 5C-1, 53, 56; 22 CT 6352; 14 RT 3993, 4108, 4110-4111, 4113-

4114.) A bullet wound to the back of the right side of her neck, at the hairline, went directly into the cerebellum. (Exhibits 5C-5, 57; 22 CT 6356; 14 RT 3994, 4109-4111, 4113.) Both of these wounds could have been fatal, especially the bullet that entered the brain. (14 RT 4109-4110.)

The stippling around the wounds and the fairly tight patterns indicated to Dr. Comfort that the gun was fired between six and twelve inches from Carole's face. Depending on the gun, the type of ammunition, and the length of the barrel, the barrel of the gun was anywhere from one to twelve inches away from the wounds. (14 RT 4106-4109, 4111-4112.)

Dr. Harrison found blood in both chest cavities. Carole probably would have been in shock within five or ten minutes and possibly deceased within 10 minutes. It is possible that she could have survived the bullet wound to the base of her brain because it did not actually perforate the brain stem. (14 RT 4114-4115.)

**g. Daniels' Arrest and Interrogation.**

After Carole's murder, Daniels "lost it." All he remembered was pulling the door shut as he left the house. He and appellant had talked earlier about the Park-and-Ride lot being a place to leave the Jeep and make it look like someone had robbed the house. He drove there, dropped the key on the side of the road, and walked back to his trailer. He talked to his roommate, took a shower, and paged appellant and left a message: "All done, going home." He also left a message on Lynn's answering machine. Appellant called and said he was at his parents' house. He asked if the message was for him. Daniels said it was. Appellant sighed and said, "Okay." (Exhibits 3, 5A-32, 5A-34, 7; 22 CT 6447-6448; 15 RT 4498-4500; 16 RT 4535, 4537-4538, 4544-4548.)

Putting five bullets in Carole was going over and over in his head. (17

RT 4851.) He knew he was in trouble and it was probably the last night that he would be free. (16 RT 4550.) At 8:11 p.m. EDT, he sent an e-mail message to companyt@usa.net: "Package delivered" (Exhibits 90, 137; 23 CT 6762, 6766; 25 CT 7182; 16 RT 4552-4553, 4625-4626; 27 RT 7743-7744.) Arnold found the message in the companyt@usa.net account. (Exhibits 90, 137R; 23 CT 6763; 25 CT 7182; 25 RT 7261.)

He cleaned the murder weapon to remove fingerprints and threw the expended casings into his front yard. Later, he told the detectives where they could be found. (Exhibit 5C-18; 22 CT 6365; 16 RT 4551-4552.) He put the murder weapon on his bed and the speed loader in the night stand, then went to the store and got some beer, a bottle of whiskey, and a pizza. He took them home and got drunk. (Exhibits 5C-14, 5C-16; 22 CT 6361, 6363; 16 RT 4541, 4553-4554.)

He left a message for Lynn on his AOL buddy list. She got online and they chatted. He told her that he had done what he was supposed to do, and he wanted to talk to her. He called her and she asked what he did with the weapon and clothes. He said, "Oh, I still got that." She responded, "Well, you better get rid of it." He said, "I'll take care of that later." (16 RT 4554-4556.)

He went to the Kickin' Mule 76 station and found a ride to a friend's apartment. Appellant paged him around 2:00 or 3:00 a.m. When he called back, appellant said that he was at his parents' house and his brother was sleeping on the floor. He asked if Daniels knew that Carole had been murdered and said they were looking for a man named Norman Daniels to interview. Then, in a low voice, he said that Daniels needed to go back and remove the evidence. Daniels told him where the pistol was and said that he was stuck because he did not have a ride. Within a half-hour, Daniels left a

page for appellant to call him back. When he called, Daniels told him that he could not get back to his residence and he needed help. Appellant responded that he was on his own, but to get back at all costs and get rid of the pistol. (Exhibit 3; 16 RT 4556-4562.)

He responded to a page from Lynn[45] and said that he knew he was in trouble and would get caught if he went back. He needed to "come in out of the rain." Appellant had told him the phrase meant that The Company would pick him up and take him to a safe area. Lynn said she would contact The Company or appellant. She reminded him that appellant said he needed to get back and get rid of the pistol. (16 RT 4562-4564.)

He got a ride to his residence just before noon. Two vehicles were parked in front of his residence. He knew they were the police, so he ducked down and told the driver to keep driving. They went to the driver's sister's apartment. Daniels told him that he had committed a murder, and started to explain about The Company and how he was in trouble and needed help. (16 RT 4564-4566.)

He walked across the street to the Texaco station and left a message on Lynn's answering machine.[46] He attempted to page her from the bowling alley next door and again from Bartels, a "hamburger place," then went to the Hometown Buffet at the Mt. Shasta Mall. He finally reached her on a pay

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[45] Pagemart Wireless records showed a 12-minute phone call from the apartment to Lynn's residence beginning at 11:01 a.m.. on May 17, 1998. (Stipulation 29; Court's Exhibit LXXXVI; 26 CT 7392; 27 RT 7716.)

[46] Two one-minute phone calls were made from a phone booth at the Texaco gas station at 1113 Boulder Drive to Lynn's residence. One began at 1:35 p.m. The other began at 1:44 p.m. (Stipulation 29; Court's Exhibit LXXXVI; 26 CT 7392; 27 RT 7716-7717.)

phone outside the Hometown Buffet.[47] He said that the police were outside his place. He really wanted to run, and he needed help. She was on the other line with appellant, and said something about talking to Montgomery and finding a place for him to stay in New York. She eventually told him to call her back. (16 RT 4566-4567, 4569-4574.)

During their next conversation, Lynn kept switching over to appellant and coming back and telling him that he needed to go back and hide the pistol or get rid of it, however he could, at all costs. He asked if anyone was watching his place. She said that appellant's brother had told him a detective was watching, waiting to talk to him and getting a search warrant. She said that Carole was still alive when appellant found her. He had to do a tracheotomy and open heart massage. (16 RT 4574-4577.) She asked him not to say anything if he got caught. "[D]on't tell them about me. Just say we're friends on the Internet." (16 RT 4598-4599.) He called a taxi and went home. (16 RT 4577.)

Grashoff and Detective John Hubbard had been advised that Daniels would be returning to his residence in a taxi. They contacted him in the yard of the residence next to his trailer at approximately 5:20 p.m. (Exhibit 3; 13 RT 3844-3847; 16 RT 4578.) Grashoff and Clemens talked to him and took him to the Park-and-Ride lot and the Gartons' residence. He decided to tell some of the truth there because he knew he was in trouble. He was basically asking for help. He told them about The Company, but he omitted Gordon

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[47] A one-minute call beginning at 3:46 p.m., a six-minute call beginning at 3:56 p.m., and a 14-minute call beginning at 4:15 p.m were made from the pay phone in a phone booth near the Hometown Buffet at 1380 Churn Creek Road to Lynn's residence. (Stipulations 26, 29; Court's Exhibits LXXXIII, LXXXVI; 26 CT 7392-7393, 7567; 27 RT 7717-7718.)

and the "Oregon adventure," and he kept Lynn out of it because she asked him to. (16 RT 4578-4579, 4597-4598, 4608-4610.) He revealed their involvement on May 20th or 21st. He said that Lynn was his contact person. (16 RT 4738.) At some point, he showed them where he dropped the Jeep key. (Exhibits 3, 5A-32, 5A-34; 22 CT 6447-6448; 16 RT 4537-4538.)

Compomizzo assisted in the service of a search warrant at Daniels' residence at approximately 6:38 p.m. A loaded revolver was underneath pillows on Daniels' bed. It had recently been cleaned. (Exhibits 5C-13, 5C-14, 5C-15, 34; 22 CT 6360-6362; 13 RT 3896, 3902-3903, 3905; 14 RT 3995.) A holster was on the top shelf of his closet. (Exhibit 33; 14 RT 4008.) A white night stand in one of the bedrooms contained items related to firearms, including a speed loader and a small container of Break-Free, a gun lubricant, with a Jones' Fort price tag on it (Exhibits 5C-13, 5C-16, 5C-17, 5C-18; 22 CT 6360, 6363-6365; 13 RT 3899-3901, 3906-3907; 14 RT 3995-3996), and a wax substance with a plastic impression in it. (Exhibit 35; 14 RT 4009, 4033-4034.) An expended cartridge casing was in a planter bed on the east side of the gravel driveway. (Exhibits 5C-19, 5C-20, 36, 36A; 22 CT 6366-6367; 13 RT 3903-3904; 14 RT 3996.)

Compomizzo returned to the residence on May 19th and located two expended .44 caliber casings in a grassy area next to a fence approximately 75 feet from Gas Point Road. (Exhibits 5C-21, 5C-22, 5C-23, 5C-24, 37, 38; 21 CT 6314-6317; 13 RT 3847-3853.) He participated in yet another search of the residence on May 26th and found numerous pieces of burnt paper in a gas barbecue in a lowered area just south of the elevated wooden entry porch. The documents referenced the IRA. (Exhibits 5C-11 5C-25-5C-30, 5C-35-5C-37; 22 CT 6358, 6459-6464, 6466-6468; 13 RT 3898-3899, 3951-3954; 14 RT 3994; 16 RT 4542-4544; 26 RT 7485-7486.) He collected the

ashes from the barbecue. (Exhibits 102, 103, 104; 31 CT 8945-8946; 26 RT 7486-7488, 7527-7528.)

Two boxes of .44 Smith and Wesson, Winchester-Western brand ammunition, one with a yellow Jones' Fort price tag, were found in a cardboard box on Daniels' bed on May 26th. It was the type of ammunition that was in the weapon underneath the pillow and that killed Carole. A latent imprint from the exterior of one of the ammunition boxes was made by Daniels' right thumb. (Stipulation 2; Court's Exhibit XLVII; Exhibits 5C-31, 5C-32, 5C-33, 43; 22 CT 6368-6370, 6373-6374; 14 RT 3984, 3996-3998, 4006-4008.)

A piece of graph-type paper with writing on it (Exhibit 39; 22 CT 6474-6475) and instructions for activating a Pagemart pager (Exhibits 41, 42; 22 CT 6422-6425) were on the kitchen counter. Two attached pieces of paper with printing on them were in the bedroom. (Exhibits 5C-34, 40; 22 CT 6420-6421.) A piece of paper with handwriting on one side was on Daniels' bed. (Exhibit 44; 22 CT 6476-6477; 14 RT 4010-4013.) It contained the name Dean E. Noyes and his address, phone number, and Social Security and Clackamas County Bank account numbers. (Exhibit 44; 22 CT 6476-6477; 18 RT 5261-5262.) Compomizzo seized Daniels' computer and related equipment. (Exhibit 5C-12; 22 CT 6359; 13 RT 3956-3957; 14 RT 3994-3995.)

**h. Lynn's Arrest and Interrogation.**

Lynn received an e-mail message from Daniels after Carol's death saying that he had done what he had to do. (18 RT 5280.) He set up a chat room and told her that he was "freaking out." He asked, "What should I do?" She told him to call her. (18 RT 5280-5282; 20 RT 5666-5667.) He was crying when he called. He said that he had paged appellant, but had not

received a response. He asked her to contact someone. She said she would try to contact appellant. (18 RT 5283.)

She paged appellant to tell him that Daniels had killed Carole. He phoned back and said, "Okay." In their next conversation, he said that Daniels had "fucked up;" Carole was not dead when he arrived at the house. He gave her CPR and tried to perform or was thinking about performing a tracheotomy. She told him that Daniels had asked what he should do. He said, "I'm going to have to get back to you." (18 RT 5291-5293.) He called back later. He was extremely paranoid about his phones being "bugged," so it was a read-between-the-lines conversation. (18 RT 5293-5294; 24 RT 6786-6787.) She asked if he wanted her to e-mail Sean and he said yes, just to make him aware of what was going on. He did not tell her what to say. (23 CT 6759-6769; 18 RT 5286-5287; 20 RT 5859.)

She sent an e-mail message to companyt@usa.net. The subject was "attn. Sean."

> Sean, your boy has become a man.however he needs advice.hes not sure if he should go home hes in the paper hes to be brought in for questioning -sheriffs orders .hes been in contact with me and will do so regardless .or should he leave immediately?if he needs to do that if you can send me funds ill set him up here but i can only keep help to a minimum because of my situation. I wont bother pat till he contacts me, but i do need devlins advice nothing more.i can help him also if thats what is required so please let me know if you receive this today im home i can speak freely till 400 pm my time if not please email me, ill check every hour .jozaphine.

(Exhibit 90; 23 CT 6767; 18 RT 5278-5279, 5335.)

She sent a second message because she did not get a response and she was very impatient:

> Hello its jozapjine i don't know if youre aware of all this crap

> im sure you are but i got a message thati should send a memo to you. The last timei spoke to devlin he was going to return home that was 1400hrs yesterday.he was supposed to contact me he hasent. pat. said he read in the paper he was arrested.thats it he cant talk he has so many people around and hes bugged .im planning to go there as soon as he requests .I just wanted to let you know of my loyalty to him if anyone can get thruogh this and make him the motivated person he was and still can be it will be me.if devlin contacts me any message for him?devlin trusts me ,but hes nervous.waiting jozaphine

(Exhibit 90; 23 CT 6767; 18 RT 5290-5291, 5335-5337.)

She was trying to convey that Devlin was in trouble and that appellant could not speak because he was being questioned by the authorities. (18 RT 5288-5290.) She mistakenly sent the message to companyt@idt.net. She re-sent it on May 18, 1998. (18 RT 5336-5337.) A message found in the companyt@usa.net account was sent at 5:49:27 p.m. PDT on May 14, 1998, but was addressed incorrectly to sean898@aol.usa.net. (Exhibits 90, 137O; 23 CT 6762; 25 CT 7179; 21 RT 6005-6011, 6036-6037.) A message received on May 18th at 6:36 p.m. with the subject "Fwd: attn sean" was likely misaddressed and returned, then forwarded. It included an attached message from jozaphine@aol.com to companyT@idt.net with the subject "attn Sean." (Exhibits 90, 137T; 23 CT 6763; 25 CT 7184; 21 RT 6038-6041; 25 RT 7264-7265.)

She had a conversation with both Daniels and appellant within a day or so of the murder. She had call waiting and could keep one on the line and click over to the other. Daniels was asking, "What should I do? Where can I go?" Appellant told her to tell him that he should hide the gun in the toilet or a heating duct, and he should burn his clothes or, if possible, flush them down the toilet. He said that Daniels was basically screwed either way, that a search warrant was being prepared for his house. He could run if he wanted,

but he was going to get caught. He did not say how he knew about the search warrant. He asked her to tell Daniels that Carole was not dead and he had screwed up. She relayed the information to Daniels. (18 RT 5294-5297, 5360.) Appellant told her that, if she was contacted by the police, she should say that she had never met Daniels and only knew him from the computer. He was a "cyber-nerd" who was obsessed with Carole and was going to cop a jealousy plea. He told her not to mention their relationship or The Company. (18 RT 5361-5364.)

Detectives Grashoff and Mark Von Rader contacted her at her home on June 16, 1998. (18 RT 5361.) She saw them at the door and went to her bedroom to call appellant. He said that the police were questioning just about everyone he knew and to remember the "truth" they had discussed and stick to that. (18 RT 5364-5365.) They searched her house and found a yellow Post-It note containing the address to appellant's Cottonwood post office box in her handwriting. (Exhibit 82; 23 CT 6773; 19 RT 5447-5449.)

They questioned her for hours that day in a conference room at the Gresham Police Department. She lied because appellant told her that she and her family would be killed if she disclosed information about The Company. (18 RT 5365-5366; 19 RT 5374-5375; 20 RT 5824.) She said that she had never met Daniels, but told them about her computer communication with him and his screen names, and said he used appellant's computer identification to talk with her. She said that he had an obsession with Carole and was going to cop a jealousy plea. She said she knew appellant in the past, that she went to school with and met Carole through him, and that he "was one of my best friends in the whole entire world." She said that she was friends with Carole. She might have told them about appellant's screen name and about attending Carole's memorial service. She might have told

them about Gordon. (19 RT 5373-5374, 5610-5611; 20 RT 5898, 5903-5908, 5915.)

She withheld information about the current status of her relationship with appellant, but panicked and changed her story when Von Rader showed her brochures of hotels she had been to with him. She also saw cell phone or pager records in a manila folder and thought they would reflect an ongoing relationship. One of the detectives called attention to her necklace. (20 RT 5908-5914.)

She may have told Von Rader on June 17, 1998, that she wanted no part of killing Dean in February 1998. (19 RT 5637.) She told him that appellant had always been tied in with and did everything through The Company. (19 RT 5618-5619.) She did not recall saying that he was a creep who had no morals and, if she had the chance, she would not mind setting him up so she could fry him. She said that the killing was all his idea, that she did not care if Carole was killed, and that he would kill her in a second if he heard what she was talking to them about. (20 RT 5893-5896.)

She was questioned by the prosecutor about the house key on October 23, 1998, and told him that appellant "had the key before we even talked about any of this." She said she sent him the key because Dean was leaving town and she wanted to make arrangements for him to meet with her. She did not recall the first time she told anyone that she gave appellant the key to help kill her husband. (19 RT 5607-5609.)

**i. Gordon's Arrest and Interrogation.**

Appellant told Gordon that, if he was questioned by the police, he should not say anything about Lynn or their trip to Oregon to kill Dean. (22 RT 6354.) He had three conversations with investigators before he told the truth. He decided to tell them about his participation in the plan to kill Dean

around June 2, 1998, because he was guilty. He realized that he had to come clean when they began showing him pictures. He learned later that Daniels had told them about what happened in Oregon. He felt betrayed by Daniels and appellant. (22 RT 6355, 6377-6380.)

**j. Carole's Memorial Service.**

Carole's memorial service was held on May 22, 1998, at the Moose Lodge in Cottonwood. Appellant told Lynn that he wanted her there to lay a foundation for her move to the Redding area. She flew to California the day before the service. He patted her down to see if she was wired when he picked her up at the airport, and asked if she knew that the person sitting next to her on the plane was an undercover officer. He did not say how he knew. (19 RT 5380-5383, 5390-5391; 24 RT 6903.)

She went to the Joneses' house with him that evening. It was someone's birthday.[48] They had been out to tour his house and had shopped for toys for the Joneses' children at Toys-R-Us. He introduced her as a friend and said that they had been dating when he met Carole. They were sitting next to each other, almost like a couple, closer than one would expect casual friends to sit. It seemed odd to Marshall Jones that they would be that close so soon after Carole's death. (19 RT 5389-5390; 20 RT 5811, 5865; 24 RT 6904, 6906-6907, 7017-7018.) She stayed that night at appellant's parents' house. She slept on one sofa and appellant slept on another. They engaged in a little sexual foreplay and appellant masturbated. (19 RT 5383-5384; 20 RT 5805, 5812.)

She sat up front, near appellant, during the service. Afterwards, she

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[48] According to Marshal and Tracie Jones, the party was after the memorial service at Tracie's father's house. (20 RT 6906-6907, 7017.)

sat next to him in a comforting manner. (24 RT 6905-6906.) She learned at the service that Carole was not the mean, nasty person appellant said she was, but cared for him as much as she did. (20 RT 5838-5839.) Appellant was numb and non-emotional during his eulogy, much different than he had been since her arrival. He was very dramatic and did not appear to be sincere. (19 RT 5385-5386; 24 RT 7016.) He cried when he played Carole's music. Gordon did not think it was unusual. He had seen him cry before. (22 RT 6467-6468.)

Colebank did not think Lynn belonged at the service. In his opinion, she was not there to grieve Carole, but rather to move in on appellant, and appellant was a willing participant. (21 RT 6161, 6183.) Appellant appeared to be in shock. He said that someone had broken into his house and shot his pregnant wife. He was having a hard time with the fact that the police had accused one of his best friends of murdering his wife. (21 RT 6182-6183.)

Appellant gave Scott McMillan a hug after the service and said he was glad that McMillan had come. He had been thinking about him; hunting season was coming up and they needed to go hunting. This struck McMillan as odd. (26 RT 7395-7396.)

Lynn spent that night at the Amerihost Inn with appellant. They had separate beds, but she was in his bed during the night. They spent time with Krista Woelfer (Woelfer), Colebank, Marty Frederici (Frederici), and Gordon in the hotel's hot tub and swimming pool. (19 RT 5386-5390; 20 RT 5805-5807.) Appellant was sitting on the side of the pool with Lynn between his legs. They were together like a couple. It was not the body language of a grieving husband and a friend. (21 RT 6161-6162.)

She spent the next day with appellant. He took her to get her nipple pierced. It was his idea. She did not remember telling the police it was her

idea. She did not talk with Dean beforehand and knew that he was going to be irritated. (20 RT 5757-5758, 5764-5765, 5864.) She flew home that afternoon. (19 RT 5390; 20 RT 5784, 5812-5814.) Other than taking a walk with appellant's father, she was with appellant, for the most part, the entire time she was in Redding. (20 RT 5784-5785.)

She returned to Oregon with a G & G Fencing hat for Dean and a some things for their children. It seemed odd to him to attend a memorial service and come back with gifts. He did not recall seeing or hearing about a piercing through her nipple. (24 RT 6795, 6856-6857.)

**k. The Label Maker.**

Mann was cleaning about a week or two before Carole's death while Gordon played with a label maker in appellant's living room.[49] He printed her name on a clear, tape label. She put it in a dish on the counter in the kitchen. Appellant came in a few minutes later and took the machine from Gordon. He said it should not be played with and took it to one of the back rooms. She saw an "I LOVE YOU BABY" label in the Gartons' bedroom. (Exhibits 106B, 189, 210; 25 CT 7349, 7352; 24 RT 6956-6959, 7000-7005.)

On the night of Carole's death, Compomizzo saw an "I LOVE YOU BABY" label in a framed picture above a dresser in the Gartons' bedroom. (Exhibits 5A-20, 5B-14, 5B-15, 106A, 106B; 22 CT 6345; 25 CT 7289-7290; 26 RT 7492, 7494-7497, 7503-7506.) A label maker, similar to one in his laboratory and to one the prosecutor received from Casio, was on the upper shelf of the dresser in the bedroom. (Exhibits 4, 5A-20, 5B-16, 5D-11,

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[49] Mann told Von Rader and Grashoff on or about July 8, 1998, that she never saw a label maker in the house. She reported her recollection around July, 1999. (24 RT 6994-6996, 7000.)

5D-12, 5D-13, 5D-14, 69, 106A, 187, 188, 189; 22 CT 6345; 25 CT 7295-7298, 7348-7349; 14 RT 4058-4060; 26 RT 7488-7492, 7505, 7508-7509, 7529-7530.)

Lynn went to appellant's house with Colebank and Frederici the day after the memorial service.[50] Appellant said he needed to get various things and came out with a pile of clothes. He said later that day that he had forgotten something very important. They returned to the house and he crawled through a window and retrieved a package of tapes, a stack of magnets, and what looked like a little portable computer. The tapes fit in the computer. He said that he had to get rid of it because it was one of the few things that could tie him to Carole's death. (19 RT 5406-5409, 5414; 20 RT 5807-5810.)

The computer device was similar to one the prosecutor received from Casio. She could not read anything on the magnetic strips. He said that they contained information about hits he had done, and they could be decoded if one had the right equipment. She took the tape out of the machine and looked at the ribbon as they drove back towards Cottonwood. She saw the word "Ireland" and year dates, the letters "PLO" and the years "1990" and "1991," and vehicle descriptions in a sequence. (Exhibit 70; 19 RT 5409, 5489-5491, 5496-5497.)

Appellant took it and said, "You don't need to read that tape." He tried to pull the tape out of the cassette, then stopped and said he needed to get rid of the items. They walked down a gravel embankment to the Sacramento River, under a bridge. He broke off a piece of the tape and put it

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[50] Colebank recalled that he went to appellant's house on the day of the service. Lynn did not go with him. (21 RT 6179.)

in the water. When it did not dissolve, he went to his truck and burned portions of it. He went back to the river and threw the items in. (Exhibits 5D-6, 5D-7, 5D-8, 5D-9, 5D-10, 5D-11, 22 69, 70; 23 CT 6713-6716; 26 CT 7295, 7425; 19 RT 5409-5419, 5440-5443, 5445.)

Compomizzo saw the label, but not the label maker, when he returned to the residence with a search warrant on May 21, 1998. (Exhibits 5A-18, 5A-20, 5B-14, 5B-15, 5B-16, 106A, 106B; 22 CT 6343, 6345; 25 CT 7289-7290; 26 RT 7493-7503, 7522-7534, 7536-7545.) Grashoff served a search warrant at the residence on May 27, 1998. The picture frame, but not the label, was there. (Exhibits 5B-32, 106A, 106B; 25 CT 7294; 27 RT 7652-7655.)

On January 18, 2001, Compomizzo made an ""I LOVE YOU BABY" label with the label maker the prosecutor received from Casio. (Exhibits 187, 188, 189, 190, 210; 25 CT 7348-7349, 7352; 7 Supp.CT 1568; 26 RT 7509-7520.) The letters on the label appeared to be the same as the letters on the label on the picture. (Exhibit 106B; 16 RT 7520-7522.) The label Mann saw was similar to the label Compomizzo made. (24 RT 6957-6958, 7001, 7004-7005.)

Lynn flew to Shasta County on June 19, 1998, at Grashoff's request, and showed him where appellant threw the items into the Sacramento river. (Exhibits 5D-6, 5D-7, 5D-8, 5D-9, 69, 70; 23 CT 6713-6716; 19 RT 5441-5442; 27 RT 7655-7656, 7762-7763.) Grashoff and other deputies went to the Deschutes River Bridge and the Sacramento River on June 23, 1998, and found a label maker approximately 10 to 15 feet from the west shoreline, in the area Lynn pointed out. (Exhibits 3, 5D-9, 5D-10, 69, 207; 23 CT 6716; 26 CT 7425, 7444-7445; 27 RT 7656-7660, 7700-7701.)

**l. Daniels' Taped Telephone Call to Appellant.**

Daniels made a taped telephone call to appellant on May 18, 1998, at the direction of Grashoff and Clemens. (Exhibits 1-A; 16 RT 4653-4654, 4657-4658.) During their conversation, appellant told him, "I'm going to get on the phone to the big boys and see what we can pull here." He said, "We'll see what we can work for you, we'll be there for you, man. We'll try to help you out as much as we can." Daniels believed that he was referring to The Company. He also said, "And you know you're still going to get yours. I'll see that, I'll see whatever monies you had coming goes to your -- goes to your kid or family or something," Daniels believed that he was referring to $25,000 for killing Carole. (16 RT 4659.)

**m. The Joneses' Residence.**

Appellant stayed with Marshall and Tracie Jones after Carole's death. He brought a bag of clothing and later, as he cleaned out his house, he brought things to store in their garage. He stored guns and other items at Jones' Fort. (24 RT 6908-6909, 6928-6930, 7064.)

Mann helped Gordon move things from appellant's house about two or three weeks after Carole's death. They took most of the property to appellant's storage unit. A couple of boxes, a bow, and a dryer went to the Joneses' house. Gordon took his property to another storage unit. (24 RT 6970-6971, 7007.)

After appellant's arrest, Tracie Jones discovered a small file box in her garage. Its latch was broken, and it came open when she picked it up. She noticed a file marked "KD" and looked through the papers to see when appellant's dog was vaccinated. She saw payroll stubs and receipts with appellant's name on them. (Exhibit 190; 24 RT 6909-6911.) A couple of large, black garbage bags in the garage contained, among other things, photo

albums and a notebook belonging to appellant. A large portion of the writing in the notebook was appellant's. (25 CT 7306-7320; 24 RT 6911, 6926; 27 RT 7640.) She moved the items from the garbage bags into a file box, copied the notebook and other materials, and gave both boxes to the authorities. (Exhibits 71, 72A, 191; 26 CT 7306-7320, 7557; 24 RT 6912-6913.) Later, she gave the prosecutor a receipt and two keys appellant had taken off of a key ring and put on a shelf in her son's room. (Exhibit 206; 26 CT 7442-7443; 24 RT 6927-6928.)

Grashoff received a file box and a cardboard box from Tracie Jones and Mann on July 1, 1999. Two newspaper articles were loose inside a wire-bound, spiral notebook in the cardboard box. (Exhibits 71, 71-A, 71-B, 190, 191; 25 CT 7306-7324; 26 CT 7557; 7 Supp.CT 1568; 27 RT 7710-7712.) Appellant's handwriting was on the cover of and inside the notebook. (Exhibits 220A, 223, 223B, 225, 225D, 226, 227; 25 CT 7307; 26 CT 7450-7451, 7460-7462, 7467-7468, 7472-7473; 27 RT 7625-7634, 7637-7639.)

Marshall Jones called the sheriff's office and said that he had appellant's guns. Officers picked up a silver, metal gun case and a couple of large plastic tubs containing appellant's belongings from him. (Exhibits 5D-28, 49; 26 CT 7400-7401, 7434; 24 RT 7036, 7066; 27 RT 7702-7710.) A latent fingerprint from the top exterior of the gun case (Exhibits 5D-15, 5D-16; 24 CT 6832-6833) was made by a portion of appellant's left palm. (Stipulation 8; Court's Exhibit LIX; 24 CT 6820-6821; 22 RT 6357-6358.) A latent fingerprint from the exterior of a Ziploc bag containing a radio (Exhibit 46) was made by his left thumb. (Stipulation 9; Court's Exhibit LVIII; 24 CT 6818-6819; 22 RT 6261.)

**n. Gabriel Michaels' Letter.**

Lynn sought to withdraw her guilty plea in November 2000. During

that process she received a letter. The return address was Gabriel Michaels, 124 Judith Lane, Cottonwood. She did not know Gabriel Michaels or anyone who lived at that address. The writing was not appellant's. (19 RT 5567-5569, 5579.)

> November, year 2000 AD. Dear Lynn, Malichi, My Angel. (1) Straight to the point. Your love is not lost. No your love is renewed. Do not hold fascination on to this ship of fools, but look to those who have always held the faith. Yes bad things have happened have been said about you, said to you, about you, and, unfortunately, by you. You my little one may not have had the first cast of the stone as you have been playing in a den of snakes. The Bible tells us to take up serpents. Mark 16:18, but this is a parable. Handfuls of snakes will get bitten or life in prison. Like at what Frank O' has done for you. Look at promises made to you by your friends Gregie, Steven and Marky. Now, towards the end as you face the abyss, and see your life ending the truth slaps you in the face like a cold wet storm. You are alone. None of these people will be away from their families forever. None of the people know or feel your pain. So you cry out for help, and help knocks on your door. Yet Frank O' and Gregie have blocked that door and being the serpent that they are, they lie bite to you even more so. You are not alone. On the other side of the door which is being blocked by your legal friends is help. Friends who want the truth to come out, and friends who would like to see you home secure, happy, and once again living with your family. We know you told a few lies to them. They too know this. We do not know what all happened or why you lied for them. Hold fast. Love and support are fighting to help you, but you must open the door. You are the only one with the key. Open the door, flee from the edge of the abyss and back to your family. The key is very simple. Swartz has written Frank O' to talk to you. Legally no one can talk to you without your lawyer's approved consent. And Frank O' has written back a big no. He is not fighting for you. He was trying to make you stay in the dark and screw you. All he cares about is seeing you finish the deal so doesn't look bad. But now you have a new lawyer. Tell Sharpe you want to give statement of fact to Swartz. Then

write Swartz, inform him that you told your lawyer of those wishes. This is your key. What can it hurt? Why do they your team, the snakes, who say they want to help you, not want you to talk to Swartz? Because it will set you free and send you home to your children. Why? Why? Why? Why would Frank O', who says he's working for you, let you have an interview with Greg without good old Franky being there to make sure you are not being used? On top, and not surprisingly of that, without any recording device? Who does Frank seem to work for? He obviously trusts the good buddy Greg to make sure your rights are not violated, or that Greg is going to manipulate you with subtle hints about it could be worse. They are using you, all because you want and need to trust someone. But they cut you off from those who care and ask as if they do. You have friends, friends who feel women and children first. But how do your friends help you if you dive over the abyss. You have the choice. But why would someone jump to their own death to save you if you are suicidal. But you have now seen the light. And, in your words, you say I want to tell the truth and change my plea. Do not let the snakes coil around you and pull you over the side. Once you enter the abyss, there is no return. Save yourself by helping me save you. As to your waiting on a reply to a letter you wrote, the DA, detective and Frank O' have slapped a hold on that, and plan to use it in court. This is, again, your friends showing how much they care. As to your other requests, watch the mail. Love comes in many forms. Concordance and other things on the way. These are people who will fight for you and see that you go home to your babies, but only if you will join the fight and help yourself. If do you not respond within a week to Swartz by letter to see him by word to your attorney, then this is farewell, Malichi, and be lost with the others, banished to eternal darkness. Revelation 12:9, Jude 1:6. And remember in your heart Jude 1, Chapter 24. Your friends.

Russell Swartz, 1824 West Street, Redding, 96001. Phone number 244-0440.

(Exhibits 125, 125A, 125B, 125C, 136; 23 CT 6276-6731, 6735-6736; 19 RT 5572-5576.)

She recognized things that appellant said to her, like the biblical references throughout the letter. He called her "Malichi" and "My Angel," and he occasionally used the phrases "My little one" (Exhibit 136A; 23 CT 6737; 19 RT 5579-5580) and "Women and children first." (Exhibit 136B; 23 CT 6738; 19 RT 5581.) She believed that "Save yourself by helping me save you" referred to appellant. (19 RT 5577-5578, 5581.) The reference to "Frank O'" was to her attorney. Mike Sharpe was the attorney who was going over her plea withdrawal. (Exhibits 125C, 136C; 23 CT 6731; 25 CT 7167; 19 RT 5576.)

The return address had no significance at first but, after thinking about it, she realized it was a reference to the Book of Jude, chapter one, verse 24. Basically, it was a plea to help appellant. (Exhibits 125, 136; 23 CT 6726-6727, 6735-6736; 19 RT 5583-5584.) She thought that Gabriel Michael was with The Company and, if she did not comply, her family's safety would be in jeopardy. She believed the letter was confirmation of a threat from appellant. (Exhibits 125-A through 125-C; 23 CT 6728-6731; 19 RT 5571-5572, 5582-5585.)

Cathy Kingsley, a fingerprint analyst with the Shasta County Sheriff's Department Evidence and ID Lab, examined the letter for latent prints. (Exhibits 125, 125A, 125B, 125C, 136, 136A, 136B, 136C; 23 CT 6726-6731, 6735-6739; 19 RT 5547, 5549-5551.) There were several latent prints on all of the pages. (19 RT 5550.) She found 14 points of identification between appellant's right thumb and a print on the first page (Exhibit 125A; 23 CT 6728) and 21 points of identification between his right index finger and a print on the back of the second page. (Exhibit 125B; 23 CT 6729.) She was unable to identify several fingerprints. She was not able to identify any of them as belonging to appellant's cell mate. (19 RT 5551-5554.)

**B. Defense Case.**

**1. Video Tapes.**

"The Jackal" (Exhibit 248-A), "Pro Sniper" (Exhibit 21-A), and "Ultimate Sniper" (Exhibit 22-A) were played for the jury. (29 RT 8464, 8469-8470; 30 RT 8696.)

**2. Kenneth Richardson.**

Carole and appellant visited Kenneth Richardson, appellant's older half-brother, at his ranch near Palermo, California. They would start hunting early in the morning and be gone until mid-afternoon. (30 RT 8698-8699.) Appellant often cared for Richardson's children. (30 RT 8716-8717.) Appellant and Carole appeared to be happy together. Appellant called and told Richardson that Carole was pregnant. He was ecstatic. They had been trying to have children. (30 RT 8699-8700.)

Appellant was not allowed to go on fishing or hunting trips as a child because he was too young. His mother said he was not allowed to go with the "big boys" until he was older. (30 RT 8718-8721.)

Richardson went to the Shasta County Sheriff's Department on the night of Carole's death. He left after midnight with appellant. They went directly to his parents' house. Appellant called from Richardson's car and left a message on Daniels' answering machine that he was not going to believe what happened, Carole had been killed. (30 RT 8706-8707, 8709-8710.) Richardson retrieved appellant's clothing and vehicle from appellant's house the next day. (30 RT 8710-8713, 8722-8724.) He did not see a label maker, but he was not looking for one. (30 RT 8718.)

**3. Dale Streetman.**

Dale Streetman met appellant in the Marine Corps when they were both stationed at Camp Pendleton. They went to school together for a short

period of time. He never saw appellant flying or riding in a helicopter. He did not know if appellant did any type of sniper work. Appellant never claimed he was a sniper or in foreign operations. Appellant was not involved in special operations. (28 RT 8040-8045, 8048.)

Streetman and his wife spent every weekend they could in 1997 and 1998 with appellant and Carole. He thought that appellant's relationship with Carole was loving. They did everything together. Appellant showed affection for her. Streetman talked to appellant about whether the baby was going to be a boy or a girl. He was anxious, nervous, and excited about the birth of his child, "Everything a new father would be." He spoke positively of the experience. (28 RT 8045-8047.)

**4. Susan Spencer.**

Susan Spencer taught a childbirth education class in April 1998. She asked at the beginning of the class if anyone was there under duress. Appellant said that he was. She did not think he had a negative attitude toward the class. He continued in it and attended all the sessions. He was an active participant and appeared to be enjoying the class. She heard him exchanging phone numbers with other parents. (28 RT 8050-8053.) She had no specific recollection of his as opposed to any other father's attitude at the class. (28 RT 8057-8058.)

**5. Corrina Howard**

Corrina Howard worked as a bartender at the Anderson Moose Lodge. Carole and appellant came in after work two or three times a week and Howard talked with them about the upcoming birth of their child. (28 RT 7971-7973, 7976.) Appellant was happy about the child. He could not believe something so little could need so many clothes. They talked about names for the baby. (28 RT 8003-8004.)

Appellant coached a coed, youth soccer team in the spring of 1995. He was very patient with the seven, eight, and nine-year-old children. Carole was the team mother. (28 RT 7974-7976.)

Appellant, Gordon, and Daniels were at the Moose Lodge one evening in late January or early-February 1998 from about 7:30 to 9:30 p.m. Howard had never seen them there together. No one else was there. She waited on and played pool with them 85 to 90 percent of the time. (28 RT 7977-7979, 8005-8006, 8008-8011.) She could not hear their conversation from behind the bar and did not know what was said while she was away. (28 RT 7995-7997, 8010.) They talked about fencing jobs, shaggy suits, and going to a sports show in Portland. She volunteered to "tag along" so she could visit her aunt. Appellant said it was okay. She did not hear anything about Lynn, insurance, taking guns or silencers on the trip, killing anyone in Gresham, or being paid money to kill anyone. (28 RT 7982-7984, 7997-8003, 8005.)

**6. Charles Hawkins.**

Charles Hawkins participated in an archery shoot as a member of "Team Shaggy or something like that" during the first weekend of May 1998. (32 RT 9116-9118.) He saw a picture in the newspaper of appellant at the shoot, holding a bow and arrow and dressed in Shaggies. (Exhibit 49; 26 CT 7400-7401; 32 RT 9118, 9133.) Rancho Safari's owner was there selling Shaggies. Appellant sold out of the booth and contacted vendors. It appeared that he knew what he was doing and did a good job. (Exhibit 254; 26 CT 7627-7628; 32 RT 9122-9123.)

Hawkins knew that appellant was "full of it" and to just keep his distance. He had "a long line of BS he leaves out there." He acted like he had seen combat as a Marine sniper, which Hawkins questioned because he

was around 40 pounds overweight. He appeared to be knowledgeable about archery equipment, but thought he knew more than he did. He "talked himself up as a good shot," but he was not very good. He said that he was buying his Adobe Road residence and part of the Moore Ranch, a large ranch near his residence, and he was interested in buying The Bow Rack, an archery store in Redding. If he could get it going, he would have the right to sell Rancho Safari shaggy suits over the whole West Coast. (32 RT 9120-9121, 9123-9124, 9129- 9132.)

Hawkins loaned appellant two video tapes, "Pro Sniper" and "Ultimate Sniper," a week or so before the shoot. The videos featured appellant's mentor, Carlos Hathcock, with whom appellant said he had trained as a sniper in Southern California. Hawkins did not believe him because Hathcock was sick. Appellant came to his residence with Daniels and told Daniels, "This is the guy (Hathcock) that I was telling you about." He did not say why he wanted to borrow the videos. He was going to show them to Daniels. (32 RT 9117-9120, 9125.)

**7. Sara Mann.**

Mann arrived at the Gartons' residence on May 16, 1998, at 5:45 or 5:50 p.m. She smelled an odd, sulphur-like odor in the house. The television was on. She watched it for 15 to 20 minutes, then played on the computer for 20 to 25 minutes before Gordon arrived around 6:30 p.m. (32 RT 9155-9156, 9161-9163.) Appellant arrived a few minutes later. She was playing Centipede, not really paying attention to what he was doing. (32 RT 9159-9160.) She believed that she saw Daniels at an intersection just minutes from the house, but it might not have been him. (32 RT 9160-9162.)

She talked to Detective Montgomery shortly after 7:00 p.m. that night. The conversation was tape recorded. The tape was played for the jury.

She answered Montgomery's questions without hesitation and appeared to be giving, at least from her perspective, accurate information. (Exhibits 265A, 265B, 265C; 32 RT 9136-9139, 9144, 9147-9149.) She said she arrived at the residence at 5:30 or 5:35 p.m. Gordon arrived shortly thereafter, around 5:45 p.m., and they talked for a few minutes before appellant arrived. She did not say that appellant mentioned anything about his Jeep being stolen or that he left the residence before he discovered his wife's body. It is not uncommon, over time, for a witness to provide additional details about a traumatic event. (Exhibit 267A; 32 RT 9139-9143.)

She did not remember when she learned that Gordon got off work at 6:30 p.m. She did not recall talking to anyone about it between May 16 and July 8, 1998. She did not remember if officers told her what time he got off work. She might have discussed it with them. (32 RT 9157-9159.) She might have told Grashoff on July 8, 1998, that she got to the Gartons' residence after 6:00 p.m, but that is not what actually happened. (Exhibits 103, 268A; 27 CT 7823-7825; 32 RT 9151.)

**8. Patricia Garton.**

Appellant's mother, Patricia Garton, was with him when he purchased a label maker, a pager, and some other items at Office Max in the latter part of April 1998. She asked him to buy the label maker as a gift for her friend, Bev Cozart. She gave the label maker to Cozart within two or three days at the Anderson Moose Lodge. Ken and Sue Korhonen and Corey Howard were there. Howard remembered seeing her give the label maker to Cozart. Ken Korhonen remembered seeing her give something to Cozart. (33 RT 9408-9413, 9415, 9417, 9429-9431.) She got the label maker for Cozart because squeezing the one she had was too hard on her hands. (33 RT 9432-

9433.) Appellant's check was written to Office Max on April 27, 1998. The sales receipt, which showed that an Express Extra pager, a labeling system, and tapes were purchased, was for the same amount as the check, $172.90. (Exhibits 272, 273; 28 CT 8154-8157; 33 RT 9418-9419.) She gave the pager to Carole to return when she discovered it was not an AT&T pager. (33 RT 9428.)

She was not present in court when the prosecutor said he had just learned that appellant purchased the label maker, pager, and other items at Office Max. (33 RT 9416.) A Casio EZ-Label Printer labeling system Compomizzo purchased at Office Max appeared to be the same type of label maker that was retrieved from the Sacramento River and that appellant purchased at Office Max, but smaller. (Exhibits 69, 278; 33 RT 9418, 9424-9425.)

She did not recall if she talked about the label maker with appellant. She told appellant's attorney about its purchase because she trusted him. She did not contact the prosecutor because he was tricky and sneaky and had lied to her. (33 RT 9433-9435.) She never had a conversation with appellant about an "I LOVE YOU BABY" label. She never saw such a label, and he never told her he had one. (33 RT 9431.)

Lynn visited her when she lived in Oregon, and they would sit and talk. It was not unusual for Lynn to wait in appellant's room if she was busy. (33 RT 9404.)

Appellant gave her a sonogram. (33 RT 9405-9407.)

**9. Lynn Noyes.**

Lynn received The Anarchist Cookbook from appellant in 1989 or 1990, before he entered the Marine Corps. She added letters and cards she received from him while he was in the Marines to it. She did not tape items

into it. (33 RT 9465-9467.)

She first spoke with Grashoff on June 16, 1998, at her residence. It was a very short conversation. A recorded conversation later that day at the Gresham Police Department lasted six to seven hours. An interview the next day lasted three or four hours. She contacted appellant when the detectives came to her house, and he said to just stick to what he told her. Most of it had to do with Daniels and the computer. Other than that, he said to say nothing. She tried to do that, and lied during the first series of interviews to protect appellant. She said that she had never met Daniels. At some point she said that appellant, Daniels and Gordon were involved in a conspiracy to kill Dean. (28 RT 7906-7909, 7919-7927, 7934-7935, 7938; 33 RT 9463, 9467-9471.) She was in a shaky frame of mind and, after seeing the hotel brochures Von Rader had, she fell apart. She realized that the detectives knew she had met with appellant at some hotels. She also recalled seeing her phone records. They did not concern her because she always talked on the phone a lot and had a large phone bill. (33 RT 9468-9469, 9473-9475.) She told them that it was all appellant's idea to kill Carole and Dean. (33 RT 9462.)

She gave appellant a house key, vehicle keys, and a push button alarm for their truck that did not work in the fall of 1997. (33 RT 9479.) She initially said that the keys had no involvement in the conspiracy to kill Dean, but admitted later that they did. She sent them to appellant before there was any talk about murdering Dean or Carole. (28 RT 7931-7932.) She did not know if she first mentioned them after she made a deal with the prosecutor. (33 RT 9475.)

Audio tapes of her interviews on June 17 and 19, July 9, and October 23, 1998, and November 22, 1999, were played for the jury. (Exhibit 301A;

Court's Exhibit CIX; 28 CT 8101-8105, 8107; 33 RT 9453-9354, 9456-9457, 9459-9641, 9480-9481.)

**10. Dale Gordon.**

Gordon kept a mental record when someone wronged him, and he would pay them back by, for example, sabotaging their business. His life fell apart after he lost his business and filed for bankruptcy, and there were a few people he wanted to pay back. Appellant was not one of those people because he did not think appellant was guilty of destroying his business. (33 RT 9582-9583.)

He participated in the plan to kill Dean because The Company threatened to kill his parents. (32 RT 9367; 33 RT 9591.) He suggested that Daniels be involved a couple weeks before the trip to Oregon in February 1998. Appellant said that he would be paid, but no amount was set. (33 RT 9581-9582, 9596-9597.)

Appellant encouraged him to "just go out and kill anyone," and gave him the names of different people. Mr. Clark was suing appellant over a fencing job, and appellant feared that he would lose his license and the bond for G & G Fencing. They went to his house one night in January or February 1998. Later that night, they went to kill a man named Randy who supposedly owed appellant $300 on a phone bill. Appellant stood with his pistol at the window of the truck and tried to shoot Randy. They went to Mr. Clark's brother's house on another occasion. (33 RT 9587-9590, 9594-9598.)

After his arrest, he corresponded with Lynn on a regular basis using the names of other people in his pod. She sent him a drawing, a picture of a rose with some hearts on it. He sent her a Valentines card he drew. (Exhibit 297; 28 CT 8084; 6 Supp.CT 1254-1259; 32 RT 9353-9354; 33 RT 9375-9376.)

He wrote a letter to the prosecutor that said, "Destroys South Park and Star Wars immediately." He explained that God was trying to get through to him that he was not supposed to enjoy the programs, and he wanted the world to know that they were bad to watch. God also told him to destroy his role-playing game, some Star Wars figures, and his guns. He was going insane at the time. It started when he got off his medication. He was put on new medication that worked well. He did not ask the prosecutor or Von Rader to destroy anything else. God did not ask him to destroy appellant. (Exhibit 298; 6 Supp.CT 8085-8086; 7 Supp.CT 1671-1672; 33 RT 9572-9576.)

He wrote 40 or 50 letters to the prosecutor. He wanted to provide information about all the crimes he committed. He did it without his attorney because they were sins. He did not want any secret sins before the Lord, Jehovah, so he confessed every possible thing that he could think of. He attempted to communicate by drawing stick figures and cartoon characters. He thought he could convey information and better explain things that way. (Court's Exhibit CVIII; Exhibit 296; 28 CT 8077-8095; 6 Supp.CT 1241-1253; 32 RT 9355-9357.)

He attempted to convey the following information to the prosecutor:

He thought appellant robbed his shop, and he blamed him for the destruction of Continental Alignment, his relationship with Mann, and his relationship with another girlfriend. He forgave him because, according to the Bible, he had to forgive. (Court's Exhibit CVIII; Exhibit 296; 28 CT 8081; 6 Supp.CT 1241; 32 RT 9357; 33 RT 9379-9380.)

Before his arrest, many of his dreams involved killing people. He was like a super-killer. He had experienced nightmares, but not recently because he felt love for everyone, even appellant. (Court's Exhibit CVIII; Exhibit

296; 28 CT 8080; 6 Supp.CT 1241; 32 RT 9356-9357.)

Appellant was going to try to say that he was a liar and insane, and that he was the father of Carole's child, but he had a vasectomy. He had, in fact, been insane. He went through demonic possession as a result of having sins. Satan got upset with him once he started working for God and reading the Bible. (Exhibit 296; 6 Supp.CT 1251; 32 RT 9372-9373c.) He feared the Lord. That is why he was trying to tell the truth. (Exhibit 296; 6 Supp.CT 1251; 32 RT 9371.)

He and Carole were like best friends. He loved her like a sister. She was incredible at everything, "the most awesome person ever." She was an incredible singer. Her voice was absolutely beautiful. He wished that she could do more things like archery, tennis, and music. Appellant did not want her to do any of it. He made the music loud on his recordings and turned his voice low because he could not stand his own voice. They listened to his recordings, but not to Carole's.(Court's Exhibit CVIII; Exhibit 296; 28 CT 8082; 6 Supp.CT 1247, 1251; 32 RT 9358-9359, 9362-9363.)

Appellant spent money on high-tech equipment, but it did not help his archery. At the last archery shoot he went to, he hit a pickup truck instead of the target. He said that he was using a new bow and was not used to it. Carole spent just a little money and had a basic bow. She would go to an archery tournament and always win. She once split an arrow with another arrow. She participated in archery tournaments with appellant for a time, but she was doing so well that he manipulated her into not shooting. (Exhibit 296; 6 Supp.CT 1247; 32 RT 9360-9362.)

Appellant did not like playing tennis with her because she always beat him, and it angered him. (6 Supp.CT 1248; 32 RT 9363-9364.)

Appellant never allowed her to show her skill as an artist. Her art

work was put away behind the bookshelf and the rain was leaking through the walls and ruining it. (Exhibit 296; 6 Supp.CT 1248; 32 RT 9364-9365.)

Appellant complained because the house was not always clean, but Carole always did the laundry and cooked. She worked hard and did the best she could. (Exhibit 296; 6 Supp.CT 1250; 32 RT 9368-9369.)

Appellant was always the master hunter and always took the shot. He would not allow Carole to make it. He once shot at a deer, but forgot to use a sight. He threw his bow down and broke the sight. (Exhibit 296; 6 Supp.CT 1250; 32 RT 9369-9370.)

Appellant "beat me down to nothing when I would work for him in the company." He acted like Gordon's master and threw tools. Carole, on the other hand, loved everyone and was very faithful to appellant. (Exhibit 296; 6 Supp.CT 1248, 1249; 32 RT 9365-9367.)

Appellant never had a DD-214 because he was just a PFC, not an officer. He never went to college. Gordon had an Associate Degree in general education. (Exhibit 296; 6 Supp.CT 1251; 32 RT 9371-9372.) He said he scored 220 out of 225 on the rifle range, but it was a possible 250, not 225. (Exhibit 296; 6 Supp.CT 1251; 32 RT 9374.)

Appellant liked to gamble, and they stopped at the casino and gambled when they went to Oregon. Gordon did not like gambling. They also got drunk and went out shooting at road signs. (Exhibit 296; 6 Supp.CT 1249; 32 RT 9367-9368.)

Appellant said he read "Playboy" magazine because they wrote good articles, but it was not the reason he bought it. (Exhibit 296; 6 Supp.CT 1250; 32 RT 9369.)

Appellant said that the baby kicked him when they were sleeping, and it made him mad because it woke him up. He said that he hated babies He

recorded over the sonogram.[51] (Exhibit 296; 6 Supp.CT 1251; 32 RT 9370-9371; 33 RT 9377.)

**11. Todd Garton.**

Allegations that appellant participated in planning and killing his wife and son, Jesse, and/or that he was involved in a conspiracy to kill Dean were untrue. He had nothing to do with Carole's murder and did not know it was going to occur. Nor did he know about or have any involvement in plotting or planning to kill Dean. He did not have any conversations with Lynn about killing him. (28 RT 8077; 29 RT 8325, 8334, 8353-8354.)

He did not steal or use a VISA card to travel to Ireland and instruct IRA snipers when he was in the fifth, sixth, and seventh grades. (28 RT 8077-8078.) He had no association with assassinations and received no income from a job as an international assassin. He never worked as or hired an assassin. (28 RT 8178.) He did not take any trips as a Marine, or tell Gordon that he had done so, for the purpose of acting as or assisting a sniper. He never went to South America to commit assassinations. He had no connection with the CIA or DEA, and did not know of any organization in the Marine Corps that did. (28 RT 8182-8183; 29 RT 8273.)

He never said that he was part of any companies other than G & G Fencing and Rancho Safari. He knew nothing about an organization called Company T. (29 RT 8212.) He never represented to either Gordon or Daniels that they could make money killing people. He never told Gordon that he received substantial sums of money killing people. He never had a discussion with either Gordon or Daniels about joining an organization known as The Company or about becoming a paid assassin. He never

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[51] Gordon did not know if appellant actually recorded over the sonogram. (32 RT 9376-9378.)

suggested to them that he had films that could be used to train to kill people. (29 RT 8336-8337.)

He did not go to a parking structure in Portland on a Saturday morning in February 1998 and look for Dean. He had no knowledge of bullet holes in a window screen in Room 218 of the Hampton Inn. He did not see Gordon's .22 rifle during the weekend. He did not see anyone shooting a firearm. Nor did he see a silencer or sound suppressor for a firearm. He did not throw a silencer over a wall. (Exhibit 211; 7 Supp.CT 1574; 29 RT 8300, 8304-8305, 8333-8334.)

He did not hand Daniels money in Jones' Fort. He loaned him $50 to purchase a holster, but he did not give him money as a down payment for a weapon. There was no discussion between them about the weapon being used to shoot anyone. (29 RT 8348-8349, 8351; 30 RT 8742.)

He never discussed killing anyone with Daniels. He never prepared a package of any type or delivered one to him. He never saw a package with a wax seal on it. (29 RT 8344.) He never gave Daniels anything with the words "liceman," "Irish." or "bomb" on it. He had never seen them before court. (29 RT 8352.) He never used a candle to make a wax seal. He never sealed a letter with a wax candle. (29 RT 8340.) He never put his Scuba Bubble into wax. (29 RT 8353.) He never saw a wax seal with the imprint of a Scuba Bubble in it before Carole was murdered. (29 RT 8298.)

There was never a label maker on the shelving unit in his master bedroom. (29 RT 8388.) He did not prepare labels on a label maker similar to the one in evidence, nor did he throw one in a river. (29 RT 8343, 8353.) He did not use the Styrofoam in his house for anything other than target practice and archery. (29 RT 8386.) The issue of insurance did not enter his mind on May 16th. (29 RT 8360.)

He moved with his family from Redding to Portland when he was 15. (28 RT 8078-8079.) He moved back to Redding in 1989, when he was 19 or 20.[52] (28 RT 8090; 30 RT 8538.) Lynn introduced herself to him the day after he enrolled at Park Rose High School. She became a girlfriend three months later. He did not date her exclusively. (28 RT 8091-8092.) She gave him a Celtic cross necklace. She had an identical necklace. He related to the Celtic cross as a family symbol. It had no significance to their relationship. He wore it until he was arrested. (28 RT 8186.)

He organized a rock band called Dentante Touch in 1985. (28 RT 8092-8093.) The band dissolved in 1989. Lynn was a groupie. She came to their gigs, bought products, and spread the word about the band. She was very supportive. (28 RT 8095-8096.) George Corman (sic) tried out for Dentante Touch. Appellant sold him a bass guitar and amplifier. When he was informed that he was not good enough to be in the band, Corman wanted to keep the equipment and not pay for it. Appellant took the amplifier and let him keep the guitar. This caused some negative feelings between them. (28 RT 8093-8095.)

He met Patrick Cohan in Portland in 1985. Cohan was a member of Sinn Fein, the political arm of the IRA, and he was very open about the fact that he was organizing fund-raising concerts for the organization. (30 RT 8508-8511.) He was a nationalist, very sympathetic to the cause of the IRA to unite Ireland as one country, and he told appellant about Ireland's geography and history, and about the IRA. They discussed his views about

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[52] Appellant got the 1980's and 1990's mixed up. He testified that he began attending Park Rose High School and formed a band 1995, that he last attended the school at the very beginning of 1996, and that he returned to Redding in 1997. He obviously mis-spoke. (28 RT 8087-8090, 8092, 8098; 29 RT 8216.)

the Royal Ulster Constabulary presence and what it was like growing up in Northern Ireland. (28 RT 8083-8085.) He told appellant that Garton was an Irish name. Appellant went to the library and looked up the name and made inquiries of his family, and concluded that he had a very strong Irish heritage. (28 RT 8081, 8083; 30 RT 8599.)

Appellant made some personal connection to the IRA as he investigated and talked to Cohan. (28 RT 8086.) He sympathized with the people in Northern Ireland because it was occupied by England. (30 RT 8545-8546.) He talked to Lynn about the situation in Ireland and told her that he was a "bigwig" in the IRA to impress her. He basically related every story that Cohan had told him. He had no personal experience; the stories were based on what someone else told him and he assumed a role in them. He did not say that he had killed people or had been a sniper. (28 RT 8109-8112.)

He obtained a copy of The Anarchist Cookbook in 1985. He did not color in the cover, put any articles into it, or tape anything inside it. Lynn took the book in 1985. She did not tell him why. (Exhibit 89; 23 CT 6515-6679; 28 RT 8107-8109; 29 RT 8228; 30 RT 8536, 8538.) He saw it in October 1997 in Gresham. (29 RT 8231-8232.) He had seen some of the documents in the book, but did not put them there. The "IRA" letters in a Soldier of Fortune magazine article in the book were similar to his tattoo. (Exhibit 89-D-89H; 23 CT 6686-6693, 6698-6699; 29 RT 8216-8228; 30 RT 8538-8548.)

He left home when he was 16 because he was a teenager with attitude. He and Carole both worked at Arby's, and he became romantically interested in her. His relationship with Lynn ended immediately. They had less than five dates after he met Carole. He and Carole shared an interest in

music. She wrote poetry, and was trying to write songs. She became the lead singer in his band in 1988. He worked with her every day as she built her confidence. (28 RT 8098-8102.)

They rented a house on 39th Avenue in Portland until 1988 or 1989, then moved in with his parents until he went into the Marines in 1990. Lynn showed up at concerts and band rehearsals. He encouraged her. Carole knew and tolerated her. He was working with his father, building fences, and Carole was working at the Oxford Suites in Redding. (28 RT 8102-8106, 8116.) He and Lynn wrote to each other. Her letters were usually addressed to Carole and him. Carole read some of them. They talked on the phone a couple of times. Carole was present during some of the phone calls and talked to her. (28 RT 8117-8119.)

He applied to the Marine Corps, but could not join because he only had a general education diploma. He returned to school in 1989 and graduated at the end of that year. (28 RT 8097-8098, 8114-8116.) He signed enlistment papers on March 23 1990, and went into the Marine Corps by his 20th birthday. (Exhibits 89-B-1, 89-B-2; 23 CT 6694-6697; 30 RT 8547-8548.) A drill instructor pushed him off a tower at boot camp and he broke his right leg in eight places and his left leg in five places. He was placed in a medical recovery platoon for two-and-a-half months, then completed basic training. (28 RT 8120-8122.) He was a squad leader. He scored 224 of 225 with the M-16A2, the standard armament for a Marine. At the time it was a range record. As a result, he was meritoriously promoted to lance corporal. (Exhibit 89-C; 23 CT 6684-6685; 28 RT 8123-8128; 30 RT 8546-8547.) He received several letters from Lynn, and he wrote but did not talk to her. She wrote to him about making arrangements to talk on the phone, but phone calls were not allowed in boot camp. (28 RT 8119-8120.)

He went to Camp Pendleton for combat training. He continued as a squad leader, qualified on the M21-A rifle, and taught the M-16-A2 and the M21-A on the rifle range. (28 RT 8129, 8136-8137, 8139-8140.) He then went to School of Infantry. (28 RT 8144-8146.) He could not pass the physical examination, so he was put on light duty and was attached to Schools Battalion for six or seven months while his situation was reviewed by the Naval Hospital, Balboa. He received basic and advanced medical training and combat first aid there, and he was attached with an EMT unit where he worked with corpsman on a day-to-day basis. He completed one week of the three week dive training at Coronado and earned a Scuba Bubble. He did not keep it in the mug on the shelf. He kept it on his dress blue uniform. He was discharged for medical reasons at the end of 1991. (Exhibits 5D-1, 30; 23 CT 6780; 28 RT 8146-8150; 29 RT 8269-8270, 8352-8353; 30 RT 8557.)

He earned a National Defense medal which he displayed in a picture frame above his mantle, next to his wedding photograph, with his picture, a Purple Heart, and a Navy Commendation medal. The Purple Heart had what appeared to be an oak leaf cluster. He did not know its significance. He did not put the display together and did not know whose medals they were. He did not earn them. (Exhibit 256; 27 CT 7836; 30 RT 8517-8519.) His lance corporal chevron was displayed on his sleeve of his uniform in his wedding picture. It is distinctly different from the insignia a lieutenant would wear. Most Marines, in his experience, would recognize the rank the insignia represented. (Exhibit 5A-29; 22 CT 6463; 29 RT 8264-8267; 30 RT 8519-8520.) He did not give any of his dog tags to Lynn. (28 RT 8150.)

He took a military flight to Ireland in 1991and stayed with Cohan in Dublin for about ten days. He met individuals associated with the IRA. It

was not what he thought it would be. After the trip, his fascination with Ireland, but not the IRA, continued. He put a cross with a drop of blood coming out of it behind the IRA tattoo on his arm. Carole designed the modification. (28 RT 8178-8182.) She gave him the nickname "Patriot" when he returned. (28 RT 8186-8187.)

He was not married during boot camp, but said he was so he could receive special visits while he was in rehabilitative training. Carole visited at least every other weekend while he was there. He was told that he had better have a certificate showing he was married when he returned from leave. (28 RT 8128; 30 RT 8740-8741; 31 RT 8786.) He married Carole in Reno a few days after he graduated from boot camp. Lynn was not invited. He informed her that he was marrying Carole about a week before the wedding. She sent him a letter saying that she would be flying down for his graduation, that she had arranged for them to marry, and that she had sent his letters to Carole to ensure that they would not be getting married. Carole told him that she received the letters. (28 RT 8128, 8151-8153.)

Their next communication was at least a year later when he received a letter saying she was pregnant and was getting married. He did not attend her wedding. She did not say she would marry him if he came to the wedding. He did not indicate that he was interested in maintaining a romantic relationship with her or suggest that he was interested in leaving Carole. (28 RT 8153-8155.) The next time he heard from her was when she called and asked Carole and him to come Jorden's Christening. They did not attend. She did not suggest that he should become Jorden's Godfather. He was not in regular telephone contact with her during this time. (28 RT 8155-8156.)

He and Carole lived with his parents in Anderson after his discharge from the military. (28 RT 8156-8157.) He worked in maintenance and as a

night auditor at the Oxford Suites. Carole also worked there. Then he worked full-time as a bartender at the American Legion. He said that he had been a lance corporal when he applied for the job. He had to provide a copy of his DD-214. (28 RT 8157-8158; 30 RT 8526.)

Someone at the American Legion misread lance corporal and called him a lieutenant. He played along because tips went "through the roof." He suggested that he had been involved in special operations when he was drinking. The stories caused tips to go from $30 to about $100 a night. He never said that he was a sniper or that he was out killing people. (28 RT 8158-8160.) He told militia members and other people to whom he was trying to sell products that he was a lieutenant. He did not tell Marshall Jones that he was a lieutenant. He did not tell Renfree that he was a Seal stationed in Grenada for six years. There are no Seals in the Marine Corps. (29 RT 8270; 30 RT 8526-8527.) He told Gordon that he was a lance corporal. He did not say that he was a lieutenant. He told Gordon that he had once traveled to Panama to unload equipment from a plane. He did not say that he had traveled to South America. (29 RT 8264, 8271-8273.)

He never filled out a job application where he did not exaggerate his experience and lie about his job history. He represented that he was a lieutenant in his employment application to the River House in Bend. (Exhibit 259; 27 CT 7837-7855; 30 RT 8528-8530.) His resume said that he was a lieutenant in the Marine Corps and that he had an AA degree in business from Shasta Community College and an LA degree from Simpson College in Redding. He never attended Simpson College or Chico State, got a teaching degree, or graduated from college. (30 RT 8530-8534.) He also lied about his military experience to sell products. (30 RT 8580.)

He and Carole moved to Bend, Oregon, and he re-contacted friends in

the Portland area, including Lynn. She called about three or four times a week. He did not accept all her calls. He or Carole talked to her about once a week. (28 RT 8161-8163.) He visited her four times when he lived in Bend. There was no sexual activity between them on these trips. She suggested some romantic interest in him, even when Carole was there. She would usually say it jokingly; "It's been such a long time, we ought to just hop in the sack for old times sakes." He laughed and showed no interest in the activity. He did nothing to promote it. (28 RT 8163-8166.)

He got his jacket when he lived in Bend. Carole designed the back of it. The flags showed his Irish and American heritage. "Eins" is Gaelic for Island. "One But Not the Same" referred to a song by U-2. (Exhibits 5B-13, 108; 27 CT 6712; 28 RT 8183-8185; 30 RT 8511-8514.)

He and Carole returned to Anderson and rented an apartment. She did not work for two years, until they moved to Adobe Road. Then, she was employed at the Bell Agency, an insurance company. He was working for fencing companies. (28 RT 8171-8173.) They spent a lot of time together bow hunting, camping, fishing, and going on long motorcycle rides to Reno or to the Indian casino in Canyonville, Oregon. People sometimes came over, and they played modern Irish rock music. (28 RT 8173-8177.)

A friend who ran Continental Alignment introduced him to Gordon, and they became friends. (29 RT 8263-8264.) Gordon purchased Continental Alignment. Appellant built the pit, then bought into the business and worked learning the trade. He did not authorize anyone to drive the vehicle that jumped the racks and smashed everything in the pit. Gordon never said that he felt he was responsible for the accident. (29 RT 8273-8276.)

Gordon went to work for appellant learning G & G Fencing about two weeks after Continental Alignment closed. He did not have a place to live,

so he moved into the back bedroom of appellant's house. He did not pay rent. He usually gave appellant a check for $100 each month to cover the food he ate. He brought electronic equipment and his computer with him. (29 RT 8276-8278, 8281.) He helped Daniels develop a web site for Rancho Safari. He was also developing a web site for some role-playing games. (29 RT 8279-8281; 30 RT 8743.)

He met Daniels in the computer lab at Shasta College. (29 RT 8235-8236.) He was the best man at Daniels' wedding. He occasionally babysat Daniels' child. Daniels needed extra money, so he dug holes at G & G Fencing and helped him set up an Internet site for Rancho Safari. (29 RT 8238-8239, 8250-8252, 8261-8262.) He let Daniels borrow his vehicles because he did not have a vehicle of his own. (29 RT 8355.) They hunted turkeys on appellant's property, and he showed Daniels how to use Shaggies to stay concealed from animals. He never trained Daniels in the art of sniper shooting. (29 RT 8261.)

In 1997 and 1998 he had two companies, G & G Fencing and Rancho Safari. He was not involved with any other company. (29 RT 8211.) He spent at least 50 hours a week building fences, and sold Rancho Safari products at shows on the weekends. He also had $97 a month in disability income from the Marine Corps, and he taught militias what he learned at the School of Infantry. (28 RT 8177-8178; 29 RT 8206-8208.) He was not in debt at the time Carole was killed, nor was he behind in paying his bills. (31 RT 8784-8785.)

He bought the fencing company from his father. Gordon worked for him with the intent of buying in after he learned the trade. (29 RT 8196-8197.) He paid his employees "under the table." He told the Contractors Board that he had no employees and filled out an exemption from workers

compensation form so he did not have to pay workers compensation taxes. (Exhibit 77; 26 CT 7531-7540; 30 RT 8524.)

He sold Rancho Safari equipment for two or three months prior to Carole's death. (30 RT 8501, 8505-8506.) Rancho Safari made three-dimensional camouflage called Shaggies, backpacks, and archery accessories. (28 RT 8173.) He had Rancho Safari cards made after he officially become a representative. (Exhibit 25; 6 Supp.CT 1235; 30 RT 8502, 8556.) He personally visited stores outside of California and made inquiries before he signed the contract. Different people went with him on these trips. (30 RT 8730-8731.) Gordon joined him on three trips to Oregon because he was into military and militia products. (29 RT 8282.)

He was also a representative for Love a Bow, TASCO, Bob Lee Recurves, and Smoky Mountain Knife Works products. He traveled to gun and archery shows in different towns and introduced himself and his products to owners of archery, gun, and sporting goods stores. He had a bank account and credit cards for the company. He also used his parents' credit cards, with their permission. (29 RT 8197-8198, 8212-8213.) He usually set up a table at gun shows and sold a myriad of products. He had a number of small items under $20. He would usually look in the phone book and go to different stores to see what products they had. He stayed at the Gresham Hampton Inn when he went to stores in Portland, even though Carole's family lived close by, because she and her family were estranged and she did not always want to see them. (29 RT 8198-8200, 8208-8211; 31 RT 8778-8782.)

James Kneeleand, an employee of Archers Afield, an archery shop in Tygart, Oregon, was contacted by a Rancho Safari sales representative in 1998. He could not identify the person he had the conversation with. (31 RT

9058-9059, 9061-9063, 9068-9071.) Shaun Lacasse, the owner of The Gun Room, Inc., a sporting goods store in Portland, had a conversation with a sales representative who was trying to sell gilly suits. She could not connect the name Rancho Safari with the visit or recall exactly when it occurred. (31 RT 9065-9066.)

Appellant bought a TV/VCR combo and was going to edit movies showing how to use the camouflage he was selling and make a montage. He watched "Sniper" with Daniels. He planned to use several portions of it in the montage. (29 RT 8259-8260.) He was reviewing, but had not yet started selling, videos on concealment, Marine training, snipers, marksmanship, and things militia-oriented. One video, "Camouflage" showed how to make a gilly suit. He was doing the same thing with "Whispering Death" and about twenty other videos. He borrowed "Pro Sniper" and "Ultimate Sniper" from Hawkins to review and see if they would be worth ordering and selling at the shows. He had not watched them. (29 RT 8201-8202, 8388.) He did not remember telling Daniels that he had trained or worked with Carlos Hathcock. It was not something he would say because Hathcock had been retired for years. (30 RT 8613-8615.) Gordon brought a copy of "The Jackal" to his house, and he saw Daniels and Gordon watching it more than ten times during 1998. He did not know if they referred to it as a training film. (29 RT 8337-8339.) He was also looking into radios. The Motorola radio was being discontinued and he intended to get as many as he could. He bought three at Circuit City. (Exhibit 5D-18; 26 CT 7427; 29 RT 8204-8206.)

He displayed the Shaggies on a mannequin made out of PVC pipe. It was not glued so he could snap it together and keep it in a bag. He did not

remember the exact size of the PVC pipe he used.[53] All his products and equipment, including the mannequin display, were stored along with his personal belongings at Jones' Fort, with Marshall Jones's permission. (29 RT 8203-8204.)

The Shaggy Shooters team competed at a two-day shoot on May 3 and 4, 1998. He shot the first day to stir up promotion. His job the second day was promoting Rancho Safari products. (Exhibit 254; 26 CT 7627-7628; 29 RT 8229-8231; 30 RT 8497-8499.) His picture appeared on the front page of the Record Searchlight's Sports Section on May 9, 1998. He was at the Redding Western Classic Trail Shoot wearing a Rancho Safari Shaggy suit and shooting a Bob Lee Bow. He did not give any of the pictures to his friends or to Lynn. (Exhibits 5D-28, 49, 249; 26 CT 7400-7401, 7434, 7618-7620; 29 RT 8213-8215; 30 RT 8499-8500.)

He had a business card that showed his military rank was lieutenant. Another business card, a gift from Carole, contained the name Patriot. He had no idea when she had the cards made. He received them in 1998. (29 RT 8380; 30 RT 8501-8502.) He did not order them. They were made at North Cal Printing, which also made his G & G Fencing and Rancho Safari cards and two banners. He paid for the Patriot cards when he picked them up with two checks, one on April 7, 1998, for $50, and another on April 15, 1998, for $85. (Exhibits 26, 30, 99, 252, 253; 22 CT 6460; 26 CT 7023-7026; 27 CT 7831; 30 RT 8506-8508, 8556-8557.) He got his Patriot pager after March, 1998. (Exhibit 83; 30 RT 8503-8504.)

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[53] According to plumber Douglas Little, the silencer for the Ruger 10/22 rifle (Exhibit 302) was Schedule 40 PVC pipe, about 18 inches long. A coupling (Exhibit 303) connected commonly available fittings to an adapter (Exhibit 305). Normally it would be held on with glue. (Exhibit 304; 33 RT 9381-9383.)

He bought a limited edition, Rossi .357, from Marshall Jones. Rossi put "Jones' Fort" on its right side; he put a Celtic cross on the left side. He also had a twelve gauge shotgun and a Remington 700 .308 rifle. (Exhibit 8; 22 CT 6412-6413; 29 RT 8285-8286.) Gordon often talked about guns and had many. Appellant knew of 15, including a Model 1911 .45 pistol; a Beretta 22A pistol; a TEC-9 pistol; and a Ruger 10-22 rifle. The TEC-9 had a large magazine. He would not shoot it because it was a dangerous, "piece-of-crap" gun. Gordon carried the .45 on his person after he moved into appellant's residence. (29 RT 8282-8285.)

He did not remember when he first saw the Ruger 10-22 rifle. He modified it in 1998, with Gordon's permission, after Carole and Jessie were killed, because he and Marshall Jones were going hunting. He took the barrel off the gun because it was illegal and threw it in the back of his Trooper. He made the gun legal and accurate by putting a heavy barrel, a stock, and a good scope on it. (29 RT 8286-8289.)

He never suggested that Daniels buy a gun. He directed him to Jones' Fort to purchase a weapon and gave him a ride to pick it up. Marshall Jones was a good friend and he directed anyone who was interested in purchasing a firearm to him. He talked with the gunsmith in the back room and looked at a rifle he was interested in while Daniels looked for a weapon. Daniels told him that Jones recommended the Rossi. Jones gave Daniels ammunition when he picked the gun up. (Exhibit 5C-33; 22 CT 6370; 29 RT 8344-8351; 30 RT 8561, 8742.) He went to the shooting range with Daniels, but did not recall if he shot the revolver. Daniels was sighting in the Rossi. He shot his .357. (29 RT 8350; 30 RT 8735; 31 RT 8783-8784.)

He had an account with AOL. Gordon and Carole installed the software. Carole asked what screen name he wanted and put it into the

computer. (29 RT 8241-8245.) He chose the name Patriot. AOL said the name was already being used and gave him some choices. He chose one of the variations, "PATR553." (29 RT 8258-8259.) Carole had her own screen name and password. (29 RT 8250.) Daniels showed him how to sign on the night they hooked it up. He had to put a password in each time he signed on to the Internet using the AOL software. (29 RT 8247.) He put the password on a Post-It note on the side of the computer. He saw Carole, Gordon, Daniels, and Mann using the computer to get on the Internet. He told them they could. (29 RT 8239-8240, 8249-8250.)

He and Carole bought candles. Gordon bought and made candles for them. He poured wax out of one of the candles to get the wick burning. (29 RT 8339-8341.) He did not know if his writing was on the AT&T pamphlet. He did not recognize the e-mail address on it. (Exhibit 17; 23 CT 6880-6881; 30 RT 8534-8536.)

He and Carole had been trying to have a baby for a long time. (30 RT 8743-8744.) He coached a youth soccer team because coaches were needed. Carole also volunteered. (29 RT 8230-8231.) He and Carole taught his brother's 13-year-old son, Derrick, how to paint with acrylics. They spent a lot of time with him and took him wherever they went. They enjoyed doing things with him. They bought him a bow which he kept at appellant's house. Appellant taught him how to shoot it. (30 RT 8744-8745.) He bought a .22, single-shot, lever-action, Ithica rifle for his son, Jesse. He kept it in the gun rack in his house. (29 RT 8267-8268.) A cigar in the mug on the shelf below the gun rack was a gift for the birth of his son. (Exhibit 5A-29; 22 CT 6349; 29 RT 8268.)

He talked with Lynn in the summer of 1997 about her suspicions that Dean was cheating on her. She brought it up. She said a friend had seen him

in a bar with another woman. She also said that he was embezzling. He did not give her any information. There was no talk about taking any action against him. She last brought up the subject in February 1998. (29 RT 8325-8329.)

He rented two rooms, 320 and 322, at the Gresham Hampton Inn on October 19, 1997. (Stipulations 22, 23; Exhibit 62; 25 CT 7299; 26 CT 7377-7380; 30 RT 8493-8494.)

On January 3 and 4, 1998, he and Gordon were looking for hunting spots in the Bend area. They stayed at the Eugene-Springfield Courtyard Marriott. Lynn called his house and learned that he was there, then called him and decided to come to Eugene-Springfield. She brought a friend, Keri Kirkpatrick. Gordon and Lynn stayed in one room and he stayed in the other. He did not have sexual relations with her that weekend or any occasion in 1997 or 1998. He took his .357 Rossi on the trip. Gordon did not take any weapons. (Exhibits 195, 196; 25 CT 7350-7351; 29 RT 8334-8336; 30 RT 8494-8495.)

He took Gordon and Daniels to Oregon in February 1998 to promote the products he was selling and to acquire new products. (29 RT 8262-8263, 8290; 30 RT 8593.) All of them were armed. (Exhibits 5D-15, 5D-16, 5D-17, 5D-20, 5D-21; 24 CT 6832-6834; 26 CT 7426, 7429-7430; 29 RT 8289-8291, 8928-8300.) He always carried a firearm when he was traveling with his merchandise. (30 RT 8594.) They stayed at the Quality Inn the first night because Carole accidentally made reservations at the airport Hampton Inn. They stayed at the Gresham Hampton Inn the second night because he made a ruckus about them not having his reservations and they assured him there would be rooms available the next night. They went downtown on Saturday morning to Copeland's Sporting Goods Store on Fourth Street. They

accompanied him on other sales calls that day. (29 RT 8300-8304; 30 RT 8494.)

Carole told Lynn that he was he was in Gresham, and she came to the hotel on Saturday. He asked Daniels and Gordon to leave, and he talked to her. The subject of killing Dean did not come up. (Stipulation 22; Exhibit 63; 25 CT 7300; 26 CT 7377-7378; 29 RT 8324-8325.) Gordon and Daniels took the Jeep that evening and visited a topless bar. They got back to the hotel around 2:30 a.m. They said they had gone to the 505 Club. They did not say they had gone to the Noyeses' residence. (29 RT 8330-8332.)

He and Carole visited her family on Easter weekend in 1998. (30 RT 8946-8947.) They were in Gresham on May 8 through 10, 1998,. They stayed at the Hampton Inn. They did not meet with Lynn. He did not go to her house and stage a burglary. He called Daniels more than once from the hotel to have him check on a fencing job. He went to Biddy McGraw's. (Stipulation 22; Exhibit 123; 25 CT 7333-7334; 26 CT 7377-7378; 30 RT 8495-8496, 8753-8758.)

He had a life insurance policy on May 16, 1998, through the Veteran's Administration. He and Carole also had policies through a company Carole picked. He knew that they were for around $100,000. He and Carole received physical examinations at their residence and signed an insurance application on March 12, 1998. He signed papers on three separate occasions. Carole filled out the paperwork. He did not understand that two policies were being applied for and was not aware that an insurance policy on Carole's life was in effect as a result of the medical exam. He did not have any contact with the policy after the physical examination. He did not make or see any payments made. He did not know if he or his mother made a call to Transamerica to report Carole's murder. (Exhibits 78A-1, 78A-2,

78B-1, 78C-1 97-B, 97-C; 26 CT 7541-7552, 7549-7552; 29 RT 8357-8360; 30 RT 8557-8564, 8735-8738.)

He went to the gun show in Anderson on May 16, 1998, to sell Rancho Safari products. Carole came to the gun show around 10:30 a.m. and left with Tracie Jones. He talked to her when she came back. She intended to go home, finish watching a movie, drop the movie off, go grocery shopping, and meet Gordon, Daniels, Mann, and himself at their house. She was driving the Jeep. Daniels went with her. The gun show ended at 5:00 p.m. He would have been done cleaning up by around 5:30 p.m. He went to his parents' house to return a copy/fax machine. He received a message from Carole on his pager saying, "All done going home." When he went home, Mann was sitting at the computer. He asked where Carole was. He did not go outside looking for the Jeep. He did not suggest that it had been stolen or request that the police be contacted. (29 RT 8354-8357, 8360-8363; 30 RT 8621-8622, 8625-8626.)

On his way to the bathroom, he saw Carole lying on the floor by the left side of the bed. He did not see blood. He jokingly said, "What are you doing?" and got no response, then walked up closer and saw blood around her head. He yelled for Gordon and Mann to call 911. He put his head on her chest and listened for her heart, but he was so scared and upset that he could not hear anything except the thumping in his ear. He tried his fingers on her neck, but he could not tell if he was feeling residual pulse from her neck or if he was feeling his hands throbbing. Her body was warm to his touch. He thought she was alive. He started CPR. The reactions were minimal. At some point he realized she had been shot. (29 RT 8364-8368.) He kept trying different things to help her. He asked for a light to check her pupils to see if

they were dilating. He wanted to do a "trachea"[54] and asked for a knife. He did not move her at all. He was angry and upset and did not know what was going on. (29 RT 8371-8374.)

He was directed to come out of the house when the police arrived, and he was not allowed to go back in. He gave them permission to search the house. He did not remove or direct anyone to remove anything from it. (30 RT 8682-8683.) He threw his pager because it kept going off and he was upset, not because he was concerned that the police might find out that Daniels was paging him. (30 RT 8505.)

He went to the police station and talked to the police that night. A video tape of the interview was played for the jury. (Court's Exhibit CII; Exhibit 269A; 27 CT 7770-7822; 29 RT 8368; 30 RT 8772; 32 RT 9206, 9265.) He did not bring up Daniels' name, even when he was asked if anyone spent the night at his house. (30 RT 8627.) He said that he thought Carole's wounds looked consistent with the size of a .45 bullet. He did not remember saying that his opinion was based on his "Military experience, two Purple Hearts and commendation." He had never been present when someone was shot. (30 RT 8628-8629, 8741; 31 RT 8784.) He did not know how many hours he spent at the Sheriff's Office. He did not remember calling Daniels when he left. (31 RT 8792.) He did not recall telling his brother that he was finally to the acceptance stage of the 12 stages of grief. He did not accept what happened to his wife within a few hours of her murder. (30 RT 8611-8613.)

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[54] He explained that a "trachea" is where a path in the throat is cleared with a quarter-inch tube. He had never done that. He was not a certified EMT. (28 8141-6142; 29 RT 8372; 30 RT 8628.)

He stayed at his parents' house that night and with Marshall and Tracie Jones the next couple of days. He found out later that Daniels was accused of being involved. He did not believe it. (29 RT 8369-8370, 8374.)

He was trying not to show emotion after Carole's death. His father taught him not to show emotion.[55] (30 RT 8732-8734; 31 RT 8782.) Lynn was standing between his legs in the pool at the Amerihost Inn on the night of Carole's memorial service service, but Carole's mother and stepfather, Woelfer, Frederici, and Colebank were also there. (31 RT 8782.)

After Carole's death, the bulk of the property from his house was put in a storage shed. He kept personal items he wanted to go through at the Joneses' house, with Marshall Jones's permission. (29 RT 8229.) He kept a lock box that contained $4,980 under the bed in the master bedroom. It was not there after the murder. (29 RT 8381-8382.) He was asked to provide a description of the lock box May 17, 1998. He did not remember being told that the information was needed for a search warrant for Daniels' house. He did not contact Lynn and ask her to tell Daniels that a search warrant was being prepared for his house. (30 RT 8569-8570.)

The label maker in his house was not electronic. It produced labels with raised lettering and a back that peeled off. Gordon also had a label maker. Its labels were thinner with clear black lettering. He did not see Gordon using it. (Exhibits 5D-6, 5D-11; 23 CT 6713; 25 CT 7295; 29 RT 8342-8344.) There never was a label maker on the shelving unit in his master bedroom. (29 RT 8388,)

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[55] Richardson believed that he was trying to avoid letting anyone see his emotions at Carole's memorial service. They both were instructed as children not to show emotion, such as crying, if at all possible, but to "suck it up" and go on. (30 RT 8713-8716.)

He believed that the wrong man was arrested for Carole's murder. He did not think that Daniels was capable of killing Carole. He talked to the media a few times and said that Daniels was a friend who had absolutely no motivation to kill her. If Daniels needed money, they would have given him some. He sent several written pages to KQMS, a radio station, and to KHSL and two other television stations. (Exhibit 255; 27 CT 7834-7835; 29 RT 8375-8376; 30 RT 8536.)

He received a telephone call from Daniels on May 19, 1998, after he talked to the media. A recording of the call (Exhibit 1-A) was played for the jury. He had not slept, he was stunned, and a good friend who had no reason to kill Carole or Jesse had been arrested. He told Daniels that he was upset the Record Searchlight was accusing and basically had already convicted him of the crime. G & G Fencing owed him $250 for his last week's pay, and he said that the company would help him. He said, "you're still going to get yours whatever monies you have coming to you." He told him that he would call his father and brother and see what their opinion was. He referred to them as the "big boys." He suggested that he would help Daniels with an attorney. He did not express concern about Carole or his son Jesse in the phone call. recording of the call was played for the jury. He said, "see they had me as the number one prime...I spent my first twenty-four hours there. They took every gun I owned and ran ballistics on it."

Daniels said, "I copped a plea of jealousy," and appellant did not question what he meant. It did not sink in during the conversation that Daniels had killed Carole. He asked him "So you said you did it?" because he was trying to figure out why. It did not make any sense. He realized after he hung up that Daniels was telling him that he had, in fact, killed Carole. (29 RT 8376-8378; 30 RT 8564, 8566-8571, 8574-8579, 8585-8586, 8688,

8759; 31 RT 8788-8791, 8793.)

Grashoff and Von Rader picked him up and talked with him on May 21, 1998. He answered their questions and gave them information. He talked about Daniels' phone call. (29 RT 8379-8380.) He went to the police department voluntarily, gave them permission to search his house whenever they needed to, and did not make any effort to retrieve the Scuba Bubble, wax candles, or the label maker. He cooperated in giving them his fingerprints, even though he knew they thought a fingerprint in a piece of wax was his. He thought it would be the easiest way to prove that it was not his. He agreed to take a voice stress analyzer because he had nothing to hide.(30 RT 8676-8685, 8762-8766; 31 RT 8776-8777, 8787.)

He was attempting to help the officers with their investigation when they started asking him about the call. He did not think they were trying to gather information against him. (30 RT 8685-8687.) He did not lie about what took place in the telephone conversation with Daniels before he realized the interview was being recorded. He knew that it was being audio taped. The detectives told him, and he saw the recorder. (30 RT 8580.) They did not mention anything about video taping. (30 RT 8669-8670.) They repeatedly said that they had not taped Daniels' phone call, then pulled out a tape recorder and played it for him during the interview. (30 RT 8580.) Video tapes of the interview were played for the jury. (Court's Exhibit C; Exhibits 260-A, 261-A, 262-A; 27 CT 7653-7767; 30 RT 8642-8645, 8664-8667.)

He did not lie. It was the day before his wife's funeral and he did not have the best recollection, but he gave the best answers that he could. (30 RT 8565.) He did not recall exactly what he said about the phone call except that he did not remember everything. He was upset and mad at everybody. He

was stunned and pretty much out of it and did not have a clear memory of the call. (30 RT 8575, 8589, 8673-8674.) They kept asking him questions about specifics, so he gave them the best of his recollection. (30 RT 8581-8584.)

He said several times that he had just got off the phone with the Record Searchlight when Daniels' call came in. He believed that Daniels could not have killed Carole, and the only reason he was arrested was because he was the last person to be with her. He considered Daniels to be a friend. He was a single father having a hard time. He needed extra food, and he and Carole brought food for him. He gave him advances and bonuses and babysat his son. (30 RT 8670-8673 8675.)

He said that he used the term The Company to mean G & G Fencing or Rancho Safari. (30 RT 8687-8688.) When he said that he was going to get on the phone with the "big boys" and "see what we can pull here," he was not referring to The Company. The "big boys" were the people he was going to contact for advice, his father and brother. He had referred to them as "big boys" since he was a small child. His mother coined the term when he was nine years old. He talked to his father and brother about helping Daniels out. (30 RT 8578-8579, 8767-8768.)

When the detectives showed him an eight by ten picture and referenced a wax seal, he talked about picking up wax at his house. Gordon bought and made candles and, whenever he cleaned up, he picked up wax around the house. He and Carole purchased jar candles with wine-colored wax. He poured wax out of a candle to get the wick burning. (Exhibits 5B-19, 5B-20, 5B-21; 25 CT 7291-7293; 29 RT 8339-8341.)

He did not know if he told the investigators that Daniels said they had him "dead-on to rights" because of the gun and the clothes. (30 RT 85-

8590.) He did not remember telling them "Everyone else has to have closure and stuff but, you know, it doesn't matter to me." (30 RT 8590.) He did not remember saying that, Col. Samolin called him in when he went to his first duty station at Quantico. He associated Samolin with his first duty station because he told him that he was going to Quantico after School of Infantry. He was not trying to hide, lie, exaggerate or evade. It was a simple misstatement. (30 RT 8618-8619, 8739-8740, 8768-8772.) He did not recall saying, "I sold him the frickin gun." (30 RT 8620-8621.) He felt awful that he referred Daniels to Marshall Jones, but he did not think he pointed Daniels in the direction of a particular gun. (30 RT 8734, 8773-8774.)

He did not lie to Daniels, saying that he spent the first 24 hours at the sheriff's office. He might have exaggerated, but he remembered spending a lot of time at the police station. To his knowledge, the detectives did take every gun that he owned and ran ballistics on them. (30 RT 8572-8574; 31 RT 8793.) He told the detectives, "I don't shoot guns." He did not hunt at all with guns in 1998. (30 RT 8745-8746.) He said that he was usually kind of a jerk. He did have a bad attitude sometimes, but it did not carry over to Carole at all. (30 RT 8750.) At one point in the video he was sitting in the room alone, looking at a picture of Carole in his watch. He was not aware that anyone was watching him. (Exhibit 263; 30 RT 8668, 8742.)

His parents put money on his jail commissary account for him to buy items such as paper and writing materials. Paul Smith, Jr., was in the cell above his and was on lock-down and not able to go to commissary. He gave Smith paper and envelopes. Smith told him that he wrote the Gabriel Michaels letter to Lynn. He had been writing to her for two years. He did not write the letter at appellant's request. Appellant did not suggest the wording. He did not handle the paper after Smith wrote the letter. He never saw the

letter before court. (29 RT 8382-8385.)

**C. Prosecution Rebuttal Case.**

**1. Sharon Lonie.**

Sharon Lonie and her husband owned North Cal Printing. Appellant came into the business in April 1998 to have two sets of business cards and a flyer printed. One of the business cards had an 800 number. To her knowledge, he had not been in the store before. Carole was never in the business and never called. (32 RT 9236-9237, 9241, 9255-9256.)

Lonie helped appellant lay out a card for a business called "Shaggy's." He gave her the information and she set up a card for him to proof. He had another card with a "1-800 number" made. He approved the cards as they were designed. (Exhibits 25, 26, 99; 27 CT 7831-7832; 32 RT 9237-9240.) He also wanted to have a banner made for a show. He talked more about that with her husband. (Exhibit 253; 26 CT 7625-7626; 32 RT 9241.) He paid with two checks. Check number 6069, a $50 deposit, was dated April 7, 1998. Check number 6084, dated April 15, 1998, was for the balance of the two print jobs. (Exhibits 99, 252, 253; 26 CT 7531-7532, 7623-7626; 32 RT 9242-9246.)

She printed two versions of the flyer for Carole's memorial service. One had what appeared to be a Celtic cross on the right side. (Exhibit 270; 28 CT 8069-8070.) Appellant was wearing the cross on his neck. He said it was important that it be on the flyer; he and Carole each had one and whoever killed her had stolen hers. Lonie photocopied the cross and pasted it onto the flyer. (Exhibit 250; 26 CT 7621-7622; 32 RT 9246-9249.) He gave her a picture of Carole. Her normal practice was to return materials to the customer. She gave the picture to Grace Bell because she did not see appellant again. (32 RT 9250-9253.)

**2. Faye Call.**

Faye Call was at home in Anderson on Sunday, May 10, 1998. Carole came by about 1:00 p.m. to wish her happy Mother's Day and gave her a single, pink carnation. (34 RT 9659-9662, 9665.)

**3. Patricia Garton.**

After listening to an audio tape of a conversation with appellant on June 14, 1998, while he was in custody, Patricia Garton recalled talking with him about an "I LOVE YOU BABY" sticker. She was referring to a sticker like one from her grandchildren's books. She was looking for it on the dash of his Isuzu. (Court's Exhibit CXIV; Exhibit 310A; 28 CT 8163-8164, 8284-8286; 34 RT 9797-9802.)

**4. Krista Woelfer.**

Woelfer saw appellant and Carole on April 11, 1998, Easter weekend, at her apartment in Beaverton, Oregon. They went to lunch and spent two or three hours shopping. Appellant purchased several Guinness products, including a hat. She took a photograph dated April 11th by the front door of her apartment. Carole was seven months pregnant. Appellant was wearing a Guinness baseball hat. (Exhibits 284, 285; 6 Supp.CT 1240; 34 RT 9809-9812.)

They met again, either that day or the following evening. She and appellant went to a pub called Biddy McGraw's. Carole did not go because she was not feeling well. Appellant left the table at least four times to make a phone call. He said that he was trying to reach a friend and meet with him. She left and walked home. Appellant was still there when she left. He and Carole left her residence after midnight. She did not know who drove. He had been drinking, but he was talking reasonably with her. (34 RT 9813-9817.)

**5. Lynn Noyes.**

Appellant called Lynn on Easter weekend 1998 and said he was at Biddy McGraw's and wanted to see her. He said that, if she did not come, he would go to Woelfer's apartment and spend the evening with her. She did not want him to do that. She said that she did not think she could leave because Dean was at home, and it was not common for her to leave in the middle of the evening. (34 RT 9827-9830, 9838.) She went to Biddy McGraw's. They drove to a park and had sexual intercourse in her Bronco. She spent at least two hours with him, then drove him to Woelfer's. He was wearing a black, Guinness hat. She asked if she could have it. He gave it to her and she wore it home. (Exhibits 284, 285; 34 RT 9830-9833, 9838-9839, 9842.) She did not remember if she told Von Rader on June 16, 1998, that she did not see him that weekend. (34 RT 9836-9838.)

She slept with appellant in his room when they met at the Eugene Marriott Hotel. Gordon stayed in another room. She was with a friend who had lived in the Eugene area. She never stayed overnight in a hotel room with Gordon. (34 RT 9834-9835.)

**6. Steve Grashoff.**

When appellant testified, Grashoff had no information about who purchased the KL-750 label maker that was found in the Sacramento River. After appellant's testimony, he went to the Sheriff's I.D. Lab and located a Patriot business card that was discovered on the dresser in the Gartons' master bedroom and two checks to North Cal printing for the purchase of Patriot and Rancho Safari business cards. (Exhibit 252; 26 CT 7623-7624; 34 RT 9671-9674, 9681-9682.) He also located G & G Fencing check number 6105, which was made to Office Max in the amount of $172.90. The back of the check contained mechanical printing from an Office Max

register. He took it to the Office Max store at 1270 Churn Creek Road in Redding and determined that, at approximately 4:59 p.m. on April 27, 1998, appellant purchased a Casio KL-750 EZ-Label Printer, a package of eight Duracell AA batteries, a package of two Casio 9mm Label Tape Cartridges, a Motorola Express Xtra Pager, a package of Magna Card business card magnets, a CareMail bubble-lined envelope, and a Rogers Month/Day/Year date stamp. The Office Max register journal receipt accurately reflected the Universal Pricing Code, a brief description, and the retail cost of the merchandise. At some point, he purchased items similar to those listed on the Office Max receipt. (Stipulation 32; Court's Exhibit CXIII; Exhibits 69, 272-279; 28 CT 8154-8157, 8160-8162; 34 RT 9667-9670, 9676-9681.)

**7. Mark Fisher.**

A Casio model KL750 label maker was submitted to the DOJ laboratory in Redding on June 23, 1998. (Exhibit 69; 34 RT 9786, 9788.) Latent print analyst Mark Fisher examined the label maker on July 2, 1998, and the batteries within the label maker on May 25, 1999. He was unable to develop any prints. Fingerprints on a label maker submerged in water would degrade over a period of time. It is highly unlikely that a latent impression remained on the object in that type of environment. (34 RT 9788-9792.)

**8. Mark Von Rader.**

During Mann's interview on May 16, 1998, Detective Montgomery occasionally turned the tape off and restarted it. This also occurred during the videotaped interviews of appellant on May 16 and 21, 1998. When detectives reach a natural break in an interview or think they have obtained all the information they need, they are instructed to leave the interview room and compare notes with other detectives to look for inconsistencies or areas that need to be explored further, and then resume the interview. Many times

there are several breaks during the course of an interview, especially if more than one witness is being interviewed and, in this case, at least three witnesses were at the main office and information was coming from the crime scene. (34 RT 9694-9695.)

Von Rader was present for the latter portion of appellant's interview on the evening of May 16, 1998. Appellant was allowed to leave around 1:00 or 1:30 a.m. Ballistics were run on just one gun in this case, the 44 caliber revolver recovered from Daniels' residence on May 17, 1998. (34 RT 9702, 9704.)

The focus of the May 21, 1998, interview with appellant was Daniels' phone call. He did not initially tell appellant that he was aware of the call. He wanted to see if appellant would acknowledge the conversation and be honest about what was said. He created a false impression that he needed appellant's assistance with information about the call. The audio recorder was out in the open and tapes were changed in appellant's presence. He did not tell appellant that the interview was being videotaped. The video recorder was not purposefully left running during breaks while appellant was alone to see his reaction. Appellant provided information about the phone call and answered questions through most of the interview. He volunteered to give fingerprints when asked. He gave his permission every time there was a request to search his house or vehicle. He agreed to take a voice stress analysis. He played the tape for appellant to confront him with the fact that it was in conflict in many aspects with what he had said up to that point. (34 RT 9698-9699, 9711-9715, 9720-9724.)

He lied and told appellant that he found a fingerprint on a piece of sticky tape at Daniels' residence. (34 RT 9717-9718, 9724-9725.) He lied and told appellant that the fingerprint impression on the wax seal was not

Daniels' when, in fact, it had not yet been compared. (34 RT 9700.) When he showed appellant an enlarged photograph of the wax seal, appellant said that a Dive Bubble had caused the impression. He did not know what a Dive Bubble was, and it took him quite a while to see what appellant was describing. (34 RT 9695-9697.)

When he interviewed Lynn on June 16, 1998, he brought brochures showing the Hampton Inn in Gresham and the Marriott in Springfield-Eugene. He wanted to see if she would volunteer information after she saw them. In the second interview, he brought a package containing her phone records just to let her know that he had them and to see if she would volunteer anything. (34 RT 9704-9706.)

He asked Portland police to investigate whether or not a transient had been killed near the Hampton Inn. Detectives from the Portland Police Department investigated. A body was not located in that area. (Exhibit 100; 34 RT 9692-9693.)

**D. Defense Surrebuttal Case.**

Appellant drove when he and Woelfer went to Biddy McGraw's. She did not notice anything different about his appearance when he returned to her house that night. She did not remember if he wore his hat to the pub or if he was wearing it when he and Carole left. (34 RT 9843-9845.)

Lynn told Von Rader on June 16, 1998, that she learned after the fact that appellant and Carole were at Woelfer's on Easter weekend 1998. She was disappointed that she did not see them. Her feelings were hurt. She said that she would have loved to have seen Carole pregnant. (34 RT 9846-9847, 9860-9861.) She told the prosecutor on September 27, 2000, that she did not know Carole and appellant were still together on Easter weekend 1998 and had no idea they were in town. She did not recall telling Von Rader that she

called appellant and asked why he did not visit her when he was in Portland that weekend. If she said that, it was part of lying to cover up for him. (34 RT 9850-9851.) She did not think they were living together during Easter 1998. She knew that Carole was pregnant, but never thought it was appellant's child. She was impartial about wanting to see Carole while she was pregnant. She did not know if it would have hurt her feelings. She did not really know her that well. (34 RT 9855-9857.)

* * * * *

## PENALTY TRIAL

The state's case in aggravation rested solely on victim impact evidence from Carole's father, James Holman, her stepmother, Victoria Holman, and two of her brothers, Michael, and Donald Holman. They testified to three general areas, describing (l) their relationship with Carole, (2) being notified of her death and the immediate emotional aftermath and (3) the devastating impact the crime had on them. (37 RT 10520-10555, 10559-10567.)

Appellant presented no evidence. During his closing argument, appellant's counsel informed the jury:

> I have a message as counsel for Mr. Garton to deliver to you. Mr. Garton points out to you the following. Norman Daniels has killed his wife Carole Anne Garton. Norman Daniels has killed his son Jesse James Garton. Norman Daniels took his family from him. The police took his freedom from him and placed him in a cell. The District Attorney accused him and took his reputation. The verdict has taken his honor. The only thing of value that Todd has left is his life. To Todd, life without family, freedom, or honor, has little value. You might as well kill him. He is neither asking nor he expects more than death from you.

(37 RT 10733.)

* * * * *

## ARGUMENT

### I.

### REFUSING TO PERMIT APPELLANT TO WEAR HIS WEDDING RING DURING TRIAL VIOLATED HIS RIGHTS TO A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE, TO WEAR CIVILIAN ATTIRE DURING TRIAL, AND TO A RELIABLE GUILT AND PENALTY DETERMINATION, AND WAS REVERSIBLE ERROR.

Appellant sought to wear his wedding ring and a necklace and religious medallion during trial.[56] (3 RT 1015.) The ring was a simple gold band with a design that could not be seen from more than two or three feet away. His counsel proposed to keep it so that it would not pose a security problem, and to give it to appellant at the beginning of each court day and take it at the end of the day. (3 RT 1015, 1070.)

The prosecutor opposed the request, saying that it was an improper effort to sway the jury: "I see no benefit for him wearing that . . . other than his attempt to try and persuade the jury that he has nothing to do with this murder, and that he's still bonded with his wife, whatever it is he's trying to convey subconsciously, or directly to the jury." (3 RT 1017.)

Appellant's counsel argued that there would be no objection to the ring except for the fact that appellant was in custody. "Otherwise he would have a perfect right to wear it. And I don't believe it's a security issue under the circumstances that we described." (3 RT 1017.)

The trial court responded, "I'll have to talk to my bailiff. But seems that's problematic. Prisoners are not allowed to wear jewelry in the jail, as I understand it." (3 RT 1015.) At the next court session, it announced that it

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[56] Appellant is challenging the denial of his request to wear the ring but not the necklace and medallion herein.

had conferred with a representative of the marshal's office, and the marshal viewed the ring "as a significant security risk, and outside jail policy." (3 RT 1074.) The court explained that metal jewelry is a potential weapon that could be taken from appellant or dropped or lost. It could also be used for barter, which creates discipline control and violence risks. Counsel's willingness to assume responsibility for the ring did not "solve all the problems" because appellant was also going to wear a belt and tie during the trial, and they, too, were contraband which the bailiff would be responsible for securing. In the court's estimation, there were "at least a hundred opportunities [during the trial] for the busy Marshal to inadvertantly [sic] miss one of the now four items, two of which are small and not readily visible." (3 RT 1073-1074.)

Appellant's counsel responded:

> I think it's absurd. . . . I don't know of a single Marshal associated with this case that can't remember four items, as opposed to two items without a checklist. But we'll provide a checklist for them for every time, so that they can check it off. Handing the tie and the necklace at the very same time holding them together, is an extremely simple thing. And the very – frankly, the belt and the ring could go on at the same time. They don't even have to take care of the ring. I would assume the responsibility, personally, for the ring, and hand it to him when he comes in this court. . . . I would also indicate to the Court that, as well as the Marshal does their job here, when Mr. Garton goes back to the jail, he is subjected to another search by the jail personnel. . . . And if they inadvertently got to the jail, within a day, that's going to be obvious. It's going to be extremely obvious that it's missing.

(3 RT 1074-1076.)

The court saw no reason to impose additional duties on the marshal to accommodate appellant:

Every one of those steps, whether it's taking a belt and a tie,

> then taking a necklace out from under his shirt and taking a ring and handing them to you, is a step that takes time. And handling those things four times a day, there's got to be a good reason that that's done. And so far you haven't persuaded me that there is a good reason.

(3 RT 1078.)

Counsel argued that there were several good reasons. The absence of a wedding ring might be interpreted by jurors as appellant's abandonment of his wife. Denying the request would deprive him of the right to make a normal appearance before the jury because of his custodial status. Allowing him to wear the ring would be a minimal effort at accommodating the presumption of innocence and avoiding discrimination due to his custodial status. (3 RT 1079, 1081.)

The court found that jurors could not see the ring, and that many married men do not even wear a wedding ring. It agreed with the "bailiff's assessment of the risks involved" and denied the request. (3 RT 1079-1080.)

Refusing to permit appellant to wear his wedding ring in the jurors' presence violated the his right to present evidence in his defense, to be dressed in civilian attire in the jury's presence, and to a reliable guilt and penalty determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and his rights under article I, sections 7, 15, 16, and 17 of the California Constitution. The error requires reversal of the judgment and sentence.

### A. Appellant's Right to Present Evidence of His Love for His Wife and Child by Wearing His Wedding Ring During Trial.

Lynn testified that appellant was miserable with Carole, that his appearance as a "happy, bubbling, father-to-be" was a front, and that he expressed no concern that his unborn child was going to die. (19 RT 5524-5525; 20 RT 5839.) Gordon told the jury that appellant did not believe he

was the father of Carole's baby. (22 RT RT 6340, 6467-6469.) Scott McMillan testified that Carole wanted children, but appellant did not. He did not like them and did not want them around because he would not be free to do what he wanted. (26 RT 7396-7397.)

Based on this testimony, the prosecutor argued that appellant did not love Carole and did not want a child, that he had her and her fetus killed so he could collect the proceeds of her life insurance policy, and that he attempted to kill Lynn's husband, Dean, so that he and Lynn could be together:

> [I]t's very clear that Todd Garton wanted his wife dead for his own selfish purposes, to collect the money. He didn't want that baby. He either didn't believe it was his or he just didn't want the little pain around him. . . . He committed every one of these crimes. He did it with malice aforethought, he wanted them dead. He wanted to kill Dean so he could get together with Lynn. He wanted his wife dead, he wanted his baby dead.

(35 RT 10209-10210.)

In contrast, appellant testified that he loved Carole. They enjoyed music together and they spent time hunting, camping, fishing, and going to casinos. He was looking forward to the birth of his son. (28 RT 8076-8187; 29 RT 8196-8388; 30 RT 8611-8629, 8668-8688, 8724-8774; 31 RT 8775-8793.) Dale Streetman saw appellant show affection for Carole and believed that they had a loving relationship. (28 RT 8046-8047.) Kenneth Richardson thought they were happy and that appellant was "ecstatic" about the pregnancy. (30 RT 8699-8700.) Corrina Howard (28 RT 8003-8004) and Amy Streetman (17 RT 5017-5019) also believed that appellant was happy about the impending birth.

Appellant's counsel argued that he and Carole were happy, that he was good with children, and that he was looking forward to the birth of his

son. His love for Carole was best demonstrated when he was left alone during the interview with Detectives Grashoff and Von Rader on May 21st and did not know he was being videotaped. He pulled out his watch and looked lovingly at a picture of her. (Exhibit 263; 30 RT 8668, 8742; 36 RT 10331.)

Given this testimony and argument, appellant's love for his wife and child was a critical disputed fact in this case. Accordingly, he was entitled to introduce evidence having any tendency in reason to prove this fact and to disprove the prosecutor's theory of the case. (Evid. Code, §§ 210, 351.) "Evidence" includes "material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." (Evid. Code, § 140.) One's love for his or her spouse is presented to the senses of others by wearing a material object, a wedding ring. Appellant was therefore entitled to wear his wedding ring to rebut evidence that he did not love his wife and child and to prove affirmatively that he did.

This right extended not only to the time during which he was on the witness stand testifying, but to the time he was in the courtroom in the jury's presence, particularly during the penalty trial. "When a defendant chooses to testify, a jury must necessarily consider the credibility of the defendant. In this circumstance, courtroom demeanor has been allowed as one factor to be taken into consideration." (*United States v. Schuler* (9th Cir.1987) 813 F.3d 978, 981, fn. 3.) "The nontestimonial behavior of a defendant while in the courtroom cannot be judicially endorsed as evidence of his guilt" (*People v. Garcia* (1984) 160 Cal.App.3d 82, 92), but "it should not be inferred from this analysis that we somehow disapprove of the routine practice of a jury viewing the defendant's physical appearance to see if it comports with a physical description given by a witness or to determine if the physical

appearance of a defendant supports a factual finding that must be made by the trier of fact. . . . . Our holding is limited to those instances where defendant's nontestimonial behavior at counsel table is not objectively relevant to any disputed issue at trial and is merely offered to show defendant's character or a trait of his character." (*Id.* at p. 91; see also *Waller v. United States* (8th Cir.1910) 179 F. 810, 812 [The demeanor of the defendant is not only proper evidence, but it is impossible to prevent the jury from observing and being influenced by it.]; *People v. Staten* (2000) 24 Cal. 4th 434, 465 [The jury could properly consider the defendant's apparent lack of emotion or remorse at trial, including during his own testimony, in evaluating the evidence presented in mitigation . . . Jurors could also properly consider his demeanor in evaluating his credibility, and for other purposes.]; 2 J. Wigmore, Evidence Sec. 274 [J. Chadbourn rev. ed. 1979] ["[I]t is as unwise to attempt the impossible as it is impolitic to conduct trials upon a fiction; and the attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory."].)

The prosecutor fully understood the evidentiary purpose of appellant's request. In fact, he acknowledged that appellant wanted to wear the ring to "attempt to try and persuade the jury that he has nothing to do with this murder, and that he's still bonded with his wife." (3 RT 1017.) The trial court acknowledged that "the wearing of that band" was "in effect, a form of communication. That is a statement, in effect, which isn't subject to cross examination."[57] (3 RT 1018.) Nonetheless, it denied appellant's

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[57] Appellant testified in his own defense. The court did not indicate why it believed the prosecutor could not inquire about why he wore the ring during his testimony. Appellant is aware of no such restrictions on cross-

request.

**B. Appellant's Right to Wear Civilian Clothes During Trial.**

A criminal defendant has a constitutional right to be tried in civilian clothes. (*People v. Froehlig* (1991) 1 Cal.App.4th 260, 263-264.) There are "substantial reasons" for this rule. Compelling one to go to trial in jail clothing could impair the presumption of innocence. (*People v. Taylor* (1982) 31 Cal.3d 488, 494, citing *Estelle v. Williams* (1976) 425 U.S. 501, 504.)

> The presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance, dignity, and self respect of a free and innocent man, except as the necessary safety and decorum of the court may otherwise require.

(*Eaddy v. People* (1946) 115 Colo. 488, 492 [174 P.2d 717].)

Jail clothing serves as a constant reminder to the jury that the defendant is in custody, and tends to undercut the presumption of innocence by creating an unacceptable risk that the jury will impermissibly consider this factor. "The prejudice may only be subtle and jurors may not even be conscious of its deadly impact, but in a system in which every person is presumed innocent until proved guilty beyond a reasonable doubt, the Due Process Clause forbids toleration of the risk." (*People v. Taylor, supra*, 31 Cal.3d at pp. 494-495.)

Refusing to permit a criminal defendant to wear ordinary clothes during trial also impinges on tenets of equal protection because it "operates

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examination.

usually against only those who cannot post bail prior to trial. Persons who can secure release are not subjected to this condition. To impose the condition on one category of defendants, over objection, would be repugnant to the concept of equal justice embodied in the Fourteenth Amendment. *Griffin v. Illinois*, 351 U.S. 12 (1956)." *(Id.*, at p. 495.)

> A defendant who can afford bail appears for trial in the best array he can muster. He may be a veritable satyr clad like Hyperion himself. Imposition of jail clothing on a defendant who cannot afford bail subjects him to inferior treatment. He suffers a disadvantage as a result of his poverty. Our traditions do not brook such disadvantage.

(*Ibid.*, citing *People v. Zapata* (1963) 220 Cal.App.2d 903, 911.)

Appellant's request to wear his wedding ring during trial clearly invoked his right to be tried in civilian clothes, and the trial court clearly understood that he had done so. The trial court invited the request: "Let's talk about Mr. Garton's courtroom attire. Any issues about that?" (3 RT 1014.) Appellant's counsel argued that there would be no objection to the ring but for the fact that appellant was in custody (3 RT 1017), and that denying the request would deprive him of the right to make a normal appearance before the jury and discriminate against him because of his custodial status. (3 RT 1079.) The trial court acknowledged that its order discriminated against appellant: "[I]f the Defendant wasn't in custody, I'm not sure there would be any way I could compel him to take off his wedding band." (3 RT 1018-1019.) Nonetheless, it denied his request wear the ring during trial.

### C. Denying Appellant's Request to Wear His Wedding Ring During Trial Was an Abuse of Discretion.

The trial court denied appellant's request to wear his wedding ring because jurors could not see the ring (3 RT 1080); because no juror would

make "negative assumptions" from the fact that he was not wearing a wedding ring (3 RT 1080); and because it was too onerous and time-consuming for the bailiff to secure the ring, a belt, and a tie and ensure that they did not find their way to the jail. (3 RT 1073-1074, 1078.)

**1. The Trial Court Knew, or Had Reason to Know, That Jurors Could See That Appellant Was Not Wearing a Wedding Ring.**

The trial court believed that jurors could not see that appellant was wearing a ring. (3 RT 1080.) There was no evidence upon which to base this finding. The court's belief was based on counsel's purported representation that the prosecutor was unable to see the ring from where he sat at counsels' table: "[M]oments ago you were suggesting that you didn't think Mr. Gaul could see it, and jurors are further away." (3 RT 1080.) Counsel, though, never represented that the prosecutor could not see the ring. Instead, as he informed the court, he did not think the prosecutor could see the design on the ring, which was "really not visible from more than two or three feet away." (3 RT 1070.) The prosecutor himself admitted that he could see the ring. (*Ibid.*) If jurors could see that appellant was wearing a ring, it follows that they could see he was not wearing a ring. The trial court thus knew, or had reason to know, that jurors could see whether or not appellant was wearing a wedding ring.

**2. Reasonable Jurors Could Have Interpreted the Absence of a Wedding Ring as Appellant's Abandonment of His Wife.**

The trial court also believed that no juror would make "negative assumptions" from the fact that appellant was not wearing a wedding ring. (3 RT 1080.) The jury was instructed that, in determining appellant's credibility, it was to consider his demeanor while testifying, the manner in which he testified, and his attitude toward the action. (CALJIC No. 2.20; Evid. Code §780, subd. (a) and (j); 29 CT 8394; 35 RT 10049-10050.)

Indeed, one of the juror's functions is to "observ[e] the quality, age, education, understanding, behaviour, and inclinations of the witness" (3 Blackstone, Commentaries at pp. 373-74), and to "judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*Mattox v United States* (1895) 156 U.S. 237, 242-243.) When a witness testifies before the jury:

> To [the trier of fact] appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by [the trier of fact].

(*Creamer v. Bivert* (Mo. 1908) 113 S.W. 1118, 1120; see also *United States v. Yida* (9th Cir. 2007) 498 F.3d 945, 950 [Live testimony gives the jury the opportunity to observe the demeanor of the witness while testifying.]; *Govt. of the Virgin Islands v. Aquino* (3d Cir. 1967) 378 F.2d 540, 548 [a witness's testimony may provide "innumerable telltale indications" that are more reliable indicators of falsity than the "literal meaning of his words"]; Hale, The History and Analysis of the Common Law of England 257-58 (1713) ["[T]he very Manner of a Witness's delivering his Testimony will give a probable Indication whether he speaks truly or falsely."].) Thus, any juror who believed that appellant's failure to wear a wedding ring showed his abandonment of Carole was permitted to decide that he did not love her, and to discount his entire testimony and find him guilty solely because he was not wearing a wedding ring.

### 3. That a Court Officer Might Not Perform His or Her Sworn Duty Is Not a Valid Reason to Deprive Appellant of Constitutional Rights.

The trial court was concerned that taking the ring, a belt, and a tie from appellant at noon and at the end of each court day when he returned to jail would require too much time and present too many opportunities for its bailiff to overlook one of the items. (3 RT 1073-1074, 1078.) The court did not articulate any duties with which securing the ring would interfere or explain why it believed the bailiff might forget to perform his sworn duty. As defense counsel noted, securing the few items of clothing appellant sought to wear in the jury's presence in this case was, at least to the casual observer, "an extremely simple thing." (3 RT 1074.) Without elaboration, it is difficult to envision any reason for the court's doubt about its bailiff's ability to do his job.

Appellant did not present an undue security risk, there were no co-defendants, and attendees honored the court's decorum throughout the trial. Moreover, two other peace officers were permitted to bypass the normal security procedures and to carry their weapons in the jury's presence so they could perform their duties, which presumably included securing the courtroom. (See *post*, pp. 169-171.) Even without this additional assistance, one would expect all but the most incompetent bailiffs to routinely accomplish the fundamental task of securing an incarcerated defendant's civilian clothing during trial. That an officer employed by the court for the purpose of securing the courtroom cannot be relied upon to reliably and consistently perform that routine task is not a justification for denying a defendant the opportunity to be presumed innocent and to present crucial evidence in his defense.

**4. Refusing to Permit Appellant to Wear His Wedding Ring Was an Abuse of Discretion.**

Appellant sought to wear the ring because, as his counsel argued, "the lack of a wedding ring might be interpreted by certain people against him, because they know that he was married, they know his wife was murdered. And the fact that he does not have a wedding ring could well be interpreted by jurors as abandonment of his wife, in some sense or another." (3 RT 1079.) The trial court denied the request because it would "shock me to think that *any* juror would start making negative assumptions about a man whose wife died roughly two years ago because he isn't currently wearing a ring, never having any knowledge about whether he ever wore a ring." (3 RT 1080, emphasis added.)

To exercise discretion properly, a trial court must know and consider all material facts and all legal principles essential to an informed, intelligent, and just decision. (*In re Cortez* (1971) 6 Cal.3d 78, 85-86; see also *People v. Filson* (1994) 22 Cal.App.4th 1841, 1849 ["the nature of discretion requires that the court's decision be an informed one"].)

> Discretion implies that in the absence of positive law or fixed rule the judge is to decide a question by his view of expediency or of the demand of equity and justice. (Citation.) The term implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy or warped by prejudice or moved by any kind of influence save alone the overwhelming passion to do that which is just. (Citation.)

(*Harris v. Superior Court* (1977) 19 Cal.3d 786, 796.)

While the trial court might have been shocked that any juror would interpret the absence of a wedding ring as abandonment of one's wife, its underestimation of the symbolism attached to the ring and its significance and importance in our society, and its conclusion that no juror would draw an adverse inference from the absence of a wedding ring is anything but discriminating and sound. The court's determination was not enlightened by intelligence and learning, but was arbitrary, capricious, and whimsical and far outside the bounds of reason. (*In re Cortez, supra*, 6 Cal.3$^{d}$ at pp. 85-86.)

Despite its belief to the contrary, the ring could be seen by the jury and some of the jurors - particularly the five female jurors (12 RT 3574-3575) - undoubtedly concluded that appellant did not love his wife because he was not wearing it. The tradition of wearing a wedding ring is deeply ingrained in American culture. The wedding ring is the outward expression of the inward bond, as two hearts unite as one, promising to love each other with fidelity for all eternity. (Fairchild, Mary, Exchanging of the Rings, Tips for your Christian Wedding Ceremony, About.com Guide, http://christianity.about.com/od/christianweddingelements/qt/2exchangerings.htm.) The subject of married men and wedding rings remains a topic of much discussion, debate, and concern, particularly among women. (Sohn, Amy, The Meaning of a Naked Finger - When married men don't wear a wedding ring, what message are they sending?, New York Magazine; May 21, 2005, http://nymag.com/ nymetro/nightlife/sex/columns/mating/10582; Katz, Gregory, Associated Press, Prince William Won't Wear Wedding Ring, April 1, 2011, http://www.huffingtonpost.com/2011/04/01/prince-william-wedding-ring_n_843451.html.) Instructing the jury to consider appellant's demeanor while precluding him from displaying the most important aspect of that demeanor was an abuse of discretion.

It may be true that some of the jurors might not have been offended by appellant's failure to wear a wedding ring, but appellant's love for his wife was an issue of fact for the jury, not the court, to decide. The trial court's ruling prohibited appellant from presenting the best and strongest evidence of his love for Carole to the jury and from rebutting the prosecutor's assertions that he did not love her, and resulted in the exclusion of evidence on a determinative issue. Excluding the evidence because the court believed no juror would hold appellant's failure to wear a wedding ring against him improperly invaded the jury's province (*Carella v. California* (1989) 491 U.S. 263, 265; *People v. Kobrin* (1995) 11 Cal.4th 416, 423) and prevented it from performing its functions. Evidentiary rules that infringe upon a "weighty interest of the accused" and are "arbitrary" and "disproportionate" to the purposes they are designed to serve violate a criminal defendant's right to have a meaningful opportunity to present a complete defense. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324-325, 331, citations omitted.)

Permitting appellant to wear the ring would have caused little inconvenience and would have presented virtually no risk of breaching the jail's security. The reasonableness of the trial court's finding in this regard cannot be determined without knowing the duties the bailiff would have been precluded from performing. Failing to state those duties was an abuse of discretion, As this Court has noted,

> Trial judges should be mindful of their duty to state the reasons for their decisions on the record. As we have explained in the context of sentencing decisions, "a requirement of articulated reasons to support a given decision serves a number of interests: it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring that the judge himself analyzes the problem and recognizes the

> grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned and equitable." (*People v. Martin* (1986) 42 Cal.3d 437, 449–450, 229 Cal.Rptr. 131, 722 P.2d 905; see also *People v. Penoli* (1996) 46 Cal.App.4th 298, 303, 53 Cal.Rptr.2d 825.)

(*People v. Hernandez* (2011) 51 Cal.4th 733, 744.)

Further, to the extent the trial court acceded to the marshal's determination that the ring was "outside jail policy," it was also an abuse of discretion. "The court may not defer decisionmaking authority to law enforcement officers, but must exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis. (*People v. Stevens* (2009) 47 Cal.4th 625, 642.)

Even if the court properly weighed appellant's request, its decision was nonetheless an abuse of discretion, particularly in view of defense counsel's offer to keep the ring and to personally ensure that it did not leave the courtroom. Counsel pointed out the simplicity of the task:

> [T]he Marshals -- they are intelligent men and women. . . . When they have a routine such as we would have in this case, providing two items, or four items, either one, it's very simple. . . . Handing the tie and the necklace at the very same time holding them together, is an extremely simple thing. And the very -- frankly, the belt and the ring could go on at the same time.

(3 RT 1075.) Nonetheless, he offered to provide a checklist to ensure that one of the items was not overlooked:

> I don't know of a single Marshal associated with this case that can't remember four items, as opposed to two items without a checklist. But we'll provide a checklist for them for every time, so that they can check it off.

(3 RT 1075.) With the aid of a checklist, even the busiest, most forgetful

bailiff easily could have ensured that appellant did not leave the courtroom with contraband. This simple step would have eliminated any risk that the ring would have found its way to the jail.

Counsel, though, went further and offered, as an officer of the court, to assume personal responsibility for the ring and hand it to appellant at the beginning of each court day and take it at the end of the day so that it would not pose a security problem. Thus, the bailiff did not "even have to take care of the ring." (3 RT 1015, 1075-1076.) The only additional duty that would have been imposed was a visual examination of appellant twice a day to ensure that he had given counsel the ring. Moreover, in the unlikely event that both counsel and the bailiff overlooked the ring, it would have been discovered during the routine search by jail personnel each time appellant returned from court. (3 RT 1074.)

Even though counsel's proposal eliminated virtually any risk that the ring could reach the jail, the trial court inexplicably refused his offer of assistance. Denying appellant the opportunity to exercise his right to the presumption of innocence and to present crucial evidence on a critical issue because it was too onerous for the bailiff to secure a belt and tie and to also perform a cursory visual examination of appellant's hand was, as counsel observed, "absurd." (3 RT 1075.) It was also a manifest abuse of discretion.

**C. The Error Was Prejudicial.**

The trial court believed there was no reason to incur the security risk involved in permitting appellant to wear the ring, but ignored two compelling reasons presented by counsel: appellant's constitutional right to present evidence of his love for his wife and child and his right to wear civilian attire during trial. (3 RT 1079, 1081.) Refusing to permit the presentation of evidence on a critical disputed fact improperly restricted

appellant's ability to establish his love for his wife and child and to rebut the prosecutor's argument that he did not want the child and had Carole killed so he could collect her life insurance proceeds. It also impaired the presumption of innocence and violated his constitutional rights to be tried in civilian clothes, to due process, and to equal protection. Granting the request would have been a minimal accommodation of these rights which presented virtually no security risk, required little time, and imposed no additional duties on the court's staff.

"Because the presumption that a defendant is innocent until proved guilty is a 'basic component of a fair trial under our system of criminal justice,' 'courts must be alert to factors that may undermine the fairness of the fact-finding process' and 'must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.' (*Estelle v. Williams, supra,* 425 U.S. at p. 503, 96 S.Ct. at p. 1692, 48 L.Ed.2$^{d}$ at p. 130.)" (*People v. Zielesch* (2009) 179 Cal.App.4$^{th}$ 731, 744.) "The probability of deleterious effects on fundamental rights calls for close judicial scrutiny. *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2$^{d}$ 543 (1965); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." (*Estelle v. Williams, supra*, 425 U.S. at pp. 501, 503-504.)

As set forth above, appellant's love for Carole was vigorously contested. (*People v. Taylor, supra*, 31 Cal.3$^{d}$ at p. 500.) Appellant testified that he had nothing to do with killing or conspiring to kill her and her fetus, or with conspiring to kill Dean, thereby putting his credibility in issue. (*Ibid.*; see also *People v. Hetrick* (1981) 125 Cal.App.3d 849, 855 [testifying defendant].) The case essentially hinged on whether the jury believed

appellant or the uncorroborated testimony of his alleged accomplices, one of whom admittedly shot and killed Carole and her fetus.

Conveying his love for Carole to the jury was crucial to appellant's defense, particularly at the penalty trial. The absence of a wedding ring served as constant reminder throughout the trial that appellant might have participated in the alleged plots to kill Carole and Dean because, as the prosecutor argued, he did not love her. Refusing to permit him to show the jury his love by virtue of the fact that he still wore his wedding ring undermined the fairness of the fact-finding process and diluted the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.

On this record, the Court cannot say that the jury would have rejected appellant's defense if not for the prejudice aroused by his failure to wear a wedding ring. (*People v. Taylor, supra*, at pp. 499–501.) The error was therefore not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Taylor, supra*, 31 Cal.3$^{d}$ at pp. 499-502.) Accordingly, the judgment and sentence must be reversed.

* * * * *

## II.
## PERMITTING THE PROSECUTOR'S DESIGNATED INVESTIGATING OFFICERS ,WHO SAT AT COUNSELS' TABLE THROUGHOUT THE TRIAL AND TESTIFIED AGAINST APPELLANT, TO BYPASS THE SECURITY PROCEDURES APPLICABLE TO ALL WHO ENTERED THE COURTHOUSE, INCLUDING COUNSEL AND THE JURORS, VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, TO A FAIR TRIAL, AND TO A RELIABLE GUILT AND PENALTY DETERMINATION, AND WAS REVERSIBLE ERROR.

Appellant's counsel objected during trial to the extraordinary privileges the prosecutor's designated investigating officers, Detectives Von Rader and Grashoff,[58] were granted in the jurors' presence during the process of gaining entry to the court house:

> [W]hen we go through that line and those jurors, some of them are present, I think that it is inappropriate for them to see the people on the defense table having all of us to unload our pockets, go through searches, if necessary, while the two officers simply flash and walk on through. Shows a level of trust on that side of this courtroom that is not being accorded to us.

(20 RT 5688-5689.) Counsel argued that the detectives were expected to "take the stand and testify. And it does present an impermissible appearance of credibility to those officers, being allowed to pass through without the proper search." (20 RT 5690.) He requested that, during the course of the trial, they "go through exactly the same entry procedure as everybody else." (20 RT 5689.)

The prosecutor confirmed counsel's representations. He, too, was

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[58] The trial court granted the prosecutor's request under Evidence Code Section 777, over appellant's objection, for two designated investigating officers. (2 RT 739-741, 884-889, 961-963.)

required to stand in line and "go through the same process. I have to empty my pockets." The court took the matter under advisement: "I'll consider it. First time it's come up." (20 RT 5690.)

The court announced the next morning that the officers were entitled to disparate treatment because the purpose of the process was primarily to screen for weapons and,

> [w]hen peace officers who are on duty come into the courthouse, the weapons screening staff assumes that they have weapons and they are permitted by law to have weapons and they're permitted by the court weapons screening policy to have weapons, so there's no point in having them go through the weapons screening. What they have to do is identify themselves with proper identification.

(20 RT 5693.) The court did not think jurors would draw "any kind of improper inference," but offered to advise them of the "reasons for that treatment so that they don't get the impression which you thought they would get, that somehow these two officers and potential witnesses have some kind of special credibility." (20 RT 5693-5694.)

Counsel stated, "right now I don't know what the policy is for who has and doesn't have passes and so on and it's not what it was told to us when we started. So, I'm . . . checking to find out what the policy is." (20 RT 5694.) The court responded, "I can tell you that I'm fairly certain the policy is that on-duty law enforcement officers who are not here on their own personal legal business or other business, but who are actually on duty and on official business, are permitted to carry firearms. Therefore, they don't need to be screened." (20 RT 5694.) Counsel argued:

> [T]wo officers appearing as aids to the District Attorney during trial do not need to carry their weapons and . . .there are other jurisdictions in which that would not be prohibited and therefore I would submit that that would be an appropriate

> thing in this case. They can leave weapons somewhere else, there's a place for them to do it right down there at the screening place, and they can submit to the same type of rules that the rest of us have to.

(20 RT 5694.)

The court disagreed because the officers had "duties that are different than the rest of us" and denied the motion. (20 RT 5694-5695.)

Permitting the officers to bypass the security procedure in the jury's presence violated appellant's rights to due process, to a fair trial, and to a reliable guilt and penalty determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. The error requires reversal of the judgment and sentence.

**A. The Trial Court Erred by Refusing to Require the Prosecutor's Investigating Officers to Submit to the Same Security Procedures as Everyone Else Who Entered the Courthouse.**

"Under *Holbrook* [*v. Flynn* (1986)] 475 U.S. [560,] 570 [106 S.Ct. 1340, 89 L.Ed.2d 525], the trial court has the first responsibility of balancing the need for heightened security against the risk that additional precautions will prejudice the accused in the eyes of the jury. 'It is that judicial reconciliation of the competing interests of the person standing trial and of the state providing for the security of the community that, according to [Supreme Court precedent], provides the appropriate guarantee of fundamental fairness.' (*Lopez v. Thurmer* (7th Cir.2009) 573 F.3d 484, 491.)" (*People v. Stevens, supra*, 47 Cal.4th at p. 642.)

"[A] 'trial court has broad power to maintain courtroom security and orderly proceedings. [Citations.]' (*People v. Hayes* (1999) 21 Cal.4th 1211, 1269, 91 Cal.Rptr.2d 211, 989 P.2d 645.) For this reason, decisions

regarding security measures in the courtroom are generally reviewed for abuse of discretion. (*Ibid.*; *People v. Ayala* (2000) 23 Cal.4th 225, 253, 96 Cal.Rptr.2d 682, 1 P.3d 3; *People v. Duran* (1976) 16 Cal.3d 282, 293, fn. 12, 127 Cal.Rptr. 618, 545 P.2d 1322 (*Duran*).)" (*People v. Stevens* (2009) 47 Cal.4th 625, 632.)

Any exercise of discretion must be informed by the particular circumstances of the case. When a court imposes a security measure that is inherently prejudicial to a defendant's right to assist in his defense, competently present his own testimony, or enjoy the presumption of innocence, it must find a manifest need sufficient to justify the risk of prejudice. Inherently prejudicial practices include visible shackling, stun belts, or other affronts to human dignity, or methods that convey to the jury that the defendant must be separated from the community at large because he is especially dangerous or culpable, or is the cause of some official concern or alarm. If an inherently prejudicial procedure is employed, a reviewing court will inquire whether, based on the record below, the trial court reasonably balanced the need for security against the constitutional rights afforded the defendant. Only a showing of manifest need will support the use of such measures. (*Id.* at pp.643-644, citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 569.)

In this case, the colloquy between counsel and the court clearly demonstrates that the court exempted Detectives Von Rader and Grashoff from "the same entry procedure as everybody else" (20 RT 5689) because they were permitted by law and by the court's weapons-screening policy to have weapons (20 RT 5693), that they were "on duty and on official business" (20 RT 5694), and that they had "duties that are different than the rest of us." (20 RT 5694-5695.) The duties which warranted granting the

officers' extraordinary privileges in the jury's presence presumably included securing the courthouse and the courtroom. The court's determination therefore called for a "heightened security measure" (*Ibid.*), much like an order permitting the placement of a magnetometer at the public entrance to the courtroom (*People v. Ayala, supra.* 23 Cal.4th at pp. 251; *People v. Jenkins* (2000) 22 Cal.4th 900, 996-997), or one permitting officers to be stationed behind defendants sitting at counsel table (*Holbrook v. Flynn, supra*, 475 U.S. at pp. 562–563 & fn. 2) or at the witness stand during an accused's testimony. (*People v. Stevens, supra*, 47 Cal.4th at p. 638.) This determination was not based on thoughtful, case-specific consideration of the need for security or the potential prejudice that might result, but rather on its belief that allowing the officers to bypass the weapons-screening procedure was an acceptable routine practice, its weapons-screening policy.

Basing an order regarding security measures on a standing practice constitutes an abuse of discretion, and this Court has made it clear that it will not examine the record in search of valid, case-specific reasons to support the order:

> Where it is clear that a heightened security measure was ordered based on a standing practice, the order constitutes an abuse of discretion, and an appellate court will not examine the record in search of valid, case-specific reasons to support the order.

(*People v. Hernandez, supra*, 51 Cal.4th at p. 744.) A review of the record reveals no reason to exempt the officers from the procedure other than the weapons-screening policy. However, because the refusal of counsel's request was based solely on that policy, a standing practice, it was an abuse of discretion and this Court must not examine the record in search of valid case-specific reasons to support the order.

Assuming, *arguendo*, that the exemption was not based on a standing practice, it was nonetheless an abuse of discretion because granting the officers extraordinary privileges in the jury's presence was inherently prejudicial to appellant's right to enjoy the presumption of innocence.

> An inherently prejudicial procedure is one that poses such a high risk of unfairness to the defendant that its use is considered to be a violation of due process unless justified by a compelling state interest. (*Deck v. Missouri*, *supra*, 544 U.S. at p. 628, 125 S.Ct. 2007.) Procedures recognized as inherently prejudicial typically offend the dignity of the defendant and the decorum of the court. They not only erode the presumption of innocence, but they may so distract and embarrass the defendant that they impair his ability to participate in his own defense. (*Stevens*, *supra*, 47 Cal.4th at pp. 632–633, 101 Cal.Rptr.3d 14, 218 P.3d 272; see also *People v. Mar* (2002) 28 Cal.4th 1201, 1226–1228, 124 Cal.Rptr.2d 161, 52 P.3d 95; *Duran*, supra, 16 Cal.3d at p. 288, 127 Cal.Rptr. 618, 545 P.2d 1322.)

(*People v. Hernandez*, *supra*, 51 Cal.4th at pp. 745-746.)

The United States Supreme Court has found that posting uniformed, armed troopers immediately behind defendants sitting at counsel table is not inherently prejudicial. (*Holbrook v. Flynn*, *supra*, 475 U.S. at pp. 562–563 & fn. 2.) A juror might reasonably draw a wide range of inferences from the officers' presence. (*Id.* at p.569.) Nor is stationing a security officer at the witness stand during an accused's testimony inherently prejudicial. (*People v. Stevens*, *supra*, 47 Cal.4th at p. 638.) "The officer's presence at the stand is not 'a continuing influence throughout the trial' (*Estelle v. Williams*, *supra*, 425 U.S. at p. 505, 96 S.Ct. 1691) in the same way as the constant sight of prison clothes or shackles." (*People v. Stevens*, *supra*, 47 Cal.4th at p. 639.) "So long as the deputy maintains a respectful distance from the defendant and does not behave in a manner that distracts from, or appears to comment

on, the defendant's testimony, a court's decision to permit a deputy's presence near the defendant at the witness stand is consistent with the decorum of courtroom proceedings." (*Ibid.*)

This Court has determined that the placement of a magnetometer at the public entrance to the courtroom is not an inherently prejudicial practice. (*People v. Ayala, supra*, 23 Cal.4th at pp.252-253.) "To the extent the use of a metal detector focuses attention on the proceedings, it point[s] to the nature of the case, not to a defendant's character. (See *People v. Miranda* (1987) 44 Cal.3d 57, 114-115 [241 Cal.Rptr. 594, 744 P.2d 1127].) *This distinction is crucial.* Nor [does] the magnetometer improperly highlight the nature of the case." (*People v. Ayala, supra*, 23 Cal.4th at p.252 [emphasis added].) "Unlike shackling and the display of the defendant in jail garb, the use of a metal detector does not identify the defendant as a person apart or as worthy of fear and suspicion." (*People v. Jenkins, supra* 22 Cal.4th at p. 996.) Morever, the use of a magnetometer is "nondiscriminatory" (cf. *Holbrook v. Flynn, supra*, 475 U.S. at p.567) because everyone is required to pass through it before entering the courtroom. Thus, it is a neutral measure that does not focus attention on the defendant. (*People v. Ayala, supra*. 23 Cal.4th at pp. 251; *People v. Jenkins, supra*, 22 Cal.4th at pp. 996-997.)

A wide range of inferences cannot be drawn from a security process which subjects everyone who enters the courthouse to the indignity of emptying their pockets and being searched while permitting the state's agents to "simply flash [their identification] and walk on through." (20 RT 5688-5689.) There is but one; that they are exempt from the process because the court believes they are entitled to more deference and trust than anyone else who enters the courthouse. Nor is such a process a neutral measure that focuses attention on the nature of the case rather than on a defendant's

character. Instead, it tends to identify the officers as trustworthy and the defendant as "a person apart or as worthy of fear and suspicion." (*People v. Ayala, supra*. 23 Cal.4th at pp. 251; *People v. Jenkins, supra*, 22 Cal.4th at pp. 996-997.) According the state's agents special privileges during trial is also inconsistent with the decorum of courtroom proceedings because it serves as a "continuing influence throughout the trial" (*Estelle v. Williams, supra*, 425 U.S. at p. 505, 96 S.Ct. 1691), in the same way as the constant sight of prison clothes or shackles, to remind jurors on a regular and frequent basis that the court places more trust in the officers than them, the prosecutor, defense counsel, and everyone else who enters the courthouse. (*People v. Stevens, supra*, 47 Cal.4th at p. 639.)

The determination to exempt the officers from the security procedure was therefore inherently prejudicial to appellant's right to the presumption of innocence, and the inquiry is whether the trial court reasonably balanced the need for heightened security against the constitutional rights afforded the defendant. Only a showing of manifest need supports the use of such measures (*People v. Stevens, supra*, 47 Cal.4th at pp. 643-644), and there was no manifest need here. The security of the community (*People v. Stevens, supra*, 47 Cal.4th at p. 642, citing *Lopez v. Thurmer, supra*, 573 F.3d at p. 491) easily could have been ensured by measures short of granting the officers extraordinary privileges in the jury's presence. Provisions could have been made, as appellant requested, for the officers "leave [their] weapons somewhere else" and "submit to the same type of rules" as everyone else who entered the court. (20 RT 5694.) Their weapons could have been discreetly returned to them outside the jurors' presence. The officers could also have been ordered to enter the courthouse through a different door or when jurors were not present. Any of these measures would

have accommodated appellant's constitutional rights while providing for the security of the community and presenting minimal inconvenience to the court, its staff, and the officers. Thus, even if its determination was not based on a standing practice, the court abused its discretion by failing to consider and implement these measures.

Counsel's failure to request an admonition did not forfeit appellate review of this issue. "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. (*People v. Arias* (1996) 13 Cal.4th 92, 159, 51 Cal.Rptr.2d 770, 913 P.2d 980; *People v. Noguera* (1992) 4 Cal.4th 599, 638, 15 Cal.Rptr.2d 400, 842 P.2d 1160.)" (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.) Counsel declined the court's offer to admonish the jury because "this is the type of situation that . . . an admonition would do more harm than good." (20 RT 5695.) Informing the jury that the officers were granted extraordinary privileges because they occupied a special place of trust in the court's own weapons-screening policy (20 RT 5693-5695) would have exacerbated, not alleviated, counsel's concern that they would have a false aura of credibility when they testified. Accordingly, an admonishment would have been futile and a request for one was unnecessary.

**B. Allowing the State's Agents to Bypass the Weapons-Screening Procedure in the Jury's Presence Was Prejudicial.**

Violation of a defendant's federal constitutional rights requires reversal unless the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) However, when a challenged security practice is not "so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial," reversal is warranted only if the defendant shows "actual prejudice" resulted from the practice. (*Holbrook v. Flynn*,

*supra*, 475 U.S. at p. 572.) This is consistent with the defendant's burden under *People v. Watson* (1956) 46 Cal.2[d] 828, 837, to establish a reasonable probability that the error affected the trial's result. (*People v. Hernandez*, *supra*, 51 Cal.4[th] at p. 745.) Under either the *Chapman* or *Watson* standard, exempting Detectives Grashoff and Von Rader from the security procedure in the jury's presence was prejudicial.

"Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. . . . Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play,' *Williams*, 425 U.S., at 505, 96 S.Ct., at 1693." (*Holbrook v. Flynn*, *supra*, 475 U.S. at p. 570.)

Exempting the officers from the security procedure created just such a risk in this case. Their testimony touched virtually every aspect of the case. Grashoff was both the lead and the primary investigator in the case. (27 RT 7702.) Von Rader responded to the Gartons' residence on the night of Carole's murder and supervised the investigation. (34 RT 9692-9693.) Their testimony was crucial to Lynn's believability. They contacted her at her home in Gresham, and questioned her at the Gresham Police Department. (18 RT 5361, 5365-5366; 20 RT 5824.) They picked her up at the Redding airport on June 19, 1998, and spent over three hours with her. (28 RT 7927-7929.) They interviewed her on July 9, 1998, and September 27, 2000. (20 RT 5622-5624, 5767; 28 RT 7925-7926, 7934-7935.) Von Rader also participated in her interview on October 23, 1998. (33 RT 9484.) She flew to Shasta County at Grashoff's request and showed him where the label maker

had been thrown into the Sacramento river. (Exhibits 5D-6-5D-8; 23 CT 6713-6715; 19 RT 5441-5442; 27 RT 7656, 7659-7660, 7762-7763.) He was present when a label maker was recovered in the area that she pointed out to him. (Exhibits 3, 69, 5D-9, 5D-10; 23 CT 6716; 26 CT 7425; 27 RT 7656-7661, 7700-7701.) They both interviewed Mann about the label maker. (24 RT 6994-6996, 7000.)

Grashoff was present at Daniels' arrest. (RT 3844- 3847.) He interviewed Daniels and took him to the Park and Ride lot and to the Gartons' residence. (16 RT 4609-4610, 4578-4579.) He directed Daniels to place a taped telephone call to appellant. (Exhibits 1-A, 27; Court's Exhibit C; 27 CT 7654-7822.) They both participated in a meeting with Daniels wherein he decided to change his testimony concerning notes he took during and after telephone calls from appellant on May 8 and 9, 1998. (Exhibits 39, 44, 120; 22 CT 6501; 17 RT 4905-4916, 4958-4971, 4984-4991.)

Grashoff arrested appellant and took him into custody. (Exhibits 67, 83; 27 RT 7745-7747.) He testified extensively about "training videos." (27 RT 7844-7845.) He searched appellant's house for photographs and an "I LOVE YOU BABY" label. (27 RT 7652-7653.) He received a file box containing a wire-bound, spiral notebook and a cardboard box from Tracie Jones and Sara Mann and discovered two newspaper articles inside the notebook. (Exhibits 71, 71-A, 71-B, 190, 191; 25 CT 2306-2320; 26 CT 7557; 27 RT 7711.) He served a search warrant at the Sheriff's Department Identification Lab to look at a silver gun case (Exhibits 5D-15 - 5D-22, 46; 24 CT 6832-6834; 26 CT 7426-7430; 27 RT 7702-7705) and a backpack that was found at Jones' Fort. (Exhibits 5D-24, 5D-26, 46-48; 26 CT 7431, 7433; 27 RT 7706-7708.)

He went to the Sheriff's I.D. Lab after appellant's testimony and located two checks to North Cal printing for the purchase of the Patriot and Rancho Safari business cards. (Exhibits 9, 252; 26 CT 7531-7532, 7623-7624; 34 RT 9672-9673.) He also located a check to Office Max, took the check to Office Max (Exhibit 273; 28 CT 8156-8157; 34 RT 9676-9677), and purchased items similar to those which were listed on the receipt. (Exhibit 272; 28 CT 8154-8155; 34 RT 9678.) They both interviewed appellant on May 21, 1998. (29 RT 8378-8380; 30 RT 8759-8761.) Von Rader lied to appellant during the interview. (34 RT 9698, 9700, 9717-9718.)

In view of the breadth and significance of the officers' testimony, their believability was crucial to the prosecutor's case. Their testimony gave credence to uncorroborated testimony about the existence of a plan to kill Dean, attempts to take his life, and appellant's connection with that plan and/or attempts. It also bolstered uncorroborated testimony about the existence of a conspiracy to kill Carole and her fetus and appellant's connection to their murder, particularly evidence of the existence of The Company; the articles and other materials in The Anarchist's Cookbook; Daniels' purchase of the murder weapon; the package, wax seal, and "Doorway" he allegedly received; and the label maker found in the Sacramento river. (See *post*, pp.212-218.)

The trial court saw no prejudice and did not think that jurors would draw improper inferences, but failed to explain why or to otherwise address the defense concern that allowing the officers "to pass through [the security process] without the proper search" gave them an "impermissible appearance of credibility" on the witness stand. (20 RT 5690.) Allowing the prosecutor's investigating officers to bypass the

weapons-screening process in the jurors' presence conveyed that appellant was less trustworthy than the state's agents who had brought the charges against him. "No witness . . . is entitled to a false aura of veracity." (*People v. Beagle* (1971) 6 Cal.3d 441, 453.)

Clothing the officers with a false aura of veracity, particularly when coupled with the uncorroborated accomplice testimony, deprived appellant of his right to the presumption of innocence and thereby presented an unacceptable risk of impermissible factors coming into play. The procedure posed such a high risk of unfairness that it violated due process and deprived appellant of a fair trial and rendered the guilt and penalty determinations unreliable. Accordingly, reversal is required.

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## III.
## PERMITTING THE PROSECUTOR TO INTRODUCE THE STATEMENTS OF THE DOCTOR WHO PERFORMED THE AUTOPSY ON CAROLE GARTON THROUGH THE TESTIMONY OF A DOCTOR WHO DID NOT PERFORM OR OBSERVE THE AUTOPSY VIOLATED APPELLANT'S RIGHTS TO CONFRONTATION AND TO A RELIABLE GUILT AND PENALTY DETERMINATION AND WAS REVERSIBLE ERROR.

Shasta County's Forensic Pathologist, Dr. Harold Harrison, performed an autopsy on Carole on May 18, 1998, and authored an autopsy report on June 8, 1998. (14 RT 4089-4090.) He retired in February 1999. His successor, Dr. Susan Comfort, testified at trial after reviewing the autopsy report, diagrams Dr. Harrison prepared as part of the report, and photographs taken during the autopsy.[59] (14 RT 4087-4116.)

At the outset of Dr. Comfort's testimony, the prosecutor sought to show the jury three charts she had prepared. Exhibit 52 was a full body diagram of a female figure showing what were designated as gunshot wound numbers one, two, and five to Carole. Exhibit 53 was a "male body diagram standard," that was "supposed to depict the general gunshot wounds on the decedent," including gunshot wound numbers three, four, and five. Exhibit 54 was an infant or a baby diagram which showed a single gunshot wound. (14 RT 4094-4095.) Dr. Comfort

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[59] The parties stipulated on September 30, 1998, for purposes of the preliminary hearing only, that Dr. Harrison would testify that Carole and her fetus, a male, both died on May 16, 1998; that the cause of death was gunshot wounds; and that the fetus was beyond a post-embryonic period and was approximately eight-months-old at the time it died. The autopsy report was introduced as evidence at the preliminary hearing. (2 CT 59-74, 112-113, 117-119.)

believed that the charts accurately reflected and would assist her in helping the jury understand Dr. Harrison's findings in Carole's autopsy. (14 RT 4091.) The court asked if defense counsel had any objection to the exhibits "being placed on the board." Counsel responded, "Yes. As I understand, what this witness is going to be doing is testifying entirely from hearsay. So, we're going to object." The court replied, "Experts routinely use hearsay, the code permits it, the law permits it, except for certain critical things. And at least at the point of using these diagrams, I don't see an issue. If you have a specific one, state it." Counsel stated, "Normally, the experts would use it as a basis of forming some opinion regarding their -- but usually they have some personal examination themselves, and that doesn't appear to be the case here." (14 RT 4092.) The court permitted Dr. Comfort's testimony and the diagrams, but cautioned, "I do think it's important . . . that if [her] testimony is based on assumptions, such as an assumption of the accuracy of a diagram or anything else, that that needs to be established in her examination." (14 RT 4093.)

Introducing Dr. Harrison's testimonial statements through a surrogate witness, Dr. Comfort, violated appellant's rights to confrontation and to a reliable guilt and penalty determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. The error requires reversal of the judgment and sentence.

**A. Appellant Was Entitled to Confront the Witnesses Against Him**

The Sixth Amendment to the United States Constitution, made

applicable to the states via the Fourteenth Amendment (*Pointer v. Texas* (1965) 380 U.S. 400, 401), provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." A defendant's Sixth Amendment right of confrontation is violated by the admission of testimonial statements of a witness who was not subject to cross-examination at trial unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 36, 68.)

**B. Dr. Harrison's Autopsy Report Is Testimonial.**

The *Crawford* court defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact," and confirmed that the "core class" of testimonial statements includes affidavits, custodial examinations, prior testimony not subject to cross-examination, and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Id.* at pp. 51-52.)

The Confrontation Clause prohibits the prosecution from introducing "a forensic laboratory report containing a testimonial certification - made for the purpose of proving a particular fact - through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. . . . The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." (*Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705, 2710; see also

*Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, 2532.)[60]

Given the holdings in *Bullcoming* and *Melendez-Diaz*, there can be little doubt that Dr. Harrison's autopsy report is testimonial. The purpose of an autopsy is to determine the circumstances, manner, and cause of death. (Gov. Code, § 27491;[61] *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1277 ["It is through the coroner and autopsy investigatory reports that the coroner 'inquire[s] into and determine[s] the circumstances, manner, and cause' of criminally related deaths."].) The findings resulting from the autopsy must be "reduced to writing" or otherwise permanently preserved. (Gov. Code, § 27491.4.) Upon

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[60] In December 2009, this Court granted review in four cases presenting different permutations of how *Melendez-Diaz* affects its decision in *People v. Geier* (2007) 41 Cal. 4th 555: *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, rev. granted Dec. 2, 2009, S176213; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, rev. granted Dec. 2, 2009, S176620; *People v. Dungo* (2009) 176 Cal.App.4th 1388, rev. granted Dec. 2, 2009, S176866; and *People v. Lopez* (2009) 177 Cal.App.4th 202, rev. granted Dec. 2, 2009, S177046. *Rutterschmidt, Dungo,* and *Lopez* were argued on June 6, 2012, but submission was vacated on June 20, 2012, when the parties in those case were requested to serve and file supplemental briefs addressing the significance, if any, of the United States Supreme Court's recent decision in *Williams v. Illinois* (June 18, 2012) ___ U.S. ___ [2012 WL 2202981]. The evidence at issue in *Dungo* is an autopsy report.

[61] Government Code section 27491 provides, in pertinent part:

> It shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths; . . . known or suspected homicide . . .; death in whole or in part occasioned by criminal means; . . . deaths under such circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another . . . . Inquiry pursuant to this section does not include those investigatory functions usually performed by other law enforcement agencies.

determining that there are reasonable grounds to suspect that a death "has been occasioned by the act of another by criminal means," the coroner must "immediately notify the law enforcement agency having jurisdiction over the criminal investigation." (Gov. Code, § 27491.1) Moreover, "officially inquiring into and determining the circumstances, manner and cause of a criminally-related death is certainly part of a law enforcement investigation." (*Dixon v. Superior Court, supra*, 170 Cal.App.4th at p. 1277.) These circumstances establish that Dr. Harrison's report was testimonial.

Neither *People v. Geier, supra*, 41 Cal. 4th 555, nor *Williams v. Illinois, supra*, ___ U.S. ___ [2012 WL 2202981] alter this conclusion. The question whether the decision in *Geier* extends to autopsy reports is currently pending before this Court. (See *ante*, fn. 60.) The Court there concluded that a DNA report is not testimonial because the analyst's observations constitute a contemporaneous recordation of observable events rather than the documentation of past events. That is, the analyst recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks. "Therefore, when [she] made these observations, [she] -- like the declarant reporting an emergency in Davis -- [was] 'not acting as [a] witness []; and [was] 'not testifying.'" (*United States v. Ellis, supra*, 460 F.3d at pp. 926-927.)" (*People v. Geier, supra*, 41 Cal. 4th at pp. 605-607.)

The Court observed:

> "'[T]he need for confrontation is particularly important where the evidence is testimonial because of the opportunity for observation of the witness's deneanor. [Citation.] Generally, the witness's demeanor is not a

> significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action,' (*Arreola, supra*, 7 Cal.4th at p. 1157.)" (*People v. Johnson, supra*, 121 Cal.App.4th at pp. 1412-1413.)

[*Id.* at p.600]

Unlike *Geier*, this case involves Dr. Comfort's testimony based on the observations and conclusions of Dr. Harrison. As noted below, she did more than authenticate documentary material. Instead, she went through "Dr. Harrison's findings in the autopsy" (14 RT 4090-4091) and conveyed his testimony to the jury as a surrogate witness.

In *Williams*, "[a]n expert witness referred to the report not to prove the truth of the matter asserted in the report, i.e., that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood. Thus, . . . the report was not to be considered for its truth but only for the 'distinctive and limited purpose' of seeing whether it matched something else." (*Williams v. Illinois, supra*, ___ U.S. ___ [2012 WL 2202981, p. 2].) The relevance of the match was then established by independent circumstantial evidence showing that the report was based on a forensic sample taken from the scene of the crime. (*Id.* 2012 WL 2202981, at p. 18.) The United States Supreme Court found that the expert testimony did not violate the Confrontation Clause because that provision has no application to

out-of-court statements that are not offered to prove the truth of the matter asserted. (*Id.* 2012 WL 2202981, at p. 6.)

The case, however, was tried by a judge, not a jury. The *Williams* plurality acknowledged that, had it been tried by a jury, there would have been a danger of the jury's taking the testimony as proof of the matter asserted and mistakenly basing its decision on inadmissible evidence.[62] Furthermore, the expert made no statement that was offered for the purpose of identifying the sample of biological material used in deriving the profile or for the purpose of establishing how the laboratory handled or tested the sample. Nor did she testify to anything that was done at the laboratory or vouch for the quality of its work. She did not vouch for the accuracy of the profile that it produced, quote or read from the report, or identify it as the source of any of the opinions she expressed. In this case, Dr. Comfort referred to Dr. Harrison's report extensively and explicitly vouched for both the accuracy and quality of his work.

Accordingly, for the reasons stated, *Geier* and *Williams* are distinguishable and neither stands for the proposition that the autopsy report in this case was not testimonial.

### C. The Trial Court Erred in Admitting Dr. Comfort's Testimony Based on the Contents of Dr. Harrison's Report.

The prosecutor made clear to the jury that he was going through "Dr. Harrison's findings in the autopsy" with Dr. Comfort (14 RT 4090-4091), and Dr. Comfort did little more than convey Dr. Harrison's findings verbatim to the jury. The prosecutor provided her with a copy of

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[62] Justice Thomas (the fifth vote for the result) disagreed with the plurality's analysis and found the evidence nontestimonial for a completely different reason.

Dr. Harrison's report, and she told the jury: "Page 2 contains the external examination and under that, under the general description, Dr. Harrison states that the body measures five feet five inches in length and he estimates a weight of 200 pounds and that she is pregnant." (14 RT 4096.) The baby was eight-and-a-half months old and was viable. (14 RT 4099.)

She explained that she drew Exhibit 52 after she looked at Exhibit 5C-6 (22 CT 6357), a photograph depicting Carole's body laying on the autopsy table at the Shasta County Coroner's Office. An entrance wound on Carole's left buttock was labeled in Dr. Harrison's report as gunshot wound number one. She was able to determine the trajectory of gunshot wound number one from reading Dr. Harrison's report. (14 RT 4097-4098.) She knew that the baby's head was pointed downward towards the buttocks area from reviewing X-rays taken at the autopsy. She drew the trajectory of the bullet on Exhibit 54. (14 RT 4099-4100.)

She explained Dr. Harrison's findings regarding gunshot wound number two using Exhibit 52, which she prepared after reviewing another photograph taken during the autopsy. (Exhibit 5C-3; 14 RT 4101; 22 RT 6354.) She drew the trajectory of the bullet on the chart. "There was actually a projectile which had gone completely through, it was lodged in between the body and the clothing that the decedent was wearing at the time, and so that was noted as the clothing was removed." (14 RT 4103.)

Appellant's counsel objected to this testimony as "hearsay that does not go in any part to the professional opinion of the doctor." The court reminded the prosecutor that, "to the extent that things are hearsay, I've indicated that that's acceptable for experts to rely on it, but it needs

to be established that it's not her finding but something . . . she's learned from some other source." (14 RT 4103-4104.) Dr. Comfort clarified that the finding was based on a combination of reading the autopsy report and the rest of the file which included the coroner's medical investigator's report and speaking with the investigator who went to the scene and saw the bullet lodged in between the clothing and Carole's body. To her knowledge, no slug was found in that area of Carole's body during Dr. Harrison's autopsy. (14 RT 4104.)

The court cautioned the prosecutor, "I think you need to go at it in such a method that we're hearing only the hearsay that this expert relied upon." (14 RT 4105)

> . . . [I]f it turns out it was hearsay it may be something the expert didn't rely on at all in forming her opinion and yet hearsay comes in, which has no other basis of admissibility if the expert's not relying upon it. For example, that bullet. I don't know if that's something she relied upon or not. But if it isn't, her recitation here that somebody else says they found it in a certain place, has no place. . . . Because counsel is then in a quandry, they've already heard me rule that the expert can relay on hearsay as long as it's made known that it is hearsay, and yet they may be hearing things they don't think should be coming in that are under that category and they don't want to keep objecting because they heard me say I was going to admit something, and yet it comes under that category.

(14 RT 4104-4105.)

Dr. Comfort described her findings regarding gunshot wounds numbers three and four with Exhibit 53, which she prepared based on an autopsy photograph. (Exhibit 5C-5; 22 CT 6256.) Wound number three passed upwards towards the left orbit and went through all of the bones in the face, passed behind the nasal bones, and came to rest within the

left eye socket. Wound number four went directly into the cerebellum. Both wounds could have been fatal, especially number four. (14 RT 4106-4110.) The slugs that entered the head at those locations were recovered inside the head. (14 RT 4109.)

She described her findings regarding gunshot wound number five, which were based on another autopsy photograph, Exhibit 5C-1, and the autopsy report, with Exhibit 53. (22 CT 6352; 14 RT 4110-4112.) She stated, "[a]ccording to Harrison, they recovered a deformed, large-caliber projectile and it was in the petrous bone." (14 RT 4112-4113.)

Her opinion that Carole died of multiple gunshot wounds was based on her review of Dr. Harrison's autopsy report and photographs taken at the scene and at the autopsy. (14 RT 4114.) She opined that death have occurred "within minutes." (14 RT 4114- 4115. "Dr. Harrison actually mentioned that she had blood in both of the chest cavities, which was the result of gunshot wound number two. And so, she lost a considerable amount of blood, that means that she probably would have certainly been in shock within five, ten minutes and possibly deceased, you know, within 20 minutes or so." (*Ibid.*) After reviewing "Dr. Harrison's autopsy report and the photographs and other items related to the autopsy Dr. Harrison did," she formed the opinion that Carole's fetus died of a single bullet wound to the head which penetrated the brain. It would have died from lack of oxygen within two minutes of Carole's death. (17 RT 5000-5002.)

The record contains no evidence that Dr. Harrison was unavailable to testify. Unavailability as a witness includes situations in which the declarant is exempted by privilege; refuses to testify; testifies to a lack of memory; is unable to testify because of death or then existing physical or

mental illness or infirmity; or is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means. (Evidence Code section 804, subdivision (a).) The prosecutor did not claim that Dr. Harrison was unavailable to come to court or that there was any other reason he did not testify at trial. Nothing about the mere fact of Dr. Harrison's retirement prevented him from testifying, for Frances Evans, a DOJ forensic chemist and criminalist who was also retired, appeared and testified. (23 RT 6698-6753.)

In essence, then, the prosecutor did nothing but convey the testimony of Dr. Harrison, who was not unavailable, to the jury through a surrogate witness, Dr. Comfort. Appellant's right of confrontation was not preserved by the opportunity to cross-examine Dr. Comfort regarding the substance of Dr. Harrison's testimonial statements. The Confrontation Clause's bar against surrogate testimony applies regardless of whether the court believed that appellant's opportunity to question Dr Comfort about Dr. Harrison's testimonial statements provided a meaningful opportunity for cross-examination. "[T]he analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.' *Melendez–Diaz,* 557 U.S., at ——, n. 6, 129 S.Ct., at 2537, n. 6." (*Bullcoming v. New Mexico, supra*, 131 S.Ct. at p. 2715.)

Morever, even if the Confrontation Clause's ban on surrogate testimony were subject to such an exception, it would not apply in this case.

**1. The Confrontation Clause's Particular-witness Rule Is Not Subject to an Exception Based on the Ability to Cross-examine a Different Witness.**

There is no exception to the Confrontation Clause's prohibition against surrogate testimony for cases in which a court believes that a defendant's ability to question a testifying witness about a nontestifying witness's testimonial statements provides a meaningful opportunity for cross-examination. Cross-examination is only one of the four elements of confrontation. Thus, even if questioning one witness with respect to another declarant's testimonial statements could satisfy the right to cross-examination, it still would not satisfy the Confrontation Clause where nothing in the record suggests that it would have been impossible to have the declarant testify under oath, in the presence of the jury, and face-to-face with the defendant.

More fundamentally, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." (*Crawford v. Washington*, *supra*, 541 U.S. at p. 54.) Nor is it "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *(Giles v. California* (2008) 554 U.S. 353, 375.) Accordingly, just as the Confrontation Clause does not tolerate "[d]ispensing with confrontation because" a court believes that "testimony is obviously reliable," (*Crawford v. Washington*, *supra*, 541 U.S. at p. 62), the Clause does not tolerate dispensing with confrontation because a court believes that questioning one witness about another's testimonial statements provides a fair opportunity for cross-examination. "[T]he guarantee of confrontation is no guarantee at all if it is subject to

whatever exceptions courts from time to time consider 'fair.'" (*Giles v. California*, *supra*, 554 U.S. at p. 375.)

Indeed, the United States Supreme Court has upheld this mode of reasoning not only in the context of the Confrontation Clause but also with respect to the Sixth Amendment right to counsel. In *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, the Government argued that illegitimately denying a defendant his counsel of choice did not violate the Sixth Amendment so long as "substitute counsel's performance" did not demonstrably prejudice the defendant in some way. (*Id.* at pp. 144-145; see *Bullcoming v. New Mexico, supra* 131 S.Ct. at p. 2716.) Expressly analogizing to the *Crawford* line of cases, (*id.* at pp. 145-146), the high court rejected that argument. "It is true enough," the court explained, "that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." (*Id.* at p. 145.) If a "particular guarantee" of the Sixth Amendment is violated, no substitute procedure can cure the violation, and "[n]o additional showing of prejudice is required to make the violation 'complete.'" (*Id.* at p. 146 (footnote omitted).) The same is true here. Just as substitute counsel cannot satisfy the Sixth Amendment, neither can confrontation of a substitute witness.

When the prosecutor elected to introduce Dr. Harrison's testimonial statements through Dr. Comfort, Dr. Harrison became a "witness" against petitioner under the Confrontation Clause. And when the prosecutor failed to put Dr. Harrison on the stand, he violated the Confrontation Clause's basic requirement of live testimony.

**2. Even If the Particular-Witness Rule Were Subject to an Exception Based on the Ability to Cross-examine a Different Witness, Such an Exception Would Not Apply Here.**

Even if the Confrontation Clause's prohibition against surrogate testimony were not absolute, there would be no grounds for creating an exception to the rule here. Precedent, as well as good sense, dictates that there is no "forensic evidence" exception to the Confrontation Clause's bar against surrogate testimony. The Supreme Court's decisions make clear that the Confrontation Clause's prohibition against introducing a nontestfying witness's testimonial statements through the in-court testimony of another applies fully in the context of forensic evidence. In the course of holding in *Melendez-Diaz* that forensic reports are testimonial, the High Court repeatedly stated that, if the defendant objects, "the analyst who provide[d] [the] results" must testify. (129 S.Ct. at p. 2537; see also p. 2532 n.1 ["what testimony *is* introduced must (if the defendant objects) be introduced live" (emphasis in original)]; p. 2531 [a "witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination."] Accordingly, the Court did not simply hold that Massachusetts violated the Confrontation Clause by failing to present a witness along with its forensic report. It held, instead, that "[t]he analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation." (*Id.* at p. 2537 n.6; see also p.2532 ["petitioner was entitled to 'be confronted with' the analysts at trial."].)

The dissent in *Melendez-Diaz* recognized as much. Summarizing the import of the majority's holding, the dissent explained that, at the very least, "the . . . analyst who must testify is the person who signed the

certificate." (*Id.* at p. 2545 (Kennedy, J., dissenting).) The dissent added that "[i]f the signatory is restating the testimonial statements of the true analysts - whoever they might be - then those analysts, too, must testify in person." (*Id.* at 2546 (Kennedy, J., dissenting).)

Indeed, long before *Crawford* and *Melendez-Diaz* were decided, the High Court observed in *California v. Trombetta* (1984) 467 U.S. 479, that when the prosecution introduces a police officer's report of breathalyzer results, the defendant has the right to confront "the law enforcement officer who administered the Intoxilizer test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered." (*Id.* at 490.) Having a different police officer in court to explain how Intoxilizer tests are typically administered would not allow a defendant to probe "whether the test [in his case] was properly administered." (*Ibid.*)

Even if the Supreme Court's precedent did not resolve the issue, it would contravene good sense to create a "forensic evidence" exception to the Confrontation Clause's ban on surrogate testimony. As the court noted in *Melendez-Diaz, supra*, 129 S.Ct. at p. 2536, forensic reports face the same "risk of manipulation" and error as other ex parte testimony. Furthermore, "[a] forensic analyst responding to a request from a law enforcement official may," like other witnesses, "feel pressure - or have an incentive - to alter the evidence in a manner favorable to the prosecution." (*Ibid.*) An analyst could also simply be careless or hurried while preparing a sample for testing. The only person whom a defendant can question effectively respecting these issues is the analyst who wrote the report that is introduced against him. In fact, a well-represented defendant may have numerous questions to ask an analyst about the work

he purportedly did in coming to his conclusions. A surrogate witness who lacks personal knowledge regarding whether the analyst skipped or botched important steps in the forensic process stymies all of these inquiries.

It is equally imperative that defendants have the right to confront particular analysts whose reports prosecutors introduce against them in order to root out whether those reports are deliberately false. Investigative boards, journalists, and independent organizations have documented numerous recent instances of fraud and dishonesty in our nation's forensic laboratories. (*Melendez-Diaz v. Massachusetts, supra*, 129 S.Ct. at pp. 2536-2538.) "While it is true," as the court observed, "that an honest analyst will not alter his testimony when forced to confront the defendant, the same cannot be said of the fraudulent analyst." (*Id.* at p. 2536 (internal citation omitted).) Furthermore, "[l]ike the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony." (*Id.* at p. 2537.) This cannot happen with a surrogate on the stand, since a surrogate who lacks personal knowledge of the analyst's actions cannot know for sure whether the analyst is simply lying.

Even if the analyst who wrote the report does not remember conducting the particular test, an opportunity to confront and cross-examine that analyst - as opposed to someone else - is still vital. As an initial matter, confrontation of the analyst who wrote the report requires that analyst to swear under oath to the accuracy of his purported findings and his other representations. In addition, as the court observed in *Melendez-Diaz*, an analyst's results may be affected by a "lack of proper

training or deficiency in judgment," (*id.* at p. 2537), or by placing undue analytical weight on a suspect methodology. (*Id.* at p. 2538.) Cross-examination in the presence of the jury and the defendant thus allows the defendant to "test[]" the analyst's "proficiency" regarding the scientific procedures he claims to have employed. (*Id.* at 2538.) All of this is impossible to do with a surrogate witness. A surrogate may not know anything about the analyst who wrote the report. Even if he does, the surrogate would likely be unable to speak from personal knowledge about the analyst's training, skill, or attention to detail - or to demonstrate the analyst's professionalism or knowledge of laboratory procedures. And the jury would be unable to observe the analyst in order to gauge those attributes for itself.

Unlike the certificates at issue in *Melendez-Diaz*, Dr. Harrison's autopsy report was not admitted into evidence. Instead, Dr. Comfort relied on Dr. Harrison's report in forming her opinions concerning the cause of death and disclosed its contents while testifying as to the basis for her opinions. Dr. Comfort's reliance on Dr. Harrison's report nonetheless violated appellant's right of confrontation because the jury was instructed:

> In determining what weight to give to any opinion expressed by an expert witness, you should consider the qualifications and believability of the witness, the facts or materials upon which each opinion is based, and the reasons for each opinion. An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based.

(CALJIC No. 2.80; 29 CT 8403; 35 RT 10052-10053.)

Thus, in evaluating Dr. Comfort's opinions concerning the cause of death of Carole and her fetus, the jury was required to evaluate the facts and accuracy of Dr. Harrison's autopsy report. In other words, the weight of Dr. Comfort's opinions was entirely dependent upon the accuracy and substantive content of Dr. Harrison's report. (See Mnookin, Expert Evidence and the Confrontation Clause after *Crawford v. Washington* (2007) 15 J.L. & Poly 791, 822-823 (Mnookin) ["[T]o pretend that expert basis statements are introduced for a purpose other than the truth of their contents is not simply splitting hairs too finely or engaging in an extreme form of formalism. It is, rather, an effort to make an end run around a constitutional prohibition by sleight of hand."]

The autopsy report in this case was formally prepared in anticipation of a prosecution. This is the sort of evidence - cloaked in the authority of a medical examiner and inherently designed to aid criminal prosecution - that the United States Supreme Court has warned against exempting from Sixth Amendment protections. (See *Melendez-Diaz, supra*, 557 U.S. at p. 2532, quoting from *White v. Illinois* (1992) 502 U.S. 346, 365, Thomas, J., conc. ["[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."].)

The trial court's reliance on Evidence Code section 801, subdivision (b), which allows an expert witness to offer opinions based on matters made known to her, whether or not admissible, if such material is reasonably relied upon by experts in the field, is misplaced. Where testimonial hearsay is involved, the Confrontation Clause trumps the rules of evidence. (*Crawford, supra*, 541 U.S. at p. 51 [158 L.Ed. at

p. 192 ["Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."].) Indeed, the court in *Bullcoming* posited the question whether an officer other than the one who recorded an objective fact in a police report could testify to that fact.

> As our precedent makes plain, the answer is emphatically "No." See *Davis v. Washington,* 547 U.S. 813, 826, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (Confrontation Clause may not be "evaded by having a note-taking police [officer] recite the ... testimony of the declarant" (emphasis deleted)); *Melendez–Diaz,* 557 U.S., at ——, 129 S.Ct., at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second.")

(*Bullcoming v. New Mexico, supra.* 131 S.Ct. at pp. 2714-2715.)

Moreover, the fact that Dr. Comfort was available for cross-examination did not satisfy appellant's right of confrontation. Where, as here, an expert bases his opinion on testimonial statements and discloses those statements to the jury, *Crawford* requires that the defendant have the opportunity to confront the individual who issued them. Substituted cross-examination is not constitutionally adequate. (See Mnookin, *supra,* 15 J.L. & Poly at p. 834 ["*Crawford's* language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial."]; Seaman, Triangular Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony (2008) 96 Geo. L.J. 827, 847-848 ["[I]f the [expert's] opinion is only as good as the facts upon which it is based, and if those facts consist of testimonial hearsay statements that were not subject to cross-examination, then it is difficult to imagine how the defendant is expected to . . . demonstrate the

underlying information [is] incorrect or unreliable."].) The court observed in *Melendez-Diaz* that the prosecution's failure to call the lab analysts as witnesses prevented the defense from exploring the possibility that the analysts lacked proper training or had poor judgment or from testing their "honesty, proficiency, and methodology." (557 U.S. at p. 2538.) The same is true here. The prosecutor's failure to call Dr. Harrison as a witness prevented appellant from exploring these same areas.

This case illustrates the inadequacies of substitute cross-examination. Dr. Comfort was unable to respond to specific questions concerning Dr. Harrison's findings. Thus, she could only guess that the number "2" in Photograph 5C-4 (22 CT 6355) referred to gunshot wound number two. (14 RT 4102.) Dr. Harrison could have explained or clarified this notation. His absence deprived appellant of the opportunity to confront this crucial evidence. Because Dr. Harrison's report was testimonial and there was no showing that he was unavailable to testify at trial, appellant was entitled to "'be confronted with'" him at trial. (*Melendez-Diaz, supra*, 557 U.S. at p.2532.) Dr. Comfort's testimony relaying the contents of Dr. Harrison's autopsy report violated appellant's right of confrontation and to a reliable guilt and penalty determination.

**D. The Admission of Dr. Comfort's Testimony Based on Dr. Harrison's Report Was Not Harmless.**

Confrontation Clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *People v. Cage* (2007) 40 Cal.4th 965, 991-992.) Respondent cannot demonstrate it is "clear beyond a reasonable doubt that a rational jury would have found

the defendant guilty absent the error." (*Neder v. United States* (1999) 527 U.S. 1, 18.)

In *Merolillo v. Yates* (9th Cir. 2011) 663 F.3d 444, 453-458, the prosecutor called two pathologists to testify. They did not include the pathologist who performed the autopsy. Like Dr, Harrison, he was no longer employed by the county coroner's office. His autopsy report was not admitted into evidence. There was no evidence that the autopsy pathologist was unavailable to testify at trial. The Ninth Circuit determined that the defendant's right to confront witnesses against him was violated by the admission of his opinion testimony. The error was not harmless "[b]ecause of the inherent weaknesses of the case, the complex nature of the evidence relevant to the cause of death, and the inconsistent expert opinions." The possibility that jurors might have rendered not-guilty verdicts after hearing cross-examination of the autopsy pathologist was even more compelling.

As noted above, Dr. Comfort was unable to explain what the number "2" in Photograph 5C-4 (22 CT 6355) referred to. (14 RT 4102.) She also noted "a small, red, almost like a dot . . . on the left side of the neck, which was not mentioned at all in Dr. Harrison's report." She could not tell from his autopsy report if it was an injury or possibly a little red mole. (14 RT 4112-4113.) Although causation was not the issue most argued by both counsel, Dr. Harrison's absence prevented appellant from pursuing the significance of these facts to his conclusion. Furthermore, Dr. Comfort's opinion that Carole's fetus died of a gunshot wound rather than as a necessary consequence of Carole's death was based solely on Dr. Harrison's autopsy report. Confronting Dr. Harrison with these statements was crucial to the issue of appellant's intent to kill the fetus.

The deprivation of confrontation in this regard was particularly prejudicial with respect to the jury's penalty trial determination. Cross-examination of Dr. Harrison could have provided clarifying details of both Carole's wounds and the wound to her fetus so as to present a less-aggravated view of the crime. Appellant was entitled to this opportunity to elicit these reasons for the jury to spare his life.

Dr. Harrison's opinion was likely given more weight than an ordinary witness as he was a doctor, the actual pathologist who conducted the autopsy and an apparent peer of Dr. Comfort. The jury's focus was likely riveted on what Dr. Harrison, the only pathologist who performed the autopsy, said in his report. Only his opinion supported the prosecutor's causation argument, particularly as to Carole's fetus. Dr. Comfort's opinion depended on the accuracy and substantive content of Dr. Harrison's report. She was unable to explain certain of his findings and observations. Therefore, to the extent these issues were important to the determination as to the cause of death, Dr. Comfort's conclusions were at best incomplete and quite possibly inaccurate. Appellant was unable to make this argument because Dr. Harrison, who was not unavailable, was never cross-examined in this case. It is impossible to say beyond a reasonable doubt that the admission of Dr. Harrison's opinion did not contribute to appellant's conviction. The error was therefore prejudicial and the judgment and sentence must be reversed.

* * * * *

## IV.
## INSTRUCTING THE JURY PURSUANT TO CALJIC NO. 8.69 RELIEVED THE PROSECUTOR OF THE BURDEN OF PROVING THE INTENT ELEMENT OF THE CRIME OF CONSPIRING TO MURDER AND DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS, AND WAS REVERSIBLE ERROR.

The trial court instructed the jury before closing argument pursuant to CALJIC No. 8.69, as follows:

> The crime of conspiracy to commit murder requires proof that the conspirators harbored express malice aforethought, namely, the specific intent to kill, unlawfully, another human being or human fetus.
>
> [¶] . . . [¶]
>
> In order to prove this crime, each of the following elements must be proved.
>
> One, two or more persons entered into an agreement to kill, unlawfully, another human being or human fetus;
>
> two, *at least two* of the persons specifically intended to enter into an agreement with one or more other persons for that purpose;
>
> three, *at least two* of the persons to the agreement harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being or human fetus; and,
>
> four, an overt act was committed in this state by one or more of the persons who agreed and intended to commit murder.

(29 CT 8439-8440; 35 RT 10072-10074 [emphasis added].) This instruction erroneously permitted the jury to find appellant guilty of conspiring to murder without finding that he entered into the conspiracy with the specific intent to kill.

A conspiracy to commit murder may exist if, among other things, "at least two" of the participants intended to kill. (*People v. Swain* (1996) 12 Cal.4th 593, 613.) However, for appellant to be guilty of the crime, he had to be one of the participants who harbored the specific intent to kill. (See *People v. Morante* (1999) 20 Cal.4th 403, 416.) The instruction the trial court gave did not inform the jury of this fact. Instead, it said that *at least two* of the participants must have intended to kill and did not specify that appellant must have been one of them.[63]

The jury was instructed that there were three accomplices as a matter of law in the alleged conspiracy to kill Carole and her fetus, and that there were four in the alleged conspiracy to kill Dean. (CALJIC No. 3.16; 29 CT 8417; 35 RT 10061.) Thus, the instruction erroneously permitted the jury to find appellant guilty of conspiracy to commit murder without regard to whether or not he personally intended to kill so long as they found that at least two of the other participants in each of the charged conspiracies harbored that intent. (*People v. Petznick* (2003) 114 Cal.App.4th 663, 681.)

This instruction relieved the prosecutor of the burden of proving beyond a reasonable doubt each element of the charged offense (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277–278; *Carella v. California, supra*, 491 U.S. at p. 265; *People v. Kobrin, supra*, 11 Cal.4th at pp. 422–423 & fn. 4), violated the exclusive domain of the trier of fact (*Carella v. California, supra*, 491 U.S. at p. 265; *People v. Kobrin,*

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[63] The version of the instruction given by the court was to be used when there was a feigned accomplice, such as a government agent, and at least two persons other than the agent must have harbored the requisite mental state. (See Use Note to CALJIC No. 8.69 (7th ed.2003) p. 388.)

*supra*, 11 Cal.4th at p. 423), and prevented the jury from finding that the prosecution failed to prove a particular element of the crime beyond a reasonable doubt. (*United States v. Gaudin* (1995) 515 U.S. 506, 510–511, 522–523; *People v. Kobrin*, *supra*, 11 Cal.4th at pp. 423–424; *People v. Hedgecock* (1990) 51 Cal.3$^{d}$ 395, 407; *People v. Flood* (1998) 18 Cal.4$^{th}$ 470, 491.) Accordingly, it was erroneous.

An erroneous instruction renders a criminal trial fundamentally unfair and the verdict unreliable unless respondent can show "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' *(Neder v. United States, supra*, 527 U.S. at pp. 9, 15, quoting *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Flood*, *supra*, 18 Cal.4th at p. 502.)" (*People v. Petznick, supra*, 114 Cal.App.4th at p. 681.) This respondent cannot do, Moreover, the erroneous instruction in this case contributed to both the conspiracy and murder verdicts and requires reversal of both.

In *People v. Petznick*, the defendant and three others were charged with burglary, robbery in concert, murder, and conspiracy to commit those crimes. (*Id.* at p. 668.) The jury was instructed with the same version of CALJIC No. 8.69 that was given in this case. (*Id.* at pp. 67-679.) It found the defendant guilty of all counts. (*Id.* at p. 66.) The court of appeal determined that CALJIC No. 8.69 was faulty for the reasons stated above, and that giving it constituted reversible error as to the conspiracy to murder count. Reversal of the remaining convictions was not required, however, because it was possible to determine from the record that the jury's verdicts with respect to those comvictions did not rest on an improper theory. The burglary and robbery convictions were not implicated by the erroneous instruction and, in light of the

overwhelming evidence that Petznick had agreed to commit robbery and burglary, the error did not taint the jury's determination that he had conspired to commit those crimes. The only theory of murder that possibly could have been tainted by the erroneous conspiracy instruction was a theory that Petznick was guilty as a coconspirator to murder. It did not infect theories that he could have been guilty of murder as a coconspirator to burglary and robbery, or under the theories of premeditated murder, aiding and abetting burglary or robbery, or felony murder. (*Id.* at p. 681, citing *People v. Green* (1980) 27 Cal.3$^{d}$ 1, 69.)

The erroneous instruction was harmless beyond a reasonable doubt as to the remaining convictions because the jury found that the defendant was guilty of conspiracy to commit robbery and burglary, which necessarily demonstrated his specific intent to commit those crimes. It also found that he acted in concert with the others to commit robbery and that the murder was committed in the course of a burglary and robbery. Thus the verdict as a whole demonstrated that the jury believed Petznick was present at the murder scene, that he personally joined in the commission of the burglary and robbery with the others, and that the murder took place during the perpetration of those crimes. These findings conclusively supported a first degree murder conviction on a theory of felony murder and also tended to support the theories of liability as coconspirator to burglary and robbery, and aiding and abetting burglary and robbery. (*Id.* at pp. 682-683.)

In this case, the prosecutor argued two theories of murder, conspiracy and aiding and abetting. The trial court instructed the jury that, in order to find appellant guilty of murder, it had to find that the killing was done with malice aforethought (CALJIC No. 8.10; 29 CT

8422; 35 RT 10063), and it defined malice aforethought.[64] (29 CT 8423; 35 RT 10063-10064.) The jury was also instructed that the required specific intent was included in the definition of the crimes or special circumstance set forth elsewhere in the instructions. (29 CT 8420; 35 RT 10062.) This definition could only have been included in the instructions the jury received concerning conspiracy[65] and aiding and abetting.[66]

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[64] Malice may be either express or implied.

> Malice is express when there is manifested an intention unlawfully to kill a human being or human fetus. Malice is implied when, one, the killing resulted from an intentional act; and, two, the natural consequences of the act are dangerous to human life; and, three, the act was deliberately performed with knowledge of the danger to, and with conscious disregard for human life.
>
> When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.
>
> The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person or human fetus killed.
>
> The word "aforethought" does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

(29 CT 8423; 35 RT 10063-10064 [CALJIC No. 8.11].)

[65] The jury was instructed concerning conspiracy pursuant to CALJIC Nos. 4.71.5 [When Proof must Show Specific Intent] (29 CT 8438; 35 RT 10072); 8.69 [Conspiracy to Commit Murder] (29 CT 8439-8440; 35 RT 10072-10074); 6.11 [Conspiracy - Joint Responsibility] (29 CT 8441; 35 RT 10074-10075); 6.12 [Conspiracy - Proof of Express Agreement Not Necessary] (29 CT 8442; 35 RT 10075); 6.13 Modified [Association Alone Does Not Prove Membership in Conspiracy] (29 CT 8443; 35 RT 10075); 6.18 [Commission of Act in Furtherance of Conspiracy] (29 CT 8444; 35

Thus, the jury could have convicted appellant of murder under valid aiding and abetting instructions or the invalid conspiracy instruction. Nothing in the record establishes that the jury relied on the aiding and abetting instructions rather than the conspiracy instruction.

The prosecutor failed to specify in his argument which of appellant's alleged acts aided and abetted the murders and which acts made him liable as a conspirator. Nearly half of his opening argument was devoted to arguing the inferences of circumstantial evidence to demonstrate the existence of and appellant's membership in a conspiracy to kill Carole. He concluded:

> It's very simple, if you take this pile of evidence that's in front of you, and that's only part of the evidence, and it's very clear who committed this crime. And it's very clear that Todd Garton wanted his wife dead for his own selfish purposes, to collect the money. He didn't want that baby. He either didn't believe it was his or he just didn't want the little pain around him. . . . . He's guilty. He committed every one of these crimes. He did it with malice aforethought, he wanted them dead. He wanted to kill Dean so he could get together with Lynn. He wanted his wife

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RT 10075); and 6.24 Modified [Determination of Admissibility of Co-conspirators Statements]. (29 CT 8445; 35 RT 10075-10076.)

[66] The court instructed the jury concerning aiding and abetting pursuant to CALJIC Nos. 3.00 [Principals - Defined] (29 CT 8411; 35 RT 10059); 3.01 Modified [Aiding and Abetting - Defined] (29 CT 8412; 35 RT 10059); 3.04 [Compelling Another to Commit a Crime] (29 CT 8413; 35 RT 10059-10060); 3.11 [Testimony of Accomplice Must Be Corroborated] (29 CT 8414; 35 RT 10060); 3.12 [Sufficiency of Evidence to Corroborate an Accomplice] (29 CT 8415; 35 RT 10060-10061); 3.13 [One Accomplice May Not Corroborate Another] (29 CT 8416; 35 RT 10061); 3.16 [Witness Accomplice as a Matter of Law] (29 CT 8417; 35 RT 10061); and 3.18 [Testimony of Accomplice to Be Viewed with Caution]. (29 CT 8418; 35 RT 10061.)

> dead, he wanted his baby dead. He's guilty. And I don't even need to show you the jury instructions like I was going to, because it's real easy to find the slot where you mark guilty. Just put an X there.

(35 RT 10209-10210.)

The only comment he made with regard to appellant's specific intent was:

> And then the third element is that there must be express malice. Now, that -- that one sounds ominous when you first look at it, but what it means is the defendant must have malice aforethought. And all that means is that he has to have the specific intent to kill unlawfully another human being or fetus. So, he has to want to do that, has to specifically decide, "I want them dead." Okay. So, that's -- that's first degree murder.

(29 RT 10089-10090.) When he explained the requisite intent, however, he merely reiterated the wording of the faulty conspiracy instruction without elaboration:

> So, let me just kind of summarize conspiracy for you. There's four elements to it. Number one, two or more persons entered into an agreement to kill unlawfully another human being or fetus. The second element is *at least two* of the persons specifically intended to enter an agreement with each other or other persons for that purpose, commit murder. Number three, three, is that *at least two* of the persons harbored express malice aforethought. And again, that just means that they had a specific intent to kill unlawfully another human being or a fetus. That's all that malice aforethought is. And finally, an overt act, at least one overt act that's charged, was committed within California by one or more of the persons who agreed and intended to commit the murder.

(35 RT 10988-10989 [emphasis added].)

Accordingly, the verdict as a whole demonstrates only that the believed Lynn, Daniels, and/or appellant entered into an agreement to

kill, unlawfully, Carole and her human fetus, and that Lynn, Daniels, Gordon, and/or appellant entered into an agreement to kill, unlawfully, Dean; *at least two* of them specifically intended to enter into an agreement with one or more other persons for that purpose; *at least two* of them harbored express malice aforethought; and that an overt act was committed in this state by one of them. The verdict does not show that the jury believed appellant was present at the murder scene, that he personally joined in the commission of the murder with Daniels, or that the murder took place during the perpetration of other crimes. Thus, unlike *Petznick*, this is a case where it is impossible to tell if the jury rested its first degree murder verdicts on an improper theory. (*People v. Green* (1980) 27 Cal.3d 1, 69; *People v. Guiton* (1993) 4 Cal.4th 1116 1128-1129.)

"Correct instruction on the element of intent was particularly important in this case because [appellant's] defense focused on the question of his intent more than on the nature of his acts." (*People v. Beeman* (1984) 35 Cal.3d 547, 562; *People v. Petznick, supra*, 114 Cal.App.4th at p. 681.) Respondent cannot show beyond a reasonable doubt that the error did not contribute to either the conspiracy or the first degree murder verdicts. The erroneous instruction was therefore not harmless beyond a reasonable doubt. (*People v. Petznick, supra*, 114 Cal.App.4th at pp. 682-683.) Accordingly, reversal is required. (*Neder v. United States, supra*, 527 U.S. at pp. 9, 15, quoting *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Flood, supra*, 18 Cal.4th at p. 502; *People v. Petznick, supra*, 114 Cal.App.4th at p. 681.)

* * * * *

## V.
## REVERSAL IS REQUIRED BECAUSE ACCOMPLICE TESTIMONY WAS UNCORROBORATED AND THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTIONS

Appellant's counsel moved at the close of the prosecutor's case for entry of a judgment of acquittal pursuant to Penal Code section 1118.1 due to insufficient evidence. Appellant was entitled to an acquittal, he argued, because the alleged conspiracies rested entirely upon the statements of the accomplices and there was no evidence connecting him to the conspiracies independent of their statements. (27 RT 7875-7878.) The evidence "required the testimony of the accomplice to give it direction to the alleged crime before it could be said to connect appellant with the commission of that crime." (27 RT 7886.) "Each of the items cited by the District Attorney, if viewed independently, standing on its own, without any reference, direction or interpretation in light of the accomplices' statements, have (sic) no meaning connecting appellant to any crime." (27 RT 7888.)

The trial court found that each count in the information was corroborated by testimony independent of the accomplices. And, although the conspiracies were charged separately, they were interrelated with a common motivation and design. (Evid. Code §1101(b).) It denied the motion. (27 RT 7893-7896.)

"A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. . . ." (Pen. Code § 1111.) Corroboration is required "to ensure that a defendant will not be convicted solely upon the

testimony of an accomplice because an accomplice is likely to have self-serving motives." (*People v. Davis* (2005) 36 Cal.4th 510, 547.)

"[W]hile corroborating evidence need only be slight, 'it is not sufficient to merely connect a defendant with the accomplice or other persons participating in the crime. The evidence must connect the defendant with the crime, not simply with its perpetrators.' (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543, 248 Cal.Rptr. 60.)" (*People v. Beaver* (2010) 186 Cal.App.4th 107, 114-115.)

> The corroborating evidence may be slight and entitled to little consideration when standing alone. However, it must tend to implicate the defendant by relating to an act that is an element of the crime. It need not by itself establish every element, but must, without aid from the accomplice's testimony, tend to connect the defendant with the offense. The trier of fact's determination on the issue of corroboration is binding on review unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime.

(*People v. Nelson* (2011) 51 Cal.4th 198, 218.)

The test on appeal is whether substantial evidence supports the conclusion of the trier of fact. Viewing the evidence in the light most favorable to the prosecution, a reviewing court determines if a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. The entire record is reviewed, not isolated bits. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1077; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320; *People v. Kovacich* (2011) 201 Cal.App.4th 863, 879; *People v. Beaver* (2010) 186 Cal.App.4th 107, 114.)

### A. The Accomplice Testimony Was Uncorroborated

Independent evidence of the alleged conspiracies to kill Dean and Carole and her fetus connected appellant with their alleged perpetrators, but failed to connect him to any criminal activity. (*People v. Beaver, supra,* 186 Cal.App.4th at pp.114-115.)

#### 1. Testimony Concerning the Alleged Conspiracy to Kill Dean.

Nothing in the record but the accomplices' testimony establishes that there ever was either a plan to kill Dean or an attempt to take his life. The entire story easily could have been made up by an accomplice with self-serving motives. (*People v. Davis, supra,* 36 Cal.4th at p. 547.)

The only proof of the existence of The Company and appellant's alleged connection with it came from Lynn (17 RT 5054-5056, 5060-5061, 5064; 18 RT 5205-5206; 20 RT 5645-5647, 5650, 5655-5656, 5829-5831, 5856-5857, 5873-5874), Gordon (21 RT 6108-6113, 6190-6191; 22 RT 6389-6390), and Daniels (14 RT 4202-4204; 15 RT 4368-4373). Absent this accomplice testimony, there is no evidence that The Company and/or appellant's connection with it was anything but a figment of their imagination.

Lynn and Gordon were the only witnesses to the articles and other items in The Anarchist's Cookbook. Other than Lynn's uncorroborated testimony, there is no proof that appellant put any of the items in the book or sent them to her. (17 RT 5047-5048; 18 RT 5115-5140, 5163-5170, 5215-5218; 19 RT 5439-5440; 20 RT 5715-5719, 5819-5821; 22 RT 6205-6210.)

Gordon was the sole witness to the alleged attempt to kill Mr. Clark (22 RT 6350-6353), to appellant's efforts to have him kill a drug addict or a bum (22 RT 6325, 6327-6328), and to appellant's statement

that the CIA sent a spike or a virus and messed up his AOL account. (22 RT 6360-6361; 23 RT 6659-6660.)

Dean acknowledged the alleged motive for his death, an extramarital affair (23 RT 6757-6760; 24 RT 6843, 6875-6876), and appellant acknowledged that Lynn informed him of the affair. (29 RT 8325-8329.) However, the only evidence that appellant suggested or planned that Dean be killed as a result of the affair, that there was a plan to kill him and collect the proceeds of insurance on his life, or that Lynn sent him keys to her house and pictures of Dean in order to accomplish that plan was furnished by Lynn (18 RT 5109-5114, 5143-5144, 5170-5174; 19 RT 5400, 5624, 5626-5627; 20 RT 5841, 5857-5859), Gordon (21 RT 6115-6117, 6194- 6196; 22 RT 6218-6222, 6224-6225, 6328, 6417, 6479-6483; 23 RT 6504-6511, 6672-6674, 6694), and Daniels (14 RT 4178-4183, 4191-4196, 4201-4202; 15 RT 4252-4253, 4260-4261, 4334-4335; 16 RT 4761-4767).

Dean confirmed that he had planned a business trip to San Francisco. (24 RT 6868-6870.) The only evidence that there was any plan to kill him during the trip came from Gordon (Exhibit 185; 23 CT 6786; 22 RT 6282-6285), and Daniels (14 RT 4193-4194, 4196-4197, 4200; 16 RT 4763-4764, 4768).

Appellant acknowledged that he was in Gresham on the weekend of October 9, 1997. (30 RT 8493-8494.) The only evidence that the trip was connected to a plan to kill Dean came from Lynn (17 RT 5076-5079; 18 RT 5114-5115), Gordon (21 RT 6197-6198; 22 RT 6202-6206, 6211-6213, 6215; 23 RT 6630-6631), and Daniels (16 RT 4767-4768).

Appellant acknowledged that he and Gordon were in Eugene/Springfield, Oregon, on January 3 and 4, 1998. (29 RT 8334-

8336.) The only evidence that the trip had anything to do with a plan to kill Dean came from Lynn (17 RT 5080-5082; 19 RT 5445-5446) and Gordon (22 RT 6214-6219; 23 RT 6512-6513, 6516-6519, 6674).

The only evidence that appellant watched training videos with Gordon and Daniels came from alleged accomplices: Lynn (18 RT 5208, 20 RT 5667-5669, 5779-5781, 5860), Gordon (22 RT 6325-6326; 23 RT 6634-6645), and Daniels (16 RT 4612-4613; 27 RT 7719-7723).

Appellant acknowledged being in Gresham on the weekend of February 8, 1998. (29 RT 8262-8263, 8290-8291, 8298-8305, 8324-8325, 8329-8334; 30 RT 8494, 8593-8594.) The only evidence that he shot through the screen at the Hampton Inn, that he killed a homeless man, or that there was an attempt to kill Dean during the weekend came from Lynn (17 RT 5079-5080; 18 RT 5140-5143, 5174-5185, 5332; 19 RT 5563; 20 RT 5768-5777, 5866-5867), Gordon (22 RT 6242-6254, 6262-6284, 6476-6477; 23 RT 6512-6516, 6519-6537; 23 RT 6563-6589, 6594-6603, 6675-6687), and Daniels (14 RT 4213, 4217-4220, 4225-4239; 15 RT 4242-4288, 4316-4355, 4358-4367; 16 RT 4536-4537, 4758-4761, 4768-4777; 17 RT 4926-4931, 4971-4979).

Appellant also acknowledged being in Gresham on the weekend of May 8, 1998. (30 RT 8495-8496, 8753-8758.) The only evidence that the Noyeses' house was burglarized that weekend, that appellant committed the burglary, that his calls to Daniels had anything to do with a plan to extort money from Dean, or that he had anything to do with e-mail messages from bladerunner3@usa.net came from Lynn (18 RT 5257-5261, 5263-5270; 20 RT 5899), Gordon (22 RT 6330-6332), and Daniels (16 RT 4579-4596, 4604-4607; 17 RT 4831-4837, 4841, 4881-4888, 4902-4918).

The only evidence of a plan to kill Dean at the Newport Bay restaurant came from Lynn (19 RT 5635-5637, 5396-5398, 5400, 5440, 5636-5638; 20 RT 5849-5850, 5777-5778) and Daniels (15 RT 4366-4369).

**2. Testimony Concerning the Alleged Conspiracy to Kill Carole and Her Fetus.**

Like their testimony concerning the conspiracy to kill Dean, nothing in the record corroborates the accomplices' testimony concerning the conspiracy to kill Carole and her fetus.

Other than his presence when the gun was purchased, the only evidence that connected appellant in any way to the murder weapon came from Daniels (15 RT 4381-4401, 4407, 4414, 4477-4478; 16 RT 4539-4540) and Gordon (22 RT 6334-6339).

Appellant purchased items at Office Max on April 27th. (33 RT 9408-9413, 9415, 9417-9419, 9427-9433.) The only evidence that they were used to assemble a package, that he gave Daniels a package containing orders to kill Carole and her fetus, that the package was sealed with a wax seal, or that Daniels agreed to kill them came from Lynn (18 RT 5191-5192, 5202-5203, 5206-5209, 5351; 20 RT 5653-5654) and Daniels (14 RT 4150-4154, 4164-4172, 4175; 15 RT 4379-4381, 4407-4442, 4450-4453; 16 RT 4602-4603; 17 RT 4838, 4843-4844, 4851-4853, 4938-4940).

Daniels was the only witness that connected appellant in any way with the "Doorway" he allegedly received. (15 RT 4466-4474; 16 RT 4614-4619; 17 RT 4844-4848, 4872-4881, 4947-4953,4958, 4979-4983.)

The only evidence that tended to connect appellant with planning to kill Carole and her fetus came from Lynn (18 RT 5187-5195, 5202-

5205, 5208-5209, 5271-5276, 5333-5350, 5352-5360; 19 RT 5394-5395, 5496-5506, 5525; 20 RT 5659-5674, 5719-5735, 5763-5764, 5779-5781, 5835-5837, 5859-5864) and Daniels (15 RT 4440-4443, 4453, 4474-4478; 16 RT 4548-4550, 4556, 4563, 4613-4614, 4619-4629, 4739-4742, 4769-4770; 17 RT 4828-4831, 4841-4843, 4937-4938, 27 RT 7730-7741).

The only evidence tending to connect appellant with the label maker came from Mann (24 RT 6958-6959, 7001-7005) and Lynn (19 RT 5406-5419, 5440-5445, 5496-5497; 20 RT 5807-5810). Mann, though, initially told investigators that she did not see a label maker in the house. She did not report her observations until almost a year later. (24 RT 6994-6996, 7000.)

**B. The Lack of Corroboration Requires Reversal.**

The trial court believed that Glen Renfree's testimony corroborated the accomplices' stories about the February trip to Gresham to kill Dean. (27 RT 7890-7891.) Renfree testified that appellant told him about a trip to Oregon to sell camouflage gear during which he, Daniels, and another person went by a house, rattled the windows, and shot off a couple rounds to scare someone in the house. (24 RT 6895-6896.) This evidence corroborates the fact that appellant rattled the windows and shot off a couple rounds on a trip to Oregon. It does not corroborate the accomplice testimony that appellant attempted to kill Dean during the trip. There was no allegation that the windows of the Noyeses' house were rattled or that shots were fired. Furthermore, there was testimony about three trips to Oregon and appellant admitted that he made several others. Nothing in Renfree's testimony established that appellant was talking about the February 8th trip.

The trial court also believed that appellant corroborated the accomplices' testimony during his taped telephone conversation with Daniels on May 16 1998. (27 RT 7890-7891.) Nothing in the tape, however, without aid from the accomplices' testimony, tends to connect appellant with the crime as opposed to its perpetrators. (*People v. Nelson, supra*, 51 Cal.4th at p.218.; *People v. Beaver, supra*, 186 Cal.App.4th at pp. 114-115.)

To the extent there was independent evidence, it tended to contradict, not support, the accomplices' testimony. Gordon testified that there was only one password for everyone to access the Internet on his computer. He had it written down on some notes, probably next to the computer. (22 RT 6443-6444; 23 RT 6657-6658.) Daniels could access appellant's AOL account from other computers. (17 RT 4837, 4840.) He got on the Internet by entering appellant's screen name and password into the computer. (22 RT 6440-6442.) Nothing related to companyt@usa.net was found on either Gordon's or Daniels' hard drives. (25 RT 7280-7281; 33 RT 9507.) However, several web pages related to the companyt@usa.net address were found on the Noyeses' computer. (25 RT 7268-7269, 7271-7273.) Someone searched for the terms "Sinn Fein" and "IRA" on it. (33 RT 9511-9516.) A message with the same content as the "Doorway" was written to the Noyeses' hard drive on May 5, 1998, at 11:56:24 p.m. PDT. (25 RT 7120.)

The cover of The Anarchist's Cookbook was different when Korum, the only disinterested witness, saw it in appellant's possession in 1986 or 1987. (21 RT 6134-6135.)

Lynn recalled that the meeting in Eugene/Springfield occurred after the attempt to kill Dean in February, not in January, 1998. (19 RT

5446.) Keri Kirkpatrick, a witness who could have corroborated the accomplices' claims, did not testify.

Lynn testified that Dean drove the Bronco to work on February 8th because she pleaded with him to take it. Dean, however, did not recall her ever pressuring him to take the Bronco and not the Fiero. (24 RT 6858.) Moreover, there was no problem parking the Bronco in the garage, as she claimed. (24 RT 6877.) Lynn and Daniels testified that she drove to the Gresham Hampton Inn that day. According to Gordon, she ran because she did not have a driver's license. (23 RT 6568, 6679-6680.) Lynn testified that she called her parents to watch her children and went to the hospital that night. (20 RT 5667, 5773-5776, 5867.) Dean recalled, however, that he took the children to a friend's house. (24 RT 6867.)

Daniels testified that he took notes of his telephone conversation with appellant about setting up the bladerunner account on May 9th. He met with the prosecutor, Grashoff, and Von Rader the following morning, decided that appellant wrote some of the information, and changed his testimony. (16 RT 4580-4584, 4586-4587, 4591-4592; 17 RT 4833-4837, 4881-4888, 4902-4904.) Dean could not identify the planner allegedly taken during the burglary of his house as his. (24 RT 6865.)

Daniels testified that appellant suggested buying the murder weapon. (15 RT 4384-4385.) Marshall Jones, however, recalled that he recommended the gun. (24 RT 7064-7065.) According to Daniels, appellant gave Jones $150 and a 20-gauge, woman's shotgun and said he owed Daniels the money for a fencing job. (15 RT 4407.) A gun was not traded in for the Rossi. (24 RT 7061.) Jones told the police at the time of

Carole's death that he received the money for the gun from Daniels. Later, he said that he saw appellant hand Daniels the money. (24 RT 7060-7065, 7067-7070.)

Lynn claimed that she did not know Carole well. (20 RT 5769, 5837-5838.) Dean testified to the contrary, that they were close friends. (24 RT 6835-6837, 6839, 6878.) Colebank recalled that Lynn was not present during the visit to appellant's house, as she claimed, after Carole's memorial service. (21 RT 6178-6179.) Dean did not recall seeing a piercing through her left nipple or any evidence that such had occurred. He did not recall her telling him about it. (24 RT 6857.)

Furthermore, appellant's alleged accomplices all had self-serving motives. (*People v. Davis* (2005) 36 Cal.4th 510, 547.) Daniels was facing capital murder charges and hoped his testimony garnered the prosecutor's mercy. (14 RT 4129-4131; 16 RT 4748-4749.) Lynn believed that she was in custody and facing prison because of appellant. (17 RT 5057; 19 RT 5621-5622; 20 RT 5870.) Gordon's mental stability was, at best, questionable. (22 RT 6380-6382.) He blamed appellant for everything that happened to him, and he wanted revenge. (22 RT 6382-6383, 6410-6414; 23 RT 6651-6652.) He admitted that he might have told his parents he wanted to devastate appellant in court and to destroy his life. (22 RT 6414-6415.) He and Lynn became friends after his arrest and wrote to each other in jail. They talked about how much he hated appellant. (22 RT 6418-6420.) He denied telling Larry Shields that his story had to match Lynn's so his plea bargain agreement could be honored. (23 RT 6606-6610.)

The alleged conspiracies rested entirely upon the statements of the accomplices. What little independent evidence there is casts doubt on

their testimony. There is no evidence connecting appellant to the conspiracies independent of their statements. Without reference, direction or interpretation in light of their testimony, the evidence fails to connect appellant to any crime. No rational trier of fact could have found the elements of the offenses beyond a reasonable doubt. Accordingly, appellant's convictions on both the conspiracy and murder counts must be reversed.

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## VI.
## APPELLANT'S CONVICTION OF CONSPIRING TO MURDER DEAN NOYES MUST BE REVERSED BECAUSE CALIFORNIA LACKED TERRITORIAL JURISDICTION OVER THE ALLEGED ATTEMPTED MURDER IN GRESHAM, OREGON

Appellant's counsel moved before trial to dismiss Count 5 of the information, conspiracy to murder Dean Noyes, for lack of territorial jurisdiction. He argued that the acts committed in California in furtherance of the alleged conspiracy were preparatory and that the alleged attempt began, if at all, in Oregon on the morning of February 8, 1998, when he, Gordon and Daniels allegedly left the Quality Inn and drove to the parking lot to wait for Dean. Thus, no attempt occurred within California and the court was without territorial jurisdiction over the conspiracy charged in Count 5. (5 CT 749-757, 1172-1180; 2 RT 847, 856-859.) The motion was heard and denied on August 14, 2000. (2 RT 847-881.)

On December 7, 2000, before Daniels testified, counsel requested a hearing pursuant to Evidence Code § 402 to determine if there was evidence which gave California jurisdiction over Count 5. The court found that the motion was untimely. (14 RT 4121-4124.) Counsel requested a "standing objection to anything dealing with anything up in Oregon" because the Court lacked jurisdiction, and testimony and exhibits about the events in Oregon regarding the conspiracy to murder Dean Noyes were not appropriately before the jury. The court granted the request as to all documentary and photographic evidence, but denied it as to witness testimony. (15 RT 4305-4306.)

California has jurisdiction to prosecute a defendant for a conspiracy the object of which was committed outside the state only

when the acts done within the state are sufficient to amount to an attempt to commit a crime. (*People v. Buffum* (1953) 40 Cal.2d 709, 718.)[67] In *Buffum*, the defendant, a Long Beach, California, physician, was convicted of conspiring to induce abortions in Mexico. Four pregnant women went separately to his office to solicit the doctor's aid. He refused to perform the abortions, but took the telephone numbers of three of the women and told each that she would receive a call. A co-conspirator, Rankin, later telephoned them, told them the amount they must pay, arranged to meet them at a designated intersection in Long Beach, California, and indicated that he would transport them to the place where the abortions were to be performed. Buffum gave Rankin's telephone number to the fourth woman, and she called Rankin and made similar arrangements. Rankin met the women at the appointed place and drove them in his car to Tijuana, Mexico. There, with Rankin's assistance, another man performed an operation upon each of them. Rankin returned the women to Long Beach later the same day. (*Id.* at p. 714.)

As a matter of statutory interpretation of Penal Code sections 182 and 274, which criminalized abortion in most cases, this Court determined that the Legislature did not intend to regulate conduct occurring outside California. Unless another California statute established jurisdiction to prosecute the performance of abortions outside California based upon an agreement and overt acts within California, the defendants could not be convicted of conspiring to perform

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[67] *Buffum* was overruled in *People v. Morante* (1999) 20 Cal.4th 403. The Court, however, declined to apply its decision retroactively. (*Id.* at pp. 422, 431-432.) The charges in this case predate *Morante*. (2 RT 853-854.)

extraterritorial acts. (*Id.* at pp. 714–715.) The Court concluded that then Penal Code section 27[68] and then section 778a[69] did not confer jurisdiction upon California to prosecute the defendants for a conspiracy the object of which was committed outside the state. Both sections were construed to apply to offenses committed outside the state only when the acts done within the state are sufficient to amount to an attempt to commit a crime. Since no direct, ineffectual act toward commission of the abortions had occurred within California, the defendants were not guilty of conspiracy. *(Id.* at pp. 715–718.)

The trial court in this case, applying *Buffum*, found that California had territorial jurisdiction over appellant's alleged extraterritorial acts because, "considering, and in light of, the unequivocal, clear, expressed intent to commit the murder," his alleged conduct in California went beyond mere preparation. (3 RT 875-877.) Therefore, based solely upon his alleged agreement and overt acts within California, he could be convicted of conspiring to murder Dean in Oregon. This ruling was prejudicially erroneous.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the

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[68] Section 27, subdivision (1), provided that persons could be punished "under the laws of this state" if they "commit, in whole or in part, any crime within this state."

[69] Section 778a provided: "Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state, such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state."

intended killing. (Pen. Code, § 21a; *People v. Lee* (2003) 31 Cal.4th 613, 623, 3 Cal.Rptr.3d 402, 74 P.3d 176.)" (*People v. Superior Court* (2007) 41 Cal.4th 1, 7.) When the design of a person to commit a crime is clearly shown, slight acts in furtherance of the design will constitute an attempt. (*Id.* at p. 9.) However, "[p]reparation alone is not enough, there must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature. *People v. Miller, supra*, 2 Cal.2d at pages 530-532, 42 P.2d 308." (*People v. Buffum* (1953) 40 Cal.2d 709, 718.)

> ". . . [T]here is a material difference between the preparation antecedent to an offense and the actual attempt to commit it. The preparation consists of devising or arranging the means or measures necessary for the commission of the offense, while the attempt is the direct movement toward its commission after the preparations are made. In other words, to constitute an attempt the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances. [Citations.]" (*People v. Werner* (1940) 16 Cal.2d 216, 221–222, 105 P.2d 927; see also 1 Witkin, Cal.Crimes, § 93 et seq.)

(*People v. Memro* (1985) 38 Cal.3d 658, 698, overruled on other grounds *by People v. Gaines* (2009) 46 Cal.4th 172.) "This court has also noted that an attempt, as distinguished from acts preparatory to that offense, requires 'some appreciable fragment of the crime ... accomplished.' (*People v. Gallardo* (1953) 41 Cal.2d 57, 66, 257 P.2d 29; *People v. Buffum* (1953) 40 Cal.2d 709, 718, 256 P.2d 317.)" (*Ibid.*)

This Court found sufficient evidence that an attempt had occurred in *People v. Superior Court, supra*, 41 Cal.4th 1. The defendant hired an undercover police detective posing as an assassin to murder his sister and

provided him with the information necessary to commit the crimes and a $5,000 payment. (*People v. Superior Court, supra*, 41 Cal.4th at pp. 7-9.) By aiming an armed professional who had agreed to commit the murder at the victims, there was nothing more for the defendant to do to bring it about. Thus, it was clear that he was actually putting his plan into action. These facts would lead a reasonable person to believe that a crime was about to be consummated absent an intervening force, and thus that the attempt was underway.

> Whether acts done in contemplation of the commission of a crime are merely preparatory or whether they are instead sufficiently close to the consummation of the crime is a question of degree and depends upon the facts and circumstances of a particular case. (Citations omitted.) A different situation may exist, for example, when the assassin has been hired and paid but the victims have not yet been identified. In this case, however, Decker had effectively done all that he needed to do to ensure that Donna and her friend be executed.

(*Id.* at p. 14.)

In *People v. Miller* (1935) 2 Cal.2d 527 this Court concluded that there was insufficient evidence that the defendant had progressed beyond mere preparation. There, the defendant entered the town post office slightly intoxicated and, in the presence of others, threatened to kill the victim. Later that day, he went to the hop field where the victim was working. He walked in a direct line toward the victim who was 250 to 300 yards away. After he had gone about a hundred yards, he stopped and loaded his rifle, then walked toward a constable who took the gun from him without resistance. The Court observed that, "up to the moment the gun was taken from the defendant no one could say with certainty whether the defendant had come into the field to carry out his threat to

kill [the victim] or merely to demand his arrest by the constable. Under the authorities, therefore, the acts of the defendant do not constitute an attempt to commit murder." (*People v. Miller, supra,* 2 Cal.2d at p. 532.) The considerable period of time that elapsed between the verbal threat to kill and the rifle march through the hop field was an important factor in determining that there was no attempt. (*Id.* at pp. 529, 532.)

As set forth above, appellant's intent in this case was a hotly-disputed issue. A "design" to commit crime was far from clearly shown. (*People v. Superior Court, supra*, 41 Cal.4th at p. 7, 9.) He testified to perfectly innocent business and personal reasons for his trips to Oregon, and the testimony of his alleged accomplices was wholly uncorroborated. (See *ante*, pp. 214-218.) Absent this testimony, there was no evidence that he harbored any intent to kill Dean.

The evidence does not establish that direct, ineffectual acts to murder Dean were committed in California. Rather, it shows that all of appellant's alleged conduct in California was clearly preparatory. The evidence, if believed, establishes that appellant received a box in California containing pictures, written documents, and keys to the Noyeses' vehicles and their home. (14 RT 4230-4232, 4236-4237; 18 RT 5143-5144, 5170-5171; 19 RT 5627-5629; 22 RT 6219-6220.) He discussed a plan to kill Dean and insurance proceeds with Gordon, and asked Gordon to back him up. (21 RT 6115-6117, 6194-6196; 22 RT 6417, 6480-6482; 23 RT 6504-6507, 6672-6673, 6694.) He solicited Daniels and talked to Gordon and Daniels about killing Dean in San Francisco. (14 RT 4150-4153, 4164-4170, 4175, 4178-4185, 4191-4202, 4229-4230, 4236-4237; 15 RT 4334-4335; 16 RT 4763-4764, 4767-4768; 22 RT 6282-6285.) He and Gordon watched "training videos." (18

RT 5208; 19 RT 5630; 20 RT 5643-5644, 5667-5669, 5777-5791, 5852-5854;. 22 RT 6325-6326; 23 RT 6634-6639, 6644.) He met with Gordon and Daniels in January 1998 at the Moose Lodge in Anderson to plan the crime. (14 RT 4218, 4232-4236; 16 RT 4760-4764, 4766-4768, 4771, 6281, 6483-6484; 23 RT 6507-6515, 6523-6524.) He and Daniels went to factory outlets looking for shoes, rain gear, and wool caps to help them "fit in" in Oregon. (14 RT 4213.) They test-fired ammunition in appellant's backyard with the 10-22 rifle. (14 RT 4220-4221, 4244.) They departed for Oregon in appellant's Jeep with six guns, two black, battery-operated, two-way radios, two lock-pick sets, two silencers, latex gloves, plastic knives, a first aid kit, plastic flex-cuffs, and extra ammunition and magazines. (14 RT 4218-4220, 4223-4227, 4237-4239; 15 RT 4245-4256; 16 RT 4758-4759; 17 RT 4926-4927; 22 RT 6221-6222, 6225-6226, 6249-6250, 6242-6244.)

These acts were clearly preparatory. They do not serve to estabish that the alleged crime was in such progress that it would be consummated unless interrupted by circumstances independent of the will of the attempter (*People v. Buffum, supra*, 40 Cal.2$^{d}$ at p. 718), for preparation continued even after the appellant and his alleged accomplices left California. Thus, appellant allegedly purchased a radio in Oregon, presumably because he, Gordon, and Daniels needed to communicate during their contemplated crime, and they only had two radios. (14 RT 4228-4229; 16 RT 4758-4759; 22 RT 6245-6246; 23 RT 6684-6685.) He had a telephone conversation with Lynn, letting her know that he was on his way to Gresham. (18 RT 5140-5142; 20 RT 5768-5769.) He, Gordon, and Daniels checked into a motel, unloaded their weapons from the Jeep, and continued to plan how they would kill Dean while they cleaned

fingerprints from the weapons and ammunition. (15 RT 4317; 16 RT 4768-4769; 17 RT 4927, 4929; 23 RT 6520-6524, 6569, 6678; 27 RT 7849.) He pointed out several places along the rail system where he would look for Daniels and Gordon if they got separated. They tested the range on their radios. (15 RT 4248-4254, 4264-4265.) They went to the garage where they intended to commit the crime and, because they were uncertain about which garage Dean would go to, they might have gone to another garage. (15 RT 4256-4258, 4317; 22 RT 6248-6249; 23 RT 6519.) Purchasing the equipment necessary to communicate during a crime, cleaning weapons and ammunition, testing radios, and planning how to kill someone and escape are not direct movements toward the commission of a crime, but rather are preparatory acts to devise or arrange the means or measures necessary for the commission of the offense.

Any appreciable fragment of the crime was not accomplished until the following morning when the alleged conspirators left the motel with the means and intent to accomplish their mission. (15 RT 4254-4255; 22 RT 6249; 23 RT 6525, 6528-6530.) Until then, nothing distinguishes appellant's behavior in California from that during his trip to Eugene/Springfield "to set things up . . . to kill Dean" the previous month. (22 RT 6214; 24 RT 6516-6517.) On that trip, he and Gordon took four guns, two of which were silenced, ammunition and extra magazines for the weapons, plastic knives, flex-cuffs, and rubber latex gloves. He, Lynn, and Gordon were allegedly in a hotel room with the guns making plans to kill Dean. (22 RT 6216-6217.) The act that did not occur in Eugene/Springfield - the act that arguably would have made appellant's behavior chargeable as an attempted murder - was donning a

disguise, arming himself with weapons, and departing the hotel the following morning to stake out the garage where Dean was expected to park. (15 RT 4255- 4256, 4258-4260, 4264; 22 RT 6249-6250; 23 RT 6529-6530, 6533.) They did not go so far that their acts would result in the accomplishment of the crime "unless interrupted by circumstances independent of the will of the attempter," but rather were clearly "devising or arranging the means or measures necessary for the commission of the offense." (*People v. Memro, supra,* 38 Cal.3$^{d}$ at p. 698.)

Since appellant's behavior in California was no different on the trip to Eugene/Springfield in January 1998 than it was during the trip to Gresham in February 1998, and since the trip to Eugene/Springfield was not an attempt to murder Dean in California, the trip to Gresham cannot be an attempt to murder Dean in California. Appellant did not do all that he had to do before he left California to ensure the murder of Dean, as did the defendant in *People v. Superior Court, supra,* 41 Cal.4$^{th}$ at p. 14. Instead, up to the moment he left the motel to wait for Dean to arrive at the parking garage no one could say with certainty whether he left California to kill Dean or, as he did during the trip to Eugene/Springfield, merely to impress Lynn with the fact that he could kill him. (*People v. Miller, supra,* 2 Cal.2$^{d}$ at p. 532.) The considerable period of time and distance between leaving California on February 7$^{th}$ and leaving for the parking lot in Oregon the following morning precludes a finding that there was an attempt to kill Dean in California. (*People v. Miller, supra,* 2 Cal.2$^{d}$ at pp. 529, 532.) The alleged plot could have been abandoned at any time prior to the trip to the parking lot on the morning of February 8$^{th}$. Only at this point could his acts have resulted in the accomplishment

of the crime unless frustrated by extraneous circumstances.

No "appreciable fragment of the crime" was accomplished in California and there was no "direct movement toward its commission." (*People v. Memro, supra,* 38 Cal.3d at p. 698.) While there might have been a chargeable attempt to murder Dean in Oregon, there was no attempt to do so in California. Accordingly, the state lacked territorial jurisdiction to prosecute appellant for conspiracy to murder Dean in California and the judgment and sentence as to Count 5 must be reversed.

* * * * *

## VII.
## CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.) In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should this Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

### A. The Broad Application Of Section 190.3, Factor (a), Violated Appellant's Constitutional Rights.

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See 30 CT 9787-8799; 37 RT 10704-10706 [CALJIC No. 8.85].) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of

circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. Here, the prosecutor argued for the death penalty by pointing out that the victims were a "27-year-old woman and her baby." (37 RT 10711-10712.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty trial results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) He urges the court to reconsider this holding.

### B. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof.

#### 1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised On Findings Made Beyond A Reasonable Doubt.

California law does not require that a reasonable doubt standard be used during any part of the penalty trial, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty trial determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (30 CT 8807-8808; 37 RT 10708-10710.)

*Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 530 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 280-282, 293, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (30 CT 8807-8808; 37 RT 10708-10710 [CALJIC No. 8.88].) Because these additional findings were required before the jury could impose the death sentence, *Ring*, *Apprendi*, *Blakely*, and *Cunningham* require that each of

these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty trial proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Appellant further contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair, supra*, 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

**2. Some Burden Of Proof Is Required, Or The Jury Should Have Been Instructed That There Was No Burden Of Proof.**

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (30 CT 8797-8798, 8807-8808; 37 RT 10704-10706, 10708-10710), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the

jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty trial under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

**3. Appellant's Death Verdict Was Not Premised On Unanimous Jury Findings.**

Imposing a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty violates the Sixth, Eighth, and Fourteenth Amendments. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*. (See *People v. Prieto, supra*, 30 Cal.4th at p.275.)

Appellant asserts that *Prieto* was incorrectly decided, and applicaiton of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal-defendant has been charged with special allegations that may increase the severity of his

sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), by its inequity violates the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution

**4. The Instructions Caused The Penalty Determination To Turn On An Impermissibly Vague And Ambiguous Standard.**

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (30 CT 8807; 37 RT 10710.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's

discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) That opinion should ne reconsidered.

**5. The Instructions Failed To Inform The Jury That The Central Determination Is Whether Death Is The Appropriate Punishment.**

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs that they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens* (1983) 462 U.S. 862, 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias,*

*supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

**6. The Instructions Failed To Inform The Jurors That, If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole.**

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death

verdict may be warranted but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

**7. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances.**

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 292-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. *(Boyde v. California, supra*, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt trial that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before

mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

**8. The Penalty Jury Should Be Instructed On The Presumption Of Life.**

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty trial, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th

Amends.), and his right to the equal protection of the laws. (U.S. Const. 14th Amend.)

In *People v. Arias, supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

**C. Failing To Require That The Jury Make Written Findings Violates Appellant's Right To Meaningful Appellate Review.**

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

### D. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights.

#### 1. The Use of Restrictive Adjectives In The List Of Potential Mitigating Factors.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see Pen. Code, § 190.3, factors (d) and (g); 30 CT 8797; 37 RT 10705 [CALJIC No. 8.85]) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. *(Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

#### 2. The Failure To Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (30 CT 8797-8798; 37 RT 10704-10706.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, several of the factors set forth in CALJIC No. 8.85 - factors (d), (e), (f), (g), (h), and (j) - were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence

based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) Appellant asks the court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

### E. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty.

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to reconsider and to require inter-case proportionality review in capital cases.

### F. The California Capital Sentencing Scheme Violates The Equal Protection Clause.

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital

defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks for reconsideration.

**G. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms.**

This court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency." (*Trop v. Dulles* (1958) 356 U.S. 86, 101;. *People v. Cook, supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the court

to reconsider its previous decisions.

* * * * *

## VIII.
## THE CUMULATIVE EFFECT OF THE ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming, *arguendo,* that the Court concludes none of the errors in this case requires reversal of appellant's conviction and death sentence by itself, the cumulative effect of the errors nevertheless undermines any confidence in the integrity of the guilt and penalty trial proceedings, and warrants reversal of the judgment of conviction and sentence of death.

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Greer v. Miller* (1987) 483 U.S. 756, 764; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty judgments in capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [errors that might not, alone, be so prejudicial as to amount to a deprivation of due process may cumulatively produce a trial that is fundamentally unfair]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"].)

Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th

Cir. 1988) 848 F.2d 1464, 1476.) Thus, reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* to totality of errors when federal constitutional errors combined with other errors].)

Appellant denied that he knew about or was part of the alleged plots to kill Carole and Dean. The intent with which he performed otherwise innocent acts was a hotly-contested issue. Yet, the case rested in large part on the uncorroborated testimony of appellant's alleged accomplices. (Argument V, *ante*, pp. 212-222.) Moreover, the jury could have determined that appellant conspired to murder without ever finding that he had the requisite specific intent. (Argument IV, *ante*, pp. 204-211.) And the trial court erroneously determined that California had territorial jurisdiction over an attempted murder alleged to have occurred in Oregon. (Argument VI, *ante*, pp. 223-232.) The result of appellant's trial would not have been the same if, in addition to these errors, he had been permitted to present evidence of his love for Carole by wearing his wedding ring (Argument I, *ante*, pp. 151-168), if Detectives Grashoff and Von Rader had not been clothed with a false aura of veracity (Argument II, *ante*, pp. 169-181), and had Dr. Harrison rather than Dr. Comfort testified regarding Carole's autopsy. (Argument III, *ante*, pp. 182-203.)

On this record, respondent cannot prove that the errors, when considered together, were not harmless beyond a reasonable doubt. Reversal of the judgment and sentence is therefore required.

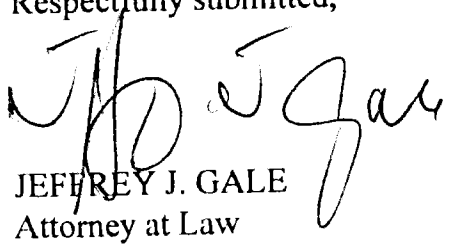
* * * * *

## CONCLUSION

For all of the reasons stated above, the judgment of conviction and sentence of death in this case must be reversed.

DATED: June 28, 2012

Respectfully submitted,



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Attorney for Appellant

## CERTIFICATION OF WORD COUNT
## (Cal. Rules of Court, Rule 8.630(b))

I certify that appellant's opening brief uses a 13 point Times New Roman font and, excluding the cover, tables, signature blocks, and this certificate, contains 75,918 words.

DATED: June 28, 2012

Jeffrey J. Gale
Attorney for Appellant

## DECLARATION OF SERVICE

**Re: PEOPLE V. GARTON** **No. S097558**

I, Jeffrey J. Gale, declare that I am over 18 years of age, and not a party to the within cause; my business address is 5714 Folsom Blvd., No. 212, Sacramento, CA 95819. I served a copy of the attached:

**APPELLANT'S OPENING BRIEF**

on each of the following, by placing same in an envelope addressed respectively as follows:

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Each said envelope was then, on June 28, 2012, sealed and deposited in the United States mail at San Francisco, California with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 28, 2012, at Seaside, California.

Jeffrey J. Gale