

1 THE COURT: All right. Let's take a recess
2 at this point then and we'll get set up and then we'll
3 begin with argument.

4 (Brief recess.)

5 THE COURT: Opening argument for the state.

6 MR. HUGI: May it please the Court and
7 counsel, ladies and gentlemen of the jury.

8 We have finished this case as far as the
9 evidence goes now. We started on May 8th, and it's
10 been over a month. And you've all been paying
11 attention throughout to listen to this evidence and
12 very shortly, maybe not in terms of today, but very
13 shortly in terms of the overall length of this trial,
14 the case is going to go to you for your deliberations,
15 and you're going to have to make your decision on this
16 case.

17 And as the Judge is going to instruct you,
18 your decision is to be based on the evidence in the
19 case. That is the testimony you heard from the
20 witness stand and the exhibits that have been received
21 in evidence.

22 What the attorneys say now in argument as in
23 opening statement or in voir dire is not evidence in
24 the case. So that's important because if the
25 attorney, myself or Mr. Jagger, makes a statement that

1 doesn't square with your recollection of the evidence,
2 then you're to trust your memory.

3 So during the course of this trial we're
4 both very busy formulating questions, asking them.
5 We're making notes at the same time, and we may have
6 inadvertently written something down wrong. So the
7 important thing is that you decide the case based on
8 the evidence that you've heard and not what somebody
9 else heard.

10 The state has the burden in this case, the
11 opportunity to prove beyond a reasonable doubt the
12 facts alleged in the indictment, and I think that's as
13 good a place to start as any.

14 The indictment in this case of course
15 alleges that the defendant, Mrs. Downs, on or about
16 May 19th, 1983, in Lane County did unlawfully and
17 intentionally cause the death of Cheryl Lynn Downs, a
18 human being, by shooting her with a firearm. That's
19 Count I. That's Murder.

20 I don't think with respect to any of these
21 counts there's going to be any dispute that these
22 facts did occur and that Cheryl was murdered, that
23 they happened on the date in the indictment in Lane
24 County, that what happened was in fact Murder,
25 Attempted Murder and Assault.

1 The issue for you of course is going to be
2 who was the shooter, Mrs. Downs right here or some
3 bushy-haired stranger that's still out there
4 somewhere.

5 Now the other counts of the indictment
6 allege Attempted Murder with relation to Christie
7 Downs. You heard her testimony as a witness.

8 Attempted Murder with relation to Stephen
9 Danny Downs who you didn't hear. And with respect to
10 those same two children, Assault in the First Degree.

11 And the way you commit Assault in the First
12 Degree is by unlawfully and intentionally causing
13 serious physical injury to a person by means of a
14 firearm.

15 I think that's undisputed that Danny is
16 paralyzed now due to this, and that's certainly serious
17 physical injury. And we've heard testimony that
18 Christie was within five minutes of death, and she'll
19 have her disability with her for the rest of her life.
20 She's lost some use of her right hand, and her speech
21 is still noticeably affected.

22 So I don't anticipate there's going to be
23 much dispute that these crimes in fact happened.
24 Everybody knows they happened, and I think upon
25 consideration of the evidence that you've heard in

1 this case, that there's no doubt who did it.
2 Mrs. Downs did it.

3 And that's certainly not something any of us
4 like to believe, that a mother would murder her child
5 and attempt to murder her own children.

6 And it sure would be nice if it was some
7 bushy-haired stranger because it would be easier for
8 all of us to live with it then, for all of us. But
9 the evidence -- when you look at all of the evidence in
10 this case, it only points to one place, and that's
11 right there, Mrs. Downs.

12 Now at the start of this trial, I talked to
13 you about use of this chart in opening statement, and
14 I said that that was the opportunity where the
15 attorneys would first get to address you and they
16 would get to tell you what evidence they anticipated
17 would be produced in the course of the trial.

18 And it was kind of a promise or commitment
19 to you because at the time we made opening statements,
20 we could have represented anything. You had to kind
21 of wait back and see what are they really going to
22 produce.

23 And I used this chart to make that
24 commitment to you to tell you what the state's theory
25 of the case was and what the evidence would be that

1 would be produced.

2 And now I'd like -- now that you've heard
3 all the evidence, I'd like to review it with you and
4 show you that in fact what the state did promise was
5 produced.

6 Generally we talked about how the case came
7 to the state's attention. The car pulled into the
8 hospital at 10:30. We talked about the nurses'
9 experience and the doctors. I'll get into that in
10 somewhat more detail later.

11 And how the police got involved, the initial
12 stories from Mrs. Downs, how just I think in the words
13 of one policeman it didn't ring true. She wasn't
14 being totally honest with them. Things didn't quite
15 add up.

16 Her demeanor, her statements, it was a
17 certain signal there was something amiss in this case,
18 and it was picked up by all the people that dealt with
19 her.

20 Now I'll acknowledge her mother came in and
21 testified and said she seemed to be crying and
22 hysterical and shocked, but that's fine. That's what
23 she testified to, but the other people did not observe
24 that at all. They observed a person who was not
25 crying, was not upset, was not in shock, had a lack of

1 genuine concern for the welfare of her children.

2 Now you say well, what kind of person can
3 that be? These Emergency Room doctors deal with
4 people in trauma and shock every day. They're coming
5 and going, cut up, bloody, painful people and they
6 deal with their relatives.

7 But Mrs. Downs stood out. There was
8 something wrong there, and that behavior and that
9 demeanor that was observed by those doctors is
10 consistent with a person who would be able to do what
11 Mrs. Downs did, to shoot her own children, that
12 disassociation, that ability to put a distance and a
13 wall between yourself and any emotional feelings for
14 your children.

15 I think as this case went on we learned more
16 about Mrs. Downs' background, a lot more than those
17 emergency doctors ever knew when they met her. We
18 began to see how that personality that she had was
19 formed and how it was shaped and how she came to be at
20 the position that she was in on May 19th, 1983.

21 After she got to the hospital the police
22 became involved. They commenced their investigation.
23 We have heard the testimony about they sent people out
24 to the scene, blocked it off, had police dogs looking,
25 trying to find a person that was initially described

1 by Mrs. Downs, a person she later told Mr. Redick that
2 she just made up to throw the police off.

3 I'll remind you specifically of that
4 statement, that that happened on June 22nd while he was
5 out delivering mail and she was telling him this story
6 here about the -- that it was two men with ski masks
7 and that her husband put them up to it. And that
8 story happens before the second composite came out.

9 So I think what we see here is a person
10 that's riding a lot of different horses, telling a lot
11 of different stories at the same time. And it's
12 intentionally misleading people.

13 And you've got to ask yourselves if this is
14 the bonafide victim of a crime, why is she behaving in
15 that manner.

16 There's an explanation for this because as
17 the evidence is coming in and the authorities and
18 Mrs. Downs are learning more about this crime, she is
19 beginning to have some problems with her original
20 story and she needs to modify it.

21 For instance, when she's first asked, "Do
22 you own or possess -- tell us about all the firearms
23 you own or possess," she doesn't talk about a .22 Ruger
24 semiautomatic pistol at all. That's left out.

25 Then on the witness stand we had a little

1 head-to-head there where she's saying, "Well, I didn't
2 really possess it." And I think that's important for
3 another reason. That shows how her mind works and her
4 logic pattern works.

5 And it's very similar to, say, a young child
6 that's been told by their mother, "You're not supposed
7 to eat ice cream." And the mother comes home and
8 there's ice cream all over the kid's face.

9 "I told you not to eat ice cream," and the
10 child has a comeback, "You told me not to eat a bowl
11 of ice cream, but I just had a cup."

12 So it's okay. That's a similar splitting of
13 hairs to do what she wants to do and avoid the
14 consequences.

15 All right. As she learns that the police
16 know she has possessed a .22 Ruger and that they're
17 able to identify that. Then it becomes necessary for
18 her to disassociate herself from that and come up with
19 an explanation that encompasses and adopts that fact
20 and makes her not guilty.

21 All right. The gun is in Arizona -- that's
22 her story -- left it in Arizona. What a coincidence
23 for some unrelated person up here in Oregon to have
24 that same gun.

25 So she's got to make an Arizona connection,

1 and she does that by saying, "Well, the gunman knew
2 me. He knew about my tattoo. He knew my name." The
3 implication is the gunman had to come from Arizona.
4 Then that resolves that problem for her.

5 The crime scene was processed. The car was
6 looked at. The police went to her apartment. They
7 removed the diary which you have in evidence, which
8 you've all read by now.

9 The Glenfield rifle that had the two
10 cartridges in it that had been in the murder weapon,
11 had been in the weapon that murdered Cheryl and
12 seriously injured Christie and Danny. The police
13 didn't know it at the time.

14 They do the gunshot residue test on her
15 hands. She learns of the results of that, that it's
16 negative and feels that proves she's not guilty and
17 makes quite a bit about that in her contact with the
18 police.

19 Now Mr. Pex came in and he told us that he
20 did an experiment himself with that same test in which
21 he fired a Ruger several times and waited a half hour
22 and swabbed his hands and sent it down to the Medford
23 lab to Mr. Telyea and that test also came back
24 inconclusive like Mrs. Downs' had.

25 So that is proof that a person can fire a

1 Ruger .22 pistol several times and have your hand
2 swabbed within a half hour and not have any detectible
3 amounts on your hands.

4 And he explained the nature of the test,
5 that this was a dust that was on your hand and if you
6 put your hands in your pockets several times, it could
7 come off. And that certainly if you washed your
8 hands, it would be off.

9 And we know from Judy Patterson's testimony
10 at the hospital that while Mrs. Downs was there, she
11 went into the washroom and there were no cups in
12 there, so she couldn't have been in there for a drink
13 of water.

14 And she never closed the door, so she
15 couldn't have been in there for a bowel movement or
16 something. And Judy Patterson heard the water
17 running.

18 So there's an opportunity at least for
19 Mrs. Downs to have washed her hands prior to anybody
20 getting to the hospital and certainly in all the time
21 that she was riding around in police cars and at the
22 hospital, she had a towel. She certainly could have
23 wiped her hands so that this gunshot residue wouldn't
24 have been detected, even though just through the
25 passage of a half an hour it wouldn't have been

1 detected and Mr. Pex's test proved that.

2 He did a number of proximity tests on the
3 car, and we had kind of a classroom in here where he
4 used the slide projector and told you in detail about
5 how he performed those tests and what his conclusions
6 were from them.

7 And in evidence you're going to have -- you
8 were handed some booklets that had the results of
9 these tests, and one of those has been received as an
10 exhibit in evidence. And you'll be able to review that
11 work where he went and gave a final distance for each
12 of the shots that took place within that car, and
13 they're all very close shots.

14 And why is that significant? I think that's
15 very significant because in the initial stories anyway
16 in the initial diagrams that Mrs. Downs did, the
17 assailant -- the videotape -- was always standing
18 outside the car. His feet were placed outside the
19 car. It's a small car, I'll grant you that, but how
20 can he make a contact shot, near contact on Christie
21 and on Cheryl when his feet are outside the car?

22 He'd have to have arms like Wilt
23 Chamberlain, and he's only a five-foot-eight inch
24 person by Mrs. Downs' description, if he was out
25 there.

1 That just doesn't add up. That's one of the
2 many, many things about her story that just doesn't
3 fit.

4 We heard testimony on blood spatter from
5 Mr. Pex whose conclusion is that Cheryl was shot
6 outside the car by a gunshot.

7 And then we got into doing tests for
8 Mr. Jagger with the postal sweater, and that still
9 didn't change Mr. Pex's mind. And you should ask
10 yourselves a question about that too. You've seen how
11 the sweater had to have been whipped around to
12 generate that blood.

13 Ask yourselves, can you picture Shelby Day
14 doing anything similar to that when she's lifting
15 Christie out of the car and taking her into the
16 hospital? There certainly was no testimony at all to
17 indicate that the child was being whipped and in any
18 sort of fashion that could have approximated the
19 experiments that Mr. Jagger did.

20 When asked about this blood spatter, okay
21 Mr. Reid, you and Mr. Jagger got together and did your
22 test. Now you've also looked at the actual Datsun
23 automobile and the work that Mr. Pex did. Do you
24 agree with his procedure? Yes, yes he did.

25 And you observed that the droplets on the

1 actual car had certain directionality, and Mr. Pex
2 talked about that in his presentation to you about how
3 these droplets would have tails on them that would
4 enable -- I'm obviously not a good drawer -- but they
5 would allow you to determine a direction, the
6 direction from which the drop came.

7 And that he observed several droplets on
8 this panel, on this pattern that all pointed back to a
9 common point. And Mr. Reid agreed with that.

10 Now his test doesn't encompass that. His
11 test has all the directionality on these individual
12 droplets being vertical, straight up and down, not
13 radiating from a precise point.

14 So there's no way that his experiments can
15 duplicate or account for the evidence that was found,
16 and Mr. Reid admitted that. He said if you consider
17 the entire pattern, the gunshot explanation is more
18 likely than the whipping postal sleeve.

19 So we had some -- I think some clear
20 testimony from both of the experts on that point, and
21 they both substantiate and prove the state's theory.

22 Why is that so important? Who cares if
23 there's blood on the outside of a car really?

24 It's real important because if Cheryl was
25 shot outside the car, where does that fit into any of

1 Mrs. Downs' stories? It's never there. Is that
2 something that's a black spot in her memory as she
3 calls it, something that would have just been
4 forgotten?

5 Why can't she adapt that fact into her
6 story? Why can't she just say, "Oh yeah, now I
7 remember Cheryl was outside the car and the guy did
8 need to finish her off out there."

9 She can't do that because there's no
10 explanation for her sticking around if the gunman had
11 to go that far to get Cheryl. What's she doing then?
12 Why didn't she run away, go somewhere, do something?
13 Too much time between the shooting of the children and
14 the shooting of her.

15 Is she just going to stand there and wait
16 until he gets done and then come around and shoot her
17 in the arm as her story goes?

18 That's important. And she was never willing
19 to or wasn't able to accommodate that fact in any
20 story she ever told.

21 The case in comparison was something that at
22 the commencement of the trial counsel said, "Well,
23 it's not what it appears to be. It's not going to be
24 what the state claims it is.

25 Now the casing comparison was conceded by

1 the defendant's expert as being a match. So we've got
2 Jim Pex, John Murdock and Bart Reid all saying that in
3 fact the casings found in the car match the cartridges
4 found in Mrs. Downs' rifle.

5 What does that leave us with? Well, Tracy
6 had to plant the evidence. Do you remember that?
7 That's the only way he can deal with that fact.

8 Now why is Tracy going to plant the
9 evidence, especially at this point in the
10 investigation, at the outset? He doesn't know where
11 this is going to go or where it's going to lead.

12 He doesn't know that Mr. Pex is going to
13 discover that this came from a Ruger. Something is
14 doing this, and he doesn't know --

15 We're having a disruption here.

16 THE COURT: Ma'am, you'll have to leave the
17 courtroom, please.

18 MEMBER OF THE AUDIENCE: Why, maybe I know
19 something?

20 THE COURT: This gentleman will help you
21 right there.

22 The jury should disregard that. You may
23 proceed.

24 MR. HUGI: Tracy has no way of knowing that
25 anyone at that point can connect Mrs. Downs to a

1 Ruger. All right.

2 What if those casings are from a Browning or
3 a High Standard, some other make of gun? And he
4 supposedly plants them, right.

5 And the only gun that ever can be connected
6 to Mrs. Downs is a Ruger. He's just ruined the case,
7 if he's done that. So I submit to you that there's no
8 logical basis to accept that hypothesis at all.

9 It would not do what the defense claims it
10 would do. They claim it would hang Mrs. Downs, make
11 the case for Tracy, and there's no way he had enough
12 knowledge at that time or he could be sure he was
13 hanging her.

14 In fact, he had just as great a chance or
15 greater chance of botching up the case or ruining it
16 if he had done that.

17 So what this shows is a desperate attempt on
18 the part of the defendant to deal with the evidence of
19 the case. That's all that shows because if in fact
20 the cartridges that were in her rifle which she
21 possessed and had sole control over matched the ones
22 that shot and killed her children, and all of these
23 happened to come from a .22 Ruger and she's seen with
24 a .22 Ruger the night she leaves Arizona for Oregon,
25 there's no way out for Mrs. Downs.

1 There's no way out unless -- well, maybe
2 counsel can come up with that. I suppose she could
3 say, "Well, I really did bring it up to Oregon. I
4 didn't leave it in Arizona, and this guy came to my
5 house and stole it and then decided to use it against
6 us out on the road." We haven't heard that put
7 forward yet.

8 The motive in the case -- I think the state
9 is not required to prove motive. Now we're required
10 to prove the elements of the crime to you beyond a
11 reasonable doubt, but we're not required to prove
12 motive. But we did spend a lot of time in the case
13 talking about Mrs. Downs' background, and I think the
14 chief value of that was that it gave us an insight
15 into her personality, into how her mind works, into
16 what her values were, into the emotional control she
17 has of herself, how she responds to different
18 situations, how she perceives herself, how she
19 perceives others.

20 We learned a lot about this when we explored
21 that area, and I'll go into that. The opportunity
22 plan section deals with Mrs. Downs committing this
23 crime and how she sets it up and how she has to plan
24 it and how this all -- all the evidence that the state
25 has fits and supports her planning it in that manner.

1 Christie Downs I informed you in opening
2 statement had suffered a trauma, had suffered a
3 disability and would come into court and tell us what
4 happened out there, and she did.

5 She came into court and she related from the
6 witness chair subject to cross-examination in quite
7 some detail what for her must be a nightmare like none
8 of us have ever experienced.

9 And to suggest that she was fabricating or
10 lying or was mistaken about that testimony I think is
11 impossible to reconcile with her demeanor.

12 You all watched that and you judged the
13 impact it had on you. And don't let me put any words
14 in your mouth or anything. If it didn't have this
15 impact on you, if you thought she just came in here
16 and told a whopper, fine, believe that and discount
17 it.

18 But I submit to you that that child on the
19 witness stand relived that experience, and when she
20 was asked about seeing Cheryl get shot, she saw that
21 happen in her. And how could anyone program a child
22 to do that if it didn't happen? How could you make a
23 nine-year-old girl that's been through this, a girl
24 who still loves her mother, come into a courtroom like
25 this in this kind of a situation and relate something

1 that awful in that fashion if it wasn't true?

2 I submit you can't. It just doesn't happen.

3 THE COURT: I think we'll go ahead and break
4 at this point. We'll be in recess until 1:30, and
5 I'll remind you once again not to discuss the case
6 with yourselves or anyone else until the Court
7 instructs you.

8 We're in recess.

9 (Noon recess.)

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JUL 1 1982
PUBLIC DEFENDERS OFFICE

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF LANE

3 STATE OF OREGON,)
4 Plaintiff,)
5 vs.) Case No. 10--84-01377
6 ELIZABETH DIANE DOWNS,)
7 Defendant.)
8 _____

9 TRANSCRIPT OF PROCEEDING

10 VOLUME 20

11 BE IT REMEMBERED that the following case came on
12 regularly for hearing before the HONORABLE GREGORY G.
13 FOOTE, Judge of the Circuit Court, Second Judicial
14 District; commencing on the 11th day of June, 1984, at
15 1:30 p.m., in the Lane County Courthouse, City of Eugene,
16 County of Lane, State of Oregon.

17
18
19 APPEARANCES:

20 For the Plaintiff: FREDERICK HUGI, Assistant District
21 Attorney, Eugene, Oregon

22 For the Defendant: JAMES C. JAGGER, Attorney At Law,
23 Eugene, Oregon

24
25 VICTORIA R. LILLY, CSR, RPR
26 Court Reporter
27 2865 N.W. Glenridge Drive
28 Corvallis, Oregon 97330
 Telephone 752-5018

2
1 JUNE 11, 1984

2 TRANSCRIPT OF PROCEEDINGS:

3
4 MR. HUGI: Before we left off at noon I had
5 gone through this chart that we used in opening statements
6 and sort of went over the overview of the case and the
7 State's theory as it's been from the start of the trial.
8 What I'd like to do now since it's been such a long trial
9 I think it is important that we go over some of the
10 witness's testimony, specifically those that started way
11 back in the first week because it has been a long time and
12 I think their testimony is as important as those people
13 we've heard more recently. My intent here is not to
14 repeat every word these people said but rather to bring
15 your attention into focus of the highlights of their
16 testimony and try and show how this all fits together.

17 Heather Plouard was the first lady who
18 testified and she was a postal worker who had worked with
19 Diane. They both transferred here from out of state. She
20 from California and Mrs. Downs from Arizona and she got to
21 know Mrs. Downs through the training session that she had
22 and I think the first night at work Mrs. Downs gave her a
23 ride out to her house on Summon (phonetics) Road.

24 Mrs. Downs came out there one other time when
25 she was trying to get her to substitute work for her so
26 she could go back to Arizona and see Nick. Her testimony
27 is particularly important I think. The evening of May
28 19th she recalls on Mrs. Downs and the children and arriv-

PET. EX. 11

DNA-Motion-000021

ing at about nine twenty a.m. and she said she was shocked to see her. Had not really been expecting her or expecting anything to do with this horse since she had already bought a horse. She talked outside with Mrs. Downs because her house was in disarray and she talked for about ten minutes while the children fed grass to the horse and played with him and then for another ten minutes when the children were in the car and she called the kids, being pretty excited at the time and not minding Mrs. Downs.

She claims that Mrs. Downs said that she was going to transfer back to Arizona since Nick had not come to Oregon and she remembers thinking that, gosh, that was weird when they left.

That's important because it establishes the time of the departure along with Delores Holland's testimony and we'll see why that's important because there's a gap of time that's unexplained and unaccounted for and when you look at the departure time that we know for sure and we looked at Mr. Inman's time and you look at McKinsey Wilhop's (phonetics) time and it all adds up to about fifty minutes and when Mrs. Downs went around with the detectives it only added up to about twenty-five minutes so that leaves a twenty-five minute time that's not accounted for in the case.

Mrs. Plouard said that after the shooting she went that Sunday the 22 and visited Mrs. Downs at the hospital and she recalled Diane to be smiling and cheerful and she told Diane that the police were searching the

PET. EX. 11

4
1 roads and rivers. She had seen divers on the way in.
2 Mrs. Downs told Heather Plouard that she, Mrs. Downs, felt
3 like she was a suspect at that point and Heather Plouard
4 said, well, Christy will clear this up when she's able to
5 talk and then we had a very unusual response from the
6 defendant. She said, "I'm afraid Christy will blame me."
7 She raised up. "I was the first person she saw." Now,
8 certainly that is an unusual statement for the victim of a
9 shooting to make.

10 The man who did the shooting certainly was
11 inside the car, much closer. She would have seen him
12 certainly and remembered someone not known to her. Why
13 would she remember her (inaudible) standing outside the
14 car? Could she possibly be there and have a person inside
15 the car shooting her and having a wound going through her
16 left hand indicating that she knows she's been shot and is
17 reacting to it and only notice the person who is standing
18 outside the car.

19 Now, that also is a very telling remark because
20 it shows Mrs. Downs is aware at this early stage that
21 Christy is a person who's going to point the finger at
22 her. What reason would she have to think that? Well, the
23 reason is because when she shot Christy they were face to
24 face, eyeball to eyeball and she knew that Christy very
25 well had seen her do it and Christy is the major threat to
26 Diane Downs and has been from day one.

27 Danny was shot in the back. He's not going to
28 be able to hurt her and Cheryl was shot in the back twice.

PET. EX. 11

1 She can't hurt her but Christy is looking her right in the
2 eye when she's shot. After Diane Downs was released from
3 the hospital Heather told her, told Diane about an Indian
4 named Ron that her neighbors knew and that this fellow had
5 high cheekbones and a thinner face and he was a bad actor,
6 bad character of sorts and she ought to investigate him as
7 a possibility.

8 If you recall the testimony Mrs. Downs came out
9 with her dad and her brother, Paul, and within a day or
10 two after the second composite was published in the
11 newspaper and that was on July 12, 1983 and that composite
12 also had a center face to it.

13 Now, this is really significant because if you
14 recall the testimony of Greg Redick he was the postal
15 employee in Eugene who had an affair with Mrs. Downs after
16 she arrived here and an affair she never told Nick about.
17 He said that one day, a particular day, June 21th, 1983 he
18 was out on his route and he was a Sacred Heart across from
19 the medical building and Mrs. Downs came up to him while
20 he was on the route and told him that there were two men
21 in ski masks that did this to her. This is June 21st now.
22 They called her by name, knew about her tattoo and they
23 said, "Watch this bitch" and shot the children. She said
24 that she suspected her husband but that he was behind it
25 but she wanted to protect him and the first story was to
26 throw the police off.

27 We've seen how much feelings Mrs. Downs has for
28 her husband, Steve. Can any of you imagine her wanting to

PET. EX. 11

1 protect him if she thought he had done this? Redick told
2 her to tell the truth. She said she told her lawyer and
3 her brother the truth and that her lawyer told her not to
4 change her story. It wouldn't look good and she told Greg
5 not to tell what he knew to the Grand Jury. He was
6 scheduled to go to the Grand Jury and testify on this case
7 the very next day, June 22.

8 I think this is very important because it
9 disproves the defendant's claim that she made at trial
10 that she believed each of the stories to be true and she
11 told them.

12 If you recall, the defense theory of the case
13 is that the original story is the true one and then there
14 were dreams which became garbled with reality and each
15 time a new story entered in her mind she believed it was
16 true and was telling this new truthful story that was the
17 product of a dream.

18 Well, here we have a month before she changes
19 the composite saying that there's two men and they know
20 her and they are wearing ski masks. How can any composite
21 be true when we've got this other story and she never --
22 doesn't go back to the police or newspapers or anyone and
23 says, "Hey, wait a minute. Things are out of hand here.
24 I misled you. It's really Steve or it's really the two
25 guys with ski masks" but just -- she's attempting to ride
26 all these horses at the same time apparently keeping her
27 options open.

28 The next witness was Delores Holland. She recalls

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1 that the car left at twenty minutes to ten and the reason
2 she knows that, she talked with Heather the next day.
3 Heather thought it had left around nine-thirty and she
4 explained in some detail -- Delores Holland did in the
5 courtroom how she arrived at the nine-forty time.

6 She said she finished reading a book and set
7 the coffee pot timer and she was sure this was the exact
8 time she heard the car door slam and the vehicle drive
9 down the driveway. She recalls that the defendant and her
10 father and brother did come back the night before the
11 second composite which is also now about a month after Mr.
12 Hilliard had said he had seen a person who looked like the
13 first composite and he told Mr. Jagger that. They noted
14 that when Mrs. Downs talked about this shooting that she
15 described the events without any emotion at all and asked
16 her how she could be so calm in talking about it.

17 Mr. Inman had been visiting his brother-in-law
18 in Marcola (phonetics). He said his name was Mr. Woodland
19 and he explained that he left his brother-in-law's house
20 at ten o'clock and his brother keeps his clock ten minutes
21 fast so the reading was ten after ten on his brother's
22 clock but he determined that it was at ten o'clock when
23 he left, that he drove this route and that at this point
24 which is roughly around Milepost 2 on Old Malhawk
25 (phonetics) Road. At about ten fifteen or ten sixteen he
26 came upon the red newer Datsun vehicle that had the
27 Arizona plates on it and he related to us how his family
28 who had lived in Texas discussed this and they made the

PET. EX. 11

1 observation that Arizona cars all seem to be red and to
2 match the Arizona plates and Texas people have white
3 plates but that shows it did register in his mind.

4 He recalled following the car for approximately
5 two minutes and it covered a very relative short distance
6 of time -- distance and that it definitely was below ten
7 miles an hour and in the area of five to seven miles an
8 hour over that distance. He had been traveling pretty
9 fast he recalled.

10 If you are going the sixty miles an hour that's
11 a mile a minute. If you are going eight tenths of a mile
12 which is the distance here at forty-eight miles an hour
13 you can do that in a minute. Eight tenths of a mile --
14 well, sixty miles an hour is a mile a minute and then a
15 tenth of a mile is equivalent to the speed of forty-eight
16 miles an hour.

17 That is certainly in keeping with his speed
18 estimates that he made and it means that he was at the
19 scene where the casings were found, one minute before he
20 got to her car and he didn't see anyone here and he didn't
21 see any yellow car in the vicinity either. He observed
22 her driving not erratic or unusual, just slow. He thought
23 that the operator was either lost or trying to locate a
24 particular location in the roadway.

25 He read about the shooting the next day in the
26 paper. He had some trouble getting through to the right
27 police agency. When he did he advised them as he
28 testified.

1 Now. Mr. Inman certainly could have rendered
2 assistance to the defendant if she would have stopped her
3 car, got out and asked for help. He testified he was
4 right up close to her and his headlights were shining on
5 her.

6 She didn't choose to do that. She didn't
7 choose to pull over. She chose to just continue along
8 slowly until he passed her. Now, why did she do that?
9 We'll talk about that later.

10 If she still had the gun and needed to get rid
11 of it that would be one important reason for not stopping
12 and talking with Mr. Inman because there she would be
13 with the shot up kids in the car and the gun also. If she
14 had gotten rid of the gun and the children were
15 sufficiently communicative at that point where they were
16 speaking, yelling, mom, you shot me or why did you shoot
17 me. That wouldn't be very good to have Mr. Inman hear
18 that either if she stopped at that point.

19 Now, we know for sure Mrs. Downs was here at
20 Heather Plouard at nine-forty. The next place we know she
21 was for sure is over here at ten fifteen. That is a
22 thirty-five minute gap right there. If you take the times
23 that Mrs. Downs provided when she drove this route with
24 Detective Tracy and did it with the purpose of providing
25 an accurate time you'd find that it takes seven minutes to
26 go from the Plouard's residence to the south end of
27 Thunderman Road and Marcola Road. That's the distance
28 from this point to State's Exhibit 16 down to the south

PET. EX. 11

1 end of Thunderman Road. That accounts for seven minutes
2 right there.

3 You know that it takes eight minutes to go up
4 Marcola Road and pull over, make the turn around and come
5 back to the location where the casings were found so that
6 gives you fifteen minutes from the time she leaves here if
7 you use her time. That puts her there at the scene of the
8 casings at nine fifty-five.

9 Now, if the shooting occurs when she gets there
10 at nine fifty-five and you give her two minutes for the
11 shooting -- you see it on the video tape and she's got the
12 entire thing taking maybe thirty seconds or a minute but
13 give her the benefit of the doubt, give her an extra
14 minute. She leaves here at nine fifty-seven. That means
15 between nine fifty-seven when she leaves there and when
16 Mr. Inman sees her here at ten fifteen it takes her
17 eighteen minutes to go eight tenths of a mile.

18 Now, if she's trying to get away from the
19 shooter she's not doing a real good job because he can
20 walk that fast so what explanation is there for this and I
21 think we saw some of it when she testified "Well, I really
22 spent more time up here at the turn around than I ever
23 told the police." That's the way to chew this down and
24 knock it down a little bit.

25 Other explanations are that she went in any
26 direction from here. The only reason we know she was
27 here is because she says so. We don't have any
28 independent proof of that and the shooting we know happened

1 in the car. That's all we know about the shooting because
2 the casings are in the car.

3 The potential of possibilities for going on any
4 road in this area and returning in the amount of time that
5 she had available to her are endless. She could leave
6 Heather's, go off in any direction. All we know is that at
7 ten-fifteen she's here which is thirty-five minutes later
8 so she's got thirty-five minutes to kill and to go
9 seventeen minutes one way and seventeen minutes back.

10 The kids very well can be shot in some other
11 location and we'll never know what that location is and
12 the State makes no claim to know what that location is.
13 We know that there were sightings of a man down here and
14 we know according to her testimony she's driving in the
15 area. She may well have seen someone walking around the
16 road out here and certainly could have incorporated that
17 person's description into her story.

18 What we do know for sure is that two casings
19 were found in the roadway at this point here and those
20 casings match the ones inside the car that killed the kids
21 and they matched the one that killed Cheryl. They match
22 the one in her rifle in her bedroom closet. Those casings
23 could get there by her throwing them out on the roadway or
24 by doing the shooting there.

25 Now, if she shoots the kids out here somewhere
26 in a remote area and there are plenty of them out there
27 she can head into town and pull over on this secluded
28 road, then she stops after the kids are shot. She's got

1 two things left to do. She's got to shoot herself. She's
2 got to make it look like she was involved in this thing as
3 a victim and she's got to get rid of the gun. Those two
4 things have to be accomplished.

5 She stops here and the shooting of the kids
6 might have happened here. We don't know that but she
7 stops here and shoots herself. That would account for the
8 two casings, puts her arm out, flinches the first time.
9 She testified she doesn't like to hurt herself, doesn't
10 like to feel pain, shoots herself the second time and
11 you've got two casings in the road.

12 What needs to be done now, need to get rid of
13 the weapon and make it to a very opportune location to get
14 rid of the weapon. The place where you can see the river
15 is the closest to the road. You just look over the bank
16 and there it is.

17 Then once she's shot herself in the arm, wraps
18 it in a towel, got rid of the weapon, needs to go to the
19 hospital but what if the kids haven't died and they are
20 still able to talk. What does she do then? She can't
21 finish them off. She doesn't have the weapon anymore so
22 she's got to wait until they are gone and Mr. Inman sees
23 her going five to seven miles an hour along this stretch
24 right here at ten-fifteen.

25 We know that it takes about ten minutes roughly
26 to drive from here to the hospital. She's only about five
27 minutes off and apparently the slow driving doesn't
28 continue all the way in but at some point it picks up and

PET. EX. 11

1 we have driving more approximating normal driving until
2 she gets to the hospital. She arrives at the hospital and
3 all the children appear to be dead. All the nurses agreed
4 to that. Her main concern is which of the two girls died.
5 She's very concerned about that. Was it Cheryl or was it
6 Christy? Why she's so concerned is because Christy can
7 identify her, Cheryl can't.

8 How do you explain this time gap? What
9 explanation is there for the total trip that should take
10 twenty-five minutes taking fifty minutes. Now if you are
11 going to shoot your kids, some of the things you might
12 want to do would be to go to an area where you're going to
13 do it and make sure nobody's around. Many people would
14 just come to a screeching halt on that roadway and start
15 blazing away. You're going to look around and make sure
16 there's no one in the area. You may need to work up your
17 courage a little bit to do it. You may want to talk to
18 the kids and tell them to go to sleep. You may want to
19 ride around and hope they go to sleep before you do it.

20 She gets to the hospital and the first person
21 she has any real contact with is Judy Patterson and Judy
22 recalls logging ten-thirty on the book as the time she got
23 there, recalls the conversation that everyone else does.
24 Diane says, "My kids have been shot."

25 Rosy Martin goes out and grabs Christy. Doctor
26 Mackey gets Danny, (inaudible) gets Cheryl. Judy
27 Patterson said they called the Code Four which is their
28 most serious situation and doctors from all over the

PET. EX. 11

1 hospital and nurses came to the emergency room to try and
2 assist.

3 She observed Mrs. Downs to be calm and coherent
4 and saw her initially watching in the center of the trauma
5 room. Rosy Martin told Judy to get Mrs. Downs out of
6 there. They went to Judy's desk. She telephoned the
7 police and she recalls Diane going to the bathroom which
8 was located behind her desk. She didn't ask to use the
9 bathroom. Judy Patterson heard the water running. She
10 told us that there were no cups in the bathroom and that
11 she was able to see that the door remained opened the
12 entire time Mrs. Downs was in there. She called the
13 Fredericksons, Mrs. Down's parents and talked some with
14 Mrs. Downs. She recalls hearing two stories, two accounts
15 of this incident from Mrs. Downs.

16 One was that riding along and all we are doing
17 is enjoying the scenery and Danny was laughing and Diane
18 was talking to Christy and the children were all awake and
19 it was, "An awful thing to be laughing and suddenly have
20 something like this happen that a man shot the children
21 through the window while standing outside." That is story
22 number one and the second story was that the man reached
23 into the vehicle and shot her children while she was
24 standing toward the rear. She never mentioned the
25 children being asleep at the time and Mrs. Patterson, Judy
26 Patterson was surprised to hear about that later. She
27 doesn't recall Mrs. Downs ever asking her about the
28 children's welfare, how well they were, how they were

PET. EX. 11

1 doing.

2 Shelby Day was a rather small women. She came
3 in and testified she was in the back room with Rosy Martin
4 about ten-thirty when this happened. She took Cheryl out
5 of the car, didn't see her at first. She was covered with
6 a postal sweater. She recalls someone, probably Mrs.
7 Downs, saying, you missed one or forgot one went back and
8 picked up Cheryl and took her into the trauma room, didn't
9 drop her. She testified that there was thick clotted
10 liver like blood in her mouth and she placed her on the
11 gerney inside the trauma room and that she was pronounced
12 deceased.

13 Rosy Martin recalls when this happened at
14 ten thirty that she grabbed an oral airway and pocket
15 mask, ran to the car as the first person there and took
16 Christy out of the passenger side and back seat. When she
17 got Christy to the trauma room her airway was full of
18 clotted blood that had to be suctioned out. She examined
19 Diane Downs and her arm and determined that she would be
20 capable of assisting the police without any danger to her
21 arm wound.

22 She recalls having a conversation with Mrs.
23 Downs and told her that there are five doctors in there
24 working and doing all they could and Mrs. Downs laughed
25 and said, "What's best for the kids. Laughed again and
26 said, it's okay. I've got good insurance." She recalls
27 Mrs. Downs being very much in control of her composure at
28 the time.

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1 Doctor Mackey came in and testified that at ten
2 thirty he was working on another patient and when this
3 happened he went out to the car and scooped up Danny. He
4 was on the seat and had his head towards Christy and he
5 could see his face. He was on the driver's side in the
6 back seat. He recalls looking at all the children briefly.
7 They had to determine who was the most critically injured
8 and who to work on first if they could.

9 He removed a blood clot from Cheryl's throat
10 and mouth and recalls it a fairly solid clot being removed
11 from her and he concluded that she had not been breathing
12 for a long time. Danny had a large collection of blood in
13 his chest. He was living on his right lung. Christy had
14 a huge collection of blood in her left lung. Her right
15 had collapsed. He told us she had begun the process of
16 dying. That she had stopped breathing, had no blood
17 pressure and had a life expectancy that he estimated to be
18 five to ten minutes.

19 He worked primarily on Danny. He thought Danny
20 was in a little bit better shape because his wound
21 appeared less severe but due to his age of being only
22 three years old that he thought he was in an equally
23 severe category as far as the possibility of death.

24 He observed that the defendant had a fairly
25 superficial wound on her left arm. He paid attention to
26 Mrs. Downs and found her to be calm, self-assured, not
27 tearful, not angry, occasionally smiling, occasionally
28 chuckling, described her as the calmest person there, in

PET. EX. 11

1 good control of herself. He testified that he was struck
2 by her response, never observed this before. She asked
3 him if she would be able to go to work the next day and
4 she appeared to be concerned about which one of the girls
5 had died. When told of Cheryl's death he recalls her
6 saying, "Oh she must have been the one who was choking so
7 much." She was an athletically inclined as opposed to
8 inactively inclined child.

9 He remembers Mrs. Downs saying, "Now I know
10 how a rape victim feels." He said, "What do you mean?"
11 "Well, I sort of feel like a suspect rather than a victim"
12 and Dr. Mackey thought that was the most irrational thing
13 that he had heard and you can see already that Mrs. Downs
14 on arrival at the hospital is starting to feel like a
15 suspect. He also if you recall sees a red mark on her
16 hand and this I would submit is the product of her own
17 knowledge and her own mind. She knows what happened out
18 there and she's very concerned about being detected.

19 Doctor Miller testified twice. He was getting
20 ready to leave the emergency room at ten thirty when he
21 saw people carrying children into the emergency room. He
22 determined that Cheryl was dead. Worked primarily on
23 Christy, agreed she was very close to death. After he was
24 able to free himself from that and Christy was stabilized
25 he had contact with Mrs. Downs in room number eight.

26 We received through evidence a map of the
27 Sacred -- excuse me, the McKinsey Willamette Emergency
28 Room and the vicinity and it's got these rooms on it. You

PET. EX. 11

1 saw her in room eight sitting quietly when he told her
2 that Cheryl was dead and Christy and Danny were both in
3 serious condition. He described the pathway of the shot
4 on Danny and Mrs. Downs said, "You mean that it missed his
5 heart?" He said it certainly appears to have and her
6 response was, "Far out."

7 He also observed her demeanor to be very much in
8 control answering questions appropriately, paying
9 attention. He found her demeanor and behavior to be in
10 contrast to the way other parents of critically injured or
11 fatally injured children have responded. He thought her
12 demeanor was consistent throughout the time he spent with
13 her, treating Christy which goes throughout Christy's stay
14 in the hospital. He recalls the defendant did attempt to
15 get the children out of the hospital. That was on June
16 1st and that was certainly not in the best interest of the
17 children to be removed from intensive care units at that
18 time.

19 There's been a letter introduced in evidence.
20 It shows the defendant's attempt to keep evidence from
21 being gathered from these children. He testified that he
22 was and still is responsible for Christy's medical care.
23 That he did not allow any questioning or interference to
24 jeopardize with Christy's health while she was in the
25 hospital.

26 Doctor Willhite came in. He explained the
27 operation on Christy Downs I believe in a good more detail
28 than the other physicians. He recalls her being close to

PET. EX. 11

1 death. No blood pressure, appeared to be white from loss
2 of blood, no pulse.

3 After he was able to stabilize Christy he also
4 had contact with Mrs. Downs. He was struck by two things
5 that stood out in his mind. The reaction of Mrs. Downs to
6 this tremendous tragedy. For him he thought it would be a
7 great displeasure to deal with this but he found she
8 showed no grief or concern for the children. He thought
9 it was a bizarre striking reaction for her to be concerned
10 for something other than the safety of the children. He
11 observed she appeared to be concerned about the car and
12 the spoiled vacation.

13 He recalls subsequently being in intensive care
14 some days later and having a conversation with Mrs. Downs
15 where she said, "Doctor, I know Christy will be a
16 vegetable. I don't want you to prolong her life" and at
17 that time Dr. Willhite told us that there was just no
18 basis for that statement at all. That that was not going
19 to be the case with Christy and there was no indication
20 that was going to be the case with Christy.

21 He overheard Mrs. Downs tell Christy, "I don't
22 want you to listen to Paula because they want you to talk
23 and put me in jail." Again, an indication of Mrs. Down's
24 reluctance to allow the children to give evidence in the
25 case and her defensive position.

26 Doctor Becker testified. He's the neurologist.
27 He's worked with both Danny and Christy and observed them
28 both to be suffering from serious physical injuries,

PET. EX. 11

1 explained those injuries to us, explained in great detail
2 the injury to Christy and how it affected her ability to
3 speak.

4 He did demonstrate showing that the stroke
5 affected the left side of her brain and that it caused her
6 to lose the use of her right arm. His prognosis was that
7 Christy will never get full speech ability or the use of
8 her right hand.

9 He observed there was no evidence of memory
10 loss and that it was not easy to tamper with memory in
11 general and long range memory is hard to change and it was
12 not a likelihood in his opinion in this case. He found
13 that Christy was reporting events accurately.

14 After Dr. Becker testified, Christy Downs was
15 the last witness for the day, was getting pretty late when
16 she testified. She talked generally about her age,
17 what grade she was in, her teacher, talked about her
18 knowing the difference between truth and a lie and she was
19 qualified as a witness, found to be a competent witness by
20 the court and then we got to talk about the day of the
21 events, what happened that day and at one point asked her,
22 "When you left Heather's, do you remember if it was light
23 or dark?" Answer, "It was dark." "Who was in the car
24 when you left Heather's house?" "My mom, Cheryl and Danny
25 and me, too." "Do you remember if there was any music
26 playing in the car?" Answer, "Yeah." Question, "Was that
27 from the radio or was it from the tape?" Answer, "Tape."
28 "Do you remember if there was a time when the car stop-

PET. EX. 11

1 ped?" Answer, "Yeah." Question, "When the car stopped
2 did you see any other people around?" Answer, "No." "Did
3 you see any person standing in the road?" Answer, "No."
4 Question, "When the car stopped what did your mom do?"
5 Answer, "She got out and she pulled a lever that went to
6 the trunk." Question, "I'm going to show you a picture
7 here. It's called State's 335. Is that the lever you are
8 talking about?" Answer, "Yes." Question, "After your mom
9 pushed the lever and went out to the trunk were you able
10 to see her doing anything after that?" Answer, "I didn't
11 look at the back." "Okay, did you see her come back into
12 the car?" Answer, "Yeah." Question, "What did you see
13 then?" Answer, "She kneeled down and -- "

14 The witness was crying at that point and I
15 believe the court asked if we would like to take a recess.
16 There was no response and the question was renewed. "What
17 did you see?" She told us she leaned across the seat.
18 Question, "What happened then?" Answer, "She shot
19 Cheryl." Question, "You saw that happen?" Answer,
20 "Yeah." Question, "Was the music still playing?" Answer,
21 "Yeah." Question, "Do you remember what song was
22 playing?" Answer, "Yeah." Question, "Can you tell us
23 what that was?" Answer, no response. Question, "Maybe I
24 will come back to that. Do you remember what happened
25 after you saw Cheryl get shot?" Answer, "Yeah." "What
26 happened then?" Answer, "She leaned over to the back seat
27 and she shot Danny." Question, "What happened then? What
28 happened then after Danny got shot?" Answer, "She was

PET. EX. 11

1 standing up and went to the back of the seat on the -- "
2 then there was crying. Question, "Do you remember when
3 you got shot?" Answer, "Yeah." Question, "Who shot you?"
4 Answer, "My mom." Question, "Do you remember that music
5 was playing?" Answer, No response. Question, "You just
6 can't think of it right now?" Answer, "I can't think of
7 it." "Do you remember what happened after you got shot?"
8 Answer, "No." "Christy, has anyone ever told you to lie
9 about this?" Answer, "No." Question, "What you said here
10 in the truth?" Answer, "Yeah." "Christy, do you still
11 love your mom?" Answer, "Yeah." "If I said the name of
12 the song that was playing do you think you would remember
13 it?" Answer, "Yeah." "Is it Hungry Like the Wolf?"
14 Answer, "Yeah." Question, "No doubt about that?" Answer,
15 "No."

16 All the cross examination of Christy and some
17 of this material was then repeated on redirect
18 examination. Dr. Peterson testified after Christy Downs
19 and we learned that he specializes in treating trauma
20 victims, that he found Christy to be initially guarded and
21 reluctant and feeling unsafe. He never doubted she had a
22 memory of the event. He analogized a memory to be
23 something stored in a vault and needing to make her feel
24 safe enough to open that vault and he felt that it was
25 impossible to resolve this trauma she was feeling unless
26 he could accomplish that.

27 He uses nondirective therapy again by just
28 testing the waters with her. They had conversations. He

PET. EX. 11

1 came up with this method of talking with her where they
2 would put the name of the person that shot her in an
3 envelope at the beginning of the session and then she
4 would go away and the next session he would ask her if it
5 is okay to burn the envelope and they went through that
6 procedure for a while until she felt that it was okay to
7 not destroy the envelope.

8 She told him that she remembered the music that
9 was playing. She remembered the lever, her mother getting
10 the gun, the shooting of Cheryl, Danny and herself,
11 remembered feeling dizzy after she was shot. Said she
12 wanted her mom to remember first, the statement that if
13 she were her mother she would be embarrassed to tell the
14 truth.

15 Dr. Peterson said that the way her memory came
16 back was not unusual. He listed several faraway looks of
17 terror in her face when she related this information. The
18 consistent relating of events not changing the details or
19 the facts of the shooting, recalls some of the small
20 details like the latch being used, recalls the driveway at
21 Heather's, the drive being very bumpy, demonstrating that
22 she had a good memory of the event itself and the facts
23 preceding the event. He said that his experience with
24 Christy is his experience of what he's seen children do.
25 Feels that she never lost memory. She had been too scared
26 to say earlier and suppressed the information. That's a
27 conscious form of forgetting.

28 If we take a little pause and think to

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1 ourselves how it would feel if you were a nine-year-old
2 child and one day you went out for a ride with your mother
3 and your brother and sister and that it got to be dark and
4 the car pulled over and your mother came back with a gun
5 and from your eyes murdered your sister, shot your brother
6 and then shot you, you would know how Christy felt. She
7 was trapped in that car. There was no where for her to
8 go. She could just back up against the seat, her shot
9 goes right through her chest and the second one comes out
10 and goes into her hand into the same place.

11 She had an awareness of exactly what was
12 happening and to go through an experience like that and
13 then wake up in the hospital bed and who do you see but
14 your mother coming to visit you and sitting by your
15 hospital bed. You don't know what's going to happen when
16 you get out of that hospital. You are certainly going to
17 have a lot of apprehension and fear and I think if you use
18 your own common sense and experience and you look at how
19 Christy handled this and how she reacted, it's really
20 understandable. Early on she indicated that the only
21 persons present during the shooting were the family. That
22 was within the first week she was in the hospital.

23 He found that not at all surprising that
24 Christy loves her mother. Certainly that wouldn't be
25 inconsistent with most child abuse victims. You've only
26 got one mother and no matter how they treat you she's
27 still your mother and it makes it all the more incredible
28 to think that she would come in here and say her mother

PET. EX. 11

1 shot her if it didn't happen. Every possible motive that
2 she would have would cut the other way. It would be much
3 easier to imagine that if her mother shot her and she knew
4 it that she would still seek to not say it.

5 Look at how Diane Downs reacted. If you take
6 her word for it that she said she's out in the desert and
7 her father is molesting her and she can't stand this guy,
8 hated him since eight years old. At thirteen got her
9 blouse off and the police come, catch him, talk to her,
10 is he bothering you, is he molesting you, no, she wouldn't
11 say anything. It would be far more likely I submit that
12 Christy would -- her tendency would be to protect her
13 mother and in the case you'll see there's never been any
14 vengeance or anger or hostility toward her mother. She's
15 just factually relating what happened and still loves her
16 mother.

17 Peterson was cross examined on this. No
18 suggestions were ever made to Christy indicating to her it
19 was all right for her to not know who shot her, always
20 gave her permission to not remember. She told them, "I
21 want my mom to tell the truth then I won't have to
22 remember anymore." She said she knew the song was playing
23 when she was first asked how she knew that her mother shot
24 Cheryl. She said, "I watched." She was very careful
25 then. She said she could see her mother's face, was very
26 emotionally distraught when she related this to Dr. Peterson
27 and the statement that her mother didn't love the family,
28 just loved Nick. She made another statement that mom

PET. EX. 11

1 didn't say, I am sorry.

2 I think we then took a turn in the case and we
3 switched from the hospital witnesses and Christy to the
4 police witnesses that first dealt with Mrs. Downs and the
5 first police officer was Richard Sharpenell (phonetics).
6 She told him, "I wasn't going to let him take my new car"
7 in a lighthearted manner. He felt she was not being
8 completely honest about the incident with him. He did
9 notice that her hands appeared to be shaking. The rest of
10 her appeared to be calm. She was talking quickly when
11 describing how she made her getaway. She said,
12 "Fortunately, it's a new car and started right up" and
13 made a diagram for him of where the shooter was, the end
14 of the door, stated several times to him, "I wasn't going
15 to let him take my new car."

16 He recalls overhearing her talk with Sergeant
17 Rutherford and asking Rutherford if she had insurance
18 because if she died she was going to sue him. She laughed
19 and said if she died she would haunt him, Sergeant
20 Rutherford.

21 Steve Downs testified. He identified the Ruger
22 that was placed in evidence as the one being identical to
23 the one that he possessed and owned. He testified he
24 showed Diane how to operate it. He recalls it was not
25 returned to his locked pickup, that it came with a case
26 and three clips.

27 He related to us the facts of the shooting
28 incident in the mobile home. He said that on September

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DNA-Motion-000045

21

1 13, 1982 Diane Downs got back from Louisville and wanted
2 him to meet her at the airport. He picked her up and
3 went to his house on Palomino and got into an argument.
4 He saw her stick something into a blue bag. They went to
5 the trailer house. She carried her bag in. He said she
6 was getting weird again. She went into the bathroom and
7 said you won't have to worry about me. I'm going to kill
8 myself. He heard the gun go off, went to the door and
9 said, "I know you are not dead, cut it out." She opened
10 the door and said, "I can't kill myself, Steve, but I can
11 kill you" and pointed the gun at him and he told her she
12 had only nine shots and that wouldn't kill him. She
13 paused and he grabbed the gun and left.

14 He also related another incident that happened
15 on November 7, 1982, the house on Palomino Street. Mrs.
16 Downs was doing laundry at his house. She was laying on
17 the couch. She was at that time taking summer classes and
18 seeing Nick. She had no time for the kids. He told her
19 to leave. He pushed her outside and they got in some sort
20 of argument, pounded on the hood of her car and told her
21 to get out of here and he went back and was sitting on his
22 front porch with the kids and noticed that she returned,
23 pulled back up. He walked to the car and the kids were
24 behind him. She said, "I've got something for you." As
25 he looked in the car she grabbed his left arm and put the
26 gun up to the window, couldn't get the safety off the
27 pistol. She is holding his arm. He is grabbing at her,
28 the car takes off at about he said fifteen to twenty miles

1 an hour without shifting. He came loose and rolled quite
2 a ways.

3 Dan Sullivan came in and testified he was the
4 neighbor. He says that no doubt in his mind that he saw a
5 gun. He recalls looking at her face and reminding him of
6 his mother-in-law I believe who was able to express anger
7 at times. Diane Downs' version is that it was a postal
8 shoe that she was pointing at her husband. Downs
9 testified that he and the kids were the only obstacle
10 in her relationship with Nick.

11 He recalls the events, the visit that Mrs.
12 Downs had on April 28. Again she showed up at the airport
13 and called him, spent the night with him. He testified he
14 left and then when Mrs. Downs testified he wasn't asked
15 about whether he raped her that night or anything but when
16 Mrs. Downs testified she said that she on that evening was
17 a victim of some sex crime. However she told no one about
18 it, that he drove her to the post office that next morning
19 and after she visited her friend she called him and he
20 drove her out to the airport that evening again.

21 He told us about the mobile home fire, said
22 that Mrs. Downs was drained financially. She needed to
23 get out from under the debt. The solution was to burn
24 down the mobile home. Apparently she didn't consider the
25 options available, just the insurance proceeds to pay off
26 her car and start a surrogate parent business in Arizona.
27 He testified that she put her relationship with Nick ahead
28 of the kids and that in his observation her caring was all

1 for herself.

2 We had quite a lot of evidence from Jim Pex
3 and John Murdock and they were the two criminologists.
4 Mr. Pex has probably testified off and on three or four
5 times in the course of the trial. He initially told us
6 how he works, what methods he uses, how he processes a
7 crime scene, explained the things that he did in this
8 particular case, told that after some extensive
9 examination he discovered that the murder weapon in this
10 case was a twenty-two caliber Ruger, semi-automatic
11 pistol. He did a gunshot residue test on his own hand. I
12 discussed that this morning I believe where he fired the
13 pistol seven times and waited a half hour and submitted
14 the results to the Medford lab which came back in-
15 conclusive.

16 He talked in great detail about the blood
17 spatter pattern, his conclusion that it was the result of
18 a gunshot, that the blood observed on the panel and it was
19 high velocity blood spatter, that it was consistent with
20 the high velocity spatter in the size of droplets as well
21 as pattern and directionality and he was able to set up a
22 test with a similar piece of metal and replicated the
23 pattern that was found on the Downs' vehicle and he's got
24 photographs demonstrating how he did that. He took a bag
25 of blood and put a shirt to simulate Cheryl's T-shirt and
26 a sweater to simulate the postal sweater over that, how he
27 fired it from a near contact distance and that it -- the
28 spatter pattern that emerged is quite similar to the one

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1 that he found on the car.

2 We had the car in here. The mock up of the
3 car; you saw the real one out in the County shops on the
4 day of the jury view and he was able to demonstrate the
5 relative positions of the children for each particular
6 shot that was fired. He was able to also show us the
7 distance of the gun barrel from the place on the child's
8 body where the bullet entered on each of those shots and
9 he told us how he was able to do that in quite some
10 detail. We've got photographs in evidence that depict
11 each of those shots in each of the positions of the
12 children. This is of some significance because it
13 corroborates Christy's version of the incident and this
14 disproves Mrs. Downs' version.

15 He found that there were no gun powder
16 particles in the driver's quadrant of the automobile and
17 that's significant because he explained that when the gun
18 was discharged unignited powder particles come out the end
19 of the barrel and they would be distributed from the end
20 of the barrel for some distance in the direction of the
21 bullet and had the person stood outside the car and fired
22 over the driver's seat you would expect to find this gun
23 powder particle in that area and there he was never able
24 to find any. There was no blood found in the driver's
25 quadrant either.

26 He examined the sleeve of the shirt worn by
27 Diane Downs and he found that it was -- had a very slight
28 amount of blood on it. He couldn't make a call in his own

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1 mind whether it was transferred or high velocity blood
2 spatter. He thought it could be either one but that the
3 total amount was consistent with a person who fired all
4 the shots. That is, you wouldn't have expected there to
5 be more blood than that on a person's sleeve who fired all
6 the shots that were fired in this case.

7 We talked about the tape deck that it was a
8 reverse type tape deck. He didn't recall about the
9 ignition. He recalled that the dome light was on when he
10 first inspected the car, had to put it off to take those
11 photos. The car had a gas trunk latch with made it
12 unnecessary to use the key to open the trunk and he was
13 able to demonstrate how the towel was folded around Mrs.
14 Down's arm from the blood seepage patterns that were on
15 that towel.

16 His conclusions regarding the cartridges was
17 that two cartridges were recovered from Diane Downs' rifle
18 in her bedroom on May 19, 1983, (inaudible) the semi-
19 automatic pistol that had killed Cheryl and seriously
20 injured Christy and Danny and caused injury to Mrs. Downs'
21 arm.

22 Bart Reed, agreed with Mr. Pex's conclusion,
23 the defense theory does not explain the evidence as well
24 as Mr. Pex's. He says that he admits that his explanation
25 that the pattern and the directionality and of droplets is
26 inconsistent and that with what he observed on the Datsun
27 automobile and the size of the droplets is larger. Under
28 the defense theory Cheryl would have been shot inside the

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1 car all right and the blood that would have gotten on the
2 outside of the car would be from a mishandling of the
3 postal sweater somehow.

4 Now, for that to happen we've got the bushy
5 haired stranger coming up to the car, coming right into
6 the headlights. He by-passes the (inaudible) Mrs. Downs
7 and standing right there. He somehow knows there's
8 going to be somebody inside that car although according
9 to Mrs. Downs he can't see them because they are all
10 sleeping at least in one of her stories they are all
11 sleeping. He reaches in and according to Mrs. Downs he
12 shoots Christy first, twice, and then Danny and then
13 Cheryl.

14 Now, Christy you could understand
15 maybe, the two shots are pretty close together and Danny
16 may be sleeping and you could understand him getting shot
17 in the back but Cheryl, if she's sleeping there under the
18 postal sweater how does the guy even see her first of all
19 if the people at the hospital missed her completely and
20 second why the shots criss-cross her back from different
21 angles. You could see two go in the same place like with
22 Christy. That would be easy to understand. How we get
23 the shot through her from one side and then the shot
24 through from the other side and all this happens just like
25 that.

26 Mrs. Downs is just standing there and can't be
27 a whole lot of time taking place to be eaten up and he
28 pops back out and he says, "I want your car" which now
he's got a car with three shot up kids in it and when she

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1 makes this throw she gets shot in her left hand and which
2 I submit you never have seen anybody throw anything in
3 your entire life that way. When you make a throw with
4 your left hand it's going to go back, not go forward. You
5 can't throw something when your hand goes forward. It
6 comes back. Very unlikely explanation of how she was able
7 to get shot. Very unlikely that (inaudible) something
8 right dead center in Christy and something right dead
9 center in Danny and he takes the time to put two in
10 Cheryl. They have to have time between them because for
11 some unbeknownst reason you want to shoot them in
12 different directions which is not borne out by the
13 evidence and he takes all that time to do that and he
14 misses her and just lets her drive away, a big target.

15 What is a far more likely explanation is what
16 Christy said. You think about that. Remember Diane was
17 talking about stopping up here and having this
18 conversation with Cheryl about whether they are going to
19 go to the waterfalls and Cheryl was pretty hyper and she
20 expected her to be awake.

21 Let's suppose that at the sight of the shooting
22 that Cheryl was very much awake just as Christy remembers
23 her sitting up in the front seat of the car. The car
24 stops with music playing. The trunk latch is pulled.
25 Mrs. Downs leaves the car. Christy is waiting to see
26 what's going to happen next and what happens next? Mrs.
27 Downs appears in the driver's doorway with a pistol and
28 here's Cheryl, what are you going to do? Are you going to

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1 sit there and take it or are you going to try and make
2 yourself small and dive for cover and as Mrs. Downs was
3 putting the gun in Cheryl is going down into that corner
4 of the car. The gun goes off and it doesn't hit her as
5 directly as she would like but we find that bullet and we
6 find the mark it made against the metal side panel inside
7 the car. Cheryl goes down.

8 Then she goes and takes Danny in the back and
9 Christy has seen both of these things happen. Now, she's
10 trying to back off into the corner as best she can. She
11 gets shot twice. She gets dizzy, has no recollection of
12 what happened. In the meantime, Cheryl, the hyper one
13 makes it out the door and Diane finishes her off outside
14 the car, pulls her back in the car and then sometime later
15 takes care of herself, far more plausible explanation than
16 the defense theory.

17 This might be a good time to take a break.

18 THE COURT: Very well, take a ^{15 min.} ~~fifty~~ minute
19 recess.

20 ^{15 min.} (A ~~fifty~~ minute recess was taken.)

21 MR. HUGI: You heard from Dr. Carter. He told
22 us about Mrs. Downs' wound, that it resulted in a very
23 slight limitation of motion to her arm and certainly
24 wasn't a disabling or severe wound. He was asked, can you
25 think of a place to shoot yourself in the arm that would
26 cause less injury and his answer was, no.

27 He recalls his contacts with Mrs. Downs, that
28 she seemed to be angry about having to stay in the

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1 hospital but not about anything else and she did not
2 appear to be upset or concerned about the children and he
3 did notice that there was some (inaudible) around her
4 wound again confirming what Mr. Pex concluded about the
5 proximity of the gun barrel to her arm at the time it was
6 fired.

7 We talked with Detective Tracy a number of
8 times. We got a chance to see him on the video and to
9 hear him in the tape interview. He made the composite.
10 He explained how he did that. It took about a half an
11 hour. Mrs. Downs did say she was dissatisfied with it
12 but it was the best that he could do at the time and that
13 she never came back and asked him to change it.

14 He went to the apartment with other police
15 officers, about six of them, and located the rifle, seized
16 the cartridges that was described to you in great detail,
17 turned it over to Jim Pex for comparison at the crime
18 lab. According to the way he was cross examined it seemed
19 that to the defense that he planted these cartridges.

20 It is not sure where he would have gotten them
21 from but somehow he was diabolical and dishonest enough in
22 the very first day of the investigation to take the
23 extremely drastic action that could have jeopardized this
24 case. That first day there surely can be no pressure on
25 anybody to solve this case. People who are barely
26 reacting at the time to finding out what happened to make
27 a commitment of this sort that implied Detective Tracy had
28 made for a guy who's been doing this for some twenty

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1 years, would jeopardize his career for nothing. For all
2 he knows the people on those roadblocks just picked up
3 some guy and he confessed out there and he's handed over
4 the murder weapon and that's -- how does he explain it,
5 explain the evidence then. It won't stand the test of
6 logic and it won't stand any careful scrutiny and the
7 other thing it won't stand is your examination of the
8 evidence in the case.

9 Look at Tracy, look at how he operates on the
10 tape recording, on the video tape. Does he seem to you to
11 be the type of hard charging guy that's out to frame a
12 victim of a crime? I think what it is most indicative of
13 is the (inaudible) that the defense has in dealing with
14 that very critical piece of evidence. As it turns out
15 Tracy has no way of knowing the significance of the
16 evidence at the time the defense would have you believe he
17 was tampering with it.

18 Pex also testified he's the guy who says that
19 it is his job to preserve evidence and to gather it and
20 collect it and know where it came from. He testified
21 about a lot of things. The most significant thing is as
22 it turned out I think he was standing there when Tracy
23 looked in the car for about ten seconds at the hospital
24 and that he saw that nothing was removed so if the theory
25 is that Tracy got it out of the car Pex also has got to
26 be in on it, too.

27 Sergeant Rutherford testified that he was the
28 person who said that he coordinated the roadblocks, that

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1 he went to McKinsey Willamette Hospital, that Officer
2 Sharpenell (phonetics) now in Springfield Police
3 Department was there already. He kind of got some
4 information from Sharpenell (phonetics). Springfield had
5 been called because Judy Patterson knew that number better
6 than any other number because of their hospital in
7 Springfield and they were trying to figure out where this
8 all happened and they were thinking it was out on Marcola
9 (phonetics) where the Sheriff had jurisdiction so
10 Rutherford responded and got some information from
11 Sharpenell (phonetics) and got pulled into the case and
12 started having some contact with Mrs. Downs.

13 He was again like the others taken back by her
14 demeanor. She seemed to him to be lighthearted and some
15 pain but enjoying the attention. He got the story from
16 her. Her father was right there telling her to cooperate
17 with them. When he asked, will you come back and show us
18 where this person is she initially balked and her father
19 said she will go. It was decided that she would go. They
20 were able to find the general area where she claims the
21 shooting occurred and that morning, the next morning they
22 found two casings in that general area that fit.

23 She made statements to him that never were
24 consistent with what the doctors heard and the type of
25 statements that other police officers heard and asked to
26 go back and said, "Okay, but if I die I'll sue you. I
27 hope you have good insurance. I hope my arm is okay.
28 Does it have any bullet holes in it."

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1 And then in the course of the ride out there
2 she made the statement about the unicorn. "I shouldn't
3 have bought the unicorn." She explained that she
4 purchased a brass unicorn on Mother's Day and had it
5 inscribed with the children's names and I love you, mom
6 and she went on to explain that, "Maybe I shouldn't have
7 done it and this wouldn't have happened."

8 A very unusual statement certainly but when you
9 look at it in the context of the other information that
10 was later developed you can see it kind of fits in. If
11 you look through that diary which you have done and maybe
12 will do again you will see that you've got this obsession
13 with Nick. Everything in the diary is Nick, Nick, Nick on
14 up until about the first week in May when we get the idea
15 for the unicorn and then we start talking about the
16 children and all of a sudden we have trips with the
17 children, how much I love the children "I think I may even
18 like my children more than, you, Nick", or words to that
19 effect in there and something has caused this change and
20 this plan which no one knows what is going on in Mrs.
21 Downs' mind, of course, but we can see the foundation for
22 this being laid in that part of the diary and we have the
23 symbolic unicorn.

24 He also notices the remark where Cheryl stopped
25 choking and he concludes that he noted almost complete
26 lack of genuine concern for the welfare of her children.

27 Paul Frederickson testified that in fact he did
28 create the second composite that was published in the

1 papers. That at the time he said to the detectives, the
2 guy could walk right past her and she wouldn't recognize
3 him. I asked why do you bother to recomposite. "We were
4 just testing to see how long it took to contact me"
5 showing some disenchantment with the Sheriff's Office and
6 their follow-up on the case.

7 Greg Redick I think you find a very important
8 witness in the case. He testified that the month of May,
9 Mrs. Downs had expected Nick to come to Oregon, that she
10 told him about a box of flowers and photos she sent to
11 him. They were returned unopened. He himself had a
12 relationship with Mrs. Downs.

13 Then we have that statement made to him on June
14 21st, 1983 that I related to you earlier, very
15 significant. She was forced off the road. There were two
16 guys in ski masks that knew about her tattoo and said if we
17 can't have the kids you can't either, grabbed her, "Watch
18 this bitch" and shot her in the arm. "Steve was behind
19 it" but she didn't want to get him in trouble. "I still
20 feel the need to protect him. He's in enough trouble over
21 the arson deal." The only deal was to throw the police
22 off the tracks when Redick told her to tell the truth and
23 she said I told the lawyer and her brother the truth. The
24 lawyer told her to not change her story. It wouldn't look
25 good, told her he was going to the Grand Jury the next day
26 and she said, "You can't tell what you know. You can't
27 tell what you know" showing again a consciousness on her
28 part of the inconsistency and there effect.

1 These are not all true stories and I think
2 that's something that will come through to you as you
3 listen to these tapes. Every story the defendant tells is
4 believable, seemingly believable. It's plausible as every
5 other one. Each time she's out there telling one she's
6 putting it out for all it's worth and there's never any
7 doubts expressed about this and certainly a person if you
8 really believed that what you are saying is truth and your
9 story changed that much and you thought they were all
10 true.

11 Robert Knickerbocker was here. I think he
12 spent almost a day on the witness stand. He detailed the
13 relationship with Mrs. Downs. I am not going through all
14 of those details. Generally I am sure you are all aware
15 she wanted him to marry her, be a father to the children,
16 had lots of conversations like this, told him she loved
17 him twenty times a day.

18 He didn't think it was right that the children
19 were around while they were having an affair and at least
20 on one occasion he related to us he had taken them away,
21 also concerned when she would visit him and not make
22 provisions for the children's care. There were numerous
23 incidents that he related to us of her impulsive behavior,
24 her temper and quick decisions.

25 There's an incident at the end of her stay in
26 Arizona where she was going to smash up the postal truck,
27 very upset, cursing and swearing, throwing basically a
28 temper tantrum over something that happened at work. The

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1 incident where he told her that he loved Charline more
2 than her and she throws the hairbrush at him and when he
3 tries to leave blocks his car with her car. The trip to
4 Arizona is where she arrives unannounced on April 28th for
5 a one-day visit and told him she's going to buy him a
6 Harley Davidson motorcycle and a house and there's the
7 incident in school where she takes on this very heavy
8 class load and in addition to her full-time work load and
9 has to drop it, can't complete it. It all demonstrates
10 poor judgement and a volatile temper that she's able to
11 suppress for some period of time but then it all comes up
12 through the surface at other times.

13 He couldn't imagine her stopping for anyone on
14 the roadway. He acknowledged that he refused her letters
15 and calls when she left, that within a couple of weeks
16 reunited with his wife. He remembers she offered him the
17 use of the twenty-two Ruger the week before she left
18 Arizona. He thought about it for a day and declined, that
19 he recalled at one point in time she challenged him to a
20 shooting contest. What surprised him about that he saw
21 this twenty-two Ruger in her possession three different
22 times, once in the trailer or twice in the car. The last
23 time he saw it was in the back of her Datsun the night she
24 left for Oregon, April 1st, 1983.

25 He helped her pack the car that night. There
26 was no microwave or tv set in there. That is important
27 because it shows it couldn't have been placed in Steve's
28 pickup some ten days before. For one the pickup was kept

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1 locked. The neighborhood he lived in, the fact he kept
2 his construction blueprints back there, he never sees any
3 pistol in there. There's no way Mrs. Downs could have put
4 it in there.

5 Her story about putting it in there makes no
6 sense at all if you recall she says that she offered the
7 gun to Nick so he can use it to protect himself against
8 Steve. All right, she admits that but then she says she
9 gives the gun to Steve before she leaves and she's got a
10 thirty-eight that Steve is equally entitled to own in her
11 trunk of car and she returns the twenty-two supposedly but
12 not the thirty-eight.

13 Now, you've seen -- you've got some insight
14 into her personality and her behavior and you can make a
15 judgement for yourself as to the likelihood of her going
16 out of her way to return a firearm to Steve before she
17 comes to Oregon. It's almost -- well, it's not very close
18 to reality, is it, that she would do that?

19 Nick recalls the tattoo and gold chains. Those
20 things are important I think because they show Mrs. Downs'
21 attachment to symbols. The gold chain being Nick's woman
22 was certainly an adolescent type thing, a novelty maybe.
23 It's something that people usually outgrow when they are
24 twelve or thirteen years old maybe. I don't know,
25 something that she never really outgrew. The same with
26 the tattoo and the eternal commitment to him by having that
27 writing placed on her body.

28 He recalls the April 28th visit, recalls

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1 getting his chain back, discussing the photos and the
2 flowers, telling her he didn't want to be a daddy and
3 didn't want to go to Oregon. That's borne out by Mrs.
4 Downs' own writings in her diary if I am calling it by the
5 right name, the spiral notebook that has the dated letters
6 in it. You look at the entries right after that trip on
7 the 29th and the 30th as soon as she gets back to Oregon
8 she refers to that fact that he doesn't want to be a daddy
9 to her kids and she's not going to tell her parents about
10 this; told us that when Diane left Arizona it was
11 impossible for her to get her job back, there again, due
12 to her behavior at the post office.

13 She told him he recalls that children are a
14 problem and he wouldn't have to have any contact with
15 them. She would get a nanny and there are several
16 references in the letters about the kids would have a very
17 large house and the kids would be in a separate part of
18 the house and he wouldn't have to have any contact.

19 These are all I submit border in a way to
20 fantasy and certain delusional thinking, consistent with
21 many things she's done in her life, feeling that she is
22 going to be a doctor, she's going to be a successful
23 business woman, pilot, going to own a big house. And when
24 in reality she's failed at everything she's ever set out
25 to do in her life. She failed in her marriage, failed in
26 her relationships with men. She's never followed through
27 and completed anything, just bounced around from one thing
28 to the next and failed and that's where we find her up

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1 here in Oregon with a pretty bleak outlook I submit to
2 you. She can't go back to Arizona.

3 You read some letters that are just dripping
4 with love for Nick and he's basically written her off and
5 she knows it now and she's got three kids and she's made
6 numerous comments about how that isn't a goal in her life
7 to raise kids and you read that Washington Post article
8 that's been received in evidence. I don't know if you've
9 had a chance to read that or not but that details her
10 feelings on that.

11 She's got a problem with the demand letter,
12 \$7700 demand letter from Denver that's she's got to pay.
13 Her solution to that is to check into bankruptcy and start
14 over, get a fresh start. By this time in her life she's
15 into the surrogate program. I think she had been back there
16 in February. There were numerous attempts to get her
17 pregnant but they failed at that time and so what does she
18 have to look forward to? She's stranded here in Oregon.
19 She's got three kids and her parents and you know she's
20 talked about how she gets on with them. Certainly a bleak
21 time for her and perhaps a stressful time and perhaps a
22 time when she is suppressing a lot of hostility and looking
23 for an outlet.

24 What's interesting then is to read her child
25 abuse paper where she talks about just that situation
26 about how you get in a situation where the stress is too
27 great and you lash out at your children because there's no
28 one else and if you look at that child abuse paper you see

1 that it's almost a cry for help or a prophesy of things to
2 come in her life, how she lays it all out in there about
3 how she works. She certainly feels like she's an abused
4 person. She sees it as inevitable that those who have
5 been abused are going to abuse and given the right
6 combination of factors that's what happened.

7 You heard from George Hurrey. He told us about
8 his contacts with Mrs. Downs at the hospital after the
9 shooting. One thing in particular, one contact, she asked
10 him, "If I go to prison what would happen to my children?"
11 he said, "Well, if I was convicted and I didn't shoot my
12 kids and if anything would happen and I went to prison"
13 and he offered that CSD would probably place the children
14 and he says, well, the only reason she had was that she
15 was concerned that Steve would possibly get the kids and
16 she did not want that to happen.

17 I think that's a very significant statement,
18 too, because we have heard in counsel's opening statement
19 that well, there are a lot of options. If she didn't want
20 the kids she could give them back to Steve, give them to
21 her parents, well, from what we have learned about Mrs.
22 Downs and in this trial we see those weren't options at
23 all. We know what she thinks of Steve now and there's no
24 way she would let him have the kids, no way and she says
25 here even when confronted with going to prison that she's
26 concerned that he would get them. It's an important
27 objective with her and she does not want him to have the
28 satisfaction of having those children and we know what

1 experience she's had with her own parents growing up. Her
2 father abused her, her mother's not protecting her.

3 Kurt Wuest testified about the photo, the one
4 made up. It included the photograph of the person that
5 Paul Frederickson had looked at prior to making the
6 composite. Mrs. Downs rejected all the people in those
7 photos. You can see that from the standpoint that she
8 never really identified anybody. Once she does she knows
9 that person is going to have an alibi. He's going to have
10 been somewhere else because she's the only one there
11 during the shooting so you see that it would be with great
12 reluctance on her part to ever commit towards picking any
13 individual as the shooter and that's consistent with doing
14 a vague composite and changing composites and kind of
15 moving it around, shifting it around and never pointing
16 the finger at anybody because then she knows anybody she
17 points the finger at is going to have been somewhere else.

18 Don Norenburg testified that he went over to
19 the (inaudible) to take a handwriting exemplar from Mrs.
20 Downs and they had a little conversation incidental to
21 that. She told him that she knew her fate depended on
22 twelve people that comprised the jury and it didn't matter
23 whether or not the truth came out but depended on which
24 side did the best acting job and that she expected to do
25 time and I think she knows how she abused the judicial
26 system as something that's consistent with her abuse of
27 all authority figures and all people in responsible
28 positions. She has nothing but distrust for them and

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1 certainly doesn't seem consistent with the person who's
2 professing their innocence that they expect to do
3 penitentiary time.

4 Defense witnesses that were called are Roy
5 Pond. He generally discussed the investigation. He told
6 about the efforts that were made to locate the shooter
7 initially.

8 Mrs. Downs' mother noticed Diane had been
9 crying at the hospital. She saw the microwave and tv set
10 in the back of her car in Arizona. That was some -- I
11 don't recall if it was five days or a week before Mrs.
12 Downs, the defendant, left Arizona. They were there to
13 pack up. They took the kids and the pickup truck.

14 Her sister, Kathy, left in the white car and
15 Diane Downs remained for the week with Mr. Knickerbocker
16 and then she came to Oregon. She noticed the gun with the
17 cylinder in it in (inaudible) which is consistent with the
18 thirty-eight and she told us that the defendant had
19 nightmares and dreams and even related some of those to
20 us.

21 Mr. Hilliard came in. He says he was going
22 from Marcola to Springfield about forty, forty-five when
23 he saw a person that he later did a composite of and
24 described as five foot ten, hundred and ninety, two
25 hundred pounds, green fatigue jacket, carrying sleeping
26 bag, hitchhiking towards Springfield and he saw some
27 person on the south end of the bridge and saw him for a
28 split second as he went by. I think he's the fellow that

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1 snaps his fingers real loud and was able to do a very
2 detail composite.

3 Well, the thing that triggered him to the case
4 was looking in the newspaper and seeing the composite that
5 had been produced in the newspaper and one thing we know
6 for absolutely sure is he looked at the newspaper
7 composite a heck of a lot longer than he ever got to look
8 at this person who was standing out there and his picture
9 does quite closely resemble the face of the original
10 composite done by Mrs. Downs but the weight and height are
11 certainly inconsistent as is the clothing. He sees the
12 person he says at nine twenty-five.

13 We know that Mrs. Downs is leaving here at
14 approximately nine forty. We don't know where in here she
15 goes or where he goes and it is conceivable the State
16 won't dispute the fact she may have seen at least one
17 person walking around out there, whether it is this person
18 or some other person or no person at all we don't know.
19 He's on the up-stream side of the bridge walking as if he
20 had somewhere to go. He's not hitchhiking and he wasn't
21 carrying anything. He said the guy hadn't shaved in over
22 a week. He remembers him to be five eight and fit to the
23 composite exactly.

24 Mr. Wilson, he's the fellow from the
25 Springfield Country Club. He lives behind the Frederick
26 residence. He said the first composite didn't match at
27 all to the fellow he saw up at the country club. I guess
28 here is the country club. The second one did but he's not

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1 the guy at six foot one and a hundred and seventy to one
2 hundred and eighty pounds, hippie type person, had a green
3 and blue knit shoulder bag with him.

4 We heard from Harold Hawkins, a psychologist at
5 the University. He talked about memory about
6 reconstruction and fabrication, about unconscious
7 transference and then we heard from Dr. Sukow who talked
8 about those things and a conscious transference as well.
9 I don't know that either of those people are going to
10 supply a great deal of information to the jury in making
11 its decision.

12 Both of them agree that neither one of them are
13 aware of any literature or any experience where dream
14 content has been incorporated into memory and that seems
15 to be the theory in the defense case that these dreams
16 became incorporated in memory and became reality so neither
17 of these people help us with that. They said they
18 couldn't say if reconstruction occurred in this particular
19 case or not.

20 The defendant was the main defense witness. I
21 think Mr. Jagger had agreed we've got probably a lot of
22 real useful information about the crime from her but we
23 didn't learn a lot about her personality, her state of
24 mind, the way she copes with things. We noticed her
25 rationalizing the death and injuries to her children.

26 We saw that she believes the shooter didn't
27 kill Cheryl, that the doctors did that. The shooter
28 wasn't responsible for paralyzing Danny, that Dr. Mackey

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1 shouldn't have picked him up the way he did. The nurse
2 shouldn't have let him be handled by Steve the way she
3 did. That's why he's paralyzed. Now she talks about
4 Christy's stroke and saying that she was okay on the
5 cat scan and therefore the hospital is responsible for her
6 stroke also and this again is a consistent type of logic
7 or rationalizing that Mrs. Downs does in her life to deal
8 with that.

9 She was quite adamant about not possessing a
10 twenty-two Ruger at any point in her life. She was
11 examined by Mr. Tracy whether she owned or possessed a
12 handgun but insisted that she never possessed one even
13 though we know that she has by her own admission.

14 We got into a semantics battle I guess over
15 whether a calendar was a log or not, whether a lie was an
16 untruth or not. You may recall those things, just really
17 drawing some fine lines.

18 She has acknowledged that you never know how
19 you look to other people and certainly that is borne out,
20 her self perception is grossly distorted from the way
21 others see her. She thinks she is an excellent mother and
22 under the evidence that we have seen it is quite the
23 contrary. She says most of the love in her life is with
24 her kids and what we see from the evidence is that she's
25 extremely self-centered, that the kids take a back seat to
26 her career and to her boyfriend. She says her children
27 want to see her and be with her and we talked to the
28 people that deal with those children and find that the

1 contrary is true that when she departs after these visits
2 the kids never voicing any of those types of concerns.

3 Her perception of others is everyone is at
4 fault except her, her father, her mother, Steve, the
5 police, Children Services Division, the hospital, Nick. It
6 is just an endless line of people that are to blame for
7 her predicament, a way of rationalizing.

8 Her relationship of events is inconsistent with
9 others to summarizing her relations of the shooting in the
10 house trailer. She says Steve broke the door down and she
11 doesn't admit pointing the gun at him in her version.
12 That's contrary to his remembrance of the incident at
13 Palomino Street.

14 We've got Dan Sullivan that came in here,
15 certainly a person who's got no ax to grind, corroborates
16 Steve Downs version that it was a gun and not a shoe.
17 We've got the rape by Steve on April 28th, certainly her
18 actions of that were inconsistent with that ever having
19 happened. Going out or having him drive her to the post
20 office that morning and calling him back up for a ride to
21 the airport that afternoon just doesn't add up. It shows
22 her to be an impulsive dissatisfied person.

23 We see in her desire for attention, desire for
24 fame. If you read the entry on May 6, 1983 in the diary
25 there is a statement in there, "Sometime, Nick, I will be
26 someone that people will know me by name and sight" and
27 it's very revealing.

28 Inconsistencies in the stories are too numerous

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1 to list and I don't know that my voice would hold out to
2 go through them all. You're going to have the tapes with
3 you in the jury room and you certainly will be able to
4 compare all of those different accounts yourself if you so
5 desire.

6 There's just no way to reconcile all the
7 different stories she has told. She denies an obsession
8 with Nick. She did that on the stand. You can read the
9 pile of documents.

10 Her attitude towards children, she gets married
11 and right off she needs something to fill the time up so
12 she believes the solution is to have Christy, have a
13 child. Then they have Cheryl because things are still not
14 right with Steve and then they become pregnant again and
15 doesn't want to have any more Cheryls because Cheryl was
16 colicky and Cheryl was a problem so the solution is we
17 have an abortion so then she feels guilty over the
18 abortion, feels that child has gone to heaven and is going
19 to be mad at her so the solution to that is to replace the
20 aborted child with Danny. We've got them going up hill
21 and down at her whim. They are interchangeable.

22 Then she discovers surrogate children and for
23 that she gets \$10,000 and no responsibility because she
24 just gives them away and you don't have to raise them, you
25 don't have to do anything but spend the money. When
26 children are killed she sees that they go to heaven and
27 they can be replaced. You can replace them with surrogate
28 children, bring in life into the world to replace the

1 ones that have died and you get \$10,000 and no
2 responsibility to boot. It's a strange way of looking at
3 things but we sure see it come through loud and clear in
4 her writing.

5 She tells Nick the kids wouldn't be a burden.
6 They are terribly independent and require very little
7 care. That sure doesn't show us a mother that cares a lot
8 for her children. You'd never be left alone with them.
9 When they go to bed at night all the loving could go
10 absolutely crazy. That shows you where her priorities are
11 with her children. Do you realize together we would have
12 plenty of money to build the house we talk about. That
13 way the kids would not really be a hindrance or a hassle.
14 Again it shows where the kids fit into her scheme of
15 things.

16 When she feels trapped she suppresses her
17 hostility and anger and then lashes out. That's a common
18 pattern that she's developed over her life. She lashes
19 out at herself scratching her face and cutting her wrists
20 or at others and Steve when she's in the bathroom pointing
21 a gun at him.

22 She's abusing her own children and again you
23 come back to that child abuse paper and you can see how
24 that fits together. You read that child abuse paper and
25 you look at her diary entries on May 16, 1983. "I am so
26 trapped, I love you" You can see the same dangerous
27 components all coming together at the same period of time
28 in her life. The feeling of rejection by this lover that

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1 she can't replace.

2 He's the only one that's ever been anything to
3 her, the only one that has the heart love I think she
4 called it and he's written her off. She finds out and
5 she's stuck up here in Oregon. What's she got left?
6 She's got three kids and some parents that she doesn't
7 like and that's no way out.

8 She's got debts that she needs to deal with,
9 makes a visit to Heather's house, real strange, shows up.
10 It's dark. "I like to take backroads." Look at the other
11 statements she's made. "I am the type of person that will
12 cut off my nose to spite my face." You can just start to
13 see how this is all fitting together with her.

14 Look at the coincidence and there's the person
15 who's got all the motivation going to be without kids and
16 that's who the bushy haired stranger picks on. That's who
17 happens to be alone out on this road, this person who very
18 conveniently can do away with these children in her life
19 and what type of weapon does he use? He picks a twenty-
20 two Ruger. It's the same type of weapon that she happened
21 to be seen with when she was leaving Arizona. What a
22 coincidence and with that same weapon we find two
23 cartridges in her bedroom that have been in the same
24 weapon.

25 From the Washington Post article, "It has been
26 a hang-up since I was a little kid. Why am I here just so
27 that my dad can yell at me, just so my husband can
28 criticize me, just to take care of my kids." That shows

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1 this motherly attitude that she tries to portray, this
2 motherly image of being her whole life.

3 What you see from her is a real readiness of
4 expression. She's very verbal and talks a good game and
5 says the words but there's something missing. There's
6 that strength of feeling or emotion that just isn't
7 present in her being and I think that came through to us
8 when she was on the witness stand.

9 Has no impulse control. It's like driving an
10 automobile without brakes. You just cannot stop these
11 urges and feelings when they call out and that's why these
12 previous incidents with Steve. We've got anger, we've
13 got stress, hostility and the reaction is to go for the
14 gun to let it out. We've got a similar thing here.

15 If you look at all of the evidence and that's
16 what I certainly suggest that you do, you look at
17 Christy's testimony and reliability of it and there's
18 certainly nothing to suggest that that's in any way
19 unreliable. You look at her background. You look at the
20 blood spatter outside the car, that casing comparison,
21 the fact that she just coincidentally happened to be seen
22 with the exact type weapon that's been used in the killing
23 when she leaves Arizona. If you look at all of this
24 evidence it is collected from a wide variety of sources
25 and then put that against her, her word, no, it didn't
26 happen, no, I didn't do it.

27 Then you look at her and you say, well, who
28 should we believe now? Christy or Mrs. Downs and you see

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1 her, number one, the unplausible story that just never I
2 submit cut it from the start. Out there sightseeing at
3 ten o'clock at night, stopped for some hitchhiker. How
4 many people do that? How many women with a carload of
5 kids do that?

6 It's just not done and you stop your car and
7 roll down the window. You shut it off completely and take
8 the keys out and jump out of the car. Does this add up?
9 Does any of this add up?

10 It doesn't and against that you've got her weird
11 behavior at the hospital. That is inconsistent with
12 anything these people have ever seen before but it is
13 consistent with somebody who could be so disassociated
14 with their feelings that they would be able to shoot their
15 children and put against all of that her story which
16 changes, which just blows with the wind. It is all over
17 the place. When you do that the only conclusion you can
18 draw is that the evidence is overwhelming that Mrs. Downs
19 shot and killed Cheryl and attempted to kill Christy and
20 Danny.

21 Now, Mr. Jagger is going to get to speak to you
22 tomorrow and I'd like you to give him the same attention
23 that you gave me. He talks faster than I do. He just
24 uses a lot of body language and hand gestures and please
25 hold both Mr. Jagger and myself to the logic of our
26 arguments and make sure what we are telling you is logical
27 and that it fits the evidence that you have heard in the
28 case. That's what you are to do, decide on the evidence

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE

STATE OF OREGON,
Plaintiff,
vs.
ELIZABETH DIANE DOWNS,
Defendant.

Case No. 10-84-01377

Eugene, Oregon

Honorable Gregory G. Foote

TRANSCRIPT OF PROCEEDINGS

TUESDAY, JUNE 12, 1984 - 10 A.M.

VOLUME XXI - Pages 2865-2928

Appearances:

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1 EUGENE, OREGON - TUESDAY, JUNE 12, 1984 - 10 A.M.

2
3 (Outside the presence of the
4 jury.)

5 THE COURT: We discussed a matter with
6 counsel in chambers. I believe we're ready to take up
7 the issue of hospital records that were referred to
8 yesterday.

9 Mr. Hugi, you had some objection to make?

10 MR. HUCI: Yes. As we indicated in
11 chambers, I have three objections. The first one is
12 to Defendant's T7 exhibit which contains a document by
13 Judy Patterson.

14 And my objection to that was that that
15 person was called as a witness and was not examined on
16 that topic and it's now -- the case is in a posture
17 such as she cannot be cross-examined on that, and I
18 think that that's within the discretion of the Court
19 at this point as to whether you'll allow it or not.
20 And the state's asking that that not be done because
21 it cannot at this point be explained.

22 The other two objections are two statements
23 made by Danny Downs in the medical records, and my
24 objection there is that Danny is not a competent
25 witness. He's three-and-a-half years old.

1 It's a hearsay objection in that he also is
2 not available for cross-examination. And it's an
3 objection based on the requirements of the Oregon
4 Evidence Code Rule 803 that deals with both hospital
5 records and business records.

6 And we've discussed that even though the
7 person who recorded them may have made them in the
8 course of business, the declarant was not under that
9 test on reliability or trustworthiness.

10 The analogy would be to an informant making
11 a statement to a police officer. The police officer
12 would record the informant's statement in the police
13 records, and it would still not become admissible
14 because of the reason I've just stated.

15 The third objection is to exclude a
16 report -- actually a paragraph in the medical records
17 dealing with an opinion by Dr. Vergamini. And I
18 believe that comes within the prohibition of Streight
19 v. Conroy, 279 Or 289. That case is cited in the
20 Commentary in Rule 803 where they discuss the court's
21 discretion in regard to opinions of this sort in the
22 absence of the availability of the declarant for
23 explanation and cross-examination. And we don't have
24 the declarant here to explain or cross-examine on the
25 remarks that are made in the medical reports.

1 So those are the three specific objections
2 and the reasons for them.

3 THE COURT: Mr. Jagger?

4 MR. JAGGER: Yes, your Honor. Some of these
5 objections are to some medical records that have
6 already been marked and received contingent upon
7 Mr. Hugi reviewing them, of course.

8 And the additional ones that are referred to
9 in 7T which has not been offered formerly because we
10 waited until Mr. Hugi could have a chance to review
11 them, and I've been formerly offering them subject to
12 our discussion of these three issues.

13 I have been able to identify them -- the
14 ones that I put in evidence basically had a number on
15 the bottom which conformed to the number placed by the
16 district attorney's office when they were provided by
17 me through discovery.

18 I think I can be of some help and for the
19 record at least as far as identifying the ones we're
20 talking about.

21 The Judy Patterson one would be in T7, and
22 that would be on page 2 of that exhibit. Our position
23 is that is something that is commonly included as part
24 of the medical records as a part of Judy Patterson's
25 observation.

1 She makes them in the ordinary course.
2 We've stipulated of course to foundation. It's not
3 a -- the indicia of trustworthiness that flows from
4 all this, it's not being offered for impeachment.
5 It's substantive evidence in and of itself, and it
6 should be something that should come into evidence.

7 The ones relating to Danny's reports, these
8 are found within the other exhibits already in
9 evidence or the ones I've referred to already.

10 And they're found I believe -- now I think
11 this takes care of all -- at page -- the back -- I
12 guess page 216 and what that makes reference to is
13 Danny wanted to sit by the window, saw an ambulance,
14 that he goes on to say -- he was asked, "Someone shot
15 you?" I replied -- "this is the nurse -- "Why?" He
16 asked. 'I don't know. Danny, they are -- I don't know,
17 they were being mean, I guess. Sometimes that
18 happens.'"

19 He replies, "Who shot me?" He asked --
20 response, "I don't know." "I replied -- " by the
21 nurse.

22 Initial question, "Do you know who shot
23 you?" And then he says, "That man," he replied.
24 "'Where were you, Danny?' I asked. 'In a car?' I
25 asked." Response, "'Yes,' he replied. 'Are you

1 sure?' I asked. 'Yes,' he replied. 'That man shot
2 me,' he said. 'Do you know that man?' I asked.
3 'That man, Jack,' he said. 'Did you know him before?'
4 I asked. He asked, 'Let's go back over to the
5 window.' We went back over. He looked and said, 'Who
6 shot me?' 'I thought that man --' there's more talking.

7 The other major reference, and I believe the
8 only other reference to that was on page -- there are
9 two others, I'm sorry, page 217 right in the middle of
10 the page right column. There's an entry, they're
11 playing, saying, "See how strong my arm is?"

12 Then I can't something or other "That man was
13 mean to me.' When asked how the man was mean to him,
14 Danny replied, 'He shot me.' 'What man?' Patient
15 replied, 'Jack.'"

16 Now the one additional spot that is on page
17 228 and once again this one and the one I just
18 referred to goes into the larger batch.

19 The course was this -- something about
20 rubbing his back, "Don't touch my hole..." which
21 refers to the injury. "I told him -- 'Okay, let's
22 see.' I said, 'Yes.' Then he said, 'That nasty man
23 with the gun shot me.' I asked, 'Do you know who that
24 man is?' He answered, 'Jack, like Jack in the
25 Beanstalk.'"

1 "I said, 'Jack in the Beanstalk is just a
2 story, Danny.' He asked, 'Who shot me?' I answered,
3 'I don't know, do you?'" "No," reply, then don't rub
4 the injury.

5 I think that covers that. The reason that
6 it's being offered of course is the entry is clearly
7 made by -- well, the foundation is clearly there.
8 It's just a question of hearsay upon hearsay et
9 cetera. It's not being offered for the truth of the
10 matter asserted.

11 Our position would be here that Danny was
12 shot in a manner that he was not involved -- all the
13 evidence points to that. But it's being offered to
14 show and support our theory as far as reconstruction,
15 how things are recalled and the fact that things are
16 recalled in this kind of a traumatic situation that
17 are not in fact true.

18 It's the only way we can do it. We suggest
19 it's appropriate. It's incredibly important to our
20 case. It's obviously no real threat to the state's
21 case as far as Danny having identified somebody. He
22 talked about Jack in the Beanstalk, but it clearly is
23 supportive of our theory of reconstruction. Not being
24 offered for the truth but simply because that it was
25 said and then we draw the inferences from that.

1 We think it's highly probative, not
2 prejudicial because it's not prejudicial on a matter
3 whether or not a man existed there at the scene, but
4 it's entirely or very, very important to our
5 particular theory.

6 The last one with respect to Vergamini is
7 referred to on page 330, and that's the only place
8 that is there, I believe.

9 And there -- Dr. Vergamini is a
10 psychiatrist, physician, and he is like any other
11 doctor in there.

12 May 26, he's making observations and drawing
13 conclusions and entering them into the log. It's no
14 different I would submit than any other physician,
15 treatment saying what you have observed and drawing
16 these conclusions.

17 It's definitely not speculative in nature.
18 In fact, actually his conclusions are generally what
19 other persons are testifying to. In fact, even
20 Christie herself -- that she was not aware
21 medically -- she did some wondering about what had
22 happened.

23 And basically his conclusion is that she
24 denies -- doesn't recall events on May 26. "She
25 appears genuinely confused about how her trauma

1 occurred," and she "was prepared for the eventuality
2 that she may be questioned extensively about the
3 incident and she appeared agreeable." She had "happy
4 feelings" about the visit with Dr. Vergamini.

5 Doesn't sound very threatening at all,
6 and -- but we feel that is -- it's not their relating
7 any hearsay at all, confusion, medical doctor,
8 psychiatrist and should be admitted. That's our
9 position.

10 MR. HUGI: I think there's one page that's
11 left out, and I don't have the numbers that Mr. Jagger
12 does on mine but it's July 19th, 1983, and it's in
13 Danny's section and it's a statement made about 9:20
14 in the morning.

15 "I was holding Danny looking out of the
16 window. He said, 'That looks like my daddy. My daddy
17 has a gun.' 'What for?' I asked. He said, 'To shoot
18 people.'"

19 "I asked, 'Why does he do that?' He said,
20 'If he gets mad at them, he can shoot them.' Asked if
21 he had ever done that. He replied, but I was unable
22 to understand what he said. I said, 'What?' But he
23 didn't answer, then changed the subject."

24 I would like that to be included in the
25 objection as well as the items mentioned by

1 Mr. Jagger.

2 THE COURT: Well, with respect to the
3 reference to Judy Patterson, I'm going to overrule
4 that objection. I believe that comes within the
5 business records exception Rule 803(6).

6 That is an observation made by a person
7 within the normal course of business, an entry made
8 pursuant to the requirements of that particular rule.

9 With respect to the statements attributed to
10 Danny, I'm going to sustain that objection. I believe
11 that even though they're made, the entries are made in
12 the normal course of business and the person making
13 those records falls within the exception, the
14 declarant in this, Danny, does not fall within that
15 exception and the Court is required by that particular
16 rule to look at the issue of trustworthiness on all
17 declarants involved, and I find that that would be
18 hearsay.

19 And I realize counsel has argued that is not
20 being offered for the truth but to prove something
21 else, and I don't believe that that evidence is
22 probative on the issue that's being suggested, so I'm
23 going to sustain that objection.

24 With respect to Dr. Vergamini's opinion, I
25 think that is a fairly close issue. I think that the

1 commentary to Rule 803(6) is instructive in that it
2 suggests with regard to expert opinion contained
3 within hospital records that the Court should read
4 that in light of Streight v. Conroy cited by
5 Mr. Hugi which suggests that where the witness is not
6 before the Court you cannot subject to cross-
7 examination, that the Court should limit that sort of
8 opinion evidence, and so I'm going to sustain that
9 objection as well.

10 Now you've offered some other hospital
11 records, and you have no objection to those with the
12 exception of the ruling the Court's made?

13 MR. HUGI: That's correct.

14 THE COURT: And I believe the Court has
15 overruled that objection.

16 MR. HUGI: Right.

17 THE COURT: That was the Judy Patterson
18 record. That's contained within the evidence that
19 you're offering?

20 MR. JAGGER: Yes. On the rulings of the
21 Court, we can get together and clean up the matter
22 before it's presented to the jury.

23 THE COURT: Aside from that, you have no
24 other objections to those additional exhibits?

25 MR. HUGI: No.

1 THE COURT: Those will be received.

2 There's one other matter you wanted to take
3 up?

4 MR. JAGGER: K and L need to be offered and
5 received. That's just a shoe and a receipt.

6 MR. HUGI: No objection.

7 THE COURT: Those are received.

8 MR. JAGGER: One matter I do need to make
9 clear on the record is that the additional objection
10 Mr. Hugi had as far as the seeing Dad with the gun, et
11 cetera, what for, to shoot people, et cetera, that is
12 being offered for a different reason than I've stated
13 already.

14 That is being offered to show the state of
15 mind of Danny. The state has opened the door by
16 saying whenever the mother is there, there's no
17 response, no love, et cetera.

18 And we want to counter that, but basically
19 they've talked about as far as observations of his
20 feelings toward the mother, we have some evidence to
21 show maybe with respect to Danny there may be some
22 reason for fear with respect to the father, and I
23 think it goes and is probative to his state of mind.

24 THE COURT: I'm going to continue to sustain
25 that objection because I don't believe that the state

1 of mind concerning the father is relevant in this
2 case.

3 It might be --

4 MR. JAGGER: The state of mind of Danny.

5 THE COURT: Right, concerning the father. I
6 don't think it has anything to do with this case.

7 It might if this was a custody battle or
8 something like that, but not in this case.

9 Are we ready to bring the jury back at this
10 time?

11 Bring the jury.

12 (Whereupon, the jury enters
13 the courtroom.)

14 THE COURT: Good morning members of the
15 jury. I believe we have the last of our housekeeping
16 matters taken care of in your absence and we're ready
17 to begin with the defendant's argument.

18 MR. JAGGER: Thank you very much.

19 As sometimes happens in cases, we -- because
20 of particular evidence or particular positions taken
21 by counsel we change our position as far as how we
22 planned to present certain facts, and it goes with
23 argument too.

24 Since yesterday I've altered a little bit
25 about the way I wanted to proceed as far as talking

1 with you. Mr. Hugi has basically gone through a
2 chronology once again similar to the trial. I want to
3 do it a little bit different because you basically
4 heard a chronology in opening statement from Mr. Hugi
5 and myself in the course of the trial, and Mr. Hugi
6 has done that again.

7 I think that can be of benefit, but it's
8 clear by now there are particular issues. It's clear
9 there are certain things that we disagree about and
10 rather than -- the danger with proceeding from start
11 to finish at this point is that we get things out of
12 context and there may be things that are so important,
13 a certain thing said here or evidence there that is
14 separated maybe by a day or days that lies dormant,
15 and unless we put them together, I submit that's the
16 only way we can really test and find out what occurred
17 and what the most appropriate response to a particular
18 issue is.

19 And that's what I want to do. You've taken
20 notes throughout. Some of you continue to take notes
21 with respect to Mr. Hugi's final argument.

22 I'm going to try and have that there as much
23 as possible and take some notes of some things we're
24 talking about. Maybe I can be of even greater
25 assistance to you. I want those in written form also

1 so that it's easier for Mr. Hugi to respond to them.

2 I suggest to you and you'll see when I'm
3 through that this case is not something that should be
4 decided upon emotion, speculation or anything like
5 that.

6 It should be decided upon some cold hard
7 facts because when the cold hard facts are looked at
8 and examined in total, it will be clear that the
9 position we have suggested from the beginning is in
10 fact the correct one.

11 I'm going to be as open as possible and
12 leave them up there and may end up ripping some down,
13 but I'm going to leave them in the courtroom so they
14 can be put back up and talked about.

15 Some of the areas we're going to talk
16 about, not in this order, but some of the key issues
17 are Tracy and the bullets, ballistic tests, et cetera,
18 rifle, that issue. It's kind of a central issue.

19 Her statements and some things that have
20 occurred at the hospital. And really over some maybe
21 days after that but to some of the various doctors,
22 the statements during that week period of time say
23 between in June and July, some statements made by
24 Diane Downs.

25 Christie, I've centered on another issue,

1 another subject matter we're going to talk about.

2 The gun relating to Steve Downs and
3 Mr. Knickerbocker, where it's at, what has happened,
4 things of that nature, some concrete evidence
5 concerning that.

6 The blood spatter evidence, the issue of
7 whether or not someone is shot outside or inside the
8 car.

9 Joe Inman in fact is a very important
10 witness, and some of these things are -- they're so
11 frustrating for both counsel to a certain extent
12 because you know that in opening statement we can't
13 say there's this fact and what I want you to do is tie
14 this fact with this fact because you'll see then when
15 they're together what it shows.

16 You can't do it then. You can't do it
17 during the trial. This fact comes out and it's
18 clearly unrebutted, and it lies there and neither
19 Mr. Hugi and I can stand there and say, "Remember this
20 fact because it will point in this particular
21 direction."

22 But what we can do now and I'm going to try
23 and do that and try and register it here so Mr. Hugi
24 can actually meet that also.

25 I'm also going to -- it's real easy to stand

1 up here and generalize and say that certain facts are
2 a certain way without reference to exhibits. It's
3 real easy.

4 If Mr. Hugi didn't refer to very many
5 exhibits in his opening statement -- and part of my
6 change in my approach is I'm going to address about
7 four or five or six things that he said that are real
8 important things. I'm not talking picky things. Real
9 important things and show you what is happening.

10 From opening statement you'll recall things
11 are generally said only halfway. And then we
12 supplement them so you get the full picture. Same
13 with the trial itself.

14 If you will recall each and every witness,
15 certain things are brought out and on cross-
16 examination we end up bringing out more. That's the
17 way the system should be. It works real well that
18 way.

19 But the thing that is important to remember
20 is that we may be swayed by emotions at various stages
21 in the proceeding, and I'm asking you not to be swayed
22 by emotion and in fact that's the reason the first
23 major topic we're going to talk about in a little
24 while is that of Christie Downs.

25 I'll write this down a little bit later

1 on -- because of something Mr. Hugi said in his first
2 argument. He said, "Think back to Christie Downs."
3 She said certain things and you think back -- you
4 think back and check what she said with what we know
5 for a fact is -- has occurred in the trial from the
6 ballistics evidence and everything else.

7 No, he didn't say that. He said, "Go back
8 and check with how you felt when Christie Downs
9 testified." Check credibility with emotion. We're
10 going to address that directly. He didn't say, "Check
11 it with the facts." He said, "Check what Christie
12 Downs said with how you felt at the time."

13 We're going to address that directly.
14 That's going to be at the top of the page that we're
15 going to write down what she said. I think there are
16 about seven or eight things, chief things, important
17 things. We're going to talk about each and every one
18 of them and see whether or not what he was asking you
19 to do is the correct way to proceed, checking
20 something by emotion.

21 We'll talk to -- Joe Inman is a real
22 important person, and you think back how you felt and
23 the inferences that were made initially when Joe Inman
24 testified that Diane Downs is shot and tried to kill
25 her kids and she's going slow waiting for them to die.

1 Do you remember that inference? I suggest
2 if you think back then how you felt you had to feel --
3 disgust isn't the word. That is repulsive. It's
4 incredible.

5 Joe Inman is going to be a major topic too,
6 and in fact when we get to that, it supports what we
7 have been saying from the first day but we have not
8 been able to say until now.

9 That will be a major topic too. It's real
10 important. I'll let you know we're going to be
11 touching on everything, all these topics, and we'll
12 take them piecemeal and try to bring it all together
13 in talking about them.

14 Time lapse. There's no time lapse. There
15 never was. There never will be. 25 minutes, whatever
16 the gap is Mr. Hugi said, I'm going to put that out
17 too so we can talk about it. You'll see what we mean
18 by that approach. There's no time lapse and never has
19 been.

20 We're going to talk about the person who is
21 really responsible, and we're going to refer to
22 exhibits and we're going to talk about the facts.

23 One thing that can be done in a case is that
24 because Mr. Hugi has to stand up and argue to you so
25 do it, one thing that is helpful to one side or the

1 other is to do two things.

2 One, either to attack the credibility of the
3 attorney bringing forth the evidence and the argument
4 and the position, and you also try to maybe paint a
5 person as bad as possible. You paint Diane Downs as
6 bad as possible.

7 Granted she's helped on that obviously in
8 her past. She's made some messes of the way she's
9 handled herself in particular portions of her life,
10 and she's done some things that we do disapprove of.

11 But it's important to think for example if
12 someone you know is on trial, you've known them for a
13 long period of time. You know even though they've
14 done some bad things, you know the good part of them.
15 Your human nature is to find it more difficult to find
16 them guilty of something than someone you don't know.
17 You can kind of shove aside what you don't like
18 anyway.

19 That's what I'm asking you to do is simply
20 recognize that feeling and ask you to go with me and
21 decide the case, not upon emotion but instead upon
22 some facts.

23 Now Mr. Hugi in his final -- part of his
24 argument yesterday talks about Mr. Jagger is going to
25 talk here in a second. He talks faster than Mr. Hugi,

1 uses a lot of body language and so on and so forth.

2 Why was that said? So what? I do talk
3 faster and the court reporter -- it's more difficult
4 for them to take down notes, and I'll try and talk
5 more slowly but I suppose that's my upbringing, I
6 don't know. What relevancy does that have here?

7 I can't talk slower. I'll be talking faster
8 than Mr. Hugi. It has nothing to do with it except
9 maybe to think, maybe because he does that maybe we're
10 not supposed to believe him so much. That's why I'm
11 going to try and take even more pains that when I say
12 something we're going to go back as much as we can,
13 and I'll show you the evidence and we can talk about
14 the inferences.

15 I'm going to try and talk about both sides.
16 Let's assume if this fact were to occur, if Diane
17 Downs actually did this, does that make any sense or
18 if she didn't do it, doesn't it make sense.

19 As much as I can, we'll go ahead and do
20 that. We've been here for a long time. I may
21 overlook something, but I've tried with great pains
22 that we hit the most important things and even some of
23 the other things that are more subtle, but it may make
24 a difference as to how you'll ultimately decide the
25 case.

1 Mr. Hugi and I can't go back with you in the
2 jury room to answer questions or to discuss it with
3 you. Both of us would give our left arm to be able to
4 do that, but we can't. And you can't really discuss
5 it with me now either.

6 So I think sometimes the best way to have an
7 argument, how I would perceive it, would be for me to
8 do some things out loud and hopefully maybe that will
9 help. Hopefully my thought process would be similar
10 to how you would be approaching different issues in
11 the case.

12 I would hope so or -- and if so, that is
13 maybe the way I can be of the most benefit to you in
14 your deliberations. There's some real heavy decisions
15 coming up. It's a real important case, real important
16 by obviously the way you saw the people handled the
17 case. The doctors, Mr. Pex arguing his position.
18 That's fine, but you can tell people a different
19 situation. It's a real different case. People react
20 differently. There are emotions for the different
21 reactions. It's a real different case.

22 We've got some real serious decisions, so I
23 don't know how long I'm going to be, but you can
24 imagine if -- that I need to take as long as it takes.
25 So hopefully I'll be through today. If not, it's not

1 because I didn't try but it's perhaps because it may
2 be a higher priority to make sure that we've discussed
3 everything. So bear with me and we can go through all
4 this.

5 We did make some promises at the opening of
6 the trial. I hope we follow through with those. The
7 Court will -- we're not here dealing with where the
8 children ended up going. That's in the juvenile
9 court. That will be decided sometime in a different
10 hearing, judge, et cetera.

11 We're deciding right now whether or not the
12 state has proven beyond a reasonable doubt that Diane
13 Downs tried to shoot and kill all three of her
14 children. That's the only issue.

15 I guess to put it in even more context right
16 now is this idea of beyond a reasonable doubt. Just
17 so that we have this, the Court is going to instruct
18 you on this, but it's important at least we think
19 about this right now so we can place what we review in
20 better context.

21 If there's an honest uncertainty, if after
22 careful deliberation -- and no one is going to
23 question our approach to this time -- but after
24 careful deliberation you don't feel convinced to a
25 moral certainty --

1 MR. HUGI: Excuse me, Mr. Jagger. I'm going
2 to object to counsel instructing the jury. I think
3 that's inappropriate.

4 THE COURT: It's overruled.

5 MR. JAGGER: Thank you, your Honor.

6 It's real important to talk to you as much
7 as possible, and we have various objections. I may do
8 it when Mr. Hugi is there too. So do not think ill of
9 either side if they object. We're all doing the job
10 that has to be done. Maybe this will be of some added
11 assistance.

12 A moral certainty is -- it's something that
13 you would -- the amount of evidence that you may need
14 to act upon the most important of your own affairs.

15 You plunk down your money for a house.
16 Maybe sometime -- maybe even having a baby-sitter come
17 to baby-sit your children. The credibility you expect
18 from someone like that in other words, it's an attempt
19 in a way to put it in your own life and to see whether
20 or not the amount of evidence here is something that
21 would cause you to act upon in some of the most
22 important of your own affairs. And that's kind of a
23 formula, and you'll apply it here in some of the
24 things we'll be talking about.

25 Mr. Hugi went on after he described how I

1 would be arguing and said that he'd expect
2 explanations from us on everything. Remember the word
3 "explanations".

4 Well, I suggest to you there may be a couple
5 of reasons for that. Number one, it's just saying,
6 "Hey, jury, don't even hardly listen to him because
7 they're just going to be explanations or excuses in
8 any event."

9 Number one because of the way the trial is
10 set up, Mr. Hugi knows that that is a part of what
11 I'll be doing here, partly because what he
12 indicates -- clearly all of us have heard the
13 evidence. On many issues he's only indicated a
14 portion of the evidence. I'm not going to go ahead
15 and add the rest of the facts in.

16 Also clearly if Diane Downs is innocent,
17 wouldn't you expect someone to explain what somebody
18 is saying that is not true? I mean, it seems pretty
19 logical. I suggest the way it's couched, it's couched
20 to affect our credibility from the very start.
21 They're just going to offer excuses.

22 If you look at it, the reason they could be
23 called explanations, the state goes first. They have
24 the burden. They say something. We explain and offer
25 additional evidence.

1 If something is produced, if we went ahead
2 and produced other facts first, Mr. Hugi would be up
3 here explaining some things. I'd suggest Mr. Hugi
4 when he stands up here the next time, he'll be trying
5 to explain some things that we have in fact put on the
6 board and talked about specifically.

7 What occurred, all those various issues that
8 I briefly talked about that we're going to talk about
9 and address are because of a single situation. They
10 all have a connecting thread and that connecting
11 thread is Diane Downs' behavior at the hospital.
12 People formed opinions at that particular time, and
13 the battle lines were drawn. They were drawn partly
14 as a result of Diane Downs, pretty combative right
15 through. If the police didn't show up for awhile, her
16 response is, "Where have you been? What's going on?"

17 Pretty combative as far as showing up at the
18 hospital and her children have been shot. She had
19 been shot and don't you think it's reasonable for her
20 to be pretty upset when they're sitting down at the
21 table and asking questions about insurance to be paid?
22 Don't you think it's reasonable for her to be pretty
23 upset and probably pretty sarcastic about it?
24 Especially when you look at her background which I'm
25 not going to go through specifically. We've heard it.

1 She testified for a matter of days.

2 It's a pretty appropriate response when you
3 think about the way she is. It makes some other
4 things fall in line that we'll talk about later on.
5 The important point right now is that everyone -- even
6 though they for the most part had contact with her for
7 only a matter of a few minutes, five to ten minutes,
8 each of the doctors and nurses when you got down to
9 it, they only saw her for a few minutes except for
10 Detective Tracy.

11 When we talk about later strangely enough he
12 recalls her saying stuff about Mr. Knickerbocker all
13 the time that is not in any of the reports. And it
14 isn't even relating to any of the subject matter of
15 the reports.

16 What's even more odd is that he's the only
17 one it appears that didn't think she was behaving
18 strangely, didn't say anything inappropriate and yet
19 he talked to her for such a period of time to fill out
20 three or four page reports, but everybody else -- and
21 there's maybe some reasons why that was his particular
22 response -- but everybody else is real upset with her.

23 Good reason even here because she of course
24 through another attorney filed the claim that she may
25 even sue them because of the damage they did to her

1 children.

2 Given more reason why they're pretty upset,
3 it's pretty easy to understand why Dr. Miller in fact
4 three to four weeks ago -- and you can check back in
5 your notes if you get a chance. We'll check back on
6 the transcript here also.

7 But Dr. Miller three or four weeks ago is
8 indicating there was no conversation about the
9 children being interrogated too much and that they
10 might revert or go back. There wasn't -- I don't
11 recall any. Now he says there's no conversation about
12 that at all.

13 Back then he said there was a possibility
14 that conversation might have occurred because that was
15 going on and we went through some of the things that
16 were going on. And yet three to four weeks later --
17 we're not talking about a year of sitting with an
18 opinion and then having your recollection formed and
19 perhaps changed because you're on a particular side of
20 the fence.

21 We're talking three to four weeks he comes
22 back in and says, "Hey, no way that conversation
23 occurred, absolutely no way."

24 Well, I'll tell you something. What we
25 have -- and I'm going to go through some of it -- is

1 we have -- we had right here, we still have in this
2 room someplace is a stack of medical records, and
3 thank goodness we have those medical records because
4 you know something, Diane Downs had reason to be upse'
5 with them. She was real angry at the perpetrator of
6 this, you bet.

7 Isn't it reasonable to think when someone is
8 sitting in the hospital concerned about the children
9 and they go to the Trauma Room, come back again. They
10 ask questions about the children and yet they sit
11 there and they hear stories in the hallway by the
12 police officer saying, "It doesn't make any sense
13 what's she's saying. She must be a suspect. She must
14 have done it. It doesn't make any sense what she
15 said."

16 Men saying that about what they think a
17 woman's reaction should be. Maybe they were thinking
18 she didn't react like their wives would have. They
19 didn't know anything about her background. They
20 didn't know anything about her growing up, and you
21 start to cry like Willa Frederickson, the mother said,
22 "Hey, quiet. You don't do this stuff in this
23 household." Not just a month of that training, but
24 years of that training.

25 She sits in the room and hears that. It

1 wasn't denied. That's uncontroverted. There has been
2 no police officer, no one has said that that didn't in
3 fact occur. She sat there in the hospital and heard
4 them say, "She's the one that did it. We don't
5 believe it. The story doesn't make any sense right
6 from the beginning."

7 You bet she had a right in addition to a lot
8 of reasons to be sarcastic, and that anger at a person
9 who had shot her and the children, that person wasn't
10 there. She couldn't vent her anger at that person who
11 was responsible, and there's some concrete evidence
12 that that person did in fact -- did this, and we're
13 going to categorize that in a little while. I'm not
14 trying to take things out of context.

15 It's real logical to assume that that anger,
16 a portion of it may be directed then at some of the
17 people who then were what she perceived as persons who
18 were injuring her children.

19 This is just made up or did she have some
20 reason to believe that the children were injured by
21 the hospital too, that hospital who appeared to be
22 taking the side of the police who were whispering
23 about her out in the hallway, who wouldn't let her see
24 the children, who then -- and I suggest that news
25 travels fast in a particular area, whether you work

1 for the railroad or the mill, whether or not you're a
2 teacher, whatever you are, news travels fast. You bet
3 it does.

4 You don't sit down and chat about something
5 but news travels fast. In a sense somebody doesn't
6 like someone, someone isn't behaving right. News
7 travels real fast, and it taints your perception. Why
8 else is it that when you go to see a basketball game
9 it's just a coincidence when a foul is called the
10 Beavers think it's one way. The Ducks think it's
11 another way. No, it's a matter of human perception.
12 You see some things from the start a particular way.

13 The medical records in fact -- and we're
14 going to go through that -- that will be the second
15 thing we talk about, but I want to address it briefly
16 now.

17 The medical records show things contrary to
18 what you've heard in testimony. I had to sit there
19 and I couldn't say, "Jury, please keep your mind open
20 because we've got some facts here we'll show you later
21 on."

22 You sat and heard that oral testimony, and
23 we're going to go through the records that were made a
24 long time ago, not subject to gossip, talking,
25 whatever.

1 Within those initial three or four days, you
2 see Danny is moving his toes voluntarily, his limbs,
3 et cetera. It's in the records. His responses are
4 okay, and then it turns bad.

5 By that time, three or four days have
6 passed. Diane does blame the hospital. Maybe in her
7 particular state of mind at that time it's pretty
8 valid.

9 Same with respect to Christie. Using all
10 four extremities, not paralyzed, not -- a seizure
11 later on. That occurs some days after that. She has
12 anger at a lot of people at that particular time. I
13 submit to you they're pretty justifiable. Wouldn't
14 you be angry if you had been assaulted and your
15 children had been assaulted and people were whispering
16 out in the hallways, et cetera, et cetera? I suggest
17 that's all logical. It's real logical.

18 I guess the important point to draw right
19 now is that the way she behaved at the hospital, then
20 unexplained, was interpreted by certain people a
21 different way. And it was from that, that common
22 source, through Tracy, through the DA's office,
23 Mr. Pex, et cetera, the doctors, the hospital staff,
24 it all flows from that.

25 We're going to address each of those, and

1 you'll see what I've said at the beginning is
2 supported by the evidence.

3 Let's -- I want to talk about a couple of
4 things right now. Number one, concerning Bart Reid
5 and these are things I cannot leave left alone for
6 awhile. The things Mr. Hugi said that are clearly
7 contrary to the evidence, totally contrary, they were
8 brought out a little bit by leading questions, and
9 they're contrary to the evidence.

10 He's talking about -- and there's a little
11 bit about the blood spatter.) He's saying that it came
12 out because of a swinging of the arms. He got out here
13 and talked about you only get this swinging the arms
14 out there, and by argument again, he has to swing the
15 whole child. Shelby has to swing the whole child.

16 That was never like that at all. When we
17 were talking to Mr. Pex -- we'll get into this as far
18 as the blood spatter force, how that occurs. You have
19 Shelby Day coming out here. She's picking up the
20 child. She's out there to handle it as quickly as
21 possible without further injury to the child.

22 Later on I'll go ahead and put the shirt on
23 the replica, and we're going to go through that and
24 indicate how it occurs.

25 We know for a fact blood -- we know the

1 source. We have pictures of it, and I'm going to show
2 you all those pictures. We know approximately where
3 that would be. She's brought up and she's moving.
4 She's not staying there.

5 Mr. Pex does that from a stationary source
6 and drops it. You better believe Shelby Day isn't
7 standing there and lifting the child and standing
8 there. For goodness sake, she's not. She's lifting
9 up the child. We know this is underneath. Lifting up
10 the child and it can happen in a number of different
11 ways.

12 There are many different ways it can happen,
13 but it is conceivable that this drops. She's going,
14 and it can in fact flip. (We've done the testing) and
15 it in fact occurs. However, the important part for
16 this right now is this, this is the reason we're
17 bringing it up right now because Mr. Hugi says to
18 support his position that Bart Reid is on their side,
19 but you know how that got there, because of the
20 question that Mr. Hugi asked Mr. Reid.

21 He asked him this question, and this is why
22 it's so important to delve into these because we get
23 wrong inferences when we do this. He said, "Assume
24 the blood from the door -- "This is outside. This is
25 in the inside of the car right here." Assume the blood

1 on the car and this tadpole and these right here with
2 nothing between, were from a common source." He said
3 assume that, common source.

4 And that -- this is the second assumption
5 that's real important. Mr. Hugi is down there. He
6 says -- remember that. He says, "You assume it's from
7 a common source and it's right here. It's from a
8 source of a single place here like a bullet hole."

9 "Then that would be more likely this source
10 of gunshot wound." Well, Mr. Reid -- I suggest he has
11 been real honest in saying, "Yes, if you assume that,
12 that's right." But, of course, the important thing is
13 that's not necessarily an assumption you can make.
14 Nobody knows that these all came from the same source.

15 Number one, in fact what is important to
16 know it is uncontradicted, it is in the evidence
17 that Mr. Pex only took one drop of blood that was here
18 on this door, and there were a lot of them there. He
19 just took one because it happened to fit his theory.

20 But the thing that's even more important is
21 this. Mr. Reid is indicating that -- and this is even
22 setting aside the fact that -- remember we went
23 through the paint brush overhand, underhand and all
24 that. Setting aside whether or not we're dealing with
25 a portion of that anyway as far as that aluminum

1 guardrail, the important point is this, that Mr. Hugi
2 in his question assumed that everything came back to a
3 single place.

4 And he was inferring that if it came from a
5 whip -- because when it happens, if that really were
6 true, then you're really going to get -- this blood is
7 going to be -- as it comes around it's going to come
8 up a little bit. It may come up between four to five
9 inches so that you have blood coming off from a number
10 of different sources. So that was his whole point,
11 right.

12 But you see he didn't refer to pictures,
13 things that were in evidence. This of course inside
14 the door showing the source of the blood is the pool
15 of blood that was inside. Did Mr. Pex indicate that
16 in his tracking of the droplets of blood back that it
17 was a common source? No, he never said that. The
18 question that Mr. Hugi asked was misleading.

19 In fact, Mr. Pex's observation and the
20 evidence is consistent with blood coming from a source
21 of maybe four to five or six inches apart.

22 You see, I'm going to try and back up
23 everything I have with the evidence and the exhibits
24 as much as possible. I'll show this one first. This
25 is from above. It shows the pole that he put down

1 here, and here's back to the door. Here's this
2 tadpole with nothing between, some right here in this
3 area here and from the top there (indicating).

4 Now it's important to note that there are
5 two groups of blood spatter right here. You have this
6 group right here coming in down at the lower portion,
7 and remember he said he was so specific about that
8 because of the way the aluminum guardrail is, the rock
9 guard because that blood travels in a straight line.

10 We've talked to him about that. He was
11 definite about that. We wanted to make sure because
12 when I'm asking questions, I know what we're going to
13 be talking about here, but I can't stand up and tell
14 you at the time because you see the guardrail is
15 different than some of the things that were tested,
16 the rock guard.

17 You have the valleys and the tops and the
18 blood gets into both, and therefore you have a line
19 right there that you can go from. You've got the line
20 right there, and you line it up, and that's what was
21 done at the bottom right there.

22 Does this look like a common source? Maybe
23 a bullet up there and maybe a bullet there, but that
24 isn't what Mr. Hugi asked.

25 The question should have been, "Assuming

1 that the source of this blood droplet covers the range
2 of about six inches, is that more consistent with a
3 gunshot back spatter or the flipping of the sweater
4 that in flips four to five, six inches?"

5 Sometimes we get misled during the course of
6 the trial. We have of course over here this is the
7 top. That's up here to 18 inches above. The bottom
8 is 12 inches. The top is 18 inches, he said.

9 Can we be really sure about this one over
10 here? This one being up to 18 inches. That's 18
11 inches, the top of it. Yes, we can.

12 Q. The reason we can be sure about that is
13 because of the tadpole effect of that one. Two to
14 one, remember we talked about two-to-one ratio. It
15 was brought out on cross-examination. McDonnell has
16 done a great deal of work on this, and it shows a 30
17 degree increase.

18 We know also from Pex's testimony that the
19 top of this -- this is that you see right here, this
20 part right here is 13-and-a-half inches. We've talked
21 about the nine-plus being the bottom. The top is 13-
22 and-a-half inches. So you've got this going about 13-
23 and-a-half inches, 30 degrees up, 18 inches up. No
24 common source at all.

25 What Mr. Hugi would like for you to believe

1 is that Mr. Reid was answering a question based upon
2 things in evidence that support his theory is
3 incorrect because those two assumptions are incorrect.

4 It's not showing a source from a single area
5 the size of a bullet. And number two, you cannot
6 assume that they are from the same source. Other
7 blood? Who knows. You don't know.

8 Mr. Pex claims he knows, but we'll talk
9 about that later on. What does that support then?
10 You've got such concrete strings going back there.
11 What does that support?

12 Mr. Hugi -- the next point, number two, and
13 we'll be getting back to blood spatter. But it's
14 important that we deal with that immediately because
15 what he says has such impact that you might carry with
16 it longer, and you might have overnight carried with
17 it thinking, "Hey, that makes sense what he said."

18 But see when you look at it and say -- you
19 look at the whole picture, that's not what occurred at
20 all, and this has happened time and time again in this
21 case. It has happened time and time again.

22 Do you remember he gets up here and he's
23 trying to paint her as bad as possible. Let me not
24 even say that. Let's just ask the question, why would
25 Mr. Hugi have done this? In fairness to him, he says,

1 "This woman here has -- gets pregnant after Cheryl,
2 and Cheryl is colicky. So she gets rid of that next
3 child, has an abortion."

4 Well, he's talking about how children are
5 fungible. Do you remember that? Did Mr. Hugi
6 mention at all about the fact that the problems that
7 she and Steve were having at that time, the fact that
8 the child was unexpected?

9 Did he mention at all about the fact that
10 Steve was doing zip around the house, felt that that
11 was woman's work, that the burden of everything fell
12 upon her shoulders, did he mention that?

13 Did he mention that fungible children, you
14 can kill them and have another one the next day?
15 That's what he wants you to believe. That in fact has
16 to be believed. That's why he said it.

17 But why did he say Cheryl is colicky, you
18 can't have another one, let's just get rid of this
19 one? Why didn't he mention the rest of these things?
20 Why didn't he mention the stuff that even Steve Downs
21 told about the reason for being a surrogate parent,
22 that was to bring the happiness of children to other
23 people?

24 It's important right here that we pull these
25 things together so we're not misled by only one fact

1 that's mentioned. Why wouldn't Mr. Hugi mention the
2 rest of this? Why didn't he mention about the reason
3 that she went to the Air Force was -- according to
4 Steve Downs -- was for security for stability. Part
5 of the reason she started to work.

6 She grew up in a conservative Baptist
7 family. Father is head of the household. You obey.
8 That's borne out also by the way she reacts. She gets
9 into this marriage with Steve Downs who -- what a
10 setup. That's incredible. Has a date within two
11 weeks.

12 And remember him on the stand? She's fixing
13 his clothes and he says, "Yeah, she was real good
14 about it." He expected that, and I suggest his
15 attitude didn't change during the course of the
16 marriage at all, not at all.

17 But she didn't, she complied. The stuff
18 with her father, that is despicable. She complied.
19 Steve Downs, still complies. Her attitude is
20 consistent -- if you don't take it out of context --
21 her attitude throughout is consistent.

22 She verbalizes and with Steve would get into
23 some physical fisticuffs, okay, but her reaction
24 throughout is to comply, ultimately make some griping
25 and moaning and yelling, but to comply with Steve

1 Downs throughout.

2 They'd separate. He'd send them off to
3 Flagstaff, not denied by Steve Downs. Just ship them
4 out. "Come back," he'd say, "Let's get back together
5 again." They would. She's depressed, ~~suicidal~~,
6 ~~maybe~~, incredibly down as you might expect the way she
7 was being treated.

8 Beaten up, a gun, a click of the gun against
9 the head. Uncontradicted, beaten up Steve suggests
10 three or four times. I'd suggest it was many, many
11 more yet she would come back.

12 She was in the bathroom. Shoots the gun off
13 and the bullet is left.) That is so important later
14 on. Steve comes in and whether or not Steve points
15 the gun, she raised the gun up to give it to him.
16 That's maybe what he comes up with, "She pointed the
17 gun at me." That's irrelevant. In fact, the gun was
18 given to him.

19 Later on she's leaving to come up to Oregon,
20 she has the gun and she gives it to him.) And we'll
21 talk about that. That's a specific heading too.

22 She did. She did give it to him. That's
23 consistent with the way she behaved her entire life.
24 Why didn't Mr. Hugi mention these additional things?

25 He didn't mention these photos, the fact

1 that she's the one who has taken the pictures. You've
2 got the pictures there, but she gave birth to those
3 children. She was in the hospital. She gave birth to
4 them. She fed them, Steve didn't. She clothed them.

5 We've got pictures in there, and the reason
6 we've got them is to counter some of the things the
7 state brought up. She's a terrible mother. Who said
8 she was a terrible mother? Steve Downs.

9 Steve Downs -- Mr. Knickerbocker once said a
10 couple of times that she was with him either when the
11 kids were at school or when they're sleeping at the
12 baby-sitter before she'd pick them up or late at night
13 after the children were in bed. You don't see a
14 person there who has Mr. Knickerbocker a higher
15 priority than the children.

16 Where is this lady who deals with children
17 as fungible objects, you can throw away and
18 disregard them. That's a fantasy world. Mr. Hugi
19 talks about a fantasy world.

20 I say that's a fantasy prosecution to say
21 that because the only way you can get to that is by
22 saying Cheryl is colicky. She had an abortion, and
23 you don't talk about the rest of the stuff that you
24 and I and Mr. Hugi heard.

25 Even as late as the letter about the big

1 house and that, if there's a problem you don't have to
2 take care of the children, Mr. Knickerbocker, I do,
3 because I love them. It's my responsibility. And if
4 you want to watch TV downstairs, we will go upstairs.
5 That's the way it's always been.

6 The only one period of time that she was
7 without the children, and that was when they were with
8 Steve for a period of time shortly before she left and
9 that was because the mobile home had burned. She
10 didn't have a place for them. That's the only time
11 period.

12 And for the most part, she was totally
13 supporting them with no child support from Steve
14 Downs. She had the entire responsibility.

15 She's the one who would get up in the middle
16 of the night. She was the one who did the things that
17 mothers and fathers should do to raise the children.
18 He didn't mention the rest of it.

19 Pictures were brought in to show that they
20 were well clothed. She was the one that took the
21 pictures. She is the one who was interested in that.
22 She was the one involved in that, and they do show a
23 mother looking adoringly at her children, yeah. We're
24 not bringing that in for the emotional part of it, but
25 to simply counter the part that has been said that she

1 didn't care about them at all. But who said that she
2 doesn't care? Steve Downs, the one who raped her
3 before this occurred. Uncontradicted.

4 He raped her. He's raped her in more ways
5 than one. He raped her. You saw her when she
6 testified. She had only indicated that to me a short
7 while before that. Do you remember her face flushed?
8 Did she break down and cry? Did she react as some
9 people would cry in relaying that? No.

10 Face turned white as a sheet. Thought she
11 was going to pass out. Asked if you want a recess?
12 No. Feel like crying? Yeah. But we toughed it out.

13 Not bizarre. She's not crazy at all. She
14 reacts more like a male would or stereotype male. At
15 the hospital -- and we have about two or three
16 witnesses indicate they didn't see the emotion from
17 her at the minute they were observing her.

18 But the same with her father, Wes
19 Frederickson. Same situation there. Didn't see any
20 emotion from him either that they recall.

21 Steve Downs said she was a bad mother.) 2914

22 Mr. Knickerbocker, we've covered the stuff there. No
23 one else. Maybe Dan Sullivan. Remember that he's the
24 one involved with the gun and shoe incident which
25 we'll talk about too, but I want to talk about the

1 importance of that is this.

2 I suggest to you Mr. Hugi I'll bet thought
3 that Dan Sullivan was going to be supportive that
4 Diane Downs was a terrible mother. Do you remember
5 what was said on direct examination? Hugi is going
6 back and forth. Mr. Sullivan said they'd come over
7 there and look for affection, starved for affection.

8 They'd come in at 9:00 or 10:00 at night and
9 they had to have food. They hadn't even eaten yet.
10 Remember all that, out running around and not clothed?
11 It was too cold, et cetera.

12 Of course, the question at the end was after
13 cross, but Mr. Hugi said, "Do you know who the
14 children were staying with?" He didn't know. He
15 didn't know if they were staying with Steve Downs or
16 Diane Downs. Didn't know at all, hadn't asked her,
17 forgotten or whatever, but he didn't know at all.

18 In fact it's clear by Steve Downs'
19 testimony, Diane Downs' testimony and other evidence
20 that they were staying with Steve Downs at that time.
21 They were love starved because I submit they didn't
22 get it from Steve Downs.

23 But I'll submit one other thing to you
24 though. Those children knew what to ask for. They
25 knew about hugging. They knew about that sort of

1 stuff, you bet. And they knew it because they had
2 been loved and they had been hugged.

3 In fact, I'll tell you the medical
4 records -- we're going to refer to them in a little
5 while. Danny is a real huggable boy, and it's
6 reflected in the medical reports. And what I'm going
7 to do is these medical reports have numbers on them
8 that -- down at the bottom. And I'll refer to them by
9 numbers and try and give the days because it will be
10 so thick that it would be difficult for you to find
11 out what I'm talking about by leaving them.

12 I'm going to give you the date and page
13 number so what I say is backed up, and I'll refer
14 again to this part. Danny is a huggable kid, real
15 cuddly. Those specific words are used there, those
16 kind of words. Didn't get that way from being around
17 Steve Downs.

18 He got that way from being around Diane
19 Downs, and when they were apart, you bet they were
20 starved for affection. That's right. And they were
21 starved for somebody to take care of them.

22 Maybe it's with good reason, good motherly
23 reason why Diane Downs would be not too crazy about
24 having Steve Downs have the children. Maybe she has
25 some good reasons for that. Ask Dan Sullivan.

1 Who else was brought out to say she was a
2 bad mother? The source of additional information
3 actually is kind of interesting. We've got Diane
4 Downs who is just -- she's going to lie up a storm.
5 Self-serving, she's going to do whatever she can to
6 look better. But you know she's the one that says
7 that during the period two years before her divorce
8 from Steve that she was not the mother she wanted to
9 be. She's the source of that information.

10 Getting beaten, the sole response to raising
11 children. Some financial problems where she ended up
12 having to get a job, and then she's doing two things,
13 a job and taking care of the children. That would be
14 stress on anyone. She was more strict and stern with
15 the children than she wanted to be.

16 Two things from that, number one, don't let
17 Mr. Hugi and the state's imagination run away with
18 this on this. ~~That happened a number of times.~~ She
19 didn't abuse the children at all and there's no
20 evidence of that, none whatsoever.

21 She would sometimes be stern with them,
22 sometimes talk to them and shake them to talk to them,
23 and she didn't like what she was doing. Never any
24 abuse as you might think of the term as far as child
25 abuse as it relates to the papers she wrote, nothing

1 like that at all, nothing. Nothing at all, no
2 evidence. Mr. Hugi talked about something like that.
3 It's not there.

4 What are you talking about? The only abuse
5 with respect to parents is sexual abuse. That's the
6 only thing that's been referred to. She certainly
7 didn't sexually abuse her children, but I think that
8 that's real interesting from this which gives you the
9 insight into who she is, is that she was -- had enough
10 self-awareness -- she had enough handle on who she was
11 to say I don't want to be the kind of person that
12 maybe my father was or I want to make my children be
13 raised better than I was.

14 Seems like a pretty normal response. She
15 went beyond that, and she thought about it and a
16 couple years later, this and a couple years before her
17 divorce from Steve, some years later, she's in -- has
18 to write articles. She writes one article, "Dumb
19 Rules," and all kinds of stuff like that.

20 And one on child abuse, but none of that
21 abuse she's writing about -- there's not one iota of
22 evidence that that sort of stuff was relating to her
23 life at all. There's examples given of that. Don't
24 let Mr. Hugi read some general quotes. Those abused,
25 and then they abuse their children.

1 You can just run off with generalities like
2 that, and then if you do, you get taken up by that
3 without saying -- looking at what we're really talking
4 about.

5 Then that maybe draws a conclusion Mr. Hugi
6 wants you to draw. If he starts quoting and reading
7 the stuff like that, look at him. You can't say it
8 out loud, look at him and say, "Hold it. What's that
9 paper really talking about?"

10 Some mother sitting on her child until it
11 was injured or died and beatings, things of that
12 nature. None of that occurred at all. There's been
13 no evidence of that, none of that at all.

14 Steve Downs raped her, and there's no
15 evidence to the contrary. Jeff Stetson and Steve
16 Downs were there. And I guess I asked, Is this an
17 important enough case, is this important enough that
18 if that had not in fact occurred, that the state would
19 have brought them in here for you to hear, hear Jeff
20 Stetson say, "No, it didn't occur," or Steve Downs
21 say, "No, it didn't really occur." Is this case that
22 important? I suggest to you it is, if that's what
23 they would have said.

24 I suggest to you they wouldn't have said
25 that. It's uncontradicted that's what occurred.

1 Let's assume the converse. I told you we'd try and do
2 this.

3 Let's assume the opposite. Let's assume
4 that they would have said that, they would have denied
5 it. Then why weren't they brought? Didn't the state
6 think it was important enough to get you all of the
7 evidence? Either direction, it doesn't make much
8 sense, does it?

9 The sense is that she said it occurred. You
10 saw the way she reacted which gives us a lot of
11 information about her. It did in fact occur.

12 So when Mr. Hugi says Cheryl is colicky and
13 that's the reason we do something, that's not exactly
14 the whole picture. But the question you should ask is
15 why doesn't he give the whole picture?

16 We talked about his indicating -- in fact,
17 let's do that now because when we get to this I can
18 then take off the paper. But rely upon -- this is
19 Christie. Rely upon how you felt -- that's Fred
20 Hugi -- at that particular time.

21 I'm going to have a number of things after
22 that. The next thing that cannot be left alone is
23 this.

24 He indicated that Dr. Mackey said -- this is
25 in the car at the time of the shooting -- indicated to

1 you that his -- Danny's head was toward Christie.

2 Number one, even -- and Christie's
3 recollection of this is really suspect for a number of
4 reasons we'll talk about and again in evidence, but
5 even Christie says that the head was away from her.

6 I suggest to you Dr. Mackey did not say
7 that. He said when he picked up Danny the head was
8 toward the window. The reason that this is important
9 is this, and I guess I want to mention it now, and
10 we'll talk about it more later.

11 It's real important you see to the state
12 that Danny not have his back -- and that the shot not
13 come from the middle of the car. The reason is that a
14 shot from the middle of the car is almost impossible
15 for a right-handed person to make.

16 So they need to have that shot coming from
17 some other direction. I suggest to you the reason
18 that was said about Dr. Mackey is that that is one
19 indication then that maybe if it was just head in
20 another direction, it might have been made through the
21 side of the car, the shot might have been, but it
22 wasn't.

23 Mr. Pex indicated the point of entry was
24 about 15 degrees, and the evidence will show -- we'll
25 go through it -- that his feet were in a direction of

1 the middle of the car, that general direction. His
2 head was back toward the corner, and therefore that
3 bullet then comes from the middle of the car and the
4 seat back in his direction.

5 Just simply -- don't let what he's indicated
6 settle there for awhile, and that's the purpose for us
7 talking about it right now.

8 He said, "Can you imagine how difficult it
9 would be for Christie to, you know, be shot and then
10 wake up in the hospital knowing her mother did it, and
11 all the fear and apprehension she must feel?"

12 I suggest to you that Mr. Hugi has not
13 reviewed the medical reports. Again, we're going to
14 answer him, his general statement with facts.

15 Can you believe how difficult it must be --
16 hospital -- the fear and apprehension she must have
17 felt?

18 The other thing is this, and this is Exhibit
19 1, her flannel shirt. He told you in argument that it
20 was Mr. Pex's testimony that on the edge of the shirt
21 there was -- he said high velocity or some droplets
22 there that may be high velocity or transfer blood, but
23 he couldn't say one direction or the other.

24 I'd ask you in your recollection is that
25 what Mr. Pex said? I suggest if you check your notes

1 and go back that is not what he said because that
2 leaves it right up in the air.

3 The other stuff he said, Mr. Pex did these
4 tests and you get a certain amount of spatter back
5 when he was doing a particular test. That I suggest
6 to you is not really the relevant one that we'll talk
7 about later, but it was against a sponge and he was
8 doing some testing.

9 Even that would come back to his sleeve and
10 on his hand. But do you recall Mr. Pex said something
11 more? He said that what was on the sleeve, number
12 one, was definitely transfer blood. He definitely saw
13 transfer blood. That's on the record. In addition to
14 that, there were a few droplets that may be transfer
15 blood or may be velocity blood.

16 I submit to you that's much different than
17 Mr. Hugi saying there are droplets there, and that's
18 all that's there. And it may be high velocity. It's
19 real consistent with it, and it may not be.
20 Obviously the inference is you can't tell one from the
21 other. It's a toss-up.

22 What can you tell us either direction is the
23 fact that there was in fact transfer blood there. And
24 of course what had occurred when Diane Downs was going
25 to the hospital getting her kids there as fast as

1 possible. She's also doing other things too.

2 One particular time she thinks she's going
3 to pass out, and she uses her legs to hold onto the
4 steering wheel. And she reaches back to try and help
5 Christie who she hears choking so she'll be okay.
6 Transfer blood, you bet. You bet.

7 This also ties in with Joe Inman also.
8 There are some specific facts that haven't been talked
9 about at all yet really very much that support this
10 too. We're going to talk about it in my Joe Inman
11 group or column.

12 Why doesn't Mr. Hugi talk about the fact
13 that there was in fact transfer blood there, I ask
14 you? Why won't he mention it? Why do we have to
15 mention it? Why do we have to be the ones that bring
16 it up?

17 Because if it's mentioned only part of the
18 stuff, then you start subconsciously or consciously
19 going a particular direction. But if you talk about
20 everything, it puts it back in perspective and
21 hopefully that's what we're doing.

22 It's work, and we wouldn't have to do
23 this -- I wouldn't have to take all this time to do it
24 if all that had been talked about initially, if
25 Mr. Hugi in his closing had said those things.

1 He either knew or he didn't. In all due
2 respect, he may have forgotten that Mr. Pex said that.
3 That's fair. There may be some things that may
4 indicate that he may have been confused or may have
5 forgotten something. But if he didn't forget about
6 it, then it's done for a reason that is not very
7 complete and real subject to drawing improper
8 inferences.

9 But it does make sense though. If he knew,
10 then at the conclusion for him to say Mr. Jagger is
11 going to stand up and give some explanations, he's
12 going to explain this stuff, I suggest to you that he
13 knew he had left out the transfer blood. You better
14 believe he knew I was going to have to add that and
15 explain that. But it's not my fault that I had to
16 explain that, not at all. It's not my fault I had to
17 spend the special time to talk about that.

18 This particular shirt though -- and let's talk
19 about it right now for just a second. It goes along
20 with some other things, but since we're here let's
21 talk about it for a minute real briefly.

22 That car had blood spatter every place,
23 absolutely every place. Do you remember it was
24 luminoled in the back seat, the back of the seat, the
25 side, around in this area and the back of the

1 passenger front seat?

2 The places they didn't luminol are pretty
3 important too, but we'll talk about those later. It's
4 all over the ceiling, the back windows, the side
5 windows, all over the place.

6 And combined with that you had the situation
7 with respect to Christie's shot and the shot with
8 respect to Cheryl. You had more -- this is Pex -- he
9 came back three or four times, but he didn't come back
10 after Bart Reid last testified, did he?

11 I'd suggest it's embarrassing that all of
12 the tests that he did with anticoagulants then it is
13 when you use the real McCoy.

14 Didn't come back later, but the thing he did
15 say even when he came back from one session to another
16 that he didn't back off because he came back.

17 We talked about the blood spatter that is
18 back spatter or with respect to Christie that in fact
19 went up. You're going to expect more coming back at
20 you.

21 More is going to come back at you, and this
22 is one piece of evidence that I submit is probably
23 better than just about anything because you know
24 something, Diane Downs was wearing this and another
25 shirt, a blue shirt.

1 She was wearing it. In this big search,
2 they didn't find any other shirt she was wearing
3 someplace. Heather Plourd said that she was wearing
4 something else, switched a shirt or something like
5 that. You bet she was wearing this stuff. Diane
6 Downs was wearing this stuff.

7 Couldn't talk about it during the trial.
8 Can't raise inferences, but believe me, I was dying to
9 do it. She was wearing the stuff.

10 We've got pictures showing the spatter on
11 the back of the car, and you'll be able to see it
12 better when you get back in the jury room. It's all
13 over the ceiling of that car, all over. And that
14 ceiling of that car is 32 inches above the seat.

15 We know -- for some reasons we'll talk about
16 this in a little while -- we know for some reasons
17 that Christie was lying down on her side. She was not
18 sitting up as she said. So subtract a foot, leaves us
19 20 inches.

20 And we know that you get more coming back
21 flying at you than going up because of gravity,
22 because of the directionality of the back spatter.

23 And I'd ask you -- what's more than 20
24 inches, close to two feet. I ask you, how far is
25 your hand back from a wound to Christie, to Cheryl, et

1 cetera? I suggest you're looking at two feet. You're
2 looking right back at that arm. You're looking back
3 at the clothing.

4 Whoever did this got in the middle of that
5 car, turned and shot at Danny and Christie, and
6 they're right in the thick of it, right in the middle
7 of the car that had blood going all over. Blood was
8 found almost everyplace in the car, door, ceiling, all
9 the way around.

10 And yet this shirt showed nothing. Diane
11 Downs -- on the shirt she was wearing it had a stain
12 on it, et cetera, nothing. Clothes had been taken,
13 jeans, nothing.

14 How could it have happened? For her to do
15 such a crazy, crazy thing, that's not normal. You're
16 dealing with a crazy person. You're dealing with
17 somebody on drugs or crazy. That's as unnatural as
18 something against nature as just the most incredible
19 thing if you really think about it. If you think
20 about it, huh-uh, nothing.

21 When Mr. Pex is on the stand, he talked
22 about different ways you test, microscope, all kinds
23 of things. He talked about luminoling the inside of
24 the car to bring up other things you might not
25 otherwise see. Luminol works on the different parts

1 of the car, clothes. I specifically asked him about
2 clothes too.

3 I suggest to you if there was any blood
4 spatter on her clothes anyplace you would have heard
5 about it, but you didn't because there was none.

6 And the reason that there was none is
7 because she didn't do anything wrong except to react
8 in a way that you might expect. When you've taken the
9 time to listen to her for three or four days on the
10 stand -- and it took some time to listen so that you
11 understood the kind of person she was and who she was.

12 And I'd suggest to you nobody took the time
13 until this particular trial because everybody else had
14 other reasons for talking to her.

15 They had reasons of going ahead and
16 confusing her and going ahead and working on her.
17 They lied to her. Did you know that they lied to her?
18 Doug Welch, they lied to her.

19 They knew about the -- Norm Hilliard. Some
20 people saw this person who she had described out at
21 the scene, the situation about the yellow car. What's
22 the lie? I'll tell you what it is. Because that's
23 the heart of it.

24 They had her in the corner. On the tape
25 she's talking about -- she's sitting down. There's a

1 male sitting there talking to her. Another male is
2 pacing back and forth. Remember the reference to it,
3 back and forth for four hours?

4 She had already began to doubt what she knew
5 was true, and we'll go through that. But they lied to
6 her. They had their own reasons. They said to her on
7 tape, "Hey, we checked out that guy. We checked that
8 guy, Diane. You say you saw him there walking down the
9 street. It's a lie. He couldn't have done it. We
10 followed it out. No way. We've checked it out."

11 They hadn't checked it out at all. They
12 lied to her. She had every reason to believe what
13 they said was correct. You shouldn't be lied to.
14 They lied to her.

15 Yellow car, you might have seen it out there
16 but it was someplace else. Did you hear any evidence
17 it was someplace else during this trial? No, not one
18 bit.

19 The only -- someplace else you heard
20 testimony about it was John Hales who saw it up in the
21 woods. And this person was sitting in a yellow car
22 who was similar in description to the person that
23 Diane had talked about. Yet they're pacing back and
24 forth, working her over for a purpose, not simply just
25 to elicit information. They had a purpose, and they

1 had that purpose since day one.

2 They lied to her at the heart of what she
3 was saying. She believed this yellow car existed and
4 this other person was there, and they said, "Hey, we
5 checked it out. It can't be so, Diane. What you're
6 saying is impossible."

7 And some of the other things that were
8 happening at that time, and I'm going to write it down
9 on paper so Mr. Hugi can approach it and talk about
10 it. It's not surprising that she started having some
11 real doubts, real concerns. They lied to her. But I
12 suggest this sort of thing you see doesn't lie. This
13 sort of thing you can't trick, you can't lead. It
14 doesn't have a purpose. It doesn't mean to get
15 somebody in trouble if they're not really in trouble.
16 Nothing, nothing on either snirt, nothing.

17 Why did Mr. Hugi say on the shirt there was
18 something consistent with high velocity blood spatter
19 or maybe transfer and didn't mention there was in fact
20 transfer there? I suggest to you it's because the
21 transfer being there is consistent with what we've
22 said all along. She's not involved. She was helping
23 Christie for awhile. She probably got it then.

24 This is one other thing that's interesting
25 when you look at what Mr. Hugi is saying and really

1 think about it. It doesn't make sense because -- and
2 this is one other thing that's real important. You
3 can't be left to simply set there in your mind after
4 you've heard it without some real looking at it.

5 It's this, he says Diane Downs said she
6 couldn't give the children to somebody else because --
7 Diane Downs has said that if she wanted to get rid of
8 the kids she could have given them to somebody else,
9 so he's got to answer that, and he's got to answer
10 that pretty convincingly.

11 So his response to that, which we heard, was
12 this, that she wouldn't have given them to Steve
13 Downs because she didn't want him to have them. And
14 in addition to that, it was that he's not a very good
15 father. He would mistreat them and probably harm
16 them.

17 The other thing was, she wouldn't want to
18 give the children to the parents or at least the
19 father. There's no question that she and the mother
20 maybe had some growing up problems, but there's a
21 pretty -- closeness there that's pretty evident.

22 But as far as the potential problem there
23 for sexual abuse, that you wouldn't put them there
24 because there might be some other harm caused to the
25 children and so she shot them.

1 You see, he's talking out of both sides of
2 his mouth. He's saying she wouldn't have left the
3 children with Steve because the children might have
4 been harmed. She wouldn't leave the children with the
5 grandparents because the children might have been
6 harmed. So she harmed them. It doesn't make any
7 sense.

8 But I suggest maybe you didn't think about
9 that approach when he said it because when he said it,
10 it had a ring to it. But when you think about it,
11 that's baloney. That's ridiculous.

12 She gave them to Steve. Steve had them the
13 months before. It just doesn't make any sense, not at
14 all, not with close analysis of it, not at all.

15 THE COURT: Excuse me, counsel. I think
16 we'll break here. We didn't take a morning recess, so
17 I think we'll break here. We'll be in recess until
18 1:30.

19 (Noon recess.)

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LANE

COURTROOM NO. 3

GREGORY G. FOOTE, JUDGE

STATE OF OREGON,

Plaintiff,

vs.

ELIZABETH DIANE DOWNS,

Defendant.

Case No. 10-84-01377

TRANSCRIPT OF PROCEEDINGS

Tuesday, June 12, 1984

VOLUME 22

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I N D E XPage

Defendant's Closing Argument

2

1 get that evidence out of the locker.

2 And then is it just a coincidence or maybe is
3 there something that we don't know about when Detective Tracy,
4 later on, says, you know, he's not going to talk to me. Not
5 going to talk to me. It's interesting to note they are not
6 going to talk to Detective -- Burks indicates they have talked
7 to people there at the Sheriff's Department. Rutherford wasn't,
8 didn't want to, although he wasn't part of the meeting. But
9 he was also the person at the scene, remember?

10 Charbonneau was suspicious. He briefed
11 Rutherford. Rutherford briefs Tracy. Rutherford at the
12 scene.

13 It's also interesting to note that, at the
14 meeting, of course, it's Sheriff Dave Burks and Sergeant Hintz
15 and Dick Tracy which -- Tracy tells us that he's told by
16 Dave Burks not to talk to us. Suggest he's trying to pass the
17 buck.

18 Sheriff Burks never said that. They did
19 discuss, apparently, whether or not it was appropriate to do so
20 or not. And I wonder why they had that conversation. I wonder
21 why Sergeant Hintz was involved. I wonder why it is that Doug
22 Welch, the person at the bedroom, the one who also has
23 information to give who might give information at that time
24 that, "Hey, they are all copper-wash, at that time, that
25 I remember", when I tried to contact him through the

1 Sheriff's Department, Sergeant Hintz is the one that stops
2 it. Says, "No way. I'm not, not going to leave a message.
3 No way. Not going to do it. Not talking to him."

4 At that time there was no reason for us --
5 at least, we thought -- to talk to Sergeant Hintz. I submit to
6 you I, if I tried to talk to Sergeant Hintz at that time, he
7 would have said, "No," too.

8 Why is it just those people wouldn't talk?
9 And why in that kind of an order? Why? Dave Burks.

10 By the time -- You see when they turned
11 them over at 6:40 to Jim Pex, Mr. Hugi says, "Well, what if,
12 out at the scene, they have caught somebody." By 6:40 the
13 nextday -- well, in fact, they actually -- Let's go back to
14 the very beginning -- May 19th, the evening. They didn't think
15 they were going to find somebody. They thought the person
16 involved was Diane Downs. Certainly, by the next afternoon,
17 they hadn't caught anybody out there. So that kind of an
18 excuse just doesn't really hold any water -- whether or not
19 they used the same envelope or different envelopes. You know,
20 probably the same envelope was used. Real easy to open them.
21 They are opened and closed many, many times.

22 The other thing that's concerned is this --
23 the keys. "1", here, would be the persons not speaking. And
24 when we -- Rutherford, Hintz, Tracy -- and the Tracy indicating
25 something that's not true as far as who, you know, if he was

1 told or not. Suggest that may be a little bit like, you know,
2 on Diane Downs didn't say anything flip -- "Don't remember
3 anything like that when she was with me." You know, just
4 doesn't hold water.

5 Detective Tracy, more than anyone else, has
6 made some, had some real problems getting something particular
7 straight. He, we have the conversation, the four-page
8 conversation. And he now says that Diane Downs was talking
9 about Mr. Knickerbocker all the time. We know, in going
10 through there, there wasn't any subject matter about
11 Mr. Knickerbocker. We submit that his name was -- no way
12 it would fit into that conversation. Absolutely no way at
13 all.

14 The keys. He, Charbonneau testifies that he
15 got the keys to the car from somebody who appears to meet
16 Tracy at 11:40. John Peckles. And -- go back and check your
17 notes -- John Peckles indicated, 1:30, got the keys from
18 Tracy. We've already talked about the receipt. We have more --
19 let's put this one under "bullets," "A" and "B". And they
20 are these right here (indicating).

21 This is the -- and the one we have over
22 here. Do we have some indication that the lead bullets were
23 put in last, if they were put in the rifle at all? Yes, we
24 do. Uh-huh. We do. What is it? Well, do you remember,
25 we had some testimony and some confusion, whether it was

1 confusion or not or just Doug Welch, what, Mr. Tracy, talking
2 among themselves, officially, and finally have it pretty
3 straight, as far as their recollections are concerned.

4 But we know that a shell is apparently
5 ejected at the very start. One of the first ones down in of
6 a load of shells, first one down at the bottom of it is
7 going to be worked through the extractor. And it looks like
8 either that one or the second one because, you know, they
9 indicate later on that, to cover both directions, they
10 dump out all the shells out, and another one has worked
11 through the ejector. So either the first one -- and one of these
12 is picked up and the other one is, apparently, is left.
13 It's funny that, if they both remember at the time so well that
14 there were two that got ejected, why didn't they look for
15 two on the bed?

16 You know, we had some confusion about, well
17 you know, maybe just one time, maybe it was beginning and
18 ending. I suggest to you, if they knew that there had been
19 two ejections of bullets under the bed, they would have
20 picked them up. But they didn't. They only picked up one.
21 And that detectives -- you know they have twenty years, one --
22 how many, the other one? How careful are they being? Or
23 how difficult it is to recollect something that maybe
24 doesn't quite sit right? But we know the first or second
25 bullet -- Then, if we accept that was a copper-wash, a "C,"

1 we know then that there either were more copper-wash behind
2 it or there were two lead bullets in behind it. So we know
3 that the copper-wash were the ones in the rifle.

4 But we don't have to just stop there.
5 Because of this, we know -- You know, the other thing they
6 may say is this: They may say, well, what happened is this.
7 Diane Downs doesn't use the pistol very much. You know, she
8 really does not. And, in fact, there really hasn't been very
9 much testimony that anybody has used it very much. So what
10 happened is this: They get the other bullets in the pistol.
11 And they have remained there. They have just stayed in the
12 clip. They have stayed in that, in that pistol. Do we have
13 some evidence? See, no testimony -- Once again, we'll use
14 the exhibits. Do we have some testimony as to what kind of
15 bullets were in that pistol, above the ones that the Downses
16 had before? Yes, we do. And that is this one (indicating),
17 because you'll recall that, prior to this, Diane Downs went
18 into the bathroom and fired a shot, for whatever reason --
19 it's not important -- fired a shot into the floor of the
20 bathtub, and it was retrieved. And do you know something?
21 That bullet was not a lead one, was not the dark-colored at
22 all. It was a copper-wash -- the gold one, that gold bullet.
23 That's what they had used in the pistol before.

24 We've got concrete, absolute, uncontradicted
25 proof of that.

1 Did Diane Downs go out and buy six or seven
2 or eight or nine lead bullets? Don't have any testimony about
3 Steve Downs or anybody going out and buying any lead bullets.
4 You've got the lead bullets before or the copper-wash before, and
5 then you got a, in Oregon, you got the ejection and the copper-wash
6 bullets, too. You've got the copper-wash bullets before and you've
7 got them after, but you've got two lead bullets kicking up
8 right out of nowhere.

9 Why is it that the, why is it that the man
10 who shot Diane Downs' children and Diane, why isn't it that
11 he turned around -- Why didn't he just turn around and finish
12 them off? Diane threw the keys -- Sometimes, you know, you
13 get, you may think, "Why didn't you just scream, sit down and
14 scream" or "Why didn't you run off in the bushes" or, you
15 know, run over and throw herself over one of the children?
16 Who is to say what causes you to do what you do?

17 There are, every week or every day you see,
18 you know, strange things happening. Just so many odd things
19 occur. People do things differently sometimes in a situation
20 than you expect. We can't figure people out. You just do it.

21 But to have her -- Then, to look at it in
22 hindsight, I suggest, is a little different than when you're
23 involved in it. She did that. But the point we're getting
24 at is that why didn't the person turn around and then shoot
25 it some more? Suggest to you because he didn't have any more

1 bullets in his clip. Either two had misfired and had worked
2 through the extractor of the weapon to be found in the car or
3 at the scene or whatever -- you see all those things, if you
4 work with them. And you see, if she did it, is it consistent?
5 Is it consistent if she didn't? Those things didn't fit.
6 They are real important things, real logical things, devoid
7 of emotion -- just strictly dealing with it logically.

8 Before and after, no testimony of the
9 observation of what kind of bullets were there. It was
10 interesting to note how -- You know, we talked about how easy
11 it is to go into that rifle, little hole there. You can
12 flick two bullets in like that.

13 Asked Detective Tracy, you know, how do you
14 put the bullets in there? And he takes it out -- doesn't
15 seem to have too much trouble, there, showing us how to work
16 it.

17 But, boy, it's really interesting, though.
18 After a while, then, starts coming back time and time again,
19 to, to explain additional things after they have talked to
20 Doug Welch or whoever. It's interesting to note that this
21 detective of twenty-plus years has difficulty with this
22 simple .22 rifle. Is it the first time he's had a case
23 dealing with a .22 rifle that he has to load in a cylinder?
24 I suggest no. I suggest that's laughable. That's real
25 laughable.

1 And yet, you know, you saw Doug Welch, other
2 people come in -- You know, he said you can put that down
3 as the word "familiar" -- the word "familiar." Boy, was that,
4 did that become such a word. You talk to my kids about the
5 word "awesome" and stuff like that. I, I used it a while ago.
6 You pick up these things because you deal with people and
7 they use words.

8 Remember, do you remember the word "familiar"
9 used by Detective Tracy and even Detective Welch? And
10 Detective Welch says they didn't appear they looked real
11 familiar with the weapon. And so he did certain things.
12 Detective Tracy did, said the same thing: "I was not," he
13 was not familiar with the weapon -- and Doug Welch.

14 Number one, I suggest it's laughable that
15 he didn't know how to operate that; and, number two, it shows
16 what occurs if you have, have a recess and they get back and
17 talk about it. And I suggest that Mr. Welch is in good faith
18 about that, but there are some holes there. Why is it, why
19 is it that Detective Tracy, more than any other witness --
20 we'll deal with Diane Downs later on -- any other witness
21 said so many things that were contradicted by other people?
22 Why?

23 He said that, he said that I, you know,
24 "Dave Burks told me not to talk to you." It's not true.
25 Dave Burks did not do that. He said that, "I talked to

1 Jim Pex about fingerprinting the casings." Jim Pex said,
2 "No. No, we didn't. We didn't talk about that. No."

3 Of course, it's important for Detective Tracy
4 to have talked about something like that because of the
5 partial fingerprints you can get on casings. If she had
6 placed those casings in there, you might have a partial print --
7 nothing you can make positive I.D. out of, because you need
8 to have a certain number of points to make a positive I.D.
9 But you may have been able to make enough points to show a
10 partial. You might have been able to come up with enough
11 points for an expert to say -- Do you remember? You need less
12 to exclude people, to exclude Diane Downs from prints on
13 those two casings.

14 Bullets go out on the bed, put into an
15 envelope. Has to be done carefully -- put in the envelope.
16 Detective Tracy must have been taking the position he didn't
17 touch the casings with his fingers, because he talked to Jim
18 Pex about taking fingerprints -- or just maybe he didn't
19 really talk to Jim Pex about that..

20 Maybe it's the situation of detectives
21 being people, somebody being caught up in a case that was
22 incredibly unusual and reacting unusually. It does occur.
23 It might be that, instead, what happened is he realized what
24 had happened and, yeah, you talk about fingerprints. But it
25 didn't happen. Why is it that he says that -- and other people

1 say -- "No, we didn't talk about that"? It's not just that,
2 "Of course we talked about it."

3 He says, "We talked about Mr. Knickerbocker."
4 But his own report counters that. No conversation about
5 Knickerbocker. Dave Burks disagrees. Jim Pex disagrees with
6 him. His report disagrees with what he says.

7 I would submit to you that a witness who
8 is false in part of his testimony, you should perhaps be
9 suspicious of some other parts. Why is it that this same
10 thing didn't happen to Burks and Welch and everybody else?

11 The other thing that's interesting to note
12 is, while we have Diane Downs' statements of probably, what,
13 maybe 20 to 25 hours worth of her conversations with
14 detectives and people -- and we would point out some different
15 things, there, and we'll talk about this specifically with
16 respect to Detective Tracy -- we had a conversation with
17 him of five percent of that, maybe. And yet you see what
18 happens here, how many inconsistencies, what might have
19 occurred had we talked to Detective Tracy for 25 hours,
20 maybe three- to five-hour segments, different times. Why?

21 The, the thing that may give some insight
22 into that is this -- we'll mark that "11" over here, I guess,
23 and make a kind of a double, triple start, here.

24 Do you remember Sergeant Hintz and Detective
25 Tracy are the ones in the meeting with Dave Burks, not John

1 Peckles. John Peckles was the one who had allowed the
2 evidence to get into the locker but was not the one who
3 allowed it out. But he is still the one that works in the
4 Sheriff's Department all the time. And you recall that the
5 evidence shows I went to talk to John Peckles, asked him if
6 he would talk to me. John Peckles -- same department, there --
7 has an idea -- You work with people, you know something, when
8 something is amiss -- you can sense it -- because his reaction
9 is a real interesting one. We asked him if he will talk, and
10 his reaction is, "Sure. I have nothing to hide."

11 I never asked him if he had something to,
12 to hide. Just asked him if he would talk to me. That's all.
13 Why did he say that: "Sure. I have nothing to hide"? Who
14 does? Who did have something to hide that he might have been
15 aware of?

16 You know, when you start going through,
17 you say what occurs, the likelihood that that would occur -- the
18 randomness of the two lead bullets in there. The bullets in the
19 pistol, before, we know was copper-wash. We know that the rifle,
20 in the inside, at least one of the first two in the rifle, were
21 copper-wash. The casings, as far as nine in the clip, seven
22 shots, two would have been remaining, either misfired through
23 the extractor -- whatever. Seven plus two is nine.

24 If, if there were, Diane, with a full clip,
25 you're going to finish them off. Same with the man, too,

1 if he had nine there -- finish it off, too, unless some
2 misfired.

3 The not talking? Disagreement with other
4 people? And then John Peckles would go there and say, "Sure.
5 I have nothing to hide." I guess, again, I guess what you do
6 is you use that formula we've talked about before, and that
7 is: Would you act upon that testimony -- Is that of sufficient
8 weight that you would act upon it in the most important of
9 your own affairs? And I ask you to just go ahead and do the
10 same thing again.

11 I mean, Detective Tracy says, "I know I
12 didn't do it." And you've got copper-wash -- this and not
13 saying stuff that other people say. You're not telling the
14 truth, Detective Tracy. They say one thing and Tracy said,
15 "No. That didn't happen." Then I ask you if what he is saying
16 he did or said is reliable, then.

17 Would you plunk down your life savings for
18 a house on that kind of credibility? And I suggest to you
19 you would -- as the instruction you're going to hear say --
20 you would hesitate. No. There has got to be something there.
21 Why?

22 There is one additional thing, one additional
23 thing that we haven't talked about. And this one, again,
24 is a double-star situation (marking). This is "12."

25 Detective Tracy was -- he was being

1 examined by me, if you recall -- was incredibly vague about
2 that next day, where he was. Do you remember that? We've
3 talked generally about that during the period of time between,
4 well, May 20th -- and that's the time that he has access to
5 these bullets -- on wherever he is, first of all, you know,
6 from that morning until 6:40 that evening when it's turned
7 over to Pex. First of all, he's incredibly vague. He doesn't
8 know what he was doing.

9 And then we have a recess. He comes back --
10 or maybe it was the same testimony. All of a sudden now he
11 remembers specifically that he went out to the scene once.
12 In cross-examination of Detective Tracy, we say -- do you
13 remember? That was the initial cross-examination -- "You
14 became aware or didn't you, Detective Tracy, about the
15 ballistics results later on" and we went through what he
16 became aware of and stuff right afterward. He said, "No, no,
17 no, no, no." And Fred Hugli brought him back later on and
18 then, all of a sudden, he has a miraculous recollection of
19 everything. He goes through specifics. Says, first week, the,
20 got results back from the extractor marks of the crime lab,
21 got blood splatter back. June 1st was grand jury, June 6 was
22 juvenile. June 27th was something else. June 15th was Joe
23 Inman.

24 Now, here's what the kicker is, is, yes,
25 all that came back. That's right. All the stuff that you

1 have heard in this trial, except for cross-examination.

2 The blood splatter evidence. Diane Downs
3 had given some statements to the police. The ballistics
4 evidence. Later on, she, you know, they became aware that she
5 was, knew where the children were.

6 And then let's look at this and think for a
7 minute. Blood splatter. Ballistics. Diane knows where the
8 children are. The children are loose. If Diane did it, they
9 are subject to being injured again -- you know, kill off the
10 rest of the witnesses, that kind of an approach.

11 But what a risk. I mean, if you know
12 someone did something, to then allow that risk to continue
13 that those children might be killed, what an incredible risk
14 to take -- although the evidence, though, indicates that she
15 was not arrested, accusation was not made -- well, the arrest
16 did not take place until January or so.

17 So here we have May and first part of June,
18 over here (indicating). We got a time at least going over
19 here to January or February. Okay. And you've got, you got
20 May and June right here and get ballistics back, the stuff --
21 lead bullets, copper-wash, blood splatter -- which we haven't
22 talked so much about yet. May and June go. He goes on,
23 throughout. Knows that some of the person, people they think
24 did it is loose and the children are vulnerable. Juvenile
25 hearing, finds out she knows where they are at.

1 And yet we go through the rest of the
2 months of the year, the rest of the months of the year of
3 taking the risk.

4 I suggest to you that that's because there
5 was, perhaps, someplace, still doubt. And I suggest that
6 there should have been. I suggest to you maybe some people
7 didn't act upon that before because perhaps some people knew
8 that they shouldn't.

9 Mr. Hugi may say they were waiting for
10 Christie Downs to say something later on, which occurs the
11 latter part of the year. But, you know, what an incredible --
12 the risk to take, if you think, if you think you know, beyond
13 a reasonable doubt. Suggest that maybe some additional
14 evidence -- that that's, there is something else there.
15 Something may be there that we don't even know yet. Maybe
16 that they knew what Paula Krogdahl had been doing with
17 respect to Christie. Maybe they knew something about the
18 substance of conversation with Dave Burks and Richard Tracy.
19 Something just, just doesn't sit right.

20 So we've got the ballistics before and
21 after. You've got the statements of Mr. Tracy. But there is
22 an agreement -- other people, John Pex's statements --
23 actual actions of people, in short, showing perhaps the
24 credibility of that kind of information.

25 The next thing I want to talk about would be

1 that concerning the blood splatter. And let's go ahead and
2 get started on that, and maybe we can finish that today, if
3 at all possible.

4 The theory of the State, of course, is that
5 one of the shots took place outside. The, I think some --
6 Probably where that occurred, initially -- Well, two things
7 occurred. One is that Pex -- he just missed it, flat out
8 missed it on a couple of points. He flat out missed it, as
9 far as seeing the blood on the bottom of the sleeve of the
10 postal sweater. He missed that.

11 And the next thing that occurred was the
12 situation of Mohawk. He saw some blood splatter outside the
13 car. But do you remember what was happening with respect
14 to the Mohawk School? Right at the very start reported some
15 blood out Mohawk School. And, obviously, the indication, the
16 thought right at the start is, hey, someplace else -- you
17 know, must have happened someplace else, and no other
18 explanation of how the blood got on the side of the car --
19 because he missed the postal sweater. Just totally missed
20 it. But checked the Mohawk School and nothing pans out with
21 respect to that.

22 And, for all the reporting done on things,
23 no blood anyplace else that's ever reported at all. And,
24 presumably, it's got to be around the street, because it has
25 relationship to a vehicle. I mean, Mr. Hugi may say there are

1 other roads around here, but I submit to you that these roads
2 were checked; and, number two, you take the number of man-hours
3 on searches and things of that nature, you bet we can, I
4 submit, assume that there is a search of some other roads
5 and some other areas around there.

6 And it had to occur on a vehicle because
7 of the vehicles involved. So their theory, I submit, doesn't
8 hold a whole lot of weight there. But, you go in the
9 direction, how they are going initially, there, and they get
10 some reports, and they are checking those things out.

11 Jim Pex then gets that evidence. Part of
12 this blood splatter evidence we're going to talk about here
13 will be dealing, a couple of times, with some other things
14 that will be coming up.

15 One is, as a result of the Mohawk School
16 situation, we have some interesting things that have occurred
17 in their theories. One is they have work done everyplace --
18 let's see. Oh, here it is -- work done everyplace, trying to
19 get a gun that, apparently, has just simply walked off,
20 with as thorough a search as you can possibly do, and were
21 not able to find anything.

22 I suggest to you what happened is that those
23 guns didn't walk off -- or that gun does not walk off by
24 itself; it walked off because somebody carried it off. And
25 that was the person that has been described by John Hales,

PET. EX. 11

1 Hilliard, Diane, et cetera. And the person has never been
2 contacted, never been found. That person has never been
3 found -- ever. Ever. Just threw the gun off. He just says
4 "threw it off." Well, they checked up and down within the
5 vicinity.

6 Did Diane Downs take off running down to
7 the water or take off running to bury it someplace like that?
8 We know for a fact these are the shoes she was wearing. Jim
9 Pex tested them just as good as he tested everything else she
10 was wearing and everything else around.

11 Do you remember, we already talked about
12 the shirts -- nothing there. Also indicated he found nothing
13 of any value at all with respect to the shoes. Nothing. Any
14 scrapes, any substance, any mud, any tracks, anything --
15 nothing at all. Nothing.

16 We do know, though, and we've talked about
17 this briefly, so I'll try not to repeat some of this. We
18 know he did some testing as far as the source of the blood.
19 We've talked about the pictures, how they came back. The
20 blood stains on the doors, he's only taken one, not the rest
21 of them. And he has the tadpole drop that comes back in a
22 different area than the other stuff.

23 I submit that it's more logical that --
24 because he has shown they come from different sources,
25 different locations -- that they come from basically a

1 situation involving the sweater. We've talked about it, since
2 it has been so abused, as far as cleaning the sweater, the
3 things of that nature.

4 Let me indicate the, what it appears
5 occurred. The bottom of that car, we're looking -- The
6 bottom of the car, here, and the door being opened -- In fact,
7 in fact, if you look carefully, you can even see some of the
8 additional blood droplets in this picture, even though the
9 direction is a different place. You can, you can see different
10 blood there, some smears. Some other parts of it that you
11 can't really see blood, but you can see other droplets, even
12 there, from this picture.

13 But the important thing to look at here is
14 we have the blood down here. There are some other pictures
15 that show it's even more pooled. This is much later, where
16 it's a red portion around it -- much more of a less coagulated,
17 perhaps, appearance. But you have at least a location of
18 that being over in that particular corner.

19 Now, I submit to you what occurred -- which
20 is much more logical, as far as the facts, and then we'll
21 test them with what was discovered by the investigators --
22 is that then they go out on the scene and, well -- or Diane
23 Downs, everybody is going out. We have had the run, this
24 lapse of time, little path.

25 Diane Downs goes up Marcola

1 Road, Sunderman Road. She comes to the corner up there and
2 doesn't just turn around and comes back; she stops there
3 because -- in fact, it has to occur there, has to be a stop
4 there because Cheryl gets down to the floor, and there is
5 some movement with respect to the sweater. She may have
6 pulled it up there. But there is also some tucking-in. We
7 know that this may have been tucked in underneath there. And
8 I'll get to you why in just a second.

9 The, they are up there at the corner -- In
10 fact, she had indicated, long before, to the officer, the
11 detectives, and it was not refuted, that she indicated to
12 them that, up at the corner, she had talked, they had talked
13 for a while up there. They just had never talked specifically
14 about what had taken place up there. In fact, even, if you
15 will recall, when they did the trip with Doug Welch and
16 Detective Tracy, there were some conversations at that time
17 that they were going faster, at one point, and they slowed
18 down at a number of other points -- more than one. They were
19 going -- let me -- Have that just reversed. They were going
20 too slow, at one time. I'm sorry. And she said to speed
21 up. But there was more than one situation where she had to
22 tell them to slow down.

23 There were some other vehicles on the road,
24 and they didn't want to be an impedance. Went to the top
25 and turned back down. They hadn't even explored what occurred

1 up there. And it's important not to fault Diane Downs for
2 that because, as you recall, the witness that testified about
3 that -- Doug Welch -- indicated that they did not indicate
4 to her the purpose for, the entire purpose for their going
5 through that. There was no way for her to know that she
6 should indicate more specifically what had occurred up at
7 that particular area.

8 But she had told them before that that,
9 in fact, occurred. They got there at the, there. They
10 stopped. Christie -- checked Christie and a little bit of
11 Danny -- basically pretty much going to sleep. And then
12 Cheryl goes down in to the, into the floor. She's able to
13 sleep down there.

14 And I suggest that she curled up in this
15 kind of an area, maybe more on her left side, in that area,
16 which is something you might expect -- instead of a child
17 curling up, facing the front, her back more towards the seat,
18 you might expect them to go in there and curl around that way,
19 with her face more towards the back with, then, this like
20 this (demonstrating) and probably being curved.

21 And you probably have -- then you have this
22 sleeve under there, Diane then also tucking it in so that
23 she's basically warm.

24 Now, there has been some indication by
25 Mr. Hugi, in his argument, that a person couldn't see that

1 there was a child there. It's pretty clear that you could
2 see a child down there -- real clear -- head, there is a
3 portion of the legs, the arms. The child is much bigger than
4 the postal sweater. That, you can see. It's, that's not a
5 correct assumption.

6 What occurs, then, is he, he's in the car,
7 and either the first or second shot inside the car goes in
8 this direction (indicating), right here. And we don't know
9 but that that occurred either with either one of these because
10 Mr. Pex has never luminolled the inside of that vehicle, never
11 searched it for blood splatter. You never heard it from him
12 once, even though he kept bringing it up, kept talking about
13 these occurring inside. The blood splatter is from out there.
14 Never indicated that they found the blood up there in the front
15 of the car. Never even looked for it.

16 If they looked for it, you know, they may
17 have found it. Maybe they did. We didn't have Mr. Pex come
18 back the last time.

19 What occurs is she is, then, shot. And at
20 that time she then maybe rolls up, because there is pain,
21 either in here or this side -- rolls over. And at that time
22 it would be pulling, then -- I'm not doing this very well.
23 It would be pulling this across, over, further. But it still
24 is underneath her. Okay.

25 Now, there are different ways that this could

1 occur. If you have -- done it one particular way, here. If
2 you have a -- The reason, the reason I wanted to do this is --
3 the way I was doing it right then -- if you can see, I want
4 to get around this way -- Real important.

5 If you have it this way, where the holes
6 are lined up with the sweater and they have a sweater across,
7 underneath, the sweater is too far over, the sleeve is too
8 far over. It is going to then have this entire portion in
9 the blood.

10 What is more likely is, if she is down there,
11 you then have this particular portion exposed, on her, not
12 being kept warm. And, if you are trying to make sure that
13 your daughter is warm while she's sleeping, you're going to
14 try and cover that up. And, if you do that, what you end up
15 doing is having this over here, which then covers all of her,
16 which brings this underneath her.

17 And it may not have fallen under there,
18 initially. May have just simply been over here, just lying
19 there. But then, when she reaches, lifts up to go to the
20 other side, this then is brought underneath. And, if you
21 note -- you can do this in the jury room -- you'll note that
22 this brings it almost exactly where the wound would be and
23 where the blood would be in the side of the car. And then
24 it's simply a matter of Shelby Day picking up the child. And
25 she either turns this way or that, picks it up -- and this

1 way it's easier, with the weight on it, than here -- comes
2 down, slides down. And it would be going in that direction.

3 The thing that is even more interesting is
4 this: that she, more likely than not, was turning back in
5 this direction. You know how we know that? Because this:
6 You have, on the side of the car -- Let's assume this is the
7 side of the car, here. And let's, let's do it this way so it's
8 really more like it would be, front passenger seat of the car
9 is going this particular direction. Okay.

10 You have the door panel down here. You have
11 the rest of the car all over here -- because it's not open.
12 It's only open at the door -- complete side of the car, here,
13 all the way up to the top.

14 Over here you have the door open. And,
15 of course, the rest of the car there.

16 Now, what we have is this. We have pretty
17 clearly a -- I submit, from the expert testimony, this: that
18 it is more likely you're going to get strays from a flip.
19 This is even setting aside this 12-, 18-inch gap. You don't
20 have the common source of a bullet. What you have is that
21 variance of 12, 18 inches, with pretty firm stuff on each
22 side, the tadpole on the top end and the stuff from the
23 aluminum thing on the bottom.

24 Now, what you have, then, is the complete
25 area covered. I mean, if blood is going to fly, it's going

1 to hit someplace, of course -- the stuff at the bottom, if
2 it happened at the scene, hospital or, at the scene, on the
3 doors, the aluminum -- Didn't find any on the counter. So
4 they have got to say it happened someplace else.

5 But it's also possible the blood splattered,
6 up at the hospital, on the ground. And, according to some,
7 there was so much blood there, you could never go back and
8 check there, anyway. But it's possible it occurred there.

9 But what happened is this: is that the
10 strays are only off on the right-hand side, off on this side.
11 If -- This is assuming it's still the same source. Okay.
12 And this is, if its ballistics -- and we had Bart Reed
13 testify if you had a group of six to eight inches splatters
14 that are -- and, in fact, even the test verified this -- you
15 would expect, during the temperature drop, this, to see our
16 splatters. But you don't. You don't see them anyplace. Not
17 at all.

18 If it's a stray, it's more likely it came
19 from a sweater because of its irregular patterns, especially
20 if it is dropping. And I'll do it in slow motion (demon-
21 strating), if it is dropping. And the lady is not just
22 stopping, she's turning at the same time -- flip. And it is
23 brought over this way. And you may lose them on this side
24 because there are no strays on the left side. There are none
25 because, if there had been, they would have been in the car.

1 Nothing at all there. That's a further indication, you see,
2 of what occurred.

3 The, what can occur, with respect to any
4 examination like this, is that, is that you say, well, how
5 likely is it going to be that the sleeve is going to leave
6 it right there? Well, we, that's the reason we did those
7 tests. And it appears to be pretty likely. Mr. Pex did a
8 series of experiments. And one of the things that we're real
9 concerned about is that, that he did it, number one, with
10 anitcoagulant blood, which makes a real difference. And, in
11 fact, it's real obvious, when you hear the testimony here --
12 in fact maybe some of you picked it up as we went along --
13 that the reason for the difference between the blood is this:
14 We had -- In fact, the doctor testified about it and also
15 Mr. Reed testified about it, too -- that when the blood
16 coagulates, starting about three minutes into its being out
17 in the open, subject to oxygen, et cetera, the blood starts
18 to separate. It's not a matter of it simply coagulating and
19 becoming hard or concrete; it separates. And a portion of it
20 turns into, like, a serum or plasma that is more watery-like,
21 not as thick, et cetera. And it appears, based on the testing
22 that was done, that that may continue up to at least 20, 25,
23 30 minutes and become so hard it becomes, instead of larger
24 drops, smaller drops.

25 But the thing that is disturbing is this:

1 When you look at this in evidence -- 29 -- and then you see
2 how much blood is on the end of that sleeve, it's not very
3 much there (indicating). And some of it is bare. And probably
4 comes up to about here, about to here. And same on the other
5 side, about to there, probably at an average of half-inch,
6 maybe three-eighths of an inch, going across there.

7 Well, you have Jim Pex who has rendered an
8 opinion. And I suggest to you he's probably not going to
9 change it. It's an opinion he's held for a year, at least.
10 Grudgingly, he's going to release it. And I submit that that's
11 where he got a little argumentative and, in defense of his
12 position.

13 The thing disturbing is that, if you take
14 what he did, you take a sweater and you put about one to two
15 inches of anticoagulant blood on it and then you just swing
16 it or flip it against a piece of paper, even Mr. Reed said
17 you would expect to get something like this.

18 Guess what we're saying is that Mr. Pex
19 knew what kind of result he was going to have before he even
20 did it. He knew that, if he did it that way, that was, that
21 would support what he was saying all the way along, because
22 they didn't really match. He wasn't thinking as far as
23 different things that might take effect, because his thought
24 was not so much, I submit, to find out what, in fact, occurred;
25 it was more to just simply support what his position had

1 already been.

2 There were a lot of things he missed. You
3 know, they did that -- We tried to get the aluminum guard that
4 was similar to Exhibit 10 -- that's the aluminum guard we've
5 talked about -- and ended up getting the big rock guard.
6 Maybe, maybe that's what happened to the State: They did
7 their experiment to the rock guard, too. They had in there
8 an aluminum rock guard they could have done a test on any
9 time, any time they wanted. They had an aluminum rock guard
10 to do a test on exactly like this one -- exactly. It's on
11 the other side of the car, sitting there -- in their
12 possession, their control -- for them to do with as they
13 wished.

14 He missed the sleeve. He missed this. He
15 did tests that he knew what the results were going to be.
16 He was real committed to a position he had taken. But we
17 know for a fact that that is not, in fact, what occurs when you
18 use the coagulant blood. And, boy, what a difference. What
19 a difference that is. What a difference that is (indicating).

20 This was the one -- You recall there is,
21 in the picture of the car, there is a little pool of a blood
22 splatter on the top of the, that goes above the, above the
23 aluminum rock guard -- "13" -- around here. And notice, if
24 you look at these, all the same -- redundant. They vary, of
25 course. But, when you get back, you'll see it, that some --

1 like in here, there was nothing that spilled over right around
2 here, when it's dropped once against, causing it to flip up
3 at the same time, basically lift it up the same way lifting
4 up a child and turning, that you basically have it end up
5 just about the same height.

6 You know, here's about the rock guard, and
7 you would have some spill over into it, stop exactly like the
8 other side of the car.

9 Yet Mr. Pex is not willing to concede that
10 that might occur. But, then again, when this stuff comes in
11 evidence, you don't have Mr. Pex back on the stand again.
12 That's -- Perhaps, perhaps his conclusion would have been this:
13 It might be just as likely, in fact, that it might have been
14 the blood from a sweater. That might have been his conclusion.
15 This is done, of course, after Pex testifies. Marion Vaughn
16 donates her blood. And Bart Reed works out of Portland. The
17 evidence is clear. Some logistics during the lineup. And,
18 as the trial progresses, you get over things you hear.

19 I suggest to you, after Mr. Reed testified,
20 the State still could have continued through that week, that
21 Friday, you know. I suggest that Mr. Pex was doing a lot of
22 experimenting. He learned about that. He kept coming back.
23 He certainly knew they could bring people back. They brought
24 back Mr. Pex at least three times, I believe -- although I
25 might be incorrect on that -- at least three times. And there

1 is nothing stopping him from being brought back a fourth or
2 fifth time.

3 I would suggest he was over there in his
4 lab -- hadn't been doing it before -- kept shrinking blood over
5 there. He might have gotten some real blood over there, and
6 maybe he did the test right, for once. And, if he did it
7 right, you know, what were the results? Why didn't he come back in?
8 Suggest the reason he didn't was because, in fact, it is
9 consistent with that. Mr. Reed was being pretty honest,
10 appeared to be pretty -- not very argumentative when Mr. Hugi
11 asked him the question we started out with this morning that
12 clearly assumes a couple of things that are not true at all:
13 assuming the source of the bullets and assuming the door --
14 which is arguable -- and the other one being from the same
15 source. Mr. Reed answered truthfully if that were it, then
16 it's more likely the ballistic situation would be the answer.
17 But that's not true -- I mean, it's not in evidence.

18 Mr. Reed didn't point that out to you and
19 say, "Look, hey, you're missing the boat." That's because
20 Mr. Reed was being real objective and forthright. And if
21 Mr. Hugi wants to ask the question, that's okay.

22 The other exhibits, showing the same kind of
23 blood. This was a little bit higher. And same, with respect
24 to this one -- and this one, also (indicating). And you'll
25 notice that each of them, either fine specks of blood, when

1 compared by Mr. Reed -- and, once again, I guess I can't say
2 this enough, is that this goes uncontroverted, absolutely
3 uncontroverted -- when you compare this and the rock guard done
4 by Mr. Reed -- and it was Vaughn and myself -- it is uncontra-
5 dicted that they are basically the same and are consistent.

6 In other words, it is uncontradicted that the
7 sweater could have done this, because Mr. Pex has not come back
8 to indicate anything to the contrary.

9 Now, one other thing. That is "scientific-
10 methodology" bit. That sometimes can lead you astray a little bit.
11 And we talked about, a little bit, the ballistic situation is
12 different than, perhaps, a sweater. And the sweater can vary.
13 It can be twisted -- may vary. Same amount of specks, but it
14 can vary -- the sprays or whatever. So it's not as controlled
15 as ballistics.

16 Now, the -- So sometimes what can occur --
17 and we need to be conscious of this -- is that it's one thing
18 to predict how something will occur in the future -- You see?
19 Like, for example, the odds of me dropping a quarter on this
20 spot right here, you know, say, would be pretty remote -- real
21 remote. And so, scientifically, you do a lot of experiments.
22 You toss quarters out, like that, and scientific things. Well,
23 it's not very likely it would land there -- maybe once every
24 thousand times.

25 Now, that's predicting. And that's, to a

1 certain extent, what Mr. Pex is doing when he says, "No, it
2 couldn't really occur," you know, even though he hasn't looked
3 at this, but -- "Couldn't really occur."

4 However, what actually is occurring is this:
5 If you throw the quarter out, it lands at a particular spot.
6 There is no question but that it has landed there. However,
7 if someone goes to Mr. Pex and says, "Hey, it landed right
8 there. That's where it was," if he does his tests, Mr. Hugi
9 could come in here and say, honestly, that we performed a
10 great number of tests and a lot of them were over here, over
11 here. It is extremely unlikely that a quarter would land right
12 where Diane Downs said it is. You see how that and the
13 statistics and the argument can mislead you? It really can,
14 because that is not the issue. The issue, clearly, is that --
15 you are right -- it's possible. It could land there. That's
16 right.

17 That's exactly right because it, in fact,
18 did. And, in fact, that is, to a certain extent, the response
19 with respect to the blood splatter, too. It's clear. And,
20 comparing the rock guards which we have back there -- I don't
21 need to bring them out -- that, yes, in fact, that blood spot
22 could have gotten on the side of the car because of the
23 sweater -- something Pex has completely missed, completely
24 overlooked.

25 When you see that -- and all we're doing is

1 just talking about just the order, just which is more likely than
2 the other, just leaving it even. And then you add onto that, if
3 you, this way, you add onto that the fact that, that the 12 to
4 18 inches, you have a flip, you have blood leading from more than
5 one spot, you pile that up there; you also pile on top of that
6 the fact that you have one blood droplet taken from the door
7 when there are many more there; you also have piled on top of
8 that -- don't forget you have piled on top of that that the only
9 thing that makes that work is that they also have to take care,
10 it's important that the sweater remain on the back of Cheryl,
11 going to the inside, to the outside, still remaining not only on
12 her but basically the same place, staying on the same place.

13 And I submit to you that, in weighing -- not
14 even talking about reasonable doubt -- I would submit to you
15 that the greater weight of evidence is that it was not caused
16 by back-spatter at all; it was caused by that sweater.

17 This might be an appropriate time -- I'll be
18 a little longer.

19 THE COURT: Very well. We'll recess until
20 10:00 o'clock tomorrow morning.

21 Once again, I'd ask you not to discuss the case.

22 (Whereupon, at 5:00 p.m.,
23 proceedings are adjourned for the
24 day, to be reconvened Wednesday,
25 June 13, 1984, at 10:00 o'clock
a.m.)

PET EX 11

1 TUESDAY, JUNE 12, 1984, 1:30 P.M.

EUGENE, OREGON

2
3 P R O C E E D I N G S

4 THE COURT: Mr. Jagger, you may continue.

5 MR. JAGGER: Thank you, Your Honor.

6 This is work -- A lot more of the same. Okay.

7 This is not easy. These things are never
8 easy, no matter whether the case is driving-under-intoxicants
9 or a case such as this that has serious, serious implications.
10 No matter what the case -- and none of them are easy. It all
11 takes work to get through. You got to think about this stuff.
12 And I probably am going to take a good part of the afternoon,
13 if not the rest of the afternoon, so -- just based upon what
14 we have left to cover. So maybe a couple of times we may try
15 to mentally stretch ourselves.

16 And, if I can feel us start to get tired, I
17 may have us try to do that, because still have some more
18 things that, at least as far as we're concerned, are very
19 important things and some more things that we need to talk
20 about.

21 Let's dive into Christie right now. Okay. We
22 have -- and, hopefully, we have situated things around here so
23 we can grab them while we're talking and I can show you what
24 we're talking about first-hand so we're not making any
25 mistakes. Okay.

PET. EX. 11

1 The comments Mr. Hugi made, how he feels -- think
2 words are pretty close to how incredible, how incredible it
3 would be for Christie to say this if it were not true. And I
4 want you to remember those words: How incredible it would be
5 if Christie were to say things that were not true -- because
6 she said things that were not true. And, yes, how incredible
7 that is. And, yes, we have some reasons why that is. Okay.

8 Those are -- I submit that goes beyond theory,
9 like the discussion we had with Dr. Hawkins. It goes to fact.
10 And I think probably within a half of an hour or less you will
11 see what I mean.

12 For instance, Mr. Hugi was reading portions
13 of a transcript, the transcript of Christie Ann Downs. And
14 we're going to explain again, quote, unquote. We're going to
15 supplement a little bit so we have a complete picture of
16 everything. I'm going to submit things from direct examination
17 and cross and put it up on the board to, to see if we have
18 done right. He said the ballistics support her. No, they
19 don't. No, they do not. He may be able to come up with one or
20 two or so that may, in an indirect sort of way. But, no, they
21 do not. He said, "Which one do you believe, Christie or
22 Diane Downs?" That is a, that's getting to the question before
23 you discuss what the facts are.

24 So let's talk about the facts first. The, the,
25 I guess -- I tell you, before we do that, there is one

1 other thing I want you to think about: emotional things. I
2 want you to, first of all, identify these things, first of all,
3 because I want us to realize and to see how erroneous emotion
4 can be. And so I want to identify the most emotional times
5 in her testimony.

6 One is, is -- Think back. I mean, really
7 just try to put yourself back when she was testifying. And
8 it was real, it was quiet in here. It was real quiet. Do
9 you remember how quiet that was? And do you remember the
10 letter situation? Do you remember the two envelopes? We
11 opened them up. And they said -- I've forgotten the exact
12 words. They are in evidence. Both of them indicated her
13 mom was responsible. And we had some discussions about when
14 they were prepared and submitted. And we'll get into that and
15 when that was.

16 Mr. Hugi was quoting some things in the
17 transcript but did not indicate, in chronological order, how
18 they actually mesh with the ballistics and our expert, factual
19 evidence.

20 So identify, if you can, the letter-opening,
21 how you felt then. And, boy, it was pretty impressive. It
22 was quite a show. And I don't mean that -- That comes off
23 kind of disrespectful. It's more of a -- it was quiet, quiet
24 in effect. So let's identify that. And let's deal with that
25 and the words -- I think I'm going to put up here that -- help

PET. EX. 11

1 identify this -- "No. 1, saw, Christie saw Cheryl get shot."

2 Another situation is the trunk. And that's
3 a little vague, as far as between -- not totally vague, but
4 a little vague, as far as how far you -- She saw Diane Downs
5 go to the trunk and back. But in fairness to her and to the
6 State's case, probably seeing her get out and opening up the
7 trunk lid. And that's probably about it. So we've got that
8 trunk. Let me put "open" -- and kind of describing lines
9 for some direction -- maybe not.

10 No. 3 -- Right here, I'm going to add another
11 word, here, the word "sitting" because she's saying that
12 Cheryl was sitting on the front passenger seat. Okay.

13 Christie says she saw Cheryl get shot and she
14 saw Cheryl sitting on the front passenger seat, facing
15 forward when she was shot. Let's even add that so that we're
16 really exact as can be -- "forward." And I want to put a
17 little asterisk by this because that is real important.

18 The other thing I want you to keep in
19 mind is what Mr. Hugi said as far as his theory is concerned,
20 and that is that the first shot of Cheryl was when she was
21 on the front seat. Okay. Assume the car is heading in your
22 direction and she is in the driver's seat, and Cheryl is
23 sitting in the front seat. And she sees her mother start to
24 go shoot her. And she doesn't dive out the door that way
25 or against the seat but, instead, dives almost, ^{PET. EX. 11} like, away

1 from Danny or Christie, towards the front seat. He's got to
2 have it that way because, of course, that's where the bullet
3 was. But it's a shot around this direction, I guess. Keep
4 that in mind. It's real important. And I'll indicate why
5 in just a little while. And I think it's the only thing that
6 Mr. Hugi can say to conform to that portion of Christie's
7 testimony, of course. And we'll deal with that in just a
8 moment.

9 Next one, No. 3, is Christie -- Let me put
10 a, let me put a "CR," I guess, for "Christie." Christie was
11 sitting behind the driver's seat. Okay.

12 No. 4, she indicates the shot came between
13 the seats. And we talked about the hole -- whether or not it
14 just went all the way across or whether there was a hole
15 between the seats. And she said it was between -- the hole,
16 there.

17 And, No. 5, she said, she was saying that
18 Danny's head was away from her or towards the window. And
19 that's not exactly what she said, but I'm using that, as far
20 as the direction. But she indicates that kind of a direction.

21 I'm going to put a "B" over here. I'm going
22 to put a "B" over here, and I'm going to put a "B" over here.
23 And this stands for "beach." And that will be more clear in
24 a little while, why we put those here and not other places.

25 She also said that, that, before she left --

PET EX 41

1 and I'll put at "B" by this one, too. -- they had dinner at
2 the grandparents' house. Remember, they got off from school
3 and stayed there until Diane Downs gets off work. And they
4 had dinner. But "She had dinner at GP."

5 And I put down -- I'll put down "CH and
6 Danny, question mark" -- their discussion in this transcript
7 about that they get shot, whatever, or however many times
8 and, then, the person doing the shooting stands up prior to
9 Christie Downs' being shot. It was -- Well, I think the actual
10 words she used was "She standed up," but, you know, "standing
11 up" is obviously what we're referring to -- "standed,"
12 different kind of terminology. And I'll put "Stands up"
13 because it will make more sense to us, but "standed up."

14 And then the next thing was that of, you
15 know, the mother -- "Mom 'R'" -- for "responsible." Okay.
16 Let's, let's look at that, then. And let's talk about the
17 first one first.

18 She saw Cheryl get shot. And I guess, to a
19 certain extent -- Maybe we need to take No. 3 first. Let's
20 take No. 3 first.

21 We know for a fact what, we know from
22 Diane Downs' testimony that they were at the beach the week
23 before. And we know that they went over to the beach in a
24 particular order, and they came back in a particular manner,
25 as far as how they were seated in the car. And we know that,

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1 on one of those trips, Christie was, in fact, behind the
2 driver's seat. But we also know for a fact that Christie was
3 nowhere near the back seat behind the driver's seat. And yet
4 she said she was. She was behind the passenger seat -- that's
5 according to Mr. Pex.

6 We have, we have above the back seat,
7 passenger side, we have blood splatter, all -- oh, in fact, it
8 was blood-typed also consistent with Christie.

9 Do you remember? We talked about the back
10 of the seat, there, the, the wounds that she suffered
11 (indicating), one coming out of the back. And then she would
12 have been -- Do you remember the more solid red mark at the
13 back of the seat? Do you recall that testimony?

14 So we can -- In fact, there was some
15 testimony that smear there potentially might have been from
16 the wound on the hand. Do you recall that testimony?

17 There is no question in this case that
18 Christie was behind the passenger seat -- without question.
19 Without question.

20 She, one thing I guess we really should add
21 here, too, is that she said that -- Well, this takes care of,
22 actually, both of them. We know that she was not behind the
23 driver's seat. Absolutely impossible. We also know this
24 for a fact: that she was not sitting. She was more in the
25 position that Diane Downs recalls, looking through the side

1 window panel and seeing her. She was more in a laying-down
2 position.

3 When she was shot or maybe just before
4 shot or whatever, she was raising a little bit on her side,
5 but she still is basically in a laying-down position. We know
6 that because of the position of the blood stain, of course,
7 but we also know that from the manner in which the shots took
8 place with respect to Christie.

9 These -- I would hope that -- but let's bring
10 it up anyway, because I can feel things quieter. don't
11 know if that's talking about the evidence or whether or not
12 it's because I'm holding this (indicating), but, if that's the
13 emotion, then maybe we should address that.

14 We've been here for a long period of time,
15 and I'm really asking you to decide this case upon some facts
16 not affected by emotion because, when that is done, when we
17 don't go around and say what a bad mother she is and, you know,
18 and she had an abortion and she's a surrogate parent -- I
19 suggest when we do that, then we make an error or at least
20 the likelihood might be higher. And I guess I want to stop
21 us right now and make sure that what I'm doing right now is --
22 We're talking about something serious, but also I want us to
23 learn as much as we can from the facts. If it is emotional, let's
24 not be shy about it. Let's think about it and recognize it's
25 there so it doesn't affect our thinking.

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1 With respect to Christie, two bullet shots.
2 One lodges inside, does not go through. The other one goes
3 through. Okay. But it's interesting to note, from Mr. Pex's
4 report, as we reviewed it with him and also the testimony
5 through this particular model dummy -- whatever -- how that
6 occurs. We're able to identify the one that was more likely
7 than not the second shot because that's the one that goes
8 through the hand. And Mr. Hugi wants to classify it as a "defense
9 wound" -- up, as a defense. However, a defense wound you would
10 expect to be like this (indicating), to fend off the blow.

11 That is not what this is. You take a look.
12 And I don't have a picture with respect to the hand, but it's
13 more in the nature of a cover-up, a reflex of hurt or
14 sensation and then cover-up. It's not a defense (indicating) --
15 not a defense.

16 Maybe either way it's not terribly important,
17 but it's just important for us to discuss each and every thing
18 that -- If the bullet went through the hand, then you get the
19 tumbling effect and entered the body. For various reasons,
20 it expends, you know, more energy through the hand, the
21 tumbling, et cetera, and lodges in the body. That's the second.

22 The first one doesn't have that and goes
23 on through. But let's look and see what we can learn from
24 that.

25 The first one -- They both enter approximately

1 the same. The one that exits is above the one that lodges,
2 but not by very much -- approximately an inch-and-a-half,
3 according to Mr. Pex's report, his testimony, et cetera.

4 Now, what causes that? What causes that,
5 in all fairness, is two things: one is either the weapon
6 being, say, at this angle and then moving down, like this,
7 more of an angle -- for example, going forward -- or it can
8 also occur by the weapon being approximately the same position
9 and the body moving up maybe a half inch or so.

10 The other thing that's important is the
11 angle. For me to -- Bill, if I could have that table there.
12 If we could bring it around and I can -- Thank you.

13 THE COURT: Thank you, Mr. Hugi.

14 MR. JAGGER: It's that one here (indicating).
15 And one other is at an angle, approximately like that. If
16 she's sitting, the person who shoots her is going to have to
17 do it in a pretty strange position. But, if she is lying
18 down on her side or whatever and sleeping on her side -- that
19 is the kind of situation, of course, that I would suggest is
20 much more reasonable -- and then a reflex of cover-up.

21 The additional piece of evidence is this.
22 The area was luminol-positive, wasn't it? But you didn't have
23 a situation such as sitting like this -- blood splatter and,
24 blood splatter and then a portion without any. You recall
25 testimony of Mr. Pex, although he didn't make a specific note
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1 of this, as perhaps he should. But, basically, it was pretty
2 much luminol-positive around this entire area.

3 And I would suggest to you a lot of what --
4 With respect to expert testimony, they do some things and
5 anticipate some things for us, but, with all due respect to
6 experts, a lot of it is real logical. And, once we understand
7 the process and the things that make someone an expert, we
8 can pretty much draw the same kind of conclusions.

9 Where we really are benefitted, to a certain
10 extent, is -- with experts -- is where -- Not all the information
11 that we can attain is attained within the courtroom. Such as,
12 for example, Dr. Hawkins. They do have a lot of tests and a
13 lot of reports and testing on perception and unconscious
14 transfer that we cannot do in the courtroom. So, to a certain
15 extent, that kind of test is more helpful. To a certain
16 extent, we end up having to rely upon those more because we
17 can't do that ourselves.

18 But we can -- This is more logical. What is
19 logical? Sitting up, of course, you have a loss of some of the
20 area here -- just the arm. The body just doesn't allow it.
21 But, when they are lying down, of course, then you have, then
22 the area is open and free to receive blood splatter.

23 So my suggestion to you is Christie saying
24 she was sitting up is not supported by the ballistics, the
25 results of it, in the car or anyplace. She was ~~NOT~~ sitting up.

1 And I submit that's a reasonable conclusion. So that is why
2 we've done that.

3 Now, the next point is this. If Christie
4 was not sitting behind the driver's seat, how was she going to
5 see Cheryl get shot? No way, because she is lying down. Even,
6 say, up on her shoulder -- give it that -- behind the passenger
7 seat, she, number one, is not going to see Cheryl sitting up
8 in the passenger seat. She definitely is not going to see
9 Cheryl lying down between the seats.

10 I would suggest that we could, then, at that
11 point indicate that she did not see Cheryl get shot, and she
12 did not see her sitting there. However, we can go further
13 than that because -- this is where the prosecution gets in a
14 hole -- because they can't exclude too much of Christie's
15 testimony because, you see, that then supports what we've
16 been trying to cover. And that is that, through suggestion,
17 for whatever reason, persons sometimes genuinely believe
18 something that is not true.

19 And I suggest to you, if somebody believes
20 something and that belief is pretty grievous, then they are
21 going to show emotion from it, too. That's real logical.

22 With respect to Cheryl -- This is the one
23 we're using for Cheryl (demonstrating). And we have a bullet
24 wound here and here.) And we know that this is the one -- Our
25 position is this is the one that first, this is the one of

1 course, that lodges in, that lodges in and has to be surgically
2 removed.

3 This one right here is the one that actually
4 goes all the way through. And, of course, the bullet then
5 is in the bottom corner, right corner of the vehicle.

6 Now, before, when we talked about blood
7 splatter -- and we'll do it again later on -- but they had to
8 do this.

9 With respect to Cheryl's shirt and also the
10 sweater -- we ~~have~~ went through this before. We put this on
11 the back -- with respect to the holes -- to match them up.
12 And then we put this sweater on, with respect to the holes
13 there (demonstrating), right here. And we talked before about
14 the improbability of her being down between the seat in that
15 small vehicle with this just draped on her with the sleeves
16 wherever they may be with these bullet wounds matching the
17 shirt almost exactly -- maybe, maybe a fraction of an inch off,
18 just -- And this sweater stretches a little bit.

19 We talked about the improbability of this
20 child being shot in the corner, getting up, having the seat
21 there and grabbing whatever, to pull this on, to get up and
22 move around, then to open up the door to get out and to crawl
23 down and get down in this position in such a way it could
24 be shot without the sweater moving.

25 And now what has happened, because of this,

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1 neither is -- We have something even more improbable, and
2 that is she is up here in the seat with the sweater in that
3 position; and Mr. Hugi would have you believe, then, that she
4 could be like this and, someone coming from the driver's side,
5 she sees it, instead of going in that direction, she heads
6 right down there, gets shot on the way down. And we have
7 this added movement: down there, back up again, open the door,
8 stretching out the arm to open up the door, goes outside and
9 gets shot again.

10 I suggest to you that's next to impossible
11 because it's just, there, nothing is keeping it hanging on.
12 I suggest that points to her, having her remain on the floor
13 exactly as Diane Downs has indicated previously.

14 She did not see, she was not in a position
15 to see, nor does logic dictate, that she, she saw Cheryl get
16 shot. She couldn't see her sitting, going forward. Is
17 impractical, impossible.

18 The trunk opening -- We'll leave that there.
19 I think, for the most part, what she says, you know, is
20 feasible. She could be lying there and hearing a trunk open.
21 And that's some added stuff that she has said.

22 Shot between the seats. That's, that's
23 feasible. She could be aware of that and conscious of that.

24 Dinner at the grandparents' house? No.
25 As a matter of fact, that didn't happen that day. RET. EX 11 Diane Downs

1 has indicated it did not happen. They went straight back to
2 their house. Willadene Frederickson -- I don't remember if we
3 asked about that or not, but let's leave it. It's unrebutted.
4 Basically they did not have dinner at the grandparents' house.
5 The grandparents had somewhere to go that particular evening.
6 They did not have dinner there. They didn't. She's wrong
7 about that.

8 However, they did have dinner there before --
9 a week before. They had gone to the beach the week before.
10 The beach, different, different position. And, obviously,
11 we know at the beach situation there was a lot of going back
12 and forth with respect to the trunk. We also have some
13 evidence that Kristie saw a gun in the trunk.

14 As far as No. 7, she says that this person
15 stood up? "She standed up." In fairness to the State, that
16 probably could mean that probably got up higher than was
17 before or something like that. But I submit that -- Actually,
18 I want you to leave that word, though, because there is another
19 interpretation that may be what she saw: The person, in fact,
20 was standing up. And we know that could not happen inside
21 the car.

22 This -- right here (indicating) -- is a
23 real big word, especially when we line it up with a couple of
24 other phrases later on.

25 One is, one is Diane Downs' testimony, and

1 the next one will be Christie's, through Carl Peterson's
2 testimony.

3 But let's put down "A," here. "B"
4 we'll get to in a moment. But "A" is -- Diane, when
5 pushed back, stood by that car window and looked in. And,
6 in fact, you can look in. You would see exactly where Christie
7 Downs was. And she indicated that, as she looked, Christie
8 was shot. And you know the terror that would go through a
9 person in that kind of a situation has to be pretty
10 incredible. She saw her child being shot once, maybe twice.

11 But the position that -- the area there, if
12 you are inside, about all you would see would be a person's
13 face (marking).

14 "Standed up." She was standing up. And,
15 "face." And then we'll tie in this word, this phrase in in
16 a little while.

17 So what we have left, then -- she's still
18 indicating, of course, that her mother is responsible. Okay.
19 So what do we do with that? And so the other thing we know
20 for a fact is impossible to have occurred.

21 Then, when we look at Mr. Hugi indicating
22 how incredible it would be if Christie were to say things that
23 were not, in fact, true, we know for a fact that she did.
24 So the next thing is to figure out why.

25 For that, we brought Dr. HawkREX. EXA and, as

1 far as, as far as certain things -- There are two kinds of
2 ideas that people, that we relate to, as far as what causes
3 us to think things and how our mind thinks things that are
4 not true. And I divide them up in a couple ways.

5 Number one, there are some things that, that
6 we had discussed here -- and it's pretty logical that we
7 don't need an expert to testify about -- that there are things
8 such as leading questions. If we have faith in someone and
9 they tell us something, there is more of a chance that we
10 are going to believe or trust in and adopt what that person
11 says than if, for example, a stranger was to tell us something.
12 So, if we see someone suggest things, through giving their
13 opinions, then that can have an effect.

14 So I suppose leading questions, suggestions,
15 reaffirming -- If you say something you're not too sure about
16 but somebody says "No," that's -- you know, everybody has
17 these situations. You come in and you say, "I went to the
18 store Thursday or Friday. I can't remember exactly." He
19 says, "I was there. It was Friday." And you go, "Oh, yeah.
20 That's right."

21 That's another way to have, you know, your
22 mind changed a little bit: by other people reaffirming. The
23 other way are some other ideas we were talking about: a
24 reconstruction, unconscious transfer. We had, had some other
25 things that were discussed by Dr. Hawkins.

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1 The, the portion that is real important --
2 in fact, it was brought out through cross-examination --
3 Dr. Hawkins basically testified -- and I'm not going to do
4 this very much. We did it a little with Christie. But it was,
5 he had initially -- and I, part of the reason I need to talk
6 about everything is that Mr. Hugi has a chance to talk after
7 I do. And, if he mentions something that I have not
8 anticipated, I can't stand up and say, "Your Honor, I'd like
9 to explain that or talk about that." So I have to anticipate
10 what new things he may talk about.

11 Dr. Hawkins talked about these various
12 ideas and also mentioned that the ideas of unconscious transfer
13 was a situation where -- or at least one situation where you
14 had a room over here and a room over here, and you saw "A"
15 over here and "B" over here. Later on you, through the
16 passage of time, you think "A" and "B" are both over here.
17 But you'll recall -- Mr. Hugi may not talk about that, but
18 he indicated that was not a good example. On cross-examination
19 he said -- One quick other example, because that might not
20 be an extremely good one, would be a person commits a crime;
21 another person is standing someplace else; and, later on --
22 and a number of people observe that -- later on, those people
23 remember the person standing over there as having been the
24 person who committed the crime.

25 (Reading.)

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1 And, as I think you know, because you do .
2 know this literature, there are a number of experiments in
3 the literature demonstrating exactly that phenomenon.

4 Whether or not we have, in fact, experienced
5 that in our own lives is one thing, I suppose. Another thing
6 is we may have experienced that more times than we are aware
7 but do not have the checks and balances to be aware that that
8 has happened. That's a convoluted -- But perhaps, hopefully,
9 you see the point, and that is this may actually happen more
10 often than we are aware, ourselves, because no one is there
11 to correct us when we are mistaken. But this does, in fact,
12 occur. I would suggest that, in fact, it occurs more so.

13 And these are things, again, that the
14 experts did not need to testify about but which we know, as
15 a matter of just human course, and that is that stress and
16 excited situations are going to make it more likely, more
17 likelihood for error. And children are more susceptible to
18 this sort of thing than -- through mistake -- than adults.
19 And that's why you didn't hear testimony concerning that.

20 I would suggest to you that, because of
21 the things we've seen, there are, in addition, some more things
22 we're going to talk about and that is, in fact, what occurred
23 with respect to Christie Downs. Danny Downs we've already
24 talked about. Weapon was approximately 15 degrees at Danny's
25 back. We also know for a fact, from Mr. Pex's report and his

PET EX 11

1 testimony on that, that his face was towards the, the corner
2 window. We know that this -- it's just a copy of a thing in
3 evidence. We had a picture of the back of the, of the car,
4 this being the back seat, this being the, the seat that you
5 sit on. And it was luminoled and a great amount of blood was
6 determined to be in this particular corner (indicating).

7 From the evidence, we know that Danny's
8 single shot, the bullet, did not -- it entered the back but
9 did not go out the front. Therefore -- and, again, a lot of
10 this discussion is real uncomfortable, but it needs to be
11 said. Then the blood -- where it came from, because when they
12 are picked up, he is picked up basically in the same position --
13 the blood must have come from either throwing it up or some
14 kind of loss of blood about the mouth area which then, of
15 course, then places that in the very position that we believe
16 he was in, which then, of course, is relevant with respect
17 to how a person, right- or left-handed, is going to be able
18 to fire a shot in that particular direction. And that's the
19 reason we bring it up.

20 What happened with respect to, to Kristie?
21 Cheryl, one of Cheryl's favorite tapes was "Hungry Like A
22 Wolf." They only have four tapes in the vehicle. And we have
23 heard testimony to, her testimony to, that the Duran Duran
24 tape was playing.

25 To a certain extent, that is an argument

RET EX 11

1 without a resolution -- to a certain extent. That's why I
2 say we need to go elsewhere to resolve some of the issues
3 here.

4 It's, they have put about 6,000 miles on the
5 way -- no real radio. They played the tape all the time.
6 First time they had that. No doubt they had played it a
7 great deal -- "Hungry Like A Wolf" probably more than others;
8 no real indication otherwise -- and played at the beach.
9 It may even have been played going to Heather Plourd's and
10 back again. Who knows?

11 The Catch-22 is that Diane Downs' position
12 is that, when the car is turned off, that tape can't play.
13 That is proof, therefore, that Christie Downs does not remember.
14 In fairness to the State, they are saying that the key was
15 still in the ignition, so the tape was playing. It doesn't
16 resolve anything. It can't. Isn't very helpful to our
17 deliberations, especially when we look at the other things,
18 of course, that she has indicated that could not have occurred.

19 We know, though, that this is what happens
20 with respect to Christie. We know from the medical reports
21 that she, early on, has contact with Paula Krogdahl, perhaps
22 others, the lady who had been with the Childrens' Services
23 Division and the lady that you did not hear testify. She was
24 the one that had contact with the children.

25 And, when we go through the medical reports,

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1 you are going to see that, when she had contact with Christie
2 Downs, the response of Christie Downs was similar to what they
3 have been accusing of Diane Downs. Christie would cry, be
4 upset, have a terrible reaction. What Paula Krogdahl was
5 doing to that girl, we don't know. When Diane Downs was with
6 her, they would be laughing, having, having a fine time. And
7 the medical report will reflect that, contrary to what you
8 have been led to believe.

9 We know that, in a while, Childrens' Services
10 Division formally gets involved. The testimony before you is
11 that there was concern as far as interrogation. There was
12 conversation with Dr. Miller, Mr. Tracy, and that our office
13 was contacted. And we sent a letter, which is in evidence,
14 to the attorney for Sacred Heart Hospital. And none of this
15 is rebutted. If it were important or if it were different
16 from what I'm going to indicate -- Because we offered this
17 numerous times, times throughout the trial. The attorney for
18 Sacred Heart Hospital, if it was contested, could have
19 testified any different. I could have been called -- whatever.

20 What occurred was to get a third party
21 involved to make sure that things were monitored more fairly
22 fairly and we just didn't go in and out and the children
23 being damaged. Childrens' Services Division did get involved,
24 and Carl Peterson became involved in the case.

25 Now, the problem, with respect to Carl Peterson, Carl

1 Peterson, was this. If you don't actually remember something,
2 you take -- Dr. Hintzman, who had a conversation with
3 Dr. Carl Peterson -- It was a little bit concerning --
4 Dr. Peterson was, is leading you to believe he's more of an
5 expert than he actually is. He indicates that he's making the
6 opinion based upon his experience, education, et cetera. But
7 we find out -- just almost more by luck than anything else --
8 that he has made a call to at least one, you know, psychologist,
9 professor at the University of Oregon and then found out --
10 a number of them, perhaps two or three others. But we have
11 a situation with Dr. Hintzman listening to the conversation
12 later, recalling, reconstructing that what Dr. Peterson said
13 was it was a fall-off-a-bike head trauma -- things like that --
14 which had not occurred at all. And, of course, we got that
15 straightened out.

16 But the important thing from this is that
17 if -- I suggest -- there is encouragement to reconstruct, if
18 someone will not leave you alone with your lack of memory,
19 then I would suggest that that is going to cause a greater
20 likelihood that you are going to recall things that did not,
21 in fact, exist at all. And maybe that would be -- and an
22 additional reason why we had one, what we set forth in the
23 front page, there -- what, in fact, occurred, because Mr. Hugi,
24 even in his argument, indicated that Dr. Peterson was sure
25 that she knew something that she had not been able to say yet.

1 He was committed to that.

2 He basically said that on the stand. And
3 Mr. Hugi indicated that in his argument: that she knew, you
4 know, something. Maybe she didn't. But maybe she got so
5 pushed -- Even, even Christie, when she testified, indicated
6 that she wondered, you know, at times before, she wondered
7 whether or not her mother was responsible.

8 This was just one of them: Do you remember,
9 sometime after you got out of the hospital and before now, do
10 you remember ever wondering if your mother had done this
11 shooting? Kind of wondering maybe she did or maybe she didn't?

12 Answer: Yeah.

13 I ask you if that is much different than the,
14 you know, "Did I pick up the stuff or not? Did I take the
15 clothes to the cleaners or not? I just don't remember" and
16 someone indicates, "Oh, no -- Yes, you did" or "No, you didn't."
17 So it's easy to slide over one direction or the other,
18 especially when there is something there that might be
19 triggered that makes you believe something happened when it
20 didn't. And I guess that's the thing that's --

21 I mean, can you imagine actually being in
22 a classroom, seeing an assault occur -- fairly calm,
23 initially -- and believing that someone over here did the
24 assaulting, just an innocent bystander, when, actually,
25 someone else did? That, you know, you say it, and you think

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1 about it. It's, even when it's said and you know it, in fact,
2 exists, sometimes it's difficult to understand that that can
3 occur. But it does.

4 And the thing that's even more incredible is
5 that, when you say that, that's what you believe -- that this
6 innocent person was the one that did it; you'll say it with
7 belief and conviction.

8 Dr. Hintzman indicated to me something about
9 a conversation that never existed. But he believed it when
10 he told me. If he had been under oath in front of a jury
11 when he told me, I submit he would have said it with the same
12 conviction and belief. And, in fact, some people can see
13 people and have them placed in other positions and say it with
14 conviction.

15 But we have, we don't need the legal facts
16 because we actually have some specific things we can point to
17 so we can see what happened with respect to Christie. She --
18 Even her name, Christie Slaven. All the factors coming in to
19 her are that something is wrong and there is a separation with
20 respect to her mother. She wonders why it is that she's not
21 able to see her mother anymore. And her father still has
22 some contact -- not a great deal -- but she wonders why.
23 Something is wrong. Something is wrong, and they don't just
24 simply take place over five or ten minutes; they take place
25 over almost a year -- many many months.

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1 And she wonders because -- She had reason
2 to wonder because she doesn't know what happened. And I would
3 suggest that no one, perhaps -- although we don't know that
4 because we don't know what Paula Krogdahl was talking to her
5 about -- but we don't know, upon a fact based upon real
6 evidence, what someone told her, one way or the other,
7 directly.

8 In fact, that is real interesting. You know,
9 when you think that somebody actually had an opportunity to
10 tell her flat out something to try to influence her: "Did you
11 know this? Do you know who that is?"

12 That would be something that -- Mr. Hugi has
13 claimed she would do anything to get rid of the children: would
14 lie, cheat -- whatever -- because Diane Downs, in October,
15 was with Christie, that same Christie that Mr. Hugi is going to
16 indicate woke up in the hospital with such great fear and
17 apprehension and was just deathly afraid of her mother.

18 They met, talked on the phone around October
19 -- cried -- everything you would expect of a mother and daughter
20 who had been separated for a while -- and a real frustrated
21 mother who has seen things go from people talking in the halls
22 to interrogations to talking to phone calls to accusations
23 from Steve, from other people, to not being able to see her
24 children, to not knowing where the children are and, in fact,
25 publishing that she knew where they were. PET. EX. 11

1 The juvenile hearing, people knew she knew
2 where the children were at before this, before October. And,
3 not having contact, so close but not, not reaching, it's an
4 appropriate reaction, from a loving mother, loving daughter.
5 In October, they met -- tearful reunion. Saw grandparents,
6 et cetera. But, when she was asked by Christie "What happened?"
7 she did not take advantage of the situation at all. She
8 instead said, always said that she could not say. She had
9 promised the police she wouldn't and didn't.

10 She went on to say something that, in
11 hindsight, was probably real damaging to what occurred because
12 what she gave as input into Christie's mind was what was coming
13 from other, some other places, too. So, to a certain extent,
14 to a certain degree, Diane Downs is at fault, in an indirect
15 sort of way, to what happened with Kristie and her wondering
16 because she went on to say that she was a suspect, that she
17 wasn't seeing Mr. Knickerbocker anymore because
18 Mr. Knickerbocker believed that she had done it; that she
19 couldn't go back to Arizona because all the people -- at least
20 this is Christie's recollection to Dr. Peterson -- that the
21 people in Arizona believed that she was responsible. And this
22 went into Christie's mind and stayed there, because we know
23 that Dr. Peterson -- We'll get to this. And I may have the
24 date here incorrect, so trust what we talk about in a little
25 while.

1 Instead of right now, it was a month or so
2 later, maybe later, that it was still in Christie's mind
3 because that was when she related to Dr. Peterson that had
4 stayed in her mind. That was coming from other sources, too,
5 of course -- indirect source of: No Mom? Something must be
6 wrong -- so on and so forth.

7 October -- in fact, October 24th was the day
8 -- makes reference to, to "Can't be with her boyfriend,
9 Arizona." And then the thing that's so important is this:
10 what is said right after that conversation about the Arizona
11 people, et cetera, is she says, October 24th -- and I'll put
12 down the word "almost" to kind of help us trigger that one
13 look back on this day. She says: "It almost seems like she
14 done it."

15 Now, does that sound like somebody that
16 knows if they went to the grocery store or not? Like she said
17 it, that was wondering -- someone who didn't know.

18 She said, "But when it happened, I went
19 blank." It's October 24th -- November -- And then we have a
20 strange period of time, here.

21 We have had meetings before, but I haven't
22 gone through -- And we went through them in the trial. I'm
23 just trying to point out some of the more important spots.

24 But, before, we have reports written on every
25 single time -- every single time. And yet there are three

PET EX 11

1 times here, November 31st, November 28th, and then later on --
2 we have another time here in December we'll talk about --
3 where there is not a single report made. Obviously, something
4 is discussed for half an hour to an hour during a session,
5 but nothing is recorded: What kind of concerns she said, what
6 kind of wonderings she was doing. We don't know. But it's
7 during that time that there is a complete void.

8 However, one thing is interesting because,
9 in her testimony and her -- well, in the testimony that you
10 heard -- she says that she has told someone that her mother
11 was responsible before she told Dr. Peterson. She said she
12 told her caseworker. That was before you folks, as a result
13 of a question of mine. She said she told Paula, Paula
14 Krogdahl and Susan Staffel. I submit she did not. She
15 couldn't. Those people could have been called if she had
16 said that to rebut, not to rebut but to affirm that's what
17 she said. She didn't tell them that. She was wondering right
18 up until the time some suggestions -- and some of the
19 suggestions are before -- took effect.

20 And we have some real things that really
21 point to that. November 29th, right in here, she's saying,
22 "Why did Mom visit only two times in the hospital?" They think
23 the hospital is -- added up to Arizona, Knickerbocker. They
24 think maybe she done it. Everybody, everybody in the whole
25 world that she knows, she believes in, thinks, ^{PET. EX 11} has the opinion

1 that Diane Downs is responsible.

2 And then we have December 5th. There is no
3 report. And then we come to December 19th. In January --
4 Those are the times of the envelope situations.

5 December 19th, she says this -- in fact,
6 you know, something we actually have direct evidence on, why
7 Christie thought Diane Downs was responsible. And it comes
8 from Dr. Peterson. Because Christie Downs said why she thought
9 it -- This is real important. December 19th. She says, "If" --
10 I'll put down "If 'm'" -- "If my mom shot me, Cheryl, and
11 Danny, I'd want to go back with her because it wouldn't happen
12 again." She's saying "if."

13 However, the response that is real important
14 is this: Dr. Peterson tells her at that time that her mother
15 is responsible by saying this: He explains why she did it.
16 The answer just assumes that she did it. It says, "Maybe she
17 just got really, really angry, and it wouldn't happen again."
18 He says, ". . . maybe it wouldn't happen again." He tells her
19 that it happened. And he does it again.

20 The question to her is: "Do you think
21 she'll get really, really, really angry again?" You see,
22 we've got to "If my mom shot me. . ." to "Do you think she'll
23 get angry again?" Right from within that, it is from "if"
24 to acceptance. And what's the acceptance from? It's from
25 what Dr. Peterson assumed and what he was saying to you

BET. EX. 11

1 think she'll get really, really angry again?"

2 January 2nd, basically same kind of
3 conversations. And she -- Even in January, it is still on her
4 mind that Mr. Knickerbocker thinks that Diane Downs is
5 responsible. And let me stop for just a second and talk about
6 this, because it's Mr. Knickerbocker -- We talked to him a
7 little bit about -- It was clear where he was at. He had been
8 talking with the police and admitted that and heard what they
9 had to say. Hasn't heard anything else that has been said,
10 but he was accepting what they were telling him. And,
11 unfortunately, what happens in investigations is, sometimes,
12 just exactly that. The police can influence intentionally or
13 unintentionally what other witnesses say, think, or how they
14 believe by what they feed them.

15 You see, for example John Hales and some of
16 these other people that phone in, say they have stuff that's
17 valuable, the response to them was -- You know, John Hales said,
18 "Didn't seem like they were very interested." If it's
19 something with respect to, interesting information that is
20 against Diane Downs, I suggest to you they are going to sound
21 pretty interested.

22 Roy Pond. He, you know, he gets the
23 information on Norm Hilliard and Mr. McCain. And I'd ask you
24 this: If your house was burglarized and you saw the person
25 leave and you gave a description of the person and they were

PET. EX. 11

1 running out and Norm Hilliard was out there and he saw this
2 person that matched your description just about, you know,
3 say within a half mile or a mile away and, just a little
4 further, Mr. McCain saw the same person and, and, maybe a
5 little later on, Hales did, too -- whatever -- Mr. Wilson did,
6 too, and these people went to the police and say, "Hey, we
7 saw this person match generally or pretty specifically the
8 same description that you gave," do you think the police are
9 going to say, "It's a bum lead"? If they do, you better go to
10 a different police agency. That's pretty incredible, but
11 that's, in fact, what their response was. They were only
12 interested in something that served their own interests.

13 How are we doing? I'm going, for a while --
14 It's work, I know. I can see it. I can feel it, too. I know
15 we're getting tired. But it's real important. We've got to,
16 we need to do it. Okay.

17 January 9th -- and this is the date that I'm
18 going to insert what Christie Downs said back over here
19 (indicating). There is a discussion right there. And they
20 say, they talk about the Duran tape, et cetera. And she says,
21 "My mom did it." And the question is: "How do you know?"
22 She says, "I watched." And then she says, "I could see her
23 face." You see? She said why she thought it. She said
24 because "I saw her face."

25 She didn't say that "I saw her face." RET 5/6/11

1 Cheryl. I was sitting in behind the seat" or "I saw her get
2 shot, seeing the face. I was behind the driver's seat. And
3 then she fell forward"; she said it was because "I saw her
4 face." And that's exactly what Diane Downs has said all the
5 way through, from the view on the outside of the window, that
6 that's, in fact, what you see, is Diane Downs' face and
7 nothing more. She pointed out later on, in fact, what she
8 does, Christie does (marking) because, throughout the session,
9 she has done some drawing.

10 To a certain extent, when you look at it
11 this way, too, you can also see how reasonable it was. We had
12 a big to-do about, about Diane Downs indicating that, that,
13 you know, in her discussion with Heather Plourd later on.
14 Diane Downs is in the hospital for about three or four days,
15 doesn't get out till the 23rd.

16 And she gets out, talks with Heather Plourd
17 after that. And she again keeps in her mind the whispering
18 in the hallway. She knows she's the suspect. She knows the
19 position that people are taking -- at least, the police. She
20 knows that Christie has seen her through the car window, and
21 it is logical. She has nothing to hide. She indicates that,
22 that, you know, that Christie may actually have seen her, that
23 she's concerned about -- that that's pretty logical and okay
24 to do. Nothing wrong with that. That's fine.

25 And that's, in fact, the discussion she has

1 with Heather Plourd.

2 There is a lot more January 9th, January 16th, as
3 far as more -- Dr. Peterson supporting, basically what was going
4 on. In fact, he even gives you, her an excuse why her mother
5 would do it: She wasn't feeling very well. There was a
6 discussion "If your mother got feeling better..." or, "If my
7 mom gets feeling better..." As soon as she switched from
8 wondering to "it must be," then it's nothing but, then, just
9 corroborating, just "She just must not have been feeling well"
10 or "Maybe she won't be angry again" or all the stuff supporting
11 them.

12 She practices, goes to Hugi's office and practices
13 being a witness and, I submit, going through where she's at at
14 that particular time.

15 We know that Christie is a pretty good drawer and
16 pretty specific, as far as pictures. And these things I can go
17 through very briefly because we've seen these. Picture of Cheryl
18 plaid shirt, and indicates these real big plaids and doing that
19 stuff to her shirt. Same with Danny. Same with Danny. Pretty
20 exact about things. We also know, when she drew the picture of
21 the person responsible, she drew that picture.

22 We also know that, from the evidence, which
23 would be the videotape, which we don't have here right now,
24 we know what kind of hairstyle Diane Downs had at that time.
25 And it wasn't like that at all. Not at all -- with no bangs,

PET. EX. 11

1 no bangs at all. We certainly know that she doesn't just
2 draw bangs as a matter of course. It's not just simply a
3 habit -- all her people having bangs on -- at all. Why did
4 she put that on?

5 And I don't have the composite here, but the
6 person responsible, who these bum leads observed, who Diane
7 Downs observed, that person had hair down the front -- the
8 bang. We know all this stuff starts coming together. You see
9 these things, kind of things.

10 If you take them out of context, like the
11 sweater or she had an abortion because Cheryl was colicky,
12 you take them out of sync, and you can do anything you want to
13 with them.

14 I'm trying to take direct testimony, cross
15 testimony -- everything. And it starts: Danny shot; the
16 position he's shot -- around the corner; Diane Downs sees a
17 left hand raised by the person -- and it wasn't a
18 hitchhiker. Mr. Hugi, again in his cross, says, "Who stops
19 for a hitchhiker?"

20 I submit Diane Downs did not stop for a
21 hitchhiker. She didn't. She stopped for a person in the
22 middle of the road waving his left hand and arm and wanting her
23 to stop. And she believed, mistakenly, obviously, that he
24 needed help -- background, Good Samaritan.

25 All the stuff you're afraid of as a kid to do, PET. EX. 11

1 she did. She stopped. She should not have done that, but she
2 did. Who are we to fault her? Who are we to stand up and
3 ridicule her, saying, "Hey, ridiculous. Well, no mother would
4 do that. That's incredible." She did it. It may be a mistake.
5 Maybe it wouldn't have been a mistake if somebody was actually
6 in need of help. Maybe it would not have been a mistake, and,
7 then, maybe it would have been a mistake to go on by.

8 She stopped. The person comes up. She initially
9 thinks it's a right-handed person but, in logically thinking,
10 it had to be the left because she has not shown that with the
11 left hand but with her right. And he goes back there in the
12 direction of the window, and the shots occurred almost
13 immediately -- because the weapon was either accessible or
14 in the left hand by that time.

15 And I suggest that that kind of a crime that
16 occurred at that time was not a sensible crime; it was not a
17 logical crime; it was not one that can be explained by "She
18 had a boyfriend and she wanted to be with the boyfriend." That
19 is an insane thought.

20 And this is an insane act -- it's either an
21 insane act, a drugged act -- It is an act that is out of
22 this world. And that is not the way she is or was or has
23 been.

24 The left-handed person -- You'll have the
25 car back there. And, again, I know we found out from Mr. Pex,
PET. EX. 11

1 you stand on the stuff, and you can ruin part of it because
2 it's Styrofoam or something similar. But you can experiment
3 with it a little bit back there.

4 For a right-handed person, a car that small,
5 you got to get over there almost in the passenger seat and
6 then turn around and do that sort of thing (demonstrating).
7 And that doesn't make a whole lot of sense when, a left-handed
8 person -- and you've got five shots in there -- you've got
9 maybe one or two at Christie, another one back at Cheryl or
10 a couple at Danny. What probably occurred -- basically the
11 order that's been indicated by the prosecution -- probably the
12 first shot with respect to Cheryl. And then it could have
13 been any combination of the ones in the back. The casing then
14 goes into the back. Both of them probably go into the back
15 because the only open door is the driver's door. And we know
16 approximately where some of the casings were found. It goes
17 into the back. A couple of shots back there. Find one or
18 two casings back in the back, one down in the bottom, and then
19 the other shot with respect to Danny. And that would go in
20 the direction, if one of the -- The car is so small, bouncing,
21 one of them goes outside of the car -- probably the most
22 logical one, since you have the trajectory, is Cheryl -- going
23 over the seat. Logically, the one, with respect to Danny,
24 probably went over the seat and in the door area, probably,
25 because that's approximately where you find them. PET. EX. 14 don't

1 find any casings in the front seat, with respect to Cheryl.
2 You find them in the back seat.

3 A left-handed person -- and that is, in fact,
4 what Christie draws (indicating).

5 We also know that Diane Downs is wearing a blue
6 shirt and, also, this flannel shirt (indicating) -- this
7 flannel shirt. She doesn't write that in. We know that the
8 person that is observed is wearing a dirty, white-colored
9 shirt. And that's what she draws.

10 But let's ask ourselves the question -- She's
11 saying what she saw. Let's ask ourselves the question again:
12 How incredible is it to believe that she would say something that
13 is not accurate? How incredible would it be that she actually
14 has this in her mind -- and believed it because it has been
15 acquired from some other source, we ask. Well, not so
16 incredible. Because of the way she draws the gun, you know
17 that's something that's in her mind because that kind of a
18 handle is not with respect to an automatic -- not at all. That
19 is a revolver. That's with respect to the revolver. See the
20 handle on that (indicating)? Christie Downs has drawn the
21 revolver. But everybody has taken it to believe that she's
22 drawing a picture of the person that's responsible.

23 And where did she acquire this information?
24 Well, she was in the area of the trunk. She saw the revolver
25 at least the week before. We know she may have seen it another

PEP EX. 11

1 time, too, because -- at least believed it to be a pretty
2 useless gun, being in the trunk for a long period of time.
3 Where did she acquire the information? Not from the evening
4 of May 19th. That's another thing we cross off.

5 Diane Downs' hair was longer than that. All
6 this you can get from the videotape.

7 Where is Paula Krogdahl? What did she say?
8 What has she done before? It's not here. That should be of
9 some concern.

10 The, I don't -- Just, beyond-a-reasonable-
11 doubt situation is something that needs to be applied to the
12 entire case. And I don't want, I guess, to leave myself open
13 for Mr. Hugi to say, "You take each of these separately and
14 it doesn't fit, and you see a little doubt here and doubt
15 there but, put it together, and still makes sense because
16 we're right." It's important for us to do this. Let's apply
17 a test right here. If it were just Christie, by herself, right
18 now, is that proof beyond a reasonable doubt? Is that the
19 amount of proof that you would require to act upon in the
20 most important of your own affairs?

21 And, for that, I guess you could take, pick
22 and choose what are some of the most important of your own
23 affairs, to a certain extent -- you know, buying a house or
24 something like that -- before you put your own money down.

25 Let's say -- This is a little bit ridiculous,

1 to a certain extent, but assume that Christie is giving
2 information concerning a house you're going to buy, and she
3 says it doesn't have dry rot and, in fact, the reason she
4 knows it doesn't have dry rot was she was at the house on
5 Wednesday and checked it out. And, and she knows that because
6 she was driving her Chevrolet Camaro -- or Chevy -- and the,
7 you know, was there. And she said a number of other things,
8 too. And she said, "But please believe me" -- the conclusion
9 is "Please believe me. I know it's in really good shape.
10 Trust me." And then you went over and you talked to Jim Pex
11 and you talked to some other people, and they said, you know,
12 "I'm sorry. I know she's told you that about the house but,
13 you know, it really is impossible. She wasn't even in town on
14 that day. No way she could have seen that because of where
15 she was."

16 And there are a lot of other things. And he
17 goes ahead and lists them. "It's just impossible for that to
18 have happened. I'm sorry." Then, I ask you, at that time,
19 are you going to put down your money and buy that house? And
20 I suggest to you you would not. And that's how we avoid, in
21 this particular system -- and it's an excellent system --
22 mistakes being made, see, by applying that formula.

23 Sometimes, I suggest, you wouldn't. Suggest
24 to you that that is too susceptible to different interpretations
25 for Mr. Hugl to draw inferences from. Some other ones can be
PET. EX. 11

1 drawn -- and pretty valid ones. The, that subject -- We've
2 talked about a lot of these other subjects. We've talked
3 about -- a lot of these other subjects we've talked about.
4 Won't take that long. But you can see why it's so important
5 we need to talk about each of them and explore what and why
6 it's occurred.

7 I suggest to you that Christie, very traumatized
8 inside the car -- was shot -- probably did see the person who
9 caused it. And, from that, she did acquire some of the
10 information that she then put down in her drawing. She also
11 saw her mother through the window. She saw her face. And, as
12 tragic as it is that she, through the passage of time, from
13 not knowing anything to wondering to suggestions from people
14 innocently suggesting things, not being experts in memory,
15 not understanding the effect they have -- including even the
16 defendant, herself -- that she came to believe something. I
17 submit that that can be taken care of. As kind of an aside,
18 that can be taken care of. She can understand. And perhaps
19 one way, I would suggest, would probably work the other way.
20 Eventually she'll understand. She'd never understood that
21 her mother took the position that she was not responsible.
22 She only heard that people thought she was. She never heard
23 someone tell her that there was a Norm Hilliard, that there is
24 a McCain, that her mother said some man -- whatever condition
25 it was at, was responsible. She never heard that situation --

1 never, over the months of therapy, months in the hospital.
2 She only heard one suggestion. I suggest that's what happened.

3 The, I want to quickly go through the, on
4 the issue of her, the last witness. For example -- this will
5 put this in context. Mrs. Whitacre, I believe, was talking
6 about, you know, Danny. She had been with Danny. And we had
7 some other people say, "I've been with" -- some of the other
8 people -- "some of the kids and" -- or "with Christie," excuse
9 me -- and, you know, when the mother would leave or when the
10 mother was there, she hardly saw any emotion at all that you
11 might expect in a mother/child relationship.

12 Well, that is a fabrication. And I want to
13 try and quickly go through that to show you that it is a
14 fabrication as a result of an adversary proceeding, which is
15 a proper and valid one. It leaves you with feelings, for a
16 while, that are not true.

17 Because of the system, it allows us to
18 respond, but some of the facts come in later, such as now.
19 But now we can go through some of those. The, in going through
20 this, I'll refer to the number of exhibits, and that will
21 ultimately -- if you need to check up on what I'm saying -- that
22 will give you the key right into what I'm talking about.

23 When Diane Downs got to the hospital, she
24 was in shock. And am I just shooting the wind? Well, I've got
25 Willadene Frederickson saying she was. She showed ~~up~~ ^{RE: EX. 11} She

1 thought that she was -- I think she used the word "hysterical."
2 Maybe hysterical -- To be candid, maybe "hysterical," in that
3 family, is perhaps much more than we think of, perhaps, in
4 other families, in a family where, if you start to cry or
5 you are showing emotion, you are told to shut up. "Hysteria"
6 may be showing emotion and crying in a normal fashion.

7 Her mother saw her, as soon as she was there,
8 crying, the effects of her having cried -- tears. She was
9 discussing something with another person there. They went
10 into another room, and Diane basically broke down and was
11 crying there, being held by her mother, Diane saying, "My
12 babies have been shot" and -- someone is saying some of the
13 things that you would have expected her to say. Mother tells
14 her it's okay -- typical family reaction. "It's okay, it's
15 going to be okay. Excellent doctors. It's okay."

16 It's confusion throughout the evening, Willaden
17 Frederickson verified -- as far as which children are shot
18 and which are not shot, which have died. There is a confusion
19 between Cheryl and Christie.

20 Mr. Hugi tries to make a big thing of the
21 fact of who has died, that there's an eyewitness, and so he,
22 she has to be real concerned about it. Well, no. Tell the
23 other side, Mr. Hugi. And that is that they were getting
24 some information that Cheryl had perhaps died. And then it
25 was Christie. They thought perhaps both. They were next to sure.

1 It was, it was -- The doctors were even confused, Dr. Miller
2 indicating at one time -- I may have them reversed; yeah, I
3 do -- Dr. Mackey indicating that they advised Diane Downs that
4 Cheryl had died ten to twenty minutes after being there,
5 Dr. Miller having the same conversation an hour-and-a-half
6 afterwards -- Willadene Frederickson recalling it was two hours
7 after they had been there.

8 But the point I want to make right now is
9 Willadene Frederickson is on point: Diane Downs was in shock.
10 This was shock from what had occurred. But is that all we have?
11 No. We have page 1 of the medical report and -- This is not
12 the shock one. I'm sorry. But, page 1 -- Let's start off
13 there. Judith Patterson. You heard her testify that she was
14 just as calm as can be, not really upset --

15 MR. HUGI: Excuse me. I don't believe --
16 That's contrary to the evidence. I don't believe she testified
17 to that at all.

18 MR. JAGGER: Recollection of the jury.

19 THE COURT: I'll overrule the objection. It's
20 a matter of argument.

21 MR. JAGGER: Recollection may be different.
22 And you can check back into the notes. But the recollection is
23 that Judith Patterson inferred, at least, that she did not see
24 anything that was wrong with respect to Diane Downs. Whether
25 she did or did not, to a certain extent, is irrelevant because

PET. EX. 11

1 we do have documents -- on page 1 -- that she put down "The
2 mother was upset." She was, in fact, upset. This was during
3 the initial stages there -- in fact, so upset that, that a
4 consent and the particular legal form had to be filled out by
5 someone else.

6 On page six-two, entry made relating to her in
7 shock: Unable to even comprehend the enormity of a child's
8 death and other person's injuries.

9 And that's what we've been indicating all
10 along: that she was denying that. It could not be, absolutely
11 could not be -- unwillingness to accept. And that is something
12 you see.

13 And her opinion, though, wasn't that something
14 was wrong; her opinion was that she was in shock. And I submit
15 to you that she was.

16 The other side of that page -- basically the
17 same kind of entry, generally the same kind of entry.

18 Page 31: Diane Downs concerned about losing
19 custody of children, real upset and wanting to be with the
20 children, obviously.

21 The next, after that: "Diane Downs was very
22 quiet" -- this is June 3rd -- "very quiet, very down." Relating
23 back to that, the wanting to visit her daughter about the same
24 time.

25 The, page 66, she was down to see her

PET. EX. 11

1 children. She came back -- and this is May 21st, when, the
2 day or two after May 19th. Comes back. And the note is that
3 she comes back after the visit and she's "weepy," unquote.

4 Some of the things we didn't hear from live
5 witnesses. The, page 68, May 22nd, "Downs to see children.
6 Returned. Very upset and tearful." Very upset. Loss of
7 child.

8 Note, with respect to May, May 23rd -- it was
9 page 80 -- Danny Downs, a note right here is that he had had
10 spontaneous movement with respect to his, his lower extremities,
11 and these, for some reason, were not there anymore.

12 Page 86, referring back to May 19th -- this
13 was relating to Danny Downs -- a moaning, moving of the
14 extremities, feet, et cetera. Same with the opposite side of
15 the page: ability to move.

16 And Diane Downs was able to observe that
17 while there. That's part of the reason she was concerned.
18 She was seeing the same thing. That's the reason, one of the
19 reasons: She saw that and was concerned about that, because
20 she saw the moving and, later on, three or four days later,
21 no more movement. And she was concerned that something had
22 occurred. Of course, at the same time, restricted by the
23 hospital.

24 Back on page 92, indication that the
25 "The child can voluntarily wiggle his toes." Same with
PET. EX. 11

1 respect to 94, page 94.

2 In fact, even a note there on page 93,
3 May 22nd: "The child can stand up, may stand at bedside to
4 void." Apparently real good use of the limbs at that
5 particular time.

6 Page 125: "Danny Stephen Downs moves all
7 extremities" -- and that's relating to May 19th. Another
8 entry: "Restrained," He's to be restrained. Moving so
9 much, might even move around.

10 The, page 88, another note, same indication.
11 Lot of people were observing this. Some of this is
12 duplication.

13 Page 129, Danny -- the person that, you know,
14 that we had the witness say just doesn't see any response
15 toward the mother, nothing at all, May 20th "Love Mommy,"
16 et cetera -- positive things with respect to the mother. These
17 things are being observed while the mother comes in. Of
18 course, the mother is, basically, never in that room without
19 somebody observing what's going on. No suggestions can be
20 made by the mother. Nothing can basically occur except
21 somebody is there looking over her shoulder when she's with
22 her children.

23 Mother -- on page 128, child is asleep.
24 Doesn't want to disrupt the child. Lets the child sleep.

25 Page, May 21, 20th, page 121: Mother there.

PET. EX. 11

1 Indicates he loves her. She stays with him. And she
2 indicates that, to him, that she'll stay there.

3 Keep in mind that, around June then, all of
4 this, this contact with the children ceases, except for this
5 October contact. And, at that particular time, as you might
6 expect, as things get more comfortable at the Slavens -- a
7 comfortable home, probably going to see a little less reaction
8 concerning the loss then or the separation between a mother
9 and child. You're going to see less of it because the child
10 is going to give up.

11 But it's important to note, later on, that
12 you have nothing but positive stuff between the mother and
13 children -- because that has been an inference, I submit, you
14 have been misled on, intentionally or unintentionally.

15 They had, they were positive there. No fear
16 and apprehension at all. And that's why I'm going through
17 this, because of the inference, only. I have to go through
18 this so we can see what, in fact, was in there that, you know,
19 is different from what perhaps you've heard so far.

20 You see, just to make sure, some of these
21 things in here with respect to Danny -- He's kind of an
22 obstinate child, cuddly but obstinate -- his age, three,
23 three and a half, four. Sometimes is asked to do things by
24 parents or nurses, and he'll say, "No. No. No. Shut up.
25 I'm not going to do it" -- very reluctant -- but later goes

1 ahead and does it. And, some things in here, where he might
2 be saying, "No, I don't want you, Mommy" and Mommy is there,
3 but it's all positive. In case it's taken out of context,
4 you understand that that's the general nature, and this is
5 what occurs.

6 And I'll try to go through, basically,
7 all the portions of page 162 -- this is July 7th. And some
8 of this is a little out of order. I apologize for that.

9 But, the talking about going to his mom's
10 house, even then -- this is after the visitation has ceased,
11 wanting to go with the mother, with his mother and being there
12 with his mother. And, in fact, the reports indicate this will
13 continue until Steve visits the children and Steve indicates
14 to them, to Danny, specifically -- it's most clear, here --
15 that they won't be able to -- they will be able to get out
16 of the hospital and go with him or go in a few days -- a switch
17 of saying, "I want to see Daddy," and reverts back to mother.
18 It's real clear who has been the primary provider and the
19 person taking care of these children.

20 July 16th is saying, "Get out of here. I
21 don't want to do exercises," and then says, "Thank you for
22 helping me do exercises" later on.

23 June 20th -- this is page 168, getting back
24 into June -- wants to see his mother.

25 July 28th, 170, they made a specific note:

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1 Danny remains affectionate and likes to cuddle. That's,
2 that's the family. He and his sister and his deceased sister.

3 Page 173, July 14th -- or 15th -- they spoke
4 with their mother. Positive things. She's also involved in
5 getting some play devices for them at that particular time.
6 Stopped by to get the progress. She was interested even after
7 May 19th, as far as what was going on.

8 And, if you look at it that way, you see the
9 State is trying to infer that she wasn't interested, she
10 doesn't care.

11 I got to go through this to show that she
12 did care afterwards. And then, when you see that she's buying
13 them things, involved in things, checking on progress, then
14 you see that that's consistent with what happened May 19th,
15 also. She was there asking about the children. She was going
16 into the trauma room. She asked Rosie Martin and at least one
17 other person how the children were doing. She was involved
18 there, also. And that's consistent. So you can't take out,
19 the State cannot take out certain things and not talk about
20 the rest.

21 The, there was some more general comments
22 about mother. In fact, there was even a note on 184, at a
23 time when Danny didn't want to see Christie. They were talking
24 about that. And turns around later on and finds, but, just
25 the opposite. Just the age that Danny was at. PET. EX. 11

1 Page 185: "I want to leave here and go with
2 my mother."

3 Page 168: "I want my mommy to come take me
4 away." This is, this is, we're getting back to the one before
5 that, I think -- yeah, latter part of June, June 25th.

6 This is -- We saw a real, you'll see in the
7 medical reports a real large, even a more amount of saying,
8 "I want my mommy" around June 23rd, 24th, 25th, 26th. And it's
9 important to remember, when thinking about that, that the last
10 visit that Diane Downs was allowed to have with Danny Downs
11 was June 20th. Prior to that time she was able to come on
12 limited visitation -- still able to come. When she wasn't,
13 then we had a great amount of, a real loss, of the children,
14 with respect to her.

15 And, of course, as time passes, that, of
16 course, some goes away.

17 The, even though there was no visitation,
18 she was calling on June 24th, 25th -- page 186 -- how the
19 children were doing.

20 Page 190: "I want to go with my mom."

21 June 30th -- I believe this is page 196 --
22 "Want to see Mommy." Cried for his mother before he went to
23 sleep.

24 Can you imagine what was occurring with
25 that child?

1 You see, I mean, that's, the mother has been
2 the primary provider his whole life, and she's gone. And he is
3 calling for her. And he is crying for her. And it makes a
4 loss. And you wonder why -- Same with Christie. Loss there.
5 She wonders why. And what fills the void? We have some idea.

6 We see, the May or July 7th, page 206, wants
7 to, pretends he's a baby and asking the nurse's to be his
8 mother -- trying to get a mother substitute.

9 Same with July 9th. "Want to be with my
10 mommy" frequently that day.

11 Page 212 -- this is the 11th of July --
12 "Crying for his mother."

13 July 15th, 220: "Wants his mother. Very
14 upset about having to go to bed and is indicating he wants
15 his mother."

16 Page 224, July 7 -- or 17th, "Wants his
17 mother."

18 July 20th, "Stating he wants to get out of
19 the hospital." Oh, and this, this is a time, July 20th, just
20 shortly before, the record will reflect, that Steve is
21 indicating that he will be taking the children to Arizona.
22 So we have, during this time, July 20th, he at one time wanted
23 to call his father. And then, down at the bottom, he said
24 he wanted to call his daddy. So that, and then he says,
25 "I want to go to Daddy's house in Arizona."

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1 July 23rd, page 232, with respect to his
2 dad, wanted to, crying for his daddy at that time. Cried for
3 his daddy that particular day.

4 July 24th, 233, with respect to his dad and
5 the -- relating to taking him out of the hospital and going
6 to Arizona.

7 July 27th, page 236, "Upset and crying."
8 He's still in the hospital. He didn't go to Arizona. So
9 what's he going to do? He goes back to the one that was
10 dependable: his mother. Starts crying and asking for his
11 mother.

12 Another one, calling for his mother.

13 Another entry, August, August 7th, "Calling
14 for his mother. Trying to find his mother."

15 With respect to Christie, the notes with
16 respect to Christie, you'll find, are less relations of what
17 she says and more medical observations of her condition. But
18 they are still some real help there, as far as what is going
19 on.

20 She wakes up, on May 28th, wakes up and
21 moves all four extremities. She wasn't paralyzed at that time.
22 And Diane Downs observed this. This is consistent with what
23 we find in the medical records.

24 And, later on, of course, she finds out
25 perhaps a seizure. And she is upset about that, along with

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1 some other things. Kind of similar to the Danny situation.

2 The 331, page 331 is a real important page.

3 May 27th. She, we've had a lot of criticism about Diane
4 Downs because she wanted to take the children out of the
5 hospital. And here we're answering it. And, if it doesn't
6 get answered and explained, then it just sits there for
7 whatever inference they want to draw.

8 It's that she wanted to have the children
9 together at one time. She wanted to have a phone call being
10 made. Danny is in another hospital during this time, and she
11 wants to get Danny and Christie together.

12 May 27, McKenzie-Willamette Hospital notes
13 that Diane Downs, "She would like to have both children in the
14 same room." And that's consistent with what she had been
15 doing all the time.

16 Okay, 331 -- The 338, we find that she is
17 tearful at times and she is refusing to cooperate with her
18 therapy -- page 338. Same with respect to 339. She's advised
19 at about that time that she is now in the custody of the
20 hospital, has nothing to do with her mother -- no custody at
21 all -- June 2nd, June 3rd, right in there. And that's just
22 two weeks until she'll not see her mother again except for
23 that October meeting, because she cannot see her mother
24 anymore around June 18th.

25 And, again, then, of course, we have PET EX. 11

1 Dr. Peterson's notes as far as "I wonder why. Why? Why?"
2 She's rebelling against speech therapy.

3 Page 342. She's advised that her speech
4 therapy is not going to get better. She refuses speech
5 therapy at that particular time.

6 Page 549, June 3rd: "Good visit with the
7 grandparents and mother" that particular time, twenty to
8 thirty minutes. It's "Been in a good mood, real good mood,"
9 relating to that particular visit. Watching some TV --
10 turning the page over -- fifty-fifty -- "Watching some TV.
11 Short walk." Things are fine.

12 So you'll find, in here, that when she
13 visits her mother, basically, it's a real stable night. Then
14 she's relaxed and rested.

15 In fact, there is a specific note, one other,
16 that that occurs -- fitful at other times, but she'll meet
17 with her mother and they will laugh and have a good time and
18 she will be restful and sleep all night without disturbance.

19 With respect to the speech therapist,
20 "Getting better, smiling and laughing" and having a good
21 exchange -- page 547.

22 Paula Krogdahl coming in, questioning. And
23 this occurred even before this time. This is even, back in
24 around August or so. She was still involved, meeting
25 basically from May 19th through 20th, right through -- she's

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1 involved.

2 The reference "Calling out in her sleep for
3 her mom" -- 548 -- some referencing to, obviously going
4 through some trauma of some kind; had a nightmare at that
5 particular time and calling for her mother.

6 THE COURT: Excuse me. I think we should
7 break here. I think the reporter is about out of paper.

8 MR. JAGGER: Fine.

9 THE COURT: We'll be in recess for fifteen
10 minutes.

11 (Whereupon, a recess was taken
12 at 3:05 p.m., proceedings being
13 resumed at 3:25 p.m. in the
14 presence of the jury.)

15 THE COURT: You may proceed.

16 MR. JAGGER: Thank you, Your Honor.

17 There are a few more of these reports, and
18 I don't want to go through it. I know it takes a little
19 while but, hopefully, this will be of some assistance, because
20 the reports, as you can see, are real thick -- the ones in
21 evidence. And, in all fairness to you and your job and your
22 deliberations, it could take quite a while to read on through,
23 verbatim -- not to say that you should not take, that you
24 shouldn't do that, but we already went through some exhibits,
25 took some time out and -- I know how long and time-consuming

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1 that is. So, hopefully, this will be of some help, although
2 right now it may wear us out and my voice out and even
3 listening becomes difficult. Let me get through this, and I'll
4 move on with respect to some bullets.

5 Page 546. Mother -- the bedside -- There is
6 some problem with, with respect to Christie crying at the
7 speech therapists whenever she's trying to work. It is real
8 frustrating there. And we find she was having difficulty
9 communicating. That's perhaps why we don't have, perhaps,
10 some more verbal communication from her, as we do from Danny.
11 But later on, as she is able to speak, it's interesting to
12 note that she is saying "Mommy," and there is a specific note
13 made of her request and laughing and having a good time and
14 chuckling and -- sometimes her mother and grandmother.

15 The page 544, Christie said, "Mommy" -- There,
16 there are some problems when she's doing some things. She
17 cries and she has real difficulty. Real frustrating, as you
18 might expect, from a person who is paralyzed and has some
19 limitations and also has the inability to communicate like she
20 has to. That is hard. Your heart just has to go out for her.
21 And it's a real difficult thing for her to do.

22 It's interesting to note, however, that the,
23 a source of pleasure, the most prevalent source of pleasure,
24 within the medical reports, you'll find is that, the time
25 she spends with her mother. And, hopefully, they will be of

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1 assistance to you for that.

2 The mother and grandfather -- or grandmother
3 -- here. Cheerful, laughing. Page 543. And we're talking
4 May 30, 31st, first part of June, in here, now. "The mother
5 came in. Christie was real tired. Mother was going to come
6 back later.

7 The mother -- couple of other visits, page
8 542 -- "Laughing, conversing. 'Yes' and 'No' on occasion.
9 Having words with her mother. The mother and grandmother
10 here later on." Therapist was there this time.

11 It's interesting to note that the problem
12 they had with the speech therapist before, for the most part,
13 it was just a speech therapist by his or herself. This is
14 with the mother and grandmother there. And it's a real good
15 session. As a matter of fact, the therapist made a special
16 note concerning that.

17 A number of notes where she's watching
18 TV, the -- excuse me, 540 -- mother was there to visit and
19 brought a sundae for her and, but she decided not to wake
20 her because she was sleeping.

21 The, we have the speech therapy in the
22 situation starting to get progressively better.

23 The page 538, mother was there couple hours
24 that night. Helped her eat supper. Ate a certain amount.
25 Watching TV. She was there for a real long time that time.

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1 Quite often, sometimes they, because of the restrictions, were
2 there even shorter. This time, May 29th, Diane was able to
3 stay for a couple hours. And a note was made that she had a
4 real stable night that evening.

5 The note was made -- You'll find, after a
6 while, here -- in fact, on page 537, just the page before
7 that, you'll find a situation of Christie starting to call the
8 nurses and some of the people there her mother.

9 Danny was doing it, of course, some of that
10 with some play -- and wanted the nurses to play like they were
11 his mother. But you'll find, at that particular time, some
12 of that started happening because she could not be around as
13 much and some of that suggestion occurs with respect to
14 Cheryl.

15 The grandparents visited Kristie. She
16 appeared a little bit grumpy -- this is page 535 -- "Mother
17 came over and appeared in a lot better spirits," talking, in
18 fact -- trying to talk and say more than three days before.
19 They noted a real difference, there, when her mother was
20 there. It's not in the negative-fear-apprehension thing.
21 And that's the reason we're forced to go through that. And
22 that's, the only way is by going through, you know, the facts.

23 Page 534 -- I'm going backwards a little bit,
24 the way this order is.

25 May 28th, laughing, cartoons -- appropriate.
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1 Mother was there talking with Christie frequently about things
2 they will do when they get out -- so on and so forth -- very
3 bubbly and talking.

4 Same way May 27th -- 533. Very positive --
5 the, pleasant exchanges.

6 The 532, this is about May 27th. The, she
7 was asking -- Her mother, Diane, and grandmother were there.
8 She was asking about her sister. And there -- the words,
9 specifically are: "Mother tearful. Explained sister has been
10 in a tragedy and was with God." And, you know, it's
11 questionable whether Christie had ever talked to anybody. So
12 how appropriate it was that Diane be allowed to share that and
13 exchange some of that grief with her at that particular time.
14 Very appropriate.

15 The, 523 -- this is May 24th. These are
16 going backwards. "Mother there for about half an hour.
17 Seemed encouraged. Christie improved."

18 Five twenty-four, Christie was crying at
19 night, apparently, that particular time -- "Some crying."
20 And, see I'm going backwards. There was improvement, I think,
21 as we indicated, about May 27th or so.

22 The 521, Diane spent the entire night with
23 Christie. Was around May 23rd.

24 Twenty-fourth, no problems. No crying. No
25 nightmares. And I suggest it's because her mother was there.

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1 Mother was not the cause of the nightmares. Her mother's
2 presence alleviated some.

3 June -- this is 361. And this is important.
4 June 16th, 361: "Long session today. Paula and Mr. Furtick,
5 the attorney for the children. Christie quite upset. Perhaps
6 we should postpone decision on surgery tomorrow."

7 What was so disruptive? Whatever was going
8 on, whatever talking was going on was so disruptive that
9 they wanted to postpone the surgery for Christie. Paula
10 Krogdahl -- And we had some -- it's hard to know exactly what
11 to make of it -- some indication on the tapes and Paul
12 Frederickson (sic) that Paula Krogdahl was there and maybe
13 something inappropriate was happening with respect to her
14 and Steve Downs, that Paul Frederickson indicated that Steve
15 had told him that Paula was coming on to Steve Downs -- the
16 indication about showering at Paula or Paul's place -- some
17 disagreement concerning that.

18 It's disappointing that, that wasn't met
19 directly to Steve Downs and Paula Krogdahl. We didn't have,
20 maybe, some persons here to actually indicate what's causing
21 her to be upset, what kinds of things are being said -- things
22 of that nature. And perhaps we could have called her --
23 Mr. Hugi could say that. The legal reason why some of that
24 may not occur is that, as you have observed during the course
25 of the trial, if you call a witness, yourself, you have to ask

1 them "what-happened-next questions." You can't lead them
2 as you can if you don't call someone.

3 And it probably would be committing
4 malpractice, on my part, to call somebody such as that, when
5 you have such an indication, in the reports, of perhaps some
6 impropriety or not handling things as they should have and
7 allow someone, then, to have just liberty to just say whatever
8 they want to and no way for you to control this with leading
9 questions. That is just something you cannot do. Besides,
10 the, the defense does not have the burden of proving something
11 in this case; the State does.

12 The State, to answer that, should
13 have called Paula Krogdahl. At least, certainly, a case can
14 be made for that. There is some real concerns about that.
15 And these concerns have been raised during the trial. And
16 they were there long before those particular times.

17 Page 553 -- this is talking June 5th: Good
18 visit with mother. Laughing, having all the positive things
19 you would expect.

20 The, page 558: Christie smiles, laughing,
21 et cetera, moving legs. This was June 7th. Getting along
22 real well.

23 Five-sixty: Diane Downs visiting her. This
24 is June 8th. Good visit. No problems. Christie slept, in
25 fact, right after the visit. Was so at peace, just excellent right

1 sleep right afterwards. Was able to sleep.

2 The page 562, same kind of indication.

3 Mother there. Father was there this time -- and grandparents.

4 Giggling, watching TV -- positive.

5 Five sixty-three. This is the entry dated

6 June 11th. Cheerful. Smiling. Mother and daughter again.

7 Same with respect to 567. Laughing, smiling. Same with

8 respect to 569. Mother and daughter exchange. Same with

9 572.

10 Of this, 562, we'll give an indication of

11 June 14th, time where she slept all night, which is just the

12 day right after she'd just had a real long session with her

13 mother.

14 Five seventy-one. Makes some reference to

15 some of her treatment -- a little bit of her obstinacy.

16 Five seventy-four makes some positive

17 references, and same with respect to 573. Okay.

18 It's taken a little while, but part of the

19 reason I did this was, during the course of the trial, when

20 inferences have been raised -- even during the Dan Sullivan,

21 when there was some inferences raised that she's a terrible

22 mother, don't -- you know, lets them go out roaming around and

23 unclothed and things of that nature. I sometimes -- You know,

24 we're very much aware of witnesses. And, but also Mr. Hugi

25 and I become aware of your reactions to things. And we see,

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1 sometimes, you look at -- during particular testimony, and it
2 was concerning some stuff like that -- you look at Diane Downs
3 and, clearly, it's something that, you know, hits at your gut
4 when you think, when you hear stuff like that. And that's
5 why I've taken some special time to go through that.

6 Mr. Hugi indicates, in his argument, that
7 she lies awake and has fear and apprehension of Diane Downs,
8 et cetera, et cetera. It's not right. And that's not true.
9 And we're able to go back to the records and go through them.
10 And, hopefully, now you can see, you know, what is there.

11 Why was it said? Because it helps their
12 case. And, but it's not supported by the evidence.

13 And I want to talk about Mr. Tracy and some
14 bullets. And this, once again, is something that -- I'll try
15 and write some things down on the board up here, so Mr. Hugi
16 can see -- If he has some explanation for it, then that would
17 be great. Love to hear it.

18 This kind of a case is a real unusual case.
19 It's something that, as soon as it, the hospital -- you know,
20 as even Dr. Miller, I believe, talked about, was a once-in-a-
21 lifetime situation. It's an unusual case that calls for
22 once-in-a-lifetime action -- unusual action and quick action.

23 The, once again, to set it -- The police
24 admittedly were concerned about Diane Downs' reaction. I
25 submit they talked among themselves. They talked in the hall.

1 And I submit to you that Dick Tracy was involved in that, too.
2 He cannot insulate, no matter how he tries, insulate himself
3 from that knowledge that was prevalent with everyone. He
4 cannot say he was not a part of that, too, even though that's
5 the position he's taken.

6 For him to take that kind of a position by
7 itself should raise some question in your mind. The questions,
8 though, to be raised here are with respect to Mr. Tracy and his
9 actions. For me to take the position that Detective Tracy,
10 from particular sources, took bullets and placed them either
11 in the envelope or in that rifle sometime during that next
12 day is a serious allegation. You bet -- and not one that is
13 made without testimony, evidence from other people, not just
14 Diane Downs.

15 It's not made without reflection upon how
16 he has reacted, as you might compare his reaction with other
17 people, and is not made without support of the physical
18 evidence, itself.

19 And this is one of those things where I
20 haven't had a chance to stand up and say, "Hey, remember this
21 because this is important." We're going to do it now. And
22 there are quite a number of them. There are close to twenty
23 situations. And I want to talk about it.

24 It was a special situation, but let me
25 address, first of all, the thing that, the answer that Mr. Hugi

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1 gives for why this would not have occurred. Okay. Mr. Hugi
2 says this would not have occurred because -- Let's assume
3 that these two bullets that Mr. Tracy put into the envelope
4 or the rifle did not match, did not match the casings at the
5 scene. Because, clearly, if that occurred, you had those
6 two alternatives: it either didn't match or it would match.
7 If it does match, that clearly helps the State's case. But
8 Mr. Hugi says if it doesn't match, then the whole case is
9 out the window. That's why he would never do it. That's not
10 correct. He'd like for you to believe that because that's
11 his only answer, because he has to deal with -- and this is
12 one, I submit, I hope he goes through because that isn't true
13 because, in fact, there were bullets that did not match.

14 There are between six to seven bullets that
15 were pulled out of the rifle that did not match. Their case
16 didn't go out the window. So what if there had been two more
17 that didn't match? So what? No. Detective Tracy's actions
18 were not something that jeopardized the case one bit. It was
19 a free shot, total free shot. So do not think that what
20 Mr. Hugi is telling us is the answer. Okay.

21 Now, let's look at what we say goes to
22 support and raise the question concerning that.

23 Detective Tracy apparently practiced either
24 early -- or got his training in Los Angeles, Orange County.
25 Worked down there for about ten years. Don't know exactly

1 what occurred down there, but we know that, around '73 he
2 came up here -- basically worked for Sheriff Burks since that
3 time. One of the, if not the one detective with about the
4 highest seniority. Been there for a considerable period of
5 time. We know about that time. It's not really denied.

6 And it's in evidence that the Sheriff's
7 Department, some bond issues -- maybe some fiscal problems
8 at that particular time, I think -- primarily referencing the
9 tape. We didn't explore it fully. And perhaps maybe we should
10 have explored it further. But we know it's pretty unrebutted.
11 And that time was the difficult time.

12 You come to the hospital, and Detective Tracy,
13 as were other ones -- And quite, to, quite admittedly, police
14 work is difficult work. It would be real frustrating, because
15 you're going to sometimes become involved in cases where you
16 believe someone is responsible and some other people disagree --
17 either a jury disagrees, or the District Attorney's Office
18 disagrees or whatever. It's got to be frustrating work. Sure.

19 In fact, we talked with Detective Tracy a
20 little bit about it, that sometimes homicides or other cases,
21 it's pretty frustrating to think that somebody -- You form a
22 conclusion, which I submit they should not do. When you form
23 a conclusion, then you start seeing people as -- Norm Hilliard
24 and other people -- as bum leads when, in truth and fact
25 they may be the very leads to lead you to who is responsible.

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1 Perhaps there has been some collateral reference
2 to the Fredericksons, the parents of Diane Downs, maybe Diane
3 Downs' being critical of the investigation. Perhaps they had a
4 right to be, when they, when the only reason, perhaps, that you
5 were able to hear from John Hales and other people is that they
6 took the initiative to call our office or contact the
7 Fredericksons. Otherwise, you never would have heard from them.
8 How much better a case the State would have had then. Are there
9 other people out there that perhaps were not able to call be
10 because officers drew a conclusion early? And I suggest they
11 drew a conclusion around May 19th. And that's really unrebutted.

12 So you have Detective Tracy, who really is
13 really vague about everybody else drawing a conclusion. And
14 I submit Detective Tracy had seen what was occurring and,
15 realizing that, hey, you've only got certain kinds of evidence.
16 And you can see Cheryl die, Christie potentially dying -- both,
17 both Christie and Danny, at that time; you heard the doctors
18 say Danny was approximately within five to ten minutes of
19 dying, Christie potentially the same.

20 The kind of injury to Danny would cause -- Well,
21 we'll get the exact quote later on from the doctor but, from
22 that kind of wound, would die quickly or -- the quote, we'll
23 get to that later on. But it was that kind of -- a real death
24 would have occurred real rapidly.

25 Basically, those detectives saw a situation
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1 where they thought she was responsible, and the only witnesses
2 were either going to die or they would be physically
3 handicapped such as there couldn't be any witnesses. Danny, if
4 he recovered at all, would be too young to be a witness,
5 potentially. And you could feel some of the frustration that
6 must have been felt at that particular time. And Detective
7 Tracy -- I submit to you this is a conclusion, that we'll then t
8 about the, the underlying facts decided from a source --

9 You see, more likely the evidence points to
10 the fact that you know, the clip holds nine, nine bullets. And
11 the equation of seven plus two is nine in this case is real
12 important because, while only six casings were found, one may
13 have been kicked who knows where -- who knows what. But,
14 potentially, there were seven shots and seven casings took
15 place, leaving two. The clip holds nine, in this kind of a
16 weapon that we have been discussing -- leaving two.

17 The two, I suggest, either misfired through
18 that weapon and either remained there at the scene or inside
19 the vehicle. Potentially, what could have happened also,
20 perhaps, as the person was leaning in with bullets in either
21 pockets or jacket, could have fallen out.

22 But the more likely story was they were a
23 misfire. Extractor marks were there. And they had, showed,
24 in fact, they had been through the action of the weapon.

25 Mr. Tracy got these bullets either out of
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1 the vehicle -- and we have testimony from a couple of people
2 he had keys to the vehicle a couple of times. And that's of
3 real concern, as far as they can't get their story straight,
4 as far as where the keys were and what was taking place. And
5 we'll talk about that.

6 He had access to the car. Maybe not to, not
7 just the -- but he had access to the scene. He had access
8 to Deputy Rutherford, who was at the scene. And he also
9 had access to these bullets for at least a full day before
10 he turned them over to Jim Pex to do with as he wished. He
11 had the opportunity. And they said Diane Downs had the
12 opportunity. Detective Tracy had the opportunity.

13 And here are the concerns. Number one,
14 only Tracy says, you know, that Diane Downs wasn't making
15 any flip remarks -- didn't laugh, didn't joke. Detective
16 Tracy was there and talking to her for four full pages of
17 reports and -- therefore, an hour or two. Everyone else who
18 had contact with her for even five or ten minutes drew some
19 kind of conclusion and, basically, tried to offer something
20 to you.

21 So how does that match? You saw her testify
22 here today. She -- not today, but during the trial. She
23 makes flip remarks all the time. You know, she, there is a
24 question being asked from Mr. Hugi, and he said: "Let's,
25 we've, we've got time."

1 She's here in a very serious case, and she's
2 still making those remarks and, to have gone through all this
3 conversation with Detective Tracy and not say something, when
4 you compare that time element with the short time element of
5 other people, is impossible.

6 So if she'd made flip remarks at that time,
7 would it be in Detective Tracy's interests to try to make it
8 appear that he was not really suspicious of her? Yes, because,
9 if you have done something improper and you know you're making,
10 know you're near -- because he believed it -- nothing to do but
11 trying to make your case -- you bet he's going to try,
12 subconsciously or consciously. But, no, he didn't suspect her.
13 Well, if he really didn't suspect her, he was the only one there.

14 The fact remains -- one thing, anyway -- he said
15 "No."

16 Number two, he had the motive and the knowledge
17 with respect to Cheryl, et cetera. We've already talked about
18 that -- witnesses, so on and so forth.

19 Now, with respect to "three" -- and we've talked
20 a little bit about this. It's seven plus two equals nine.
21 And let me -- This is real important, so let me explore that
22 a little bit further because it has to do with Diane Downs'
23 responsibility, too.

24 Let's assume, let's assume that you are going
25 to shoot your children. Okay. And you have nine bullets in the

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1 clip. And you have fired five and one or two at yourself and
2 the children were still alive. I ask you to choose, then,
3 between finishing them off -- you don't care about them,
4 anyway; they are expendable -- you can finish them off by
5 firing two more shots at them -- and, clearly, you can tell
6 they are alive. The doctors at the hospital said they could
7 see she was alive. She was gasping, choking. Same thing with
8 Kristie. Same thing she heard going to the hospital. Or do you
9 slowly drive around and wait for them to die, as the
10 prosecution says?

11 I suggest to you you finish them off. If
12 that's really what occurred, then that's what you do. Okay.
13 That's if you have nine bullets in the gun, in the clip.

14 Let's assume, let's assume further -- You
15 see, that doesn't make any sense, then, does it? I mean,
16 you're not going to choose to do that. The prosecution says
17 that you, that she did, and that is: causing their death
18 by driving around.

19 Let's assume that she only had seven bullets
20 in the clip, so she couldn't do it anymore. Let's assume that
21 what the prosecution is saying is that these bullets were
22 back in the rifle. Okay? So what has occurred is these
23 bullets are worked through the extractor of the pistol, and
24 then she takes them out, rather than having them in the clip.
25 You can put two more in. She takes them out, and she puts them

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1 in the rifle. It doesn't make any sense. You know, why, if
2 you are going to go out and shoot your children, why do it
3 with, you know -- why do you take some bullets out of the clip
4 and put it into the rifle? Why don't you leave a full clip
5 there?

6 And I told you we would be talking about
7 both alternatives. You look at the evidence and you say if
8 she did or didn't. How does it fit? You see, those don't
9 make any sense.

10 But what does make sense is that, if they
11 come to the rifle or to the envelope from some other source
12 and for a different reason. Let's assume something further,
13 because this is the only other assumption you can make. Let's
14 assume that -- I've taken two hypotheticals. One is if they,
15 it just simply doesn't have that many, just has seven there.
16 And we've talked about this.

17 Let's assume the following. Let's assume
18 these bullets, in fact, were owned by Diane Downs. Okay. We
19 have seven -- and let me show them to you -- this is real
20 important -- before I get to -- Look at this exhibit
21 (indicating).

22 There are the gold-colored ones, which are
23 called "copper-washed." And they have, on the end of them,
24 a "C." This is real important in this case. Real important.
25 They have a "C" on the end of that casing. And those are the

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1 copper-colored bullets. And you'll see two, four, six of them
2 in there and two of the darker-colored -- Further back, you'll
3 see the difference in color. One is lead and one is copper.
4 And, even from that far away, you can see.

5 Now, let's assume that you then have, in your
6 possession, seven of the copper-wash bullets. And you have
7 seven shots at the scene -- lead bullets plus two more. You
8 have nine lead bullets, and you just intermingle them because
9 there is, I mean, they just go through the pistol, both go
10 through the rifle -- who cares -- because, in a way, that's
11 what they are saying is, you know, there is an explanation for
12 the two with the extractor in the rifle. They go both
13 directions. So what? Somebody didn't care.

14 Can you imagine the odds, then, of seven of
15 the lead bullets being taken out of this pile that no one cares
16 about, shake them up, you take seven out, and the ones involved
17 in the crime, only the seven lead bullets are used -- not one
18 or two copper-wash? Can you imagine the odds that the only
19 ones that have extraction marks are the lead-colored bullets,
20 not the copper-wash? Throw them up in the air, mix them up,
21 and run certain of them through the pistol. Can you imagine
22 the odds of that -- without getting one or two of the copper-
23 wash with the extractor mark or one or two of the lead bullets
24 without them? Can you imagine? Odds have to be astronomical.
25 And, yet, you only have so many options.

1 She either had them in the pistol, all of
2 them -- and, then how in the world did two get in the rifle --
3 or we separate them -- and, then, why in the world, if you are
4 going to shoot the children, you reduce the number of bullets
5 you have? Or she did it just unconsciously and wasn't really
6 concerned, and then -- What a coincidence, an incredible,
7 astronomical coincidence, that only the extractor marks are on
8 the lead bullets and, just, it just so happened, the lead
9 bullets are the ones used in the shooting in the car. Awesome.

10 What is even more incredible is this: that
11 you have a receipt which, well, we have here -- I don't know
12 if I can put my fingers on it real quickly -- the receipt, when
13 Detective Tracy picked up eight bullets. And I suggest it
14 may or may not be those same eight. I suggest the same six
15 copper-wash and the other lead bullets. I don't know. When he
16 picked them up, he wrote down on the receipt -- you'll have
17 this in evidence -- "eight bullets." It did not designate which
18 were which. He didn't designate "two of them new, lead bullets,
19 dark-colored bullets, lead-colored bullets and six copper-wash,
20 gold, 'C'" -- six different ones, whatever. He didn't
21 designate anything -- nothing at all.

22 When you've got somebody who's been a
23 detective -- '73, '84, Los Angeles for ten years, whatever
24 else -- certainly one thing you're taught is to be pretty
25 specific, and you record what has occurred pretty exactly.

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1 But he didn't.

2 I'll tell you what's even more incredible is
3 this. During -- You in the back row could see that there were
4 two lead bullets. And these bullets supposedly came out of
5 the rifle and flipped on the bed. And they were there for at
6 least Detective Tracy, Doug Welch, perhaps Jerry Smith of the
7 Springfield Police Department, another Springfield Police
8 Department person, Antoine, or another person -- has name
9 escapes me right now. There is a question whether they were
10 up there. Questionable whether they were there or not.

11 But I would suggest to you what would have
12 happened is that Detective Welch or Tracy or somebody would
13 have made a note to at least be able to say that they saw
14 on the bed two lead bullets, six copper-wash. Doug Welch,
15 perhaps in talking with Detective Tracy -- They may have done
16 some more talking. Recall that perhaps the reason that they
17 didn't do that is that Doug Welch would not back up Detective
18 Tracy on something like that. Maybe he doesn't recall, speci-
19 fically remember or maybe has some doubts about it and so did
20 not really commit himself, one way or the other -- or maybe
21 doesn't want to get involved, because we know, later on, there
22 was some discussion with Sheriff Dave Burks about Detective
23 Tracy's actions in this case, what to do.

24 Doug Welch was not involved in those
25 discussions. It was Sheriff Burks, Detective Tracy and

1 Sergeant Hintz. And it's interesting to know how Sergeant
2 Hintz' name came up in this, which we'll talk about in just a
3 second. Some real disturbing things. None of them indicated,
4 though -- Doug Welch did not testify he saw a couple of
5 different colored bullets there. That's because, I suggest
6 to you, he didn't see them because they probably were not --
7 more likely than not, they probably were not there at that
8 time.

9 What happened? This. We've got this, the
10 coincidence of the things we've talked about. Assume one
11 direction or the other -- just the odds. And put the "odds"
12 there.

13 I guess -- No. 4, the fact that you see
14 Mr. Hugi is trying to indicate that, hey, this decision had
15 to be made real quickly. That's because he's still thinking
16 about it. That probably did not occur -- the switch
17 probably occurred later on. It could have happened before.
18 It could very well have happened. But I suggest to you
19 Detective Tracy thought about it. It may have been, might
20 have been an impulse, but he had a full day to go through that.
21 See, he wouldn't have turned them over to Jim Pex until 8:00,
22 4:30 the next day. He comes up, he comes -- He's not going to
23 wait for John Peckles to get there. He doesn't, does he? In fact,
24 who does he get to get the evidence? Not the person in charge
25 of the crime lab. He gets Sergeant Hintz, Sergeant Hintz to

PET EX 11

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE

STATE OF OREGON,)	
)	
Plaintiff,)	Case No. 10-84-01377
)	
vs.)	VOLUME NO. 23
)	
ELIZABETH DIANE DOWNS,)	(Pages 1 - 191)
)	
<u>Defendant.</u>)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON APPEAL
DEFENDANT'S CLOSING ARGUMENT - WEDNESDAY, JUNE 13, 1984
STATE'S CLOSING ARGUMENT - WEDNESDAY, JUNE 13, 1984

BE IT REMEMBERED, That the above-entitled cause came duly on for hearing in Courtroom 3, Lane County Courthouse, Eugene, Oregon, on June 13, 1984, to the Court and Jury of 12 persons,

THE HONORABLE GREGORY G. FOOTE, presiding.

Appearances:

For the State:	MR. FREDRICK HUGI Deputy District Attorney Lane County Courthouse Eugene, Oregon 97401
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For the Defendant:	MR. JAMES JAGGER Attorney at Law 540 Oak Street Eugene, Oregon 97401
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Reported By:	SUSAN C. NISSMAN Official Court Reporter
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1 WEDNESDAY, JUNE 13, 1984: EUGENE, OREGON

2 THE COURT: I apologize for the delay getting
3 started. This Court is involved in other proceed-
4 ings that begin at 8:30 and often times go to
5 10:00 and today we went a little more and we had
6 a matter that we needed to clear with up with
7 Counsel, so that's why the -- the reason for the
8 delay this morning.

9 Mr. Jagger, you may continue with your argu-
10 ment.

11 CONTINUATION OF DEFENDANT'S CLOSING ARGUMENT

12 MR. JAGGER: Thank you very much, your Honor.

13 The -- these trials continue on and on even
14 -- even after the evidence is closed and Mr. Hugi
15 and I sometimes discuss things and we want you to
16 draw different inferences from the facts. We still
17 continue to discuss, I think, the attempt is to
18 make sure that you have all the evidence here that
19 you possibly can. There's one thing that we have
20 talked about in -- in between yesterday and today.
21 And I want to clarify, maybe I can, one thing
22 certain which extends from your consideration in,
23 I think amounts fair to both sides.

24 There's been some testimony in this case
25 about Paula Krogdahl and Steve Downs and you recall

1 the tapes about going over to Paul or Paula's
2 house as far as showering. There had been a
3 conversation sometime ago between Mr. Hugi and
4 myself about, well, about -- about that -- and
5 some other matters and I think there maybe
6 talking with Mr. Hugi, there -- there may in all
7 fairness be some misunderstanding between he and
8 I that would be an issue with respect to this.
9 I've talked to Mr. Alton. Mr. Alton has indi-
10 cated that basically when Steve Downs was here,
11 he did in fact go to Mr. Alton's house to shower,
12 so while we've learned some of that right now, I
13 think it's important for you to understand that
14 at least so -- some point, if we get additional
15 information and I'll try to give it to you to a
16 certain extent. Hopefully in a way that one
17 particular thing that there might have been a
18 misunderstanding about it.

19 The point though that I guess is still the
20 important point of that which is the main thrust
21 of that, Paula Krogdahl is not here. Mr. Hugi
22 thought as far as the Paul Alton -- Paula Krogdahl
23 shower issue, he could have called Paula Krogdahl
24 on that. In all fairness to clear up any misunder-
25 standing on that particular point and maybe one

1 reason that he didn't call her on that however --
2 however the point remains clear and firm that we've
3 indicated before, is that Paula Krogdahl in medical
4 reports, has been talking to Christie a great deal
5 and we went through yesterday, sometimes by herself,
6 sometimes with Mr. Furtick and after these shower
7 sessions, Christie was really upset and crying
8 and fearful, etc. And, in fact in addition to that,
9 we talked briefly about Dr. Miller, you know, this
10 testimony at the start of this trial and then
11 toward the end, just as far as never having talked
12 or inferred to Miss Downs that this kind of inter-
13 rogation was harmful or any interrogation was harm-
14 ful and we talked a little bit about reversion --
15 reverting, but -- or in other words, that an
16 effect with him and he basically was saying,

17 "Hey, no way. Never had a conversa-
18 tion like that."

19 Well, the first conversation in fact before
20 you -- he was making reference to that, making
21 statements such as,

22 "I think the conversation would have
23 been more along the lines that inter-
24 rogating of any sort would interfere
25 all over, medically and psychological

1 welfare, etc."

2 And there was some more discussion before and
3 after generally in effect what Ms. Downs had said
4 that he said that this kind of interrogation
5 continued, etc., was harmful to not only their
6 physical -- medical, but also psychological welfare
7 and that's what she understood it to be. That's
8 what she said initially and I suggest what he
9 later on -- on the stand talked about was some-
10 thing quite contrary to that. The -- as a follow-
11 up to what we're talking about is that it's clear
12 though that Paula Krogdahl was there talking to
13 Christie Downs numerous times. Clear in the medi-
14 cal reports. The reaction to that. It's clear
15 also to the State that our position was and has
16 always been of suggesting and whether or not sugges-
17 tions might influence someone, it's clear in their
18 response that that was recognized and calling
19 Evelyn Slavin, Susan Staffel and others that they
20 can't handle it. Professionals, they didn't say
21 something then and yet Paula Krogdahl was not
22 called and the question still remains why medical
23 reports, etc., cry out.

24 Was some kind of a -- an effect upon Christie
25 Downs? Hopefully, that takes care of some of that

1 there.

2 The -- since -- since I'm not coming back
3 after Mr. Hugi's arguments again, I want to make
4 sure and anticipate evidence and one thing I got
5 to thinking about when we read through the medi-
6 cal reports that might be misinterpreted so I
7 want to make sure I go back to this just to confront
8 and to deal with it, is that Ms. Downs saying in
9 the car,

10 "Christie is shot."

11 She looks through the window and basically
12 reaches out almost at -- and asking for help from
13 her mother. Okay. Now, I would ask you if -- if
14 well, number one, there's some question whether or
15 not Christie Downs had very much recollection at all
16 of what occurred back when she was in the hospital,
17 but let's assume because I need to guess what maybe
18 assumed in argument by the State, let's assume that
19 she was remembering, if not continuing then, it's
20 in her dreams or whatever. You might say some-
21 think like,

22 "No, Mother."

23 You know,

24 "No Mother. Don't Mother. Don't Mother."

25 Or if she -- something materially was happening to

1 her then she might be going,

2 "No, no, no."

3 And also calling her mother.

4 Now, we -- one mentioned in the medical reports
5 about something that was here and I need, in case
6 you don't have a specific page, we need to make a
7 specific page, what actually was reported there.
8 It was a note that she had a dream or had been
9 asleep and was crying out and was saying,

10 "No, no, no."

11 And there's an -- and in there -- and she was also
12 calling for her mommy also, so it's important that
13 we don't have someone suggesting to you that it
14 was a,

15 "No, no, no, Mother."

16 It wasn't. They weren't corrected at all. There
17 was a,

18 "No, no, no,"

19 And then there was apparently some words as far as
20 mom that was said during the dream which is consis-
21 tent with in fact what Ms. Downs is saying, that
22 there may have been some kind of a,

23 "No."

24 And also she was reaching for her mother, also saw
25 her and someone that needed to help, but she was

1 not reported in those medical reports. There also
2 was an explanation for -- that some of the medical
3 reports there from different areas from -- from
4 nurses to medical logs, etc., and when you put them
5 together, you'll find just about the stream, it just
6 so happens that Paula Krogdahl had been visiting
7 Christie Downs. Find in the medical reports that
8 advised that she was in the custody of the hospital,
9 not her mother and that basically there was going
10 to be a separation there and when you look at it
11 in that respect, put them together and you also
12 bind that, of course, with when she had contact
13 with her mother, she had that feeling and those
14 were in there. I mean sometimes obviously for
15 ever as a general rule, you'll find fully, you
16 know, during the night or whatever, but the ones
17 that have a specific note was made during every
18 stable evening that was after she had been with
19 the mother then you see where that inference could
20 be inappropriately taken from that -- that I'm
21 referring to. Let's make sure you don't take
22 it out of context and used in a way that it
23 shouldn't be.

24 A couple of other just loose ends. One is
25 unclear, referring to it or not, Detective Tracy's

1 refusal to talk. It also came out in evidence
 2 that he had talked almost in every other case that
 3 he ever has been involved in where I have been
 4 involved in the trial to discuss it with him.
 5 Remember that came out during cross examination?
 6 And also, something to note is that after the first
 7 month or so of Detective Tracy's involvement in
 8 this case, it appears that he either is taken off
 9 the case -- we simply don't hear anything about it.
 10 He was the one who was primarily involved initially.
 11 He was the one who was involved in the interroga-
 12 tion of Diane Downs, you know, before pages of
 13 notes, etc. However, who was it then that later
 14 on was taken off by Detective Burks? (sic) Of course,
 15 we hear of Doug Welch, I didn't hear anymore
 16 about Detective Tracy. Why put in the concerns?
 17 You can ask why from them and we discussed that
 18 all in the responses in light of the ballistics,
 19 the bullets, all the stuff we talked about leading
 20 you to one particular conclusion. The -- some of
 21 you came into this trial, this is the other loose
 22 end, you come into the trial and bring your common
 23 experience too and when Mr. Hugi was talking about
 24 her theory, obviously, you had to ridicule it like
 25 calling the person who comes out in the middle of

1 the road the hitchhiker, when you know every-
2 one said the person is not a hitchhiker and --
3 and that, but his idea was ridicule as much as
4 a point of ridicule perhaps not going to separate
5 one of the ridicule that Diane Downs up, indi-
6 cating where she was shot in her shoulder and
7 put her arm out when she threw the keys. The
8 arm was out and Mr. Hugi indicated when you
9 throw something your arm also goes back. This
10 maybe something that you're going to have to do,
11 kind of by standing up, not in the jury box, but
12 maybe in the deliberation room. Maybe some of
13 you have played some baseball at all and your --
14 or softball or whatever, you will find, if you
15 do this and look at yourself, you'll find that
16 a couple of things occur.

17 Maybe you've played in the outfield and
18 you're throwing a long ways, yes, you are going
19 to throw and it would be similar to maybe a
20 pitcher, you're going to throw that arm back.
21 But, you'll find that you do that when you throw
22 a long ways or actually release the ball. You'll
23 find that say, if you're throwing something, maybe
24 catch in the living room with your children or
25 whatever or you're not throwing such long distances,

1 you'll find actually your arm right here and the
2 lower swing will be in this direction.

3 (Indicating.)

4 And you'll find that if you -- if you work that,
5 you'll find that in fact it's even more so that
6 you keep your arm here if you don't release the
7 ball. If you know that you're going to do so is
8 to hold onto the keys or the ball, you hold up.
9 So, Mr. Hugi gives that kind of a conclusion,
10 that's, you know, you bring into this trial your
11 own experience. Don't be misled by anything.
12 You can go ahead and see that there has to be
13 -- you have all done at various times is bring
14 in your common experience. Work on it. You'll
15 see what he's trying to get you to conclude which
16 is not the -- is not correct.

17 The -- I submit it's already clear as far
18 as the -- in the comment at last here about
19 Christie being happy, you know, when she leaves
20 the home or the hospital. She's going to show
21 -- she's been told that she's not going home or
22 to her mother. She's going to a foster home and
23 she appears happy, but of course, when we brought
24 out that she's leaving the hospital where she had
25 been for awhile and that's going to make her pretty

1 much happy. She had not been around her mother
2 for a period of time. I would suggest that she
3 pretty much already accepts that she was not
4 going to be with her mother for awhile. That
5 was not new information. The new information
6 for Christie at that time was that she was
7 leaving the hospital and so once again, it would
8 be improper inference and I don't have to spend
9 the time to go through this, except that it's
10 the only way that we can explain the rest of the
11 story.

12 You see, it was something that was brought
13 out in cross examination. We have to bring it
14 out, same thing with respect to argument. We've
15 got to make sure that we cover all of it.

16 The next thing is the -- you know, the
17 once again this falls in line, trying to pin
18 something in the bad light. The situation was
19 brought out about this shoe box and the gun inci-
20 dent in front on Steve Downs' house. Dan Sullivan
21 remembers that if you look at that, number one,
22 what relevance does it have to this case, number
23 one. That's why I've asked you since yesterday
24 to decide the case upon the facts and not upon
25 the emotions that are generated. If we dislike

1 her or not or whatever, I suggest that probably
2 there was not a gun used in that particular situa-
3 tion. Dan Sullivan, you'll recall right after
4 the situation between Steve Downs and Diane Downs,
5 Steve ran over to Dan and said over the discussion,

6 "Did you see the gun?"

7 Dan Sullivan said,

8 "Yes."

9 And he's believed that all this time until now.
10 The thing that's interesting, this thing about
11 this how far Dan Sullivan was away from that car
12 also keeping in mind there are other cars in between
13 and naturally we would assume it's unobstructed.
14 If you think about how far that is, it's impossible
15 to see clearly what is inside of a vehicle at that
16 distance. Especially, when other things are hap-
17 pening. I mean, he's looking at not only other
18 vehicles, but also Steve outside pointing to the
19 vehicle or other vehicles in just -- just, there
20 nearby there and I think, looking at Steven Downs,
21 he's questionable whether or not he was entirely
22 the victim in that situation, but in any event,
23 remember there -- there were two hours in the
24 front line sixty to seventy feet, say sixty-five
25 feet -- hundred and thirty feet and further. You

1 have the -- basically, the driveway or adjacent
2 to those houses, it still makes an additional
3 say, an additional ten to fifteen feet on both
4 sides. We're still talking about a hundred and
5 fifty feet is how far down? So then was from
6 that hundred and fifty feet doesn't still mean
7 a whole lot. You put here in some context, one
8 context put it maybe that some of you can imagine
9 one half the length of a football field and that's
10 -- that's a good long distance. You think maybe
11 watching football field and think about that
12 being, you know, zero yard line and working on out,
13 that has been around the middle and you think
14 about, you know, seeing things, you know, a lot
15 of action and something so small, so quick, there's
16 some question as to whether or not he observed
17 what was actually what he observed which actually
18 were suggestions by Steve Downs, but be that as
19 it may, I really -- it really is not that impor-
20 tant. There was a lot of -- because it -- it has
21 nothing really to do with May 19th at all.

22 You had some other allegations made through-
23 out the trial. One is, I think, remember some
24 questioning of Diane Downs about whether or not
25 she was upset one time with respect to her rifle

1 or with respect to Steve Downs and working and
2 action of the rifle? She said,

3 "No, that never happened."

4 Mr. Hugi alluded apparently, you remember, you
5 know, was suggesting that she didn't testify
6 uncontradicted that it did not happen, perhaps
7 after that cross examination occurred, maybe
8 it was discovered that maybe the information
9 was incorrect and maybe it was something else
10 or whatever, but nevertheless the evidence you
11 heard was the accusation and we can leave the
12 accusation there without discussing it and
13 realizing that in fact, you know, there's no
14 evidence of that at all. And in fact, the
15 only evidence you have is that that did not
16 occur at all and should not be really consider-
17 ed by you at all.

18 The -- okay, he was critical of Diane
19 Downs' use of symbols. The unicorn. She should
20 be out -- she should have grown out of this.
21 That's, well, once again I submit those -- that's
22 an attack to ridicule what she's done. I suggest
23 that's, you know, what's wrong with -- is there
24 something wrong with -- with that sort of thing?
25 Some kind of symbols and things of that nature?

1 I suggest that it's not. We do that thing all
2 the time and whether it's a necklace or whatever,
3 that that means some very important thing between
4 people or -- or with respect to children that
5 teddy bears become important. You get family
6 things that become real important from trips,
7 obviously, they were in a new place here, Oregon.
8 A new beginning. A new life in a lot of respects
9 and it seemed to be pretty logical that, you
10 know, that they have something that maybe
11 symbolizes that. What's wrong with that? In a
12 way, it was a gift to the family to a certain
13 extent.

14 Okay, let me get back to where we -- we
15 left off and I want to deal with finishing with
16 respects to the blood spatter and it's important
17 to anticipate what maybe said by Mr. Hugi that,
18 remember there was a test done by Mr. Pex. We
19 had some papers where he actually fired a weapon
20 into a thin sheet, sheet with some blood spot
21 with a plastic bag around. We found out that
22 the bullet went right on through it and also
23 had a piece of paper in front of him that left
24 very small spatters, you recall that?

25 Now, Mr. Hugi may argue that while that

1 shows then that even firing a weapon inside the
2 car would not cause back spatter or because this
3 maybe argued by him, to rebutt the fact that
4 knowing -- on the shirt -- her two shirts which
5 showed nothing placed on her. There was nothing
6 just transfer that we were talking about and a
7 little bit right here as far as a transfer,
8 you'll see as far as alike, it's clearly a trans-
9 fer-type situation where you have a smudge on
10 your hand or something like that or tool brushes
11 or whatever, but the important part to remember
12 is this: That that test as it became clear
13 through the testimony, is different. In fact,
14 Mr. Hugi on redirect of Mr. Pex made this clear,
15 he was indicating basically two of the shots are
16 the ones that produced the back spatter. One
17 with respect to Christie and one with respect
18 to Cheryl. Another potential would not cause
19 very much back spatter at all. It's important
20 to remember that testimony was -- was that there
21 was blood between the seats and console area.
22 Blood also on various parts throughout the car,
23 in the back of that -- that seat, back of the
24 driver's seat, we talked about the other areas,
25 the ceiling and every place and of course, we

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1 still have Pex' conclusion that the action
2 with respect to the bodies when the bullet
3 does not go all the way through, is going
4 to cause the back spatter and that's what
5 different from his experiment. It went
6 completely through and it didn't have any-
7 thing coming back. It's a different situa-
8 tion. So, make sure, if he's arguing that
9 experiment, keep in mind that that, during
10 the trial was distinguished from the situa-
11 tion we're talking about.

12 Mr. Pex still had the conclusion that
13 you have in those situations, more compact
14 action then for example what would go -- what
15 would be going up to the ceiling. So, I want
16 to make sure and really anticipate everything
17 he might argue and keep in mind, you know,
18 that the real evidence was that an experiment
19 that is distinguishable from what we know the
20 fact and evidence to be.

21 The rock guards, the evidence there is
22 that these spatters on this one -- this rock
23 guard, the door was the one that Mr. Reed
24 and Mr. Pond and myself were involved in.
25 It's consistent with ones that this one and

1 Mr. Pex is not disagreeing with that, not at
2 all. Obviously, there are some variations and
3 you see a number of spatters or whatever, there's
4 going to be some variation of course, but --
5 but they are consistent. It's because of
6 course, you never get the same exact spatter,
7 but they are consistent with -- with -- with
8 the swing of the sweater. They're a consis-
9 tent type and no, that's not uncontroverted.

10 Okay, one of the things that has to be
11 cleared up -- Mr. Hugi in his redirect of Mr.
12 Pex inferred a question that there was some
13 aerosal spray on the side of the car on the
14 outside which is of course, only -- the only
15 thing you could get from a gun shot. Now,
16 it's just clear in case that we've written it
17 down or recall it, it's important to check back
18 through or you'll find in response and other
19 evidence, there's no evidence from anyone that
20 there was any aerosal spray on the side of that
21 car which you would expect in a gunshot. There
22 was some tests whether or not you would actually
23 have the aerosal back eleven, twelve, thirteen
24 inches. You may have lost all of it and that is
25 a possibility in all fairness, it's a possibility,

1 but it's important that you don't have in your
2 mind some place that in fact there was aerosol
3 spray there because there was in the -- there
4 was not at all.

5 The other situation we have is Mr. Pex
6 of course, running some experiments with his
7 sweater which he didn't really bring -- bring
8 the sweater to us. We had -- we tried to verify
9 and do ourselves exactly as possible with actual
10 real whole blood, etc., but also the exact same
11 sweater and you'll recall there are different
12 kinds of postal sweaters, different lengths,
13 different sizes, some are heavier than others.
14 This is a heavier winter-type sweater which is
15 -- meant perhaps additional weight from the
16 bringing of that -- swinging of the sweater
17 down to that area between twelve to eighteen
18 inches.

19 If -- and I don't need to bring the dummy
20 of Cheryl back out again, but we started to do
21 that with respects to her being on the side --
22 the gunshot and if, as it appears, we are in a
23 direct, the second shot with respects to Cheryl
24 would have perhaps after shots with respects to
25 Christie and/or Danny and that allowed her to

1 get up and she in fact would be turning which is
2 in fact the very angle as she would turn --
3 would have, of course, swinging of that sleeve
4 in the sweater coming down where that pool of
5 blood, the only way that sweater that they've
6 done in that -- done in that particular direc-
7 tion and then we -- we talked about that yester-
8 day and that in fact put in direct line then with
9 someone in that sense or driving areas.

10 Again, if she is turning in that particu-
11 lar area. So, and we suggest that is in fact
12 what happened. The rest we've already talked
13 about yesterday as far as the sweater and all
14 of those things. It just does not match.

15 The other thing that needs to just be
16 clarified, a lot of questions were asked yester-
17 day that were necessarily taken as evidence at
18 all or -- or if it is, then the effect of it
19 should be placed in the appropriate perspective.

20 The -- Mr. Hugi was talking about the fact
21 that every time you swing the sweater or dropping
22 it, then there are smaller droppings which occur.
23 But, keeping in mind that that -- that the tests
24 that were done, only one of them was swinging a
25 second time when, before it was placed in the

1 blood again, only one situation like that and
2 when you look at it, there's not much difference.
3 There's not much difference at all. All the
4 rest of them, all the initial swinging so all
5 the question is simply there as a question, but
6 with no real evidence at all. It's something
7 that may suggest some things, but it's something
8 that is irrelevant as far as the case is con-
9 cerned and irrelevant as far as the tests are
10 concerned.

11 He indicated or inferred in questions that
12 led up to the sleeve, just right out of the
13 blood, you may get some droplings that may drop
14 off. Well, that's correct, but let's make sure
15 that we put it in proper perspective. It's in
16 fact, when Cheryl is picked up, that's right.
17 The blood maybe dripping off. That's right, as
18 it is picked up -- out, but as it's dropped and
19 swinging, you're going to get the same reaction
20 because that's exactly what was happening with
21 respect to the tests that were done with Mr.
22 Reed and Ms. Van and myself. There's no
23 evidence that what happened was pick it up and
24 he slaps it a little bit and then is swinging
25 it again and the papers, there's none of that

1 at all because that isn't what happened. It
2 was in there just like -- just like what would
3 have happened. It brought out and then it was
4 dropped just in the same manner as it might have
5 been from the back of Cheryl. So, those are
6 questions that are suggestive, but they are
7 questions that you see are -- and they're --
8 they're to cause you to infer certain things
9 though there's no facts in evidence to get
10 where he wants you to get if you really look
11 at what they're talking about.

12 Okay, the -- I want to deal with the --
13 the hospital statements and let's talk about
14 that just -- for just a moment.

15 Diane Downs has, you know, through another
16 attorney gave notice that she was going to sue
17 the hospital. Obviously, this irritated the
18 people and they had pride, rightfully so, they had
19 pride in what they accomplished and there was
20 no question that there would be -- have been
21 reaction. They're people, obviously, and not
22 thinking very highly of her for doing that, we
23 know referring to the medical reports at least
24 why she was concerned about that and the change
25 with Christie and Danny as far as activity and

1 then the experience with Christie to the loss of
2 some moment and satisfaction with Danny too, but
3 be that as it may, you can understand some of the
4 problems between the two of them. The -- what's
5 important to remember and I want to go through
6 this a little bit, it won't take very long, to
7 try to put this generally in order.

8 Diane Downs comes in and Rosie Martin indi-
9 cates that, you know, the hoping, some other
10 people indicated too, hoping to, but Rosie
11 Martin indicated that she says,

12 "Somebody just shot my children."

13 Willadene Frederickson said she was upset in
14 the main area, crying. We talked about hyster-
15 ical situation and the definition of that. Judy
16 Patterson and Diane Downs were asking how her
17 kids were and information during the admission
18 and insurance and she's going into that trauma
19 room, so she's saying that she was not interested
20 is -- is incorrect and also to infer that she
21 was just interested because -- because to see
22 if Christie was alive. If Christie would be able
23 to finger her and say is the one involved, hope-
24 fully answer too because we know that Willadene
25 Frederickson, there was some confusion of whether

1 or not which one died, which at all, both or
2 none and that was confusion that continued
3 through a couple of hours and so there was
4 some pretty good reasons to be up and down and
5 not knowing exactly what was going on. And,
6 so there was some reason for her to be inquir-
7 ing and wondering what was happening when --
8 when their mother was confused, both of them
9 basically together for a good part of that
10 time.

11 So, to draw that inference is really
12 incorrect about going into the trauma room
13 and back out, of course she was interested.
14 The medical reports suggest also she's -- she
15 was attentive and concerned about the children.
16 The page, "Mother Upset," etc. figures a --
17 Willadene Frederickson, Rosie Martin also indi-
18 cated she asked how the children were. Was not
19 asking about any specific one child or another.
20 She was inquiring how the children were. The
21 upset about the insurance admissions and getting
22 pretty hot with the police when they finally
23 arrived and as we know her, you know, her demeanor,
24 she obviously said things that perhaps we would
25 not have said in either a trial or other situa-

1 tions, but she did and there are kinds of
2 explanations actually when you look at them
3 and put them in context. Rosie Martin -- she
4 indicated that she had -- she's, okay, she
5 had good insurance. Same with Robin Ruther-
6 ford, some of these we heard duplications,
7 Rutherford when you hear them, it sounds like
8 they are separate situations or incidences,
9 but really they're the same situation and
10 when you look at it in context, let's talk
11 about it for awhile the evening, next morning.

12 There were not that inappropriate things
13 which might classify as inappropriate things.
14 She said they, you know, for the whole evening
15 when you look at Tracy's contact, other persons
16 contact, there were not that many. Take them
17 out of context, only spell them before you,
18 it makes to look different than when it was in
19 fact, was at the hospital. Conversations about
20 this child that had died and we've talked about
21 Cheryl, Christie, that confusion.

22 Dr. Mackey went to work -- to work the next
23 day, that was later on and that -- that's a real
24 coping thing for that family. It's really clear
25 and that's something that you may -- you may

1 see from people and -- and we can ridicule or
2 say that she shouldn't have, but she did. Felt
3 more like a suspect than a victim. Take that
4 out of context and certainly it looks funny
5 to separately put them in context, it's a situa-
6 tion of officers in the hall saying, you know,
7 we don't believe her, you know, etc., etc. and
8 that's uncontradicted and no -- no doubt she felt
9 like a suspect. That's right, making it real
10 clear from the very start when you have it in
11 that context, it is not inappropriate either.

12 The -- Dr. Miller, Dr. Mackey, the concern
13 for Danny, the concern of course, where the bullet
14 hole was in the area of the heart. Obtains the
15 information that it missed the heart. That --
16 that was great and so used so many slang terms.
17 That someone used in a different age group
18 might be termed, "far out", you know, a great
19 need, whatever, it just so she used a particular
20 term, she was glad for it and -- and now take
21 that out of context and I think -- I suggest
22 it's really improper.

23 It's interesting that, you know, Dr. Miller
24 indicated she didn't seem light hearted like other
25 people. There's various times though when she was

1 and I suggest also to look back at her on the
2 stand, she would sometimes laugh or her face
3 would set in kind of a smile. Some persons
4 -- some people face situations more of a front,
5 maybe more of a front or kind of a look while
6 sitting there, actually pretty state, you know,
7 sits more in a smile and I suggest to think
8 back how she was when she was testifying and
9 I think you'll see that that is more of how
10 her face just happens to sit and used in our
11 common -- using our common sense. I suggest
12 probably you've had some conversation with
13 other people as far as, you know,

14 "How you -- are you feeling?

15 You look sad."

16 "No, I'm not. Just -- I'm just
17 fine."

18 Maybe the opposite is occurring.

19 The grandfather of course, it's interest-
20 ing to note that Charbonneau and others also
21 observed that she thought the grandfather was
22 in control too, there was a comparison between
23 her and the rest of her family, but for the
24 most part, the front that there was observa-
25 tions were about the same. They were in control

1 and they were keeping control their emotions
2 and so once we talked the -- basically was the
3 same situation which is what you would expect
4 when you know the kind of background and things
5 that they threw out.

6 The -- Dr. Willhite, it was, you know, when
7 you first heard the conversation of Dr. Willhite,
8 obviously they had some real personality prob-
9 lems, couple of real strong individuals clearly,
10 but what -- and contradicted Christie was on --
11 she was in fact on a monitor machine. It wasn't
12 necessarily to sustain her life, maybe in fact
13 was -- she was in fact on the machine -- it was
14 a respirator at that time and -- and there was
15 in fact a conversation about the effect of that
16 upon Christie and I think -- I submit to you
17 that in light of what we know about Diane Downs
18 as far as this in retrospection, this taking --
19 taking and writing questions about them or
20 writing about them, abuse, she's an interested
21 person who gets involved in things. She wanted
22 to take a pre-med course, doctor, etc.; she
23 starts out in that kind of thing. Obviously,
24 some various problems in various aspects of her
25 life, she wasn't able to complete that, but

1 knowing that she's a person who likes to learn
2 things and acquire new knowledge, it's very
3 easy I think to understand why she would have
4 had a conversation about that with Dr. Willhite
5 about the effect of a respirator or what it was
6 having upon Christie. What happens, you know,
7 just to continue to prolong her life or -- or
8 what happens if there are more problems going
9 to really be important merely as to what happens
10 if it was not there and it -- it's easy to under-
11 stand why she would be asking some of those
12 things, especially also in light of what was in
13 the news at that particular time. Also, about
14 the Bovia, if I'm pronouncing that. That was
15 in the news quite a bit about right to life,
16 you know, etc. or right to die, things of that
17 nature. So, it's easy to understand how that
18 conversation may have been misinterpreted by
19 both parties. Interesting once again, uncontra-
20 dicted evidence is that we did have her respira-
21 tor, we did have the things that would precipitate
22 such a conversation.

23 Rutherford says she wasn't anxious to go --
24 made a big deal when they were going to go, Rosie
25 Martin indicated she was -- she appeared ready

1 to go and confused about whether or not she had
2 to check her arm, you know, at that time before
3 she was allowed to go and there was, you know,
4 and completed order there was some confusion,
5 but it appears from different points -- from
6 different points, even excluding Diane Downs,
7 you have some discrepancy -- some different
8 people seeing things differently and that's
9 what you expect to have happen on a night as
10 -- as unusual, as different as May 19th and May
11 20th morning would be. So that's not entirely
12 surprising.

13 The other thing that does need to be
14 cleared up also, just to make sure that we're
15 clear on this, is that we have medical reports
16 that we already went through in her case,
17 wanting to have the children together when
18 this separation to various hospitals is con-
19 cerned about interrogation that actually
20 borns out by Dr. Miller's first testimony and
21 in the medical reports and the use of the letter
22 in there to the hospital's attorney to get the
23 Children's Services Division involved and we
24 tried to make that clear from the very start.
25 If there was a dispute as to that, that was a

1 real purpose that they go in and call the
2 attorney from the hospital or other persons
3 to dispute that and that did not occur. And,
4 I suggest to you the reason that it did not
5 occur is because it is in fact what in fact
6 occurred is exactly as we indicated from the
7 very start and through Diane Downs' testimony
8 and that is the reason that that was done was
9 to the -- to stop interrogation or cooperation
10 with authorities. It was done because of the
11 things she had heard and understood as far as
12 that the effect upon -- and to use Dr. Miller's
13 words,

14 "Their medical and psychological
15 welfare,"

16 that that was done to get into the third party
17 to be able to monitor things and that was the
18 fair effect of it and even of course, although
19 you've got all the control of that and that was
20 the effect of it and that was the reason that
21 it was done.

22 The -- okay, next, this -- this weapon.
23 The -- let's talk about that for a minute. And
24 this would be related to Steve and this Ruger
25 that has been in their family for awhile.

1 And let's -- let's first of all, I guess we'll
2 put this thing in context.

3 We have -- we have a Ruger semi-automatic
4 similar to the one that Downs had into evidence,
5 but before I talk about this, let's put this
6 thing in proper perspective because there has
7 been no evidence that that in fact was the model
8 of the weapon used at the scene.

9 Basically, what have you have heard is
10 this -- you have heard that for example a burglary
11 was committed at a particular residence and what
12 you have heard is that a Ford was used in that
13 burglary and you don't know what year the Ford
14 was. It may have been as old as a '76 to a '83
15 or '84 and you don't know if it was a sports
16 car to station wagon or two door or a four
17 door, that's what the evidence is. And , you
18 have added to that, you have that Downs had
19 once upon a time acquired a pretty unusual
20 manner of course, a Ford. I submit that there
21 are an awful lot of Rugers around so -- so keep
22 that in mind. We're not to be misled to say
23 the kind of weapon used was the same kind of
24 weapon that has been in their possession at
25 once upon a time. As you recall, basically

1 just a Ruger semi-automatic as I went through,
2 Mr. Pex referred to -- in our notes, maintained
3 -- I couldn't read, I remember putting down, I
4 submit it was a '76. I think it was and as old
5 as perhaps a '76 or earlier right around this
6 time. Maybe new and changed a different model,
7 maybe different model in the same year as they
8 make different changes in it. They're different
9 -- they're different things, but still as far
10 as the testing done, it still reverts to the
11 same thing -- reverts back to -- to a Ford. So
12 -- so keep that in mind because we might be in,
13 for instance, might be drawing things that was
14 offered into evidence, the same one that was
15 used, that is not correct. That is not correct.

16 Ms. Downs has asked what kind of weapon
17 she has and she indicates a .38 and a rifle
18 that's in fact what she had. You get into a
19 sematical argument which is whether or not they're
20 appropriate or not, a legal definition of posses-
21 sion and ownership, perhaps a little different
22 and the attorney gets into the legalese in
23 things and it's a little difficult then what
24 we initially think as a lay person, she did not
25 possess. She had given it back to Steve after --

1 and that is in fact where it's at and we have
2 some theories with respect to that and I'll share
3 those with you.

4 We don't know exactly, but we have -- we
5 have some -- some, I guess as to what has
6 occurred. He -- she -- we know, let's get an
7 idea with respect to that weapon, she gave it
8 back a week or two before she came up here.
9 The .38 is something that at least as far as
10 she thought was not workable and so somebody,
11 boy, you just kind of put that stuff in a
12 particular trunk and you put -- and you forgot
13 what's there, expecially when it's stuff you
14 don't use and you think is not worth it. How
15 many times have you thought that you should
16 throw away something when you just never get
17 away to go do it? Well, that is kind of the
18 way that is a little bit with respect to the
19 other weapon, though let's look and see the
20 uncontradicted evidence which was her thought
21 which was as far as that weapon was concerned.
22 Her thought was, without contradiction, was to
23 not take it to Oregon and, but to go ahead and
24 get rid of it because that is what she did with
25 respect to Mr. Knickerbocker. She didn't want

1 it. She offered it to him. Mr. Hugi says,
2 "Well, he didn't want it so
3 why would she give it do Steve
4 Downs when that was somebody
5 who was threatening Mr. Knicker-
6 bocker and was threatening Diane
7 Downs?"

8 Well, we know from her nature that she had been
9 doing this sort of thing all her life with
10 respect to her father, she stays around. She
11 complies with respect to Steve Downs, the gun
12 and the bathroom, it's given right back to
13 Steve Downs who was causing her to be so upset
14 in the first place and we know that Steve hit
15 her in the back of the head, beating her up,
16 etc., would come back and reconcile. She still
17 would go ahead and do it. She is raped and
18 Steve Downs comes right back to the airport,
19 you know, it's kind of just what can you do,
20 you know. She doesn't want that weapon and
21 so we know that she tries to give it to Mr.
22 Knickerbocker. Now, the main issue then was
23 not addressed when Mr. Hugi just basically had
24 a conclusion. It is seen with her that evening
25 when she leaves and I suggest to you that is not

1 true and if you look at the evidence and you
2 weigh it, which is more likely and I want you
3 to just put it on some scales there. Put it
4 there and does she want to take it to Oregon?
5 No. Mr. Knickerbocker, she wanted to give it
6 away and suggested that she put it over there.
7 She didn't want it. Up until that time she
8 went after there and it's a reasonable inference
9 and so she gave it to Steve Downs and this
10 occurred the week to week and a half before
11 that time and the same, we know, that is that
12 Mr. Knickerbocker is somebody who is really
13 protecting his backside. There's no question
14 about it. Some taping and he admits that he
15 was looking out for Mr. Knickerbocker and he
16 also, in talking with the police, you know,
17 took their side of it and -- and you know,
18 that's understandable too. But, there are
19 a couple of things that he trips on.

20 On his recollection, one is that you'll
21 recall that when asked if Diane Downs had a
22 postal uniform on, do you remember that
23 question? When the conversation took place,
24 she in fact had her postal uniform on and it
25 was a work day and you'll recall that he agreed

1 with that and initially, he agreed with that.
2 However, he only agreed with it for so long,
3 but you can, because you can recall after that
4 it was brought up to him that day, Mr. Knicker-
5 bocker remembered that she didn't work the
6 last week that she was there and then what's
7 Mr. Knickerbocker going to do? Then, because
8 he can't have his cake and eat it too, it was
9 either occurring when she was not in a postal
10 uniform or was, or either in a postal uniform
11 and therefore it's as she said it occurred or
12 it was when she wasn't in a postal uniform and
13 then that is more consistent with what he had
14 been saying all along and was committed to.
15 So, which way did he go? Well, he backed off
16 and said well the day before must not have been
17 a postal outfit, however he said before it was
18 and he said it was before because that's in
19 fact what occurred. Hadn't thought about that
20 had he? Where does he put that? It is subject
21 -- we put it right over her because she was
22 wearing her postal outfit and it was more than
23 a week before. He says on the evening before
24 that -- that when he saw the gun, the microwave
25 and the TV were in the trunk of the car. Now,

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1 Mr. Knickerbocker, are you confused that that
2 occurred a week to ten days before that?

3 Because, he says when he saw it in the trunk,
4 it was not there, he maybe mystified when he
5 saw in there, the microwave and the TV was
6 not in there and we know for a fact that all
7 -- all this -- this packing occurred the week
8 before. Three full vehicles were piled with
9 as many possessions as she could carry.

10 Pickup, vehicle and her vehicle, the trunk
11 area. The microwave and the TV were in the
12 back. We know that in -- we know that Wil-
13 ladene Frederickson, she looked in the trunk
14 area and as Diane Downs is saying, that that
15 already, by the time she had taken over and
16 taken it and pitched it in the back of Steve
17 Downs' pickup, the evidence of that, you
18 know, where do we put the evidence? We --
19 the evidence we will put is that Willadene
20 Frederickson was helping move. She was in
21 the back. She saw -- she knew that every-
22 thing was in the trunk of the car. You're
23 involved in the move, you know, the rifle
24 was in the back and also this weapon was in
25 the back because she saw, you know, if -- if

1 she was -- if she was lying, Willadene Frederick-
2 son maybe that's what she's lying for her
3 daughter number one. The background I submit
4 to you is such that they realized their greater
5 consequences than just simply lying at trial and
6 I suggest that that's something to consider as
7 far as her being truthful, but there's addition-
8 al things that -- and if she was lying, simply
9 say,

10 "Hey, I saw the whole gun. I
11 saw the whole gun, it was clear
12 that, you know, it was you know,
13 a revolver. I saw the handle
14 and everything,"

15 but that isn't what she said. I submit she was
16 trying to be as truthful as possible. She saw
17 only two weapons because Diane Downs had already
18 given the other one to Steve Downs and she was,
19 and I circled this portion right here as the
20 part that -- that she saw and you recall it, it
21 was just as a single cloth bag at the time, she
22 doesn't know what was underneath it, it was just
23 that particular area right there. The gun was
24 in just a cloth there and that was just moving
25 aside so that she could get in and saw she -- and

1 saw the kind of weapon that it was. Different
2 of course, than the semi-automatic, different.
3 Her credibility I suggest is -- is unaffected.
4 She saw it, the only weapon that was there and
5 the microwave and the TV where placed on the
6 back of that car back then. So, how do we
7 deal with Mr. Knickerbocker saying that it was
8 not before I saw it in the trunk of the car?
9 Why would he say that? Was he lying? You
10 know, maybe -- maybe, but maybe not. I would
11 suggest rather that maybe a different explana-
12 tion maybe that his thoughts about it and just
13 obviously real sure that it was there, it's
14 impossible for it to occur and a possible
15 explanation, assuming what he's saying is, let's
16 assume that that -- that everybody is helping
17 to pack this and leaving the TV and microwave
18 in the trunk of the car and Diane Downs, for
19 some reason wanted to fool somebody and she
20 has the automatic weapon in the trunk of the
21 car and she goes around and takes the micro-
22 wave and puts it somewhere, the TV and so on
23 and puts it someplace and Mr. Knickerbocker
24 sees the trunk of the car and sees that it
25 would be in the back and something -- Diane

1 Downs, if she wanted him to see that, that's
2 right before she's leaving. So, during that
3 night or the next morning, she goes back and
4 slips the microwave and TV back in and makes
5 no sense at all. But, that's the only thing
6 that seems to make sense with what Mr. Knicker-
7 bocker says. It doesn't make sense. You
8 know, why would she do something like that?
9 It just doesn't -- it doesn't match. The
10 only possible explanation is that Mr. Knicker-
11 bocker is just confused or has been so involved
12 by talking with officers for so long and he's
13 committed to what he thinks happened is what
14 he is saying convincingly and believing it
15 which in fact is not correct. She did not have
16 that weapon the evening before she left and I
17 suggest when you look at the evidence and you
18 put it in perspective, you know, which side
19 does it appear more likely, you know, happened?
20 That you'll find Wilma Frederickson, the matter
21 in which the information is given that you know,
22 it was not there. Her -- she already had
23 expressed her intention with the woman was to
24 get rid of it and it -- and that's what I
25 suggest she did, gave it to Mr. Downs and then

PET. EX. 11

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1 what happens to it, you know, there are a lot of
2 things that happened there.

3 One is, it's clear that Steve Downs and
4 Diane Downs don't get along very well. It's
5 clear that Mr. Downs' approach to life is may-
6 be perhaps simpler to his friends and that is,
7 you -- you don't however, you can steal whatever
8 you can. You give excuses for it. A gun, his
9 excuse is that a person was ill and then he
10 can't give it back because he's too embarrassed
11 because the guy gets more healthier and that's
12 reaching for a denial as real in -- he can't
13 give the gun back. You need the money so you
14 steal them and borrow them, you get the money
15 for who knows what and we know the evidence is
16 clear that apparently he stole it about this
17 time, the same time which quite coincidentally
18 was about four thousand dollars, although Steve
19 of course, on the stand is saying well, you
20 know, something about a lawyer and thinking
21 that it would work out okay. We would work it
22 out. Well, be that as it may it maybe -- he's
23 up there saying we will work it out and that's
24 fine. But, what didn't happen, it didn't take
25 way from the fact that there is a lot of stuff

1 going on there. Steven Downs sets on fire his
2 trailer and there's grand theft of a car trying
3 to get the money that he wasn't entitled to.
4 It's grand theft and I say it's a type of thing
5 involving a vehicle that's not accurately indi-
6 cated. You know, it's -- it's incredible --
7 it's also not surprising that we've had a little
8 bit in here, you know, of Steve Downs in trying
9 to blame Diane Downs for the fire of her trailer.
10 Do you recall that?

11 Well, I suggest that Diane Downs' position
12 in fact is and I think you'll recall the way it
13 was made, it was pretty clear in some of the
14 tapes that while that was an action saying that
15 it was made by Steve, it wasn't too surprising to
16 her that he made that allegation. It was Steve
17 Downs' track record. He didn't say that before.
18 This is really in line with what she would do
19 or what he would do, but it's also real clear
20 in the evidence that he once again is getting
21 away from these people by saying or accusing
22 this thing and you look at the fact and response
23 to those facts just as to what we don't get
24 the inside track. What is at issue is this
25 what, in fact is that -- is that there were two

1 vehicles of that fire. The second one of course
2 being brought out because the neighbor knew that
3 Diane Downs had been assaulted by -- by Steve
4 and there might be a motive for him to go do
5 something like that. Why even the neighbor is
6 in agreement, you know, that he's still -- he's
7 still there to burn, you know, he intended I
8 mean to do bad things. It's just -- it's his
9 style so they do other investigations and of
10 course, to a result of that it was -- it was
11 natural. It was not an arson, electrical I
12 suggest because people are experts and they
13 know and if anything different, you would have
14 heard that. The thing that makes this more
15 preposterous is you see him -- that side which
16 is what really happened or Steve Downs is
17 trying to get Diane Downs in trouble. Before
18 you didn't have any indication by Steven Downs
19 who I submit to you the theft and the arson
20 in the fire, the assault, you know, first
21 Diane viciously and she was checked out and
22 it's incredible, you know, his best by far,
23 for if you hear no question, sort of like
24 Knickerbocker who had his best face on in the
25 tapes he was taping. So, don't be fooled

1 by some of that either. He had his best foot
2 forward and so did Mr. Downs. You don't see
3 him beating Diane Downs. You don't see him
4 stealing things. I suggest you don't see those
5 things in an assault.

6 But, you've got to put that stuff on this
7 side, you know, the experts are saying,

8 "No, it doesn't."

9 Steve Downs is saying it's ridiculous. You've
10 also got something additional too, you've got
11 to decide which side you put it on. You recall
12 that sequence is that the fire took place and
13 there was some insurance proceeds that came to
14 Diane Downs and if -- if it had been done by
15 Steve Downs and if they were to share in the
16 proceeds of that money, Steve Downs was pretty
17 much upset that he didn't get any and certainly
18 wouldn't justify that Diane Downs certainly
19 wouldn't expect him to and yet of course, what
20 he then says happens is that he enters into a
21 contract negotiation with Diane Downs to fix
22 the trailer and apparently trust by Diane Downs
23 to that, he'll do some work and she'll pay him
24 for it. I would suggest to you this: that that
25 is the most incredible, most stupendous act that

1 anybody could take to assume that he was saying
2 that was true by,

3 "Burning your trailer you're
4 suppose to give me some money
5 or I'll be really upset. I
6 certainly would entrust you
7 within the next few days to
8 pay me some money because of
9 some labor that I was performing."

10 And I suggest that Steven Downs is not so
11 stupid, you'll recall that some of the things
12 that he was involved in, you don't deal neces-
13 sarily with stupidity, she dealt with manipu-
14 lation and fraud, lying, things of that nature.
15 He is out for himself number one and he -- he
16 wouldn't be so stupid to do that if what he
17 was trying to do which was arson and the experts
18 in the investigation will call him that added
19 to that impossible scenario of his that what
20 he's saying is not true. That -- that is just
21 ridiculous, however you see Steve Downs knows
22 that Diane Downs caused him potentially to go
23 to jail, convicted of a felony which is a
24 serious matter.

25 Diane Downs, by now you know that people

1 are not very forgiving when they're as bad or
2 worse, I mean Steve Downs out seeing other
3 people, you know, we talked about the two
4 week into the marriage and stuff like that.
5 And, yet later on in the marriage Diane Downs
6 also was involved with some people. She basi-
7 cally says no to him to get together a number
8 of times. There -- there was a real history
9 of real deep problems between the two of them
10 that gets worse and worse until, you recall
11 Steve almost -- almost had words right there
12 had to be separated -- separated and with some
13 real hard feelings and I suggest to you that
14 Mr. Downs probably had the same kind of coping
15 with the officer that Mr. Knickerbocker did.
16 They were subject to an argument from one
17 party without explanation from the other party.
18 And, perhaps he drew some conclusions also
19 because of certain statements and the investi-
20 gation, we need to understand that that is --
21 that is at that time particularly that can be
22 used. It takes you to be aware of that witnesses
23 will be more capable of more than what you think
24 that might me on your right side.

25 So, you give him information, Mr. Knicker-

1 bocker indicated he just heard one side and you
2 then form conclusions as far as what is right.
3 That is the thing that is so nice about this
4 system to be perfectly frank, this judicial
5 system is, is that then for the first time,
6 for the first time this is --is the very first
7 time that someone has heard the facts and heard
8 both sides. Not to -- the community, not the
9 witnesses, not the investigators, not anyone,
10 that's why this kind of system is so special
11 and that's why it works so well, but keep in
12 mind that what you are hearing and what is
13 taking place is different from what Mr. Knick-
14 erbocker heard and what other people heard and
15 it's much much different. You bet it does.
16 And it affects them, you bet it does.

17 So, what happens? The gun is placed in
18 the back of his pickup. Greg Redick may have
19 taken it. It may have been sold in fact and
20 it may have been sold by Steve Downs himself,
21 who knows. Who knows, God knows that Greg
22 Redick potentially was stealing other things
23 from him, who knows. It also is possible that,
24 and these are all things that we will not know,
25 it's also possible that it's also possible that

1 maybe Steven Downs in fact did find it and did
2 get rid of it and you know, it would be a great
3 way for him to just get even with her, wouldn't
4 it? You know, we're talking about incredible
5 things, you know, someone that would shoot
6 three children that they raised because they
7 liked someone and were involved with somebody
8 for a -- a few months. But, Mr. Downs despised
9 her for a long long period of time and has done
10 awful things to her for a much longer period
11 of time and especially if Steve Downs actually
12 thought that maybe she was reasonable, maybe he
13 had some other weapon or something else that
14 would naturally lead us to believe that that's
15 a reasonable reason. However, you don't even
16 need that. It's possible that he would do
17 that and would not say anything that he did
18 because there's a lot of possibility and maybe
19 he didn't get the weapon. Maybe it was stolen
20 by somebody, whatever, but you know, something
21 in his personality makeup is to get even. It's
22 to get even with Diane Downs which caused him
23 -- her father caused him to have a record and
24 potentially go to jail, whatever. And, his
25 personality is to get even. Remember what he

1 said about the "get even with Diane Downs", well,
2 kind of a nice -- kind of a way to get even with
3 Knickerbocker. Kind of a nice way to get even
4 with Diane Downs. Just won't mention anything
5 and trouble is what happens, you don't mention
6 anything right from the very start and you're
7 pretty much committed to it. He's embarrassed
8 that he stole it and he is committed to some-
9 thing, he's gone somehow to look for Steven Downs
10 if he then later sees, you know, well -- I had
11 it, I didn't mention it and it's not going to
12 make much difference, it's right anyway. I'll
13 just simply stay out of it.

14 Steven Downs' track record and history is
15 consistant with that, but also consistant was
16 the number of other ways that the gun might have
17 gone on another way too, but also the important
18 thing is to keep in mind that -- is that there's
19 no evidence, that kind of evidence that was
20 used, none whatsoever. None whatsoever that
21 the Ruger semi-automatic, the year, the model
22 and nothing and how much are they? How many of
23 them are there?

24 Okay, the getting even, you know, to a
25 certain extent though I guess the biggest piece

1 of evidence there is this: that -- can you
2 imagine how -- how much a person would have to
3 despise someone to rape them? And that is some-
4 thing that you need to decide if that in fact
5 occurred and we've already gone through that.
6 But, to do that and -- and to lie about it and
7 take the attitude that he did, I suggest that
8 he despises her a great deal. And, that in
9 addition to some of the other things that we
10 have talked about gives at least some -- some
11 potential, one particular theory with that gun
12 and some other ones too and we've already talked
13 about those.

14 Okay, I want to talk about two things that
15 are really important and strangely enough one
16 Joe Inman and the time lapse, okay, and these
17 are two things that are real important because
18 they happen to support the Defendant's theory
19 and I guess Joe Inman, I would ask you to go
20 back and to think back to how you felt when
21 you heard Joe Inman's testimony and I'd -- I'd
22 identify how you felt because we try to be
23 aware how you felt and how things in the court
24 room were felt by that time and remember the
25 inference was then she's out here, she's trying

1 to kill her kids and just driving to wait
2 until they die?

3 Okay, well when Joe Inman testifies, you
4 can't stand up and indicate look, this proves
5 what we have been saying all along, but in fact
6 does and the time too, we're going to talk about
7 those right now. But, I guess I do want to
8 identify how you felt back there and I suggest
9 you felt uncomfortable and you say my word, if
10 a mother wanted to get the children as quickly
11 as possible to the hospital and was driving at
12 five to seven miles per hour, maybe ten, what-
13 ever, that's incredible. And, you must -- you
14 must have felt that you had to have felt some-
15 things back then. Okay, and let's see if they
16 were correct feelings based upon the evidence
17 that actually had come out in light of other
18 stuff that we have. Let me get to that.

19 Joe Inman gets, and let me draw kind of
20 like this with leading in this direction, let's
21 say Old Mohawk Road and this is -- this is the
22 scene and we know that point eight miles is
23 approximately where he comes upon her. Now,
24 we heard that he followed her for approximately
25 two to two and two and a half minutes. He said --

1 we've got that figured out basically, we agree
2 pretty much point two miles.

3 Now, remember when he testified? It sounded
4 like it was about two - three miles that he
5 followed her just in the way it was said. It
6 was a corner or he couldn't pass, he couldn't
7 get around and the way he testified, it just
8 seemed like it was forever. Let's put it in
9 context exactly how that is, there's some dif-
10 ferent way that we could do that.

11 Generally, you think of -- well, point
12 two-tenths of a mile, that -- that's less than
13 a quarter of a mile for those involved in
14 track, you know, four laps a mile, basically.
15 So, you've got point two five would be a full
16 lap around a track and this is less than that
17 by point five, by twenty percent less if my
18 math's correct there so you don't even have a
19 full lap. Get away to look at it generally
20 stated, you think of a city block in general
21 rules about eight city blocks to a mile so
22 you've got point two, you can go back to a
23 quarter of that being two city blocks and point
24 two would be maybe, you know, less than two
25 city blocks long basically and the time span

1 that Joe Inman saw her.

2 Now, this may come as a surprise to you,
3 but -- but -- but listen. She was driving
4 slower before and after Joe Inman saw her, can
5 you believe I'm telling you that? Of course,
6 she did. That's not a very long distance and
7 especially keeping in mind three things and
8 they're these: she did three things, one with
9 respect to Christie and this is really impor-
10 tant. This is really important as far as this
11 thing occurred timewise. She was concerned
12 about her -- she heard as is consistant, she
13 heard the breathing that the two children were
14 in pain. She knew that they were still alive
15 and they were choking and Christie had to roll
16 over and as she said, she hadn't changed her
17 position so Diane thought number two, is the
18 towel and three is the window.

19 Okay, she did these things and I suggest
20 to you that she did all of them pretty quickly.
21 All she -- she doesn't remember the towel and
22 Diane, we can tell approximately when that's
23 done because it's done before she gets to the
24 stop sign down at Hayden Bridge Road, some-
25 where on Old Mohawk Road what appears to have

1 been consistant is the, let's really explain
2 this, when you do explain this on -- let's
3 write one other thing down that's got to be
4 discussed, that's really important that was
5 not mentioned.

6 It is when Joe Inman was behind her two
7 to two and half minutes and when he passed her,
8 whatever, he didn't see anyone in the car and
9 yet -- and his whole family was looking at the
10 car and it was as they went around the car,
11 they didn't see anyone in the car and this
12 I'll tell, this is a double star because of --
13 of what you can learn from this, they saw no one.

14 Okay, to do this once again in all fairness,
15 I'm going to tell you a conclusion we're going
16 to take it from both sides and see if she really
17 did shoot her children or if she did not shoot
18 her children and see how it fits.

19 Okay, number one. I suggest to you what
20 happened was this: she gets in the car, takes
21 off as fast as she can right at the start and
22 she gets not very far away, maybe a half mile
23 or so. She's far enough away from the person
24 who she believed to be solely on foot, didn't
25 think that this person could hop in the car

1 and follow her and she hears that the children
2 are alive.

3 Okay, she slows down to help Christie,
4 the smell being in the car is just over-
5 whelming. So, she needs to roll down the
6 window to make it to the hospital and how's
7 she going to do that? She has her -- her knees
8 or a knee is on the steering wheel and she's
9 leaning on the back trying to help Christie
10 and she's across over this direction to roll
11 down the window and also while you're at it,
12 she seems to be, it's a logical time you know,
13 we can't draw anymore conclusions except that
14 it seems to be logical that this maybe also
15 the time that she drapes a towel, whether
16 back between the seats, who knows, puts it
17 around her arm.

18 Now, how long approximately is that going
19 to take if you think one of your children needs
20 to move to be saved? Okay, who knows, thirty
21 seconds, a minute, a minute and a half? You're
22 going to keep doing it until you think you've
23 had success or not. How long are you going to
24 be reaching across when you've had an injury --
25 a physical one referring to a superficial wound,

1 but the pain to it causes you to not be able
2 to use it so much and you're reaching across
3 to roll down the window and while doing that,
4 you can because you can't do it over this
5 direction to keep it to fresh air making it
6 to the hospital and putting the towel, how
7 long would that take? Approximately two -
8 three minutes? Who knows. But, I suggest
9 that was what was occurring at the time and
10 you know something we have proof. Okay, if
11 you're sitting there and you're thinking how
12 does that prove anything? Then here's what
13 the proof is, here it is and let me aide in
14 one other factor too right here, that's real
15 important to Joe Inman, you recall when he
16 passes and goes on, he said he didn't see
17 a yellow car. Okay, he says,

18 "I don't recall how many."

19 Do you remember how many cars you passed when
20 you were coming into jury service this morn-
21 ing? You start seeing stuff after an exciting
22 event had occurred. You start making recol-
23 lections, you were just driving along and you
24 didn't see anybody or anything that happened.
25 However, I suggest also that that yellow car

1 potentially was gone when you got to Old Mohawk
2 Road because he unintentionally misrepresented
3 it to you.

4 Mr. Hugi's argument, he said that -- I'll
5 get to this in just a second, he said that Mr.
6 Inman drove here to here and do you recall he
7 talking about sixty miles per hour approximately?
8 So, this period, he would have made in about
9 one minute. So, therefore he drew the conclu-
10 sion that he would have passed her a little
11 after this occurred. That is also false, as
12 false can be that that -- that's -- you would
13 not get an 'A' or passing score in math for
14 that. I'm going to show you why in just a
15 second. Let's deal with this for just a second.

16 Let's assume -- let's assume that Diane
17 Downs has shot her children right there. And
18 that scene, well, let's look first of all,
19 assume what is the only assumption that is
20 possible with the -- with the blood spatter on
21 the outside of the car? This is logical when
22 we start doing the motion, just striking logi-
23 cal it's gets away from the opinion and gets
24 you down to the facts which are the only ways to
25 remember it. Mr. Pex, these marks --these were

1 found in the front, so they think it was some
2 place, let's assume that she shot her children
3 someplace else, maybe far off the route, it
4 could have happened any place, see? When she
5 got in the car, she could have heard it was
6 clear to everyone that Danny and Christie were
7 still alive. She would have gone on a deserted
8 road some place that they were still alive and
9 we've talked to Christie, she had the bullet.
10 She could have shot them more or on the other
11 hand, like it's just -- it's incredible, but
12 their theory of course, is that she's driving
13 around, she doesn't have anymore bullets so
14 she's just driving around until they die.
15 Where does she go on this road if she's off on
16 some deserted road, why not sit there and park,
17 you know, I mean she's going to know immediately
18 that these children are gasping. Dr. Miller
19 said you would hear them all gasping. Why did
20 she not stay on the road until they die? The
21 reason is because she didn't injure or harm her
22 children one way -- one bit, you know, you're
23 on some road. Why -- why do you drive on a
24 road where people are driving and then you drive
25 slow? Why don't you just sit there? They can't

1 have their cake and eat it too. They cannot --
2 they can argue and infer one thing, but they
3 better be prepared to prove it and that's why
4 I've taken the time to draw it, see it. Let's
5 go further with Joe Inman and that stuff, okay?
6 Let's deal with that further.

7 He -- he forgot I think he indicated this,
8 but I don't know if counsel -- this -- the other
9 real important thing with Joe Inman, he's driving
10 on this road, he -- on Marcola Road and you
11 recall he sees lights of a car heading this
12 direction from a direction not -- I don't recall
13 specifically, you may check your records, but
14 he says he saw some lights over in that direc-
15 tion, there maybe a question mark as far as
16 direction. Let's take it now to -- to when Joe
17 Inman comes up behind this car.

18 Now, only two things can occur. One is,
19 if -- if he can't see her in there, then -- and
20 she's really responsible, okay? I mean, only
21 certain possible reasons why you couldn't see
22 her in there. One is, she might not have been
23 doing anything and the only explanation or
24 option is that -- that she was hiding. The
25 only other option that we can come up with any

1 other option, there are no other options. She
2 was hiding. Hiding from Mr. Inman and she sees
3 this car coming. You don't want to get caught
4 so you're hiding it down there so you're hiding.
5 Well, let's look at that. Let's look at it
6 really. Let's explore that.

7 She didn't want to call attention to
8 herself. She wanted the car to get around her
9 and -- and leave her alone because she's just
10 guilty as can be. Then, why do you come to
11 drive on the road for five to seven miles per
12 hour for two - two and a half minutes when all
13 you have to do is pull over to the side of the
14 road? If she knew, you know, the question is
15 did she know or didn't know a person was behind
16 her? If she knew and was hiding, do you think
17 frankly that she would just continue to drive
18 down the road two - two and a half minutes? You
19 know, I mean it doesn't make any sense. No, she
20 would have pulled over to the side of the road
21 immediately and let Joe Inman pass. If -- if,
22 it occurred to -- as it say, she never would
23 have come out of this road, she wouldn't have
24 brought or tried to attract the attention to her
25 by driving five to seven miles an hour. I do

1 suggest to you that when Joe Inman was behind
2 her, she did not know that because she was
3 trying to do these things that we've just
4 described. She did not know because she did
5 not pull over to the side of the road. She
6 did not know that vehicle was there because
7 she was so involved. She was so traumatized,
8 she was so involved in trying to save her
9 children and to keep from passing out and
10 maybe she was trying to get the towel also.
11 And, that would occur over a matter of two -
12 two, three -- three and a half minutes. You
13 know something, we can learn from Joe Inman,
14 we learned this also: I submit that if -- if
15 you really can explain that and you end up
16 learning from that whether or not she knew
17 about Joe Inman, I suggest it's responsible
18 to inform that she did not have reason -- we
19 did not know that he was there or she would
20 have pulled over even -- even, you know, just
21 because you don't want any obstruction, she
22 did not know.

23 So, Joe Inman passes and gets by and I
24 submit no, that car is not even there other-
25 wise if she didn't know at anytime, why wouldn't

1 she have incorporated this lie or why wouldn't
2 it continue this into her story, you know, that's
3 been inferred that she didn't know the car was
4 there.

5 Now, this is what we know from this as it
6 is incredible and it is really important that
7 we know that in a short while after Joe Inman
8 passes her, she's not going at five to seven
9 miles an hour any more. We know the two child-
10 ren are still alive, close to death when they
11 get to the hospital, but they are still alive
12 and she can tell because they're gasping and
13 making noise so that you know it. Let's also
14 keep in mind one other thing, okay? It is
15 important too, it's one of those that didn't
16 fit when you think about the State's theory
17 because they inferred that what Diane Downs
18 wanted was for Christie to die because she
19 was the one that saw her do it. She saw that
20 then they have forgotten that they have totally
21 forgotten even their theory of this case be-
22 cause they're saying that the reason she shot
23 her children was because Mr. Knickerbocker
24 wouldn't be with her if she had children. You
25 see what we're talking about is that it did no

1 good for her to get to the hospital, according
2 to the State with one dead and two alive. The
3 only way to get Mr. Knickerbocker was to have
4 -- if all three were dead. So, what purpose
5 did it serve her I would ask for her to drive
6 to the hospital with two gasping and still alive
7 and one perhaps deceased? Not to get Mr.
8 Knickerbocker. She could have stayed on Old
9 Mohawk Road or some old gravel road and all
10 these hidden roads, park around on Mohawk Road
11 and the only reason she tried to get to the
12 hospital in time was to save her children.
13 It's not worrying about Christie as Mr. Hugi
14 has suggested. You've forgotten about the
15 theory that Ms. Diane Downs was out there for
16 one reason, it's to get all three children.
17 She wants to be with Knickerbocker, a love of
18 a few months. Huh-uh. The reason she got to
19 the emergency room was she wanted to save her
20 children and that's where Joe Inman dovetails
21 there.

22 If you look at the fact honestly, the
23 part to dovetail and the dovetailing is this:
24 that she didn't know Joe Inman was there so
25 therefore what -- what reason does Diane have

1 then to accelerate the vehicle and get to the
2 hospital? Why don't you just come at five to
3 seven miles an hour? You see until they have
4 died and you could tell if they had died because
5 of the gasping, etc. stops. That's something at
6 least some indication that they're still alive.
7 Why doesn't she -- she notice from the time
8 that she then accelerates and moves pretty
9 rapidly, getting to the hospital then from both
10 Mr. Hugi's scenario and the card and also from
11 the one review with the -- in just a moment,
12 when she goes quickly there and I ask you then,
13 what was the reason? It wasn't because she saw
14 Joe Inman and therefore there's a car out there
15 seen and so, you've got to get into the hospital
16 because we know that she could not have seen
17 Joe Inman because of what she was doing. The
18 reason she accelerated was to get to the hospi-
19 tal. She wanted to save as many children as
20 she could. See how all those things start to
21 fit in? See how they fell into place? Joe
22 Inman, for instance, that was suggested at that
23 time, but you see now when you look at it, you
24 see it does in fact support what we have been
25 saying all along and it does not raise the

1 inference that she initially would think it
2 might. Before -- because this has to do with
3 the -- this theory of the -- of the State as
4 far as timing. I want to go ahead and show
5 you right here why this is wrong.

6 He raised the conclusion that Joe Inman
7 is going sixty miles an hour and therefore he
8 gets there a minute after the shooting occurs.
9 That is wrong and the only way that we're
10 really going to be able to describe it to a
11 certain extent is for -- for us to maybe do
12 this, let's do it this way: let's -- let's
13 use these two as cars and let's -- let's say
14 here is where the casings are found to the
15 shooting which occurred and let's say right
16 over here is -- is where -- is where the Joe
17 Inman first sees the car.

18 Okay, the State says it takes a minute.
19 He has got to the scene a minute after the
20 shooting. Now, there are a whole bunch -- all
21 kinds of questions you had when you were in
22 grade school or junior high school, question:
23 if the train started at this depot and it goes
24 to depots and another train starts at this
25 depot and is -- this one is the kind of a prob-

1 lem that you learn in school and we have done
2 well in this test because of this reason:
3 because, the time -- let's -- they get here
4 at the same time. Okay. Okay, let's go back-
5 wards on it.

6 Going at when they meet here at eighth
7 of a mile and the question that is, when did
8 the shooting occur? Is it -- is it taking
9 Inman's vehicle and going backwards? Is it
10 going back approximately a minute? No. It's
11 not because when he was there at the scene,
12 it was not occurring then, obviously. No, you
13 take her vehicle, her vehicle which at this
14 time Joe Inman had caught her, she was already
15 going slow. So, what you have then is a situation
16 of about a mile to sixty miles an hour, that's
17 right. That's a minute, but her vehicle went
18 sixty miles an hour from the casing to where
19 Joe Inman and her vehicle converged is known.
20 So, the correct answer to this -- this math
21 question is this: it's possibly closer to
22 two to three minutes after the shooting occurred
23 because she accelerates, not up to sixty miles
24 an hour, accelerated twenty - twenty-five,
25 thirty - thirty-five, forty maybe something

1 like that and comes around about here and she
2 hears the children. They're still alive and
3 reaching back and slowing down reaching back
4 and trying to take care of Christie, talking
5 to her or doing whatever, it's a slowing down
6 and it may have two to three minutes during
7 that period of time and then Mr. Inman comes
8 upon the same scene. He is perhaps three
9 minutes late, two to three minutes late poten-
10 tially and whatever occurred during a particu-
11 lar time, that person who was responsible plus
12 the gun that was never recovered are long gone
13 in the bushes and they maybe, if that yellow
14 car was checked, can that person may or may not
15 have been there. Some discussion that it was
16 there, there have been some discussions that
17 on Old Mohawk Road that perhaps the lights --
18 there could have been some lights that Joe
19 Inman saw. You wouldn't expect the person to
20 just shoot the children, drug her or whatever
21 to maybe -- to continue to follow her. She's
22 gotten away. You don't expect him to go the
23 same route. You'd expect him, if he was in a
24 yellow vehicle, in fact it was matched with
25 that person, you'd expect to go back and out,

1 perhaps down Marcola Road in that direction,
2 the person was walking. There's some theories
3 about who was with this person, was -- where
4 he was going and we'll talk about that in a
5 minute. But, that-that math is all wrong.
6 It's all wrong. So we learn a lot from Joe
7 Inman and I suggest what we learn from that is
8 not damaging to the defense's case -- to the --
9 it's not helpful to the State's case. It is
10 helpful to what we have indicated all along.

11 Okay, the timing and --this -- this timing,
12 here you'll also find in the -- find in the
13 things that were done at the -- on that car,
14 the cardboard -- the paper that was presented
15 to you in Mr. Hugi's opening argument and I'm
16 going to go ahead and write some things down
17 here and deal with that.

18 First of all, the things used are incor-
19 rect. Joe Inman at ten fifteen to ten sixteen
20 and once again we'll go ahead and take these
21 as approximations, but let's keep in mind these
22 things a minute or two off, I mean it's hard to
23 say exactly with -- with his theory, it takes
24 these things as exact, but let's use our common
25 sense and indicate that something maybe off a

1 little bit. You never can tell.

2 Heather Plouard, she's indicated a start
3 at nine thirty, do you recall her testimony
4 which was she didn't have a clock or watch, no
5 phone, but that goes into, you know, her reason
6 for being out there. She indicated it was like
7 nine forty-five, ten, somewhere in there.
8 Various times she thought another time too,
9 in a way different parts of her testimony
10 picks out different times and she said nine
11 forty-five to ten, another time, I think maybe
12 nine thirty. She talked to Delores Holland,
13 there's some variation in there.

14 Delores Holland, she did not say, now if
15 you look at the facts, setting aside the con-
16 clusions, she is not saying factually that it
17 was nine forty that she heard the car door,
18 okay, close. She did not say that. She says
19 that she is coming to that conclusion based
20 upon some facts which we could have and then
21 we could derive at our own conclusions. She
22 says the time -- she is sure about ten to ten
23 and if you go back and look at what she did in
24 between that time, between the car door and ten
25 to ten is, she had a few pages -- a couple of

1 few pages left to read in her book. It's right
2 at the end of her book and presumably, the two -
3 three pages was not in the middle and think back
4 and use common sense about how -- what occurs at
5 the end of a book? It's fairly exciting and
6 you're not exactly reading well slowly. It's
7 a conclusion time and I suggest to you, reading
8 a few pages of the end of a book and then going
9 to the -- to think that she did at ten to ten
10 does not cause her to take ten minutes to read
11 those few pages. I suggest it may have been
12 two minutes - three minutes, maybe four minutes.
13 Give her say, five minutes and I suggest what
14 is more likely that she heard the car door may-
15 be around nine forty-five - nine forty-four,
16 whatever, so let's start there and then let's
17 see some of the things that in fact were left
18 out or misinterpreted in -- in the time gap --
19 time lapse situation.

20 The -- also keep in mind, also that you
21 know, what we've already talked about, some
22 timing in that thing which results of this
23 driving in the area out there with Doug Welch
24 and Dick Tracy with Diane Downs who told to
25 speed up once and told to slow down many times.

1 So, if there was an area -- and also was done
2 in daylight with an experienced driver that
3 knows the area verses Diane Downs driving at
4 night time, not being totally familiar with
5 that particular area and also keeping in mind
6 also that we had the stop at this area for a
7 few minutes. That she had referred -- she had
8 indicated to the officers, but they didn't even
9 inquire and she didn't think it was important
10 to specify -- go through factually what had
11 occurred during that time. That wasn't consi-
12 dered either.

13 Okay, this is what we've got here. We've
14 got nine forty-five -- let's go through, here's
15 -- we can check and see if it's reasonable.
16 Nine forty-five when she starts to -- on, this
17 is maybe somewhat unclear, but -- but reason-
18 ably an inference can be drawn that they drove
19 out there to check how long it would take to
20 go from Heather Plouard's to say up to north
21 Sunderman, P to S.

22 Now, what is unclear, we have a few min-
23 utes -- a minute or two either direction, but
24 she gets into the car and she presumably backs
25 out of the driveway and at least the jury view,

1 we saw approximately how the driveway went
2 into the house. You don't park on the roadway,
3 but you drive out back onto the street, put it
4 in gear and start to go forward. If we're
5 getting -- going about time, we'd better make
6 sure that we deal with the evidence. Better
7 make sure we deal with absolutely the evidence.

8 Let's say that we back out and go out and
9 get on the roadway which is maybe going to take
10 a minute or two. Okay, and, you know, maybe --
11 maybe a minute, maybe a little less in all.
12 These all give and take here a little bit.
13 Let's conclude that at approximately, let's put
14 down as only started out, doing it this -- this
15 way. Look at the whole thing and give or take
16 here, put down as about two minutes with a
17 drive and maybe she left at nine forty-seven,
18 given the benefit of a doubt, that reading
19 three pages in a few minutes to read a few
20 pages, nine forty-five to nine forty-seven.
21 Nine four seven. Gets on the roadway and then
22 the next one is a drive from that area to north
23 Sunderman -- of seven minutes, it's daylight,
24 etc. and I'd ask you to give us an additional
25 minute for that drive because of the other cars

1 being in the area. They are going faster than
2 they should of and were told to slow down there
3 for a few minutes, five to six miles right in
4 there which gives us an additional minute.
5 That's all. Okay, I think that's reasonable
6 and we'll take it. So, we've got that as being
7 nine or nine forty-seven, add eight, that's nine
8 forty-five. (sic)

9 Okay, now while -- okay, nine forty-five,
10 you're at Sunderman Road and instead of keeping
11 the vehicle traveling straight ahead, we're
12 going to go up there to that little jury view,
13 you recall? It was full out over there and it
14 wasn't just like in the middle of the inter-
15 section, but it was a pullout there and they
16 turned around, pulled around and came back when
17 in fact, during that time, was when Cheryl was
18 getting down in the front seat and there's some
19 conversation about whether they come on or not.
20 Something to respect that a checkbook in fact
21 the checkbook -- in fact, if it was in the car
22 and a few other things. Some discussion takes
23 place in there and just for purposes of this
24 right now, we'll talk about say five or six
25 minutes. That takes place there, the conver-

1 sations and things of that nature, so once again,
2 give or take the -- let's take that to ten o' one.
3 Five to six minutes. And, then we have the
4 driveway from North Sunderman to Seifert.

5 Okay, and during that time you have this
6 --indicated it was about eight minutes is what
7 they put down. Once again, they're going faster
8 than they were suppose to drive. Give us an
9 additional, just for the straight drive, just
10 as far as timing is concerned, give us -- give
11 us an additional minute right there.

12 All right. And this maybe probably more
13 balanced out with that, give us nine minutes
14 and let's do something different also. Because,
15 see what really happened there? It's not that
16 Diane Downs is going out there timing her
17 driving and you drive from North Sunderman,
18 right past where the casings are and you offi-
19 cer, you know -- see what the timing is and
20 you drive on into town then. Officers are
21 going to say, you know, it took us this long.
22 They're writing it down. They keep doing that
23 and that isn't what happened. Huh-uh. She is
24 seeing someone in the middle of the road and
25 so you get to the casing and she is slowing up.

1 She slows up and then comes to a stop. All
2 these things occur before there's even any
3 contact with this person.

4 How much, you know, what happens -- what's
5 a comparison to just driving and timing as
6 far as whether you get places verses when you
7 slow up to stop at a stop sign -- stop light,
8 you know, it's hard to say. I guess that it
9 may be a minute or less. It may not be, but
10 I will assign some time to that. Some time
11 to that at least we can do here, I want to
12 start with fractions here, but let's -- let's
13 put one here and there's been talk about the
14 shooting incident before she's able to leave
15 and being a minute or two or thirty seconds or
16 whatever, let's cut that down to the shortened
17 say, a minute for that because the man doesn't
18 walk over to her car or he doesn't run over or
19 jog over. In fact, we're unclear exactly how
20 that occurred, but potentially just is walking
21 over or hurrying over, there's no evidence of
22 that presumably just walking over and opening
23 the door, etc. You know, what takes place
24 there probably is more than a minute, but at
25 least a minute. So, we'll cut that down some.

1 When she then takes off from there, you've
2 added eleven minutes to this and you are then
3 at ten, whoops, twelve, ten twelve when she is
4 leaving that area. One other thing, we need to
5 keep in mind if some of you wrote down some of
6 the things on his -- on this cardboard thing,
7 he was talking about -- about the, you know,
8 average miles per hour. He would say going
9 about seven minutes five point three, it was
10 an average miles per hour. When I look at
11 average miles per hour, that's really deceiving
12 because that doesn't take -- that's not saying
13 a whole lot which is consistent, that's saying
14 that when you start, you immediately start at
15 this speed. There's no fluctuation, no stop signs,
16 nothing. I want you to refer to your common
17 sense when you go on a trip some place and say
18 even if you don't stop for like meals and again,
19 we're talking about a big span of time during
20 the evening like fifty or fifty-five that becomes
21 more fifty-five I'd have to probably say, maybe
22 seventy-five miles an hour when you're driving
23 and keeping in mind that it's an evening which
24 puts those evenings out there and a particular
25 reason to give an inference that she's going

1 to be going slower. That what they were doing
2 was not taking into consideration that, you
3 know, a slow time or stopping at stop signs,
4 etc., I submit to you or accelerating or de-
5 celerating. But, then what we have is the
6 next period of time as being this point eight --
7 point eight miles between the casings -- between
8 the casings and Joe Inman.

9 Now, you cannot put there one minute
10 because she was not going sixty miles an hour.
11 We know she was already slowed down to maybe
12 five to seven when Joe Inman came upon her.
13 So, I would suggest to you if she was at an
14 average of say thirty miles through there that
15 would be two minutes, close to a mile, I would
16 suggest that perhaps that mile of acceleration
17 to twenty-five - forty miles an hour, whatever
18 and then back down as she is turning and doing
19 things, that gives us two minutes, thirty miles
20 an hour is much more than that maybe even three -
21 four minutes, maybe even three - four minutes,
22 but you know, I -- I'd ask you to maybe add
23 some minutes there. I asked you to add some
24 minutes there at back before we'll take off --
25 we'll take the low side, three minutes which

1 has to be real reasonable for that. Three
2 minutes get to -- to ten fifteen and when
3 does Joe Inman say that he saw her? Ten
4 sixteen. But, it -- it's even difficult
5 than that because there's some more things
6 that are -- are misleading in what was pre-
7 sented to you, because when he assumes then
8 in the average mile per hour, etc., after
9 that is that she takes off at the same speed
10 as Joe Inman.

11 There is some contact. Joe Inman has
12 passed her and she immediately zooms off,
13 but that is not what occurred. She is doing
14 things at least that need to be done and at
15 least, you know, say an additional half city
16 block or whatever, at least at a minimum say
17 another minute, say and so you have a minute
18 or two, whatever you have, excuse me, indeed
19 it has jumped up to what Joe Inman has just
20 as few minutes. I think that it would be,
21 I know it's close to twelve, if I could just
22 have a minute?

23 Joe Inman says it's two to two and a half
24 minutes, right? So, let's say this then becomes
25 say ten seventeen or ten fifteen when he leaves.

1 Okay. There's some other things that are not
2 added in here what we have just been talking
3 about with Joe Inman when Joe Inman leaves,
4 she is still going slow for a period of time.

5 So, let's just put a slow period question
6 mark? But, let's get an additional minute,
7 just another minute say about ten nineteen.
8 And then, let's look down here to hospital
9 arrival as being, you know, people looking at
10 their watches and clocks when she goes and
11 she honks her horn and yells, you know,

12 "Kids shot."

13 "Help."

14 There's some running around, information,
15 etc. People are doing things and some people
16 are noting as they run around. As counsel said,
17 you know, scattering and checking that's going on
18 and sticking their head back in and you -- they
19 needed help and so they were calling people in
20 different rooms. They get that and they report
21 that which may have been thirty seconds and it
22 may have been more, but I suggest to you say
23 that she wrote or looked at her watch and wrote
24 ten thirty which is exactly the same time that
25 people are, you know, are reacting to this which

1 is probably not fair, maybe their -- maybe there
2 has been a minute or less or so of daylight
3 driving to them. Ten thirty, I suggest probably
4 they rolled into that parking lot say about
5 ten twenty-nine or somewhere about that which
6 then leaves not -- not thirteen minutes or so,
7 but instead approximately ten minutes and that's
8 saying that she was able to finish what she was
9 going within another minute or so and then she
10 accelerated.

11 Now, there is no time gap there which can
12 be a time gap when you take from people's testi-
13 mony, you know, the worse of all possible world's,
14 but I suggest to you what we have done, I have
15 talked about each of these and indicated things
16 that were left out, wrong assumptions that were
17 made.

18 I suggest to you that there was no time
19 losses at all. In fact, actually things fit in
20 -- in fact, actually about perfectly when you
21 think and walk through the events that happened.

22 Okay, I'll leave this here and Mr. Hugi may
23 have some responses to it, but keep in mind all
24 these various things and make sure if he is criti-
25 cal of that, that he fits it. That -- that he

1 actually fits it.

2 I think that that completes that portion,
3 your Honor. I don't have too much more, but
4 we're probably going to finish this afternoon,
5 think.

6 THE COURT: Very well. We'll be in recess
7 until 1:30 p.m.

8 (Lunch recess taken.)

9 THE COURT: You may continue.

10 MR. JAGGER: Thank you, your Honor.

11 The thing that's really irritating about this
12 particular case is that, you know, we go through
13 a great portion of trial and a good portion of
14 argument to an extent accusing a little bit what
15 Diane Downs has done. You know, we talk about
16 the statements she makes at the hospital and when
17 you think about it, it's really irritating, but
18 you try and explain what has been said and why
19 certain people heard her say things that -- at
20 particular times. But, if you -- if you approach
21 it from a different way, if you had heard for
22 example the entire story reversed and the State
23 had gone second, we wouldn't have had to explain
24 some things that appear to be bringing in the
25 entire situation and then going through it pretty

1 slowly, fact by fact, and taking each fact from
2 Joe Inman and Christie and whoever and say how
3 that actually has a point to what we have said
4 all along, it would have been a different situa-
5 tion.

6 I think/thought, that what is the most
7 irritating and probably the most frustrating at
8 all is that -- is this distortion. This -- this
9 fabrication of motive because you don't do stuff
10 like this just for no reason whatsoever unless
11 you're absolutely crazy, drugged out or whatever.
12 So, the motive then is Mr. Knickerbocker which,
13 when you look at it, when you get past that
14 initial thought, it is bizarre. It is ridicu-
15 lous and not because of what anybody said, it's
16 because of what people and how people acted.

17 The thing that is so -- so incredibly
18 bizarre, you take -- you take a person who has
19 mothered the children. Okay, and who is so,
20 not naive, is the word, but a situation that is
21 she's -- she's kind of fresh initially. She
22 gets educated pretty quickly by Steve Downs,
23 but you know, the things not said by her -- by
24 her reactions and said things the Air Force thing,
25 Steve Downs indicated part of the reason for the

1 Air Force is that she felt, you know, an obli-
2 gation to the country. She felt, you know, a
3 career was needed and obviously needed some
4 money. Needed to have some stability. Steve
5 Downs wasn't providing that though the kind of
6 naive approach to things. It's fresh, it's
7 nice and then you say how distorted it is
8 later on.

9 The -- the two week thing after the marri-
10 age separation, the whole thing was Steve Downs
11 indicating the situation with respect to surro-
12 gate parenthood. He never said it was done for
13 money or for gain or from some kind of a selfish
14 motive. It was done for the reason in his words
15 almost exact words,

16 "To have -- let other people see
17 the happiness that children bring."

18 And then Mr. Hugi stands up here and goes
19 ahead and says, you know, tells them that there
20 is just no way that she's that naive, not that
21 fresh to go out when she goes to a new place
22 in Oregon, works full time in Oregon and having
23 for the first time in a long time, has a chance
24 to be with her children. You know, Mr. Hugi
25 gets up here and talks about the diary and the

1 log and say, look at this week or so she's up --
2 she's writing about children where she didn't do
3 it before. She had a good relationship. She
4 testified that she didn't have Mr. Knickerbocker
5 in an outside going to and from, wasn't going
6 with her, moving in and out. She didn't have
7 that to be concerned about anymore. What was
8 she doing up here? Being with her children.
9 Why wouldn't she write more about it because
10 she was doing more with her children and to
11 distort that and say she's doing it because of
12 some weeks before she planned on killing her
13 children. That is an abortion. That's -- that's
14 ridiculous. It's not born out by her actions
15 before she moved to Oregon or afterwards.

16 Mr. Knickerbocker, she was involved with
17 him what? A few months. She is leaving in
18 April and to look back there, this part of
19 January, a couple of months before that, what's
20 she doing? She's -- she's traveling off to the
21 East to become pregnant, to what social life was
22 before when she was pregnant which is exactly a
23 lot of social life. I suggest she had every
24 reason to believe the something would occur if
25 she got pregnant again. Did that stop her?

1 You put down here a lot of trails initially,
2 setup like this and you have Mr. Knickerbocker
3 right here and they've got to put Mr. Knicker-
4 bocker as the most important thing in the
5 world to Diane Downs. Has gone crazy for him.
6 Everything is more important. Everything is
7 less important than Mr. Knickerbocker and so
8 what do they use to prove that?

9 They have some letters. There's no ques-
10 tion she cared for him, yes, but they -- the
11 comparison is these letters and -- and other
12 men, but the comparison is not with respect to
13 career; -- surrogate parenting and going to
14 Oregon with the children and the acts, not the
15 words of people, the acts or that these were
16 more important. Okay, I said, "uses," let's
17 follow it up with some facts, okay?

18 Number one, the -- there were some pictures
19 brought in and we have them basically from the
20 beginning, approximately ten years ago when
21 Christie was born through basically right around
22 the middle part of '83, shortly before she came
23 to Oregon. She took the pictures. She was,
24 involved with the children. She was the one
25 that was providing for them. Steven Downs pays

1 ^{No} support. It wasn't his job, it was her job
2 and you don't become even -- even the most
3 vicious of marriages, the ones where you don't
4 get along, you hate each other, you can't stand
5 each other, I suggest common experience, when
6 you separate and split that tie, even if it's
7 distasteful, there's a certain sadness that
8 goes along with it. A certain loss because
9 good or bad, it was with you. It's a part of
10 your life. And for -- to say that she would
11 for -- for a man among many men, to voluntarily
12 and deliberately thought out weeks in advance
13 to separate, a part of her -- it's bizarre.
14 It's crazy. Didn't happen. Did not happen.
15 She cared for the children. I'll tell --
16 look through this and it shows Steven's
17 involvement. Doesn't show a whole lot of
18 involvement in Steve's pictures with respect
19 to his Army buddies or service buddies, other
20 people. You go through that and they are
21 pictures which go towards the end, you see
22 Diane Downs holding the children, pictures
23 of the crib, etc. Ones that we brought in
24 show the same thought right up to '83 and you
25 know, you look at those and then you know the

1 concerns that you have.

2 You know the concerns that -- you know, the
3 sometimes we say about the children, you say so
4 many strange things. You know that they drive
5 me up the wall, whatever, you know they also
6 do of course, but it's sort of a statement made
7 about dormitory food, fraternity or dormitory
8 food, but it's a wonderful experience. You
9 wouldn't give it up. The children, you know,
10 the good and bad times, they melt in one and
11 I tell you, yeah, you don't -- you don't decide
12 to separate yourself and cut that out of your
13 being because of -- because of Mr. Knickerbocker
14 an arrogant -- an arrogant, undependable, unre-
15 liable scoundral. He would be with her for a
16 week or two and gone with the taxes, whatever.
17 Just a matter of months. Yeah, he cared for her
18 or she cared for him more than some of the other
19 people he had been involved in, but no way enough
20 to injure her children. No way. Let's look at
21 that.

22 A short period of time, ups and downs. What
23 was her approach to it? Her approach to that was
24 kind of like you'd expect when you really had got
25 to know her, you know, talked about for anyone has

1 listened to her, like you have. Anyone has.

2 Okay? What did she do?

3 She wanted to know what was wrong. Some-
4 thing was wrong with him or her so what did
5 she do? Samething she's done many many times.
6 Let's do some writing. Write these down and
7 reflect upon it. In reaching for paper, she
8 did it with him too. She came to use it. It
9 wasn't her, it was him. Pretty sound decision.

10 She also had the children with her. Only time
11 she didn't was when the trailer house burnt,
12 of course, Steve had for a short period of time
13 -- she wasn't without the children because of
14 Nick. She was without the children for other
15 reasons. It had to be boys, Mr. Knickerbocker,
16 why did he -- did she get him back? Why did
17 she track Steven Downs before she came up to
18 Oregon? Huh-uh. If that had been the situa-
19 tion and he had given this excuse, keep in mind
20 she was doing things, the excuses all of the time,
21 those were different expenses when he wouldn't
22 be with her, you know, after the week would
23 pass, you know, the difference usually were just
24 one -- just weren't ones that you heard they were,
25 you know, Sharon, that is has sclerosis, she's

1 really in bad shape. He didn't feel such an
2 obligation. I've just got to, you know, or,
3 you know, this thing -- it's so proportioned.
4 It's so disproportioned and you have a right
5 to indeed a right to be upset about it. He
6 didn't want to be a Daddy.

7 I -- well, let's put it in the words that
8 they were really meant. For instance, that
9 they try and stray from it what he said --
10 what the real words are, you learned was,
11 he was saying,

12 "I love children, but I don't
13 want the responsibility of raising
14 them."

15 So, that's why he didn't have any children
16 of his own. But, he loved them. Loved to be
17 around them. Had a friend and relatives with
18 children and had them over. There's no problems
19 as far as responsibility. Diane Downs had the
20 responsibility before. There was no problem
21 with that. She had to have it some more, big
22 deal. There's no change for her. But, that
23 was just one of the many excuses that he had
24 been giving all the time. Other excuses, you
25 know, love Sharon more and here's the kicker,

1 the drive really inside Mr. Knickerbocker:

2 Another reason Sharon's parents, you know,
3 family had a lot of money. Diane Downs' parents
4 didn't have a lot of money. Great in excuses.
5 Great insight as a parent. Diane Downs and in
6 her response to life, a log she had and would
7 write it down to test and find out what he's
8 worth and how much was he worth looking at
9 actions.

10 Come January - February right in there,
11 she still was flying back, for example, to get
12 pregnant. Still following through the surrogate
13 parenting program. The time they had otherwise
14 spent with him, she's off taking flying lessons.
15 She's a woman that we talked about, here's this
16 crazed woman, just crazy because she's in love
17 with so many and the even is more important than
18 him. No way. No way. No way. And don't let the
19 State rely on different statements in her diary,
20 letters or whatever because we know some of that
21 writing, she does care in fact without -- with-
22 out question, she would have liked him to have
23 left Sharon and come on up and live with him up
24 here. No question about it. But, sure -- but
25 don't distort it. Don't let anything distort that.

1 You look at some actions and there contrast to
2 that. Look when she came to Oregon. I'd ask
3 you which is more important, you know, if this
4 -- this crazy woman, you know, who loves Mr.
5 Knickerbocker more than anything certainly you
6 would think that -- that if that were true, that
7 she would like Mr. Knickerbocker at least more
8 than a job, if she's like more than a life of her
9 children, she'd like Mr. Knickerbocker more than
10 a job, right? But, what happens in the move up
11 here?

12 He takes off to Texas and she gets a job
13 too at the Eugene Postal Service. He came back
14 and they lived together for awhile, but then
15 what happened? Why didn't he stay?

16 He goes back and tries to get a job to
17 give her support if she's still there. Can't
18 get it. She already has a surrogate parenting
19 program business going. Other alternatives --
20 certainly, he's -- she's had other jobs. She
21 certainly isn't naive to get other jobs. She
22 had work experience. She can get them, but when
23 it comes down to it, what does she do? Does she
24 go to work and leave him lay there for a reason?
25 I'll talk about that next. Does she leave him

1 or does she stay there? Does she leave and come
2 up here? Does she have a job up here or is she
3 being so crazy and couldn't stand to be without
4 him, can't live without him and stay there in
5 Arizona and get another job? No, because she
6 already had a job. Also, it's looking like the
7 postal job is more important than Mr. Knicker-
8 bocker.

9 And Mr. Hugi, he may stand here and say no,
10 she came up to Oregon because sure, he was going
11 to come up here and get away from Sharon, but you
12 know, something that wasn't in her attitude,
13 didn't come out of her mouth, it was commented
14 by Mr. Knickerbocker on the stand and it supports
15 it too the reason was not that they all live in
16 and will stay there and he will come up to Oregon.
17 It was expressed that the reason was to get her
18 away and he can decide what he wanted to do with
19 his life. One direction or another. But, it
20 sounds like something manipulative and so -- so
21 overbearing, so obsessed and so obsessive with
22 Mr. Knickerbocker, she's going to do anything to
23 get him to come up? No, that sounds like the
24 same reason to decide whether or not, you know,
25 if -- if she was out of order or he was out of

1 order and the up and down realationship and she
2 sat down and decided it was him. It sounds like
3 the same even person in approach and thought that
4 left not to a manipulative maneuver, instead to
5 give him a chance to put up or shut up. That's
6 what she did and so, it's distorted then to say
7 that's more important, you know, these other
8 things, the actions don't rely upon some words
9 that Diane Downs said. Rely on some actions.

10 You know -- you know Diane Downs, Mr. Hugi
11 would say Diane Downs is so, boy, does she --
12 Mr. Knickerbocker is just incredible if he came
13 up and started to get married and she'd probably
14 run down in the middle of the night and meet him
15 half way in the car, the two of them, if he
16 shows a sign that they're getting together,
17 but I think Mr. Hugi says that you ask him to
18 hold it just a second, simply remember something
19 that is uncontroverted again, not to be submitted
20 at all about that, you know, because for awhile
21 there didn't -- Mr. Knickerbocker wasn't thinking
22 about leaving her and talking about getting
23 married and didn't -- remember something about
24 that? She wouldn't do it unless they had a con-
25 tract. So, the -- if they got together in the

1 surrogate parenting business, etc. and they
2 thought up it wouldn't go to him, it would
3 be there for her and her children, you remember
4 that? Does that sound like a woman who is
5 so upset that would do anything? She wanted
6 a contract. She realized -- she knew the
7 value of Mr. Knickerbocker. She had checked
8 it and she had thought about it and she acted
9 upon it. No sir-ee, no relationship. No
10 marriage unless we get somethings down on
11 paper. What would happen if it didn't work
12 out? Obsessed woman? Obsessed woman without
13 any thoughts but Mr. Knickerbocker? No, she
14 had lots of other thoughts besides Mr. Knicker-
15 bocker and that goes along with so many other
16 things too.

17 Just -- just, you know, you hear a portion
18 and -- but it doesn't mesh. You see? You need
19 to get all the facts and then you look at them
20 and then you say,

21 "Hey, that's something. That's
22 not right here. Nothing is right
23 and we haven't seen quite yet the
24 meeting with Mr. Burks, Mr. Tracy,
25 you started looking at these things

1 and you set aside the emotion
2 of Christie Downs and you look
3 at what she said and you explain
4 it and it's not there."

5 It's been a long time since this happened, about
6 a year, but, you know, what that -- that allows
7 -- it allows for more confusion. It allows for
8 more commitment to a position and it allows for
9 a larger and more room for mistakes to be made.
10 Unfortunately, things that might be needed to
11 have a chance to check them out right in front
12 of them and hopefully you'll see what we mean by
13 that.

14 She said that when she got into town, she
15 had some things done with respect to other --
16 other men. We went through -- we, you know,
17 she was intimate with others. Intimate with in
18 fact within a week or so after being in Eugene.
19 You know -- you know, it's such a sharing thing
20 with somebody you care, what did she share with
21 Mr. Knickerbocker if she was so obsessed with him?
22 You know it didn't make sense in addition to the
23 intimacy she dated with other people during that
24 time before and after and before Oregon. She had
25 dates. She had things pretty much in proper

1 perspective and yet for her to sit here and
2 listen to people like Joe Inman for instance,
3 that she was really -- what she was really
4 doing out there. I suggest that she had a
5 reason. She was really upset. I suggest any-
6 body would be. If she did not and was not
7 responsible for what occurred out there, but
8 if it happened to me-- happened to anyone else,
9 I suggest they would be real angry and we'd have
10 a very angry person. Very angry. Very upset.
11 And is going to react in fact in a way that Diane
12 Downs did. I'm going to draft in just a second,
13 a couple of hooplike structure which is going to
14 put stuff in order. I'd submit you'll be sur-
15 prised in seeing that what -- what occurs and
16 what you'll see from that.

17 She took the children back and was, before
18 she came to Oregon, was clear to tell Mr. Knicker-
19 bocker that that was more important to her and
20 also has been and always will be after their,
21 you know, once we talked about this briefly
22 before the lunch, if -- if their children had
23 to be gone, she certainly messed up because
24 she saved two of the children when she got to
25 the hospital and if Mr. Hugi's theory is correct,

1 she certainly had the ability to just park along
2 this road and wait until they died. Boy, and how
3 indignant and how angry you might be to hear
4 people in the halls of the hospital and after
5 that saying that she'd done that when you hadn't.
6 What they may do with your mind and think that's
7 even worse that they intentionally would do that
8 with your mind. They intentionally would do that
9 with your mind and the tapes, Doug Welch and
10 everyone/ they were indicating to her,

11 "Diane Downs you don't know what
12 you're saying. What you're saying
13 is wrong. It was impossible.
14 Impossible, you know, somebody
15 out there on the road. You bet.
16 Sure. You bet. Possibly a yellow
17 car out there? But we've checked
18 it all out and what you're saying
19 is impossible to have occurred."

20 They lied to her. They played mind games. She's
21 ~~on the stand up here and right in the middle of~~
22 ~~her testimony what happens?~~ She is carrying a
23 ~~child for nine months, maybe a little different~~
24 ~~maybe than having a child and rearing or caring~~
25 ~~for it for nine months and raising it for then~~

1 years, you know, caring for a child for nine
2 months and is about ready to deliver and she
3 said she was told that she should deliver the
4 child and we're yanking it away from you. Mind
5 games. How long has this trial lasted? Six -
6 five - six weeks? I'll tell you certainly to
7 put them on notice that she was pregnant and
8 there wasn't any confusion to any of us was it?
9 Why did they do it? Right in the middle of her
10 testimony? Why did that occur? What, a coinci-
11 dence? What a coincidence. She had a right to
12 be angry. Anybody has a right to be angry.
13 Every woman in that kind of a situation, mind
14 games. They mess with your mind.

15 And then to fabricate something that is
16 so incredible, you shot your children that you've
17 lived with for ten years for Mr. Knickerbocker
18 who you've known for a few months. You look at
19 the other stuff and you talk about this a number
20 of times to be able to correspond to him and the
21 written stuff -- is significant of -- of, we --
22 the children, we -- Diane Downs and the three
23 children and then Nick is separated and the very
24 thing --the house thing, we've gone over that a
25 number of times and that is just so indicative

1 of her reactions of how she's been. You even
2 look at it after the shooting, you know, what --
3 what an excuse to have the children away from her
4 at that time. They're handicapped too and CSD
5 is involved. Talk to Mr. Knickerbocker and the
6 next thing you know they're talking about how
7 she's going to get the kids back again, you know,
8 she's fighting for the children. It doesn't mesh
9 with her actions, statements, written stuff.
10 It doesn't mesh and if you don't have that, if
11 that's not the reason you see that's the only
12 reason they have -- the only reason they have
13 and it doesn't make any sense. She cared about
14 Mr. Knickerbocker, yes, but I'll tell you to
15 change that and to say that that -- it's really
16 incredible and doesn't fit with the facts that
17 we've talked about. What happened out there?
18 It's a little bit hard to say exactly because
19 anyone -- there were a lot of police officers,
20 a lot of people who have worked on the case and
21 Diane Downs has worked. The family had worked
22 somewhat and our office has been able to work
23 somewhat, but also you have a situation where
24 it leads people to phone in. They have a right
25 to phone in things to the police department.

1 She wanted to have them followed up. They have
2 a right to expect that and you have a right to
3 be angry. You have a right to be very angry when
4 you find out that people have seen someone that
5 matches your description and they have been told
6 that it's not -- that it's worthless information.
7 It's quite a coincidence, you know, I suggest
8 what occurred and it's, you know, exactly because
9 there's certain information which comes up so
10 let's finally get on. Our office becomes involved
11 in somewhat late and really not where -- with
12 all the means or whatever to be able to do as
13 much. Of course, the State can go through it's
14 resources, but (it's clear that someone was out
15 there who matched this composite who was not --
16 had not been in the area before. Most likely
17 what he was doing out there, you don't know if
18 he wasn't necessarily seen out there before and
19 wasn't seen afterwards.

20 Two of the persons who saw leads us to
21 believe that the person was on some kind of
22 drugs, remember Mr. McCain specifically talking
23 about the big eyes, etc., you know, remember
24 talking about, you know, I asked him,

25 "Have you seen people under the

1 influence?"

2 And he said if you go down to the Mall, you
3 know, and you can see them all time time.
4 So, the evidence that is just a part of the
5 very act, it's what he was doing out there.
6 You don't know and perhaps in his mental state
7 at the time, perhaps he didn't have a real
8 rationale reason for what he was doing either.

9 I mean, take somebody who walks, you
10 know, into the Country Club out there. A whole
11 bunch of people are inside there sitting around
12 a table presumably their cars are parked outside
13 (and you take this person that walks in there
14 and who matches the composite. The slimmer one
15 -- the second one, dressed the same and just
16 standing there for what Mr. Wilson said to be
17 a couple minutes, wandering around, looking
18 bewildered, strung out, out of place, looking
19 like a hippie. The hippie dress, bewildered,
20 just in there, you know, in there for no purpose
21 whatsoever. Just wandering around. Leaves and
22 you know, let me while we're there, he said he
23 was six one. Keep in mind he was sitting down,
24 Mr. Wilson was sitting down looking up. A person
25 six one, Mr. McCoin and Mr. Hilliard thought he

1 was about five nine, something like that and
2 before that -- let's think, let's -- what
3 might Ms. Downs think before you get to that
4 one, think that that's real important and it's
5 -- it's this type of timing that is real
6 important.

7 You've got Heather Plouard and some people
8 indicating that Diane Downs is out to their
9 place at about nine twenty. You know what that
10 means? That means that she, Diane Downs has
11 already gone past the intersection of Marcola
12 Road and Sunderman Road before nine twenty-five
13 to nine thirty. She's already gone past that
14 before this person gets there.

15 Okay, then we know that at about nine
16 twenty-five to nine thirty according to Hilliard
17 and McCoin, this person then is coming by pretty
18 obviously couldn't be before that, pretty sure
19 because they need to get to their place at
20 nine thirty and it's a few minutes away and they
21 -- and so they -- they come rolling past here and
22 they're right at that intersection, the bridge
23 is right at the intersection and we know also
24 within point six miles away and in fact at that
25 particular point in time, a mile point six, you'd

1 be at that area around ten o'clock or a little
2 bit thereafter. You take the Old Mohawk Road
3 and you walk maybe three miles an hour, some-
4 thing of that nature, a little bit more, a
5 little bit less, whatever. It would be done
6 there just about that time.

7 With respect to the yellow car, you know,
8 it's with -- when you're talking about rational
9 people, it's hard to understand why he would,
10 for example, the yellow car, if that's involved,
11 why the yellow car would be parked there and
12 then he would walk back up to the Country Club
13 unless you plan on going through cars or steal-
14 ing or whatever. It's hard to tell exactly
15 unless maybe there's some kind of problem with
16 the car, maybe. Maybe you might run, but you
17 don't run very well. (He didn't obviously, he
18 had no business in the area and never came back
19 in. We infer a pretty good reason for getting
20 out.) Whatever occurred, maybe he was going to
21 steal a car there, whatever, who knows. You
22 don't know. It seemed very rational to leave
23 the yellow car someplace and walk your way up
24 the road, but perhaps we're not dealing with a
25 very rational person. But, I think it's inter-

1 esting, you know, is this description of course
2 given by Diane Downs initially which was white
3 male adult, five nine, one hundred and fifty to
4 one hundred and seventy. This Exhibit, 351, one
5 hundred and fifty to one hundred and seventy,
6 dark brown shaggy hair, stubble beard, jaw
7 rotund, wearing dirty t-shirt, levi jacket, jeans.
8 Mid-size yellow Chevrolet, the reason it appears
9 confusing, you have John Hales -- John Hales who
10 indicates then that shortly thereafter, he sees
11 an older model yellow he believes to be Chevrolet,
12 it's pretty dirty, whatever, straight hair, matches
13 this composite. Which one? Because if you really
14 -- they were sometimes getting confused, obviously
15 the first and second composite. And what do we
16 learn from Dr. Hawkins?

17 Some other people in fact saw the same thing.
18 The first thing, you tend to forget is the odd or
19 timing of events, but then the thing you remember
20 most is the event. It's what is the first or
21 second composite that's your timing that's what
22 you remember which is the event itself. Is what
23 you see, so Mr. Hugi, may state not only who saw
24 the first composite first -- the first composite
25 that's the one in looking back, the real thing

1 that stuck with him, but John Hales is indica-
2 ting the composite -- it was the narrower faced
3 one and it's a clear composite which is the
4 narrower faced one. It was actually this, the
5 second one, but it was a narrower one and he
6 went to -- to say how he just really thought it
7 was a narrower face, do you recall that? Straight
8 hair thing, what a coincidence. What a coinci-
9 dence. Incredible coincidence.

10 Mr. Wilson said he saw him with a bag, some
11 kind of like shoulder bag or whatever. I think
12 Mr. Hilliard was the other one who saw it with
13 a bag, you know, looked like a bag, maybe a
14 sleeping bag, obviously something of the kind,
15 some kind of a bag, but also the description,
16 take away that and they described him which
17 generally, you know, seemed to have the same
18 kind of clothing, things of that nature. I
19 suggest it was the same. Clearly the person
20 that Mr. McCoin and Mr. Hilliard was the same.)
21 We know a Mr. Wilson apparently talked to a
22 friend Mr. Lunsgard (phonetic spelling) or
23 someone there who thought maybe they had seen
24 this person leave on a bicycle. Didn't leave
25 a whole lot of sense starting to ride a bike

1 trying to make a quick get away, back in front
2 to the parking lot and heading out. Who knows.
3 It's real hard to say. Very likely could be
4 the person who had a bike, very incredible --
5 more probable that Mr. Lunsgard would have been
6 here, you know, really it is confusing there.
7 But, don't make too much sense with a person
8 with a bag, you see how comfortable and he tries
9 to ride a bicycle. It could be either way. Who
10 knows, especially when you're dealing with some-
11 one who's not very rational, who maybe drugged,
12 maybe crazy, maybe a combination of both and has
13 no business in that area. Who wasn't in that
14 area before and who had no business in that area
15 before and was never seen in that area and has
16 not ever been found, ever.

17 Mr. Hilliard says here in Court, one sixty-
18 one - one seventy. Apparently, when he first
19 talked, it was one ninety or two hundred, some-
20 thing like that. Said five eight -- five nine,
21 the bag, the -- the subble beard, consistent
22 with Diane Downs, consistent with Hales', Mr.
23 McCoin, Mr. Wolmans or Wilson, excuse me, that
24 a day's growth -- a day's growth or some combi-
25 nation of events would occur. How likely? And

1 yet, this is of course a bum lead, comes from
2 the same agency that is contacting some witnesses
3 who they thought, you know, were good and
4 credible. Mr. Hales -- Mr. Hales thought they
5 weren't too interested and suggested what they
6 do was get some more information that was helpful,
7 yet, that's good information and how about this?

8 All about the same age, twenties to thirties
9 except he was there heading in the vicinity where
10 it was, there's no way Diane Downs would have
11 seen this person on the road because she was
12 -- had come from Heather Plouard's house before
13 he crossed the intersection and when you look
14 at the timing, the true timing that we talked
15 about just before lunch, there wasn't any time
16 period for -- to be scattering around, driving
17 around checking something in the area. But,
18 from this, (let's look at one thing that is real
19 important as far as her credibility, okay?

20 Her credibility is this:) she just wanted
21 to go ahead and blame this on anyone around.
22 She did -- she knew ~~she~~ didn't want to put the
23 blame on somebody, well, you look at it this
24 way and there's no way that you can draw that
25 conclusion. No way. First to come out, it

1 comes out when we learn about Mr. Hilliard who
2 has identified this person and then the second
3 composite comes out though there are two reasons
4 I submit -- (I submit to you only two reasons why
5 the second composite out especially when she knew
6 that Norm Hilliard had said he saw the person
7 there and that would put him right there at the
8 scene.) Why do you go about changing, you know,
9 to (Detective Tracy, it was made pretty candid
10 when they finished the composite that he wasn't
11 completely satisfied. Do you recall that? Why
12 -- why would she go ahead and change it to a more
13 narrower face?)

14 (Mr. Hilsgard identified the person for all
15 she knew, this person may be picked up and found.
16 She ~~either~~ did it because it would give a more
17 accurate description of the person, okay? Or ~~the~~
18 the reason I'm saying this about -- or even inclu-
19 ding this at all, ~~she~~ she wouldn't want to blame
20 someone who would be picked up and have an alibi, ~~she~~
21 you see? Okay. So, presumably the other options
22 and trying to be fair to both sides, so we can
23 analyze and anticipate is that Mr. Lunsgard
24 identified this person and so this person really
25 existed and that is of some concern. So, we have

1 that composite which takes Hilliard out of it
2 and you know, we don't have to take the worry
3 about picking up somebody who has an alibi,
4 okay? What are the others?

5 She goes ahead and changes it, but what
6 does that do? What does it do to make it more
7 consistent with what people saw? The narrow
8 face. It ties it in with Mr. McCain, Mr. Wilson,
9 it's a narrow face and she explains the compo-
10 site knowing that potentially she was losing a
11 witness because it was more honest and it was
12 more accurate and more truthful and you know,
13 what it made out in a different end, not infor-
14 mation that came through the power poles, infor-
15 mation that was brought directly into the office
16 for the most part she's being more honest and
17 it paid off by Mr. Wawasic, isn't that incred-
18 ible?

19 She goes out to Delores Holland's and
20 she's not shown a picture and by, you know, when
21 you look back at it thank goodness she didn't
22 look at it. Mr. Frederickson was right, that
23 was great, so glad that happened, you know, the
24 grow out, it showed a lack of interest from her
25 person -- showed her children and she's standing

1 back there which appears to not be interested
2 and you get the full picture once again, this
3 has happened thousands of times during the trial
4 and we find out to stay back there because Mr.
5 Frederickson watched TV and finds out about
6 a lineup that might occur later on. If there's
7 a lineup, it's going to be a correct one. So,
8 she didn't look at it and the police know about
9 it though, they apparently didn't get a picture
10 from the same source as they had mentioned, but
11 it's from the police file -- a police file on a
12 person and they go ahead and put it up, you
13 know, I submit to you that they didn't expect
14 her to identify anyone, I -- I would submit,
15 but they brought her on down and had her sit
16 through a photograph lineup, what? Six photos
17 or six or seven and who does she pick up? Is
18 the one that's, you know, she is the most likely
19 to get into that. Mr. Wawasic. Things make
20 that just a little different -- a little dif-
21 ferent, just like it's not sure enough -- she
22 knows what you go through if someone thinks
23 you've done something you haven't. She knows
24 what happens. She doesn't want to subject
25 anyone else to that. So, she's real honest

1 with them too and not quick to point the finger.
2 Real honest. And indicates as close as you
3 know, not close enough, can't see -- I suggest
4 you picture a little different than in real life,
5 anyway and I suggest not in any other case that
6 you'd have as pretty good lead. You don't have
7 the police agency and someone doing the investi-
8 gation antagonistic, sitting in the minds as to
9 what you do, they would have tried to find any-
10 body and set up a live lineup. I suggest they
11 didn't even look for him, that's what my sugges-
12 tion is and I suggest they didn't even look for
13 him because it was not going to help their case
14 if they find him and it's not going to help
15 his case and admits to it and says so, that impli-
16 cates him in this.

17 I can help her. Mr. McCoin can help --
18 neither him nor Mr. Hale or Mr. Wilson, she has
19 a right to be angry. A real right to be angry.
20 And these people were never found. That man
21 who in fact exists, who in fact was in the area,
22 who in fact matches this description and who
23 some of the people at least believe that they
24 saw a man bewildered or drugged and he hasn't
25 been found. And, I submit to you the gun that

1 was involved, the Ruger, whatever the model,
2 whatever the year, whatever the type, walked
3 off with him. You'd better believe those.
4 You'd better believe that they searched that
5 area, really searched it while Diane Downs
6 was in the hospital. They checked it off.
7 She was out of the hospital and she didn't --
8 they didn't find it because they -- it walked
9 off with a person. Maybe Mr. Wawasic, maybe
10 someone else, but you know something that's
11 interesting, the reason -- the kind of combi-
12 nation with John Hale a little bit, it makes
13 you think that probably he was going to back
14 to that yellow car.

15 Number one, after the shooting Diane Downs
16 leaves. Mr. Inman sees lights on Marcola Road.
17 The person was able to get away, although, you
18 know, it could have been otherwise beside the
19 other car. John Hale is seen and they match,
20 but there's the thing that perhaps has not been
21 pointed out. You -- perhaps you've seen this,
22 but it's this. That here's this person quite
23 a few miles from Springfield, yet a few miles
24 from Eugene. They live in that area, uh-huh,
25 never been seen there before or after they went

1 from door-to-door, I suggest he didn't live in
2 that area, but, you know, something -- he wasn't
3 hitchhiking. He was not hitchhiking and the
4 reason that's important is this: got a lot of
5 miles to go, wherever he was going, you'd think
6 that he'd be trying to get a lift or whatever
7 unless his destination was close. Unless he
8 had alternative transportation and he wouldn't
9 be hitchhiking, would he? And that ties in
10 with John Hales.

11 Joe Inman's observations start to dovetail
12 and it makes sense, but of course, when you
13 view those bum leads for a year, it would be
14 hard pressed to, you know, accept that you were
15 a total failure and that you really missed it.

16 So, what happened? What happened with
17 Diane Downs, the lady that they have messed
18 with from beginning to trial? They are taking
19 her child away. Here's what happened.

20 She, I want you to see what happened to
21 her and the key dates in fact are some dates
22 that Mr. Hugi's taking about, June 21st, that's
23 Greg Redick there and also around July 18th which
24 is the around the day on the tapes that she was
25 talking about basically a single story. Mr. Hugi

1 stood up with a number of stories that she says
2 is not so. She indicates what occurred there
3 that she indicated to you she believed what
4 happened at the scene and then a story basically
5 came out in different parts, but it's the same
6 story. The story is that she believed that
7 Steve was involved. That there are more people
8 that are involved, maybe some masked, they called
9 her by name, referred to her, whatever, grabbed
10 on to her, etc., that's all. Basically, the
11 same thing came out with different steps when
12 she came out, see that it comes out in different
13 statements when she's angry? When certain
14 things are occurring and she -- how that devel-
15 opes, not coming up and say there's no document
16 or evidence that dreams cause a function with
17 your memory a little bit, but you know, that's
18 not -- excuse me, that's not necessarily what
19 we're talking about. There were dreams and
20 then they were visualized. They were brought
21 conscious. They were related to other ones
22 with thoughts about -- but not said.

23 We know for a fact, around June 4th, this
24 was happening already. She made a reference in
25 her diary of statements of what's reality which

1 is not -- on June 4th, in place and you'll
2 understand what happened with her.

3 So, questioning reality unrelated by Diane
4 Downs, it's really important, you see, she wrote
5 every single day if different from that, the
6 thoughts there are at different times what she
7 testified to at other times. The idea impres-
8 sion they could have brought that these things
9 aren't true. On this day, I find it isn't true.
10 You said this on that day, seems to be jammed
11 together. We give those notes if she wasn't
12 consistent with that which has occurred at
13 different stages, you were drawing it out. You
14 can show it. That's medical reports to show.
15 That is some other impression that was taken
16 which was incorrect.

17 The June 4th, I think it was June 4th
18 where she writes down reality is unrelated,
19 confusion that she ---

20 MR. HUGI: ----Your Honor, I don't believe
21 that is in evidence. Maybe I'm mistaken, but ---

22 MR. JAGGER: ----Diane Downs testified about
23 it and referred to the date relied on in refer-
24 ence to it in the diary which is in fact in
25 evidence. I think that there was an objection

1 to that, okay counsel?

2 THE COURT: You may proceed.

3 MR. JAGGER: The interesting thing about this
4 diary, it's not in evidence. We had some refer-
5 ences made to it because it was in the hands of
6 the police and evidence is this: that -- that
7 Diane Downs was not keeping it for someone to
8 hastily see. There was no reason to falsify
9 something in there, not at all. She wrote
10 these things down to be able to say things with
11 respects to men where it was acquired by the
12 police which was not because she voluntarily
13 gave them some self-serving document. It was
14 when she was required that they got it. She
15 keeps that herself. I submit that has some
16 inducia of reality. Wasn't just, you know,
17 it's to -- imagine what it would be like to
18 actual be a victim of something like that. It's
19 pretty unreal. A victim of a shooting like that
20 unless you've done as I have in my -- it's dif-
21 ficult for me to express, I mean, I suppose
22 unless you've been in that kind of a situation
23 and who really has the trauma of that kind of
24 a thing, the children destroyed, damaged and
25 then to find that people don't believe you, you

1 hear whispering in the halls, nightmares and
2 crimes, some of the verified ones that Steve
3 and other people contacted the police and we're
4 just talking about, say first within a few weeks
5 afterwards, okay? Accusations made against you.
6 Steven Downs calling up and saying,

7 "Why didn't you do something?

8 Why were you standing there?

9 Why didn't you do something?"

10 The guilt that she lays on herself from that
11 too, it's so natural, why doesn't she do some-
12 thing? Why didn't she do something?

13 "Why didn't I do something?"

14 You know,

15 "Why did I freeze for a few

16 seconds? Why is Steve calling?"

17 The phone calls, you know, the concern about
18 the children. The phone calls from people who
19 have been involved and Children Services Divi-
20 sion, Paula Krogdahl who was involved in the --
21 it was pretty clear where the position was at
22 least to show that she believed the other
23 persons indicating how they -- they have had
24 the situation where their children, you know,
25 were forced to admit something that wasn't

1 even true at all sexual abuse, whatever, she
2 gave some abuse. Can you explain the fear --
3 the fear that already has predisposition and
4 that direct in anyway with the situation with
5 her father, trapped? You're there -- the author-
6 ities are there, where do you go? But, nothing.
7 Nothing but panic and falling apart inside.
8 Steve beating her. Where do you go? She comes
9 back for more. That situation, some panic that
10 she would actually take her own life and almost
11 endanger herself, none others, but just that
12 -- just in functioning, the panic that -- must
13 have been material to it, must have been something
14 pretty indescribable, a loneliness, you know, any-
15 one fighting for you. Depressed, oh boy, you've
16 got to be depressed. Some thoughts of suicide?
17 Sure, I mean that sounds pretty logical. Expres-
18 sions like these, she's indicated to me in fact,
19 in some difficult meetings, some real concerns
20 than obviously they're expressed as far as getting
21 some counseling, you know, to -- to try and get
22 ahold of yourself. Try -- try and deal with
23 reality, you know, come on and completely start
24 over and to go to a Dr. Jamison and of course,
25 we had subsiding of the dreams. She was able

1 to then rely on some griefs to someone and
2 talk and get control a little bit, to realize
3 that, you know, still, even though you're a
4 single individual, you can still bear up and
5 things will get better.

6 The police telling her that something
7 couldn't have occurred. Those things over-
8 lapping, the following, the -- the first June
9 21st, keep in mind what we've just reviewed
10 and see how you think you might be, how the
11 triangle is and I think in your mind, you might
12 be in this kind of a situation, okay?

13 May 19th, your children have been shot.
14 One child murdered, the other one is damaged
15 permanently. Yourself, also. You go to the
16 hospital. In addition to the things that
17 we've talked about, May 20th to May 23rd, she
18 has surgery, has taken drugs, Percadan, it's
19 all in the medical reports in there for about
20 three - four days. Dreams, etc., Steve's
21 problems in there. May 25th, Cheryl's funeral.
22 The loss of her child. The realization. She
23 loses custody of her children and up until
24 she's arrested, she's trying to maintain life
25 in some sort of a way and Mr. Hugi can be

1 critical if he wants to, but I suggest that's
2 okay.

3 Right around this time, Danny's back in
4 surgery. The medical records shows she's in
5 there, she's seeing the children. She's co-
6 operating. She's talking to people. She's
7 inquiring about how things are going.

8 June 2nd, notified to -- children are
9 notified and so Ms. Downs, that the hospital
10 has now custody of the kids. She's not --
11 the children are shot, but now the hospital
12 has custody. She doesn't know it all.

13 June 4th, diary notes dreams, the night-
14 mares, the crying, you know, what is going on?
15 What is going on here? Dreams of Steve that
16 called, etc., and it continues on for awhile.
17 The suicide, the depression, etc.

18 June 18th which we're talking about just
19 a few days in here, a couple of weeks, something,
20 continuing and going on. Custody and during
21 this time -- during the time also, in addition
22 I need to point out that her visitation is re-
23 stricted from being able to see her children who
24 would call out for her in the medical records,
25 perhaps not too much from the live witnesses,

1 but asked for her mom. Christie, Danny,

2 "I want my mommy."

3 And she knows it. She knows that's what they're
4 saying because she had wanted full time with them.
5 Just picture -- just depict before she had full
6 visitation with both of them and yet it comes
7 down to saying,

8 "Hey, you can see your children
9 for maybe twenty minutes. You
10 know, twenty minutes and that's
11 it and you can't see them alone."

12 She wasn't alone in October and she didn't
13 do anything -- couldn't see them alone without
14 an officer on her back. You know, because we
15 don't believe you Diane Downs. You know, hey,
16 boy you're really conniving and we don't believe
17 the stuff you say. So, let's limit that for
18 awhile. But, it gets worse.

19 June 18th, it's the last time she saw
20 Christie because she couldn't see her child
21 anymore. June 18th, dreams continue. The guilt.
22 Dreams, we're talking about them and the depression.
23 You bet. You'd be depressed too. Mind games.
24 Apparently from the same source as who are trying
25 to take her child right before. June 18th,

1 Christie no more and June 20th, last time she
2 could see Danny. The last visit.

3 June 21st, she sees Redick and I'd ask you
4 this: if you -- if you hadn't done something
5 wrong and --and for various reasons people didn't
6 believe you, taking your children away and the
7 same situation -- and you try to react pretty
8 honestly, you'd change the composite quite
9 later on after this, you change the composite,
10 etc. I would suggest that you would be pretty
11 understandable, even if someone were to lie,
12 I submit that your children are shot and you're
13 depressed to the point of suicide because basic-
14 ally your life is taken away. The pictures --
15 the continued eight, nine, ten years was taken
16 away. I suggest you might be able to lie or
17 attempt to lie, whether or not it was or whether
18 it was then is Dr. Hawkins and other people have
19 talked about a combination that in the most
20 stressful of times and I suggest to you, when
21 you look at that, that is the most stressful of
22 times when he with Mr. Redick, that is when you
23 break through and you go and you have been ques-
24 tioning like Christie to a certain extent, won-
25 dering -- wondering if she was questioning too

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1 that perhaps it may burst out that what must
2 have happened, excuse me for my guilt, for not
3 stopping that person. It must -- must have
4 been more -- it had to be more. She indicated
5 most honestly that she felt better than that
6 and I suggest it did. I suggest it was more
7 likely that she believed it was when she said
8 it -- it was the height of her stress that
9 everything that she had done before was taken
10 away.

11 I suggest that she told that whether she
12 told Dr. Redick and then for awhile there, it
13 stopped. Say, we have a period of time her,
14 June 21st when we have some escape for awhile.
15 We don't have the immediate pressure of that
16 anymore and then it goes for awhile and Mr.
17 Hugi's correct that the second composite comes
18 around on July 12th and so maybe three -- three
19 -- three and a half weeks, whatever that figures
20 out to be inbetween that time, she started to
21 be able to be active. She is no longer defeated.
22 She's not depleted yet. She's still fighting back,
23 you know, you can fight. You maybe one person
24 against a hostile police agency, against some
25 people who just are trying -- don't care for you

1 back in Arizona, but at least you're starting
2 to fight. But, it doesn't last for very long
3 because pretty soon she's right back in -- she
4 goes to the police department to talk to him,
5 we've got to settle this and she does -- what
6 happens there? Not there -- they're not there
7 to help her.

8 They're -- they're there to mess with her
9 mind. They're there to have her sit at a table
10 and have an officer sitting there accusing her
11 and another one passing back and forth.

12 "We don't believe you."

13 Hour after hour and you would expect that it's
14 possible -- it's crazy how anyone would do it.

15 "A mother wouldn't be that way, you know, that
16 all things that she had basically done to her-
17 self, a lot even before and I suggest that it
18 didn't take too much then for her to slip back
19 into wondering except, you know, what you can
20 see, wondering when she says this -- see her
21 even thinking about it. It doesn't -- she's
22 saying,

23 "I don't know. It doesn't make
24 sense."

25 You just don't see her fighting back and forth.

1 You can see for example in one part of
2 the transcript, she says the person that did
3 this,

4 "Knew me, even though I didn't
5 know them."

6 Such and such and didn't have time to go through
7 them all, but the final play in this,

8 "The person that did this knew
9 me, even though I didn't know them."
10 She is confused and she said that basically
11 later on or thought this, "I don't know, there
12 are blanks,"

13 "I'm afraid. I am confused."
14 So depressed, suicidal. We know this did happen
15 and I ask you, if it didn't happen in this kind
16 of a situation, if you don't have that fuzzy of
17 a memory in this kind of a situation, I suggest
18 that there never could be a time when you could
19 believe that that could happen. How much -- how
20 much stress can you believe that -- that a child
21 of yours dies, other ones are damaged and you've
22 got someone blaming you ~~and anyone~~, you know,
23 you have people who you contact for support that
24 you know and believe that they would discount
25 them. How much more? What greater situation can

1 you have then than that? And I suggest none.

2 When you put it in there, you can see what
3 you -- if you take it -- the conflict that I
4 mentioned and a couple of things, it makes more
5 -- a little more different.

6 She sees a doctor. Her dreams subside,
7 but here's the thing that is really interesting
8 too because you know, something -- remember this:
9 we did this with the ballistics, didn't we? I
10 suggest that even though Diane Downs said these
11 things that the police knew what kind of a pres-
12 sure hold they put on her and they knew that it
13 wouldn't hold true, how did we know that?

14 Because if we have a little luck chronologically,
15 if you go around this route you'll be right here
16 and we walk on through, you know, August and
17 September and October and November and December
18 and January when she was arrested, even though
19 that information was there. It -- she wasn't
20 arrested and though they knew that she knew
21 about the juvenile hearing, we talked about
22 where the children were. I suggest they knew
23 what they had done with her. They knew. Mr.
24 Hugi says there's a whole bunch of stress when
25 she got up here and she explodes, you know,

1 she's so stressful up here but she just doesn't
2 care about it now.

3 It was real -- it was a very nice time
4 for her when she got up here to rainsville,
5 nicely speaking, for Oregon. She had relatives
6 then in Arizona and it was real nice to spend
7 more time with her children up here. Bank-
8 ruptcy is gone. She had one single debt. She
9 wanted to do something, to see, you know, that
10 that could be taken care of and got some forms
11 and followed through. They didn't do anything
12 with it.

13 That -- that's a little like saying, you
14 know, that Nick is the cause of this. It was --
15 things are going fine with her. She had a nice
16 job. She was away. Steve was -- she was away
17 from all the hassle of Mr. Knickerbocker. Had
18 more time with the children. She had a job that
19 was just fine for her. Real fine time for her.

20 Said what a failure she was. Failure.
21 Sure, the grandparents business, she was involved
22 in the process of putting together that program
23 that she had already had people who sent in
24 things. It already had tried to match up one
25 and they were getting started. That had nothing,

1 perhaps she -- the family had nothing, but
2 perhaps she then with some licensing which must
3 have been accelerated to be successful at that
4 and school stuff, she could always pick up later
5 on. She had dropped out of that. She wasn't a
6 failure. She had everything going for her, but
7 she had to drop out. Remember, she was working?
8 Steve Hansen, Mr. Knickerbocker, the hassle she
9 had. She's not a failure at all. Not at all.
10 She's a woman who had a conservative upbringing
11 despite the earlier weeing a little bit of matur-
12 ity and maturing a lot reasonable, the self-evalu-
13 ation and handled things really, maybe you could
14 say inappropriate, and -- but we knew that
15 happened throughout her entire life.

16 I'm trying to -- I'm trying to go through
17 everything and it's taking us awhile. It's
18 easy to stand up here and say -- and say con-
19 clusions to you. It's easy to stand up here
20 and she didn't do it because of this or, boy,
21 the blood spatters shows this. It takes some
22 time to go through and look at Joe Inman, you
23 know, and see why, you know, what it means.
24 It takes some time to look at Christie Downs'
25 testimony and see what it means and we took that

1 time. She -- give Mr. Hugi as much time as he
2 wants to and definitely not some time to rush
3 on through. We've already vested in a number
4 of weeks, a number of hours, minutes, whatever,
5 you know, so what -- so long as we're careful,
6 so long as we've gone through the facts. I
7 could have been through in two - three hours or
8 let's -- by standing up and giving you some
9 conclusions, not referring to exhibits. Not
10 dealing with evidence, but I didn't. If I had
11 to do it over again, I'd subject you to the
12 same thing again, same afternoons that are so
13 hot in here. We'd have to go through the same
14 things because it has to be done. Because, for
15 a year, only a certain portion of the story has
16 been, bit by bit, it has been told. I think
17 that is so nice about this system, it doesn't
18 matter if someone is wrong and if they have
19 gotten tunnel vision or some particular vision,
20 and created tests such as Mr. Pex, you know,
21 tests that, you know, before you even do it.
22 That's sort of our position, it doesn't matter
23 that a whole year and accumulation of things
24 because I think that's the nice thing of our
25 system, is that no one has heard all of the

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1 evidence until now. You can still work it
2 because you can sit here and when those people
3 come one after another, you ask him questions
4 and do the best you can, maybe you don't have
5 them in your room passing back and forth,
6 three - four hours, but you've got them up
7 and you ask them some questions and what happens?
8 When you do that, you start to get to the truth
9 and we don't have a year here, we had just a
10 few weeks, but I submit to you we made some
11 real headway and then when you sit back and
12 look at the facts and you see what has hap-
13 pened and you see where the mistakes were
14 made and you have some real questions.

15 The person that killed Cheryl, that shot
16 Christie and Danny and shot Diane Downs was
17 crazy. Had to be. Was drugged, must have
18 been because it doesn't make any sense. It
19 doesn't make any sense for an individual that
20 you've seen three - four months, it doesn't
21 make any sense. But, what a coincidence that
22 they see some people out there and, you know,
23 that are like that, some people believe that
24 anyway. They can't -- that's what they're
25 doing is messing with your mind, they can't do

1 that anymore. You've heard all the facts,
2 allegations were made. Sometimes they were
3 just mere allegations which were made without
4 any suggestions, just with hope that you'd
5 hear them and wonder and be suspicious. (Thank
6 God for afterthoughts. Questions such as,
7 you know, Dan Sullivan,

8 "Do you know who the children
9 were with at that time?"

10 You know, it's nice. I wonder why those ques-
11 tions weren't asked a year ago? Maybe they
12 weren't interested.

13 Mr. Hugi will talk for a while now and
14 sometimes attack, is to say, you know, -- you
15 know, if -- if we -- the State has done such a
16 terrible job and has indicated some other thing
17 that we have done, why didn't they do it?
18 Number one. Our resources are insignificant
19 compared to theirs and, number one. Number two,
20 it's not our burden, even though we have done
21 the very best that we can. It's not -- it's
22 their burden to prove beyond a reasonable doubt.
23 Beyond a reasonable doubt, any hesitation. We're
24 not -- it's strange, it's not correct, the more
25 certain uncertainty, the hesitation, honest

1 uncertainty, it's something to that effect.
2 They can be wrong and they are wrong. They
3 have based their thrust upon things when viewed
4 in partialness such as a word points to a parti-
5 cular direction, when you'd add an additional
6 eighty percent or it doesn't wash and to the
7 entire package, you say assume this, assume that.

8 She would like to be left alone, obviously.
9 And, has very much wanted to be left alone.
10 Maybe you're angry at the person who -- that has
11 done that kind of damage to your children and your-
12 self when that person is absent, sometimes it
13 can be switched to the hospital, the police,
14 to people who are making ridiculous claims and
15 to focus accusations.

16 You know, when you think about closing,
17 so many things kind of flood on through. You
18 know, you think about things, what were said.
19 I have nothing to hide. You think about Diane
20 Downs' reality verses unreality at -- at a time
21 when things have been made up. It was there for
22 no reason, just for our own reflections.

23 You see Christie Downs' things. You hear
24 such things, I saw her face then, you think about
25 the photograph, that's what she was. How do you

1 know? Because I saw her face. It's that which
2 Diane Downs had said all along.

3 You hear Roy Pond. They are bum leads.
4 You think events -- you think of -- you think
5 of the sources of the blood spatters outside
6 from a bullet. A little small mass that you
7 look at. The pictures from the space six
8 inches wide or so high when you think about
9 all of this stuff that goes back and forth on
10 that kind of a thing. You think about the
11 fact that -- that with all due respect to Mr.
12 Pex' papers in front of his body and the firing
13 of a shot into a thin plastic bag that shows no
14 spatters and you have evidence of him saying
15 that the blood spatters were still every place.
16 With respect to that, you're going to have more
17 coming back than going up or other places and
18 you have the event of nothing at all -- nothing
19 at all. That the person responsible was in the
20 back seat with his arm and with his body and
21 blood every place in that car, it was a mess.
22 It was a hell, but not for one droplet to trans-
23 fer blood.

24 Mr. Hugi can get, hopefully when he argues
25 he will concede, that there was transfer blood.

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1 There was definitely. And, there were some
2 additional blood which is consistant with that.
3 No other drops of blood were any place else.
4 No high velocity blood any place. Not on his
5 shoes. Not on her shoes, nothing.

6 You have evidence such as Christie's
7 picture depicting a left handed person. Other
8 thoughts flooding back into the back -- in the
9 picture --the back of a person that -- who did
10 this. You reflect back in the person seen that
11 has never been caught. Never been found. Had
12 no business to be out there in the first place
13 and the gun apparently walked off too.

14 Mr. Hugi's opening statement about being
15 put in the pouch and floated down the river,
16 that's like Knickerbocker being the motive,
17 putting it in a pouch and letting float down
18 the river. You were, if you were out there,
19 the trees and the bushes, you know, staying
20 some place, if you think it might, you know
21 something that's the only way that they can
22 think about where it went and it doesn't
23 matter how many men, how many hours, how many
24 men, how much more money goes out there and it
25 walked off. Not by itself. It walked off with

1 someone who -- it walked off with someone else.

2 I suggest that -- that it was a nightmare.
3 And, it was a nightmare she lived for a consider-
4 able period of time and have, I would also
5 suggest, that a lot of these concerns would
6 cause you with the amount and degree and -- and
7 the type of evidence that you've heard, conflic-
8 ting and just suspiciousness of the whole trial,
9 I think with the ballistics and her miraculous
10 extractor marks showing up lead bullets, that
11 any theory before or after related to the gun
12 or the weapon, everything else, the things that
13 Christie says that could not be ballistics that
14 Pex was so unwilling to release when it's clear
15 that it's not there, I suggest to you that you
16 have an honest hesitation and that if you're
17 putting your own money on the table, in your
18 own affairs, that you would hesitate to put it
19 out in front of you. And, I would suggest to
20 your hesitation which would be pretty well
21 founded. Real well founded.

22 You'll have -- the Judge is going to in-
23 struct you on some stuff and you have some
24 decisions to make. Obviously, it's, you know,
25 decisions of guilt or not guilty and you've

1 heard it described pretty well. As a matter of
2 ~~fact, I think it's similar to -- to proven or~~
3 not proven. You see, when the police started
4 ~~whispering in the hallways and so many months~~
5 ~~thereafter they~~ accused her, arrested her, there
6 was essentially a public accusation against her.
7 She will never have a public body to indicate
8 that, we the jury being duly impaneled find
9 that you ~~were right~~ Diane Downs, that you were
10 innocent after all. That will never occur.

11 Instead what occurs is that that situation
12 will be aside and the only decision is whether
13 or not -- is that it's proven or not proven
14 ~~beyond a reasonable doubt.~~ She would like
15 probably some other questions to be put to you,
16 but that's not what we're here for. We -- it's
17 a serious decision. One that has serious con-
18 sequences. Mistakes are sometimes made. That's
19 why this system works really well.

20 I appreciate your attention very much and I
21 want you to have the same courtesy to Mr. Hugi.
22 On behalf of my client, we ask you -- we request
23 that you return a verdict of not guilty and not
24 based upon emotion, not based upon some feelings
25 with respect to Mr. Inman and Christie Downs or

1 like Mr. Hugi says things and I want you to
2 think back how you felt, what I ask you to do
3 is go back and think about the facts. And, the
4 emotion is real misleading. It really can.

5 Thank you very much.

6 THE COURT: We're going to take a fifteen
7 minute recess at this point. Maybe you could
8 shed some light on the Court?

9 Please do not discuss the evidence.

10 (Recess taken.)

11 THE COURT: State's Closing Argument.

12 STATE'S CLOSING ARGUMENT

13 MR. HUGI: Thank you.

14 Ladies and Gentlement of the jury, I get
15 to talk to you one last time and I'm sure by
16 this point in the trial you really have
17 exercised your patience, listening to people
18 now for near the -- near the limit and I think
19 there's -- that there's no way for me to do
20 my job other than to respond to each of Mr.
21 Jagger's allegations and to points that he made
22 in his argument. So, I want to tell you that
23 ahead of time, that is going to take some time
24 to do this and hopefully you -- you understand
25 that.

1 Where we started in opening statement and
2 in opening argument was explaining that what the
3 attorneys says in the case is not evidence and
4 that's really important. That's a -- a corner
5 stone of our system, that the evidence in the
6 case comes from the witness stand, from the wit-
7 nesses that testify and from exhibits received
8 in the case. If it wasn't that way, we would
9 have the witnesses come in and go then what the
10 attorney said was evidence, we could say anything.
11 Attorneys can say,

12 "Well, this guy said that."

13 It really wasn't what you say, this is what the
14 facts are and decided on what I'm telling you
15 the facts are. See? And, the system wouldn't
16 work that way because your decision then wouldn't
17 be based on the facts or the witnesses. They
18 would be based on what some lawyer told ya and
19 the lawyers not under oath and he's not subject
20 to cross examination.

21 So, it might be tempting for an attorney
22 to stand up and give you a version of a trial
23 that's completely at variance with what you heard
24 and so what do you do to -- if you're in that
25 dilemma?

1 Well, the instructions here you're going to
2 get from the Judge are clear. That you make sure
3 your decision is based on the evidence that you
4 heard in trial. That you heard -- what you re-
5 member the facts to be and if somebody tells you
6 that it was this way and you remember -- it was
7 that way, then you're to make the decision in
8 this case on the way you remember it and the
9 impressions you got because you're the sole
10 judges of the credibility of a witness and the
11 weight to give each of these witnesses.

12 Now, I started to trail back to whenever
13 we started and I used this chart to tell you
14 what the State's case was going to be and at
15 that time I said, well attorneys it's not evi-
16 dence in the case, but this is the kind of a
17 program we make to you. This is what we expect
18 the evidence will be and hold us to that and
19 when I got to talk to you in my first argument,
20 I went through it with you and you were either
21 satisfied in your own mind that I delivered on
22 my promises and the evidence was what it should
23 be or you weren't satisfied with it. Those are
24 the two choices.

25 Now, I submit to you that the State's been

1 open and candid and forthright with you from
2 the very beginning as to what their theory --
3 what the theory of the case was and what I
4 evidence I was going to use to prove it.

5 Now, if you recall the Defense theory,
6 where did you first hear about the things that
7 Mr. Jagger talked about? I submit to you that
8 the first time you heard about the Joe Inman
9 gap and all of that was at the end of the trial,
10 after the evidence was over, after the exhibits
11 were in, then the theory -- we learned for the
12 very first time, so we weren't put on notice
13 of that, which way it was going to go in the
14 beginning. We weren't told many many things
15 in the beginning of the trial when we could
16 have done something about it and responded to
17 -- to those issues with witnesses.

18 For instance, now when was the first time
19 we heard about the Steve Downs rape that occurred
20 on April 20th? You recall that incident, right?
21 The State told you what our theory was going to
22 be, who our witnesses are going to be, what
23 they're going to talk about before we called
24 them. Steve Downs came into the courtroom too,
25 the oath laid out and the testimony subject to

1 cross examination, he can be asked about any-
2 thing. But, he said,

3 "How -- how come you raped
4 Diane Downs that night?"

5 No, he testified about that night. He said he
6 -- he -- they were intimate.

7 "How do you feel about that?"

8 Well, well I think you got a response that he
9 thought it was about kind of squared things a
10 little bit with Nick and in his mind, for all
11 the times that it had gone the other way, he
12 said that but nobody asked him while he was
13 there,

14 "Well, wasn't there more than
15 that? Wasn't there a horrible
16 brutal rape, was it not?"

17 And give him a chance to respond to that and
18 answer that. No, he just had done his testi-
19 mony and goes back to Arizona. There he is.

20 Now, Diane Downs gets on the stand and
21 for the first time we hear about this rape.
22 So, what's -- what's the choices? We're not
23 trying a rape case here. All right. It's a
24 collateral matter. It's a side issue. Do we
25 bring Steve Downs back up here and say,

1 "No, you didn't do anything
2 like that. It's bolongy?"
3 Or do we just ignore it and say,
4 "Well, look, maybe by now
5 you've heard enough of Mrs.
6 Downs and you've heard her
7 stories and her opinions on
8 a whole bunch of other things
9 that have happened in this
10 trial and you consider the
11 source, where it came from.
12 And, really it isn't a matter
13 to have any real value in
14 determing who the murderer
15 is in this case."

16 And, after all, that's what we're here to prove
17 and sometimes I think we tend to lose sight of
18 that especially when we start doing a lot of
19 talking. We -- and talking really fast, we
20 get off on other issues and maybe we start
21 thinking,

22 "Gee, you know, why are we here?
23 Are we here to -- to get photo-
24 graphs of a family album or who
25 is the better parent? Is this

1 kind of a divorce trial or is
2 this --is this a very serious
3 trial about three little
4 children, two of them are with
5 us still and both of them are
6 permanently disabled now."

7 Maybe that is what we ought to come back to
8 reality now and let's look at that, who did this
9 to the children?

10 All right. And, I've got a burden to prove
11 that to you beyond a reasonable doubt and Mrs.
12 Downs did it and do not shuck that burden or
13 try to minimize it in anyway. I'm -- the State's
14 evidence is up to it -- it's here, but you have
15 to be able to accurately remember what you heard
16 and what came off the witness stand and all the
17 facts were received.

18 It's easy to say,

19 "Well, somebody was really --
20 wasn't very obsessed with
21 Robert Knickerbocker. That he
22 was just a casual fling, but is
23 that what the evidence shows when
24 you read day after day, letter
25 after letter, entry after entry

1 and in a diary?"

2 Now, you can read those letters and you
3 can judge for yourself what level of intensity
4 there is there, but your decision should be
5 made on -- on the evidence, not just some
6 broad bunch of generalizations about that.

7 It's the desired goal to this system, that
8 these decisions are made on -- on logic and that
9 you can reasonably figure out where you get to
10 the position that you do, why you vote not guilty
11 and why you vote guilty. I think you've got some
12 reasons that we understand there's going to be
13 some discussion of some very critical issues
14 in this case and they should have your attention
15 which should be on them and you should be able
16 to know why you feel either to believe that
17 evidence or disbelieve it and not be swept up
18 in a kind of a -- a very emotional presentation.
19 That shouldn't really deal with the facts.

20 Now, I'm going to -- I've taken a number
21 of pages of notes and I took them in the order
22 that these things came up in -- in argument and
23 Defense argument -- and I'm going to deal with
24 them, so it's -- it's not going to be a very
25 orderly presentation and I wouldn't just be able

1 to go, well, we talked about Christie and
2 now -- and this topic or physical evidence,
3 it's going to be how it -- how it came up.

4 Mr. Jagger started off with the state-
5 ment, he says there's a danger of proceeding
6 from start to finish. You get things out of
7 context. Do you recall him saying that? It
8 isn't a dangerous way to go in order. Not a
9 very logical statement; is it? There's -- if
10 you want to create confusion and if your job
11 is really to create a doubt, that's why you're
12 here in the case to do that. Then, maybe you
13 want to jump around a lot and -- a keep things
14 off balance and that would be an easier way
15 to do it.

16 We talked -- Mr. Jagger said or talked
17 about Christie Downs and Mr. Hugi mentioning
18 how did you feel when she testified? We're
19 not going to make -- decide this case on emo-
20 tion. All right. I want to defend that state-
21 ment and ask you, how did you feel when she
22 testified? How much credibility did you give
23 that witness? Every witness who came up and
24 sat in that chair, you probably had some sort
25 of feeling about. I believe this person and

1 I don't believe them and part of your opinion
2 is based on how they appeared on the witness
3 stand. Did they appear like they really didn't
4 want to answer the questions? Or, were they
5 forced? How much did they appear to know about
6 what they were talking about? Their candor of
7 reliability.

8 Dr. Peterson was the man in which she re-
9 lated this story, this event, this very important
10 incident to him and there's nothing at all that
11 I'm going to apologize for about asking you to
12 observe her demeanor and I'll go through her
13 testimony slowly and accurately for you so that
14 we -- we can refresh our recollections as to
15 exactly what she said.

16 She said -- we talked about -- mentioned
17 reasonable doubt. In every criminal case in
18 the United States it is decided on that exact
19 standard, reasonable doubt. And, that's whether
20 it's a shoplifting or murder case or anything
21 in between and the Judge is going to give you
22 instructions. The attorneys are not suppose to
23 do that. He's going to do -- give the instruc-
24 tions, the rules of laws that you're to apply to
25 this case. He's going to put them on a tape

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1 recording so that when you're in the jury room,
2 you may very well use this room for the jury
3 room, you'll be able to hear them whenever --
4 anytime that you want to.

5 He said -- Hugi said expect that there
6 will be explanations on each item. All right.
7 I did say that and my purpose in saying that,
8 if I didn't make it clear, was, you have to
9 focus on all of the evidence in the case and
10 not narrowly look at just any one thing because
11 if you do that, any one single piece of evidence
12 that you request to make an explanation for,
13 but what the -- the telling thing is in this
14 case, the extremely telling thing is, that it
15 requires for you to accept the different theories.
16 Find that the Defendant is not guilty. You've
17 got find that Christie is not truthful. Dis-
18 count her. You've got to find that all of these
19 items dealing with the fire arm are not accurate.
20 That Detective Tracy came in her and committed a
21 number of crimes, dummied up the evidence and
22 the police -- other police officers were in the
23 conspiracy with him; that they acted in concert.
24 That Nick is in on it because he -- he talks
25 about a gun that he never saw. Steve Downs is

1 in on it because he's not telling us about
2 a gun that he got back. You've got to find
3 that at the start, the hospital people were --
4 are telling lies anytime there is conflict with
5 what Mrs. Downs recalls. You've got to find
6 that Mr. Pex doesn't know what he's doing on
7 the tests that he performed, even though if you
8 recall the defense expert, Mr. Reed was asked,

9 "Well now, you've gone through
10 the crime lab and you've reviewed
11 all Mr. Pex' work and what do you
12 think of his methodology? Do you
13 take issue with what he did?"

14 "No. No, everything is fine."

15 So, you've got to find he's wrong. You've got
16 to find just a number of things and all of these
17 things are wrong with the State's case and against
18 that, you put Mrs. Downs who has told just easily
19 three distinct different stories which I submit
20 now that it's not easy to explain away in -- in
21 our common sense and after all, we in a court-
22 room, there's a lot of people here, but our
23 brains should work the same as when we're in our
24 own living room or on our jobs. We should be able
25 to use common sense in evaluating people. It's

1 not some sort of a magical arena here where
2 we're in the world of television and sound
3 apparatuses, it's still a real world outside
4 and it rains out there and it snows and it gets
5 hot and cold and we're all part of that world.
6 Even though, for the last month we probably
7 haven't seen as much of it as -- as we'd like
8 to have seen it. But, the same decision making
9 process that you use in everyday in getting
10 along in doing your job and relating with your
11 families and friends, that same process should
12 be going on in evaluating the evidence in this
13 case. And, there is no nice way I suppose to
14 suggest that someone who tells this many dif-
15 ferent stories is not lying. I mean, that's
16 what it boils down to, doesn't it? It's not
17 nice to say that about somebody, but think
18 about it? How many people, if a person came
19 up to you and said,

20 "Mr. Jones, you know, how do you
21 like my -- how would you like to
22 buy my red car or something?"

23 And then the next day he said a different story.
24 How -- I can't -- I just can't even make up, you
25 know, I might be able to, but a person who came

1 up to you and just was maybe telling you about a
2 fish he caught and he says,

3 "Oh yesterday I went out and I
4 caught this two pound trout."

5 And then the next time you see him,

6 "Yeah, how's the fishin' been?
7 Remember the last time we talked?"

8 "Oh yeah, I got two four pounders
9 that day."

10 And you go,

11 "Wait a minute, did I make a
12 mistake back then?"

13 And then you see him a little later on that
14 day, maybe the next day and you say,

15 "How -- how's the fishin' been?"

16 "Well, remember the last time I
17 went? We got -- we really
18 knocked them dead. We got five
19 eight pounders."

20 You start looking at Diane and you say,

21 "Now wait a minute."

22 Look, these people just don't act that way or --
23 or you're very suspicious of them and you have
24 been very suspicious of this story and this story
25 is not just four lines on my board over here.

1 This story is embodied in the twenty-five tape
2 recordings that you got -- that we have all
3 listened to in here and that we went through
4 tediously and in our notebooks and we followed
5 every line of it and we know that it's kind of
6 dismiss it? Does it seem to be a person who's
7 nervous? A person under stress? I don't think
8 so. I don't think so.

9 If something like this happened to you,
10 would you be telling three different stories?
11 Would you act the way Mrs. Downs acted in this
12 case? Doesn't add up. It just doesn't square.
13 So, you've got the entire statements of the case
14 going one way. Right there. She did it. She
15 shot her kids and against that you've got her
16 saying,

17 "No, I didn't. But, just --
18 just no, I didn't and this is
19 the way it was. No, I didn't
20 and it was these three ways and
21 you can pick whichever one you'd
22 like to believe. I don't care
23 which one, just get me off the
24 hook. I don't want to be respon-
25 sible for this. I don't want to

1 pay for it. I want it like it
2 never happened."

3 And, my job is to present the evidence to
4 you so -- in a way that you can understand it
5 and see it so that doesn't happen.

6 I think the first major topic that Mr.
7 Jagger talked to -- in his argument was the
8 blood spatter evidence and I'd like to now
9 review that and make sure that we understand
10 that as best we can.

11 Here are two exhibits, 103 and 102 that
12 were received in evidence and I know that you
13 sat through about a one day presentation by
14 Mr. Pex and he explained to you what he was
15 doing and how he conducted this test and this
16 summarizing it to make sure we understand this.
17 He indicated that on this vehicle, the Downs'
18 vehicle, the vehicle in which the murder occur-
19 red, that he observed a blood spatter pattern
20 and that is a series of droplets now of blood
21 and that these droplets were not there from
22 different sources of different instances. They
23 didn't gather there over a five year period of
24 time. He was able to analyze this pattern,
25 using his training that he has and his skills

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1 and explain it to you -- to your satisfaction.
2 Because, if any of this stuff is not explained
3 to you to your satisfaction, then what good is
4 it? Because the buck stops here. You're the
5 folks that have to make the decision and you
6 have to understand why you're making the
7 decision.

8 Now, he explained that he saw approxi-
9 mately twenty to twenty-five decent droplets
10 scattered in the area of this pattern and
11 that, based on the size of these droplets,
12 they were very small and his understanding,
13 he gave a presentation to you of the energy
14 required to propel such a small droplet; that
15 he concluded there was sufficient information
16 here to determine that what caused these drop-
17 lets to hit and remain on these parts of the
18 car was a gun shot and I think that covered
19 maybe a hundred feet per second, nine hundred
20 feet per second, a very high velocity and that
21 further more, that he could see from separate
22 droplets that he inspected struck too, that
23 he could see where they had come from what
24 direction got them to where they landed and
25 ended up. And, he went and strung them back

1 and he came back to a common source and this
2 indicated to him that this general area here
3 was the area where they all started from and
4 that area would have been where Cheryl Downs'
5 body was at that part of the body that the
6 bullet struck at that particular time to make
7 bleeding there.

8 Now, the Defense's position to this, the
9 counter is that no, this didn't happen this way.
10 This is not what you're seeing here at all.
11 This got there from a postal sweater that was
12 being worn by the children and we're not clear,
13 Mr. Jagger's not clear and I'm not clear when
14 she had it on her arms in the sleeve or that
15 it was on her sufficiently tied, but her arms
16 were out of the sleeves. That's not a known
17 fact.

18 All right. But, the Defense's theory is
19 that a pattern was made there. That this
20 pattern -- this particular pattern that we're
21 looking at came from this postal sweater. All
22 right. Now, how do they prove that? They get
23 Mr. Reed to come down with Mr. Jagger and they
24 worked with a postal sweater and they made
25 patterns on patterns that showed blood coming

1 off a postal sweater. Now, there's one -- this
2 may very well be blood coming off the postal
3 sweater, but let's -- let's explain it a little
4 bit and now that the -- that it's been much
5 testimony that the rock guard that we're --
6 these blood droplets landed nine inches off the
7 ground. Well, that would just say approximately
8 in that area there, these droplets came off
9 this postal sweater intermittent which would
10 have many of them down underneath the car, but
11 many of them would have gone before the nine
12 inches -- the spot on the car, this area right
13 here, right? The car here and the swinging of
14 all this creates a line of droplets then there
15 should be droplets in a vertical line up and
16 down here if the -- if that was a valid experi-
17 ment, but there were none and the real car --
18 they didn't go up and down the seat there.
19 They didn't continue to go straight up in here
20 at all. So, then the postal sweater must have
21 just swung with the right arm of force to hit
22 not only this area here, but off to these sides
23 as well and we had testimony from Mr. Reed that
24 it didn't make this wide of a pattern at all.
25 That the largest -- the width that he could

1 ever could get out of these droplets was roughly
2 twelve inches. So, it's inconsistent with that
3 experiment to get a pattern like the one that
4 Mr. Pex observed and I talked to Mr. Reed about
5 that.

6 "Q. You've observed Mr. Pex'
7 methodology, how he went about
8 processing this blood spatter,
9 have you not?

10 You've seen the string, the
11 photographs?

12 A. With regard to this aspect
13 of it, yes.

14 Q. Do you have any criticism
15 of how he did that?

16 A. No, based upon documentation
17 I've seen, it's the standard way
18 of doing it.

19 Q. The directionality that he
20 observed, if the car were in this
21 northerly direction and the body
22 were outside the car and the shot
23 was fired, you see by those tadpoles
24 and tails and things he's connected
25 string to, you see that you're able

1 to determine a common point of
2 origin?

3 A. Based upon the stringing, yes,
4 it does depict a common point some
5 distance out in the -- outside the
6 vehicle.

7 Q. And you've looked at those
8 droplets that he strung?

9 A. Yes.

10 Q. And they do in fact exhibit that
11 directionality?

12 A. Several that I saw did, yes,
13 show a directionality.

14 Q. Coming back to a particular
15 point?

16 A. If you place the aluminum rock
17 guard back on the car, yes, sir, you
18 could do that.

19 Q. Now in your experiments where
20 the sleeve is dropped, right?

21 A. Uh-huh.

22 Q. You also get a directionality of
23 those droplets?

24 A. Yes, you do.

25 Q. And that's straight up and down,

1 isn't it?

2 A. Yes, as the paper is standing.

3 Q. And there's no particular
4 single point of origin, is there?

5 A. Not in the sense of a gun shot
6 or a point that is depicted in the
7 photograph from the stringing, no.

8 Q. It would be perhaps similiar
9 to taking a paint brush and flicking
10 it out like you were drying a paint
11 brush?

12 A. In a loose sense with the sleeve
13 in it's widest position when it's
14 being snapped, yes.

15 Q. That's not what you saw on the
16 Datsun Pulsar automobile on the thresh-
17 hold, is it?

18 A. Not if you take into considera-
19 tion what's coming off the door, no.

20 Q. And what explanation fits the
21 facts better, the explanation of
22 the gunshot outside the vehicle with
23 the radiating pattern or the swing-
24 ing postal sleeve?

25 A. Assuming that the blood spatter

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1 on the door is a part of the same
2 incident, you would have a common
3 point consistent with a small area
4 that the blood is departing from
5 such as a bullet hole."

6 And I said,

7 "So the gun shot explanation is
8 more consistent with the facts
9 than the postal sweater one, is
10 it not?

11 A. Again, assuming everything on
12 the door is associated with the
13 same immediate incident."

14 Okay, he's conceding the gun shot is the
15 better explanation, but he's keeping it out
16 there so that we have to make the assumption
17 that everything is -- is the same incident.
18 They follow it up.

19 "Q. Do you have any reason to
20 believe otherwise?

21 A. I have no reason to believe
22 either way. To the best of my
23 knowledge the blood wasn't typed
24 to determine origin from the indi-
25 vidual."

1 Okay, but he's not ready to go that far,
2 yet.

3 "Q. All right. but whatever
4 individual it came from, you're
5 disputing it came from a common
6 source?"

7 A common point?

8 "A. I'm not disputing that.
9 We have to make the assumption
10 that it all comes from a common
11 source. That's the assumption
12 we've made throughout all these
13 experiments, or at least the
14 experiments that have been done
15 this far."

16 And I followed it up a little more,

17 "Q. It would be a pretty hard
18 thing to duplicate if you got
19 the outer most droplet -- "

20 Talking about the one by the door now, the
21 one that's the furthest east one out in this
22 wide pattern,

23 "Q. It would be a pretty hard
24 thing to duplicate if you got the
25 outer most droplet that you found

1 had a directionality toward a
2 common source with all the other
3 droplets to say that it occurred
4 at -- "

5 at some other time? I didn't say those words

6 "at another time"

7 because he cut me off and he answered,

8 "It would be unlikely."

9 All right. How could this one little drop-
10 let out this door be pointing right to the same
11 place that all these other droplets point to if
12 it got there at some different time? And that's
13 consistent -- that's pretty unlikely.

14 "Q. Unlikely?

15 A. I'm saying you have to make
16 the assumption that what's on the
17 door is the same incident. If you
18 make that assumption, it's consis-
19 tent from a small -- blood coming
20 from the small area such as a gun-
21 shot."

22 All right. That's Mr. Reed's testimony.
23 I think it's fair to say that he concedes that
24 it comes from the gunshot that -- that postal
25 theory does not fit the facts as well. Now,

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1 did you get that impression from listening to
2 counsel talk about the blood spatter theory?
3 Maybe it had something to do with the way --
4 the way the argument went, that it wasn't very
5 clear. It was subject to some misinterpreta-
6 tion and you might even have felt that the
7 postal sweater theory fit these facts in this --
8 in this case. It doesn't fit. There's drop-
9 lets over the threshold the size of the drop-
10 lets are very small. You can see the experiments
11 that Mr. Pex did to duplicate it. He came in
12 and he showed us the photographs of, I think
13 it was a bullet catcher with a kind of a box
14 with a bag of blood on it and over that he had
15 a piece of fabric to simulate Cheryl. The shirt
16 ran over that and he had a piece of postal
17 sweater material and he put a gun close to that
18 like a contact wound and he fired it and he got
19 this pattern which in fact is extremely similar
20 to the one on the Datsun Pulsar.

21 Now, if you look at the Defense product,
22 brand 'X' here, you see that the dots are a lot
23 larger and that indicates they're of a medium
24 velocity, not a high velocity which is the
25 smaller blood droplets. It takes more to propel

1 and Mr. Pex explained all that and I hope you
2 remember it. A lot lesser force can be gener-
3 ated by swinging around a sleeve of a -- of a
4 postal sweater. And, we only have that portion
5 of the pattern that happened to hit her, what-
6 ever went up this way is not presented for us.
7 So, that's another basis of distinguishing it
8 which had something like that pattern which
9 happened on the Datsun car, we would have been
10 able to see the other droplets on the side of
11 the seat and there are none. They're observed
12 one drop here with a string of it there.

13 The other thing that I would ask you to
14 consider would be, if you had a child laying
15 in the car, right, and you're a nurse; how are
16 you going to get this child out of the car and
17 get it into the emergency room and in the mean-
18 time create that kind of a pattern -- that kind
19 of a force on the side of the car going all the
20 way up? She was asked if she flipped the sleeve
21 or if she had dropped the child or if she had
22 dropped the child and if she could remember if
23 she had flipped it around with such a velocity
24 that it would make a blood spatter pattern on
25 the door? This is one very important area of

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1 evidence in this case and you should put it in
2 some kind of perspective because if this is true
3 and this is the way it happened, Cheryl Downs
4 was shot outside that car. Who did it? Right
5 there. Mrs. Downs. Because, none of her
6 stories -- none of her stories accomodate that.
7 We don't -- they don't accomodate that fact
8 and they can't and I think I've talked about
9 that before. She can't have it that the guy
10 goes out the other side of the car after the
11 kid and she's still waiting around to get shot
12 in her arm. You wouldn't even sell -- I mean,
13 you could try to sell it I suppose, but that
14 would be a tough one. So, she's got have it
15 kind of a slam bam shot them up and get on
16 with it and with Cheryl out of the car, that's
17 a real problem for her in her story. She can't
18 admit that ever happened and if it did happen,
19 she did it.

20 These holes. There was some talk about
21 that these holes didn't line up and that was
22 proof that Cheryl never got out of the car
23 some way. The holes you'll see do line up,
24 but the sweater probably did -- did move a
25 little bit when she went outside the car and

1 it maybe that someone grabbed her by the sweater
2 and shot her or that it just moved around because
3 it sure doesn't have-- I didn't mislead you. You
4 don't have anything like that. This here holding
5 it in place, I think -- how can you get these
6 two -- get these two different shots? If I lift
7 it up, if the child is lying on the floor of the
8 car, the gunman has to do one of these, you can't
9 do that just -- she shoots one here and she's got
10 to roll over someway and shoot the other way
11 and that's -- that's not a very good theory
12 either because it requires that he waits around
13 for her to move around and got to point it out
14 later and I'm emphasizing it, Mr. Jagger has
15 said in his argument that he adopts the State's
16 theory on the order of the shots, that is, he
17 adopts that Cheryl was shot first and then
18 Danny, Christie twice and then Cheryl again,
19 but he still says in his theory that Cheryl
20 remains inside the car and -- and that's kind
21 of a shocking change of position.

22 It's not a change for Mr. Jagger because
23 he never tells us any -- what his position is
24 until we get to the closing argument. But it
25 sure is a big change for Mrs. Downs because in

1 all those tape recordings you're going to listen
2 to and in her testimony, the man gets him up to
3 the door and pushes her back and bam, hits
4 Christie, getting shot and they're making the
5 contact through the window. So, Mrs. Downs
6 has also had it that Christie is shot first,
7 but that's not very good for -- for Mr. Jagger
8 to argue to you because Christie is shot first
9 and then they got to put two into Cheryl, you
10 see? How close are they to holding Christie?
11 Boom boom, right there. Why did the guy wait
12 around and wait for Cheryl to roll over and
13 shoot her the second time? He's very exposed.
14 This man -- this man is extremely exposed to
15 Mrs. Downs when he's doing that. She's out-
16 side the car, right? He's -- he's exposed.
17 He's shooting Danny, but he's in this position.
18 He just can be blindsighted for Christie, he's
19 got to be probably kneeling on the seat to make
20 a contact shot on her and for Cheryl, he's got
21 to be clear into the car to -- to reach her
22 and make a contact shot on her. So, what's
23 Mrs. Downs doing to -- during the time that
24 this is all going on? And that guy is stretched
25 out across the car, I mean there's a lot of

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1 things that you think to do I suppose that you
2 could slap the car door on him. You could jump
3 on him if you like to get into boxing. You
4 could do something of that on this person.
5 Jump on his back. No, it doesn't happen. She's
6 thinking of this -- throws these keys. That's
7 the way we get the keys out and we throw the
8 keys, you see that on the video tape how she
9 has to make her position to her hand as she
10 flicks the keys here. They just happen to come
11 out and this person who I submit you couldn't
12 hire a hit man to -- to do this on three children,
13 but this phantom man who puts two right together
14 in Christie and one in Danny because it's far
15 out that he missed the heart and then he hits
16 Cheryl twice and his misses her standing out
17 there just kind of watching her as she says how
18 does -- how does that happen? Why does this
19 guy ever want to shoot these kids in the first
20 place? I mean, they are no threat to him. He
21 can just boot them out of the car. They can't
22 identify him. They're -- they're no trouble to
23 him. This guy --

24 "I want your car."

25 That's this man's motive, right?

1 "I want your car."

2 Well, all right. Get your car now, maybe --
3 maybe you can identify me and I'm not going to
4 leave any witnesses living to this. So, I'm
5 going to kill you and you can understand that
6 why these three kids, according to the majority
7 of Mrs. Downs' stories, that they are sleeping.
8 Why kill them? There's no -- there's no reason
9 to. And, then after he shoots them up and then
10 he tells her again he wants the car. Now, who's
11 going to want the car with three dead kids in it?
12 And then, she makes her fake and then the situa-
13 tion starts up with her saying oh golly, you got
14 the car started right up and tears off down the
15 road so fast that according to her the door
16 closes of its own volition. So, she can do
17 what so she can go five to seven miles an hour?
18 And, you know, with her -- and with -- in the
19 courtroom and we can make a lot of things
20 sound real in here, maybe because of this
21 atmosphere that you couldn't -- you couldn't
22 make sounds to reel out of the park and in
23 the corner bar or anywhere else, but that
24 stretches it even for -- for a courtroom.
25 Don't you think that you could sell that --

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1 that kind of a story to -- to twelve people?

2 And what does she do? She's really con-
3 cerned about Christie so she -- it's strange,
4 but she's petting her or talking to her, any-
5 thing to account for some blood on her sleeve
6 and she's rolling down the window because the
7 smell of blood is so bad. Well, this blood
8 must really get out there and it starts smelling
9 real quick because she doesn't get a minute
10 away and she's forgotten about the terror
11 of the phantom. She's concerned about rolling
12 down the window, at least according to the
13 argument we heard, so she can get away from
14 the blood smell? Does that -- do you guys --
15 you people think that that's reasonable? And,
16 then the other thing that occupies her time
17 is -- is wrapping her wound. She does that
18 with a towel and see, this towel has got a
19 blood stain on it. It's got a piece missing
20 from it. Mr. Pex testified that he cut that
21 out to do some tests on it.

22 Now, put this towel together, you can make
23 these blood spots match up I believe fairly well.
24 If you look at this towel, you can see that --
25 see that's where the most blood is and under-

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1 neath it you can see -- you can see the pattern
2 that seeps through and it starts making a
3 pattern on the -- on the next layer as well.
4 All right. And, there's a logical explanation
5 for that because the side with the most blood
6 on it is the side closest to the wound and
7 then the next layer has the same pattern, goes
8 through to it and there's less blood and -- and
9 there's thinly the least amount of blood on
10 the final layer.

11 If you sit your arm in this towel in a
12 certain way, you can make it have contact with
13 that portion of your arm that coincides with --
14 with Mrs. Downs' wound which is right about on
15 this part of her forearm and see? There's the
16 blood, there's the wound and this blood here
17 follows over on that part of the wound and it's
18 all tucked in real nice, you see? And you can --
19 you can move around pretty good.

20 Now, Mrs. Downs was able to accomplish this
21 while she was driving on the road in her car with
22 her steering wheel in her lap and you can't deny
23 that it was followed in -- in a pattern because
24 there's the blood to prove it. What a nice neat
25 pattern for someone to wrap themselves with.

1 It's a regular, you don't need to know what
2 you call this, there's a name for them in first
3 aide and there's a person that's really upset
4 because their kids had just been shot by this
5 person and they manage to get themselves bandaged
6 and -- in a pretty fine style and would have
7 you believe they're traveling while all of this
8 is happening too? And what the evidence shows
9 is that they never lose one drop of blood. You
10 don't have blood in the front of the driver's
11 compartment. So, what happens? Maybe their
12 arm just doesn't bleed until they get to bandage
13 it in place, but that's one theory. Another
14 theory is that maybe they're sitting in their
15 car and this -- a little high for -- for a car
16 and they got their bandage right in their lap,
17 see? And they make their shot just like that
18 and they put their hand in their bag and fold
19 it right around.

20 MR. JAGGER: Excuse me Counsel, I'm sorry
21 to do this but I must object. This is not in
22 the manner of proper evidence for rebuttal.
23 I'm not allowed to answer that. There was no
24 gun powder, not in the driver's seat and I don't
25 believe that it's proper argument for rebuttal.

1 I don't have a chance to respond. This is a
2 new matter that should have been in opening
3 argument. I realize that this is at the des-
4 cretion of the Court. I don't -- I don't get
5 to respond to these things and clearly there
6 are responses for them.

7 THE COURT: Well, I'll overrule the objec-
8 tion. You can argue that -- that she wrapped
9 the towel while she's driving. I think you
10 can rebutt that.

11 MR.JAGGER: Thank you, your Honor.

12 MR. HUGI: Well, there's a way that you
13 can do that and never lose any of your precious
14 blood. Not one drop. That would be a person
15 that was pretty concerned about themselves,
16 considering that -- that at that point they
17 had three dying children in the car.

18 Mr. Jagger's argument, after we got through
19 with the blood spatter went to the fact that
20 we were painting Mrs. Downs as bad as we could.
21 That it was a fantasy of the prosecution to say
22 that, because Cheryl was colicky, that Mrs.
23 Downs would get rid of the next child. This
24 thing was the same argument which was mentioned
25 a number of times and it was thrown up as some-

1 thing that I think was mentioned that the
2 children might be functionable to her in that
3 she had the power to give it and to take it
4 away. That she was in her own mind was --
5 did have an abortion and felt that -- that
6 was a murder and that in her own mind she
7 replaced that person with the aborted child
8 with Danny Downs and we have her own written
9 explanation of that in evidence. That was
10 not a fantasy of the prosecution. You look
11 at July 22 tape, Wuest on page 32 was talking
12 about the abortion and Mr. Wuest says,

13 "I got the indication that you
14 felt very badly about that Mrs.
15 Downs?

16 Yes, I do.

17 Why did you have it Mrs. Downs?

18 At the time I was being very
19 selfish in account Cheryl was
20 about two months old and she was
21 colicky and Steve was a bastard
22 and I just couldn't handle it and
23 I knew it at that time I didn't
24 feel that an abortion was murder."

25 So, not a fantasy of the prosecution at all,

1 but it comes from the mouth of the Defendant.

2 And, maybe you knew that when you were listening
3 to Mr. Jagger's argument. Maybe you remembered
4 that and maybe you didn't, but if you didn't,
5 that just points out the reason why it's so
6 important to decide this case based on the evi-
7 dence that you hear and not what's represented
8 to you.

9 It went on to talk about her marriage with
10 Steve Downs and said her attitude throughout
11 was consistent with her attitude which to comply
12 and I'd submit to you that Mrs. Downs is not a
13 complacent or passive person, but she's like --
14 sort of like a volcano, that when things get bad
15 and she feels stress, she will erupt and we dealt
16 with two instances that happened within this year
17 proceeding. In fact, I think they're just about
18 six months before that -- the shooting that we're
19 concerned with when she fires the gun under stress
20 in the trailer talking about suicide, fires the
21 gun at Steve Downs who is standing outside the
22 door. He knows that she hasn't done it. Waits
23 for her -- the body to hit the floor and he says,
24 "I know you're in there Diane."
25 And she points it at him,

1 "Maybe I can't kill myself, but
2 I can kill you."

3 So, Steven makes a remark about,
4 "Well, nine shots and you don't
5 got nine shots or whatever,"
6 and he guesses she probably had eight by that
7 time, but that wouldn't do it and he takes the
8 gun away from her.

9 And, then the other one is the Palomino
10 Street one which, if I suppose if Dan Sullivan
11 hadn't testified you'd have a lot more doubt
12 -- about that one then you probably do right now.
13 The idea of standing in front of -- under oath
14 and telling you that this was a postal shoe that
15 we're talking about in that incident, I think
16 that shows something about Mrs. Downs also.
17 It's not a postal shoe, it's a .22 caliber Ruger
18 semi-automatic pistol. Steve Downs shows Mr.
19 Sullivan and Mrs. Downs maintains that it was
20 a postal shoe. Why?

21 Because, it hurts her. It hurts her case
22 a lot. She never possessed .22 Ruger. Remember
23 when I asked her about that?

24 "Have you ever owned or possessed
25 hand guns?

1 No, not me."

2 Even here under oath,

3 "No."

4 And we know that's not true at all. And we also
5 know that she's not the type of a person to go
6 out of her way to give back this gun to Steve
7 Downs. She's never given him anything back.
8 He's also had taken from him every time he takes
9 from her, she steals it back. Takes it back,
10 steals it and it might be too strong, but why
11 does he take it back? She has some sort of a
12 need for it? What's this need for the .22 Ruger?
13 Has the need changed when she moved from Arizona
14 to Oregon? She doesn't need it anymore? She
15 testifies here with all her credibility, I think
16 that, yeah, I gave it back to Steve because I
17 offered it to Nick. So, I could protect myself
18 from Steve because I thought that Steve might
19 hurt Nick and Nick could use the .22, but since
20 Nick didn't want it I made a special trip to give
21 it to Steve. Is there some logic that Nick would
22 need the .22 and that she was making this special
23 trip to give back that hand gun? But she doesn't
24 give back the .38 which is packed around in her
25 trunk. Sees it every time she goes to the trunk,

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1 presumably.

2 And, we're told she's a complacent person.
3 Mr. Jagger is upset that she's called a maternal
4 mother. Well, that's just not the way it is at
5 all. She's really a fine mother. Well, if she
6 could find any character witnesses we would have
7 heard them. We went to Arizona with her lawyers
8 and there's something in evidence, a list of all
9 these people that they're going to look to see
10 and you bet that if there was somebody in here
11 to come and say,

12 "Boy, that Diane Downs was fine
13 person. Tells the truth all the
14 time. Good mother."

15 They'd have been here. There's nobody who came
16 in here and said that. On the other hand, if
17 there was anybody that could say that about
18 Christie Downs, we'd have heard them too that
19 she's just a lying little kid. She's just
20 telling fibs and doesn't know the difference
21 between the truth and a lie. We didn't hear
22 that. Nobody -- nobody said that.

23 Talked about the medical records. I suppose
24 that I ought to deal with those. Those, you were
25 given a number of citations from the medical

1 report and you're going to have a very thick
2 stack of these records in the jury room with
3 you. They're not and shouldn't be thought to
4 be an accounting of all or even part of the
5 interactions of Danny and Christie while they're
6 not in the hospital, but the fact that within
7 those pages maybe one page show some observa-
8 tions that nurses might make while they're
9 administering to those kids. Observations of
10 contact with the family. Records are -- records
11 are there not real people there, not that you
12 can't cross examine them. The people who made
13 these writings aren't available here to explain
14 them.

15 "What do you mean by that?

16 What were the circumstances
17 by that you would create these
18 impressions that are written
19 down."

20 And they reflect the professional medical care
21 that these children received and details that
22 you see of every shot she got and every test
23 that was performed on them and they also
24 reflect the mixed feelings of two seriously
25 wounded little children that will come through

1 to you and keep in mind how unlikely that it
2 would be that Christie Downs, a little girl that
3 came in here and has told you that she continues
4 to love her mother even though she knows her
5 mother shot her. How she could be brain washed
6 and -- and made to come in here and say something
7 like that if it weren't true? These medical
8 reports were in response to the State calling
9 some witnesses, in response to Mrs. Downs'
10 testifying that there was intentional emotional
11 attachment between her and the children, made
12 this statement that whenever she left Danny he
13 would be crying and tearful and the State proved
14 a witness, Kim Morrison and she was one of
15 Danny's shift nurses at Sacred Heart and was
16 there when Mrs. Downs visited and said,

17 "No, nothing like that ever happened."

18 Now, these children love their mother and the
19 State's never said -- I never told you different.
20 Dr. Peterson said the same thing and he was
21 impressed by that and I think of the psychological
22 dilemma that these children must face, not Danny
23 -- Danny doesn't know what happened to him,
24 that he was shot in the back, but at least
25 Christie who sees this happen face-to-face and

1 -- and that she is -- she's in the hospital
2 and on these machines and she's got these holes
3 in her, in the medical report it's noted where
4 she was really upset by having to look at her
5 left hand and see that -- that bullet hole in
6 it. Doesn't like to look at it and sees her
7 mother come in all the time and she can't --
8 what option is there for the child? I mean,
9 any battered or abused child is going to still
10 love her mother. She loves her only mother.
11 She had and she's got to wonder what did I do
12 to make my mother do this to me? And she's
13 got to wonder what's going to happen when I
14 get out of this hospital. And, so when you see
15 these written here, I think you're going to see
16 a lot of stuff where the children are saying
17 they wanted their -- they love their parents.
18 And, many of the details like,

19 "Dad came in and talked to Danny.

20 Danny very excited to talk to him.

21 Danny's father called from Arizona."

22 This one where Danny says -- is asked about who
23 shot you implied,

24 "Mommy -- mommy shot me.

25 I thought you said that a man

1 shot you?"

2 I said and he says,

3 "They both shot me."

4 And he replied,

5 "Let's go read a story."

6 You're going to find a lot of that and I'm
7 not -- don't get me wrong, I'm not explaining
8 that because Danny Downs said in one place in
9 a medical report that his mother shoots him,
10 that that's any evidence at all that -- that
11 happened. I don't believe that -- that his is
12 competent evidence of that. He says,

13 "Jack shot him."

14 A man shot him, someone shot you that was out-
15 side in a car. You can see a lot of confusing
16 statements. You're not -- you're when you're
17 reading these and you see that it all points
18 in one direction, any direction, that they are
19 fearful of their mother and disliking of her
20 or their father or that they're just in need of
21 their parents.

22 MR. JAGGER: Excuse me, I hesitate to
23 interrupt but some of this stuff I must object
24 to. I don't want to interrupt. So, you know,
25 my objection is that this stuff is not in evidence.

1 If you want something in, you can't just put
2 it in there, that was our objection.

3 MR. HUGI: I'm sorry if I inadvertantly ---

4 MR. JAGGER: ----It may confuse the jury
5 to find some stuff that are not in there and I
6 don't think you want that in.

7 MR. HUGI: I'm sorry if ---

8 THE COURT: ----Are you making objection or ---

9 MR. JAGGER: ----I guess for the record, to
10 let the jury know that some of things that are
11 being repeated may not be in there. We may assume
12 that it was submitted in the record, so it should
13 be remembered ---

14 THE COURT: ----I'll sustain the objection.

15 MR. HUGI: That's fine. I apologize for that.
16 I had intended to just read some excerpts here
17 and I don't think Mr. Jagger nor I have really
18 gone through these reports and sorted them out.

19 MR. JAGGER: Before -- I have no objection
20 to referring to anything, even the stuff that's
21 not in evidence which is supplemented. I just
22 want to make it clear on the record. So, go ahead.
23 Whatever you want to refer to.

24 MR. HUGI: With Christie, generally you'll
25 see that she's very upset in the evening. That

1 she cries at night. That she wakes up with
2 nightmares. Most every night that she wants
3 someone to be in the room with her and she
4 really, I would submit doesn't cut one way or
5 the other. There, as far as proving the shooting.

6 Now, Mr. Jagger spent a lot of time on this
7 with these things and I feel like I should res-
8 pond to them in someway and they're going to be
9 there and you can look at them and anything that
10 he said, you can read them and you'll find, I
11 think that it is pretty balanced for everything
12 that goes -- goes one way, you'll find something
13 that goes the other. There are not, I submit as
14 good evidence as having a live witness come in
15 here and talk about the children and you get far
16 more insight from them, from witnesses such as
17 Carl Peterson than you can from the medical
18 reports by themselves.

19 Mr. Jagger said that Diane Downs didn't
20 abuse children and though no evidence at all and
21 then the next breath, I think it was something,
22 well, she shook them, but that's not abusing,
23 nothing at all. Where did abuse come from?
24 Well, you recall she -- when she was yet
25 on the stand and admitted stopping the abuse

1 some two years ago and I asked her about that
2 and she said well I meant two years from when I
3 got my divorce and -- but, it wasn't really
4 abuse. Abuse is like hitting with the two by
5 four and I guess by that definition of abuse
6 you might feel somewhat short, but I submit to
7 you that in fact is the form of abuse as well.
8 Leaving the children alone while you go and see
9 your boy friends, that's neglectful. Her pulling
10 that certainly is -- seems to show a lack of
11 parenting skills.

12 There was a point made by Dr. Mackey who
13 said Danny's head was toward Christie, but his
14 head was toward the window on, I see Mr. Jagger
15 saying that isn't true because he believes
16 Christie -- Dr. Mackey said that Danny's head
17 was toward Christie and Christie remembers
18 Danny's head being toward the window and that
19 sounds logical and consistent, but what Dr.
20 Mackey is talking about is how he tended the
21 children when they get to the hospital and what
22 Christie is talking about is how Danny was before
23 he got shot and there's no inconsistency there at
24 all and I submit that Danny was sitting on his --
25 in the back seat and he was turned toward the

1 window. He would receive his shots in just
2 the right place. It lines up with the -- with
3 the holes that are there and then he would tend
4 to fall on the seat and be in the exact position
5 that Dr. Mackey found him. There wouldn't be
6 any inconsistency at all. Christie is seeing
7 him.

8 "Where was Danny before he was
9 shot?

10 Towards the window."

11 And then Dr. Mackey upon finding him laying on
12 the seat and having Mr. Pex finding -- finds it
13 to be consistent with that. These points, they're
14 all brought up in the argument and at that time
15 it sounded like a point was trying to be made
16 that there were at least problems with the State's
17 case. I feel an obligation to talk about them.

18 Talked about the shirt. We talked about
19 that a number of times. Mr. Jagger did, if I
20 remember it right, now he said that there was
21 this shirt -- well, I don't need to talk -- to
22 talk about it. That's the shirt that Mrs. Downs
23 was wearing at the time of the shooting and Mr.
24 Jagger says well, there's no blood on it. There
25 are -- she couldn't have done the shooting.

1 Well, there's blood. There's transfer blood.
2 It's been clearly identified and there's some
3 blood on the sleeve that Mr. Pex said he wouldn't
4 call either way. Either high velocity back
5 spatter or transfer and Mr. Pex was asked and
6 I believe it was out of the time when we had
7 the mockup car in here and we had a doll in the
8 car, if it was possible for a person to make each
9 of the shots in this case, it's one to Cheryl to
10 Danny to Christie and another one to Cheryl from
11 the distance that they were made at -- from that
12 shot contact either nine inches, something in
13 between possibly that and the amount of blood on
14 your sleeve, was that consistent with that exhibit
15 and he said,

16 "Yes, it was."

17 And the reason is that only two of those shots
18 are contact shots and only the contact shots
19 cause back spatter and if you recall the testimony,
20 I hope you do, that the back spatter caused by
21 gasses entering the wound went through and he
22 elaborated on how initially there's a depression
23 made in the skin and then it throws back that
24 with that type of a contact wound and back spatter
25 -- there's a very fine mist that comes out. That's

1 sort of an aerosol effect and remember that one
2 of the things that we talked to Mr. Reed about
3 was the fact that there was a contact wound on
4 Cheryl and it would -- would it bother him that
5 there was no aerosol mist of blood found on the
6 car and Mr. Reed said no, it wouldn't bother him
7 at all and the reason for that is because if
8 you're wearing clothing that the fine mist gets
9 trapped in the clothing, it doesn't come back
10 and hit the object.

11 All right. And the two contact shots are
12 Cheryl's outside the car and one to Christie
13 happens or near contact and that he characterized
14 it as a defense wound. Mr. Jagger said it was
15 a reflex wound. I'm not going to quiver with
16 him on that. I think the evidence is as I recall
17 it, is that her hand was not against her chest
18 as -- as the bullet entered but it was at some
19 distance away from it and the reason that we knew
20 that was because of the spatter on the -- the
21 swelling and the kind of cone shaped spatter
22 that went out and there's photographs of it on
23 the -- on the swelling and on the windows around
24 her and that had it been against her body, you
25 couldn't have gotten that type of pattern. So,

1 therefore it had to be away and be away, it might
2 be a reflex as she gets the first shot and she's
3 on her hands or reacting to that to touch that
4 wound and in the process she gets shot there and
5 it could be that we're talking about a very close
6 shot here. It could be that she is the other way
7 trying to push that -- that gun that's coming at
8 her and has just shot her, to push that away.
9 So, whether it's defense or reflex is really --
10 it would not be worth arguing about. At some
11 point in time her hand was in that position as
12 the bullet does strike it and did make the spatter
13 pattern. And, there was some discussion about
14 back spatter and some principles about it that
15 if you fire into a solid object where the bullet
16 couldn't exit out the other side, that there would
17 be more back spatter but there was resistance
18 then if you fire into a very thin object where the
19 bullet could penetrate the force which would
20 come in that direction and there would be less
21 back spatter. And the situation with Christie's
22 hand, of course is that then the object that would
23 have caused back spatter because the bullet does
24 actually go through it and the marks on the holes,
25 just under the skin in here back where Dr. Willhite

1 takes it -- eventually takes it out. And, the
2 testimony was clear that you could match each
3 of those shots and not have any more blood on
4 you than Mrs. Downs who had -- who claims she
5 wasn't the shooter. She claims we should be
6 looking for someone who has -- dripping with
7 blood which is not accurate and if you look
8 at the inside of the car, if you look at the
9 photographs of it, you wouldn't see blood being
10 blown all over the car as I think Mr. Jagger
11 was saying. If that there's blood everywhere,
12 it's thrown everywhere, it's not that way if
13 you look at the photographs. You can see for
14 yourself there's some definite areas where we
15 have blood spatter and there's some definite
16 areas where you can see either only large
17 droplet of blood or none at all and Mr. Pex
18 had to laminate part of the car, he had to place
19 a chemical on it that would glow when contacted
20 with blood so that he could find and look for
21 some blood in some parts of the car. There was
22 blood that was quite obvious and he didn't have
23 to do that and then there were some parts of the
24 car he intensely had to look for the blood and
25 did this chemical analysis to do it because

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1 putting this wet thing on that material on the
2 blood, seeing it would -- would cause the blood
3 pattern to -- to become loose and be destroyed.

4 You look very tired. Your Honor, do you
5 want to go for the next ten minutes?

6 THE COURT: This could be a good place to
7 break. I don't mind taking a recess at this time.

8 We will be in recess then until 10:00 o'clock
9 in the morning.

10 (Thereupon the evening adjourn-
11 ment was taken, to resume at
12 10:00 a.m. on Thursday, June 14,
13 1984.)

14
15
16 (Further Transcript of Trial in
17 Chief reported by SUSAN C. NISSMAN,
18 Official Reporter, and continued in
19 VOLUME NO. 24, Thursday, June 14, 1984.)
20
21
22
23
24
25

1 STATE OF OREGON)
2) ss.
3 County of Lane)

4
5 I, SUSAN C. NISSMAN, Official Court Reporter
6 for the Circuit Court of Lane County, do hereby
7 certify that I did report the foregoing pro-
8 ceedings in stenotype on June 13, 1984;

9 That the foregoing 191 pages of transcript
10 constitute a complete, true and accurate trans-
11 cription of my stenotype notes;

12 That I am not counsel to, nor related to
13 any of the parties involved herein; nor am I
14 otherwise interested in the outcome of this
15 proceeding.

16 IN WITNESS WHEREOF I have affixed my
17 signature hereto this 20th day of December,
18 1984.

19
20 CERTIFIED TRUE COPY

21 Susan C. Nissman

Susan C. Nissman

Susan C. Nissman

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE

STATE OF OREGON,)	
)	
Plaintiff,)	Case No. 10-84-01377
)	
vs.)	VOLUME NO. 24
)	
ELIZABETH DIANE DOWNS,)	(Pages 1 - 121)
)	
Defendant.)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON APPEAL
STATE'S CLOSING ARGUMENT - THURSDAY, JUNE 14, 1984
JURY INSTRUCTIONS - THURSDAY, JUNE 14, 1984

BE IT REMEMBERED, That the above-entitled
cause came duly on for hearing in Courtroom 3, Lane County
Courthouse, Eugene, Oregon, on June 14, 1984, to the
Court and Jury of 12 persons,

THE HONORABLE GREGORY G. FOOTE, Presiding.

Appearances:

For the State:

MR. FREDRICK HUGI
Deputy District Attorney
Lane County Courthouse
Eugene, Oregon 97401

For the Defendant:

MR. JAMES JAGGER
Attorney at Law
540 Oak Street
Eugene, Oregon 97401

Reported By:

SUSAN C. NISSMAN
Official Court Reporter

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1 THURSDAY, JUNE 14, 1984: EUGENE, OREGON

2 THE COURT: Good morning. Mr. Hugl, you
3 may continue with your closing argument.

4 CONTINUATION OF STATE'S CLOSING ARGUMENT

5 MR. HUGL: Yesterday when we left off, we
6 were talking about blood spatter evidence which
7 was outside of the vehicle. We discussed that
8 pretty thoroughly and that's important of course
9 because it proves that Cheryl was outside the
10 vehicle when she was shot and if that's true,
11 that proves Mrs. Downs recollection or stories
12 of lies about this event are just that and it
13 makes her guilty of this crime. It's an impor-
14 tant piece of evidence. There's another piece
15 of evidence that supports that as well as the
16 fact that Cheryl's outside the car and that's
17 the missing piece of evidence and within the
18 car there were four casings recovered, two
19 right over here, one here and one on the jacket,
20 behind the driver's seat.

21 Now, this is where these pieces of evidence
22 were found after the car was processed and in
23 the meantime we -- we have the shooting of the
24 children which would have caused these casings
25 to be expelled from the pistol and we have the

1 drive to the hospital. We've got the people
2 taking the children out of the car and pretty
3 much from that point on, the car is recovered
4 and nothing gets moved in it. So, the only
5 way these casings could have been moved prac-
6 tically speaking, when these children were
7 moved, if the casings had been lying near the
8 children's bodies and they were twisted around
9 or were picked up, the casings could have
10 rolled off them, but otherwise there's no
11 reason to believe that these casings have moved
12 in any great distance or portion from where they
13 ended up from where they just came to rest after
14 the gun was discharged.

15 We've got four of these casings now and
16 we've got five shots that we know of. We've
17 got two in Cheryl, she's got two in back and
18 we recovered all of them. We recovered all the
19 bullets, one gets taken out of Cheryl's body,
20 another one comes through -- through her body
21 and hits the panel over here and is found
22 beneath the rug. So, we proved those two shots.
23 We've got two in Christie, one drops out of her
24 clothing and she's brought into McKenzie-Willam-
25 ette, the nurse picks her up and it goes off onto

1 the floor and once removed, Dr. Willhite, after
2 Christie was removed sufficiently to withstand
3 the major surgery and another one, we've got one
4 that goes into Danny's back and that part of it
5 is still in him.

6 We have had testimony from Mr. Pex that
7 he fired the -- this Ruger and many others that
8 he acquired for purposes of demonstration and
9 that this weapon ejects casings slightly forward
10 and to the right, so we know when you pull the
11 trigger and a bullet is fired, that the casings
12 do pop out in that direction. It's not going
13 to come here or this way or that way.

14 Now, we also know thanks to Mr. Pex, that
15 the position of each of the children in the car
16 at the time they were shot and from that, we can
17 position where the gun was in the car for each
18 shot and we've got some focus in evidence. You've
19 seen these in the demonstrations, but they show
20 where the firearm would have had to be for every
21 single shot that was made. Parts of that, I
22 think is -- is this last shot -- the shot of
23 Cheryl on the outside of the car and you see
24 where the firearm has to be to make that shot
25 and for every other shot that's made as the

1 casings would eject, it would hit part of the
2 interior of the car and drop back down. We
3 can't say with certainty which casings except
4 to which shot, but it does give it some shot
5 and the shot to Danny in the back seat which
6 might assume logically that this casing here
7 is responsible for that one. We know that
8 Christie gets shot with -- twice very closely
9 together in both in time and distance, so you
10 would expect those casings would be close
11 together. We've got two touching each other
12 right in the area where Christies body was --
13 was found. In fact, it came from her -- her
14 mouth and we've got another cartridge by itself
15 in the back seat by the seat buckle and Christie's
16 accounts and recollection of Cheryl being shot
17 was that she was sitting in the seat as her
18 mother came in the door with the firearm and we
19 know that that round struck there right here
20 against this metal panel because that's the
21 round that went through Cheryl, the one that was
22 inflicted to her outside the car. It remained
23 in her, so Cheryl had to come off of that seat
24 and move in that direction for the shot to occur
25 and we have a photograph of that and if the pistol

1 is in a position to fire that shot, the round
2 is going to be coming out slightly forward and
3 to the right, striking the ceiling of the car
4 and coming to rest roughly in the back seat
5 here, so there's a logical way to associate
6 every casing with every shot. And, there's
7 one casing missing and that casing is the one
8 that went to Cheryl when she was shot outside
9 the car and why is that missing? Because that
10 casing, the pistol has to be held outside the
11 car because Cheryl's outside the car and it's
12 a contact wound and so where is that casing
13 going to be? It's going to go off into the
14 roadway on the outside of the car and that
15 casing never has been found. The fact that
16 Cheryl is shot outside the car, is she's shot
17 inside the car as the defense counsel contends
18 and the door's closed, there's no way that that
19 casing could be lost. It's going to be trapped
20 within the car. We're going to find five casings
21 in the car to match the five shots.

22 It's a very important piece of evidence and
23 -- and I hope that you'll be able to examine it.
24 This car is a sealed container and five shots
25 are fired in it, you have to find five ---

1 MR. JAGGER: ----I'm sorry Counsel, you're
2 saying that is a sealed container? It's not
3 supported by the evidence. The door's open ---

4 THE COURT: ----Well, it's a matter of
5 argument.

6 MR. JAGGER: Thank you, your Honor.

7 MR. HUGI: See? If the car is a sealed
8 container, the casings have to remain there
9 within it and you should find five and there's
10 no reason not to find five.

11 Now, if Mr. -- Mr. Jagger's suggestion that
12 some how the pistol was held close enough to the
13 driver's door so that a casing could eject out
14 of it, that's inconsistent with the distances
15 -- the proximity that this pistol had to be to
16 each of the children to make the shots. That --
17 that doesn't add up. If it went outside the
18 driver's door and this occurred where Mrs. Downs
19 said it did, when we look on the roadway here
20 instead of finding the two casings, there would
21 be three. So, that theory just doesn't wash.
22 There's no way that it could happen the way that
23 the defense claims it happened. There's no
24 accounting for that missing casing other than
25 that it went off into the roadway. Why didn't

1 we find it over on this side of the roadway?

2 That's a good logical question.

3 We looked certainly to this area which
4 was searched and that supports the theory that
5 she came out of the car at some other location.
6 Can't certainly search the roadway between her
7 and McKenzie-Willamette Hospital and expect to
8 find a casing that you can -- you can try. You
9 can go over with a metal detector and try and
10 find all the casings in the roadway, cars run-
11 ning over it and hitting it with a tire and
12 bouncing it off, it's not reasonable that it
13 would remain there very long. So, what you've
14 got is physical evidence that can't lie. Can't
15 be manipulated supporting the State's theory
16 and disproving the Defendant's theory. Four
17 shots occurred in the car, one outside and
18 there's no way that Cheryl could be shot in here
19 and not find five casings inside and if you
20 look at the blood spatter on the outside and
21 that supports it as well. She had to be outside
22 to get that blood spatter out there. That
23 accounts for not recovering the casing.

24 Mr. Jagger claims that the shirt that Mrs.
25 Downs was wearing proved nothing. Mr. Pex dealt

1 with this shirt in great detail. He even went
2 so far as to demonstrate that with a laboratory
3 coat, he could make the same shots into bloody
4 objects and not have any more blood than he was
5 able to observe her sleeve which he's testified
6 to that. That the amount of blood on her sleeve
7 is consistent with a pattern that matched those
8 of these shots and the only place you get blood,
9 only possibility of getting blood on your sleeve
10 would be from contact wounds because you get a
11 blast which is entering the skin to cause the
12 blood to blow back with shooting people and ten
13 feet away, we're not going to get blood on us or
14 from any other distance. We need to have the
15 contact wound. There's only two shots that occur
16 in this case that could have caused anything,
17 the one to Cheryl on the outside of the car.
18 That caused a fine spatter back and you can see
19 it. We talked about it in detail yesterday, the
20 pattern and the shot to Christie which there's
21 evidence that caused less spray back because
22 you're inside the car when you climb to the back
23 of the seat, back around in this area where
24 Christie was at the time she got shot. You don't
25 see the pattern -- the back spatter pattern

1 there so there wasn't ---

2 MR. JAGGER: ----I'm sorry Counselor, I
3 hesitate to object. The evidence -- I do need
4 to make part of the record, to do so, it was on
5 the back of the seat -- passenger side. I
6 understand that it's argument, but I'm doing it
7 as a duty to my client.

8 THE COURT: It's overruled.

9 MR. HUGI: That no back spatter pattern of
10 any kind on the back seat of that car and there's
11 no evidence that there is -- is one in this case.
12 The evidence shows that the spatter that came
13 from Christie's hand was -- went in the forward
14 direction, that it went up to the ceiling and
15 there was droplets to the windows behind it.
16 Mr. Pex did an exhibit that indicated he's
17 checking of this area down to the places that --
18 that did contain blood spatter and the areas that
19 were void of it. From this, he's able to posi-
20 tion Christie's body and it was at the time
21 that she was shot.

22 More importantly, Mr. Reed testified that
23 he was retained by the Defendant, that he re-
24 viewed all of Mr. Pex' work in the laboratory
25 and the only thing that he was going to dispute

1 was the only thing he could call to testimony
2 to dispute was the blood spatter pattern out-
3 side on the car and we dealt with that in some
4 detail yesterday and he acknowledged in fact
5 that Mr. Pex' examination fit the facts better
6 than his did. That the postal sweater did not
7 cause that pattern that in fact, the gunshot
8 wound did. He has no dispute with any of Mr.
9 Pex' other conclusions in this case regarding
10 marking of the bullets or his blood spatter
11 work. So, we didn't hear any evidence contra-
12 dictory to that at all.

13 Regarding Christie, she's an eye witness
14 in this case. Mr. Jagger said that Christie's
15 testimony would prove that Mrs. Downs is inno-
16 cent. He said that in his opening statement.
17 That's not true at all. It's quite to the
18 contrary.

19 I think the best place to start in talking
20 about Christie is her actual testimony. It's
21 -- it was not that long. She came in and was
22 asked if she felt okay and she indicated that
23 she did.

24 "Q. We're going to have to talk
25 to all these people here.

1 Can you tell me your name?

2 A. Christie Ann Downs.

3 Q. How old are you?

4 A. Nine.

5 Q. What grade are you in?

6 A. Fourth.

7 Q. Can you tell us her name?

8 A. Miss Bottoroff.

9 Q. Did you go to school today?

10 A. No.

11 Q. You had to come to the
12 Courthouse?

13 A. Yes.

14 Q. We've talked about this day
15 before, haven't we, that this day
16 would happen.

17 Have we talked about that?

18 A. Yeah.

19 Q. Okay.

20 Christie, do you remember back
21 to the day when you got shot, can
22 you remember?

23 A. Yes.

24 Q. Do you remember if you went to
25 school that day or not?

1 A. Yes, I did.

2 Q. Do you remember where you
3 went when you came home from school?

4 A. Yeah."

5 At this point, the Court interrupted and
6 said,

7 "Excuse me, are you going to inquire
8 as to competency at this point?

9 MR. HUGI: Yes, I haven't lost sight
10 of that.

11 THE COURT: Very well.

12 Q. (By Mr. Hugi) The Judge wants
13 me to ask you some questions about
14 if you understand the difference
15 between the truth and a lie.

16 Do you understand the difference?

17 A. Yeah.

18 Q. If I said this piece of paper
19 was black, would it be a truth or a
20 lie (indicating)?

21 A. A lie.

22 Q. And you know that when you come
23 in the courtroom like this, that you
24 have to tell the truth, you understand
25 that?

1 A. Yeah.

2 Q. Do you promise to do that?

3 A. Uh-huh.

4 Q. Do you promise to do that?

5 A. Yeah.

6 Q. So everything we talk about in
7 here now has to be the truth as best
8 you can remember it.

9 Do you understand that?

10 A. Yeah.

11 Q. On the day this happened, you
12 went to school and you came home
13 from school.

14 Do you recall that?

15 A. Yeah.

16 Q. Whose house did you go to?

17 A. My grandparents.

18 Q. Did you eat there?

19 A. Yeah."

20 Now, that's important because Mr. Jagger
21 talked about this conversation and he was holding
22 a transcript and he said, well, Christie stated
23 that she had dinner at her grandparents before
24 she left and had dinner, that that was not the
25 way the transcript says at all. That's not what

1 was said. It was said,

2 "Did you eat there?

3 A. Yeah."

4 Now, there's a difference between having
5 something to eat at a house and having dinner
6 there and you certainly -- it was not a big
7 point at this -- at this time, but it was a
8 big point that was made at it -- of it at a
9 later on in the argument. There certainly
10 is a difference between eating something and
11 having dinner. It sure isn't unusual that
12 children would get something to eat at their
13 grandparents house after they came home from
14 school.

15 "Q. And after you ate, where did
16 you go then?

17 A. To my mom's house.

18 Q. Back to her apartment where
19 you were living?"

20 Answer yeah.

21 "Q. Did you go out that night?

22 A. Yeah.

23 Q. Did you go for a ride?

24 A. Yeah.

25 Q. Who went with you?"

1 MR. JAGGER: Excuse me Counselor ---

2 MR. HUGI: ----"My mom, Cheryl and Danny
3 went."

4 MR. JAGGER: I apologize, but I need to do
5 this. The record is clear it was dinner and
6 Dr. Peterson notes in addition to other portions
7 of examinations I do object that it's not based
8 upon any evidence that we have uncontradicted it
9 in reference to the dinner.

10 THE COURT: Mr. Jagger, this is not the
11 appropriate objection. He is reading from a
12 transcript of the evidence that was given. I
13 understand that you may dispute that testimony,
14 but it is in evidence and he can argue it.

15 MR. JAGGER: I understand, I think -- I
16 understand. The only objection simply is that
17 it is not based upon contradicted evidence when
18 you look at the total -- when you look at it as
19 a whole ---

20 MR. HUGI: ----He's arguing his case. He's
21 had his chance to do that.

22 THE COURT: Counsel, I'm going to instruct
23 you to make objections only to issue of law and
24 not any dispute that you have with the evidence.

25 MR. JAGGER: Okay, my position is that that

1 is an issue with respect to ---

2 THE COURT: ----I'll overrule that.

3 MR. HUGI: I was able to sit through Mr.
4 Jagger's for quite sometime.

5 "Did you go for a ride?

6 A. Yeah.

7 Q. Who went with you?

8 A. My mom, Cheryl and Danny went.

9 Q. And do you remember the car?

10 A. Yeah.

11 Q. What color was that car?

12 A. Black and red.

13 Q. Can you tell us where you went,
14 do you remember where you went to?

15 A. Yeah.

16 Q. Where?

17 A. My mom's friend's house.

18 Q. And was that in the city or was
19 it in the country?"

20 And this record doesn't reflect the pauses
21 and I'm sure that it doesn't go as fast as it is
22 now and I don't want to mislead you on that. I'm
23 reading just the words that are printed here and
24 of course, that's -- there are some dangers in
25 that, Dr. Peterson notes or any other person can

1 note that the time that goes by and the way
2 people are acting during that time, is not
3 reflected there, but this is -- these are the
4 words that were said.

5 "Were there buildings, tall
6 buildings or was there a lot
7 of grass?

8 A. A lot of grass.

9 Q. Do you remember what you did
10 when you got there?

11 A. Yeah.

12 Q. What did you do?

13 A. We went out and petted the horse.

14 Q. Did you give the horse food?

15 A. Yeah.

16 Q. What was your mom doing when you
17 were petting the horse and giving it
18 food?

19 A. She was talking to her friend.

20 Q. Do you remember her friend's name?

21 A. Yeah, Heather.

22 Q. When you left Heather's, do you
23 remember if it was light out or dark?

24 A. It was dark.

25 Q. Who was in the car when you left

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Heather's house?

A. My mom, Cheryl and Danny and me too.

Q. Do you remember if there was any music playing in the car?

A. Yeah.

Q. Was that from the radio or was it from the tape?

A. Tape.

Q. Do you remember there was a time when the car stopped?

A. Yeah.

Q. When the car stopped, did you see any other people around?

A. No.

Q. Did you see any person standing in the road?

A. No.

Q. When the car stopped what did your mom do?

A. She got out and she pulled the lever that went to the trunk.

Q. I'm going to show you a picture here. It's called State's 335.

Is that the lever you're talking

1 about (indicating)?

2 A. Yes.

3 Q. After your mom pushed the lever
4 that went out to the trunk, were you
5 able to see her do anything after that?

6 A. I didn't look at the back.

7 Q. Okay.

8 Did you see her come back into
9 the car?

10 A. Yeah.

11 Q. What did you see then?

12 A. She kneeled down and --

13 (Witness is crying.)

14 The Court (sic) asked,

15 "Would you like a recess?"

16 There was no response.

17 "What did you see? You told us
18 she leaned across the seat?

19 A. Yeah.

20 Q. What happened then?

21 A. She shot Cheryl.

22 Q. And you saw that happen?

23 A. Yeah.

24 Q. Was the music still playing?

25 A. Yeah.

1 Q. Do you remember what song was
2 playing?

3 A. Yeah.

4 Q. Can you tell us what that was?
5 (No response.)"

6 And then we had a witness previously, Dr.
7 Becker who told us about Christie's problem with
8 being able to see what she had and to say -- but
9 not finding the words for it and we were -- both
10 Counsel were not pushing her when we got no
11 response.

12 "Maybe I'll come back to that.

13 Do you remember what happened
14 after you saw Cheryl get shot?

15 A. Yeah.

16 Q. What happened then?

17 A. She leaned over to the back
18 seat and she shot Danny.

19 Q. What happened then? What
20 happened then after Danny got shot?

21 A. She stood up and went to the
22 back of the seat on the --

23 (Witness is crying.)

24 Q. Do you remember when you got
25 shot?

1 A. Yeah.

2 Q. Who shot you?

3 A. My mom.

4 Q. Do you remember that music
5 that was playing?

6 (No response.)

7 Q. Can you not just think of it
8 right now?

9 A. I can't think of it.

10 Q. Do you remember what happened
11 after you got shot?

12 A. No."

13 At that point I gave her the unicorn and
14 she identified that.

15 "Christie, has anyone ever told
16 you to lie about this?

17 A. No.

18 Q. What you've said here is the
19 truth?

20 A. Yeah.

21 Q. Christie, do you still your mom?

22 A. Yeah.

23 Q. If I said the name of that song
24 that was playing, do you think you'd
25 remember it?

1 A. Yeah.

2 Q. Is it 'Hungry Like the Wolfe'?

3 A. Yeah.

4 Q. No doubt about that?

5 A. No."

6 Then I offered an exhibit and Mr. Jagger
7 cross examined her.

8 "Do you know who I am?

9 A. No. -

10 Q. Do you recognize me?

11 A. No.

12 Q. I'm an attorney just like Mr. Hugi,
13 and I'll be asking some questions
14 for your mom, okay?

15 A. Okay.

16 Q. You know Mr. Hugi, don't you?

17 A. Yeah.

18 Q. And you think he's nice, don't
19 you?

20 A. Yeah.

21 Q. Do you know when the last time
22 was that you talked with him?

23 A. Today.

24 Q. About testifying here today?

25 A. Yeah.

1 Q. You believe very much that
2 what you've said is the truth,
3 don't you?

4 A. Yeah.

5 Q. And that hurts and makes you
6 feel really kind of bad, doesn't
7 it?

8 A. Yeah.

9 Q. Do you know when you first
10 started to think that this is
11 what happened back then, do you
12 remember at all?

13 A. Yeah.

14 Q. When was that?

15 A. In the hospital I remembered."

16 I think that's important because Mr. Jagger
17 tried to illicit the implication that Dr. Peter-
18 son was the one that planted these ideas or some-
19 one else really did. It doesn't hold up to it.
20 She remembered in the hospital.

21 "Q. Do you remember if you told
22 anybody --

23 A. Yeah.

24 Q. (By Mr. Jagger) -- about it?
25 Who did you tell?

1 A. My case worker.

2 Q. And you remembered back
3 then who shot you and Danny and
4 Cheryl?

5 A. Yeah.

6 Q. Do you remember her name?

7 A. Yeah.

8 Q. What was her name?

9 A. (No response.)

10 Q. Would it be like a Paula or
11 Susan?

12 A. Yeah, I telled Paula and
13 Susan first.

14 Q. And you remember telling both
15 of them about who shot your brother
16 and sister and you?"

17 A. She nodded her head affirmatively.

18 "Q. When the car pulled over to
19 stop, do you remember if you
20 were -- do you remember if you
21 were lying down or standing up or
22 sitting up?

23 A. I was sitting up.

24 Q. And what was Danny doing?

25 A. He was sleeping and his head

1 was on the --
2 Q. Was he in the -- were you in
3 the front seat or the back seat?
4 A. I was in the back seat.
5 Q. And was Danny in the back seat
6 or the front seat?
7 A. Back seat.
8 Q. Was his head closer to you or
9 away from you?
10 A. Away from me.
11 Q. The back seat -- the back has
12 a part that you can put your back
13 against?
14 A. Yeah.
15 Q. Was his back -- was Danny's back
16 to the back seat or on the bottom of
17 the seat or towards the front of the
18 car, or was he lying on his stomach?
19 A. He was lying on his side.
20 Q. Do you remember where Cheryl was?
21 A. Yeah.
22 Q. Where was she?
23 A. She was sitting up.
24 Q. She was sitting up?
25 A. Uh-huh.

1 Q. And where was she sitting?

2 A. In the front seat.

3 Q. She wasn't asleep?

4 A. No.

5 Q. Do you remember what she
6 was wearing?

7 A. No.

8 Q. And you remember that -- do
9 you remember if Cheryl was awake
10 or asleep?

11 A. She was awake.

12 Q. Can you tell me which way she
13 was facing, front or side or back?

14 A. Front.

15 Q. Do you remember going to the
16 beach with your mother and Danny and
17 Cheryl?

18 A. Yeah.

19 Q. Do you remember the drive to the
20 beach being a long ways or a short
21 ways?

22 A. It was long.

23 Q. Do you remember Danny sleeping --
24 well, forget that question. I'll
25 ask you again.

1 Do you remember where Cheryl
2 was sitting on the ride to the beach?

3 A. (No response.)

4 Q. Do you remember if she would
5 have been sitting in the front seat
6 or the back seat?

7 A. She was in the back seat.

8 Q. Do you remember about coming
9 home if she was in the back seat?

10 A. (No response.)

11 Q. We can come back to that in a
12 minute.

13 Do you remember Danny sleeping
14 on that trip too and back from the
15 beach while in the car driving?

16 A. (No response.)

17 Q. We can come back to that, or do
18 you want to think about it more or
19 do you want me to ask you another
20 question?

21 A. All right.

22 Q. I'm sorry?

23 A. It's all right. You can ask me
24 another question.

25 Q. Do you remember helping your

1 mother at all taking things from
2 the trunk of the car or putting
3 anything into the trunk of the car?

4 A. Not -- only our clothes!"

5 And then we went through some exhibits and
6 Mr. Jagger asked,

7 "Have you talked with -- do you
8 know how long a week is?

9 A. Yeah.

10 Q. Have you talked with Mr. Hugi
11 about testifying here? Can you
12 tell me about how many times you've
13 talked to Mr. Hugi about what you
14 would say here in Court or about
15 testifying here?

16 A. (No response.)

17 Q. Have you been talking to him
18 each week or do you remember?

19 A. (No response.)

20 Q. Do you want me to ask another
21 question?

22 A. It's all right, if you want to.

23 Q. Do you remember when you would
24 talk with Mr. Hugi, would somebody
25 always be with you?

1 A. Yeah.

2 Q. Who was that?

3 A. Sue.

4 Q. Susan Staffel?

5 A. Yeah.

6 Q. Have you practiced being a
7 witness in a courtroom before?

8 A. Yeah.

9 Q. Did you go through a little bit
10 how that would happen?

11 A. Yeah.

12 Q. Did you talk a little bit about
13 what you would say?

14 A. Yeah.

15 Q. Do you know how many times
16 you've done that?

17 A. One time.

18 Q. Did you practice being a Judge?
19 Do you remember that at all? Did you
20 do that too?

21 A. (Witness nods head.)

22 Q. Nodding your head up and down,
23 okay.

24 Did you practice sitting where
25 the attorneys sit?

1 A. No."

2 There was some criticism or the imprecation
3 that it would be improper to prepare a witness
4 to testify or that that was some how would influ-
5 ence their testimony. I am not going to apologize
6 for that at all. I think it would be unreasonable
7 to expect a nine year old girl whose experienced
8 what Christie has to come into a courtroom without
9 any preparation and to testify about a matter as
10 serious and emotional as the one that she did.
11 You might remember how you felt coming into the
12 courtroom for voir dire on May 8th, whenever it
13 was, and you folks are a lot older and have a lot
14 more knowledge about court proceedings and the
15 idea of being examined by someone in a packed
16 courtroom with people writing it down, it might
17 be a little unsettling, wouldn't you? You wouldn't
18 expect it to be any other way.

19 Susan Staffel was called as a witness. There
20 was no contention made that anything was improper
21 that was done.

22 He went on,

23 "....when you were driving to
24 your mom's friend that night,
25 were you and Danny and Cheryl --

1 what were you doing on the
2 drive to her place?
3 A. Listening to music.
4 Q. What music was playing?
5 A. The tape of Doran, Doran.
6 Q. Do you remember the song?
7 A. No.
8 Q. Were you all laughing or
9 talking?
10 A. Not talking or laughing.
11 Q. Just listening to the music?
12 A. Maybe we were talking sometimes.
13 Q. Do you remember if on the way
14 out there you got lost at all?
15 A. Nope.
16 Q. Do you remember any talking
17 about taking the right turn or the
18 right road to her place?
19 A. Nope.
20 Q. Do you remember seeing in the
21 hospital some things on the television
22 about your mother and you and Danny
23 and Cheryl?
24 A. Yeah.
25 Q. What do you remember?

1 A. (No response.)"

2 Then we had a break and Mr. Jagger came
3 back,

4 "Q. Do you remember sometime
5 ago you being told by anyone --
6 erase that.

7 Do you know what a suspect
8 -- do you know what the word
9 'suspect' means?

10 A. No.

11 Q. That's the reason I want to
12 stop for a second.

13 Do you remember ever being
14 told by someone that some people
15 thought your mother was the one
16 who shot Danny and Cheryl and you,
17 do you ever remember that?

18 A. No.

19 Q. Do you remember Susan Staffel
20 ever saying that to you?

21 A. No.

22 Q. Or Paula Krogdahl?

23 A. No.

24 Q. Do you remember when Paula
25 Krogdahl would talk to you, if

1 she would bring you nice presents
2 or anything to play with?

3 A. No.

4 Q. Do you remember if Cheryl --
5 when the shots were being fired,
6 did Cheryl ever get out of the car?

7 A. No.

8 Q. Do you remember if the person
9 who shot Cheryl and Danny and you,
10 if that person got in through the
11 driver's -- the side where the
12 steering wheel is or the other side?

13 A. The driver's seat.

14 Q. And which side were you sitting
15 on, the driver's seat or the other
16 seat?

17 A. Behind the driver's seat.

18 Q. Do you remember seeing your mom
19 through the back window of the car,
20 don't you?

21 A. I didn't look at the back of the
22 window.

23 Q. Do you remember seeing -- the back
24 window of the car -- do you know what
25 I mean by 'the back window'?

1 A. Yeah.

2 Q. One you'd look at as you drive
3 straight ahead, and the other one
4 is the back window.

5 Do you remember before the
6 shooting took place, do you remem-
7 ber seeing your mother through the
8 back window?

9 A. No.

10 Q. Isn't that because you were
11 lying down?

12 A. No.

13 Q. Were you sitting up or standing
14 up?

15 A. I was sitting down, but I didn't
16 look at the back window.

17 Q. Did you go ahead and draw a
18 picture of who shot Danny and Cheryl
19 and you?

20 A. I was trying to draw.

21 Q. And do you remember if you actually
22 did draw it or not?

23 A. I was not finished."

24 And this is the exhibit that we have here.

25 "Q. I'll ask you -- before you do

1 it -- when I -- when I have a
2 picture shown to you, I'll ask
3 you if that's the picture you
4 drew of who hurt you, okay?

5 A. (Witness nods head.)

6 MR. JAGGER: Show her 'G'.

7 Q. That's the one that you drew
8 of who hurt you, isn't it?

9 A. Yeah.

10 MR. JAGGER: Okay, thank you.

11 You can take that back.

12 Q. And that was the -- even though
13 maybe it wasn't finished, it was the
14 best job you could do on drawing that,
15 right?

16 A. Uh-huh.

17 MR. JAGGER: I'm through with those
18 pictures. Thank you.

19 Q. (By Mr. Jagger) Do you remember
20 anything on the drive to the hospital?

21 A. No."

22 This is an important picture. Mr. Jagger
23 contends, because it's of someone else other than
24 her mother. Well, when you take it out of sequence
25 and you don't realize when and why this -- this

1 drawing was made, you might be able to argue that.
2 But, this drawing was made on March 5th, 1984.
3 This is after Christie Downs has testified in
4 Grand Jury and -- and an indictment had been
5 returned and her mother had been arrested and
6 it's a picture of Mom with the gun and it's only
7 parts of Mom that could be since there's --
8 there's the purpose which is not to -- to be a
9 portrait of Mom or some other person, Mom has
10 been established from way back -- back when
11 Christie is staying in the hospital, no strangers
12 were present. Isn't that saying, Mom? Just
13 using some other words. So, the fact that this
14 drawing is made on March 5th, 1984 really has no
15 bearing about whether Christie is confused about
16 who did this or not. She's identified this as
17 Mom.

18 "Mom, this is a drawing of Mom
19 and these are the parts that I
20 could see when I was shot."

21 And she's got her left hand, the gun and Christie
22 is left handed and is killed and you can make
23 what you want out of it, but don't be misled into
24 thinking that the purpose of this -- this picture
25 was to draw an accurate picture of her mom, that

1 wasn't at all. It was to show the parts of Mom
2 that could be seen during the shooting and you
3 only see the upper torso and the arm and the
4 face and that is reasonable.

5 "When Mr. Hugi asked you if the
6 person who hurt you was kneeling
7 and leaning across, I think he
8 motioned across the seat to the
9 shelf, and that's what you remember?

10 A. Yeah.

11 Q. Now the car seat in the front
12 seat of the car, is that a seat
13 that goes all the way across from
14 one side of the car to the other,
15 or is there a hole in the middle?

16 A. It has a hole in the middle.

17 Q. Was the person -- are you
18 getting tired?

19 A. Yeah.

20 Q. Did the person who hurt you
21 shoot through that hole?

22 A. Yeah."

23 On redirect, I asked her briefly,

24 "Do you know who shot Cheryl?

25 A. Yeah.

1 Q. Who was that?
2 A. My mom.
3 Q. How do you know that?
4 A. I watched.
5 Q. Were there any strangers there,
6 anybody that you didn't know?
7 A. No.
8 Q. How about with Danny, was there
9 any stranger there when Danny got
10 shot?
11 A. No.
12 Q. Who shot him?
13 A. My mom.
14 Q. How about you when you got
15 shot, were there any strangers there?
16 A. No.
17 Q. Who shot you?
18 A. My mom.
19 Q. Do you know that because you
20 saw her do it?
21 A. Yeah."

22 Well, the testimony of Christie Downs is
23 extremely clear. There's no ambiguity about it.
24 There's no doubt in her mind who did it. I submit
25 there never has been. There's no -- certainly

1 no evidence that she ever said anything other
2 than her mom did it. Her story has been consis-
3 tent throughout. If it had been inconsistent,
4 Mr. Jagger certainly would have pointed it out
5 -- any inconsistencies.

6 "Well, on such and such a day
7 didn't you say this or that?
8 Didn't you say that it was a
9 monster? The man with the long
10 ears? Bill? Jim? Some other
11 lady? Didn't you ever say there
12 was a stranger out there? Could
13 there have been anyway?"

14 No, no. There were no inconsistencies ever
15 in her story. Straight forward from the time she
16 remembered in the hospital. And, you compare that
17 to Mrs. Downs' testimony and her -- her stories.

18 Important things are that the car stops. No
19 stranger is present. Tape playing 'Hungry Like
20 a Wolf'. That makes the ignition key would have
21 to be on. The ignition key would have to be in
22 to play the tape. Mrs. Downs can't have it in
23 her hand throwing it. That story she told in the
24 hospital, that is a lie and she never really did
25 fake throwing the keys.

1 We've got her pulling the trunk lever which
2 makes sense to open the trunk. You don't need to
3 take keys out to do that. You use the lever to
4 return with the gun, kneels on the seat, shot
5 Cheryl sitting on the seat facing front when her
6 mother appears in the doorway. It certainly not--
7 let's think, if you're sitting in a car and a
8 person appears in the doorway pointing a gun at
9 you, what are your options? Sit there or try and
10 get away. She's making her way out and she gets
11 shot on the move, goes down. Mrs. Downs then
12 she leans over to the back seat and shot Danny,
13 stands up and went to the back of the seat.
14 Christie didn't get to finish that sentence and
15 then she shot Christie. Christie remembers the
16 music still playing throughout all of everything.
17 She still loves her mom. It's consistent with
18 all of the physical evidence. I think it's impor-
19 tant that there's one point where you might be
20 misled. That is, how would Christie be sitting
21 behind the driver's seat and find the body behind
22 the passenger seat?

23 Well, you can see that she is sprawled out
24 according to the -- to the blood that is found
25 at the time of the shooting and her legs do go

1 back to behind the driver's seat, so think of
2 what Christie is doing? She's sitting behind
3 the driver's seat, Mom comes in the door, Cheryl
4 sees Mom. Cheryl is bailing out, she get's
5 shot. Can't remember -- there's the bullet,
6 there's where it struck. What's Christie
7 thinking and doing at this point? What does
8 anybody do when you are in the back seat of
9 a car and you've just seen your sister get
10 blasted by your mother. I think -- you think
11 that it's getting pretty serious about that
12 point in time and there can be no mistake
13 who's doing this. You can't be confused that
14 this is not the bushy haired stranger because
15 I'm looking at my mom who's standing outside
16 of the window. Why, it was so important to
17 Mrs. Downs, Christie got shot first, she can
18 say,

19 "Well, Christie got shot first
20 and she's looking at me and
21 Christie goes out and doesn't
22 remember anything and that
23 explains why Christie would
24 identify Mrs. Downs as the
25 shooter."

1 But, we moved off that story. Mr. Jagger did
2 in his argument he took no objection to the
3 State's theory or reason that had to do --
4 that they would have to give Cheryl time to
5 move around. We can't have two shots going
6 into Cheryl at the same time because they're
7 in different sides of her body. So, they've
8 got a real dilemma to work with here.

9 Okay, so we've got Cheryl shot. Christie
10 sees that, no way she can misconstrue that as
11 being someone else. She's sitting in a place
12 where she can see it happen. There's a hole
13 between the seat. Turns, what do you see next?
14 Danny, who's in the corner, he may have heard
15 the shots and being -- trying to be even more
16 in the corner by this time or maybe sleeping.
17 He get's shot in the back. Now, what's Christie
18 thinking? What's going through her mind then?
19 You've got two down, what's next? That's right,
20 so what's she going to do? She's going to get
21 as far from the shooter as she can get and
22 that's why her legs are in the position where
23 they start out and her body is lying back against
24 the seat with her head in the corner as far as
25 she can get from the shooting and that's when

1 she gets the two shots.

2 It's right there. Right there and Christie
3 -- you were told by the Defendant was going to
4 prove Mom was innocent in this and her testimony
5 is right down to the line with the physical
6 evidence and it's just the opposite. Christie
7 proves her mom is the shooter. There's no reason
8 to disbelieve that child.

9 So, before she's shot, she's behind the
10 driver's seat, half the shot, she's still behind
11 the driver's side and her body is struck out
12 behind the passenger's seat.

13 You're going to be instructed I believe,
14 that one witness whom you believe is sufficient
15 to prove any fact in dispute, one witness whom
16 you believe is sufficient to prove any fact in
17 dispute, if you believe Christie Downs and there's
18 been no -- no reason demonstrated to you why you
19 shouldn't believe her. And, Counsel is aware of
20 the importance of her eye witness testimony. If
21 there was any way that he could discredit her,
22 it would have been done. It proves the case
23 right there. No other witnesses needed to be
24 called.

25 Then, you put that in context, you think

1 about Mrs. Downs' statements to Heather Plouard
2 in the hospital. This is about the shooting --
3 the shooting happening on Thursday night, ten
4 o'clock, say Heather Plouard testified that on
5 Sunday she's comes in and she told Mrs. Downs,

6 "The police are really making a
7 search out there."

8 "Yeah."

9 Mrs. Downs is saying, something well,

10 "I think -- maybe the suspect."

11 Heather says,

12 "Well -- well Christie will
13 clear that up."

14 And Mrs. Downs says,

15 "Well, I think Christie may
16 blame me for the shooting."

17 Well sure she's got a lot of reason to
18 think Christie is going to blame her. Christie
19 has seen the whole thing. Christie has looked
20 her right in the eye when she shot her. She
21 sure does remember Christie grabbing for help.
22 Just think how that child will look at her mother
23 having just seen her sister been shot, her brother
24 been shot and here's Mom coming over the seat
25 with a gun?

1 "Why me? Why are you doing this?
2 What's going on here? Why is this
3 whole world all of a sudden turned
4 upside down and gone crazy?"

5 The expression that Christie must have had, just
6 a terrible horrified expression, one that the
7 person who's looking her in the eyes and shoot-
8 ing her, is not likely to forget. One Mrs.
9 Downs is not likely to forget.

10 What's important to wait for Christie to
11 be a witness. Mr. Jagger said,

12 "Well, this shows that Tracy must
13 have been tampering with the
14 evidence and otherwise the State
15 wouldn't have waited so long."

16 Well, just think of the argument you would
17 have heard if the Grand Jury had not waited to
18 hear Christie's testimony before returning an
19 indictment. You bet we'd be in here and the
20 defense attorney would be saying,

21 "Look at the State. Look at what
22 they're doing. They want you to
23 convict my client on flimsy evidence.
24 Flimsy evidence. We've got an eye
25 witness to come in here and tell

1 us exactly what happened, see?
2 She'll -- she'll clear my client.
3 She'll tell us that the bushy haired
4 stranger did it. How are you people
5 going to feel if you convict my
6 client with flimsy evidence and
7 then you find out this eye witness
8 says that bushy haired stranger
9 did it."

10 You'd be sitting there,

11 "Well, yeah. Maybe we should --
12 should have that witness in here."

13 So the defense argument that it could go both ways
14 and therefore think you do, you're going to be
15 criticized either you went too fast or you went
16 too slow. You called too many witnesses here.
17 You're going to dress up your case, you're here
18 and you don't call the right witnesses here, but
19 the system is designed to allow anybody to call
20 any witnesses they want to call in the case. So,
21 think about that. Certainly, it's a reason to
22 wait. Very good reason to wait until Christie
23 is able to testify.

24 One important point that I would like to
25 address before the break. This is a piece taken

1 out of the ceiling of the car on the evening
2 that it was -- the car was taken into evidence
3 at McKenzie-Willamette Hospital. You can see
4 here a light -- a dome light and that light is
5 quite large and it's a light that goes on when
6 your door opens in the Datsun car.

7 Now, the evidence shows that without --
8 when you're out in a very secluded location and
9 it's dark, it's ten o'clock at night, there's
10 no street lights out there, there's no houses.
11 No illumination at all out there. And the defense
12 theory, one of them is -- is that Christie is
13 looking at her mother who's standing outside the
14 car and I think this -- this theory had more
15 validity when going with Christie, being the
16 first one shot than it does now that they're on
17 the theory that the sequence happened in the
18 order that we proved it did. Says Christie is
19 looking at me through the window while the
20 shooter is shooting her, not looking at who's
21 inside the car, she's looking out through this
22 window. Well, think about that. What are you
23 going to be able to see if you are inside a
24 car on the complete other side of the car looking
25 back? Like it was explained by Christie, you've

1 got a dome light on inside that car. The only
2 thing you're going to see when you look out that
3 window is a reflection. It's going to be like --
4 like shining on the window, you can't see the
5 house outside the car on the other side of that
6 window. How's she going to see Mrs. Downs
7 standing out there? That's why people don't
8 drive with their dome light on. You can see
9 everything that's going on out there real good,
10 you can't see what's going on outside the car.
11 There's -- there can be no mistaken identifi-
12 cation in this case. She can see Mom shoot
13 Cheryl. She can see Mom and she can see Danny
14 being shot because Mother is inside and the
15 dome light is on her face when she is doing
16 this, not because she's standing outside the
17 car and somebody else is in there doing it.
18 Christie indicated since May that no stranger
19 was present. That is the basis of the temporary
20 custody order. Carl Peterson testified that as
21 well.

22 Mr. Jagger claims that he wrote this letter
23 here on June 2nd to get the Childrens Services
24 Division involved in the case. That's the pur-
25 pose of the letter. We want to get help for

1 these children. Well, immediately after they
2 get in the case they're on the black list too,
3 but at this time they're -- they're supposedly
4 what the Defendant wants. This letter is
5 addressed to the hospital, not to Childrens
6 Services Division,

7 "Please be advised this office
8 represents Mrs. Downs. Pursuant
9 to Court Decree, Mrs. Downs is
10 the custodial parent of her minor
11 children, one or more whom are
12 presently in your hospital
13 facility. This letter is to
14 serve as notice on behalf of Mrs.
15 Downs that law enforcement agencies
16 and Childrens Services Division and
17 their agents and representatives are
18 not to have access to Mrs. Downs or
19 her room or the rooms of her children."

20 This is to get Children Services Division
21 involved in the case? That was argued. That's
22 why we want to do this here, it is his words, his
23 signature on that letter, not law enforcement
24 agencies and Children Services Division and their
25 agents and representatives. Not to have access

1 to Ms. Downs or her room or rooms of her child-
2 ren and that each party including hospital
3 personnel. She wants immediate satisfaction
4 and refrain from any interrogation or question-
5 ing of Ms. Downs' minor children and/or Ms. Downs
6 as to any event leading to their injuries except
7 if surgery or directly related medical care and
8 treatment.

9 Back on May 25th, Dr. Wilson testified he
10 needed to get a Court Order to carry out his
11 functions as Lane County Medical Examiner in
12 this case, to get -- because of the resistance
13 that he met and they never had -- had to get
14 such an order before on any other case. And,
15 we have Mr. Jagger's letter -- letter to Mr.
16 Jagger from Sheriff Burke's,

17 "It has come to my attention
18 through the District Attorney's
19 office and through the news media
20 that you have represented that
21 this office has failed to follow
22 up investigative leads supplied
23 by you to this office. Similar
24 public accusations have been made
25 by your client Diane Downs and her

1 father, Wes Frederickson. In
2 reviewing our file I can find
3 no indication of any information
4 being supplied by you or your
5 client Mrs. Downs or Mr. Freder-
6 ickson to this office regarding
7 this case since your representa-
8 tions of Mrs. Downs became known
9 June 1st, 1983. This is an
10 official request that you provide
11 directly to me any investigative
12 leads that you or your client
13 possess or have knowledge of with
14 respect to Downs' assault and homi-
15 cide investigation so we may pursue
16 that."

17 Is there any evidence that Mr. Jagger produced?
18 Produced anything in response at all? No, nothing.
19 And that goes back to a statement we heard in
20 trial. Well, there's two ways to defend a client.
21 One way, if they're innocent and one way if they're
22 guilty. Now, which way is Mr. Jagger using in
23 this case?

24 THE COURT: Excuse me Counselor, I think
25 we'll take our morning recess. We'll be in

1 recess for ten minutes.

2 (Morning recess taken.)

3 THE COURT: You may continue.

4 MR. HUGI: Mrs. Downs claimed -- it is
5 important, the first time in Court that her
6 assailant was left handed and that was done
7 to change the story to fit a degreee that it's
8 easier for a left handed person to make the
9 shot some how than a right handed person to
10 make the shots and there was some explanation
11 why she had -- had never told anybody about
12 that before. And, you'll have your tape recorded
13 interviews with her and you'll see in -- and in
14 one with Detective West and Tracy, you'll see
15 right off the bat that she is asked which hand
16 did he hold the gun, his right hand? Right hand
17 and Diane says,

18 "You guys asked me that. I
19 told you I thought it was and
20 I was just -- I have been thinking
21 about it over and over and I'm
22 positive now that he was right
23 handed."

24 And, this was said again in Court when this was
25 presented as argument, some how that the police

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1 say either they're suggesting it or pushed her
2 or put stress on her or did something to make
3 her say -- jump to conclusions. That wasn't
4 true and you see that that's just a fabrication
5 as well.

6 I think the tapings are very revealing
7 because you can get an insight for how the inves-
8 tigation was proceeding and that's the -- that
9 includes the video tape re-enactment. That was
10 done on the same day that the drive was done,
11 where we were able to determine the times --
12 time intervals and -- and the tapes of the initial
13 interviews with Mrs. Downs. And, you're going
14 to see that there's no stress there on anybody's
15 part, by the police or Mrs. Downs that she was
16 very light hearted, seems to be enjoying the
17 interview, enjoying making the video tape. If
18 you look, she's in the car and she's fixing her
19 hair in the mirror before it starts. You see
20 her whole attitude about it. She is just getting
21 out of the hospital. Cheryl's been killed and
22 it's not a very pretty way and she's there like
23 she's going out for an audition, you know, a job
24 in the movies or something, making jokes about
25 how she hits her arm on the door. That almost

1 hurt more than the shot. Any stress that was
2 ever placed on Mrs. Downs was placed there by
3 herself and that stress came from her knowledge
4 of what the evidence was as this progressed, as
5 the Childrens Services Division filed their
6 papers and were in the process of going through
7 the courts, right in May, to keep the kids
8 separated from Mrs. Downs. She got an attorney
9 and they were getting information, demanding that
10 they want to know what proof you've got. This
11 and that, she had learned the information and
12 she was getting a little wired.

13 "Well, wait a minute. They're not
14 believing my story. I thought this
15 was going to be easy. I thought
16 everybody was going to get to the
17 hospital and recover pretty quickly
18 and you know, life goes on."

19 All of a sudden it didn't. The children are still
20 alive. Christie has seen her and is going to be
21 able to talk some day and she's -- the police
22 are just, you know, they're friendly but boy, she
23 just never will say,

24 "Well, that's good. You're --
25 you've got the green light. Go

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on and just forget about it.

They keep asking me questions
about this stuff."

You'll see how they're asking questions. They're
not implicating or being hard on her or trying
to give her the run around. You bet, by the
end they were listening to her, you know, by the
time they were on tape 22, after this and they've
gotten three different stories with her and I
think their patience were getting a little
toward the end and they -- they say,

"Yeah, you're going to play hard
ball or softball now."

And they started to lean on her a little bit.

"Well, which is it Diane? Your
stories don't add up."

And -- and we were getting that from Mr. Knick-
erbocker as well and they were justified in saying
that because these stories just didn't add up.
They were just blatant lies and the problem that
Mrs. Downs has with -- with that, how's she's
going to get through life with these -- just
shucking people on and -- and not being used to
anybody calling her on it. And, that's if there's
-- if stress is put on Mrs. Downs in this case,

1 it's stress put on her by herself because she
2 knows she's not going to get through this by
3 just walking away from this. Maybe she is
4 concerned about herself. She doesn't want to
5 take the consequences, you see, we're here in
6 trial and when she was testifying, the times
7 that Mrs. Downs appeared to be affected would
8 not be when we were talking about the children
9 and how they were getting shot. I mean, she
10 was bopping away to 'Hungry Like a Wolf'.
11 Her daughter came into the courtroom and testi-
12 fied she watched Cheryl be murdered and Diane
13 shot me. She wouldn't stop. She was playing
14 right into her wrongfully accused person right
15 into this big mistake, this big conspiracy.
16 She was just don't get this as a miscarriage of
17 justice and they play that song. Are you going
18 to be getting it on like Mrs. Downs was? That's
19 a sick person there. Sick in not in having an
20 emotional defense. No -- no feeling. Not crazy
21 mad. Calculated. Pulling this off was not some-
22 thing -- not some axe murder or person snapping
23 and they just bled and body parts everywhere.
24 This is -- this planning this out to get away
25 with it, let's go at night. Let's have a reason

1 for being out there. Let's do it and let's
2 try and make sure it's done right. After
3 they're shot we want them -- want them dead
4 when we get to the hospital and you can recall
5 the doctors and nurses talking about that --
6 the clothes, the blood that they're taking out
7 of these children and what was coming out of
8 them like wet chopped liver. This is a ten
9 minute drive and we didn't head for the hospi-
10 tal when those kids were shot and -- and have
11 them alive in that condition. We waited until
12 they were goners and we were, I mean you heard
13 Dr. Willhite, and Dr. Miller and Dr. Mackey talk
14 about the touch and go situation with Christie.
15 It's -- it was that close.

16 And just think about that. Think about
17 what if? What if it had been pulled off?
18 Christie Downs, Danny can't tell us anything.
19 Say Mr. Pex is a little bit sloppy and he misses
20 this blood spatter on the outside of the car
21 or doesn't, with his microscope make these marks
22 match up? She's home free. Goin' on down the
23 road. She would be set and it would be a new
24 beginning for her. Here comes Diane Downs
25 with no more responsibility, no more kids to

1 take care of. Let's go back to the surrogate
2 program for ten thousands bucks every time.
3 Doesn't have to raise them. A real -- she came
4 real close.

5 Mr. Jagger has said,

6 "Well where's Paula Krogdahl?"

7 That was part of his argument. She's the helper
8 like anyone else at the hospital. Bill Furtick
9 is Christie's attorney and Danny's attorney.
10 He was -- he was a helper too. He's present
11 during the early conversations. The medical
12 reports will show that. He's not called as a
13 witness either. A lot of nurses weren't called
14 who worked closely with Christie in the hospital.
15 We didn't have a parade of every nurse that was
16 there come in. Paula's never alone with Christie.
17 There's hospital rules that require nurses in
18 attendance all the time when these children
19 were in the hospital, especially in intensive
20 care. You have to. That's intensive care. You
21 have to have a nurse right there.

22 Mr. Jagger said he didn't -- Mr. Jagger says
23 he didn't call her because if you call a witness
24 yourself, you can't lead them. No way to control
25 a witness with leading questions. Okay, so

1 there's Paula Krogdahl sporting all this infor-
2 mation and she'd hold it against the State
3 because we didn't produce her and he says,

4 "Well, you can't, you know, you
5 didn't want to call her because
6 you can't control her without
7 asking her leading questions."

8 If Paula Krogdahl has any important information
9 in this case and he really thinks she does,
10 bringing her in -- if he needs to lead her,
11 he can have her declared a hostile witness
12 and to do that it's done all the time. No
13 problem. Why is he making it sound like he's
14 on some horn or some dilemma here? There's no
15 dilemma. Just more fabrication. You've got
16 to ask yourself why are we showing all this
17 stuff? What's the purpose? It's to demonstrate
18 on a side issue, maybe just like the State --
19 just like Mr. Hugi is not bringing in the
20 witnesses or the Taj Mahal. It's an argument
21 or an inference and just pure speculation not
22 on fact. If Paula Krogdahl could say one word
23 that would help his client, we would have seen
24 her here in court. Mr. Jagger said it would be
25 malpractice for him to call her as -- as a witness.

1 Those were his words if you recall. Well, if
2 it's malpractice to call her as a witness, what
3 would it be if your an attorney and your defending
4 a client that's charged with murder and there's
5 a witness that could be helpful to your case out
6 there and you didn't call her into the trial?
7 That would be malpractice.

8 Just another point. Why do I even address
9 these things? Well, because we can't talk -- we
10 can look at each other and I can talk, but you
11 can't and I don't know if you're buying this
12 line or not and if you are, I'd better be talking
13 and doing a lot of talking and I won't sit down
14 for as long as it takes because we can't -- we
15 cannot let her walk because you have been misled
16 away from what the facts are. Something that
17 when Mr. Jagger shows it out to you in argument
18 might sound good. Yeah, why shouldn't she be
19 here? But, when you analyze it and look at it
20 in a logical way, you see that what that is, is
21 an attorney's game. It's -- it's tricks. There's
22 no -- there's no substance behind that. It's
23 something that you throw into the jury to make
24 them get off track. It's to make them get one
25 of you and maybe just one of you will buy it and

1 if you get one, he's home free.

2 Now, Mr. Jagger has a cornerstone of this
3 defense argument which came here and said they're
4 -- Tracy planted the evidence. All right.
5 Detective Tracy has been doing his job for some
6 twenty years, got seniority. Why is he doing
7 this? Well, never produced any facts. Just
8 inferences about well, the budge cuts. Or, well
9 the budge had been defeated. Mr. Tracy is still
10 here. He's got seniority. He's not effected by
11 any budget cuts. What's his motive to hinder
12 prosecution? Fabricate evidence? Obstruct
13 justice? Commit perjury to all those felony
14 crimes? That's how he wants to end his career
15 here on this case?

16 There's no motive for Mr. Tracy to do it.
17 Mr. Jagger says he took two misfires out of the
18 car or to the roadway and it's easy to stand up
19 here and say anything that you want to say.
20 Where's the proof of that? Where's the evidence?
21 Is -- is that -- that car that was secured
22 shortly after it got to McKenzie-Willamette
23 Hospital in Springfield and there are police
24 standing out there watching it. Mr. Tracy
25 did get the keys. He goes there with Mr. Pex

1 also to the car. He's holding his clipboard
2 and flashlight. They hold the door and they
3 look in. Mr. Pex is still there. A Spring-
4 field Police Department officer is there and
5 they close the door. Whole thing takes ten
6 seconds and then he goes to -- to her house
7 and he looks in the car because he's trying
8 to get some idea of what this case is about
9 since you know, he's investigating it and he's
10 on his way to Mrs. Downs' house to do a search
11 and it might be helpful to know what the case
12 is about so when you go there to do a search,
13 you might make some idea of what you should
14 take and what you shouldn't take.

15 Goes to the house with eight other police
16 officers and they take and empty her gun and
17 take it -- her rifle. They don't know if it's
18 something they need. They don't know if it has
19 any significance at all to the investigation at
20 that point. Testimony is, he goes back to the
21 crime scene the next day after he's done the
22 composite with Mrs. Downs which is about noon
23 to deliver to the people who are out there
24 gathering at the crime scene, preserving it and
25 still, that they know who they're looking for

1 and they -- it makes sense that he's out there
2 for about five minutes.

3 Now, other testimony was that it was day-
4 light when this thing was searched before day-
5 light. We had dogs out there and we had people
6 here who talked about that horses would be
7 spotted in the field out there and road blocks
8 would be set up. Nobody is coming and going.
9 Nobody is driving through this -- this at the
10 crack of dawn. We've got people walking through
11 here. They find the casings there. It's turned
12 over to Mr. Pex.

13 Now, he comes out to hand these composites
14 out where he's going to get these casings and
15 cartridges from this place already which has
16 been searched and they found what's out there.
17 But, let's just keep looking at this, you know,
18 he's taken exception to it. Mr. Jagger gets up
19 here and shows it out here, I'm sure the thing
20 maybe -- maybe there's something to this. He
21 takes these two misfires and he fits them in
22 Mrs. Downs' rifle or he puts them in -- he leads
23 people to believe they're -- they came out of a
24 rifle and we're not clear which theory is really
25 -- what they're really going with, but one of

1 those happens. Ask yourself this: you've got
2 these -- these cartridges here, all right?
3 You're -- you're Detective Tracy, right? And
4 you've got these two lead bullets here, you've
5 got them in your hand. How do you know that --
6 that they've been in any weapon? How do you
7 know that they have been in a Ruger .22 semi-
8 automatic pistol? How do you know what the
9 capacity is of the weapon that was used in the
10 murder? Do you know if you're dealing with a
11 five shooter or seven shooter or nine shooter
12 weapon? What do you know about the case? You
13 don't know anything about Mrs. Downs and what
14 kind of weapon she's got. You don't know if
15 she's got a throw away .22 or some off the wall
16 brand weapons and you're going to take these
17 casings then and these cartridges and interject
18 them into -- into the case? And you think that's
19 going to help the case some how? How can you
20 ever tie her to a gun that -- that would have
21 fired them? He's thinking they are from a
22 Browning and it turned out that you learned
23 from Steve Downs that she had a Ruger, well you
24 just -- you've just thrown the whole thing away,
25 haven't you?

1 Now, these misfires here, they've got to
2 be misfires and you look at those, you can't
3 see them too good, what I'm holding up here,
4 but what we're looking at is right here, 14 A
5 and 14 B and we've got photographs of them,
6 right? And how are we going to generate these
7 misfires? How are these misfirings going to get
8 into the case?

9 Okay, we get a misfire, you have to pull
10 the trigger, right? Something can't misfire
11 until you attempt to fire it. You can't have
12 cartridges here and misfires until you attempt
13 to fire it. Once you fire it, the firing pin
14 is going to strike it, okay? And one of two
15 things is going to happen. It's going to deto-
16 nate the primer, bullet goes out, it fires or
17 it's going to strike the case and be a misfire.
18 Nothing happening. That's -- that's the two
19 options.

20 All right. When it strikes the casings,
21 it's going to leave the firing pin impression.
22 All right. You pull the trigger, something
23 happens. That hammer goes forward and it strikes
24 the cartridge. Well, when the shooter does that
25 in the course of killing and it misfires, what's

1 he going to do? He's got a round in there,
2 that's just laying in there now and if it's --
3 if it's first, he can eject it out, but it
4 misfires and it is staying there. He's got to
5 take two hands and clear the weapon to get it
6 out of there manually. All right? Getting it
7 out of there manually you are going to put
8 these ejector marks on it. This too produces
9 two misfires and it has to happen twice in the
10 course of all this shooting. What's Mrs. Downs
11 doing while this shooter is having these misfires?
12 She's having a dream then or looking at Christie
13 or looking at her reflection in the -- in the
14 window or she never mentioned seeing the shooter
15 misfiring or having to clear -- clear the gun
16 in the middle -- in the middle of the shooting
17 episode. You surely would notice that and she
18 surely would have told the detective the -- she
19 does -- she doesn't because it didn't happen.
20 And, the proof that it didn't happen is because
21 you look at the -- at the cartridges and there's
22 no firing pin marks on them so they can't be
23 misfires. There's no fire pin marks other than
24 these cartridges. There's fire pin marks on them,
25 it's there, boom, there it is. It's there fire

PET. EX. 11

DNA-Motion-000515

1 pin which strikes it down and it depends --
2 depends on the metal, you can't take it out of
3 -- you can't just rip it with your thumb and
4 make it go down, it's metal against metal, a
5 boom, that happens where is the -- there is no
6 evidence either of these cartridges were ever
7 misfired.

8 Well, if they're not misfired, why are
9 they out there? There's no explanation for
10 that either. And, based on that he accuses
11 Tracy of planting evidence just from -- from
12 looking at, yeah, I think that there maybe some
13 confusion here.

14 All right. The cartridges are placed in
15 the -- in the clip in the magazine. It's in-
16 serted into the pistol. Now, to get a cartridge
17 into a position within the automatic pistol to
18 get it into a place where it would be struck by
19 the firing pin, you need to chamber it and you
20 pull this back and strike, pushes the cartridge
21 up and it comes into the chamber as you push it
22 forward, the cartridge is grabbed and seated in
23 the barrel right behind the firing pin, right
24 ahead of the firing pin, okay? Once it is in
25 there, the hammer is cocked. When you pull the

1 trigger, a hammer slides forward and hits the
2 back of the cartridge with sufficient force to
3 detonate it, all right? If it's detonated, if
4 the bullet comes out this automatically is
5 thrown out -- the empty casing is -- falls out,
6 is ejected onto the ground which comes out to
7 the right side, slightly forward and another
8 one is chambering and you just keep pulling the
9 trigger over and over and over and over until
10 they're all used up. Each time you pull the
11 trigger, you have an explosion and the mechanism
12 works the casings which come out and I just do
13 it over and over and over again until you have
14 a misfire. Misfires happen when a hammer strikes
15 that cartridge and no explosion occurs. It's --
16 you strike it with enough strength with the same
17 amount of power every time, every amount of time
18 to make a mark like that, but for some reason
19 either this powder is wet or there's none in
20 there, a bad manufacturer, something gone wrong,
21 a misfire will not go off. It just remains sitting
22 in there. Sitting in the gun so what do you do?
23 You can't get a good shell in there until you
24 get a bad one out. A good cartridge, so you have
25 to work manually popping it out -- the unexploded

PET. EX. 11

DNA-Motion-000517

1 cartridge with the -- this time we'll have a
2 firing pin impression on it and you put the
3 next one in and hopefully that it fires when
4 you pull the trigger. And, what the defense
5 contention is, is that Mr. Tracy found two
6 misfirings in the car. Well, they've got to
7 say something about why -- why are you -- why
8 would you have a cartridge instead of casings
9 in the car? All right. There's -- there's
10 four casings found and we know that there's
11 five shots fired, one casing we've explained
12 why it wasn't found. It was from a shot that
13 occurred outside the car. Their saying that
14 while there's two -- two cartridges that were
15 misfired that were in the car and these are
16 the two that Tracy selected and brought to
17 Mrs. Downs' house or implies that it came out
18 of her -- her rifle.

19 Well, how were they generated? How do you
20 generate -- how do you cause these misfirings
21 to be laying in the car? You have to work them
22 through the pistol, but when are you going to
23 do it? Are you going to do it during the process
24 of the shooting? When else was this man --
25 bushy haired stranger in the car? Comes up to

1 the car shooting occurs, he leaves. He apparently
2 drives up in a yellow car and driving on the --
3 in a yellow car, but he's only in the car for
4 the time it takes to do -- to do the shooting.
5 Mrs. Downs never sees any misfirings. Doesn't
6 see the man -- oh yes, he fired into Cheryl then
7 he tried to shoot Danny, but his gun doesn't
8 work and he -- he cleared one out and he shot
9 Danny and then he shot Christie once and then
10 he had a problem. He got one out and then he
11 got Christie again and then he had a -- he has
12 pins coming out of it and he continues to shoot
13 and then he came out and he shot me a couple
14 of times. Shot at me twice and hit me once,
15 where do these misfires happen at?

16 So, it is disproving completely the Defen-
17 dant's theory. They're not misfires and they're
18 not misfires -- there's no reason for them.
19 There's no way to explain how they got there.
20 So, how is Tracy going to find them to plant them?

21 I think it shows that the Defendant -- that
22 is there is no reservation about the attacking
23 of a person even when the actual physical evidence
24 is contrary to their position and Mr. Reed
25 explained that evidence and he can't dispute it.

1 He can't dispute that there were misfires when
2 he testified there are misfires, they're not
3 misfires. There's no evidence that there's any
4 misfires in this case that were injected into it.
5 It's an important piece of evidence because it
6 makes Mrs. Downs the shooter. They have to deal
7 with the evidence so how did the extractor marks
8 match? They can't get an expert to say that they
9 don't match. How does she explain having in her
10 possession, in her rifle, in her closet two .22
11 cartridges that have been worked through the
12 actions of the same weapon that was used in the
13 shooting? How do you explain it? You can't
14 explain it. That's why it's so important to
15 discredit it and do anything you can to -- to
16 discredit it and if the only thing you can do,
17 you can't throw it out on the physical evidence
18 by attacking the experts, what explanation can
19 you come up for it? You've got -- she's got to
20 disassociate it from the Defendant, the only
21 thing left is -- is to throw it on the police,
22 that the police must have planted it as the defense
23 stated the evidence and it shows how distraught
24 they are to deal with it. There's no other
25 alternative left to them.

1 Some talk about that there's two lead and
2 seven copper cartridges in the rifle and some
3 how this proves something or disproves something.
4 I think we know from experience that you buy
5 boxes of shells that can come in groups of nine,
6 they come in fifties, hundreds, maybe shot shells
7 in twenty-five. People don't always shoot entire
8 boxes of shells every time they use a weapon.
9 If you got a nine shoot weapon and you were to
10 shoot nine shots out of it each time you used it,
11 you're going to have some left over if you've
12 got a box of fifty or a box of twenty-five.
13 Just going to be expected that you're going to
14 have loose rounds laying around if you're a gun
15 owner. Laying around, but you're going to have
16 an uneven quantities or you're not always going
17 to have a complete box. People don't throw them
18 away. They keep them. How did she get nine
19 rounds in her rifle? It held fifteen or sixteen,
20 I don't know, I can't answer that. She could
21 have had fifteen in there. She could have had
22 none in there. I don't know how they got her,
23 I don't know how, if she put them in there, I
24 think it's her rifle, although we know is what
25 we found were seven copper and two lead ones.

1 She may, you know, we speculate, we don't think
2 that's very good. Nine happens to be the amount
3 of .22 casings that one magazine Ruger semi-
4 automatic would hold if she had a full magazine
5 of those and maybe wanted to get rid of the
6 magazine might put the nine rounds in her rifle
7 rather than showing them. It's not speculation,
8 I'm not asking you to do that. I'm pointing out to
9 you that it's not a significant factor at all.
10 What's significant is that she has in her pos-
11 session two cartridges that have been worked
12 through the precise one and the only one in the
13 whole world, weapon that murdered Cheryl Downs
14 and how does she account for it? That the
15 bushy haired stranger goes to her house and gets
16 these -- gets her cartridges in -- in her rifle?
17 Does he -- he go to Arizona and steal the gun
18 and then just happen to know that at ten o'clock
19 at night she was going to take a last minute
20 detour and take Old Mohawk Road and -- instead
21 of Marcola Road and go in these bushes and he was
22 going to go ahead of her with his yellow car and
23 be waiting for her? There's no explaining it.
24 There's no explaining it. It's the Defendant
25 stating a piece of evidence and the defense is

1 distraught to associate themselves from it and
2 they can't do it.

3 It's a theory that speculation about it is
4 being the misfires and Tracy planted it. It
5 just goes out the window. There's not any
6 misfires. There's not any misfires and there's
7 no way they would -- could be there.

8 He told that stress on Mrs. Downs is what
9 caused her to tell these three different stories
10 and more lies. She's working every day during
11 this period of time. She's able to function.
12 There's no evidence that she ever had a nervous
13 breakdown or stressful reaction. You listened
14 to her on the telephone and in her interviews
15 and she's talking as well as she did when she's
16 in Court.

17 We've had something made of the fact that
18 she didn't know the purpose of the ride with
19 Detective Welch and Tracy to take the time --
20 the time estimates, same day as the video re-
21 enactment was done, yet she's telling you that --
22 I'm telling you that they are going to -- they
23 are going too slow, I'm telling them they are
24 going too fast, speed up and then she says,

25 "I didn't know we were trying to

1 get times down, so I never
2 told them that I was at a
3 speed of fifty-five or six
4 minutes up to the north end of
5 Sunderman Road, balancing my
6 checkbook at nine forty-five."

7 It doesn't add up. Some wishful thinking on her
8 part. She'd like you to believe that, but it
9 doesn't -- it didn't scare -- she's not stupid.
10 You see her in the video tape, she's understanding
11 what's going on. She understands the purpose of
12 the drive. It's not to just have a nice drive
13 in the country. She's telling them to go faster,
14 slower, trying to be accurate and she's trying to
15 help them to be accurate. She never tells them
16 about stopping at Sunderman Road and driving five
17 or six minutes or whatever, that's an after thought
18 that comes up for the first time in this courtroom
19 and why does it come up? Because she's got this
20 time gap to deal with, not twenty-five minutes
21 unexplained time and she needs to fill it in
22 some how and you saw Mr. Jagger whittle away from
23 both ends, not based on any facts in the case or
24 any evidence, just on wishful thinking.

25 "Well, let's take a minute off

1 Delores Holland's time because
2 well -- because -- because she
3 was reading a book. Let's take a
4 minute off the other end from the
5 hospital people because we --
6 because they wouldn't have gotten
7 it right with their training to
8 get things right. They call to
9 come in and note the time."

10 The time layout that was done by the State
11 with the cooperation of Mrs. Downs is an accurate
12 one. It's the best one that could be done.
13 It's done with her cooperation back at the time
14 -- very close to the event. The re-enactment by
15 Mr. Jagger in his argument again is just wishful
16 thinking, not based on any facts, just trying to
17 reconstruct the evidence in a light that's most
18 favorable to him that he can live with. Problem
19 is, he can't. The -- he cannot explain it by
20 anything else other than Mrs. Downs took too
21 much time to do this. To do the shooting and to
22 wait before going to the hospital. Now, she may
23 have used that time, taken some time to ditch
24 the gun, it could be she may have also taken some
25 time to make sure that when she got to the

1 hospital, that the kids were not in a -- in
2 a state where she would say,

3 "My mommy shot me."

4 That they were sufficiently close to death
5 where that wouldn't happen. Couldn't wait
6 out there an hour -- two hours, you couldn't
7 bring them in cold. Bringing them in cold then
8 it wouldn't add up to going to the hospital.
9 People -- they knew Heather Plouard knows she
10 was -- she would explain that some how and
11 would indicate a little bit, but not a long
12 time and that's what happened.

13 THE COURT: Is this a good place to take
14 a break?

15 MR. HUGI: Yes, it is.

16 THE COURT: We'll be in recess until 1:30.

17 (Lunch recess taken.)

18 THE COURT: You may proceed.

19 MR. HUGI: One of the points that was made
20 by Mr. Jagger, the Sheriff's Office didn't con-
21 duct a very good investigation and there were
22 some defense witnesses or persons who matched a
23 composite or composites that were drawn in this
24 case. Those people were Norm Hilliard and Jim
25 McCain. There testimony was quite colorful at

1 points and was probably almost a welcomed break
2 at the end of the day for us. They made obser-
3 vations and those observations were changed
4 somewhat over time, for instance you'll see
5 that Mr. Hilliard's composite indicates a man
6 of some hundred and ninety or two hundred pounds
7 and he's looking like the original composite.
8 Mr. McCoin never did one. The thing I think you
9 should remember is that they're going by these
10 people at forty to forty-five miles an hour,
11 one of those witnesses snaps his finger to indi-
12 cate how long a time he had to look at this
13 person and then they see a composite in the
14 paper and they -- they then produce a composite
15 that's very similar on the surface to the
16 Defendant.

17 Now, there may very well have been some-
18 body out there. That's -- I can't say that
19 there wasn't, but what can the police do about
20 that information? There are roadblocks which
21 were set up immediately that night, signs Mrs.
22 Downs got in the hospital and she was asked
23 where that all happened at and the police were
24 sent out and roadblocks were run. Deputy Pond
25 went from door-to-door showing the people and

1 asking the people if they had seen these people
2 and the Sheriff were looking for a yellow car
3 or anyone who -- who might match the composite.
4 There are people around and just walking through,
5 a drifter-type person and they're out there now
6 and they're out there yesterday and they've been
7 out there tomorrow if some person was -- was
8 walking through. What can you do to find it?
9 I submit to you that everything that could be done
10 was done. The police were not trying to not find
11 anybody. It would have made the case a lot
12 better if they could catch the person in the com-
13 posite, that's where everybody was going. Mr.
14 Wilson described the man, he's at the Spring-
15 field Country Club and this fellow and he said
16 six foot one, hippie, carrying a brown shoulder
17 bag, riding a bicycle out of the parking lot
18 full of cars. Well, the way this -- the way it
19 was repeated when Mr. Jagger discusses these
20 people, was like it was all these one person
21 that Mr. Wilson sees them and Hilliard and McCain,
22 but Mr. Wilson said that he didn't like the
23 first composite, he looked more like the second
24 composite. So, what do we have here but some
25 kind of melting of -- by the defense of anybody

1 who saw anyone as seeing the person who matched
2 the composite, not pointed out to you that's the
3 first sighting or a person seen by Mr. Hilliard
4 and Mr. Hilliard matches the one that is seen
5 by Mr. Wilson, another composite and then we
6 had Mr. Hales, he, four days later near Hills
7 Creek Reservoir, he sees a car he can't identify
8 the guy. He stops but he doesn't know who to
9 tell or what and he calls that information in.
10 Well, our poor Sheriff's Office, they get this
11 yellow car which is seen with the person in it
12 near Hills Creek Reservoir. What can you do by
13 the time that Mr. Hales got his phone where in
14 turn did the yellow car go? And by the time you
15 can get a car out there, where do you look? Do
16 you look around the reservoir or where can you
17 look and what are you really chasing anyway? A
18 yellow car? I think you have to use your logic
19 and some thought as to what resources were avail-
20 able and how they were expended and I submit
21 that they were prioritised and these were the
22 things that would produce solid evidence and
23 these leads -- all possible leads were the ones
24 that were followed in the case and the evidence
25 doesn't dispute that.

1 The defense theory is requiring you to
2 believe that just about all of the State's
3 witnesses are lying or mistaken and that he
4 goes through Steve Downs' testimony, he's got
5 to be a liar. Knickerbocker can't have seen
6 the .22 in her car before she left. The police
7 are lying because they're trying to either dis-
8 tort Mrs. Downs' statements or they're saying
9 things that are not true. They're planting
10 evidence. The doctors are not telling the truth.
11 They're covering up their own conspiracy, their
12 malpractice in the case since really these kids
13 are healthy when they get to the hospital and
14 they develop their -- Danny gets harrassed
15 from his treatment at the hospital and Christie
16 gets her stroke because of what happened at the
17 hospital. It takes a situation where he's
18 pointing the finger at everybody else and Mrs.
19 Downs is on trial for murder here and the
20 State's evidence is aimed at Mrs. Downs and
21 to deal with that evidence, is not to deal with
22 the evidence, but rather point the finger some-
23 where else, get the heat out -- get the attention
24 off of her. She -- the theory of why she's got
25 all these different stories is that she dreams

1 them, yet there's no evidence that she was ever
2 -- couldn't tell the dreams from the -- from
3 the truth when she testifies, what dream did
4 you have?

5 "Well, I had dreams."

6 And then she'll tell you about a dream and,

7 "I had dreams about this and

8 I had dreams about that."

9 But, there's never any connection made between
10 what dream she had caused what change in her
11 story. And, I'd say that these dreams -- this
12 dream theory is again a matter of convenience.
13 People just don't come up with the kind of
14 different explanations of an event serious
15 event like this that Mrs. Downs did. It -- it's
16 a tough problem for the defense to deal with and
17 the only way they can explain is to say,

18 "Let's all dream and -- and

19 let's let them pick from all

20 the facts and all of the

21 stories, which ones they want

22 to choose and which ones they

23 don't. They're not bound to

24 anyone's story. Then they don't

25 have to stick to number one,

1 number two, number three, you
2 did meet them altogether and
3 pick whatever fits best."

4 And that's the kind of similar kind of thing
5 that is implied in the -- in the defense argu-
6 ment about Mr. Inman, about how the car is
7 driven and none of the prior stories do we
8 have an explanation about slowing down and
9 attending to this towel and window and Christie.
10 We've got a general,

11 "I don't remember what happened.
12 I don't know where the towel came
13 from. I grabbed it. I don't
14 remember when I put it on. When
15 I first noticed that I had it
16 bandaged."

17 Now, we've got it down in time which is
18 more important, a specific time that we're fussing
19 with when the towel itself -- when Mr. Inman is
20 following them, that five to seven miles per
21 hour, it's got to have an explanation for that.
22 You've got to be doing something. You can't just
23 say,

24 "Well, I was waiting for the kids
25 to die."

1 You've got to say,

2 "Well, I must have been doing
3 something. Well, I must have
4 been folding towels or rolling
5 down windows or treating Christie."

6 But, that is really at odds with -- with
7 Mrs. Downs' statement that you've got on the
8 tape. Three -- three different times on May
9 21st, 1983 to Detective Tracy and Welch,

10 "Drove from the scene as fast as
11 I could. Couldn't stop to roll
12 Christie off, would've lost five
13 seconds and five seconds was a
14 lot."

15 How does that fit with the argument you heard
16 in this explanation of going five to seven miles
17 an hour? Drove the vehicle as fast as it would
18 go?. Opening the sun roof? I was driving like
19 a maniac? That's three prior explanations of
20 the drive from the shooting to the hospital.

21 I think you have to find that the dream
22 maybe theoretically framework for some people,
23 but that you've got to call a spade a spade, a
24 liar a liar, and in this case we're dealing with
25 a person who's intentionally fabricating, lying

1 to serve their own interests which is to try
2 and -- and beat a very serious charge. You're
3 going to be instructed that a witness false in
4 part of their testimony maybe distrusted in
5 other parts. I think there is just an example
6 after example after example of Mrs. Downs being
7 false in her testimony. One thing she testified
8 under oath that the diary was a chronological
9 set of lies to show Nick how much she loved him
10 when he came to Oregon. That she didn't really
11 mean the stuff that she wrote, not in the diary,
12 that it was just lies so that when Nick got here,
13 he could read that and it would flatter his ego
14 and -- and put her in a better standing with him.

15 The State contends that -- that that's not
16 so. That these entries in that diary were --
17 were made and they did reflect the truth. Mrs.
18 Downs denies that. Either way, she's a liar.
19 She's either lying intentionally to Nick in the
20 diary or she's lying to us on the witness stand.

21 I think I've touched on this, the case is
22 to be decided on evidence which you consider to
23 be worthy of belief. It's not be decided on guess
24 work, conjecture or speculation. Guess work,
25 conjecture and speculation is an accurate summary

1 of the defense theory of the case. It just
2 doesn't fit with the facts. It's a reconstruc-
3 tion of the evidence by suggesting wishful
4 thinking. For the Defendant's theory to work,
5 you're going to have to find that this is all a
6 big conspiracy to frame Mrs. Downs. That in on
7 the conspiracy is Christie, who's lying too --
8 to see her mother get in trouble and there's
9 absolutely no evidence/indication of that at all.
10 She's loving her mother. No reason why she
11 would want to say something that was not true.

12 Nick is lying because he puts the gun in
13 her possession shortly before she gets to Oregon.
14 Steve's lying. Tracy, Welch, consider these
15 people -- all the people from the District
16 Attorney's Office, Paul Alton, everyone of these
17 people has to be mistaken. They have to be all
18 working together to get her falsely convicted of
19 something that she didn't do or on the other
20 hand, these people are all telling the truth and
21 Mrs. Downs is the one that is telling the false-
22 hoods and that their testimony combined with all
23 of the physical evidence in the case, constitutes
24 an overwhelming proof of her guilt.

25 One item of evidence Mr. Pex testified that

1 in his class characteristics, his investigation
2 into the casings and cartridges found in the car
3 and at the scene, he was able to determine that
4 it came from a Ruger semi-automatic firearm
5 and that it was in the 1400 Series. He testi-
6 fied though that -- we've got the bill of sale
7 on the original gun to Bill Proctor from the
8 Chandler Gun Shop in Chandler, Arizona and you
9 see that the pistol we're talking about in this
10 case is a Ruger .22 RST-6, Series 14-76187. It
11 is a 1400 Series, so again another strange piece
12 of evidence.

13 It's mentioned in Mr. Jagger's argument that
14 Steve has a personality to get even and that's
15 thrown out as a motive for him to lie. I think
16 that's out of sequence. The way we get in dealing
17 with Steve is, Steve tells the police about the
18 .22 Ruger after the shooting and then Diane's
19 reality to that, Mrs. Downs does by calling
20 Arizona and reporting him for some crime, arson
21 and theft. So, it's her that's getting even with
22 him for telling the police about the Ruger and
23 then we've seen, when he comes to Court and he
24 testifies and we have her reporting that he's
25 been -- he's raped her on some previous occasion.

1 Never bothers to report that to anybody before.
2 Then, so this idea that Steve has a personality
3 of getting even I think that at least -- at least
4 equally applies to Mrs. Downs and from all the
5 other things that we've heard, applies to her
6 more so.

7 Defense has not been candid with us from the
8 beginning. They didn't lay out their theory of
9 the case and tell us -- they didn't stand up in
10 opening statement and say we're going to show
11 that Detective Tracy planted the evidence and
12 say we're going to show you how these time gaps
13 are wrong. They just kind of sat back day after
14 day as the case went along, hoping to find a way
15 out and instead, day after day the evidence piled
16 up and piled up and the argument then was a last
17 ditch effort to reconstruct the fact that twice
18 with them around to find a way out of the case,
19 but it was not based on the evidence and you're
20 going to be instructed that your decision is to
21 be based on the facts.

22 Other than it, I'd also say the Defendant's
23 all said in her testimony that she was not in
24 fact infatuated with Nick and she was going to
25 insist on a marriage contract and this came up

1 after Nick had testified and left and he was
2 never asked about,

3 "have you ever discussed this
4 marriage contract with Diane
5 Downs?"

6 You've got a lot of written material that are --
7 have been received in evidence and as you read
8 that stuff, ask yourself, is this the type of
9 woman that she in a position where she's going
10 to insist on a marriage contract to get him to
11 come to Oregon? She is doing everything she
12 can to get him -- to get him here with no condi-
13 tions whatsoever and yet she comes in and makes
14 it should like she's being very selective unless
15 he signs this contract. There's no way she'll
16 accept him.

17 She, when you read these, is she a person
18 who you would find was devastated by this reaction?
19 Rejection from Nick? A person who just couldn't
20 deal with it? A person who puts herself first
21 all the time?

22 She immediately has an affair with a married
23 man in Eugene. She doesn't tell Nick about that.
24 She just sees him. What type of a personality
25 are we dealing with here? A person who's really

1 looking for their own self-gratification or
2 their own self interest? And on one level, and
3 then another level professing great love for Nick?
4 Fidelity to no one else? No one else will ever
5 touch me until -- until you get here? Not a big
6 deal, except you look at how this mind is working.
7 How this person is set up. How it deals with --
8 with reality and with life itself. It's a
9 deceptive -- deceptive situation on a daily
10 basis.

11 I think there's a lot of evidence of
12 these affairs impulsive behavior on Mrs. Downs'
13 part which enables her to really devote herself
14 to her children. She's more concerned with her
15 own care and her own -- her own ability to get
16 ahead. She's got a history of being unable to
17 get along with her co-workers at Chandler's,
18 that ends up being a failure. That situation
19 deteriorates. What she is good at is one night
20 stands and affairs where there's no commitments
21 required on her part. No -- no real feeling --
22 genuine feeling. She's quick to express deep
23 concerns, she's very good at that, expressing
24 deep love -- deep feeling, deep emotions, but
25 she's never able to show it. It's just not there.

1 Her actions don't comfort with the language
2 that she uses.

3 . The Arizona surrogate program and, for
4 example again that reaches in this business of
5 using money from the fire and getting it started,
6 never making anything out of it. No failure,
7 no follow through. Moves to Oregon. Got a lot
8 of debts, considering bankruptcy. A lot of
9 ambitions though, a lot of ambitions in this
10 woman's mind. She's not content to be just a
11 housewife or a mother. She wants to be the
12 postmistress, the doctor, the pilot, no follow
13 through. Everything is just a lot of grand
14 schemes and -- and planning ones to have the
15 big house with the nanny for Nick; what situation
16 is she in? Where she can have every reasonable
17 thing that she can obtain those goals. She
18 can't, so these got to be unrealistic goals set
19 for herself and the track record of failure and
20 frustration and anger.

21 If you analyze the story a little bit, I
22 think I've gone into this before, we can see where
23 Mrs. Downs can't get herself out of the story.
24 The gunman would have to be vulnerable to her.
25 She can see why she can't have the gunman getting

1 into the car because of the video re-enactment.
2 And the earlier stories either through the
3 window or from a place outside the car and then
4 as the evidence developes and we learn that these
5 compact shots and close proximity episode, she's
6 got to modify that and allow flexibility to allow
7 the gunman to be inside the car more, more and
8 more. She -- the more the gunman gets in the
9 car, the harder it is to explain her just standing
10 around outside the car. She needs in her story,
11 to pull the keys from the ignition because if
12 she doesn't, you don't have that element in
13 there. There's no way to -- to distract the
14 gunman. So, we've got the keys pulled, that
15 accounts for the distracting the gunman which
16 is why she escapes with just a wound, but
17 that's -- Christie disproves that.

18 The gunman's motive apparently,

19 "I want your car."

20 He drives up in a yellow car. He leaves in the
21 yellow car as fast as Mrs. Downs leave the
22 scene of the crime. He doesn't need a car to
23 catch her. If he wanted to catch her, he could
24 have just skipped after her and caught her. The
25 story is totally impossible. People don't stop

1 for strangers at night, much less on a secluded
2 road. There's no reason to be on that road.
3 No reason other than to find a place where you
4 can murder your kids. That's the reason to be
5 in that secluded place. No reason to take a
6 detour off -- off the main road there and
7 according to her kids, they are all sleeping
8 there, age eight, seven and three, schools the
9 next day, we're going to do some sightseeing,
10 just take another road? No reason to stop for
11 this guy or to turn the ignition off if you do
12 slow your car down, no reason to ever get out
13 of the car. Nobody is going to do it.

14 Nobody is as selfish a person like Mrs.
15 Downs. She cares for no one but herself, she
16 doesn't care for any person where there is any
17 example of her giving of herself for someone
18 else. We're told that she's such a good
19 samaritan. Quite the contrary, quite the con-
20 trary. Diane comes first.

21 It's hard to believe that a mother would
22 shoot her kids. It's certainly -- it's nothing
23 that any of us want to believe, but it's hard to
24 believe that mother would stand there and --
25 and watch her kids being shot and she's a person

1 that has a lot of anger and fisty. She's not
2 afraid to bit and scratch and kick and take
3 people on. Why does she all of a sudden become
4 so inhibitted and quiet out there? It's just a
5 lie. That's -- that's why.

6 If you're a real victim and we have real
7 victims every day, you don't prevent the police
8 from completing their investigation. You don't
9 try and take your kids away so that they can't
10 gather the evidence or refuse to allow them to
11 take photos of them, this and that, not talking
12 to them. You cooperate. You seek to assist
13 them in anyway possible. That's how people
14 react. You want them to catch the bad guy.
15 Mrs. Downs initially cooperated, that is last
16 of a very brief period of time and once she
17 sees that her story is not being swallowed
18 hook line and sinker, then she's on the defense.
19 She's out attacking everybody. It's -- the lines
20 are drawn, all right? At that point.

21 There's a lot of hatred in Mrs. Downs' life.
22 It's been built up over the long period of time.
23 She testified that by age eight she hated her
24 father, really down on her mother. Said we're
25 here no protecting from her -- her father. Doesn't

1 like men. Doesn't believe husbands are
2 necessary -- fathers are necessary for children.
3 She's ambitious. A lot of hostility there, a
4 lot of -- of anger and it comes out in her inap-
5 propriate behavior. She's got so wrapped up in
6 herself and these feelings that she can't dis-
7 play normal human emotions because she doesn't
8 have -- have them any more. Maybe -- maybe she
9 never did. Maybe this childhood of hers took
10 that away from her. Maybe or maybe she just is
11 an anti-social person from a very young age.
12 If you listen to her accounts of how her earlier
13 years -- her informative years were, she kind of
14 doesn't want to be part of groups, rejected, a
15 loner, off by herself, angry and as she progresses
16 through life, a mother and more instances of that
17 anger coming out and not being controlled. In
18 the beginning, she would suppress it, maybe
19 afraid of her father or parents and then as they
20 become older, it comes boiling to the surface
21 more and more. It shows in instances even with
22 Steve where she feels frustrated and her reactions
23 are to go and get the gun.

24 When you listen to Mrs. Downs on tape, yet
25 you notice that she sounds as believable on --

1 on those tapes as she does in Court. She's able
2 to also project this same story, the same degree
3 of feeling in whatever she's telling and that's
4 her problem. You get with an accomplished liar
5 and people that are used to it do it all the time.
6 They -- they develop a facility for it. And,
7 you've seen that here. She and her mind
8 reconciles everything. There's an explanation
9 for everything. She never admits that she's done
10 anything wrong, no matter if you pin her down,
11 it's just denial, denial, denial.

12 Let's compare Diane Downs with the image
13 presented of her in closing argument of Counsel.
14 He's got her as this poor victim that's just
15 innocently being framed of all this wrong doing.
16 Does not know how to fight back. Does not know
17 how to cope and is that -- that the real --
18 the real Diane Downs that's been presented to
19 you through the evidence? I submit that situa-
20 tion -- it isn't the real Diane Downs who is a
21 warped person, very superficial person. A person
22 that sees their own life in such a way that they
23 could become angry, hostile, upset and -- and
24 shoot their kids as she did. Her whole life is
25 a lie. By her own testimony, she's -- she's a

1 social misfit pulled away from friendships and
2 sought to control as others did for years. Why
3 do you suppose she preys on married men? There's
4 a lot of men in the world whose also into getting
5 the married one whether in Eugene or Chandler,
6 trying to fight the jungle, maybe by her testi-
7 mony three, four, five or more sexual partners
8 at the same time. Is she a person who's into
9 giving love? Seeking love? Does love have any
10 place in -- in her -- her emotions? Does it
11 exist for her at all? She loves herself, but
12 not anyone else.

13 These affairs are eruptions of a way of
14 hating for her, it's a way for her to manipulate
15 people. Maybe because of her warped upbringing,
16 she sees her as a person who had -- had her
17 whether she was growing up or her contemporaries.
18 She can laugh at the institution of marriage.
19 Big motivation there. Her father, mother pressed
20 to be married. She's very critical of that and
21 just loathes to reject it. Through it away. She
22 can even abuse her children when anger erupts.
23 There's plenty of testimony of how she would mis-
24 direct her anger from Steve to Cheryl in shaking
25 her. Let this transference of anger get out of hand.

1 I think that is a real deficit for Diane Downs.
2 She's not crazy. She's -- she's not even
3 slightly mad. She never was. Remember when
4 she described her frustrations with Steve on
5 direct examination? It was the time when she
6 was coming back from Louisville and he picks
7 her up at the airport and she would have like
8 to had Nick meet her and he's talking to her
9 about patching this marriage up and getting it
10 back together and she says she -- she felt
11 trapped by the frustration. You wanted to
12 hurt him, but you can't so you go inside your-
13 self. But, you can only keep it inside so long.
14 You keep stringing it along until you can't
15 contain it anymore and it does come out,
16 physically. That's the situation where she goes
17 from there then to the mobile home and -- and
18 fires the gun in the floor. That's the same
19 situation that she found herself in on May 19th,
20 1983. She's here in Eugene, she's been rejected
21 by Nick. She's tried everything to get him up
22 here and the anger, the hatred, the frustration,
23 has just been building up inside of her. Who can
24 she take it out on? What anti-social act or
25 impulse can she do? She goes for the gun again.

1 And uses it. It's the new beginning for her.
2 All right, that's what's in her mind. That
3 unicorn is in her mind. That is a new begin-
4 ning. It's a new beginning unhampered by any
5 of things that have been holding her back in
6 the past. It's a new beginning where Diane
7 can get the big house, big money and big job.
8 She's -- she has this ability to strike out at
9 a society that she feels that doesn't protect
10 her. The real dangerous thing about that is
11 that she knows about this anger, she is on notice
12 of it. She knows how she reacts to things,
13 situations and she completely rationalized it and
14 separated it just as a part of her -- her person-
15 ality and she can live with it. No evidence
16 that she is seeking to change that or that she's
17 looking for help or that she's in anyway sorry
18 for what she did.

19 She's testified that she didn't know how
20 she looks to other people and that's apparent
21 from all witnesses who saw her at the hospital.
22 She's right. She never will see herself as
23 others see her and she's never going to recognize
24 her own guilt and it's always going to be some-
25 body else put me in this predicament. Somebody

1 else is at fault and she'll forever continue
2 to manipulate people, to manipulate them
3 physically, mentally and it's up to you to
4 consider the evidence that you've heard, the
5 overwhelming evidence of her guilt, and to
6 hold her accountable for her actions. To
7 send her the message finally, now in her life
8 that we're not going to tolerate murder and
9 that's what it's come to now.

10 The only way all of this evidence fits
11 together, the only way that it makes sense,
12 is that the Defendant is guilty as charged,
13 there's no other way to reconcile it all.
14 There's no reason to feel any sympathy for
15 Mrs. Downs. She made a conscious choice to
16 do this, not an act that was an accident, not
17 something that got -- came up in a heat of
18 passion, it was cold, calculated planning.
19 She invisioned it out in detail. She put it
20 into execution, performing it and trying to
21 cover it up as best she can. And, that's what
22 the evidence shows in this case.

23 Talk about these cases and sometimes you
24 get so involved in them that as you people have
25 done now, you've heard this case for some, I

1 don't know, five - six weeks, how long it has
2 been, you've heard all this evidence. And,
3 while it all kind of bunches together, sort
4 of a melting together and it's hard to keep it
5 separated and that's why you're going to be
6 given the opportunity to deliberate in the
7 case. Let's not -- please not lose sight of
8 the fact that we're talking about a child that
9 was killed. A young girl that's not here any-
10 more. A person that's been brutally murdered
11 for what reason? For -- for Diane Downs own
12 warped -- warped sense of values, anger, just
13 rejected, just rejected this child and the
14 other children, Christie and Danny. They're
15 not going to walk away from this. They're not
16 going to be the same anymore. Their lives are
17 gone. Danny is not going to walk and Christie
18 is never going to have the use of her arm or
19 her mental facilities like she would have.
20 And it's very -- it's critical for you to not
21 be sidetracked to focus on the evidence, to use
22 your common sense and return a verdict that you
23 feel good about. Witnesses have come into this
24 courtroom and testified. The police have inves-
25 tigated it. I've done my job as best I can to

1 try and make you understand the evidence that
2 has been produced. That's as far as it can be
3 taken now to this point. It's going to be
4 turned over to you and you're going to make
5 the decision.

6 Make a decision that you're going to feel
7 good about. A decision you're going to feel
8 proud of, a decision that the right thing is
9 done, where Christie Downs can have a life
10 after this case. Where Mrs. Downs is told for
11 once and for all,

12 "Look lady, you're not going to
13 lie your way out of this situation.
14 We're not buying it. It doesn't
15 cut it. These stories just don't
16 make it. You're a murderer. A
17 cold blooded, cruel, vicious
18 murderer."

19 Thank you.

20 JURY INSTRUCTIONS

21 THE COURT: Members of the jury, it's now
22 the duty of the Court to instruct you as to the
23 law.

24 Let me just indicate to you that we'll be
25 taping these instructions so that you'll have

1 them in the jury room and if you need to refresh
2 yourself on anything that's being said, you'll
3 have that opportunity. All you need to do is
4 notify the Bailiff and she can come in and play
5 these for you.

6 The just determination of every legal con-
7 troversy depends upon finding the true facts
8 and applying to those facts the correct legal
9 principles. Under our system of jurisprudence
10 the Court decides all questions of law and
11 procedure arising during a trial and it is the
12 jury's duty to follow the Court's instructions
13 in these matters. In this regard, the objections
14 that have been raised by Counsel are helpful to
15 the Court in deciding such issues and the Court's
16 ruling thereon should not be considered by you
17 as any indication that the Court has an opinion
18 as to the outcome of the case.

19 On the other hand, the jury is the sole
20 and exclusive judge of the facts and of the
21 reliability to be given the testimony of any
22 witness. It's findings as to the facts are
23 final. The jury's power, however, is not arbi-
24 trary and if the Court instructs you as to the
25 law on a particular subject or how to judge the

1 evidence, you must follow such instructions.

2 It is of the utmost importance, therefore, that
3 in performing your functions as jurors you under-
4 stand the instructions which I shall give to
5 you.

6 Your verdict should be based only upon these
7 instructions and upon the evidence in this case.

8 It is your duty to weigh the evidence calmly
9 and dispassionately and to decide the questions
10 upon their merits. You are not to allow bias,
11 sympathy or prejudice any place in your delibera-
12 tions, for all parties are equal before the law.
13 Neither are you to base your decisions on guess
14 work, conjecture or speculation. Furthermore,
15 you must not consider what sentence might be
16 imposed upon the Defendant.

17 In deciding this case you are to consider
18 all of the evidence which you find worthy of
19 belief presented by either party bearing on
20 each question.

21 Every witness is presumed to speak the
22 truth. This expectation maybe overcome by the
23 manner in which the witness testifies, by the
24 nature of his or her testimony, by evidence
25 effecting his or her character, interests, or

1 motives, by contradictory evidence.

2 A witness found to be intentionally false
3 in a part of his or her testimony maybe dis-
4 trusted in others.

5 There are two types of evidence. One is
6 direct evidence -- such as the testimony of
7 an eye witness. The other is circumstantial
8 evidence -- the proof of a chain of circum-
9 stances pointing to the existence or non-
10 existence of a certain fact. Proof maybe
11 either type or both.

12 The testimony of one witness, whom you
13 believe, is sufficient to prove any fact in
14 dispute. In other words, you are not simply
15 to count the witnesses on each side, but you
16 are to weigh the evidence.

17 The State is not required to prove motive,
18 for it is not an essential element of the crime
19 charged.

20 Proof of motive maybe shown, and if so,
21 should be given such weight as you determine it
22 should have as evidence.

23 During the course of this trial, you have
24 listened to certain tape recordings which have
25 been entered into evidence. As an aide to your

1 listening to those tape recordings, you had the
2 assistance of a typed written transcript. You
3 are instructed that the type written transcript
4 is not evidence in this case, but you may under
5 certain circumstances therein after set forth be
6 used as a further aide to your consideration of
7 the evidence. Exhibit 429 collectively are tran-
8 scripts which are similar to that which you had
9 during your listening to the tape recordings.
10 As those exhibits are not evidence, they will
11 not remain with you during your deliberations.
12 The transcript maybe used for the following
13 purposes:

- 14 1. In assisting you in location portions
15 of the tapes which you wish to review.
- 16 2. In aiding your listening to the
17 tape recordings during deliberations.

18 If you need Exhibit 429 for either of these
19 purposes during your deliberations, please
20 request that exhibit from the Bailiff. Upon
21 your completion of reviewing Exhibit 429 for
22 these purposes, you must immediately return it
23 into the possession of the Bailiff.

24 And I'll simply add that because of the
25 technical nature of the tape recordings, like-

1 wise if you wish to listen to those, simply
2 summon the Bailiff and she'll come in and play
3 them for you.

4 Testimony regarding the oral statements
5 of the Defendant unfavorable to her interest are
6 to be viewed with caution, for the Defendant
7 herself may have been misinformed, or may not
8 have clearly expressed the meaning, or the wit-
9 ness may have misunderstood her or it maybe that
10 the witness who testifies to these statements,
11 by intentionally or inadvertently altering a
12 few of the expressions really used, gives an
13 effect to the statement completely at variance
14 with what the Defendant actually did say. On
15 the other hand, if you can say from the evidence
16 that the alleged statements were clearly and
17 understandably made by the Defendant, that
18 they are precisely identified, and that the
19 language is correctly remembered and accurately
20 reported by the witness, you are authorized to
21 consider such statements for what you deem them
22 to be worth against the Defendant making them,
23 but in reaching such a result you must, for the
24 reasons given, proceed with caution.

25 A witness who has special knowledge, skill,

1 experience, training or education in a parti-
2 cular field, may give an opinion as to any
3 matter in which the witness is so skilled.
4 In determining the weight to be given such an
5 opinion, you should consider the qualifications
6 and credibility of the witness and the reasons
7 given for the opinion.

8 You're not bound by such opinion. Give
9 it the weight, if any, which you deem it
10 entitled.

11 Questions have been asked in which a
12 witness was requested to assume that certain
13 facts were true, and to give an opinion based
14 on those assumed facts. These are called
15 hypothetical questions. If you find that any
16 of the facts assumed and relied upon by the
17 witness in forming his opinion are not estab-
18 lished by the evidence or were untrue, you
19 must disregard that opinion.

20 Now, in this case there's been an indict-
21 ment filed against the Defendant in which the
22 Defendant is charged with the commission of the
23 crime of murder, attempted murder in two counts
24 and assault in the first degree in two counts
25 which are alleged to have been committed as

1 follows:

2 That the Defendant on or about the 19th
3 day of May, 1983, in Lane County, did unlaw-
4 fully and intentionally cause the death of
5 Cheryl Lynn Downs, a human being, by shooting
6 her with a firearm. That's Count I.

7 Count II alleges that as part of that
8 same act and transaction, the Defendant on or
9 about the 19th day of May, 1983, in Lane
10 County, did unlawfully and intentionally
11 attempt to cause the death of Christie Ann
12 Downs by shooting her with a firearm.

13 Count III alleges that as part of that
14 same act and transaction, the Defendant on or
15 about the 19th day of May, 1983, in Lane
16 County, did unlawfully and intentionally
17 attempt to cause the death of Steven Daniel
18 Downs by shooting him with a firearm.

19 Count IV alleges that as part of that
20 same act and transaction, the Defendant on or
21 about the 19th day of May, 1983, in Lane
22 County, did unlawfully and intentionally cause
23 serious physical injury to Christie Ann Downs
24 by means of a firearm, a deadly weapon.

25 And Count V alleges that as part of that

1 same act and transaction, Defendant unlawfully
2 and intentionally caused serious physical injury
3 to Steven Daniel Downs by means of a firearm,
4 a deadly weapon.

5 The indictment itself and the fact that
6 an indictment has been filed are not evidence.
7 The indictment is merely the formal statement
8 of the charge.

9 To this indictment the Defendant has
10 entered a plea of not guilty. The plea of
11 not guilty is a denial of every material alle-
12 gation contained in the indictment.

13 The burden is upon the State to prove the
14 guilt of the Defendant beyond a reasonable doubt.

15 Beyond a reasonable doubt means an honest
16 uncertainty as to the guilt of the Defendant.
17 The reasonable doubt exists when, after careful
18 and impartial consideration of all the evidence
19 in the case, you do not feel convinced to a moral
20 certainty that the Defendant is guilty. Proof
21 beyond a reasonable doubt is such as you would
22 be willing to act upon in the most important of
23 your own affairs.

24 The law presumes that the Defendant is
25 innocent, and this presumption follows the

1 Defendant until guilt is proved beyond a
2 reasonable doubt.

3 Now, with respect to Count I of the indict-
4 ment which charges murder, Oregon law provides
5 as follows:

6 A person commits murder, if he intention-
7 ally causes the death of another human being.
8 In order to establish murder, it is necessary
9 for the State to prove beyond a reasonable
10 doubt each of the material elements of the
11 crime as follows:

12 First, that the crime was committed in
13 Lane County, Oregon.

14 Second, that the crime was committed on
15 or about the 19th day of May, 1983, the date
16 alleged in the indictment.

17 Third, that the Defendant intentionally
18 caused the death of Cheryl Lynn Downs.

19 Fourth, that the Defendant caused the
20 death of Cheryl Lynn Downs in the manner speci-
21 fied in the indictment which is alleged that
22 she did it by shooting her with a firearm.

23 These definitions -- this definition applies:

24 Intentionally means that a person acted with
25 a conscious objective to cause the death.

1 Now, with respects to Count II and III which
2 allege attempted murder, Oregon law provides as
3 follows:

4 A person commits the crime of attempted
5 murder when he intentionally engages in conduct
6 to constitute substantial steps towards the
7 commission of the crime of murder. In order
8 to establish the crime of attempted murder, it
9 is necessary for the State to prove beyond a
10 reasonable doubt each of the material elements
11 of the crime as follows:

12 First, that the crime was committed in
13 Lane County, Oregon.

14 Second, that the crime was committed on
15 or about the 19th day of May, 1983, which is
16 the alleged date in the indictment.

17 Third, that the Defendant intentionally
18 engaged in conduct which constituted a substan-
19 tial step toward the commission of the crime
20 of murder as used in this instruction, the
21 material elements of murder as I have just
22 defined that crime, with the exception that
23 with respect to Count III, excuse me, Count II,
24 the alleged victim is Christie Ann Downs and
25 with Count III, the alleged victim is Steven

1 Daniel Downs.

2 Again, this definition applies:

3 Intentionally means that a person acts
4 with conscious objective to cause the result
5 or to engage in the conduct described.

6 Now, with respect to Counts IV and V which
7 charges assault in the first degree, Oregon law
8 provides as follows:

9 A person commits the crime of assault in
10 the first degree if intentionally causes serious
11 physical injury to another by means of a deadly
12 weapon. In order to establish assault in the
13 first degree, it is necessary for the State to
14 prove beyond a reasonable doubt each of the
15 material elements of the crime as follows:

16 First, that the crime was committed in Lane
17 County, Oregon.

18 Secondly, the crime was committed on or
19 about the 19th day of May, 1983 which is the
20 date alleged in the indictment.

21 Third, that the Defendant intentionally
22 caused serious physical injury to Christie Ann
23 Downs in Count IV and Steven Daniel Downs in
24 Count V.

25 Fourth, that the Defendant caused serious

1 physical injury by means of a deadly weapon.

2 This definition applies:

3 Intentionally means a person acts with a
4 conscious objective to cause the result or to
5 engage in the conduct described.

6 Serious physical injury means, physical
7 injury which creates a substantial risk of
8 death or which causes serious and protracted
9 disfigurement, protracted impairment of health
10 or protracted loss or impairment of functions
11 of any bodily organ.

12 Deadly weapon means any instrument, article
13 or substance specifically designed for and
14 presently capable of causing death or serious
15 physical injury.

16 Now, upon your return to the jury room,
17 select one of your number, man or woman, to
18 act as foreperson. The foreperson is to preside
19 and to be spokesman. Then deliberate and find
20 your verdict.

21 Now, on the murder charge, Count I, that
22 requires a unanimous verdict. All twelve of
23 you must agree on your verdict, whether it's
24 guilty or not guilty.

25 On the other cases, attempted murder and

1 assault in the first degree and Count II through
2 V, ten or more of your number must agree upon
3 your verdict. So, once again it requires a
4 unanimous verdict for Count I. Ten or more
5 for Count II through V.

6 When you have arrived at your verdict, the
7 foreman should sign it upon the appropriate forms.
8 And, you'll have a separate verdict form for
9 each count. For County I, it reads as follows:

10 "We the jury, duly impaneled and
11 sworn to try the above entitled
12 cause find the Defendant ---"

13 and there's a blank space --

14 "....of the crime of murder,
15 Count I."

16 There's a place for the date and a place for
17 the signature. Have the foreman fill in the
18 words "guilty" or "not guilty" whichever reflect
19 your verdict. And, use the date of the day that
20 you finally decide the case, if it happens to
21 be tomorrow, use tomorrow's date and whatever
22 then, have the foreperson sign it on the appro-
23 priate line. You'll have the same verdict form
24 each of the counts. Those counts are identified
25 in the form, Attempted Murder Count II, Attempted

1 Murder Count III and so and so forth. You'll
2 be able to tell which one you use for which
3 count.

4 I remind you that once -- that you may
5 consider each of those individually, once you've
6 reached a verdict in that particular count, you
7 can move on the next one.

8 Once those forms have been executed, signal
9 the Bailiff, who will be outside your door, and
10 the Court will be reassembled and your verdict
11 received.

12 Counselors, are you aware that I misspoke
13 myself or inadvertantly omitted any instructions?

14 MR. JAGGER: No, your Honor, not at all.

15 (Side bar conference.)

16 THE COURT: I have been asked to instruct
17 you with respect to the firearms that are in the
18 case. Maybe this is obvious, but please don't
19 put the cartridges in the firearms. There's an
20 obvious reason for that, one of which is it's
21 dangerous and another one is that those are
22 evidence and as you've heard in the case, certain
23 markings can be left if they're in the weapon.
24 So, so please don't do that.

25 Let me also explain that we'll be using

1 the courtroom as the jury room in this case
2 because there are numerous exhibits. So, what's
3 going to happen is that you'll be conducted back
4 to your jury room. You can begin your delibera-
5 tions. You can select a foreman and that sort
6 of thing and as soon as we get this courtroom
7 cleared and all the exhibits brought back in
8 here, then we'll bring you in here and you can
9 use this as your -- your room for deliberations.

10 I have not been notified by anybody that
11 they're unable to continue. So, this becomes
12 the time in the case when we have to say
13 good-bye to Mrs. Kephart and Ms. Manning.
14 We sincerely appreciate your efforts in -- in
15 coming down here, being here for the past six
16 weeks. Your attentiveness and dedication to
17 reflect that, you can't be part of the process
18 at this point. We trust that your experience
19 has been a good one and we certainly appreciate
20 it very much. So, once the jury is conducted
21 out, we'll excuse you and you can be on your
22 way and we thank you very very much.

23 Will the Bailiffs please come forward and
24 be sworn?

25 Do you swear to conduct yourself as Bailiffs

1 of the jury in accordance with the laws as
2 previously read to you?

3 THE BAILIFFS: I will.

4 THE COURT: With that then, the jury can
5 be excused to begin your deliberations.

6 (Jury exits.)

7 THE COURT: We have some other matters to
8 cover, so please -- aside from instructions
9 requested and not given, are there any exceptions
10 at this point?

11 MR. JAGGER: No, your Honor. Not on behalf
12 of the Defendant.

13 THE COURT: Very well.

14 Let me just indicate some procedures here
15 on out. As I've indicated, we will be using this
16 jury room as the deliberation room. So, everybody
17 will have to vacate the courtroom. It will be
18 sealed and the windows will be covered, the
19 cracks too will be covered and we ask that you
20 remember that we do have a jury in session here
21 and -- and to try and keep it quiet outside the
22 door. If -- you're happy to be out there, obvi-
23 ously but we can't have any communications
24 going on or anything like that. So, we'll be
25 having somebody posted to keep you away from

1 that door.

2 We will likely be sequestering the jury
3 this evening. If they've not come up with a
4 verdict by the time that they are excused for
5 the night, I'm not going to indicate where
6 that is going to be, although you may find
7 that out. Simply, I ask for your cooperation
8 from both the media and the other people,
9 don't attempt to follow the jury over there
10 and see them or whatever. We want to keep --
11 the purpose of sequestration is to keep them
12 separated from the public so they're not in
13 anyway influenced in their deliberations. I
14 expect them to deliberate and I want to give
15 them a chance to sleep. So, I'd ask for your
16 cooperation in not attempting to contact,
17 photograph or in anyway interfere with -- with
18 that process.

19 With respect to the availability of this
20 building at night, now I don't know how many
21 people want to be down here at night, waiting
22 for the jury to come back, but the fact is
23 that courtrooms -- court is open to the public
24 anytime court is in session. We do have a
25 problem with security in this building and so

1 I have been asked to indicate that if you do
2 want to be down here when they're deliberating
3 in the night or weekend or whatever, you'll be
4 allowed to wait on the first floor down near
5 the Sheriff's Office and then at such a time as
6 we do have a verdict, we'll allow you to come
7 up into the courtroom. They simply haven't
8 got the manpower to secure this building with
9 a lot of people running around. So, so they're
10 not going to allow you up here until such a time
11 that they have reached a verdict. And, we're
12 not discouraging you from waiting around, if
13 you wish. But, we'll try to provide chairs and
14 that sort of thing downstairs if that is helpful
15 to you.

16 With respect to the media, they're are a
17 number of you here, I know that you would all
18 like to be notified as soon as the verdict comes
19 in. What we'd like to do is have you select
20 one of your members to receive a phone call and
21 with the idea that that person will then call
22 everybody else. If we only have to call one
23 name designated to spread that information that
24 way, I think it will work. We expect at such
25 time to be very busy. At such time that the jury

1 does come back, we will reconvene and the court-
2 room will have to be cleared and so we're not
3 going to have time to make a lot of calls. So,
4 if you could go back and elect somebody to be
5 designated, someone to be number one and would
6 comply with that.

7 Last thing I would like to say, this has
8 been a long and difficult case and I just want
9 to commend Counsel for the very professional
10 manner in which I believe they tried the case.
11 There's been a great deal of cooperation. There's
12 been a lot of times when we'd have meetings back
13 in chambers and having little reality checks to
14 find out where we are and how we're doing. And,
15 I think it's enabled us to -- to really proceed
16 with the trial and to proceed with this thin in
17 an orderly fashion. And I just want to say that
18 I do appreciate the efforts of Counsel and -- in
19 that respect.

20 With that then, we'll be in recess.

21
22 (Further Transcript of Trial
23 reported by KAY V. CATES,
24 Official Reporter, and
25 continued in VOLUME 25, June
17th, 1984.)

1 STATE OF OREGON)
2) ss.
3 COUNTY OF LANE)
4
5

6 I, SUSAN C. NISSMAN, Official Court
7 Reporter for the Circuit Court of Lane County,
8 do hereby certify that I did report the fore-
9 going mproceedings in stenotype on June 14, 1984.

10 That the foregoing 121 pages of transcript,
11 constitute a complete, true and accurate trans-
12 cription of my stenotype notes;

13 That I am not counsel to, nor related to
14 any of the parties involved herein; nor am I
15 otherwise interested in the outcome of this
16 proceeding.

17 IN WITNESS WHEREOF I have affixed my
18 signature hereto this 20th day of December, 1984.

19
20
21 CERTIFIED TRUE COPY

22 Susan C. Nissman

23 Susan C. Nissman
24 Susan C. Nissman
25

all these little tabs
were Steve Sorham's or
the attorneys before him.

You can remove them
all and start over
if you like
W.F.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE

STATE OF OREGON,
Plaintiff,
vs.
ELIZABETH DIANE DOWNS,
Defendant.

Case No. 10-84-01377

Eugene, Oregon

Honorable Gregory G. Foote

TRANSCRIPT OF PROCEEDINGS

SUNDAY, JUNE 17, 1984 - 12:50 A.M.

TUESDAY, AUGUST 28, 1984 - 10 A.M.

MONDAY, OCTOBER 29, 1984 - 9:30 A.M.

VOLUME XXV - Pages 2929-3003

Appearances:

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KAY V. CATES
Official Court Reporter
Lane County Courthouse
Eugene, OR 97401

PET. EX. 11

DNA-Motion-000573

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1 EUGENE, OREGON - SUNDAY, JUNE 17, 1984 - 12:50 A.M.

2
3 (Outside the presence of the
4 jury.)

5 THE COURT: The word that we have is that
6 the jury has reached a verdict. And before they come
7 back in the courtroom, I want to caution everybody
8 against reacting in any way to the verdicts once
9 they're received.

10 We have five of them to read, and it would
11 be inappropriate for there to be any response
12 whatsoever. So please keep quiet.

13 Secondly, there are generally other
14 proceedings that need to continue after the receipt of
15 any verdict, and we need to get that on the record.
16 So please remain seated until the Court is in recess.

17 It will be just a couple of minutes, so
18 please remain seated until that time.

19 THE BAILIFF: Your Honor, the jury has
20 reached their verdicts. May they enter?

21 THE COURT: Yes.

22 (Whereupon, the jury enters
23 the courtroom.)

24 THE COURT: You may be seated.

25 Mr. Bendt, are you the foreman?

1 MR. BENDT: Yes.

2 THE COURT: Has the jury reached verdicts in
3 each count?

4 MR. BENDT: Yes, we have.

5 THE COURT: Would you hand them to the
6 bailiff, please?

7 The verdicts are as follows:

8 We the jury, duly impaneled and sworn to try
9 the above-entitled cause find the defendant guilty of
10 Murder, Count I; guilty of the crime of Attempted Murder,
11 Count II; guilty of the crime of Attempted Murder,
12 Count III; guilty of the crime of Assault in the First
13 Degree, Count IV; guilty of the crime of Assault in
14 the First Degree, Count V.

15 Dated the -- please be seated -- dated the
16 16th day of June, 1984, signed by Mr. Bendt, the
17 foreperson.

18 Mr. Bendt, was each of these a unanimous
19 verdict?

20 MR. BENDT: No.

21 THE COURT: Was the Murder verdict
22 unanimous?

23 MR. BENDT: Yes.

24 THE COURT: And were the other four verdicts
25 by at least 10?

1 MR. BENDT: Yes.

2 THE COURT: Is there anybody who did not
3 vote for the verdict in Count I, that is the murder?
4 Is there anybody who did not vote for that count?

5 (No response.)

6 THE COURT: Any request for a poll?

7 MR. JAGGER: No, your Honor.

8 THE COURT: The verdicts will be received.
9 Members of the jury, it's now the time for
10 you to be excused as jurors on this case.

11 Speaking for the Court and for this
12 community, I can't thank you enough for your efforts.
13 Obviously it's been a long, difficult time. We've
14 asked you to do much that we really had no right to
15 ask.

16 I feel that you gave this case your utmost
17 attention. You were very conscientious. Obviously by
18 the length of your deliberations you were very serious
19 about your job, and we have appreciated it. There
20 are no words that I can say that can express our
21 thanks to you except thank you very much.

22 You may be excused.

23 (Whereupon, the jury leaves
24 the courtroom.)

25 THE COURT: The verdicts will be received.

1 The matter will be then continued for sentencing. A
2 presentence investigation will be ordered. The
3 defendant will be remanded to the custody of the
4 sheriff.

5 Any further proceedings?

6 MR. HUGI: I think you should put something
7 on the record about the instruction that was given
8 initially with regard to the Murder verdict. I think
9 on the record that we have now it's unclear what
10 happened there.

11 THE COURT: All right. Let me just indicate
12 that the Court did instruct the jury in writing
13 subsequent to their -- beginning their deliberations
14 that the initial instruction was partially in error in
15 that it indicated that it would take a unanimous
16 verdict either way on the Murder charge, either for a
17 conviction or for acquittal.

18 In writing, the Court simply indicated to
19 the jury that it required a unanimous verdict for
20 conviction and a 10-to-2 verdict for acquittal.

21 I don't know if that explains what the
22 nature of the jury's vote was on this. There was also
23 a subsequent question concerning -- I don't have it in
24 writing in front of me, but there was a question in
25 writing concerning if they reached verdicts on four of

1 the counts but not on the fifth count, how they should
2 proceed.

3 And they were instructed to go ahead and
4 enter verdicts on the four that they had agreed on and
5 then to continue deliberating on the fifth. And that
6 may explain why the votes were different.

7 In fact, let me just indicate that I may
8 have misread this. Count I was dated the 17th of
9 June, and Counts II through V were dated the 16th of
10 June. So it's apparent that they reached Counts II
11 through V earlier in the evening.

12 Any other matters before the Court?

13 MR. JAGGER: I don't think so, your Honor.

14 THE COURT: We're adjourned.

15 (Whereupon, the hearing was
16 adjourned.)

17

18

19

20

21

22

23

24

25

1 EUGENE, OREGON - TUESDAY, AUGUST 28, 1984 - 10 A.M.

2
3 THE COURT: Good morning. This is the
4 matter of State vs. Elizabeth Diane Downs, time set
5 for hearing on the state's motion concerning offender
6 status and time for sentencing.

7 Does either party wish to make an opening
8 statement?

9 MR. HUGI: Your Honor, Dr. Suckow has
10 furnished a report to the Court, and that should be in
11 your file. And Mr. Jagger has got a copy of that.

12 He's present here, and I intend to put him
13 on the stand and let Mr. Jagger basically cross-
14 examine him if he wishes to.

15 THE COURT: Very well.

16 MR. JAGGER: We'll waive opening statement.
17 I assume he's going to have some direct.

18 THE COURT: Very well. You may call your
19 witness.

20 Raise your right hand, please.

21 //

22 //

23 //

24 //

25 //

1 DR. GEORGE SUCKOW,
2 called as a witness on behalf of the state, and after
3 having been duly sworn by the Court to tell the truth,
4 the whole truth and nothing but the truth, was
5 examined and testified as follows:

6 THE COURT: Take the stand, please.

7
8 DIRECT EXAMINATION

9
10 BY MR. HUGI:

11 Q. Tell us your name?

12 A. George Robert Suckow, S-u-c-k-o-w.

13 Q. What's your occupation?

14 A. A physician who specializes in psychiatry.

15 Q. What are your qualifications for that? I
16 think you've testified at trial, and they're part of
17 the record, but just summarize them for the Court at
18 this time.

19 MR. JAGGER: Excuse me, counsel. You can do
20 that if you want to. We'll stipulate to his
21 qualifications, if you wish to.

22 Q. (By Mr. Hugi) What's your experience, can
23 you relate what your experience has been as a
24 professional?

25 A. I trained in psychiatry at the Oregon State

1 Hospital in Salem, finishing that training in 1964.

2 Was on active duty with the United States
3 Army for two years as a psychiatrist, finishing that in
4 1966.

5 I then came to the Oregon State Hospital,
6 assumed the directorship of the psychiatric security
7 unit which is now known as the forensic unit, a unit
8 which is devoted to the examination and treatment of
9 people who are both mentally ill and criminal
10 offenders.

11 Q. How do people get on the psychiatric
12 security unit?

13 A. They are found not guilty by reason of
14 insanity or sent there for examination prior to trial
15 or sent there for time prior to trial when they've
16 been determined unable to stand trial.

17 Q. Was it your job to interview those people
18 and to make determinations as to their mental
19 capabilities?

20 A. Yes, it was my job to do the complete
21 examination and report.

22 I was also a director in charge of running
23 the whole program. I was there for seven years.

24 Q. Roughly how many people do you think you've
25 seen and evaluated?

1 A. I would guess probably close to 2,000.

2 Q. I think I interrupted you. That's not your
3 present position, is it?

4 A. No, I then went to Dammasch State Hospital
5 where I was the clinical director for seven years and
6 then returned to the Oregon State Hospital and again
7 took over the forensic psychiatric unit as the
8 clinical director of that.

9 In the past year I've been the chief medical
10 officer at the Oregon State Hospital. I was also a
11 consultant to the Oregon State Penitentiary for about
12 a year-and-a-half in 1969 and 1970.

13 Q. What did you do on that job as a consultant?

14 A. I saw those inmates who -- both at the
15 penitentiary and at the Women's Correctional Center
16 who requested to see a psychiatrist because of some
17 emotional or psychiatric problems.

18 I also saw individuals who were referred by
19 the staff, some of whom require statutory evaluation
20 every two years, for example.

21 Q. In this case the Court ordered you to
22 evaluate the defendant, Elizabeth Diane Downs.

23 And did you in fact evaluate her?

24 A. Yes, I did.

25 Q. And you filed a written report with the

1 Court dated July 17th, 1984, is that correct, a two-
2 page report?

3 A. Yes.

4 Q. That contained your conclusions regarding
5 your examination of the defendant?

6 A. Yes.

7 Q. You found her to be suffering from a severe
8 personality disorder indicating a propensity for
9 future criminal activities, is that correct?

10 A. Yes.

11 Q. Is it your feeling that because of the
12 dangerousness of this defendant, then an extended
13 period of confinement is required for the protection
14 of the public?

15 A. Yes.

16 MR. HUGI: Your witness.

17

18 CROSS-EXAMINATION

19

20 BY MR. JAGGER:

21 MR. JAGGER: Perhaps it would be easier -- I
22 would request that -- my copy of Mr. Suckow's report
23 is marked up.

24 Do you have one that's unmarked and maybe
25 you can have the Court file marked as an exhibit?

1 MR. HUGI: It's in the Court file.

2 MR. JAGGER: Maybe a part of the Court file,
3 but I don't think it's evidence within this particular
4 hearing, and I would request that it be marked, if it
5 please the Court, maybe have the report from the Court
6 file marked as evidence.

7 I can maybe supplement the Court's file
8 after this hearing with a copy of it if that would be
9 appropriate. I'd request we do that. That would
10 maybe save us from writing out what's in the Court --
11 it's not a matter of evidence in this hearing yet.

12 THE COURT: Any objection?

13 MR. HUGI: No, I would assume everything in
14 the Court's file is part of the record in this case,
15 however.

16 MR. JAGGER: Part of the record but not part
17 of the evidence in this hearing.

18 THE COURT: We'll have that marked and it
19 will be received.

20 MR. JAGGER: Thank you, your Honor.

21 Q. (By Mr. Jagger) Dr. Suckow, you're saying
22 that your opinion is that she has a severe personality
23 disorder or is suffering from a personality disorder
24 doesn't tell us what that personality disorder is.

25 Isn't it true that your conclusion is that

1 the personality disorder that she suffers from is a
2 narcissistic personality disorder?

3 A. That's correct.

4 Q. And while you found some maybe features of
5 other personality disorders, that is the personality
6 disorder that it was your conclusion that she was
7 suffering from though?

8 A. Yes.

9 Q. There's nothing -- would you tell me what
10 your own criteria is for determining if a personality
11 disorder such as narcissistic -- in fact, let's just
12 simply limit it to that -- is severe or simply just
13 the narcissistic personality disorder.

14 I need to find out what your criteria is
15 that makes something a severe versus personality
16 disorder?

17 A. If the person meets the determination for
18 diagnosis and has evidence of a lot of other -- or has
19 evidence of a lot of other personality problems, that
20 would not be a severe personality disorder.

21 But when they fall primarily into one
22 category and they meet practically all of the
23 requirements, then it becomes a severe personality
24 disorder.

25 Q. I heard you say two things, and maybe I

1 don't understand exactly what direction you're going
2 to, but --

3 A. There are many features in diagnosis, many
4 behaviors that people show which overlap a number of
5 different diagnoses.

6 And if a person has a lot of other
7 overlapping problems, then you might have a situation
8 where they have a mild personality disorder plus other
9 problems.

10 If you're familiar with diagnostic axes as
11 in the Diagnostic and Statistical Manual, for example,
12 there's a primary Axis I diagnosis which some people
13 may have, and there's also an Axis II diagnosis under
14 which the personality disorders fall.

15 If you have an individual who for example
16 had an Axis I diagnosis of paranoid schizophrenia and
17 an Axis II diagnosis of schizoid personality, you
18 might then find their personality disorder was not a
19 severe one, that they were not greatly affected by it.
20 The primary problem was the schizophrenia.

21 In this case there's no Axis I diagnosis.
22 The other thing is that if you look at the Statistical
23 Manual, you'll find a number of symptoms are listed.
24 And frequently they'll say any two of five or any
25 three of six.

1 If all you have is two of five or three of
2 six, that's perhaps not a severe personality disorder..
3 When they're all present, then it is.

4 Q. I guess this is where I got confused by your
5 initial answer.

6 There may be a personality disorder that is
7 in and of itself not severe, but there are three or
8 four of them. I think you mentioned there may be one
9 and there may be -- the whole picture of the
10 individual which then gives us -- none of them
11 independently are severe, but of course all of them
12 together then gives a severely incapacitated or sever
13 problem with that individual?

14 A. Yes.

15 Q. If I can compare that with something else I
16 guess also, and that is just isolating each
17 personality disorder by itself and identifying whether
18 that is severe.

19 There are two separate questions here, can
20 you see that?

21 A. Yes.

22 Q. You've indicated that in a personality
23 disorder there are certain overlapping
24 characteristics. Narcissistic will have some
25 histrionic and perhaps others you've indicated.

1 That's why of course you have to look then for the
2 particular diagnosis that is best and you have more
3 than just one criterion for those, isn't that correct?

4 A. Yes.

5 Q. Now I need to know I guess -- is what you're
6 saying that you felt that her problem is a severe one
7 because she has the narcissistic personality disorder
8 plus other complicated factors?

9 A. No. And there's a third factor that goes
10 into it that I neglected to mention, and that's how
11 incapacitating the problem is.

12 Q. You mentioned that by saying how they're
13 affected?

14 A. Yes.

15 Q. Approximately the same type of question,
16 isn't it?

17 A. Yes.

18 Q. Okay. Now just taking the narcissistic
19 personality disorder in and of itself, not as it may
20 be complicated by overlapping factors, isn't it true
21 that her -- what you would determine to be a
22 personality disorder, narcissistic, is not a severe
23 one?

24 A. No.

25 Q. It's your opinion that it is a severe one?

1 A. Yes.

2 Q. There isn't any -- for example in DSM III,
3 there isn't any sum classification of narcissistic
4 personality disorder of being severe or not severe?

5 A. No.

6 Q. So that is pretty much left up to the
7 individual practitioner, is that correct?

8 A. I think it is, yes.

9 Q. You indicated that I think there was some --
10 Mr. Hugi asked you a question, maybe kind of a -- I'm
11 not being critical of Mr. Hugi, but I wanted to refer
12 back to that so I can ask you a few questions off of
13 it.

14 He asked you a question you responded yes
15 to, but it had a number of questions in it.

16 He asked if she was suffering from a severe
17 personality disorder indicating a propensity for
18 commission of antisocial acts or words to that effect
19 anyway?

20 A. Yes.

21 Q. Now it was your opinion that based upon your
22 analysis of her that she is predisposed to the further
23 commission of dangerous and antisocial acts.

24 You wrote that in your opinion, correct?

25 A. Yes.

1 Q. Now just simply isolating the narcissistic
2 personality disorder, there's nothing in the
3 personality disorder itself, the narcissistic
4 personality disorder excluding the additional factors
5 that you have with respect to her, but there's nothing
6 in that personality disorder itself which indicates a
7 propensity for further criminal activity, isn't that
8 correct?

9 A. No.

10 Q. And where do you get that information?

11 A. Part of the problem with what you're saying
12 is that narcissistic personality indicates a person
13 who is impulsive, that indicates a propensity for the
14 commission of criminal activities, a person who tends
15 to see things on the surface and doesn't understand
16 the feelings behind it.

17 In other words, they're shallow in their
18 opinions. That may tend to increase the propensity
19 for criminal activity.

20 They often are exhibitionistic, so they may
21 do something illegal to show off like small children
22 on a school ground break rules to show off in front
23 of the class.

24 They have a tendency to go into rages when
25 they're confronted or thwarted which again may

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1 indicate a propensity toward criminal activity.

2 They tend to be exploitive of others which
3 may be criminal in intent, but the big thing is
4 there's no empathy. There's no feeling for the rights
5 of others.

6 It's all me attitude, and that in and of
7 itself predisposes you to do things which may harm
8 others.

9 Q. You're saying it may?

10 A. That's right, they're all ways.

11 Q. It may indicate?

12 A. Yes.

13 Q. When you take the personality disorder of
14 antisocial, now that in and of itself indicates a
15 propensity for criminal activity, doesn't it?

16 A. Yes.

17 Q. It's not even a may, is it? That's part of
18 the criteria, it indicates the propensity?

19 A. Yes, that's right.

20 Q. Now narcissistic personality disorder is
21 different from that, and the diagnosis itself does not
22 indicate a propensity for criminal activity, does it?

23 A. Not necessarily, no.

24 Q. It may because there are in life -- in all
25 of life there are overlapping factors.

1 For example, poor people, that may indicate
2 that someone may steal to get something, isn't that
3 correct?

4 A. No.

5 Q. If someone is poor and they don't have
6 something, haven't you in some of your --

7 A. There are many, many poor people who are
8 honest.

9 Q. And there are also many, many people who
10 have a narcissistic personality disorder who do not
11 commit crimes, isn't that correct, Doctor?

12 A. Yes.

13 Q. There is a difference between that someone
14 may indicate a propensity for criminal activity versus
15 a personality disorder, that in fact indicates a
16 personality disorder, isn't that true?

17 A. Yes. I would remind you though that --

18 Q. Excuse me, I'll give you a chance after my
19 next question. I'll give you a chance to respond to
20 that.

21 A. Okay.

22 Q. To make it real clear in the record though,
23 there's a difference as you've indicated between may
24 indicate and indicating.

25 Such a personality disorder indicates a

1 propensity for criminal activity. Narcissistic may
2 indicate in and of itself, isn't that correct?

3 A. Yes.

4 Q. You were going to respond, and I did cut you
5 off. And I want to give you a chance to respond.

6 Go ahead and say what you were going to say.

7 A. When you look at personality disorders,
8 they're lifelong patterns of behavior.

9 They're repetitive. They tend to be
10 predictable in the sense they follow patterns. And
11 personality disorders tend to fall in groups or
12 clusters with very similar features.

13 Histrionic personality, narcissistic
14 personality, antisocial personality and borderline
15 personality are all very closely allied. They're very
16 similar, and sometimes it's difficult to determine
17 which is which.

18 Q. What evidence did you have that prior to age
19 15 of Diane Downs that she had a narcissistic
20 personality disorder?

21 A. She gave a history of a suicidal attempt.

22 Q. When?

23 A. When she was 13. She also gave a history of
24 being sexually molested by her father.

25 Q. That has nothing to do with narcissistic,

1 does it?

2 A. Yes, it does.

3 Q. What?

4 A. Narcissistic people often are seductive in
5 order to gain attention, not to gain sex.

6 Q. Excuse me, was your observation that she had
7 been seductive to the person who molested her and had
8 almost in fact invited this, it was her fault?

9 A. No, no, it's not her fault. It's not her
10 intent.

11 Q. She was seductive?

12 A. What I'm saying is narcissistic people are
13 often seductive in behavior in order to gain attention
14 because that's what they want is the attention.

15 So you ask me if I knew of anything prior to
16 age 15 which would indicate a narcissistic
17 personality, and those things do.

18 Q. How does her being sexually molested
19 indicate a seductive personality?

20 A. I did not say she was sexually molested. I
21 said her father apparently molested her by her
22 history.

23 Q. What's the difference between saying she was
24 molested?

25 A. I wasn't there. I don't know if she was or

1 not.

2 Q. You said her being molested as a child is
3 evidence of a narcissistic personality. How --

4 A. It can be. It's not by itself diagnostic,
5 but you're asking me what are the things that I could
6 show that go along with that.

7 Q. That's right. And I'm still asking you
8 that.

9 A. By itself, it doesn't show that she's
10 narcissistic, but it is consistent with a narcissistic
11 personality.

12 Q. But it's not inconsistent with it either, is
13 it? It's not consistent with it either? It doesn't get
14 you anywhere?

15 A. That's not so.

16 Q. But being --

17 A. High frequency of sexual molestation,
18 histrionic and narcissistic females.

19 Q. But being molested has nothing to do with
20 narcissistic personality, does it?

21 A. In and of itself, no, but what I'm saying is
22 that the propensity to be molested is there.

23 Q. Only if you're seductive?

24 A. Yes. And most narcissistic people are.

25 Q. Okay. But you don't have any evidence at

1 all that she in these prior molesting situations was
2 seductive?

3 A. No.

4 Q. You're saying she has a history of being
5 molested so therefore -- ?

6 A. You asked what indications I have before age
7 15, and I started to give them to you.

8 Q. Okay.

9 A. Another one was that she was -- what would I
10 say -- outwardly calm and inwardly angry most of the
11 time.

12 She would please people, but she really
13 didn't want to. She wanted her own way, but she
14 wasn't able to achieve it.

15 Q. And -- ?

16 A. Which again is consistent with a
17 narcissistic personality, also consistent with other
18 personality disorders.

19 Q. Did you explore with her the reason for
20 that?

21 A. Yes, she didn't respect her father.

22 Q. And that's -- in your professional opinion
23 might have been a non-narcissistic response, isn't
24 that correct?

25 A. Don't take any one of these things by itself

1 and try to make a diagnosis from it because you can't.
2 You're looking at a multitude of factors.

3 Q. But listen, if we take this by itself, if
4 that reaction to her being angry at her father for
5 historically molesting her, if you find then that that
6 was a reason for it -- ?

7 A. She's angry at him for much more than that.

8 Q. But you're taking each of these
9 independently, and you're then saying that they
10 support the narcissistic conclusion?

11 A. Yes.

12 Q. It's also valid to take each of these
13 individually, and if they support something
14 inconsistent with narcissistic personality disorder,
15 that's a valid way to approach it, isn't it?

16 A. Yes.

17 Q. That's all I'm doing.

18 If she has this outward calm, inward anger
19 at her father and it's because she was molested by her
20 father, that's sufficient I believe. That has nothing
21 to do with narcissistic personality disorder, does it?

22 A. No, in that sense, no.

23 Q. And do you have any evidence --

24 A. But what I was saying was --

25 Q. All right.

1 A. That this kind of behavior occurs more
2 frequently in people with narcissistic personality
3 than it does in people without by itself it doesn't
4 make the diagnosis.

5 The fact that she's angry at him for
6 molesting her is a normal response, but she's angry at
7 him for a lot of other things too.

8 Q. Historically from your -- what else was it
9 that she was angry at him for?

10 A. Well, basically what she was angry at him
11 was that she felt that he did not live up to her
12 expectations of what he should. She couldn't respect
13 him.

14 Apparently he would lay out certain programs
15 that she was to follow, didn't follow them himself,
16 was overly perhaps disciplinary, a number of things.

17 But her reaction was somewhat exaggerated in
18 that regard, and by itself that still doesn't make a
19 diagnosis. It's just consistent with it.

20 Q. Now you also rely upon DSM III, Diagnostic
21 and Statistical Manual of Mental Disorders. That's
22 the bible of psychiatry, isn't it, in helping diagnose
23 individuals?

24 A. It's a compilation of all the different
25 diagnoses and all of the factors that go into them

1 that are most commonly accepted by psychiatrists
2 worldwide.

3 Q. You rely upon that, don't you?

4 A. Yes.

5 Q. And also DSM III is a casebook, isn't it?

6 A. Yes.

7 Q. And you rely upon that also in your
8 obtaining knowledge and skills in diagnosis?

9 A. No, that's really designed to help us under
10 the first one.

11 Q. Sure. But it's accepted within the field of
12 psychiatry as additional authority and explanation of
13 the DSM III, isn't that correct?

14 A. That's what it's intended for.

15 Q. Are you familiar with the textbook portion
16 of this casebook that deals with narcissistic
17 personality disorder called "Unrecognized Genius",
18 number 37 on page 52?

19 A. No, I'm not.

20 Q. It's very brief. And these are given as I
21 think -- as you've already indicated as examples of
22 the diagnostic disorders or mental disorders within
23 this book.

24 This is a casebook. It has some examples of
25 what is meant by this, is that correct, is that

1 roughly stated correctly?

2 A. I assume so.

3 Q. Entitled "Unrecognized Genius".

4 "A 25-year-old single graduate student
5 complains to his psychoanalyst of difficulty completing
6 his Ph.D. in English literature and expresses concerns
7 about his relationship with women.

8 "He believes that his thesis topic may
9 profoundly increase the level of understanding in his
10 discipline and make him famous, but so far he has not
11 been able to get past the third chapter.

12 "His mentor does not seem sufficiently
13 impressed with his ideas, and the patient is furious
14 at him but also self-doubting and ashamed. He blames
15 his mentor for his lack of progress and thinks he
16 deserves more help with his grand idea, that his
17 mentor should help with some of the research. The
18 patient brags about his creativity and complains that
19 other people are jealous of his insight.

20 "He's very envious of students who are
21 moving along faster than he and regards them as
22 'dull drones' and 'ass kissers'. He prides himself on
23 the brilliance of his class participation and imagines
24 someday becoming a great professor.

25 "He becomes rapidly infatuated with women and

1 has powerful and persistent fantasies about each new
2 woman he meets, but after several experiences of
3 sexual intercourse feels disappointed and finds them
4 dumb, clinging and physically repugnant. He has many
5 friends, but they turn over quickly and no one
6 relationship lasts very long.

7 "People get tired of his continual self-
8 promotion and lack of consideration of them. For
9 example, he was lonely at Christmas and insisted that
10 his best friend stay at town rather than visit his
11 family. The friend refused, criticizing the patient's
12 self-centeredness. And the patient, enraged, decided
13 never to see this friend again."

14 That would be typical of a narcissistic
15 personality disorder, isn't that correct?

16 A. Yes.

17 Q. Did you have evidence of -- I guess you
18 found in your examination of people that sometimes
19 making the diagnostic criteria or making a decision
20 concerning a mental disorder is complicated by the
21 situational aspect of someone being arrested, in jail,
22 obviously feeling some aspects of paranoia in that kind
23 of a situation, guilty or not, but you have found in
24 your experience that that sometimes complicates a
25 diagnosis a little bit, doesn't it?

1 A. Yes.

2 Q. It takes some added experience to be able to
3 deal with that, doesn't it?

4 A. Yes.

5 Q. I want to exclude then her involvement in
6 this situation, okay, and only kind of cut off her
7 lifeline so to speak present in this situation.

8 A. By "this situation," what are you referring
9 to?

10 Q. This offense she was charged with and we had
11 a trial about involving her children?

12 A. All right.

13 Q. What if anything did you see in Diane Downs'
14 previous history that was grandiose and that she was
15 going to undertake some situation that she thought
16 would make her the best in a field and make her
17 famous?

18 A. She was going to start a surrogate mother
19 program here in Eugene, had fantasies about that or
20 thoughts about it.

21 Q. Did you know she actually did it, she
22 actually started it?

23 A. No, I didn't.

24 Q. How is that different?

25 A. I know she had plans to do so based upon her

1 own experiences as a surrogate mother.

2 Q. But she wasn't trying to be famous because
3 of that, was she?

4 A. Oh, what's trying to be famous? She was
5 trying to be successful and well known.

6 Q. Okay. Are you saying that's -- do you have
7 any evidence of her approach to that situation as
8 being any different than any other business person out
9 here in this community who starts up a new business?

10 A. No, but once again what you're looking at
11 is a compilation of normal behaviors which differ only
12 from normal in their degree of extremeness or their
13 constellation, clumping what goes together and fits
14 together. Any one of them could be done by anyone
15 else.

16 Q. Set up a business?

17 A. For example, to set up a business, to run
18 surrogate mother programs.

19 Q. Well --

20 A. The grandiose part is Diane isn't
21 particularly trained to do that and other than having
22 been a surrogate mother has no real experience with
23 it.

24 Q. Do you have any experience as far as what it
25 takes to be trained to set up a surrogate parenting

1 program?

2 A. No, I don't.

3 Q. You don't know if she had the experience or
4 not, do you?

5 A. I know what's required. I don't personally
6 have the experience of doing it.

7 Q. What's required?

8 A. You need to have good genetic counseling.
9 She doesn't have the background for that. You need to
10 have good medical back-up. I don't know whether she
11 had that or not.

12 Q. You also don't know if she was hiring
13 someone with respect to genetic background?

14 A. No, but those are a couple of things.

15 Q. You're assuming the worst?

16 A. You'd also have to have good legal counsel
17 because that's a very gray area under the law. I
18 don't know if she had legal counsel or not.

19 Q. You cannot then come to the conclusion that
20 she was unqualified to do that because you don't know
21 if she had that or not?

22 A. I know she doesn't have the experience other
23 than her own personal experience.

24 Q. Did you ask her?

25 A. Let me finish.

1 If you want to do an appendectomy, the fact
2 that I've had an appendectomy does not qualify me to
3 do one.

4 I may know a little bit more about it,
5 having been in the situation, but I still don't know
6 how to do it.

7 Q. Would you say this person, unrecognized
8 genius, had a severe narcissistic personality disorder
9 or just a narcissistic personality disorder?

10 A. The one that you read the description of?

11 Q. Yes.

12 A. Severe. The reason I say that is it was
13 incapacitating.

14 Q. Couldn't complete his task?

15 A. That's right.

16 Q. And was affecting his relationship with
17 other people?

18 A. Affecting his performance in school,
19 interfering with what he wanted to a large degree,
20 preventing him from obtaining it.

21 Q. Do you know if this narcissistic personality
22 disorder kept her from attaining a goal of surrogate
23 parenting?

24 A. I don't think she was successful at it.

25 Q. Do you know?

1 A. No, but I never heard of any further
2 developments.

3 Q. Did you ask her when you interviewed her?

4 A. I don't think I did.

5 Q. In fact, during your interview how long did
6 you talk with her?

7 A. An hour.

8 Q. And you had a lot of things you had to
9 cover, isn't that correct?

10 A. Yes.

11 Q. And in other words this was not conversation
12 just -- that was directed by her. It was directed by
13 you with certain preset topics you wanted to cover?

14 A. It's directed by me in the sense there are
15 certain preset areas that I wish discussed.

16 Q. And is it generally true some of the areas
17 you want to cover within this hour was her background,
18 both educational and workwise, military record, legal
19 connection, speeding tickets, things of that nature,
20 psychiatric history, physical illnessess or injuries,
21 sexual relationships, values such as religion, et
22 cetera, the parental and family history such as
23 brothers, et cetera, and I guess -- I'm going through
24 your notes here.

25 I think maybe you knew what I was doing

1 here, going through respect for authority, depression,
2 suicide, angriness, friends. The bottom of that page
3 I'm not sure what that word is, looks like acting or
4 something, bottom of page 3 of your notes?

5 A. On the notes?

6 Q. Yes.

7 A. Yes, that's acting.

8 Q. And you covered MMPI. What happened after
9 the Amy situation, some more conversation about maybe
10 the legal system or some relationship to that.

11 As far as writing, conversation about Ann
12 Rule, some other inmates, some more about her
13 education, some drugs, seizures, delusions,
14 hallucinations, things of that nature, correct, all
15 within an hour?

16 A. Yes.

17 Q. She did not show any preoccupation with the
18 fantasies of unlimited success, power, brilliance,
19 beauty or ideal level, did she?

20 A. She showed preoccupation with those areas,
21 but I wouldn't say that they were fantasies. She had
22 a lot of preoccupation with her notoriety if you will,
23 which is I suppose fame.

24 Q. Okay. No fantasies, anyway. Let's leave it
25 at that. That's what you're saying, not fantasies?

1 A. Yes. She also added some thoughts about the
2 love which she had with her daughter Cheryl which I
3 thought were kind of idealistic.

4 Q. Preoccupation with the fantasies of unlimited
5 success, power, beauty or ideal love is one of the
6 diagnostic criteria for narcissistic personality
7 disorder, isn't it?

8 A. Yes.

9 MR. JAGGER: I don't have any other
10 questions, Dr. Suckow.

11 THE COURT: Redirect?

12

13 REDIRECT EXAMINATION

14

15 BY MR. HUGI:

16 Q. The purpose of DSM III, the diagnostic
17 manual that Mr. Jagger referred to is to categorize
18 disorders so that people in the psychotherapy field
19 can talk about them, is that correct?

20 A. That's correct. So that people will be
21 uniform in what they talk about. They talk about
22 oranges when they're talking about apples.

23 Q. That lets you categorize a person's behavior
24 and put it in one pigeonhole as opposed to another?

25 A. Yes.

1 Q. Its utility for treatment purposes is --
2 what would you say -- minimal at best?

3 A. The only utility it has for treatment
4 purposes is to enable clinicians to talk about what
5 they're treating and be talking about the same thing.
6 It doesn't really tell you what's treatable or how to
7 treat it.

8 Q. You find that by labeling her -- and that's
9 what you've done -- as a narcissistic personality
10 disorder that precluded or ruled out her being
11 antisocial and having that disorder?

12 A. No.

13 Q. In fact, you've seen MMPI's and you have
14 them with you that have labeled her as antisocial,
15 have they not?

16 A. Yes.

17 MR. JAGGER: Well, your Honor, I would
18 object to that and move to strike.

19 That's beyond the scope of direct. This is
20 something that through discovery was not to be part of
21 his testimony, otherwise we'd have had some other
22 people here because it's clear -- as part of the
23 presentence report -- clear when you get part of the
24 MMPI, that's not what the proper diagnosis would be.

25 THE COURT: I'm not sure I understand your

1 objection.

2 MR. JAGGER: Beyond the scope of direct.
3 It's also irrelevant because it does not have to do
4 with any specific -- we're going through -- she might
5 have some other personality disorder possibility which
6 is irrelevant to this hearing, and that's what his
7 question is.

8 You can go through the DSM III and say she
9 might have this and might have that.

10 THE COURT: I'm going to overrule the
11 objection. I think there's reference in the letter to
12 other disorders.

13 You may proceed.

14 Q. (By Mr. Hugi) And the basis of your
15 conclusion comes from many sources. You've reviewed
16 psychological and psychiatric reports of this
17 defendant from the Air Force, in the presentence
18 report when she was age 18, a number of them conducted
19 in connection with her baby-selling program in
20 Kentucky and Arizona.

21 These reports are quite consistent, are they
22 not, in the personality that they depict?

23 A. Yes, they are. Yes, I did review all of
24 those.

25 Q. And would you say a person who has a

1 personality that allows them to intentionally murder
2 their children would have a severe personality
3 disorder?

4 A. Yes.

5 Q. You're aware that she had ambitions to be a
6 doctor, head of the post office, have a house with
7 servants, are you not?

8 A. Yes.

9 Q. Have you read her letters to
10 Mr. Knickerbocker?

11 A. Yes, I have.

12 Q. Would you categorize those as expressing an
13 ideal love?

14 A. Yes, they did.

15 Q. Has Mr. Jagger's penetrating questions
16 caused you to change your conclusions in any respect?

17 A. No.

18 MR. HUGI: That's all.

19 THE COURT: You may step down.

20 THE WITNESS: May I be excused?

21 THE COURT: Any objection?

22 MR. JAGGER: None.

23 MR. HUGI: No.

24 THE COURT: You may be excused.

25 Further evidence for the state?

1 MR. HUGI: None.

2 THE COURT: Does the defense want to present
3 anything on this issue?

4 MR. JAGGER: No, your Honor, we have
5 argument.

6 THE COURT: I'll hear first from the state.

7 MR. HUGI: The notion in this case it would
8 take a psychiatrist to tell the Court that this person
9 is dangerous to the community is hard to believe. I
10 think the facts of this case speak for themselves, and
11 if were there no psychiatrists, if the Court based its
12 finding on the evidence it heard in trial and its
13 observations of this person, it could reach the
14 necessary findings that it should make in this case.

15 Every psychological study of this defendant
16 is consistent with Dr. Suckow's conclusion. If it
17 weren't, Mr. Jagger certainly would have brought it
18 out.

19 THE COURT: Mr. Jagger?

20 MR. JAGGER: Your Honor, that -- what
21 Mr. Hugi is talking about is not legally the question
22 before the Court at this particular time.

23 The question before the Court at this time
24 is one of a narrow legal principle. The bottom line
25 of that principle is that we sentence persons to a

1 longer period of incarceration when because of a
2 personality disorder, that personality disorder is
3 indicative that they're going to do criminal activity
4 in the future.

5 The statute 161.725 subsection (1) -- and
6 the wording is real important in that the Court finds
7 that he -- he or she is suffering from a severe
8 personality disorder indicating -- and it's not saying
9 personality disorder -- and further that person may
10 show a propensity toward criminal activity or
11 suffering from a severe personality disorder and it
12 may indicate a propensity. But that severe
13 personality disorder is indicative of -- is indicating
14 from that springs the propensity toward criminal
15 activity.

16 The only evidence before this Court is we've
17 had a discussion of -- in fact of specifically what
18 we're talking about by that statute. The severe
19 personality disorder of antisocial -- the only
20 personality disorder given, the only one that
21 Dr. Suckow says that she has and we take issue with
22 that. I don't want to concede that is his -- I'm
23 sorry, narcissistic personality disorder.

24 But Dr. Suckow says that this kind of a
25 personality disorder is different from those which in

1 and of themselves indicate a propensity for criminal
2 activity such as antisocial.

3 He says this one may indicate -- but it's
4 clear from the evidence that that personality disorder
5 does not in and of itself indicate a propensity for
6 criminal activity.

7 As a matter of law, the state has the burden
8 and as a matter of law based upon Dr. Suckow, that is
9 not what we have in this particular situation. I
10 would suggest to the Court that this would not hold up
11 a finding that the facts support that which we're
12 talking about in ORS 161.725.

13 We of course take issue with the conclusion
14 that she has a personality disorder in the first
15 place, but I would submit that the strongest argument
16 here is that that's not what we're talking about in
17 that particular statute.

18 I understand that the appeal of an argument
19 that Mr. Hugi says to a certain extent it would be
20 nice for the public to hear too. A person who does
21 this kind of an act, they must be sick. But we don't
22 just have an emotional statute here or something that
23 strikes when we get that kind of an emotional appeal.

24 We have specifically this kind of criteria,
25 and the reason for the criteria is not because of the

1 bad appearance of the act but instead because of a
2 personality disorder which shows -- indicates
3 propensity to do something in the future.

4 I submit to you we don't have that in this
5 particular case at all.

6 THE COURT: Do you wish to respond?

7 MR. HUGI: Anybody who potentially murders
8 their children and tries to get away with it and
9 doesn't I would submit certainly has a propensity to
10 engage in that type of behavior in the future.

11 THE COURT: Well, I think the argument here
12 is really a matter of statutory interpretation. We're
13 dealing with 161.725, subsection (1). There are other
14 means by which a person can be considered a dangerous
15 offender. Those relate to prior convictions and that
16 sort of thing.

17 But what we're dealing with here is
18 circumstances where the defendant is being sentenced
19 for a Class A felony. "The Court finds he is
20 suffering from a severe personality disorder
21 indicating a propensity toward criminal activity."

22 Mr. Jagger's argument seems to be that the
23 classification itself must be one which necessarily
24 indicates that propensity. The way I read the statute
25 and the way I think it makes a little more sense is

1 you have to look subjectively at the particular
2 defendant.

3 I would not want to have a situation arise
4 where somebody comes in, he's been diagnosed as an
5 antisocial personality disorder and have that mean
6 that the Court must automatically find that the person
7 has a propensity to commit further crime.

8 It may or may not. I think it depends on
9 how that disorder manifests itself in the past. And
10 as Dr. Suckow indicated, it's a question of looking at
11 life history.

12 I don't think the statute intends to say if
13 somebody comes in with that particular disorder she
14 should also be considered a dangerous offender, and
15 that would be the logical conclusion for Mr. Jagger's
16 argument.

17 I think that the more reasonable
18 interpretation is does the Court find that first of
19 all there's a severe personality disorder, and in the
20 case of this defendant, does the Court find that it
21 indicates a propensity for further criminality.

22 Moving to the evidence, the testimony and
23 the report of Dr. Suckow in this case is almost an
24 afterthought, perhaps an understatement. The Court
25 sat through six weeks of what in many instances became

1 the Diane Downs story. I probably heard more about
2 this particular defendant than any other that's ever
3 been before me.

4 We heard some 12 hours of tape. We had her
5 on the witness stand. We had others describing her.
6 We had the whole life history. I doubt that there's
7 anything that Dr. Suckow heard that I haven't already
8 heard and probably in greater detail.

9 His conclusion was that Ms. Downs has a
10 narcissistic personality disorder manifested by a
11 grandiose sense of self-importance, fantasies,
12 exhibitionism, lack of empathy, exploitiveness, poor
13 interpersonal relationships, physical aggressiveness,
14 impulsivity, disregard for the truth and at times
15 angry, irrational outbursts.

16 There was evidence of all that in the course
17 of the trial. So I am inclined to -- certainly not to
18 discount Dr. Suckow's evaluation but to agree with it
19 upon my own personal observation. I may not have used
20 the language from the DSM III that the doctor is
21 familiar with, but I think certainly the Court can
22 make those observations, although I will note that the
23 statute does require the psychiatric examination and
24 that was done in this case.

25 My comments are simply to indicate that at

1 least in this case the Court found those to be merely
2 surplusage.

3 I do make a finding that the defendant is in
4 fact suffering from that severe personality disorder
5 and that that in this case indicates a propensity for
6 criminal activity.

7 I further find that because of the danger
8 imposed by the defendant to the public that an
9 extended period of confinement would be required for
10 the protection of the public, and we'll proceed to
11 sentencing on that basis and certainly allow the state
12 to argue for whatever sentence is appropriate under
13 that finding.

14 Now we're prepared I assume to proceed to
15 sentencing. I'll indicate that I've reviewed the
16 presentence report. I'll hear first from the state.

17 MR. HUGI: Well, of course we're now here to
18 determine the appropriate sentence or penalty for
19 Elizabeth Diane Downs who shot each of her children on
20 May 19th, 1983 to benefit herself.

21 Our system which gives criminals more rights
22 than any other system in the world has allowed this
23 offender to exercise those rights, and she's been
24 found guilty beyond a reasonable doubt of all charges
25 against her.

1 I'd point out it's been nearly three months
2 since trial. I know anyone who heard this evidence in
3 this case would recall it. The Court should recall
4 especially the testimony of the hospital personnel,
5 their description of the condition of these children
6 when they arrived in the Emergency Room, their
7 testimony regarding the condition of the defendant,
8 the contrast of the medical personnel's concern for
9 the Downs children and the defendant's concern for
10 herself.

11 The Court should recall the testimony of
12 Christie Downs who painfully related to this Court the
13 details of the shooting that took place, the physical
14 evidence that was presented that showed the defendant
15 had in her possession ammunition from the murder
16 weapon, that the fact was conceded by the defense at
17 trial.

18 Blood spatter evidence which shows that
19 Cheryl was shot outside the car, that could not be
20 conceded by the defense because that contradicted her
21 story of how she escaped. She certainly couldn't
22 drive off in a hurry if Cheryl was outside the car.
23 She couldn't admit that.

24 The Court heard as it's referred to
25 recently, numerous instances of violent and impulsive

1 behavior by the defendant, some with a firearm
2 identical to the murder weapon in this case.

3 The Court listened to numerous conversations
4 between the defendant and the police and her
5 boyfriend. I believe there are 24 tapes.

6 The defendant sought to change her story to
7 fit the evidence and consistently continued her lying.

8 I think it's important to recall the
9 injuries to the children. That is part of why we're
10 here. The autopsy photos of Cheryl's mutilated body,
11 I hope the Court can recall that and keep in mind
12 those wounds were inflicted by the person you're about
13 to sentence.

14 Christie Downs is permanently handicapped in
15 speech and movement, physically and mentally. She now
16 lives with her injuries and her guilt about this, all
17 due to the person you're about to sentence.

18 Danny Downs who now is a paraplegic crawls
19 from place to place unable to know if he's injuring
20 his legs because he no longer has any feeling in them.

21 He doesn't realize yet in his life that
22 these injuries were caused by his mother. He doesn't
23 yet realize that these injuries will appreciably
24 shorten his life span. And these children's only
25 crime was to be born to Elizabeth Diane Downs who

1 refuses to assume any responsibility for her actions.

2 I'd ask the Court further to recreate in
3 your own mind the horror she imposed on these
4 children, taking them out to an isolated location in
5 the dark, playing that music that was played in this
6 courtroom, calmly parking the car, going to the trunk,
7 returning with a gun, firing near contact shots into
8 each of her children's bodies.

9 Think of the screaming children unable to
10 escape, the blood curdling screams that went
11 unanswered as this person you're about to sentence
12 calmly, coolly carried out her plan in a workmanlike
13 manner.

14 She got rid of the gun, waited for the
15 children to stop screaming and die, slowly drove to
16 the hospital, arm neatly bandaged, concerned about
17 getting treatment for her wound.

18 As you recall, the defendant would not allow
19 a photograph to be -- of her arm to be taken in the
20 X-ray room until she could comb her hair because she
21 didn't want to have a photograph that didn't show her
22 at her best.

23 Subsequently this defendant has threatened
24 to kill Robert Knickerbocker, the witness who
25 testified at this trial. A warrant for her arrest --

1 although she laughs now -- has been issued on that
2 matter.

3 The defendant was ordered to cooperate with
4 Dr. Peterson in treating Christie and Danny. She
5 failed to do that.

6 The defendant has shown no concern for her
7 victims but rather spends her time wooing a criminal
8 who has committed atrocities similar to her own.

9 She steadfastly distorted the facts and the
10 evidence that she did at trial, and as the Court is
11 aware from the defendant's statements that were kept
12 from the jury, she failed to pass a polygraph
13 examination arranged for her by her attorney last
14 summer. Previously administered mental examinations
15 of this defendant all found her to be histrionic,
16 self-indulgent, impulsive and manipulative. This
17 defendant is a true sociopath and must be dealt with
18 accordingly.

19 Making the sentencing decision, the Court
20 must keep in mind that there can't be any reformation
21 or rehabilitation for a person who refuses to
22 acknowledge responsibility for a crime. So that all
23 that is left to be accomplished by the sentencing is
24 punishment and deterrence to others.

25 This defendant physically abused her

1 children when they were younger, and the night before
2 she was murdered, Cheryl told the next door neighbor
3 she was scared of her mother. Christie recalls being
4 lifted up by her hair by her mother.

5 This defendant has no remorse for her
6 actions, still treats this entire proceeding as a
7 joke. Her main concern is for what pleasure will be
8 available to her in the future. She thrives on the
9 attention that her cold-blooded murdering has brought
10 her.

11 There's been much talk in this community of
12 imposing the death penalty in this case. That concept
13 offends our Supreme Court, and they have taken that
14 option away. This monster that's before you to be
15 sentenced should be buried deep for her crimes, as
16 deep within the corrections institution as the law
17 allows.

18 The law compels a sentence of life for the
19 murder of Cheryl Lynn Downs. What that means, only
20 the Parole Board can say for they have the power to
21 parole her as soon as she reaches the institution.

22 For that reason I would urge the Court to
23 impose in conjunction with that life sentence a five-
24 year firearm enhancement that cannot be overridden by
25 the Parole Board.

1 The remaining crimes are all Class A
2 felonies. Counts II and IV against Christie Ann
3 Downs, the defendant should be sentenced as a
4 dangerous offender and receive 30 years with a 15-year
5 minimum mandatory and a five-year firearm enhancement
6 to be served consecutively to the sentence for the
7 murder of Cheryl Lynn Downs.

8 For Counts III and IV against Stephen Daniel
9 Downs, the defendant should receive a 20-year sentence
10 with a 10-year minimum mandatory and five-year firearm
11 enhancement consecutive to the sentences imposed for
12 the crimes against Cheryl and Christie.

13 The Parole Board of this state has indicated
14 on other cases that if the Court fails to impose the
15 maximum allowable sentence it will interpret that as a
16 recommendation for leniency by the trial court.

17 If this Court fails to impose consecutive
18 sentences it's saying that you can victimize three
19 people and only pay the price for one.

20 Regarding the matter of restitution, that
21 should be ordered for the victims. The surviving
22 victims will require attention for the rest of their
23 lives. This amount cannot be precisely determined at
24 this time, although substantial sums have already been
25 spent for their physical and mental treatment.

1 Costs should be ordered to compensate the
2 taxpayers of this community for the costs of this
3 prosecution.

4 This defendant is employed as a postal
5 worker, has still not terminated that employment, did
6 not qualify for court-appointed attorney. She
7 describes herself in the presentence report as healthy
8 as a horse. Prior to incarceration she had money for
9 a new car, for dancing, for booze, for her own
10 psychotherapist.

11 Since this murder she's enjoyed a symbiotic
12 relationship with the media. Local media personnel
13 have handed to her and made a celebrity out of her
14 which she relishes. Although refusing to testify
15 under oath before the grand jury, through the
16 cooperative media, this defendant was able to saturate
17 the community with her version of the facts in the
18 investigation while ethical and legal responsibility
19 prevented law enforcement from responding to her
20 allegations.

21 As a media celebrity, she has the capability
22 of parlaying the situation into a lot of money. She's
23 indicated that she and her boyfriend, murderer-rapist
24 Randall Woodfield intend to write a book together.

25 The media shows every indication of

1 continuing to promote her every word and action. This
2 defendant has also indicated her intention to sue many
3 people in the institutions involved in these events
4 for civil damages that she claims will result in
5 millions of dollars going to her.

6 Therefore, for these reasons the Court
7 should impose the maximum allowable financial
8 penalties upon this defendant to prevent a scenario
9 where she goes to prison and gets rich while the
10 taxpayers work to support her and pay for the damage
11 she has done.

12 This is not a case for any form of leniency.
13 This defendant is a gutless coward who attempted to
14 execute all of her children, was partially successful.
15 This ugly and despicable human should never again be
16 unleashed upon the public.

17 In this case the police did their job. The
18 witnesses, hospital personnel, experts, at great
19 sacrifice and personal hardship did theirs. The case
20 was prosecuted and the jury anguished and did its job.
21 This community can be proud of this response. Now
22 it's up to you, Judge Foote, to do your job and to
23 impose the maximum allowable sentence.

24 THE COURT: I have a question, Mr. Hugi.
25 You indicated that on Counts III and V your

1 recommendation was 20 years with a 10-year mandatory
2 minimum?

3 MR. HUGI: That's correct.

4 THE COURT: Is it your position that the
5 Court cannot enhance that under the dangerous offender
6 statute?

7 MR. HUGI: My reading of the cases says that
8 that dangerous offender can only be used once per
9 criminal episode.

10 I don't agree with that, but that seems to
11 be the principle of lenity adopted by our appellate
12 courts. I'd be willing to let them sort this out if
13 the Court were inclined to impose consecutive
14 dangerous offender sentences.

15 THE COURT: Mr. Jagger?

16 MR. JAGGER: Yes, your Honor.

17 Very briefly, I would agree that the present
18 state of the law, appellate law, is it's one per
19 criminal episode, to respond to the Court's most
20 recent question.

21 I don't believe this is the time for
22 reargument. A good part of what was within this
23 presentence report I think the Court will in reviewing
24 it note some inaccuracies, but that is to be expected
25 perhaps when the report is written by someone that was

1 not present during the trial, and to a certain -- to a
2 great sense, some of these inaccuracies are not
3 terribly relevant as far as the Court's decision here.

4 I'm also not going to I guess take the
5 opportunity to respond to all of what Mr. Hugi said.
6 I think a lot of it is a repetition of the argument
7 made during the course of the trial, and I don't think
8 this is the appropriate forum or place to redo that.
9 I'm not going to do that.

10 There were a few things that Mr. Hugi was
11 referring to that were not in the trial that are
12 fabricated, either completely or by their intended
13 inference.

14 One is her boyfriend Mr. Woodfield and all
15 these comments about that. That is total fabrication.
16 Mr. Woodfield wrote to her under a different name.
17 She didn't know who she was talking to for a good
18 period of time. It's not a boyfriend situation.

19 The situation as far as the book,
20 anticipated income is a total fabrication to support
21 Mr. Hugi's request that she receive apparently some
22 kind of a fine over and above what period of
23 incarceration would be imposed.

24 Case law is pretty clear that to impose
25 restitution amounts, things of that nature, that we

1 need to have some showing of her present ability or
2 future ability to have some income.

3 What Mr. Hugi says she's employed by the
4 postal service. It's pretty clear she has not been
5 working there for a period of time, and she's been
6 terminated. So she's not working there any more at
7 all. She has no source of income at all.

8 They have not established any showing of any
9 ability to pay such sums as Mr. Hugi is requesting.

10 It makes reference to her not passing a
11 polygraph. Some evidence -- I think the Court maybe
12 even reviewed some of the transcripts that did not -- of
13 course the inference to be made from that is that she
14 failed the polygraph examination. In fact, that
15 examination was inconclusive, could not come to a
16 conclusion one way or the other concerning that.

17 So the inference made by Mr. Hugi is a false
18 one that she failed to pass one. It was inconclusive.
19 The polygrapher did not come to a conclusion
20 concerning that.

21 So as to testify before the grand jury, I
22 don't need to respond to that. The Court understands
23 that kind of a situation, legally the responsibility
24 of representation of someone whether or not they
25 appear before the grand jury or not. I think the only

1 reason that is more for public consumption than for
2 the Court's consideration as that really has no
3 bearing on the sentence here today.

4 Those are the additional matters. The other
5 things -- the other facts that Mr. Hugl sets forth, a
6 great deal of name calling which really -- it can't be
7 of much benefit except to enhance Mr. Hugl's own
8 image, how the public sees the prosecution. But
9 obviously it's not facts. It's just public name
10 calling, and I'm not going to take the temptation to
11 respond to that kind of situation.

12 I've reviewed the presentence report with
13 Ms. Downs. Factually I think basically what is within
14 that is of course the state's position on the matter
15 because an appeal will be forthcoming. She was
16 instructed not to respond to the presentence report
17 writer, but the Court has obviously, as the Court has
18 indicated, has a great deal of information concerning
19 her in this particular case. And I don't believe I
20 need to spend time going through that. And those are
21 the answers to the various things Mr. Hugl was saying.

22 We can see there's a merger of particular
23 counts, and that's been set forth in the presentence
24 report, our position that there's such a merger.

25 Ms. Downs' position, I think it's important

1 to advise the Court today, is the same that she has
2 maintained throughout these proceedings. She
3 maintained she's innocent of these charges. And I
4 think though the family also is still investigating
5 the case, investigating -- I think there's been some
6 indication concerning a gun that we're attempting to
7 locate. There has been some evidence come to us of
8 jury coercion as a result of the deliberations in this
9 particular case, and that will be pursued also.

10 She does still now and has indicated that we
11 have no reason to suspect otherwise that she is
12 innocent and will always remain innocent. She has
13 indicated to me her respect and understanding of the
14 court system we were involved in, understands the
15 jury's verdict and understands that the comments the
16 Court will make have to basically because of our
17 system assume that what the jury's verdict was is in
18 fact true. She understands that.

19 She understands that as a result of that
20 jury verdict certain consequences fall upon her and
21 she is not a fighter of the system. She's accepting
22 and understands the natural consequences of different
23 decisions throughout this particular legal system.

24 She intends to still pursue and hopefully I
25 think what is primarily her hope at this point is that

1 ultimately the person responsible will be found. She
2 just in the last two or three days has some additional
3 information pointing to someone in the vicinity who
4 the police contacted. No report was generated
5 whatsoever which seems to give some indication of
6 culpability of that person, and we'll be pursuing that
7 too.

8 She understands today is the day that we
9 cannot postpone, we must deal with. And these other
10 matters she's pursuing will be pursued and brought
11 before the Court at other times. She does request
12 leniency of the Court, and that's all we have at this
13 time.

14 She may have a statement.

15 THE COURT: Ms. Downs, do you wish to say
16 anything?

17 THE DEFENDANT: Yes, your Honor. I would
18 like to say that I came before this Court and was
19 tried and was told that I was guilty of a crime which
20 I did not commit. I still state that I'm not guilty.

21 But because I'm a law abiding citizen, if
22 this Court wishes to impose a sentence upon me,
23 then I will succumb to that. I will do the time for
24 the man that murdered my daughter.

25 I think it's also important for me to tell

1 this community -- because I have friends, I have
2 people that I've met during the past 15 months that I
3 care about -- that they cannot let down their guard
4 because there's still a killer out there.

5 They can't just sit back and say that
6 they're pleased that the murderer has been sent to
7 prison because somebody else may die if they let their
8 guard down, and I can't let that happen.

9 But most important, your Honor, I have to
10 say that I love my kids very much, all my children.
11 Christie was my very best friend, and I think that the
12 pain that she has suffered is more than she should
13 have ever suffered. But what has been decided in this
14 courtroom only brings more pain on her.

15 My little boy, Danny, used to cry in the
16 hospital because mommy wouldn't come to see him.
17 Mommy didn't choose not to come to see him. That was
18 something that was imposed upon her also.

19 A little girl which I carried for nine
20 months I held for four hours, and it was taken from me
21 which I'll probably never see again. She doesn't
22 deserve that either.

23 But most important, your Honor, my daughter
24 died. She was murdered and her killer was set free
25 just as if he sat in this courtroom and was found not

1 guilty himself.

2 I will abide by the wishes of this Court and
3 I will go to prison, but when my time is up, your
4 Honor, I intend to find the person that did this and I
5 would bring him to Court. And if you want to set him
6 free again, you may, but I intend to find him. That's
7 all.

8 THE COURT: The Court has made a prior
9 finding concerning the dangerous offender status, and
10 I want to also address myself to the issue of
11 restitution.

12 This case does present a somewhat unique
13 situation in that respect because it's difficult for
14 the Court at this point to presuppose either what
15 expenses there are.

16 I understand there's been some insurance
17 applied. I don't know where that's coming from, who's
18 paying for that, where's there some entitlement there.
19 I don't know what property the defendant has which is
20 available to be applied to the restitution, and I
21 don't know what her earning capacity might be.

22 But I suspect if Mr. Hugi is correct, there
23 may well be some ability to generate income. She has
24 demonstrated some writing skills. This case is one of
25 a fair amount of notoriety. And so the Court is

1 prepared to order at this time that restitution be
2 made in an amount to be determined subsequently when
3 the information becomes more available.

4 And I assume that that will be within the
5 near future, but I do think that that should be part
6 of the Court's order. And what I'll do is allow the
7 district attorney 30 days to submit information on
8 that, and then it may require another hearing after
9 that time in order to determine that amount.

10 Moving to the -- and I think this is the
11 proper time to indicate that I think that the actions
12 that took place on the night of the shooting represent
13 certainly on behalf of the medical community the best
14 that could have been expected.

15 Those people reacted heroically to that
16 situation, and as a result at least two of those
17 children are still alive. And I think that that
18 wouldn't have occurred had not those heroic actions
19 taken place, and I think that those people ought to
20 be commended.

21 The death of a child is one of life's great
22 tragedies. Obviously it ends something that is living
23 and viable, but it also ends something much more, what
24 might have been, what that child might have become.
25 How that child might have affected other people.

1 When that death becomes intentional and at
2 the hands of a parent, a person charged with the
3 nurture and comfort of that child, it's an outrage, an
4 outrage of the highest proportions.

5 This is a case in which emotions have run
6 very high, and the Court is not without feelings in
7 that respect as well. And I don't apologize for the
8 fact that I reacted emotionally to what I saw for six
9 weeks in this courtroom. And it's feelings that make
10 us human and I hope also humane.

11 So the Court grieves for Cheryl, feels great
12 sorrow over what's happened to Christie and to Danny,
13 what they may still have to endure. The Court feels
14 anger. The Court feels frustration.

15 If I didn't feel those things, I don't think
16 I'd be fit for this job, and like I say, I don't
17 apologize for it.

18 It's ironic that the -- that that has become
19 an issue here because it's apparent that the defendant
20 perhaps lacks those feelings.

21 As I indicated, I don't think it's the
22 function of the Court not to have emotions. I think
23 it's important however that the Court place those
24 emotions in the proper perspective so that what should
25 be based on reason is not unduly influenced by

1 emotion, and likewise what is properly subject of
2 feelings is not dehumanized by what amounts to cold
3 rationality.

4 I think it's safe to say that it's my
5 reason, my intellect which tells me that somebody who
6 could so objectify her own children that she could
7 shoot them down and rid herself of them like they were
8 some kind of worthless baggage, someone who would
9 callously violate that precious bond of trust that
10 exists between a child and its mother and could show
11 so little remorse and empathy afterwards is certainly
12 a danger to other people and should never be in a
13 position of freedom.

14 That's based on reason. It's my emotions, I
15 guess, my feelings, my sense of fairness that tell me
16 that she doesn't deserve to be free.

17 These sentences, as the public may know, are
18 not always as they seem. What I may order in court is
19 not necessarily what takes place in the final
20 execution.

21 And so the Court is placed in sort of a
22 guessing game situation in terms of what may happen.
23 Once I commit this person to the Correction Division,
24 I lose all control over this case. And what happens
25 at that point is up to the Parole Board and they don't

1 have to worry about anything that I said here or
2 anything we heard for six weeks or whatever.

3 So I have to try to presuppose what may
4 happen and try to do the best I can from this end to
5 try to accomplish the objectives that I think are
6 appropriate.

7 On the charge of Murder, the law is clear
8 and requires that the Court impose a commitment to the
9 Corrections Division for the natural life, and I make
10 that order at this time. I also order that that be
11 enhanced with the five-year firearm enhancement.

12 Counts II and IV, charges of Attempted
13 Murder and Assault in the First Degree do merge for
14 sentencing. And the Court will sentence Ms. Downs as
15 a Dangerous Offender, impose the maximum sentence of
16 30 years' confinement to the Corrections Division,
17 will order a 15-year minimum mandatory and five-year
18 firearm enhancement, that five years of course to run
19 concurrent with the 15, pursuant to recent case law.

20 On Counts III and V, again those to merge
21 for sentencing, the Court imposes the maximum of 20
22 years, once again orders a 10-year mandatory minimum
23 and a five-year firearm enhancement that would run
24 concurrent with the mandatory minimum.

25 It's further ordered that all sentences in

1 the case will run consecutive. It's the hope of this
2 Court that this defendant never again be free. It's
3 that simple. I don't think I've accomplished that
4 today, but it was my intent to come as close to that
5 objective as possible.

6 And you have a right to appeal this
7 decision. That should be done within 30 days. You
8 may wish to talk to your lawyer about that.

9 MR. JAGGER: If I can put on the record, I
10 would object to more than one five-year enhancement
11 being imposed, and it should apply to one criminal
12 episode. If I heard the Court correctly, I know it
13 was applying it to more than one of the offenses.

14 I would also object to there being a
15 mandatory minimum of 15 to 30 years' enhancement. My
16 position is that the Court would only have authority
17 to up to 10 years and cannot have a mandatory minimum
18 on the enhancing portion or the dangerous offender
19 portion.

20 That's for the record.

21 THE COURT: Do you have a position on that,
22 Mr. Hugi, do you want to be heard?

23 MR. HUGI: I think he's incorrect. I
24 believe those cases are contrary to this position. So
25 I would hope the Court would keep the sentence in

1 effect that it's imposed.

2 THE COURT: Objection overruled.

3 The defendant is remanded to the custody of
4 the sheriff. We're in recess.

5 (Whereupon, the hearing was
6 adjourned.)

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1 EUGENE, OREGON - MONDAY, OCTOBER 29, 1984 - 9:30 A.M.

2
3 THE COURT: We have both a matter of State
4 vs. Elizabeth Diane Downs hearing on restitution and
5 juvenile matters pertaining to Christie Ann and
6 Stephen Daniel Downs.

7 Do the parties have a preference as to which
8 matters we should take up first?

9 MR. HUGI: Let's get the restitution out of
10 the way first.

11 MR. JAGGER: That sounds fine.

12 THE COURT: I've reviewed the objections
13 filed by the defense and also the state's response.
14 I'll hear first from the state on that issue.

15 MR. HUGI: I have nothing to add.

16 THE COURT: Mr. Jagger?

17 MR. JAGGER: I guess I really don't have
18 anything to add. I know the Court reviewed -- for the
19 record I would point out I'm sure the Court has
20 reviewed the Dillon case that did not allow AFS
21 recovery.

22 It's important to point out while the
23 state's brief is three pages, it does not address at
24 all some of the jurisdictional questions that we've
25 raised, and I guess my position is that I think they

1 may be conceding at that point that really you are
2 without authority at this point to impose this
3 restitution.

4 They did not say so affirmatively, but they
5 do not meet the bulk of our objections listed in our
6 letter dated October 2nd.

7 Outside of that, our position is clear. We
8 object to them.

9 THE COURT: Do you wish to respond?

10 MR. HUGI: I think the jurisdictional
11 questions -- the first thing that was dealt with under
12 the heading "Timeliness of Restitution Hearing," so I
13 think it's been covered.

14 THE COURT: With respect to the timeliness
15 issue, it's long been the policy of this Court to
16 consider the matter of restitution, oftentimes after
17 the actual sentencing. And essentially what the Court
18 does in that -- those cases is address the issue of
19 restitution at the sentencing and in effect continue
20 the sentencing so that the appropriate figures can be
21 submitted and allow the defendant the opportunity to
22 object to those amounts specifically.

23 The alternative to that I think would result
24 in most cases in delays in sentencing which I think
25 would work to the disadvantage of most defendants if

1 we had to wait until all of the financial information
2 was available to the Court.

3 It would oftentimes mean that defendants who
4 are in custody would remain in custody until such a
5 time as those figures were complete.

6 Those issues are oftentimes addressed in the
7 presentence investigation but not with the specificity
8 that is required.

9 I don't see that this Court's -- I'm aware
10 that it's the policy of the Circuit Court in general.
11 I don't see that that policy is in conflict with the
12 statute that's been cited.

13 I think that again what we're doing is
14 simply continuing the matter of sentencing to
15 incorporate that issue in the information that was
16 available. So I'm going to order restitution may
17 still be recoverable.

18 Do the parties have anything to add
19 concerning the amount that should be ordered?

20 MR. JAGGER: No, your Honor, I think we've
21 indicated our position here as far as the burden. I
22 think we really don't have anything over and above
23 what we've set forth in our letter.

24 We object to the nature of the proof of the
25 particular items of restitution and the nature of the

1 different types of restitution.

2 We've had the appellate court comment on
3 this issue a couple of times. I wish the Court --
4 wish to leave it to the appellate court to make the
5 decision, and obviously they'll have to.

6 I don't have anything further other than
7 what I've indicated in our letter of objection.

8 THE COURT: One of the difficulties that I'm
9 having with the overall issue here on the amounts is
10 the fact that there have been funds extended by
11 Children's Services to date for the care of these two
12 children.

13 There's also been a substantial amount of
14 medical expense incurred which has been largely covered
15 by the defendant's insurance policy that was I guess a
16 part of her employment.

17 Anyway, we also have the issue of the
18 state's costs involved, and I think that the Court in
19 considering those amounts does have to consider the
20 insurance issue and does have to consider the issue of
21 the defendant's ability to pay those amounts.

22 So what I'm prepared to do at this time is
23 limit the restitution to the amounts actually
24 disbursed by Children's Services Division and the
25 state's costs, leaving the other medical expenses to

1 be covered by insurance, noting that of course there
2 are some civil remedies available as well.

3 Now that I believe -- if I read this
4 right -- leaves us with a balance of \$2,163.38 for
5 Christie and -- let me correct that. Maybe counsel
6 could help me on that, Mr. Hugi?

7 I understand that some of that has been
8 reimbursed by Social Security. I'm looking at page 2.

9 It looks like we're dealing with 2163 plus
10 the medical expenses paid by Adult and Family Services
11 listed there on the bottom half of that page, is that
12 correct?

13 MR. HUGI: That looks correct.

14 THE COURT: On that basis, the Court would
15 be prepared to order that restitution be paid in the
16 amount of \$5,339.80 for services provided by the state
17 to date. And also for the amount of \$12,113.92 which
18 are the state's costs of prosecution in this matter.

19 I'm not prepared to award restitution for
20 anticipated future costs, nor am I going to award the
21 restitution for the medical services that have been
22 covered by insurance.

23 I think that there are some problems with
24 both the Court's ability to determine what those
25 future costs are and also the ability of the defendant

1 to pay those. So that will be the order of the Court.

2 Now moving to --

3 MR. JAGGER: Excuse me, your Honor, I
4 hesitate to interrupt you, but to make sure that the
5 record is clear that we have done our job down here, I
6 assume that the initial September 20th '84 submission
7 to the Court by the district attorney's office
8 concerning restitution and costs, also our letter of
9 October 2nd and the state's response which is -- I
10 think was filed Thursday or Friday and the attachments
11 would all be part of the file and would be in the
12 file, I assume?

13 THE COURT: Yes.

14 MR. JAGGER: Okay, fine.

15 THE COURT: All right now, moving to the
16 juvenile matters, let me clarify one thing.

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20 RECEIVED
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23 PUBLIC DEFENDERS OFFICE



1 STATE OF OREGON)
2) ss.
3 County of Lane)
4

5 I, Kay V. Cates, C.M., Registered
6 Professional Reporter, do hereby certify that I was a
7 duly appointed Official Court Reporter for the Second
8 Judicial District of Oregon, and was acting in that
9 official capacity on the 6th day of April; the 8th, 9th,
10 10th, 11th, 14th, 15th, 16th, 17th, 18th, 21st, 22nd,
11 23rd, 24th, 29th, 30th and 31st days of May; the 1st,
12 4th, 5th, 6th, 7th, 8th, 11th, 12th and 17th days of
13 June; the 28th day of August; and the 29th day of
14 October, 1984, during the proceedings of the foregoing
15 cause.

16 I further certify that the foregoing
17 reporter's transcript is a true and correct transcript
18 of proceedings and that the proceedings were taken
19 down by me in stenotype and thereafter reduced to
20 typewriting under my direction.

21 IN WITNESS WHEREOF, I have hereunto set my
22 hand this 27th day of June, 1985.

23 Kay V. Cates
24 Kay V. Cates
25 Official Court Reporter
Lane County Courthouse
Eugene, Oregon

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