

1 LOS ANGELES, CA - JANUARY 28, 2010 - MORNING SESSION

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3
4 THE COURT: OKAY. MR. POURAT IS PRESENT.

5 COUNSEL FOR THE DEFENDANT, PLEASE STATE YOUR
6 APPEARANCE.

7 MR. RICHARDS: GOOD MORNING, YOUR HONOR. RONALD
8 RICHARDS AND PATRICK SANTOS APPEARING FOR MR. POURAT WHO IS
9 PRESENT IN COURT.

10 MS. ANTONESCU: STEFANA ANTONESCU FOR THE PEOPLE.

11 THE COURT: AND THE OTHER GENTLEMAN IS?

12 MR. RICHARDS: PATRICK SANTOS. HE'S AN ASSOCIATE OF MY
13 FIRM.

14 THE COURT: THANK YOU.

15 ALL RIGHT. THIS MATTER IS CALENDARED TODAY FOR
16 A 995 MOTION RELATING TO THE INFORMATION THAT -- ON WHICH
17 THE DEFENDANT HAS ALREADY BEEN ARRAIGNED. THE COURT HAS
18 READ THE MOTION, THE PEOPLE'S OPPOSITION, AND ALSO THE
19 REPLY TO THE PEOPLE'S OPPOSITION. THE LAST DOCUMENT THAT I
20 RECEIVED IS THE REPLY, SO I'LL LET THE PEOPLE RESPOND FIRST
21 BECAUSE I'VE GOTTEN TWO PLEADINGS FROM THE DEFENSE, AND ONE
22 FROM THE PEOPLE. THEN AFTER THAT I'LL HEAR AGAIN FROM THE
23 DEFENSE, AND WE'LL GO BACK AND FORTH UNTIL THE MATTER IS
24 SUBMITTED.

25 SO IF YOU'LL WILL, COUNSEL.

26 MS. ANTONESCU: THANK YOU, YOUR HONOR.

27 IN THIS CASE, THE PEOPLE HAVE FILED FIVE COUNTS OF
28 ATTEMPTED MURDER, ONCE FOR EACH TIME THE GUN WAS PLACED IN

1 FRONT OF MS. MEDIC AND THE TRIGGER WAS PULLED. I THINK
2 THAT THERE CAN BE AN ARGUMENT THAT EACH TIME THAT THAT
3 CONDUCT AROSE SHOWS A SEPARATE ATTEMPT TO KILL.

4 ALTHOUGH I THINK MORE PROPERLY IF WE WERE TO VIEW
5 THE CONDUCT IN WHOLE, IN ITS ENTIRETY, THAT THE REPEATED
6 CONDUCT OF PULLING THE GUN, SPINNING THE CYLINDER, AND
7 PULLING THE TRIGGER AT VERY CLOSE PROXIMITY TO THE VICTIM,
8 I THINK THAT SHOWS AN INTENT TO KILL. SO I THINK THAT
9 EITHER WAY WE LOOK AT IT, WE CAN INFER FROM THE CONDUCT OF
10 THE DEFENDANT THAT HE DID, IN FACT, INTEND TO KILL
11 MS. MEDIC WHEN HE ENGAGED IN THIS CONDUCT.

12 I THINK THAT THE DEFENDANT COULD HAVE DUAL INTENT.
13 FOR EXAMPLE, HE COULD HAVE INTENDED TO SCARE HER. OR AN
14 ARGUMENT CAN BE MADE, AND CAN BE INFERRED FROM THE
15 CIRCUMSTANCES FROM THE CONDUCT, THAT HE, IN FACT, INTENDED
16 TO KILL HER. I THINK THAT WHEN ONE ENGAGES IN SUCH
17 CONDUCT, WHEN ONE PULLS A GUN, LOADS THE GUN, SPINS THE
18 CYLINDER, PULLS THE TRIGGER, THAT WE CAN INFER FROM THAT AN
19 INTENT TO KILL.

20 THE FACT THAT HE IS DOING THIS, AND, IN FACT,
21 LEAVING IT UP TO CHANCE, OR GOD, THAT SHE LIVES OR DIES, I
22 THINK IS SORT OF -- I THINK WE CAN INFER AN INTENT TO KILL.
23 I THINK WE CAN ABSOLUTELY INFER AN INTENT TO KILL THAT WHEN
24 HIS CONDUCT IS SUCH THAT HE'S LEAVING IT TO CHANCE, I THINK
25 IT'S KIND OF DISINGENUOUS TO SAY HE DIDN'T HAVE AN INTENT
26 TO KILL. AND THE FACT THAT THE BULLET WASN'T DISCHARGED
27 AND MS. MEDIC WASN'T KILLED, THE ABSENCE OF THE KILLING IS
28 NOT AN ABSENCE OF THE INTENT TO KILL.

1 THE COURT: HOW DO YOU RESPOND TO THE DEFENSE ARGUMENT
2 THAT IF THAT WAS HIS INTENT, WHY DID HE JUST KEEP PULLING
3 THE TRIGGER? BECAUSE IF HE PUT -- IF THE GUN WAS HALF
4 LOADED, AT SOME POINT IN TIME, NO MATTER HOW YOU LOOK AT
5 IT, THE CYLINDER IS GOING TO GO SPIN AROUND ON TO A LIVE
6 ROUND, AND THE BULLET IS GOING TO BE FIRED INTO THE HEAD OF
7 THE PERSON. SO THEIR POSITION IS, IF THERE'S AN EXPRESS
8 INTENT TO KILL, WHICH IS NECESSARY FOR ATTEMPTED MURDER,
9 WHY WOULDN'T YOU JUST KEEP PULLING THE TRIGGER?

10 MS. ANTONESCU: AND THE ARGUMENT IS THAT WHICH EACH
11 TIME HE DOES IT HE MAKES IT MORE LIKELY A BULLET WILL BE
12 EXPENDED THROUGH THE GUN. HE ONLY STOPS BECAUSE HE --
13 THERE'S OTHER THINGS GOING ON IN THE APARTMENT. AND SO I
14 DON'T EXACTLY KNOW WHY HE STOPS, BUT EACH TIME HE DOES IT
15 HE MAKES IT MORE LIKELY THAT A BULLET WILL BE EXPELLED.

16 SO I THINK GIVEN THE FACT THAT HE DOES IT A NUMBER
17 OF TIMES, THAT GOES EVEN MORE SO TO THE FACT THAT HE
18 INTENDED TO KILL.

19 THE COURT: ONE OF THE WAYS THAT SOMETIMES WE LOOK AT
20 THINGS IS WHETHER THE GUN IS MISFIRING. IN OTHER WORDS,
21 THE PERSON ATTEMPTS TO FIRE A WEAPON UNDER CIRCUMSTANCES
22 WHERE THE WEAPON IS EXPECTED TO DISCHARGE, BUT FOR WHATEVER
23 REASON, BECAUSE OF A MALFUNCTION IN THE WEAPON, IT DOESN'T
24 HAPPEN. BUT NORMALLY IN THOSE SITUATIONS YOU DON'T HAVE
25 SOMEBODY ESSENTIALLY GIVING OPTIONS TO THE PERSON ON THE
26 RECEIVING END OF THE BARREL OF THE GUN, ESSENTIALLY SAYING,
27 YOU KNOW, IF YOU DON'T TELL ME WHAT I WANT TO KNOW, YOU
28 KNOW, THEN THIS IS WHAT'S GOING TO HAPPEN TO YOU, AND THEN

1 THEY CONTINUE TO CLICK THE REVOLVER. THAT'S WHAT WE
2 NORMALLY DON'T SEE.

3 SOMETIMES WE HAVE A SITUATION WHERE SOMEBODY IS
4 SEEN TO DRAW A WEAPON, POINT IT AT SOMEONE. THEY PULL THE
5 TRIGGER, AND NOTHING HAPPENS. AND THEY DO IT AGAIN, AND
6 NOTHING HAPPENS. THAT'S A PRETTY STRONG ARGUMENT THAT
7 THEY'RE NOT DOING IT TO SCARE THE PERSON; THAT THEY'RE
8 DOING IT BECAUSE THEY INTEND THE ROUND TO FIRE, BUT FOR
9 SOME REASON THERE'S A MALFUNCTION.

10 IN THIS CASE, IT APPEARS TO BE THE OTHER WAY
11 AROUND, WHERE THERE DOESN'T APPEAR TO BE ANY EVIDENCE OF
12 ANY MALFUNCTION OF THE WEAPON, BUT RATHER THAT THIS IS PART
13 OF THE PLAN, AS IT WERE, TO TRY AND FORCE THE INDIVIDUAL TO
14 COME UP WITH THE INFORMATION THAT MR. POURAT WANTS.

15 SO IT'S KIND OF AN UNUSUAL FACT PATTERN, TO SAY
16 THE LEAST. SO ANY OTHER COMMENTS YOU WANT TO MAKE IN
17 RESPONSE TO WHAT THE COURT'S GOING TO SAY?

18 MS. ANTONESCU: NO, YOUR HONOR. SUBMITTED.

19 THE COURT: OKAY. THANK YOU.

20 NOW WE'LL HEAR FROM THE DEFENSE.

21 MR. RICHARDS: YES, YOUR HONOR. DOES THE COURT HAVE
22 ANY OPINION AS TO MY PROCEDURAL OBJECTION UNDER 739,
23 ARTICLE 1, SECTION A? BECAUSE I WOULD HAVE HANDLED THE
24 PRELIM ENTIRELY DIFFERENTLY IF I WOULD HAVE HAD ANY INKLING
25 THAT THIS WAS GOING TO BE RE-FILED AS AN ATTEMPTED MURDER
26 CHARGE. I FOCUSED MY RESEARCH, MY QUESTIONS, ON THE
27 KIDNAPPING FOR EXTORTION, WHICH WAS VINDICATED BY THE
28 MAGISTRATE, AND THE PEOPLE NOW AGREE THAT WAS AN

1 IMPROPERLY-FILED CHARGE.

2 SO MY CONCERN IS THAT BY THE PEOPLE MERELY FILING
3 THE ATTEMPTED MURDER, WHAT THEY'RE DOING IS THEY'RE DOING
4 AN END RUN AROUND THE MAGISTRATE, AND THE PRELIMINARY-
5 HEARING PROCESS, AND VIOLATING ARTICLE 1, SECTION A OF THE
6 CALIFORNIA CONSTITUTION BECAUSE WHAT REALLY THEY'RE ASKING
7 THE COURT TO DO IS NOW RULE ON AN ATTEMPTED MURDER CHARGE
8 WITHOUT EVEN HAVING THE MAGISTRATE HEAR CROSS-EXAMINATION
9 ON THAT SPECIFIC CHARGE.

10 I FELT THAT 739 -- WE CITED CASES IN MY BRIEF --
11 IS TAILORED BY THE DUE-PROCESS CLAUSE. IT'S NOT AN
12 ABSOLUTE RIGHT THAT THE PEOPLE COULD FILE ANY CHARGE THEY
13 WANT FROM THE UNDERLYING FACTS OF THE PRELIMINARY HEARING.

14 IN ADDITION, THEY HAVE TO BE TRANSACTIONALLY
15 RELATED, AND THE FACTS IN THIS CASE WAS MR. POURAT WAS
16 TRYING TO SCARE THE VICTIM INTO TELLING THEM WHERE THIS
17 PERSON WAS THAT HAD JUST SHOT A FRIEND OF HIS. THE
18 TESTIMONY ALSO CAME OUT SHE'D NEVER FIRED A GUN, SHE WASN'T
19 FAMILIAR WITH AMMUNITION.

20 STATISTICALLY IT'S HIGHLY UNLIKELY THAT THERE WAS
21 ANY LIVE ROUNDS IN THE BULLET -- IN THE GUN. WE SHOWED THE
22 COURT THAT IT COULD BE LESS THAN A THREE PERCENT CHANCE
23 THAT IF YOU FIRED A GUN THAT WAS HALF FULL OF LIVE ROUNDS
24 THAT A BULLET WOULDN'T DISCHARGE.

25 THEY HAD JUST HAD SEXUAL INTERCOURSE BEFORE THIS
26 INCIDENT IN THE SAME BUILDING. HE WAS FRIENDS WITH HER.
27 THEY WOULD GO OUT TOGETHER TO CLUBS. THERE'S REALLY NO
28 FACTS THAT HE INTENDED TO KILL HER. HE WAS ACTING LIKE AN

1 IDIOT IN A VERY STUPID MANNER, BUT MY CONCERN, AS HIS
2 LAWYER, WAS THAT IT SEEMS LIKE SOUR GRAPES AT THE PRELIM
3 SIMPLY BECAUSE I POINTED OUT THAT WITHHOLDING SOMEONE FROM
4 INFORMATION IS NOT A PROPERTY RIGHT IDENTIFIED OR
5 ACKNOWLEDGED BY THE LEGISLATURE OR THE COURT OF APPEAL;
6 THAT THIS CAN'T BE A KIDNAPPING FOR EXTORTION CASE. AND
7 ULTIMATELY, AFTER LENGTHY DISCUSSION AND ARGUMENT, JUDGE
8 RAYVIS AGREED WITH ME.

9 THEN I GOT SURPRISED BY THIS. I THINK IT'S A
10 WORSE POSITION TO ALLOW THE DISTRICT ATTORNEY'S OFFICE TO
11 SORT OF USURP THE JUDICIAL BRANCH BY SIMPLY FILING THESE
12 CHARGES, AND THAT'S WHY I SPENT A GREAT DEAL OF TIME ON MY
13 BRIEF ON THE PROCEDURAL ISSUES BECAUSE I BELIEVE HE WAS
14 DENIED A SUBSTANTIAL RIGHT AT THE PRELIM BECAUSE I DIDN'T
15 CROSS-EXAMINE ANYTHING ABOUT HIS INTENT TO KILL BECAUSE I
16 HAD NO IDEA THAT THIS WAS EVER GOING TO HAPPEN.

17 THE COURT: MR. RICHARDS, IT'S SIMPLE TO SAY THAT YOU
18 WOULD HAVE DONE A LOT OF THINGS DIFFERENTLY. I CAN'T
19 IMAGINE HOW YOU WOULD HAVE DONE ANYTHING DIFFERENTLY. THE
20 FACTS ARE THE FACTS, EVEN AS YOU HAVE PUT IN YOUR BRIEF --
21 YOU WROTE THOSE WORDS -- "THE FACTS ARE THE FACTS."
22 INDEED. AND WHAT MORE COULD YOU HAVE ASKED OF HER OTHER
23 THAN WHAT SHE TESTIFIED TO?

24 SO I DON'T SEE ANY MERIT TO YOUR PROCEDURAL
25 ARGUMENT THAT SOMEHOW THIS IS AN END RUN. THE JONES
26 DECISION SAYS THIS CAN BE DONE BECAUSE OF THE SITUATION
27 INVOLVED. THE CHARGES MAY BE FILED ON ANY EVIDENCE ADDUCED
28 AT THE PRELIMINARY HEARING WHETHER OR NOT THE CHARGE WAS

1 BEFORE THE COURT AT THAT TIME. HOWEVER, THE SPECTER OF A
2 DUE-PROCESS PROBLEM ONLY ARISES WHEN SOMEONE IS BEING
3 COMPLETELY SURPRISED BY WHAT'S COMING OUT OF LEFT FIELD,
4 AND NOBODY HAS ANY IDEA THIS COULD POSSIBLY HAPPEN.

5 WHEN THE EVIDENCE IS THAT ON REPEATED OCCASION
6 YOUR CLIENT HOLDS A GUN TO THE HEAD OF SOMEBODY AND PLAYS
7 RUSSIAN ROULETTE WITH A GUN, ESSENTIALLY TELLING THE PERSON
8 THAT IF SHE DOESN'T GIVE UP THE INFORMATION HE'S GOING TO
9 KEEP PULLING THE TRIGGER, I THINK TO SOMEHOW ARGUE THAT
10 YOU'RE SURPRISED THAT THE PROSECUTION MIGHT SUGGEST THAT HE
11 HAD AN EXPRESS INTENT TO KILL, IT'S AN ARGUMENT, BUT I
12 THINK IT HAS NO BASIS.

13 MR. RICHARDS: YOUR HONOR --

14 THE COURT: SO I DON'T THINK PROCEDURALLY YOU HAVE A
15 LEG TO STAND ON. THIS IS A FACTUAL ISSUE AS TO WHETHER THE
16 CHARGE, THE NEW CHARGES, ARE MADE OR SUPPORTED TO A STRONG
17 SUSPICION BY THE EVIDENCE ADDUCED AT THE PRELIMINARY
18 HEARING.

19 MR. RICHARDS: NO PROBLEM. I JUST WANTED TO RAISE IT.
20 I SORT OF AGREE WITH THE COURT, BUT THERE WAS A DEBATE IN
21 MY OFFICE OF THAT ISSUE, AND I JUST WANTED TO PRESERVE IT.

22 LET ME FOCUS ON THE SUBSTANTIVE FACTS.

23 THE COURT: THANK YOU.

24 MR. RICHARDS: THE SUBSTANTIVE FACTS IS THAT THIS
25 BEHAVIOR IS, AT BEST, WANTON BEHAVIOR, AND THIS WOULD BE AN
26 IMPLIED-MALICE-TYPE SITUATION. AND THE CASES THAT WE CITED
27 ALL STAND FOR THE PROPOSITION THAT IMPLIED MALICE CANNOT BE
28 THE BASIS OF AN ATTEMPTED MURDER CHARGE.

1 IN ADDITION, THE EVIDENCE THAT WAS DEDUCED AT THE
2 PRELIM WAS NOT THAT HE WAS TRYING TO KILL HER. HE HAD A
3 SPECIFIC PLAN AND THEN HE FELL ASLEEP. THERE WAS PEOPLE
4 COMING IN AND OUT OF THE ROOM. THERE WAS OTHER DEFENDANTS
5 THAT WERE INVOLVED IN THIS, AND THERE WAS NEVER A
6 DISCUSSION OR EVIDENCE AMONGST ANYBODY THAT THEY HAD SOME
7 PLAN TO KILL MS. MEDIC.

8 IT'S EXACTLY AS THE COURT OPINED, THAT HE WAS
9 TRYING TO SCARE HER. IT'S NOT A SITUATION WHERE THE OTHER
10 CASES ARE CITED WHERE THERE'S A FIRING, THERE'S A DISCHARGE
11 OF THE PROJECTIVE AT THE PERSON AND THEY MISS. THERE'S
12 CLEAR INDICATION THEY WANTED THE GUN TO GO OFF, AND THE
13 BULLET MALFUNCTIONS.

14 THIS IS -- IT'S -- IT'S NOT A COINCIDENCE THAT
15 THERE'S NO REPORTED CASE IN CALIFORNIA EVER OF SOMEONE
16 PLAYING RUSSIAN ROULETTE, AND THERE BEING AN ATTEMPTED
17 MURDER CHARGE AS A RESULT OF THE RUSSIAN ROULETTE, AND
18 THAT'S BECAUSE IN THIS PARTICULAR FACT PATTERN -- IN ALL
19 THE OTHER CASES THEY HAD EVIDENCE THAT THERE WAS SOME SORT
20 OF RACIAL PREJUDICE AGAINST THE VICTIM; THAT THE BULLET WAS
21 ACTUALLY DISCHARGED; THAT THE VICTIM WAS ACTUALLY SHOT.
22 THERE WAS A CLEAR MOTIVE OF THE CRIME THAT THEY WERE TRYING
23 TO DO A HIT, OR SOME OTHER -- YOU KNOW, THERE WAS SOME
24 DESIGN; THAT THAT WAS THE PLAN.

25 THE PLAN FROM THE FACTS AT THIS PARTICULAR PRELIM,
26 IT WAS VERY CLEAR WHAT WAS DEDUCED, AND THAT WAS THAT THIS
27 WAS A POOR ATTEMPT TO TRY TO GET HER TO PROVIDE
28 INFORMATION. WHEN WE SAID IF HE WANTED TO KILL HER HE

1 WOULD HAVE, THAT'S BECAUSE HE HAD EVERY OPPORTUNITY TO LOAD
2 THE GUN, HAVE ALL CHAMBERS LOADED, AND HE COULD HAVE JUST
3 PULLED THE TRIGGER. IT'S OBVIOUS HE DIDN'T WANT TO KILL
4 THE VICTIM. HE LIKED THE VICTIM. THEY WERE -- THE
5 VICTIM -- THE VICTIM AND MR. POURAT SPENT A LOT OF TIME
6 TOGETHER, INTIMATE TIME, AND UNFORTUNATELY FOR HIM HE WAS
7 USING SOME DRUGS THAT NIGHT.

8 THERE WAS OTHER ISSUES INVOLVED, BUT THIS DOESN'T
9 RISE TO THE LEVEL OF AN ATTEMPTED MURDER CHARGE BECAUSE I
10 DON'T BELIEVE THERE'S ANY REASONABLE INFERENCE AT THE
11 PRELIM THAT MR. POURAT HAD THE SPECIFIC INTENT TO KILL HER
12 ON THAT NIGHT. LIKE I SAID, HIS BEHAVIOR IS, AT BEST,
13 WANTON BEHAVIOR, AND THAT ABSENCE OF ANY OTHER FACTS, WE
14 CAN'T JUST TRANSFORM THAT BEHAVIOR INTO SOME SORT OF
15 EXPRESS MALICE, OR A SPECIFIC INTENT TO KILL.

16 THE THRESHOLD, I BELIEVE, WHEN YOU'RE DEALING WITH
17 A FIREARM IS THERE HAS TO BE SOME STEP THAT SHOWS THAT BUT
18 FOR SOME UNFORESEEABLE MALFUNCTION, THE BULLET WOULD HAVE
19 DISCHARGED, OR THE BULLET DISCHARGED AND MISSED THE PERSON.
20 THEN THE INTENT IS CLEAR. BUT IN THIS CASE IT'S OBVIOUS
21 FROM THE ENTIRE RECORD -- AND WE CITED A GOOD CASE ON
22 OUR -- IN OUR ORIGINAL BRIEF THAT SAID THE PROSECUTION JUST
23 CAN'T GRAB FROM FACTS HERE OR THERE IN ISOLATION, AND TO
24 TAKE THOSE FACTS AS AN INFERENCE; THAT THEY ACTUALLY -- IT
25 WAS ON PAGE 11 OF 20 OF OUR ORIGINAL BRIEF -- THAT THE
26 COURT HAS A DUTY TO RESOLVE THE ISSUE IN LIGHT OF THE WHOLE
27 RECORD, AND MAY NOT LIMIT ITS APPRAISAL TO ISOLATED BITS OF
28 EVIDENCE SELECTED BY THE PROSECUTION.

1 I MEAN, WHEN YOU LOOK AT THE WHOLE RECORD IT IS
2 WHAT IT IS, AND IT'S AN ASSAULT WITH A DEADLY WEAPON. IT'S
3 ALL THE OTHER CHARGES THAT WE DIDN'T ARGUE. BUT TO HOLD
4 THIS YOUNG MAN FOR AN ATTEMPTED MURDER CHARGE IS SIMPLY NOT
5 THERE IN THIS RECORD. THERE'S NO FACTS TO WARRANT IT, AND
6 THE EVIDENCE DEDUCED FROM IT DOES NOT SUPPORT THE ELEMENTS
7 THAT ARE REQUIRED FOR THIS SERIOUS OFFENSE.

8 THE COURT: THANK YOU.

9 ANYTHING FURTHER FROM THE PEOPLE?

10 MS. ANTONESCU: IF HIS INTENT WAS TO SCARE HER, HE DID
11 THAT THE FIRST TIME HE ENGAGED IN THIS CONDUCT. AND YET HE
12 CONTINUES TO DO IT. THE FACT THAT -- I MEAN, HE'S DOING
13 EVERYTHING POSSIBLE IN ORDER TO GET THAT BULLET TO BE
14 EXPELLED FROM THAT WEAPON.

15 THE COURT: WELL, THAT'S NOT TRUE. "EVERYTHING
16 POSSIBLE," WOULD INCLUDE, NUMBER ONE, LOADING THE GUN
17 FULLY, OR NUMBER TWO, CONTINUING TO PULL THE TRIGGER.

18 MS. ANTONESCU: HE DID FIVE TIMES. HE CONTINUED TO
19 PULL THE TRIGGER. SO HAVING HIM SAY, "WELL, IT'S LEAVING
20 IT UP TO GOD OR CHANCE THAT A BULLET WILL COME OUT," HE CAN
21 HAVE MORE THAN ONE INTENT. SO HIS INTENT CAN BE TO SCARE
22 HER AND TO KILL HER.

23 SO I THINK GIVEN THE FACT THAT WE HAVE THIS TYPE
24 OF CONDUCT -- AND HE DOES IT MULTIPLE TIMES -- I THINK
25 THAT -- WE CAN IF INFER FROM THAT EVIDENCE HE DID HAVE AN
26 INTENT TO KILL.

27 THE COURT: ALL RIGHT. THANK YOU.

28 ALL RIGHT. THE WAY THE COURT SEES IT IS THIS:

1 FIRST OF ALL, BECAUSE THE CHARGE WAS NOT BEFORE THE
2 MAGISTRATE, BUT NOW IT IS -- IN EFFECT I BECOME THE
3 MAGISTRATE -- THIS IS THE RARE OCCASION WHERE THE COURT IS
4 NOT TRYING TO DETERMINE WHETHER OR NOT THE ACTIONS OF
5 SOMEBODY ELSE ARE REASONABLE OR NOT. I'VE READ ALL OF THE
6 EVIDENCE IN THIS CASE IN THE PRELIMINARY HEARING TRANSCRIPT
7 AND THE THING THAT STANDS OUT TO ME, AND I THINK THE THING
8 THAT'S MOST IMPORTANT, IS THE ABSENCE OF ANY EVIDENCE
9 TENDING TO SHOW SOMETHING THAT WOULD INTERFERE WITH THE
10 DEFENDANT'S ABILITY TO CARRY OUT THE DEATH OF THE VICTIM IF
11 THAT WAS HIS INTENT, A MALFUNCTION OF THE WEAPON BEING
12 INTERRUPTED BEFORE HE COULD PULL THE TRIGGER THE FINAL
13 TIME, AS IT WERE, OR ENOUGH TIMES TO DISCHARGE THE WEAPON.

14 IT APPEARS THAT THIS WAS DONE, FOR ALL OUTWARD
15 PURPOSES, AS A CONTINUING ATTEMPT TO TRY AND OBTAIN THE
16 PROPERTY. AND THE EVIDENCE, I THINK FAIRLY READ, INDICATES
17 THE DEFENDANT DIDN'T CARE IF THE GUN WENT OFF. BUT IMPLIED
18 MALICE IS INSUFFICIENT AS A MATTER OF LAW. IT HAS TO BE
19 EXPRESS.

20 NOW, I PERSONALLY THINK THE LAW IS WRONG IN THAT
21 REGARD BECAUSE IF THE PERSON ACTUALLY DIES, THEN WE GET,
22 YOU KNOW -- THE PERSON COULD BE TRIED FOR MURDER ON AN
23 IMPLIED-MALICE THEORY. BUT IF THE PERSON DOESN'T DIE, THEY
24 CAN'T BE PROSECUTED FOR ATTEMPTED MURDER IF ALL THEY'RE
25 DOING IS ACTING IN A WANTON MANNER. I UNDERSTAND WHY.
26 IT'S BECAUSE OF THE DEFINITION OF WHAT CONSTITUTES AN
27 ATTEMPT. AND I UNDERSTAND WHY THE COURT HELD THAT MANY
28 YEARS AGO.

1 I THOUGHT FOR MANY YEARS THAT THIS IS WRONG
2 BECAUSE ONE OF THE THINGS THAT WE DON'T HAVE IN THIS STATE,
3 THAT WE SHOULD, IS A CRIMINAL OFFENSE DEALING WITH RECKLESS
4 ENDANGERMENT. AND ACCORDING TO THE MANNER IN WHICH A
5 PERSON'S LIFE IS IN DANGER THERE SHOULD BE A CONCOMITANT
6 INCREASE IN POTENTIAL FOR PUNISHMENT. FOR WHATEVER REASON,
7 WE DON'T HAVE THAT IN THIS STATE. MANY STATES HAVE SUCH A
8 STATUTE, AND WE DON'T. WE SHOULD BECAUSE THAT IS WHAT I
9 SEE HAPPENING HERE. THIS IS A RECKLESS ENDANGERMENT, BUT
10 UNDER THE LAWS OF CALIFORNIA IT IS NOT ATTEMPTED MURDER.
11 SO THE COURT BELIEVES THAT THERE IS NOT A STRONG-ENOUGH
12 SUSPICION BASED UPON THE EVIDENCE PRESENTED AT THE
13 PRELIMINARY HEARING TO SUPPORT THESE CHARGES.

14 HOWEVER, THAT DOES NOT MEAN THAT IF THE
15 PROSECUTION DOESN'T THINK THEY CAN PRESENT SUFFICIENT
16 EVIDENCE, AND DO IT ON A SECOND TIME AROUND, THAT THEY
17 CAN'T FILE ATTEMPTED MURDER CHARGES AND TRY TO PROVE THAT
18 THAT, IN FACT, IS WHAT THE DEFENDANT'S EXPRESS INTENT WAS,
19 WAS THE INTENT TO KILL. THEY CAN DO THAT. THEY JUST
20 DIDN'T DO IT AT THIS HEARING, AND THAT'S WHAT I'M LIMITED
21 TO, IS THE EVIDENCE AT THE HEARING. AS IT WAS MENTIONED IN
22 THE BRIEF, "THE FACTS ARE WHAT THE FACTS ARE," AND THE
23 FACTS HERE ARE NOT SUFFICIENT.

24 SO THE COURT'S DISMISSING COUNT 10 THROUGH 14
25 ONLY. WE HAVE THE REMAINDER OF THE CASE HERE, AND WE HAVE
26 OUR 50-OF-60 DATE OF FEBRUARY 18TH. WHAT'S NEXT?

27 MR. RICHARDS: CAN I APPROACH WITH COUNSEL FOR A
28 MINUTE, YOUR HONOR?