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# Who Shot Charles Summers?

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# WHO SHOT CHARLES SUMMERS?

*Kyle Graham*

**A**S RELATED BY THE California Supreme Court, the facts of *Summers v. Tice*<sup>1</sup> start out like a barroom joke, then transform into a *Rashomon* tragedy. Three hunters venture onto the open range, all armed with shotguns. One member of the group wanders ahead of the others. His companions spot a quail. Both fire at the quarry. One – but, most likely, only one – of these shots hits the third hunter in the eye and lip. Who did it? And, more pivotally for the injured hunter’s subsequent court case, if he can’t prove who did it, can he recover from both of his companions, only one, or neither?

In answering the latter question, the California Supreme Court started from the premises that both defendants were negligent and the plaintiff, through no fault of his own, could not ascertain who shot him. In light of these circumstances, the court ruled that the burden shifted to each defendant to show that he was *not* a cause of the plaintiff’s injury.<sup>2</sup> That way, the blameless plaintiff’s 50-50 case against each defendant would not founder upon the shoals of the preponderance standard of proof.

The simplicity of the *Summers* fact pattern and the elegance of the California Supreme Court’s response have made the case a staple of

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<sup>1</sup> 199 P.2d 1 (Cal. 1948).

<sup>2</sup> *Id.* at 4.

modern Torts casebooks. But the resolution in *Summers* (together with the California Supreme Court's failure to remand the matter for further fact-finding) leaves at least one nagging question unanswered: who, in fact, shot Charles Summers? Was *Summers* really a 50-50 case, or did the evidence presented at trial tip the probabilities toward one defendant, and away from the other? There exists at least one tribunal with the power to conduct a more searching inquiry . . .

*Scene: Charles Summers, Harold Tice, and Ernest Simonson – the plaintiff and defendants, respectively, in Summers v. Tice – walk up to the pearly gates of Heaven. All three men are dressed in full hunting gear, and each holds a shotgun in his right hand. St. Peter stands in front of the gates, reviewing a ledger. As the hunters approach, St. Peter looks up, sees the men, and smiles.*

ST. PETER: Welcome, gentlemen.

SUMMERS (*feeling his face*): Hey! I got my eye back! (*He looks around.*) Is this Heaven?

ST. PETER: No, it's Iowa. (*Chuckles to self.*) I love that joke. Indeed it is Heaven. But before we can admit any of you into eternal paradise, our lawyers tell us we have to figure out whether it was Mr. Simonson or Mr. Tice who shot Mr. Summers on that ill-fated hunting trip. You know the saying, "shoot 'em all, and let God sort it out." Well, gentlemen, it's time for God to sort it out.

SUMMERS: You have lawyers in Heaven?

ST. PETER (*smiling and nodding*): We get asked that all the time. Yes, we have a small in-house legal department. They mostly respond to habeas petitions filed by people assigned to The Other Place (*pointing down*). We had been using outside counsel, but their rates got too high. (*Sighs, and shakes his head.*) Satan really outdid himself when he got the New York firms to raise first-year associate salaries to \$160K.

Now, I want each of you to tell me what happened that fateful day. In case you need your memories refreshed, I will now recite the background facts. (*St. Peter clears his throat, and proceeds to read from his ledger.*)

November 20, 1945, was a sunny day in the hills east of Bakers-

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field, California.<sup>3</sup> You gentlemen were among those who ventured out onto the open range to do some hunting. Mr. Summers, you were a middle-aged car salesman at the time, and approximately ten years older than your companions.<sup>4</sup> You three were longtime acquaintances,<sup>5</sup> and both Mr. Tice and Mr. Simonson had hunted with Mr. Summers before.<sup>6</sup>

You started the day hunting for pheasant,<sup>7</sup> but by 4:00 p.m., as the afternoon shadows grew,<sup>8</sup> you had turned your attention to quail.<sup>9</sup> In search of your quarry, the three of you, armed with your shotguns, walked up a draw.<sup>10</sup> There, you stumbled into a large covey of quail.<sup>11</sup> The birds flew up, with one soaring so high that it crashed into our spy satellite, disabling the device for some time. (*Looks up from ledger.*) That's where, and why, we need your help.

(*St. Peter returns to reading.*) The story resumes with Mr. Summers shot and crying for aid.<sup>12</sup> A pellet from either Mr. Tice's or Mr. Simonson's gun had entered Mr. Summers' right eye, and another pellet had lodged in his upper lip.<sup>13</sup> Mr. Tice and Mr. Simonson

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<sup>3</sup> Reporter's Transcript on Appeal at 52, *Summers v. Tice*, 190 P.2d 963 (Cal. Ct. App.), *rev'd*, 199 P.2d 1 (Cal. 1948) (No. LA 20650) [hereinafter Reporter's Transcript]. The complaint in *Summers v. Tice* relates that the accident occurred close to Welton, California, a community that does not exist. Complaint at 1, *Summers v. Tice*, No. 509835 (L.A. Super. Ct. Jan. 25, 1946). While a remote possibility exists that California contains a Brigadoon-esque township that materializes to hunters once every century before fading into the mist, from remarks made at trial the author has inferred that, disappointingly, the complaint more likely just contains a typographical error, and the episode in fact took place in the countryside near *Weldon*, California, a town east of Bakersfield.

<sup>4</sup> *Wounded Hunter Awarded \$10,000*, L.A. TIMES, Oct. 29, 1946, at A1.

<sup>5</sup> Reporter's Transcript, *supra* note 3, at 64.

<sup>6</sup> *Id.* at 25, 39-40, 64.

<sup>7</sup> *Id.* at 43, 65.

<sup>8</sup> *Id.* at 51.

<sup>9</sup> *Id.* at 54, 65.

<sup>10</sup> *Id.* at 60, 66.

<sup>11</sup> *Id.* at 66, 94-95.

<sup>12</sup> *Id.* at 49.

<sup>13</sup> *Id.* at 4-5.

took Mr. Summers to a hospital in Mojave,<sup>14</sup> and then to a more substantial medical facility in Los Angeles.<sup>15</sup> Though doctors removed both pellets, they could not save Mr. Summers' eye.<sup>16</sup>

Shortly after the accident, Mr. Summers hired an experienced Los Angeles attorney, Werner Graf, to represent him.<sup>17</sup> Mr. Graf drafted a complaint that named both Mr. Tice and Mr. Simonson as defendants.<sup>18</sup> This pleading requested a judicial determination as to *which* of the two men had shot his client.<sup>19</sup> After being served, Mr. Simonson and Mr. Tice each hired their own counsel. These attorneys fired boilerplate answers that denied liability for the accident.<sup>20</sup>

You three agreed to waive a jury trial and have the matter tried before a judge *pro tempore*. You decided upon John Holland, a senior member of the Los Angeles bar.<sup>21</sup> After trial and supplemental briefing – (*looks up from ledger*) regrettably, we have been unable to locate these briefs – (*returns to reading*) Mr. Holland issued a short ruling. He ordered that judgment would be entered in favor of Mr. Summers and against the defendants, “and each of them,” in the amount of \$10,000.<sup>22</sup> The order offered no explanations. Instead, it simply directed Mr. Graf to prepare findings of fact and conclusions of law consistent with the decision.<sup>23</sup>

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<sup>14</sup> *Id.* at 17.

<sup>15</sup> *Id.* at 17, 18, 79.

<sup>16</sup> *Id.* at 4-5.

<sup>17</sup> Graf had been admitted to the California bar in 1928. LOS ANGELES BENCH AND BAR 127 (Elmer Cain ed., 1950).

<sup>18</sup> Complaint at 2, *Summers v. Tice*, No. 509835 (L.A. Super. Ct. Jan. 25, 1946).

<sup>19</sup> The complaint provides, in relevant part, that “. . . plaintiff is in doubt as to the person from whom he is entitled to redress, and therefore has joined both defendants in this action with the intent that the question as to which of the defendants is liable, and to what extent, may be determined by this Court.” *Id.*

<sup>20</sup> Answer of Ernest Simonson, *Summers v. Tice*, No. 509835 (L.A. Super. Ct. Feb. 15, 1946); Answer of Harold Tice, *Summers v. Tice*, No. 509835 (L.A. Super. Ct. Feb. 11, 1946).

<sup>21</sup> Holland had been admitted to the California Bar in 1924. LOS ANGELES BENCH AND BAR, *supra* note 17, at 150.

<sup>22</sup> Order, *Summers v. Tice*, No. 509835 (L.A. Super. Ct. Oct. 24, 1946).

<sup>23</sup> *Id.*

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Mr. Holland signed Mr. Graf's proposed findings, apparently without making any alterations to them.<sup>24</sup> Because of their significance to this matter, I will now repeat the most important of these conclusions. It was determined that, at the time of the accident, both defendants (1) were using shotguns loaded with size 7½ shot, (2) were approximately 75 yards away from the plaintiff, (3) knew the plaintiff's location, and (4) had nothing to obstruct their views of the plaintiff.<sup>25</sup> Due to their special importance, I will repeat three other findings verbatim:

- "That the evidence further disclosed that the defendant, Harold W. Tice, flushed a quail and that said quail, at an elevation from the ground of about ten feet, flew between the plaintiff, Charles A. Summers, and the defendants, Ernest Simonson and Harold W. Tice; that the said Harold W. Tice shot at said quail when said bird was at the elevation of ten feet from the ground in the direction of the plaintiff and that the said Harold W. Tice knew that the said plaintiff was in that direction and that the said defendant, Ernest Simonson, also shot at said quail.
- "That the defendants, and each of them, were guilty of gross negligence in firing a gun in the general direction of the plaintiff, knowing full well the place where said plaintiff was located and the Court further finds that the said Charles A. Summers was not guilty of contributory negligence of any kind or character.
- "That as a direct and proximate result of the shots fired by defendants, and each of them, a birdshot pellet was caused to and did lodge in plaintiff's right eye and that another birdshot pellet was caused to and did lodge in plaintiff's upper lip."<sup>26</sup>

Mr. Tice and Mr. Simonson, you both took appeals from the judgment that followed. After a short-lived reversal by the California Court of Appeal,<sup>27</sup> the California Supreme Court ultimately val-

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<sup>24</sup> Graf prepared the findings on his letterhead; as they appear in the court file, they display no sign of edits by Holland. Findings of Fact and Conclusions of Law, *Summers v. Tice*, No. 509835 (L.A. Super. Ct. Nov. 27, 1946).

<sup>25</sup> *Id.* at 2-3.

<sup>26</sup> *Id.* at 3-4.

<sup>27</sup> *Summers v. Tice*, 190 P.2d 963 (Cal. Ct. App.), *rev'd*, 199 P.2d 1 (Cal. 1948).

idated the trial court's judgment.<sup>28</sup> The California Supreme Court held that under the circumstances presented, it was not Mr. Summers' obligation to prove which of you two (*pointing to Tice and Simonson*) shot him; instead, the burden shifted to each of you to exonerate yourself.<sup>29</sup>

(*St. Peter looks up.*) So, that's what we know. Unfortunately, we still *don't* know who shot Mr. Summers. Rest assured, it's not a matter of consequences up here. We – and you – simply must have all of your affairs in order before you can enter.

Mr. Summers, I would like to hear from you first. If possible, please hew as closely as possible to your trial testimony.

SUMMERS (*taking off his red hunting cap and approaching the podium*): Well, sir, here's what happened. Like you said, we were out hunting quail. The three of us walked up a draw. A ways up the draw, we flushed a big bevy of quail. After each of us bagged a couple of birds, I went uphill to see if I couldn't scare out a few more of them.

It was hard work walking upslope, so I sat down on a big rock about a quarter-way up the rise. After a few minutes, I saw some birds flying in my direction, so I stood up and walked about 25 feet from the rock. I could see both Harold and Ernie down below me. I just had a general knowledge of where they were, but I could tell they had a full view of me; the sage brush all around us was just about waist high, and not tall enough to hide anyone who was standing up. I'm not good at estimating distances, but I believe that Ernie and Harold were both about 60 to 70 yards away from me, and that I was about 20 or 30 feet above their level.

Then I heard two shots, simultaneously or pretty close together. The shots must have come from different guns. I know Harold was using a pump gun, and I think Ernie was, too, and you can only fire one shot at a time from a pump gun. I was looking in their general direction at the time, but I don't know who fired the shot that hit me; if I had seen a gun pointing toward me, I would have turned my head away.

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<sup>28</sup> Summers v. Tice, 199 P.2d 1 (1948).

<sup>29</sup> *Id.* at 4.

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I was hit with birdshot in the right eye, and in my upper lip. Most of the damage came from the piece of shot that landed in my eye. The doctor gave me the two pellets after he removed them. They looked like size 6 or size 7½ shot. I don't know which, though I could tell the difference between the two sizes if I had both size 6 and size 7½ pellets in front of me. After Harold's lawyer raised a fuss at trial about the type of shot Harold used, I looked around my house for the pellets. I couldn't find them anywhere.<sup>30</sup>

ST. PETER: All right, thank you. Now, Mr. Tice.

TICE: It's true that Charlie, Ernie, and I were out hunting quail that afternoon. I got a little tired, and returned to the car for a bit. When I came back to the draw, I ran into Ernie. He told me that Charlie had gone uphill, along the side of the draw, to track down part of the covey.

After I spoke to Ernie, I flushed out a couple of quail. I took two shots at them. When I walked over to where the quail had been, I spooked and flushed out another bird. This bird flew toward Ernie. Charlie was nowhere within view, at least initially.

I couldn't fire at the bird because it was headed toward Ernie. So instead, I called out to Ernie, who took two shots at the quail. The first shot came after the bird veered to Ernie's right, and then, as the bird changed direction again and headed toward the edge of the hill, Ernie fired uphill at it. By the time Ernie fired his first shot, I hadn't fired my gun for three to five minutes.

Ernie's shots were, I would say, about thirty seconds to a minute apart. Charlie climbed up on a rock and came into view, for me, between Ernie's first and his second shot. At the time, I was around 150 yards from where Charlie was situated. As for Ernie, he was standing somewhere between 75 to 90 yards away from where Charlie was. After Ernie's second shot, Charlie cried out that he had been hit.

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<sup>30</sup> This narrative represents a summary of Summers' testimony at trial, which appears in the Reporter's Transcript, *supra* note 3, at 15-56 and 135-36. This summary necessarily makes small changes to Summers' testimony, but the author has tried to accurately relay all material points testified to by Summers.

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And here's the most important thing. I could have proved that I wasn't the shooter, if only Charlie had kept the pellets that his doctor had given him. You see, at the time I was using a different size shot than what Ernie was using. I was using a size 6 shot; Ernie was using a size 8.<sup>31</sup>

ST. PETER: Thank you, Mr. Tice. I do wonder why you didn't call out "Stop shooting!," or something like that, to Mr. Simonson, if you saw Mr. Summers before Mr. Simonson took his second shot. In any event, Mr. Simonson?

SIMONSON: OK. In response to Harold's last point, as near as I can remember, we were talking about putting size 7½ shot in our guns before we left the car to go hunt quail.

Out on the range, shortly before the accident I was walking with Charlie, and Harold was a little ways ahead of us. Charlie told me that he would go uphill, and that I should follow along with Harold. That way, Harold and I would stir the birds up, and Charlie would have a clear shot at them.

I waited for Charlie to climb onto a rock, up above us. Then Harold shot at some birds. Charlie hollered at me that he didn't get them, and then he climbed down off the rock. A little later, a bird rose up, off to the right of Harold, and came straight at me. Harold took one shot at it – in the direction of Charlie, as it turned out – and then I took a shot. I then held my fire because the bird was flying toward the rock where Charlie had been standing. I didn't see Charlie, and so I fired another shot. My first shot was on a line somewhere between Harold and the rock where Charlie had been standing; the second was closer to the rock.

Three to five minutes later, I heard Charlie holler that he had been shot. When I reached Charlie, he was several feet in back of the rock. At the time we fired, Harold and I were both about 315 to 350 feet from Charlie. I was just over 250 feet from Harold.<sup>32</sup>

ST. PETER: Is that all?

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<sup>31</sup> This narrative represents a summary of Tice's testimony at trial, which appears at Reporter's Transcript, *supra* note 3, at 64-106.

<sup>32</sup> This narrative represents a summary of Simonson's testimony at trial, which appears at Reporter's Transcript, *supra* note 3, at 61-62 and 167-208.

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SIMONSON: Yes.

ST. PETER: Very well. (*Meditatively rubs his chin with his hand.*) I must say that I am a little confused here, and have a few follow-up questions.

My first question is for Mr. Summers. Would you agree that, since you had, but lost, the pellets, that you were in at least as good a position as the defendants were to identify your shooter?

SUMMERS: No. As you'll recall, Mr. Holland found that both defendants were using size 7½ shot. He rejected Harold's testimony that he was using size 6 shot. This finding meant it didn't matter whether I kept the pellets.

ST. PETER: I see. Now, let me ask a few questions to Mr. Tice. Sir, it appears that in his findings, Mr. Holland rejected most of your testimony. Do you have any sense why?

TICE: No, but then, we don't know precisely what Mr. Holland thought. It's not in the record, at least. It's true that the findings of fact rejected a lot of my testimony. But I should stress that those findings were authored by Charlie's attorney, Mr. Graf. Mr. Holland just rubber-stamped them.

The order that Mr. Holland himself prepared said only that both Ernie and myself were liable to Charlie. There was no rationale given for his decision. Nor, really, did the findings of fact spell out any such rationale. Maybe Mr. Holland anticipated the California Supreme Court's logic. Maybe he thought it was unimportant who fired the specific shot that injured Charlie, and that both Ernie and I were liable under a concert of action theory or on some other basis. If pressed, though, I believe that Mr. Holland would have found that it was more likely than not that Ernie, not me, was the shooter.

How do I know this? Well, for argument's sake, let's just put aside the fact that I *was* using a different size of shot than the ammunition that Ernie had loaded in his gun. The sole evidence to the contrary was Ernie's weak assertion at trial that "as near as [he could] remember," "we were all talking about" changing our ammunition to size 7½ shot before we went out to hunt quail.<sup>33</sup> Ernie

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<sup>33</sup> *Id.* at 168, 188.

never testified that he *saw* me load size 7½ shot, or that I ever flat-out *said* that I had put size 7½ shot in my gun. Long story short, I could have proved my innocence if only Charlie hadn't "lost" (*here, Tice makes little finger-quotations*) the shot that his doctor gave him, with his lawyer then papering over that "loss" with a convenient finding of fact.

So, *Charlie* was the one who had, but then lost, the crucial evidence in this case. But I appreciate that I'm spitting into the wind of an adverse finding on this point, so I'll turn to other facts that tend to suggest that Ernie, and not me, fired the shot that hit Charlie.

Here, let's assume that everything I said was bunk, including some testimony I gave at trial about a statement I heard Ernie make, in which he said he had shot Charlie.<sup>34</sup> And I also won't rely on the fact that when I told an officer in Mojave, within Ernie's earshot, that Ernie was the one who shot Charlie, Ernie didn't say squat.<sup>35</sup> Instead, I'll just point out that *Ernie himself* testified that he fired twice, while I fired just once. All else being equal, that means that there's a two-thirds chance he was the shooter. Ernie also testified that he fired both shots, many seconds apart, *after* I fired mine. If I had shot Charlie, and *then* Ernie fired twice, wouldn't Charlie have cried out sometime *before* Ernie shot him? Yes, I know that Charlie testified that he heard almost simultaneous shots coming from two different guns. But who's in a better position to speak to that point – Charlie or Ernie? Plus, you can reload a pump-action shotgun like the one Ernie was using in two or three seconds; that's "almost simultaneous," in my book.

ST. PETER: You say that you could have exonerated yourself. But, for sake of argument and at the risk of departing somewhat from our specific task, let's say that you did fire once, and that you negligently shot in Mr. Summers' direction, but missed him. Wouldn't it still be appropriate to hold you liable, even if it could be proved that the pellets that struck Mr. Summers came from Mr. Simonson's gun? After all, firing in that direction suggested to Mr.

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<sup>34</sup> *Id.* at 76.

<sup>35</sup> *Id.* at 178.

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Simonson that it was safe to shoot toward that vicinity. Furthermore, even if you *didn't* fire your gun, didn't your testified-to actions in calling out to Mr. Simonson and alerting him to the quail encourage his shooting, and thereby justify holding you liable, too – at least if you knew, or should have known, that Mr. Simonson would fire in Mr. Summers' general direction?

I appreciate that parts of the California Supreme Court's decision, especially its assertion that “the negligence of one of [you] injured the plaintiff,”<sup>36</sup> suggest that if one of you could prove you weren't the actual shooter, you'd be off the hook. But I also observe that some of the authorities that the court relied upon<sup>37</sup> suggest otherwise. For example, there's the Restatement of Torts hypothetical recited by the court, in which A and B are shooting across a road, at an animal on the far side. In doing so, both A and B are behaving negligently as to persons upon the road. A hits the animal, but B strikes only C, a pedestrian along the road. Per the Restatement, A is liable to C.<sup>38</sup> Wouldn't it follow that, if (as Mr. Holland found) you fired your gun toward Mr. Summers, you occupy the same position as A?

Finally, I would observe that the Supreme Court didn't remand the case for further proceedings, as might have been expected if that body had anticipated that one of you could, in fact, exonerate yourself under the rule it announced.

TICE: I'm not a lawyer, your honor, so I don't know the answers to your questions. If I were to put on my best lawyerly hat, I would wonder whether in that hypothetical you described, A should be held liable, or whether it would be more appropriate to say that A's possible causal role presents a jury question, subject to counterproof such as B's testimony that he would have fired anyway, even if A hadn't. And, not that it matters, but the A, B, C situation and rule you describe wouldn't sustain a judgment against *Ernie* on the facts of this case, if it had been *my* shot that hit Charlie. Even if one were

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<sup>36</sup> Summers v. Tice, 199 P.2d 1, 4 (1948).

<sup>37</sup> *Id.* at 3-4.

<sup>38</sup> RESTATEMENT OF TORTS, § 876, cmt. b (1939).

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to conclude that my actions encouraged Ernie, how did *his* actions encourage *mine*, when everyone agrees that if I fired at all, I fired first?

ST. PETER: Very well; would that we had time to further address this issue. Finally, I have a question for Mr. Simonson. Sir, can you truly stand here and tell me that there was a greater than 50 percent chance that Mr. Tice was the actual shooter?

SIMONSON: I think I can. I think everything depends on which direction we were each firing. We drew our positions and lines of fire on a blackboard at trial, but unfortunately that doesn't us help much now. If Harold aimed squarely at Charlie, and I was at least a few degrees off with each of my shots, then, sure, it's more likely than not that Harold was the one who hit him. But of course, we don't know. All I know is that I was aiming in a certain area, and so was Harold; I wasn't using a protractor to measure all the angles.

I appreciate we're running short on time, so let me just close with this. I know I took an appeal, and I still say I wasn't negligent. But I can't argue too much with a rule that lets the whodunit issues in these sorts of cases go to juries. I reckon that they'll usually figure something out, and that everyone will be basically OK with it.

ST. PETER: Thank you, Mr. Simonson. I am going to close the ledger here by finding that the pellets that struck Mr. Summers – both of them – more likely than not came from your gun. But, I confess, given the spotty record and the conflicts in the testimony, my conclusion is really just a shot in the dark. (*The gates behind St. Peter open, revealing an escalator that ascends higher into the heavens.*) All three of you may enter. Just please hold onto the escalator's hand-rails. We're already swamped with slip-and-fall cases, you know.

