

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

---

JAMES R.W.MITCHELL—PETITIONER

VS.

MARCUS POLLARD, Warden of Richard J. Donovan Correctional Facility,  
an individual —RESPONDENT

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI  
TO THE CALIFORNIA COURT OF APPEAL,  
FIRST APPELLATE DISTRICT, DIVISON ONE (VOL. 2)

Steven S. Lubliner (California State Bar No. 164143)  
LAW OFFICES OF STEVEN S. LUBLINER  
P.O. Box 750639  
Petaluma, CA 94975  
Phone: (707) 789-0516  
e-mail: [sslubliner@comcast.net](mailto:sslubliner@comcast.net)  
Attorney for Petitioner James R.W. Mitchell

## INDEX TO APPENDIX

### VOLUME 1-RELEVANT POST-CONVICTION PROCEEDINGS

<u>Order of the Court of Appeal in <i>In re James R.W. Mitchell</i>, on Habeas Corpus, California Court of Appeal, First Appellate District, No. A160759 Denying Habeas Petition on McCoy Issues on the Merits</u>	
November 18, 2020 .....	1
<u>Order of the California Supreme Court in <i>In re James R.W. Mitchell</i>, on Habeas Corpus, California Supreme Court No. S265812 Denying Petition for Discretionary Review on McCoy issues</u>	
January 13, 2021 .....	3
<u>Order of the Marin County Superior Court in <i>In the Matter of James R.W. Mitchell</i>, on Habeas Corpus, Marin County Superior Court No. SC210551A Denying Habeas Petition on McCoy Issues on the Merits</u>	
May 20, 2020 .....	4
<u>Petition for Discretionary Review on McCoy Issues in <i>In re James R.W. Mitchell</i>, on Habeas Corpus, California Supreme Court No. S265812</u>	
November 30, 2020 .....	40
<u>Petition for Writ of Habeas Corpus on McCoy Issues with Memorandum of Points and Authorities in <i>In re James R.W. Mitchell</i>, on Habeas Corpus, California Court of Appeal, First Appellate District, No. A160759</u>	
August 21, 2020 .....	82
<u>Opinion on Direct Appeal in <i>People v. Mitchell</i>, A133094</u>	
July 28, 2014 .....	158
<u>Order Denying Petition and Certificate of Appealability in <i>Mitchell v. CSP-Corcoran</i>, Nor. Dist. No. 15-cv-4919</u>	
October 18, 2016 .....	202
<u>Petitioner's Motion to Stay Habeas Appeal in Ninth Circuit Case 16-17057 to Allow him to Pursue McCoy Issues in State Court</u>	
July 12, 2019 .....	212

<u>Ninth Circuit Order in Case 16-17057 Granting Motion to Stay Habeas Appeal to Allow Petitioner to Pursue McCoy Issues in State Court</u>	
July 17, 2019 .....	223

<u>Order Appointing Petitioner Counsel in Ninth Circuit Case 16-17057</u>	
August 15, 2017 .....	225

## **VOLUME 2-RELEVANT TRIAL COURT PROCEEDINGS**

<u>Hearing Where Defense Counsel Hanlon and Rief Substitute as Counsel for Petitioner (Excerpts)</u>	
September 1, 2010 .....	226

<u>In Camera Hearing on Need for DNA Testing and Defense Counsel's Strategy</u>	
January 20, 2011 .....	251

<u>Hearing on Petitioner's Request that Public Defender Relieve Defense Counsel</u>	
May 10, 2011 .....	256

<u>In Camera Hearing on Request for Investigative Funds and Defense Counsel's Strategy</u>	
May 25, 2011 .....	264

<u>Farettta Hearing on Petitioner's Request to Represent Himself</u>	
June 10 & 13, 2011 .....	272

<u>In Camera Hearing on Defense Counsel's Motion to Withdraw after Denial of Petitioner's Farettta Request</u>	
June 13, 2011 .....	304

<u>Hearing on Petitioner's Competency After Denial of Petitioner's Farettta Request and Defense Counsel's Motion to Withdraw</u>	
June 13 & 14, 2011 .....	319

<u>Defense Counsel's Opening Statement at Trial</u>	
June 21, 2011 .....	328

<u>Trial Court Proceedings on Jury Instructions on Charge of First-Degree Murder and Lesser Homicides</u>	
July 6 & 7, 2011 .....	334

<u>Defense Counsel's Closing Argument at Trial</u>	
July 7 & 8, 2011 .....	344
<u><i>In Camera</i> Hearing on Petitioner's Motion for New Counsel for Sentencing</u>	
<u>and Possible New Trial Motion and Defense Counsel's Related Motion to</u>	
<u>Withdraw</u>	
August 16, 2011 .....	411

## 1 COURT OF APPEAL OF THE STATE OF CALIFORNIA

## 2 FIRST APPELLATE DISTRICT

3 ---000---

4

5 THE PEOPLE OF THE STATE )  
6 OF CALIFORNIA, )  
7 )  
8 PLAINTIFF, )  
9 VS. ) No. SC165475A  
10 )  
11 JAMES MITCHELL, )  
12 )  
13 DEFENDANT. )  
14 -----

15 REPORTER'S TRANSCRIPT OF PROCEEDINGS ON APPEAL16 VOLUME 9

17 September 1, 2010

18 Pages 155 through 164

19 APPEAL FROM THE JUDGEMENT OF THE SUPERIOR COURT  
20 COUNTY OF MARIN

21 HONORABLE PAUL HAAKONSEN, JUDGE PRESIDING

22 **COPY**

23 APPEARANCES:

24 FOR THE PEOPLE:

CHARLES CACCIATORE,  
DEPUTY DISTRICT ATTORNEY

25 FOR THE DEFENDANT:

DOUGLAS HORNGRAD,  
ATTORNEY AT LAW

26 SARA RIEF,  
ATTORNEY AT LAW

27  
28 Reported by: Aaron D. Ellington, CSR #13449

1                   WEDNESDAY, SEPTEMBER 1, 2010 - 9:05 A.M.

2                   ---oo---

3                   THE COURT: I'll call James Mitchell.

4                   MR. HORNGRAD: Good morning, your Honor,  
5 Douglas Horngrad and Kelly Copenhaver with James  
6 Mitchell.

7                   MR. CACCIATORE: Charles Cacciato for the  
8 People.

9                   MR. HORNGRAD: Your Honor, Mr. Cosharen was  
10 kind enough to add this on at my request. There is  
11 going to be a substitution of counsel here. Ms. Rief is  
12 present. She is here on behalf of Hanlon & Rief.  
13 Stuart Hanlon will become trial counsel for Mr. Mitchell  
14 at his request. I have a motion to withdraw, and they  
15 have a motion to substitute in.

16                  I would just tell the Court -- notwithstanding  
17 whatever Mr. Cacciato is about to say -- I would just  
18 tell the Court that as I understand it from Mr. Hanlon,  
19 he is good with all the dates that have previously been  
20 set for Judge Simmons for all the events in this case  
21 including the trial, the receipt of the jury  
22 questionnaire, the in limine motions, everything. The  
23 only date which would need to change is the 995 motion  
24 which is currently set for tomorrow.

25                  I was in touch with the prosecutor -- at least  
26 tried to be -- a couple weeks ago. I miscalculated Mr.  
27 Cacciato's vacation. I was in touch with Mr.  
28 Broussard, but he had other responsibilities and

1 couldn't quite get back to me.

2 When I got the Court's e-mail about the briefs you  
3 were reading, I thought it was incumbent to advise the  
4 Court that we would need to continue the 995. I did  
5 endeavor to see to it that the substitution occurred  
6 today, so the Court could be reassured that there was  
7 counsel on board before resetting the 995 hearing date.

8 And finally I would add, notwithstanding the  
9 counsel issue, that there's an independent reason for  
10 the 995 not to go forward here today. There is DNA  
11 testing for the mother of the decedent on the alleged  
12 murder weapon. The allegations from the Defense being  
13 that that murder weapon was in the decedent's home and  
14 was not brought by Defendant or whoever was responsible  
15 for this, and the Prosecutor has a reference sample of  
16 hers, and it has been late in coming through no fault of  
17 ours and no fault of the Prosecutor's. That could be --  
18 I believe -- would be stricken -- prejudice, but I'll  
19 leave that to the court. For all those reasons, I am  
20 asking the 995 be continued.

21 Mr. Cacciatore told me informally that it would be  
22 his position that the 995 go forward tomorrow. I will  
23 tell the Court I cannot and will not do the 995  
24 tomorrow. There are independent reasons for that, but I  
25 think all of that could be avoided by allowing the  
26 substitution of counsel, and Mr. Hanlon's office tells  
27 me that they could be prepared within 30 days to do the  
28 995. That will in no way disrupt the trial date which

1 is currently set for January 20th. And this is Ms.  
2 Rief.

3 MS. RIEF: Good morning, your Honor. Sara  
4 Rief, R-I-E-F.

5 THE COURT: That's pretty strong language that  
6 you cannot or will not proceed to the 995 hearing.

7 MR. HORNGRAD: Yes. All due respect to your  
8 Honor.

9 THE COURT: Are there reasons unknown at this  
10 point that you wish not to disclose?

11 MR. HORNGRAD: There are reasons known to me  
12 that I wish not to disclose, correct. And I think we do  
13 not need to go into those because there is new counsel  
14 here, and they want to substitute in, and Mr. Mitchell  
15 wants them to go forward. Certainly I would hope the  
16 Court would respect that.

17 I know the Prosecutor has a couple of witnesses  
18 under subpoena, and without denigrating their  
19 profession, they are not civilians, they are lawyers, so  
20 they could be re-subpoenaed. I think it will not  
21 disrupt the trial date. It will still give the Defense  
22 time to go to the -- if it should be an adverse ruling,  
23 it will not disturb any of the other dates. I would  
24 like to withdraw today. I intend to withdraw today.  
25 Mr. Mitchell has new counsel prepared to sub in today.  
26 I really think it is a nonissue, and this is an  
27 uneventful event.

28 THE COURT: Before I hear from the District

1 Attorney's Office, I might point out that this is a case  
2 that's assigned to this department for a limited  
3 purpose, that's the hearing of the 995. I'm disinclined  
4 to allow substitution of counsel without having Judge  
5 Simmons weigh in on that request. I'm also anxious to  
6 have the limited purpose of this court's involvement of  
7 the case concluded, and the 995 motion seems to be fully  
8 briefed and ready to go.

9 MR. HORNGRAD: The alternative is we could ask  
10 to be transferred to Judge Simmons for the substitution.  
11 Frankly, those folks, but for the 995, they could have  
12 filed a paper substitution, but we are trying to do  
13 everything in an organized fashion. If the Court wishes  
14 to send us to Judge Simmons this morning for  
15 substitution and then come back here, we can. It just  
16 seems in as much as they are agreeable to all of Judge  
17 Simmons' dates and everything is already set, that would  
18 probably be a trial of form over substance, but I get  
19 what your Honor is saying about wishing to keep your  
20 role in this matter a limited one.

21 THE COURT: Mr. Cacciato, do you wish to be  
22 heard?

23 MR. CACCIATORE: Judge, just briefly, I do  
24 believe that it's most appropriate that Judge Simmons  
25 hear the substitution issue, and that this Court not be  
26 involved in that process. Part of the Prosecution's  
27 problem with request of continuance in the 995 is that  
28 this is the fourth 995 hearing date we've had. March of

1 this year, April, then June, and now tomorrow. This is  
2 the second time that we have been set for a 995 when  
3 we've had a substitution of attorney, and Mr. Horngrad  
4 came into the case when it was at this posture.

5 Our original trial date, which I'll be sure to  
6 remind Judge Simmons of, was in May of this year, and  
7 just on -- I believe two or three weeks ago we were in  
8 court in front of Judge Simmons when Mr. Horngrad  
9 requested a continuance of the trial date from October  
10 to January. And then now shortly on the heels of that,  
11 we're here with another substitution.

12 I understood that Mr. Hanlon was going to be taking  
13 the case. I know that his partner is here today, but I  
14 was expecting representations from him about the trial  
15 readiness issues this morning which we can discuss with  
16 Judge Simmons. But in any event, we do have witnesses  
17 subpoenaed for tomorrow. We are prepared to proceed  
18 with the 995.

19 Counsel's issues regarding the DNA are complete red  
20 herring as far as that's concerned, and whatever  
21 independent reasons he has for not wanting to go  
22 forward, I think should be made on the record, and if it  
23 cannot be done so in open court, that there should be a  
24 good cause stated in chamber in camera with the Court so  
25 that you can fully make a decision about whether this  
26 should proceed tomorrow.

27 THE COURT: We'll send this to Judge Simmons  
28 forthwith. I'll walk you down to her, and I'll see you

1 back here after she gives you her ruling.

2 MR. HORNGRAD: Thank you.

3 (Whereupon the proceedings were continued)

4 ---oo---

5 WEDNESDAY, SEPTEMBER 1, 2010 - 10:30 A.M.

6 ---oo---

7 THE COURT: I'll recall the James Mitchell  
8 case. Is Ms. Copenhaver staying on? She's made  
9 appearances in the case along with Mr. Hanlon. She has  
10 stated appearances. She hasn't made a general  
11 appearance. Mr. Hanlon has been the named attorney, and  
12 she's been assisting.

13 MS. COPENHAVER: And that's how it will stay  
14 going forward. Thank you.

15 MR. CACCIATORE: Sort of like I'm doing for Mr.  
16 Cosharen.

17 THE COURT: That's what he's been saying.

18 MR. CACCIATORE: Well we've both been --

19 THE COURT: I'm kidding about that. Mr.  
20 Mitchell is present. Appearances?

21 MR. CACCIATORE: Charles Cacciatore for the  
22 People.

23 MS. RIEF: Good morning, your Honor. Sara Rief  
24 appearing on behalf of Mr. Mitchell.

25 THE COURT: Mr. Mitchell's case is on for a 995  
26 hearing tomorrow. There are a few such motions. In  
27 light of the substitution of counsel that took place  
28 this morning, it is evident that this case will not

1 proceed tomorrow. What's the anticipated schedule here?  
2 Are you going to look at the motions and decide whether  
3 or not supplemental briefs are necessary?

4 MS. RIEF: That's correct, your Honor. We  
5 would be asking for 30 days because we have not seen the  
6 briefs. I don't imagine we will be filing additional  
7 briefs, but I don't know the answer to that. That looks  
8 about to be October 1st -- or into the next week,  
9 October 4th or 5th, we are available.

10 MR. CACCIATORE: That's fine. 30 days from  
11 today, and the only thing we would request is that the  
12 Court give a filing date for any supplemental motions,  
13 maybe two weeks from today, so that we have a couple of  
14 weeks to respond within the 30-day time period.

15 THE COURT: Is that acceptable?

16 MS. RIEF: If I could have about two and a half  
17 weeks, your Honor? We are anticipating getting the  
18 files tomorrow and taking the next two weeks to go  
19 through the binders.

20 THE COURT: Okay. Any supplemental briefs are  
21 to be filed by end of business, September 17th. Any  
22 response to those supplemental briefs?

23 MR. CACCIATORE: We would ask just 24 hours  
24 before the hearing, please.

25 THE COURT: October the -- need to have the  
26 hearing on the 1st, so September 30th. 995 hearing,  
27 October 1st, Friday morning, 9:00 a.m. Mr. Mitchell is  
28 ordered to appear then.

1 MR. CACCIATORE: Thank you.

2 THE COURT: Thank you.

3 MS. RIEF: Thank you, your Honor.

4 THE COURT: If you have -- if you file a  
5 response on the 30th, would you bring me down a copy so  
6 it doesn't have to go through the back halls before I  
7 get it?

8 MR. CACCIATORE: Certainly.

9 THE COURT: Thank you.

10 MS. RIEF: Thank you.

11 (Whereupon the proceedings were continued)

12 ---oo---

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 MARIN COUNTY JUDICIAL DISTRICT  
3 HON. KELLY VIEIRA SIMMONS, JUDGE DEPARTMENT G  
4

--000--

5 THE PEOPLE OF THE STATE OF )  
6 CALIFORNIA, )  
7 Plaintiff, )  
8 vs. ) No. SC165475A  
9 JAMES RAPHAEL WHITTY MITCHELL, )  
10 Defendant. )  
11 \_\_\_\_\_ )  
12  
13

14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 RE SUBSTITUTION OF ATTORNEY

16 Wednesday, September 1, 2010

17 VOLUME 10, PAGES 165 THROUGH 182, INCLUSIVE

18

19 APPEARANCES:

20 For the People: HON. EDWARD BERBERIAN  
21 District Attorney  
22 By: CHARLES CACCIATORE  
Deputy District Attorney

23 For the Defendant: DOUGLAS HORNGRAD, ESQ.  
24 1736 Stockton Street  
Building 4  
San Francisco, CA 94133

25 SARA RIEF, ESQ.  
26 HANLON & RIEF  
179 11th Street, 2nd Floor  
27 San Francisco, CA 94103

28 Reported by: CHRISTINA GILSON, CSR NO. 9824

1 WEDNESDAY, SEPTEMBER 1, 2010

9:00 O'CLOCK A.M.

2

3

--00o--

4

5 THE COURT: This is the case of People vs. James  
6 Mitchell. The record should reflect that Mr. Mitchell is  
7 in court and in custody. Appearances, please?

8

9 MR. CACCIATORE: Charles Cacciatore for the

People.

10

THE COURT: Good morning.

11

12 MR. CACCIATORE: Leon Kousharian for the District

Attorney's Office.

13

14 MR. HORNGRAD: Good morning, your Honor. Douglas  
15 Horngrad with Kelly Copenhaver with Mr. Mitchell who is  
16 present in custody. And this is Sara Rief of Hanlon and  
17 Rief. And I have a motion to withdraw today. Mr. Hanlon  
18 intends to substitute in. Ms. Rief is here to make that  
19 representation on his behalf. And if the Court is  
20 wondering, their office is prepared to go forward on all  
the dates that are currently set before your Honor.

21

22 THE COURT: But not for the prelim, so that's why  
we're here.

23

MR. CACCIATORE: You mean the 995.

24

25 THE COURT: I mean the 995, pardon me. That's  
what we're here to discuss, as to why I should allow a  
26 substitution now.

27

MR. HORNGRAD: Well --

28

THE COURT: I've spoken to Judge Haakenson about

1 the request and he indicated that he's already heard much  
2 of the discussion and it's presented as the only date that  
3 won't work will be the 995. And the 995 is scheduled for  
4 tomorrow. And I want to know why I should allow a  
5 substitution that would delay the 995, as opposed to allow  
6 the substitution after the 995 has been resolved,  
7 especially since the motions and the 995 are numerous.  
8 They've all been filed by competent counsel and why would I  
9 start over?

10 MR. HORNGRAD: Actually, I had alleged on  
11 Mr. Mitchell's behalf that the initial 995 was filed by  
12 incompetent counsel, but we can save that for another day.

13 THE COURT: We're on 995 number two that's being  
14 filed. And the request is to allow a third set of  
15 documents by having a different attorney come in.

16 MR. HORNGRAD: I'm not aware of that. This is my  
17 understanding, and this is my position, if I may. New  
18 counsel are agreeable to all the dates set before the  
19 Court.

20 THE COURT: Before this Court.

21 MR. HORNGRAD: Yes, your Honor. Are there any  
22 other courts?

23 THE COURT: Not as important as me, but there is  
24 another --

25 MR. HORNGRAD: So stipulated. In any event, all  
26 the dates set before this Court. And under People vs.  
27 Courts, coincidentally, defendant is entitled to counsel of  
28 his choosing and that would be Mr. Hanlon and Ms. Rief to

1 my left.

2                   And so it would seem to me, just as a legal  
3 matter, inasmuch as Mr. Mitchell wishes to have Mr. Hanlon  
4 and Ms. Rief represent him now, that he should be permitted  
5 to do so. And that I think it would be, all due respect,  
6 error to not permit these attorneys to come in now and to  
7 take care of whatever matters are pending.

8                   With respect to the 995, happily, the 995 is five  
9 months away from trial. And, in fact, it's tactically  
10 advantageous to the defense to have the 995 heard quickly  
11 because then in the unlikely event that the motion is  
12 denied, they can seek redress in the Court of Appeal and  
13 still have time to do so prior the trial.

14                  Mr. Hanlon and Ms. Rief tell me they're prepared  
15 to go forward on the 995 within the next 30 days, which  
16 seems reasonable, which is to say that the 995 would be  
17 heard probably in the month of September.

18                  And the Court, I know, is aware that this case is  
19 set for January 20. September is very far away from  
20 January 20.

21                  Finally, and I think it would not illuminate the  
22 record, but rather affect it, there are reasons why I  
23 cannot go forward on that 995 tomorrow.

24                  For that reason, to be frank with your Honor, I  
25 endeavored to have the counsel change occur today  
26 contemporaneous with the request to put over the 995. I  
27 had been in touch with the prosecutor's office, initially  
28 in the form of Mr. Cacciatore, who was on vacation. I

1 thought for a week, but happily for him, for two, so I  
2 didn't get a answer for awhile there. I then emailed  
3 Mr. Kousharian to let him know there was something in the  
4 wind and Mr. Kousharian was attending to other matters, no  
5 fault of his own, but there is a reduced number of DAs now,  
6 I suppose.

7 In any event, when I heard from Judge Haakenson  
8 about which documents he was reviewing, I then felt it  
9 incumbent upon me to send him a note saying I cannot go  
10 forward on the 995.

11 I then did have an opportunity to talk to  
12 Mr. Cacciato and told him there would be a counsel change  
13 and that I was endeavoring to have counsel appear today so  
14 that everything could be as seamless as possible.

15 And so it would be my proposal to the Court to  
16 permit these folks to substitute in, which would be  
17 consonant with Mr. Mitchell's wishes. They're on board for  
18 all of your dates. To be, again, frank, I spoke with them  
19 and said, look, this Court is going to want these dates to  
20 go forward. Any counsel that comes in is going to have to  
21 tell the Court and adhere to it that they're ready to go on  
22 the dates that are set. And with the understanding, that  
23 these folks are substituting in. So I have done all I  
24 could to keep this on track.

25 The only change here is that the 995 would be  
26 heard 30 days later.

27 Now, this was a first setting for the 995. Judge  
28 Haakenson actually put it over quite a bit of time because

1 of his schedule, which was okay with the defense. Since I  
2 filed my papers, it was the first 995 setting and inasmuch  
3 as trial is set in -- had been set in October, but now it's  
4 January, there is plenty of time to hear the 995. That's  
5 the only thing that changes.

6 And the People have some witnesses subpoenaed and,  
7 as I mentioned, in Judge Haakenson's court, I don't mean to  
8 be rude about it, but they're lawyers, not civilians.  
9 They're used to coming to court all time and if they're not  
10 coming tomorrow they could come next month and that won't  
11 be a particular hardship on counsel.

12 THE COURT: Let me just say, I've spoken to Judge  
13 Haakenson and he and I are of the same mind. He has read  
14 all of the papers. He is ready to go on the 995, which is  
15 scheduled tomorrow.

16 If Mr. Mitchell wishes Ms. Rief and her co-counsel  
17 to come in, sure, he has the right of counsel of his  
18 choosing, but we're on counsel number two now. He really  
19 wanted the first one and then he really wanted you. And  
20 now he really wants this other set of lawyers. So that's  
21 not that -- I shouldn't say that important, but right now  
22 we have a big motion set for tomorrow with very competent  
23 counsel who has filed many motions, the judge is ready. I  
24 have not heard from the prosecution. Perhaps they're not  
25 ready. But if they're ready, I would need something more  
26 that would allow me to allow a substitution right now.  
27 Maybe after the 995 it's a different story, but right now  
28 I'm disinclined to grant the request the day before the 995

1 after all the motions have been filed.

2 MR. HORNGRAD: I would just tell the Court, if I  
3 may, that I'm moving to withdraw as counsel of record.

4 THE COURT: I understand that.

5 MR. HORNGRAD: I'm using that word for a reason  
6 and that new counsel is prepared to substitute in. And I  
7 will tell the Court, as an officer of the Court, there is a  
8 reason why I am withdrawing as counsel of record and there  
9 are reasons why I cannot go forward on the 995 motion. And  
10 I think there are cases that stand for the proposition that  
11 if the Court accepts those kinds of representations from  
12 counsel, that no further inquiry needs to be made, but --

13 THE COURT: I would need further information,  
14 Mr. Horngrad.

15 MR. HORNGRAD: Well, if the Court needs further  
16 information, then I would ask that we do so in camera.

17 THE COURT: Okay. And the prosecution would be  
18 present?

19 MR. HORNGRAD: Absolutely not. I mean, please, no  
20 -- sorry about that. If I may defer to your Honor, I would  
21 suggest that you not permit that because there would be  
22 confidential information.

23 THE COURT: All right. I will have an in chambers  
24 discussion with my court reporter present with you.

25 Mr. Cacciato, did you have something you wanted  
26 to say?

27 MR. CACCIATORE: I just wanted to make sure you  
28 were going to bring the reporter and if you make some

1 determination that is information that the prosecution is  
2 entitled to, that you would call us in.

3 THE COURT: Of course.

4 MR. CACCIATORE: Thank you.

5 MR. HORNGRAD: I would ask that the transcript be  
6 sealed and remain sealed until further order of the Court.

7 THE COURT: So ordered. Let's go into chambers.

8 (Whereupon, a discussion was had in chambers  
9 between the Court and Mr. Horngrad, which  
10 remains sealed per order of the Court.)

11 THE COURT: We're back on the record in the  
12 Mitchell matter. I did have an in camera discussion with  
13 Mr. Horngrad. That transcript will be under seal and will  
14 not be opened unless there is further order of the Court.

15 Also, the staff who is present is ordered not to  
16 discuss the information in the meeting, as well.

17 Before I indicate my feelings in this regard,  
18 Ms. Rief, I have not heard from you. Good morning.

19 MS. RIEF: Good morning. Mr. Hanlon is in a  
20 multiple defendant homicide prelim in San Francisco today  
21 or he would have been before your Honor today, but I am  
22 here and can make representations on his behalf and for our  
23 office. And based on Mr. Hanlon and my calendar, we are  
24 ready and available for the dates that this Court has  
25 previously set.

26 I have received all the dates, including the jury  
27 questionnaire dates, the in limine dates and the current  
28 trial dates from Mr. Horngrad and we are prepared to go

1 forward.

2 That being said, your Honor will not get a  
3 continuance motion from us based on our unavailability, but  
4 we have not reviewed the file. I imagine Mr. Horngrad  
5 has done an excellent job getting the file ready for trial  
6 and we do have until January, but if something is to come  
7 up after reviewing that file, we will come back before this  
8 Court with a motion which we believe represents good cause  
9 for continuance for anything substantive, but we are  
10 available as far as our calendar is concerned and we know  
11 that this Court is ready to go forward, as is the District  
12 Attorney and so are we.

13 THE COURT: When would you be able to look at the  
14 file and tell me without doubt that you're going to be  
15 prepared, because apparently it's not today, really, other  
16 than the calendar.

17 MS. RIEF: We are -- from what I understand,  
18 Mr. Horngrad has discussed the issues, I just don't want to  
19 mislead this Court to say there is not going to be a  
20 discovery issue or an expert witness that we don't know  
21 about.

22 As far as we know from what Mr. Horngrad has  
23 explained to Mr. Hanlon, the case is ready, minus the DNA  
24 issue that Mr. Horngrad has already explained to this Court  
25 in his motion to continue that is still outstanding.

26 We will be receiving the file tomorrow from  
27 Mr. Horngrad, or maybe even today, he's telling me, but as  
28 I've told the Court, we have not reviewed it, at this time.

1                   So I just don't want to mislead this Court to say  
2 we are not going to file any motion to continue.

3                   THE COURT: How long -- let's say you got the file  
4 from Mr. Horngrad tomorrow, how long will it take you to  
5 look it over and come back to me and tell me, yes, the  
6 January date is workable and doable for your office?

7                   MS. RIEF: I'm being told, your Honor, that it's  
8 about 16 notebooks. I'd anticipate we could get through it  
9 in no more than two weeks, a week -- a week -- I mean, I  
10 would like to tell your Honor a week, but --

11                  THE COURT: But you prefer two weeks. The thing  
12 I'm trying to assess, Ms. Rief, is, it's been clear that  
13 Mr. Horngrad has indicated I'm wanting the trial to go out  
14 in January. We had an October date. I just continued it.  
15 I'm not inclined to start shifting lawyers again just to  
16 continue the trial date.

17                  And I appreciate your representations. You're  
18 obviously going to do everything you can, but I want you  
19 and co-counsel to have had an opportunity to look at what  
20 you're talking about and then come back and tell me that,  
21 yes, you're going to be ready in January.

22                  So if -- and you have a 995 that you're going to  
23 have -- I don't know if you're filing new papers or you're  
24 just going to come in on the papers. You don't know the  
25 answer to that either, right?

26                  MS. RIEF: I can't tell that to you this morning.  
27 I imagine we won't be filing additional paperwork, from  
28 what I know, it's been extensively briefed.

1                   THE COURT: That's what I hear, as well.

2                   MS. RIEF: I, again, haven't read it.

3                   MR. HORNGRAD: For what it's worth, Judge, I would  
4 just note that the notebooks that I'm giving to counsel did  
5 take my office literally 350 hours to organize in that  
6 fashion. So it's -- and every last page, every transcript,  
7 every disk, every piece of paper has been printed and cross  
8 indexed by witness and it's a very complete trial prep.

9                   THE COURT: Do you have any comment or --

10                  MR. CACCIATORE: Judge, first of all, I appreciate  
11 the Court's thorough inquiry this morning because it  
12 certainly does understand what our continuing position is  
13 about keeping this case on track for this January trial  
14 date since the first trial date was May of this year and  
15 now we're off to January of 2011.

16                  That said -- and I also appreciate Ms. Rief's  
17 comment that she can't speak to any future issues that may  
18 come up regarding discovery, and I certainly understand  
19 that, but we have endeavored to keep the case moving in  
20 that regard.

21                  And I would just agree with the Court's request  
22 that they review the file now to make sure that everything  
23 there is doable for them in January so that they don't  
24 review it and say, we can't possibly be ready because there  
25 is some issue that's been floating here that somebody else  
26 didn't see or we have a different tact we're going to take  
27 that is going to require us to continue the case based on  
28 what we have today.

1                   THE COURT: Here is the problem. The first  
2 problem is, I do think that Mr. Horngrad's withdrawal  
3 motion has merit and so that's one issue I need to address.  
4 And then, of course, the next issue I need to address is  
5 who is Mr. Mitchell's counsel going to be.

6                   So I guess I'm open to proposals. My suggestion,  
7 it might not be the best proposal, is to indicate for Judge  
8 Haakenson's purposes my feeling that the 995 cannot proceed  
9 tomorrow and everyone will go back to his court and set a  
10 new date and then put this case over two weeks for Ms. Rief  
11 and/or Mr. Hanlon to indicate to me their position, after  
12 reviewing the file, and confirmation that they will be  
13 proceeding in January.

14                   The issue, I guess, becomes whether Mr. Horngrad  
15 is to be relieved today or in two weeks. I'm not sure.

16                   What are your thoughts, Mr. Horngrad? If I  
17 relieve you now, then he's without counsel.

18                   MR. HORNGRAD: Right. I'm leaving the country  
19 September -- on Monday. I wonder in the Court would permit  
20 me to withdraw and provisionally permit Mr. Hanlon and  
21 Ms. Rief to substitute in, subject to your further inquiry  
22 in two weeks. But based on my conversations with counsel  
23 and the state of my file, I'm confident that they'll be  
24 prepared to go January 20.

25                   As I mentioned to the Court earlier, I did make a  
26 point of raising the calendaring issues with successor  
27 counsel.

28                   MR. CACCIATORE: Could the Court inquire of

1 Ms. Rief if the representations made by Mr. Horngrad this  
2 morning in front of Judge Haakenson were accurate in that  
3 the only date that would be required to be changed would be  
4 the 30-day continuance of the 995 motion? And then if  
5 that's the case, that the representation is this morning  
6 that only the 995 motion would need to be continued 30  
7 days, then I would feel comfortable with the Court's making  
8 the substitution today, based on those representations that  
9 we're keeping the January 20 trial date based on everything  
10 that's transpired thus far and that the 995 motion will be  
11 continued 30 days.

12 I'm a bit concerned because you made statements  
13 this morning regarding Mr. Horngrad's continued  
14 representation of the client that I think, based on what  
15 you now know, creates some type of issue, as far as that's  
16 concerned. So keeping him in for whatever reason, I'm not  
17 sure would be particularly effective, at this point.

18 THE COURT: I think that's true.

19 MR. CACCIATORE: I'm speaking in a vacuum, of  
20 course, but that seems to be the assessment, at this point.

21 THE COURT: So -- I'm sorry.

22 MS. RIEF: I agree, your Honor, we are prepared  
23 today to represent Mr. Mitchell. And if we could come back  
24 in two weeks, that would be wonderful. And the only date  
25 today that needs to be changed would be tomorrow's 995  
26 date.

27 MR. CACCIATORE: And that would be a 30-day  
28 continuance.

1 MS. RIEF: That's what we're requesting.

2 THE COURT: So I'll allow you, Mr. Horngrad, to  
3 withdraw.

4 MR. HORNGRAD: Thank you.

5 THE COURT: I will provisionally substitute -- is  
6 it Stuart Hanlon?

7 MS. RIEF: Yes, it's S-t-u-a-r-t H-a-n-l-o-n.

8 THE COURT: And Sara Rief?

9 MS. RIEF: Sara Rief, S-a-r-a R-i-e-f, as in  
10 Frank.

11 THE COURT: All right. I will provisionally  
12 substitute you in, assuming, of course, that on this future  
13 date you're going to confirm after review of the file that  
14 you will be ready to proceed on the January trial date.

15 Let's pick a date for you to return. Is September  
16 10th okay. In the morning?

17 MS. RIEF: That would --

18 MR. CACCIATORE: For what date?

19 THE COURT: Just for new counsel to come in.

20 MR. CACCIATORE: That's fine. That's fine.

21 MS. RIEF: Your Honor, would you like us to hold  
22 off? We do have formal substitution of attorney paperwork.  
23 Hold off until then?

24 THE COURT: Please.

25 MS. RIEF: The 10th at 9:00 o'clock?

26 THE COURT: Yes. That will be at 9:00 o'clock.  
27 And I will indicate on the record in light of the  
28 provisional substitution, I will grant the continuance of

1 the 995. Yes?

2 MR. CACCIATORE: Judge, I just don't understand  
3 this provisional aspect. If they can't proceed --

4 THE COURT: If they come back in two weeks and  
5 cannot proceed, then I may not substitute them in. My  
6 feeling is that if Mr. Mitchell wishes to continue to  
7 change counsel, he can do so, but I'm only going to allow  
8 counsel to come in when they tell me they're prepared to  
9 take on the trial date. Ms. Rief seems pretty sincere.  
10 I'm assuming I'm going to substitute her in, I just want to  
11 be extra cautious.

12 MR. CACCIATORE: I think your last statement that  
13 it be clear to the defendant that the Court is going to  
14 endeavor to keep the January 20th trial date, then if this  
15 counsel cannot announce ready for that date, then he's  
16 going to be looking for another attorney. It's important  
17 for him to understand this morning.

18 THE COURT: That's what I'm saying and that's what  
19 I mean by provisionally substituting counsel in.

20 MR. CACCIATORE: Thank you.

21 THE COURT: The only reason I'm stating on the  
22 record here that I'm allowing the 995 to be continued, is  
23 solely so Judge Haakenson is aware that I've made that  
24 decision. I'm going to send everybody back to him for him  
25 to set the appearance date for counsel to return for  
26 hearing on the 995 and that hearing date should be 30 days  
27 from tomorrow, give or take, whatever, whatever works for  
28 everyone's calendar.

1                   Is there anything else that I need to address here  
2 on behalf of the prosecution?

3                   MR. CACCIATORE: No.

4                   THE COURT: Ms. Rief?

5                   MS. RIEF: No, your Honor.

6                   THE COURT: Everyone, thank you very much.

7                   MR. CACCIATORE: And we'll see you on the --

8                   THE COURT: The 10th at 9:00 o'clock.

9                   MR. HORNGRAD: Thank you and good luck to all.

10                  MR. CACCIATORE: You had to get the last word in,  
11 didn't you?

12                  (Whereupon, the proceedings were concluded.)

13                  - - -

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28



COPY

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF MARIN

3 ---oo---

4

5 HON. KELLY VIEIRA SIMMONS, JUDGE, PRESIDING DEPARTMENT G

6

7 THE PEOPLE OF THE STATE OF )  
8 CALIFORNIA, )  
9 PLAINTIFF, )  
10 VS. )  
11 JAMES RAPHAEL WHITTY MITCHELL, )  
12 DEFENDANT. )  
13  
14

)  
CASE NO.  
SC 165475A

)

11

12

13

14

REPORTER'S TRANSCRIPT OF PROCEEDINGS

15

IN CAMERA MOTION

16

THURSDAY, JANUARY 20, 2011

17

PAGES 342 - 345

18

APPEARANCES:

19

FOR THE PEOPLE:

HONORABLE EDWARD BERBERIAN  
DISTRICT ATTORNEY  
HALL OF JUSTICE, ROOM 130  
COUNTY OF MARIN  
SAN RAFAEL, CA. 94903

BY: CHARLES CACCIATORE  
LEON KOUSHARIAN

DEPUTY DISTRICT ATTORNEY

20

FOR THE DEFENDANT:

STUART HANLON & SARA RIEF  
ATTORNEY-AT-LAW  
179 11TH STREET, 2ND FLOOR  
SAN FRANCISCO, CA. 94103

21

FOR THE CHILD:

KELLY COENHAVER  
ATTORNEY-AT-LAW  
38 MILLER AVENUE, SUITE 299  
MILL VALLEY, CA. 94941

22

23

24

25

26

27

28

REPORTED BY: CATHERINE HEEFNER, CSR 8813

1                   THE COURT: All right. With the exception of my  
2 staff the only persons here are Mr. Mitchell and his  
3 attorneys. At the conclusion of this particular hearing  
4 it will be ordered under seal and will not be opened or  
5 discussed without further order of the Court.

6                   Mr. Hanlon, why don't you just tell me what you  
7 need to say to support the motion.

8                   MR. HANLON: Okay. In any criminal trial a person  
9 at trial has a choice whether to testify or not and to tell  
10 his/her version of the truth of what they believe to be the  
11 truth. In our case we are going forward on the defense  
12 that Mr. Mitchell did not commit this crime and that there  
13 were other people who did.

14                  That as a defense I will work with him on and I  
15 believe him and we will go forward on that. That is very  
16 different than what is perceived to be the issue based on  
17 comments by Mr. Hanlon that it would be a manslaughter not  
18 self-defense.

19                  THE COURT: Right.

20                  MR. HANLON: But the issue of heat of passion. So  
21 we're not going forward on that, we're going on the defense  
22 that Mr. Mitchell did not do this and he will testify.

23                  In that defense it is our belief, we also believe  
24 there's evidence that supports that, and I don't need to go  
25 into that at this point, but there is evidence and it makes  
26 me believe that further testing on the bat is mandatory,  
27 because we believe there is a likelihood we will find DNA  
28 of unknown persons on it, as well as there will be issues,

1 that is the bat, I mean the bat is we believe, right now  
2 we've been given evidence that shows that Mr. Mitchell's  
3 fingerprints, some prints that aren't his but they can't  
4 match it according to the government, and the DNA only  
5 shows the blood or the DNA of Mr. Mitchell in the middle  
6 of the bat, not the handle, and DNA of the victim  
7 obviously, there was blood on the bat. And we believe  
8 further testing will support his defense that other people  
9 did this act.

10 Without that if I were to rely on the state of the  
11 evidence as given to us by the prosecution testing it would  
12 be very difficult to go forward, if we will become barred  
13 it becomes a more complex defense.

14 So given the defense we're going to use these  
15 tests are mandatory. And they are not going to be done in  
16 a timeframe, I don't need to go through the timeframe again.

17 THE COURT: What about the clothes in the car?

18 MR. HANLON: The clothes, okay, the clothes, your  
19 Honor, there have been witnesses -- well, the Court did the  
20 prelim so you are aware.

21 THE COURT: I don't think I did. I think I heard,  
22 well, I did, I did, but there was, part of it went to Judge  
23 Haakenson and it was kind of a confused process.

24 MR. HANLON: Let's just say this, there are  
25 descriptions of the assailant wearing certain clothes,  
26 those were not the clothes Mr. Mitchell was arrested in.  
27 They don't at all fit those clothes.

28 I need to be aware of the universe of evidence on

1 other clothes in the car, that they are not inconsistent  
2 with his defense, and there's nothing that could be used to  
3 effect the defense that we're using, which is there are  
4 other people. He was not wearing these clothes, his  
5 clothes.

6 THE COURT: So basically what you are telling me  
7 is that the reason that these things all need to be tested  
8 and reviewed very carefully is to make sure that there's  
9 nothing there that would significantly hamper the defense  
10 that you plan on presenting?

11 MR. HANLON: As to the clothes.

12 THE COURT: Right.

13 MR. HANLON: The bat we think there is evidence  
14 that will support it. The clothes, it would not hamper  
15 the defense, but the bat is very much more of an  
16 affirmative issue.

17 THE COURT: I don't really have a problem with  
18 the bat argument that you are making to me, I mean what am  
19 I going to say, it is the alleged weapon, you got me on  
20 that one, but the clothes I did not quite understand.

21 MR. HANLON: The clothes --

22 THE COURT: But I think I understand now.

23 MR. HANLON: What you said back to me is correct.

24 THE COURT: Right.

25 MR. HANLON: And both those are part of his right  
26 to competent counsel, which includes competent  
27 investigation and competent expert. I mean the cases are  
28 clear.

1           If Mr. Mitchell had gone forward with a lawyer who  
2 didn't do these tests in his defense it would be  
3 incompetent counsel. I mean I think a conviction would be  
4 reversed, there may be other issues involved, but to not do  
5 the test given the defense we're proceeding on is not  
6 competent. I mean you have the duty as a lawyer.

7           THE COURT: I understand.

8           MR. HANLON: Okay.

9           THE COURT: I understand. I don't need to hear  
10 anymore.

11           MR. HANLON: That's where we are.

12           THE COURT: All right. We'll open up the  
13 courtroom.

14           And that discussion was under seal and I'm  
15 ordering no one to discuss it. I'm ordering everyone not  
16 to discuss it.

17           (Whereupon, this in camera proceedings  
18 is sealed upon request of the Court.)

19

20

21

22

23

24

25

26

27

28

1 TUESDAY, MAY 10, 2011

9:26 O'CLOCK A.M.

2 -----oo---

3 THE COURT: We'll have Mr. Mitchell brought out  
4 please, Mr. Bailiff.5 MS. RIEF: I'm sorry, Your Honor, did you say 9:00  
6 or 9:30?7 THE COURT: I asked that question. We thought it  
8 was 9:00, but I also know at times I say 9:30.

9 MS. RIEF: Our calendar says 9:30.

10 THE COURT: For the hardships and jury selection,  
11 let's make it 9:00. When the trial starts, let's make it  
12 9:30. I certainly could have said 9:30, certainly something I  
13 do.14 (Whereupon, the defendant was escorted into  
15 the courtroom.)16 THE COURT: Okay. So, this is the matter of People  
17 versus James Mitchell. The record should reflect that  
18 Mr. Mitchell is in court and in custody. May I have  
19 appearances, please?20 MR. CACCIATORE: Charles Cacciatore for the District  
21 Attorney.22 MR. KOUSHARIAN: Leon Kousharian for the District  
23 Attorney's Office.24 MS. RIEF: Sarah Rief appearing on behalf of  
25 Mr. Mitchell, who is present in custody.26 THE COURT: This morning we're on to start the  
27 hardship and questionnaire process with the jurors who have  
28 been summoned. Before I bring the jurors down, is there

1 anything either side wishes to bring up with the Court?

2 MS. RIEF: Yes, Your Honor. It's my understanding  
3 that Mr. Mitchell has a motion for this Court. His intention  
4 that he indicated to us was that he would like to relieve us  
5 as counsel.

6 THE COURT: Mr. Mitchell.

7 THE DEFENDANT: Yes, Your Honor, that's true. I  
8 wrote them a letter last week indicating I want to relieve 'em  
9 as counsel. And the reason why is there is just a lot of  
10 trust issues like, you know, as to them misleading me in other  
11 cases outside of this court.

12 And then, like, it was, like I've incurred like a  
13 \$150,000 loss like, you know, due to their malfeasance not  
14 even telling me like they'll stand in, like they will conduct  
15 certain duties. And then I learned three to four months later  
16 that they neglected to do so whatsoever. And then it's just  
17 like then I'm like, you know, without counsel in Probate  
18 Court, and I'm without counsel in my wrongful death suit. And  
19 as far as I know it's like, finally, like, you know, like  
20 counsel came about in my wrongful death suit.

21 But now it's just like, you know, I'm like, you  
22 know, behind on just like, you know, literally it's just like  
23 I'm out like a \$150,000 a year and whatever. My trust has  
24 literally been dissolved, and it's due to their malfeasance.  
25 And because I didn't have anyone appear for me on my behalf at  
26 900 McCallister Street and say, hey, look, he's in jail and,  
27 hey, look, he's -- he's over here in the court right now, like  
28 he can't appear because he's in custody. It's just like they

1 just went ahead and granted summary judgment on me.

2 And now I have absolutely like, you know, no income,  
3 no protection, none whatsoever. And now it's just like, you  
4 know, on all the remainder of my funds and income, which I  
5 could have had in trust or that was irrevocable until I was  
6 35, is completely like either gone to -- from here like either  
7 my 85 year old grandmother who supposedly like has given it  
8 all away to my stepmother.

9 THE COURT: I'm not sure exactly this part that  
10 you're talking about how it relates to --

11 THE DEFENDANT: Well, it's just like, you know, what  
12 else are they not telling me, Your Honor. That's the whole  
13 thing. Is it just like are they telling me something I want  
14 to hear? Are they telling me like -- are they telling me what  
15 I want to hear, so that they can like, you know, keep me happy  
16 or what's the word I'm looking for, docile, or like, you know,  
17 keep me like, you know, cooperative with the Court. Or is  
18 this like, you know, are they just like, you know, is this  
19 like what else are they not telling me? What else are they  
20 not like, you know, displaying to me? It's like as far as I'm  
21 concerned it's like I'm putting on a certain defense.

22 THE COURT: Right.

23 THE DEFENDANT: And this it's like so now -- and but  
24 again they're not open with this Court. They're not really  
25 open to the public with what kind of defense --

26 THE COURT: They probably purposely are not doing  
27 that right now. They're waiting for the right moment to do  
28 that.

1                   THE DEFENDANT: Well, Your Honor, it's like I'm  
2 going to sue them. So, why am I going to like, you know, why  
3 am I going to like, you know, sit with counsel who I'm  
4 possibly going to sue.

5                   THE COURT: Okay. So, what's your intention then if  
6 you were to relieve them?

7                   THE DEFENDANT: I want them to give my file to the  
8 Public Defender's Office, and then I'd want the Public  
9 Defender to probably like go to trial in the next month, if  
10 not in the next three weeks. I don't want -- this is not a  
11 delay or a scare tactic. Like I don't want to delay the Court  
12 any longer, right? I want to go to trial. I want to get this  
13 over with.

14                  THE COURT: Well, you're going to.

15                  THE DEFENDANT: Yeah, it's just like I want to get  
16 this -- I wish I could go to trial tomorrow, right? But it's  
17 just like I want to go to trial with counsel who is like, you  
18 know, if they're not going to tell me what I want to hear,  
19 they're going to tell me what's going on, and they're not, you  
20 know, going to be worried about getting along with me, or, oh,  
21 I'm going to please Mr. Mitchell or what have you, you know  
22 what I mean? I just want -- I just want counsel who is  
23 competent and counsel who is just going to say, yeah, hey,  
24 look, that's impossible. You know what, four months ago or  
25 three months ago --

26                  THE COURT: You just mentioned the competence issue.  
27 You know it's interesting this is your third counsel, and I  
28 was writing the names of the attorneys you've had in this

1 case. There's no more competent lawyers than the ones you've  
2 had --

3 THE DEFENDANT: No, they're good.

4 THE COURT: Let me finish. Especially Mr. Horngrad,  
5 Mr. Hanlon and Ms. Rief. So, when you say you want someone  
6 who is competent, that's a difficult thing for you to sell to  
7 me because the reputation of those particular lawyers, not  
8 only Mr. Horngrad, but the attorneys you have now is just  
9 extraordinary.

10 THE DEFENDANT: Well, Your Honor -- well, Your  
11 Honor, let me say if competency is not an issue, then let me  
12 say honesty is an issue.

13 THE COURT: M-hm, okay.

14 THE DEFENDANT: Honesty is a big issue.

15 THE COURT: Anything else you want to say?

16 THE DEFENDANT: No, I know this is like the third  
17 time I've gone through lawyers before. But you know what,  
18 like Hallinan, Hallinan was like, you know, he couldn't even  
19 stand, he could hardly remember his own name.

20 And Horngrad like he wanted me to take a 12 year  
21 deal. I said the hell with you, I want to go to trial. And  
22 then he wanted to chicken out. So, the thing is it's like,  
23 you know, when it came to my lawyers, right, like, you know, I  
24 admired them because it's like they wanted to take the 15,  
25 they wanted me to take a 15 year deal that the DA went ahead  
26 and introduced. And I said, "Go to hell, I want to go to  
27 trial." Then they stood by me.

28 So, competence not being -- competence is not an

1 issue as well as honesty and me being able to like, you know,  
2 trust my attorneys and like, you know, having and being  
3 comfortable and trusting them in what they're saying. It's  
4 just like, you know, four months go by. I have letters  
5 written from them, like, you know, from their office saying  
6 like we're going to help you with this, and we're going to do  
7 whatever. And then I learn like two weeks before jury  
8 hardships that's not the case, that it's completely like, you  
9 know, it's like, you know, they're not going to do it  
10 whatsoever. I wish I would have learned this four months ago  
11 versus -- versus now. And then it kind of raises an alarm in  
12 me -- it alarms me what else are they not telling me and what  
13 else are they misleading me on. So, that's all I have to say.

14 THE COURT: And you've done nothing to retain new  
15 counsel?

16 THE DEFENDANT: I'm indigent. I don't have like I  
17 don't know the issues with the money or the funds that I've  
18 given this counsel right here.

19 THE COURT: Okay.

20 THE DEFENDANT: I'm indigent. That's why I don't  
21 really have that many options.

22 THE COURT: Okay. Ms. Rief, is there anything you  
23 wish to say?

24 MS. RIEF: No, Your Honor.

25 THE COURT: Mr. Kousharian, is there anything you  
26 wish to say?

27 MR. KOUSHARIAN: We're prepared to submit it on our  
28 papers, Your Honor.

1                   THE COURT: Ms. Rief, the prosecution did submit  
2 papers. Did you see them?

3                   MS. RIEF: Yes, Your Honor, we did.

4                   THE COURT: Mr. Cacciato, anything you wish to  
5 say?

6                   MR. CACCIATORE: No, thank you.

7                   THE COURT: So, it's interesting I just saw the  
8 prosecution's papers this morning. They cite a case that I  
9 also have reviewed. This is the case of People versus  
10 Keshishian, K-e-s-h-i-s-h-i-a-n. That's at 162 Cal. App. 4th  
11 425. And that case talks about sort of balancing a request  
12 like this against the disruption to the process, the parties,  
13 that sort of thing. I am taking guidance from that case in  
14 considering where we are in the process, what's happened so  
15 far in considering the request.

16                  Of course, I have to consider the defendant's  
17 request, which is that he have counsel of his choosing. This  
18 is a serious case, so I have to certainly consider that  
19 seriously. So, I balance that against a few things. One is  
20 this is the defendant's third attorney or set of attorneys.  
21 And as I indicated a few moments ago, especially as it relates  
22 to Mr. Horngrad, Mr. Hanlon and Ms. Rief, very competent,  
23 experienced, excellent lawyers.

24                  This is at least the third trial setting. It's been  
25 set over several times at the defendant's request, mostly to  
26 get new counsel ready, up and going. The case is two years  
27 old. We've already proceeded with motions in limine. This is  
28 the day of hardships, and I was notified of the potential

1 request yesterday.

2 We have 65 witnesses approximately under subpoena,  
3 800 jurors have been summoned, a hundred of them for today,  
4 and they're upstairs. And I think that any further delay  
5 would result in a complete disruption of an orderly and just  
6 process. There's not another counsel here ready to go. The  
7 only way that Mr. Mitchell could have what he wants was if I  
8 discharged counsel, reset the case again, re-subpoenaed  
9 witnesses, resummoned jurors, and then gave new counsel  
10 additional time to prepare. And then if there's a discontent  
11 between that attorney and this defendant, I'm not sure where  
12 we would be. Seems that perhaps that's a common thread. In  
13 any event, it's the 11th hour. We've already proceeded with  
14 in limines, jurors are upstairs. I'm denying the request on  
15 balance pursuant to the case cited.

16 Moving onto the hardships, I do have questions of  
17 the attorneys, just sort of logistical questions, and then  
18 we'll have the jurors brought down. I want to let you know  
19 what I thought was the right way to handle the situation and  
20 get your feedback if you think I should do something  
21 different.

22 I was going to have the jurors brought down. I was  
23 going to introduce everyone to the jurors and explain that  
24 Mr. Hanlon is also an attorney for and with Mr. Mitchell. I  
25 was then going to indicate to the jurors that the defendant  
26 has entered a plea of not guilty. The question is whether he  
27 is or is not after evidence presented, and then I was going to  
28 read the Information to them, not the entire Information, but

1 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

2 FIRST APPELLATE DISTRICT

3 ----oo----

**COPY**

4  
5 PEOPLE OF THE STATE OF CALIFORNIA, ) Court of Appeals  
6 ) Case No. \_\_\_\_\_  
7 Plaintiff and Respondent, )  
8 vs. ) Marin County  
9 JAMES RAPHAEL WHITTY MITCHELL, ) Superior Court  
10 ) Case No. SC165475A  
11 Defendant and Appellant. )  
12 \_\_\_\_\_  
13  
14  
15 APPEAL FROM THE SUPERIOR COURT OF MARIN COUNTY  
16 HONORABLE KELLY VIEIRA SIMMONS, JUDGE PRESIDING  
17  
18 REPORTER'S TRANSCRIPT ON APPEAL  
19 IN CAMERA HEARING  
20 MAY 25, 2011  
21  
22 \*\* SEALED BY ORDER OF THE COURT \*\*  
23  
24  
25  
26  
27 Reported by:  
28 SUSAN L. FITZSIMMONS  
CSR No. 4369

1 WEDNESDAY, MAY 25, 2011

4:09 O'CLOCK P.M.

2 ---oo---

3 (Whereupon, the following proceedings were  
4 held in camera:)

5 THE COURT: All right. The record has been cleared  
6 (sic) with the exception of my staff. These proceedings are  
7 ordered sealed until further order of the Court.

8 Mr. Hanlon has filed a motion, and, in fact, I don't  
9 have it before me, I will get it, and I will file it under  
10 seal. The motion requests significant funds, additional  
11 funds, for additional defense.

12 And, Mr. Hanlon, why don't you make your record in  
13 that regard.

14 MR. HANLON: Yes, your Honor.

15 As the Court is aware from our other in camera  
16 hearing, Mr. Mitchell will be testifying that he didn't do  
17 this crime. As I indicated in my declaration, there is some  
18 evidence supporting that, that there could be other people,  
19 sufficient that I feel that I can question him. Whether I  
20 argue that or not will be up to me.

21 However, there is a large amount of evidence that  
22 Mr. Mitchell suffers from certain psychiatric problems that  
23 began in early childhood. He was interviewed by the  
24 Government and us, including a review of his siblings where he  
25 was violent towards them at a very early age, had psychiatric  
26 help from his mother.

27 His mother, his cousins have been interviewed, and  
28 whether they call it off, or bipolar, or something wrong with

1 him, or something different, but there's been a history of  
2 Mr. Mitchell having mental issues.

3 And it seems to me there was also psychiatric  
4 evaluation done by Mr. Hallinan's doctor, who was hired,  
5 and -- who found a certain diagnosis, as I remember it, the  
6 diagnosis was PTSD with possible bipolar, there were more  
7 tests needed.

8 And as I told the Court, when I got first involved  
9 in this case, it was represented to me that Mr. Mitchell had  
10 agreed to go forward with a mental defense, which was not the  
11 case, he never did agree. He had never said to me he did it,  
12 I don't think he said to the other lawyers, so I don't know.

13 So, I tried very strongly to get him to go forward  
14 with a psychiatric defense, because I thought it was in his  
15 best interests, that it could affect the murder verdict as a  
16 manslaughter, it could affect the allegations that makes this  
17 special circumstance of kidnapping, murder in the course of  
18 kidnapping.

19 That, as I pointed out to the Court, Mr. Mitchell's  
20 father killed his brother on July 12th. Mr. Mitchell's father  
21 died of a heart attack or stroke on July 12th. His baby was  
22 born on July 12th. And this event occurred on July 12th. So,  
23 there's a consistency that led to what, I think, a -- I hate  
24 to use the term, a perfect storm of things going on with him.  
25 Anyway, that -- I'm trying to lay a framework of why I pushed  
26 him so hard and why I'm doing what I'm doing.

27 Mr. Mitchell has consistently told me he would not  
28 go forward with the defense. He didn't do it, he's going to

1 testify he didn't do it. I finally came to the conclusion --  
2 I've been wrestling with this, really, since my involvement in  
3 the case on how to proceed, and I came to the conclusion that  
4 it isn't just the Defendant telling me what he's going to do  
5 or not do, the end of the story -- just because he said he  
6 didn't do it, and he's going to testify to that, is not the  
7 end of the story, and my obligation is to not only him but to  
8 the legal system that I'm a part of, that I have an obligation  
9 to explore as best I can all avenues of defense. And also to  
10 proceed in a way that does not involve deception to the Court  
11 or the jury.

12 So, to do all that, I felt the best interests would  
13 be -- and my job would be to contact the psychiatrist, to  
14 review his records, and, in fact, watch him testify, and if it  
15 became clear through that that the question would then be --  
16 if that doctor came to the conclusion that he did suffer from  
17 the disease that affected either his ability to testify or, in  
18 fact, what happened -- about what happened, that we would call  
19 that person.

20 Now, this, of course, raises numerous issues, i.e.,  
21 notice to the Prosecution, and can I put on a defense that  
22 contradicts my own client's testimony, which I don't have the  
23 answer to that one. But I determined that I should do that,  
24 and if I had money, I would do that.

25 And as the Court knows, 'cause the Court has been  
26 generous with us so far, we went forward on a defense that he  
27 didn't do it, and we ran out of money, and the Court has given  
28 me substantial funds, the record will speak for itself, to

1 continue in the forensic evaluation to find evidence that he  
2 didn't do it.

3 Therefore, the money the Court gave me is all gone,  
4 the money that I got from the client is long gone, and I would  
5 need the Court expenditure of funds for this.

6 And I understand it's now going in many arguments  
7 against it, some of which I raised, you know, how do we deal  
8 with notice, how do we deal with giving the Prosecution  
9 adequate notice to prepare for that kind of defense that would  
10 occur after my client testified.

11 All I know is, I can't answer those questions, I  
12 can't answer the financial ones, but I can ask the Court to  
13 help me try to deal with this problem, because I don't know  
14 what else to do. I think it's a really unusual circumstance  
15 that I find myself in, and that's why I made the request to  
16 have the Court appoint money for a psychiatrist.

17 THE COURT: And my understanding from your request  
18 is your estimate for what you want is about 25 to \$30,000?

19 MR. HANLON: That's --

20 THE COURT: That's your estimate?

21 MR. HANLON: I mean, I could say 20 to 30.  
22 Psychiatrists run the gamut of anywhere from 3 to \$500 an  
23 hour, the time goes so quickly, I think that's a realistic --  
24 even, let's say, 15 to 30, I think that would be realistic,  
25 but it certainly is expensive, yes. I think that's a  
reasonable --

27 THE COURT: Well -- so I thought about your request  
28 and our discussion, and I have a few thoughts. First of all,

1 the Court has already provided funds for Mr. Mitchell's  
2 defense, and for the defense he wants. The money that I have  
3 provided -- not I, personally, but the Court has provided to  
4 the Defense has gone to the defense that Mr. Mitchell  
5 specifically wishes. And this particular defense is really  
6 one that you, as a professional, believe is the more  
7 appropriate defense, but your client is not interested in?

8 MR. HANLON: That's correct.

9 THE COURT: And so that's something for me to  
10 consider as well. Providing funds for a conflicting defense  
11 is problem -- causing problems for me personally. Whether or  
12 not a psychiatrist could watch your client testify and then  
13 testify about it, I don't even know if that would necessarily  
14 be admissible evidence, which is something I think I need to  
15 consider, especially since it's a large amount of money that  
16 is being requested.

17 You already pointed out the problem that might be  
18 raised, namely, that there would be no notice to the  
19 Prosecution, it's on the eve of trial. And I think the most  
20 important thing is that, really, this is a due process issue,  
21 you know, I think I have to make sure that Mr. Mitchell has  
22 his due process rights guarded.

23 And my feeling is that I have done that. You have  
24 done that. A lot of money has been spent and energy has been  
25 spent to assist him in his defense. And I remember you  
26 stating that you've spoken to him at length about your feeling  
27 that this other defense might be more beneficial for him --

28 MR. HANLON: That's correct, Judge.

1           THE COURT: -- and he has rejected that advice.

2           MR. HANLON: Can I just say, by not disagreeing with  
3 anything the Court says, I'd agree with everything you're  
4 saying about discussions we had, so I'm not trying to  
5 interrupt you, but if I think something's wrong, I'll say it,  
6 otherwise I'm agreeing with the Court.

7           THE COURT: Okay. Thank you.

8           And I also think about what you just said, which is  
9 that there is some evidence that you can argue which would  
10 support the defense he wishes to present --

11           MR. HANLON: Yes.

12           THE COURT: -- and so that is something I consider  
13 as well.

14           So, what I'm deciding is, I don't think that it  
15 would be a prudent expenditure of funds for me to give you for  
16 your client such an exorbitant amount of money for a  
17 conflicting defense that might not come into play in any  
18 event.

19           If you feel, Mr. Hanlon, that a psychiatrist or  
20 psychologist could review any prior medical records and enter  
21 an opinion that you're wanting, with a dollar figure of a  
22 couple thousand dollars, why don't you look into that?

23           MR. HANLON: Okay.

24           THE COURT: If you find one that you think could  
25 help you for 2,000, I encourage you to ask me again. If you  
26 don't think that's going to be enough money for you to look  
27 into this alternative defense, then I decline to provide  
28 additional funds.

1 MR. HANLON: All right. All right. I understand  
2 what the Court's saying then. Thank you for considering  
3 this --

4 THE COURT: Okay.

5 MR. HANLON: -- and giving me the time.

6 THE COURT: Thank you very much. Have a lovely  
7 afternoon.

8 MR. HANLON: And getting my tire fixed.

9 THE COURT: Oh, I know, I'm sorry about that.

10 MR. HANLON: Have a wonderful vacation.

11 THE COURT: What's that?

12 MR. HANLON: I said, have a wonderful vacation.

13 THE COURT: Thank you. Thank you very much.

14 MR. HANLON: See you in a couple of weeks.

15 THE COURT: All right.

16 MR. HANLON: The 10th,

17 THE COURT: Yes, see you on t

18 afternoon.

19 MR. HANLON: All right. Thank you.

20 THE COURT: And this is ordered sealed, my staff is  
21 not to discuss the issues presented in this hearing.

22 (Whereupon, at the hour of 4:20 o'clock p.m.,  
23 the proceedings were concluded.)

24 ---oo---

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF MARIN

3 -----oo---

4 HON. KELLY V. SIMMONS, JUDGE

5 DEPARTMENT G

6 THE PEOPLE OF THE STATE OF CALIFORNIA, ]

7 Plaintiff, ]

8 versus ]

9 JAMES RAPHAEL WHITTY MITCHELL, ]

10 Defendant. ]

11 ]

12

13

14

15 REPORTER'S TRANSCRIPT OF PROCEEDINGS

16 FRIDAY, JUNE 10, 2011

17 MONDAY, JUNE 13, 2011

18 TUESDAY, JUNE 14, 2011

19 WEDNESDAY, JUNE 15, 2011

20 A P P E A R A N C E S:

21 FOR THE PEOPLE:

22 HON. EDWARD S. BERBERIAN  
DISTRICT ATTORNEY  
23 San Rafael, California  
By: CHARLES CACCIATORE  
Deputy District Attorney  
And: LEON KOUSHARIAN  
Deputy District Attorney

24

25 FOR THE DEFENDANT:

26 STUART HANLON  
SARA RIEF  
27 STUART HANLON LAW  
179 - 11th Street, 2nd Floor  
San Francisco, California

28 REPORTED BY: SUSAN J. KLOTZ, CSR No. 8300

1 FRIDAY, JUNE 10, 2011

1:30 O'CLOCK P.M.

2 -----oo---

3 THE BAILIFF: Remain seated. Come to order. Court  
4 is again in session.5 THE COURT: I want to deal with one matter from this  
6 morning.7 (Whereupon, unrelated calendar matters were  
8 heard and reported but not transcribed  
9 herein.)10 THE COURT: If you'll bring out Mr. Mitchell,  
11 please.

12 THE BAILIFF: Yes, Your Honor.

13 (Whereupon, the defendant was escorted into  
14 the courtroom.)15 THE COURT: Hi. Now, I'm calling the matter of  
16 People versus James Mitchell. The record should reflect that  
17 Mr. Mitchell is in court and in custody. Good afternoon,  
18 everyone.

19 MR. HANLON: Afternoon, Your Honor.

20 THE COURT: May I have appearances, please?

21 MR. KOUSHARIAN: Leon Kousharian for the District  
22 Attorney's Office.

23 MR. CACCIATORE: Charles Cacciatore for the People.

24 MR. HANLON: Stuart Hanlon and Sara Rief for  
25 Mr. Mitchell, who is present.26 THE COURT: The matter comes on for further  
27 discussion regarding any additional motions, sort of sorry I  
28 set that date now after reading all the motions, but I did get

1 the motions, and we'll talk about them.

2 (Whereupon, unrelated calendar matters were  
3 heard and reported but not transcribed  
4 herein.)

5 THE COURT: Okay. All right. So, back to the  
6 Mitchell matter as it relates to further motions that were  
7 filed. First of all, I do have the alphabetical and random  
8 list for jurors which I'll give to each side. It's a little  
9 confusing. The only way we could do it properly you'll get a  
10 list that's got some words highlighted in yellow and some are  
11 not. Those highlighted in yellow are the people that are  
12 returning on June 15, and they'll go in order that you see  
13 them on the list. Those not highlighted are coming back on  
14 the 14th. I don't have two lists. You have to work off one  
15 list that way. I have an alphabetical and random list for  
16 each of you. And remember the highlighted names come back on  
17 the 15th, the unhighlighted on the 14th.

18 MR. CACCIATORE: Thank you.

19 THE COURT: Then one more sort of issue relating to  
20 those is there was one juror who I believe was not excused  
21 whose name is not on the list and her name is Diane Simpkin.

22 THE CLERK: Yes.

23 THE COURT: What I propose is that there was a  
24 gentleman by the name of Rodzen who was excused, but his name  
25 is on the list. I propose I put Ms. Simpkin's name in the  
26 location where he was on the random list, seems like a logical  
27 way to deal with that.

28 MR. HANLON: What's his name?

1 MS. RIEF: Rodzen.

2 THE COURT: My proposal is, I just gave you my  
3 random list, but my proposal is I put her name in the location  
4 where his name was on that list. Does the defense have any  
5 problem with my doing that?

6 MR. HANLON: Your Honor, at this point before I can  
7 agree to anything, Mr. Mitchell just gave me a note, I think  
8 he wants to address the Court.

9 THE COURT: Just a minute. I want an answer to that  
10 question first.

11 MR. HANLON: I can't agree. He wants to dismiss me.  
12 I can't agree.

13 THE COURT: Well, at the moment you're counsel.

14 MR. HANLON: I agree with it.

15 THE COURT: Prosecution?

16 MR. CACCIATORE: No objection.

17 THE COURT: That's what I'll do. Let me make sure,  
18 Madam Clerk, Ms. Simpkins is on the same day as Mr. Rodzen?

19 THE CLERK: Yes, both on the 12th.

20 THE COURT: That's how we'll do it. So, that  
21 resolves that particular issue. Also the record should  
22 reflect that the Court and the parties have had a few E-mail  
23 discussions, very briefly, regarding juror names and who was  
24 excused and who wasn't excused. I'm quite satisfied with  
25 those discussions and don't think anything was improper. I'm  
26 assuming everyone is comfortable with that. If anyone has a  
27 disagreement, let me know now.

28 MR. CACCIATORE: I have no objection to the series

1 of E-mails. They actually helped us sort out quite a few of  
2 the issues we had.

3 MR. HANLON: I feel the same way.

4 THE COURT: Great. So, now, Mr. Hanlon, you've  
5 indicated there is an issue you would like to address before I  
6 proceed further?

7 MR. HANLON: I got a note from Mr. Mitchell. He  
8 wants to address it.

9 THE DEFENDANT: I'll go ahead and address it, Your  
10 Honor. I'd rather go pro per for the remainder of the trial,  
11 and I'm ready. There will be no disturbances, no delays,  
12 nothing else. I'll pick up from right where we picked up on.  
13 I'll go pro per all the way through July 22nd.

14 THE COURT: Why would you do that, Mr. Mitchell?

15 THE DEFENDANT: It's my constitutional right.

16 THE COURT: But why would you want to do that?

17 THE DEFENDANT: I could discuss it in chambers. I  
18 could discuss it under seal if like that was like, you know, a  
19 progress report. It's really a personal problem, and I don't  
20 trust him. I don't like him. I don't want anything to do  
21 with them. They've been way too disruptive. Like if they're  
22 going to lie to me, I can only imagine that they're going to  
23 lie to a jury. This man wants to do that to a jury, I can  
24 only imagine the blowback and the effect that it's going to  
25 have on me as a defendant in this case. And like I said if we  
26 want to discuss it further, we could discuss it under seal.  
27 But other than that, it's my right.

28 I've done the research. I can go pro per any time I

1 wish or any time that I see. I have to say I'm very competent  
2 in the case. I know the information. The only thing I'd ask  
3 the Court to do is order present counsel I do have right now  
4 to turn over all documents, all -- like all investigations,  
5 like, you know, all experts, like everything, all the trial  
6 books, everything that they have done thus far and then turn  
7 it over to me here in the jail. And our next court date is  
8 June 14th, right?

9 THE COURT: Monday.

10 THE DEFENDANT: This Monday?

11 MR. CACCIATORE: Tuesday.

12 MR. HANLON: Tuesday.

13 THE COURT: Sorry, Tuesday.

14 THE DEFENDANT: We're dark on Mondays. I'll be  
15 ready to go on Tuesday. If they turn everything over to me  
16 today or Saturday, I'll be ready to go on Tuesday.

17 THE COURT: So, there are a few things. Number one,  
18 this is just being presented to me at this exact moment. And  
19 so, Mr. Mitchell, referring to you specifically since you're  
20 speaking to me, I need a short time to think about what you're  
21 saying, not a long time, just a short time because I didn't  
22 expect it. So, I'm not going to give you an answer  
23 immediately, but you'll have an answer likely today, if not on  
24 Monday morning. I just need to think about how to address  
25 this particular question.

26 THE DEFENDANT: Okay, Your Honor.

27 THE COURT: The other concern I have I guess is if  
28 I'm considering that request, Mr. Mitchell, there are some

1 motions that are on file right now. I have not dismissed your  
2 counsel. What I would like to do is discuss the motions, deal  
3 with those with your attorney.

4 THE DEFENDANT: I can deal with the motions right  
5 now, Your Honor, with the change of venue motion as well as  
6 the motion in limine regarding Danielle Keller's, I'm sorry,  
7 Danielle Keller's hearsay statements, hearsay statements from  
8 Erica Menezes and Mary Jane Grimm, right?

9 THE COURT: So, you have the motions that were  
10 filed?

11 THE DEFENDANT: I have the motions that are filed,  
12 and I've gone over them, and I'm ready.

13 THE COURT: Do you have the motions that the  
14 prosecution has filed?

15 MR. MITCHELL: I do not. I'd have to look over  
16 those, right, probably need 15 minutes to look over them.

17 THE COURT: Mr. Cacciato, Mr. Kousharian, do you  
18 have any comment or suggestion as to how I should deal with  
19 this?

20 MR. CACCIATORE: Well, the defendant does have  
21 certain rights as he's alluded to, and I've sent an E-mail to  
22 request some materials regarding Farettwaivers --

23 THE COURT: I have that.

24 MR. CACCIATORE: -- we have.

25 THE COURT: I have that. Do you mean the form that  
26 one fills out?

27 MR. CACCIATORE: There was -- yes. There was one  
28 most recently used by the court in the Naso case, just a

1 couple weeks ago. I just didn't have anything on it. So, if  
2 you have it, that is kind of where it's at. And I'm  
3 understanding that -- the only thing I'm unsure of is this eve  
4 of trial issue.

5 THE COURT: Right. That's what I need to look up.

6 MR. CACCIATORE: Although counsel -- I mean although  
7 Mr. Mitchell is stating that there will not be any delay, and  
8 I just question his ability to competently represent himself  
9 if he's also requesting he be given the discovery, which is in  
10 excess of 2,000 pages today, that he'll be ready by Tuesday  
11 unless he's already seen that.

12 MR. MITCHELL: I've seen most of the pages of  
13 discovery, Your Honor. I've seen like everything from the  
14 2,000 pages Mr. Cacciatore is speaking about. The only thing  
15 I haven't seen are the trial books, and that will take me  
16 three days to go over, the witness list and orders. Then I  
17 need to touch base with on the logistics of it all, take three  
18 or four days. As for the discovery, I've read all the  
19 discovery. I'm completely competent.

20 THE COURT: Well, it sounds as though you know what  
21 you're doing and that you want to make this decision. I'm  
22 hesitating because you know, of course, it's a very serious  
23 case with serious consequences. You do have very competent  
24 counsel trying to assist you. I appreciate that you're not  
25 happy with their services. I'm just trying to make sure that  
26 any decision you make in this regard is one you really want to  
27 do. You do have the right to represent yourself.

28 MR. MITCHELL: It's a tough call, Your Honor, but

1 I've already made it, Your Honor. It's okay.

2 THE COURT: So, I have this document. This is a  
3 questionnaire we give to people who want to represent  
4 themselves, and you have to fill it out. It talks about  
5 making sure you understand what will happen if you do  
6 represent yourself, what the charges are, what the  
7 consequences are, what type of penalty you might be facing.  
8 And I want you to spend some time filling that out for me.

9 What I'll do I think, Mr. Cacciato, is I'll walk  
10 downstairs -- downstairs. Down the hall and make sure that  
11 Judge Sweet didn't use an altered form. I mean he got this  
12 form from me. I don't know if he amended it at all. I'll go  
13 talk to him. So, why don't we take a brief --

14 MR. CACCIATORE: Could we have like maybe 10  
15 minutes. We'll check in with our colleagues on the issues  
16 that they addressed there.

17 THE COURT: Sure, why don't you do that.

18 Mr. Mitchell is filling out the form. Try and get back here  
19 in 10 minutes.

20 MR. CACCIATORE: Actually, I'll wait here, and  
21 Mr. Kousharian has volunteered to do that.

22 (Whereupon, a recess was taken from 2:00 p.m.  
23 to 2:19 p.m.)

24 THE COURT: All right. Back on the record in the  
25 Mitchell matter. And before we discuss this further, I'd like  
26 to know, either you Mr. Kousharian or Mr. Cacciato, could  
27 you tell me please what the maximum penalty for the offenses  
28 that Mr. Mitchell is charged with?

1 MR. KOUSHARIAN: Life without possibility of parole,  
2 Your Honor.

3 THE COURT: Okay. And, Mr. Mitchell, I see you  
4 crossed that part out. I didn't see what you did here. Okay.  
5 Starting with the prosecution, what do you think would be  
6 advisable as it relates to what I should do at this moment?

7 MR. CACCIATORE: Well, you know, of course, as the  
8 Court knows voir diring the defendant on the form that he had  
9 filled out, the advisement he had filled out, and then a  
10 concern that I have is that because of the history of the case  
11 is that if you relieve counsel today, and on Monday or Tuesday  
12 Mr. Mitchell says he wants an attorney, then we're sort of  
13 back where we were before. And this may be some manipulation  
14 by him to delay the case further in spite of what he's saying  
15 about wanting to go forward. I think we just need to address  
16 that issue, talk about standby counsel, those types of things.  
17 That's really all I have to add to what's going on right now.

18 THE COURT: Mr. Hanlon, Ms. Rief, do either of have  
19 any comments?

20 MR. HANLON: Yes, Your Honor, make sure my phone is  
21 off. My understanding of the law is Mr. Mitchell, if he's  
22 prepared to go on Tuesday, he has an absolute right to  
23 represent himself. For what it's worth, he's intelligent. He  
24 understands the facts of the case, which I've discussed at  
25 length with him. He understands the issues. He's been able  
26 to communicate with me about these matters.

27 On that basis -- I'm not commenting on what he said  
28 or why he wants to do this, but if I had any doubts about his

1 competency, I would say. In terms of being able to understand  
2 the issues and the law, my discussion with him for the last  
3 period of time however long it's been since I've been his  
4 lawyer, he does have that ability, and he understands. He  
5 certainly understands the issues in the case, discussed the  
6 legal concepts with me at length. That -- that's my only real  
7 comment. If you want to talk about the issues Mr. Cacciatoore  
8 raised, I could, but I don't feel appropriate to talk about  
9 them now. I don't think that's what you're asking me.

10 THE COURT: Ms. Rief, do you have any comments?

11 MS. RIEF: No, Your Honor.

12 THE COURT: So, Mr. Mitchell, a few things. I'm  
13 concerned about the request you're making. I agree with you  
14 that you do have the right to represent yourself under certain  
15 circumstances. So, I'm seriously considering your request,  
16 and I'm obligated under many scenarios to grant your request.  
17 But I'm worried about it for you. I don't think it's a good  
18 idea, but it is your right to represent yourself if you are  
19 capable of doing so, and if there's no request to delay.

20 Because this issue was brought up to me moments ago,  
21 basically, what I'm going to do is I'm -- in a moment I'm  
22 going to recess the proceedings until Monday, and I'm going to  
23 want either you, Mr. Hanlon, or you, Ms. Rief, to return on  
24 Monday, and I'm going to have a more thorough voir dire with  
25 Mr. Mitchell to make sure he's (a) had an opportunity to  
26 review all the discovery and still satisfy me he's prepared to  
27 proceed without any delay, and have a further voir dire about  
28 his motion to proceed in pro per.

1                   So, I need -- I know that the prosecution is a  
2 little more flexible as far as appearances than the defense  
3 is, but I'm not excusing or relieving you at this time, and  
4 I'll need someone to appear on Monday to discuss the motion to  
5 proceed in pro per. And if it's not granted, to proceed with  
6 the motions that are on file. My preference would be, if it's  
7 workable, Monday at about 10:30.

8                   MR. HANLON: Ms. Rief has to address it. I'm in a  
9 continuing homicide prelim in Alameda County in front of Judge  
10 Jacobson. He knows I'm not available past Monday. So, he  
11 asked me -- a witness was beat up, so we had to put it over to  
12 Monday. Ms. Rief would prefer the afternoon I know because of  
13 scheduling. We tried to schedule things to end as of Monday.

14                  THE COURT: That's fine.

15                  MR. HANLON: That's one thought. The other thought  
16 in terms of getting the materials to Mr. Mitchell, the case is  
17 very well organized. We have some new discovery we have to  
18 print out. The problem is taking out metal pieces of the  
19 material. They're either paper clipped or stapled or  
20 sometimes clipped. And we would have to get people to work on  
21 that this weekend. I couldn't perceive getting materials to  
22 Mr. Mitchell prior to that. He does have -- up until  
23 discovery approximately a month ago, he had all the discovery.  
24 There is some -- there's stuff he doesn't have. We would have  
25 to get it. I can't see getting things to him before Monday in  
26 an organized way, the way I'd like to give it to him. We have  
27 approximately four boxes and ten binders of materials.

28                  THE COURT: That has to get to them that he doesn't

1 have?

2 MR. HANLON: No, he has it. We've organized it by  
3 witnesses and subject matter. He doesn't have it with our  
4 organization. What he doesn't have -- we just got three new  
5 disks of paper which we could print out. I don't know how  
6 crucial it is. He doesn't have those. I think we'd have to  
7 write a memo to him about a meeting we had with an expert. He  
8 doesn't have that. We could do that. We could try to get  
9 material to him that he doesn't have by Sunday. The material  
10 that -- we could bring up the rest of the material on Monday  
11 in the binders. I don't know if he can have binders. They  
12 have metal clips. Have to take them out of the binders. The  
13 binder has big metal part. I assume this jail is like San  
14 Francisco jail, and you can't bring in any metal. We would  
15 have to unbind them and make them available.

16 The other part is all of the written material, a lot  
17 of the written discovery came in disks, which we printed out.  
18 I don't know what the Court wants to do with disks. At least  
19 in Alameda County we can't give CDs to inmates because they're  
20 possible weapons. And we'll print them all out. The disks  
21 themselves, the pictures we can't print out in a readable  
22 form. The pictures are -- no, we've colored printed the  
23 photographs. That's not an issue. We have them. The  
24 material ones we have. And --

25 THE COURT: Well, the issue is I would like to know  
26 if Mr. Mitchell could be provided, and I know this is putting,  
27 you know, responsibility on you, but all discovery by Sunday,  
28 so that on Monday afternoon I can ask him if he has all the

1 discovery and be ready to proceed. Because if he's not, I'm  
2 not relieving you.

3 MR. HANLON: You mean all the discovery he doesn't  
4 have already?

5 THE COURT: Right.

6 MR. HANLON: Not the summaries we did, we can get  
7 that to him later. Okay. We can do that. We can get it by  
8 Sunday in the jail, not probably more than three, 400 pages,  
9 get them to the jail. We'll print them out and get them to  
10 Mr. Mitchell. We'll give him the colored copy of the  
11 photographs that we have. I don't think he has them. And  
12 we'll give him all the new discovery. Ms. Rief and I will go  
13 back and organize that. We'll get them to Mr. Mitchell on  
14 Sunday certainly by noon, I don't know who at this point.  
15 We'll have someone going through the materials we have, so  
16 there's no metal. We could bring them to court on Monday.

17 MS. RIEF: That's another issue Mr. Mitchell just  
18 brought up what about the questionnaires prior to Monday. We,  
19 obviously, have them all organized.

20 MR. HANLON: We have them organized in order. We do  
21 have staples. We have cover sheets stapled.

22 MR. MITCHELL: I can always take out staples here,  
23 Your Honor. They send it over, the deputies will have them  
24 take everything out in front of them. I can go ahead and be  
25 taking care of those issues if the present counsel is worried  
26 about that.

27 MR. CACCIATORE: I'm a little worried about any  
28 representations Mr. Mitchell might be making about how the

1 jail is going to handle that.

2 THE COURT: I know.

3 MR. HANLON: We will try our best to take the metal  
4 out of the questionnaires. They're in boxes. This is going  
5 to be an issue for the Sheriff. There's boxes of materials.  
6 For the questionnaires, I wouldn't want to take them out of  
7 the boxes, only way they're organized. We will deliver the  
8 boxes without metal. We have people available. I have young  
9 children -- old children who want to make some money. So,  
10 we'll get them available tomorrow. We'll work on it tomorrow.  
11 We'll get the questionnaires and all new discovery to  
12 Mr. Mitchell by Sunday.

13 MR. KOUSHARIAN: Your Honor, I know the Court  
14 doesn't like to tell the jail what to do. But if the Court  
15 could perhaps fashion an order that discovery is to be  
16 delivered to Mr. Mitchell on Sunday by the Sheriff's  
17 Department so they don't hold it in some type of evidence  
18 locker or something like that.

19 MR. HANLON: I think it's appropriate the Sheriff  
20 should know what's coming, just alone on Sunday --

21 THE COURT: I'll take care of it.

22 MR. HANLON: Okay. Thank you.

23 THE COURT: Ms. Rief, could you be here at 1:30 on  
24 Monday?

25 MS. RIEF: Yes, Your Honor. That would be great.

26 THE COURT: Can the People manage that?

27 MR. CACCIATORE: Sure.

28 THE COURT: Mr. Mitchell, this is going to seem a

1 little silly, I'm going to hand you another one of these  
2 forms. You're just going to take it with you to the jail.  
3 It's almost -- almost exactly like the one I gave you. It's a  
4 little different. It requires you to make more initials than  
5 you did on the one I gave you. And I want you to bring this  
6 back with you on Monday afternoon.

7 THE DEFENDANT: You got it, Your Honor.

8 THE COURT: And over the weekend, Mr. Mitchell, I  
9 just want you to think about this issue very carefully. It's  
10 what you're suggesting is kind of uncommon in these sort of  
11 cases. It's not unheard of. It does happen, and people do  
12 represent themselves. But it's a, you know, I'm sure I'm not  
13 supposed to discourage you from exercising your constitutional  
14 right, but I think it's a mistake for you to do this with such  
15 a serious case. And when you -- if you do proceed to trial,  
16 you'll be expected to know the ins and outs of trials. You'll  
17 be expected to know as much as the attorneys you have now. I  
18 won't be able to help you. You don't get, you know, extra,  
19 you know, better treatment. You're going to be going against  
20 experienced prosecutors who have been preparing the case  
21 against you.

22 MR. MITCHELL: They look pretty tough.

23 THE COURT: Pardon me?

24 MR. MITCHELL: They look pretty tough.

25 THE COURT: They are weighty issues. It's your  
26 life. It's your constitutional right, and you get to exercise  
27 it. I just -- I really want you to think it over. What we'll  
28 do on Monday is I'll ask you for the second motion filled out,

1 assuming you still want to proceed. I'm going to give you --  
2 probably going to discuss the issues in these forms with you  
3 on the record to make sure that you understand them and still  
4 want to proceed on your own if you do. I'm going to ask you  
5 about the discovery if you received it, what you reviewed, if  
6 you're ready to go. And I want you to know that I won't grant  
7 a continuance. You need to be prepared for that. Because if  
8 you come to me on Monday and say it's my right to represent  
9 myself, and I just need two more weeks, the answer is going to  
10 be, "No." So, I just need you to just think about these  
11 things over the weekend.

12 Your lawyers have been working hard on the case for  
13 your benefit I think. I know that you have a disagreement  
14 about that, and I don't want to get involved in that  
15 disagreement, but it's an important decision. I know it's a  
16 difficult one. And I just want you to really weigh the pros  
17 and cons of the situation. You know, you, who is not a lawyer  
18 and doesn't have trial experience, against experienced trial  
19 lawyers, it's not -- it's not great.

20 THE DEFENDANT: It's not. I'll think about it, Your  
21 Honor.

22 THE COURT: Okay. No matter what happens whether  
23 Mr. Mitchell is representing himself or not come Monday  
24 afternoon, I will address the final in limine motions that  
25 were filed at that time, and then we'll be prepared to proceed  
26 to jury selection Tuesday morning.

27 MR. HANLON: Your Honor, could I just add in case  
28 we're still on the case, I did an ex parte E-mail, which I

1 know you don't favor, I will not be available Friday. I have  
2 to go to the East Coast for a funeral. I can't leave late in  
3 the day and get there in time. So, if I'm in the case, we  
4 can't proceed. I will be in back in time for Tuesday.

5 THE COURT: Friday was the opening statement day.

6 MR. HANLON: I understand. I don't have -- I didn't  
7 pick the time.

8 THE COURT: I understand.

9 MR. HANLON: And it's somebody very important to me.  
10 So, I wouldn't be -- but I would be available for Tuesday and  
11 the rest of the week. There's no other conflicts, so the  
12 Court is aware of that.

13 MR. CACCIATORE: May -- go ahead.

14 MS. RIEF: Can I also make a request to get  
15 additional copies of the motions in limine you filed, since I  
16 have now handed my copies over to Mr. Mitchell so he has them  
17 for Monday?

18 MR. CACCIATORE: Yes, we can get those through  
19 E-mail.

20 This might be a bit premature, but in going over the  
21 scheduling and the witnesses, we really think we may be able  
22 to rest, I don't want to be held to this, but by July 8, a  
23 full two weeks before we said because some of this has been  
24 streamlined. I think a little of this is changing, but  
25 Mr. Hanlon and I were going to discuss some stipulations we  
26 could still talk about on Monday. If there's any concerns  
27 about timing, I don't think there should be.

28 THE COURT: Thank you for saying that. All right,

1 everyone, see you on Monday at 1:30.

2 MR. CACCIATORE: Thank you.

3 THE COURT: Thank you.

4 (Whereupon, at 2:35 p.m., this matter was  
5 concluded.)

6 -----oOo-----

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 MONDAY, JUNE 13, 2011

2:35 O'CLOCK P.M.

2 ---oo---

3 THE COURT: Mr. Bailiff, if I could have  
4 Mr. Mitchell, please.

5 THE BAILIFF: Sure.

6 (Whereupon, the defendant was escorted into  
7 the courtroom.)

8 THE COURT: Hello, Mr. Mitchell.

9 THE DEFENDANT: Good morning, Your Honor.

10 THE COURT: This is the matter of People versus  
11 James Mitchell. The record should reflect that Mr. Mitchell  
12 is in court and in custody. May I have appearances, please?13 MR. KOUSHARIAN: Leon Kousharian, District  
14 Attorney's Office.15 MR. CACCIATORE: Charles Cacciatore for the District  
16 Attorney's Office.

17 MR. HANLON: Stuart Hanlon and Sara Rief.

18 THE COURT: All right. When we left off last week  
19 we were having a discussion, Mr. Mitchell, you and I regarding  
20 your desire to represent yourself in this trial. And let me  
21 just start first with the question of whether or not that's  
22 still your desire?23 MR. MITCHELL: It is, Your Honor. I want to bring  
24 up to the Court I will go pro per. I got all the discovery  
25 this past Sunday. I got -- received it somewhere around 1:00  
26 in the afternoon. No nonsense I spent 13 and a half hours  
27 like, you know, updating myself to all the discovery that I  
28 haven't seen and everything that I did see. And I basically

1 said to myself, okay, yeah, I could do it. And then I looked  
2 over the questionnaires. I will be ready by tomorrow like,  
3 you know, for the panel coming in. I will be ready on the  
4 15th.

5 These are the only negatives that I kind of want to  
6 bring up to the Court right now if I were to go pro per if you  
7 were to say "no" to me or if you were to say "yes." And the  
8 only ones -- the only things I do need to get from the law  
9 office from soon to be probably prior counsel is I need the  
10 case law studies for most of the cases from Westlaw, and I  
11 need -- I could read those over pretty quick. I could  
12 probably do that. That has nothing to do with voir dire. So,  
13 that wouldn't affect the schedule for that. I do need all the  
14 Westlaw and case law studies pertaining to the case and a lot  
15 of the citations like, you know, to do with the motions in  
16 limine. I like to know my substance. I like to know what I'm  
17 talking about when people cite the cases, right?

18 Then the second is I need to confer with my  
19 investigator like, you know, as to the witness list, what  
20 witnesses have been subpoenaed, which ones haven't. And so, I  
21 actually know whether or not if I'm -- if I -- if I could go  
22 by the trial plan, if I could like, you know, go by the set  
23 schedule. Of course, I'm going second, so I don't think that  
24 should be a problem, right? The DA has to go first. The only  
25 other thing is my communication is limited in the jail. I  
26 only get out of my cell for one hour a day. If I were to  
27 like, you know, get out for four or five hours a day, it would  
28 help me confer with my experts, help me confer with contacting

1 people and getting people like, you know, coming to jail so I  
2 can interview my witnesses, or interview anyone from Forensic  
3 Analytical or even contacting my private investigator so then  
4 he could contact people, and then I could contact him  
5 directly.

6 The only other -- I don't have a written trial book.  
7 My law office like Stuart Hanlon and Sara Rief they didn't  
8 give me a written trial book as to like, you know, how -- how  
9 the trial should play out. They only gave me -- they gave me  
10 all the discovery, all the materials I need. That is about  
11 it.

12 The only other thing I have is -- here, keep that.  
13 The only other thing I also need is an Evidence Code manual.  
14 The Evidence Code manual I need is because I have motions in  
15 limine coming from the government that I actually need to read  
16 over, and I need to cite and actually argue with any substance  
17 to the Court, nor to actually properly like present an  
18 argument right back to him. I can't say, oh, that's not fair,  
19 that doesn't sound right, or you're going to kind of laugh at  
20 me and say that's too bad, right, Mr. Mitchell. I actually  
21 need to come at them. I have to cite, you know, actual case  
22 law and actual points of law, you know. And I have a Penal  
23 Code, but, you know, there's a lot more. Penal Code is really  
24 nothing when we're talking about motions in limine.

25 And the only other thing is I need is time to  
26 interview my witnesses. I don't know if I go pro per, I don't  
27 know if I'll have time to even contact or get a subpoenaed  
28 list of who's coming or who's not. Let's see. Well, and

1 there's like another issue to which I don't know if I could  
2 talk to you about it if you were even considering what I'm  
3 about to ask you in regards to pro per. This would also  
4 probably be an issue that if I -- if you tell me I can't lose  
5 my current counsel now, I think this is an issue I'd have to  
6 bring up to my counsel now anyway. I read the discovery. I  
7 read it really, really close. I went over all the findings of  
8 Forensic Analytical to the government and their experts, and I  
9 also went over the Forensic Analytical findings of my expert  
10 and like what I see. And actually brought up two different  
11 points that haven't been addressed and haven't been tested by  
12 either side. And like if I were to discuss this with you, I  
13 want to discuss it with you under seal. I don't think I can  
14 go back to chambers with you, but I want to discuss it under  
15 seal with the bailiff and only the recorder present because it  
16 has to do with Forensic Analytical, which like I'd have to  
17 bring up to you, I haven't brought it up with my current  
18 counsel, you know what I mean. When I read everything from  
19 the DNA sequencing like all the way to the gene mapping,  
20 right? And I came down to like two really obvious things that  
21 not even the DOJ crime lab has even gone over, and not even  
22 like what my DNA expert have gone over. It's because it's  
23 never been brought up or even thought of.

24 My motion is to sum everything up, Your Honor, is  
25 that if I were to have -- if my communications in the jail  
26 were hindered to getting out of my cell for one hour or day or  
27 two hours, I could take this all the way -- I could take  
28 this -- I could take this like, you know, I would be trial

1 ready in four weeks, and this is like after we do voir dire,  
2 this is after we like, you know, select the jury, after  
3 they've been impaneled.

4           If I were to get out of my cell four to five hours a  
5 day which I don't know how the dynamics of that work, I could  
6 be ready by June 28th for opening arguments and opening  
7 statements. This is -- like I said, this is after reviewing  
8 the discovery and finding two issues with Forensic Analytical  
9 that I'd want to bring up to you under seal if that's at all  
10 possible. It's a continuance of two of like, you know, two  
11 weeks if I were to get out of my cell if the jail says, "No,  
12 we have to keep him classified and keep him on that regimented  
13 program," then it would take four weeks.

14           But if you're going to say "no" to that, then  
15 there's no point of me discussing with you on with anything  
16 under seal. I should basically whisper in my lawyer's ear,  
17 tell him like Mr. Hanlon and Mrs. Rief what's going on. They  
18 might shrug their shoulders and say that's not a big deal or  
19 they could probably say something like, oh, well, okay, we  
20 have to discuss that like with the Judge and with the Court  
21 and see if that's, you know, see whatever it is. Because I  
22 don't -- there's no guarantee. You know, I'm not trying to  
23 pull the government's leg. I'm not trying to waste  
24 Mr. Kousharian's or Mr. Cacciato's time.

25           But literally I looked at all the discovery last  
26 night. I looked at like, hey, physical anthropology is one of  
27 my things, right, I'm pretty competent at when it comes to  
28 DNA. I'm reading it, I'm just like, oh, my goodness did they

1 even -- I just realized neither side tested like, you know,  
2 two or three different items, you know what I mean? I don't  
3 want to say because I don't want --

4 THE COURT: I understand.

5 THE DEFENDANT: You understand why I don't want to  
6 say.

7 THE COURT: Yes, I do. Anything else you want to  
8 say?

9 MR. MITCHELL: No, Your Honor, I don't.

10 THE COURT: I don't know if you, Ms. Rief, or you,  
11 Mr. Hanlon, want to say anything at this point or not?

12 MR. HANLON: I would only say Mr. Mitchell is  
13 getting five boxes we have in our car of the witness files and  
14 trial books which we said we'd bring today. What he got over  
15 the weekend is what we thought he didn't have, including the  
16 jury instructions. We contacted Mr. Raskin the investigator  
17 to make himself available for Mr. Mitchell. He's been our  
18 investigator, and I assume he would continue. So, I haven't  
19 spoken to him. Other than that, we have witnesses subpoenaed  
20 that I think is in the material he's getting today. If not,  
21 make sure he gets them. We have witnesses under subpoena.  
22 And other than that, I have no comment.

23 THE COURT: Mr. Kousharian or Mr. Cacciato, do you  
24 have any comment?

25 MR. CACCIATORE: The only comment I have is the  
26 caution because I thought I heard a continuance requested.

27 THE COURT: You did.

28 MR. CACCIATORE: Well, I would object to that. He

1 represented to us last week that he would be -- be ready to  
2 go. We have a 117 plus people coming in tomorrow, and we've  
3 set parameters on the timing of the trial. We can't very well  
4 select a jury and then have them -- and recess the trial and  
5 have them come back in two weeks if that's what the suggestion  
6 was. So, it really sounds to me like Mr. Mitchell is not  
7 prepared to proceed pro per, and that he actually is going to  
8 stick with his current counsel.

9 THE COURT: All right. If you'll all just give me  
10 one moment, please. Mr. Mitchell, did you fill out that form  
11 that I gave you last week? Would one of the bailiffs please  
12 hand that to me? Thanks.

13 MR. CACCIATORE: Judge --

14 THE COURT: I just need a minute.

15 All right. So, I didn't know that the request was  
16 going to change a little bit, which it has changed. And it  
17 seems to me that the cases are quite clear that a request to  
18 proceed pro per at this stage of the proceedings is really at  
19 the discretion of the Judge. Earlier proceedings there's a  
20 little less discretion. Generally, the cases suggest that a  
21 request at this particular time is untimely. But there are  
22 things for the Court to consider before either granting or  
23 denying such a request.

24 I did read earlier a couple of cases that really  
25 talk about those things pretty specifically. One is People  
26 versus Marshall, 13 Cal. 4th 799. The other is People versus  
27 Cummings, 4 Cal. 4th 1233. There's many other cases. These  
28 are just two of them that I spent a little bit of time with.

1 And the cases suggest that at this stage of things if there  
2 was a need for a continuance then really the truth of the  
3 matter is the request is untimely, and the request should be  
4 denied.

5 The things that I need to consider are some of the  
6 things Mr. Cacciatore started to talk about. We have gone  
7 through approximately 1,000 potential jurors. It took us  
8 about two weeks to go through them to try and find people that  
9 could put aside the time for this particular case and people  
10 who did not have some sort of prejudgetment about the case  
11 because of some notoriety relating to it. We're scheduled to  
12 have jurors return tomorrow, more than a hundred people are  
13 scheduled to return tomorrow. These are people who have  
14 filled out questionnaires and have not been challenged for  
15 cause. We are expecting 60 plus the next day to return.

16 We did already proceed through 90 percent of all of  
17 the motions in limine. Those occurred several weeks ago.  
18 There are only a few left to discuss. This case is two years  
19 old now. Several continuances have been granted at the  
20 defense request, more often than not because of a request to  
21 have a change in lawyers. This is, Mr. Mitchell, your third  
22 lawyer. The prosecution has made objections to those  
23 continuances, and I have granted them in an effort to make  
24 sure that you're properly represented, and that all of the  
25 evidence is reviewed, and that you can prepare yourself and  
26 that your lawyers can prepare themselves.

27 The last day before we're -- actually, two days  
28 before we're supposed to have the jurors brought in, that's

1 the first time you brought up the desire to represent  
2 yourself. It seems to me that you're competent. You  
3 certainly seem to be aware of what your rights are and what  
4 you want to do, but you didn't make that request earlier. And  
5 on Friday I think you started your discussion with me by  
6 saying something like I want to represent myself, and I'm  
7 going to be ready to go on Tuesday, and there would be no  
8 delay.

9                   And, of course, you didn't have the opportunity to  
10 see the extra documents that your attorney had for you. Now  
11 that you've had that opportunity, you, rightly, have pointed  
12 out there would be some negatives to representing yourself.  
13 There are a lot of them. But most importantly, as far as my  
14 decision in this case because it is a discretionary decision,  
15 you think you would need at least in my view at least four  
16 weeks to get yourself up and ready to go. I think that's a --  
17 almost an unreasonable --

18                   MR. MITCHELL: Two weeks.

19                   THE COURT: No, I think it's unreasonable because I  
20 think really if you want to get yourself ready, it would be  
21 more than four weeks. It's a case where your very experienced  
22 lawyers couldn't get ready in months. And I know that you  
23 have a disagreement with them, but they're very experienced.  
24 They know what they're doing, and they couldn't do it in four  
25 weeks. And I couldn't find a lawyer that I could just give  
26 the case to and they would be ready in four weeks.

27                   In any event, it's the day before the jurors are to  
28 come in. As I indicated, we've gone through over a thousand

1 people to try and get a panel you could talk to. I think this  
2 case involves thousands of pages of discovery. You're  
3 concerned about your ability to have communication with  
4 witnesses. Of course, you have that concern. It's a concern  
5 you should have because of your circumstances. I could get  
6 you an Evidence Code. I could get you some cases if you  
7 needed certain cases printed. But the truth of the matter is  
8 you're at a disadvantage at this point in the stage of the  
9 proceedings, and you're not going to get a continuance.

10 And so, I'm going to rule in light of these cases as  
11 well as other cases that I've read that the request is  
12 untimely, and I will not allow you to represent yourself at  
13 this time. I'm not relieving counsel.

14 Mr. Cacciato, you tried to interrupt, and I'm  
15 sorry. I went on.

16 MR. CACCIATORE: Judge, I apologize. I just  
17 consistent with your ruling there was a case that  
18 Mr. Kousharian brought back to my attention. We discussed it  
19 at lunch. But I did want to cite it because it talks about an  
20 unequivocal ability to go forward representing yourself. And  
21 it's People versus Powell. It's an April 29th, 2011 decision.  
22 Once again, it does reaffirm what the Court has indicated.  
23 And I was trying to find the citation here. It's a Sixth  
24 District, and it's -- oh, it's a slip citation, so there isn't  
25 one. H034349.

26 THE COURT: Okay.

27 MR. CACCIATORE: That's all I have to add. Thank  
28 you.

1                   THE COURT: In light of that ruling, Mr. Hanlon and  
2 Ms. Rief, do you feel that you're ready to discuss the in  
3 limine -- the additional in limines right now, or would you  
4 like a few moments with your client to talk to him before we  
5 proceed?

6                   MR. HANLON: Your Honor, at this point we're moving  
7 to withdraw. We want to give the reasons to the Court. I am  
8 not prepared to go forward. I will go forward if you order me  
9 to, but I want to have a right to put on the record why.

10                  THE COURT: Why you're not ready to go?

11                  MR. HANLON: Why I won't go. I'm not capable of  
12 going forward at this point with this defendant.

13                  THE COURT: And is that a discussion you want to  
14 have with your client present?

15                  MR. HANLON: No.

16                  THE COURT: With Ms. Rief present?

17                  MR. HANLON: Yes.

18                  THE COURT: We'll ask everyone please to leave the  
19 courtroom for a few moments. I'm not going to do this in  
20 chambers. I'll have a discussion in the courtroom, on the  
21 record sealed discussion. I'll need to excuse Mr. Mitchell  
22 for a moment as well.

23                  Actually, before I do this, I'm going to take five  
24 minutes to think about what's going on. You can put  
25 Mr. Mitchell in there. Let me take a few minutes.

26                  MR. CACCIATORE: Can we just say before he leaves  
27 and our concern was that he's present.

28                  THE COURT: I understand.

1 | ////

4 (Whereupon, the defendant was escorted into  
5 the courtroom.)

6 THE COURT: All right. We're back on the record in  
7 the Mitchell matter. Thank you for those few moments.

8 Mr. Mitchell is here. The attorneys are here as before.

9                   Mr. Hanlon, I have a few concerns about your  
10                  request. I'm happy to hear your request. But the few  
11                  concerns I have, number one, is a request for basically a  
12                  sealed conversation, number one.

13                   And number two, even if it was a sealed discussion  
14 to have that without your client. Those are both things I am  
15 concerned about. I'm inclined to give you an opportunity to  
16 have a discussion with me, but I'm inclined to have it in open  
17 court with your client present.

18 MR. HANLON: Since it's going to deal with attorney  
19 client communication to some extent it cannot be in open  
20 court.

24 MR. HANLON: And also I maintain my interest in  
25 protecting Mr. Mitchell's interests. Some of the things I'm  
26 going to say should not be part of the public record because  
27 it will hurt his interests. That's the last thing I want to  
28 do. And in terms of having Mr. Mitchell here, it's up to you.

1 I think we have a right to communicate about representation  
2 without the client here, but that's your call. But I can't do  
3 this in the public forum.

4 THE COURT: I'm satisfied that the discussion that  
5 you wish to have since they would involve potentially  
6 attorney-client private discussions can be conducted in camera  
7 or privately without the prosecution being present. I'm not  
8 convinced that I should have that discussion without your  
9 client present however. So, I will again close the courtroom  
10 and ask everyone to excuse us please while I have the  
11 discussion. I will not make any rulings without the  
12 prosecution being here.

13 MR. CACCIATORE: Thanks.

14 (Whereupon, an in camera hearing was  
15 conducted in a locked courtroom, which was  
16 reported and transcribed and filed under  
17 seal.)

18 (Whereupon, the courtroom was opened and the  
19 following appeared in open court.)

20 THE COURT: Record should reflect the courtroom has  
21 been opened. I did reiterate my sealing of the discussion  
22 that just occurred. I am denying the motion to withdraw as  
23 trial counsel over objection.

24 And, Mr. Hanlon, did you have a new motion?

25 MR. HANLON: Yes, Your Honor.

26 THE COURT: Okay.

27 MR. HANLON: Based on my inability in my mind to  
28 communicate with Mr. Mitchell, his inability to communicate

## 1                   IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

## 2                   FIRST APPELLATE DISTRICT

3                   ---oo---

4                   **COPY**

5                   THE PEOPLE OF THE STATE OF CALIFORNIA, ]

6                   Plaintiff and Respondent,    ] ]

Court of Appeal  
Number \_\_\_\_\_

7                   versus                           ] ]

8                   JAMES RAPHAEL WHITTY MITCHELL,   ] ]

Marin County Superior  
Court No. SC165475A

9                   Defendant and Appellant.    ] ]

10                   -----

11

12

13

14

15

16

17

18                   APPEAL FROM THE SUPERIOR COURT OF MARIN COUNTY

19                   HONORABLE KELLY V. SIMMONS, JUDGE, PRESIDING

20                   REPORTER'S TRANSCRIPT ON APPEAL

21                   IN CAMERA HEARING

22                   JUNE 13, 2011

23

24

25

26

27

28                   REPORTED BY: SUSAN J. KLOTZ, CSR #8300

1 MONDAY, JUNE 13, 2011

3:12 O'CLOCK P.M.

2 ---oo---

3 (Whereupon, related matters were heard and  
4 reported but not transcribed herein.)5 THE COURT: Record should reflect the courtroom has  
6 been cleared with the exception of my court staff. The  
7 discussion we're about to have will be placed under seal, and  
8 none of my court staff will be permitted to discuss it.  
9 They're under orders to not discuss it, in fact.

10 Mr. Hanlon, go ahead.

11 MR. HANLON: Yes, Your Honor. As the Court knows, I  
12 made a commitment to Mr. Mitchell and this Court to go forward  
13 with the trial. And Ms. Rief and I for nine months have  
14 worked to do that, and we've attempted to work with  
15 Mr. Mitchell. And we communicated with him regularly. We get  
16 multiple letters and multiple phone calls, and we have seen  
17 him.18 There has been until I would say recently not any  
19 particular threat from Mr. Mitchell if I did something that he  
20 didn't like or he didn't want. In the last 10 days there have  
21 been two direct threats in letters that -- and I don't want to  
22 go -- this is a problem, the attorney-client privilege, I  
23 can't go into detail. I can only tell you that based on the  
24 volatileness Mr. Mitchell has shown to us in changing and  
25 getting angry, not getting angry, the threats are serious.  
26 I'm uncomfortable physically continuing at counsel table as is  
27 Ms. Rief.

28 The most recent one came -- I think we got it on

1 Saturday. There was one probably prior to that. And I've  
2 never been in this situation, and I've tried to be open and  
3 direct with my client and ignore some of the earlier veiled  
4 comments that he made to me. The last two I can't ignore.

5 And again, without going into detail, there was -- I  
6 can't -- I can only tell you that through a number of  
7 coincidences Mr. Mitchell got the phone number of family  
8 members of Ms. Rief, and in a letter that we received Saturday  
9 there was a comment about one of these numbers. Had that  
10 occurred on its own, it would be meaningless. But in the  
11 context of other direct threats to me that we've gotten that,  
12 you know, I can only say they're direct. It caused us great  
13 concern.

14 And -- and what this does -- it's not only am I  
15 physically concerned, which is a huge issue, I've never been  
16 in this situation, that if I do something wrong or something  
17 that Mr. Mitchell doesn't like, there's going to be possible  
18 violence towards me. But it also is a breakdown on the basic  
19 level of the attorney-client relationship. He may not trust  
20 me. I don't trust him now. I've lost the ability -- the key  
21 to my practice for 36 years has been committed to my client no  
22 matter how unusual the case, how difficult the case, how  
23 whatever the allegations are, whatever the issues are that  
24 sometimes criminal defendants bring to the table as human  
25 beings, I've been able to find a way to commit myself to that  
26 case in a way that I gave it the best that I could. And to  
27 me, that's the essence of me as a lawyer.

28 And I brought that to Mr. Mitchell's case in the

1 face of really a difficult situation, and I no longer have  
2 that commitment. I no longer have the ability to tell him or  
3 you that I can go forward with the commitment of a counsel  
4 that he deserves especially in a case like this. It's just  
5 not -- there's been too much stuff that has happened.

6 And again, the attorney-client privilege I can't --  
7 even if Mr. Mitchell wasn't here, I still wouldn't talk to you  
8 about the direct communication. But I have never been in this  
9 situation before. I -- I don't know. I know we're on the eve  
10 of trial. I understand. I've committed -- I'm an officer of  
11 the court. I'm as committed as this Court is to the procedure  
12 we've gone through and jurors we've called. Ms. Rief and I  
13 have been talking about this constantly since Friday what to  
14 do. We're just not -- well, I'm not, because I'm lead trial  
15 counsel, in a position to continue with the vigor and the  
16 intensity that a lawyer needs in a case. Part of it is out of  
17 this whole physical fear. It's just outside my concept as an  
18 attorney when it comes to my client. It's something that I've  
19 never dealt with, and I've dealt with some really difficult  
20 people. But I always felt if I committed myself to them, they  
21 would commit themselves to me, and it's always worked. It  
22 hasn't worked in this case.

23 And I also believe that he and I no longer  
24 communicate. I feel sometimes we're talking at opposite  
25 universes or different universes. And I have investigated the  
26 issue of a 1368 with doctors. And we can address that  
27 depending -- right now I'm not at this second prepared to do  
28 that. I simply am no longer a competent lawyer for him

1 because of the issues that I've raised. You could order me to  
2 be here.

3 Knowing what I feel inside and knowing the  
4 commitment I brought to all my cases over the years, it would  
5 be a travesty of justice. I can't represent him any more. I  
6 just don't -- it's gone on too long. Things have occurred  
7 that I'm not even talking about that made it impossible for me  
8 to have that kind of commitment that it takes to do these  
9 trials.

10 And I'm sympathetic to Mr. Mitchell and his  
11 situation and things he's gone through. I've tried to work  
12 with him. I've tried to ignore things, danger signals that  
13 occurred within the first couple weeks of representation and  
14 in large part because of my commitment to him and this Court  
15 and this trial especially when I knew two lawyers had left  
16 before I got here. Some things are not meant to occur. I  
17 don't know how else to tell you. It's not -- it's just not  
18 something I can do, and I think it would be a disservice to  
19 this Court and Mr. Mitchell to have us continue or me because  
20 Ms. Rief won't be here.

21 THE COURT: Do you have any single example of a  
22 written threat that you would permit me to read?

23 MR. HANLON: I have two of them, but I don't think  
24 it's appropriate to let the Court see.

25 THE COURT: You don't.

26 MR. HANLON: It's direct attorney-client  
27 communication. I can represent that there are two written  
28 things that are threatening. And the first one Ms. Rief

1 indicated I should take much more seriously, and I didn't.  
2 The second one Saturday was just I can't do this. You know, I  
3 can't sit worried. I'm not going to ask you to chain and gag  
4 my client, and I can't sit here and do my job and feel worried  
5 about whether if I say something he doesn't like, I'm going to  
6 get a pencil in my face. I can't practice law that way. And  
7 I have so much empathy for him and my client, this is so  
8 difficult for me to say because I am committed to him. But  
9 it's just -- I don't know how else to say it. Yes, there are  
10 two written threats that we have, and I thought about it, and  
11 I think that would be the breach of the attorney-client  
12 privilege. I've come close enough as it is. But that would  
13 be over the top. I don't think I could do that.

14 THE COURT: Okay.

15 MR. HANLON: That's my feeling, and I don't know how  
16 I could proceed. I mean if you ordered me to, I'd be here  
17 physically. But, you know, and it's clear, I hope it's clear,  
18 I'm making a record, I'm not competent. Competency is not  
19 your years of practice and what you've read. Competency is  
20 your commitment to your client and the case. To me that's  
21 what I consider competency, and I don't have that now. I have  
22 my experience. I've read all the records. I know the case.  
23 But it goes maybe just my perception of it, but that's my  
24 perception of competency, and that's not even dealing with  
25 fear which is outside my universe up until this case. And  
26 that's something I can't deal with. I have a family, people  
27 care about me and depend on me, and I can't worry about that  
28 being a danger when I'm doing my work. I'm not concentrating,

1 and I can't proceed.

2 THE COURT: Ms. Rief, is there anything you wanted  
3 to add?

4 MS. RIEF: No, Your Honor. I think what Mr. Hanlon  
5 said covers everything I'm feeling as well.

6 THE COURT: I don't know, Mr. Mitchell, if you  
7 wanted to say anything. You certainly don't need to. Since  
8 you're here, if you wanted to, you can.

9 THE DEFENDANT: I would say like any threats like,  
10 you know, any threats I might have made or even like said to  
11 Mr. Hanlon or Ms. Rief like, you know, aren't imminent  
12 threats. They're not even dangerous threats. If you were to  
13 read the letters, you'd probably find that you can see that  
14 it's just an upset client who is locked up in jail for 23  
15 hours a day and has like, you know, no intention of like, you  
16 know, ever really hurting the people who he cares about.

17 I think if you were to read all the letters or all  
18 the attorney-client communications between me and Stuart and  
19 Mrs. Rief is that I've always displayed -- I don't know, at  
20 first, the very first letter like, you know, if you receive  
21 the communications, you can see that the communications are  
22 rather like not really like they're professional, but they're  
23 also kind of distant. I have gone through two lawyers before,  
24 one lawyer who completely sold me out, completely like, you  
25 know, I told him my account of what happened and the crime and  
26 what have you, like he completely didn't believe me and told  
27 the papers that it's a crime of passion, when in reality I  
28 tell him completely something different. And my first

1 counsel's excuse was, "Oh, well, no one will believe us, you  
2 know what I mean, you have to let me do this." And it's just  
3 like, well, no, I'm completely betrayed by my first counsel.

4                   And the second counsel it was he wanted me to take a  
5 deal. He wanted to like, you know, he wanted to like pursue a  
6 manslaughter deal. I wanted to fight and maintain my  
7 innocence and maintain that I did not commit this crime. When  
8 I had like my third set of counsel, like Stuart and Sara,  
9 well, I really -- it's like, you know, the first letters in  
10 the chain of communication weren't hostile, were not really  
11 threatening, but they did display anger as in like, "No, I'm  
12 not going to go with a manslaughter or with a provocation or  
13 with a heat of passion or with any other kind of defense  
14 because I did not commit this crime." And the first like  
15 chain of letters were probably fairly hostile just because it  
16 was like, hey, give me back my money so I can find new  
17 counsel, or we're going to go and move forward with this  
18 defense.

19                   When they came to me and said, okay, we looked at  
20 the research, and we have to switch gears, and we have to  
21 like, you know, concentrate on Forensic Analytical, and we're  
22 going to represent you this way, I really liked them. I've  
23 gotten to know them really quite well, you know, I heard them  
24 mention something like Mrs. Rief's like, you know, family  
25 members on the phone. It's just like I tend to sit in my  
26 cell. I tend to write letters, and I tend to have nothing  
27 else better to do with my time than to write these free write  
28 letters that kind of continue on and on and on. It's not

1 really like writing a letter, like, you know, "Hi, this and  
2 that, goodbye," or like "Hi, I'm going to have a conversation  
3 with somebody for six to seven hours." It's -- I think it's  
4 only crazy if I don't think it's crazy, or I'm not aware it's  
5 crazy, you know what I am?

6 THE COURT: M-hm.

7 THE DEFENDANT: I have no one really to talk to in  
8 this situation. And I've remained silent this entire time.  
9 And I'm sorry if I'm a little emotional.

10 THE COURT: That's okay.

11 THE DEFENDANT: But I haven't seen my daughter for  
12 two years. I've remained silent. All my family members they  
13 have come up with their own conclusions of the case without  
14 seeing any evidence, without knowing what really happened,  
15 without knowing anything of what's really going on.

16 And I've seen this like people after people that  
17 abandoned me from day like, you know, throughout the duration  
18 of two years because I can't communicate with them outside of  
19 my attorneys because I can't let the government or let the  
20 prosecution convict me for a crime that I didn't do. I know  
21 that the prosecution has every right for the charges, and  
22 there's evidence that's been brought against me, and I  
23 understand the dynamics of all of that.

24 And just to rebut what Mr. Hanlon is saying about  
25 his competency as well as his commitment to the client is that  
26 I've like, you know, this is like, you know, there's been ups  
27 and downs in our relationship between attorney-client. It's  
28 nothing like perhaps like Mr. Horngard. For example, I never

1 liked Mr. Horngrad. I know he's a competent attorney, but I  
2 never liked him. And I just don't really, I can't --  
3 professionally maybe if I was forced to work with him, I  
4 would. I don't like him. And then Hallinan, I don't like.

5 But I do like Mr. Hanlon. I do like Mrs. Rief. I  
6 always respected like they've always been open and personal  
7 with me. And it's sometimes like they've gotten angry with me  
8 sometimes. Mr. Hanlon is actually a really, really strong  
9 guy. I've never seen him get angry to tell you the truth,  
10 I've never seen him get angry like, you know, once. I can't  
11 see what he's saying is like, you know, he's not lying.  
12 Because it's like, you know, I do get angry sometimes. But  
13 it's not to the level or to the gravity or to the effect of  
14 like me actually carrying anything out or following anything  
15 through because I would never do anything to Mr. Hanlon. I  
16 would never do anything to Mrs. Rief because I care about  
17 them.

18 I sit in my cell. I write a letter. It takes two  
19 or three days for the letter to get there, and something I  
20 feel like, you know, within that two or three hours time spot  
21 while in that cell for 23 hours a day or 22 hours a day, I  
22 actually regret even writing it, like, you know, within I  
23 don't know what the law is, I don't know like -- I don't know  
24 like standard like, you know, what happens. But within that  
25 hour or two hours I kind of say to myself, "Oh, my goodness, I  
26 wish I could walk over and like get that letter out of the  
27 box" which I could or maybe if I really tried to. But it's  
28 not like, you know, I have a cellphone. It's not like I have

1 someone to call up. It's not like I have E-mails. It's not  
2 like I can get on the computer you and shoot to Stuart or  
3 Sara, "Oh, my goodness, like I got upset in my cell, and I  
4 wrote this like, you know, really funny letter, you know what  
5 I mean? They've seen letters just like I can be a little  
6 spunky or a little feisty, not threatening or not really  
7 angry, but a little spunky, they will come back and laugh with  
8 me about it. Oh, my God, man, you're a real mean dude. I'll  
9 laugh too. Just like where do you come up with this stuff?  
10 This is like maybe this is from whatever hanging out with  
11 Spielberg too many times. I don't know Spielberg.

12 THE COURT: I got it.

13 THE DEFENDANT: Hanging with those type of people  
14 you hear everything. I don't mean to digress, Your Honor.  
15 It's just that, you know, the threats that I have like that  
16 they say that I'm making or that like I've done are usually  
17 either taken out of context, or it's like, you know, due to  
18 the fact it's just like they can't hear tone, and they can't  
19 hear emotion out of the letters. If they were to hear  
20 sarcasm, if they were to hear -- if they were to hear me  
21 speak, they'd hear sarcasm. They'd hear maybe something in  
22 jest, or maybe they would even hear something like "Oh, wow,  
23 like he's really sad. He's not this serious about it," right?  
24 I don't mean to downplay it because I can be a butthole, you  
25 know what I mean? I can be totally mean guy. But it's not  
26 like any threats that are imminent. It's not like any threats  
27 that are actually carried out. It's not any threats that I  
28 would commit against Mr. Hanlon or Mrs. Rief because I

1 actually really like them and care about them. I know  
2 Mr. Hanlon he has showed me a lot of care and so has  
3 Mrs. Rief. And they've like, you know, I think they've shown  
4 me a lot of love in the past nine months. And I think in  
5 return I've also shown them a lot of love. They show you all  
6 the pictures that I've drawn for them, yeah, there you go.  
7 No, really I've done really good, Your Honor. I could draw  
8 your portrait if you'd sit still for an hour. I'm really that  
9 good, you know what I mean? I'm really good. I've drawn them  
10 I'm working on a puppy of a Golden Retriever for Stuart Hanlon  
11 right now with them holding the bone, saying, you know, like I  
12 love you, sorry we've been through a lot. Please understand  
13 that. It's like I'm going to ask -- this pro per motion right  
14 now, I knew you were going to deny it to me when I asked for a  
15 continuance, right? And a lot of it, too, for the past three  
16 weeks I've been under a lot of stress from my daughter, not  
17 because I can't see her. I'm under a lot of stress for her  
18 financial well-being. And I'm glad this is under seal.  
19 Currently right now my homeowner's insurance will pay out a  
20 \$300,000 settlement to my daughter. However, on July 22nd  
21 it's like set up to go to wrongful death trial on July 20th.  
22 My homeowner's insurance, if they were to settle like out of  
23 court with my daughter, she would be able to like, you know,  
24 she'd be able to take this money, and then she'd be able to  
25 move forward, like she would be able to -- settle my wrongful  
26 death, that's good for me, there's some selfishness there.  
27 Also mostly for my daughter because, you know, like she has  
28 no -- the realities of her financial situation if something

1 bad happens to me is dire. She will not be supported. She  
2 will not be put into college or whatever.

3 THE COURT: Well, I can appreciate --

4 THE DEFENDANT: So --

5 THE COURT: Just a minute. Just a minute.

6 THE DEFENDANT: Okay.

7 THE COURT: I can appreciate what you're saying, and  
8 I can appreciate the stresses that you may be experiencing,  
9 and I don't mean to actually not address them. But I'm here  
10 just to address whether or not I should let Mr. Hanlon go.  
11 He's made his record. I think I understand your response to  
12 what he had to say. I'm going to hear from him, and then I'm  
13 going to rule. Okay?

14 THE DEFENDANT: Whatever he says, Your Honor, let  
15 him know I like him.

16 MR. HANLON: Judge, I can only say the threat to the  
17 point where I take them seriously, and I have a whole history  
18 of information to look at. I've thought about this. I don't  
19 feel comfortable, and I don't want to respond to anything.

20 THE COURT: I understand. Okay. So, I'll reiterate  
21 my ruling in a few minutes, but this is a sort of a similar  
22 analysis, quite honestly, as the pro per request. It's a  
23 discretionary issue. The few cases I was able to look up  
24 quickly talk about whether or not if I were to allow the  
25 withdrawal, would that work an injustice in the handling of  
26 the case, or would it cause a delay.

27 And first of all, Mr. Hanlon, I'm to some extent  
28 ignoring a comment you made as well, not for lack of human

1 interest or compassion, but for more of a legal analysis. I  
2 think that if you were to be relieved, it would cause a  
3 horrible injustice in the handling of the case. I do think it  
4 would require an undue delay. I find you, Mr. Hanlon, and  
5 you, Ms. Rief, two of the most competent lawyers I've worked.  
6 Not that I have as much experience as the two of you do, but  
7 20 years working with lawyers and judges, and I've been  
8 impressed every time the two of you have appeared. You're  
9 thorough, you're competent, you're ready to go. You provided  
10 Mr. Mitchell with excellent representation. And although I'm  
11 not experiencing the concern that the two of you are  
12 experiencing right now, I am not going to allow the  
13 withdrawal.

14 The cases that I relied upon in albeit very brief  
15 research are Lempert versus Superior Court at 112 Cal. App.  
16 4th, 1161, and Mandell, M-a-n-d-e-l-l, versus Superior Court  
17 at 67 Cal. App. 3d, 1.

18 Mr. Hanlon, you did not request me to make a 1368  
19 review. But I do want to say for the record, and I, of  
20 course, I'm not having the same discussions with your client  
21 that you have had, but I find both the discussion with  
22 Mr. Mitchell on Friday and the discussion he just had with me,  
23 I find that he seems to be quite lucid and competent. I don't  
24 hear anything from him that would suggest he's anything other  
25 than that. And so, I have no concern at all myself as far as  
26 Mr. Mitchell's competency.

27 So, those are the rulings. That's the ruling at  
28 least as it relates to the motion to withdraw. I'm going to

1 open the doors and allow the prosecution in. I should also  
2 say before they're open that the last counsel was removed for  
3 the same reason, Mr. Hanlon, that you and Ms. Rief are  
4 commenting upon. And it makes me wonder, you know, a  
5 defendant cannot excuse lawyers forever by issuing a threat,  
6 otherwise those people will never have a lawyer. And it  
7 happened once before. It appears to be happening again. I  
8 don't know if it's -- I certainly don't know if it's something  
9 that is purposefully occurring in an attempt to have new  
10 counsel. I don't know.

11 But again, the same factors play in my decision, the  
12 timing of the request, the fact that the jurors will be here  
13 tomorrow, all of the things I mentioned when I was discussing  
14 the pro per request are the same considerations I make at this  
15 time in denying the request.

16 Now, we'll open the door.

17 MR. HANLON: Judge, can I just say?

18 THE COURT: Yes, sir.

19 MR. HANLON: First of all, you're not sitting where  
20 I'm sitting.

21 THE COURT: That's true.

22 MR. HANLON: Effectively, I'm going to make a 1368.  
23 I'm going to express a doubt when everybody is here, and you  
24 can rule on that. I don't believe he has the ability to  
25 communicate with me.

26 THE COURT: Okay. Thank you.

27 (Whereupon, at 3:35 p.m., this matter was  
28 concluded.)

1 I think we have a right to communicate about representation  
2 without the client here, but that's your call. But I can't do  
3 this in the public forum.

4 THE COURT: I'm satisfied that the discussion that  
5 you wish to have since they would involve potentially  
6 attorney-client private discussions can be conducted in camera  
7 or privately without the prosecution being present. I'm not  
8 convinced that I should have that discussion without your  
9 client present however. So, I will again close the courtroom  
10 and ask everyone to excuse us please while I have the  
11 discussion. I will not make any rulings without the  
12 prosecution being here.

13 MR. CACCIATORE: Thanks.

14 (Whereupon, an in camera hearing was  
15 conducted in a locked courtroom, which was  
16 reported and transcribed and filed under  
17 seal.)

18 (Whereupon, the courtroom was opened and the  
19 following appeared in open court.)

20 THE COURT: Record should reflect the courtroom has  
21 been opened. I did reiterate my sealing of the discussion  
22 that just occurred. I am denying the motion to withdraw as  
23 trial counsel over objection.

24 And, Mr. Hanlon, did you have a new motion?

25 MR. HANLON: Yes, Your Honor.

26 THE COURT: Okay.

27 MR. HANLON: Based on my inability in my mind to  
28 communicate with Mr. Mitchell, his inability to communicate

1 with me based on things that he's written to me and says, that  
2 I'm expressing a doubt as to his competency to go forward in  
3 his ability to communicate in any meaningful way with counsel.  
4 Doesn't mean he's not smart, but I express a doubt. I'm  
5 concerned that our ability to communicate does not exist, and  
6 I would like an evaluation of him prior to the continuing of  
7 trial.

8 THE COURT: So, without hearing from the  
9 prosecution, I did have a lengthy discussion with Mr. Mitchell  
10 during the sealing, the sealed portion of the motion to  
11 withdraw as trial counsel. Mr. Mitchell spoke at length. He  
12 also spoke on Friday and a little bit earlier today. I find  
13 Mr. Mitchell to be competent, and I think that he has the  
14 ability to communicate with counsel if he chooses to do so.  
15 And I know that, Mr. Hanlon, you disagree with that and would  
16 like me to make the referral. I decline to do that at this  
17 time.

18 MR. HANLON: I would say, so our record is clear, my  
19 communication with Mr. Mitchell is far more extensive than  
20 this Court's of two days of approximately 15 minutes. I make  
21 the motion in all seriousness. We have not been able to  
22 communicate in a meaningful way. I believe that there are  
23 things that are approaching delusional comments, and I don't  
24 believe the Court based on 15 minutes of conversation, when  
25 experienced counsel said he expresses a doubt as to his  
26 competency, the Court can refuse to make a referral, but I  
27 think the record should be clear that you don't have the  
28 information I have. And I think that it's inappropriate to

1 just ignore the comments and thoughts and position of counsel  
2 who's dealt with this man for nine months and read hundreds of  
3 pages of letters from him, probably over a thousand pages of  
4 letters. We gets sometimes 15 a week.

5 And the continuing -- it started a while ago, I feel  
6 like he does not hear me. I feel like things are going on in  
7 his head that are not real, and he's not able to communicate.  
8 There are multiple levels of the 1368 standard, Judge. One of  
9 them is ability to meaningfully communicate with counsel. And  
10 I don't think the Court is in a position to even understand  
11 that without expert help based on 15 minutes of conversation.

12 I think I'm in a position to understand that having  
13 gone through this, and not only in meeting with him and  
14 talking to him and watching the breakdown occur and watching  
15 what I consider delusional things to be more and more common.  
16 I just don't think it's an appropriate ruling. The Court is  
17 ruling because we're a day from jury selection. That's not  
18 the only standard. The issue now is can he meaningfully  
19 communicate with me, and I've represented he can't. And the  
20 Court is ruling on a 15 minute conversation he can. I don't  
21 think that's appropriate, Your Honor. Obviously, I respect  
22 this Court. I don't think that -- 1368 I don't think allows  
23 that. I think when a lawyer expresses a doubt and the basis  
24 for it, there has to be an evaluation.

25 THE COURT: Well, there's a few things. One is,  
26 I'll read the section, but I believe it has to do with the  
27 court having a doubt. I do not have a doubt. I also think  
28 it's important to note that the defense attorneys have been

1 working with Mr. Hanlon, pardon me, Mr. Mitchell, as you  
2 indicated, for nine months, never before the eve of trial has  
3 there been an expression of a doubt as it relates to his  
4 competency.

5                   When Mr. Mitchell asked to represent himself in pro  
6 per, Mr. Hanlon, you made a record indicating you felt he was  
7 competent to do so. When that motion was denied, you moved to  
8 withdraw, and you did make a statement that suggested in the  
9 sealed portion that you did not -- you were not making a 1368  
10 motion. And now, that the motion to withdraw is denied,  
11 you're making a 1368 motion. So, I think I'm relying on  
12 several things, not just the 15 minute conversation. The  
13 timing is suspicious. And I don't mean that to impugn your  
14 integrity either, Mr. Hanlon. But I am not suspending these  
15 proceedings the day before all of these jurors are to be  
16 brought in after that record.

17                   MR. HANLON: Well, I think the record should also  
18 include I have indicated to this Court on previous in camera  
19 meetings that I've considered 1368 and have talked to doctors  
20 about that. I was unable at that point -- it was something  
21 that had been going on. And I think the Court has been aware  
22 of that. And I just feel as we get nearer and nearer to trial  
23 it's gotten worse. And I know the Court doesn't mean to  
24 impugn my integrity, but you're indicating I'm playing games  
25 with the Court by going one, two, three in the order it  
26 occurred. And that's not true. If I didn't think there was  
27 an issue, it wouldn't be brought up.

28                   THE COURT: There's not a doubt in my mind as it

1 relates to the competency of the defendant. So, I'm not going  
2 to suspend criminal proceedings.

3                   Okay. So, we have some motions to discuss. There  
4 is the change of venue motion. Let's start with that. The  
5 defense has filed a change of motion venue. The prosecution  
6 has responded. I've read everything as well as the cases  
7 cited. Starting with the defense, is there anything else you  
8 wish to add?

9                   MR. HANLON: No.

10                  THE COURT: Anything the prosecution wishes to add?

11                  MR. KOUSHARIAN: We're prepared to submit on our  
12 papers, Your Honor.

13                  THE COURT: So, as the motion points out, this has  
14 to do with a few things. Rules of Court 4.150 and through and  
15 including 4.162, as well as Penal Code Section 1033  
16 subdivision (a).

17                  The defense feels that in light of many of the  
18 responses to the questionnaires that a change of venue is  
19 appropriate. The prosecution disagrees. There are five  
20 factors that each side talk about in considering whether or  
21 not a change of venue is appropriate. Each of you have  
22 reviewed those five factors. I think it's important to note,  
23 number one, that after going through the jury selection, not  
24 the jury selection, but the initial stages of jury selection,  
25 that we have come to 169 juror questionnaires in which people  
26 responded indicating that they felt they could, in fact,  
27 provide Mr. Mitchell with a fair and impartial consideration.  
28 These 169 people were not excused for cause. The standard is

1 MR. HANLON: Submit, Your Honor.

2 THE COURT: So, it is -- I know the defense was not  
3 objecting on hearsay -- for hearsay reasons, and so I don't  
4 know that this particular point is of great significance, but  
5 I do think the tape itself does qualify either as an excited  
6 utterance or spontaneous statement. Mr. Hanlon's objection is  
7 that it's irrelevant. And I did think about that for a moment  
8 and more than a moment, Mr. Hanlon, I thought more than a  
9 moment.

10 MR. HANLON: I know you did.

11 THE COURT: And I do think that there is relevance  
12 to it. It's corroborative evidence, and there's nothing  
13 testimonial in it as far as any Crawford issues are concerned.  
14 So, I would permit the prosecution to present it, especially  
15 as it relates to any -- the stalking charge that they filed.

16 The next issue that we have has to do with the gag  
17 order. I didn't receive any memorandum from you.

18 MR. HANLON: We're just going to gag ourselves.

19 THE COURT: Okay. Fair enough.

20 And then lastly, there was the renewed 1368 motion.  
21 I've had a chance to look that over. Is there anything else  
22 you want to say, Mr. Hanlon?

23 MR. HANLON: Nope.

24 THE COURT: How about you, Mr. Cacciato?

25 MR. CACCIATORE: No, thank you.

26 THE COURT: So, I'll start just by saying what my  
27 ultimate conclusion is, and then I'll explain my reasons.  
28 I -- I'm not changing my mind about the 1368 request. I do

1 not believe that there is substantial evidence at this time  
2 for me to believe that Mr. Mitchell is incompetent such that I  
3 would be required to suspend criminal proceedings or refer the  
4 matter to a doctor for review. And I know the defense  
5 attorneys strongly disagree. I just want to say what my  
6 reasoning is. Part of it is similar to what I said the other  
7 day. But when Mr. Mitchell indicated that he wanted to  
8 represent himself, I gave him the weekend to look over  
9 everything. And when he returned, he had read hundreds of  
10 pages of documents and was able to -- not to a great extent,  
11 but when he was speaking, he was able to articulate that he  
12 was able to read the documents, and then he provided me with a  
13 list of negatives, a list of things that would be negative if  
14 he were to represent himself. That was a very important list  
15 because it was very rational, it was very reasonable, and it  
16 was very intelligent. He also listed some concerns he had if  
17 he was to represent himself, and again, very coherent, very  
18 reasonable, and intelligent, and he asked for four weeks,  
19 which again was a very rational request under the  
20 circumstances.

21 So, that discussion with Mr. Mitchell suggested to  
22 me that he was quite competent. After that, we had some  
23 closed hearings after Mr. Hanlon and Ms. Rief wanted to  
24 withdraw, and I won't go into the discussion because it was a  
25 sealed discussion. But Mr. Mitchell did have a discussion  
26 with me at that time, and I had asked him to -- if he wanted  
27 to respond to some of the things that had been said. And when  
28 he spoke, Mr. Mitchell explained his communications with his

1 attorney, he explained his circumstances in the jail and the  
2 stresses he's under. He explained circumstances regarding his  
3 daughter and different losses. He explained his emotional  
4 state, and all of those explanations were coherent and  
5 reasonable.

6 He explained what his defense strategy was. He  
7 explained the disagreements he was having with this counsel,  
8 as well as prior counsel, and he also talked about DNA  
9 evidence and what he thought should be addressed. Very  
10 reasonable, very intelligent, and very thoughtful. I -- I  
11 understand clearly that Mr. Mitchell and his attorneys have  
12 some disagreements and I -- that is plain. But I -- I don't  
13 think that that makes Mr. Mitchell incompetent.

14 And I know that the -- I know that it sounds as  
15 though I am suggesting that the request is disingenuous, but I  
16 do have to again point out that the timing of the 1368 motion  
17 was after I denied every single motion that would have  
18 continued the trial. After Mr. Mitchell asked to represent  
19 himself and asked for four weeks and I denied it, after the  
20 defense asked to withdraw, which would have necessitated a  
21 continuance, and I denied it, it was at that point that the  
22 1368 issue presented itself. And I do -- I do feel that that  
23 timing is a little suspect, especially after the discussion  
24 that I had with Mr. Mitchell. I appreciate that my discussion  
25 with him was brief much more -- much less than -- than the  
26 discussion that he has had with defense counsel, but I feel  
27 very strongly that there is not substantial evidence, in my  
28 mind, that would suggest that Mr. Mitchell is incompetent.

1 And so, I respect the motion, but I will deny it, and I'll  
2 keep the motion and the ex parte declaration under seal.

3 MR. HANLON: Thank you.

4 THE COURT: Anything else?

5 MR. HANLON: No.

6 THE COURT: Any objections or concerns,  
7 Mr. Cacciato?

8 MR. CACCIATORE: No, thank you.

9 THE COURT: Any objections or concerns, Mr. Hanlon?

10 MR. HANLON: Objections? I've already done those.  
11 Concerns, no.

12 THE COURT: All right. Thank you all very much for  
13 your hard work. Mr. Hanlon, safe travels. And I'll see you  
14 all Tuesday morning at 9:30.

15 MR. HANLON: Is there any reason to get here a  
16 little early.

17 THE COURT: I don't think so.

18 MR. HANLON: Okay.

19 THE COURT: We'll just go straight in. Okay?

20 MR. HANLON: All right.

21 MR. CACCIATORE: Okay, great.

22 THE COURT: Thanks, Mr. Mitchell. I'll see you  
23 Tuesday.

24 MR. CACCIATORE: Thanks, Judge, thanks a lot.

25 (Whereupon, at 5:20 p.m., this matter was  
26 recessed to be reconvened at 9:30 a.m. on  
27 Tuesday, June 21, 2011.)

28 ---oo---

1 that on July 12th, 2009 the defendant drove to 3 Diablo Court  
2 with two things in mind. He intended to kill Danielle Keller,  
3 and he intended to kidnap Samantha Mitchell. He did just that  
4 striking her repeatedly over the head with a baseball bat  
5 until the skull was crushed and she was dead, and then taking  
6 Samantha from her possession and fleeing the scene.

7 That's why when you've heard all the evidence,  
8 ladies and gentlemen, the People of the State of California  
9 will ask you to return the only just verdicts in this case,  
10 verdicts of guilty on all counts.

11 THE COURT: Thank you, Mr. Kousharian.

12 Mr. Hanlon, do you wish to make an opening at this  
13 time or reserve?

14 MR. HANLON: Yes, I do.

15 THE COURT: Okay. Please.

16 MR. HANLON: Ladies and gentlemen, you hear what the  
17 People have to say, you hear that tape, and you can say to  
18 yourself why are we here? The point is what they say isn't  
19 evidence, what I say isn't evidence. They believe that's what  
20 the evidence will show.

21 You know, many of the things that they say are true,  
22 I don't think will end up being true. One example, they say  
23 this neighbor Frank makes an identification of my client.  
24 When he's shown pictures of my client on the night in  
25 question, he can't pick him out. He doesn't make an  
26 identification.

27 But you will hear from James Mitchell. He's going  
28 to testify. He's going to explain to you why he went there.

1 He was there. He's going to explain to you what happened when  
2 he was there. He's going to explain to you, and you're going  
3 to hear his voice, he's leaving messages for Danielle. He  
4 didn't go over there to kill her or to take the baby. You  
5 will hear him. There's no anger. There's no I'm going to get  
6 you, there's no don't go to court. He's just begging for her  
7 to love him and to let him see the baby on her birthday.  
8 That's why he goes over there.

9 There's no evidence -- the People want to prove to  
10 you that Mr. Mitchell went over there with the intent to kill  
11 and with the intent to kidnap. You know, they can say what  
12 they're going to say, I can say what I'm going to say, but the  
13 point is you have to withhold judgment. It's so difficult in  
14 a trial to withhold judgment to hear the evidence. You hear  
15 that tape -- I mean the tape of Bessie is I -- I can't  
16 pronounce her last name, the witness who's here today, one of  
17 the old Greek people, they're Greek people who live in that  
18 house. You know, she says, "It's her husband, the father of  
19 the baby." Well, she doesn't know that. You'll hear, as  
20 Mr. Kousharian said, she can't identify him.

21 Things are not always the way they seem, and that's  
22 why we have a trial. The way it proceeds is the government  
23 calls -- they do their opening statement. They say I -- I  
24 believe Mr. Kousharian believes that's what the evidence is  
25 going to show. But what he believes and I believe is totally  
26 irrelevant, doesn't matter. What -- the government will put  
27 on their witnesses, and it's called direct examination.  
28 They'll question them. Then I will cross-examine their

1       witnesses. And you can't even make a judgment about a  
2       particular witness, about their credibility, about what they  
3       saw, about whether they're wrong or lying or whatever until  
4       you hear the cross-examination of that witness because it's  
5       often said in courtroom situations, you really don't know what  
6       a witness is saying until cross-examination occurs. So, you  
7       have to withhold judgment there. And then you have to wait to  
8       see how witnesses fit in with each other. You have to  
9       withhold judgment. And I keep on saying that because you hear  
10      the evidence.

11           I mean they talked about some DNA and fingerprint on  
12      the bat. There'll be a lot of evidence about that. The  
13      evidence will be -- I think will show that my client didn't  
14      bring a bat over there. This wasn't his bat. The evidence  
15      will show he didn't go over there with the intent to do  
16      anything wrong, of violating restraining order. There's a  
17      restraining order. The evidence is going to show they both  
18      violated restraining orders. It doesn't make it right. She  
19      wasn't restrained. But Mr. Mitchell is not on trial for  
20      violating restraining order, you know. And you have to really  
21      sit back. It's such a hard thing. We make so many snap  
22      judgments in our lives. But with all the stuff we're getting  
23      on the Internet, in the papers, we read things, we reach  
24      judgments. Life happens in sound bytes. Decisions are made.  
25      You can't do that. You really have to stop the way you  
26      normally make decisions on what you see outside your personal  
27      life and sit back and wait. It's hard to do, but that's your  
28      job as jurors. When you took the oath, you decided -- you

1 told us and swore that you would be fair and follow the law.  
2 And the law says that the Judge told you you cannot take what  
3 the lawyers say as evidence. You can't make a decision right  
4 away. You can't talk about it with each other until the trial  
5 ends, the evidence completed, you're instructed and the  
6 closing arguments, then finally you can go in and talk. And  
7 all that time the law says do not make up your mind until  
8 everything is done. And that's what you have to do in this  
9 case. And I repeat it because really as I started, when I  
10 first started talking, you wonder why we're here. You know,  
11 eyewitnesses say he did it. His fingerprint and DNA is on the  
12 bat. He has blood splatter on his clothes -- on his clothes.  
13 The baby's with him. He must be guilty of murder, kidnapping,  
14 and other charges.

15 Must is not something we deal with here in court.  
16 Has the evidence proved? And here, until you hear  
17 Mr. Mitchell, you're not going to know what the evidence is.  
18 You can choose to believe him, if it's believable or not, but  
19 you have to wait to hear what he has say. He has pled not  
20 guilty, and you have to withhold judgment.

21 It's -- you know, the -- the -- you have to hear --  
22 you have to hear the testimony of this guy Frank, who lives  
23 across the street, until -- before you decide he's an  
24 eyewitness. You have to hear Mr. Mitchell's calls, his voice  
25 mail on Danielle's phone before you decide why he went over  
26 there. You have to determine if he brought the bat before you  
27 decide he brought the bat because his fingerprint and DNA is  
28 on the bat. You have to wait and withhold judgment.

1                   And in this case it's going to be difficult. This  
2 is a awful crime. The way Mr. Kousharian described it, I  
3 think is gentle. I mean it's an emotional crime that is going  
4 to make you cringe. It makes us cringe. Let's get real.  
5 It's not just somebody that shot somebody. A lady, a  
6 beautiful young woman's brains were beaten in in the backyard  
7 of her home when her baby is being held by her. It's hard to  
8 even say, but you're going to have to somehow get -- move away  
9 from that and listen to the facts. You're going to see these  
10 pictures. You know, death is never pretty. Is it any easier  
11 or different or better if you're shot in the back and you  
12 don't see a bullet hole? No. But here it is such a gruesome  
13 sight. You have to withhold judgment.

14                   And all I can ask you to do is, you know, wait and  
15 hear the evidence. One example Mr. Mitchell has a restraining  
16 order. He violates it by going over June 26th, which is true.  
17 What you haven't heard and you're going to hear the evidence,  
18 that he had a court hearing in San Francisco June 1st -- July  
19 1st, July 3rd, he went there. He followed the Judge's  
20 instruction. You're going to find evidence in his car that he  
21 was about to enter a program. These are not the actions --  
22 you have to decide if these are the actions of someone who was  
23 about to go and kill his wife and the mother of his baby  
24 because she won't let him have contact when he wants it. I  
25 mean that's going to be your -- you know, you have to wait and  
26 hear. You have to wait and hear the evidence. You're going  
27 to have to hear from Mr. Mitchell what he did that day. That  
28 day July 12th was the day his father died, someone he was very

1 close to. It's the day his baby was born. It's the day these  
2 events happened.

3 I'm not going to tell you what's going to happen  
4 because this is one of these trials, I don't think we know  
5 until people testify and Mr. Mitchell testifies. But I am  
6 convinced I think the evidence will show that when it's all  
7 said and done, he's not guilty of murder, he's not guilty of  
8 kidnapping. And if the People prove it to you beyond a  
9 reasonable doubt, he is. If they don't, he isn't. So, don't  
10 decide now. I can see it in your face, don't decide now.

11 You've listened to that tape. It's the father of  
12 the baby, he's beating her head. Bessie doesn't know. She  
13 knows someone's beating her in the head. She sees part of the  
14 event. All these people see part of an event, and your job is  
15 to put them together. Do your job withhold judgment. Sit  
16 through a trial, some of it is going to be really difficult,  
17 pay attention, concentrate. And then at the end you'll have  
18 ample opportunity to stop withholding judgment and make a  
19 judgment. But do it at the end of the case and not at opening  
20 statement. It's not fair to Mr. Mitchell. It's not fair to  
21 our system. It's not fair to any of the lawyers. Wait till  
22 the end of the case. Thank you.

23 THE COURT: Thank you, Mr. Hanlon.

24 So, we're about to start with our first witness.  
25 The prosecution needs to sort of change some of the equipment.  
26 More than -- do you need more than five minutes?

27 MR. KOUSHARIAN: No.

28 MR. HANLON: Before we take a break, could I make a

1 homicide one. 521 is the other one?

2 THE COURT: 500, 521, and 522 where you have  
3 agreement, if they're -- if you still both agree.

4 MR. HANLON: 520, 521. Okay. And what's the third  
5 one? We'd ask for all three.

6 THE COURT: Okay. There's four, 500, 520, 521 and  
7 522. And that's all okay with both sides. Let's look at  
8 these carefully starting with 5 --

9 MR. HANLON: Which one?

10 THE COURT: Let's start with 500. I'm assuming in  
11 500 that the second paragraph that's bracketed -- bracketed  
12 does not apply.

13 MR. HANLON: Right.

14 THE COURT: So, I wouldn't give that. Now, in the  
15 first paragraph, "Homicide is the killing of one human being  
16 by another," obviously, I would give that. Let me ask. Is  
17 anyone asking for a manslaughter instruction?

18 MR. HANLON: Yes.

19 THE COURT: So, your position would be that if I  
20 were to do what you wanted, that the entire first bracketed  
21 portion -- the entire first paragraph be read?

22 MR. HANLON: Yes.

23 THE COURT: So, maybe this is the discussion we need  
24 to have.

25 MR. HANLON: Yes.

26 THE COURT: The defense is, am I correct, you're  
27 asking for a first, a second and a vol?

28 MR. HANLON: Yes.

1                   THE COURT: And what is the People's position?

2                   MR. CACCIATORE: Your Honor, I think that they  
3 clearly are, obviously, lesser included offenses to each  
4 other. And despite the defendant's testimony, I do believe  
5 there is sufficient evidence for the Court to give a  
6 manslaughter instruction. So, in an abundance of caution, we  
7 would ask the Court to --

8                   THE COURT: To do all.

9                   MR. KOUSHARIAN: -- do all.

10                  THE COURT: What about the involuntary, no one's  
11 asking for that?

12                  MR. KOUSHARIAN: That is not a lesser included  
13 offense, Your Honor.

14                  THE COURT: All right. So --

15                  MR. HANLON: We're not asking for it either way.

16                  THE COURT: Okay. So, it's a first, second and  
17 voluntary manslaughter. And we're gonna have -- and it's  
18 going to be -- as read would it be read as the second and vol  
19 as lesser includeds? You know, in the lesser included  
20 instruction where it defines how you deal with those things?

21                  MR. KOUSHARIAN: Yes, I think they would have to  
22 find him not guilty of first degree murder to move on to  
23 second degree.

24                  THE COURT: Okay. So, then going back to 500, the  
25 whole first paragraph should be read. Do you agree  
26 Mr. Kousharian?

27                  MR. KOUSHARIAN: Yes, Your Honor.

28                  THE COURT: All right. Moving on to 520.

1                   THE COURT: It seems like everything on Page 6  
2 should be excluded except the last paragraph. Everyone agree  
3 with that?

4                   MR. KOUSHARIAN: Yes, Your Honor.

5                   MR. HANLON: What about the requirement of second  
6 degree murder?

7                   THE COURT: I'm sorry?

8                   MR. HANLON: What about the paragraph before that.  
9 Requirements of second degree murder based on express and  
10 implied malice are explained in another instruction.

11                  THE COURT: Are we -- is there an express or implied  
12 malice?

13                  MR. HANLON: Well, I mean, this is clearly -- if  
14 it's murder -- if it's murder, it's express malice.

15                  THE COURT: Well, I guess the reason I'm hesitating  
16 is because I'm -- we do -- is there another instruction that  
17 involves -- hold on here.

18                  MR. KOUSHARIAN: The Court's already giving 520.

19                  MR. HANLON: Oh, right. You're right. I take it  
20 back. Just the last paragraph..

21                  THE COURT: Okay. So, let's look at 522. Seems  
22 like I would give the whole page.

23                  MR. HANLON: All the brackets, right.

24                  THE COURT: Okay. Now, the next thing is the  
25 prosecution has asked for 540A; the defense has asked for  
26 541A.

27                  MR. HANLON: I think we made a mistake. I think it  
28 is 540. I was looking at it this morning. 540A is the

1 MR. HANLON: Yes.

2 THE COURT: Is there a second degree instruction  
3 that's separate?

4 MR. KOUSHARIAN: No, Your Honor. Basically, the  
5 instructions define first degree, and says if it's not first  
6 degree, all other murders are second degree.

7 THE COURT: And so then --

8 MR. KOUSHARIAN: And then provocation reduces murder  
9 to --

10 THE COURT: Right. But what -- what I'm trying to  
11 say is there an instruction that tells the jurors that they  
12 have to go from first to second to vol.

13 MR. KOUSHARIAN: I think that's the next one, 640.

14 THE COURT: Okay.

15 MR. HANLON: There is one --

16 THE COURT: I'm just not there yet.

17 MR. HANLON: Yeah, there is one that does.

18 THE COURT: Okay. So, right now we're at 570 then.  
19 Sorry for jumping ahead. Doesn't seem to have anything on the  
20 first page that I need to --

21 MR. HANLON: No.

22 THE COURT: -- deal with. The second page has one  
23 bracketed portion of "cool off period," does that seem to be  
24 something we need to put in?

25 MR. KOUSHARIAN: I think, Your Honor, with the phone  
26 records, there is a one tower time line between the last  
27 conversation they had, I think it's appropriate.

28 THE COURT: To read that portion?

1 MR. KOUSHARIAN: Yes, Your Honor.

2 THE COURT: Do you have any problem with that,

3 Mr. --

4 MR. HANLON: Which portion is this, Your Honor?

5 THE COURT: It's page 2 of 2, middle paragraph, "If  
6 enough time."

7 MR. HANLON: No, I think that's appropriate.

8 THE COURT: Okay. I'll give it.

9 Next, the defense has asked for 625, voluntary  
10 intoxication effect on homicide.

11 MR. HANLON: Well, I think the evidence supports it  
12 as something that goes versus second.

13 THE COURT: So, you want me to read it?

14 MR. HANLON: Yeah.

15 MR. KOUSHARIAN: And, Your Honor, I think the  
16 evidences does not support that. The only evidence we had of  
17 any type of intoxicant use was, number one, the defendant's  
18 testimony indicating use four days before the incident. And  
19 the criminalists all agreed that any use was historical up to  
20 five days before and perhaps even more. So, I don't think  
21 that there's been any testimony that on or near the date of  
22 the murder the defendant was intoxicated.

23 MR. HANLON: No, well, the prosecutor -- the second  
24 Najera, the woman toxicologist female, she testified this  
25 period of tweaking post use and how it causes depression, I  
26 can't think of the word she used. And Mr. Mitchell's  
27 testimony is that he can't -- it was before he spoke --  
28 stopped before he spoke to Erica on the 11th, and it was

1 good spot, you know, it seems we go from first --

2 MR. HANLON: M-hm.

3 THE COURT: -- to voluntary. And maybe -- you know,  
4 maybe it's up to you all to just sort of explain that I guess.

5 Okay. Well, that's what it is.

6 MR. HANLON: Well, I mean, do you want to look at  
7 CALJIC or not?

8 MR. KOUSHARIAN: No, Your Honor. We would not.

9 MR. HANLON: I was really addressing the Court.

10 THE COURT: Would you -- would you see if the  
11 research attorneys have an old CALJIC?

12 MR. CACCIATORE: I have one in my office.

13 THE COURT: They'll know what that means.

14 MR. CACCIATORE: There were -- Judge, there were  
15 some issues in CALJIC with intent instructions on the second.

16 THE COURT: I just want to see it.

17 MR. CACCIATORE: There was an issue, and that's  
18 generally the way I've dealt with it, it's just the absence  
19 was deliberate premeditated.

20 THE COURT: Well, this doesn't even say that. It  
21 says -- it doesn't even say that. But let's -- let's pass it  
22 for a minute. I'll -- I'll look at CALJIC in a minute.

23 Let's go on to 570, that's the voluntary  
24 manslaughter instruction. Obviously, I'm going to give Page 1  
25 of 2, and then there's 2 of 2. Are the parties wanting me to  
26 read that middle paragraph on Page 2 of 2?

27 MR. KOUSHARIAN: The People request that, Your  
28 Honor.

1                   THE COURT: Okay. I will.

2                   MR. HANLON: That's fine.

3                   THE COURT: All right. 640, I spent some time with  
4 that. I think I've got it pretty well -- you know, I had a  
5 question at first because the options don't even have the  
6 jurors finding the defendant not guilty of second degree.  
7 It's either guilty or hung and then they go to vol. That's  
8 the way this reads.

9                   MR. HANLON: Really?

10                  THE COURT: Really.

11                  MR. HANLON: I didn't notice that seems to be a hole  
12 in the instructions.

13                  THE COURT: So -- and then I -- well, then I was  
14 saying to myself, well, maybe that makes sense.

15                  MR. KOUSHARIAN: Your Honor, it's Page 3 of 5, it  
16 does cover that situation. Page 3 of 5 --

17                  THE COURT: Uh-huh?

18                  MR. KOUSHARIAN: -- item number 5, not guilty --  
19 person not guilty of second.

20                  THE COURT: Right. But look -- right. And you  
21 agree on a decision on manslaughter. But if you look at  
22 murder, for instance, the way it -- the way it goes is guilty  
23 of murder, not guilty of murder or hung, right? So, they kind  
24 of do it that way. And then even for the voluntary  
25 manslaughter, "Guilty of voluntary manslaughter, not guilty,  
26 or hung. But for the second degree it's guilty or hung. Do  
27 you see what I'm saying?

28                  MR. KOUSHARIAN: On Page 2 of 5 --

1 you must then decide whether it is murder of the first or  
2 second degree. Provocation may reduce a murder from first  
3 degree to second degree and may reduce a murder to  
4 manslaughter. The weight and significance of the provocation,  
5 if any, are for you to decide. If you conclude that the  
6 defendant committed murder but was provoked, consider the  
7 provocation in deciding whether the crime was first or second  
8 degree murder. Also consider the provocation in deciding  
9 whether the defendant committed murder or manslaughter.  
10 Provocation does not apply to a prosecution under a theory of  
11 felony murder.

12 The defendant has been prosecuted for murder under  
13 two theories. Theory number one is referred to as malice  
14 aforethought, and theory number two is referred to felony  
15 murder. Each theory of murder has different requirements, and  
16 I will instruct you on both.

17 You may not find the defendant guilty of murder  
18 unless all of you agree that the People have proved that the  
19 defendant committed murder under at least one of these  
20 theories. You do not all need to -- pardon me. You do not  
21 all need to agree on the same theory.

22 Okay. This is the instruction on theory number one,  
23 which we refer to as malice aforethought. The defendant is  
24 guilty of first degree murder if the People have proved that  
25 he acted willfully, deliberately, and with premeditation. The  
26 defendant acted willfully if he intended to kill. The  
27 defendant acted deliberately if he carefully weighed the  
28 considerations for and against his choice, and knowing the

1       felony. Number 5: Whether the fatal act occurred while the  
2       perpetrator was fleeing from the scene of the felony or  
3       otherwise trying to prevent the discovery or reporting of the  
4       crime. 6: Whether the felony was the direct cause of the  
5       death. And 7: Whether the death was a natural and probable  
6       consequence of the felony.

7           It's not required that the People prove any one of  
8       these factors or any particular combination of these factors.  
9       The factors are given to assist you in deciding whether the  
10      fatal act and the felony were part of one continuous  
11      transaction.

12           A killing that would otherwise be murder is reduced  
13      to voluntary manslaughter if the defendant killed someone  
14      because of a sudden quarrel or in the heat of passion. The  
15      defendant killed some -- the defendant killed someone because  
16      of a sudden quarrel or in the heat of passion, if, number 1:  
17      The defendant was provoked. Number 2: As a result of the  
18      provocation, the defendant acted rashly and under the  
19      influence of intense emotion that obscured his reasoning or  
20      judgment. And 3: The provocation would have caused a person  
21      of average disposition to act rashly and without due  
22      deliberation, that is from passion rather than from judgment.

23           Heat of passion does not require anger, rage or any  
24      specific emotion. It can be any violent or intense emotion  
25      that causes a person to act without due deliberation and  
26      reflection.

27           In order for heat of passion to reduce a murder to  
28      voluntary manslaughter, the defendant must have acted under

1 the direct and immediate influence of provocation as I have  
2 defined it. While no specific type of provocation is  
3 required, slight or remote provocation is not sufficient.  
4 Sufficient provocation may occur over a short or a long period  
5 of time.

6 It's not enough that the defendant simply was  
7 provoked. The defendant is not allowed to set up his own  
8 standard of conduct. You must decide whether the defendant  
9 was provoked and whether the provocation was sufficient. In  
10 deciding whether the provocation was sufficient, consider  
11 whether a person of average disposition in the same situation  
12 and knowing the same facts, would have -- would have reacted  
13 from passion rather than from judgment. If enough time passed  
14 between the provocation and the killing for a person of  
15 average disposition to cool off and regain his or her clear  
16 reasoning and judgment, then the killing is not reduced to  
17 voluntary manslaughter on this basis. The People have the  
18 burden of proving beyond a reasonable doubt that the defendant  
19 did not kill as the -- as the result of a sudden quarrel or in  
20 the heat of passion. If the People have not met this burden,  
21 you must find the defendant not guilty of murder.

22 You may consider evidence, if any, of the  
23 defendant's voluntary intoxication only in a limited way. You  
24 may consider that evidence only in deciding whether the  
25 defendant acted with an intent to kill or the defendant acted  
26 with deliberation and premeditation.

27 A person is voluntarily intoxicated if he or she  
28 becomes intoxicated by willfully using any intoxicating drug,

1                   Mr. Hanlon, go ahead.

2                   MR. HANLON: Thank you, Your Honor.

3                   Ladies and gentlemen, this is my opportunity to talk  
4 to you. We're not going to finish today, just so you know. I  
5 will go to about 5:00, come back tomorrow. I will finish my  
6 argument. Mr. Cacciato has a rebuttal. So, it's not going  
7 to get to you tonight. It's been a -- it's not a long as you  
8 thought trial, but it's long, and there's a lot of evidence to  
9 go over.

10                  I have some remarks I want to make to you. I'd like  
11 to start, though, I think it's really important in a case like  
12 this where there is so much emotion and such an awful crime  
13 where some young woman's brains were knocked out of her head  
14 and her skull was crushed while she's holding her baby, it's  
15 important for the lawyers to talk to you about evidence and  
16 not prey on your emotions 'cause you're supposed to decide  
17 this based on evidence. And it's hard, but part of the  
18 lawyer's job's to make sure we focus on the evidence, and then  
19 you're going to reach a decision.

20                  I think -- I have a lot of respect for  
21 Mr. Cacciato, but I think some of his arguments, he does  
22 prey on your emotion. Out of nowhere his beginning he showed  
23 you the pictures of Danielle, the back of her head. It had  
24 nothing to do with science. It had nothing to do with -- to  
25 make you be upset. I mean, things are upsetting enough about  
26 a case like this. But a murder -- if someone's guilty or not  
27 of murder, you can shoot someone in the dark and you can't see  
28 it, does that make it less of a murder? Of course not.

If you look at the evidence, would it be any better if I said Mr. Mitchell was a Marine who went for his country to Chile, that he was a businessman, that he's a student, would that affect what we're doing here? No. Would -- to say the voice mails that Mr. Mitchell left are frightening, you'll have to decide that. You heard them, you'll hear 'em again, I'm not going to play them for you again. You've heard 'em. They were pathetic. They were sad. They were "I miss you," they were, "I fucked up, I wish I hadn't done it, I want you back." They weren't frightening. But that's an adjective that lawyers use to prey on your emotion. I don't think I've done that in this trial, and I'm going to try not to do it today or tomorrow.

27 I think it's important to focus on the evidence, to  
28 not make arguments when we're doing a very serious argument

1 about the blood on the -- or the DNA on this handle of the  
2 bat. We're going to talk about that probably tomorrow. And  
3 whether it was touch DNA or blood. And Mr. Cacciatore's  
4 argument to you about why you know it has to be blood is let's  
5 be serious. There is no proof for you to talk about. There's  
6 no analysis of the evidence. Let's be serious.

7 I'm going to be serious. This case is incredibly  
8 serious. It's difficult for you. It's difficult for the  
9 lawyers. It's difficult to see some of this evidence. But we  
10 have to look at it and be serious to see what occurred and see  
11 if Mr. Mitchell's guilty. And if he is guilty, what he's  
12 guilty of.

13 Hopefully, in Mr. Cacciatore's rebuttal and in my  
14 argument, we will not continue to prey on your emotions. You  
15 know, talking to you at the end of his argument about what is  
16 taken away from Danielle, what's taken away from Samantha, now  
17 it's true and it's awful, but what does that have to do with  
18 this case except to make you angry and feel bad. Think about  
19 it. And why in a case like this where there's so much  
20 emotion, so much difficulty that the prosecutor bring that up  
21 at the end of his closing argument? What does it have to do  
22 with guilt or innocence except to sway you?

23 And let's -- you know, your job -- you know, I've  
24 looked at over a hundred juries from this view, mostly in  
25 California, all over this country. And what I normally see --  
26 what I see here are 12, here we have, you know, 15, I guess,  
27 really good people who want to do the right thing and want to  
28 do justice. Now, a lot of time they don't agree with me, but

1 that's not the point. I see in you an incredible cross  
2 section of your community, people -- all different kinds of  
3 work, all different points in their lives, and you here  
4 wanting to do justice.

5 You know, whether you agree with me or  
6 Mr. Cacciato what the evidence shows is irrelevant. I am  
7 convinced, and I was in jury selection as was the prosecution  
8 'cause we all agreed on you guys, that this group of people  
9 can do justice and be fair. And part of being justice and  
10 doing justice being a juror is to not be swayed by pity and  
11 emotion. So, I question and say to the prosecutor why do you  
12 try to do that to our jury? What we want from you is  
13 analysis, thinking, reason, and then judgment. We don't want  
14 you -- the Judge has instructed you again and again don't be  
15 swayed by pity or emotion.

16 So, hopefully, I won't do that. But I do believe  
17 that our jury system -- there're two great things about our  
18 criminal justice system. The first is the jury system  
19 because, though there are problems and sometimes decisions may  
20 be wrong, we never know, basically 12 people picked at  
21 random -- it's not at random, as close as random as we get, we  
22 get to knock 20 of you off for no reason in homicide cases,  
23 challenge some of you if we think you can't be fair in this  
24 case. But that system really seems to work. And it works  
25 because people come here, like you folks, wanting to do  
26 justice. I feel a lot more comfortable when I do having 12  
27 people from here in Marin County, wherever the trial is from  
28 where you live -- people live and where the crime occurred,

1 deciding it, as opposed to a police officer, a prosecutor, or  
2 even a Judge.

3                   This system works. And I mean, it works because  
4 you're the only ones here looking at the evidence and being  
5 able to actually analyze the evidence, not be swayed by the  
6 media. I mean, just recently we saw this lady in Florida,  
7 Casey Anthony, was convicted in the media. Everybody thought  
8 she killed her baby. There was no doubt if you read the  
9 papers. Nancy Grace on TV saying, "Who needs a trial?" You  
10 know what, the 12 jurors in the court made a decision on the  
11 evidence they heard, not on what was in the media, and  
12 certainly not on emotion.

13                   So, that's why I believe, and I mean it when I say,  
14 you are the conscience of your community. What a job to have.  
15 We're never going to be able to be that because we're lawyers,  
16 no one will ever want us to sit in the jury. He thought we  
17 wouldn't pick a lawyer except for one.

18                   MR. CACCIATORE: You got on.

19                   MR. HANLON: I don't know how that happened. So,  
20 you know, it's not fair for Mr. Cacciato and I to be on a  
21 jury, but we have to -- you know, we have come -- we come here  
22 with our baggage. We come here with our bias. But you 12 are  
23 the conscience of your community. You're going to judge who's  
24 telling the truth and who's not. And you're going to make  
25 judgment on whether some other human being in your community  
26 is guilty or not.

27                   I don't think people in our society get to do that  
28 anywhere but in a jury. It's a very serious job. We've had

1 some laughs in this trial, and I'm sure I've acted silly, and  
2 we just laugh at things. But it's such a serious job. And  
3 you have to take it seriously. And you have to base it on  
4 evidence and not on emotion, and not on the poor future of  
5 Samantha. You can't change that. I mean, it -- it just -- it  
6 really -- I know I came back to it, it just bothers me that a  
7 lawyer as good as Mr. Cacciato would think he needs to do  
8 that to prove his case. Look what happened to Samantha. Tell  
9 me one thing -- and if Mr. Cacciato wants to come back, tell  
10 you one thing that has to do with any issue in this trial  
11 except to make you excited and feel emotions. And that's not  
12 our job. Our job is to present the evidence and argue the  
13 inferences of the evidence so you can make a decision.

14 So, that's -- you know, I expect you to make a  
15 decision on the evidence, not on whether Mr. Cacciato called  
16 my client a man of violence, not on whether he has a trust  
17 fund, but on evidence. And I think you'll do that. And I  
18 harp on this 'cause it's so important in a case like this. I  
19 don't think it's harping, but I'm talking about it because  
20 this is such an emotional case.

21 I mean, I work on numerous murder cases, and I don't  
22 know of another one that tugs at your heart as much as the  
23 images of this case. A baby, a mother dying holding her child  
24 in her arms. It -- it's difficult to even say, you know, it's  
25 like these things should not happen, but they do. And the  
26 question is how do we as a jury and a legal system deal with  
27 it? We put on the evidence, and we lay it out for you guys.

28 So, what's -- I said there were two reasons I think

1 we have the best legal system in the world, and the other one  
2 is the law. Not the two hours that the Judge had to read to  
3 you this morning, and I respect the law, but there's one law  
4 that's been here for the last 250 years we've been a country,  
5 and that is the law that presumes anybody charged with a  
6 crime, including James Mitchell, no matter how heinous the  
7 allegation, whether it's drunk driving or murder, the law says  
8 you must, the jury, presume Mr. Mitchell innocent, and you  
9 cannot convict him unless and until that innocence is pulled  
10 from him, not by emotion, not by misguided argument, but by  
11 evidence or stipulations. Evidence from that chair, pictures  
12 or tapes that come in. You have to cloak him with the  
13 presumption of innocence.

14 And the question becomes why is this so important?  
15 You know, why is the law like this there, you know. I mean,  
16 some people can think you know that kind of law, it's guilty  
17 people who go off, they can get off. I mean, why is it such a  
18 burden on the prosecution? Well, our founding fathers  
19 understood. Fathers, mothers, daughters, whatever they were,  
20 back then it was men, right? They understood that the power  
21 of law enforcement, whether it's 1750 or now, and the  
22 government, whether you call him a District Attorney, the U.S.  
23 Attorney, the prosecution, the government is so overwhelming  
24 against any individual, anybody, person, rich, poor, black,  
25 white, Spanish, Asian, any individual charged with a crime.  
26 We have to protect our citizens because we're a free society.  
27 And how do we protect them? We presume them innocent, and we  
28 say you can't convict somebody unless and until evidence is

1 produced that convinces you of their guilt beyond a reasonable  
2 doubt.

3 And what is really the concept behind that in a free  
4 society? We can argue in election at some point what freedom  
5 is, but we're free. And we know that as Americans we're free  
6 as citizens of Marin as citizens of California.

7 Every courtroom in every county in every burb in  
8 every state in every Federal building has one law that's  
9 always the same: A person charged with a crime is presumed  
10 innocent and cannot be convicted until and unless the  
11 government produces evidence that convinces you beyond a  
12 reasonable doubt of his or her guilt.

13 And what that law says it is better to sometimes  
14 free a guilty person than it ever is to convict an innocent  
15 one. Think about it. That is really the idea behind the  
16 presumption of innocence. Because what it says to you is that  
17 you may have some evidence that you think Mr. Mitchell is  
18 guilty of some of these crimes or all of 'em, you can't  
19 convict, it's not because the gloves don't fit, it's because  
20 the law says you can't convict because you have a reasonable  
21 doubt. If there's substantial evidence against someone, you  
22 can't convict if you have a reasonable doubt.

23 And if you ever want to wonder what our laws would  
24 be like, our country, our freedom, let me -- it sounds like  
25 what is this guy up there talking about freedom, we're in a  
26 murder trial in, you know, in our county. Why is there such a  
27 big deal about freedom in a free society? Because the way --  
28 if you look at societies in the past, in the present, that

1 don't have this law, you kind of get the idea. There is no  
2 presumption of innocence in China right now where people are  
3 just swept up and put in jail because the government doesn't  
4 like their beliefs. Under in Iraq and a Saddam Hussein no one  
5 was presumed innocent before they disappeared, or in Columbia  
6 where people disappeared, or Guatemala all in our lifetime.  
7 You know, I mean, I don't want to make it more than it is, but  
8 I can't make it more than it is, to understand how important  
9 this is.

10 To understand, look at our country, when 150 years  
11 ago African Americans were lynched in the South. There was no  
12 presumption of innocence. It wasn't even a trial. That was  
13 by the -- the people who ran those states. It was okay to do  
14 because there was no presumption of innocence. So, don't  
15 underestimate how important it is.

16 Don't think I'm just talking legalese. Understand  
17 that this is what makes us a free society. So, you folks  
18 accept it. You may be thinking now why am I up here? You  
19 know he's guilty. I'm not saying that's true. You may think  
20 there's evidence. I'm up here because I'm going to show you  
21 the evidence, but I need you to cloak Mr. Mitchell in the  
22 presumption of innocence. I need you to do it like you would  
23 any other person charged with a crime.

24 And what does it mean beyond a reasonable doubt?  
25 The Judge has read you the instruction, you're going to hear  
26 it again, I'm going to read it. What it means is is there a  
27 reason to doubt the truth of the charge? Is there a reason to  
28 doubt the guilt of Mr. Mitchell? I suggest to you there are

1 two parts to that. One is the rational part. In your head  
2 you think there's a lot of evidence shown, we're going to go  
3 through the evidence, a little today and tomorrow. Is there  
4 something about the evidence that leaves me having a rational  
5 doubt? I don't -- they haven't convinced me. And then  
6 there's a emotional or moral part, really moral. There's  
7 something inside of me hesitates I don't think they proved  
8 beyond a reasonable doubt. I understand there's a lot of  
9 evidence, but I have a hesitation, and that's what reasonable  
10 doubt means I think. And that's -- you're going to have to  
11 determine from the instructions what it means. But I think  
12 that's a pretty good analysis is there a reason to doubt the  
13 truth of the charge?

14 So, as you do that, as you start to examine the  
15 evidence in the back when you tomorrow at some point will go  
16 do that, you'll pick a foreperson. Remember, that is the most  
17 important law you have. That's what I -- I mean, I think as  
18 you approach this, you have to start with that.

19 Now, I would just add a final thought on this. I'm  
20 probably a little bit older than most of you. But since when  
21 I was a young person, we have been bombarded in the media and  
22 in politics especially. People have got elected by carping on  
23 fear of crime. The war on crime, these sound bytes the people  
24 running for office, you know, they call something a victim  
25 bill of rights, has nothing to do with victim. They talk  
26 about -- all they talk about is our fear about crime in our  
27 homes, on the streets. It's not saying it's not there. But,  
28 you know, we should not try to do these things as sound bytes.

1 We should look and try to think. So, it's very important in  
2 these times, regardless of when you were born, that we step  
3 away from that. We step away from our own fears of crime, and  
4 say, "I'm now a juror. I'm not just another citizen. I'm a  
5 juror. And I have to -- I have to presume James Mitchell  
6 innocent and see if the government produced evidence that  
7 convinces me beyond a reasonable doubt."

8 It's not as easy as it sounds. You know, we're so  
9 used to making quick decisions in our lives because our lives  
10 are so busy. You know, we made you take four weeks out of  
11 your life already, and maybe it's made your life impossible.  
12 It maybe makes you realize you probably can slow down  
13 sometimes. But we make such quick decisions, such snap  
14 decisions all the time. And this is not one of those times.  
15 It really isn't.

16 Whatever you decide it's not a snap decision. It's  
17 a thought out, careful analysis because you are judges. And  
18 it's -- I guess sometimes if we have some kids over, we can be  
19 judges of these kids fighting. But really we don't do this  
20 very much in our lives or at work.

21 So, I want to talk to you about what other laws the  
22 Judge talked about today or read you. One is, and it's tied  
23 to presumption of innocence and the need to produce guilt  
24 beyond a reasonable doubt. It has to do with circumstantial  
25 evidence. What is -- the Judge gave an example, I think  
26 that's a -- a good example, you know, is it raining out?  
27 Another example is is X at home. And Y called out to X and  
28 the line's busy. The one reasonable interpretation is X is at

1 home. Another reasonable interpretation is you have a cat who  
2 knocked the phone off the line, or someone else is calling at  
3 the same time. If they're all reasonable, it's just an  
4 example. If one points to innocence, one reasonable  
5 interpretation, and the other to guilt, you must accept the  
6 one pointed to innocence.

7 Now, of course, if they're not both reasonable,  
8 that's different. But if they're both reasonable, you must  
9 you heard it, I think, three times in instructions. 'Cause  
10 here we're dealing with a special circumstance that says it  
11 again. It's just another aspect of the presumption of  
12 innocence and the need for proof beyond a reasonable doubt.  
13 If there are two reasonable interpretations of a fact of  
14 evidence, you have to accept the one pointing to innocence.  
15 And it goes with the idea of the link in a chain. I mean,  
16 part of the instruction you'll see is that if each piece of  
17 circumstantial evidence to prove something are needed, if  
18 there's a break in one link, if at one point the link of  
19 evidence shows two reasonable interpretations, one to proof --  
20 one to guilt, one to innocence, you have to accept the one to  
21 innocence, the chain is gone. That -- that evidence cannot be  
22 used to prove guilt.

23 So, let's look at some examples in our case, and  
24 we're gonna talk about the evidence, but I want to go through  
25 this to make sense. Mr. Mitchell's conversations with his  
26 cousin and brother. He didn't mention he didn't kill. He  
27 didn't mention that there were other people. He didn't  
28 mention when he testified in court that there were two other

1 men there. Is this circumstantial evidence of guilt or not?

2 One view is that we can sit here and say, "Well, if  
3 I was in trouble and someone was saying to me, you know,  
4 what -- you know, where are you, what's going on, I would say  
5 I didn't do it. I'm, you know, with somebody else." So,  
6 that's one reasonable interpretation that points to guilt. If  
7 another reasonable interpretation is that Mr. Mitchell is as  
8 he says confused, his mother has indicated without saying it  
9 that she thinks he's guilty, everybody thinks he's guilty,  
10 they think he's going to hurt his baby, he knows what his dad  
11 has told him about going to a lawyer, and he decides to shut  
12 up, even though he's emotional and upset. If you find that  
13 reasonable, and I think it is, then you have to accept it. If  
14 you don't, then it's evidence pointing towards guilt. You got  
15 to go through the evidence this way. You know, was it  
16 reasonable from what he had learned through his father if  
17 you're in trouble, go to a lawyer? If you find that  
18 reasonable, then it's evidence pointing to innocence. Or it  
19 can't be evidence pointing to guilt.

20 Another concept is the idea of shifting the burden  
21 of proof. It's not a legal concept. It's something I'm  
22 talking about. There's no law saying don't shift the burden.  
23 The law assumes you won't. But it can happen through the  
24 prosecutor's argument. It can happen when you talk to the  
25 Judge. And you can't let it happen because the evidence can  
26 never -- the burden of proof can never be shifted. If  
27 somebody says he's guilty, who else would do this, it's not  
28 proof. You have to say that's not proof. Show me proof that

1 he's guilty. Oh, he said he wanted to see his lawyer in  
2 Auburn. If that's an important fact, then you could say,  
3 well, the defense would call that lawyer if he went to see  
4 him. Defense doesn't have a burden of proof. The burden lies  
5 with the government.

6 Let's talk about the black and white shirts that  
7 we'll be talking about a lot tomorrow. You've heard evidence  
8 from police officers and pictures of the back of  
9 Mr. Mitchell's car that there were lots of clothes there. So,  
10 you can say, as you talk to each other, I don't think  
11 Mr. Cacciatoore will say this, but it may come up, well, all  
12 these witnesses see a black T-shirt and a white T-shirt, a  
13 white, oversize T-shirt, according to one.

14 Mr. Mitchell's wearing this blue and red, whatever  
15 color it is, striped shirt. If -- how do we know those  
16 T-shirts aren't in the car? How do we know he didn't just  
17 take it off and put it in the car? He didn't come in and show  
18 us all the clothes and say I didn't have a black T-shirt, I  
19 didn't have a white T-shirt. We know it's shifting the  
20 burdens. Because not only did the government have the car and  
21 all the evidence in it since June -- July 12th, 2009, if there  
22 was a black and white T-shirts or T-shirt they would have  
23 brought it into court. They would have put it into evidence  
24 if Mr. Mitchell's car had those kind of shirts.

25 Now, Mr. Cacciatoore hadn't even talked about that,  
26 other than that one witness said black T-shirt, one witness  
27 says white. We're going to spend some time on it. But the  
28 key is you can't shift the burden. That car is with the

1 government. They had all the clothes since 12:00 o'clock on  
2 the night of July 12th. If they're going to argue or imply  
3 that Mr. Mitchell took off his clothes and changed shirts,  
4 then bring in what was in the car, and they didn't.

5 In Mr. Cacciato's argument he shifted the burden  
6 over and over again. Unreasonable to think that Danielle  
7 Keller would invite Mr. Mitchell over on July 12th, Samantha's  
8 birthday, unreasonable to think that. Do you know, if I  
9 didn't know better, I would think he's talking out of both  
10 sides of his mouth. Because when Dr. Sonkin said something he  
11 likes, then Dr. Sonkin, this expert about abuse, partner  
12 abuse. But when Dr. Sonkin says it's hard to break up, we  
13 know that. There's love, there's real love, there's other  
14 issues going on.

15 Well, why is it unreasonable to think that Danielle  
16 Keller would invite Mr. Mitchell over on the 12th? Why is it  
17 unrealistic to think she would invite him over on the 26th?  
18 Because she finally made this break that she'll never talk to  
19 him again? We know she talked to him on the 12th. The phone  
20 records are in evidence. The color phones are in. You'll see  
21 the ones that she answered. So, it's not just -- you know,  
22 just to say it's unreasonable isn't evidence.

23 You know, it's -- another one. Physical evidence  
24 doesn't lie. It's like TV news on Fox. Physical evidence  
25 doesn't lie. To believe everything our experts say, well,  
26 physical evidence might not lie, but the experts who put it  
27 on, the way it's collected, the way they testify, that's what  
28 you determine about whether you believe the experts, whether

1 you believe what came out in court, whether you believe what  
2 Mr. Cacciato said is what the evidence means and what the  
3 expert says. So, physical evidence doesn't lie, though it  
4 doesn't tell us anything.

5 This idea that he said, Mr. Cacciato said, because  
6 all the blows were to this woman's head, towards Danielle  
7 Keller's head and not to her shoulders and neck, it was a  
8 focused attack, which is evidence of partner violence. That  
9 may be his opinion. But what we think don't mean anything in  
10 this court. What we say is not evidence. And we can't even  
11 argue what we think. Where is that from? Is that something  
12 he got from Dr. Sonkin that he forgot to ask him about in  
13 court and just kind of threw it in and maybe you'd listen to  
14 it? Where is that from? Is that his experience that we're  
15 going to have Mr. Cacciato testify what it means when a  
16 partner really hurts their partner that it means they don't  
17 miss the other people who just killed, they always miss. They  
18 hit her on the shoulder, they hit -- I mean, it's ridiculous  
19 argument. But he says it just like he says all those other  
20 arguments because it's so easy to shift this burden, just say  
21 it, just say it and it's true.

22 He's heading to Canada. The strangest way I've ever  
23 seen to go from Marin to Canada is via Auburn with. I mean,  
24 where is that -- when he wants to show that Mr. Mitchell's a  
25 liar and he's gonna go to Mexico, he says Mexico, but he means  
26 Canada. You know, what is -- what is that evidence of? And  
27 then he -- he quotes Kory Jones the policeman to what is on  
28 that injury on his shoulder. I don't remember Kory Jones

1 being Dr. Jones. I don't remember him being an expert on  
2 injury. Or Mr. Cacciato. The pictures are there. You will  
3 look at 'em. You will decide what it means. But there's an  
4 injury on Mr. Mitchell's back and whether it's an abrasion or  
5 anything else you will see and what you call it, but Kory  
6 Jones is a cop. There's no evidence of training about  
7 medicine. There's no evidence of training about how you  
8 develop a -- diagnose injuries. It's shifting the burden.

9                 June 26th was a line in the sand for Danielle  
10 Keller. That's maybe his interpretation of the evidence. But  
11 what would Dr. -- Dr. Sonkin say? How do we know when there's  
12 a line in the sand? How do you know when partners have had it  
13 with each other? How do we know when things are over are they  
14 really over? How do we know that? It's a nice, really good  
15 sound byte. June 26th was a line in the sand, but you got to  
16 look at the evidence to see if it's correct.

17                 Mr. Cacciato said that my client's a man who feels  
18 above the law. Interesting concept. What do we know about  
19 Mr. Mitchell and the law? We know a lot. We know one thing  
20 he doesn't feel bound by a restraining orders, and we know  
21 Danielle Keller didn't think much of 'em either. He says at  
22 one point when my client got out of San Francisco Jail on  
23 February of '08, he violated the restraining order. Or what  
24 he really should have said, Danielle Keller came over to see  
25 Mr. Mitchell, and she created a situation where the  
26 restraining order was violated.

27                 But, you know, all's fair in game and argument.

28 What do the facts have to do with it? You know, my client is

1 above the law. There is a custody hearing here in Marin. My  
2 client hires a lawyer, goes there, signs a stipulation that he  
3 will visit once a week on Sunday with his mother there. In  
4 April, remember this is in April, and what does he do? He  
5 visits on Sunday with his mother, no violation. But he's  
6 above the law.

7 My client told he has to go to family violence  
8 classes, 52. And he finished either 50 or 52 and ordered to  
9 go again. Is that what we call above the law? And the court  
10 says, "Go to family violence," he says to the court, "Fuck  
11 you, I don't have to go, I'm above the law." It's not what I  
12 see. He goes to court in San Francisco on July 1st. It's  
13 interesting Mr. Cacciato has all these nice, little videos  
14 for you to see, and he put these dates on. He doesn't say,  
15 "On July 1st my client goes to court in San Francisco, not  
16 knowing he'll be arrested," and then he appears again on  
17 July 6th, six days before this incident and gets an order from  
18 the court, and, you know, there's no -- you know, he doesn't  
19 break that order. You know, it -- it's just -- is that above  
20 the law? If you're above the law, you don't go to court. Who  
21 needs court, I'm above the law. Hey, man, I don't go to  
22 court. I mean, that's really this impression of above the  
23 law. Some cowboy with a gun is above the law.

24 Mr. Mitchell primarily follows the law in terms of  
25 what's happening. His violations are restraining orders. And  
26 one time he went to Canada is immaterial. At first he didn't  
27 know about the dates and then decided to stay there. I don't  
28 really think it's fair to use that set of facts to argue that

1 someone's above the law. It's important an argument to tie  
2 our arguments to the facts.

3 So, again, I mean, this whole idea that Mr. Mitchell  
4 did what he did because he was upset with Danielle over  
5 custody, and we're going to get to that. It flies in the face  
6 of what we know is true. There's a custody order he follows.  
7 The July 7th order he never got. It's mailed on the 10th.

8 So, you know, I think it's going to be a lot better  
9 to approach the evidence speaking to the facts and arguing the  
10 inference of the facts. I have no problem with that. But  
11 it's important as lawyers that we stick to the facts. And if  
12 we don't, well, here's the great thing. If we don't, if we  
13 mistake what's said by witnesses, the court reporter, might  
14 not be this wonderful woman here or someone else will read it  
15 back for you. Because it's really important not to be misled.  
16 It's really important to make a decision on facts. And again,  
17 I'm not -- you know, if I do something that I'm saying is  
18 happening to the other side, call me on it, and call me on it  
19 when you deliberate. But I think it's really important to  
20 stick to the evidence.

21 Your Honor, I'm about to go to another area, and I'm  
22 a little tired. This might be a good place to stop. Is that  
23 all right?

24 THE COURT: Mr. Hanlon's tired.

25 MR. HANLON: I'm tired. They look tired, too,  
26 Judge, you know. We're not all young like you.

27 THE COURT: Oh, right.

28 MR. HANLON: Right. Gets me nowhere with this

1 MR. HANLON: Yes, we both have to.

2 THE COURT: You both have to.

3 MR. HANLON: If I have to initial them, you have to  
4 initial them. It only makes sense that way.

5 THE COURT: I like it, it's an interesting practice.

6 Have you ever done that, Mr. Cacciato, ever?

7 MR. CACCIATORE: No. They probably started that in  
8 about 1860, I believe.

9 (Laughter.)

10 THE CLERK: Jury entering.

11 MR. CACCIATORE: Sorry.

12 (Whereupon, the following proceedings were held  
13 in open court in the presence of the jury:)

14 THE COURT: All right. Good morning, everyone.  
15 Welcome back.

16 We're back on the record in the case of People  
17 versus James Mitchell. The record should reflect that  
18 Mr. Mitchell is in court, the attorneys are here as before,  
19 and the jurors have returned to the courtroom.

20 Mr. Hanlon?

21 MR. HANLON: Thank you, your Honor.

22 Good morning, ladies and gentlemen. What I'd like  
23 to do this morning is go through the evidence and talk to you  
24 about what inferences can be drawn and what we can say about  
25 it.

26 I'd like to start by saying, what did the Government  
27 prove beyond a reasonable doubt that is not contested? They  
28 have proved that Mr. Mitchell engaged in prior acts of

1 violence against Danielle Keller. It's uncontested. They  
2 have proved that he violated restraining orders on a regular  
3 basis with Danielle Keller starting in 2008. Regardless of  
4 whether she wanted to see him, the order was on him to not see  
5 her, and they were violated.

6 They have proved beyond a reasonable doubt that Mr.  
7 Keller (sic) went to her house on July 12th, 2009, at or about  
8 the time of the homicide. They have proved beyond a  
9 reasonable doubt that he had blood spatter of Danielle Keller  
10 on his pants and shoes.

11 They have proved beyond a reasonable doubt that he  
12 has his fingerprint on the bat, and possibly DNA, 'cause  
13 that's unclear. And they have proved beyond a reasonable  
14 doubt that he left the scene with his child and Danielle's  
15 child, Samantha. And they have proof of what they say are  
16 some conversations he had with his brother in custody.

17 The question becomes, when you accept that, then we  
18 look at the evidence and see what that shows us, what else is  
19 proved beyond a reasonable doubt. 'Cause I will try to -- I  
20 think I will -- well, it's important, what the lawyers believe  
21 or think is not an issue, so I want to go through the facts  
22 and start with the issue: Has the Government proved that  
23 James Mitchell went to that house with the intent to hurt, to  
24 kill, and kidnap? Have they proved to you beyond a reasonable  
25 doubt that as he drove from Pittsburg to Danielle's home, that  
26 he did so -- he went there to kill, to kidnap, to hurt?

27 And I would submit the evidence doesn't show that at  
28 all. It's not even a close issue when we start to go through

1 the evidence. His calls to Erica, not only on the Monday  
2 before, but on the 11th, do not show a man who's angry, who  
3 wants to hurt, they show a man who's sad and almost pathetic  
4 on some level, who's asking for her back.

5 Mr. Cacciato has said, and I'm sure will say  
6 again, that this was manipulation. It's easy to say, you have  
7 to prove it. When we go through that, it's almost a mantra:  
8 Things have to be proved. Important issues have to be proved  
9 by the Government. It's not enough to rely -- I mean, in one  
10 sense, you don't need Dr. Sonkin to say people manipulate the  
11 other -- people manipulate each other, or spouses manipulate  
12 each other, or girlfriends and boyfriends manipulate each  
13 other.

14 The human race is, by nature, manipulative, and  
15 people want what they want. So, to say that doesn't say very  
16 much. And you have to look at the facts surrounding the  
17 event. And I'm sure there have been times when Mr. Mitchell  
18 manipulated Danielle Keller, and I'm sure there have been  
19 times when she manipulated him.

20 The question is, are these conversations -- and  
21 we're talking about this voice mail, are they manipulation?  
22 They're certainly not getting ready for trial, it's not that  
23 kind of manipulation, but is he trying to use Erica, or is he  
24 speaking honestly as to what he's feeling?

25 And one view is from Erica, who said she believed he  
26 was sincere. She probably had the best vantage point at the  
27 time. She's Danielle's friend, it's clear she's not a friend  
28 of Mr. Mitchell's, and on both conversations, the Monday

1 before, and the Saturday -- the Saturday night, she believed  
2 he was sincere and tried to help him by contacting her best  
3 friend.

4 You then go to the voice mails that seem to have  
5 occurred on the 11th, that's Mr. Mitchell's remembrance of it,  
6 it makes sense, we listened to them. Mr. Cacciatore called  
7 them frightening. You have been listening to them, and I  
8 touched on this yesterday, I believe if you go through them,  
9 they are not full of anger, and rage, and hatred, or  
10 manipulation, they're full of a man who is broken.

11 I don't know if his voice is affected and the mood  
12 is affected by the leftover of drugs, or it's just he's so  
13 distraught over not seeing the two women -- the woman and the  
14 baby in his life that he's fallen apart. And you have to  
15 listen to it, you know? Again, what Mr. Cacciatore and I say  
16 is not evidence, you have to hear that voice and say, what is  
17 going on in Mr. Mitchell's mind in leaving these messages?

18 You know, what -- now, there is some, you know,  
19 anger, I guess, at the Judge, you know, we called her a Nazi.  
20 There is some anger at Danielle's mother. And -- but in terms  
21 of Danielle and James, there's no anger directed at her. You  
22 know, "I wasn't good enough for you. I'm sorry. I know  
23 you'll never take me back."

24 He doesn't even say, "Please take me back," if you  
25 listen to it, if this is a manipulation, that's not what it's  
26 about. Remember, looking at it now, did he go over there with  
27 the intent to kill her? And to decide that, we're looking  
28 inside somebody's head, we have to look at the circumstantial

1 evidence surrounding it, that's what we do, and your role as  
2 jurors, that's your role. We point it out to you, and you  
3 make the decision. So, that's two sets of circumstantial  
4 evidence.

5 He said he wanted to bring a birthday cake. John --  
6 his cousin John saw a birthday cake in the refrigerator after  
7 he was arrested. He knew he had bought it, he said the  
8 receipt was there. This is not the act of someone getting  
9 ready to kill.

10 Was Mr. Mitchell -- do you have any indication, from  
11 the circumstances surrounding it, that he was at this point so  
12 angry about what was going on with court, with the criminal or  
13 domestic violence -- the court in -- the custody court, that  
14 he would snap and kill? There's no evidence of that.

15 Remember, the visitation order had gone into effect  
16 in April, he didn't even know it had changed. The only thing  
17 that occurred was this was Samantha's birthday, and the  
18 anniversary of his father's death. I mean, everything else --  
19 he violated restraining orders, he went there on the 26th. He  
20 didn't punch Danielle, he didn't threaten to hurt her, he  
21 didn't punch her mother. He didn't -- you know, he went  
22 there, he wanted to be there, he sat -- if you listen to the  
23 tape -- on the couch and then says, "I'll go."

24 You know, it's like, these are not the acts of a  
25 violent man. I'm sure it was not a good scene for Danielle  
26 and her mother, that's not the point. The point is, can you  
27 infer from that a development of violence? Can you say, as  
28 Mr. Cacciatore wants you to say, a crescendo moving toward a

1 homicide? And he wants to use Dr. Sonkin, who's really  
2 telling you about how a battered woman reacts, but he's trying  
3 to say there's a crescendo going forward.

4 Well, it didn't start on the 26th. It didn't start  
5 with the court hearing on July 7th because he never got notice  
6 of it. It didn't start on July 1st or July 7 -- 6th when he  
7 went to court in San Francisco. So, listen to those tapes of  
8 those calls.

9 So, then let's look -- and I would submit, in  
10 judging circumstantial evidence, if you go up to July 12th,  
11 he's calling a lot, he starts on the 11th, there's no doubt  
12 about that, but there's no threats. The thing that seems to  
13 be occurring, like I said, is the birth of -- the birthday of  
14 his daughter and the death of his father.

15 So, let's look at the 12th. And I think what's  
16 really interesting -- when I say "interesting," I think  
17 important -- is that, if there was a plan to kidnap, and,  
18 then, in the course of the kidnapping, if Danielle got in the  
19 way, kill her. I mean, I -- if there was a plan to go there  
20 and take his baby, and whatever Danielle did, if she got in  
21 his way, he'd kill her, if that was the plan, what would  
22 Mr. Mitchell have done? He's clearly not a stupid man.

23 What didn't he do? He didn't prepare to take a baby  
24 and go somewhere knowing that the police would be looking for  
25 him. He didn't bring a lot of cash. He didn't bring a car  
26 seat. He didn't bring baby food. He didn't bring diapers --  
27 and that's something they found in the trunk, he didn't bring  
28 diapers, he didn't bring wipes.

1                   He didn't do everything you need -- if you're  
2 about -- I mean, think about it. If you say, "I've had it, I  
3 can't see my baby, she's messed with me too many months," you  
4 know, "I hit her, and it doesn't make her do what I want,"  
5 according to Mr. Cacciato, you know, "Do what you want," "I  
6 scare her, she still doesn't do what I want, I'm going to go  
7 get that baby." You know you're going to be on the lamb, you  
8 know that this is a huge issue.

9                   I mean -- I mean, just after living in our society,  
10 let alone the personality part of a crime like that, you know  
11 how child stealing is looked at, people are chased all over  
12 the world, who would nonviolently steal their child from a  
13 spouse who has custody? So, it's not like he's stupid, but he  
14 doesn't prepare. Circumstantial evidence. One reasonable  
15 interpretation pointing to innocence, one to guilt.  
16 Everything about that day points that he wasn't going over  
17 there to kill. He wasn't going over there to kidnap.

18                   Now, you also know, and you have the phone records,  
19 that on that date, there is some conversations with Danielle  
20 Keller, and we'll talk about what they mean. Mr. Mitchell  
21 says she invited him over. There's no reason to believe, as  
22 Mr. Cacciato said yesterday, that she would never invite him  
23 over.

24                   June -- June 26th was the line in the sand according  
25 to Mr. Cacciato. Well, according to Dr. Sonkin, there  
26 really is no -- if you really believe this idea -- and I think  
27 there's a lot of truth in what he said, that he's -- he's the  
28 man -- I may have questioned him about some of his other

1 issues of psychiatry, but as to domestic violence, he seems to  
2 be a man experienced, who cares, and probably if you're doing  
3 this long, is one of the leaders in defending battered women,  
4 a movement that has happened in our lifetime.

5           But, according to him, there is no line in the sand.  
6 I mean, these things go back and forth, and -- and sometimes  
7 they get resolved, sometimes people leave, sometimes it's  
8 violent, sometimes it's not, but there is no cut -- there's no  
9 red litmus test.

10           So, why -- Miss Keller loves Mr. Mitchell, or is  
11 fond of him, whatever you want to say. There's violence, and  
12 you have to -- you know, why would that woman have stayed from  
13 '08 till '09? People do. Women do. There are men who are  
14 battered. People say, you know -- I mean, I -- it's not  
15 something -- that's not something we're going to answer today,  
16 or you're going to answer in deliberation, but it happens.

17           But why is it so ridiculous, as Mr. Cacciatore will  
18 say -- tells you, and probably will say again, that she didn't  
19 change her mind again. That she -- even if she didn't want  
20 James back, she wanted him to see their child. It's not un --  
21 it's not circumstantial evidence what happened on the 26th,  
22 that she never would have invited him over to see the baby on  
23 the 12th.

24           Okay. Now, there's one -- there's one area of  
25 circumstantial evidence. Did he go over there to commit a  
26 crime, besides a -- a restraining order violation? The crime  
27 we're talking about -- I mean, we're not on trial for a  
28 restraining order violation, this trial is about murder,

1 kidnapping, really serious cases. So, he did go over there  
2 knowing he would do a restraining order? But that's not what  
3 we're dealing with.

4 So, now let's look to another area, which I think is  
5 central to the case. Did Mr. Mitchell bring this bat? Now,  
6 Mr. Cacciato -- you know, I'm gonna talk in a little while  
7 about what lawyers do, because I'm gonna say some things to  
8 you I'm going to have to address directly, but Mr. Cacciato  
9 yesterday -- I don't have my notes from yesterday, but he  
10 said, "It doesn't matter if he brought the bat or not. It  
11 doesn't matter if he took it from a closet or found it under  
12 the staircase."

13 Now, at the beginning of this trial, he would never  
14 have said that to you, because the key issue of intent to  
15 kill, of going there, is bringing the murder weapon. You  
16 know, it never would have been said, it wasn't said in opening  
17 statements, because, at that point, they wanted -- the  
18 Government wanted to say Mr. Mitchell brought the bat.

19 But as the trial developed, and we were talking  
20 about it, that is not a fact that can be proven to even close  
21 to beyond a reasonable doubt. So, what does the Government  
22 do? All of a sudden they shift and say, "Ah, doesn't matter."  
23 Is that being direct with you?

24 And -- and when I say that, with respect to  
25 Mr. Cacciato, if I do it myself, he will call me on it, or  
26 you should call me on it. I mean, I'm trying to talk to you  
27 with these facts as honestly as I can, but I know that  
28 occurred, because the opening statement, he brought it out.

1           Now, it doesn't matter. Well, it does matter. You  
2 know it matters. If you bring a murder weapon, you intend to  
3 kill somebody. You know, it's like, would you say, if you  
4 found a gun there, it didn't matter whether he brought it or  
5 not? It's ridiculous. If you're going to go hurt somebody,  
6 you bring a weapon. So, this issue of weapon, did he bring  
7 it, is really important. And so I disagree with  
8 Mr. Cacciatoe that it doesn't matter.

9           Now, what's the evidence that he did bring the bat?  
10          The testimony of Claudia Stevens in trial. "I never saw that  
11 bat before. Wasn't mine." The testimony of Nick and Bessie  
12 that they never saw the bat.

13          What's the circumstances you can point to to say he  
14 didn't bring the bat? Let's start with where we started, the  
15 circumstantial evidence he did, Claudia Stevens. It's really  
16 interesting, Miss Stevens says in court, "I never saw that bat  
17 before." Then we know -- I asked her, "Well, what did you  
18 tell -- did you tell Officer -- the Inspector -- the Inspector  
19 who -- who lead this case, did you tell her anything about the  
20 bat?" "Well, yeah, that I -- my kids had wooden bats, but  
21 they got rid of them years ago." Okay. "They played  
22 softball, they had wooden bats."

23          Well, one thing we know -- you may not know, but  
24 it's been in the news, high school, lower schools, in softball  
25 have used, up to a year ago, all metal bats because you can  
26 hit farther, and then a year ago, I think it was in Marin,  
27 some young boy got his head slammed with a ball off a bat, and  
28 all of a sudden Little League and all the other leagues say,

1 "Let's use wooden bats." But up until last year, the bats,  
2 when kids played ball, softball, boys, men, women, girls, were  
3 metal bats.

4 So, Miss Stevens, when she's confronted by Inspector  
5 Winters, on, I think, the 23rd of June -- July, says, "Oh, you  
6 know, it wasn't like I said this bat was there," 'cause  
7 they're asking her about her statement to Mr. Holmes. She  
8 says, "Well, it was -- I think it was a wooden bat, it was  
9 gone, and I never saw this bat."

10 And then we hear from Holmes, and it's really  
11 interesting. Holmes comes in the last day of evidence, I  
12 think -- yes, last Tuesday, and he says, "Well, she said it  
13 possibly could have been there in her house, maybe in the  
14 laundry room." That's what he testified in court.

15 But then Heiden -- Lieutenant Heiden comes in, and  
16 he says, 'cause he wrote in his report that day of July 23rd,  
17 "Holmes told me that Claudia Stevens said that that bat had  
18 been there and was possibly in the laundry room." No, "I'm  
19 not sure, maybe," you know, so, I don't know if maybe Mr.  
20 Holmes forgets what he told Officer Heiden, and forgets what  
21 Miss Stevens tells him, but what you draw from all that is  
22 that that bat was not brought by James Mitchell, it has a  
23 connection to that house, whether it would be Miss Stevens'  
24 other children who played softball, as she said, whether it be  
25 there for a variety of reasons, it wasn't brought by James  
26 Mitchell.

27 Now, in -- the key issue is not going to be where  
28 the bat was at Miss Stevens' property, it's whether it was

1 brought there by Mr. Mitchell or whether it was there. And I  
2 think it's pretty clear, just from her testimony, that  
3 Mr. Mitchell didn't bring the bat.

4 What else do we know? John Morgan tells you that he  
5 moved Mr. Mitchell, he's known him for years, he never saw a  
6 bat, he didn't play softball. The young coach, Cristina  
7 Byrne, we brought in said this bat is a high school girl's or  
8 small college girl's bat. She's -- it's interesting to have  
9 an expert on women's softball, but she -- if there is one,  
10 she's it, you know, she's coached and played softball, hard  
11 pit softball, and that's what this bat is. And the only one  
12 who had connections to teenage girls who played ball --  
13 softball is Miss Stevens and her family.

14 Now, what else do we have to look at and -- to try  
15 to answer this question? And you may wonder what all this to  
16 do was about. "To do," I mean by questioning the witnesses  
17 and me getting worked up during questioning with Miss Kacer  
18 about toucher's blood DNA. Why did we care? Why was it an  
19 issue?

20 It's an issue because if Claudia -- if Danielle  
21 Keller's non-blood DNA is on the handle of the bat, that's  
22 consistent with her touching the bat, not, as Mr. Cacciatoe  
23 implied, I want to take the bat out of Mr. Mitchell's hand and  
24 put it in Danielle Keller's on July 12th, it's ridiculous.  
25 There's no even inference that Danielle Keller touched the bat  
26 other than getting beaten with it and her head crushed by it.  
27 She didn't grab it.

28 But if she had touched, which means just what it

1 says, non-blood, non-saliva, non-semen, touch, you know, DNA,  
2 then she had touched that bat on a former occasion. Just --  
3 it's all we talking about, was the bat there before or after?  
4 So, the lawyer who says to you, "It doesn't matter if the bat  
5 was there," why did he care so much as -- so that when I put  
6 on Officer -- when they put on Priebe and Priebe testified --  
7 Priebe, he's, you know, a scientist.

8 "I looked at the bat," you can see his drawing, "and  
9 I tried to take areas where there were no blood. And I tested  
10 for areas of no blood, and I thought I swabbed no blood." And  
11 then one of the Prosecutors said, "Well, are you sure you  
12 really did? You didn't use a very good microscope, did you?  
13 I mean, you didn't have a high powered one, it was low  
14 powered."

15 If they don't think it really doesn't matter who  
16 brought the bat, why did the Prosecution turn on their own  
17 witness, 'cause they all of a sudden -- it's really  
18 interesting, when the DOJ or their witnesses do a good job,  
19 it's great, but when they say something they don't like, all  
20 of a sudden, "Well, you're incompetent. You probably got  
21 blood on it."

22 "What test did you really do? You used a low  
23 powered microscope? Gee, how could you do that?" Why would  
24 our Prosecutors say that if they didn't care who brought the  
25 bat? And if they did care then, and the Prosecutor says at  
26 trial, at closing, "It doesn't matter," what's changed? And  
27 are they really looking to find the truth, or are they looking  
28 to convict James Mitchell?

1                   It's an honest question because it really did  
2 change, and --

3                   MR. CACCIATORE: Excuse me, I'm going to object,  
4 your Honor, that misstates our obligation. Our obligation is  
5 not to convict James Mitchell, but to find the truth, that's  
6 what it is.

7                   MR. HANLON: Well --

8                   THE COURT: So -- okay. So, again, ladies and  
9 gentlemen, this is argument, and I already instructed you as  
10 to what the attorneys say is not evidence, what the evidence  
11 is is what you're to consider, it's argument.

12                  MR. HANLON: And I would say, I agree, the  
13 Prosecutor's duty is to find justice and to find the truth,  
14 and you have to question them when that seems to get confused  
15 in the way they questioned their witnesses and how they change  
16 their arguments. That was my point. I agree with  
17 Mr. Cacciato, that is their obligation.

18                  So, then what do we know? So, these witnesses  
19 testified, Priebe, and Waller, too, and even Miss Kacer, they  
20 say -- she said, "I didn't test the blood on that swab because  
21 I assumed it was touch DNA." And if anything I say you think  
22 is wrong, have it read back. She didn't bother to test it  
23 because she was told it was touch DNA. Okay. But then it's a  
24 problem for the People, who don't really care whether that was  
25 there or not, because if you don't care it's there, blood,  
26 touch, it doesn't matter because it could be there, it  
27 wouldn't affect their case.

28                  What'd they do? They had this nice expert scientist

1 go over the weekend, last weekend, the 4th of July weekend,  
2 when everybody should be having a good time, she's going to go  
3 retest this swab to prove that that wasn't touch DNA, the DNA  
4 found there, but it was gonna be blood, or semen, or saliva --  
5 it obviously wasn't semen, but it was something stronger than  
6 touch. And Mr. Cacciato, who argued to you he didn't care,  
7 called her up on Saturday to do that, the 2nd of July.

8 And so she goes and do it -- does it, and you could  
9 tell that I had a report, we requested it, the Government was  
10 good enough to provide me the report on Monday, and what did  
11 she say? It's really interesting. She says, "Well, I did a  
12 test to see what that DNA was. And my presumptive test" --  
13 remember, it's called presumptive, which means it's not a  
14 final test because all it can show is apparent blood, "My  
15 presumptive test showed there's apparent blood."

16 "But that's not enough, so I did this immunological  
17 test to see if it -- if that tested right, because," as she  
18 admits, "there are false positives on presumptive tests that  
19 can show blood when it's not, when it's something else." So  
20 she's going to do more tests 'cause she's a good scientist.  
21 And the test comes up negative for human blood.

22 But that is not what Mr. Cacciato asked her to  
23 look for, that is not a good result. I mean, it could be a  
24 good result --

25 MR. CACCIATORE: Excuse me, I have to object again.  
26 I didn't tell her to look for anything --

27 THE COURT: Well, there --

28 MR. CACCIATORE: -- there was no evidence of that.

1                   THE COURT: There was no evidence of what his  
2 specific request was in that regard, so I'll sustain it.

3                   MR. CACCIATORE: Well, it was to test the swab, that  
4 was it.

5                   THE COURT: I understand.

6                   MR. CACCIATORE: Thank you.

7                   MR. HANLON: Okay. We don't know what  
8 Mr. Cacciato told her, so let's forget that. So let's just  
9 go -- she came in, and all of a sudden she finds negative for  
10 human blood. Negative normally means negative, especially if  
11 you're a scientist, you don't try -- I mean, she even admitted  
12 there were explanations, which are, negative could be a false  
13 positive, it could mean human blood. I mean, it could be  
14 non-human blood, and we talked about that. Meat -- you cut  
15 meat, you pick up a bat, the bat's in the backyard, or  
16 outside, an animal bleeds on it years ago. The bat was made,  
17 I think we have evidence, in 2000. But she can't accept that  
18 because it's not the answer she wants.

19                   So, all of a sudden, negative did not mean negative.  
20 All of a sudden, there has to be an explanation. All of a  
21 sudden, negative -- I'll say it, negative did not mean  
22 negative, and she looks to a test. She shows you this chart  
23 that's in evidence with the high peak of DNA. "Well, that  
24 will tell me it was blood."

25                   The problem with that is, she had that test from  
26 her -- that peak she didn't do over the weekend, she did that  
27 in 2009 and 2010. And with that peak, and that evidence, she  
28 testified in court the first time saying, "Well, I assume it's

1 touch DNA. It's not -- it's not blood, it's not that level."

2 So, the question is -- you have seen one true  
3 scientist in this case, Mr. Waller. Mr. Waller doesn't reach,  
4 he doesn't make stuff up. Mr. Cacciato tried to say, "Can  
5 you tell me how close this is" -- or I did, I don't remember,  
6 "How far DNA -- how far the blood spatter would travel?" He  
7 says, "I can't tell you. I'm not going to try to guess. I  
8 can tell you what I can tell you."

9 I don't think that applies to Miss Kacer, because I  
10 think the evidence will show you she took a side. And here's  
11 how you know she did. I asked her at one point, there was  
12 some objections going on, but this was admitted, "Do you ever  
13 play softball?" "No." I said, "Well, do you know -- could  
14 you get -- spit in your hand and play baseball?" And what's  
15 her answer for a scientist? "No, you wear gloves when you  
16 play baseball." Is that a scientific response? I mean, is  
17 that really someone who's just trying to look at the evidence,  
18 or is it someone who has a angle to push, which is the  
19 Prosecution, which is saying a negative doesn't mean negative?

20 You know, I mean, it -- think about it. She didn't  
21 learn about baseball in graduate school. And if she had, she  
22 would find out that many young people play baseball without  
23 gloves. I mean, it's really not an issue. Little League  
24 players play without gloves, high school players -- some  
25 players like to feel the bat in their hand. Some kids play on  
26 non-teams. It's not an issue, but she all of a sudden -- her  
27 answer -- could you see Mr. Waller saying that? No, because  
28 he didn't take a side. And when a scientist has a side

1 besides science, they give up their role as scientist, and  
2 that's what she did.

3 So, if you look at all this, what you have is no  
4 evidence that showed Mr. Mitchell brought the bat. Again, all  
5 that was about was D -- was Miss Keller's DNA touch, or blood,  
6 and I don't think we know.

7 Now, the Government argued, and will argue again,  
8 that why didn't we retest it? There's no evidence of what we  
9 did. Well, first of all, there was no argument about the DNA  
10 results. The results were what they were. The blood on the  
11 pants were Danielle's, the blood on the shoes was Danielle's,  
12 the blood on the baby's face was Danielle's, the blood on the  
13 baby's leggings were Danielle, on her shoes were Danielle. It  
14 wasn't contested.

15 And on our first go through of the evidence when  
16 witnesses were just testifying, there was no -- I didn't have  
17 an argument with Mr. Priebe or Miss Kacer when she said, "I  
18 assume that was touch DNA," and Priebe says "It's touch DNA, I  
19 tried to find a non-blood part." There was nothing to redo.  
20 But all of a sudden, things change. And that's when my expert  
21 came to court, you saw him here.

22 So, you could say it's a lot to do about nothing,  
23 but obviously the lawyers thought it was about something, and  
24 we can be wrong, but I really think listening to  
25 Mr. Cacciatore's argument, if it was a lot to do about  
26 nothing, why did he argue the change from the bat with the  
27 weapon Mr. Mitchell brought in opening to it doesn't matter in  
28 his closing?

1 MR. CACCIATORE: Your Honor, I have to object again.

2 That statement wasn't made in opening.

3 MR. HANLON: I think it was.

4 MR. CACCIATORE: Well --

5 THE COURT: May I see the attorneys at the bench,  
6 please?

7 (Whereupon, Mr. Cacciato, Mr. Kousharian  
8 and Mr. Hanlon approached the bench and had  
9 a discussion with the Court off the record.)

10 MR. HANLON: Let -- let us look -- another  
11 indication, if Mr. Mitchell had brought this bat, it was his  
12 bat, you would assume he would have touch DNA all over the  
13 bat. You would think he would have more fingerprints than one  
14 that they found.

15 So, what other evidence is there that Mr. Mitchell  
16 brought the bat? Well, we know if he was gonna go there to  
17 hurt her, there were other weapons you'll have in evidence in  
18 his car. There was a hammer. There was a stick -- we're  
19 talking about this walking stick.

20 And, you know, I don't know if the Government is  
21 just saying, "Well, he wanted backup evidence, backup  
22 weapons," but we'll see. Remember, Mr. Cacciato gets  
23 rebuttal, but, you know, what's interesting about my argument,  
24 his argument in rebuttal, we all trust you to listen, and if  
25 we think the lawyers' arguments don't make sense, you know  
26 you're going to reject it.

27 But let's now look at the other area, which is the  
28 eyewitnesses. Did they I.D. James Mitchell beating

1 Miss Keller, and did they I.D. him running with the baby down  
2 the street? Now, let's start with their ability to see and  
3 what they saw.

4 If you believe Nick, he saw a man from the side  
5 beating a woman he knew to death with a bat. He was under  
6 stress, he was fearful, it was an awful crime. He could not  
7 pick out that person in a photo spread that day, he could not  
8 pick out that person in a lineup. So, in the lineup he maybe  
9 said three people, he picked out two cops and Mr. Mitchell as  
10 possible suspects. And only after he saw Mr. Mitchell in the  
11 newspaper did he pick him in court at the preliminary hearing,  
12 and then he repeated that in court.

13 A very brief view, under stress, and we'll talk  
14 about his contradictions -- well, let's go right there. What  
15 did he tell Officer Holmes -- not Officer Holmes, Coroner  
16 Holmes? He tells him that he heard a scream.

17 In court, he says he hears a tap, tap, tap. I don't  
18 mean to minimize the sound, but I think that's what he said,  
19 of the bat hitting the head. He tells Holmes that that's  
20 what -- that's not what he heard, he heard a woman scream or  
21 screams. And then he goes out his back door, onto this patio  
22 you see, and sees it and runs back in. In court, he says he  
23 goes out the front door, it has a whole different angle of  
24 view.

25 On the day of the incident, or hours later, he tells  
26 Mr. Holmes -- now, I don't know if the implication in  
27 Mr. Cacciatore's questioning was that Mr. Holmes, because he  
28 didn't get his report in for 10 or 12 days, miswrote what he

1 said? Of course, it's really interesting, when Mr. Cacciatoore  
2 likes a statement of a witness, if Holmes says something that  
3 helps him, then the 10 or 12 days have no effect, but if it  
4 hurts him, all of a sudden -- "Well, you don't remember, you  
5 waited too long."

6 The Coroner, who has no interest in the case, said  
7 that's what Mr. -- what Nick said. He also said Nick says --  
8 that Nick, according to Nick, I.D.s Mr. Mitchell, which we  
9 know isn't true, 'cause he never did until the preliminary  
10 hearing.

11 So -- and what did Bessie tell us? She says she  
12 just saw a man after the beating run past her quickly with a  
13 baby, and she can't identify anybody. But let's look at her  
14 testimony. You know -- and, clearly, these are elder people  
15 who got confused and scared. You know, and I'm not calling  
16 them liars, I mean, you look through her testimony, 'cause  
17 you've got to see -- I mean, Mr. Cacciatoore said based on the  
18 eyewitnesses alone, you can convict my client. Well,  
19 therefore, we have to examine these eyewitnesses and what they  
20 said and who they -- you know, what they saw.

21 So, what else do we know about Bessie? She  
22 testified in court she loved the baby and Danielle. She said  
23 what she said. Well, she tells her friend, Miss Farren two  
24 weeks later, not that she was in the house and heard this God  
25 awful scream, remember that's what she said in court, she gave  
26 a screech which she heard, her husband heard this tap, tap,  
27 tap, she heard a scream, except Nick tells Holmes he didn't  
28 hear the tap, he heard the woman cry for help. These are the

1 evidence, this is what we have.

2 Then she tells Miss Farren, "I was outside walking  
3 from one of my neighbor's house and I saw it happen, I saw  
4 this man beating this woman I love like a daughter." You  
5 know, did Miss Farren sound like she was wrong? I mean, she  
6 knows what she was told.

7 The language problem. We understood Bessie talking  
8 in English. There's no language problem. I mean, maybe you  
9 have to listen a couple of times, but you can discuss it in  
10 the chamber where you deliberate. Did any of you have a  
11 problem understanding Bessie when she testified? Did  
12 Mr. Cacciatoe ever ask her to repeat it? "It's unclear what  
13 you're saying?"

14 So, what are they going to say? Miss Farren just  
15 got it wrong, or it doesn't matter? You know, of course it  
16 matters. This is an eyewitness they want to rely on. And  
17 their eyewitness tells a friend, two weeks after the event,  
18 something totally different from where -- what she says in  
19 court.

20 But what's the most telling -- I found the most --  
21 disturbing is too strong a word, but difficult to understand  
22 this testimony of Bessie. She's in the house, and she hears  
23 this screech, this -- I mean, she said -- I'm not going to  
24 repeat it, but almost a blood curdling screech is what it  
25 sounded like, and I think she described it that way.

26 And remember what she said, and I totally believe  
27 her, that she was really close to Danielle and this baby, and  
28 loved them as a daughter and a granddaughter, and, I mean,

1 she's a very loving woman, you can tell. But after going up  
2 there on her birthday and coming down, she hears this screech,  
3 and then there's quiet. And she thinks they fell down the  
4 stairs bringing laundry down.

5       Okay. What do you do if you're that person? What  
6 did she do? She went and made coffee. It doesn't fit. It  
7 doesn't make sense. I don't know why she's telling you  
8 what -- she's telling us what she's telling, but you don't  
9 hear someone you really care about with a little baby who you  
10 just bounced on your knee and sang happy birthday to, you  
11 don't hear this awful screech, assume they fell down the  
12 stairs, and everything's quiet, which is a sign of something  
13 bad happening, and then just go make coffee because you don't  
14 see anything out your window. We all know that doesn't make  
15 sense.

16       And I don't have an explanation -- I mean, I don't  
17 know if this thing's -- I don't know what the answer is. I  
18 know what it means is it's hard to take her testimony as proof  
19 beyond a reasonable doubt of anything.

20       Now, what do we know about Frank Walashek -- I have  
21 to get his name right. He hears -- in court, he says he hears  
22 a voice for help, but he can't identify a woman, and he says  
23 that's what he heard back then. But then two policemen came  
24 in and said he tells back then it's a girl's -- woman's cry  
25 for help, he tells it that day.

26       And then he does tell us, which is interesting, when  
27 he runs outside, after he puts on his pants, he gets off the  
28 computer with his girlfriend, he goes outside, he sees Nick,

1 not in the middle of the street, where he puts himself, but  
2 back either in his doorway or gate, you have to -- I don't  
3 remember exactly which it was, but he has him on his property.

4                   And Mr. Cacciato argued that Nick was in the  
5 middle of the street looking so he could see what's going on.  
6 But Frank said, "No, he's there," either at his gate or his  
7 front door. And for seconds -- this is Frank -- he sees a man  
8 run by and gets a sideway view. And that day when he's showed  
9 a photo spread, he can't identify who it is.

10                  And then he believed -- he tells you that, "Because  
11 I didn't want to poison my identification, I didn't look at  
12 any pictures in the I.J." Picks Mr. Mitchell out at the  
13 lineup. And the question is, do you think that's credible?  
14 Remember, my last question to Frank Walashek -- Frank was, "In  
15 2007, did you lie to a police officer?" "Yes." "Did you lie  
16 to a grocery store owner?" "Yes."

17                  You try to think, how many 19 year olds do you  
18 know -- or when you were 19, who saw something like this,  
19 would not look in the paper to see what was written about a  
20 story you were involved in?

21                  Eyewitness testimony is questionable at best. The  
22 Court has instructed you of specific things you look at, and  
23 many of those factors apply here to question eyewitness  
24 identification, which is -- well, it's all there, I'm not  
25 going to go through it, but as you look at it, the things I  
26 pointed out, the time to see, the view to see, would you make  
27 a prior -- failed a prior identification, there're all things  
28 the law says you look at, but what you also know is, and

1 there's been many articles about this, and we've developed and  
2 seen DNA freeing people, some of them on Death Row --

3 MR. CACCIATORE: Objection, your Honor, it's not  
4 relevant. There's just not any evidence. It's not even  
5 appropriate argument.

6 THE COURT: Well, I'm going to sustain that on the  
7 Death Row argument.

8 MR. HANLON: Okay. You've seen people -- DNA cases  
9 being reversed because DNA proves people are innocent.

10 MR. CACCIATORE: Same objection, your Honor.

11 THE COURT: I'll allow it.

12 MR. HANLON: You know, as to all of those cases,  
13 those false convictions are based on false identifications.  
14 This is what -- it's a classic way that things have gone. And  
15 it doesn't mean identification is always wrong, it just means  
16 the classic, "I'll never forget that face," is not always  
17 correct.

18 So -- but what else do we know? Really, what's  
19 consistent in the testimony of these people is that they see a  
20 Caucasian male, with pretty big build, I think between 5-10  
21 and 6-2, bald head, or really close shaven hair, and what  
22 else? Blue jeans. And according to the two Greek people, a  
23 black T-shirt. And according to Frank, a white oversized  
24 T-shirt. White oversized shirt.

25 Now, I have no idea what Mr. Cacciato's going to  
26 say, he's probably going to say it doesn't matter, like it  
27 doesn't matter if the bat was there or not. But, you know  
28 what, it does matter because these people are consistent that

1 they see a tall Caucasian, with a white or black T-shirt,  
2 depending who you're talking to. They never confused about  
3 that. They never give prior statements saying something  
4 different.

5 They've all been interviewed and testified, and what  
6 do they say consistently? Caucasian male, big, bald head, or  
7 shaved, or short hair, and if the two Greeks testify, it's a  
8 black T-shirt, and when Mr. Walashek testifies, it's an  
9 oversized white T-shirt.

10 Now, you can't just ignore that. You can't say  
11 they're right on everything, but they're wrong on the shirt  
12 because, when you're running by, if you want to base  
13 identifications on these brief seconds of someone running,  
14 side views, what do you see? Race, size, and clothes, or  
15 hairstyle. You can't say they're right on three but ignore --  
16 and they're wrong on the fourth.

17 This is what Mr. Mitchell wore that day. There's no  
18 con -- there's no evidence -- this is neither white nor black,  
19 and if you saw it for two seconds, or five seconds, or 10  
20 seconds, you would not call this white or black.

21 And, you know, it -- it just -- you can't have it  
22 both ways. The people see what they see, and you want to say  
23 they're right, but you have to question, what does it mean  
24 when they're wrong? I mean, it's simply that they see someone  
25 wearing different clothes than Mr. Mitchell.

26 As I said yesterday, the police and the Government  
27 had the control of his car since the day he was arrested. If  
28 there was a black or white T-shirt in that car, they'd have it

1 for you. It's not my burden to prove. You know, it -- it's  
2 the Government's burden, and they didn't bring these shirts in  
3 because they didn't exist. And then because they -- we  
4 question, who did these people see? Are these eyewitness  
5 identifications really real? You know, and -- and have they  
6 proven anything beyond a reasonable doubt?

7 And you look, again -- a really good example of why  
8 eyewitness identification is so confusing. We have four  
9 people on a quiet cul-de-sac listening to the same thing, and  
10 we have four different things they hear. Let's look at it.  
11 Bessie hears this God wrenching screech.

12 Her husband hears (counsel taps three times),  
13 they're right next to each other, the same house. He doesn't  
14 hear the scream, or maybe he does, he hears a yelp or help  
15 when he talks to Holmes, but when he testifies, he hears  
16 (counsel taps three times).

17 Then we have a neighbor, probably as far as from me  
18 to the wall, Danielle, from the wall in which she cuts her  
19 vines, on the next side, I forget her name, but she testified,  
20 Government called her -- Tolvag or Toveg, what does she hear?  
21 No one has bad hearing. There's no evidence that, "I have bad  
22 hearing." There's no evidence that either of the Greeks have  
23 bad hearing. She certainly doesn't appear to have bad  
24 hearing. She doesn't hear the tapping, she doesn't hear the  
25 screech, she hears a baby cry.

26 And then across the street, this guy Frank, he hears  
27 a woman cry for help.

28 Four people listening to the same incident hear four

1 different things. What it means is, people's perceptions when  
2 things are happening are not always right. I mean, they're  
3 not necessarily wrong, but they're not always right. So, if  
4 they're wrong, I guess we could say all those things happened,  
5 but how do you describe four people hearing four different  
6 things? How do you understand that?

7 So, Mr. Cacciato says to you, you can convict my  
8 client based on the eyewitness identification. And I say to  
9 you -- what I'm trying to do is look at the evidence. If you  
10 think I'm messing with the evidence or I'm misstating things,  
11 not only will Mr. Cacciato point it out, but you can point  
12 it out and say, "That lawyer, he's trying to mess with us."

13 I'm not. The evidence is what it is. And when you  
14 start to examine it -- part of the problem in a case like  
15 this, where the crime is so terrible, and it looks so  
16 overwhelming, the evidence, the proof, when you first hear it,  
17 you just assume this is all right.

18 And it's so easy to look at this and say, "Oh, he's  
19 guilty." It's such an easy job for you to just not examine  
20 the evidence and say he's guilty. He's there, he has the  
21 baby, he has blood spatter, his fingerprint's on the bat, he's  
22 guilty. My job is to make you look at the evidence. You  
23 still may reach that conclusion, you know, it's up to you, but  
24 you have to examine the evidence to do that.

25 Now, the blood spatter. Clearly, Mr. Mitchell was  
26 near this when it was happening. The problem I have found is  
27 that Mr. Cacciato asked a question of Mr. Waller, "Is it  
28 consistent that he was standing behind the body and hitting

1 it," and Mr. Cacciatore, I think, had his feet together, but,  
2 whatever, and, of course, it's consistent, but when I cross --  
3 questioned Mr. Waller, there were so many consistent  
4 possibilities, it doesn't mean anything to be consistent.

5 I mean, it could have been that Mr. Mitchell was  
6 moving and got blood spatter. It could mean someone's  
7 blocking one side and blood spatter gets here. And as Mr. --  
8 the expert pointed out, Mr. Waller, blood doesn't go in a  
9 straight line like this, it's a vector. When you hit  
10 something and you create spatter, it creates as a vector. And  
11 he understood the word vector, and the common sense of it,  
12 it's moving.

13 So, the blood spatter certainly -- I mean, when you  
14 get to it, and we're talking about, again, puts Mr. Mitchell  
15 right -- whatever near is, it means fast. Mr. Waller wouldn't  
16 say near, it's clearly less than 10 feet from where she's  
17 getting hit, but it doesn't mean that they've proven beyond a  
18 reasonable doubt that he's beating her with a bat when this is  
19 happening, because that's simply not true.

20 You may end up concluding, based on all the  
21 evidence, that that is true, but you can't do it based on an  
22 argument and a question that says, "Isn't it consistent,"  
23 because there's so many consistent possibilities that Waller  
24 talked about.

25 You know, and -- and, see, that's -- that's how you  
26 judge the argument of counsel. Are they messing with you or  
27 are they telling you what's straight up? And I think it's  
28 really important, because even though what we say is not

1 evidence, it pushes you in directions of thinking. And that's  
2 important. And my hope is to push you in the direction of  
3 thinking, has the Government met its burden in examining the  
4 evidence?

5 So, I'm going to try to move this along. Okay. The  
6 print on the bat. It shows Mr. Mitchell touched this bat.  
7 And I would agree, he has some type of DNA on the bat, whether  
8 it's blood or spatter, it appears -- I mean, blood or touch,  
9 it appears to be touch on the handle. One hundred -- one in  
10 110,000 is good enough for me to say that's Mitchell's DNA.  
11 And I think there's -- I mean, it's too big of odds.

12 But we're not sure that he clearly touched the bat  
13 with his print. Is that consistent with that he took this bat  
14 by the handle and beat her? Is it consistent he grabbed it  
15 there, or is it all -- it is, of course, that -- the evidence  
16 is consistent with that theory. Is it also consistent with  
17 him getting hit by something, turning around, and struggling  
18 with a guy over a bat? Of course, it is.

19 But you can't look at this just all -- you have to  
20 look at the entire case. But if both those interpretations  
21 are reasonable under the facts of the whole case -- and we'll  
22 talk about that -- and, again, Mr. Cacciatore pointed out, he  
23 said Mr. Mitchell said he got hit in the back with the bat,  
24 and where's the blood?

25 He never said that. He said he got hit from behind,  
26 he didn't know what with, and he turned and struggled over the  
27 bat. There doesn't appear -- I mean, it wasn't really tested  
28 by Waller, this shirt. You look at it, there's no blood. I

1 agree, I looked at it, there's no blood. You look at it. But  
2 Mr. Mitchell never said he got hit in the back with a bat.

3 MR. CACCIATORE: I'll object, that misstates the  
4 Defendant's testimony.

5 MR. HANLON: It does not. It does -- this is -- I  
6 can argue, he can argue --

7 THE COURT: Excuse me, Mr. Hanlon. Mr. Hanlon --

8 MR. HANLON: It does not do that.

9 THE COURT: -- excuse me.

10 I didn't hear you, Mr. Cacciato?

11 MR. CACCIATORE: I was objecting, it misstated  
12 Mr. Mitchell's testimony.

13 MR. HANLON: And I disagree.

14 THE COURT: Okay. Would you like me to rule, or did  
15 you wish to make the ruling?

16 MR. HANLON: I think you could rule and I'll accept  
17 it.

18 MR. CACCIATORE: Your Honor, could you admonish the  
19 Defendant, please? He's making comments.

20 THE COURT: All right. Mr. Mitchell, you're not to  
21 make comments.

22 I'll remind everyone we're talking about argument.  
23 You know what the evidence was. If you don't know what it is,  
24 you can ask for read back. I'll allow the argument to stand.

25 Go ahead, Mr. Hanlon.

26 MR. HANLON: And I apologize, Judge, for -- and  
27 Mr. Cacciato, and the jury, for reacting that way, 'cause it  
28 really is not appropriate, and, you know -- it isn't, so, I'm

1 sorry.

2 Let's move on. So, let's examine -- I want to do  
3 two more things, I want to examine the testimony of  
4 Mr. Mitchell, and then talk about another issue in the case.

5 So, Mr. Mitchell admits in his testimony that he is  
6 a batterer, that he has hit this young woman, his girlfriend,  
7 his intimate partner, on a number of occasions. It is not  
8 pretty. It's disturbing, you know, and I would agree with  
9 that. I mean, people can't do that.

10 And the fact that it happened doesn't make it right,  
11 and the fact that there are open hand slaps, that doesn't make  
12 it better than a punch, it's abuse, you know. And he was  
13 honest and told you the number of occasions it happened. But  
14 he's not on trial for that. The question becomes, did he  
15 commit this murder?

16 Now, of course, you can use that to think -- it's  
17 evidence -- who would do that, in '08, when she's four months  
18 pregnant? Do that when she has the baby in '09, or late of  
19 '08? Is that the same person who murdered her? You can use  
20 that, but you can't convict him because he's an admitted  
21 batterer.

22 And -- I mean, there's no other way to talk about  
23 that. You can -- you can say to yourself, and to each other,  
24 "Well, if he did that to her in '08 twice or three times, then  
25 he killed her. We think that's evidence that he would kill  
26 her." You know, I think you have to look at the whole  
27 circumstances, but I'm certainly not going to try to sugar  
28 coat that, it's really a very ugly situation, that kind of

1 abuse. But it doesn't mean -- as I asked him, "You're a  
2 batterer. Are you a murderer?" He said, "No." That's going  
3 to be your decision.

4 You know, he testifies, I think, in a pretty direct  
5 way. He talked about what he did. He talked about the TROs  
6 that he violated. He talked about his disregard for the Court  
7 TRO, that Danielle wanted to be with him, and he wanted to be  
8 with her. And basically "F the Court," you know, that was  
9 true, you know, "I'm going to do what I want." But only on  
10 that issue. I mean, when you listen to the rest of him, he  
11 does follow court orders, he does do what they say, he does  
12 follow the custody order.

13 You know, he does go to classes. There are times  
14 that him and Danielle seem to be getting along. And the  
15 question, you know -- I think it's important that he goes to  
16 court on the 1st and the 6th of July, because they put a mind  
17 set in of somebody a week before this event.

18 If someone is going -- is working themselves up into  
19 a rage, that then six days later plans to kill, 'cause nothing  
20 really happened -- well, it did, on the 11th he tried to talk  
21 to her, and the 12th he said she said, "You can come over,"  
22 but he's upset that he can't see her on her birthday -- on the  
23 baby's birthday.

24 But a man acting the way he's acting, and has for  
25 over a year, does not seem to be a man out of control. Nor  
26 does his phone calls, though they're sad and rambling, they're  
27 not filled with anger.

28 So -- I have about half an hour left. Can we -- is

1 there a point we could take a short break?

2 THE COURT: Do you need a break now?

3 MR. HANLON: Yes, I'd like to organize my thoughts.

4 THE COURT: All right. Why don't we take a 10  
5 minute recess --

6 MR. HANLON: Thank you.

7 THE COURT: -- and we'll return at that time.

8 (Whereupon, at the hour of 10:37 o'clock a.m.,

9 a recess was taken until 10:54 o'clock a.m.)

10 (Whereupon, the following proceedings were held  
11 in open court outside the presence of the jury:)

12 THE COURT: Okay. You can bring the jurors in.

13 MR. HANLON: Can I stay up here, Judge?

14 THE COURT: Of course.

15 THE CLERK: Jury entering.

16 THE COURT: Thanks.

17 (Whereupon, the following proceedings were held  
18 in open court in the presence of the jury:)

19 THE BAILIFF: Please come to order, Court is back in  
20 session.

21 THE COURT: All right. The jurors have returned to  
22 the courtroom.

23 Mr. Hanlon, go ahead.

24 MR. HANLON: Thank you, your Honor.

25 Ladies and gentlemen, I want to go over two more  
26 areas, and then I'm going to be done. Mr. -- Mr. Mitchell's  
27 testimony, we talked about. The question becomes, if you look  
28 at what he said, has the Government proved beyond a reasonable

1 doubt that he's not telling the truth?

2 And I would say two things -- there were a couple of  
3 things. In terms of what eyewitnesses saw, there certainly is  
4 issues with who they saw, because unless you want to dismiss  
5 the shirts as just they're wrong, without any reason for it,  
6 there are people wearing a black T-shirt and a white T-shirt,  
7 and there's a person wearing a striped T-shirt.

8 Now, Mr. Mitchell, when he went to the market in  
9 Napa, was wearing, you could see it in the video, a  
10 sweatshirt, it's not a T-shirt.

11 So, it's an issue you just can't dismiss by saying  
12 the witnesses were wrong. I mean, there's no -- again, as I  
13 pointed out, the only consistencies they have is the size of  
14 the man, the hairstyle, and the shirt. So, it's something  
15 you've got to deal with. I mean, these are issues -- it would  
16 be nice if every case was simple, for you guys, for the jury,  
17 but, you know, this is a serious, serious issue.

18 And it's consistent with Mr. Mitchell's testimony  
19 there were two other people. His fighting, his locking in on  
20 the person he's fighting with, locking in and not seeing  
21 Danielle being hit, because clearly that's what would have to  
22 happen if he got blood spatter. It's consistent with  
23 fighting. He doesn't know how long it is, he said he was  
24 trained in hand-to-hand combat, you lock in.

25 The issue that you're going to have to deal with --  
26 I mean, I -- if you have any questions about what people said,  
27 or Mr. Mitchell testified to about where he was hit and how he  
28 was hit, have a readback, you know, any questions about

1 evidence, have it read back. But -- I mean, the issue -- you  
2 have to deal with the issue that Mr. Mitchell arrived, and  
3 within minutes, this event happened, and Danielle Keller's  
4 dead, and the 9-1-1 call happens.

5 You know, coincidences in life happen. You have to  
6 question if this is such a coincidence that you can't accept  
7 it. I mean, that's really the issue.

8 The other things he testified to are reasonable, and  
9 the question is, you don't have to believe him, you have to  
10 believe, has the Government proved his guilt beyond a  
11 reasonable doubt?

12 And to do that, you have to deal with the fact that  
13 he drives there, and within a few minutes, this event happens.  
14 And could you say to yourself that, "That's too much for us,  
15 we can't accept that as a coincidence?" Or, "It is a  
16 coincidence, and these other people are there."

17 And I'm not gonna sugar coat you, that's an issue  
18 you have to deal with. And I don't have any answer. I  
19 suggest to you that Mr. Mitchell's testimony is consistent  
20 with the evidence we have, it's consistent with the physical  
21 evidence, and it's certainly consistent with Mr. Waller, you  
22 know, the issue is what -- you know, the timing, certainly  
23 points to him as the person who's coming, and then the event  
24 happened.

25 And is that enough to convince you beyond a  
26 reasonable doubt he's not telling the truth? And that's going  
27 to be your job, is to determine that.

28 I want to talk to you about an issue that's very

1 difficult, not because it's difficult to talk about, but  
2 because my job as an attorney is to be an advocate for my  
3 client. I'm also an officer of the Court. And I see my job  
4 in closing argument as arguing what I believe the evidence  
5 suggests and have you think about it.

6 And I think even though you can tell from  
7 Mr. Mitchell's testimony, he would not agree with me going to  
8 where I'm going to go, which is, if you don't believe him,  
9 what occurred? If you don't believe what he testified to, if  
10 you believe he's a killer, what do you then do with the facts?

11 And, I don't want you to take it to mean that I  
12 don't believe my client. As I pointed out to you, what  
13 Mr. Cacciato and I believe is irrelevant, we can't argue  
14 what we believe, we can argue what the evidence shows.

15 And one of my concerns was, if I argued to you, what  
16 do you do if you were convinced beyond a reasonable doubt that  
17 Mr. Mitchell is not telling the truth and did take the hammer  
18 and did kill her? Then you will say, "Well, this is where he  
19 talked about honesty, being straightforward with us, and now  
20 he's going to talk out of two sides of his mouth. 'He's  
21 innocent, but if you don't think he's innocent, what's he  
22 guilty of?'"

23 I don't -- you know, I try never to do that, and  
24 that's why this is difficult, but it's something, as an  
25 officer of the Court and an advocate for my client, I have to  
26 do, because there certainly is evidence on which you could  
27 conclude, depending on how you understand the inferences for  
28 circumstantial evidence, that Mr. Mitchell is not being

1 totally honest with you about what happened.

2                   And there're inferences -- there's arguments which  
3 should say he is, but I have to deal with what do I do as his  
4 lawyer. If you decide, "We don't believe beyond a reasonable  
5 doubt," or, "We're convinced beyond a reasonable doubt that he  
6 is the person who hit Danielle Keller with a bat," and if you  
7 think, or if Mr. Cacciato wants to say, it's talking out of  
8 two sides of my mouth, I don't think it is, but I think I  
9 would not be doing my duty as a lawyer to not address these  
10 issues, because then we have -- the only thing you have  
11 guidance from is the instructions and the argument of  
12 Mr. Cacciato.

13                   And, you know, it'd be great if lawyers were all  
14 unbiased, but we have sides, we're advocates for each other,  
15 and I don't -- I'm an advocate for Mr. Mitchell, and I don't  
16 knock Mr. Cacciato being an advocate for the Government.

17                   So, I want to talk to you -- what can we infer from  
18 the evidence, if you conclude that Mr. Mitchell is the person  
19 who killed Danielle Keller? And the real issues that occur  
20 from that is, if you conclude that, is he guilty of first  
21 degree murder? Is he guilty of felony murder, wherein you  
22 have to be convinced beyond a reasonable doubt that he went  
23 there, or decided to kidnap, and in the course of that kidnap,  
24 he committed a homicide? Because if the People can't convince  
25 you of that, then he's not guilty of special circumstances.

26                   So, many of the things I argue to you are consistent  
27 with this -- with the argument of what do we do if you find  
28 that he is the person who hit her with the bat?

1                   There is no evidence that he went there with the  
2 intent to do that. There is no evidence he brought a bat.  
3 All that is -- that argument, and those set of facts, are the  
4 same. If Mr. Mitchell is the person who killed her, he  
5 didn't -- there's no -- any argument that he went there with  
6 the intent to kill is fog, it just isn't real. I mean, you  
7 look at the facts and the inferences, but -- you look at  
8 these -- the conversations, the tapes, the lack of preparation  
9 on his part.

10                  That he went there to do anything but to see the  
11 baby, to argue with her, whatever, it -- you know, it's  
12 reasonable that she did say, "Come over," and so the question  
13 becomes, what happened? What happened?

14                  What happened, if you believe that he is guilty and  
15 someone else didn't do it, that led to a man beating in the  
16 brains of a woman he loved? And you could just --  
17 Mr. Cacciato could say he's just a batterer. But I think  
18 it's too simplistic. I think -- the inferences of the facts  
19 are that Mr. Mitchell went there to see his daughter on her  
20 birthday. Either he heard Danielle tell him he could come, or  
21 he inferred it from what she said, but when he got there, she  
22 said no, she didn't want him to see the baby. Something  
23 happened, and there was an explosion.

24                  I don't think, if -- you know, if -- I don't think  
25 you can believe that someone just picks up a bat and beats  
26 someone, even they don't know, but someone they've been  
27 intimate with and loved, it just doesn't happen without an  
28 explosion of anger and loss of control. To do that more than

1 once to somebody you care about, while they're holding a  
2 child, it just -- there's nothing about Mr. Mitchell that  
3 indicates he's capable of that without a loss of control.

4 And in that context, you have to answer the  
5 questions, what do we do with it? If that's what you  
6 conclude -- and I'm not saying Mr. Mitchell is guilty, I'm  
7 saying, I think we presented evidence to you and arguments to  
8 you that the inferences and circumstances -- that the  
9 Government has not proved their case beyond a reasonable  
10 doubt. You can never say, "I'm convinced he didn't do it,"  
11 but you can say, looking at this evidence, and I've spent  
12 three hours arguing to you, that the inference of the  
13 evidence, the circumstantial evidence is that they have not  
14 proved beyond a reasonable doubt that he did this.

15 And you come back that there are explanations for  
16 the physical evidence that Mr. Mitchell testified, the  
17 eyewitnesses cannot be believed beyond a reasonable doubt, and  
18 the Government can never explain, except by saying to you, the  
19 witnesses -- their witnesses, Frank, and Bessie, and Nick,  
20 made a mistake, explain how there are people in white shirts  
21 and black T-shirts when he's wearing a red striped shirt.

22 You know, it just -- and remember, to do that, they  
23 have to say they're right about other things, but they're  
24 wrong about that.

25 So, I don't -- I believe -- it doesn't matter what I  
26 believe, I think the evidence has shown that the People have  
27 not proved their case beyond a reasonable doubt.

28 I have to address, and am addressing, what do I do

1 as a lawyer to help you make a decision if you don't accept  
2 that, if you believe that he has been proved guilty beyond a  
3 reasonable doubt?

4                   And the first thing you look at is first degree  
5 murder. If you look at first degree murder, the instructions  
6 say that there are two theories. One is, it's premeditated,  
7 willful murder, premeditated and deliberate. And the Judge  
8 read the instruction, I'm going to repeat some of it again,  
9 that someone killed willfully, with deliberate --  
10 deliberately, and with premeditation, that deliberately if she  
11 or he carefully weighed the consideration for or against the  
12 choice, and knowing the consequences, decided to kill.

13                  That he acted in a cold, calculated manner in  
14 deciding to Danielle Keller because of whatever. I would say  
15 there's no evidence that supports that, that the nature of the  
16 killing itself did not support that.

17                  The nature of the explosion of rage that caused  
18 someone to do this is not a cold, calculated decision. This  
19 is qualitatively so different than slapping someone in the  
20 face. It is a rage. To do this to someone -- whoever did  
21 this to her was in a rage. And you saw Mr. Mitchell -- that's  
22 not a cold, calculated decision, weighing the pros and cons  
23 and then acting, it's not possible.

24                  You know -- I mean, you could say he made the  
25 decision really quickly, but his mind -- if he -- if he did  
26 this, his mind is not act -- acting in a calculated manner.  
27 Because you can't do that -- I mean, I -- the evidence, I  
28 don't think, supports that he went there to do it, that he

1 brought a weapon to do it, that he was planning to take the  
2 baby, all these things you have to look at, in whatever theory  
3 you're going on. And when you look at 'em, they don't show a  
4 plan to do a criminal act. It's just -- you know, it's not --  
5 you got to go back and talk to each other, it's not consistent  
6 with the facts.

7 So, then, the other theory of first degree murder is  
8 that Mr. Mitchell went there and decided to kidnap Samantha,  
9 and in the course of the kidnapping, he killed Danielle  
10 Keller. That's called felony murder. The Court has read to  
11 you various instructions on this, but the bottom line is, if  
12 you find the Defendant formed the intent to commit the kidnap  
13 after the murder, then the special circumstances and felony  
14 murder don't apply.

15 So that, if something happened and Mr. Mitchell went  
16 in a rage and did this awful act, it wasn't done to kidnap  
17 Danielle, it was something going on between -- to kidnap  
18 Samantha, it was something going on between him and Danielle,  
19 and at that point, he took the baby. There was no plan to do  
20 this, to take the baby. There's nothing that supports that.  
21 And, again, you look at the circumstances of what happened.  
22 Of getting ready, you know, there was no plan to do this.

23 These are difficult issues, you know, and -- and  
24 because -- if you do decide Mr. Mitchell has done this, it's a  
25 horrible crime, and what do you do with it? What you do is  
26 follow the law. What you do is not do what people do in the  
27 newspaper and say, "Oh, my God, this is awful." It is awful.  
28 It is, "Oh, my God," but that's not your job. It's why, in

1 the course of a trial, we can stand here as lawyers and talk  
2 about it, even though it's awful, and it's why you have been  
3 picked as the jurors to analyze this under the law and not  
4 stop at "Oh, my God, it's awful."

5 Because your job is to analyze the facts rationally.  
6 That's why keeping emotion out is so important. And I think  
7 you can do that. You know, I think when you do it, sit back,  
8 you'll find these -- these type -- this is not, if  
9 Mr. Mitchell is guilty, this is not first degree murder.

10 The question's going to be, is it second degree or  
11 is it manslaughter, because the passion that affected him, and  
12 it really is the heat of passion, you know, it's not -- let me  
13 get this word right, this idea of provocation. If provocation  
14 means somebody does something bad when there's common sense,  
15 that's not how it's used.

16 It means, did -- if you -- if you decide that  
17 Mr. Mitchell did this act, the provocation, though not in --  
18 in a legal sense, is that, she said no to him, and he  
19 exploded -- she said, "No, I don't want you to have the baby  
20 today, I don't want you to see her." And the question  
21 becomes, is that passion reasonable in the sense that -- not  
22 that you kill somebody, that's not the standard, the passion  
23 is, would you go -- if you knew what Mr. Mitchell knew and saw  
24 what he saw -- and I disagree with Mr. Cacciato, I think his  
25 tweaking on drugs, you're in his situation, I think you do  
26 consider that, you -- you put yourself in the situation of  
27 someone who is him, even though you talk to the ordinary,  
28 reasonable person, and he can argue the law and you'll decide

1 what it means, but I think you look at all the factors where  
2 he was, and decide if that type of explosion, when someone  
3 said you can't see your baby on her birthday, would cause  
4 other people to become -- not to kill, it's not to kill, not  
5 to pick up a baseball bat, to have their judgment affected by  
6 passion. That's the standard.

7 And every kind of test has to be, has the Government  
8 proved beyond a reasonable doubt that's not true? Every time  
9 you come to -- in fact, 'cause it's normal to say, "Well,  
10 Mr. Mitchell's shown us this or that." It's like his  
11 testimony. It's not that you have to say, "We believe  
12 Mr. Mitchell's testimony, we believe -- because there's these  
13 two other people, there's two other shirts, we believe there  
14 were other people there, or we're not convinced there  
15 weren't."

16 See, that's the difference. It's not that we're  
17 convinced beyond a reasonable doubt there weren't, and if  
18 we're not, then we can't convict, then his story makes sense  
19 unless -- his testimony makes sense unless, because of the  
20 timing, that circumstance, we're convinced beyond a reasonable  
21 doubt it doesn't make sense, and that -- every time you look  
22 at circumstantial evidence, you have to analyze it, either two  
23 reasonable interpretations, or has the Government proved  
24 beyond a reasonable doubt a certain factor?

25 And all I can do is show you these things, you know,  
26 it becomes common -- second nature of a lawyer, we've been  
27 talking about this for decades, or I have. So, yes,  
28 circumstantial evidence, two reasonable interpretations. And

1 then you tell it to your children or something they go, "Huh?  
2 What do you" -- you know, "Either you know, or you don't know,  
3 dad." You know, it's like, "What do you mean, reasonable.  
4 interpretation? Life is about we know stuff."

5 Law and the courtroom are not always in life, but  
6 sometimes they have a lot in common. Here, you have to think  
7 following the law. You have to do it. And I look at you, I  
8 know you can do it. Some of you may not agree with me, but I  
9 know you can follow the law and do what the law instructs you  
10 to do.

11 So, the question becomes, has the Government proved  
12 Mr. Mitchell is guilty beyond a reasonable doubt? Have they  
13 proved his testimony is not only inconsistent with the facts,  
14 but beyond a reasonable doubt -- doubt is not true? I don't  
15 think they have. I don't think the evidence has shown that.  
16 If you think they have, then you go to the next stage.

17 What do we do -- it's all the -- I mean, you're  
18 analyzing first degree murder, that's what the Court tells  
19 you. You then look at the murder statute and you see --  
20 Mr. Cacciato says his view of it to you. I think if you  
21 read it, you will see that the view I'm presenting is the way  
22 you have to address it, and always ask, has the Government  
23 proved that he acted in a cold, calculated manner, weighing  
24 the decisions? Have they proved that to us beyond a  
25 reasonable doubt? Because if they haven't, then it's not  
26 first degree murder.

27 Premeditation. So, go to the second part of the  
28 special circumstances, which is also what makes it felony

1       murder, the same standard. Did he commit the murder because  
2       he wanted to kidnap the baby? It's basically, did he have  
3       that intent to kidnap before the killing? And have they  
4       proved that beyond a reasonable doubt?

5           If they haven't, then there is no special  
6       circumstances, there is no felony murder, because if you go to  
7       the reason -- if you accept this as -- as he's guilty and look  
8       at the evidence, the question is, is it reasonable that if  
9       there's two reasonable interpretations, one, he went there and  
10      exploded, there was an awful set of facts that happened and  
11      then he took Samantha, or that he went there with the intent  
12      to take her, and in that context, he killed her 'cause she got  
13      in the way?

14           If they're both reasonable, and I don't think the  
15      second one is, then the one that's pointing to innocence has  
16      to be accepted by you. And that finds him not guilty of  
17      special circumstances and felony murder. It's the same thing.

18           The other charge is -- I mean, there has been --  
19      it's interesting, there has been -- I mean, if Mr. Mitchell is  
20      not the killer, he's not guilty of kidnapping, he's not guilty  
21      of these other charges, other than possibly stalking and  
22      endanger -- child endangerment, you know, the question is, you  
23      have to look at those, but is it a child endangerment to pick  
24      them up and drive them without a seat belt all this way when  
25      there's an Amber Alert?

26           But the real issue -- the Judge has instructed you  
27      on these other crimes, but the issue is the homicide and what  
28      do you do with it.

1                   So, I want you to think about the facts when you go  
2 in, think about the evidence, talk to each other, I want you  
3 to use your mind and your moral centers to judge the evidence.  
4 I want you to not decide Mr. Mitchell is guilty or not because  
5 you don't like him, that's not the test. I want you to look  
6 at the facts.

7                   I want you to listen to Mr. Cacciato's rebuttal  
8 with the same attention you listened to my argument, remember  
9 they're both arguments, no, they're not evidence. And then I  
10 want you to go back and listen to each other and think about  
11 it and try to work through all this. It's a complex case, you  
12 know, it's not so simple as it first seemed. It's very  
13 complex, and there are certain facts that I've tried to point  
14 out to you that you have to deal with.

15                  Go back there and listen to each other and argue  
16 with each other, if that's what it takes, verbally, you know,  
17 and try to work this stuff out because people disagree on  
18 issues, but the key is listening to each other, but don't be  
19 changed simply because you want a decision. If you can reach  
20 a decision, that's great. If you can't, then you can't.

21                  But don't agree because you just want it over with.  
22 Don't agree because it comes to Monday you want to go home,  
23 you don't want to come back on Tuesday, that's not fair to any  
24 of us. You have to analyze the facts and look at the law, and  
25 ultimately what you have to do is do justice. You know, it's  
26 owed to everybody here. It's owed to Mr. Mitchell, it's owed  
27 to the victim, everybody, the State that represents the  
28 victim, everybody needs justice, and you're the people who are

1 going to do it. That's the nature of the jury system.

2 It's an amazing system. In one view, you could say,  
3 "Why me? What did I do to be on this jury?" The other view  
4 is, well, here you are. 'Cause you're going to mete out  
5 justice on a really complex homicide case, that you have to  
6 analyze facts and do stuff you normally don't do. I trust  
7 you will do that.

8 I appreciate your attention yesterday and today.

9 Thank you very much.

10 THE COURT: Thank you, Mr. Hanlon.

11 MR. CACCIATORE: Can we take a brief recess? I'll  
12 try and be finished before noon --

13 THE COURT: Okay.

14 MR. CACCIATORE: -- if we can just maybe take 10 now  
15 and then I finish up

16 THE COURT: All right. So, another 10 minutes,  
17 ladies and gentlemen, please, if you don't mind. Thank you.

18 (Whereupon, the following proceedings were held  
19 in open court outside the presence of the jury:)

20 THE COURT: So, just a quick -- just a quick  
21 question for the two of you. Let's say you finish and they're  
22 gonna go out, then they can have -- what I'd like to do is let  
23 them have lunch, and tell them when they return, this is how  
24 they have to start their process, if that's --

25 MR. HANLON: Okay. Fine.

26 THE COURT: -- okay with you.

27 MR. CACCIATORE: You're going to read the concluding  
28 instructions?

1 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

2 FIRST APPELLATE DISTRICT

3 ---oo---

4 **COPY**

5 THE PEOPLE OF THE STATE OF CALIFORNIA, ]

6 Plaintiff and Respondent, ] Court of Appeal  
7 versus ] Number \_\_\_\_\_

8 JAMES RAPHAEL WHITTY MITCHELL, ]

9 Defendant and Appellant. ] Marin County Superior  
10 \_\_\_\_\_ Court No. SC165475A

11

12

13

14

15

16

17

18 APPEAL FROM THE SUPERIOR COURT OF MARIN COUNTY

19 HONORABLE KELLY V. SIMMONS, JUDGE, PRESIDING

20 REPORTER'S TRANSCRIPT ON APPEAL

21 IN CAMERA HEARING

22

23

AUGUST 16, 2011

24

25

26

27

28 REPORTED BY: SUSAN J. KLOTZ, CSR #8300

1 TUESDAY, AUGUST 16, 2011

9:20 O'CLOCK A.M.

2 ---oo---

3 (Whereupon, related matters were heard and  
4 reported but not transcribed herein.)

5 THE COURT: Okay. The record should reflect that  
6 the courtroom has been cleared with the exception of my staff,  
7 Mr. Hanlon and Mr. Mitchell.

8 Mr. Mitchell, as you heard me saying I've received  
9 the request that you've made apparently to have the Public  
10 Defender's Office appointed to represent you to discuss  
11 ineffective assistance of counsel, a new trial motion, and to  
12 put over the sentencing date. First of all, is that still  
13 your request?

14 THE DEFENDANT: Yes, it is, Your Honor.

15 THE COURT: Okay. And so, now is your opportunity  
16 to explain to me why you think I should do that.

17 THE DEFENDANT: Well, for one, in closing arguments  
18 on Mr. Hanlon he argued a heat of passion case. I instructed  
19 him not to argue heat of passion case. I instructed him to  
20 maintain identity defense because it is a fact I did not kill  
21 Danielle Keller.

22 Second was he never provided any doctors, any  
23 witnesses, any evidence, or anything of a heat of passion  
24 case. Him addressing the jury in a manner of saying that you  
25 have a choice not to believe Mr. Mitchell, when you choose not  
26 to believe him, that this is -- then he has to be guilty of a  
27 heat of passion. It's a -- it's a complete contradiction of  
28 the case itself. It's like someone stealing your purse, and

1 then you know your purse was stolen, and then that person  
2 goes, "I didn't steal your purse," like, you know, Miss  
3 Simmons. But, like, if I did, I was hungry, and I didn't want  
4 drugs. Wait, wait, wait a second here. You stole my purse or  
5 didn't you? And that's exactly, like, you know, probably what  
6 happened with the jury right in closing arguments.

7           Secondly, on the -- on -- on the stand I testified  
8 to the fact that I was most likely hit in the back with a  
9 baseball bat, and the bruise on my back was -- was -- was  
10 relevant. It was -- it was there. And then he direct -- he  
11 directly tells the jury, "No, he never said that." So, it's  
12 like the jury is reading the transcripts, and they're like  
13 saying, like, you know, wait a second, he took the stand, he  
14 made this direct statement, and now his lawyer is saying, "No,  
15 he didn't make that statement." So, the jury's probably not  
16 going to say, oh, what's this. It's, like, you know, it was  
17 like, was it a made up story, hard to like, you know, remember  
18 or not remember, like, you know, the facts as it happened?

19           And then, like, you know, I can continue to count  
20 the ways and I continue to go. Most of it is, like, you know,  
21 to do why argue a heat of passion without any doctors, without  
22 any psychiatry, without any, like, you know, evidence or any  
23 without providing any solid or tangible evidence or any  
24 witnesses that would support that kind of argument towards the  
25 end of the case.

26           And then -- and this also goes back to, like, you  
27 know, why I wanted to remove counsel before even jury  
28 selection and kind of went. Like their mentality was we can

1 fool the jury, the jury is ignorant, the jury is gullible,  
2 like, you know, we can, like, you know, we can get away with,  
3 like, you know, doing this identity defense, like, you know,  
4 that you want to put on. And for me I'm just kind of looking  
5 at it well, like, well, wait a second here, I didn't kill  
6 Danielle, I never told you that I did, and it's, like, you  
7 know, why would you want to put on a heat of passion defense,  
8 you know what I mean? Why would you even want to argue that,  
9 mention that, or even, like, you know, do anything, like, you  
10 know, of the sort.

11 And for me it's really, really hard to, like, be  
12 reading these sentencing days, the media. It's, like, you  
13 know, it's hard for me to even, like, sit down and, like, you  
14 know, even be taking this all in. It's a fact that I didn't  
15 kill Danielle Keller. And it's just like all I can do is stay  
16 strong for my daughter, stay strong for, like, you know,  
17 Danielle, and all I can do is stay strong for my family and  
18 for myself. So, the thing is it's like, you know, the other  
19 factors too, this, like, you know, Stuart Hanlon and his --  
20 his partner Sarah Rief, even it's like all throughout the  
21 whole nine months of them having the case, they have  
22 constantly said, like, you know, we're going to do the  
23 identity, we're going, like, you know, we're going to provide  
24 the experts, we're going to put on the DNA expert, we're going  
25 to show how there's a third party like on the handle of the  
26 bat, we're gonna show that, like, you know -- we're gonna show  
27 that, like, it's subjective that you have -- you didn't even  
28 have your hands on the bat whatsoever. We're gonna, like, you

1 know, we're gonna show -- we're gonna call the experts in,  
2 they're going to testify to all this. We're gonna, like, you  
3 know, bring on character witnesses, so on and so forth. All  
4 right. I'm kind of like going, huh, what's going on.

5 At the same time it's, like, you know, then all of a  
6 sudden at the eve of trial they go, well, no, we're going to,  
7 like, you know, try to, like, you know, swing a heat of  
8 passion defense along with the identity defense, you know what  
9 I mean? So, they didn't give me enough time to, like, you  
10 know, find new counsel. They didn't give me enough time to,  
11 like, you know, to properly, like, even to find a -- a good  
12 lawyer, who's gonna fight for the truth, who's not, like, you  
13 know, going to be no nonsense and go without any tricks,  
14 without any gimmicks and without any, you know, with -- I  
15 think I've said everything I've got to say.

16 You know, like he, like, you know, Mr. Hanlon might  
17 be good with points of law, but, like, you know, like, you  
18 know, stating 1109s and fighting for little objections, right?  
19 But when it comes to actually no nonsense fighting for the  
20 truth and, like, you know, telling that jury that, hey, there  
21 is, like, you know, you have the choice, like you can either  
22 convict an innocent man, or you have to let him walk. He  
23 doesn't have it in him. He never did, you know, and that's  
24 exactly how I feel, like, you know, why argue a heat of  
25 passion in closing arguments when all of a sudden, like, with  
26 no doctors, no tangible evidence, nothing, like, you know,  
27 nothing at all whatsoever, other than, like, oh, yeah, you  
28 have -- you -- you can choose not to believe Mr. Mitchell, you

1 know what I mean? And if you choose not to believe him, then,  
2 you know, then he's guilty of this and not that. Just like,  
3 you know, someone steals your purse, you know what I mean?  
4 They either did it or they didn't. Like, they either did or  
5 they didn't. And it's just, like, you know, if they said that  
6 they didn't, then why would they say, oh, and if I did it was  
7 because I was hungry. It wasn't because I was on drugs and I  
8 just wanted to steal your purse. That's why I'm bringing up  
9 the motion, and it's submitted.

10 THE COURT: Okay. Thank you.

11 Mr. Hanlon, do you have -- do you wish to respond to  
12 any of the statements made?

13 MR. HANLON: No, I -- unless -- I consider the  
14 attorney-client privilege still in place. If the Court would  
15 order -- and order me to respond, I would, but I have no  
16 inclination to respond at this point.

17 THE COURT: Do you -- let me ask you, Mr. Hanlon, do  
18 you feel despite the discord between the two of you, do you  
19 feel despite that, that you are capable of proceeding to a  
20 sentencing hearing in -- as best you can on -- well, that's  
21 not a good way to say it. Let me think about it a minute.  
22 What I'm wondering is, it's clear there is discord between the  
23 two of you, if I were to deny this motion, and I'm not saying  
24 I'm going to deny it, but if I were, do you feel, Mr. Hanlon,  
25 that you could provide good service to Mr. Mitchell at the  
sentencing hearing this morning?

27 MR. HANLON: Well, that's the term, good service.  
28 What I would argue Mr. Mitchell objects to, and so I -- I feel

1 uncomfortable arguing -- well, I mean the issues before the  
2 Court at sentencing are concurrent sentences. And I -- what I  
3 would argue to the Court are exactly the things that  
4 Mr. Mitchell is now complaining that I argued to the jury.  
5 So, in that sense I don't think for him I could apply -- good  
6 services in that context what my client wants. I mean, he --  
7 his position is clear. So, for me to argue you should give  
8 concurrent sentences because whatever, it goes -- the  
9 antithesis what he wants to be said. So, I don't think I can  
10 provide him service in that sense 'cause I won't argue what he  
11 wants.

12 THE COURT: Well, in that sense he wants, he -- if  
13 I'm hearing you correctly, he wants you to argue he didn't do  
14 it.

15 MR. HANLON: Right.

16 THE COURT: We're at the stage where there's been a  
17 conviction and you are, as a professional, required to make  
18 some argument. So, what you're saying is you're prepared to  
19 make an argument; it's just not the one your client wants you  
20 to make.

21 MR. HANLON: Right. Given -- but it's his life,  
22 given what he wants, I'm not prepared to really argue against  
23 his interests because it's stated interest. I mean, he's the  
24 person who's going to have to serve this time. And I just --  
25 we reached a point, you know, I did the trial as best I could,  
26 and now he's clear what he wants, and I'm very uncomfortable  
27 arguing what I think is the appropriate argument, given what  
28 my client wants.

1                   And -- and therefore, if you ask me to go forward at  
2 sentencing, I would probably submit it and not argue for the  
3 reasons I'm saying because again, it's Mr. Mitchell's life. I  
4 mean, my job as a professional goes only so far to do what I  
5 ought to do to the Court and to my client's interest, and my  
6 client comes first.

7                   But I'm not going to get up here and argue why you  
8 should give -- I'm not going to do it. I mean, I'll -- I'll  
9 be the lawyer. I'll be the body at sentencing, and I'll  
10 submit it because I don't have an argument. To argue to the  
11 Court at sentencing he didn't do it, given the jury verdict,  
12 is meaningless. And to argue anything else flies in the face  
13 of what he wants, and I -- I made that decision once. I'm not  
14 going to do it again.

15                  THE COURT: The decision you made in the closing  
16 argument that Mr. Mitchell complains of.

17                  MR. HANLON: Right.

18                  THE COURT: You made that decision for what reason?

19                  MR. HANLON: Are you ordering me to answer?

20                  THE COURT: I am.

21                  MR. HANLON: Because I felt the jury -- the evidence  
22 was overwhelming, and the only way to save him from life in  
23 prison was to make that argument, even though for reasons that  
24 I don't think I have to answer to answer your question, I  
25 didn't have witnesses to support that. But I felt that I had  
26 to. I felt Mr. Mitchell's view and the jury's read of his  
27 testimony would be correct. He thought they were behind him  
28 and thought he was innocent. I did not see it that way. I

1 thought the evidence was overwhelming, as it was from the  
2 beginning, and I felt I had to do that to try to save him from  
3 life in prison without a chance of parole. That was my  
4 choice.

5                   Mr. Mitchell clearly expressed his desire that I not  
6 do it. I told him -- I don't know when that conversation  
7 first came up, whether it was before the trial or during the  
8 trial, that this was an attorney's choice. The decision to  
9 testify as to what the truth was was up to him, but what to  
10 argue was up to me. And he argued with me about that. It's  
11 clear what he's saying is true, but I made that decision based  
12 on what I saw the evidence to be and what was in his best  
13 interests. And I tried to make it, you know, it -- it was a  
14 difficult situation, but, yes, there was a reason why I did  
15 it, and that's what it was.

16                   THE COURT: If we were to proceed to sentencing and  
17 thinking in that same vein, couldn't you then make the  
18 argument that you're talking to me about as far as concurrent  
19 versus consecutive sentences?

20                   MR. HANLON: I'm not prepared to do it again. I'm  
21 not prepared to fly in the face of what my client wants. It's  
22 his life. I've done my best for him, and I've done my best as  
23 an officer of the court. I'm not going to continue in that  
24 vein. It's contradictory to what I believe my job is. So,  
25 Mr. Mitchell makes this call. He clearly doesn't want me  
26 to -- he doesn't want me to be his lawyer at sentencing. But  
27 if I am, I'm not going to argue against what he believes are  
28 the facts. I'm just not prepared to do it again regardless

1 I -- with all due respect regarding the order, you can't order  
2 me to argue.

3 THE COURT: Sure.

4 MR. HANLON: You know, so I would probably submit it  
5 and just let the prosecution put on their evidence, and  
6 Mr. Mitchell wants to make a statement, he can argue his own  
7 view of the evidence. I'm not going to argue at sentencing  
8 under these circumstances.

9 THE COURT: Mr. Mitchell, anything else you'd like  
10 to say?

11 THE DEFENDANT: Other than it's just like I think --  
12 I thought the evidence spoke for itself. It's like, you know,  
13 like two people, like you know, saw the guy in the black shirt  
14 murder Danielle. All right? The guy across the street sees  
15 the guy in the white shirt, I -- he identifies this man who's  
16 wearing white shirt run away with Samantha. He even asks for  
17 some blood spatter expert come to say, I'm within like 10 or  
18 15 feet of, like, you know, of the blood actually, like, you  
19 know, making contact with my pants or possibly, you know what  
20 I mean? Like, you know, and then it's little possible that  
21 someone could have been blocking that blood or even traveling  
22 to my pants.

23 You know, I crack up when I read the media say the  
24 same, I don't know how that blood got on his pants. It's  
25 like, no, the experts tell me that even block the blood  
26 spatter, right? It's -- it's the evidence it's, like, you  
27 know, it's a question of when, like, you know, it got on  
28 there, you know? And it's just like everything happened fast,

1 and it was intense. But it's -- it's, like, you know, the  
2 argument spoke for itself.

3 There's even third party DNA on the bat, like, you  
4 know, that -- that it belongs to a male, you know what I mean,  
5 and didn't bring up more experts to even, like, you know, to  
6 even say like, you know, yeah, that's the white Caucasian  
7 male, with his below level -- level contributor, along with  
8 Mr. Mitchell. And it's actually, like -- it's actually  
9 subjective. It's not, like, inconclusive that Mr. Mitchell's  
10 DNA on his pants -- it's like -- like, DNA, like, and, like,  
11 you know, his prints are even on the handle of the bat.

12 So, if I'm like within 10 or 15 feet with the medium  
13 velocity blood spatter being applied, then it's just like  
14 subjective, like, you know, that it's just, like, you know, my  
15 DNA's not even on the handle of the weapon, and how could I  
16 have even used the weapon, and then how could I use it at this  
17 close distance.

18 And Mr. Hanlon, like, you know, he discussed this  
19 with me before. He says, like, the evidence is overwhelming.  
20 It was just, like, you know, no, not necessarily, not if  
21 something's, like, you know, fast and intense. In fact, Your  
22 Honor, before we even, like, you know -- remember when we were  
23 arguing jury instructions, you know, like, you know, they were  
24 trying to say that me asking for a lawyer is like me denying  
25 the guilt for me, like, you know -- or not deny anything.  
26 It's me admitting that I could have committed a crime. Like  
27 Mr. Hanlon and myself, we didn't catch that, like, you know,  
28 me telling my mother that I'm waiting for Danielle to call me

1 so we can go sing happy birthday is an automatic denial, is an  
2 automatic denial of the charges.

3 It's like -- and then Mr. Hanlon addresses the jury  
4 and goes, oh, yeah, him, like, asking, like, you know, to see  
5 a lawyer or talk to a lawyer, not discuss anything of the  
6 matters of the case could be circumstantial evidence that he  
7 admitted kill -- to killing Danielle Keller. So, not only did  
8 he just say, oh, yeah, the Constitution are like him -- him  
9 having the right to only speak to an attorney is like thrown  
10 out the window, and that's an admission of guilt. But if  
11 it's, like, you know, they -- practically just didn't even,  
12 like, you know, catch on to what you even brought up in the  
13 court, like, you know, what you even addressed to the  
14 prosecution and things how you addressed the prosecution, told  
15 'em, like, hey, this is why I can't read this instruction  
16 right now. That is it's like, you know, that there was any  
17 admission. You know.

18 Then he just told the jury, oh, yeah, that's  
19 circumstantial evidence that he admitted to it, you know?  
20 Especially when it's -- I've been trained my whole life, like,  
21 you know, to like, you know, keep any mouth shut until I --  
22 until I talk to a lawyer, you know what I mean? I'm sure  
23 that's what you teach your son, that's what, like, my father  
24 taught me. It's like I've been in trouble before, and that's  
25 what lawyers have instructed me to do. If anyone accuses you  
26 of a crime, you keep your mouth shut until you talk to your  
27 lawyer, you know. And he just went ahead and told the jury in  
28 closing argument that, no, that's circumstantial evidence that

1 he committed to a crime. Asking, like, you know, asking to  
2 speak to an attorney.

3 I think that's -- I can argue it's, like, you know,  
4 point by point all day, you know. But it's, like, you know, I  
5 real -- what I really need is, like, you know, and like I said  
6 before, Mr. Hanlon -- I'm not going to go on a tangent, but  
7 Mr. Hanlon I feel, like, you know, put all this off until the  
8 very last minute so I couldn't find new counsel. If he would  
9 have, like, you know, if he said that the evidence was  
10 overwhelming, and he was incapable of defending my case, he  
11 could have done this six months before trial, he could have  
12 done this seven or eight months before trial, he didn't have  
13 to do it a day before trial -- or -- or the day before jury  
14 selection where it prevented us from, like, you know, from --  
15 from delaying the process of justice, you know what I mean?  
16 From delaying, like, you know, from any delays. Because I  
17 remember in jury selection said, hey, this would be really  
18 disruptive to a jury selection process. He could have told me  
19 six months ago that I -- he felt that the evidence was  
20 overwhelming, and that he can't do this -- that he couldn't,  
21 like, do this trial, that he was incapable.

22 'Cause I know lawyers that could have capable of  
23 doing it. I had six lawyers lined up. He said that he was,  
24 like, you know, he was capable, like, you know, nine months  
25 ago or when Doug Horngrad wanted to be substituted. And if he  
26 felt it was overwhelming, I could have had numerous lawyers.  
27 I could have, you know, put on a good defense, good -- good  
28 job could have been no nonsense and argue to the jury and

1 fought for the truth. But instead it's -- it's, like, you  
2 know, well, he just throws in the towel, and it doesn't make  
3 sense to me.

4 THE COURT: Let me ask you a similar question to the  
5 question I asked Mr. Hanlon, and that is if your motion was  
6 denied, are you prepared to discuss sentencing options with  
7 Mr. Hanlon so that he can make a presentation on your behalf?

8 THE DEFENDANT: I don't know anything about  
9 concurrent or consecutive sentencing.

10 THE COURT: Right.

11 THE DEFENDANT: I don't know anything about that  
12 kind of stuff, Your Honor, I'll be honest. That's why I'm  
13 asking for a Public Defender to represent me. If I have to go  
14 pro per, then I need at least like a month to just read about  
15 it, just to know what I'm talking about, just to research and  
16 be confident enough to address the Court, to address the  
17 argument with Mr. Cacciato.

18 THE COURT: The -- the case law on this sort of  
19 situation gives me some guidance on how to address these sorts  
20 of motions. And I -- I sort of have an inclination of -- of  
21 what the right thing to do is. My concern -- and it's  
22 probably that I'm going to proceed this morning. And I'll  
23 explain that in just a minute.

24 The concern I have, though, Mr. Mitchell, and,  
25 Mr. Hanlon, is that, you know, a sentencing hearing is likely  
26 going to take place. And, Mr. Hanlon, although you don't  
27 appreciate his services is generally in the position of making  
28 an argument about why I should do one thing versus another,

1 something that's lower for you and on your behalf.

2                   What he said to me was he feels uncomfortable making  
3 those arguments because you have been steadfast in your  
4 position that you're not the person that committed this crime.  
5 And if he makes the argument that now that you've found --  
6 been found guilty, I should impose a lesser amount of time  
7 versus the higher amount of time, he feels that he can only  
8 make that argument by arguing heat of passion issue, which you  
9 object to. So that's the difficulty he's having because  
10 there's no other argument for him to make. He can't argue to  
11 me right now that you didn't do it because the jurors found  
12 that you did.

13                   So, it's like we're past that point. We're past  
14 that point to some degree because you still have appellate  
15 rights. You can still appeal the verdict. You can still  
16 appeal the trial. You can argue that your counsel was  
17 ineffective and ask the Court of Appeals to overturn the  
18 conviction. You still have those options.

19                   But I guess Mr. Hanlon feels that he's now in this  
20 odd situation of being unable to argue concurrent sentencing,  
21 which means ultimately you get a little bit less as far as  
22 time is concerned than consecutive sentencing.

23                   A few things I want to point out to you,  
24 Mr. Mitchell. I understood during the trial that your  
25 position has always been that you didn't commit this crime,  
26 and you've been steadfast on that.

27                   As a lawyer making an argument to the jury, I have  
28 to tell you, I think the best way to address your defense is

1 to, number one, tell the jurors that you didn't do it, and  
2 then tell the jurors, if they disagree with that, if they --  
3 if they don't believe you, then they should consider not  
4 finding you guilty of first degree murder under this other  
5 theory. Sort of the best in my -- in my personal view, you  
6 know, maybe you'll disagree, but sort of the best argument I  
7 think someone could make is find him not guilty because he  
8 didn't do it. But if you don't buy that story, buy this one,  
9 so that he doesn't have to go to prison for the rest of his  
10 life. That's sort of what your attorney did for you in  
11 closing arguments. And we're going to disagree on this  
12 statement, but I think it was sort of a brilliant argument  
13 because it gave jurors two reasons not to find you guilty of  
14 first degree murder.

15 THE DEFENDANT: I disagree.

16 THE COURT: I understand. So, it's clear that you  
17 disagree with that. It's clear that you disagree with the  
18 services you've been provided by Mr. Hanlon. I told you  
19 before that -- well, maybe you just heard me say I -- I  
20 thought all of the attorneys in the case were excellent, I  
21 really did, both sides, your attorney included.

22 In any event, it seems to me that you're,  
23 understandably so, very disappointed in the verdict, and I do  
24 think that you have options regarding that verdict. You can  
25 appeal it. And I think that's really what you're going to  
26 have to do. I think what I'm -- I'm going to deny your  
27 motion. We're going to proceed. I'd like to give you a few  
28 minutes to talk to Mr. Hanlon, if you're willing, to discuss

1 how he can best assist you in the sentencing hearing. If you  
2 refuse to discuss that with him, then I guess you --

3 THE DEFENDANT: I'm already suing him for  
4 malpractice, Your Honor. I have nothing to discuss with my  
5 lawyer.

6 THE COURT: Okay. So, then do you wish to just make  
7 your own statement at the sentencing hearing, without --  
8 without discussing that with Mr. Hanlon?

9 THE DEFENDANT: If you're going to put me without  
10 counsel for sentencing --

11 THE COURT: Sorry, I can't hear you.

12 THE DEFENDANT: If you're going appoint me with no  
13 counsel for sentencing, then you're going to take away my  
14 counsel.

15 THE COURT: No, there's a very good attorney sitting  
16 right next to you who's --

17 THE DEFENDANT: He's pathetic, Your Honor.

18 THE COURT: Okay.

19 THE DEFENDANT: I'll -- I'll say that.

20 THE COURT: Okay. All right. Well, that's the  
21 ruling I am going to proceed. At the conclusion of the  
22 prosecution's case, Mr. Mitchell, I'll ask you again if you  
23 want a few minutes to think about if you want to say anything  
24 or if you want to talk to Mr. Hanlon, I'll give you just a few  
25 minutes to sort of think about that before I give your side an  
26 option to -- an opportunity to speak if you want.

27 THE DEFENDANT: No, thanks, Your Honor.

28 THE COURT: Okay. So, if we can open up the

1 courtroom.

2 Madam Clerk, if you'll, please, get Mr. Cacciatore  
3 and Mr. Kousharian.

4 (Whereupon, at 9:43 a.m., the in-camera  
5 hearing was concluded.)

6 ---oOo---

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28