

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, DIVISION ONE (VOL. 2)

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COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

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THE PEOPLE OF THE STATE
OF CALIFORNIA,

PLAINTIFF,

VS.

JAMES MITCHELL,

DEFENDANT.

No. SC165475A

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON APPEAL

VOLUME 9

September 1, 2010

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APPEAL FROM THE JUDGEMENT OF THE SUPERIOR COURT
COUNTY OF MARIN

HONORABLE PAUL HAAKENSEN, JUDGE PRESIDING

APPEARANCES:

FOR THE PEOPLE:

CHARLES CACCIATORE,
DEPUTY DISTRICT ATTORNEY

FOR THE DEFENDANT:

DOUGLAS HORNGRAD,
ATTORNEY AT LAW

SARA RIEF,
ATTORNEY AT LAW

Reported by: Aaron D. Ellington, CSR #13449

COPY

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

2 ---o0o---

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 Cacciatore 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 -- not withstanding
17 whatever Mr. Cacciatore 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 Cacciatore'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. Cacciatore, 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 ---o0o---

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

6 ---o0o---

7 THE COURT: I'll recall the James Mitchell
8 case. Is Ms. Copenhagen 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 ---o0o---

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1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 MARIN COUNTY JUDICIAL DISTRICT

3 HON. KELLY VIEIRA SIMMONS, JUDGE

DEPARTMENT G

4 --o0o--

5 THE PEOPLE OF THE STATE OF)

6 CALIFORNIA,)

7 Plaintiff,)

8 vs.) No. SC165475A

9 JAMES RAPHAEL WHITTY MITCHELL,)

10 Defendant.)

11 _____)

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13
14 REPORTER'S TRANSCRIPT OF PROCEEDINGS15 RE SUBSTITUTION OF ATTORNEY

16 Wednesday, September 1, 2010

17 VOLUME 10, PAGES 165 THROUGH 182, INCLUSIVE18
19 APPEARANCES:

20 For the People:

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By: CHARLES CACCIATORE
Deputy District Attorney

22 For the Defendant:

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28 Reported by: CHRISTINA GILSON, CSR NO. 9824

1 WEDNESDAY, SEPTEMBER 1, 2010

9:00 O'CLOCK A.M.

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3 --oOo--
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 MR. CACCIATORE: Charles Cacciatore for the
9 People.

10 THE COURT: Good morning.

11 MR. CACCIATORE: Leon Kousharian for the District
12 Attorney's Office.

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

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

23 MR. CACCIATORE: You mean the 995.

24 THE COURT: I mean the 995, pardon me. That's
25 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. Cacciatore 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. Cacciatore, 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 the 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 explain 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 - - -


COPY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

---oOo---

HON. KELLY VIEIRA SIMMONS, JUDGE, PRESIDING DEPARTMENT G

THE PEOPLE OF THE STATE OF)
 CALIFORNIA,)
 PLAINTIFF,)
 VS.)
 JAMES RAPHAEL WHITTY MITCHELL,)
 DEFENDANT.)

CASE NO.
 SC 165475A

REPORTER'S TRANSCRIPT OF PROCEEDINGS

IN CAMERA MOTION

THURSDAY, JANUARY 20, 2011

PAGES 342 - 345

APPEARANCES:

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

FOR THE DEFENDANT:

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

FOR THE CHILD:

KELLY COPENHAVER
 ATTORNEY-AT-LAW
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 MILL VALLEY, CA. 94941

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.)
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1 TUESDAY, MAY 10, 2011

9:26 O'CLOCK A.M.

2 ----oOo----

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. Cacciatore, 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

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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COPY

PEOPLE OF THE STATE OF CALIFORNIA,)	Court of Appeals
)	Case No. _____
Plaintiff and Respondent,)	
)	
vs.)	Marin County
)	Superior Court
JAMES RAPHAEL WHITTY MITCHELL,)	Case No. SC165475A
)	
Defendant and Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF MARIN COUNTY
HONORABLE KELLY VIEIRA SIMMONS, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

IN CAMERA HEARING

MAY 25, 2011

**** SEALED BY ORDER OF THE COURT ****

Reported by:
SUSAN L. FITZSIMMONS
CSR No. 4369

1 WEDNESDAY, MAY 25, 2011

4:09 O'CLOCK P.M.

2 ---oOo---

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
26 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, right?

17 THE COURT: Yes, see you on the 10th, in the
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 ---oOo---

25

26

27

28

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF MARIN

3 ---oOo---

4 HON. KELLY V. SIMMONS, JUDGE

DEPARTMENT G

5
6 THE PEOPLE OF THE STATE OF CALIFORNIA,]

7 Plaintiff,]

8 versus]

No. SC165457A

9 JAMES RAPHAEL WHITTY MITCHELL,]

10 Defendant.]

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12
13
14
15 REPORTER'S TRANSCRIPT OF PROCEEDINGS

16 FRIDAY, JUNE 10, 2011

17 MONDAY, JUNE 13, 2011

TUESDAY, JUNE 14, 2011

18 WEDNESDAY, JUNE 15, 2011

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

20 FOR THE PEOPLE:

HON. EDWARD S. BERBERIAN

DISTRICT ATTORNEY

21 San Rafael, California

By: CHARLES CACCIATORE

22 Deputy District Attorney

And: LEON KOUSHARIAN

23 Deputy District Attorney

24
25 FOR THE DEFENDANT:

STUART HANLON

SARA RIEF

26 STUART HANLON LAW

179 - 11th Street, 2nd Floor

27 San Francisco, California

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

1 FRIDAY, JUNE 10, 2011

1:30 O'CLOCK P.M.

2 ---oOo---

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. Cacciatore, 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 Faretta waivers --

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. Cacciatore, 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. Cacciatore, 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. Cacciatore
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.)

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1 MONDAY, JUNE 13, 2011

2:35 O'CLOCK P.M.

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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. Cacciatore'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. Cacciatore, 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 prejudgment 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. Cacciatore, 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 ////

2 (Whereupon, a recess was taken from 2:57 p.m.
3 to 3:09 p.m.)

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.

21 THE COURT: Okay. That's the reason I believe this
22 discussion needs to be in camera is because it has to do with
23 client discussion.

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 ---oOo---

COPY

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5 THE PEOPLE OF THE STATE OF CALIFORNIA,]

6 Plaintiff and Respondent,]

7 versus]

8 JAMES RAPHAEL WHITTY MITCHELL,]

9 Defendant and Appellant.]

Court of Appeal
Number _____

Marin County Superior
Court No. SC165475A

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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

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

1 MONDAY, JUNE 13, 2011

3:12 O'CLOCK P.M.

2 ---oOo---

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. Horngrad. 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. Cacciatore?

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. Cacciatore?

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 ---oOo---

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 included? 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 as 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. Cacciatore 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. Cacciatore, 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.

1 Mr. Cacciatore did to you what he did to Danielle
2 Keller's friend Erica who testified. At the end of her
3 testimony he says, "I just want to make sure we're talking
4 about the same person." Of course, we know we're talking
5 about the same person. He said, "Here's a picture," he puts
6 up Danielle Keller's picture there. So, Erica starts crying
7 because she misses her friend. Was that a mistake? Did he
8 really wonder if Erica didn't know which Danielle Keller we
9 were talking about, or did he want to affect you emotionally?
10 I mean, his opening remarks today, they weren't evidence, they
11 were sound bytes. Mr. Mitchell is a man of violence. He
12 talks about Nazis and Fascists. He's above the law. He has
13 frightening voice mails.

14 If you look at the evidence, would it be any better
15 if I said Mr. Mitchell was a Marine who went for his country
16 to Chile, that he was a businessman, that he's a student,
17 would that affect what we're doing here? No. Would -- to say
18 the voice mails that Mr. Mitchell left are frightening, you'll
19 have to decide that. You heard them, you'll hear 'em again,
20 I'm not going to play them for you again. You've heard 'em.
21 They were pathetic. They were sad. They were "I miss you,"
22 they were, "I fucked up, I wish I hadn't done it, I want you
23 back." They weren't frightening. But that's an adjective
24 that lawyers use to prey on your emotion. I don't think I've
25 done that in this trial, and I'm going to try not to do it
26 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. Cacciatore 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. Cacciatore 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. Cacciatore 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. Cacciatore 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. Cacciatore 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. Cacciatore 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. Cacciatore 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. Cacciatore'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. Cacciatore 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. Cacciatore 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. Cacciatore 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. Cacciatore. 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. Cacciatore 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. Cacciatore 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. Cacciatore, 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. Cacciatore 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. Cacciatore, 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. Cacciatore said yesterday, that she would never invite him
23 over.

24 June -- June 26th was the line in the sand according
25 to Mr. Cacciatore. 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. Cacciatore -- 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. Cacciatore
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. Cacciatore, 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. Cacciatore 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. Cacciatore
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. Cacciatore, 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. Cacciatore, 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. Cacciatore 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. Cacciatore 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. Cacciatore 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. Cacciatore, 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. Cacciatore 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. Cacciatore
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. Cacciatore 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. Cacciatore 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. Cacciatore 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 sideways 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. Cacciatore'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. Cacciatore 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. Cacciatore 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. Cacciatore 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. Cacciatore?

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. Cacciatore, 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. Cacciatore 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. Cacciatore 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. Cacciatore.

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. Cacciatore 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. Cacciatore 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. Cacciatore, 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. Cacciatore 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. Cacciatore'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 to 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?

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

---oOo---

COPY

THE PEOPLE OF THE STATE OF CALIFORNIA,]
Plaintiff and Respondent,]
versus]
JAMES RAPHAEL WHITTY MITCHELL,]
Defendant and Appellant.]

Court of Appeal
Number _____

Marin County Superior
Court No. SC165475A

APPEAL FROM THE SUPERIOR COURT OF MARIN COUNTY

HONORABLE KELLY V. SIMMONS, JUDGE, PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

IN CAMERA HEARING

AUGUST 16, 2011

REPORTED BY: SUSAN J. KLOTZ, CSR #8300

1 TUESDAY, AUGUST 16, 2011

9:20 O'CLOCK A.M.

2 ---oOo---

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
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
26 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. Cacciatore.

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.)

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