No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JAMES R.W.MITCHELL—PETITIONER

VS.

RAYMOND MADDEN, Warden of Richard J. Donovan Correctional Facility, an individual —RESPONDENT

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES R. W. MITCHELL, Petitioner-Appellant, v. CSP CORCORAN; DAVE DAVEY, Warden, Respondents-Appellees.	No. 16-17057 D.C. No. 3:15-cv-04919-VC MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Vince Chhabria, District Judge, Presiding

Argued and Submitted December 7, 2021
San Francisco, California

Before: WARDLAW, BRESS, and BUMATAY, Circuit Judges.

James Mitchell, a California state prisoner, appeals the district court's denial of his habeas petition under 28 U.S.C. § 2254. We review a district court's denial of a § 2254 petition de novo. *Carter v. Davis*, 946 F.3d 489, 501 (9th Cir. 2019). Mitchell's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which bars relief unless the state court's decision "was contrary

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). Here, the California Court of Appeal's decision on direct appeal addressed Mitchell's claims and is the operative decision for AEDPA purposes. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1191–92 (2018). We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

1. The state court reasonably concluded that Mitchell was not improperly denied the right of self-representation under *Faretta v. California*, 422 U.S. 806 (1975). A *Faretta* request must be "unequivocal, timely, and not for purposes of delay." *Stenson v. Lambert*, 504 F.3d 873, 882 (9th Cir. 2007). In *Faretta*, the Supreme Court held that a request made "weeks before trial" and "[w]ell before the date of trial" was timely. 422 U.S. at 807, 835. But because *Faretta* "does not define when such a request would become untimely," we have held that "other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request weeks before trial is timely." *Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005) (quotations omitted).

It therefore did not contradict clearly established federal law for the state court to conclude that Mitchell's request to represent himself was untimely when Mitchell made the request only several days before trial was to begin. *See id.* ("*Faretta* clearly established some timing element, but we still do not know the precise contours of

that element. At most, we know that *Faretta* requests made 'weeks before trial' are timely."). The state court could also reasonably conclude that Mitchell's request to represent himself would be unduly prejudicial and disruptive to the trial considering that Mitchell also requested four additional weeks for trial preparation in a case that involved lengthy past continuances, where the trial court had already convened approximately 1,000 jurors, and where elderly witnesses were set to testify. *See United States v. Flewitt*, 874 F.2d 669, 679 (9th Cir. 1989) (Defendants may not "attempt[] to delay their trial on the merits by asserting their right to proceed pro se in an untimely manner . . . .").

2. We reject Mitchell's contention that his trial counsel was constitutionally ineffective at sentencing. To establish ineffective assistance of counsel, Mitchell must demonstrate both deficient performance and prejudice under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, Mitchell must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693). In addition, under AEDPA, "it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, [Mitchell] must show that the

[court] applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 699 (2002) (citation omitted).

Here, assuming Mitchell's counsel acted deficiently, Mitchell has not demonstrated prejudice under AEDPA's deferential standard of review. While Mitchell argues that his counsel's failure to make a statement at sentencing means that prejudice must be presumed under *United States v. Cronic*, 466 U.S. 648 (1984), no Supreme Court decision clearly establishes that an attorney's decision not to make a statement at sentencing is tantamount to a total denial of counsel. *Woods v. Donald*, 575 U.S. 312, 318 (2015) (per curiam) (noting that the "precise contours" of *Cronic* are unclear). Therefore, the state court reasonably did not presume prejudice.

And Mitchell cannot otherwise show prejudice. The trial court had limited sentencing discretion, especially on the murder conviction. As to the kidnapping count, the California Court of Appeal reasonably explained that "[t]he reasons for imposing the . . . consecutive sentences were well articulated in the probation report and would have been difficult to refute." The facts also show that Mitchell's kidnapping of his child included a lengthy series of events following the murder involving a different victim, justifying a consecutive sentence under Rule 4.425 of the California Rules of Court. It was therefore not objectively unreasonable for the state court to conclude that any statement by Mitchell's counsel at sentencing was

unlikely to have changed the result.[1]

AFFIRMED.

[1] We deny Mitchell's request to expand the certificate of appealability to encompass two uncertified claims because Mitchell has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). We further deny as moot Mitchell's pro se motion entitled "Motion of Inquiry/Requesting Instructions."

FILED

FEB 8 2022

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES R. W. MITCHELL, Petitioner-Appellant, v. CSP CORCORAN; DAVE DAVEY, Warden, Respondents-Appellees.	No. 16-17057 D.C. No. 3:15-cv-04919-VC Northern District of California, San Francisco ORDER

Before: WARDLAW, BRESS, and BUMATAY, Circuit Judges.

The panel unanimously voted to deny the petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc (Dkt. No. 93) is **DENIED**.

People v. Mitchell

Court of Appeal of California, First Appellate District, Division One

July 28, 2014, Opinion Filed

A133094

Reporter
2014 Cal. App. Unpub. LEXIS 5375 *; 2014 WL 3707995

THE PEOPLE, Plaintiff and Respondent, v. ***JAMES RAPHAEL WHITTY MITCHELL***, Defendant and Appellant.

Subsequent History: Related proceeding at *Mitchell v. Hanlon, 2014 Cal. App. Unpub. LEXIS 5491 (Cal. App. 1st Dist., July 31, 2014)*

Review denied by *People v. Mitchell, 2014 Cal. LEXIS 9693 (Cal., Oct. 15, 2014)*

Prior History: [*1] Superior Court of Marin County, No. SC165475A.

Core Terms

sentencing, withdraw, disruption, bat, heat, passion, ineffective, appointed, murder, breakdown, irreconcilable, incompetent, probation, psychological, restraining, jurors, kidnapping, attorney-client, baseball, blood, phone, innocence, shirt, mitigation, killed, psychiatrist, psychiatric, violence, talking, consecutive

Judges: Opinion by Becton, J.*, with Margulies, Acting P. J., and Dondero, J., concurring.

Opinion by: Becton, J.

Opinion

* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

BECTON, J.[*]—Defendant James Raphael Whitty Mitchell was convicted in a jury trial of first degree murder (*Pen. Code, § 187*), corporal injury on a cohabitant (*§ 273.5*),[1] kidnapping (*§ 207*), child abduction (*§ 278*), child endangerment (*§ 273a*), and stalking (*§ 646.9*). The jury found defendant personally used a deadly weapon in counts one and two (*§ 12022, subd. (b)(1)*), and personally inflicted great bodily injury with respect to count two (*§ 12022.7*). Additionally, there was an allegation that the homicide occurred with the special circumstance of kidnapping (*§ 190.2, subd. (a)(17)(B)*), which the jury found to be not true. Defendant was sentenced to imprisonment for 35 years to life.

The following issues are raised on appeal: (1) whether the trial court erred by refusing to allow defendant to discharge his retained attorneys on the eve of trial or permit them to withdraw; **[*2]** (2) whether defendant's retained attorneys provided ineffective assistance of counsel before trial or at sentencing; (3) whether the trial court erred by denying defendant's motion to appoint new counsel for purposes of a new trial motion and sentencing; (4) whether the trial court erred by refusing to order a competency hearing under *section 1368*; (5) whether the trial court properly handled defendant's request for funds to retain a psychiatric expert; (6) whether the evidence was sufficient to sustain the conviction for child endangerment; and (7) whether the restraining order issued to protect members of D.K.'s family was authorized under *section 646.9*.

We conclude that defendant was not deprived of his *Sixth Amendment* right to counsel of his choice by any of the court's rulings; defendant's claims of an irreconcilable conflict amounted to a difference of opinion about defense strategies, which was a matter exclusively within counsel's control. The denial of all of the motions was within the trial court's discretion due to the lateness of the requests and the disruption of the proceedings that was sure to ensue. We also find no evidence of ineffective assistance of counsel before trial or at sentencing and, in any event, **[*3]** could not find any prejudice from counsel's handling of this difficult case. The trial court acted within its discretion in refusing to suspend criminal proceedings under *section 1368* and responded reasonably to counsel's request for funds for a psychiatric expert. There was more than sufficient evidence of child endangerment. Based on recent authority, however, the restraining order was not properly issued in favor of D.K.'s mother and child. We, therefore, reverse the restraining order, but otherwise affirm the judgment.

FACTUAL BACKGROUND

The Crimes

Defendant testified at trial, and much of the following background comes from his testimony. Defendant and D.K. met at a San Francisco club in August 2007. They moved in together about two weeks later. They had a child together (the minor).

Defendant admitted at trial that he and D.K. got into fights when one or both was drinking or taking drugs, with defendant's preferred drugs being marijuana and methamphetamine.

[*] Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

[1] Undesignated statutory references are to the Penal Code.

Although he used methamphetamine a lot when he was younger, he claimed he had used it only two or three times since 2007.

Defendant admitted he committed several acts of domestic violence against D.K. before the crimes alleged in this case. **[*4]** First, in 2008, when D.K. was pregnant, defendant slapped her during an argument in her apartment in San Francisco because she would not give him the car keys. Defendant was arrested, pled guilty to a domestic violence charge, and was placed on probation. Second, as they argued in the car while moving possessions from his place to hers, defendant backhanded D.K. Third, when defendant wanted to leave the apartment during an argument, he pushed D.K. out of the way. D.K.'s friend Erica was present on that occasion. Fourth, defendant took D.K. and her sister out to dinner in San Francisco. As he was driving them home afterwards, he and D.K. had a fight about trying to find drugs for the evening. Defendant slapped D.K. Finally, he hit D.K. in the face and gave her a bloody nose while she was on the phone with his cousin, starting to tell him that defendant was using drugs. She was holding the minor when he hit her.

Defendant and D.K. reunited after the incidents of violence, sometimes at the initiative of D.K., despite stay-away orders. In March 2009, however, defendant was arrested for a probation violation based on D.K.'s allegation that he had violated the San Francisco restraining order. **[*5]** D.K.'s testimony from that proceeding was read into the record. She claimed defendant owned a gun in November 2007 and had pointed it at her before, and now he told her he could easily get a gun within two hours. Defendant was arrested, but released after spending three or four days in jail, and his probation was modified.

After that probation violation, defendant went to Canada and stayed there in May and June. During that time, he spoke with D.K. on the phone at least once a day.

In June 2009, after he returned from Canada, defendant began taking methamphetamine again. D.K. caught him taking methamphetamine and packed her bags and left. D.K. and the minor moved in with D.K.'s mother in Novato.

On June 26, 2009, defendant went to D.K.'s apartment (he testified it was at her invitation) to see her and the minor. When he arrived, D.K. and her mother did not seem to want him there. Her mother called 911. Defendant was confused, but left when asked. After a police officer responded, a call came in to D.K.'s phone from defendant. The officer took the call and asked defendant to turn himself in. Defendant said he would "rather go home in a body bag" and threatened to kill the officer.

D.K. **[*6]** had also obtained a temporary restraining order against defendant from the Family Court in Marin County, in late March 2009. The temporary order was scheduled to be made permanent at a hearing on July 7, 2009. Neither defendant nor his attorney appeared for the hearing, and a copy of the order was mailed to him on July 10, 2009. Defendant denied having received that order.

Phone records showed the many phone calls defendant had made to D.K.'s phone in the weeks preceding her death, including 92 calls between June 16, 2009 and June 25, 2009, and 40 calls on June 26 alone. He twice called D.K.'s best friend, Erica, once on July 5 (when he left a message asking her to intercede on his behalf with D.K.) and again on July 11 (the day before the murder), when she accepted his call directly. He admitted he had "fucked up," but

would do anything necessary to get back together with D.K. and the minor. Defendant said he missed the minor, but was not going to "do anything stupid or crazy." He said, "I don't know what to do anymore," and if D.K. just told him she was in love with someone else, "that'd be like a lot easier than just messin' around with my emotions all the time." Defendant called **[*7]** D.K. 78 times between June 26 and July 12, 2009, but D.K. never answered until July 12.

Vasiliki (Bessie) and Nicholas Tzafopoulos (Nick), who was 80 at the time of trial, lived in the downstairs unit of a duplex in Novato, while D.K. and the minor lived with D.K.'s mother in the upstairs unit. Shortly before 7:00 p.m. on July 12, 2009, Bessie heard a scream and thought D.K. may have fallen down the stairs with her child. Bessie looked out of her living room window, but did not see anything.

About the same time, Nick heard a thumping sound and went outside to investigate. In the side yard, from a distance of about 15 feet, he saw a man repeatedly hitting D.K. on the head with a baseball bat. Afraid for his personal safety, Nick stepped back into the apartment and told Bessie to call the police "because he's here." Bessie called 911 and told the dispatcher it was the child's father who was beating D.K. Nick continued to hear the thumping noise as he stood in the house. Nick was screaming at the top of his lungs and said the man was using a bat.

Bessie then saw a white man run past the window with a screaming child under his left arm. The man had a shaved head and wore a black T-shirt and **[*8]** jeans. Nick also saw a man wearing dark clothes run away with a child, down the dead-end court into a car. Two other neighbors also saw a man running away carrying a screaming child. The witnesses who were able to describe the man said he was white, bald or having a shaved head, about six feet tall, and "built up" or "heavyset," which matched defendant's description.

The descriptions of the clothing worn by the man were not consistent, however, and there were weaknesses in the identification. One neighbor thought the man carrying the child was wearing a big, white T-shirt. Nick picked the wrong man at a live lineup. The neighbor who said the assailant was wearing a white T-shirt could not identify anyone in a photo lineup that night, but he did identify defendant with "95 percent" certainty at a live lineup a week later. The neighbors testified to seeing only one man involved in the altercation and kidnapping. Nick testified the man he saw hitting D.K. was the same man who ran off with the child.

When police arrived they found D.K. on the side of the residence, lying on her side with multiple fractures to the back of her head and a large amount of blood pooling around her head. The officer **[*9]** checked for a pulse and breathing, but found nothing. D.K. died on the spot from blunt force trauma. D.K.'s keys were found in her left hand. A black baseball bat lay about two feet from her leg. Later examination would show the bat had defendant's left index fingerprint on it near the grip. Defendant is left handed.

John Morgan (Morgan), a close cousin of defendant, testified that he got a message from D.K.'s mother that evening saying defendant had killed D.K. and taken the minor. Morgan called defendant and could hear the minor in the background screaming. Morgan asked defendant if he knew D.K. was dead, and defendant said he did. Both men were crying. Morgan tried to get defendant to take the minor someplace safe. Defendant said he was going to

Mexico, and authorities "would have to pry [the minor] out of his dead, dying arms." Defendant did not deny or admit killing D.K. Morgan testified on cross-examination that he had never seen defendant with a baseball bat and had never seen a baseball bat at defendant's house, even though he sometimes stayed in a room there and had helped defendant move several times. He did not recognize the bat that killed D.K.

Defendant's brother, Justin **[*10]** Mitchell (Justin), also received word that D.K. was dead that evening and called defendant's cell phone. It sounded like defendant was driving, and Justin heard the minor in the background. Defendant was teary and distraught. He said he was taking the minor to Mexico. Defendant talked about how much he loved the minor and said he wanted to see her grow up and did not want to be apart from her. Defendant also mentioned he might take the minor to his own mother. Defendant then said he had to go and hung up. He neither admitted nor denied killing D.K. Justin, too, had never seen defendant with a baseball bat and had not known him to play baseball or softball as an adult.

Novato police called AT&T to track defendant's cell phone and found he was heading east on Interstate 80. They tracked him as far as Auburn, east of Sacramento. The car stopped in a residential location in Citrus Heights. Citrus Heights Police were notified, and a perimeter was set up. When officers approached the car they found the minor alone, sleeping in the front seat. The minor was unharmed, but she had a dried red substance on her cheek and shoe that proved to be D.K.'s blood.

Defendant's passport was found in the **[*11]** center console of the car, and a temporary restraining order dated March 20, 2009 was found in the trunk. Defendant was located walking on a street several blocks from the car. He did not resist arrest. He was wearing a red and navy blue striped shirt and jeans.

Aside from the above testimony, there was physical evidence that the front of defendant's jeans had D.K.'s blood spatter on them, and the pattern was consistent with the victim having received blows to the head with the bat while she was on the ground. The fine blood spatter suggested defendant was only a few feet from the source of the blood, probably less than five feet away when D.K. was being bludgeoned with the bat. The blood was all on the front of his pants; no blood spatter appeared on the back of them or on the shirt defendant was wearing when he was arrested.

The prosecution had the bat tested for trace DNA (i.e., not from blood). The primary contributor was D.K., but defendant could not be excluded as a low-level trace DNA contributor, nor could the minor. If defendant was a low-level contributor, then there was another low-level contributor of trace DNA on the bat, since the DNA sample included an allele foreign to **[*12]** both D.K. and defendant.

Phone records showed that defendant called D.K. 19 times on July 12, but made no calls to her after 6:42 p.m.

The Defense

Defendant testified on his own behalf, raising a defense of mistaken identity. He claimed he did not kill D.K., but tried to raise a suspicion that two other unidentified men may have. He testified that on July 12, 2009, D.K. invited him over to her house. He left his home in Pittsburg sometime after 5:00 p.m. and drove to D.K.'s

apartment. He was wearing a red and blue striped polo shirt and jeans. Defendant parked at the base of the court and walked toward the duplex.

As he walked through the front gate, he heard D.K. yell, "help." He jogged around the corner of the duplex and immediately became "engaged" with a man in a white shirt. The man had a "buzzed head" and "very light sky blue" eyes and bad breath. The two began pushing each other. As the two fought, out of the corner of his eye defendant saw a man in a black T-shirt running past him. As he struggled with the man in the white shirt, he was hit in the back with a baseball bat. He turned around and saw the guy in the black T-shirt and struggled with him. The man was a little taller **[*13]** than defendant, well built, with hairy arms and gray or brown eyes. Defendant tried to take the bat away from the man, and then re-engaged with the man in the white shirt. The man in the white shirt then knocked defendant down. He immediately hopped back up and then ran down the cul-de-sac because he heard the minor screaming.

Defendant chased the man in the black T-shirt, who had the minor. Defendant caught up to the man and faced him. He told the man to give him the minor, and then batted him on the cheek and kicked him in the shin. The man let defendant grab the minor and then ran away.

As defendant started to head back to D.K.'s apartment, he heard someone say, "call 9-1-1." Defendant then remembered he had a restraining order and decided to leave before the police arrived.

Defendant drove north on Highway 101. He called his cousins. He planned to go to his cousin's house to wait for D.K. to call him. He did not call D.K. because he did not want to call her while the police were there. Then his mother called and told him D.K. was dead, and D.K.'s mother was saying that defendant had killed her. Defendant told his mother he could not talk any longer because he had to talk to his lawyer **[*14]** right away.

By chance, he ran into his attorney, Terrence Hallinan, at a gas station in Auburn that night. He had run out of gas, and he left the minor in the car in order to separate himself from her because he was afraid of what the police might do if they caught up to his car.

Defendant testified he did not see anyone hit D.K. with a baseball bat, did not know she was dead when he left with the minor, and did not even see D.K. at all that day. He could not explain how the blood spatter got on his jeans.

The defense presented testimony of the head coach of women's softball at San Francisco State College that the softball bat used in the assault was the kind that would be used by a high school or small college man or woman. D.K.'s mother, called by the defense, denied having seen the bat around her home. She testified that her other children played baseball or softball as children, but D.K. did not. She claimed the children's bats had been given away to Goodwill. D.K.'s mother was impeached by the county coroner, who testified that on the day after the murder, she told him the bat may have been in the laundry room of her apartment prior to the murder.

The defense also presented testimony **[*15]** that a urine test done after defendant's arrest showed he had no alcohol in his system and a small amount of methamphetamine tending to indicate defendant had used methamphetamine within the past five days, or if he was a chronic user, it may have been detectable for up to seven days.

Defense Counsel's Closing Argument

In closing argument to the jury, Stuart Hanlon, who represented defendant at trial, first suggested it was not unbelievable that D.K. had invited defendant over to her house since she had previously initiated contact with him despite restraining orders. This, he argued, was also consistent with the testimony of a domestic violence expert who acknowledged couples have trouble separating, even in abusive relationships. Having adduced evidence tending to show the baseball bat belonged to D.K., not defendant, Hanlon argued that defendant did not bring the bat with him and, thus, there was insufficient evidence of premeditation and deliberation. He also noted that defendant did not bring with him the things he would have wanted if he had been planning to kidnap the minor, such as diapers and bottles. Using this evidence, he argued against a first degree murder conviction based **[*16]** on either premeditation and deliberation or felony murder, as well as arguing against the kidnapping special circumstance.

Hanlon then argued the believability of defendant's testimony as best he could. He pointed out weaknesses in the witness identifications, and reminded the jury that other witnesses had testified about both a man in a black T-shirt and a man in a white T-shirt, which was consistent with defendant's testimony about the two other men with whom he claimed he had a confrontation. Defendant, on the other hand, wore a blue and red striped shirt, and the prosecution never presented evidence that he changed his shirt after the crime.

Hanlon admitted defendant must have been near D.K. when she was beaten to death because of the blood spatter on his jeans. But he argued that defendant must have been "locked in" on the man in the white shirt, with whom he was fighting, so that he did not notice D.K. being murdered. He argued that defendant's fingerprint could have got on the bat when he struggled with the man in the black T-shirt over the bat.

Finally, near the end of his argument, Hanlon explained—if the jury did not believe defendant's version of the events—still, the crime **[*17]** most likely occurred in an "explosion of anger," and in the "heat of passion." He pointed out the coincidence of the date with defendant's father's death, which tended to suggest that some kind of psychological factors may have been at work. He argued that defendant's phone calls to D.K. had not been threatening, but rather sad and "pathetic" pleas to get back together with her. And he recited that Erica testified defendant did not sound angry and she believed he was sincere in wanting to change his ways when she talked to him on July 11. None of this pointed to a premeditated murder. Hanlon theorized that D.K. must have said something, such as telling defendant he could not see the minor, that made him snap, and the killing occurred in a fit of rage.

PROCEDURAL HISTORY

Continuances to Change Counsel

We now turn to the lengthy procedural history in this case. On December 4, 2009, the information was filed, and defendant appeared for arraignment with attorney Hallinan. The court tentatively set jury selection for May 27, 2010. On February 24, 2010, the parties appeared and Hallinan informed the court that

he had been fired by defendant.

On March 11, 2010, Hallinan appeared along with Douglas **[*18]** Horngrad, who announced his intention to substitute in as defendant's retained attorney. Horngrad said he had just been retained that week, and he would need a 60-day continuance because it was a "huge case." The trial court expressed concern about a substantial continuance.

The prosecution indicated it had no objection to a continuance for trial until September of 2010. The prosecutor stressed the People's right to a speedy trial, and pointed out that two of the witnesses were very elderly. The court allowed a substitution on Horngrad's assurance he could begin the trial on October 21, 2010.

On August 8, 2010, Horngrad requested another continuance of about four months based on problems with the processing of the DNA evidence. The court continued the trial to January 20, 2011 for jury selection.

On September 1, 2010, Horngrad appeared and moved to withdraw as counsel, telling the court that Hanlon and his associate, Sara Rief, would be substituting in. At a closed hearing, counsel explained that he and defendant had a disagreement about defense strategy, and "it was communicated to me both directly and indirectly that there are concerns regarding my physical safety that should compel **[*19]** me to adhere to [defendant's] strategies . . . rather than the strategies that I believe were legally sound."

The court expressed concern whether such problems might occur with "any defense attorney," making clear it did not want to have the next counsel come in and say there was a similar problem. Horngrad assured the court that Hanlon "is a terrific attorney" and "an extremely gifted lawyer . . . whose word is his bond." Horngrad said he had been very clear with Hanlon that the trial dates could not be moved, and Hanlon had agreed to them.

The judge reconvened in open court where Rief stated they "were ready and available for the dates that this Court has previously set." The court said it would allow defendant to change counsel, but only if new counsel were prepared to "take on the trial date." The judge stressed that the trial date had already been continued from October to January, and the court was "not inclined to start shifting lawyers again just to continue the trial date." Horngrad said his trial preparation in the case was very complete and he would give his files to Hanlon.

On December 16, 2010, both sides agreed to a two-week continuance because of issues with transportation **[*20]** of the bat to a defense laboratory. The trial was reset for February 3, 2011.

On January 20, 2011, defense counsel raised more issues with regard to DNA testing and sought a continuance of trial to mid-March. The court affirmed its belief that both sides were working diligently, but stressed that the case was nearing two years old and "I can't just ignore that." The court continued the trial date to June 17. Jurors would be summoned on May 9, juror questionnaires would be provided, and hardship requests would be discussed. A jury would be selected beginning June 14. Opening statements were to commence on June 17, with presentation of evidence to begin on June 21.

Defendant's Request to Remove Retained Attorneys and Substitute the Public Defender

On May 10, 2011, at the commencement of jury selection, defendant moved to relieve his attorneys and to have the case turned over to

the public defender due to his indigence. He complained that "trust issues" had arisen between him, Hanlon and Rief. He said his defense attorneys were just telling him what he wanted to hear, but were not being forthright with him. Defendant informed the court he was going to sue his attorneys and asked, "So, why **[*21]** am I going to . . . sit with counsel who I'm possibly going to sue?" Defendant did not question counsel's competence—especially after the court told him there were "no more competent lawyers than the ones you've had," and that "the reputation of . . . the lawyers you have now is just extraordinary." But he did question their honesty.

The court denied the motion due to the imminence of trial, the fact that jurors had already appeared for hardship excusals, witnesses had been subpoenaed, and granting the motion would cause an inevitable delay in and disruption of the trial. It then proceeded to convene groups of jurors and required them to fill out juror questionnaires. Over the course of the next month, the court and counsel adjudicated the numerous hardship and cause challenges.

Defense Counsel's Request for Funds for a Psychiatric Examination

At an ex parte hearing on May 25, 2011, which defendant did not attend, Hanlon requested $20,000 to $30,000 from the court for a forensic psychiatric examination of defendant. Hanlon told the court there was much evidence that defendant possibly had psychological problems. Hanlon confirmed defendant would testify he did not commit the murder, and **[*22]** said there was some evidence supporting that theory. But, he added, "[w]hether I argue that or not will be up to me." Hanlon suggested that, based on interviews with family members, defendant had "a history of . . . mental issues." And despite defendant's strong wishes to the contrary, "I have an obligation to explore as best I can all avenues of defense." We shall discuss the record of this colloquy in more detail in section V, below.

Defendant's Request to Represent Himself

On Friday, June 10, 2011, in open court while discussing juror issues, defendant said he wanted to represent himself, and there would be no disturbances or delays. Defendant explained: "It's really a personal problem, and I don't trust him. I don't like him. I don't want anything to do with them. They've been way too disruptive. Like if they're going to lie to me, I can only imagine that they're going to lie to a jury. This man wants to do that to a jury, I can only imagine the blowback and the effect that it's going to have on me as a defendant in this case. And like I said if we want to discuss it further, we could discuss it under seal. But other than that, it's my right. [¶] I've done the research. I can go [pro. per.] **[*23]** any time I wish or any time that I see. I have to say I'm very competent in the case. I know the information. The only thing I'd ask the Court to do is order present counsel I do have right now to turn over all documents, all—like all investigations, like, you know, all experts, like everything, all the trial books, everything that they have done thus far and then turn it over to me here in the jail. And our next court date is June 14th, right? [¶] . . . [¶] We're dark on Mondays. I'll be ready to go on Tuesday. If they turn everything over to me today or Saturday, I'll be ready to go on Tuesday." Defendant assured the court he was ready to proceed on the pending motions "right now." The court stated, "Well, it sounds as though you know what you're doing and that you want to make this decision."

In response to an inquiry from the court, Hanlon said: "My understanding of the law is Mr. Mitchell, if he's prepared to go on Tuesday, he has an absolute right to represent himself. For what it's worth, he's intelligent. He understands the facts of the case, which I've discussed at length with him. He understands the issues. He's been able to communicate with me about these matters. [¶] On **[*24]** that basis—I'm not commenting on what he said or why he wants to do this, but if I had any doubts about his competency, I would say. In terms of being able to understand the issues and the law, my discussion with him for the last period of time however long it's been since I've been his lawyer, he does have that ability, and he understands. He certainly understands the issues in the case, discussed the legal concepts with me at length. That—that's my only real comment."

The court continued the trial until Monday, and ordered Hanlon to produce the entire file to defendant over the weekend. The court concluded by assuring defendant that he had the right to represent himself.

On Monday, June 13, 2011, defendant acknowledged receipt of the files and still wanted to represent himself. Defendant then produced a list of requests to the court, including the need to procure counsel's "case law studies . . . from Westlaw," to confer with Hanlon's investigator, to have the court order the jail to allow him out of his cell for four or five hours a day, to receive a copy of the Evidence Code, and finally, he said he needed time to interview witnesses. Defendant said under current conditions, with **[*25]** only one to two hours a day out of his cell, he could be ready to proceed to trial "in four weeks, and this is like after we do voir dire . . . ." He indicated that if he could get out of the cell more, for four or five hours a day, he could be ready by June 28. The prosecution objected to the continuance.

The court reminded defendant he had earlier stated he would be able to go to trial without a continuance. In light of defendant's need for another continuance, the court noted its decision was "discretionary." It made a detailed ruling denying defendant's request, including that jury selection had already been underway for a month, in limine motions had been adjudicated, prior continuances had been granted to accommodate defendant's changes of counsel, and "most importantly," defendant would need "at least four weeks" to get ready to go to trial.

Retained Counsel's Request to Withdraw

Immediately after that ruling, Hanlon moved to withdraw as counsel. The court convened a closed hearing with Hanlon, Rief and defendant. Hanlon told the court defendant had threatened him and Rief, and they had concerns for their safety. Hanlon said he was afraid to sit at the counsel table with defendant **[*26]** because he might "get a pencil in [his] face." He also said he could no longer communicate with defendant and could not act competently as counsel because he no longer felt a sufficient commitment to his client. He said he had two letters he considered threatening, but he would not show them to the court based on attorney-client privilege.

The court noted this was a "discretionary" ruling and was "similar analysis" to the "[pro. per.] request." The judge looked at whether the withdrawal would "work an injustice in the handling of the case" or would "cause a delay," concluding that if counsel were to be relieved "it would cause a horrible injustice in the

handling of the case" and would "require an undue delay." The judge complimented Hanlon and Rief, saying they were "two of the most competent lawyers" to appear in her court, were always "thorough, . . . competent, . . . [and] ready to go," and had provided defendant with "excellent representation" so far.

Defendant denied any such threats were "imminent" or "dangerous." He said his letters to counsel were a product of his frustration and anger with being locked up "23 hours a day." He said he "like[d]" Hanlon and Rief and would not harm "people **[*27]** who he care[d] about."

Based on the timing and other factors it considered in denying the pro. per. request, the court also denied counsel's request to withdraw.

Counsel Expresses a Doubt as to Defendant's Competency

When the matter was reconvened in open court, Hanlon expressed doubt as to defendant's competence. The court declined to suspend criminal proceedings to hold a *section 1368* hearing based in part on the court's own discussions with defendant in the course of his *Faretta* motion and Hanlon's motion to withdraw, in part on Hanlon's contradictory statements about defendant's competency to represent himself, and based on the fact that Hanlon had represented defendant for nine months without expressing a doubt about his competency. The court noted that the expression of doubt came on the heels of the denial of Hanlon's motion to withdraw, and the "timing is suspicious." The next day Hanlon filed a declaration supplementing the factual basis for his doubt about defendant's competency, but the court again declined to initiate a competency hearing.

Opening statements were made on June 21, 2011. Evidence was taken from June 21 through July 6. The jury began deliberating on July 8 and returned its verdicts **[*28]** on the next court date, July 12.

Posttrial Proceedings

The court scheduled the sentencing hearing for August 16, 2011, taking into account Hanlon's scheduling conflicts that would prevent his availability from early September to October. On August 8, Hanlon filed "Defendant's Request to Relieve Present Counsel and Request for Appointment of New Counsel for Purposes of Sentencing and Motion for New Trial." In the motion, Hanlon stated that defendant wished to have new counsel appointed to pursue a new trial motion based on Hanlon's purported ineffective assistance at trial. Hanlon expressed his disagreement that he had rendered ineffective assistance. Hanlon also requested to withdraw for purposes of sentencing because of defendant's "lack of faith." The prosecution filed a written opposition.

At the commencement of the August 16 hearing, the trial court brought up the motion, and the parties agreed that a hearing out of the presence of the prosecutor was appropriate. At that hearing, the trial court asked defendant to explain why he believed Hanlon had been ineffective at trial. The reasons included most prominently Hanlon's raising a heat of passion defense in closing argument, which **[*29]** defendant believed was inconsistent with his testimony.

After hearing defendant's complaints, the trial court denied the motions, finding no evidence of ineffective assistance by Hanlon. In fact, the court believed Hanlon's representation had been

"excellent," and his handling of the inconsistent defenses was "sort of a brilliant argument."

Sentencing went forward on August 16, with defendant receiving a 35 to life prison sentence, consisting of a 25 to life sentence for the murder of D.K. with one consecutive year for the deadly weapon enhancement, the aggravated term of eight consecutive years for kidnapping, and one consecutive year for stalking. Sentences for the remaining crimes and enhancements were imposed, but stayed under *section 654*.

DISCUSSION

I. Issues Relating to Legal Representation at Trial

A. Motion to Discharge Retained Attorneys and Substitute in the Public Defender

When defendant made his first motion to discharge Hanlon and Rief and substitute in the public defender, jury selection was about to begin. Defendant explained his "trust issues" with counsel as follows: "I have letters written from them, like, you know, from their office saying like we're going to help you with this, **[*30]** and we're going to do whatever. And then I learn[ed] like two weeks before jury hardships that's not the case, that it's completely like, you know, it's like, you know, they're not going to do it whatsoever." Defendant said he wished he had learned "this" four months ago, instead of "now." Defendant concluded it "kind of raises an alarm in me—it alarms me what else are they not telling me and what else are they misleading me on."

In denying the substitution, the judge said, "Of course, I have to consider the defendant's request, which is that he have counsel of his choosing." Nevertheless, she noted that Hanlon and Rief were defendant's third set of attorneys, and they were "very competent, experienced, excellent lawyers." The court reminded defendant that the trial had been continued several times at his request, mostly to get new counsel ready. Further, the court again remarked that the case was two years old, motions in limine had been completed, the current date was the day set to hear juror hardships, and the court was only informed of defendant's request the previous day.

"We have 65 witnesses approximately under subpoena, 800 jurors have been summoned, a hundred of them for today, and **[*31]** they're upstairs. And I think that any further delay would result in a complete disruption of an orderly and just process. There's not another counsel here ready to go. The only way that Mr. Mitchell could have what he wants was if I discharged counsel, reset the case again, re-subpoenaed witnesses, re-summoned jurors, and then gave counsel additional time to prepare. And then if there's a discontent between that attorney and this defendant, I'm not sure where we would be. Seems that perhaps that's a common thread. In any event, it's the 11th hour. We've already proceeded with in limines, jurors are upstairs. I'm denying the request on balance pursuant to" *People v. Keshishian (2008) 162 Cal.App.4th 425, 75 Cal. Rptr. 3d 539* (*Keshishian*).

Both an indigent and a nonindigent criminal defendant have the right to discharge a retained attorney with or without cause. "A nonindigent defendant's right to discharge his retained counsel, however, is not absolute. The trial court, in its discretion, may deny such a motion

if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]. . . . [T]he 'fair opportunity' to secure counsel of choice **[*32]** provided by the *Sixth Amendment* 'is necessarily [limited by] . . . the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time."' The trial court, however, must exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' [Citation.]" (*People v. Ortiz (1990) 51 Cal.3d 975, 983-984, 275 Cal. Rptr. 191, 800 P.2d 547* (*Ortiz*).)

In the case of an untimely motion to discharge retained counsel, we apply the abuse of discretion standard on appeal. (See, e.g., *People v. Lara (2001) 86 Cal.App.4th 139, 153-155, 165-166, 103 Cal. Rptr. 2d 201*.) "A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Stewart (1985) 171 Cal.App.3d 59, 65, 215 Cal. Rptr. 716*.)

There is no question in the present case that denial of the May 10, 2011 motion was justified. In balancing defendant's request against the disruption of the trial process, the trial court was expressly guided by *Keshishian, supra, 162 Cal.App.4th 425*, which held: "Because the right **[*33]** to discharge retained counsel is broader than the right to discharge appointed counsel, a *Marsden*-type hearing[2] at which the court determines whether counsel is providing adequate representation or is tangled in irreconcilable differences with the defendant is '"[an] inappropriate vehicle in which to consider [the defendant's] complaints against his retained counsel."' [Citations.] Instead, under the applicable test for retained counsel, the court should 'balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution.' [Citation.]" (*Keshishian, supra, at p. 429*.) Indeed it has been recognized that a motion to substitute counsel may be denied as untimely, especially when made during jury selection. (*People v. Williamson (1985) 172 Cal.App.3d 737, 745, 218 Cal. Rptr. 550* [motion to substitute appointed counsel]; *People v. Molina (1977) 74 Cal.App.3d 544, 547-548, 141 Cal. Rptr. 533* [request for continuance to retain counsel in lieu of appointed counsel]; see also *People v. Turner (1992) 7 Cal.App.4th 913, 918-919, 9 Cal. Rptr. 2d 388* [denial of substitution on day of hearing on probation revocation where defendant represented by staff attorney at legal services clinic].)

More recently, in *People v. Maciel (2013) 57 Cal.4th 482, 160 Cal. Rptr. 3d 305, 304 P.3d 983* (*Maciel*), the Supreme Court encountered a multiple-defendant death penalty case in which the defendant, whose trial had been severed, sought to discharge retained counsel approximately six **[*34]** weeks before the case was called for trial. (*Id. at pp. 510-513*.) The trial court denied the motion and the Supreme Court affirmed: "We conclude that the trial court acted within its discretion in denying defendant's motion to discharge counsel. At the time the motion was made, the case had been

[2] *People v. Marsden (1970) 2 Cal.3d 118, 84 Cal. Rptr. 156, 465 P.2d 44*.

pending for two years. Trial was imminent and, in fact, began about six weeks later. Defendant had no substitute counsel in mind; rather, he requested that the court appoint counsel. New counsel would have had to study the records in each former codefendant's trial as well as in this case, resulting in significant delays. In evaluating timeliness, the trial court properly considered the long delay that would have resulted from changing counsel in this case." (*Id. at pp. 512-513*.)

Here, as in *Maciel*, the predictable disruption was great, as articulated by the trial court and quoted above. The case had already been pending for nearly two years. Jurors had been summoned and witnesses subpoenaed. Two important witnesses were elderly, the only eyewitness to the beating being 80 years old. It is undeniable that substituting in the public defender at that late date would have required a substantial delay. Denial of defendant's motion **[*35]** was directly tied to the delay and disruption that inevitably would have flowed from granting it. The court did not abuse its discretion. (See *People v. Turner, supra, 7 Cal.App.4th at pp. 915-916, 918-919* [court's denial of belated request to discharge counsel proper because the request was unduly disruptive to "witnesses and other participants"]; *People v. Lau (1986) 177 Cal.App.3d 473, 477-479, 223 Cal. Rptr. 48* [denial of substitution based on disagreement between counsel and client regarding defendant's guilt or innocence, though resulting in a loss of trust on the part of the client and anger on the part of the attorney, was justified by the lateness of the request].)

Defendant attempts to distinguish *Keshishian* because in that case the client had simply "lost confidence" in his attorneys. (*Keshishian, supra, 162 Cal.App.4th at p. 428*.) But we find defendant's complaint of "trust" issues to be very close on its facts. In *Keshishian*, as here, the defendant was charged with murder. As here, the defendant appeared with retained counsel on "the day the matter was called for trial." (*Id. at p. 427*.) Both cases had been pending for a long time: nearly two years in our case and two and a half years in *Keshishian*. (*Id. at p. 428*.) Previous continuances had been granted in both cases at the defense's request. (*Ibid*.) The Court of Appeal noted in *Keshishian* that "[a]n indefinite continuance **[*36]** would have been necessary, as [defendant] had neither identified nor retained new counsel." (*Id. at p. 429*.) True here also. And in both cases the courts held retained defense counsel in high regard, and both counsel appeared ready for trial. (Compare *Keshishian, supra, at p. 428* ["some of the best attorneys in all of Southern California"] with our case ["two of the most competent lawyers" to appear in her court].) "Witnesses whose appearances had already been scheduled would have been further inconvenienced by an indefinite delay." (*Id. at p. 429*.) So, too, here.

On these very similar facts *Keshishian* held: """The right to counsel cannot mean that a defendant may continually delay his day of judgment by discharging prior counsel,'" and the court is within its discretion to deny a last-minute motion for continuance to secure new counsel." (*Keshishian, supra, 162 Cal.App.4th at p. 429*.) Under *Maciel* and *Keshishian*, we find there was no abuse of discretion in denying the substitution motion.

Defendant insists, however, he had an actual conflict of interest with Hanlon because he had a potential lawsuit against him, which he claims *required* the court to allow him to replace Hanlon with new counsel, citing *U.S. v. Moore (9th Cir. 1998) 159 F.3d 1154, 1158-1160*

(*Moore*). *Moore* involved a federal prosecution for conspiracy to distribute cocaine **[*37]** and possession for distribution. (*Id. at p. 1155*.) Moore wanted to put on a defense of withdrawal from the conspiracy, but his counsel disagreed. (*Id. at p. 1156*.) However, *Moore* differed from our case in that Moore's attorney failed to communicate to Moore a plea bargain offer until it was too late to respond. (*Id. at p. 1158*.) Moore, in response, threatened to sue him and reacted so badly that his attorney felt physically threatened. (*Id. at p. 1159*.) Moore's counsel moved to withdraw at Moore's request. (*Ibid*.) The Ninth Circuit concluded that defendant and his attorney had "no actual conflict because Moore's threat to sue [his attorney] for ineffective assistance was not inconsistent with [the attorney's] goal of rendering effective assistance." (*Id. at p. 1158*.)

Thus, *Moore* is not favorable to defendant's position on conflict of interest: "Although a lawsuit between defendant and counsel can potentially create an actual conflict of interest, we do not find that Moore's threat actually resulted in a conflict in this case. . . . Moore's threat of a malpractice suit never went beyond the threat to file a claim against [his attorney]. Despite Moore's assurances that he had a valid claim for malpractice, finding an actual conflict from a mere threat would **[*38]** allow defendants to manufacture a conflict in any case. We decline to adopt such an unbounded rule. While Moore's threat is evidence of the breakdown of the attorney-client relationship, we agree with the district court that it was insufficient to create an actual conflict of interest." (*Moore, supra, 159 F.3d at p. 1158*.)

The *Moore* court went on to find an irreconcilable breakdown between Moore and counsel, noting it is only "if the relationship between lawyer and client completely collapses" that the courts must be concerned about violation of the *Sixth Amendment* right to counsel. Having found a complete breakdown in the relationship, the court did not require a showing of prejudice. "A defendant need not show prejudice when the breakdown of a relationship between attorney and client from irreconcilable differences results in the *complete denial* of counsel." (*Moore, supra, 159 F.3d at p. 1158*, italics added.) The factors considered by the court in assessing whether there was an irreconcilable conflict were: "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion." (*Id. at pp. 1158-1159*.)

The extent of the conflict was more serious in *Moore*, where the court found the defendant had valid grievances against counsel, including failure to **[*39]** timely inform him of plea negotiations and failure to prepare for trial. (*Moore, supra, 159 F.3d at p. 1159*.) Here, by contrast, we see no likelihood that the difficulties in the relationship resulted from Hanlon's negligence or lack of preparation. The underlying dispute was essentially one of tactics. Defense counsel were not refusing to put on a defense that defendant wanted to assert, but rather were considering putting on an additional and alternative "defense" of mitigated culpability. There was never any claim that Hanlon was unprepared for trial or had blown his client's chance to get a favorable plea bargain.

Moore's attempts to substitute counsel were also more timely than defendant's. Moore brought the problems to the court's attention four times before trial, nearly a month before the trial was scheduled to begin and six weeks before it actually began. He raised the issue at the first opportunity following his explosive meeting with counsel in which he learned that

the plea bargain was no longer available. (*Moore, supra, 159 F.3d at pp. 1158-1159*.) Even Moore's final attempt to obtain substitute counsel was made two weeks before trial and was deemed timely. (*Id. at p. 1161*.) We also note that Moore's case had been pending for a far shorter time than the present **[*40]** case, there was no mention in *Moore* of any previous attempts by the defendant to change counsel (and the timing of events suggests there had been none), and the opinion does not disclose whether as lengthy a trial was required.

Moore was also backed up by his counsel throughout the substitution motions in affirming there had been a breakdown (*Moore, supra, 159 F.3d at pp. 1156, 1158, 1161)*, whereas Hanlon did not move to withdraw or bring the purported threats to the court's attention until more than a month after defendant's May 10 motion, when jury selection had been underway for more than a month. The Ninth Circuit in *Moore* found no continuance would have been necessary had the motion been granted when the attorney-client discord first was brought to its attention. (*Id. at p. 1161*.) The same is not true here.

In *Moore*, as here, the court learned more as time progressed, and by two weeks or more before trial actually commenced, the court in *Moore* was aware the attorney felt physically threatened by the defendant. (*Id. at pp. 1159-1160*.) In *Moore*, the Ninth Circuit held the district court largely to blame for the way the facts trickled in, finding the district court's initial inquiries to have been "minimal." (*Id. at p. 1160*.) We do not find the same defect in the proceedings **[*41]** below.

In our case, defendant mentioned primarily "trust issues" in his May 10, 2011 motion. Defendant seems to argue on appeal that there had been a complete and irreconcilable breakdown of the attorney-client relationship even as of May 10, claiming that view is supported by Hanlon's request to withdraw on June 13. But at the time of defendant's May 10 motion, defense counsel did *not* represent to the judge there was any desire by the attorneys to withdraw. Rief, who appeared with defendant that day, was invited to speak, but did not voice any comment at all. She did not, as defendant seems to contend, inform the court there had been an irreconcilable breakdown in the attorney-client relationship, nor did she inform the court of any threats. (*People v. Sanchez (1995) 12 Cal.4th 1, 37, 47 Cal. Rptr. 2d 843, 906 P.2d 1129* ["In reviewing denial of motion to substitute attorneys, the court 'focuses on the ruling itself and the record on which it is made. It does not look to subsequent matters . . . .'"].)

Defendant also cites cases involving counsel with conflicting loyalties due to representation of other clients involved in some manner in the defendant's case. *Leversen v. Superior Court (1983) 34 Cal.3d 530, 533-535, 538-540, 194 Cal. Rptr. 448, 668 P.2d 755*, in which defense counsel discovered at trial that his firm had formerly represented a trial witness **[*42]** and cosuspect in different proceedings, held counsel's motion to withdraw was improperly denied. In *Uhl v. Municipal Court (1974) 37 Cal.App.3d 526, 112 Cal. Rptr. 478*, the superior court ordered the municipal court to allow a public defender to withdraw as counsel based on an asserted conflict of interest with another of the office's clients in a different proceeding, without requiring the attorney to provide further details. Because the claim of a potential conflict was within the realm of "informed speculation," and because it would have violated the public defender's ethical duties to represent conflicting interests, the order was upheld on appeal. (*Id. at pp. 529,*

532, 535-536.) We cannot equate defendant's dispute with Hanlon over strategy with an actual conflict resulting from dual representation of clients with adverse interests. (Cf. Glasser v. United States (1942) 315 U.S. 60, 69-70, 62 S. Ct. 457, 86 L. Ed. 680 [attorney hired by one defendant in conspiracy trial appointed to simultaneously represent codefendant who had inconsistent interests].)

In U.S. v. Adelzo-Gonzalez (9th Cir. 2001) 268 F.3d 772, an irreparable breakdown had occurred where appointed counsel argued vigorously against a defendant's substitution motion, called defendant a "liar," and according to the defendant, threatened to testify against him at trial and to "sink him for 105 years." (Id. at pp. 778-779.) The Ninth Circuit found the extent of **[*43]** the conflict "prevented the attorney from providing adequate representation." (Id. at p. 781.) No such open antagonism was displayed in the present case. The case is both nonbinding and distinguishable.

Only in the most extreme circumstances have the courts found a breakdown in communication sufficient to establish a Sixth Amendment violation. (See, e.g., Frazer v. U.S. (9th Cir. 1994) 18 F.3d 778, 780 [appointed attorney called his client a "'stupid nigger son of a bitch,'" and said he hoped defendant would "'get life,'" and said if defendant continued "'to insist on going to trial,'" counsel would prove to be "'very ineffective'"]; United States v. Williams (9th Cir. 1979) 594 F.2d 1258, 1260 [where attorney-client relationship had for some time been "stormy," with "quarrels, bad language, threats, and counter-threats," court erred in summarily denying substitution motion made a month before trial].) In U.S. v. Nguyen (9th Cir. 2001) 262 F.3d 998, 1004-1005, it was primarily the district court's failure to conduct an adequate inquiry that led to the reversal of the defendant's conviction on grounds that a substitution motion had been improperly denied.

Additional cases cited by defendant are not helpful to his position. People v. Abilez (2007) 41 Cal.4th 472, 488, 61 Cal. Rptr. 3d 526, 161 P.3d 58, involved a *Marsden* motion by a defendant charged with sodomizing and murdering his mother. He claimed his attorney (1) was "overly concerned with convincing **[*44]** defendant to accept a plea bargain"; (2) "discussed the case with his (counsel's) teenage son"; (3) "was disrespectful and sarcastic"; and (4) "had not discussed the defense witnesses with him." (Id. at pp. 485-486.) The Supreme Court found no error in the court's denial of the motion because the defendant did not claim any lack of preparation by defense counsel, and counsel explained the other accusations. (Id. at pp. 486-490.) Likewise, Manfredi & Levine v. Superior Court (1998) 66 Cal.App.4th 1128, 78 Cal. Rptr. 2d 494 (*Manfredi*), involved an attorney's motion to withdraw due to an ethical conflict, while he refused to divulge any details about the conflict. The Court of Appeal upheld the trial court's denial of the motion. (Id. at pp. 1135-1136; see also People v. Horton (1995) 11 Cal.4th 1068, 1105-1107, 47 Cal. Rptr. 2d 516, 906 P.2d 478 [denial of counsel's motion to withdraw upheld on appeal where client had filed malpractice action against counsel, but dismissed it during jury selection and court concluded the lawsuit had no merit].) These cases do not advance defendant's cause.

Based on the foregoing authorities, we conclude the trial court's ruling on the first motion to substitute counsel was not an abuse of discretion.

B. Defendant's June 10, 2011 Request to Dismiss Counsel and Represent Himself

Next, on June 10, 2011, after the court and counsel had gone through a month of hardship challenges, **[*45]** defense counsel announced that defendant wished to dismiss counsel and proceed in pro. per. (*Faretta v. California (1975) 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562* (*Faretta*).) As detailed above, defendant said he did not like or trust defense counsel and insisted he would be ready to begin trial on the next court date (Tuesday, June 14). Hanlon supported defendant's motion, stressing that he had thoroughly discussed the law and facts with defendant and had no doubt as to his competence.

The trial court agreed that, despite the timing of the request, defendant had the near-absolute right to represent himself, absent a request for a continuance. However, when defendant returned to court the next Monday, he told the court he would need a month to prepare. The court considered the continuance request, among other factors, and denied the motion.

A *Faretta* motion may be denied if it is untimely. (*People v. Lynch (2010) 50 Cal.4th 693, 721-722, 114 Cal. Rptr. 3d 63, 237 P.3d 416* (*Lynch*); *People v. Windham (1977) 19 Cal.3d 121, 127-128, 137 Cal. Rptr. 8, 560 P.2d 1187* (*Windham*).) A *Faretta* motion brought on the "eve of trial" is untimely. (*Lynch, supra, at pp. 722-723*.) In assessing an untimely motion for self-representation, the trial court considers factors such as "'the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, **[*46]** and the disruption or delay which might reasonably be expected to follow the granting of such a motion.'" (*Id. at p. 722, fn. 10*, quoting *Windham, supra, at p. 128*.)

All of those grounds argued in favor of denying the motion. Defense counsel were prepared to go to trial and were known to the court to be excellent attorneys. With regard to the length and stage of the proceedings, the trial court recited that defendant had delayed his request to go pro. per. until opening statements were about to begin, the parties had sorted out hardship and cause challenges for "approximately 1000" potential jurors, "90 percent" of the in limine motions had been ruled on "several weeks ago," the case was two years old, and several continuances had already been granted at defense request, in part to allow defendant to change lawyers. But clearly, the court's biggest concern was the four-week continuance that defendant would have needed to prepare. The court did not abuse its discretion in denying defendant's belated *Faretta* motion.

C. Defense Counsel's Request to Withdraw on June 13, 2011

Immediately after the denial of defendant's *Faretta* motion, defense counsel moved to withdraw. The trial court convened a hearing out of the presence of the prosecutor **[*47]** to discuss the issues. After Hanlon explained his fears to the court, defendant addressed the court at some length and denied that any threats to Hanlon and Rief were "imminent" or "dangerous," claiming he "really liked" Hanlon and Rief, and did not want to hurt them. He said, "I do get angry sometimes. But it's not to the level or to the gravity or to the effect of like me actually carrying anything out or following anything through because I would never do anything to Mr. Hanlon. I would never do anything to Mrs. Rief because I care about

them." He said the letters should be seen as coming from "an upset client who is locked up in jail for 23 hours a day and has . . . no intention of . . . ever really hurting the people who he cares about."

The trial court denied Hanlon's motion. It noted that defendant's last counsel, Horngrad, "was removed for the same reason [Mr. Hanlon and Ms. Rief] are commenting upon. And it makes me wonder, . . . a defendant cannot excuse lawyers forever by issuing a threat, otherwise those people will never have a lawyer. And it happened once before. It appears to be happening again. I don't know if it's—I certainly don't know if it's something that is purposefully **[*48]** occurring in an attempt to have new counsel." The court applied the same factors that entered into its decision to deny the *Faretta* request.

Defendant argues that—at any stage of the proceedings—if "the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result," the defendant must be given new counsel. (*People v. Smith (1993) 6 Cal.4th 684, 696, 25 Cal. Rptr. 2d 122, 863 P.2d 192* (*Smith*).) We do not disagree, but the trial court is not required to "'rubber stamp' counsel's request to withdraw." (*Aceves v. Superior Court (1996) 51 Cal.App.4th 584, 592, 59 Cal. Rptr. 2d 280* (*Aceves*).) Defendant insists that we must find there was an irreconcilable conflict between him and Hanlon and Rief by June 13, 2011, based on the attorneys' fear of defendant's threats. But the trial court impliedly found otherwise and we see no basis for overturning that finding. (Cf. *People v. Verdugo (2010) 50 Cal.4th 263, 310, 113 Cal. Rptr. 3d 803, 236 P.3d 1035* [threats allegedly made against counsel by defendant's father were found not to be "serious and credible" by trial court, and refusal to discharge retained counsel and appoint counsel upheld on appeal]; *In re Z.N. (2009) 181 Cal. App. 4th 282, 289, 294, 104 Cal. Rptr. 3d 247* [threatening phone calls from client did not require granting a belated *Marsden* motion].)

Defendant cites *Aceves, supra, 51 Cal.App.4th 584*, an opinion issued over a strong dissent. The appellate court in *Aceves* issued a writ of mandate requiring **[*49]** the superior court to vacate its denial of counsel's motion to withdraw where a deputy public defender told the court, the conflict "(1) was confined to [the defendant] and the office of the public defender, (2) did not involve threats to witnesses or third parties, (3) did not relate to other cases, and (4) had resulted in a complete breakdown in the attorney-client relationship: it was as such a classic conflict where duty of loyalty to the client is compromised by the attorney's own interests." (*Id. at p. 592*.) The attorney further represented as an officer of the court he could say no more about the conflict "without violating the [attorney-client] privilege or breaching ethical duties," and the trial court did not doubt the attorney's representations. (*Ibid*.) But *Aceves* relied in part on the fact that the deputy himself did not make the final call as to whether a conflict existed; rather, the issue was reviewed through superiors in the public defender's office. (*Id. at pp. 594-595*.) Moreover, the trial court in *Aceves* expressly stated it did not doubt counsel's representations. (*Id. at p. 592*.) And counsel's representations included the opinion that it was unlikely there would be a conflict should new counsel appear on **[*50]** the defendant's behalf. (*Id. at p. 589*.)

Our case is different. The court here never stated that it believed Hanlon's description of

the seriousness of the threats, and it did express its concern that the same type of conflict had arisen before and might arise again if withdrawal were allowed. The risk of a "perpetual cycle of eleventh hour motions to withdraw" was one ground upon which *Manfredi, supra, 66 Cal.App.4th at page 1136*, distinguished and refused to follow *Aceves, supra, 51 Cal.App.4th 584*.

By the conclusion of the in camera hearing, the court had acquired enough information from Hanlon and from defendant to assess for itself whether an irremediable breakdown had occurred. In fact, it was evidently defendant's own statements reassuring the court that he meant Hanlon and Rief no harm that swayed the court to believe no grounds for withdrawal existed. In light of the conflicting reports of the nature of the threats, the trial court was free to resolve the credibility question, and we defer to such findings. (See *Smith, supra, 6 Cal.4th at p. 696* [in *Marsden* hearing, trial court may resolve credibility issues].) The court implicitly concluded, as proved to be true, the threats were the product of a heated disagreement about defense strategy, but did not amount to a risk of actual danger to Hanlon **[*51]** or Rief and did not truly threaten to result in ineffective assistance of counsel. The exchange of heated words does not necessarily reflect an irreconcilable conflict. (*Ibid.*; see also *Miller v. Blacketter (9th Cir. 2008) 525 F.3d 890, 897*.)

We refuse to find, as defendant urges us to do, that the court actually believed Hanlon was in true danger and yet sent him back into the courtroom with defendant without any protection, such that it affected counsel's ability to perform effectively at trial. Defendant acknowledges in his reply brief that shackling defendant would have been an alternative satisfactory resolution to the problem. Yet, Hanlon did not ask to have defendant shackled—and specifically rejected any such remedy—which casts doubt on how seriously he took the threats.[3]

Defendant points to nothing in the record suggesting Hanlon's performance as an advocate at trial actually was affected by the purported threats. From our review of the record, it appears he performed as a conscientious advocate for his client, cross-examining the prosecution's witnesses, **[*52]** putting on defense witnesses, making appropriate objections, and taking care that his client not be prejudiced before the jury (e.g., making sure D.K.'s mother was not allowed to make faces or otherwise react inappropriately while in the courtroom). Hanlon also mentioned talking to his client in jail, so it appears his fear did not prevent him from consulting with defendant during trial. In open court, outside the presence of the jury, Hanlon said he wanted to be in court with defendant at the end of each day when the jury was excused for the evening. These do not appear to be the reactions of a frightened man, nor have we detected anything in counsel's performance that shows he was less than a zealous advocate both before and at trial. Counsel ultimately did present the heat of passion mitigation argument he thought appropriate, despite defendant's opposition and despite the purported threats, both by requesting jury instructions and by arguing to the jury.

It is evident from the record that the court had great confidence in Hanlon's professionalism and his ability to conduct the best defense possible in these difficult circumstances, despite defendant's purported threats. The

[3] Before defendant testified, the court instructed Hanlon that defendant was not to be given any sticks or bats during the examination. Hanlon initially objected to that restriction.

record **[*53]** of the trial seems to bear out the judge's faith in this experienced attorney, who appears to have avoided any departure from prevailing norms of effective representation.

The court cited *Lempert v. Superior Court (2003) 112 Cal.App.4th 1161, 5 Cal. Rptr. 3d 700* (*Lempert) and Mandell v. Superior Court (1977) 67 Cal.App.3d 1, 136 Cal. Rptr. 354* (*Mandell*). While both of those cases reversed the trial court's denial of a motion to withdraw,[4] both held the decision lay in the sound discretion of the trial court, "having in mind whether such withdrawal might work an injustice in the handling of the case," and also whether the withdrawal would "cause undue delay in the proceeding." (*Lempert, supra, at p. 1173*; *Mandell, supra, at p. 4*.) These are precisely the considerations the trial court relied upon, finding that counsel's withdrawal "would cause a horrible injustice in the handling of the case," and would "require an undue delay."

The gist of defendant's complaint about Hanlon and Rief, as it ultimately emerged, was that he did not want them to present a defense or an argument based on any theory other than pure innocence. Although this was only spelled out for the court clearly after trial, we think the judge would have had a strong inkling that this was behind all of the representation issues based on what she could glean from conversations with defendant, Hanlon and Horngrad. But sharp disagreements as to strategy do not create an actual conflict, nor do they necessarily signify a complete breakdown in the attorney-client relationship. Similar complaints with counsel have frequently been rejected as a justification for a last minute substitution of counsel. (See *People v. Lau, supra, 177 Cal.App.3d at pp. 478-479* [retained counsel not substituted where defense counsel believed defendant was guilty and should enter a plea]; *Plumlee v. Masto (9th Cir. 2008) 512 F.3d 1204, 1211* ["Plumlee has cited no Supreme Court case—and we are not aware of any—that stands for the proposition that the *Sixth Amendment* is violated when a defendant is represented by a lawyer free of actual conflicts of interest, but with whom the defendant refuses to cooperate because of dislike or distrust. **[*55]** Indeed, *Morris v. Slappy [(1983) 461 U.S. 1, 103 S. Ct. 1610, 75 L. Ed. 2d 610]* is to the contrary"].) The fact that defendant carried his disagreement with counsel to the point of making colorable, but nonserious threats does not change the outcome.

Fundamentally, "[i]t is well established that an attorney representing a criminal defendant has the power to control the court proceedings." (*People v. Floyd (1970) 1 Cal.3d 694, 704, 83 Cal. Rptr. 608, 464 P.2d 64*; accord, *People v. Moore (1983) 140 Cal.App.3d 508, 513-514, 189 Cal. Rptr. 487* [whether to request a mistrial in counsel's control]; *People v. Williams (1987) 194 Cal.App.3d 124, 130, 239 Cal. Rptr. 375*.) We reject defendant's claim that the foregoing rule applies only to appointed attorneys. Rather, the cases are unconditional in their statement that "[a] criminal accused has only two constitutional rights with respect to his legal representation, and they are mutually exclusive. He may choose to be represented by professional

[4] Specifically, those cases dealt with attorneys who sought to withdraw as counsel because their fees were not being paid. (*Lempert, supra, at pp. 1165-1166*; *Mandell, supra, 67 Cal.App.3d at p. 4*.) The attorney in *Lempert* told the court "it bordered on involuntary servitude . . . to mandate continued representation," and that he "could not afford to represent defendant through trial without compensation." (*Lempert, supra, at p. 1167*.) Because the attorney's livelihood was threatened in those cases, an actual financial conflict of interest existed that likely **[*54]** would have affected counsel's performance at trial.

counsel, or he may knowingly and intelligently elect to assume his own representation. [¶] . . . [¶] [¶] [W]hen the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to *counsel's* complete control of defense strategies and tactics."[5] (*People v. Hamilton (1989) 48 Cal.3d 1142, 1162-1163, 259 Cal. Rptr. 701, 774 P.2d 730* (*Hamilton*); see also *People v. Jones (1991) 53 Cal.3d 1115, 1139, 282 Cal. Rptr. 465, 811 P.2d 757* [retained attorney].) Where, **[*56]** as here, the untimeliness of the request removed the absolute right to proceed in pro. per., defendant had no right to insist on his choice of legal strategy. (*Hamilton, supra, at p. 1163*.)

This case is similar to *People v. Welch (1999) 20 Cal.4th 701, 85 Cal. Rptr. 2d 203, 976 P.2d 754* (*Welch*), in which "defendant wanted a defense of actual innocence and mistaken identity, whereas counsel pursued the defense that defendant . . . lacked premeditation and deliberation." (*Id. at p. 728*.) "A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. (See [*Hamilton, supra, 48 Cal.3d at p. 1162*].) Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.' 'When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.'" (*Id. at pp. 728-729*.) "A defendant who does not qualify under *Faretta* for self-representation does not have the right to dictate strategy **[*57]** to his counsel. (See *People v. Hamilton, supra, 48 Cal.3d at p. 1162*.)" (*Welch, supra, at p. 736*.)

Likewise, a "defendant may not force the substitution of counsel by his own conduct that manufactures a conflict." (*Smith, supra, 6 Cal.4th at p. 696*; see also *Miller v. Blacketter, supra, 525 F.3d at p. 897*.) A "trial court is not required to conclude that an *irreconcilable* conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel." (*People v. Myles (2012) 53 Cal.4th 1181, 1207, 139 Cal. Rptr. 3d 786, 274 P.3d 413*.) A defendant's "frequent repetitive attempts to replace" his attorney may reasonably suggest he has "made insufficient efforts to resolve his disagreements" with counsel, making "any breakdown in his relationship with counsel . . . attributable to his own attitude and refusal to cooperate."[6] (*Clark, supra, 52 Cal.4th at p. 913*.) The same was true here, as evidenced by defendant's replacement of two previous attorneys, seemingly on similar grounds.[7]

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[5] A criminal defendant does have limited specific rights to override counsel's decisions. For instance, a defendant undoubtedly has the right to insist on testifying, even if counsel disagrees. (*People v. Robles (1970) 2 Cal.3d 205, 215, 85 Cal. Rptr. 166, 466 P.2d 710*; see *Hamilton, supra, 48 Cal.3d at pp. 1162-1163* [listing a defendant's limited rights to overrule counsel].)

[6] Defendant attempts to distinguish *People v. Clark (2011) 52 Cal.4th 856, 131 Cal. Rptr. 3d 225, 261 P.3d 243* (*Clark*) on the basis that counsel in that case assured the court that she would "fight hard" for the defendant, whereas no such express assurance was given in this case. We find the distinction unpersuasive, as the court repeatedly recognized the excellent representation Hanlon had so far provided. The court impliedly found Hanlon would "fight" for defendant, despite their differences.

[7] Horngrad told **[*58]** the court that he and defendant disagreed about "strategies" and that defendant had threatened him if he failed to carry out defendant's preferred strategy. Defendant told the court he parted ways with Horngrad because Horngrad wanted him to take a 12-year plea bargain. He also complained about a lawyer, inferably Hallinan, who "told the papers that it's a crime of passion, when in reality I [told] him something completely different."

Defendant stresses Hanlon's statement on June 13, 2011 that "he and I no longer communicate. I feel sometimes we're talking at opposite universes or different universes." This statement conflicted with Hanlon's earlier statements that he and defendant had communicated thoroughly, including that Hanlon had read 500 to 1,000 pages of letters from defendant. We trust defendant could have communicated his thoughts about the defense in such abundant correspondence during the nine months Hanlon had represented him. Even if the lines of communication had recently broken down, Hanlon never claimed that his client had been so uncommunicative that Hanlon could not prepare a defense.

This record contains substantial evidence to support the court's implied finding **[*59]** that counsel had no reason to fear physical harm such that his performance at trial would be affected, and that defendant had no legally cognizable reason to disapprove of counsel's performance. Accordingly, no breakdown in the attorney-client relationship had occurred. The court acted within its discretion in denying counsel's motion to withdraw.

II. Ineffective Assistance of Counsel Before Trial and at Sentencing

Defendant next raises claims of ineffective assistance of trial counsel before trial, at trial, and at sentencing. First, he claims counsel failed to keep him promptly informed of the legal defenses to be raised at trial and this prevented him from hiring new counsel to take over the defense who would pursue only the identification defense. Second, he claims he was denied effective assistance of counsel based on Hanlon's "abandonment" of him at sentencing. We also perceive a third claim of ineffective assistance of counsel based on counsel's having argued a heat of passion defense without having presented medical evidence to support it.

A. The Law

A defendant claiming ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. (*Strickland v. Washington (1984) 466 U.S. 668, 687, 691-692, 104 S. Ct. 2052, 80 L. Ed. 2d 674* (*Strickland* ***[*60]***).) The burden is on defendant to show, first, that trial counsel failed to act in a manner to be expected of reasonably competent attorneys. (*People v. Lewis (1990) 50 Cal.3d 262, 288, 266 Cal. Rptr. 834, 786 P.2d 892* (*Lewis*); *Strickland, supra, at p. 687*.) Where a defendant cannot make such a showing, including cases where the record is not clear, we will affirm. (*Lewis, supra, at p. 288*.) On the first prong, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland, supra, at p. 688*.) Under the second prong, he must show that in the absence of the error it is reasonably probable that a result more favorable to him would have been obtained. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id. at p. 694*.)

We further note that claims of ineffective assistance most often must be raised on a petition for writ of habeas corpus. Raising the issue on appeal is appropriate only if there was no conceivable legitimate basis for counsel's challenged conduct, or if he was asked for an explanation and failed to provide one. (*People v. Mai (2013) 57 Cal.4th 986, 1009, 161 Cal. Rptr. 3d 1, 305 P.3d 1175*; *Lewis, supra, 50 Cal.3d at p. 288*; *People v. Mendoza Tello*

(1997) 15 Cal.4th 264, 266-267, 62 Cal. Rptr. 2d 437, 933 P.2d 1134.) Here, defendant has chosen to rely on the appellate record which, as we shall discuss, is insufficient to entitle him to relief.

Finally, as discussed above, it is well settled that counsel **[*61]** retains decision-making power with respect to trial strategy. (E.g., *Hamilton, supra, 48 Cal.3d at p. 1163*.) We also must avoid second-guessing trial counsel in hindsight and must apply a "highly deferential" review to counsel's performance. (*Strickland, supra, 466 U.S. at p. 689*.)

B. Timing of Defense Counsel's Decision to Argue Heat of Passion

The record here does not clearly disclose when counsel made his decision to argue the lesser included offenses of second degree murder and voluntary manslaughter to the jury, nor does it establish what communication occurred about raising such issues. Defendant claims that Hanlon and Rief "agreed" when they were retained that they would *only* present a defense based on mistaken identity, and would forgo any argument based on heat of passion. We find it unlikely that competent counsel would ever agree to such an inflexible strategy and, in any case, find insufficient support in the record to justify relief on appeal. At the very least, such an argument would have to be raised by a petition for writ of habeas corpus to have even a colorable chance of success.

It is true, as defendant points out, that on January 20, 2011, Hanlon stated to the court that he intended to pursue the theory that "Mr. Mitchell did not commit **[*62]** this crime and that there were other people who did. [¶] That as a defense I will work with him on [it] and I believe him and we will go forward on that. [¶] . . . [¶] [¶] But the issue of heat of passion. So we're not going forward on that, we're going on the defense that Mr. Mitchell did not do this and he will testify." These statements were made in the context of a request for a continuance for further DNA testing on the baseball bat, in hopes that "we will find DNA of unknown persons on it," or perhaps some other individuals' fingerprints. Hanlon also said, "we believe further testing will support his defense that other people did this act," immediately adding that if the court would not allow such testing, "it would be very difficult to go forward, if we will become barred it becomes a more complex defense. [¶] So given the defense we're going to use these tests are mandatory."

These statements do not manifest a final decision—much less a binding commitment—to adhere to a particular trial strategy, and rather reflect that the investigation was ongoing. They also do not show what Hanlon and defendant had discussed about a heat of passion theory. Ultimately, the defense lab's DNA **[*63]** test results apparently provided no support for defendant's third party culpability defense. Understanding the strength of the evidence against defendant, naturally counsel would consider an alternative defense strategy.

Likewise, at the hearing on May 10, 2011, defendant's statement that "trust issues" had developed was too general to clarify what Hanlon had told defendant about using or not using a heat of passion defense or when that information was conveyed. From defendant's statement the most we can glean is that some significant discussion occurred "two weeks" earlier, presumably after the DNA test results came back from the lab.

Next, defendant points out that on May 25, 2011, counsel requested funds for a psychiatric

examination of defendant. The record of that hearing tends to show that counsel was still investigating and deliberating about which defenses to raise at trial. It provides no factual basis for defendant's claim that defense counsel withheld a final decision from him.

On June 21, 2011, defense counsel filed a request for jury instructions, including an instruction on heat of passion voluntary manslaughter (*CALCRIM No. 570*). The court ultimately did instruct the jury on that theory, **[*64]** as well as on provocation reducing a murder to second degree. This, we conclude, is the first objective sign in the record that Hanlon had decided to argue a heat of passion defense.

What emerges from the foregoing excerpts is the undeniable impression that Hanlon was wrestling through much of the pretrial period with the question of how to best present a defense for this difficult client. On this record, we cannot conclude that Hanlon willfully withheld important information or strategy decisions from defendant. Defendant has not carried his burden of showing that counsel made a decision earlier and withheld it from him until the very last minute, even assuming such conduct would be considered incompetent. Nor has he convinced us that counsel "agreed" in advance not to use a heat of passion argument.

As noted above, the choice of a defense was always Hanlon's. In *Jones, supra, 53 Cal.3d 1115*, the defendant was represented by retained counsel who "argued that because of defendant's mental state the jury should find him guilty only of the lesser included offense of voluntary manslaughter. . . . [Counsel made this argument] over the objection of defendant, who insisted on proclaiming his innocence . . . ." (*Id. at p. 1139*.) *Jones* ***[*65]*** rejected the defendant's assertion that presenting conflicting defenses is categorically incompetent. (*Id. at pp. 1138-1139*; see also *People v. McPeters (1992) 2 Cal.4th 1148, 1186-1187, 9 Cal. Rptr. 2d 834, 832 P.2d 146* [where counsel conceded facts contrary to defendant's testimony, the court ruled: "we cannot say counsel was constitutionally ineffective in his attempt to make the best of a bad situation"].)

Defendant tries to distinguish these authorities on the basis that the defendants in those cases claimed counsel was ineffective for presenting a particular defense at trial, whereas, he claims counsel's ineffectiveness occurred before trial when he failed to communicate his defense strategy to defendant in a timely way. Had he been informed earlier of counsel's intentions, defendant claims he could have simply hired another lawyer who would present his misidentification defense without a heat of passion argument.

Besides taking us outside the record, defendant's argument also rests on the implicit assumption that he could have found another competent attorney who would have actually allowed him to dictate which defense theories would be raised and which would not. Given that Horngrad and Hanlon both refused to be dominated in such a way by this client, it is unlikely he could have **[*66]** found another competent attorney willing to cede to defendant the role of "captain of the ship."

And even assuming Hanlon's conduct fell below professional standards, defendant has not satisfied the prejudice prong of *Strickland*. There is no reason whatsoever to think that a misidentification defense alone would have been more successful.

The evidence showing the falsity of defendant's testimony was overwhelming. The physical

evidence showed that defendant was present at the scene and touched the bat, leaving his fingerprint. Defense counsel's argument that the fingerprint could have been the result of a struggle over the bat was probably the best explanation available from a defense standpoint. But two prosecution experts agreed that the blood spatter on defendant's pant legs meant he was within five feet of D.K. when the blows were struck. This not only tended to incriminate defendant, but also belied his claim that he did not see anyone hitting the victim, and in fact did not see the victim at all when he came into her yard. Hanlon's suggestion that he was so "locked in" on his own fight that he did not realize D.K. was being bludgeoned to death less than five feet away—while perhaps **[*67]** the best available argument consistent with defendant's testimony—was a long stretch at best.

Moreover, the jury knew about defendant's previous domestic attacks on D.K., about D.K.'s having cut defendant off from her and the minor because of his drug use, and about the flurry of phone calls made by defendant to D.K. in the days before the attack. From the evidence it may be inferred that defendant began beating the victim on sight, while she still held her car keys in one hand and the minor in the other. Thus, a trial strategy based solely on defendant's testimony was doomed.

While Hanlon's heat of passion argument was also unsuccessful, he did manage to convince the jury that the prosecution had not proved defendant had formed the intent to kidnap the minor before he killed D.K., thus avoiding a life sentence without parole. And although a theory of heat of passion was unlikely to succeed due to lack of proof of provocation, we cannot fault Hanlon for attempting to argue a theory that could potentially have saved defendant years in prison. Defendant has not shown that Hanlon was ineffective before trial either in deciding to argue heat of passion or in failing to communicate his choice **[*68]** of defense strategy to defendant in a timely way.

C. Presentation of Heat of Passion Argument at Trial

Defendant also argues counsel was ineffective when he presented the lesser included offense theory only in closing argument, without calling experts or other witnesses to support it. Once again, defendant fails to carry his burden on the first prong of *Strickland*. To begin with, defendant fails to enlighten us as to what those experts would have established by their testimony or what other witnesses should have been called.

Hanlon's heat of passion theory was not altogether unsupported by the evidence. The jury had heard testimony about the coincidence of the anniversary of the death of defendant's father and the minor's birth, both falling on the day of the murder. There was evidence to show how distraught he was over his estrangement from D.K. and his inability to see the minor. Thus, there was some evidentiary basis for the subjective element of a crime of passion argument, which requires no medical testimony. (*People v. Steele (2002) 27 Cal.4th 1230, 1253, 120 Cal. Rptr. 2d 432, 47 P.3d 225* (*Steele*); *People v. Mercado (2013) 216 Cal.App.4th 67, 81-82, 156 Cal. Rptr. 3d 804* (*Mercado*).) A doctor's evaluation of defendant's mental state or psychological makeup would not have been necessary in presenting this aspect of the theory to the **[*69]** jury.

What was, in fact, missing was evidence on the objective prong of heat of passion analysis—

evidence of provocation. The heat of passion theory is ultimately judged by an objective standard of provocation such as would incite a reasonable person. (*Steele, supra, 27 Cal.4th at p. 1253*; *Mercado, supra, 216 Cal.App.4th at pp. 81-82*.) But defendant was the only person who could have provided such evidence (if it existed), and he insisted on sticking to his story about his confrontation with two other men.

When the court, while hearing defendant's motion for new counsel to present a motion for new trial, ordered Hanlon to explain why he decided to argue mitigation at trial, the following colloquy ensued: "MR. HANLON: Because I felt the jury—the evidence was overwhelming, and the only way to save him from life in prison was to make that argument, even though for reasons that I don't think I have to answer . . . your question, I didn't have witnesses to support that. But I felt that I had to. I felt Mr. Mitchell's view and the jury's read of his testimony would be correct. He thought they were behind him and thought he was innocent. I did not see it that way. I thought the evidence was overwhelming, as it was from the beginning, and I felt I had to do that to try **[*70]** to save him from life in prison without a chance of parole. That was my choice. [¶] Mr. Mitchell clearly expressed his desire that I not do it. I told him—I don't know when that conversation first came up, whether it was before the trial or during the trial, that this was an attorney's choice. The decision to testify as to what the truth was was up to him, but what to argue was up to me. And he argued with me about that. It's clear what he's saying is true, but I made that decision based on what I saw the evidence to be and what was in his best interests. And I tried to make it, you know, it—it was a difficult situation, but, yes, there was a reason why I did it, and that's what it was."

Being appropriately deferential to counsel's tactical decisions, we cannot say Hanlon's reasoning was beyond the realm of competent lawyering. We conceive of counsel's argument on heat of passion not as a contradictory theory, but rather a backup argument, in recognition by counsel that the jurors would likely reject defendant's far-fetched testimony.

Nor can we say Hanlon's strategic decision proved to be prejudicial under the second prong of the *Strickland* test. Hanlon did not altogether abandon defendant's **[*71]** favored theory of defense. In fact, he spent most of his closing argument attempting to support the theory to which defendant had testified. The problem that defendant fails to come to grips with is that his testimony was wholly unbelievable in light of the other evidence, and the evidence of guilt was, in fact, overwhelming. Based on this record, counsel's argument on heat of passion clearly was aimed at making the best of a bad situation and cannot fairly be deemed either incompetent or prejudicial.

D. Sentencing Hearing

Defendant also argues defense counsel was incompetent at the sentencing hearing because he "abandoned" defendant and basically stood by as a "body," without making any argument on defendant's behalf. At the outset of the August 16, 2011 hearing set for sentencing, the court noted defendant had filed a written request to relieve Hanlon as his attorney for purposes of sentencing and filing a new trial motion.

At a closed hearing, counsel explained there were only two arguments he could make at sentencing. First, he could argue in line with defendant's testimony that defendant was innocent. Counsel rejected that course, saying

"[t]o argue to the court at sentencing he didn't **[*72]** do it, given the jury verdict, is meaningless." Counsel argued that the other possibility, to argue that defendant was guilty, but that his crime was mitigated "flies in the face of what he wants, and I—I made that decision once. I'm not going to do it again." "THE COURT: If we were to proceed to sentencing and thinking in that same vein, couldn't you then make the argument that you're talking to me about as far as concurrent versus consecutive sentences? [¶] MR. HANLON: I'm not prepared to do it again. I'm not prepared to fly in the face of what my client wants. It's his life. I've done my best for him, and I've done my best as an officer of the court. I'm not going to continue in that vein. It's contradictory to what I believe my job is. So, Mr. Mitchell makes this call. He clearly doesn't want me to—he doesn't want me to be his lawyer at sentencing. But if I am, I'm not going to argue against what he believes are the facts. I'm just not prepared to do it again regardless I—with all due respect regarding the order, you can't order me to argue. [¶] THE COURT: Sure. [¶] MR. HANLON: You know, so I would probably submit it and just let the prosecution put on their evidence, and Mr. Mitchell **[*73]** wants to make a statement, he can argue his own view of the evidence. I'm not going to argue at sentencing under these circumstances." Defendant, in fact, wished to replace Hanlon precisely for the reason that he wished his attorney *not* to state any facts contradicting his own profession of complete innocence.

Defendant's preferred argument did not go unexpressed at sentencing. Defendant spoke at length on his own behalf. The court appears to have listened attentively and allowed him to continue speaking even when the prosecutor objected to his calling D.K.'s mother "a drunk." He maintained his absolute innocence, but was also allowed to argue his complaints about counsel, his opinion of D.K.'s mother, and his view of the criminal justice system and the press.

And despite his arguments to the contrary, defendant was not deprived of counsel entirely at the hearing. We do not view Hanlon's presence at sentencing as being nothing more than a "body." Although Hanlon did not make a statement on defendant's behalf at sentencing, he was a legally-trained representative, fully familiar with the facts of the case, who had reviewed the probation report. We are confident, given counsel's otherwise **[*74]** vigorous representation, if the probation report had recommended an unauthorized sentence or had failed to take account of relevant sentencing factors, counsel would have pointed that out. Appellate counsel has specified no sentencing error. Defendant fails to show that Hanlon's assessment of the pros and cons of arguing at sentencing constituted ineffective assistance.

Hanlon could reasonably have believed arguing for a lesser sentence based on heat of passion or lack of planning would be pointless, or maybe even an affront to the court, given the jury's rejection of the lesser included offenses. Moreover, defendant perceived such arguments as tantamount to calling him a liar and arguing along those lines could have triggered an outburst from defendant that would have only made things worse for him. Counsel may also have perceived that the trial court would have been unreceptive to arguments based on psychological factors, as it had been when counsel made the *section 1368* request. Nor has defendant pointed to any helpful medical evidence that could have been presented.

We apply the usual *Strickland* standard of prejudice and see no reasonable likelihood that counsel's failure to argue at sentencing **[*75]** had a negative impact on the sentence imposed. Indeed, the court had limited sentencing discretion. The sentence for first degree murder is statutorily set at a minimum of 25 years to life. (*§ 190*.) To that extent, as the court noted, the sentence was "mandatory." Thus, the chief issues for decision by the court were whether to impose the aggravated term of eight years on the kidnapping count, as recommended by probation, and whether to impose the sentences concurrently or consecutively. Given the narrow issues at stake, there was little counsel could have done to influence the court's decision.

The probation report recommended an upper term on the kidnapping count. The identified factors in aggravation overwhelmingly outweighed the circumstances in mitigation, including the violence, viciousness, cruelty and callousness of the beating of D.K. with the minor in close proximity, the use of a deadly weapon, the vulnerability of the victim the minor, the planning and almost "military precision" with which the crime was carried out, and defendant's violation of the trust and confidence of his estranged girlfriend and the minor. With respect to defendant himself, the probation report noted defendant's **[*76]** violence and danger to society with reference not only to the current crimes, but to the fact that his siblings had previously obtained a restraining order against him, not to mention the history of domestic violence against D.K. (*Cal. Rules of Court, rule 4.421*.) His prior convictions were "just entering the level considered numerous," defendant was on probation when the crime was committed, and his performance on probation was, of course, unsatisfactory.

Only one factor in mitigation was identified and that was defendant's history of methamphetamine abuse, which the probation officer noted could have "permanently affected his mental health." (*Cal. Rules of Court, rule 4.423*.) However, the report concluded "little weight" should be given to this factor, as defendant was not under the influence of drugs at the time of the offense, and claimed that he had not used any controlled substances for a week prior to the instant offense. The court reviewed and considered the probation officer's analysis of this mitigating factor, but concluded that it did not significantly mitigate defendant's crimes.

Although Hanlon had at one point suggested that defendant did have a diagnosed mental health issue (which Hanlon believed was posttraumatic stress disorder, **[*77]** with possible bipolar features), the record sheds no light on whether such a diagnosis would have constituted helpful mitigation evidence. Significantly, defendant does not contend that counsel was ineffective for failing to develop medical evidence for presentation at sentencing or failing to argue existing medical evidence. (See section V, *post*.) In fact, he makes no suggestion about what Hanlon actually should have done at sentencing that he did not do.

The probation report also recommended the sentence on the kidnapping count be imposed consecutively to the 25 to life sentence for the murder because it involved a different victim from the murder. (*Cal. Rules of Court, rule 4.425*.) The report further recommended that the sentence on the stalking count also be imposed consecutively because it had occurred over a long period of time and had kept D.K. perpetually in fear. It did correctly recommend, however, that the sentences on counts two, four and five be stayed under *section 654*. The

report recommended an aggregate term of 35 years to life.

We see little that counsel could have done to advocate for a more favorable outcome. The reasons for imposing the aggravated terms and consecutive sentences were well articulated in the **[*78]** probation report and would have been difficult to refute. Given defendant's insistence that he was innocent of D.K.'s murder and had actually rescued the minor from being kidnapped by the men in the black and white shirts, remorse certainly could not have been argued to soften the court's view of the offenses. In sum, defendant has failed to meet his burden of showing any ineffectiveness in Hanlon's representation of him at the sentencing hearing, much less resulting prejudice.

III. Posttrial Motions Relating to New Counsel for Motion for New Trial and for Sentencing

A. New Counsel for a New Trial Motion and Sentencing

Defendant claims the court erred in denying his motion for new counsel to make a new trial motion, first, by applying the *Marsden* standard, requiring a showing of cause. He contends that because Hanlon was retained, not appointed, that standard was inappropriate. Second, he claims any delay in the proceedings that would have occurred by granting the motion would have been minimally disruptive and would have been outweighed by defendant's right to counsel of his choice, given the irreconcilable breakdown in the relationship between Hanlon and defendant.

In arguing the first **[*79]** point, defendant seizes on the trial court's brief reference to *Marsden* in deciding how to approach defendant's motion. At the outset of the proceedings on August 16, 2011, the trial court asked counsel whether they thought it appropriate to hold a hearing outside of the prosecutor's presence, "sort of in accordance with the *Marsden* case . . . ." The prosecutor agreed he should not be present at the hearing, "[j]ust like a *Marsden*." It is not clear from the remarks whether the court believed the substantive standards of *Marsden* would apply in such a hearing, or whether it simply intended to hold the hearing without the prosecutor. These remarks alone do not clearly establish whether counsel and the court understood this was not strictly a *Marsden* motion, given that Hanlon was retained counsel.

We do note that in opposition to the substitution request the prosecution had filed a written response arguing that a *Marsden*-type hearing was required and that substitution should be allowed only if defendant could show "failure to replace counsel would substantially impair the defendant's right to assistance of counsel based on either inadequate representation or an irreconcilable conflict between **[*80]** counsel and the defendant," citing *Marsden*. Defendant argues this standard was incorrect, citing cases such as *People v. Munoz (2006) 138 Cal.App.4th 860, 866-867, 41 Cal. Rptr. 3d 842* (*Munoz*) [requesting substitution for a new trial motion] and *People v. Lara, supra, 86 Cal.App.4th at page 155* [motion as trial commenced]. As we have discussed, a request to discharge retained counsel is not governed by the same standard as a motion to substitute appointed counsel. We agree with defendant that holding him to a *Marsden* substantive standard would not have been appropriate in the context of relieving

retained counsel, and we believe the prosecutor's response to defendant's posttrial substitution motion was misleading in that respect.

The question is whether the court actually followed the prosecutor's advice on this point, or whether it correctly judged the substitution motion by the standard set forth in *Keshishian, supra, 162 Cal.App.4th 425*, denying the motion because it would result in undue delay and disruption of the proceedings. We think the latter is more likely, or at least it cannot be ruled out.

The court held a closed hearing, allowing defendant to state at length the reasons why he believed Hanlon had been ineffective at trial and why new counsel should be appointed to pursue a new trial motion, which would have necessitated putting **[*81]** over the sentencing hearing. Defendant outlined his complaints, including Hanlon's arguing of the heat of passion defense in closing argument, Hanlon's failure to produce doctors or witnesses to support that defense, and Hanlon's purportedly waiting until the last minute to inform defendant he intended to argue the lesser included offenses (thereby preventing defendant from getting another attorney). Defendant also disputed Hanlon's interpretation of the evidence in statements to the jury.[8]

After hearing defendant's complaints, the trial court invited Hanlon to respond and he declined. The court asked him whether he could provide "good service" to defendant if sentencing went forward as scheduled that day. We have reviewed in section II.C., the colloquy that followed, with Hanlon telling **[*82]** the court he refused to argue that defendant did not commit the murder, given the jury's verdict, and also refused to argue mitigation because that argument "flies in the face of what [defendant] wants . . . ." Indeed, defendant made it clear he wanted to continue to assert his innocence at sentencing and would not accept Hanlon's advice that the jury's guilty verdicts had foreclosed those arguments. The court, too, tried to explain, "He can't argue to me right now that you didn't do it because the jurors found that you did. [¶] So, it's like we're past that point."

The court denied the motion, expressing its belief that Hanlon's handling of the inconsistent defenses was "the best argument . . . someone could make" on defendant's behalf, "sort of a brilliant argument because it gave jurors two reasons not to find you guilty of first degree murder." The court concluded, "I thought all of the attorneys in the case were excellent . . . your attorney included." The court denied the motion for new counsel and counsel's request to withdraw.

The judge offered to give defendant time to consult with Hanlon before the sentencing continued. Defendant responded, "I'm already suing him for malpractice, **[*83]** Your Honor. I have nothing to discuss with my lawyer." The court then asked whether defendant wanted to make his own statement at sentencing, and defendant responded that he would if the court was "going to take away [his] counsel." The court pointed out, "there's a very good attorney sitting right next to you," to which defendant responded by calling Hanlon "pathetic." The court then said it would deny the motion and would give defendant an opportunity to speak

[8] Specifically, defendant complained that although he testified he was hit in the back with a baseball bat during his confrontation with the men in the black and white shirts, Hanlon contradicted that testimony in his argument to the jury, saying, "Mr. Mitchell never said he got hit in the back with a bat." Defendant said he could "continue to count the ways" in which Hanlon had contradicted his testimony.

at sentencing, including giving him "a few minutes to think about if you want to say anything or if you want to talk to Mr. Hanlon . . . ."

The Attorney General insists that the trial court did not apply the wrong standard, noting that "the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties." (*People v. Mack (1986) 178 Cal.App.3d 1026, 1032, 224 Cal. Rptr. 208*; *Evid. Code § 664*.) The record certainly shows the court knew that attempts to replace retained counsel stood on a different footing from attempts to replace appointed counsel when the issue arose at the start of trial, having expressly cited *Keshishian, supra, 162 Cal.App.4th 425* at an earlier hearing. As discussed in section I.A. above, *Keshishian* held the discharge of retained counsel may be executed at any time, **[*84]** for any reason or no reason, provided the discharge does not result in "'disruption of the orderly processes of justice.'" (*Keshishian, supra, at p. 428*.) The question is whether, as defendant posits, the court failed to recognize the *Keshishian* standard was also correct in the posttrial context.

Given the trial court's demonstrated knowledge of *Keshishian, supra, 162 Cal.App.4th 425*, it may be that the court denied the posttrial motion to substitute because it believed, on balance, that the denial was necessary to avoid disruption of an orderly judicial process. The court did not expressly cite delay and disruption as the reasons for denying the motion, but if the denial was premised on such factors, we could not disturb that ruling as an abuse of discretion.

Here, the motion to substitute counsel was filed just eight days before the sentencing hearing was scheduled and was heard at the beginning of the sentencing hearing. Several witnesses had planned to and did attend the August 16, 2011 sentencing. Appointment of new counsel undoubtedly would have disrupted the proceedings, inconvenienced witnesses, and caused a substantial delay while transcripts were prepared and new counsel familiarized himself or herself with the case. We cannot believe, as **[*85]** defendant tries to convince us, that these factors were not taken into account by the court in ruling on the motion.

Of the cases cited by defendant, *Munoz, supra, 138 Cal.App.4th 860* is the closest to our facts. There, the defendant filed a posttrial motion to relieve retained counsel and have new counsel appointed for a motion for a new trial. The substitution motion was filed 40 days after he was convicted and nine days before the scheduled sentencing. (*Id. at p. 864*.) The court, as here, initially addressed the issue on the date set for sentencing. (*Ibid*.) It made it very clear, however, that it was applying a *Marsden* standard to the request, stating, "We're in a unique situation in that there is one set of rules when you are seeking substitution of counsel prior to a verdict and there is a different set of rules when you are seeking substitution of counsel after a verdict." (*Ibid*.) The trial court informed the defendant that he was not automatically entitled to a new attorney, and that he would have to show a conflict of interest or incompetent representation. (*Ibid*.) The court did not, however, rule on the motion on the date set for sentencing. Instead, it trailed the sentencing hearing for a week to give the defendant a **[*86]** further chance to express his complaints about counsel, which he did in a six-page letter. (*Id. at pp. 864-865*.)

When the hearing resumed a week later, retained counsel expressed the opinion that, because he was retained, the defendant could

discharge him "at any time on any quantum of proof . . . ." (*Munoz, supra, 138 Cal.App.4th at p. 865*.) The court responded: "'I believe that what you are suggesting is true prior to trial, or prior to a retrial. . . . [¶] I truly believe that this is a different setting. . . . [W]ere the rule to be that he could discharge you at this point, it would be an automatic situation where there would be a substantial delay in the administration of justice because any new lawyer who came in would only be competent if transcripts were prepared, the entire trial was reviewed, and then a decision was made about that. [¶] I do not believe that that is the state of the law that exists now, so if he had wished to discharge your services prior to trial, I agree with you. But just as if he wanted to discharge your services mid trial, I think it would be a discretionary call on my part and there would have to be a showing. The court believes that the same would occur now.'" (*Ibid*.) It then considered the defendant's request **[*87]** for new counsel under a *Marsden* standard and denied the request.[9]

Relying on *People v. Ortiz, supra, 51 Cal.3d at pages 982-987*, the Court of Appeal reversed the order denying appointment of new counsel and remanded the cause to allow defendant to discharge his retained attorney. (*Munoz, supra, 138 Cal.App.4th at pp. 866, 871*.) The court held that an automatic **[*88]** retrial was not required. Instead, "[o]nce new counsel is appointed, the case shall proceed anew from the point defendant originally sought to discharge his attorney." (*Id. at p. 871*.)

Defendant argues that the court in this case, as in *Munoz*, incorrectly applied a *Marsden* standard in ruling on defendant's motion. Defendant asks for the same remedy here, with new counsel being appointed to consider filing a new trial motion and, if no such motion were to be filed, to appear at resentencing on his behalf.

We find two significant points of distinction that persuade us such a remedy is unnecessary in this case. First, the prospect of delay and disruption in the proceedings in *Munoz* was much less obvious and less severe than in the present case. The crime there was a stabbing during an attempted carjacking that had required only a two-day trial, in which the key witness's testimony had been previously transcribed on a conditional examination. (*Munoz, supra, 138 Cal.App.4th at p. 868*.) Thus, very little time would have been required to allow newly appointed counsel to determine whether to file a motion for a new trial. (*Ibid*.) There was also no mention in *Munoz* that witnesses had appeared to speak at sentencing who would be inconvenienced by the **[*89]** delay. Delay and disruption of the orderly process of justice, therefore, constitutes a much stronger reason for denying the motion in this case than it did in *Munoz*.

Munoz itself observed: "Most trials will not be as easily reviewed as this one, so delay and public expense will often be the primary reasons for denying motions to replace counsel [posttrial]. The defendant must always be

[9] Similar to *Munoz, supra*, *138 Cal.App.4th 860, 41 Cal. Rptr. 3d 842*, *U.S. v. Rivera-Corona (9th Cir. 2010) 618 F.3d 976* (*Rivera-Corona*), vacated the trial court's denial of a motion to replace retained counsel with appointed counsel after defendant's guilty plea and before sentencing because the district court used the wrong standard—requiring "'a complete and utter breakdown' in the attorney-client relationship"—when it denied the defendant's motion. (*Rivera-Corona, supra, at p. 978*.) The defendant told the court he had entered his plea because counsel had demanded $5,000 more to take the case to trial and had threatened to "prosecute [his] family" if he could not pay, which "scared" him into entering a guilty plea. (*Ibid*.) The Ninth Circuit vacated the sentence and remanded the case to the district court, requiring it to "appoint counsel if Rivera-Corona is financially eligible, and make appropriate factual inquiries into Rivera-Corona's allegations concerning the circumstances underlying his guilty plea if there is a formal motion to set aside the plea." (*Id. at p. 983*.)

required to justify this additional expense to the satisfaction of the trial court, and such calls will always be within its broad discretion. Delay and public expense will militate for denial and we do not envision either a spate of such motions or a plethora of successful ones." (*Munoz, supra, 138 Cal.App.4th at p. 868*.)

The trial in the present case and its record were unusually lengthy and complex. It likely would have taken months to secure the transcripts and bring new counsel up to speed so that he or she could draft a new trial motion. If *Munoz* was at the low end of the spectrum of disruption, this case was certainly near the high end. "[D]elay and public expense" justified the court's ruling in this case. (*Munoz, supra, 138 Cal.App.4th at p. 869*.) Several witnesses had appeared to speak at defendant's sentencing. The Court of Appeal implicitly found that delay, disruption and **[*90]** public expense did *not* justify a denial of the defendant's motion in *Munoz*, whereas we find the opposite is true here.

The crime victim's family also had rights to a speedy resolution of the case that weighed heavily against a substitution of counsel on the day set for sentencing. *Article 1, section 28 of the California Constitution* provides in part: "(a) The People of the State of California find and declare all of the following: [¶] . . . [¶] [¶] (6) Victims of crime are entitled to finality in their criminal cases. [¶] . . . [¶] [¶] (b) In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights: [¶] . . . [¶] [¶] (8) To be heard, upon request, at any proceeding, including any . . . sentencing. . . . [¶] (9) To a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings."

A second distinction between this case and *Munoz* is that it was very clear that the court applied the wrong standard in *Munoz*, whereas the record in our case is more ambiguous. Arguably, the trial court understood and applied the proper standard, but inquired into defendant's dissatisfaction with Hanlon to determine whether an irreconcilable conflict existed **[*91]** that would justify relieving counsel *regardless* of the delay and disruption it would obviously entail. Read in that light, the court may have simply been assuring itself that it could safely deny the motion on grounds of delay and disruption without violating defendant's *Sixth Amendment* rights.

Once again, *Maciel, supra, 57 Cal.4th 482* is instructive, and we think dispositive. There, as here, the defendant argued that the court improperly applied a *Marsden* standard to a motion to discharge retained counsel and appoint counsel in his stead. (*Maciel, supra, at p. 513*.) There, as here, the defendant rested his argument on the fact that the court inquired into the defendant's dissatisfaction with counsel and also used the word "*Marsden*" in referring to the motion. (*Id. at pp. 513-514*.) The Supreme Court rejected his argument that the court had improperly held him to the *Marsden* standard of good cause, a more difficult standard to meet than should have been required under *Ortiz, supra, 51 Cal.3d 975*.

In upholding the trial court's ruling, *Maciel* said: "Contrary to defendant's assertion, the trial court did not deny the motion merely because defendant had failed to demonstrate that counsel was incompetent or had abandoned him or that there was an irreconcilable conflict between defendant and counsel. **[*92]** In evaluating whether a motion to discharge retained counsel is 'timely, i.e., if it will result in "disruption of the orderly processes of justice"' (*Ortiz, supra, 51 Cal.3d at p. 983*), the

trial court considers the totality of the circumstances (see *United States v. Gonzalez-Lopez [(2006)] 548 U.S. [140,] 152, 126 S. Ct. 2557, 165 L. Ed. 2d 409*; *Verdugo, supra, 50 Cal.4th at p. 311*). Although a defendant seeking to discharge his retained attorney is not *required* to demonstrate inadequate representation or an irreconcilable conflict, this does not mean that the trial court cannot properly consider the absence of such circumstances in deciding whether discharging counsel would result in disruption of the orderly processes of justice. Here, defendant raised numerous concerns about retained counsel in his declaration filed in support of the motion to discharge counsel, and the trial court did nothing improper in discussing those concerns with defendant at the hearing." (*Maciel, supra, 57 Cal.4th at pp. 513-514*.)

Defendant does not dispute that the court could properly have denied the motion based on delay and disruption alone, but contends the court did not expressly mention those factors in denying the motion and, therefore, must be found to have held him to the higher *Marsden* standard. We cannot accept defendant's argument. Although the judge never said expressly that granting the motion **[*93]** would disrupt the administration of justice, such a consideration was implicit in the circumstances. The motion was being heard on the date set for sentencing, with the probation officer in court, as well as family and friends of D.K. who had appeared to speak at sentencing. We will not entertain the unrealistic supposition that delay and disruption played no role in the judge's ruling. It is defendant's burden to show error on appeal (e.g., *People v. Green (1979) 95 Cal.App.3d 991, 1001, 157 Cal. Rptr. 520)*, and we are not convinced that the court improperly applied the *Marsden* standard.

B. Hanlon's Motion to Withdraw for Sentencing

With respect to the court's refusal to allow Hanlon to withdraw for purposes of sentencing, defendant's argument fares no better. We conclude the court was within its discretion in denying the motion, in part because defendant would have been prejudiced at sentencing if he had been forced to appear with no counsel at all. The court was faced with either allowing counsel to withdraw with no substitution, which would have violated his right to counsel at sentencing (*Gardner v. Florida (1977) 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393*; *Mempa v. Rhay (1967) 389 U.S. 128, 134, 137, 88 S. Ct. 254, 19 L. Ed. 2d 336)*, or else allowing the withdrawal, but continuing the sentencing hearing, resulting in the disruption of the proceedings that we have already concluded constituted **[*94]** reason enough for denying defendant's substitution motion. The court did not abuse its discretion in denying counsel's request to withdraw. (*People v. Sanchez, supra, 12 Cal.4th at p. 37*; *Manfredi, supra, 66 Cal.App.4th 1128, 1133*.)

IV. The Court's Refusal to Order a *Section 1368* Evaluation

A. Factual Background

As discussed above, Hanlon unsuccessfully moved to withdraw as counsel on June 13, 2011. Only upon the denial of the motion to withdraw did he for the first time raise a doubt as to defendant's competence under *section 1368*. And only the next day did Hanlon produce his declaration claiming he had harbored longstanding doubts as to defendant's

competence. That declaration of course flatly contradicted Hanlon's statement to the court just a few days earlier that he had no doubts about defendant's competence in the context of defendant's *Faretta* motion.

Hanlon argued that his declaration of a doubt as to the defendant's competency was based on his inability to communicate with defendant "in any meaningful way," as well as defendant's "inability to communicate" with him. Hanlon told the court, "there are things that are approaching delusional comments . . . ." The court noted it had spoken at length to defendant that day at the closed hearing, as well as the preceding Friday, and found him **[*95]** fully able to communicate. The court found defendant "to be competent," and to have "the ability to communicate with counsel if he chooses to do so." Hanlon said, based on his greater familiarity with defendant, he believed "things are going on in [defendant's] head that are not real." He felt he had watched a "breakdown occur" with "delusional things" becoming more and more common.

The court noted that in nine months Hanlon had been representing defendant he had never previously stated a doubt about defendant's competence. In fact, the previous week, when defendant requested to represent himself, Hanlon "made a record indicating [he] felt he was competent to do so." The court noted Hanlon expressed a doubt about defendant's competency only after his motion to withdraw had been denied, and "the timing is suspicious." The court concluded, "[t]here's not a doubt in my mind as it relates to the competency of the defendant. So I'm not going to suspend criminal proceedings."

The following day Hanlon filed a declaration under seal providing more details to support his doubt about defendant's competency, in which he stated that he had sought the advice of two forensic psychiatrists, but neither would **[*96]** express an opinion without interviewing defendant, who refused to be interviewed. Hanlon claimed he had not pushed the issue earlier so as to avoid causing a "total and irreversible breakdown of the attorney-client relationship." When he told the court on Friday, June 10, 2011, that defendant was competent, he did so despite "grave doubts as to his competency to communicate in a meaningful way with me." Hanlon conceded he had made a "mistake" in vouching for defendant's competency, and that "my judgment may have been effected [*sic*] by the recent threats of violence he had made against me, the breakdown of our attorney-client relationship, and my knowledge that I felt I could no longer continue in my representation of him." In recent weeks, defendant had become resistant to talking about the facts of the case, becoming agitated and angry when Hanlon pressed him on facts of his defense.

Hanlon declared that prosecution and defense interviews with family members and others showed defendant had a long history of psychological problems, learning disabilities, and bizarre behavior, and that his delusional thinking had existed since childhood. Hanlon said a psychiatrist retained by Hallinan **[*97]** had diagnosed defendant with "a recognizable mental illness that included delusional ideation."

The declaration listed several statements made by defendant that Hanlon believed were delusional because, after investigation, he concluded they were untrue. These included defendant's claim he had been visited in jail by famous people, had been part of a secret military force, had had sexual relations with well-known women, had been a bodyguard for

a famous musician and had been shot while protecting him. It is difficult to tell from Hanlon's declaration whether all of these statements had been investigated and found to be untrue. We note that because defendant was a member of a well-known family in the world of adult entertainment, his claims of consorting with well-known people cannot be rejected as delusional quite as readily as they might be in some other cases.[10]

After reviewing Hanlon's declaration, the court noted in particular that after defendant made his *Faretta* motion and had been given his attorneys' files over the weekend, he came into court and made a "very rational," "very reasonable," "very intelligent" and "very coherent" presentation to the court about the materials he had reviewed and his reasons for and estimate of needing more time to prepare. He was also able to explain at the in camera hearing on Hanlon's motion to withdraw both his own emotional state and his communications with his attorneys, as well as describing his stresses in jail and his defense strategy in a manner the court described as "coherent and reasonable." The court stressed that it found defendant's discussion during the hearing to be "[v]ery reasonable, very intelligent, and very thoughtful." The court acknowledged that defendant and his attorneys "have some disagreements," "[b]ut I . . . don't think that that makes Mr. Mitchell incompetent." The court again noted that it considered the timing of the motion "a little suspect," and felt "very strongly" there was "not substantial evidence . . . that would suggest that Mr. Mitchell is incompetent." It, **[*99]** therefore, denied the renewed motion. Under settled law, that ruling was within the court's discretion.

B. The Law

"A defendant is presumed competent unless it is proved otherwise by a preponderance of the evidence. . . . [¶] If a defendant presents substantial evidence of his lack of competence and is unable to assist counsel in the conduct of a defense in a rational manner during the legal proceedings, the court must stop the proceedings and order a hearing on the competence issue. [(*Pate* [*v. Robinson* (1966) 383] U.S. [375,] 384-386.)] [Citation.] In this context, substantial evidence means evidence that raises a reasonable doubt about the defendant's ability to stand trial. [Citation.] The substantiality of the evidence is determined when the competence issue arises at any point in the proceedings. [Citation.] The court's decision whether to grant a competency hearing is reviewed under an abuse of discretion standard." (*People v. Ramos (2004) 34 Cal.4th 494, 507, 21 Cal. Rptr. 3d 575, 101 P.3d 478* (*Ramos*).)

"Substantial evidence of incompetence may arise from separate sources, including the defendant's own behavior. For example, if a psychiatrist or psychologist 'who has had sufficient opportunity to examine the accused, states under oath with particularity **[*100]** that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial-evidence test is satisfied.' [Citation.] If a

[10] Defendant is the son of one of the Mitchell Brothers, rather well-known producers of pornography. Defendant himself had worked at the O'Farrell Theater in San Francisco, a family-owned business, which he described as a "strip club." It is, therefore, not inconceivable that defendant would have known "famous" people or slept with **[*98]** "well-known" women.

defendant presents merely 'a litany of facts, none of which actually related to his competence at the time of sentencing to understand the nature of that proceeding or to rationally assist his counsel at that proceeding,' the evidence will be inadequate to support holding a competency hearing. [Citation.] In other words, a defendant must exhibit more than bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel." (*Ramos, supra, 34 Cal.4th at pp. 507-508*.)

"When the evidence casting doubt on an accused's present competence is less than substantial, the following rules govern the application of *section 1368*. It is within the discretion of the trial judge whether to order a competence hearing. When the trial court's declaration of a doubt is discretionary, it is clear that 'more is required to raise a doubt than **[*101]** mere bizarre actions . . . or bizarre statements . . . or statements of defense counsel that defendant is incapable of cooperating in his defense . . . or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense . . . ." (*Welch, supra, 20 Cal.4th at p. 742*.)

C. Analysis

The reliability of Hanlon's assertion of a doubt as to defendant's competency was severely undercut by words from Hanlon's own mouth just days earlier. In order to credibly assert a doubt about his client's competence, Hanlon had to account for the fact that on the preceding Friday, he told the court he had no doubt whatsoever as to defendant's competency, and by June 14, 2011, he claimed to have had a doubt of long standing.

Despite Hanlon's efforts to distance himself from his earlier comments, the court was not obligated to accept his explanations and could, based on its own observation of defendant, place more credence in counsel's initial expression of confidence in defendant's competence. Accordingly, the court, in its reasoned discretion, was justified in finding Hanlon's declaration was not substantial evidence of defendant's **[*102]** incompetence. *Ramos* made clear that a defendant's demeanor during court appearances could be used in determining competency. "Although a court may not rely *solely* on its observations of a defendant in the courtroom *if there is substantial evidence of incompetence*, the court's observations and objective opinion do become important when no substantial evidence exists that the defendant is less than competent to plead guilty or stand trial. [Citation.] When a defendant has not presented substantial evidence to indicate he was incompetent, and the court's declaration of a doubt is therefore discretionary, its brief reference to the defendant's demeanor is not error." (*Ramos, supra, 34 Cal.4th at p. 509*, italics added; see also *People v. Rogers (2006) 39 Cal.4th 826, 849-850, 48 Cal. Rptr. 3d 1, 141 P.3d 135* ["psychiatric testimony . . . with little reference to defendant's ability to assist in his own defense" not sufficient]; *People v. Blair (2005) 36 Cal.4th 686, 714, 31 Cal. Rptr. 3d 485, 115 P.3d 1145* [preexisting mental condition not sufficient].)

Thus, Hanlon's assertion that defendant had a "long history . . . of psychological problems . . . and bizarre behavior" did not amount to substantial evidence that he was incompetent to go to trial. Defendant's purported past mental

problems were remote in time, did not come in the form of expert opinions, and were insufficiently **[*103]** connected to defendant's current health status and ability to assist in his defense at trial.

Likewise, Hanlon's litany of facts purportedly leading to a conclusion of incompetency (such as delusional statements) did not relate those facts to an inability to aid in his own defense. Although defendant might have been uncooperative in executing Hanlon's strategy, there is no reason to believe his behavior was due to mental problems rather than sheer stubborn insistence on his innocence. The court was within its discretion in declining to convene competency proceedings, bolstered by its lengthy and detailed colloquies with defendant before trial.

"[A]n uncooperative attitude is not, in and of itself, substantial evidence of incompetence." (*People v. Mai, supra, 57 Cal.4th at p. 1034*.) And "although a defense counsel's opinion that his client is incompetent is entitled to some weight, such an opinion alone does not compel the trial court to hold a competency hearing unless the court itself has expressed a doubt as to the defendant's competence. [Citation.] Here, the trial court entertained no such doubt. [¶] . . . [¶] [¶] Defendant further faults the trial court for concluding defendant's unwillingness to cooperate with his counsel did **[*104]** not equate with an inability to assist counsel. But we have recognized a similar distinction. [Citation.] If there is testimony from a qualified expert that, because of a mental disorder, a defendant truly lacks the ability to cooperate with counsel, a competency hearing is required. [Citation.] Here, however, there was no substantial evidence that defendant's lack of cooperation stemmed from *inability* rather than *unwillingness*, and the trial court's comments suggest that it found defendant's problem to be of the latter type rather than the former. In these circumstances, no competency hearing was required." (*People v. Lewis (2008) 43 Cal.4th 415, 525-526, 75 Cal. Rptr. 3d 588, 181 P.3d 947*, italics added; see also *Welch, supra, 20 Cal.4th at p. 742* [defendant's disagreement with counsel about "which defense to employ," even when accompanied by "paranoid distrust" of the legal system and his lawyer, did not require competency hearing].) The court in our case came expressly to the same conclusion. The trial court acted within its discretion in determining Hanlon's evidence of defendant's incompetence was insubstantial and declining to order a hearing under *section 1368*.

V. Refusal to Grant Counsel's Request for Funds for Psychological Expert

A. Factual Background

On May 25, 2011, during jury selection, defense **[*105]** counsel requested an ex parte hearing with the judge without his client's presence, during which he reviewed with the court the history of his representation of defendant. Counsel reported that defendant flatly refused counsel's repeated advice that they should pursue a psychological defense. Counsel said there were past psychological reports, and reports from family and friends, that defendant may have had some past psychological issues. He pointed out the bizarre coincidence that defendant's father had killed his brother (defendant's uncle) on July 12, 1991. Defendant's father had died on July 12, 2007. Defendant's minor child was born on July 12, and the murder of D.K. occurred on July 12, 2009. Hanlon thought this pointed to a

"perfect storm" of psychological stressors that could have triggered the crime.

Hanlon believed he needed to investigate such a defense, but because defendant would not cooperate with an examination, the psychological expert could only review defendant's medical records and watch him testify. If "that doctor came to the conclusion that he did suffer from a disease that affected either his ability to testify, or in fact, what happened," the defense "would call **[*106]** that person." Counsel estimated that such an expert would charge $300 to $500 per hour, and would cost $20,000 to $30,000.

The court carefully considered counsel's request, noting "the Court has already provided funds for Mr. Mitchell's defense, and for the defense he wants." Counsel conceded that the trial court had been "generous" in funding the defense investigation. As for a psychiatrist who would merely watch defendant testify, the court said: "I don't even know if that would necessarily be admissible evidence, which is something I think I need to consider, especially since it's a large amount of money that is being requested." Of course, the court pointed out that the request was on the eve of trial, which would cause a problem of notice to the prosecution. But the court said, "the most important thing" was that defendant's due process rights be guarded. The court concluded it would not be prudent to give counsel "such an exorbitant amount of money for a conflicting defense that might not come into play in any event."

However, the court did not entirely deny counsel's request. Instead, if counsel thought "a psychiatrist or psychologist could review any prior medical records and **[*107]** enter an opinion that you're wanting, with a dollar figure of [$2,000]"; Hanlon was encouraged to "look into that" and to "ask me again" if the expert's initial work seemed to call for further investigation. "If you don't think that's going to be enough money for you to look into this alternative defense, then I decline to provide additional funds." Defendant points to no further discussion of the topic, nor are we aware of any.

B. The Law

"An indigent defendant has a statutory and constitutional right to ancillary services reasonably necessary to prepare a defense. (*§ 987.9, subd. (a)*; [*Corenevsky v. Superior Court (1984) 36 Cal.3d 307, 319-320, 204 Cal. Rptr. 165, 682 P.2d 360]*.) The defendant has the burden of demonstrating the need for the requested services. [Citation.] The trial court should view a motion for assistance with considerable liberality, but it should also order the requested services only upon a showing they are reasonably necessary. . . . On appeal, a trial court's order on a motion for ancillary services is reviewed for abuse of discretion." (*People v. Guerra (2006) 37 Cal.4th 1067, 1085, 40 Cal. Rptr. 3d 118, 129 P.3d 321*; see also *People v. Gonzales and Soliz (2011) 52 Cal.4th 254, 286, 128 Cal. Rptr. 3d 417, 256 P.3d 543* [where "defendant failed to carry his burden to show that additional funding was reasonably necessary, . . . the trial court properly exercised its discretion to deny the motion"]; *People v. Beardslee (1991) 53 Cal.3d 68, 100, 279 Cal. Rptr. 276, 806 P.2d 1311* [defendant "had the burden of showing that **[*108]** the investigative services were reasonably necessary by reference to the general lines of inquiry he wished to pursue, being as specific as possible. [Citation.] Although a motion for assistance should be viewed with considerable liberality . . . , on appeal the trial court's order is presumed

correct. Error must be affirmatively shown"].)

C. Analysis

We think it is significant that the trial court did not deny defendant's request outright, but rather conditionally granted counsel a disbursement of $2,000 to look into the psychological defense. The trial court acted reasonably and within its discretion in authorizing a smaller amount for a preliminary investigation. Counsel's preferred psychiatrist would have charged $300 to $500 per hour, and he said he needed $20,000 to $30,000 in total. Mathematically, this suggests he was estimating 40 to 100 hours of expert psychiatric work, which inferably included the time the psychiatrist would have spent in court observing defendant's testimony and demeanor. Hanlon made no record below why, perhaps at a more modest hourly rate, he could not have secured the services of a competent psychologist or psychiatrist to conduct a preliminary review **[*109]** of defendant's medical records in far less time and for far less money.[11]

In fact, there is no indication in the record that defense counsel actually requested the $2,000 offered by the court. Defendant, therefore, arguably forfeited the claim he now raises. (Cf. *People v. Ervin (2000) 22 Cal.4th 48, 68, 91 Cal. Rptr. 2d 623, 990 P.2d 506* [where circumstances changed, failure to renew severance motion forfeited issue on appeal]; *People v. Davenport (1995) 11 Cal.4th 1171, 1195, 47 Cal. Rptr. 2d 800, 906 P.2d 1068* [same, motion challenging jury composition].)

Finally, as to prejudice, defendant makes no reasonable argument that his trial was rendered unfair or that he otherwise suffered prejudice because of the failure of the trial court to offer more than the preliminary $2,000. (See *People v. Guerra, supra, 37 Cal.4th at p. 1086*.) Defendant has failed to identify any mental defect or disease that he was suffering from, to explain the effect any such psychological problem had on his mental state at the time of the murder, or to make any showing or even any argument as to what a psychologist or psychiatrist would have reported if funds had been granted. Given defendant's resistance, it was not reasonably likely that counsel **[*110]** would have put on any actual evidence of a psychological defense. And though defendant seems to believe medical testimony was necessary to support a heat of passion defense, that clearly is not the case. As discussed above, psychological evidence could have contributed to the subjective element of heat of passion (for which there was already evidence), but would have been irrelevant to the objective element. (*Steele, supra, 27 Cal.4th at p. 1253*; *Mercado, supra, 216 Cal.App.4th at pp. 81-82*.) Moreover, as discussed above, the evidence of guilt was overwhelming. Consequently, defendant has not shown that the trial court's ruling on his request for $20,000 to $30,000 had any negative effect on his defense.

VI. Sufficiency of Evidence of Child Endangerment

Defendant next challenges the sufficiency of the evidence for the jury's verdict on count five, felony child endangerment under *section 273a, subdivision (a)*. The standard of review is the familiar substantial evidence standard. "Substantial evidence is 'evidence which is reasonable, credible, and of solid value.'"

[11] An indigent defendant does not have a constitutional right to choose a psychiatrist "of his personal liking," but rather, only has a right to a "competent psychiatrist." (*Ake v. Oklahoma (1985) 470 U.S. 68, 83, 105 S. Ct. 1087, 84 L. Ed. 2d 53*.)

(*People v. Morales (2008) 168 Cal.App.4th 1075, 1083-1084, 85 Cal. Rptr. 3d 873* (*Morales*).) The question is whether any reasonable trier of fact could have found defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia (1979) 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560*.)

Defendant argues that the evidence was insufficient to prove the child endangerment charge because **[*111]** he took good care of the minor, and that he did not expose her to conditions likely to cause her great bodily harm. Defendant argues that he first assumed custody of the minor when he grabbed her from the man in the black T-shirt. He then carried her to his car. He cites Nick's testimony that he took "good care of the [minor]" when he placed the minor in his car. He claims from that point forward there was no evidence that he placed the minor in danger.

But in making this argument, defendant analogizes to kidnapping cases and other cases in which the defendant had no clear legal duty to care for the child. "*Section 273a* does not require that a defendant be related to a child. . . . '[T]he relevant question in a situation involving an individual *who does not otherwise have a duty imposed by law* or formalized agreement to care for a child (*as in the case of parents* or babysitters), is whether the individual in question can be found to have undertaken the attendant responsibilities at all.'" (*Morales, supra, 168 Cal.App.4th at pp. 1083-1084*, italics added, fn. omitted [defendant kidnapper assumed caregiving responsibilities when he kidnapped victim and endangered her by taking her as a passenger in his speeding car]; see also *People v. Perez (2008) 164 Cal.App.4th 1462, 1471, 80 Cal. Rptr. 3d 500* [defendant properly convicted **[*112]** under *§ 273a* for having heroin and heroin-filled syringe in home he shared with his sister, whose granddaughter sometimes stayed there while defendant was the only awake adult in the home]; *People v. Malfavon (2002) 102 Cal.App.4th 727, 731, 734, 737, 125 Cal. Rptr. 2d 618* [defendant shook to death his girlfriend's seven-month-old baby while left to watch her briefly]; *People v. Culuko (2000) 78 Cal.App.4th 307, 313, 335, 92 Cal. Rptr. 2d 789* [man who had lived with baby's mother for two months properly convicted, along with mother, under *§ 273a*, where baby died from being punched in the stomach and showed signs of past abuse]; *People v. Cochran (1998) 62 Cal.App.4th 826, 833, 73 Cal. Rptr. 2d 257* [defendant's conviction sustained where he allowed child to live in his house and acted as "surrogate father"].) Before he ever took the minor from her mother, defendant had a preexisting fundamental legal duty of care as the minor's father.[12] Hence, we find his cases inapposite.

As the prosecutor argued, it could be inferred from the evidence that D.K. held the minor in her arms when the attack began. Thus, the minor was endangered in various ways: the minor could have been dropped by D.K., D.K. could have fallen on top of the minor, and of course, the minor could have been hit by the

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[12] "[P]arents have a duty 'to exercise reasonable care, supervision, protection, and control over their minor child[ren].' (*§ 272, subd. (a)(2)*.)" (*People v. Swanson-Birabent (2003) 114 Cal.App.4th 733, 746, 7 Cal. Rptr. 3d 744*.) "'It is the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation.'" (*Lipscomb By And Through DeFehr v. Simmons (9th Cir. 1992) 962 F.2d 1374, 1386, fn. 2*; *Williams v. Garcetti (1993) 5 Cal.4th 561, 570, 20 Cal. Rptr. 2d 341, 853 P.2d 507* [parents' legal responsibilities for care and protection of their **[*113]** children are well established and defined]; *People v. Burden (1977) 72 Cal.App.3d 603, 606, 615-616, 618-621, 140 Cal. Rptr. 282* [death of baby by starvation was murder because defendant father had common law duty to care for him].)

baseball bat. That the minor was spattered with D.K.'s blood gave rise to a legitimate inference that the minor had been close to D.K. during the attack and, therefore, in danger. In fact, the prosecutor's theory was that the minor was actually trapped under D.K.'s body as defendant beat D.K. to death.[13]

Moreover, there can be no doubt that once defendant took the minor away in his car he had assumed care and custody of her. Rather **[*114]** than taking appropriate precaution, defendant put her in the front seat of his car and drove at highway speeds with the minor protected, at most, with an adult seat belt. A patrol officer from the Citrus Heights Police Department testified that a front seat belt is not a safe method to restrain a child of the minor's size and would not "provide [the minor] any safety if there was a collision." By leaving the minor alone in the car at night defendant added another layer of danger. Based on all of these facts, the jury had ample evidence on which to base its verdict.

VII. Restraining Order Under *Section 646.9*

Finally, defendant argues the trial court exceeded its authority at sentencing when it issued an order under the stalking statute (*§ 646.9*) restraining defendant from having contact with the minor or D.K.'s mother for 10 years because they were not the named victims of the stalking offense. The operative language of *section 646.9, subdivision (k)(1)*, is as follows: "The sentencing court also shall consider issuing an order restraining the defendant from any contact with the victim, that may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon **[*115]** the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family."

We are faced with two conflicting opinions construing this language and the very similar language of *section 136.2, subdivision (i)(1)*.[14] *People v. Clayburg (2012) 211 Cal.App.4th 86, 88, 149 Cal. Rptr. 3d 414* (*Clayburg*) expressly authorized a restraining order to protect immediate family members who "suffer[] emotional harm" under *section 646.9*, while *People v. Delarosarauda (2014) 227 Cal.App.4th 205, 211-213, 173 Cal. Rptr. 3d 512* (*Delarosarauda*) disagreed with the *Clayburg* majority and held that family members are not "victims" under the similarly worded *section 136.2*.

The majority opinion in *Clayburg, supra, 211 Cal.App.4th 86*, held the reference to "immediate family" in the second sentence of the statute expands the class of "victims" on whose behalf a protective order **[*116]** may be issued. (*Id. at pp. 90-92*.) A dissenting opinion by Justice Perren interpreted *section 646.9, subdivision (k)(1)* as authorizing a protective order only for the named victim of the stalking offense, and expressed the view that the reference to "immediate family" in the second sentence above was intended only to make the

[13] D.K. had been face down during the beating, but she was on her side when the police arrived. Nick did not see or hear the minor during the beating. The prosecutor theorized that the minor was lying under D.K. when she was murdered and that defendant turned her on her side as he snatched the minor from her arms.

[14] *Section 136.2, subdivision (i)(1)* provides in relevant part: "[T]he court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with the victim. The order may be valid for up to 10 years, as determined by the court. . . . It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family."

safety of such individuals a factor to be considered in setting the duration of the protective order. (*Clayburg, supra, at p. 95*.) *Delarosarauda* agreed with the construction advocated by Justice Perren and interpreted *section 136.2, subdivision (i)(1)* as authorizing protective orders only on behalf of named victims of domestic violence.

As a matter of statutory interpretation, we agree with the reasoning of *Delarosarauda* and the *Clayburg* dissent. We do not believe the second sentence of *section 646.9, subdivision (k)(1)* modifies the definition of "victim" in the first sentence. We therefore reverse the protective order issued under *section 646.9*.

DISPOSITION

The order restraining defendant from having contact with the minor and D.K.'s mother is reversed. In all other respects the judgment is affirmed.

Margulies, Acting P. J., and Dondero, J., concurred.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES R.W. MITCHELL,

Petitioner,

v.

CSP-CORCORAN, et al.,

Respondents.

Case No. 15-cv-04919-VC (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; DENYING CERTIFICATE OF APPEALABILITY

James R.W. Mitchell has filed a *pro se* petition for a writ of habeas corpus challenging the validity of his state criminal conviction. Mitchell seeks habeas relief based on the following claims: (i) the trial court erred by denying Mitchell's motion to replace his third set of retained attorneys with the public defender, his motion to dismiss his attorneys and proceed in pro per, and his attorneys' motion to withdraw; (ii) ineffective assistance of counsel when counsel did not promptly inform Mitchell of the defenses he would argue at trial and when counsel abandoned Mitchell at sentencing; (iii) the trial court erred by denying Mitchell's motion to appoint new counsel to submit a motion for a new trial and to represent him at sentencing; (iv) the trial court erred by failing to order a pretrial competency evaluation; and (v) the trial court erred in its handling of counsel's request for funds to hire a psychological expert. Because the claims lack merit, the petition is denied.

PROCEDURAL BACKGROUND

On July 12, 2011, Mitchell was convicted by a jury of first degree murder, corporal injury on a cohabitant, kidnapping, child abduction, child endangerment and stalking. 8 Clerk's

Transcript ("CT") 1583-84; ECF No. 14-18 at 147-48. The jury found that Mitchell personally used a deadly weapon in counts one and two and personally inflicted great bodily injury with respect to count two. *Id.* The jury found the allegation that the homicide occurred with the special circumstances of kidnapping to be false. *Id.* On August 16, 2011, the trial court sentenced Mitchell to thirty-five years to life in prison. 8 CT 1655-58; ECF No. 14-19 at 35-43.

On July 28, 2014, the California Court of Appeal affirmed the judgment. *See People v. Mitchell*, 2014 WL 3707995 (Cal. Ct. App. Jul 28, 2014) (unpublished). On October 15, 2014, the California Supreme Court denied Mitchell's petition for review.

STANDARD OF REVIEW

A federal court may entertain a habeas petition from a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court may not grant habeas relief unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412 (2000).[1] This is a highly deferential standard for evaluating state court rulings: "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Additionally, habeas relief is warranted only if the constitutional error at issue "'had substantial and injurious effect or influence in determining the jury's verdict.'"

[1]Mitchell argues AEDPA does not apply to him because he is not a terrorist and has not been sentenced to death. Although AEDPA's name suggests it only applies to terrorism and death penalty cases, the above authority substantiates that it applies to all federal petitions for a writ of habeas corpus.

Penry v. Johnson, 532 U.S. 782, 795 (2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

When there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion of the highest court to analyze whether the state judgment was erroneous under the standard of § 2254(d). *Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991). In this case, the California Court of Appeal is the highest court to issue a reasoned decision on Mitchell's claims.

DISCUSSION

The trial proceedings and the evidence presented against Mitchell are described thoroughly by the California Court of Appeal in its opinion upholding the conviction. *See Mitchell*, 2014 WL 3707995 at *1-6. This Court now rules as follows on the claims presented by the habeas petition:

- Mitchell claims the trial court erred by denying his motion to substitute his third set of retained attorneys with a public defender. Although the Sixth Amendment grants criminal defendants who can afford counsel a right to hire counsel of their choice, *see Wheat v. United States*, 486 U.S. 153, 159, 164 (1988), the right is qualified when the proposed choice will interfere with the integrity of the proceeding, *see United States v. Stites*, 56 F.3d 1020, 2014, 1026 (9th Cir. 1995); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (trial court has wide latitude in balancing right to counsel of choice with needs of fairness and demands of its calendar).

  As articulated by both the trial court and the Court of Appeal, at the time Mitchell made his motion to substitute counsel, the case was nearly two years old, hundreds of potential jurors had been summoned, sixty-five witnesses had been subpoenaed, and two important witnesses were elderly. *See Mitchell*, 2014 WL 3707995 at *12. Because granting the motion would require substantial delay and disruption, the Court of Appeal's rejection of this claim was not an unreasonable application of Supreme Court authority or an unreasonable determination of the facts in light of the state record.

Mitchell's argument that there was an irreconcilable conflict with his counsel was also reasonably rejected by the Court of Appeal. *See Stenson v. Lambert*, 504 F.3d 873, 886 (9th Cir. 2007) (irreconcilable conflict occurs only where there is a complete breakdown in communication between attorney and client). As the court found, the only evidence Mitchell presented of a conflict was his own threat to sue his attorney which was based on an underlying dispute involving a disagreement about trial tactics. Furthermore, counsel were not refusing to put on Mitchell's preferred mistaken identity defense, as he claimed, but rather were considering putting on an additional and alternative defense of mitigated culpability. *Mitchell*, 2014 WL 3707995 at *12-13; *see Stenson*, 504 F.3d at 886 (disagreements over trial strategy or tactical decisions do not rise to level of complete breakdown in communication). Therefore, Mitchell did not receive ineffective assistance of counsel based on an irreconcilable conflict.

- Mitchell claims the trial court's denial of his motion to represent himself violated his Sixth Amendment rights. Although a criminal defendant has a Sixth Amendment right to self-representation, *Faretta v. California*, 422 U.S. 806, 832 (1975), such a motion may be denied if it is untimely, s*ee Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005) (denial of *Faretta* motion made on first day of trial before jury selection as untimely not contrary to clearly established federal law). The trial court noted that Mitchell had delayed his *Faretta* request until opening statements were about to begin, the parties had sorted out hardship and cause challenges for approximately 1000 potential jurors, most of the in limine motions had been ruled on, the case was two years old, and several continuances had been granted at defense request, in part to allow Mitchell to change attorneys. *Mitchell*, 2014 WL 3707995, at *14-15. The trial court denied the motion only after Mitchell stated that he would need a month to prepare. Given the delay and disruption that would result if the motion were granted, the denial of this claim was not contrary to or an unreasonable application of Supreme Court authority.
- After the denial of Mitchell's *Faretta* motion, defense counsel filed a motion to withdraw

on the ground that Mitchell had threatened him, which the trial court denied. Mitchell argues that an irreconcilable conflict existed between himself and counsel at that time based on counsel's fear of Mitchell's threats which resulted in ineffective assistance. However, at the hearing before the trial court, Mitchell denied that any threats to his counsel were "imminent" or "dangerous," that he liked his two attorneys and would not harm them. *Id.* at *15. As reasonably found by the Court of Appeal, after an in camera hearing on the motion, the trial court "implicitly concluded . . . the threats were the product of a heated disagreement about defense strategy, but did not amount to a risk of actual danger to the attorneys and did not threaten to result in ineffective assistance of counsel." *Id.* at 16. Furthermore, the Court of Appeal's review of the record showed that, after the denial of this motion, defense counsel provided effective assistance by conscientiously advocating for his client, "cross-examining prosecution's witnesses, putting on defense witnesses, making appropriate objections, and taking care that his client not be prejudiced before the jury." *Id.* at 17. The Court of Appeal's denial of this claim was not contrary to or an unreasonable application of federal authority or an unreasonable determination of the facts. *See Stenson*, 504 F. 3d at 886 (irreconcilable conflict only occurs where there is a complete breakdown in attorney-client communication and the breakdown prevents effective assistance; disagreements over trial strategy do not rise to level of complete breakdown in communications).

- The Court of Appeal reasonably denied Mitchell's claims of ineffective assistance of counsel. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) (doubly deferential standard used on federal habeas review of ineffective assistance of counsel claims). Counsel's decision to pursue a heat of passion defense in addition to Mitchell's mistaken identity defense did not constitute ineffective assistance because defense strategies are controlled by counsel, not by the client. *See Brookhart v. Janis*, 384 U.S. 1, 9 (1966) (attorney may properly make strategy decision about how to run a trial even if client disapproves*); United States v. Mayo*, 646 F.2d 369, 375 (9th Cir. 1981) (difference of opinion as to trial

tactics does not constitute denial of effective assistance). The Court of Appeal's review of the record showed that counsel "was wrestling through much of the pretrial period with the question of how to best present a defense for this difficult client" and, on this basis, reasonably concluded that counsel did not willfully withhold important information or strategic decisions from Mitchell. *Mitchell*, 2014 WL 3707995, at *20. Furthermore, contrary to Mitchell's assertions, counsel did not abandon Mitchell's mistaken identity defense but presented the heat of passion defense as a backup argument, recognizing that the jury would likely reject Mitchell's "far-fetched" testimony that he was not the person who hit the victim with a baseball bat. *Id.* at *22-23. Counsel cannot be faulted for presenting both defenses, satisfying Mitchell by arguing mistaken identity and presenting a backup mitigating defense because he believed the evidence would not support a defense of mistaken identity. *See Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997) (counsel's performance was not deficient where "he did what he could with what he had to work with, which was not much."). Furthermore, because counsel presented Mitchell's desired mistaken identity defense, Mitchell cannot show prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (petitioner bears burden not only of showing counsel's performance was deficient but that it also caused him prejudice); *see also DePasquale v. McDaniel*, 2011 WL 841419, *10 (D. Nev. Mar. 7, 2011) (presentation of two defenses not unreasonable and did not prejudice petitioner).

- Mitchell fails to show that counsel's performance was deficient at the sentencing hearing or that it caused prejudice. At an in–camera hearing, counsel thoroughly explained his reasons for remaining silent at Mitchell's sentencing hearing. *Mitchell*, 2014 WL 3707995, at *23. He stated that he could argue, in line with Mitchell's testimony, that Mitchell was innocent, but rejected this in light of the jury's verdict; his only other alternative was to argue that Mitchell was guilty, with mitigating factors, but because Mitchell disapproved of this counsel would not argue it. *Id.* At the sentencing hearing, counsel was silent and Mitchell spoke at length about his innocence. *Id.*

Given counsel's strategic decision for his silence at Mitchell's sentencing hearing, Mitchell has failed to show deficient performance. Furthermore, the Court of Appeal reasonably found that, even though counsel was silent, he provided effective assistance because, given counsel's otherwise vigorous representation of Mitchell, had the probation report recommended an unauthorized sentence or failed to take account of relevant sentencing factors, counsel would have pointed it out to the court. *Id.* In light of the fact that Mitchell's argument for his innocence was heard by the court and that the trial court had limited sentencing discretion based upon Mitchell's convictions, *see id.* at *24, Mitchell has also failed to show prejudice.

- Mitchell claims the trial court erred in denying his motion to substitute an attorney to file a motion for a new trial and for sentencing. The Court of Appeal reasonably determined that the trial court understood the applicable law and properly based its decision on the disruption and delay that would result from granting Mitchell's motion given that the motion was heard on the date set for sentencing and that friends and family of the victim were in court to speak at the sentencing hearing. *Id.* at *29. This Court must defer to this ruling. *See Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (on habeas review, a federal court must presume that state courts know and follow the law and must follow § 2254(d)'s "highly deferential standard for evaluating state-court rulings").
- The Court of Appeal's decision to reject Mitchell's claim that the trial court erred in denying his counsel's motion to withdraw for sentencing was reasonably based on its determination that the trial court was faced with either allowing counsel to withdraw with no substitution, which would have violated Mitchell's right to counsel at sentencing, or to allow the withdrawal, but continuing the sentencing hearing, which would have resulted in delay and disruption of the proceedings. *Mitchell*, 2014 WL 3707995, at *30. This Court defers to this ruling. *Visciotti*, 537 U.S. at 24.
- Mitchell claims the trial court erred by refusing to order a competency hearing. The conviction of a defendant while legally incompetent violates due process. *Pate v.*

Robinson, 383 U.S. 375, 378 (1966). The test for competence to stand trial is whether the defendant demonstrates the ability "to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Godinez v. Moran*, 509 U.S. 389, 396 (1993). The question "is not whether mental illness substantially affects a *decision*, but whether a mental disease, disorder or defect substantially affects the prisoner's *capacity* to appreciate his options and make a rational choice." *Dennis v. Budge*, 378 F.3d 880, 890 (9th Cir. 2004) (emphasis in original). Due process requires a trial court to order a psychiatric evaluation or conduct a competency hearing sua sponte if the court has a good faith doubt concerning the defendant's competence. *Pate v. Robinson*, 383 U.S. 375, 385 (1966) (only when evidence raises a bona fide doubt about competency must trial court conduct a hearing). On habeas review, the state court's determination that the evidence did not require a competency hearing is a factual determination requiring deference unless it is unreasonable. *Torres v. Prunty*, 223 F.3d 1103, 1105 (9th Cir. 2000).

The issue of Mitchell's competency was raised by his defense counsel. However, counsel made contradictory statements: he first asserted he had no doubts about Mitchell's competency and then, four days later, after it became apparent that Mitchell's *Faretta* motion and counsel's motion to withdraw would be denied, he asserted he had longstanding doubts about Mitchell's competency. *Mitchell*, 2014 WL 3707995, at *32. Under these circumstances, counsel's credibility was put in question and the trial court was entitled to discount counsel's second statement. *Id.* Furthermore, the trial court had several lengthy discussions with Mitchell about his motions to substitute counsel and concluded that Mitchell made rational, reasonable, intelligent and coherent arguments in support of his motions. *Id.* at *31. Finally, the Court of Appeal found no evidence supported Mitchell's argument that his lack of cooperation with his attorneys stemmed from inability; instead, the Court of Appeal reasonably found that the evidence showed that his lack of cooperation stemmed from unwillingness. *Id.* at *33. Given these factual

findings, to which this Court must defer, it was objectively reasonable for the Court of Appeal to conclude that the denial of a competency hearing did not violate Mitchell's due process rights.

- Mitchell argues the trial court improperly denied counsel's pretrial request for $20,000 to hire a psychological expert to pursue a mental defect defense. However, at the time counsel made this request, Mitchell refused to be examined by a psychologist, therefore, counsel could only request an expert to review Mitchell's records and watch him testify. *Id.* at *33. The trial court did not deny the request but granted an amount of $2,000 for counsel to "look into" such a defense and to ask the court again if the expert's initial work called for further investigation. *Id.* at *34. Nothing in the record indicates that counsel requested the $2,000. *Id.* at *35. The Court of Appeal reasonably found the trial court's authorization of a smaller amount than counsel requested for a preliminary investigation was proper. *Id.* at *34 (citing *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (when defendant demonstrates to trial court that his sanity will be a significant factor at trial, state must assure access to a competent psychiatrist; however, defendant does not have a constitutional right to a psychiatrist of his own choosing or to receive funds to hire his own)). Furthermore, the denial of the $20,000 did not have a substantial or injurious effect or influence on the verdict because Mitchell failed to identify any mental defect he was suffering from or to explain how such a defect affected his mental state at the time of the murder or to show what the expert might have reported had the funds been granted. *Id.* at *35; *see Brecht*, 507 U.S. at 637.

CONCLUSION

Based on the foregoing, the Court orders as follows:

1. Mitchell's petition for a writ of habeas corpus is denied. A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case in which "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

2. The Clerk shall enter judgment in favor of respondent and close the file.

IT IS SO ORDERED.

Dated: October 18, 2016

VINCE CHHABRIA
United States District Judge

SUPERIOR COURT OF THE STATE OF CALIFORNIA

MARIN COUNTY JUDICIAL DISTRICT

HON. KELLY VIEIRA SIMMONS, JUDGE DEPARTMENT G

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs. No. SC165475A

JAMES RAPHAEL WHITTY MITCHELL, Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

RE SUBSTITUTION OF ATTORNEY

Wednesday, September 1, 2010

VOLUME 10, PAGES 165 THROUGH 182, INCLUSIVE

APPEARANCES:

For the People:
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Deputy District Attorney

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Reported by: CHRISTINA GILSON, CSR NO. 9824

WEDNESDAY, SEPTEMBER 1, 2010 9:00 O'CLOCK A.M.

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

MR. CACCIATORE: Charles Cacciatore for the People.

THE COURT: Good morning.

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

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

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

MR. CACCIATORE: You mean the 995.

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

MR. HORNGRAD: Well --

THE COURT: I've spoken to Judge Haakenson about

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

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

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

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

THE COURT: Before this Court.

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

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

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

my left.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

after all the motions have been filed.

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

THE COURT: I understand that.

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

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

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

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

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

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

Mr. Cacciatore, did you have something you wanted to say?

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

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

THE COURT: Of course.

MR. CACCIATORE: Thank you.

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

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

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

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

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

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

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

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

forward.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Do you have any comment or --

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

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

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

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

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

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

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

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

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

MR. CACCIATORE: Could the Court inquire of

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

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

THE COURT: I think that's true.

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

THE COURT: So -- I'm sorry.

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

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

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

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

MR. HORNGRAD: Thank you.

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

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

THE COURT: And Sara Rief?

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

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

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

MS. RIEF: That would --

MR. CACCIATORE: For what date?

THE COURT: Just for new counsel to come in.

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

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

THE COURT: Please.

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

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

the 995. Yes?

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

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

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

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

MR. CACCIATORE: Thank you.

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

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

MR. CACCIATORE: No.

THE COURT: Ms. Rief?

MS. RIEF: No, your Honor.

THE COURT: Everyone, thank you very much.

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

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

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

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

(Whereupon, the proceedings were concluded.)

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FRIDAY, SEPTEMBER 1, 2010 10:00 O'CLOCK A.M.

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(Whereupon, the following proceedings took place in chambers and filed under seal per order of the Court.)

THE COURT: All right. I'm not sure if I want everybody here.

MR. HORNGRAD: You tell us.

THE COURT: I'm not meaning to be disrespectful. Let's have the discussion with the three of us, then it might be that I need you to come in, at that point. But let me figure out what I'm dealing with first.

MR. HORNGRAD: Could I say while we're on the record --

THE COURT: By the way, hello.

MS. RIEF: Hello. I'm Sarah Rief.

MR. HORNGRAD: I told Ms. Rief that it was my intention to let her know what transpired in camera once they're appointed as counsel of record. Does that sound okay? In other words, if she's not going to be present, then I think as successor counsel, they'll need to know.

THE COURT: The problem is, I don't know what you're going to tell me, so I can't say to you: Yes, you can tell her later.

MR. HORNGRAD: Then let's see what happens.

THE COURT: If you don't mind, I'll let you know when we're ready.

The record should reflect Mr. Horngrad, myself, and my court reporter only are in my chambers.

MR. HORNGRAD: Hi.

THE COURT: Good morning.

MR. HORNGRAD: So the word I was trying to avoid in open court was "conflict" and there are cases that say that if the Court accepts a representation from counsel there is a conflict in the case, if you believe that, then you need not go any further.

We've done that research and I can try to get a hold of my office and get that case. I didn't want to use the word "conflict" in open court because I didn't want to use the word "conflict" in open court. And I also do not want to prejudice defendant in any way with this Court.

And I understand that the case is assigned to you and in fact I envisioned the possibility that if this inquiry was made before Judge Haakenson, maybe that might be more copacetic because he's not the one handling the trial, but here we are.

I don't want to make this about me, but you've known me for 30 years and, you know, Judge Burke (sic) just said in the legal newspaper that your legal practice is like a bank which is your reputation. You make withdrawals and you make deposits. And I tried to make deposits more than withdrawals. And I can tell you as an officer of the Court, and I'm prepared to be sworn, if you wish, that

there is a conflict in the case and it's a stone cold conflict.

THE COURT: Let me start by saying, and I said this to you before, I do take you at your word. I do think you have great reputation in the court and I do trust you, but I'm dealing with a very serious case. And I think when I have -- when I'm making a record, I need to be careful about making sure that everybody's interests are protected. And I believe you probably have a conflict, but can you be a little more specific so I have a record that would support my allowing a substitution the day before the 995 when you've worked so hard on it?

MR. HORNGRAD: Yes, yes. And I do not intend to quarrel with your Honor about your legal opinion. I think if new counsel comes in, new counsel comes in and he gets to have a new attorney for all the pending stuff.

Tell me if you're comfortable with this, if I frame it this way, and then if there comes a point when I've said enough, will you let me know so I can stop?

THE COURT: Sure. This is what I want, and maybe it can't happen because of what you're saying. I want you to do the 995, then I'll appoint them to move on.

MR. HORNGRAD: I would ask the Court to assume, based on my representations, to assume that Mr. Mitchell and I have a disagreement about strategy with respect to the 995 and with respect to his defense at trial and that it was communicated to me both directly and indirectly that there are concerns regarding my physical safety that should

compel me to adhere to Mr. Mitchell's strategies for the 995 and trial, rather than the strategies that I believe were legally sound.

THE COURT: Is this something that you think is going to occur with any defense attorney?

MR. HORNGRAD: As an exit interview I will counsel as to Mr. Mitchell's behavioral expectations with counsel and I'd like to think not. I don't believe that was a problem with Mr. Hallinan, though I couldn't say.

THE COURT: Because you might see where I'm going. You know, every two months I might have counsel coming in saying there is a problem and then I have to sort of figure that part out.

MR. HORNGRAD: Well, you know, generally speaking, there are times when I ask my client the facts of the case, initially, then there are times when I say: Let's see what the evidence is, then we can talk about it. And I believe that Mr. Mitchell is pursuing the latter course with new counsel.

THE COURT: Okay. Let me just ask you. I understand what you're saying. Why do you think that under the circumstances you could not proceed tomorrow and then get out?

MR. HORNGRAD: For one thing, I've been in this position once or twice before, but to be honest, thinking it through and speaking to my loved ones, I've come to realize, you know, I mean, I knew before, but I have responsibilities to people other than myself and --

THE COURT: So you think that there is this problem if you do one more thing. Is that what you're saying?

MR. HORNGRAD: Yes. And particularly with respect to the 995 and the defense at trial?

THE COURT: Well, yes. I --

MR. HORNGRAD: Both.

THE COURT: Do you know the substituting attorneys? I'm not familiar with them.

MR. HORNGRAD: Extremely well. Stuart Hanlon, Stuart Hanlon was one of the attorneys in Fajita Gate. Stuart Hanlon is a terrific attorney and I have a good relationship with him and he and I have had a good flow of information between us. Stuart has probably tried 50 homicide cases. He's used to be Tony Tamburello's partner and he's an extremely gifted lawyer.

THE COURT: So you believe that you know them well enough that when they say they're not going to move the trial dates, you believe they're competent enough to keep those dates?

MR. HORNGRAD: Yes. And I was very clear with Mr. Hanlon in my phone coversation. Other people were interviewing Mr. Mitchell and could not make that same guarantee. I told him that I had words with one particular attorney, so I've done my best to do my due diligence here.

I would also tell the Court in preparation for this I told Mr. Hanlon's office we have the file ready today we have 16 notebooks broken down by witness reports.

The way I do these things, I had my staff start to go through the file drawer yesterday and we hope to get everything to them this afternoon, the entire file ready to go.

I've represented to Mr. Hanlon that other than in limine motions, the case is trial ready. And Mr. Hanlon has been an attorney longer than I have and he's really a brilliant attorney whose word is his bond.

Again, for what it's worth, I also felt a personal obligation on some level to at least be satisfied that my successor attorney was an extremely competent lawyer and I'm certainly satisfied about that.

THE COURT: Okay.

MR. HORNGRAD: Now I think you understand why I was so reluctant, but I kept it as elliptical as possible and I would ask this stay sealed.

THE COURT: It will stay sealed. I will not discuss it, nor will the court reporter, unless there is further order of the Court.

I'm trying to think if there is any additional information that I feel that I need. I don't think there is.

MR. HORNGRAD: I should say that I told Ms. Rief I was going to be forthcoming with the Court because I felt obligated to tell her that as successor counsel. She said essentially to go forward.

THE COURT: Is she aware of your concern?

MR. HORNGRAD: No. I think Mr. Hanlon is in a

general way.

THE COURT: Okay. Thank you. I appreciate your coming in and discussing the facts. I know you didn't want to.

(Whereupon, the in camera sealed proceedings were concluded.)

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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
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SAN RAFAEL, CA. 94903
BY: CHARLES CACCIATORE
LEON KOUSHARIAN
DEPUTY DISTRICT ATTORNEY

FOR THE DEFENDANT: STUART HANLON & SARA RIEF
ATTORNEY-AT-LAW
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SAN FRANCISCO, CA. 94103

FOR THE CHILD: KELLY COPENHAVER
ATTORNEY-AT-LAW
38 MILLER AVENUE, SUITE 299
MILL VALLEY, CA. 94941

REPORTED BY: CATHERINE HEEFNER, CSR 8813

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

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

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

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

THE COURT: Right.

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

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

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

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

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

THE COURT: What about the clothes in the car?

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

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

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

I need to be aware of the universe of evidence on

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

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

MR. HANLON: As to the clothes.

THE COURT: Right.

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

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

MR. HANLON: The clothes --

THE COURT: But I think I understand now.

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

THE COURT: Right.

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

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

THE COURT: I understand.

MR. HANLON: Okay.

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

MR. HANLON: That's where we are.

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

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

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

TUESDAY, MAY 10, 2011 9:26 O'CLOCK A.M.

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THE COURT: We'll have Mr. Mitchell brought out please, Mr. Bailiff.

MS. RIEF: I'm sorry, Your Honor, did you say 9:00 or 9:30?

THE COURT: I asked that question. We thought it was 9:00, but I also know at times I say 9:30.

MS. RIEF: Our calendar says 9:30.

THE COURT: For the hardships and jury selection, let's make it 9:00. When the trial starts, let's make it 9:30. I certainly could have said 9:30, certainly something I do.

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

THE COURT: Okay. So, this is the matter of People versus James Mitchell. The record should reflect that Mr. Mitchell is in court and in custody. May I have appearances, please?

MR. CACCIATORE: Charles Cacciatore for the District Attorney.

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

MS. RIEF: Sarah Rief appearing on behalf of Mr. Mitchell, who is present in custody.

THE COURT: This morning we're on to start the hardship and questionnaire process with the jurors who have been summoned. Before I bring the jurors down, is there

anything either side wishes to bring up with the Court?

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

THE COURT: Mr. Mitchell.

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

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

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

just went ahead and granted summary judgment on me.

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

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

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

THE COURT: Right.

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

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

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

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

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

THE COURT: Well, you're going to.

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

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

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

THE DEFENDANT: No, they're good.

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

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

THE COURT: M-hm, okay.

THE DEFENDANT: Honesty is a big issue.

THE COURT: Anything else you want to say?

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

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

So, competence not being -- competence is not an

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

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

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

THE COURT: Okay.

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

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

MS. RIEF: No, Your Honor.

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

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

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

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

THE COURT: Mr. Cacciatore, anything you wish to say?

MR. CACCIATORE: No, thank you.

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

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

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

request yesterday.

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

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

I was going to have the jurors brought down. I was going to introduce everyone to the jurors and explain that Mr. Hanlon is also an attorney for and with Mr. Mitchell. I was then going to indicate to the jurors that the defendant has entered a plea of not guilty. The question is whether he is or is not after evidence presented, and then I was going to 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, Plaintiff and Respondent, vs. JAMES RAPHAEL WHITTY MITCHELL, Defendant and Appellant.	Court of Appeals Case No. _____ Marin County Superior Court Case No. SC165475A

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

WEDNESDAY, MAY 25, 2011 4:09 O'CLOCK P.M.

---oOo---

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

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

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

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

MR. HANLON: Yes, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HANLON: That's --

THE COURT: That's your estimate?

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

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

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

MR. HANLON: That's correct.

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

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

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

MR. HANLON: That's correct, Judge.

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

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

THE COURT: Okay. Thank you.

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

MR. HANLON: Yes.

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

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

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

MR. HANLON: Okay.

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

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

THE COURT: Okay.

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

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

MR. HANLON: And getting my tire fixed.

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

MR. HANLON: Have a wonderful vacation.

THE COURT: What's that?

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

THE COURT: Thank you. Thank you very much.

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

THE COURT: All right.

MR. HANLON: The 10th, right?

THE COURT: Yes, see you on the 10th, in the afternoon.

MR. HANLON: All right. Thank you.

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

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

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

---oOo---

HON. KELLY V. SIMMONS, JUDGE DEPARTMENT G

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
versus
JAMES RAPHAEL WHITTY MITCHELL,
Defendant.

No. SC165457A

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, JUNE 10, 2011
MONDAY, JUNE 13, 2011
TUESDAY, JUNE 14, 2011
WEDNESDAY, JUNE 15, 2011

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

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

FOR THE DEFENDANT: STUART HANLON
SARA RIEF
STUART HANLON LAW
179 - 11th Street, 2nd Floor
San Francisco, California

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

FRIDAY, JUNE 10, 2011 1:30 O'CLOCK P.M.

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THE BAILIFF: Remain seated. Come to order. Court is again in session.

THE COURT: I want to deal with one matter from this morning.

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

THE COURT: If you'll bring out Mr. Mitchell, please.

THE BAILIFF: Yes, Your Honor.

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

THE COURT: Hi. Now, I'm calling the matter of People versus James Mitchell. The record should reflect that Mr. Mitchell is in court and in custody. Good afternoon, everyone.

MR. HANLON: Afternoon, Your Honor.

THE COURT: May I have appearances, please?

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

MR. CACCIATORE: Charles Cacciatore for the People.

MR. HANLON: Stuart Hanlon and Sara Rief for Mr. Mitchell, who is present.

THE COURT: The matter comes on for further discussion regarding any additional motions, sort of sorry I set that date now after reading all the motions, but I did get

the motions, and we'll talk about them.

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

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

MR. CACCIATORE: Thank you.

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

THE CLERK: Yes.

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

MR. HANLON: What's his name?

MS. RIEF: Rodzen.

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

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

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

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

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

MR. HANLON: I agree with it.

THE COURT: Prosecution?

MR. CACCIATORE: No objection.

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

THE CLERK: Yes, both on the 12th.

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

MR. CACCIATORE: I have no objection to the series

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

MR. HANLON: I feel the same way.

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

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

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

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

THE DEFENDANT: It's my constitutional right.

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

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

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

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

THE COURT: Monday.

THE DEFENDANT: This Monday?

MR. CACCIATORE: Tuesday.

MR. HANLON: Tuesday.

THE COURT: Sorry, Tuesday.

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

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

THE DEFENDANT: Okay, Your Honor.

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

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

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

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

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

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

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

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

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

THE COURT: I have that.

MR. CACCIATORE: -- we have.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Sure, why don't you do that. Mr. Mitchell is filling out the form. Try and get back here in 10 minutes.

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

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

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

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

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

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

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

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

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

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

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

MS. RIEF: No, Your Honor.

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

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

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

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

THE COURT: That's fine.

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

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

have?

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

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

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

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

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

THE COURT: Right.

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

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

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

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

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

jail is going to handle that.

THE COURT: I know.

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

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

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

THE COURT: I'll take care of it.

MR. HANLON: Okay. Thank you.

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

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

THE COURT: Can the People manage that?

MR. CACCIATORE: Sure.

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

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

THE DEFENDANT: You got it, Your Honor.

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

MR. MITCHELL: They look pretty tough.

THE COURT: Pardon me?

MR. MITCHELL: They look pretty tough.

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

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

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

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

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

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

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

THE COURT: Friday was the opening statement day.

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

THE COURT: I understand.

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

MR. CACCIATORE: May -- go ahead.

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

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

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

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

everyone, see you on Monday at 1:30.

MR. CACCIATORE: Thank you.

THE COURT: Thank you.

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

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MONDAY, JUNE 13, 2011 2:35 O'CLOCK P.M.

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

THE BAILIFF: Sure.

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

THE COURT: Hello, Mr. Mitchell.

THE DEFENDANT: Good morning, Your Honor.

THE COURT: This is the matter of People versus James Mitchell. The record should reflect that Mr. Mitchell is in court and in custody. May I have appearances, please?

MR. KOUSHARIAN: Leon Kousharian, District Attorney's Office.

MR. CACCIATORE: Charles Cacciatore for the District Attorney's Office.

MR. HANLON: Stuart Hanlon and Sara Rief.

THE COURT: All right. When we left off last week we were having a discussion, Mr. Mitchell, you and I regarding your desire to represent yourself in this trial. And let me just start first with the question of whether or not that's still your desire?

MR. MITCHELL: It is, Your Honor. I want to bring up to the Court I will go pro per. I got all the discovery this past Sunday. I got -- received it somewhere around 1:00 in the afternoon. No nonsense I spent 13 and a half hours like, you know, updating myself to all the discovery that I haven't seen and everything that I did see. And I basically

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: I understand.

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

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

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

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

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

THE COURT: Mr. Kousharian or Mr. Cacciatore, do you have any comment?

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

THE COURT: You did.

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

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

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

MR. CACCIATORE: Judge --

THE COURT: I just need a minute.

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

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

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

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

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

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

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

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

MR. MITCHELL: Two weeks.

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

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

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

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

Mr. Cacciatore, you tried to interrupt, and I'm sorry. I went on.

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

THE COURT: Okay.

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

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

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

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

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

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

MR. HANLON: No.

THE COURT: With Ms. Rief present?

MR. HANLON: Yes.

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

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

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

THE COURT: I understand.

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

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

THE COURT: All right. We're back on the record in the Mitchell matter. Thank you for those few moments. Mr. Mitchell is here. The attorneys are here as before.

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

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

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

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

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

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

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

MR. CACCIATORE: Thanks.

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

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

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

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

MR. HANLON: Yes, Your Honor.

THE COURT: Okay.

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

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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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

JUNE 13, 2011

REPORTED BY: SUSAN J. KLOTZ, CSR #8300

MONDAY, JUNE 13, 2011 3:12 O'CLOCK P.M.

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(Whereupon, related matters were heard and reported but not transcribed herein.)

THE COURT: Record should reflect the courtroom has been cleared with the exception of my court staff. The discussion we're about to have will be placed under seal, and none of my court staff will be permitted to discuss it. They're under orders to not discuss it, in fact.

Mr. Hanlon, go ahead.

MR. HANLON: Yes, Your Honor. As the Court knows, I made a commitment to Mr. Mitchell and this Court to go forward with the trial. And Ms. Rief and I for nine months have worked to do that, and we've attempted to work with Mr. Mitchell. And we communicated with him regularly. We get multiple letters and multiple phone calls, and we have seen him.

There has been until I would say recently not any particular threat from Mr. Mitchell if I did something that he didn't like or he didn't want. In the last 10 days there have been two direct threats in letters that -- and I don't want to go -- this is a problem, the attorney-client privilege, I can't go into detail. I can only tell you that based on the volatileness Mr. Mitchell has shown to us in changing and getting angry, not getting angry, the threats are serious. I'm uncomfortable physically continuing at counsel table as is Ms. Rief.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: You don't.

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

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

THE COURT: Okay.

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

and I can't proceed.

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

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

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

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

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

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

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

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

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

THE COURT: M-hm.

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

THE COURT: That's okay.

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

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

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

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

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

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

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

THE COURT: I got it.

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

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

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

THE COURT: Well, I can appreciate --

THE DEFENDANT: So --

THE COURT: Just a minute. Just a minute.

THE DEFENDANT: Okay.

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

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

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

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

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

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

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

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

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

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

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

Now, we'll open the door.

MR. HANLON: Judge, can I just say?

THE COURT: Yes, sir.

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

THE COURT: That's true.

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

THE COURT: Okay. Thank you.

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

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

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

MR. CACCIATORE: Thanks.

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

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

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

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

MR. HANLON: Yes, Your Honor.

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HANLON: No.

THE COURT: Anything the prosecution wishes to add?

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

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

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

MR. HANLON: Submit, Your Honor.

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

MR. HANLON: I know you did.

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

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

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

THE COURT: Okay. Fair enough.

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

MR. HANLON: Nope.

THE COURT: How about you, Mr. Cacciatore?

MR. CACCIATORE: No, thank you.

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

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

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

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

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

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

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

MR. HANLON: Thank you.

THE COURT: Anything else?

MR. HANLON: No.

THE COURT: Any objections or concerns, Mr. Cacciatore?

MR. CACCIATORE: No, thank you.

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

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

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

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

THE COURT: I don't think so.

MR. HANLON: Okay.

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

MR. HANLON: All right.

MR. CACCIATORE: Okay, great.

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

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

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

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

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

THE COURT: Thank you, Mr. Kousharian.

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

MR. HANLON: Yes, I do.

THE COURT: Okay. Please.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you, Mr. Hanlon.

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

MR. KOUSHARIAN: No.

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

homicide one. 521 is the other one?

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

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

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

MR. HANLON: Which one?

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

MR. HANLON: Right.

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

MR. HANLON: Yes.

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

MR. HANLON: Yes.

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

MR. HANLON: Yes.

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

MR. HANLON: Yes.

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

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

THE COURT: To do all.

MR. KOUSHARIAN: -- do all.

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

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

THE COURT: All right. So --

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

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

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

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

MR. KOUSHARIAN: Yes, Your Honor.

THE COURT: All right. Moving on to 520.

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

MR. KOUSHARIAN: Yes, Your Honor.

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

THE COURT: I'm sorry?

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

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

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

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

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

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

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

MR. HANLON: All the brackets, right.

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

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

MR. HANLON: Yes.

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

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

THE COURT: And so then --

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

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

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

THE COURT: Okay.

MR. HANLON: There is one --

THE COURT: I'm just not there yet.

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

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

MR. HANLON: No.

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

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

THE COURT: To read that portion?

MR. KOUSHARIAN: Yes, Your Honor.

THE COURT: Do you have any problem with that, Mr. --

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

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

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

THE COURT: Okay. I'll give it.

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

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

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

MR. HANLON: Yeah.

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

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

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

MR. HANLON: M-hm.

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

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

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

MR. HANLON: I was really addressing the Court.

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

MR. CACCIATORE: I have one in my office.

THE COURT: They'll know what that means.

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

THE COURT: I just want to see it.

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

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

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

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

THE COURT: Okay. I will.

MR. HANLON: That's fine.

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

MR. HANLON: Really?

THE COURT: Really.

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

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

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

THE COURT: Uh-huh?

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

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

MR. KOUSHARIAN: On Page 2 of 5 --

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Hanlon, go ahead.

MR. HANLON: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CACCIATORE: You got on.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But, you know, all's fair in game and argument. What do the facts have to do with it? You know, my client is

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

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

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

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

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

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

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

THE COURT: Mr. Hanlon's tired.

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

THE COURT: Oh, right.

MR. HANLON: Right. Gets me nowhere with this

MR. HANLON: Yes, we both have to.

THE COURT: You both have to.

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

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

Have you ever done that, Mr. Cacciatore, ever?

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

(Laughter.)

THE CLERK: Jury entering.

MR. CACCIATORE: Sorry.

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

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

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

Mr. Hanlon?

MR. HANLON: Thank you, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But if she had touched, which means just what it

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

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

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

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

It's an honest question because it really did change, and --

MR. CACCIATORE: Excuse me, I'm going to object, your Honor, that misstates our obligation. Our obligation is not to convict James Mitchell, but to find the truth, that's what it is.

MR. HANLON: Well --

THE COURT: So -- okay. So, again, ladies and gentlemen, this is argument, and I already instructed you as to what the attorneys say is not evidence, what the evidence is is what you're to consider, it's argument.

MR. HANLON: And I would say, I agree, the Prosecutor's duty is to find justice and to find the truth, and you have to question them when that seems to get confused in the way they questioned their witnesses and how they change their arguments. That was my point. I agree with Mr. Cacciatore, that is their obligation.

So, then what do we know? So, these witnesses testified, Priebe, and Waller, too, and even Miss Kacer, they say -- she said, "I didn't test the blood on that swab because I assumed it was touch DNA." And if anything I say you think is wrong, have it read back. She didn't bother to test it because she was told it was touch DNA. Okay. But then it's a problem for the People, who don't really care whether that was there or not, because if you don't care it's there, blood, touch, it doesn't matter because it could be there, it wouldn't affect their case.

What'd they do? They had this nice expert scientist

go over the weekend, last weekend, the 4th of July weekend, when everybody should be having a good time, she's going to go retest this swab to prove that that wasn't touch DNA, the DNA found there, but it was gonna be blood, or semen, or saliva -- it obviously wasn't semen, but it was something stronger than touch. And Mr. Cacciatore, who argued to you he didn't care, called her up on Saturday to do that, the 2nd of July.

And so she goes and do it -- does it, and you could tell that I had a report, we requested it, the Government was good enough to provide me the report on Monday, and what did she say? It's really interesting. She says, "Well, I did a test to see what that DNA was. And my presumptive test" -- remember, it's called presumptive, which means it's not a final test because all it can show is apparent blood, "My presumptive test showed there's apparent blood."

"But that's not enough, so I did this immunological test to see if it -- if that tested right, because," as she admits, "there are false positives on presumptive tests that can show blood when it's not, when it's something else." So she's going to do more tests 'cause she's a good scientist. And the test comes up negative for human blood.

But that is not what Mr. Cacciatore asked her to look for, that is not a good result. I mean, it could be a good result --

MR. CACCIATORE: Excuse me, I have to object again. I didn't tell her to look for anything --

THE COURT: Well, there --

MR. CACCIATORE: -- there was no evidence of that.

THE COURT: There was no evidence of what his specific request was in that regard, so I'll sustain it.

MR. CACCIATORE: Well, it was to test the swab, that was it.

THE COURT: I understand.

MR. CACCIATORE: Thank you.

MR. HANLON: Okay. We don't know what Mr. Cacciatore told her, so let's forget that. So let's just go -- she came in, and all of a sudden she finds negative for human blood. Negative normally means negative, especially if you're a scientist, you don't try -- I mean, she even admitted there were explanations, which are, negative could be a false positive, it could mean human blood. I mean, it could be non-human blood, and we talked about that. Meat -- you cut meat, you pick up a bat, the bat's in the backyard, or outside, an animal bleeds on it years ago. The bat was made, I think we have evidence, in 2000. But she can't accept that because it's not the answer she wants.

So, all of a sudden, negative did not mean negative. All of a sudden, there has to be an explanation. All of a sudden, negative -- I'll say it, negative did not mean negative, and she looks to a test. She shows you this chart that's in evidence with the high peak of DNA. "Well, that will tell me it was blood."

The problem with that is, she had that test from her -- that peak she didn't do over the weekend, she did that in 2009 and 2010. And with that peak, and that evidence, she testified in court the first time saying, "Well, I assume it's

touch DNA. It's not -- it's not blood, it's not that level."

So, the question is -- you have seen one true scientist in this case, Mr. Waller. Mr. Waller doesn't reach, he doesn't make stuff up. Mr. Cacciatore tried to say, "Can you tell me how close this is" -- or I did, I don't remember, "How far DNA -- how far the blood spatter would travel?" He says, "I can't tell you. I'm not going to try to guess. I can tell you what I can tell you."

I don't think that applies to Miss Kacer, because I think the evidence will show you she took a side. And here's how you know she did. I asked her at one point, there was some objections going on, but this was admitted, "Do you ever play softball?" "No." I said, "Well, do you know -- could you get -- spit in your hand and play baseball?" And what's her answer for a scientist? "No, you wear gloves when you play baseball." Is that a scientific response? I mean, is that really someone who's just trying to look at the evidence, or is it someone who has a angle to push, which is the Prosecution, which is saying a negative doesn't mean negative?

You know, I mean, it -- think about it. She didn't learn about baseball in graduate school. And if she had, she would find out that many young people play baseball without gloves. I mean, it's really not an issue. Little League players play without gloves, high school players -- some players like to feel the bat in their hand. Some kids play on non-teams. It's not an issue, but she all of a sudden -- her answer -- could you see Mr. Waller saying that? No, because he didn't take a side. And when a scientist has a side

besides science, they give up their role as scientist, and that's what she did.

So, if you look at all this, what you have is no evidence that showed Mr. Mitchell brought the bat. Again, all that was about was D -- was Miss Keller's DNA touch, or blood, and I don't think we know.

Now, the Government argued, and will argue again, that why didn't we retest it? There's no evidence of what we did. Well, first of all, there was no argument about the DNA results. The results were what they were. The blood on the pants were Danielle's, the blood on the shoes was Danielle's, the blood on the baby's face was Danielle's, the blood on the baby's leggings were Danielle, on her shoes were Danielle. It wasn't contested.

And on our first go through of the evidence when witnesses were just testifying, there was no -- I didn't have an argument with Mr. Priebe or Miss Kacer when she said, "I assume that was touch DNA," and Priebe says "It's touch DNA, I tried to find a non-blood part." There was nothing to redo. But all of a sudden, things change. And that's when my expert came to court, you saw him here.

So, you could say it's a lot to do about nothing, but obviously the lawyers thought it was about something, and we can be wrong, but I really think listening to Mr. Cacciatore's argument, if it was a lot to do about nothing, why did he argue the change from the bat with the weapon Mr. Mitchell brought in opening to it doesn't matter in his closing?

MR. CACCIATORE: Your Honor, I have to object again. That statement wasn't made in opening.

MR. HANLON: I think it was.

MR. CACCIATORE: Well --

THE COURT: May I see the attorneys at the bench, please?

(Whereupon, Mr. Cacciatore, Mr. Kousharian and Mr. Hanlon approached the bench and had a discussion with the Court off the record.)

MR. HANLON: Let -- let us look -- another indication, if Mr. Mitchell had brought this bat, it was his bat, you would assume he would have touch DNA all over the bat. You would think he would have more fingerprints than one that they found.

So, what other evidence is there that Mr. Mitchell brought the bat? Well, we know if he was gonna go there to hurt her, there were other weapons you'll have in evidence in his car. There was a hammer. There was a stick -- we're talking about this walking stick.

And, you know, I don't know if the Government is just saying, "Well, he wanted backup evidence, backup weapons," but we'll see. Remember, Mr. Cacciatore gets rebuttal, but, you know, what's interesting about my argument, his argument in rebuttal, we all trust you to listen, and if we think the lawyers' arguments don't make sense, you know you're going to reject it.

But let's now look at the other area, which is the eyewitnesses. Did they I.D. James Mitchell beating

Miss Keller, and did they I.D. him running with the baby down the street? Now, let's start with their ability to see and what they saw.

If you believe Nick, he saw a man from the side beating a woman he knew to death with a bat. He was under stress, he was fearful, it was an awful crime. He could not pick out that person in a photo spread that day, he could not pick out that person in a lineup. So, in the lineup he maybe said three people, he picked out two cops and Mr. Mitchell as possible suspects. And only after he saw Mr. Mitchell in the newspaper did he pick him in court at the preliminary hearing, and then he repeated that in court.

A very brief view, under stress, and we'll talk about his contradictions -- well, let's go right there. What did he tell Officer Holmes -- not Officer Holmes, Coroner Holmes? He tells him that he heard a scream.

In court, he says he hears a tap, tap, tap. I don't mean to minimize the sound, but I think that's what he said, of the bat hitting the head. He tells Holmes that that's what -- that's not what he heard, he heard a woman scream or screams. And then he goes out his back door, onto this patio you see, and sees it and runs back in. In court, he says he goes out the front door, it has a whole different angle of view.

On the day of the incident, or hours later, he tells Mr. Holmes -- now, I don't know if the implication in Mr. Cacciatore's questioning was that Mr. Holmes, because he didn't get his report in for 10 or 12 days, miswrote what he

said? Of course, it's really interesting, when Mr. Cacciatore likes a statement of a witness, if Holmes says something that helps him, then the 10 or 12 days have no effect, but if it hurts him, all of a sudden -- "Well, you don't remember, you waited too long."

The Coroner, who has no interest in the case, said that's what Mr. -- what Nick said. He also said Nick says -- that Nick, according to Nick, I.D.s Mr. Mitchell, which we know isn't true, 'cause he never did until the preliminary hearing.

So -- and what did Bessie tell us? She says she just saw a man after the beating run past her quickly with a baby, and she can't identify anybody. But let's look at her testimony. You know -- and, clearly, these are elder people who got confused and scared. You know, and I'm not calling them liars, I mean, you look through her testimony, 'cause you've got to see -- I mean, Mr. Cacciatore said based on the eyewitnesses alone, you can convict my client. Well, therefore, we have to examine these eyewitnesses and what they said and who they -- you know, what they saw.

So, what else do we know about Bessie? She testified in court she loved the baby and Danielle. She said what she said. Well, she tells her friend, Miss Farren two weeks later, not that she was in the house and heard this God awful scream, remember that's what she said in court, she gave a screech which she heard, her husband heard this tap, tap, tap, she heard a scream, except Nick tells Holmes he didn't hear the tap, he heard the woman cry for help. These are the

evidence, this is what we have.

Then she tells Miss Farren, "I was outside walking from one of my neighbor's house and I saw it happen, I saw this man beating this woman I love like a daughter." You know, did Miss Farren sound like she was wrong? I mean, she knows what she was told.

The language problem. We understood Bessie talking in English. There's no language problem. I mean, maybe you have to listen a couple of times, but you can discuss it in the chamber where you deliberate. Did any of you have a problem understanding Bessie when she testified? Did Mr. Cacciatore ever ask her to repeat it? "It's unclear what you're saying?"

So, what are they going to say? Miss Farren just got it wrong, or it doesn't matter? You know, of course it matters. This is an eyewitness they want to rely on. And their eyewitness tells a friend, two weeks after the event, something totally different from where -- what she says in court.

But what's the most telling -- I found the most -- disturbing is too strong a word, but difficult to understand this testimony of Bessie. She's in the house, and she hears this screech, this -- I mean, she said -- I'm not going to repeat it, but almost a blood curdling screech is what it sounded like, and I think she described it that way.

And remember what she said, and I totally believe her, that she was really close to Danielle and this baby, and loved them as a daughter and a granddaughter, and, I mean,

she's a very loving woman, you can tell. But after going up there on her birthday and coming down, she hears this screech, and then there's quiet. And she thinks they fell down the stairs bringing laundry down.

Okay. What do you do if you're that person? What did she do? She went and made coffee. It doesn't fit. It doesn't make sense. I don't know why she's telling you what -- she's telling us what she's telling, but you don't hear someone you really care about with a little baby who you just bounced on your knee and sang happy birthday to, you don't hear this awful screech, assume they fell down the stairs, and everything's quiet, which is a sign of something bad happening, and then just go make coffee because you don't see anything out your window. We all know that doesn't make sense.

And I don't have an explanation -- I mean, I don't know if this thing's -- I don't know what the answer is. I know what it means is it's hard to take her testimony as proof beyond a reasonable doubt of anything.

Now, what do we know about Frank Walashek -- I have to get his name right. He hears -- in court, he says he hears a voice for help, but he can't identify a woman, and he says that's what he heard back then. But then two policemen came in and said he tells back then it's a girl's -- woman's cry for help, he tells it that day.

And then he does tell us, which is interesting, when he runs outside, after he puts on his pants, he gets off the computer with his girlfriend, he goes outside, he sees Nick,

not in the middle of the street, where he puts himself, but back either in his doorway or gate, you have to -- I don't remember exactly which it was, but he has him on his property.

And Mr. Cacciatore argued that Nick was in the middle of the street looking so he could see what's going on. But Frank said, "No, he's there," either at his gate or his front door. And for seconds -- this is Frank -- he sees a man run by and gets a sideway view. And that day when he's showed a photo spread, he can't identify who it is.

And then he believed -- he tells you that, "Because I didn't want to poison my identification, I didn't look at any pictures in the I.J." Picks Mr. Mitchell out at the lineup. And the question is, do you think that's credible? Remember, my last question to Frank Walashek -- Frank was, "In 2007, did you lie to a police officer?" "Yes." "Did you lie to a grocery store owner?" "Yes."

You try to think, how many 19 year olds do you know -- or when you were 19, who saw something like this, would not look in the paper to see what was written about a story you were involved in?

Eyewitness testimony is questionable at best. The Court has instructed you of specific things you look at, and many of those factors apply here to question eyewitness identification, which is -- well, it's all there, I'm not going to go through it, but as you look at it, the things I pointed out, the time to see, the view to see, would you make a prior -- failed a prior identification, there're all things the law says you look at, but what you also know is, and

there's been many articles about this, and we've developed and seen DNA freeing people, some of them on Death Row --

MR. CACCIATORE: Objection, your Honor, it's not relevant. There's just not any evidence. It's not even appropriate argument.

THE COURT: Well, I'm going to sustain that on the Death Row argument.

MR. HANLON: Okay. You've seen people -- DNA cases being reversed because DNA proves people are innocent.

MR. CACCIATORE: Same objection, your Honor.

THE COURT: I'll allow it.

MR. HANLON: You know, as to all of those cases, those false convictions are based on false identifications. This is what -- it's a classic way that things have gone. And it doesn't mean identification is always wrong, it just means the classic, "I'll never forget that face," is not always correct.

So -- but what else do we know? Really, what's consistent in the testimony of these people is that they see a Caucasian male, with pretty big build, I think between 5-10 and 6-2, bald head, or really close shaven hair, and what else? Blue jeans. And according to the two Greek people, a black T-shirt. And according to Frank, a white oversized T-shirt. White oversized shirt.

Now, I have no idea what Mr. Cacciatore's going to say, he's probably going to say it doesn't matter, like it doesn't matter if the bat was there or not. But, you know what, it does matter because these people are consistent that

they see a tall Caucasian, with a white or black T-shirt, depending who you're talking to. They never confused about that. They never give prior statements saying something different.

They've all been interviewed and testified, and what do they say consistently? Caucasian male, big, bald head, or shaved, or short hair, and if the two Greeks testify, it's a black T-shirt, and when Mr. Walashek testifies, it's an oversized white T-shirt.

Now, you can't just ignore that. You can't say they're right on everything, but they're wrong on the shirt because, when you're running by, if you want to base identifications on these brief seconds of someone running, side views, what do you see? Race, size, and clothes, or hairstyle. You can't say they're right on three but ignore -- and they're wrong on the fourth.

This is what Mr. Mitchell wore that day. There's no con -- there's no evidence -- this is neither white nor black, and if you saw it for two seconds, or five seconds, or 10 seconds, you would not call this white or black.

And, you know, it -- it just -- you can't have it both ways. The people see what they see, and you want to say they're right, but you have to question, what does it mean when they're wrong? I mean, it's simply that they see someone wearing different clothes than Mr. Mitchell.

As I said yesterday, the police and the Government had the control of his car since the day he was arrested. If there was a black or white T-shirt in that car, they'd have it

for you. It's not my burden to prove. You know, it -- it's the Government's burden, and they didn't bring these shirts in because they didn't exist. And then because they -- we question, who did these people see? Are these eyewitness identifications really real? You know, and -- and have they proven anything beyond a reasonable doubt?

And you look, again -- a really good example of why eyewitness identification is so confusing. We have four people on a quiet cul-de-sac listening to the same thing, and we have four different things they hear. Let's look at it. Bessie hears this God wrenching screech.

Her husband hears (counsel taps three times), they're right next to each other, the same house. He doesn't hear the scream, or maybe he does, he hears a yelp or help when he talks to Holmes, but when he testifies, he hears (counsel taps three times).

Then we have a neighbor, probably as far as from me to the wall, Danielle, from the wall in which she cuts her vines, on the next side, I forget her name, but she testified, Government called her -- Tolvag or Toveg, what does she hear? No one has bad hearing. There's no evidence that, "I have bad hearing." There's no evidence that either of the Greeks have bad hearing. She certainly doesn't appear to have bad hearing. She doesn't hear the tapping, she doesn't hear the screech, she hears a baby cry.

And then across the street, this guy Frank, he hears a woman cry for help.

Four people listening to the same incident hear four

different things. What it means is, people's perceptions when things are happening are not always right. I mean, they're not necessarily wrong, but they're not always right. So, if they're wrong, I guess we could say all those things happened, but how do you describe four people hearing four different things? How do you understand that?

So, Mr. Cacciatore says to you, you can convict my client based on the eyewitness identification. And I say to you -- what I'm trying to do is look at the evidence. If you think I'm messing with the evidence or I'm misstating things, not only will Mr. Cacciatore point it out, but you can point it out and say, "That lawyer, he's trying to mess with us."

I'm not. The evidence is what it is. And when you start to examine it -- part of the problem in a case like this, where the crime is so terrible, and it looks so overwhelming, the evidence, the proof, when you first hear it, you just assume this is all right.

And it's so easy to look at this and say, "Oh, he's guilty." It's such an easy job for you to just not examine the evidence and say he's guilty. He's there, he has the baby, he has blood spatter, his fingerprint's on the bat, he's guilty. My job is to make you look at the evidence. You still may reach that conclusion, you know, it's up to you, but you have to examine the evidence to do that.

Now, the blood spatter. Clearly, Mr. Mitchell was near this when it was happening. The problem I have found is that Mr. Cacciatore asked a question of Mr. Waller, "Is it consistent that he was standing behind the body and hitting

it," and Mr. Cacciatore, I think, had his feet together, but, whatever, and, of course, it's consistent, but when I cross -- questioned Mr. Waller, there were so many consistent possibilities, it doesn't mean anything to be consistent.

I mean, it could have been that Mr. Mitchell was moving and got blood spatter. It could mean someone's blocking one side and blood spatter gets here. And as Mr. -- the expert pointed out, Mr. Waller, blood doesn't go in a straight line like this, it's a vector. When you hit something and you create spatter, it creates as a vector. And he understood the word vector, and the common sense of it, it's moving.

So, the blood spatter certainly -- I mean, when you get to it, and we're talking about, again, puts Mr. Mitchell right -- whatever near is, it means fast. Mr. Waller wouldn't say near, it's clearly less than 10 feet from where she's getting hit, but it doesn't mean that they've proven beyond a reasonable doubt that he's beating her with a bat when this is happening, because that's simply not true.

You may end up concluding, based on all the evidence, that that is true, but you can't do it based on an argument and a question that says, "Isn't it consistent," because there's so many consistent possibilities that Waller talked about.

You know, and -- and, see, that's -- that's how you judge the argument of counsel. Are they messing with you or are they telling you what's straight up? And I think it's really important, because even though what we say is not

evidence, it pushes you in directions of thinking. And that's important. And my hope is to push you in the direction of thinking, has the Government met its burden in examining the evidence?

So, I'm going to try to move this along. Okay. The print on the bat. It shows Mr. Mitchell touched this bat. And I would agree, he has some type of DNA on the bat, whether it's blood or spatter, it appears -- I mean, blood or touch, it appears to be touch on the handle. One hundred -- one in 110,000 is good enough for me to say that's Mitchell's DNA. And I think there's -- I mean, it's too big of odds.

But we're not sure that he clearly touched the bat with his print. Is that consistent with that he took this bat by the handle and beat her? Is it consistent he grabbed it there, or is it all -- it is, of course, that -- the evidence is consistent with that theory. Is it also consistent with him getting hit by something, turning around, and struggling with a guy over a bat? Of course, it is.

But you can't look at this just all -- you have to look at the entire case. But if both those interpretations are reasonable under the facts of the whole case -- and we'll talk about that -- and, again, Mr. Cacciatore pointed out, he said Mr. Mitchell said he got hit in the back with the bat, and where's the blood?

He never said that. He said he got hit from behind, he didn't know what with, and he turned and struggled over the bat. There doesn't appear -- I mean, it wasn't really tested by Waller, this shirt. You look at it, there's no blood. I

agree, I looked at it, there's no blood. You look at it. But Mr. Mitchell never said he got hit in the back with a bat.

MR. CACCIATORE: I'll object, that misstates the Defendant's testimony.

MR. HANLON: It does not. It does -- this is -- I can argue, he can argue --

THE COURT: Excuse me, Mr. Hanlon. Mr. Hanlon --

MR. HANLON: It does not do that.

THE COURT: -- excuse me.

I didn't hear you, Mr. Cacciatore?

MR. CACCIATORE: I was objecting, it misstated Mr. Mitchell's testimony.

MR. HANLON: And I disagree.

THE COURT: Okay. Would you like me to rule, or did you wish to make the ruling?

MR. HANLON: I think you could rule and I'll accept it.

MR. CACCIATORE: Your Honor, could you admonish the Defendant, please? He's making comments.

THE COURT: All right. Mr. Mitchell, you're not to make comments.

I'll remind everyone we're talking about argument. You know what the evidence was. If you don't know what it is, you can ask for read back. I'll allow the argument to stand.

Go ahead, Mr. Hanlon.

MR. HANLON: And I apologize, Judge, for -- and Mr. Cacciatore, and the jury, for reacting that way, 'cause it really is not appropriate, and, you know -- it isn't, so, I'm

sorry.

Let's move on. So, let's examine -- I want to do two more things, I want to examine the testimony of Mr. Mitchell, and then talk about another issue in the case.

So, Mr. Mitchell admits in his testimony that he is a batterer, that he has hit this young woman, his girlfriend, his intimate partner, on a number of occasions. It is not pretty. It's disturbing, you know, and I would agree with that. I mean, people can't do that.

And the fact that it happened doesn't make it right, and the fact that there are open hand slaps, that doesn't make it better than a punch, it's abuse, you know. And he was honest and told you the number of occasions it happened. But he's not on trial for that. The question becomes, did he commit this murder?

Now, of course, you can use that to think -- it's evidence -- who would do that, in '08, when she's four months pregnant? Do that when she has the baby in '09, or late of '08? Is that the same person who murdered her? You can use that, but you can't convict him because he's an admitted batterer.

And -- I mean, there's no other way to talk about that. You can -- you can say to yourself, and to each other, "Well, if he did that to her in '08 twice or three times, then he killed her. We think that's evidence that he would kill her." You know, I think you have to look at the whole circumstances, but I'm certainly not going to try to sugar coat that, it's really a very ugly situation, that kind of

abuse. But it doesn't mean -- as I asked him, "You're a batterer. Are you a murderer?" He said, "No." That's going to be your decision.

You know, he testifies, I think, in a pretty direct way. He talked about what he did. He talked about the TROs that he violated. He talked about his disregard for the Court TRO, that Danielle wanted to be with him, and he wanted to be with her. And basically "F the Court," you know, that was true, you know, "I'm going to do what I want." But only on that issue. I mean, when you listen to the rest of him, he does follow court orders, he does do what they say, he does follow the custody order.

You know, he does go to classes. There are times that him and Danielle seem to be getting along. And the question, you know -- I think it's important that he goes to court on the 1st and the 6th of July, because they put a mind set in of somebody a week before this event.

If someone is going -- is working themselves up into a rage, that then six days later plans to kill, 'cause nothing really happened -- well, it did, on the 11th he tried to talk to her, and the 12th he said she said, "You can come over," but he's upset that he can't see her on her birthday -- on the baby's birthday.

But a man acting the way he's acting, and has for over a year, does not seem to be a man out of control. Nor does his phone calls, though they're sad and rambling, they're not filled with anger.

So -- I have about half an hour left. Can we -- is

there a point we could take a short break?

THE COURT: Do you need a break now?

MR. HANLON: Yes, I'd like to organize my thoughts.

THE COURT: All right. Why don't we take a 10 minute recess --

MR. HANLON: Thank you.

THE COURT: -- and we'll return at that time.

(Whereupon, at the hour of 10:37 o'clock a.m., a recess was taken until 10:54 o'clock a.m.)

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

THE COURT: Okay. You can bring the jurors in.

MR. HANLON: Can I stay up here, Judge?

THE COURT: Of course.

THE CLERK: Jury entering.

THE COURT: Thanks.

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

THE BAILIFF: Please come to order, Court is back in session.

THE COURT: All right. The jurors have returned to the courtroom.

Mr. Hanlon, go ahead.

MR. HANLON: Thank you, your Honor.

Ladies and gentlemen, I want to go over two more areas, and then I'm going to be done. Mr. -- Mr. Mitchell's testimony, we talked about. The question becomes, if you look at what he said, has the Government proved beyond a reasonable

doubt that he's not telling the truth?

And I would say two things -- there were a couple of things. In terms of what eyewitnesses saw, there certainly is issues with who they saw, because unless you want to dismiss the shirts as just they're wrong, without any reason for it, there are people wearing a black T-shirt and a white T-shirt, and there's a person wearing a striped T-shirt.

Now, Mr. Mitchell, when he went to the market in Napa, was wearing, you could see it in the video, a sweatshirt, it's not a T-shirt.

So, it's an issue you just can't dismiss by saying the witnesses were wrong. I mean, there's no -- again, as I pointed out, the only consistencies they have is the size of the man, the hairstyle, and the shirt. So, it's something you've got to deal with. I mean, these are issues -- it would be nice if every case was simple, for you guys, for the jury, but, you know, this is a serious, serious issue.

And it's consistent with Mr. Mitchell's testimony there were two other people. His fighting, his locking in on the person he's fighting with, locking in and not seeing Danielle being hit, because clearly that's what would have to happen if he got blood spatter. It's consistent with fighting. He doesn't know how long it is, he said he was trained in hand-to-hand combat, you lock in.

The issue that you're going to have to deal with -- I mean, I -- if you have any questions about what people said, or Mr. Mitchell testified to about where he was hit and how he was hit, have a readback, you know, any questions about

evidence, have it read back. But -- I mean, the issue -- you have to deal with the issue that Mr. Mitchell arrived, and within minutes, this event happened, and Danielle Keller's dead, and the 9-1-1 call happens.

You know, coincidences in life happen. You have to question if this is such a coincidence that you can't accept it. I mean, that's really the issue.

The other things he testified to are reasonable, and the question is, you don't have to believe him, you have to believe, has the Government proved his guilt beyond a reasonable doubt?

And to do that, you have to deal with the fact that he drives there, and within a few minutes, this event happens. And could you say to yourself that, "That's too much for us, we can't accept that as a coincidence?" Or, "It is a coincidence, and these other people are there."

And I'm not gonna sugar coat you, that's an issue you have to deal with. And I don't have any answer. I suggest to you that Mr. Mitchell's testimony is consistent with the evidence we have, it's consistent with the physical evidence, and it's certainly consistent with Mr. Waller, you know, the issue is what -- you know, the timing, certainly points to him as the person who's coming, and then the event happened.

And is that enough to convince you beyond a reasonable doubt he's not telling the truth? And that's going to be your job, is to determine that.

I want to talk to you about an issue that's very

difficult, not because it's difficult to talk about, but because my job as an attorney is to be an advocate for my client. I'm also an officer of the Court. And I see my job in closing argument as arguing what I believe the evidence suggests and have you think about it.

And I think even though you can tell from Mr. Mitchell's testimony, he would not agree with me going to where I'm going to go, which is, if you don't believe him, what occurred? If you don't believe what he testified to, if you believe he's a killer, what do you then do with the facts?

And, I don't want you to take it to mean that I don't believe my client. As I pointed out to you, what Mr. Cacciatore and I believe is irrelevant, we can't argue what we believe, we can argue what the evidence shows.

And one of my concerns was, if I argued to you, what do you do if you were convinced beyond a reasonable doubt that Mr. Mitchell is not telling the truth and did take the hammer and did kill her? Then you will say, "Well, this is where he talked about honesty, being straightforward with us, and now he's going to talk out of two sides of his mouth. 'He's innocent, but if you don't think he's innocent, what's he guilty of?'"

I don't -- you know, I try never to do that, and that's why this is difficult, but it's something, as an officer of the Court and an advocate for my client, I have to do, because there certainly is evidence on which you could conclude, depending on how you understand the inferences for circumstantial evidence, that Mr. Mitchell is not being

totally honest with you about what happened.

And there're inferences -- there's arguments which should say he is, but I have to deal with what do I do as his lawyer. If you decide, "We don't believe beyond a reasonable doubt," or, "We're convinced beyond a reasonable doubt that he is the person who hit Danielle Keller with a bat," and if you think, or if Mr. Cacciatore wants to say, it's talking out of two sides of my mouth, I don't think it is, but I think I would not be doing my duty as a lawyer to not address these issues, because then we have -- the only thing you have guidance from is the instructions and the argument of Mr. Cacciatore.

And, you know, it'd be great if lawyers were all unbiased, but we have sides, we're advocates for each other, and I don't -- I'm an advocate for Mr. Mitchell, and I don't knock Mr. Cacciatore being an advocate for the Government.

So, I want to talk to you -- what can we infer from the evidence, if you conclude that Mr. Mitchell is the person who killed Danielle Keller? And the real issues that occur from that is, if you conclude that, is he guilty of first degree murder? Is he guilty of felony murder, wherein you have to be convinced beyond a reasonable doubt that he went there, or decided to kidnap, and in the course of that kidnap, he committed a homicide? Because if the People can't convince you of that, then he's not guilty of special circumstances.

So, many of the things I argue to you are consistent with this -- with the argument of what do we do if you find that he is the person who hit her with the bat?

There is no evidence that he went there with the intent to do that. There is no evidence he brought a bat. All that is -- that argument, and those set of facts, are the same. If Mr. Mitchell is the person who killed her, he didn't -- there's no -- any argument that he went there with the intent to kill is fog, it just isn't real. I mean, you look at the facts and the inferences, but -- you look at these -- the conversations, the tapes, the lack of preparation on his part.

That he went there to do anything but to see the baby, to argue with her, whatever, it -- you know, it's reasonable that she did say, "Come over," and so the question becomes, what happened? What happened?

What happened, if you believe that he is guilty and someone else didn't do it, that led to a man beating in the brains of a woman he loved? And you could just -- Mr. Cacciatore could say he's just a batterer. But I think it's too simplistic. I think -- the inferences of the facts are that Mr. Mitchell went there to see his daughter on her birthday. Either he heard Danielle tell him he could come, or he inferred it from what she said, but when he got there, she said no, she didn't want him to see the baby. Something happened, and there was an explosion.

I don't think, if -- you know, if -- I don't think you can believe that someone just picks up a bat and beats someone, even they don't know, but someone they've been intimate with and loved, it just doesn't happen without an explosion of anger and loss of control. To do that more than

once to somebody you care about, while they're holding a child, it just -- there's nothing about Mr. Mitchell that indicates he's capable of that without a loss of control.

And in that context, you have to answer the questions, what do we do with it? If that's what you conclude -- and I'm not saying Mr. Mitchell is guilty, I'm saying, I think we presented evidence to you and arguments to you that the inferences and circumstances -- that the Government has not proved their case beyond a reasonable doubt. You can never say, "I'm convinced he didn't do it," but you can say, looking at this evidence, and I've spent three hours arguing to you, that the inference of the evidence, the circumstantial evidence is that they have not proved beyond a reasonable doubt that he did this.

And you come back that there are explanations for the physical evidence that Mr. Mitchell testified, the eyewitnesses cannot be believed beyond a reasonable doubt, and the Government can never explain, except by saying to you, the witnesses -- their witnesses, Frank, and Bessie, and Nick, made a mistake, explain how there are people in white shirts and black T-shirts when he's wearing a red striped shirt.

You know, it just -- and remember, to do that, they have to say they're right about other things, but they're wrong about that.

So, I don't -- I believe -- it doesn't matter what I believe, I think the evidence has shown that the People have not proved their case beyond a reasonable doubt.

I have to address, and am addressing, what do I do

as a lawyer to help you make a decision if you don't accept that, if you believe that he has been proved guilty beyond a reasonable doubt?

And the first thing you look at is first degree murder. If you look at first degree murder, the instructions say that there are two theories. One is, it's premeditated, willful murder, premeditated and deliberate. And the Judge read the instruction, I'm going to repeat some of it again, that someone killed willfully, with deliberate -- deliberately, and with premeditation, that deliberately if she or he carefully weighed the consideration for or against the choice, and knowing the consequences, decided to kill.

That he acted in a cold, calculated manner in deciding to Danielle Keller because of whatever. I would say there's no evidence that supports that, that the nature of the killing itself did not support that.

The nature of the explosion of rage that caused someone to do this is not a cold, calculated decision. This is qualitatively so different than slapping someone in the face. It is a rage. To do this to someone -- whoever did this to her was in a rage. And you saw Mr. Mitchell -- that's not a cold, calculated decision, weighing the pros and cons and then acting, it's not possible.

You know -- I mean, you could say he made the decision really quickly, but his mind -- if he -- if he did this, his mind is not act -- acting in a calculated manner. Because you can't do that -- I mean, I -- the evidence, I don't think, supports that he went there to do it, that he

brought a weapon to do it, that he was planning to take the baby, all these things you have to look at, in whatever theory you're going on. And when you look at 'em, they don't show a plan to do a criminal act. It's just -- you know, it's not -- you got to go back and talk to each other, it's not consistent with the facts.

So, then, the other theory of first degree murder is that Mr. Mitchell went there and decided to kidnap Samantha, and in the course of the kidnapping, he killed Danielle Keller. That's called felony murder. The Court has read to you various instructions on this, but the bottom line is, if you find the Defendant formed the intent to commit the kidnap after the murder, then the special circumstances and felony murder don't apply.

So that, if something happened and Mr. Mitchell went in a rage and did this awful act, it wasn't done to kidnap Danielle, it was something going on between -- to kidnap Samantha, it was something going on between him and Danielle, and at that point, he took the baby. There was no plan to do this, to take the baby. There's nothing that supports that. And, again, you look at the circumstances of what happened. Of getting ready, you know, there was no plan to do this.

These are difficult issues, you know, and -- and because -- if you do decide Mr. Mitchell has done this, it's a horrible crime, and what do you do with it? What you do is follow the law. What you do is not do what people do in the newspaper and say, "Oh, my God, this is awful." It is awful. It is, "Oh, my God," but that's not your job. It's why, in

the course of a trial, we can stand here as lawyers and talk about it, even though it's awful, and it's why you have been picked as the jurors to analyze this under the law and not stop at "Oh, my God, it's awful."

Because your job is to analyze the facts rationally. That's why keeping emotion out is so important. And I think you can do that. You know, I think when you do it, sit back, you'll find these -- these type -- this is not, if Mr. Mitchell is guilty, this is not first degree murder.

The question's going to be, is it second degree or is it manslaughter, because the passion that affected him, and it really is the heat of passion, you know, it's not -- let me get this word right, this idea of provocation. If provocation means somebody does something bad when there's common sense, that's not how it's used.

It means, did -- if you -- if you decide that Mr. Mitchell did this act, the provocation, though not in -- in a legal sense, is that, she said no to him, and he exploded -- she said, "No, I don't want you to have the baby today, I don't want you to see her." And the question becomes, is that passion reasonable in the sense that -- not that you kill somebody, that's not the standard, the passion is, would you go -- if you knew what Mr. Mitchell knew and saw what he saw -- and I disagree with Mr. Cacciatore, I think his tweaking on drugs, you're in his situation, I think you do consider that, you -- you put yourself in the situation of someone who is him, even though you talk to the ordinary, reasonable person, and he can argue the law and you'll decide

what it means, but I think you look at all the factors where he was, and decide if that type of explosion, when someone said you can't see your baby on her birthday, would cause other people to become -- not to kill, it's not to kill, not to pick up a baseball bat, to have their judgment affected by passion. That's the standard.

And every kind of test has to be, has the Government proved beyond a reasonable doubt that's not true? Every time you come to -- in fact, 'cause it's normal to say, "Well, Mr. Mitchell's shown us this or that." It's like his testimony. It's not that you have to say, "We believe Mr. Mitchell's testimony, we believe -- because there's these two other people, there's two other shirts, we believe there were other people there, or we're not convinced there weren't."

See, that's the difference. It's not that we're convinced beyond a reasonable doubt there weren't, and if we're not, then we can't convict, then his story makes sense unless -- his testimony makes sense unless, because of the timing, that circumstance, we're convinced beyond a reasonable doubt it doesn't make sense, and that -- every time you look at circumstantial evidence, you have to analyze it, either two reasonable interpretations, or has the Government proved beyond a reasonable doubt a certain factor?

And all I can do is show you these things, you know, it becomes common -- second nature of a lawyer, we've been talking about this for decades, or I have. So, yes, circumstantial evidence, two reasonable interpretations. And

then you tell it to your children or something they go, "Huh? What do you" -- you know, "Either you know, or you don't know, dad." You know, it's like, "What do you mean, reasonable interpretation? Life is about we know stuff."

Law and the courtroom are not always in life, but sometimes they have a lot in common. Here, you have to think following the law. You have to do it. And I look at you, I know you can do it. Some of you may not agree with me, but I know you can follow the law and do what the law instructs you to do.

So, the question becomes, has the Government proved Mr. Mitchell is guilty beyond a reasonable doubt? Have they proved his testimony is not only inconsistent with the facts, but beyond a reasonable doubt -- doubt is not true? I don't think they have. I don't think the evidence has shown that. If you think they have, then you go to the next stage.

What do we do -- it's all the -- I mean, you're analyzing first degree murder, that's what the Court tells you. You then look at the murder statute and you see -- Mr. Cacciatore says his view of it to you. I think if you read it, you will see that the view I'm presenting is the way you have to address it, and always ask, has the Government proved that he acted in a cold, calculated manner, weighing the decisions? Have they proved that to us beyond a reasonable doubt? Because if they haven't, then it's not first degree murder.

Premeditation. So, go to the second part of the special circumstances, which is also what makes it felony

murder, the same standard. Did he commit the murder because he wanted to kidnap the baby? It's basically, did he have that intent to kidnap before the killing? And have they proved that beyond a reasonable doubt?

If they haven't, then there is no special circumstances, there is no felony murder, because if you go to the reason -- if you accept this as -- as he's guilty and look at the evidence, the question is, is it reasonable that if there's two reasonable interpretations, one, he went there and exploded, there was an awful set of facts that happened and then he took Samantha, or that he went there with the intent to take her, and in that context, he killed her 'cause she got in the way?

If they're both reasonable, and I don't think the second one is, then the one that's pointing to innocence has to be accepted by you. And that finds him not guilty of special circumstances and felony murder. It's the same thing.

The other charge is -- I mean, there has been -- it's interesting, there has been -- I mean, if Mr. Mitchell is not the killer, he's not guilty of kidnapping, he's not guilty of these other charges, other than possibly stalking and endanger -- child endangerment, you know, the question is, you have to look at those, but is it a child endangerment to pick them up and drive them without a seat belt all this way when there's an Amber Alert?

But the real issue -- the Judge has instructed you on these other crimes, but the issue is the homicide and what do you do with it.

So, I want you to think about the facts when you go in, think about the evidence, talk to each other, I want you to use your mind and your moral centers to judge the evidence. I want you to not decide Mr. Mitchell is guilty or not because you don't like him, that's not the test. I want you to look at the facts.

I want you to listen to Mr. Cacciatore's rebuttal with the same attention you listened to my argument, remember they're both arguments, no, they're not evidence. And then I want you to go back and listen to each other and think about it and try to work through all this. It's a complex case, you know, it's not so simple as it first seemed. It's very complex, and there are certain facts that I've tried to point out to you that you have to deal with.

Go back there and listen to each other and argue with each other, if that's what it takes, verbally, you know, and try to work this stuff out because people disagree on issues, but the key is listening to each other, but don't be changed simply because you want a decision. If you can reach a decision, that's great. If you can't, then you can't.

But don't agree because you just want it over with. Don't agree because it comes to Monday you want to go home, you don't want to come back on Tuesday, that's not fair to any of us. You have to analyze the facts and look at the law, and ultimately what you have to do is do justice. You know, it's owed to everybody here. It's owed to Mr. Mitchell, it's owed to the victim, everybody, the State that represents the victim, everybody needs justice, and you're the people who are

going to do it. That's the nature of the jury system.

It's an amazing system. In one view, you could say, "Why me? What did I do to be on this jury?" The other view is, well, here you are. 'Cause you're going to mete out justice on a really complex homicide case, that you have to analyze facts and do stuff you normally don't to do. I trust you will do that.

I appreciate your attention yesterday and today. Thank you very much.

THE COURT: Thank you, Mr. Hanlon.

MR. CACCIATORE: Can we take a brief recess? I'll try and be finished before noon --

THE COURT: Okay.

MR. CACCIATORE: -- if we can just maybe take 10 now and then I finish up

THE COURT: All right. So, another 10 minutes, ladies and gentlemen, please, if you don't mind. Thank you.

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

THE COURT: So, just a quick -- just a quick question for the two of you. Let's say you finish and they're gonna go out, then they can have -- what I'd like to do is let them have lunch, and tell them when they return, this is how they have to start their process, if that's --

MR. HANLON: Okay. Fine.

THE COURT: -- okay with you.

MR. CACCIATORE: You're going to read the concluding instructions?

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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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

TUESDAY, AUGUST 16, 2011 9:20 O'CLOCK A.M.

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(Whereupon, related matters were heard and reported but not transcribed herein.)

THE COURT: Okay. The record should reflect that the courtroom has been cleared with the exception of my staff, Mr. Hanlon and Mr. Mitchell.

Mr. Mitchell, as you heard me saying I've received the request that you've made apparently to have the Public Defender's Office appointed to represent you to discuss ineffective assistance of counsel, a new trial motion, and to put over the sentencing date. First of all, is that still your request?

THE DEFENDANT: Yes, it is, Your Honor.

THE COURT: Okay. And so, now is your opportunity to explain to me why you think I should do that.

THE DEFENDANT: Well, for one, in closing arguments on Mr. Hanlon he argued a heat of passion case. I instructed him not to argue heat of passion case. I instructed him to maintain identity defense because it is a fact I did not kill Danielle Keller.

Second was he never provided any doctors, any witnesses, any evidence, or anything of a heat of passion case. Him addressing the jury in a manner of saying that you have a choice not to believe Mr. Mitchell, when you choose not to believe him, that this is -- then he has to be guilty of a heat of passion. It's a -- it's a complete contradiction of the case itself. It's like someone stealing your purse, and

then you know your purse was stolen, and then that person goes, "I didn't steal your purse," like, you know, Miss Simmons. But, like, if I did, I was hungry, and I didn't want drugs. Wait, wait, wait a second here. You stole my purse or didn't you? And that's exactly, like, you know, probably what happened with the jury right in closing arguments.

Secondly, on the -- on -- on the stand I testified to the fact that I was most likely hit in the back with a baseball bat, and the bruise on my back was -- was -- was relevant. It was -- it was there. And then he direct -- he directly tells the jury, "No, he never said that." So, it's like the jury is reading the transcripts, and they're like saying, like, you know, wait a second, he took the stand, he made this direct statement, and now his lawyer is saying, "No, he didn't make that statement." So, the jury's probably not going to say, oh, what's this. It's, like, you know, it was like, was it a made up story, hard to like, you know, remember or not remember, like, you know, the facts as it happened?

And then, like, you know, I can continue to count the ways and I continue to go. Most of it is, like, you know, to do why argue a heat of passion without any doctors, without any psychiatry, without any, like, you know, evidence or without providing any solid or tangible evidence or any witnesses that would support that kind of argument towards the end of the case.

And then -- and this also goes back to, like, you know, why I wanted to remove counsel before even jury selection and kind of went. Like their mentality was we can

fool the jury, the jury is ignorant, the jury is gullible, like, you know, we can, like, you know, we can get away with, like, you know, doing this identity defense, like, you know, that you want to put on. And for me I'm just kind of looking at it well, like, well, wait a second here, I didn't kill Danielle, I never told you that I did, and it's, like, you know, why would you want to put on a heat of passion defense, you know what I mean? Why would you even want to argue that, mention that, or even, like, you know, do anything, like, you know, of the sort.

And for me it's really, really hard to, like, be reading these sentencing days, the media. It's, like, you know, it's hard for me to even, like, sit down and, like, you know, even be taking this all in. It's a fact that I didn't kill Danielle Keller. And it's just like all I can do is stay strong for my daughter, stay strong for, like, you know, Danielle, and all I can do is stay strong for my family and for myself. So, the thing is it's like, you know, the other factors too, this, like, you know, Stuart Hanlon and his -- his partner Sarah Rief, even it's like all throughout the whole nine months of them having the case, they have constantly said, like, you know, we're going to do the identity, we're going, like, you know, we're going to provide the experts, we're going to put on the DNA expert, we're going to show how there's a third party like on the handle of the bat, we're gonna show that, like, you know -- we're gonna show that, like, it's subjective that you have -- you didn't even have your hands on the bat whatsoever. We're gonna, like, you

know, we're gonna show -- we're gonna call the experts in, they're going to testify to all this. We're gonna, like, you know, bring on character witnesses, so on and so forth. All right. I'm kind of like going, huh, what's going on.

At the same time it's, like, you know, then all of a sudden at the eve of trial they go, well, no, we're going to, like, you know, try to, like, you know, swing a heat of passion defense along with the identity defense, you know what I mean? So, they didn't give me enough time to, like, you know, find new counsel. They didn't give me enough time to, like, you know, to properly, like, even to find a -- a good lawyer, who's gonna fight for the truth, who's not, like, you know, going to be no nonsense and go without any tricks, without any gimmicks and without any, you know, with -- I think I've said everything I've got to say.

You know, like he, like, you know, Mr. Hanlon might be good with points of law, but, like, you know, like, you know, stating 1109s and fighting for little objections, right? But when it comes to actually no nonsense fighting for the truth and, like, you know, telling that jury that, hey, there is, like, you know, you have the choice, like you can either convict an innocent man, or you have to let him walk. He doesn't have it in him. He never did, you know, and that's exactly how I feel, like, you know, why argue a heat of passion in closing arguments when all of a sudden, like, with no doctors, no tangible evidence, nothing, like, you know, nothing at all whatsoever, other than, like, oh, yeah, you have -- you -- you can choose not to believe Mr. Mitchell, you

know what I mean? And if you choose not to believe him, then, you know, then he's guilty of this and not that. Just like, you know, someone steals your purse, you know what I mean? They either did it or they didn't. Like, they either did or they didn't. And it's just, like, you know, if they said that they didn't, then why would they say, oh, and if I did it was because I was hungry. It wasn't because I was on drugs and I just wanted to steal your purse. That's why I'm bringing up the motion, and it's submitted.

THE COURT: Okay. Thank you.

Mr. Hanlon, do you have -- do you wish to respond to any of the statements made?

MR. HANLON: No, I -- unless -- I consider the attorney-client privilege still in place. If the Court would order -- and order me to respond, I would, but I have no inclination to respond at this point.

THE COURT: Do you -- let me ask you, Mr. Hanlon, do you feel despite the discord between the two of you, do you feel despite that, that you are capable of proceeding to a sentencing hearing in -- as best you can on -- well, that's not a good way to say it. Let me think about it a minute. What I'm wondering is, it's clear there is discord between the two of you, if I were to deny this motion, and I'm not saying I'm going to deny it, but if I were, do you feel, Mr. Hanlon, that you could provide good service to Mr. Mitchell at the sentencing hearing this morning?

MR. HANLON: Well, that's the term, good service. What I would argue Mr. Mitchell objects to, and so I -- I feel

uncomfortable arguing -- well, I mean the issues before the Court at sentencing are concurrent sentences. And I -- what I would argue to the Court are exactly the things that Mr. Mitchell is now complaining that I argued to the jury. So, in that sense I don't think for him I could apply -- good services in that context what my client wants. I mean, he -- his position is clear. So, for me to argue you should give concurrent sentences because whatever, it goes -- the antithesis what he wants to be said. So, I don't think I can provide him service in that sense 'cause I won't argue what he wants.

THE COURT: Well, in that sense he wants, he -- if I'm hearing you correctly, he wants you to argue he didn't do it.

MR. HANLON: Right.

THE COURT: We're at the stage where there's been a conviction and you are, as a professional, required to make some argument. So, what you're saying is you're prepared to make an argument; it's just not the one your client wants you to make.

MR. HANLON: Right. Given -- but it's his life, given what he wants, I'm not prepared to really argue against his interests because it's stated interest. I mean, he's the person who's going to have to serve this time. And I just -- we reached a point, you know, I did the trial as best I could, and now he's clear what he wants, and I'm very uncomfortable arguing what I think is the appropriate argument, given what my client wants.

And -- and therefore, if you ask me to go forward at sentencing, I would probably submit it and not argue for the reasons I'm saying because again, it's Mr. Mitchell's life. I mean, my job as a professional goes only so far to do what I ought to do to the Court and to my client's interest, and my client comes first.

But I'm not going to get up here and argue why you should give -- I'm not going to do it. I mean, I'll -- I'll be the lawyer. I'll be the body at sentencing, and I'll submit it because I don't have an argument. To argue to the Court at sentencing he didn't do it, given the jury verdict, is meaningless. And to argue anything else flies in the face of what he wants, and I -- I made that decision once. I'm not going to do it again.

THE COURT: The decision you made in the closing argument that Mr. Mitchell complains of.

MR. HANLON: Right.

THE COURT: You made that decision for what reason?

MR. HANLON: Are you ordering me to answer?

THE COURT: I am.

MR. HANLON: Because I felt the jury -- the evidence was overwhelming, and the only way to save him from life in prison was to make that argument, even though for reasons that I don't think I have to answer to answer your question, I didn't have witnesses to support that. But I felt that I had to. I felt Mr. Mitchell's view and the jury's read of his testimony would be correct. He thought they were behind him and thought he was innocent. I did not see it that way. I

thought the evidence was overwhelming, as it was from the beginning, and I felt I had to do that to try to save him from life in prison without a chance of parole. That was my choice.

Mr. Mitchell clearly expressed his desire that I not do it. I told him -- I don't know when that conversation first came up, whether it was before the trial or during the trial, that this was an attorney's choice. The decision to testify as to what the truth was was up to him, but what to argue was up to me. And he argued with me about that. It's clear what he's saying is true, but I made that decision based on what I saw the evidence to be and what was in his best interests. And I tried to make it, you know, it -- it was a difficult situation, but, yes, there was a reason why I did it, and that's what it was.

THE COURT: If we were to proceed to sentencing and thinking in that same vein, couldn't you then make the argument that you're talking to me about as far as concurrent versus consecutive sentences?

MR. HANLON: I'm not prepared to do it again. I'm not prepared to fly in the face of what my client wants. It's his life. I've done my best for him, and I've done my best as an officer of the court. I'm not going to continue in that vein. It's contradictory to what I believe my job is. So, Mr. Mitchell makes this call. He clearly doesn't want me to -- he doesn't want me to be his lawyer at sentencing. But if I am, I'm not going to argue against what he believes are the facts. I'm just not prepared to do it again regardless

I -- with all due respect regarding the order, you can't order me to argue.

THE COURT: Sure.

MR. HANLON: You know, so I would probably submit it and just let the prosecution put on their evidence, and Mr. Mitchell wants to make a statement, he can argue his own view of the evidence. I'm not going to argue at sentencing under these circumstances.

THE COURT: Mr. Mitchell, anything else you'd like to say?

THE DEFENDANT: Other than it's just like I think -- I thought the evidence spoke for itself. It's like, you know, like two people, like you know, saw the guy in the black shirt murder Danielle. All right? The guy across the street sees the guy in the white shirt, I -- he identifies this man who's wearing white shirt run away with Samantha. He even asks for some blood spatter expert come to say, I'm within like 10 or 15 feet of, like, you know, of the blood actually, like, you know, making contact with my pants or possibly, you know what I mean? Like, you know, and then it's little possible that someone could have been blocking that blood or even traveling to my pants.

You know, I crack up when I read the media say the same, I don't know how that blood got on his pants. It's like, no, the experts tell me that even block the blood spatter, right? It's -- it's the evidence it's, like, you know, it's a question of when, like, you know, it got on there, you know? And it's just like everything happened fast,

and it was intense. But it's -- it's, like, you know, the argument spoke for itself.

There's even third party DNA on the bat, like, you know, that -- that it belongs to a male, you know what I mean, and didn't bring up more experts to even, like, you know, to even say like, you know, yeah, that's the white Caucasian male, with his below level -- level contributor, along with Mr. Mitchell. And it's actually, like -- it's actually subjective. It's not, like, inconclusive that Mr. Mitchell's DNA on his pants -- it's like -- like, DNA, like, and, like, you know, his prints are even on the handle of the bat.

So, if I'm like within 10 or 15 feet with the medium velocity blood spatter being applied, then it's just like subjective, like, you know, that it's just, like, you know, my DNA's not even on the handle of the weapon, and how could I have even used the weapon, and then how could I use it at this close distance.

And Mr. Hanlon, like, you know, he discussed this with me before. He says, like, the evidence is overwhelming. It was just, like, you know, no, not necessarily, not if something's, like, you know, fast and intense. In fact, Your Honor, before we even, like, you know -- remember when we were arguing jury instructions, you know, like, you know, they were trying to say that me asking for a lawyer is like me denying the guilt for me, like, you know -- or not deny anything. It's me admitting that I could have committed a crime. Like Mr. Hanlon and myself, we didn't catch that, like, you know, me telling my mother that I'm waiting for Danielle to call me

so we can go sing happy birthday is an automatic denial, is an automatic denial of the charges.

It's like -- and then Mr. Hanlon addresses the jury and goes, oh, yeah, him, like, asking, like, you know, to see a lawyer or talk to a lawyer, not discuss anything of the matters of the case could be circumstantial evidence that he admitted kill -- to killing Danielle Keller. So, not only did he just say, oh, yeah, the Constitution are like him -- him having the right to only speak to an attorney is like thrown out the window, and that's an admission of guilt. But if it's, like, you know, they -- practically just didn't even, like, you know, catch on to what you even brought up in the court, like, you know, what you even addressed to the prosecution and things how you addressed the prosecution, told 'em, like, hey, this is why I can't read this instruction right now. That is it's like, you know, that there was any admission. You know.

Then he just told the jury, oh, yeah, that's circumstantial evidence that he admitted to it, you know? Especially when it's -- I've been trained my whole life, like, you know, to like, you know, keep any mouth shut until I -- until I talk to a lawyer, you know what I mean? I'm sure that's what you teach your son, that's what, like, my father taught me. It's like I've been in trouble before, and that's what lawyers have instructed me to do. If anyone accuses you of a crime, you keep your mouth shut until you talk to your lawyer, you know. And he just went ahead and told the jury in closing argument that, no, that's circumstantial evidence that

he committed to a crime. Asking, like, you know, asking to speak to an attorney.

I think that's -- I can argue it's, like, you know, point by point all day, you know. But it's, like, you know, I real -- what I really need is, like, you know, and like I said before, Mr. Hanlon -- I'm not going to go on a tangent, but Mr. Hanlon I feel, like, you know, put all this off until the very last minute so I couldn't find new counsel. If he would have, like, you know, if he said that the evidence was overwhelming, and he was incapable of defending my case, he could have done this six months before trial, he could have done this seven or eight months before trial, he didn't have to do it a day before trial -- or -- or the day before jury selection where it prevented us from, like, you know, from -- from delaying the process of justice, you know what I mean? From delaying, like, you know, from any delays. Because I remember in jury selection said, hey, this would be really disruptive to a jury selection process. He could have told me six months ago that I -- he felt that the evidence was overwhelming, and that he can't do this -- that he couldn't, like, do this trial, that he was incapable.

'Cause I know lawyers that could have capable of doing it. I had six lawyers lined up. He said that he was, like, you know, he was capable, like, you know, nine months ago or when Doug Horngrad wanted to be substituted. And if he felt it was overwhelming, I could have had numerous lawyers. I could have, you know, put on a good defense, good -- good job could have been no nonsense and argue to the jury and

fought for the truth. But instead it's -- it's, like, you know, well, he just throws in the towel, and it doesn't make sense to me.

THE COURT: Let me ask you a similar question to the question I asked Mr. Hanlon, and that is if your motion was denied, are you prepared to discuss sentencing options with Mr. Hanlon so that he can make a presentation on your behalf?

THE DEFENDANT: I don't know anything about concurrent or consecutive sentencing.

THE COURT: Right.

THE DEFENDANT: I don't know anything about that kind of stuff, Your Honor, I'll be honest. That's why I'm asking for a Public Defender to represent me. If I have to go pro per, then I need at least like a month to just read about it, just to know what I'm talking about, just to research and be confident enough to address the Court, to address the argument with Mr. Cacciatore.

THE COURT: The -- the case law on this sort of situation gives me some guidance on how to address these sorts of motions. And I -- I sort of have an inclination of -- of what the right thing to do is. My concern -- and it's probably that I'm going to proceed this morning. And I'll explain that in just a minute.

The concern I have, though, Mr. Mitchell, and, Mr. Hanlon, is that, you know, a sentencing hearing is likely going to take place. And, Mr. Hanlon, although you don't appreciate his services is generally in the position of making an argument about why I should do one thing versus another,

something that's lower for you and on your behalf.

What he said to me was he feels uncomfortable making those arguments because you have been steadfast in your position that you're not the person that committed this crime. And if he makes the argument that now that you've found -- been found guilty, I should impose a lesser amount of time versus the higher amount of time, he feels that he can only make that argument by arguing heat of passion issue, which you object to. So that's the difficulty he's having because there's no other argument for him to make. He can't argue to me right now that you didn't do it because the jurors found that you did.

So, it's like we're past that point. We're past that point to some degree because you still have appellate rights. You can still appeal the verdict. You can still appeal the trial. You can argue that your counsel was ineffective and ask the Court of Appeals to overturn the conviction. You still have those options.

But I guess Mr. Hanlon feels that he's now in this odd situation of being unable to argue concurrent sentencing, which means ultimately you get a little bit less as far as time is concerned than consecutive sentencing.

A few things I want to point out to you, Mr. Mitchell. I understood during the trial that your position has always been that you didn't commit this crime, and you've been steadfast on that.

As a lawyer making an argument to the jury, I have to tell you, I think the best way to address your defense is

to, number one, tell the jurors that you didn't do it, and then tell the jurors, if they disagree with that, if they -- if they don't believe you, then they should consider not finding you guilty of first degree murder under this other theory. Sort of the best in my -- in my personal view, you know, maybe you'll disagree, but sort of the best argument I think someone could make is find him not guilty because he didn't do it. But if you don't buy that story, buy this one, so that he doesn't have to go to prison for the rest of his life. That's sort of what your attorney did for you in closing arguments. And we're going to disagree on this statement, but I think it was sort of a brilliant argument because it gave jurors two reasons not to find you guilty of first degree murder.

THE DEFENDANT: I disagree.

THE COURT: I understand. So, it's clear that you disagree with that. It's clear that you disagree with the services you've been provided by Mr. Hanlon. I told you before that -- well, maybe you just heard me say I -- I thought all of the attorneys in the case were excellent, I really did, both sides, your attorney included.

In any event, it seems to me that you're, understandably so, very disappointed in the verdict, and I do think that you have options regarding that verdict. You can appeal it. And I think that's really what you're going to have to do. I think what I'm -- I'm going to deny your motion. We're going to proceed. I'd like to give you a few minutes to talk to Mr. Hanlon, if you're willing, to discuss

how he can best assist you in the sentencing hearing. If you refuse to discuss that with him, then I guess you --

THE DEFENDANT: I'm already suing him for malpractice, Your Honor. I have nothing to discuss with my lawyer.

THE COURT: Okay. So, then do you wish to just make your own statement at the sentencing hearing, without -- without discussing that with Mr. Hanlon?

THE DEFENDANT: If you're going to put me without counsel for sentencing --

THE COURT: Sorry, I can't hear you.

THE DEFENDANT: If you're going appoint me with no counsel for sentencing, then you're going to take away my counsel.

THE COURT: No, there's a very good attorney sitting right next to you who's --

THE DEFENDANT: He's pathetic, Your Honor.

THE COURT: Okay.

THE DEFENDANT: I'll -- I'll say that.

THE COURT: Okay. All right. Well, that's the ruling I am going to proceed. At the conclusion of the prosecution's case, Mr. Mitchell, I'll ask you again if you want a few minutes to think about if you want to say anything or if you want to talk to Mr. Hanlon, I'll give you just a few minutes to sort of think about that before I give your side an option to -- an opportunity to speak if you want.

THE DEFENDANT: No, thanks, Your Honor.

THE COURT: Okay. So, if we can open up the

courtroom.

Madam Clerk, if you'll, please, get Mr. Cacciatore and Mr. Kousharian.

(Whereupon, at 9:43 a.m., the in-camera hearing was concluded.)

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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES R.W. MITCHELL **Petitioner,** **vs** **CSP CORCORAN and DAVEY,** **Respondent.**	**U.S.C.A. No.: 16-17057** **U.S.D.C. No.: CV-15-04919-VC** **ORDER RE: CJA APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL ON APPEAL**

The individual named above as appellant, having testified under oath or having otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and, because the interests of justice so require, the Court finds that the appellant is indigent, therefore;

IT IS ORDERED that the attorney whose name and contact information are listed below is appointed to represent the above appellant.

Steven S. Lubliner
P.O. Box 750639
Petaluma, CA 94975
707-789-0516
sslubliner@comcast.net

Appointing Judge: Hon . Judge Chhabria

August 15, 2017
Date of Order

August 14, 2017
Nunc Pro Tunc Date