

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A, HIDALGO, JR.

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

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CASE NO.: 54209

On Appeal from a Final Judgment of
Conviction entered by The Eighth Judicial
District Court

APPELLANT'S APPENDIX

Volume 23 of 25

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¹ This CD is a copy of the original. The copy was prepared by a Clark County employee at the Regional Justice Center in Las Vegas Nevada. Eight hard copies of the CD are being mailed to the Nevada Supreme Court.

² Id.

³ Id.

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DISTRICT COURT
CLARK COUNTY, NEVADA

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Alfonso J. Hernandez
CLERK OF COURT

STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO: C212667/C241394
)	DEPT NO: XXI
vs.)	
)	
LUIS ALONSO HIDALGO, aka)	
LUIS ALONSO HIDALGO, III, and)	Transcript of
LUIS ALONSO HIDALGO, JR.,)	Proceedings
)	
Defendants.)	

BEFORE THE HONORABLE VALERIE P. ADAIR, DISTRICT COURT JUDGE

JURY TRIAL - DAY 13

THURSDAY, FEBRUARY 12, 2009

APPEARANCES:

FOR THE STATE:	MARC DiGIACOMO, ESQ. Chief Deputy District Attorney GIANCARLO PESCI, ESQ. Deputy District Attorney
FOR LUIS ALONSO HIDALGO, JR.:	DOMINIC P. GENTILE, ESQ. PAOLA M. ARMENI, ESQ.
FOR LUIS ALONSO HIDALGO, III:	JOHN L. ARRASCADA, ESQ. CHRISTOPHER ADAMS, ESQ.

RECORDED BY: JANIE OLSEN, COURT RECORDER
TRANSCRIBED BY: KARReporting and Transcription Services

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04143

1 LAS VEGAS, NEVADA, THURSDAY, FEBRUARY 12, 2009, 9:18 A.M.

2 P R O C E E D I N G S

3 (Outside the presence of the jury.)

4 THE COURT: All right. Why don't we start with the
5 defense packet.

6 Mr. DiGiacomo.

7 MR. DIGIACOMO: Fine, Judge.

8 THE COURT: All right. The first instruction, if
9 one or more of the jurors are unclear or confused, I am
10 disinclined to give this instruction.

11 MR. DIGIACOMO: The State would agree with that.

12 THE COURT: Here's the problem, then you get a bunch
13 of questions, and there may be no, you know -- I mean, here's
14 my experience. If they're confused, they give us an
15 instruction -- a question anyway, but I don't want to get into
16 the position of having to supplement a bunch of the
17 instructions. And a lot of times when they ask for
18 clarification on the instructions, I just send back, The Court
19 is not at liberty to supplement the instructions. So that's
20 why I'm disinclined to give this one.

21 All right. Isn't the second one the stock one?

22 MR. DIGIACOMO: Yes, Judge, it's in ours.

23 THE COURT: Okay. The ones that I'm not giving, I'm
24 just going to give as a Court exhibit.

25 The third one is a stock?

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1 MR. DIGIACOMO: That's correct, Judge.

2 THE COURT: What about the fourth one?

3 MR. DIGIACOMO: I believe that I did two separate
4 ones in ours because there is an Information and there is an
5 Indictment and because there's two separate instructions
6 related to those, but the information contained is stock and
7 in ours. So it's going to be up to the Court's pleasure as to
8 which way you like to do it better.

9 THE COURT: Okay. We'll just hold this one then.
10 This one may be fine.

11 MR. ARRASCADA: Judge, actually that language is not
12 the same. This is the stock instruction that is the same.

13 THE COURT: Okay. This one's probably fine.

14 MR. ARRASCADA: Okay.

15 THE COURT: The penalty provided for law is not to
16 be considered. Do you have the stock one, The subject of
17 punishment is not to be considered? Why don't we just use
18 that one?

19 MR. ARRASCADA: The subject of punishment one?

20 THE COURT: Yeah. We'll just use that.

21 Two types of evidence, this one's a little bit --
22 unfortunately, I don't have the stocks in front of me. This
23 looks a little bit differently -- different, excuse me, than
24 the other State's one.

25 MR. ARRASCADA: It is, Judge. It's one that --

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1 MR. DIGIACOMO: It's slightly, but it is the
2 standard. I mean, our stock one covers this information.
3 THE COURT: Any objection by the State to using the
4 defendant's one?
5 MR. DIGIACOMO: Well, there's more information in
6 the State's, so I want to at least have all the other
7 information that's in the State's --
8 THE COURT: Okay. I'll hold it until we get there.
9 Nothing counsel says, do we have one of the State's?
10 MR. DIGIACOMO: That's also in ours.
11 THE COURT: Okay.
12 MR. ARRASCADA: Judge, this is just a shorter more
13 accurate concise version.
14 THE COURT: I can see we're going to have to wait
15 for Mr. Pesci to get here so I have something to look at with
16 these.
17 MR. GENTILE: Yeah.
18 THE COURT: Why don't we go to some of the more
19 hotly contested ones?
20 MR. DIGIACOMO: There's Mr. Pesci.
21 MR. GENTILE: Well, how will we know that?
22 MS. ARMENI: Start backwards.
23 THE COURT: Well, the --
24 MR. DIGIACOMO: They haven't told us what they're
25 contesting of ours. I can probably guess from reading theirs.

1 THE COURT: Okay. All right. I don't know how to
2 do this because of the way it's arranged, frankly. Okay. The
3 two types of evidence that they want -- why is yours better
4 than the State's? Why do you want yours -- Mr. Arrascada?

5 MR. ARRASCADA: Court's indulgence.

6 Which one, Judge?

7 THE COURT: There are two types of evidence. Okay.
8 You have all your specials in the front.

9 I don't see that one in the State's instruction.

10 MS. ARMENI: It is.

11 MR. DIGIACOMO: It's right after the special, Judge.
12 It's the one that starts off, The evidence which you're to
13 consider in this case --

14 THE COURT: Oh, thank you.

15 MR. DIGIACOMO: -- consists of the testimony.

16 MR. PESCI: What if we just number them as is right
17 now at the beginning so we'll be able to reference them fast,
18 and then --

19 THE COURT: If you can do that -- that's a good
20 idea. All right.

21 MR. PESCI: We'll just number each one.

22 THE COURT: All right. We've already pulled out a
23 couple from the defendants' instructions so just follow along
24 with me.

25 Instruction -- we'll take out, If in these

1 instructions, because we've already got that in the State's.

2 If during this trial, is 1.

3 The penalty provided, is 2.

4 An Information and Indictment.

5 There are two types of evidence.

6 Nothing that counsel says.

7 It is the duty of an attorney, is 6.

8 7, good character.

9 8, You are the sole judges.

10 9, Although you are to consider. This is exactly
11 the same, isn't it?

12 MR. DIGIACOMO: Which one?

13 MR. ADAMS: Judge, you've got to give us a chance to
14 catch up or it's going to not --

15 MR. DIGIACOMO: A lot of these are all the same. I
16 mean, there's just a couple that are actually specifically
17 hotly contested.

18 THE COURT: Which is what I wanted.

19 MR. DIGIACOMO: We didn't get theirs until, again,
20 this morning. I mean, we e-mailed ours on Monday. We got a
21 packaged yesterday.

22 THE COURT: All right. Instruction No. 9 is the
23 common sense instruction in the defense packet. I'm pulling
24 that out because it's really the same as the State's.

25 So now No. 9 is, Every person charged with the

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1 commission of a crime.

2 10 is, In every crime. And basically you've
3 rewritten all of the stocks a little bit --

4 MR. ARRASCADA: Your Honor, what I did here is that
5 they have --

6 THE COURT: -- which I'm inclined to just give on
7 most of these just general ones the regular stocks that the
8 State has.

9 MR. ARRASCADA: Your Honor, one thing that's
10 significant in their stocks is they have as a -- one charge to
11 the jury the dual presumption of innocence and reasonable
12 doubt instruction on the same, and those should be two
13 separate instructions.

14 THE COURT: Okay. All right. A reasonable doubt is
15 one based on reason. This looks like it's exactly the same as
16 the State's.

17 MR. ARRASCADA: No, they have a presumption of
18 innocence --

19 THE COURT: Oh, I see.

20 MR. ARRASCADA: -- and they have reasonable doubt on
21 the same page.

22 THE COURT: All right. You want them given as two
23 instructions?

24 MR. ARRASCADA: Yes.

25 THE COURT: That's fine with me.

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1 Intent may be proved by circumstantial evidence,
2 will be 12.

3 13, It is your duty as jurors.

4 14, A person who knowingly does any act. Actually,
5 you know --

6 MR. DIGIACOMO: Yeah, I mean, literally like
7 there's -- these are little sections of all of the State's
8 ones.

9 THE COURT: Right. I mean, basically I've never
10 been given a packet of instructions that has sort of rewritten
11 everything, and so --

12 MR. PESCI: I was just say numbering so we would
13 know how to reference --

14 THE COURT: -- I don't know an efficient way to do
15 this because, again, you've taken all of the basic, sort of
16 accepted, in the eighth, and I'm assuming in the second, stock
17 instructions and you've tweaked them a little bit. So
18 basically whereas normally we would go through and fight over
19 the specials, we now have to go through all of the stocks.

20 And I don't mind on some of the stocks, if you
21 think -- like, for example, one of them says, The presumpt --
22 unless proved innocent. A lot of people complain about that.
23 I'm happy to change that to not guilty. Little tweaks like
24 that, I think, are substantive and make sense to do and I
25 routinely, if requested, will change innocence to not guilty,

1 if that's something you want.

2 On these stocks, though --

3 MR. GENTILE: I don't know what you're talking
4 about.

5 THE COURT: Well, I'm just saying -- what they've
6 done, Dominic, is they've rewritten all of the sort of basic
7 instructions. And so we have to essentially either go through
8 all of the basic instructions, the common sense instructions
9 that we never even discuss in -- literally since I've been a
10 judge, hundreds of trials that I've done, and so I'm trying to
11 figure out how to do this in an efficient way that's not going
12 to take all day long.

13 MR. DIGIACOMO: Judge, can I suggest that we just
14 start going through 1, 2, 3, and then if they see something in
15 ours that they object to -- because like they all have three
16 versions of --

17 THE COURT: That's what I was going to do.

18 MR. DIGIACOMO: -- of the same statement in three
19 different instructions.

20 THE COURT: Let's do that.

21 MR. DIGIACOMO: And maybe we can just address that
22 one at a time.

23 MR. GENTILE: Can we -- wait. I have all of my
24 objections to their instructions highlighted on my computer
25 and --

1 THE COURT: Let's do that. Or I can just leave and
2 let you guys work it out, which is what I normally make you
3 guys do ahead of time, but --

4 MR. DIGIACOMO: I have no idea what they object to
5 yet. I mean, I will be more than willing to tell them what we
6 object to. I mean, a lot of these --

7 THE COURT: Mr. DiGiacomo, what do you think is the
8 most efficient way to settle the jury instructions given the
9 type of the packet that they've given to the Court?

10 MR. DIGIACOMO: Well, what I would think is that if
11 Mr. Gentile can get into his computer where he has his
12 objections, we could go through them, mark ours, and then --

13 THE COURT: That's better.

14 MR. DIGIACOMO: -- we'll see what the problems are
15 and then we can just go through and then if there's small
16 tweaks they want -- we don't usually care about small tweaks
17 either. We have them electronically.

18 THE COURT: Right. Okay. All right.

19 (Pause in proceedings)

20 THE COURT: Okay.

21 MR. ARRASCADA: On Instruction 4, the
22 Fourth Amendment, the third page where -- at the end of
23 Count 4, the language, It's the duty of the jury to apply the
24 rule of law as contained in these instructions to the facts of
25 the case and determine whether or not the defendant is guilty

1 of one or more of the offenses charged, that's redundant. The
2 instructions tell the jury to look at the instructions. They
3 don't need that there.

4 MR. GENTILE: Is that 3 or 4?

5 THE COURT: It's actually 3, for the record, he's
6 talking about.

7 MR. DIGIACOMO: That's on 3 and 4.

8 THE COURT: That's a standard instruction.
9 Sometimes people have it off of the instruction.

10 Does the State care if we take it off?

11 MR. PESCI: I think it's there for the fact that
12 there's more than one charge, and so it lets them understand
13 that they can find somebody guilty of one charge and not
14 another. And that's a clear point that they need to know.

15 THE COURT: I mean, I don't really see it as
16 objectionable. I'm going to leave it in.

17 All right. 4, the same thing.

18 5 --

19 MR. DIGIACOMO: This is the one where they had --

20 THE COURT: They had a change on this one. And what
21 did you want?

22 MR. DIGIACOMO: Actually, they didn't have a change.
23 There is --

24 THE COURT: An Information and an Indictment are a
25 formal method. It is not evidence of any kind against the

1 accused.

2 MR. DIGIACOMO: Isn't that on the top of our 3 and
3 4?

4 THE COURT: Yeah. I mean, I can add to 3 and 4, if
5 you want, It does not create any presumption or permit any
6 inference of guilt, if you want that added.

7 MR. ARRASCADA: That'd be great.

8 MS. ARMENI: Yes.

9 THE COURT: All right.

10 MR. DIGIACOMO: Okay. So --

11 THE COURT: Mr. DiGiacomo, are you adding that?

12 MR. DIGIACOMO: Yeah, let me just write it in and
13 then I'll type it up when we're done.

14 THE COURT: Okay. So everyone, then, is okay with
15 that, with the changes?

16 MR. ARRASCADA: Yes.

17 MR. DIGIACOMO: And should we -- to make this
18 conform, do they want that on the amended indictment, 1, 2?

19 THE COURT: I think they --

20 MR. GENTILE: Absolutely.

21 THE COURT: They want it on both instructions, 3 and
22 4.

23 MR. DIGIACOMO: Okay. Then we can do that.

24 THE COURT: Okay.

25 MR. DIGIACOMO: Okay. We can go on, Judge.

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1 THE COURT: Okay. 5 is, In this case the defendants
2 are accused in an Information or Indictment alleging the open
3 charge of murder. Does anyone have a problem with 5?

4 MR. GENTILE: Excuse me, Your Honor.

5 MR. ARRASCADA: Court's indulgence. Your Honor, we
6 have a problem with Instruction No. 5.

7 THE COURT: And that would be?

8 MR. ARRASCADA: Well, under Freegen v State -- or
9 Freegen, I believe, it is, Your Honor, is defense -- what
10 they've proved is -- this isn't an open murder, this is a
11 first-degree murder, and we'd like the jury instructed only on
12 first-degree murder.

13 MR. DIGIACOMO: I'm sorry, but the Information and
14 the Indictment have theories of first, second, and
15 involuntary, and all the caselaw in the State of Nevada is
16 that when you charge the count of murder, it's all those --
17 all the elements of first, second, voluntary and involuntary,
18 but in order to get a voluntary instruction or an involuntary,
19 there must be some evidence.

20 MR. PESCI: The Court in Schuster v State said that,
21 I think, most recently.

22 MR. DIGIACOMO: Yes. I mean, Tedford -- there's a
23 number of them that says when you're charged with murder, it's
24 all the different various forms of murder.

25 MR. ARRASCADA: Your Honor, Freegen v State --

1 Freegen v State says that the defense can elect if the proof
2 is a first-degree murder and nothing else, and we submit that
3 that's all there is and, you know, it's a risk for our clients
4 and they want -- it's an all or nothing, and we want --

5 THE COURT: No, but it's also a risk for the State
6 because --

7 MR. DIGIACOMO: We proved a number of things. We
8 proved a conspiracy of battery, we proved a conspiracy of
9 battery with a deadly weapon, we proved --

10 THE COURT: Right. I think they're entitled to an
11 open murder charge, so I'm going to give that.

12 Any objection to 6, Murder is the unlawful killing?

13 MR. GENTILE: No.

14 THE COURT: Okay. 7, Malice aforethought, any
15 objection to that, or changes?

16 MR. GENTILE: No.

17 THE COURT: 8, Expressed malice, any changes or
18 objections?

19 MR. GENTILE: No.

20 THE COURT: All right. 9, Murder of the first
21 degree, any objections or changes?

22 MR. GENTILE: No.

23 THE COURT: All right. 10, The law does not
24 undertake to measure?

25 MR. DIGIACOMO: It's the rest of Biford.

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1 MR. GENTILE: Right.

2 THE COURT: Any objection to that?

3 MR. GENTILE: No.

4 MR. ARRASCADA: No, Your Honor.

5 THE COURT: Okay. 11, Murder which is immediately
6 proceeded by lying in wait, any objections or changes?

7 MR. GENTILE: Well, I don't think there's a -- I
8 don't think the facts of this case fit that one.

9 MR. ARRASCADA: Exactly.

10 THE COURT: Well, yeah, it's a lying in wait because
11 they parked the van and called TJ Hadland on his cell phone, I
12 mean, and waited for him to basically sneak up on him and
13 shoot him, I mean, if you believe what Rontae Zone's testimony
14 is. So I think there is evidence of a lying in wait.

15 12, You don't have to agree on the principle of
16 guilt or theory of liability, any objection to that one?

17 MR. GENTILE: Hold on a minute. I think that that's
18 a -- here's the problem with that. There is a conspiracy
19 charge here and in that -- well, because of the way this is
20 drafted, in the second count, and I'm talking about the
21 indictment now, in the second count, there is -- there are
22 four alternative theories as to how there could be murder.
23 Within one of those theories there are three alternatives, and
24 I think that's theory three, that there could be a conspiracy
25 to commit battery, a conspiracy to commit battery with and a

1 conspiracy with -- battery with a deadly weapon.

2 THE COURT: Right.

3 MR. GENTILE: They do have to agree unanimously on
4 what the object of the conspiracy in paragraph three of Count
5 2 is, and so this is -- this particular instruction confuses
6 that.

7 THE COURT: Do you have an alternate instruction on
8 that point?

9 MR. GENTILE: I believe that we do, but --

10 MR. DIGIACOMO: I didn't see that. I mean, the rest
11 of the -- this just says as to principle of guilt and theory
12 of liability. The rest of the instructions are going to
13 explain to them, hey, if you're going to be a conspirator and
14 held for first-degree murder, this is what we have to prove.

15 THE COURT: Well, I don't mind amending this one to
16 make it more clear.

17 MR. GENTILE: Right.

18 THE COURT: Like, this is not how I want it written
19 because it doesn't -- it's more effect -- unless you find the
20 defendant guilty of murder under a conspiracy or -- however,
21 theory, then you must agree -- although, then that's wrong.

22 MR. DIGIACOMO: Yeah, because, I mean, their theory
23 is there should be one of these for second-degree murder as --

24 MR. GENTILE: We have a special verdict form and I
25 think that that will cover it.

1 THE COURT: Okay.

2 MR. GENTILE: Maybe we should show it to you.

3 Do you have it?

4 MS. ARMENI: She already has it.

5 THE COURT: I already have it.

6 MR. GENTILE: Okay.

7 THE COURT: Okay. So --

8 MR. GENTILE: Why don't we pull this --

9 THE COURT: 12 is okay unless we don't give the
10 special verdict form, then you want 12 modified; is that
11 right?

12 MR. GENTILE: 12 is not okay because of the special
13 verdict form. That's the problem.

14 MR. DIGIACOMO: Well, if there's a special verdict
15 form, we could argue the legality of their special verdict
16 form. There's a number of legal statements: One, they are
17 wrong; and, two, when you get to the rest of the instructions,
18 you'll see the difference between their verdict form and our
19 verdict form. Because if it's conspiracy to commit murder,
20 it's conspiracy to commit murder with the intent to kill. You
21 have to establish the intent to kill.

22 THE COURT: Right.

23 MR. DIGIACOMO: If it's the conspiracy to commit
24 battery, battery with a deadly, or battery with substantial
25 bodily harm, it's just conspiracy to commit a crime. Those

1 are the two crimes. They actually want to lay it out on
2 conspiracy to commit battery, conspiracy to commit battery
3 with a deadly weapon, conspiracy to --

4 THE COURT: Right. Because what's going to happen
5 then is you could really easily hang the jury on this because
6 some of them may think, no, they wanted a simple battery and
7 some of them may think, well, no, they wanted a battery with a
8 baseball bat and some of them may think, well --

9 MR. GENTILE: But, Your Honor --

10 THE COURT: -- they really wanted to hurt him, but
11 we're not sure if they wanted to use a baseball bat or
12 whatever.

13 MR. GENTILE: In which case -- look, here's what's
14 real. If they find them guilty of conspiracy to commit a
15 battery, then it leads directly to an involuntary because
16 battery is neither a felony nor the other condition.

17 THE COURT: Let's just argue through this.

18 MR. PESCI: Why don't we flag 12, come back to it,
19 because when we fight over that legal issue, it will resolve
20 what we're doing with 12.

21 THE COURT: Right. Well, that's what I initially
22 said, but that could impact a lot of the other instructions.

23 MR. DIGIACOMO: It could impact all the instructions
24 because there's --

25 THE COURT: So let's decide -- let's decide on this

1 point. I mean, the State's point is that no, if it's
2 foreseeable, if they conspire to commit a battery or a battery
3 was -- I'm not -- and a foreseeable outcome would be death,
4 for example, if you --

5 MR. DIGIACOMO: No, no, not even a foreseeable --
6 foreseeable outcome could be death, a foreseeable outcome
7 could be substantial bodily harm. That would get you to the
8 intent requirement for murder, and I've been asking them --
9 they did this brief -- I've been saying to them, give me the
10 law that says theoretically -- and it's not even the law in
11 Nevada -- theoretically if you're involved in just a simple
12 battery, you yourself, you push somebody down, they hit their
13 head, they die, that's an involuntary.

14 But when you ask somebody else to go and do
15 something, are you -- is it foreseeable that he may do more
16 than just a simple battery? And the answer to that question
17 is yes. Now you have sufficient intent for second-degree
18 murder. And so to say as a proposition that the conspiracy
19 law says -- I'm not sure that even simple battery law says
20 that because in the State of Nevada that's not true. I mean,
21 there's a lot of degrees of simple battery.

22 THE COURT: Why don't we do this? On the verdict
23 form, this, I think, might be okay.

24 MR. ADAMS: Whose verdict form, Judge?

25 THE COURT: I'm looking at the defenses' verdict

1 form.

2 If you find the defendant not guilty of conspiracy,
3 advise the bailiff and return to court, is fine. Guilty of
4 conspiracy -- okay. And then, If you find the defendant
5 guilty of conspiracy, then continue. We find the object of
6 the conspiracy to be conspiracy to commit battery and/or
7 battery causing substantial bodily harm and/or battery with
8 use of a deadly weapon or conspiracy to commit murder.

9 MR. DIGIACOMO: Well, two things. One, that's what
10 our -- basically what our verdict form says. We give an
11 instruction that says if you find one of these three things,
12 it's conspiracy to commit a crime, and you check off
13 conspiracy to commit a crime.

14 Two, the State -- and Green is very clear on this,
15 in the State of Nevada, you don't go from bottom up, you go
16 from top down. So their verdict form is backwards.

17 THE COURT: Right. But I'm saying why not do it
18 that way.

19 MR. DIGIACOMO: And that's exactly what we did on
20 our verdict form, Judge. If you look --

21 THE COURT: I mean, I don't have a problem unless we
22 need to argue about this. If the defense would rather have
23 the crimes enumerated of battery, battery causing substantial
24 bodily harm, and/or --

25 MR. DIGIACOMO: And that's how I originally had it.

1 THE COURT: -- battery with a deadly weapon, I don't
2 have a problem changing that from battery to commit a crime if
3 the defense requests that. The defense might prefer
4 conspiracy to commit a crime.

5 MR. GENTILE: Oh, no, absolutely not. As a matter
6 of fact, a conspiracy to commit a crime --

7 THE COURT: Right.

8 MR. GENTILE: -- we would object to.

9 THE COURT: Okay. Then let's amend the verdict
10 form, the State's verdict form, to say, instead of conspiracy
11 to commit a crime, we find the object of the conspiracy to be
12 conspiracy to commit battery and/or battery causing
13 substantial bodily harm and/or battery with use of a deadly
14 weapon.

15 MR. GENTILE: But they have to agree on which it is.

16 MR. DIGIACOMO: No, they do not. They simply do
17 not.

18 MR. GENTILE: No, they have to agree -- look, in
19 People versus Cox, which is a California reporter case, and
20 it's in my brief at page 36 -- and you won't find much caselaw
21 on this issue, but in this one, it says that because death
22 from a misdemeanor battery doesn't fit, you know, the
23 description of reasonable foreseeable consequence, you can't
24 find the murder from a simple battery. And battery is a
25 misdemeanor in Nevada.

1 Now, as a matter of fact, the irony there is that
2 the battery -- the punishment is what changes depending upon
3 how much damage that the battery does, obviously, but the
4 battery is the misdemeanor, and because our involuntary
5 statute would permit -- in fact, would require that nothing
6 greater than involuntary flow from a conspiracy to commit a
7 battery, simple battery, not the others, I grant you that,
8 then we're entitled to have the jury have a special verdict
9 form at least with respect to simple battery.

10 Now, they can lump the other two together. I would
11 agree with that. But on a simple battery, they can't.

12 THE COURT: Mr. DiGiacomo, what's the Nevada case
13 that says if you hire someone to commit -- or you procure
14 someone to commit a simple battery and it's foreseeable that a
15 possible outcome could be greater than that, that then it
16 could become a -- what do you have for that?

17 MR. DIGIACOMO: There isn't. But when you read Cox,
18 they're interpreting California law.

19 THE COURT: Right.

20 MR. DIGIACOMO: When you read State of Nevada versus
21 Contreras, a very recent case, and I actually pulled it up
22 here because --

23 THE COURT: Do you have it like on a hard copy that
24 I can look at?

25 MR. DIGIACOMO: Judge, unfortunately, I walked out

1 of my office, I brought all my hard copies, it wasn't in
2 there.

3 MR. GENTILE: I could print one.

4 THE COURT: You know what? I told my law clerk to
5 hang --

6 Would you go get Arlene?

7 Give me a minute and I'll go get Arlene and I'll
8 look at the two cases together because this, to me, is like
9 the biggest issue in the case. So we --

10 MR. DIGIACOMO: Right. It's the whole issue. And,
11 you know, just so that I -- I can tell you about Contreras,
12 because it's not directly on point at all, but --

13 THE COURT: Okay. Let me go get it physically along
14 with Cox so I have can have them together.

15 Would you give Arlene, my capable law clerk, the two
16 cites.

17 MR. GENTILE: Cox is --

18 MS. ARMENI: Cox is 23 Cal, 4th, 665.

19 MR. GENTILE: Or 97 Cal, Reporter 2d, 697.

20 Actually, are you using Pacific? Well, Pacific, I
21 can take you right to the pages on Pacific. It's 2 Pacific
22 3rd at pages 1195 to 1197.

23 THE CLERK: Go ahead. Is there another one?

24 MR. DIGIACOMO: Yeah, that's 118 Nevada 332.

25 THE CLERK: Okay.

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1 (Pause in proceedings)

2 THE COURT: All right. I've got the cases.

3 Mr. DiGiacomo, did you want to make any argument?

4 MR. DIGIACOMO: Yes, Judge.

5 THE COURT: Go ahead. I'm all ears.

6 MR. DIGIACOMO: Judge, if you read Cox, what Cox
7 talks about, it's a case where somebody slaps somebody and
8 then somehow they died. They're not really clear exactly what
9 happened to the person after he slaps him, but they died. And
10 the entire holding in Cox has nothing to do with conspiracy
11 law. It has nothing to do with anything related to this case.

12 And here's the reason why: In Cox, the judge
13 instructed that a misdemeanor battery is inherently dangerous.
14 And what the California court said was --

15 THE COURT: Right. That it's not necessary.

16 MR. DIGIACOMO: -- it's not necessarily -- it
17 depends on what the circumstances are.

18 THE COURT: Right.

19 MR. DIGIACOMO: And based on the circumstances of
20 this case, a slap is not inherently dangerous. It was a wrong
21 instruction. Kick it back.

22 Now, in Contreras, which is the Nevada caselaw on
23 it -- or the only caselaw -- if you look up involuntary
24 manslaughter in the State of Nevada, there's practically
25 nothing that discusses it, and there's certainly nothing that

1 discusses the natural probable consequences because ultimately
2 that's a question for a jury. There is no legal argument that
3 is a matter of law conspiring to commit a battery by its
4 definition is only involuntary manslaughter. It depends on
5 the nature of the conspiracy. It depends on what you know
6 about the person that you are doing the conspiring with, what
7 words you utilize.

8 THE COURT: Here's, I think -- let me just cut to
9 the chase because here's where I think we see a problem -- I
10 see a problem. I accept all of that and I think you're right,
11 but the problem is, let's say some of the jurors think, well,
12 it's a misdemeanor battery, and some of the jurors think, no,
13 it was a battery with substantial bodily harm or battery with
14 a deadly weapon, okay, and they check that box. The jurors
15 who think it's just a simple battery need to go further than
16 that to say -- to say this is this. So the way the verdict
17 form is now written, it doesn't take you to that next step.

18 I guess what you're saying is that will be clear in
19 the instructions.

20 MR. DIGIACOMO: Yeah, and I'll get to that in just a
21 second --

22 THE COURT: But I --

23 MR. DIGIACOMO: -- just let me just finish as to the
24 legal argument, which is --

25 THE COURT: No, I agree that if you commit a

1 misdemeanor battery -- or conspire to do that, you could get
2 to -- you could get beyond that. The problem is I think you
3 need additional fact finding and inquiry, and the way the
4 verdict form is, you don't have that. So let me offer --

5 MR. DIGIACOMO: Okay. Because I was going to
6 address it in the instructions.

7 THE COURT: Yeah. But, I mean --

8 MR. DIGIACOMO: In the instructions, you clearly
9 address that --

10 THE COURT: Yeah, but like I just said, what if --
11 if you have it all on one line, what if, okay, half of them
12 think, well, it was just a misdemeanor battery, and half of
13 them think, no, it was a battery with the baseball bats or
14 whatever that they planned. How do we know, then -- how do we
15 make sure that they then go to that second level of inquiry
16 and do it --

17 MR. GENTILE: Exactly.

18 MR. DIGIACOMO: Because of the instructions on the
19 conspiracy --

20 THE COURT: Well, they might not -- here's what I'm
21 proposing, which I think is a brilliant idea --

22 MR. DIGIACOMO: Okay. I'm willing to accept any
23 brilliant idea.

24 THE COURT: -- which means -- which will mean, in my
25 experience, that will be universally frowned upon by the

1 lawyers. Here's what I'm proposing. Okay.

2 If you find the defendant guilty of conspiracy, then
3 continue or whatever. We find the object of the conspiracy to
4 be murder. We find the object of the conspiracy to be battery
5 causing substantial bodily harm and/or battery with a deadly
6 weapon. We find the object of the conspiracy to be battery.
7 Okay.

8 Then we have an instruction, battery is a lesser
9 included crime of battery with a deadly weapon and battery
10 with substantial bodily harm. So if you find -- if 12 -- just
11 that lesser included, you know, if 12 of you agree that it's
12 either battery or a battery -- you know, but if you can't,
13 then 12 of you have to agree that it's a battery. And then if
14 they think it's a battery, they're going to go -- well, I
15 don't know if that will work. Do you see what I'm saying?

16 MR. DIGIACOMO: I understand what you're saying, but
17 that doesn't solve the issue that the defense is complaining
18 about, I don't think.

19 MR. GENTILE: Yeah, it does.

20 MR. DIGIACOMO: And here's the reason why: One,
21 there's more than just --

22 MR. GENTILE: Well, you know what, it solves the
23 issue, so if he wants to tell you why it doesn't, I don't
24 adopt them.

25 MR. DIGIACOMO: Because I know what the next step is

1 going to be from the defense. And here's the problem with it.
2 I'm assuming you're not willing to give those instructions
3 underneath it because, one, there's more than just a
4 conspiracy theory here. There's aiding and abetting and
5 there's natural and probable consequences that stem from
6 aiding and abetting. There are a number of other theories of
7 liability. I don't care about necessarily the counts like how
8 it says that. That doesn't matter to me. But I don't know --
9 we're not going to instruct them once you make a finding on
10 conspiracy that that somehow in any way constrains or adopts
11 their verdict as to the murder.

12 THE COURT: Right. Well, I would take that line
13 out. But I'm just saying on the whole argument on the
14 conspiracy and whether or not they need to go to that second
15 step to then determining if it was a natural and foreseeable
16 consequence and blah, blah, blah, if it's only unanimous as to
17 a battery, then -- then I think they do need to take it that
18 next step because, otherwise, it's not -- they're not going to
19 do it right. I mean, there's no way -- when we're all
20 confused and arguing about it, there's no way the jury's going
21 to get back there and do it right, and then if some of them
22 think it's a battery, go into the natural and foreseeable as
23 to those four or five people that think it's a simple
24 battery -- do you know what I mean -- and be deliberating
25 separately from the other, you know, seven people who think

1 it's -- so that's the only way I can think to do it.

2 MR. DIGIACOMO: Yeah, I just don't -- as long as --
3 I mean, I don't care about that first part about what the
4 object of the conspiracy is.

5 THE COURT: Right.

6 MR. DIGIACOMO: But as long as there's no
7 instruction about, hey, once you get to this, you do something
8 different as to the murder. You don't. You still have to do
9 an analysis as to whether or not you can reach the natural and
10 probable consequences. And then how do we establish
11 unanimity? They don't have to be unanimous as to the battery,
12 the battery with a deadly, or battery with substantial --

13 THE COURT: Well, here's the --

14 MR. GENTILE: They do because it's a conspiracy.

15 THE COURT: Well, no, no. Here's the thing. Okay.
16 If some of them think that they conspired to commit murder and
17 some of them don't, they think it's only a misdemeanor
18 battery, everybody who conspired to -- who thinks it was a
19 murder, by definition, is going to have think it was a
20 battery. Anybody who thinks it's a battery with a
21 substantial -- or whatever, if some don't, they're
22 automatically going to drop to the battery.

23 MR. DIGIACOMO: So even though they -- if 11 of them
24 find battery with substantial or battery with a deadly and one
25 of them finds battery, you're saying the verdict form should

1 say conspiracy to commit battery and then there's going to be
2 no legal consequences to us later on from that? That's --

3 THE COURT: Well, because what I'm saying is --
4 well, yeah, because it has to be unanimous. I agree, it has
5 to be -- I'm not saying it's automatically involuntary.

6 MR. DIGIACOMO: But the crime is not conspiracy to
7 commit battery. The crime is conspiracy to commit a crime.
8 That is the crime. They can be unanimous as to that crime --

9 THE COURT: Well, wait. Except -- no, because what
10 if it was --

11 MR. GENTILE: Judge.

12 THE COURT: -- a conspiracy to commit petty larceny
13 and somebody died, you know, as you were doing your petty
14 larceny, you unscrewed something and threw it on the floor and
15 somebody stepped on it and slid away, so conspiracy -- you
16 know what, I -- that's a bad thing.

17 MR. DIGIACOMO: Yeah, I know, but it's still the
18 crime that they committed, the conspiracy to commit petty
19 larceny. It's still just conspiracy to commit a crime. It
20 doesn't matter what the crime is. The only -- unless it's
21 murder, kidnapping or robbery, it's just conspiracy to commit
22 a crime.

23 THE COURT: Right.

24 MR. GENTILE: No.

25 THE COURT: But then if it's a petty -- what I'm

1 saying is it's a different -- it's a different result. If you
2 conspire to commit battery with a deadly weapon and somebody
3 dies, it's a totally different thing than just conspiring to
4 commit any crime and somebody dies. So I think they're
5 entitled to have the two boxes for battery, the felony, and
6 then the simple misdemeanor and have the instruction that
7 battery is lesser letter included offense to battery with
8 substantial bodily harm and battery with a deadly weapon.

9 MR. DIGIACOMO: Okay. But --

10 THE COURT: And then you can also say, just like --
11 you know, if your verdict as to whether it was a battery with
12 substantial bodily harm or a battery with a deadly weapon on
13 the -- you know, on the conspiracy does not have to be
14 unanimous or something like that.

15 MR. GENTILE: What?

16 THE COURT: Meaning -- well, some can think it's a
17 battery with a deadly weapon and some can think it's a battery
18 with substantial bodily harm.

19 MR. GENTILE: Oh, yeah. You're right there.

20 THE COURT: That doesn't need to be unanimous --

21 MR. GENTILE: You're right. That's correct.

22 THE COURT: -- right? If six people think it's a
23 battery with substantial bodily harm and --

24 MR. DIGIACOMO: I'm not really disputing with the
25 Court. I'm just wondering why it is that -- I mean, there's

1 no different crime committed if it's a battery, a battery with
2 a deadly or battery with substantial --

3 MR. GENTILE: That's not true. One's a misdemeanor,
4 two are felonies.

5 MR. DIGIACOMO: They're both grosses, though.
6 They're all grosses.

7 THE COURT: Well, it gets to the next analysis.
8 That's why -- all right. I think that's fine to make the
9 change. So making that change -- is everybody cool with
10 Instruction No. 12?

11 MR. GENTILE: Yeah. I mean, we've got to see the
12 actual instruction.

13 MR. DIGIACOMO: Well, this is going to be the
14 instruction.

15 MR. GENTILE: Did you read the language?

16 THE COURT: No. Instruction No. 12 is, Although
17 your verdict must be unanimous, you do not have to agree on
18 the principle of guilt or theory of liability. It's just on
19 the murder and the first degree one.

20 MR. PESCI: Right. And this is dealing with lying
21 in wait --

22 THE COURT: I think that's right.

23 MR. GENTILE: Well, see, that's the problem because
24 when you get to the coconspirator aspect, if somebody thinks
25 that somebody is -- that the theory of liability -- that

1 somebody conspired to commit a battery, okay, they can't go
2 from conspiracy to commit a battery to first-degree murder.

3 MR. DIGIACOMO: Well, that's instructed later on.

4 MR. PESCI: Right. This is just the first-degree
5 murder.

6 MR. GENTILE: Well, why confuse them? And that's
7 the problem.

8 THE COURT: Well, I don't know. Let's go on and --
9 okay. I'll just sort of mark 12.

10 MR. GENTILE: Now, if you want to eliminate the
11 coconspirator language in this instruction, then we can deal
12 with it later.

13 MR. DIGIACOMO: No.

14 THE COURT: No, because some people may think he's
15 an aider and abettor and some people may think, well, he's
16 just a coconspirator; although, if he's an aider and abettor,
17 by definition, he's a coconspirator.

18 MR. GENTILE: No.

19 MR. DIGIACOMO: Not necessarily for Little Lou.
20 Little Lou theoretically could be an aider and abettor and not
21 a coconspirator.

22 THE COURT: Well, wouldn't he, though, have to be
23 conspiring with the people who actually committed the murder?
24 I mean, that's --

25 MR. DIGIACOMO: To a certain extent, he could be --

1 you're right. He could be --

2 THE COURT: I mean, he -- because since he didn't
3 commit the murder and he's not out there helping them, he, by
4 definition, would have had to have agreed if he's aiding and
5 abetting in the commission --

6 MR. GENTILE: Yeah, but an aider and abettor
7 actually has to do something.

8 THE COURT: No, no. But what I -- I know, but
9 that's what I'm saying. If he's an aider and abettor, then he
10 has to, in the facts of this case, have been a coconspirator.
11 Now, if he's a coconspirator, he doesn't have to have been an
12 aider and abettor.

13 MR. GENTILE: Right.

14 THE COURT: But in order to be an aider and a
15 better, he has to be a coconspirator. That's all I'm saying.
16 So you're not going to --

17 MR. DIGIACOMO: And -- all right. I'm just saying
18 the conspiracy requires knowledge of the agreement. Aiding
19 and abetting doesn't. He could be encouraging his dad, he
20 could be encouraging Deangelo Carroll to do something, not be
21 present for the agreement, not know that the agreement took
22 place, and he'd still be liable because he was encouraging
23 these two individuals.

24 THE COURT: All right. Well -- okay. 12, we're
25 kind of marking.

1 13 --

2 MR. GENTILE: Well, again, I will probably then want
3 to enter an objection on the record to the instruction.

4 THE COURT: We are on the record.

5 MR. GENTILE: Okay. Then I object to this
6 instruction.

7 THE COURT: Well, I'm going to go through and see --
8 and you haven't -- do you have an alternative instruction to
9 12?

10 MR. GENTILE: Yeah. We submitted it. That's our.

11 MR. DIGIACOMO: I didn't see --

12 THE COURT: Where is it?

13 MR. GENTILE: That's what was done -- hold on.
14 That's really our special verdict form. That's what tracks.
15 That's what my -- that's the reason that we even need a
16 special verdict form in this case.

17 THE COURT: Okay. Well, let's hold --

18 MR. GENTILE: They can't make the quantum leap from
19 finding somebody a conspirator under --

20 THE COURT: Yeah, a misdemeanor.

21 MR. GENTILE: -- Count 2, theory 3A, and make the
22 leap to first-degree, they can't do it.

23 MR. DIGIACOMO: To first degree, no.

24 MR. PESCI: No one's arguing that. It's the second.

25 MR. DIGIACOMO: No one's arguing that.

1 MR. PESCI: No one's arguing to first.

2 MR. DIGIACOMO: When you read the instruction, it
3 says in order to hold them liable under conspiracy theory for
4 first-degree murder, you're going to have to find that he
5 premeditated and deliberated the crime. It's -- that
6 instruction is in here, so --

7 MR. ARRASCADA: It's a specific intent crime.

8 MR. GENTILE: If you conspire -- look, here's --
9 here's -- and Mr. DiGiacomo had it for a second and then he
10 went right by it. Battery is a fact question in terms of was
11 it a simple battery --

12 THE COURT: Right. Right.

13 MR. GENTILE: -- or was it something greater than
14 that that they had planned. Okay. And if it was a simple
15 battery, then was it foreseeable, then it would grow to
16 something else. And that's something that the jury has to
17 agree on.

18 THE COURT: Right.

19 MR. GENTILE: But they have to agree on it
20 unanimously.

21 THE COURT: Right.

22 MR. GENTILE: Okay. And so we're getting away
23 from --

24 THE COURT: I have another brilliant idea --

25 MR. GENTILE: Okay.

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1 THE COURT: -- which means nobody will like it.
2 Okay. When we get then to the next thing where, you know, you
3 find he conspired to commit murder or they find he conspired
4 to commit battery substantial harm and/or battery with a
5 deadly weapon or simple battery, and then the next question
6 is, you know, does the jury find that whatever you were just
7 saying, was a reasonable and foreseeable outcome of this --

8 MR. GENTILE: Right.

9 THE COURT: -- yes or no.

10 MR. DIGIACOMO: Judge, since when --

11 MR. GENTILE: Yeah, we do it --

12 MR. DIGIACOMO: Since when -- I mean, the law is the
13 general verdict form, so long as all the law contained in the
14 instructions are appropriate. Now we're going to ask the jury
15 to start making specific findings and it's going to be more
16 confusing than just reading the instructions and then they're
17 going to utilize the verdict form to start making legal
18 arguments about this is what the jury actually meant and you
19 can't hold my client liable under these theories because it's
20 so confusing. That's the whole problem here.

21 If we instruct them appropriate on the law, you give
22 them general verdict forms, they hit the general verdict
23 forms, we're not going to have all this post trial litigation
24 about, well, you wrote this wrong, you wrote this wrong.

25 THE COURT: [Inaudible] litigation anyway,

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1 Mr. DiGiacomo.

2 MR. DIGIACOMO: Well, that's true, but I'm just
3 saying -- I'm just saying it's just creating full grounds for
4 a mistake to be made in the way that they check off these
5 boxes because it's going to get to a point where it's
6 impossible to understand. And now we're telling them, well,
7 look, under conspiracy -- but then also if it's -- but if you
8 find a different theory of liability, you could get somewhere
9 else even though you found the conspiracy.

10 MR. GENTILE: Yeah, that's the law. You're right.

11 MR. DIGIACOMO: So what you're saying is why even
12 have these. Let's throw away this instructions. We'll give
13 them one verdict form and tell them to go back --

14 MR. GENTILE: No.

15 THE COURT: Mr. DiGiacomo.

16 MR. GENTILE: You brought the indictment the way you
17 brought it.

18 THE COURT: As clever as that is, and frankly, I
19 know you never -- or maybe you did practice civil law --
20 special verdict forms are used --

21 MR. DIGIACOMO: True.

22 THE COURT: -- all the time and, in my experience,
23 they clarify complicated cases as opposed to making them more
24 confusing. So in my experience -- and, you know, obviously, a
25 lot of the instructions in civil cases are as complicated, if

1 not more complicated, than these. The jurors don't get, you
2 know, so confused and fill out the verdict forms incorrectly.
3 So I'm not worried about a danger of more confusion. And,
4 frankly, if it's requested by the defense on the verdict form,
5 unless it's filled out incorrectly, then they can't very well
6 object to the verdict form later if we're doing --

7 MR. DIGIACOMO: No, but it's going to be filled out
8 and then it's going to be a question of whether they
9 deliberated about it back there.

10 MR. PESCI: And, Judge, he's kind of mixing second
11 and first together. He complained about 12 because it says
12 that they can make the logic leap to first. That's not the
13 argument. That's not the law. It's that this gets you to
14 second, not first. We're not standing up and saying that
15 conspiring to commit battery gets you to first-degree murder.
16 We're not. That's not the law. That's not what we're asking.

17 MR. GENTILE: But this instruction --

18 MR. PESCI: It gets you to second-degree murder.

19 MR. GENTILE: -- allows for that.

20 MR. DIGIACOMO: No, it doesn't.

21 MR. PESCI: This one talks about first-degree murder
22 and lying in wait.

23 MR. DIGIACOMO: We could write a different one for
24 second-degree murder, but --

25 MR. PESCI: And it's specific as to Mr. H because

1 Little Lou's not facing that lying in wait analysis.

2 MR. GENTILE: We're not talking about a lying in
3 wait instruction. We're talking about No. 12.

4 MR. PESCI: That's in 12.

5 THE COURT: Well, 12, let's see what comes later and
6 maybe that explains 12.

7 13, does anyone have a problem with 13? That looks
8 fine to me.

9 MR. GENTILE: No.

10 THE COURT: 14, anyone will have a problem --

11 MS. ARMENI: Your Honor, we just ask that under the
12 last sentence --

13 THE COURT: Right.

14 MS. ARMENI: -- that there's another sentence that
15 says a simple battery is a misdemeanor.

16 MR. DIGIACOMO: That's fine.

17 THE COURT: Do you want a simple battery is a
18 misdemeanor or just battery --

19 MR. GENTILE: Battery is a misdemeanor.

20 MS. ARMENI: That's fine.

21 THE COURT: -- is a misdemeanor? Okay.

22 MR. DIGIACOMO: Okay.

23 THE COURT: 15, A conspiracy is an agreement. Does
24 anyone have a problem with 15?

25 MR. GENTILE: Wait, just a second.

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1 MS. ARMENI: We don't have a disagreement, but we
2 wanted something added.

3 THE COURT: Okay.

4 MS. ARMENI: This would be the last sentence.
5 However, one cannot join the conspiracy after the completion
6 of the crime that was its object.

7 THE COURT: That's fine.

8 MR. DIGIACOMO: Yeah, that's right.

9 THE COURT: Would you say that again, Ms. Armeni?

10 MS. ARMENI: Sure. However, one cannot join the
11 conspiracy after the completion of the crime that was its
12 object.

13 MR. ARRASCADA: And, actually, Judge, we want to go
14 a step further. I believe their sentence, line 14 through 16,
15 should be stricken, that it does not end upon the completion
16 of the crime, the conspiracy continues until they've
17 successfully gotten away and concealed the crime. You've
18 already ruled on this, Judge --

19 MR. DIGIACOMO: Yes, you did. You did.

20 MR. ARRASCADA: -- and said there are two
21 conspiracies, and they can argue that the wire can show Little
22 Lou was part of the original conspiracy, yet --

23 THE COURT: They can -- here's what I ruled, and if
24 they go around this in argument, I want everybody to object
25 and they will be reprimanded. Here's what I ruled. The wire,

1 Little Lou's knowledge of the crime and his discussion can be
2 evidence of the conspiracy. You know, his interest in trying
3 to do away with the coconspirators can be evidence of Little
4 Lou's involvement and motive in the conspiracy. It is not
5 evidence of Mr. Hidalgo, Jr.'s involvement in the conspiracy
6 and cannot be argued by the State as evidence of Mr. Hidalgo's
7 involvement in the conspiracy.

8 MR. DIGIACOMO: Just the solicitation portions of
9 it. That's what you ruled.

10 THE COURT: Right. Just the solicitation part.

11 MR. DIGIACOMO: And we understand that and --

12 THE COURT: To me, that shows Little Lou's knowledge
13 of the crime and why is he so concerned about killing the
14 coconspirators if he wasn't involved in the crime in the first
15 place. Now, obviously you can argue --

16 MR. ARRASCADA: It's a jury question.

17 THE COURT: -- it's because he loved Anabel or he's
18 trying to protect his father or whatever you want to argue,
19 but to me that's a question --

20 MR. DIGIACOMO: Can Ms. Armeni just finish that so I
21 can type it?

22 MR. GENTILE: May I -- Your Honor, in our
23 instructions, I proposed this language and, frankly, I think
24 it really succinctly states the entire theory of defense as
25 argued by one more instruction of -- of my client, and this

1 would be the instruction.

2 A conspiracy begins when two or more persons enter
3 into an unlawful agreement. A conspiracy continues beyond the
4 accomplishment of its objective. However, a person cannot
5 become a member of a conspiracy after the object of the
6 conspiracy has been accomplished. If a person was not a
7 member of the conspiracy before its objective was accomplished
8 but assists the conspirators afterwards, he's an accessory
9 after the fact. That is an absolutely accurate statement of
10 the law and that is our theory of defense.

11 MR. PESCI: He says afterwards. Doesn't that
12 delineate after the beginning of it as opposed to after the
13 end of the conspiracy? They could get confused in thinking
14 that they joined in --

15 MR. GENTILE: I'd be happy to --

16 THE COURT: Right.

17 MR. GENTILE: No, it says before the objective was
18 accomplished.

19 MR. DIGIACOMO: Did I get the wrong one or -- is
20 that in one of your proposed, because I haven't seen it?

21 MR. GENTILE: Yeah. Yeah, it's right here.

22 MR. DIGIACOMO: The one you e-mailed me here didn't
23 have that one in it.

24 MR. GENTILE: It should have.

25 THE COURT: Is the State fine with that one?

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1 MS. ARMENI: It did.

2 MR. DIGIACOMO: Well, hold on. Conspiracy begins
3 when two or more persons enter into an unlawful agreement.
4 Well, I'd ask that the next -- after a conspiracy begins with
5 two or more persons enter into an unlawful agreement --

6 THE COURT: Well, I think it should be for an
7 unlawful purpose because how are they going to know what an
8 unlawful agreement is?

9 MR. GENTILE: Okay. An agreement for an unlawful --
10 well, actually -- okay.

11 MR. DIGIACOMO: Into an agreement for an unlawful
12 purpose.

13 THE COURT: I think that's better.

14 MR. GENTILE: I'm fine with that.

15 THE COURT: Well, don't you want -- to me this is
16 helpful to the defense. To be guilty of conspiracy, a
17 defendant must intend to commit or to aid in the commission of
18 the specific crime agreed to.

19 MR. GENTILE: Right. Exactly.

20 THE COURT: You want that.

21 MR. DIGIACOMO: Oh, no, I thought --

22 MR. GENTILE: No, I'm not trying -- I'm not
23 objecting -- we're only talking about the last paragraph.

24 MR. DIGIACOMO: We're changing the last paragraph.

25 THE COURT: Oh, you want all of that added. Okay.

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1 I'm fine with that.

2 MR. DIGIACOMO: Yeah. What I was going to say is a
3 conspiracy begins when two or more persons enter -- two or
4 more persons enter into an agreement for an unlawful purpose.
5 A conspiracy continues beyond the -- how about a conspiracy --
6 does not end upon the completion of the crime. Conspiracy
7 continues until the coconspirators have successfully gotten
8 away with the concealed crime.

9 MR. GENTILE: Okay. I can live with that.

10 MR. DIGIACOMO: Right. And then say, however, a
11 person cannot become a member of a conspiracy after the object
12 of the conspiracy has been accomplished. If a person is not a
13 member of the conspiracy before its objective was accomplished
14 but assists the coconspirators afterwards, he's an accessory
15 after the fact.

16 MR. GENTILE: I can live with that.

17 MR. DIGIACOMO: You can live with that, right?

18 MR. GENTILE: I can live with that.

19 THE COURT: All right. That's great. Okay.

20 16, Once a person joins a conspiracy -- don't mind
21 me.

22 MS. ARMENI: Dominic.

23 MR. GENTILE: I just lost one of my -- all right.
24 Great, so we'll take -- the last paragraph of No. 15 will
25 read --

1 MR. DIGIACOMO: We're going to fix it and then when
2 we print it out, we'll all read it.

3 MR. GENTILE: Okay. Good.

4 THE COURT: You know, if it was just me and the
5 defendants and Mr. Pesci, we'd probably have done the trial
6 two weeks ago and Ms. Armeni and Mr. --

7 MR. DIGIACOMO: Which one of them? Come on.

8 THE COURT: I pick Adams.

9 MR. ARRASCADA: What? Judge --

10 MR. PESCI: 16. Once a person --

11 (Off-record colloquy)

12 THE COURT: All right. 16, Once a person joins a
13 conspiracy, any objection to this one?

14 MR. GENTILE: No.

15 THE COURT: Okay. 17.

16 MR. DIGIACOMO: We do, but -- it's ours.

17 MR. GENTILE: It's yours.

18 THE COURT: 17, It is not necessary in proving a
19 conspiracy to show a meeting. This looks fine..

20 MR. GENTILE: Right.

21 THE COURT: 18, Every member of a criminal
22 conspiracy. Are we good --

23 MR. GENTILE: Wait, wait, wait. This is -- you
24 know, I've got to tell you something. Unless we're going to
25 define general and specific intent --

1 MR. DIGIACOMO: We are on the next one.

2 MR. GENTILE: Okay.

3 MR. DIGIACOMO: The next instruction will define

4 murder and there's actually, I think, three more ones that

5 specifically define what the heck we're talking about.

6 MR. GENTILE: All right. But the next one is the

7 one that I have a big objection on.

8 MR. PESCI: So as far as 18 --

9 MS. ARMENI: Are we okay with 18?

10 MR. GENTILE: Well, I think you need to take them

11 all together.

12 THE COURT: Okay. 18 --

13 MR. GENTILE: I don't think -- do we have an

14 instruction that defines specific intent?

15 THE COURT: I do not believe there is one in the

16 pack.

17 MR. DIGIACOMO: I don't think anyone offered one.

18 MR. GENTILE: Well, we will need to do that.

19 THE COURT: Okay. Do we have a suggestive one? .

20 Because that's not part of the normal instructions.

21 MR. PESCI: We do define which ones are specific

22 versus general. We enumerate that.

23 MR. GENTILE: Right. But what good is that if you

24 don't tell them what it means?

25 THE COURT: So you want a specific intent crime

1 means blah, blah, blah; general intent crime means, blah,
2 blah, blah? That might actually be more confusing.

3 MR. PESCI: That can get very dangerous.

4 MR. GENTILE: Well, it can't be because if you're
5 going to tell them one is specific and one is general and
6 they're back there and they don't know the difference between
7 the two --

8 MR. PESCI: Well, it's just that these crimes are
9 specific, this defendant has to specifically intend that this
10 crime occurs in order to be found guilty.

11 MR. GENTILE: But the problem is that if you don't
12 tell them what specific intent is, if you don't define it --
13 hold on a second.

14 THE COURT: Well, I've got a brilliant idea, which
15 means nobody will like it again. Why don't we say on the
16 form, Murder in the first degree -- on Instruction 18, just
17 tell -- because, otherwise, it's like a law school exam.
18 They're going to get back in there, is this specific intent,
19 is this -- I would rather then just on 18 remind them again
20 murder is a specific intent crime, murder in the second degree
21 is a general intent crime, battery is a general intent crime,
22 blah, blah, blah.

23 MR. DIGIACOMO: That's what No. 19 says.

24 MR. GENTILE: Judge, in this case --

25 THE COURT: But let's put it on the same instruction

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1 and then say it again in 19 that defines it more.

2 MR. ARRASCADA: Back to what Mr. Gentile said, what
3 is specific intent --

4 MR. GENTILE: Yeah, I mean --

5 MR. ARRASCADA: -- I mean, general intent?

6 THE COURT: Yeah, but why --

7 MR. GENTILE: When they're making that decision,
8 they have to decide whether -- a specific intent offense is
9 one that requires an intent to break that law, okay.

10 THE COURT: Right. I know what it is.

11 MR. GENTILE: A general intent -- well, but my point
12 is they don't know what it is. And so -- and I could see on
13 the facts of this case --

14 THE COURT: Here's another idea that nobody will
15 like. Let's put a specific intent crime is this, a general
16 intent crime is that, you and -- all on 18, You are instructed
17 that murder in the first degree is a specific intent crime.
18 You are instructed that murder in the second degree, you know,
19 battery with a deadly --

20 MR. DIGIACOMO: Battery with a deadly weapon,
21 battery --

22 THE COURT: Well, what do you want then?

23 MR. DIGIACOMO: What's the proposed language?

24 MR. GENTILE: I'm looking for it right now.

25 THE COURT: I think if we incorporate all of that,

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1 it's fine. Then they won't be -- or just put your language
2 and just use 19 and 20 on the State's to then say it. Does it
3 say anywhere battery is a general intent crime?

4 MR. GENTILE: Here. Here we go.

5 MR. DIGIACOMO: It does. 21, Judge.

6 MR. GENTILE: Let's use -- let's use -- oh, here's a
7 good case. Bolden. Let's use Bolden. It says, Specific
8 intent is the intent to accomplish the precise act which the
9 law prohibits.

10 MR. PESCI: Except for Justice Rose's second degree
11 kidnapping was specific.

12 MR. GENTILE: Let's just put it in there.

13 MR. DIGIACOMO: Okay. But then -- the problem is
14 never defining specific intent. Define general intent, the
15 jury's going to understand.

16 MR. PESCI: Right.

17 MR. GENTILE: I'll get that for you in a second, but
18 specific intent is the intent to accomplish the precise act
19 which the law prohibits. All right. Now, I'll find one
20 for -- and that's Bolden --

21 MR. DIGIACOMO: I don't have a problem with that
22 definition.

23 THE COURT: All right.

24 MR. GENTILE: Okay.

25 THE COURT: I don't have a problem.

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1 MR. PESCI: Can you read that again.

2 MR. GENTILE: Specific intent is the intent --

3 THE COURT: Is the intent to accomplish the precise

4 act which the law prohibits.

5 MR. GENTILE: Right, exactly. Now we'll define

6 general intent.

7 MR. DIGIACOMO: I don't have a problem with that.

8 MR. GENTILE: And now general intent, we'll define

9 that in a second.

10 MR. DIGIACOMO: That's a problem with general

11 intent --

12 THE COURT: General intent is everything else.

13 MR. DIGIACOMO: Right. Literally you could almost

14 say it that way and that's almost the best way to describe it.

15 THE COURT: Have we found general intent yet?

16 MR. GENTILE: I'm looking for it right now.

17 Basically a general intent offense is any act that's committed

18 wilfully, but hold on, let's see if we can find a Nevada case.

19 Do we have a wilfully instruction?

20 THE COURT: Yeah, I'm sure there's something that

21 has that.

22 MR. PESCI: The Biford instruction has wilful.

23 THE COURT: Why don't we pass this one for right

24 now. I can ask my law clerk --

25 MR. GENTILE: You know what, Your Honor, it seems

1 like all other cases point to this general wilfully
2 instruction when they're talking about the general
3 instruction.

4 THE COURT: So what do you want --

5 MR. GENTILE: So any offense that's committed --

6 THE COURT: So a general intent --

7 MR. GENTILE: Do you know what, if you want to say a
8 general intent offense is anything else, I'm fine with that,
9 really. Are you okay with that?

10 MR. DIGIACOMO: I literally think that's true.

11 MR. GENTILE: Yeah, I think it's probably true.

12 THE COURT: All right. Is everybody fine with that,
13 a general intent offense is everything else?

14 MR. GENTILE: Yeah.

15 MR. DIGIACOMO: A general intent offense is one
16 which is -- does not require specific intent. It's true.

17 THE COURT: Is that --

18 MR. DIGIACOMO: Maybe the law professor back there
19 can give us a better one.

20 THE COURT: So do you want, A general intent offense
21 is one which does not require specific intent --

22 MR. GENTILE: Well, it has to be done knowingly and
23 wilfully, but does not require specific intent.

24 THE COURT: A general offense is everything else?

25 MR. GENTILE: Yeah, it can't be accidental. It's

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1 got to be knowing and wilful.

2 MR. ARRASCADA: A general intent is -- yeah, knowing
3 and wilful.

4 THE COURT: All other offenses --

5 MR. DIGIACOMO: A general intent offense is one that
6 does not require specific intent, because in the definition it
7 says wilful and all of that other --

8 MR. GENTILE: Yeah, I'm okay with that. I'm okay
9 with that.

10 MR. DIGIACOMO: General intent offense is one that
11 does --

12 THE COURT: Which does not -- or one that does not.

13 MR. DIGIACOMO: It doesn't require specific intent.

14 THE COURT: Okay. All right. 19, are we good with
15 this?

16 MR. GENTILE: Now, hold on a second.

17 MR. ARRASCADA: Your Honor, lines 4 and 5 --

18 MR. DIGIACOMO: Oh, I'm sorry. Yeah, this is my old
19 one. It just needs to get cut.

20 MR. ARRASCADA: Where it says the and/or --

21 MR. DIGIACOMO: Yeah.

22 MR. ARRASCADA: -- that should all be -- line 5
23 should be stricken to line 6.

24 MR. DIGIACOMO: Sorry. I cut and pasted. You're
25 right. It's out.

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1 THE COURT: Okay. That was --
2 MR. GENTILE: Hold on just a second.
3 THE COURT: I'm glad you caught that. I would have
4 caught it when I read it though.
5 MR. ARMENI: Can we add -- Marc, can you add
6 specific intent offense?
7 MR. DIGIACOMO: It's the first line.
8 THE COURT: So there should be a period after kill
9 on line 5 --
10 MR. DIGIACOMO: A specific intent, instead of --
11 specific intent crime, not offense crime. Okay.
12 THE COURT: All right. 20, then, is everybody good
13 with 20?
14 MR. GENTILE: I have -- I have a problem still with
15 19, second paragraph.
16 THE COURT: Okay.
17 MR. GENTILE: And here's why. We get back to, I
18 believe, a need to address the conspiracy to commit a simple
19 battery here. This says that a -- murder in the second degree
20 may be a general intent crime. That's true. As such,
21 defendant may be liable under conspiracy theory or aiding and
22 abetting theory for murder of the second degree for an act
23 committed by a coconspirator if the killing is one of the
24 reasonably foreseeable and probable and natural -- well, I
25 guess that's --

1 MR. DIGIACOMO: Consequences of the object of the
2 conspiracy --

3 THE COURT: It's right.

4 MR. GENTILE: That's an accurate statement of the
5 law.

6 THE COURT: Yeah, I mean, you can argue, you know,
7 it was a simple -- I mean, I don't think that's what you're
8 going to argue, but --

9 MR. DIGIACOMO: How do they know? You know, how do
10 they know Deangelo's going to go do this?

11 THE COURT: 20, Where two or more persons are
12 accused of committing a crime together, is everybody all right
13 with this, the aiding and abetting instruction?

14 MR. GENTILE: Okay.

15 THE COURT: All right. 21 is foreseeable general
16 intent crimes.

17 MR. GENTILE: Yeah, I think you've got to think --
18 well, hold on now. I highlighted this --

19 THE COURT: Well, we don't -- you haven't charged --
20 did you charge Little Lou with conspiracy to commit
21 second-degree -- solicitation?

22 MR. DIGIACOMO: No, I didn't -- you can't do --

23 THE COURT: Right. So then why do we even have --

24 MR. DIGIACOMO: The only reason I have that there is
25 because nowhere in here did it ever say solicitation to commit

1 murder is a specific intent crime and I didn't want the
2 jury -- because in every other crime we're talking about in
3 this case, we define that one's general intent, this one's
4 specific intent. There's no --

5 THE COURT: Okay.

6 MR. DIGIACOMO: -- he needs the actor in that case.

7 THE COURT: Right. That's why I'm saying, it's kind
8 of confusing to have it on this same one.

9 MR. DIGIACOMO: I'd be happy to -- I put it on there
10 for them so that somewhere in here it said it's a specific
11 intent crime.

12 THE COURT: Right. Do you guys care if it's on
13 here, defense, or would you rather just have first degree
14 murder is a specific intent crime and then in a separate
15 instruction solicitation to commit murder is a specific --

16 MR. ARRASCADA: We actually submitted a separate
17 solicitation instruction, Your Honor --

18 THE COURT: Okay.

19 MR. ARRASCADA: -- on the intent, so we would like
20 it struck.

21 MR. DIGIACOMO: All right. I'll strike it out.
22 Okay. I don't care.

23 THE COURT: Let's strike that and we'll make a note
24 that we still have to have a specific intent instruction on
25 solicitation.

1 Okay. We need to rewrite 22.

2 MR. GENTILE: All right. No. 22 is just wrong.

3 THE COURT: I said we need to rewrite it.

4 MR. GENTILE: Yeah, conspiracy to commit a crime has
5 got to be out of there.

6 MR. DIGIACOMO: I don't know how you're going to
7 rewrite that, but okay.

8 THE COURT: Well, okay --

9 MR. DIGIACOMO: Are we going to do a transition
10 instruction for every conspiracy? Because it's not. The
11 conspiracy's not a lesser -- they're not all lesser included
12 of each other.

13 MR. GENTILE: No, and we're not talking about that.

14 THE COURT: Okay. Here's what I would proposed --

15 MR. DIGIACOMO: Well, if you just take out crime and
16 put battery, battery with a deadly or battery with
17 substantial?

18 THE COURT: No. Why don't we just take out the
19 crime of conspiracy to commit murder includes the crime of
20 conspiracy to commit a crime, because if it's a conspiracy to
21 commit murder -- you know.

22 You may find the defendant guilty of conspiracy to
23 commit battery with a deadly weapon and/or battery with
24 substantial bodily harm if, right, you have found -- not found
25 beyond a reasonable doubt the defendant is guilty of

1 conspiracy to commit murder; and, two, all 12 of you are
2 convinced beyond a reasonable doubt that the defendant is
3 guilty of the crime of conspiracy to commit battery with a
4 deadly weapon or battery with substantial bodily harm.

5 And then you may do the same thing. You may find
6 the defendant guilty of conspiracy to commit battery: One, if
7 you have not found beyond a reasonable doubt that the
8 defendant is guilty of conspiracy to commit murder and/or
9 conspiracy to commit battery with a deadly weapon and/or
10 conspiracy with substantial bodily harm; and, two, all 12 of
11 you are convinced beyond a reasonable doubt that the defendant
12 is guilty of the crime of conspiracy to commit battery.

13 MR. GENTILE: That's perfect.

14 THE COURT: Thank you. And then if you are
15 convinced beyond a reasonable doubt that the crime of
16 conspiracy -- and then you must give the --

17 MR. DIGIACOMO: I understand what you're saying.

18 THE COURT: -- benefit of the doubt.

19 MR. DIGIACOMO: I object for the record, but I
20 understand.

21 THE COURT: All right. You'll make the changes
22 notwithstanding --

23 MR. DIGIACOMO: Yeah, my vehement objection, I
24 will --

25 THE COURT: I said [inaudible], but vehement is

1 better.

2 MR. GENTILE: 23 should go out because at this point
3 in time it's --

4 THE COURT: Right. 23 we'll pull.

5 24, Battery means any wilful and unlawful use of
6 force or violence upon a person.

7 MR. GENTILE: Why don't you address it?

8 MS. ARMENI: Your Honor, we separated them. We
9 thought that they should be battery -- simple battery should
10 be on one jury instruction. That's how we did it.

11 THE COURT: That's fine. Does the State have a
12 problem with making this three instructions?

13 MR. DIGIACOMO: Three or two?

14 MS. ARMENI: I think our exact wording was --

15 MR. PESCI: Just tell us where to cut it off on this
16 because it's probably easy to cut and paste.

17 MS. ARMENI: It was towards the back.

18 MR. GENTILE: You know what, let me make -- I think
19 we could save this one.

20 THE COURT: Yeah, this looks fine to me.

21 MR. GENTILE: I think you need to put in here
22 somewhere that battery is a misdemeanor, a battery which
23 occurs with a deadly weapon is a felony, a battery results in
24 substantial bodily harm is a felony.

25 MR. DIGIACOMO: You want to add one line that says a

1 simple battery is a misdemeanor?

2 MR. GENTILE: Well, I -- you want to use the word
3 simple?

4 THE COURT: Well, I would do it this way, battery
5 means any wilful and unlawful use of force. A battery which
6 occurs with a deadly weapon is a felony, a battery which
7 occurs with substantial bodily harm is a felony, substantial
8 bodily harm means a battery --

9 MR. DIGIACOMO: Without a deadly weapon or
10 substantial bodily harm is --

11 MR. GENTILE: Is a misdemeanor.

12 THE COURT: Is a misdemeanor.

13 MR. DIGIACOMO: -- a misdemeanor.

14 MR. GENTILE: Yeah, there you go.

15 (Off-record colloquy)

16 MR. PESCI: Are we on 25?

17 MR. ARRASCADA: Well, I'm thinking Mr. Arrascada
18 will want to weigh in on 25. Let's just pick 25 -- let's just
19 skip 25 until he gets back.

20 Move on to 26, Mere presence at the scene of a
21 crime.

22 MR. GENTILE: Yeah, that's fine.

23 THE COURT: That's fine.

24 27.

25 MR. PESCI: Mr. Adams, do you have any problem with

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1 26?

2 MR. ADAMS: I don't know.

3 MR. DIGIACOMO: Yeah, I don't know why this
4 transition instruction wound up later than the first
5 transition instruction, but, hey, it's --

6 THE COURT: Okay. 27.

7 MR. DIGIACOMO: 27's your standard first to second
8 transition instruction. And 28 is your standard second to
9 involuntary instruction.

10 MR. GENTILE: I think you've got a typo on this
11 unless the one that I have has been cleared.

12 THE COURT: All right. Mr. Arrascada's back. Let's
13 go back to Instruction 25 --

14 MR. ARRASCADA: Thank you, Your Honor.

15 THE COURT: -- which is the solicitation to commit
16 murder instruction that the State has.

17 MR. ARRASCADA: Your Honor, that's a correct
18 statement of the law and then we have a second instruction
19 that addresses it being a specific intent crime to commit
20 murder.

21 THE COURT: Why don't we just incorporate the two
22 and say --

23 MR. DIGIACOMO: Yeah, but it has to be a specific
24 intent to kill because there's no element of premeditation and
25 deliberation, so it's just the specific intent to kill.

1 MR. ARRASCADA: It's a murder. Judge, I throw it
2 out to you this way, how do you solicit someone to commit a
3 second-degree murder? You don't. You have to -- you have to
4 solicit someone to commit first-degree murder.

5 MR. DIGIACOMO: No, it's an attempt murder.

6 MR. ARRASCADA: Now, there's other states that have
7 a second-degree murder solicitation law. We don't have that.
8 So your solicitation has to be to commit a first-degree
9 murder.

10 MR. DIGIACOMO: No, it --

11 MR. ARRASCADA: You have to have the actual intent
12 to have that committed.

13 MR. DIGIACOMO: We instruct that all the time.

14 THE COURT: Well, I think the solicitation to commit
15 murder is you must have the specific intent that a killing be
16 done.

17 MR. DIGIACOMO: Right. You don't have to have
18 premeditation, deliberation. Just like attempt murder, we
19 instruct premeditation, deliberation are not elements of --.

20 THE COURT: So let's combine your instruction partly
21 with 25 --

22 MR. DIGIACOMO: Yeah, I was going to offer to say
23 solicitation to commit murder requires the specific intent to
24 kill.

25 MR. ARRASCADA: And we would ask that it be the

1 specific intent to commit first-degree murder.

2 THE COURT: Okay. I think it's the specific intent
3 to kill, so I'm going to direct Mr. DiGiacomo to make that
4 change on No. 25.

5 MR. DIGIACOMO: Okay.

6 THE COURT: 26 we said was okay.

7 27 is --

8 MR. DIGIACOMO: Hold on. Wasn't that 26 we just --

9 THE COURT: No.

10 MR. DIGIACOMO: No, that was 25.

11 THE COURT: 27. Any objection to 27?

12 MR. GENTILE: The one that I have, which is what
13 Mr. DiGiacomo sent me the other day, on line 3, which starts
14 with the word "committed murder", it's --

15 THE COURT: Right.

16 MR. GENTILE: -- mine says, You shall select the
17 degree murder.

18 THE COURT: Oh, mine says first-degree murder, so
19 it's fine.

20 MR. GENTILE: Okay.

21 MR. DIGIACOMO: As your verdict. I don't remember
22 changing it, but I must have.

23 THE COURT: 28, Crime of murder includes a --

24 MR. DIGIACOMO: Oh, no, this is the one that I said
25 you shall -- you shall select the degree of murder as your

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1 verdict. You're right.

2 THE COURT: The crime of murder includes the crime
3 of involuntary manslaughter.

4 MR. GENTILE: What's that? What number?

5 MS. ARMENI: 28.

6 MR. DIGIACOMO: 28.

7 MR. GENTILE: I don't even have that.

8 THE COURT: It's the one if you're not convinced
9 it's a murder, then it's -- but you are convinced it's an
10 involuntary manslaughter.

11 MR. GENTILE: My No. 28 is, If you find of first or
12 second degree, then you have to make a determination as to
13 whether it was with a deadly weapon.

14 THE COURT: No.

15 MR. GENTILE: So I got it wrong. Okay.

16 THE COURT: All right. 27, You are instructed that
17 if you find the State has established that the defendant has
18 committed first-degree murder, are we good with that?

19 The only thing I don't like is on No. 28, line 10,
20 If you are convinced beyond a reasonable doubt that a crime
21 has been committed by the defendant.

22 MR. DIGIACOMO: I didn't know what to write in there
23 because --

24 THE COURT: Yeah, I don't like "crime."

25 MR. DIGIACOMO: But you have a reasonable doubt as

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1 to whether such crime is murder or involuntary manslaughter.

2 THE COURT: Okay.

3 MR. DIGIACOMO: I mean, that's --

4 THE COURT: Yeah, I mean, I don't know what else to
5 put, but -- okay. Any problem with 28?

6 MR. ARRASCADA: No, Your Honor.

7 THE COURT: All right. 29 is the deadly weapon, You
8 must determine if a deadly weapon was used.

9 30 defines deadly weapon. I think that's fine.

10 31 is, Each may be liable for the deadly weapon.

11 MS. ARMENI: Hold on, Your Honor.

12 MR. GENTILE: The law changed on this, though,
13 that's the problem, so I want to see the second --

14 MR. DIGIACOMO: This is the new Brooks instruction.

15 MS. ARMENI: Our instruction is different.

16 MR. ARRASCADA: Judge, I think ours is a more
17 concise statement and clear for the jury.

18 THE COURT: What does your say?

19 MR. ARRASCADA: Mr. Gentile will read it.

20 MR. GENTILE: It says, An unarmed defendant charged
21 as an aider or abettor or coconspirator cannot be held
22 criminally responsible for the use of a deadly weapon unless
23 he has actual or constructive control over the deadly weapon.
24 An unarmed defendant does not have constructive control over a
25 weapon unless the State proves he had knowledge the armed

1 defender was armed and he had the ability to exercise control
2 over the firearm. That comes right out of the case.

3 MR. DIGIACOMO: Now, that's the old one. This is
4 the new case right here. An unarmed defendant uses a deadly
5 weapon when the unarmed defender is liable to the offense,
6 another person liable to the defense is armed with and uses a
7 deadly weapon in the commission of the crime, and the unarmed
8 defender had knowledge of the use of the deadly weapon.

9 That's what Brooks says, the new instruction is.

10 THE COURT: I think you're right.

11 MR. GENTILE: We got it. Actually I submitted it in
12 my trial brief.

13 MR. DIGIACOMO: Isn't it Brooks?

14 MS. ARMENI: Yeah, I think it's Brooks.

15 MR. DIGIACOMO: I remember, because you were -- you
16 gave the Brooks instruction before Brooks came out.

17 MS. ARMENI: Yeah, Brooks, 659.

18 THE COURT: I did?

19 MR. DIGIACOMO: Yeah.

20 MR. ARRASCADA: It was brilliant.

21 MR. DIGIACOMO: What number is it?

22 MS. ARMENI: We took it out of Brooks, too. 659.

23 MR. DIGIACOMO: 659 what, P 2d?

24 MS. ARMENI: P 3d. It's 180, P 3d.

25 MR. DIGIACOMO: Oh, it's 180 P 3d?

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1 MS. ARMENI: Yeah, 180 P 3d, 657. 659 is the direct
2 site.

3 MR. GENTILE: Just a second, please.

4 THE COURT: I like to take it directly from the case
5 because then I'm --

6 MS. ARMENI: I thought we did, but maybe we didn't.

7 THE COURT: -- you know, less likely of being
8 overturned.

9 MR. DIGIACOMO: There's two different ones.

10 MR. GENTILE: Let me pull up the case.

11 THE COURT: Here's the problem, as a coconspirator
12 that wasn't at the scene, there's no way he could have
13 exercised control over the deadly weapon. So by definition
14 you would not be able to have a conviction of murder with use
15 of a deadly weapon because -- if that's the instruction you
16 give. I mean, there's no evidence if that's the right
17 instruction that either one of them had control of the deadly
18 weapon.

19 MR. GENTILE: Actually, this was the instruction
20 that Brooks -- the one that we submitted is the instruction
21 that was proffered by Brooks and not given by the Court.

22 MR. DIGIACOMO: Right. But then -- you're right.
23 No, you're right, that's the instruction that was offered but
24 not given, but then they said that's not the one we're going
25 to give, either. Here's the one we're going to give, and

1 that's the one that I typed up.

2 MR. GENTILE: I don't think -- I'd have to go and
3 revisit Brooks, but I don't think the Court came back with it
4 as an instruction.

5 THE COURT: Will you go pull the Brooks case for me.
6 Do you guys have the site?

7 MS. ARMENI: Yes, it's 180 P 3d, 657.

8 THE COURT: All right. While he does that, let's
9 hold this instruction in abeyance, 31 in abeyance.

10 32 is the -- constitute a crime charged, joint
11 operation of an act and blah, blah, blah.

12 MR. GENTILE: No problem.

13 THE COURT: That one looks fine.

14 33, The defendant is presumed innocent, is the
15 standard reasonable doubt instruction.

16 MR. ARRASCADA: Your Honor, we wanted it separated.
17 You have two constitutional rights. You have a presumption of
18 innocence which should be one instruction and then the
19 reasonable doubt instruction should be on its own.

20 THE COURT: Any -- I don't care.

21 MR. DIGIACOMO: I don't care either. We're not
22 changing the language.

23 THE COURT: No.

24 MR. DIGIACOMO: The one thing that I did notice is
25 they went with the "unless," even though the statute says

1 "until" -- I don't really care. Do they want "unless" instead
2 of "until"?

3 THE COURT: Do you want unless or until? I don't
4 like to change the reasonable doubt at all because --

5 MR. DIGIACOMO: I don't either, but they also were
6 asking, well, until implies that you're going to get there as
7 opposed to unless.

8 THE COURT: Okay. Do you want unless?

9 MR. ARRASCADA: Unless, please.

10 THE COURT: Or unless and until?

11 MR. ARRASCADA: Unless.

12 THE COURT: Okay. Mr. DiGiacomo, you'll change
13 that.

14 MR. DIGIACOMO: I'll change that and add an
15 instruct --

16 THE COURT: And make it two instructions.

17 MR. DIGIACOMO: Yep.

18 THE COURT: 34 is guilt or innocence of others. Are
19 we all okay with this?

20 MS. ARMENI: Yes.

21 THE COURT: 35 is the subject of punishment.

22 36 is direct and circumstantial evidence. Are we
23 okay with that?

24 37 is slight evidence that a conspiracy existed.

25 MR. GENTILE: This is a confusing instruction.

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1 Frankly -- this is the one that permits the use of the
2 hearsay?

3 THE COURT: Right.

4 MR. GENTILE: I -- well, let me think this through
5 for just one second.

6 MR. ARRASCADA: Judge, to address the top, line 2,
7 slight should be taken out. That's lessening their burden of
8 proof. It should be when there is evidence that a conspiracy
9 exists.

10 MR. PESCI: That's as to the concept of the
11 conspiracy of the law.

12 MR. GENTILE: But this is conspiracy law in an
13 evidentiary sense. This is in the conspiracy law in a
14 liability sense. And, frankly, I don't see any need for this
15 jury to -- I mean, it really -- it really -- how do I put it?
16 It really disfavors the defendant more to not have the
17 instruction. We're basically -- you have basically ruled that
18 they can consider this evidence. It is true that you make the
19 finding in terms of admissibility, okay.

20 Bergali [phonetic] and the cases in Nevada that
21 follow Bergali makes that clear. And so I really don't think
22 that this -- at this point in time it's a jury issue anymore.
23 The jury can consider that evidence, period.

24 MR. DIGIACOMO: One, he's wrong, but the jury has to
25 make a determination that there's evidence of a conspiracy.

1 They're required to do that before -- under, They can consider
2 these. You make the legal determination as to admissibility,
3 but ultimately the question is for this jury, one.

4 Two, juries have to be instructed on the use of the
5 hearsay language or the hearsay instruction, particularly in
6 this particular case, where there are certain things that
7 cannot be utilized for that purpose and the jury needs to be
8 instructed as to that.

9 THE COURT: Yeah, I'm inclined to give the
10 instruction.

11 MR. GENTILE: I object to the first two paragraphs.
12 I don't have a problem with respect to the third, although --

13 THE COURT: Okay. My only thought on the third
14 paragraph is after he's withdrawn from the conspiracy, how do
15 they know when that was?

16 MR. GENTILE: Right.

17 THE COURT: Should we put something in there like,
18 You are instructed that Deangelo Carroll withdrew from the
19 conspiracy once he was contacted by law enforcement or once he
20 agreed to work with law enforcement? Now --

21 MR. GENTILE: There's a different issue here, too,
22 and here's where the confusion is. Do you remember we get
23 back to Professor Friedland and the question of common ground?

24 THE COURT: Right, right.

25 MR. GENTILE: Deangelo Carroll's statements, while

1 they cannot be taken for the truth, they can be taken as
2 circumstantial evidence of what transpired before. And if you
3 give them this instruction without telling them that last
4 part, then -- there's too great of a danger that they won't
5 consider them at all. And they do provide circumstantial
6 evidence --

7 THE COURT: Let's just take out --

8 MR. DIGIACOMO: They don't provide circumstantial
9 evidence.

10 MR. GENTILE: Sure they do.

11 MR. DIGIACOMO: They provide context to the other
12 person. You can't say, hey, he said X is not offered for the
13 truth of the matter asserted, it is offered to prove that he
14 knew X.

15 THE COURT: No, no. What Mr. Gentile is saying is
16 when he's talking about the killing and stuff, I mean, it's a
17 same thing. It's not saying that that's true, but obviously
18 the listeners knew about it because they didn't say, What the
19 heck are you talking about. They adopted his statements and
20 didn't contradict his statements.

21 MR. DIGIACOMO: Certain of them are adopted. If
22 they wanted an adoptive admission instruction, I don't mind
23 adding an adoptive admission instruction because the adoptive
24 admission is very specific, which says that the person would
25 have objected to it or would have made some comment to it --

1 there's language --

2 THE COURT: No. Why don't we do this? Let's just
3 take out the third paragraph.

4 MR. GENTILE: Yes.

5 MR. DIGIACOMO: No. You can't take out the third
6 paragraph. That was the entire argument as to why it is you
7 wouldn't let us get into attacking his credibility. How can
8 you take out the entire paragraph that you agreed that that
9 was what the ruling was?

10 THE COURT: Well, because you're not going to argue
11 any of those things from the third -- from -- that were not
12 offered for the truth.

13 MR. DIGIACOMO: They stood up in their opening and
14 argued it.

15 MR. PESCI: Right. It was the first line --

16 MR. DIGIACOMO: The first thing out of their mouth
17 was that --

18 MR. PESCI: The first line in opening statement.
19 And the quote was, From the mouth of Deangelo Carroll comes
20 the best evidence in this case, straight from Mr. Adam's
21 mouth.

22 MR. DIGIACOMO: And that was the entire argument we
23 had and you eventually made that ruling and precluded us from
24 attacking the truth of the matter asserted by Deangelo
25 Carroll. So we have to tell this jury that they can't

1 consider --

2 MR. GENTILE: You did attack it. You had your
3 witness testify that there were certain lies that he provided
4 to them.

5 MR. DIGIACOMO: No, the Judge stopped us on that
6 when they approached the bench. And then you said you may
7 consider -- reconsider that from Marty Wildemann and then you
8 wouldn't let us --

9 THE COURT: No, no, no. Mr. DiGiacomo, you're
10 totally wrong, because what I said I would consider from Marty
11 Wildemann was based on the juror question that I still have
12 that was, What did he tell you that was corroborated, not what
13 lies did you tell him. I didn't sustain the lies objection.
14 I sustained, What did you corroborate.

15 MR. DIGIACOMO: Right. No, no.

16 THE COURT: Not, What lies did you tell him, because
17 I overruled the what lies did you tell him because I said no,
18 it's important to know why he's making certain statements that
19 he was briefed by the police, so I definitely did not sustain
20 that objection. You're wrong.

21 MR. DIGIACOMO: No, no. You allowed us to say what
22 lies you did tell him, but you didn't allow us to say, hey --
23 when they said, that's not a lie, you didn't allow us to go
24 back to Marty Wildemann and say, okay, what did he tell you in
25 that first statement that tells you --

1 THE COURT: That was corroborated, right.
2 Absolutely. I didn't let you do it.

3 MR. DIGIACOMO: -- that was corroborated and you
4 didn't let -- didn't let me do it.

5 THE COURT: I didn't let you do it. Right. We're
6 on the same page.

7 MR. DIGIACOMO: And then the jury asked the
8 question -- right. So that entire import of that question is,
9 is Deangelo Carroll telling the truth when he made that
10 statement. That's not a question for this jury. And you have
11 to instruct them that that's not a question for this jury.

12 MR. GENTILE: Your Honor, any surreptitious tape
13 recording, any surreptitious tape recording is circumstantial
14 evidence of things that occurred before when -- when that
15 recording is made in the course of an ongoing relationship
16 between the speakers, not just this case, any case. Now, I'm
17 not addressing the question of that specific part that relates
18 to Luis, III. That's not for me to do. But there's much in
19 this recording that Mr. Deangelo Carroll says that is
20 indicative of the common ground that exists during that
21 telephone -- during that --

22 THE COURT: I'm happy to do both, but, I mean,
23 I'm -- the statements of Deangelo Carroll after he has
24 withdrawn from the conspiracy were not offered and may not be
25 considered by you for the truth of a matter asserted, period.

1 MR. DIGIACOMO: Yeah, that's fine.

2 MR. ARRASCADA: Judge, may I be heard on this before
3 you do anything?

4 THE COURT: Sure.

5 MR. ARRASCADA: Number one, you've already ruled on
6 this and issued a limiting instruction to the jury on the
7 Deangelo Carroll issue. Number two, by putting this in there
8 regarding Deangelo Carroll, it's doing exactly what you don't
9 want jury instructions to do and that is to focus on one
10 thing, one event, one matter that Deangelo Carroll said. And
11 it's bringing an improper focus onto Deangelo Carroll.

12 THE COURT: Okay. Here's what we're going to do.
13 Statements made by a coconspirator after he has withdrawn from
14 a conspiracy are not offered and may not be considered by you
15 for the truth of the matter asserted. Statements made by a
16 coconspirator after -- well, that takes away the Deangelo
17 Carroll singling him out problem.

18 MR. GENTILE: Your Honor, it is true -- it is true
19 that they may not be taken in and of themselves for the truth
20 of the matter asserted. Okay. I would not quarrel with that
21 position. But they are circumstantial evidence of what
22 transpired before this recorded meeting. So the instruction
23 that you're giving is going to confuse this jury and make them
24 think they can't --

25 THE COURT: Okay. Why don't we say this, The

1 statements of a coconspirator after he has withdrawn from the
2 conspiracy were not offered and may not be considered by you
3 for the truth of the matter asserted. However, they may be
4 considered to give context to the statements made by the other
5 individuals who are speaking and as other circumstantial
6 evidence, or something like that.

7 MR. GENTILE: That would be fine.

8 MR. DIGIACOMO: Yeah, but other circumstantial
9 evidence, they're not going to be allowed to argue the truth
10 of what Deangelo Carroll's saying.

11 THE COURT: Of course not. Of course not. And if
12 they do, it's objectionable.

13 MR. ARRASCADA: Judge, we respect your order that
14 you made long ago.

15 THE COURT: Okay. So let's -- Mr. DiGiacomo, go
16 back to your chair. Go back to your chair.

17 MR. DIGIACOMO: Okay. And we didn't get a limiting
18 instruction when it happened --

19 THE COURT: Go back to your chair.

20 MR. ADAMS: Judge, that's not what --

21 THE COURT: I need you to type the change I'm
22 making.

23 MR. ADAMS: Judge, that's not what you ruled
24 pretrial. Judge, that's not what you ruled pretrial. My
25 argument was pretrial and that's not also what you ruled when

1 we readdressed the issue at the bench. You said that we
2 could -- we could not argue the words explicitly from Deangelo
3 Carroll's mouth as the truth of the matter asserted, which we
4 disagreed with and put that on the record, but you said we
5 could argue it as an adoptive admission or other ways.

6 THE COURT: Right.

7 MR. ADAMS: We intend to do that.

8 THE COURT: That's fine. You can argue it for the
9 truth of the matter asserted. They were only offered to
10 give -- or they may be considered to give context to the
11 statements made by the other individuals, comma, as an
12 adoptive admission or as other circumstantial evidence.

13 MR. ADAMS: Right.

14 THE COURT: Is everybody fine with that?

15 MR. ADAMS: I'm fine with that.

16 MR. ARRASCADA: What about on the -- after he's
17 withdrawn from the conspiracy?

18 MR. DIGIACOMO: Is there an adoptive admission for
19 other --

20 THE COURT: Well, that's why I said the statements
21 of a coconspirator, not highlighting Deangelo Carroll.

22 MR. ARRASCADA: And then strike the after he has
23 withdrawn from the conspiracy?

24 THE COURT: No, because then it doesn't make any
25 sense. The statements of a coconspirator after he's withdrawn

1 from the conspiracy may not offer -- were not offered and may
2 not be considered by you for the truth of the matter asserted,
3 period. However, they may be considered to give context to
4 the statements made by the other individuals who are speaking
5 as adoptive admissions or as other circumstantial evidence.

6 MR. DIGIACOMO: Can we define adoptive admissions?

7 THE COURT: Sure.

8 MR. DIGIACOMO: Okay. I'll pull up the statute for
9 that.

10 THE COURT: Is everyone fine with that?

11 MR. ADAMS: Yes.

12 THE COURT: Because otherwise, if we don't put after
13 he's withdrawn from a conspiracy, we say you can consider
14 them, no, you can't consider them. It doesn't make any sense.

15 MR. ARRASCADA: Okay.

16 THE COURT: 38, the conviction, the accomplice
17 testimony instruction. Well, it's both. Brooks says, on --
18 with headnote 5, We conclude that an unarmed defender uses a
19 deadly weapon and therefore is subject to a sentence
20 enhancement when the unarmed defender is liable as a principle
21 for the offense that is sought to be enhanced. Another
22 principle to offense is armed with and uses a deadly weapon in
23 the commission of offense and the unarmed offender had
24 knowledge of the use of a deadly weapon. So it eliminates the
25 control instruction.

1 But then in its conclusion, it says that it was
2 error not to give the proposed instruction by Brooks which
3 includes the ability to control the deadly weapon. So it's
4 ambiguous.

5 MR. DIGIACOMO: 662, Judge, if you -- at the end it
6 says, Applying the clarifying test we adopt today --

7 THE COURT: Where is it?

8 MR. DIGIACOMO: 662, first paragraph. It's right
9 above --

10 THE COURT: I don't have it that way.

11 MR. DIGIACOMO: It's right above where paragraph
12 four is -- I mean, the little parens heading in four is in the
13 body.

14 THE COURT: Here the State presented evidence?

15 MR. DIGIACOMO: Yes. If you go to applying the
16 clarifying test we adopt today, on retrial the State must not
17 only prove -- and then that's the instruction.

18 MR. GENTILE: That's not the instruction. The
19 earlier part's the instruction. That's a directive to the
20 Court on remand.

21 MR. DIGIACOMO: Right. Here's the three things you
22 have to prove. That's the instruction.

23 THE COURT: Well, the State's instruction in Brooks
24 was clearly wrong.

25 MR. DIGIACOMO: Correct. The defense instruction

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1 was wrong too.

2 THE COURT: But I think if you read the whole case,
3 between the two instructions, the Brooks instruction was more
4 correct than the State's instruction, which was totally wrong,
5 but it doesn't say that you have to give that instruction. It
6 says that they had to have known of the use, so I'm going to
7 go with the instruction that we've got because I think that
8 that more accurately reflects the holding.

9 All right. 38, accomplice testimony, do we have an
10 objection to this one?

11 MR. GENTILE: We have our own.

12 MS. ARMENI: We do, but it's more of 39.

13 THE COURT: Okay. So 38 we're okay with?

14 MR. GENTILE: 38, yeah.

15 MS. ARMENI: Yeah.

16 THE COURT: What about 39?

17 MS. ARMENI: All we did, Your Honor, is we combined
18 our jury instruction with their jury instruction.

19 MR. DIGIACOMO: Which ones?

20 MS. ARMENI: It's towards -- sorry. Ours aren't
21 numbered either. It starts with, An accomplice is defined as
22 one who's liable.

23 THE COURT: I found it. An accomplice is defined as
24 one who's liable to prosecution for the identical defense --
25 offense charged.

1 MR. DIGIACOMO: Yeah, well, that's our 38 and --
2 MS. ARMENI: It's definitely a lot of your 38. I
3 mixed our instruction with your 38 instruction.
4 THE COURT: I think this is -- their instruction is
5 clearer.
6 MR. DIGIACOMO: Well, it's not completely clear.
7 THE COURT: They've omitted important things,
8 however.
9 MR. DIGIACOMO: Some very important things.
10 THE COURT: Let's take -- okay. Let's take the
11 first paragraph of the defense instruction, the second
12 paragraph of the State's instruction --
13 MR. DIGIACOMO: The second paragraph of which one,
14 38?
15 THE COURT: However -- I'm going to give the whole
16 38.
17 MR. DIGIACOMO: Okay. Well, 38, we've already done
18 everything in the first paragraph of the defense instruction.
19 THE COURT: Yeah, you're right.
20 MS. ARMENI: Actually, I misspoke, Your Honor. It's
21 between 38 and 39 is what we did. We took a lot of 39.
22 THE COURT: All right. Why don't we do this.
23 Remove State's 38. Use the first paragraph of the defense's
24 in lieu of 38.
25 MR. DIGIACOMO: So we don't get the tends language?

1 THE COURT: No. I was going to put -- which
2 language do you want?

3 MR. DIGIACOMO: I mean, the very first paragraph is
4 it tends to connect the defendant with the commission of the
5 offense. Their first paragraph says Nevada law authorizes
6 commission [inaudible] unless he or she is corroborated --
7 which in and of itself -- I guess the tends to connect is
8 there.

9 THE COURT: Tends to connect. And then I was going
10 to put at the end from 39 on the State's paragraph, line 6
11 through 9, because I think you get -- you should have,
12 However, it is not necessary that the evidence of the
13 corroboration be sufficient in itself to establish every
14 element of the offense charged.

15 MR. DIGIACOMO: 6 through 8 where?

16 THE COURT: At the end of the defenses' instruction.
17 Then that should cover everything the State wants.

18 MR. DIGIACOMO: How about to -- must be some act or
19 fact related to the offense which, if believed by itself,
20 tends to -- okay. That's fine.

21 MS. ARMENI: That's there.

22 THE COURT: Are you all good with that?

23 MR. DIGIACOMO: Hold on. Well, the some act or fact
24 part isn't.

25 THE COURT: What do you object to?

1 MR. DIGIACOMO: Well, in their -- defense's first
2 paragraph, because it's -- I mean, it's just kind of a
3 generally, hey, it's got to be corroborated language, it
4 doesn't say, some act -- because one act or one fact alone can
5 tend to connect the defendant to the crime.

6 THE COURT: Yeah, but yours doesn't say that either.

7 MR. DIGIACOMO: Yes, it does.

8 THE COURT: Where?

9 MR. DIGIACOMO: I'm looking for it right now.

10 THE COURT: Oh, of your 39?

11 MR. DIGIACOMO: The first paragraph of our 39.

12 THE COURT: Well, let's just give State's 38 and 39
13 then because it's too hard to rewrite them.

14 All right. 40, The fact that a witness was given an
15 inducement, are we good with that?

16 MS. ARMENI: Yeah.

17 THE COURT: 41, The determination of whether someone
18 is an accomplice.

19 MR. GENTILE: That's fine.

20 THE COURT: 42, the accomplice corroboration rule,
21 are we good with that?

22 43 is, The credibility or believability of a
23 witness. Are we good with that?

24 MR. ARRASCADA: No.

25 MR. GENTILE: Your Honor, we have --

1 MR. ARRASCADA: We have a different instruction.
2 We'd like to submit it.

3 MR. DIGIACOMO: On 43 or on 42? 43?

4 MR. ARRASCADA: The credibility instruction.

5 THE COURT: All right. What do you have? We didn't
6 talk about the Riley instruction on the accomplice testimony
7 that the defense wants.

8 MR. DIGIACOMO: Yeah. I thought we were going to
9 get to theirs eventually.

10 THE COURT: Well, I'm trying to kind of do them all
11 together.

12 MR. ARRASCADA: Your Honor, you're addressing the --
13 just the general credibility instruction, right?

14 THE COURT: Yeah.

15 MR. ARRASCADA: Okay. We have one about midway in
16 our packet. Do you want me to approach, Judge?

17 MR. DIGIACOMO: No. 8 in their package.

18 THE COURT: I have it.

19 MR. DIGIACOMO: Do you have a cite for this one?

20 THE COURT: You are the sole judges of the
21 credibility.

22 MR. DIGIACOMO: Yeah, but I'm just wondering if the
23 defense has a cite for all the language.

24 MS. ARMENI: If that's one of the stock ones, I
25 don't think --

1 MR. ARRASCADA: Your Honor, I believe this comes
2 from CALJIC --

3 MR. DIGIACOMO: Oh, California --

4 MR. ARRASCADA: -- jury instructions, criminal.
5 And, Your Honor, this case is key -- credibility, as the
6 Court's seeing, is crucial in this case. And this just lays
7 out more of what they can consider regarding credibility and I
8 think it's significant that they need to know these are all
9 legal things that they can look at regarding credibility.

10 THE COURT: Well, I don't have a problem with giving
11 the defense's instructions, but I think you also have to add,
12 If you believe that a witness has lied about any material fact
13 in the case, you may disregard the entire testimony of that
14 witness or any portion of his testimony which is not proved by
15 other evidence.

16 MR. ARRASCADA: That's the last sentence, Your
17 Honor, of ours.

18 THE COURT: Oh, okay.

19 MR. ARRASCADA: If the jury believes that any
20 witness has wilfully sworn falsely --

21 THE COURT: Well, I don't like the way you did it.

22 MR. ARRASCADA: Okay.

23 MR. DIGIACOMO: Disregard the -- no, that's not what
24 it says. You may -- yeah, I mean, their language is more --
25 you can --

1 THE COURT: No, okay. We'll have, Also, in
2 considering a discrepancy, you should consider whether such
3 discrepancy concerns an important fact or only a trivial
4 detail. That's fine. But then add, If you believe that a
5 witness, directly from the State's is better. Did you get
6 that?

7 MR. DIGIACOMO: What?

8 THE COURT: Well, using their proposed instruction,
9 deleting the last sentence and inserting the last paragraph of
10 the State's instruction.

11 MR. DIGIACOMO: Deleting the last sentence and
12 putting in, If you believe that a witness has lied about a
13 material fact?

14 THE COURT: Yeah.

15 The fact that a witness has been convicted of a
16 felony, we're fine with that, right, the expert witness
17 instruction?

18 MR. DIGIACOMO: Hold on. Can I have just two
19 seconds to add that so that I know what I'm doing when I'm
20 done?

21 THE COURT: Yeah.

22 MR. ARRASCADA: I'm sorry. Which number's the
23 convicted of a felony?

24 MS. ARMENI: 44.

25 MR. ARRASCADA: 44?

1 MS. ARMENI: Yes.

2 THE COURT: All right. 45, are we fine with the
3 expert witness instruction?

4 MR. ARRASCADA: Yes.

5 MR. DIGIACOMO: Actually, 44, do we have a witness
6 who was convicted of a felony? I guess Anabel is. Oh, no,
7 she's not convicted of it yet.

8 MR. GENTILE: No, but that goes to Deangelo
9 Carroll's credibility.

10 MR. DIGIACOMO: Do we have evidence he was convicted
11 of a felony?

12 THE COURT: Yeah, he was convicted of a robbery.

13 MR. GENTILE: Yeah, convicted of a robbery.
14 Remember Mike McGrath?

15 MR. DIGIACOMO: No, he was not convicted of a --
16 convicted of a robbery.

17 MR. GENTILE: Conspiracy to commit a robbery.

18 MR. DIGIACOMO: That's true. He was --

19 THE COURT: . But it came out in the evidence that he
20 was convicted.

21 MR. DIGIACOMO: That's fine.

22 THE COURT: The common sense instruction, are we
23 fine with that?

24 Foreperson instruction.

25 And now, You'll listen to arguments of counsel.

1 MR. GENTILE: Okay. What do we have of ours that --

2 MS. ARMENI: I'm looking at it.

3 THE COURT: Okay. The important ones that you guys
4 have --

5 MR. GENTILE: Well, the accessory after the fact
6 instruction for sure, that's critical.

7 THE COURT: Okay.

8 MR. GENTILE: Because if they don't know the
9 definition of that that's...

10 MS. ARMENI: The accessory after the fact defense.

11 MR. DIGIACOMO: Isn't your instruction -- shouldn't
12 your instruction say -- because he didn't really testify he
13 was an accessory after the fact. Shouldn't your instruction
14 be, If you find he didn't have any knowledge before the
15 killing occurred, you must find him not guilty?

16 MR. GENTILE: Why would I want that?

17 MR. DIGIACOMO: Because he didn't have any knowledge
18 that TJ was going to be harmed prior to the killing. I guess
19 it's not just knowledge, but -- okay.

20 MR. GENTILE: I mean, if you want -- that's a great
21 instruction --

22 MR. DIGIACOMO: I know.

23 MR. GENTILE: -- but I don't have the burden of
24 proof on that. So if they're left with a reasonable doubt as
25 to whether he had knowledge --

1 THE COURT: All right. Let's go through -- excuse
2 me. Let's go through the defendants' specials that you want.

3 MR. GENTILE: All right. The first one is an
4 accessory after the --

5 Are our's numbered?

6 MR. DIGIACOMO: Yeah, are we going to go -- can we
7 now start flipping through and just tell me which ones you
8 guys want to --

9 MS. ARMENI: Wait, say that again. Sorry.

10 MR. DIGIACOMO: If you guys want to just start
11 flipping through these, because I haven't put them in here,
12 and then tell me --

13 MS. ARMENI: Well, Your Honor, can we have a second
14 just to mark ours, 1, 2, 3, 4 so we can --

15 MR. DIGIACOMO: I thought we did that.

16 THE COURT: Yeah, we stopped.

17 (Pause in proceedings)

18 THE COURT: Ms. Armeni, what I'm going to ask you to
19 do, because of the way that we did this, I just want you to
20 file the whole packet with the clerk and the proposed
21 instructions.

22 MS. ARMENI: Okay.

23 (Pause in proceedings)

24 THE COURT: All right. Which ones does the
25 defense -- a lot of these we've covered already, so just go

1 through them and when you get to one that you want to give an
2 addition to what we've already agreed upon for the State, just
3 tell us what it is.

4 MS. ARMENI: Okay. Our Instruction No. 9, there
5 isn't one about the character yet, Your Honor.

6 THE COURT: Which one is that, good character?

7 MS. ARMENI: It's No. --

8 THE COURT: Good character.

9 MS. ARMENI: Good character when considered in
10 connection with the other evidence. It's No. 9.

11 THE COURT: State?

12 MR. DIGIACOMO: Yeah, unfortunately for the defense,
13 the good character that this instruction replies to is that he
14 has a good character for not committing crime. That wasn't
15 admitted. The only thing that was admitted by any witness in
16 this case was he had a character for truthfulness, not for he
17 had a character not to commit crimes, because specifically you
18 precluded us from going into that subject matter, and then
19 they didn't offer it through any of their witnesses. Not a
20 single witness testified that his character was such that he
21 wouldn't commit a crime. That's the good character
22 instruction that they'd be entitled to.

23 THE COURT: So you want to withdraw it?

24 MR. DIGIACOMO: I just heard the defense in the back
25 say, isn't it true that neither of them have been arrested,

1 but they said that that wasn't offering his good character
2 when they did it because we thought it was. Now they're going
3 to argue it is? That can't be evidence of good character
4 because they disputed it when they offered it.

5 MR. GENTILE: It modifies the character of the proof
6 of it. It's one of the things to be considered.

7 THE COURT: Yeah, because character for truthfulness
8 can only be considered --

9 MR. GENTILE: No, I know. I didn't -- here's what
10 I'm trying to get at. We are entitled to an instruction that
11 in assessing the credibility they can take into consideration
12 evidence that's --

13 THE COURT: Of character for truthfulness.

14 MR. GENTILE: Right.

15 THE COURT: All right. Well, let's just do that
16 instruction.

17 Mr. DiGiacomo, please --

18 MR. DIGIACOMO: Well, can't we just add it to the
19 other credibility one?

20 MR. GENTILE: Yeah. Yeah. No, I'm okay with that.

21 THE COURT: Mr. DiGiacomo, return to your seat.

22 MR. DIGIACOMO: I know, I'm sorry. I'm a walker,
23 Judge. It's hard to sit here.

24 THE COURT: You're supposed to be making the notes
25 and making the changes.

1 MR. GENTILE: Yeah, I'm okay with that.

2 THE COURT: So that was instruction number what, the
3 credibility?

4 MR. DIGIACOMO: I'll tell you. It's way back here.

5 MR. GENTILE: Well, I don't know, because --

6 MR. PESCI: It's 43.

7 THE COURT: All right. So we're going to add to 43,
8 Evidence of character for truthfulness --

9 MR. GENTILE: Evidence of good character for
10 truthfulness.

11 THE COURT: Okay. Of good character for
12 truthfulness may be considered in assessing the veracity of a
13 witness.

14 MR. GENTILE: Don't use veracity.

15 THE COURT: I know. They won't -- the truthfulness
16 of a witness.

17 MR. GENTILE: Mm-hmm.

18 THE COURT: Okay.

19 MR. DIGIACOMO: Evidence of good character for
20 truthfulness may be considered in judging the credibility of a
21 witness.

22 MR. GENTILE: Right.

23 THE COURT: Okay. That's better.

24 Okay. What's the next one you guys want?

25 MR. GENTILE: We're getting there.

1 THE COURT: Do you guys want your intent
2 instruction?

3 MR. GENTILE: The specific intent, you mean?

4 MR. DIGIACOMO: I thought we did it --

5 THE COURT: Intent may be proved by circumstantial
6 evidence.

7 MS. ARMENI: I thought we had one similar.

8 THE COURT: Okay. That's fine. We may.

9 MS. ARMENI: We're looking at the aiding and
10 abetting right now.

11 MR. GENTILE: We have one, As a matter of law, one
12 cannot aid and abet a murder after it has been accomplished.

13 MR. DIGIACOMO: Well, yeah, I mean, I don't have a
14 problem with that, but where is it?

15 THE COURT: That's true. All right. Let's put that
16 in.

17 MR. DIGIACOMO: I'm just trying to --

18 THE COURT: All right. That's -- where shall we
19 insert that?

20 MR. DIGIACOMO: Right after the aiding and abetting
21 instruction.

22 THE COURT: Okay. Put that in there.

23 MR. DIGIACOMO: I'm just trying to find it here
24 because --

25 (Off-record colloquy)

1 MS. ARMENI: All right. So the next one is our
2 theory of defense, which is 31, along with the accessory after
3 the fact.

4 THE COURT: Which one is that? Oh, an --

5 MS. ARMENI: 31.

6 MR. GENTILE: An accessory after the fact is one who
7 after the commission of a felony harbors, conceals, or aids
8 such offender with intent that he may avoid or escape from
9 arrest, trial, conviction or punishment having knowledge that
10 is such offender has committed a felony or is liable for
11 arrest. One cannot be both an accessory after the fact and an
12 aider and abettor or conspirator for the completed offense.

13 THE COURT: I'm fine with that.

14 MR. DIGIACOMO: I'm fine with the first paragraph,
15 but the second paragraph is --

16 MR. GENTILE: The second part is our contention.
17 That's our theory of defense.

18 THE COURT: Well, that's your contention. You get
19 up and argue it.

20 MR. DIGIACOMO: Right. Why does he get to have --
21 say, hey, this is what my client testified to?

22 THE COURT: Well, because then also it's unfair to
23 Luis Hidalgo, III, who could also say, well, he was, you know,
24 trying to help cover it up or protect his father, if you don't
25 have --

1 MR. ARRASCADA: Maybe it should be the
2 defendant's --

3 THE COURT: No, it's coming out. Your theory of
4 defense doesn't come in on an instruction. So we'll add the
5 first paragraph.

6 MR. DIGIACOMO: Judge, just so that we can be
7 careful so that --

8 THE COURT: But we do have to make an adjustment in
9 the second paragraph.

10 MR. DIGIACOMO: I was going to do this, start at
11 line 10 and start off with, A defendant --

12 THE COURT: Is not required to establish that he was
13 an accessory after the fact beyond a reasonable doubt.

14 MR. DIGIACOMO: That if, along with all the other
15 evidence, it raises in the minds of the jury a reasonable
16 doubt the defendant was only an accessory after the fact, then
17 in that event, it would be your sworn duty -- no.

18 THE COURT: To return a verdict -- it would be your
19 duty to return a verdict of not guilty, period. Okay.

20 MR. DIGIACOMO: Verdict of not guilty.

21 THE COURT: And where shall we put this in the
22 stack?

23 MR. GENTILE: First, 15th and about 28th, and at the
24 end.

25 MR. DIGIACOMO: I guess right before we get to

1 constitute the crime charged. I don't know. Do you want to
2 do it right after the, Constitute the crime charged? Where do
3 you want to do it?

4 THE COURT: I don't care.

5 MS. ARMENI: Why don't you do it after all the
6 conspiracy and aider and abettor instructions?

7 MR. GENTILE: Yeah, that would be the best place for
8 it.

9 THE COURT: All right. Are you making that
10 insertion, Mr. DiGiacomo?

11 MR. DIGIACOMO: I'm trying to figure it out. Well,
12 that -- well, yeah, that's basically right before the
13 solicitation to commit murder instruction.

14 THE COURT: Okay. Once we print this out, we're
15 going to have to all sit together and renumber our packets.

16 MR. DIGIACOMO: Right. I'm going to retype the
17 whole thing and then e-mail it and we print one packet,
18 photocopy it, and --

19 THE COURT: I thought you were doing the retyping
20 right now.

21 MR. DIGIACOMO: No, I'm making notes to myself
22 because you're going too fast. I can't type a hundred miles
23 an hour, Judge.

24 THE COURT: Well, what is Mr. Pesci doing?

25 MR. PESCI: I'm trying to change my closing as

1 you're changing the language of the law.

2 MS. ARMENI: 34 would be our next one, Your Honor,
3 In deciding -- it's the --

4 THE COURT: Whether to believe testimony.

5 MS. ARMENI: -- greater care and caution for an
6 accomplice.

7 MR. DIGIACOMO: Hold on just a second. I was
8 running up that language because some --

9 THE COURT: It's the Riley one.

10 MR. DIGIACOMO: It is, but is it --

11 MS. ARMENI: Right. I have Riley --

12 MR. DIGIACOMO: -- completely the Riley one?

13 MS. ARMENI: I think so.

14 THE COURT: Yeah, if it's taken directly from the
15 case, I don't have a problem.

16 MR. DIGIACOMO: That's the only thing I want to
17 check it against. Is that the -- because I didn't see this
18 one earlier, so let me just --

19 THE COURT: Yeah. Like I said, I'm fine with this
20 if it's directly from the language of Riley.

21 MR. DIGIACOMO: Do you have the cite?

22 MS. ARMENI: No. Sorry.

23 THE COURT: Of Riley?

24 MR. DIGIACOMO: Is that 110 Nevada 638, that one?

25 MS. ARMENI: Oh, I have that cite. I thought you

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1 meant a pinpoint --

2 THE COURT: There's no jump site on it.

3 MS. ARMENI: Yeah, that's what I meant.

4 MR. DIGIACOMO: Is it 110 Nevada 638?

5 THE COURT: Yes. That's what they have on their
6 thing.

7 MS. ARMENI: And I think it's about 653.

8 MR. DIGIACOMO: I'm at 653. The only thing it says
9 from Riley that I'm looking at is, An accomplice instruction
10 advises the jury that it should view a suspect incriminating
11 testimony given by those who are liable for -- to prosecution
12 [inaudible] identical charge as the defense is accused. All
13 this other language about interest in minimizing the
14 seriousness of the crime and the significance of accomplice's
15 own role in its commission, the fact that the accomplice
16 produced may not show the [inaudible] being an untrustworthy
17 person -- I actually really don't care because some of it is
18 helpful to me.

19 THE COURT: Okay. Well, if the State doesn't impose
20 it, let's just give the instruction as written.

21 And, Mr. DiGiacomo, if you would just insert that
22 then somewhere after the State's accomplice instruction.

23 MR. DIGIACOMO: Well, the only thing that I object
24 to is that the -- [inaudible] the testimony that supports the
25 prosecution's case by granting the accomplice immunity.

1 There's no evidence of immunity being provided to anybody --

2 MR. GENTILE: No, there's no --

3 MS. ARMENI: Okay. We can take that out.

4 MR. GENTILE: There's no immunity.

5 THE COURT: All right.

6 MR. DIGIACOMO: So an accomplice leniency --

7 THE COURT: All right. Take out immunity at "or"
8 and insert leniency.

9 All right. Then this will be inserted after the
10 State's accomplice instructions.

11 All right. Solicitation -- what's the next one the
12 defense cares about?

13 MS. ARMENI: Yeah, I think those would be
14 Mr. Arrascada's.

15 MR. GENTILE: Your Honor, I'm going to withdraw from
16 the courtroom.

17 MR. ARRASCADA: We've already addressed this, Your
18 Honor, and I think you made a combined instruction, but we'd
19 ask that our 35 and 36, solicitation to commit murder,
20 requires the asking of another to commit murder with the
21 specific intent that a first-degree murder be committed. And
22 we'd ask that that be instructed.

23 THE COURT: Okay. And I had already said that -- no
24 on that so...

25 MR. ARRASCADA: Correct.

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1 THE COURT: Do we need a person who can -- okay.
2 What's the next one, the --

3 MS. ARMENI: It would be the 44. I believe they're
4 the last two instructions.

5 THE COURT: Okay.

6 MS. ARMENI: 44 and 45.

7 MR. DIGIACOMO: Yeah. 44 and 45 is --

8 THE COURT: Okay. If you believe that the State had
9 the ability to produce stronger and more satisfactory
10 evidence --

11 MR. DIGIACOMO: It's the missing person instruction,
12 missing witness instruction, Judge.

13 THE COURT: Is that the one we're talking about?

14 MR. DIGIACOMO: Yes. It's not the language itself
15 the State is objecting to. This is a federal jury
16 instruction. Every circuit that I could find says that if the
17 missing witness is a witness -- first of all, it has to be
18 within our custody. So the only person this could be would be
19 Kenneth Counts or Deangelo Carroll. It says that if -- first
20 of all, in order [inaudible] to be a witness, they had to
21 issue a subpoena, make them come to a courtroom, and then --
22 and if we somehow stop that, then they might be entitled to
23 it.

24 But then they said if it's a criminal defendant
25 facing -- invoking his own Fifth Amendment rights and the

1 State refused to give him immunity it is not the basis for a
2 missing witness instruction. So they're not entitled to it at
3 all in any manner.

4 THE COURT: Right. And with respect to Jayson
5 Taoipu, if that's the one --

6 MR. DIGIACOMO: He's unavailable to both of us.

7 THE COURT: -- he's unavailable to everybody.

8 MR. DIGIACOMO: Right.

9 THE COURT: So I don't think you're entitled to this
10 instruction.

11 Entrapment is an affirmative offense.

12 MR. DIGIACOMO: Defense.

13 THE COURT: I'm sorry. That's what I meant. Any
14 objection to this one?

15 MR. DIGIACOMO: Yes. And here's -- there's multiple
16 reasons why. One is it's an affirmative defense, which means
17 they have the duty of a preponderance of the evidence to get
18 there, but here's the even more important thing, because now
19 we're at jury instructions, the evidence in this case is
20 closed. The moment they assert an entrapment defense all
21 character evidence of the defendant is admissible, which would
22 tend to explain his predisposition to commit the crime.
23 They've repeatedly, repeatedly, repeatedly objected to
24 character evidence and said it's not relevant in this case,
25 it's not admissible in this case, and you've precluded us from

1 getting into anything -- and you've even excluded stuff
2 that --

3 THE COURT: The sword.

4 MR. DIGIACOMO: The sword, the brass knuckles, PK
5 Hadley, what he would have been able to testify as to prior
6 times this person has made threats to kill before. We got --

7 MS. ARMENI: No, we need more explanation.

8 MR. ARRASCADA: That's a complete
9 mischaracterization of his report, a 25-page report. It is a
10 creation.

11 MR. DIGIACOMO: It's not a creation. He says, I saw
12 him say this to Moose before. We're --

13 MR. ARRASCADA: Judge, we're not here to litigate PK
14 Hadley. He's wrong.

15 THE COURT: Well, the point is that if you were
16 going to assert an entrapment defense it would have opened the
17 door for the State for his predisposition which was excluded
18 based on the objections of the defense, including the sword
19 and the brass knuckles that we argued about here, that they
20 said, well, it shows his propensity maybe for violence or to
21 commit crimes. And I said no, it doesn't. You can show the
22 Social Security card that maybe has a little bit of the brass
23 knuckles for dominion and control but that you can't show the
24 brass knuckles. And I let the bottle in. And I even excluded
25 some of the pictures because to me it just made Mr. Hidalgo,

1 III, just looked incredibly mess and didn't really show any
2 evidence beyond that. And so I don't know how now you can
3 come in and say, well, you want to argue entrapment when the
4 State didn't have an opportunity to refute that.

5 MR. ARRASCADA: We'd ask that the instruction be
6 given.

7 THE COURT: All right. I don't think I can give it.
8 I might have given it had you indicated that was going to be
9 your defense, but there would have been different evidence
10 across the board. So I think we're all in agreement on the
11 jury instructions.

12 (Court recessed at 11:27 a.m. until 12:00 p.m.)

13 (Outside the presence of the jury.)

14 THE COURT: What I was thinking is probably,
15 depending on when their lunch gets here, I would read the
16 instructions, we'll take our lunch break and then just do all
17 the closings.

18 All right. Let's just go through and number these
19 together.

20 (Court numbers the instructions)

21 (Jury reconvened at 12:11 p.m.)

22 THE COURT: All right. Court is now back in
23 session. The record will reflect the presence of the State
24 through the deputy district attorneys, Mr. DiGiacomo and
25 Mr. Pesci, the presence of the defendant Mr. Hidalgo, Jr.,

1 along with Ms. Armeni and Mr. Gentile, the presence of the
2 defendant, Mr. Hidalgo, III, along with Mr. Arrascada and
3 Mr. Adams, the officers of the Court and the members of the
4 jury.

5 Good afternoon, ladies and gentlemen. Let me first
6 apologize for our tardy start this morning/afternoon. As I
7 told you yesterday, the evidence has all been presented in
8 this case. The next step is the instructions on the law which
9 I'm going to read to you in a moment, followed by the closing
10 arguments by the attorneys.

11 After I read to you the instructions on the law,
12 we'll be taking our lunch break and the Court has ordered
13 lunch for you in the back. We're not going to take a really
14 long lunch break and then we'll move into the closing
15 arguments.

16 It is important that I read these instructions
17 exactly as they are written. I am precluded from trying to
18 clarify or expound upon them in any way. There are a number
19 of instructions here. You will have several copies of these
20 instructions back in the jury deliberation room with you
21 should you wish to refer back to them. Sometimes I see people
22 trying to write down the instructions. If you want to refer
23 back to a particular instruction, every instruction is
24 numbered. It's probably easier just to write the number of
25 the instruction. But again, there will be a number of copies

1 back in the jury deliberation room with you that you can go
2 over when you begin your deliberations.

3 (Jury instructions read)

4 THE COURT: Ladies and gentlemen, that concludes the
5 instructions on the law. As I told you before, we're now
6 going to take a break for lunch because we've ordered in and
7 we won't need to take that long. We'll take about 30 minutes
8 or so, 35 minutes for the lunch break.

9 The case still has not been submitted to you, so the
10 prohibition on speaking about the case and doing anything
11 else, any research, reading about the case or anything like
12 that on the break still pertains, so I'm just reminding you of
13 the admonition.

14 Once again, notepads in your chairs and follow Jeff
15 from the rear of the courtroom.

16 (Jury recessed at 12:53 p.m.)

17 THE COURT: Can you guys get lunch in 35 minutes?

18 MR. DIGIACOMO: There's a couple of things that --

19 MR. PESCI: Judge, on Instruction 35, I think the
20 language needs to be switched from "until" to "unless."

21 THE COURT: I did that. There were a couple of
22 other changes and I saw Mr. DiGiacomo following along on the
23 computer. Did you make the changes contemporaneously when
24 I --

25 MR. DIGIACOMO: No. Actually, Judge, I wasn't

1 listening to a thing you said during that -- during the
2 reading of the instructions. Mr. Pesci was making notes. I
3 apologize.

4 THE COURT: I caught that one and made the
5 correction on the --

6 MR. PESCI: And then on 18, I wasn't sure, it
7 sounded like you said conspiracy and it should have been
8 coconspirator on one line on 18.

9 (Pause in proceedings)

10 THE COURT: I may have just said it quickly or --

11 MR. PESCI: I think that takes care of it.

12 MR. DIGIACOMO: Is that all of it?

13 THE COURT: There were like a couple of minor things
14 like a word was missing, "of," and I just inserted them and
15 then made a note on my thing so I --

16 MR. DIGIACOMO: Oh, yeah, like on 33, the unarmed
17 person is liable to the offense or of the offense, for the
18 offense.

19 THE COURT: Right.

20 MR. PESCI: So do we need to make some sort of
21 change here, or is --

22 MR. DIGIACOMO: Is the Court going to do it?
23 Because Ms. Weisner has those electronically --

24 THE COURT: Okay. I can give them to her.

25 MR. DIGIACOMO: -- so if you can take your notes

1 that you made and give them to her --

2 THE COURT: Yeah -- no, I'll give them to her.

3 That's fine.

4 MR. PESCI: Thank you very much, Judge.

5 THE COURT: All right.

6 MR. ADAMS: Judge, I do have two matters.

7 THE COURT: Oh.

8 MR. ADAMS: Either now or when we get back.

9 THE COURT: We can do it now.

10 MR. ADAMS: All right. First is yesterday we dealt
11 with -- and I'm not reopening the bats and bags issue as it
12 relates to Jayson Taoipu. We do request that any -- since we
13 were not allowed to put that in, that any testimony related to
14 bats and bags be stricken from the record. I think Rontae
15 Zone testified earlier about bats and bags and I think it's
16 improper that -- since we weren't allowed to put in the part
17 of the transcript which speaks directly to that point that the
18 State not be allowed to benefit and argue from that. So we
19 make the formal request of the Court under due process and
20 fair trial rights to strike any reference to bats and bags.

21 THE COURT: Okay. And then your second argument.

22 MR. ADAMS: The second argument issue is they were
23 messing around with their PowerPoint earlier and it popped up
24 in front me. They have a picture of Little Lou, his booking
25 photo, sandwiched between a couple of other people, co --

1 alleged coconspirators in the case. That booking photo was
2 not admitted into evidence, it's not evidence, and I ask that
3 that not be shown to the jury.

4 THE COURT: Okay. On the booking photo, we
5 approached the bench and Mr. Gentile indicated -- I said it
6 didn't need to be admitted as an exhibit because they're
7 sitting in the courtroom but that Mr. DiGiacomo would be
8 allowed to use it in his closing PowerPoint, and Mr. Gentile
9 indicated no objection. So that's that issue.

10 On the other issue --

11 MR. ADAMS: We object. Formally we objected.

12 THE COURT: Right. On the other issue, anything the
13 State wants to add?

14 MR. DIGIACOMO: There's no legal basis for the
15 request and I'll submit it, Judge.

16 THE COURT: All right. Yeah, the evidence is what
17 the evidence is and we don't need to revisit it, but I --

18 MR. ADAMS: No, I'm not trying to reopen your
19 ruling.

20 THE COURT: No, I understand. And so they are
21 allowed to comment on that.

22 MR. ADAMS: We'll proceed with one arm.

23 THE COURT: Anything that -- the one thing that we
24 did forget to do was to address the issue that was raised on
25 the house arrest bracelet by Mr. DiGiacomo -- sorry,

1 Mr. Gentile, which he -- I understand why he did it, because
2 it had been in response to a question of a juror, but then I
3 was concerned because it creates the inference that
4 Mr. Hidalgo, Jr. was given straight-out house arrest and he's
5 been wandering around in the hallways and everything, and it's
6 quite clear Luis Hidalgo, III is in custody because he hasn't
7 been seen in the hallways, he isn't using the bathroom, the
8 public bathroom on the breaks, and we have at least two
9 corrections officers in here. So I had neglected to put it --

10 MR. ADAMS: Judge, we have not -- we have not made
11 an objection to that and I think if we did now, it wouldn't be
12 timely.

13 THE COURT: Okay. Yeah. I mean, I just, you know,
14 had wanted it corrected on the record because it's not that
15 Mr. Hidalgo, Jr. had house arrest, it's that he posted
16 hundreds of thousand dollars' worth of bond and I said, okay,
17 even if you do that, you're still going to have to do house
18 arrest. And I think that that --

19 MR. GENTILE: You're not going to advise the jury
20 about the bail?

21 THE COURT: No. No one's requested me to, but --

22 MR. DIGIACOMO: We were concerned about that --

23 THE COURT: I was mainly concerned not only for the
24 defendant, but also because it created an improper inference,
25 in my view, against the Court, that I would --

1 MR. GENTILE: Well, Your Honor, I don't think
2 that's --

3 MR. DIGIACOMO: I think that -- I think that maybe
4 the implication was that he had two strokes and at some point
5 he --

6 THE COURT: All right. That was also the concern.
7 Then it sounded like in your questioning that the Court put
8 somebody on house arrest with no bond on a death penalty case.

9 MR. GENTILE: I would have never asked the question
10 if the juror --

11 THE COURT: No, I understand. I'm not faulting you.
12 That was my -- I was -- you know, I think that that inference
13 is out there, but it is what it is.

14 MR. ADAMS: So, Judge, are we overruled also on the
15 photograph and the PowerPoint issue?

16 THE COURT: Yes.

17 MR. ADAMS: Are we preserved on that, or do I need
18 to reraise the objection during argument?

19 THE COURT: No, no. Your objection is preserved.
20 Like I said, we addressed it at the bench when he sought to
21 introduce the exhibit. And I would just note on the record
22 that initially the Court had ruled, well, anyone who
23 testified, they've seen them, we don't need their pictures
24 admitted into evidence. So I pulled out Anabel Espindola and
25 the two defendants and then you or Mr. Arrascada actually

1 introduced the photograph of Anabel Espindola.

2 MR. ADAMS: I did.

3 MR. DIGIACOMO: Over our objection because you
4 didn't admit the others.

5 THE COURT: Right. And I let it come in. So -- all
6 right.

7 MR. ADAMS: Actually, I don't think the State
8 objected to that, Your Honor.

9 THE COURT: No. Then they did because the
10 defendants hadn't come in.

11 (Court recessed at 12:59 p.m. until 1:38 p.m.)

12 (In the presence of the jury.)

13 THE COURT: All right. Court is now back in
14 session. The record will reflect the presence of the State
15 through the deputy district attorneys, the presence of the
16 defendants, along with their attorneys, the officers of the
17 Court and the members of the jury.

18 Mr. Pesci, are you ready to make your closing
19 statement?

20 MR. PESCI: Yes, thank you, Your Honor.

21 STATE'S CLOSING ARGUMENT

22 MR. PESCI: Luis Hidalgo, III --

23 MR. ADAMS: Your Honor, I hate to do this, but we
24 object to this screen. This wasn't in either of the
25 transcripts admitted to the jury.

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1 MR. PESCI: Right on queue. There's an argument
2 about TJ --

3 THE COURT: Well, wait a minute --

4 MR. ADAMS: Judge, I object to this --

5 THE COURT: Okay. I said wait a minute, Mr. Adams.

6 Ladies and gentlemen, once again, the defense is --
7 the State is going to tell you what they think they hear in
8 the tape. I'm sure the defense will tell you what they hear
9 in the tape. It's your collective hearing of what is in the
10 tape that controls in your deliberation. There are things
11 that are here on the screen that were not in the transcripts
12 that went to -- again, if you don't hear it and the State says
13 it's there, the defense says it's there, then disregard it.
14 Again, this isn't evidence. It's just argument.

15 All right. Go on, Mr. Pesci.

16 MR. PESCI: Thank you, Judge.

17 22:15, ladies and gentlemen, if you have a pencil,
18 you've got a pen, you've got something to write with, you want
19 to be sure what it says there, 22:15, that's where you go and
20 listen to it. But let's put it into context. Let's take
21 it -- let's assume it's their version of the transcripts.
22 Instead of TJ, and when you listen to it, the State tells you
23 that the evidence will show it says TJ, but let's take their
24 version of the transcript that --

25 MR. ADAMS: Objection. Personal submission, Your

1 Honor.

2 MR. PESCI: That --

3 THE COURT: All right. Overruled.

4 MR. PESCI: I told you -- Luis Hidalgo, III, I told
5 you to look at this compelling language that helps you
6 understand that it's TJ. Taken care of, taken care of. What
7 was the evidence that Rontae said? That Mr. H wanted him
8 taken care of. There is the language, ladies and gentlemen,
9 that tells you what this is all about and that, in fact, it's
10 TJ. Because what on earth else are they talking about if it's
11 not about the dead guy out at the lake?

12 If it's this or if it's TJ, it's the same thing.
13 It's talking about the murder. It's talking about the
14 killing.

15 (Playing tape)

16 MR. PESCI: He's all ready to close the doors and
17 everything and go into exile, whispered, after checking to see
18 if someone has a recording device. What reason does Little
19 Lou have to make that up about his father if it's not true?
20 What reason does he have to whisper it after checking for a
21 wire?

22 Anabel Espindola, on May 23rd, 2005, is not a
23 witness for the State of Nevada. She hasn't been arrested,
24 let alone charged, let alone taken a deal. When she's talking
25 right here, she hasn't done anything for the State. She's

1 worrying about herself, her mistress and her mistress' son.
2 And straight from Luis Hidalgo, III's mouth comes the evidence
3 about his father not going into hiding because he's afraid of
4 Deangelo or Deangelo's friend, the person he had outside the
5 club.

6 There's no mention of that because really, ladies
7 and gentlemen, if Mr. H is really afraid of Deangelo and he
8 really loves his son and his mistress, why is he sending them
9 to go meet with the very guy who constitutes the danger? Why
10 would he say, Anabel, get a recording device and go talk to
11 Deangelo, the guy who is the reason that he paid out the cash
12 because he's in fear? Why do that?

13 Well, this is some more evidence to help you
14 understand and put this all in context. Maybe we're being
15 under surveillance, surveilled, whatever that spelling is, but
16 there's really no issue as to the spelling of, Keep your mouth
17 shut, exclamation point, exclamation point.

18 And what you've been told is that was just a note to
19 Mr. H himself at a meeting. That wasn't really because he was
20 concerned about having committed a crime, just a meeting with
21 an attorney in which, if you believe the evidence, he sat and
22 for 90 percent of the time was a bump on a log. A note to
23 himself to help him to remember to shut up? He needs help to
24 remember that?

25 Where was this note found? This is really

1 important, very telling. It's found in Simone's, in Simone's
2 AutoPlaza, which going back, and we'll get to this again,
3 Rontae Zone testifies after the murder that Rontae, JJ, Jayson
4 and Deangelo go to Simone's, that when they're there, Deangelo
5 talks to Mr. H. And if he really paid out because he is
6 afraid, why is he talking to Deangelo? He talks to Mr. H.
7 Oh, now what happens next?

8 Rontae says that after -- after Mr. H talks to
9 Deangelo, Deangelo takes Rontae into the bathroom. See,
10 because surveillance from outside of Simone's is not going to
11 see what Deangelo tells Rontae in the bathroom, which is to
12 shut up.

13 Remember, Rontae told you that, Deangelo took him in
14 the bathroom at Simone's and said, Keep your mouth shut.
15 That's where the note was found. That's what this is all
16 about. This is all about taking care of TJ. The murder of
17 Timothy Hadland is what this is all about.

18 Murder, ladies and gentlemen, is the unlawful
19 killing of a human being with malice aforethought. Well,
20 there's no doubt on earth that the killing of TJ Hadland was
21 unlawful. What is malice aforethought? He's out here all by
22 himself, lured out away from his girlfriend on a dark street
23 late at night, ambushed, shot twice in the head.

24 Malice, what is it? It's the intentional doing of a
25 wrongful act. This wasn't an accident. The gun didn't go off

1 by itself twice. You heard the testimony of Rontae. He came
2 around that van, put two in his head. Kenneth Counts shot him
3 twice in the head. He didn't even see it coming. He was
4 ambushed.

5 Malice -- don't confuse it with premeditation, and
6 we'll get into what premeditation is in a minute. Malice does
7 not imply deliberation or the lapse of any considerable time
8 between the malicious intent to injure another and the actual
9 doing. So there's not some time requirement for malice.

10 Now, there is murder of the first degree, there's
11 murder of the second degree, and we'll go through all of this.
12 For first-degree murder, there are three elements. You'll
13 hear us throw that word out sometimes. They're kind of like
14 ingredients in a recipe. You can't make the recipe if you
15 don't have all the ingredients. For this, for first-degree
16 murder, it has to be wilful, deliberate, and premeditated.

17 What is wilful? It's the intent to kill. And there
18 need be no appreciable time between the formulation of the
19 intent and the act of killing. Getting a gun, sneaking out of
20 a car and taking care of a person by shooting him twice in the
21 head for money paid out by -- oh, by the way, Mr. H, he told
22 you that himself, that he paid him. That is a wilful act.

23 Deliberation, the second element, the second
24 ingredient, the process of determining upon a course of action
25 to kill as a result of thought. I want TJ taken care of,

1 Mr. H. Little Lou, I told you to take care of TJ, to take
2 care of this. It's a process, a determination upon a course
3 of action, getting someone to do their bidding for them,
4 someone to dangle out in the wind when things get bad.

5 Premeditation, the third element, third ingredient,
6 it's a design, a determination to kill. I want him taken care
7 of. Premeditation need not be for a day, an hour, or even a
8 minute. There's not a specific time requirement. It can be
9 as instantaneous as successive thoughts of the mind. That's
10 not what we're worried about here. This is not some real
11 quick rash thing, someone just pulls out a gun and shoots.
12 There's a lot of planning. There was a lot of getting people
13 to do this, giving the order, carrying the order out.

14 Now, Mr. H is facing first-degree murder from being
15 either wilful, deliberate or premeditated. And there's
16 another way of getting to first-degree murder for Mr. H. Just
17 like you come into this box every day, you come in from the
18 left-hand side and you take your seat. You could come in from
19 this right-hand side sometimes if you are taken out the back.
20 As long as you all get in here, it doesn't matter if you came
21 from the left or the right. It's the same thing with murder,
22 first-degree murder, in this context.

23 We just talked about wilful, deliberate, and
24 premeditated, coming in from the left. Now we're talking
25 about the option from the right. Lying in wait.

1 What is lying in wait? It's a terminology that you
2 see in your instructions. It's defined as a waiting and
3 watching for an opportune time. Get him out at the lake away
4 from his wife, girlfriend, out on a deserted street, no street
5 lights, not many people around. Together with the concealment
6 by ambush, he didn't see it coming, or some other secret
7 design to take the other person by surprise. Not that you can
8 really describe a benefit to this situation, but at least TJ
9 didn't know it was coming. At least he didn't know. It was
10 so much a surprise, so much an ambush, he didn't even know
11 before it happened.

12 Lying in wait is the second part to this. To
13 constitute murder by lying in wait, in addition to what we
14 just talked about, there must be an intentional infliction
15 upon the person killed of bodily harm involving a high degree
16 of probability that it will result in death and shows a wanton
17 disregard for human life. Shooting someone in the head is
18 just that.

19 Now, there's second-degree murder. What's
20 second-degree murder? Second-degree murder is murder without
21 premeditation and deliberation. So if the thought process is
22 that there wasn't premeditation and deliberation, then it's
23 second-degree murder; or -- this is important -- or, this is
24 another way to second-degree murder, a killing which occurs in
25 the commission of an unlawful act which in its consequences

1 naturally tends to destroy the life of a human being.

2 Plan B, go put a beating on him. Out there
3 isolated, all alone, conspire with a group of people to get
4 him out there, discussion of baseball bats and garbage bags.
5 Plan B is what is second-degree murder. If you think that
6 really the only plan was to beat and the consequences
7 naturally tend to destroy, you get a bunch of people together
8 with the intent to go beat someone all by himself, and adding
9 to the mix is the concept of the baseball bags, trash bags,
10 that's your second-degree murder.

11 Plan A, if he's alone, kill him. That's the wilful
12 deliberate, premeditated. Lying in wait, Plan B,
13 second-degree murder.

14 In making this determination, you have to also
15 determine if a deadly weapon was used. Ladies and gentlemen,
16 the instruction -- the main point is the very end, you are
17 instructed that a firearm is a deadly weapon. This is really
18 not an issue. There are two holes, gunshot wounds of entry.
19 You heard from the doctor. In fact, you've seen the fragments
20 from the bullets recovered from his head. There's no doubt a
21 deadly weapon was used.

22 Now, this is an important part because the gun was
23 not found. The State is not required to have recovered the
24 weapon. It doesn't have to be found in order to be found
25 guilty of using a deadly weapon. It doesn't even have to be

1 brought to court. It just has to be shown that it was used.

2 There are different theories of criminal liability,
3 by conspiring or aiding and abetting, because the State's not
4 arguing that Luis Hidalgo, III physically pulled the trigger,
5 that Mr. H physically pulled the trigger. Kenneth Counts
6 pulled the trigger. The question is, under the law, are they
7 responsible for that killing? Yes, they were.

8 And so, conspiracy. Conspiracy's an agreement or
9 mutual understanding between two or more persons to commit a
10 crime. I want him taken care of. Even in the notes of
11 Mr. DePalma, the information given is that TJ has been talking
12 bad about the club. Mr. H, even on the stand, said, Well, I
13 may have said something to him to the effect of, Tell him to
14 stop running his mouth about the club. If it doesn't matter,
15 like he says, that someone's running their mouth about the
16 club, why tell him to do that? Why go talk to somebody who's
17 fired? And if he truly has no effect on the business by
18 running his mouth, what's the reason to have him talked to,
19 beaten, or killed? What's the reason? Because he is talking.
20 crap about the club.

21 A crime is the agreement to do something unlawful.
22 It does not matter whether it was successful. The crime of
23 conspiracy to commit murder is when people agree to commit
24 murder. That's a separate crime from the murder itself.

25 So even if the murder didn't happen, someone can be

1 guilty of conspiring to commit murder because they made the
2 agreement to kill somebody, and the killing didn't happen.
3 But in this case the killing did happen.

4 Now, for conspiracy, you're instructed that if you
5 find that the State has established that the defendant, in
6 this case, the defendants, has committed conspiracy to commit
7 murder, you shall select conspiracy to commit murder. That's
8 that first count that we just talked about.

9 Now, for a conspiracy, it's not necessary to show a
10 meeting. We don't have to have video surveillance of them
11 hunkered down in the office where the direct order is given or
12 out on the floor when Deangelo was told by Mr. H or on the
13 phone or wherever it was that Little Lou said, I told you to
14 take care of TJ, to take care of this. We don't have to show
15 video of that. The formation, the evidence of a conspiracy
16 can be inferred. We can figure it out from all the
17 surrounding facts and circumstances. It comes to the
18 conclusion that there is a conspiracy.

19 An act can be done by direct evidence, it can be
20 done by circumstantial evidence. A person who knowingly does
21 any act to further the object of a conspiracy or otherwise
22 participates therein is criminally liable as a conspirator.
23 So the people who aren't pulling the trigger but they're doing
24 acts in furtherance of that conspiracy saying, I want this
25 person dead, giving the order, telling them, I told you to

1 take care of TJ, paying out afterwards, this is the evidence,
2 ladies and gentlemen, that shows the conspiracy and puts them
3 on the hook for the murder even though they didn't pull the
4 trigger.

5 It's almost as acceptable as direct proof and it's
6 usually established by inference. Well, we're going to get
7 through the inferences that we can establish later on from the
8 recordings.

9 Now, the conspiracy to commit a crime does not end
10 upon the completion of the crime. It's not over when TJ's
11 dead. The conspiracy continues until the coconspirators have
12 successfully gotten away and concealed the crime. The efforts
13 to conceal the crime afterwards show that the conspiracy is
14 still going. It's not over because TJ's dead. It continues
15 until they have successfully gotten away and concealed it.

16 They didn't successfully get away and conceal it.
17 And each member of the criminal conspiracy is liable,
18 responsible, for each act and bound by each declaration of
19 every other member. They're on the hook for what Deangelo's
20 doing, what Kenneth Counts is doing if the act or the
21 declaration is in the furtherance of the object of the
22 conspiracy. When Deangelo sets it up and does the lying in
23 wait and the ambush, and when Kenneth Counts gets out with
24 premeditation, deliberation and shoots him in the head twice
25 with a gun, they're responsible when the evidence is --

1 establishes that they're a part of the conspiracy to commit
2 that murder. Because under the law of conspiracy, the act of
3 one is the act of all. Every conspirator is legally
4 responsible for a specific intent crime.

5 Now, murder in the first degree is a specific intent
6 crime. Specifically, intent that you want that crime,
7 first-degree murder, to occur. Then there are general intent
8 crimes. And you're going to hear some -- you've already heard
9 this from the judge and you'll have the instructions with you
10 on the definition. Now, it's different. Under a conspiracy
11 for a general intent crime, the liability is different because
12 for conspiracy to commit first-degree murder, they
13 specifically have to have the intent that he is killed. Well,
14 it's very evident, I want him taken care of. I told you to
15 take care of him, and, in fact, the payment afterwards for
16 getting the job done.

17 But let's say in the analysis as to plan B to the --
18 just B, it's a little bit different, because for a general
19 intent crime, a conspirator's legally responsible for the
20 crime that follows, the things that come after, that battery
21 with substantial bodily harm, that battery with a deadly
22 weapon, getting together, getting him out there, baseball bats
23 and trash bags. The probable and natural consequences of the
24 object of the conspiracy by getting there, they are
25 responsible for that, even if it's past the original plan.

1 Because the probable and natural consequences of the object of
2 the conspiracy, even if it was not intended as part of the
3 original plan, and even if it was not -- if the conspirator
4 was not present at the time, because you run that risk when
5 you conspire with people to go out and beat somebody and to
6 beat them isolated all alone by a group of people with
7 discussions of baseball bats.

8 Now, even though the statements and acts may be made
9 or occur in the absence and without the knowledge of the
10 defendant, provided such statements were knowingly made and
11 done during the continuance of such conspiracy and in
12 furtherance of the same object, this is further showing that
13 Little Lou, Mr. H are responsible for the acts of Deangelo and
14 Kenneth Counts when it's in the furtherance of that
15 conspiracy. This holds true even if the statement was made by
16 the coconspirator prior to the time the defendant entered the
17 conspiracy or after he left the conspiracy so long as the
18 coconspirator was a member of the conspiracy at the time. You
19 heard in opening timing means everything, from the defense.
20 And we'll get into that.

21 Let's talk about the concept of withdraw from the
22 conspiracy. Once a person joins a conspiracy, that person
23 remains a member until he withdraws. A person can withdraw
24 from a conspiracy by taking some positive action which
25 disavowed or defeated the purpose of the conspiracy. Changing

1 from plan A to plan B is not withdrawal from the conspiracy.
2 That's not saying, Stop the presses, don't kill and don't
3 beat. It's just -- if it's believed that the argument was to
4 change from A, kill, to B, it goes from first degree to second
5 degree, this is not withdrawal from the conspiracy.

6 Now, that was a conspiracy analysis. You can also
7 be responsible under aiding and abetting. When two or more
8 persons are accused of committing a crime together, their
9 guilt may be established without proof that each person did
10 every act. Same concept, being responsible even for the acts
11 of somebody else if -- if there is aiding and abetting shown.

12 Now, if they either directly commit the act or abet
13 to help, whether present or not, who advise, who encourage its
14 commission with the intent that the crime occurred, just like
15 a conspiracy, aiding and abetting for a specific intent crime
16 of murder, they must aid and abet with the specific intent
17 that the first-degree murder occur. It's that same
18 requirement. And we've already gone over the evidence of the
19 specific intent.

20 Now, a person aids and abets in the commission if he
21 knowingly and with criminal intent aids, promotes, encourages
22 or instigates by act or advice the commission of such crime
23 with the intention that such crime occur.

24 Now, you must be unanimous in your verdict. You
25 must all believe beyond a reasonable doubt that the crime was

1 charged. But if you take, for example, the first-degree
2 murder -- and we talked about the examples of wilful,
3 deliberate, premeditated or lying in wait -- some of you could
4 think it was wilful, deliberate and premeditated. Some of you
5 could think it was lying in wait. It doesn't matter as long
6 as you all agree that it's first-degree murder. That's what
7 this instruction is telling you.

8 General intent crimes, battery, battery with a
9 deadly weapon, battery with substantial bodily harm, that was
10 general intent. First-degree murder, specific intent.
11 Second-degree murder is general intent. Where several parties
12 join together in a common design to commit an unlawful act,
13 each is criminally responsible for the reasonable foreseeable
14 general intent crimes committed in the furtherance. This is,
15 getting to second-degree murder, general intent by aiding and
16 abetting for the concept of beating, the plan B version.
17 Battery with a deadly, the battery with substantial, the
18 battery in the context of this case, when you look at all the
19 surrounding facts, that's how they can be responsible for
20 second-degree murder of aiding and abetting.

21 Now, we talked about that first-degree murder is a
22 specific intent crime. Then the other crimes -- because these
23 are the crimes charged. These are the crimes, solicitation to
24 commit murder, that Little Lou, Luis Hidalgo, III is facing.
25 Mr. H is not facing solicitation to commit murder.

1 A person who counsels, hires, commands or otherwise
2 solicits in order to commit murder. If no criminal act is
3 committed as a result of the solicitation, he is guilty of
4 solicitation to commit murder.

5 Put rat poisoning, that's a solicitation to commit
6 the murder. The fact that the murder doesn't happen is not an
7 issue with being charged with and convicted of. In fact, if
8 the murder had happened of Jayson and Rontae, then there would
9 be a murder charge, there wouldn't be a solicitation to commit
10 a murder. So solicitation is the asking, it is the
11 encouraging, enticing, this is what he does to get them to
12 kill.

13 And why? Why on earth is there any reason to kill
14 Rontae or Jayson if, in fact, there was only a payment of
15 \$5,000 because of fear of what Deangelo or Deangelo's friend
16 could do? Why on earth would there be conversations,
17 whispered conversations, about killing these people, the very
18 witnesses? Why? Because it's a joke. It was just a joke.
19 He was just, you know, running his mouth as he checked for a
20 wire and whispered?

21 We've been through this. He's found out at the
22 lake. The police did their job. They work out at the scene.
23 They find his car. They find the phone with Deangelo's phone
24 number on it. The Palomino cards lead them back to the
25 Palomino. They get to the Palomino and they learn about the

1 people there, Mr. H. They learn about Anabel Espindola,
2 Little Lou, Luis Hidalgo, III. These are the owner, managers.

3 Then the police encounter Deangelo Carroll, an
4 employee, the go-between, between the orders and the
5 execution. And Deangelo Carroll has Jayson and Rontae with
6 him. You heard the evidence from Rontae about how Deangelo
7 talked to them about taking care of somebody, and you heard
8 how Kenneth Counts was picked up by Deangelo after getting
9 that order and Kenneth Counts went out there and took care of
10 TJ.

11 What did Rontae Zone tell you? That Mr. H wanted TJ
12 taken care of. But it wasn't just that. Rontae also told you
13 that Little Lou also wanted TJ taken care of. Rontae told you
14 that the information that he had was that Little Lou had said
15 bring baseball bags and garbage bags and that Rontae said that
16 Deangelo Carroll went and got Kenneth Counts.

17 (Playing tape)

18 MR. PESCI: What is that about if it's not about
19 this killing? What taking care of is it? What on earth is
20 there to be taken care of?

21 Rontae also says Kenneth Counts shot TJ twice in the
22 head without warning. And Kenneth Counts said -- Rontae said
23 Kenneth Counts used a .357 revolver to kill TJ. Remember, the
24 police found no casings out at the scene.

25 James Krylo came in, he took the stand, a firearm's

1 expert, and he told you that those fragments were consistent
2 with being shot by a revolver. And he said the revolver does
3 not expend the cartridge cases, those little anatomies of a
4 bullet there. That's why there aren't casings out there
5 because it's a revolver. And he said that those fragments are
6 consistent with a nominal .38, and a nominal .38 includes a
7 .357 caliber.

8 Rontae says KC's the shooter.

9 Kenneth Counts got paid. He got paid. Anabel says
10 that Mr. H told her to get \$5,000 which she said -- which she
11 did, and Deangelo took the money and gave it to Kenneth
12 Counts. Kenneth Counts was found hiding in a ceiling
13 underneath which were found, what, Palomino cards and cash.
14 And oh, by the way, the cash, the Palomino cards underneath
15 him where he's hiding, the payoff for taking care of TJ,
16 Deangelo's fingerprints show up on those cards, Kenneth
17 Counts' show up on those cards. Evidence corroborating Rontae
18 Zone.

19 Rontae says after being paid, Kenneth Counts left
20 the Palomino Club in a taxi. Gary McWhorter testified. He
21 came in here, the man in the wheelchair, and he told you that
22 he picked up an African-American male on the night that this
23 occurred and he drove him to the area of where? Kenneth
24 Counts' house. Remember his trip sheet, that he picked him up
25 at the Palomino and dropped him off on -- remember, he

1 specifically said he wrote down a different location because
2 the person got out not where they originally asked and walked
3 through the backyard, not right into his house. And, oh, by
4 the way, that backyard abuts Kenneth Counts' house, which you
5 remember hearing the testimony from the detectives, he ran
6 across the street to hide from them up there in the attic.
7 And the cash is found underneath him.

8 Rontae says Deangelo slashed the tires to the white
9 Chevy Astro van and dumped them in the trash. Detective
10 Wildemann told you they went out there, they found those
11 tires, and those tires were slashed.

12 Rontae says that Rontae and Jayson go with Deangelo
13 to Simone's Auto the day of the murder -- day after the
14 murder. Now, Rontae says that while at Simone's Deangelo goes
15 and talks with Mr. H. Mr. H was the guy in his 40s or 50s.
16 The picture which we used when Mr. H was on the stand of the
17 three generations, Little Lou, his dad and then, as they refer
18 to him, Pops, ladies and gentlemen, the man who looked like he
19 was in his 40s and 50s was not Pops, no disrespect to Pops.
20 Deangelo's referring to Mr. H. Deangelo, from the stand,
21 pointed out it was Mr. H.

22 After speaking with Mr. H, Deangelo pulls Rontae in
23 the bathroom and tells him to -- oh, look, keep your mouth
24 shut. And that's where that note's found, in Simone's.

25 Now, Anabel's testimony. A week before the murder

1 there was a problem with TJ. Little Lou and Mr. H were
2 talking about TJ getting kickbacks from cab drivers. Now, if
3 you don't believe Anabel, what did PK tell you, the
4 defendant's witness? PK was very assertive of the fact that,
5 one, he doesn't like Deangelo; and, two, TJ was skinny, and
6 that he brought it to their attention. It's not the State's
7 witness. That's the defense's witness. That Mr. H told them
8 they needed to watch TJ. Later Deangelo told them that TJ was
9 badmouthing the club. That's actually in the notes of
10 Mr. DePalma.

11 Anabel told Mr. H about that and Little Lou got mad.
12 Little Lou, You're not going to do anything. You're never
13 going to be like Rizzolo or Gilardi. They take care of
14 business. Little Lou had mentioned that Rizzolo had an
15 employee beat up -- had an employee beat up a customer.
16 Mr. H, per Anabel, says to just mind his own business.

17 Now, we go to May 19th. On that evening Mr. H and
18 Deangelo come into the office. Well, Mr. H brings Deangelo to
19 the office. They didn't work at Simone's. Remember, Anabel
20 testified she worked at Simone's most of the day, then her and
21 Mr. H would drive to the Palomino, and then at the Palomino
22 she's sitting in the office. Anabel could not hear the
23 conversation. Mr. H took Deangelo out of the office. Mr. H
24 and Deangelo leave the office and Mr. H later comes back with
25 PK. What happened that time with Rose's boyfriend? Take care

1 of or deal with Rose's boyfriend, that is the evidence from
2 Anabel, as Mr. H talked to Deangelo. Anabel found out and
3 Anabel shut it down.

4 So this time Mr. H takes Deangelo outside of the
5 office where Anabel's not going hear, where Anabel's not going
6 to shut it down. Mr. H told PK to have a seat and told Anabel
7 to go into the kitchenette with him, that Anabel and Mr. H
8 left PK and went into the back, meaning that kitchenette area
9 off of the office. Mr. H told Anabel to go into the back
10 room, go further back, call Deangelo and tell him to go to
11 plan B. Plan B was not a term that Mr. H had used with her
12 before. That's what you heard from Anabel.

13 Anabel followed Mr. H's order and then called
14 Deangelo and told him to go to plan B. You've heard all the
15 testimony about the phone records and about her trying to get
16 through. You heard Rontae say that they were having problems
17 on the phone, that Deangelo was on the phone and because of
18 the connection problems he was driving back and forth to try
19 to get that connection of the phone call. Anabel went back
20 into the office and told him that she had called. And then
21 Deangelo comes back to the club.

22 Deangelo comes back and Mr. H is watching TV.
23 Deangelo comes in the office, sits down and says, It's done.
24 He's downstairs.

25 Now, even Mr. H's testimony is consistent with

1 Anabel there, that Deangelo comes into the office, that he
2 announces, It's done. Now, from there, it parts company
3 because Mr. H's version is he was scared, scared of Deangelo,
4 Deangelo's friends that were outside, that he didn't know how
5 many there were. But he didn't get up and go look at the
6 surveillance and see. He just took the word of the employee,
7 if you believe him, that he thinks should have been fired a
8 long time ago and told Anabel to get the cash.

9 He says, Get 5. She says, 5 what? He gets angry
10 and says \$5,000. She gets it, brings it back, puts it down
11 and Deangelo takes it.

12 Then the night goes on. They leave and Mr. H turns
13 the TV on and he's watching the news and he says, Did he do
14 it, as he's looking on the news. Did he do it? And he's
15 nervous, she says. Now, when she wakes up the next morning,
16 that -- Mr. H is up, watching the news and she asked him if he
17 slept and he said no. Then the news comes of the death, of
18 the murder, of the body found out at the lake. And Mr. H
19 says, He did it.

20 And then they go to the Silverton. Now, he did not
21 want to go back to the house so they checked into the
22 Silverton. That's what Anabel says, that Mr. H didn't want to
23 go back there. This was before the recordings with Deangelo,
24 that Deangelo represents this fear, before the recordings.
25 They haven't even heard yet from Deangelo the concept of KC

1 threatening Deangelo. They haven't even heard it yet and
2 they're going to the Silverton.

3 Little Lou comes to the Silverton, tells Mr. H,
4 Don't worry, I've already talked to Deangelo. Deangelo says
5 he's not going to say anything. He's dealt with the police
6 before. And that they didn't even go back to the club. He
7 could bring him the paperwork, the daily logs, the work that
8 Anabel would have to do so as not to have to go back.

9 On Sunday Mr. H and Anabel meet with Mr. H's
10 attorney. Mr. H spoke with the attorney. Anabel and H were
11 told not to speak with Deangelo because he could be wired.
12 That was advice given to both of them, Mr. H and Anabel. And
13 he becomes increasingly upset, nervous and worried.
14 Completely distraught, she says, right now. I don't know what
15 I told him to do, she said he's saying to himself. He's
16 mumbling. I feel like killing myself, she says.

17 Apparently -- well, Anabel said she never saw him
18 like this before. Anabel then tells him -- tells you that she
19 said to him, Do you want me to go talk to him, to Deangelo?
20 This is after the advice by the attorney to not talk to him.
21 She's willing to help him out, to try to stop him from being
22 in this position and she says, Do you want me to, and he says,
23 Yes. Let her go out there and take the chance, just like
24 somebody else opens up the doors for him, just like somebody
25 else has to open up the safes for him, just like somebody else

1 has to unlock everything for him. Let the woman get out there
2 and do it for him.

3 Anabel and Mr. H discuss what would be said to
4 Deangelo. Mr. H told Anabel to tell Deangelo to resign from
5 the club and not to talk to anyone because if something
6 happened to Mr. H, then he couldn't help anyone. Anabel asks
7 Mark Quaid after that to call Deangelo to set it up and now we
8 get to the recordings.

9 He comes in on May the 23rd, the first time, goes
10 into Little Lou's room and begins.

11 (Playing tape)

12 MR. PESCI: Why the whispering? If you believe the
13 testimony, no crime has occurred, nothing more than just
14 trying to avoid gang retaliation. What's the whispering
15 about?

16 (Playing tape)

17 MR. PESCI: If somebody else now has the advice to
18 not talk to Deangelo because he might have a wire, because
19 Anabel's not in the wire, which is why we played the first
20 clip, Anabel's not in the room when Luis Hidalgo, III -- make
21 sure that there isn't a wire. Someone else now has that
22 information. Mr. H told you on his testimony he doesn't
23 remember the talk to his son the day after the murder, the day
24 after that and the day after that. But Little Lou realizes, I
25 should check for a wire, just magically.

1 (Playing tape)

2 MR. PESCI: If something happens to him, we all
3 lose, every one of us. What's going to happen to him? She
4 didn't say that the gang banging dangerous friend of Deangelo
5 Carroll comes back, he could shoot and kill us all. I'm
6 really concerned just like he is for my well being of the
7 person who did this.

8 (Playing tape)

9 MR. PESCI: If these guys are looking for money,
10 payoff to keep their mouth shut about the crime, nothing about
11 these guys coming back to do harm to me, to do harm to Little
12 Lou, to do harm to Mr. H, nothing about that. It's trying to
13 shut them up from going to see the cops.

14 And what is this history we have? Mr. H has been
15 extorted before.

16 THE COURT: I think we need a break. All right.

17 Ladies and gentlemen, we'll go ahead and take a
18 quick break, and once again, you're reminded of the
19 admonishment which, of course, is still in place not to
20 discuss anything relating to the case or do anything else
21 relating to the case on the break. If everyone will just go
22 through the double doors, notepads in your chairs. We'll see
23 you all back here at the 2:30.

24 (Court recessed at 2:24 p.m. until 2:32 p.m.)

25 (In the presence of the jury.)

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1 THE COURT: All right. Court is now back in
2 session.

3 And, Mr. Pesci, you may resume your closing
4 argument.

5 MR. PESCI: Thank you, Your Honor.

6 You heard the testimony almost a year to the day
7 that TJ was killed. Anabel and Mr. H went and made police
8 reports about being extorted, that there was a former employee
9 who was extorting them from money from the club and that went
10 to the attorney and the attorney says, Go make a police
11 report, go to the police when a crime has occurred. He
12 doesn't go to the police and it's not because of fear of gang
13 retaliation. It's because that would be walking right to the
14 police as the defendant.

15 (Playing tape)

16 MR. PESCI: You, Deangelo, and Lou are going to have
17 to stick together. Mr. H takes Deangelo out, gives the order.
18 Mr. H tells her after the fact, Go to plan B, because Mr. H
19 uses Deangelo to get Kenneth Counts to kill TJ. That's why
20 you, Deangelo, and Mr. H are going to have to stick together.

21 And she is not a State's witness on May the 23rd,
22 2005. She's not trying to get out from underneath a death
23 penalty, which, oh, by the way, when the deal went down wasn't
24 on the table. She's not doing any of that. She's whispering.
25 She doesn't set this up way in advance. She's whispering

1 because of the fact that Mr. H is on the hook with Deangelo
2 because he gave the order.

3 (Playing tape)

4 MR. PESCI: Beat up, not dead. Plan B, not plan A,
5 Deangelo, come on. Not, Holy cow, we had nothing to do with
6 this, we're being extorted by you for money, we're threatened
7 by this gang banger outside the door that no one saw on
8 surveillance. If it's plan B, it's second-degree murder.

9 (Playing tape)

10 MR. PESCI: He, Mr. H, is the only one, not that
11 he's going to get killed, that's a terrible thing, because
12 some gang banger's going to come do him in he's so afraid of.
13 He's going to lose the club because he's going to be arrested
14 for the murder. Why is everybody screwed when the heat comes
15 down? What heat? Is the heat Deangelo's friend? If they had
16 nothing to do with it, why would the club be lost? Why would
17 they want to take care of Deangelo's family? Mr. H told you
18 that he didn't like Deangelo, that he thought he should have
19 been fired. If he never gave the order, why would there need
20 to be the need to keep him quiet by taking care of his family?

21 (Playing tape)

22 MR. PESCI: Not a bad deal because you shouldn't
23 kill somebody, bad deal because you've got witnesses, you've
24 got people who can pinpoint you.

25 (Playing tape)

1 MR. PESCI: Have KC kill them too, t-o-o, also, in
2 addition to the killing of TJ. And so there's no confusion,
3 Little Lou tells us, We will put something in their food so
4 they die, rat poison or something. Is that a joke? Is that
5 funny? In the context that that's happening, in hushed tones
6 after Anabel's checked for a wire, after all that, this is a
7 joke, whispering? Under surveillance, keeping your mouth
8 shut, he's really a stand-up comic and this was all just a
9 joke?

10 (Playing tape)

11 MR. PESCI: We, we can take care of KC too. That's
12 Anabel. Big to do about how in the heck did she plead to a
13 crime, that her attorney's so bad for doing that. Do you see
14 in the evidence now stacking up on Anabel, not just Mr. H and
15 Little Lou? But let's focus on Little Lou right now.

16 Little Lou, We get KC last, because he is a part of
17 this event too. I told you to take care of TJ. We can get KC
18 last. Is it a joke now the second time, the joke about
19 killing -- not just Rontae, not just Jayson, but now Kenneth
20 Counts too?

21 (Playing tape)

22 MR. PESCI: Stick to your story. Why is there a
23 need of a story if Deangelo's friend just went crazy and
24 killed the guy for no reason and came in and extorted them?
25 Why would they have to stick to the story? The story is run

1 to the police, tell them what happened, give us help, because
2 it all depends on you, because Little Lou, Anabel, Mr. H know
3 that Deangelo is the conduit that gets to KC, that does the
4 killing on the behest of them.

5 (Playing tape)

6 MR. PESCI: Why would his dad be going into exile?
7 It's not because someone's going to come hurt him because then
8 they wouldn't all be screwed. They've got to get him back on
9 track. We --

10

11 (Playing tape)

12 MR. PESCI: -- do this all the time.

13 (Playing tape)

14 MR. PESCI: We keep our mouth shut. Anabel says
15 that Deangelo's in the room and so is Little Lou. Little Lou
16 doesn't say, you know what, you're crazy, Anabel, I had
17 nothing to do with this. You're crazy. I wasn't a part of
18 any order. I wasn't a part of any conspiracy. He's adopting
19 what she's saying. And doesn't his statement of, We'll get
20 them too, confirm that to you?

21 (Playing tape)

22 MR. PESCI: Any chance that this was just a joke has
23 been left behind because you guys smoke weed, right? After
24 you have given them the money and still start talking, they're
25 not going to expect rat poisoning. Set them up. Pay them the

1 cash. They'll be calmed down. They won't be expecting it
2 when you give them the rat poisoning. This is the clear
3 direct evidence of solicitation to commit murder, to kill
4 Jayson, to kill Rontae. The joke has left a long time ago.
5 Go buy rat poison.

6 (Playing tape)

7 MR. PESCI: Weed's not going to work. Well, let's
8 move on to the next way to do it, the Tanqueray bottle. A big
9 to do about the fact that the Tanqueray bottle doesn't have
10 Little Lou's fingerprints. Well, neither does the cash that
11 the defense and the State both say Anabel paid out. Anabel
12 got the cash, brought it, put it there. Her fingerprints
13 aren't on the cash. Just because her fingerprints aren't on
14 the cash doesn't mean she didn't do it, just like she said,
15 got the money that Mr. H ordered her to get and bring it out
16 and put it on the table and Deangelo took it. Mr. H said the
17 money was paid. How can that be true? There are no prints.
18 Sometimes there aren't prints on things, ladies and gentlemen.
19 And the fact that his fingerprints aren't on the Tanqueray
20 bottle doesn't mean that he didn't say what he just said
21 because you heard it yourself.

22 (Playing tape)

23 MR. PESCI: The last option of rat poison is not
24 going to work. You know what you've got to do. Make no
25 mistake about it, the clear intent is to have them killed

1 because they are the witnesses that implicate them in that
2 conspiracy, each one of them, to kill TJ.

3 (Playing tape)

4 MR. PESCI: There's the evidence of the conspiracy
5 straight from defendant's own mouth. It's not the State
6 creating this up out of nothing. It is straight from the
7 defendant's own mouth. How much time for a conspiracy? The
8 conspiracy that we're telling you here exists is confirmed by
9 Little Lou himself and he's willing to pay Deangelo thousands
10 of dollars so that a conspiracy doesn't blow backwards on him
11 and on his dad and on Anabel.

12 The wire from the 24th.

13 (Playing tape)

14 MR. PESCI: The days passed, Anabel's got some more
15 time to think about what she should or shouldn't be saying
16 when a guy who could be wired is talking to her. She says,
17 Talk to the guy, not kill him. Why would they send them talk
18 to him at all? He's just an insignificant employee that Mr. H
19 doesn't like and has no effect on the business by running his
20 mouth about the club. Why would they send them to talk to him
21 at all? Let's just assume for the sake of argument that
22 that's true, it was only to talk and Deangelo went so crazy
23 and his friend did. Why did they send him to go talk to an
24 insignificant employee who has no effect? Because he's fired.
25 And you heard his testimony, he can't [inaudible] it any way.

1 (Playing tape)

2 MR. PESCI: I said to go to plan B, not -- I didn't
3 say anything. I had nothing to do with it. I said, Go to
4 plan B. There's no plan B without a plan A. And the plan A
5 comes from the guy at the top. Remember the organizational
6 chart? It goes up to him. Use your common sense, ladies and
7 gentlemen. There's an instruction that at the end of the day
8 you can use your common sense, and when you look at this at
9 the end of the day, you've heard this, that Little Lou himself
10 says to take care of him. You've seen this piece of evidence.
11 Does it make any sense at all to remind himself to keep his
12 mouth shut and that he might be under surveillance as he sat
13 like a bump on a log in a meeting with an attorney? Why does
14 he need to worry about being under surveillance if he did
15 nothing wrong? Why does he have to go run to an attorney?
16 Use your common sense, ladies and gentlemen. Use your common
17 sense and the evidence that establishes that the defendants in
18 this case are guilty as charged.

19 Thank you.

20 THE COURT: All right. Thank you, Mr. Pesci.

21 MR. GENTILE: We need a couple of minutes to set up.

22 THE COURT: Okay. Do we need to take a break?

23 MR. GENTILE: We could take maybe five, seven,
24 eight, ten minutes.

25 THE COURT: All right. Ladies and gentlemen, we

1 need to switch over the equipment for the defense's closing
2 argument, so we'll just take a quick break. We'll give you
3 until 2:55.

4 And once again, you're reminded of the admonishment
5 that, of course, is still in place. And if you'd put your
6 notepads in your chairs and follow Jeff through the double
7 doors.

8 (Court recessed at 2:50 p.m. until 3:12 p.m.)

9 (In the presence of the jury.)

10 THE COURT: All right. Court is now back in
11 session.

12 And, Mr. Gentile, are you now ready to proceed?

13 MR. GENTILE: I am, Your Honor, thank you.

14 THE COURT: All right. Thank you.

15 DEFENDANT HIDALGO, JR'S CLOSING ARGUMENT

16 MR. GENTILE: Every time anybody sits through
17 something this long, there's certain high points, certain
18 things that you remember. I'm sure everybody in this jury box
19 is always going to remember Rontae Zone talking about how weed
20 makes him smarter. That's not something that you're ever
21 going to forget. Okay.

22 But I think that from a standpoint of a theme on how
23 to approach this, we have Mike McGrath to thank. Remember
24 when he said that last week? He said, We didn't believe we
25 had enough the first time so we sent him back in again, and

1 he's talking about Deangelo Carroll. And he was talking about
2 the first day that Deangelo Carroll came back and he tried to
3 make it sound like there was a plan for a murder and Anabel
4 Espindola shut him down, so they sent him back in.

5 But do you remember why they sent him in the first
6 time? They sent him in the first time because they wanted him
7 to get Luis Hidalgo, Jr. on tape. And when you get into the
8 jury room, you're going to get the exhibits. I hope you like
9 looking at photographs because that's mostly what it is. It's
10 mostly photographs. And I'm -- you know that Luis Hidalgo
11 Jr., my client, I call him Louie -- I have a hard time calling
12 him Mr. H. It's been very tough the last several weeks --
13 wasn't charged at all until after Anabel Espindola made her
14 deal, which was about a year ago, a year and a few days.

15 And so what I'd like to do over the next however
16 long, and it's time for you to get the case, you don't need to
17 be listening to the lawyers anymore, but what I'd like to do
18 is I'd like to give you a little structure in terms of the law
19 as it relates to how to approach the evaluation of what you
20 have heard, what you have seen over the last couple of weeks.

21 What wasn't enough? Rontae Zone wasn't enough.
22 They had Rontae Zone at that point in time and no tapes. They
23 had Jayson Taoipu who you didn't -- you don't have and they
24 had no tapes. And they had Deangelo Carroll who, of course,
25 was the person that they sent in with the digital recorder on

1 to get the recordings. So at that time after the second day,
2 after the 24th of May, they had these three people, they had
3 two audio tapes and they still didn't have enough.

4 And so you have to say to yourself, okay, that's
5 what they had then. It took 33 months before they charged
6 Mr. Hidalgo. What do they have now? They have Rontae Zone.
7 And you heard him, and you -- you are going to get an
8 instruction that deals with the reasonable doubt, what is a
9 reasonable doubt, and that instruction is going to tell you
10 how to reach within yourself in terms of the things that
11 happened to you in your life, important things, and use that
12 kind of approach to making a determination, if there's
13 something in evidence, if there's enough proof, okay, proof,
14 not evidence, proof, because it isn't evidence beyond a
15 reasonable doubt, it's proof beyond a reasonable doubt.

16 And they have Anabel Espindola. Now, you know
17 what's really interesting, Mr. Pesci got up here and he made a
18 very good presentation. There's no question about it. He is
19 an experienced trial lawyer and he had a great PowerPoint, but
20 I want to take you back a couple of weeks to when the last
21 time the State stood up in front of you and talked to you in
22 their opening statements, because at that time -- you heard
23 Mr. Pesci say today when he was talking about four people
24 driving out in a van, because that was what he said shows that
25 there was an intention to do substantial bodily harm. He just

1 said that a little while ago. At the opening statement a
2 couple of weeks ago, Mr. DiGiacomo said -- well, first he said
3 write it down on your notepads, which we're going to get the
4 note taking and perfect memory without being assisted by notes
5 sooner or later by this presentation, but he said to you, In
6 addition to what you will learn during the course of the time
7 period -- he was talking about a tape recording, what else
8 he's talking about is how do you know this guy KC that the
9 conspirators -- he's saying that the conspirators are upset
10 that he used someone else as opposed to doing it himself. So
11 there's been a lot of movement, a lot of change in the way the
12 State is approaching this from the time it started until now.

13 You'll remember in the opening statement
14 Mr. DiGiacomo said that there was a direct call involving
15 Deangelo Carroll and Luis Hidalgo, my client. You never saw
16 that call because it didn't happen.

17 So what I want you to do, if you will, is pay close
18 attention to the jury instructions. We're going to go through
19 them now. These instructions have developed over almost 1000
20 years. The approach to a trial is not something that started
21 last week. And I don't think -- I'm not sure, I don't
22 remember if any of you have ever sat before on a criminal
23 case, but the concept of reasonable doubt is sacred. A
24 person -- it is so easy, it is so easy for anyone to be in a
25 situation where they're subject to accusation and it is such a

1 wrong thing to jump to a conclusion, to speculate, to say
2 that, well, something must have happened. Clearly no question
3 about it, if Louie Hidalgo did not pay the money to Deangelo
4 Carroll at some time after midnight on the 20th of May, 2005,
5 he wouldn't be here. Okay.

6 He did something that was foolish and he told you
7 that, but he did it motivated by fear. And so what I want to
8 do now is I want to take you through the instructions in terms
9 of what the law is, in terms of what the State needs to prove,
10 and I'm going to demonstrate to you that there is no question
11 that there's a reasonable doubt with respect to whether Louie
12 Hidalgo ever joined any conspiracy to do any harm to TJ
13 Hadland. And we will demonstrate without a doubt that he is
14 not guilty of the charges in this case.

15 We started up with the theme of timing is everything
16 and we've kind of stayed with that theme throughout here. So
17 let's talk about conspiracy. The Judge has instructed you,
18 and you will get those instructions in writing, that you can't
19 join a conspiracy that has already ended. And if you don't,
20 you're not responsible for its results. Here's the
21 instruction. It's Instruction No. 15. I'm going to read it
22 to you and I know that you can read it yourselves, but I'm not
23 sure if that print is big enough for everybody. There is
24 another monitor up there, of course.

25 A conspiracy begins when two or more persons enter

1 into an agreement for an unlawful purpose. A conspiracy to
2 commit a crime does not end upon the completion of the crime.
3 The conspiracy continues until the coconspirators have
4 successfully gotten away and concealed the crime.

5 Now, you just heard that a little while ago. You
6 just saw it up here because Mr. Pesci had it up here. He only
7 had half of it, though. Okay. Now let's talk about the other
8 half.

9 However, a person cannot become a member of a
10 conspiracy after the object of the conspiracy has been
11 accomplished. In this case, what was the object of the
12 conspiracy? We all know. According to the way it was
13 charged, the object of the conspiracy was killing TJ Hadland.
14 The law is that if he did not agree to the death of TJ Hadland
15 and TJ Hadland died and then he learned about it and did
16 something afterwards, he is not a conspirator. If a person
17 was not a member of the conspiracy before its objective was
18 accomplished but assists the conspirators afterwards, he is an
19 accessory after the fact, not a conspirator.

20 Aiding and abetting, that's another theory that the
21 State has here with respect to trying to hook Louie Hidalgo
22 into liability for the death of TJ Hadland, aiding and
23 abetting.

24 What is it? What must you give to aid and what if
25 the crime has already occurred? Instruction No. 21, and you