

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

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

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.

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.

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.)

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

1 know the Judge read them and it's not -- it's not easy to  
2 the -- listen to a narrative and really grasp everything  
3 that's being said, but you're going to have these back there  
4 on paper and the Judge has instructed you that as a matter of  
5 law one cannot aid and abet a murder after it's been  
6 accomplished.

7           Instruction No. 26 goes directly to the heart of  
8 what this case is about. It says that an accessory after the  
9 fact is one who, after the commission of a felony, harbors,  
10 conceals, or aids such offender with intent that he may avoid  
11 or escape from arrest, trial, conviction or punishment, having  
12 knowledge that such offender has committed a felony or is  
13 liable to arrest. One cannot be both an accessory after the  
14 fact and an aider and abettor or conspirator for the completed  
15 offense.

16           The completed offense was the death of Timothy  
17 Hadland. He died. He was murdered. There's no doubt about  
18 it. That has never been contested here. What else hasn't  
19 been contested? Without a doubt not even the State has even  
20 suggested that Luis Hidalgo was in the van, at the scene, had  
21 a gun, provided a gun, none of that. And that is important  
22 because, as I said in the beginning and I'm saying now, in  
23 this case, ladies and gentlemen, timing is everything for you  
24 to come to the correct decision.

25           Instruction No. 26 says that the defendant is not

1 required to establish that he was an accessory after the fact  
2 beyond a reasonable doubt. Well, that makes sense. We don't  
3 have the burden of proof. I don't have to come in here and  
4 prove to you that he was an accessory after the fact. All  
5 right. It's that simple. And please keep that in mind,  
6 particularly in a case that -- you know, there's a dynamic  
7 that occurs when a defendant testifies. And what that dynamic  
8 is is sometimes people -- you know, maybe you don't like the  
9 way he looks, maybe you don't like certain affects that he's  
10 got. And the key -- the thing to remember, and I'm pleading  
11 that you do that, is that it isn't what he gets up there and  
12 says. It's what the proof that the State has presented that  
13 has to be taken into consideration.

14 But if along with all of the evidence this case it  
15 raises in the minds of the jury a reasonable doubt as to  
16 whether the defendant was only an accessory after the fact,  
17 then in that event it will be your duty, your sworn duty to  
18 return a verdict of not guilty. That is what these  
19 proceedings are about. A defendant is presumed innocent until  
20 the contrary is proved. This presumption places on the State  
21 the burden of proving beyond a reasonable doubt every material  
22 element of the crime charged and the defendant is the person  
23 who committed the offense. And so right now still, this  
24 moment, and when you go into that jury room, at that moment,  
25 and until you make a determination that it's no longer there,

1 he's presumed innocent.

2           The other thing we talked about, and it's kind of  
3 interesting because when I was listening to Mr. Pesci's  
4 presentation, it's still all about the tapes and, worse yet,  
5 his interpretation of what the things on the tapes mean. He  
6 didn't talk much about his witnesses. Let's talk about his  
7 witnesses. Rontae Zone, Anabel Espindola. And although he  
8 didn't stand up on that stand and let us ask him questions and  
9 demonstrate for you what that and only that could do, you  
10 still have statements that people are reporting to you that  
11 they say, if they're remembering it right, and in this  
12 instance, for the most part, that's Rontae Zone and Anabel  
13 Espindola, you're still having to consider some things that  
14 Deangelo Carroll said without us having an opportunity to  
15 confront him and cross-examine him, and so his credibility is  
16 on the line as well.

17           Now, all of these people, all three of them are  
18 accomplices. You're going to see an instruction in a second  
19 and when we get to it, I'll articulate it.

20           Just because Rontae Zone was not prosecuted does not  
21 mean he's not an accomplice. There are lots of reasons, lots  
22 of reasons why law enforcement or the prosecution might choose  
23 to not prosecute somebody. We'll go into those in a second.

24           But an accomplice is defined as one who is liable  
25 for the prosecution for the identical offense charged against

1 the defendant on trial in the cause which the testimony of the  
2 accomplice is given. In this case you have two accomplices.  
3 One has admitted to being an accomplice, that's Anabel  
4 Espindola. One has admitted that he's got to perform or he  
5 might be charged, and that's Rontae Zone. That was the last  
6 series of questions that were asked of him, and maybe you  
7 remember them.

8 To be an accomplice, the person must have aided,  
9 promoted, encouraged or instigated by act or advice the  
10 commission of such offense with knowledge of the unlawful  
11 purpose of the person who committed the offense.

12 Well, what did Zone tell you? He doesn't remember  
13 when. He thinks it might have been on the 18th of May. He  
14 also thinks that it might have been on the 20th of May. If it  
15 was on the 20th of May, it was clearly too late. But on the  
16 18th of May, he says to you that he hears Deangelo talking  
17 about wanting to hurt somebody for snitching. Do you recall  
18 that, snitching? He goes with him. He goes out to the lake.  
19 Now, Deangelo's either the dumbest guy on the planet to be  
20 hauling a bunch of witnesses with him for the purpose of  
21 committing a murder or Zone was in on it or it wasn't supposed  
22 to happen. Those are the only things that make sense. And  
23 we're going to get to each of those.

24 But clearly if he had nothing to do with this  
25 situation prior to going out to the lake and poor Mr. Hadland

1 was killed, what is he doing remaining with Deangelo Carroll  
2 the next day, changing tires on the van? Does that really  
3 sound like somebody's who's not an accomplice?

4 In determining whether an accomplice has been  
5 corroborated -- now, you're going to need to have  
6 corroboration. You have an instruction that talks about the  
7 need, the legal requirement that accomplice testimony be  
8 corroborated.

9 In Nevada we have a statute, and the Judge has  
10 instructed you what that statute requires, but in Nevada  
11 and -- not in every state, but in Nevada, the bottom line is  
12 accomplices are simply not trusted. And as a matter of  
13 legislative enactment and the instruction of the Court, you  
14 have to approach it that way. In determining whether an  
15 accomplice has been corroborated, you have to assume the  
16 testimony of the accomplice has been removed from the case.  
17 All right.

18 Remove Anabel Espindola and Rontae Zone and who said  
19 anything? What's left? The tapes. More importantly, at the  
20 time that he's on the tape, Deangelo Carroll's an accomplice.  
21 So you've got accomplices on the tape. You've got Anabel  
22 Espindola and Deangelo Carroll on the tapes. And then you've  
23 got Anabel Espindola and Rontae Zone in court. And the law  
24 requires you to set that aside --

25 MR. DIGIACOMO: Well, Judge, I'm going to object

1 because the tapes do not have to be set aside by law.

2 THE COURT: It's sustained. It's the testimony of  
3 the witness.

4 MR. GENTILE: You must then determine whether there  
5 is any remaining evidence which tends to connect the defendant  
6 with the commission of the offense. Well, what do we know?  
7 State's got tapes, but Luis Hidalgo's not on them. The State  
8 has fingerprints, but not Luis Hidalgo's. They can't even  
9 place Luis Hidalgo anywhere that comes in contact with this  
10 offense.

11 You know, when Deangelo Carroll walked into  
12 Simone's -- you're going to take this back there with you --  
13 the testimony from Anabel Espindola is that he came through  
14 the front door. The testimony is also that this is  
15 Mr. Hidalgo's office. This is Anabel Espindola's office.  
16 Ironically, you will see that as the exhibits are coded on  
17 this exhibit itself, this is Exhibit C, when Simone's was  
18 searched, take a look at this exhibit. What do you see taken  
19 out of Luis Hidalgo's office? What do you see taken out of  
20 Anabel Espindola's office?

21 But anyhow, he walks into this place, Carroll does,  
22 he's all wired up. He's in there because he told McGrath and  
23 Wildemann that he could get Mr. Hidalgo on tape. You've  
24 listened to those tapes and you're going to listen to them a  
25 lot more. And you can listen to them until the last breath

1 that you take on this planet, and guess what you're never  
2 going to hear? Not only are you not going to hear Luis  
3 Hidalgo's voice, you're not going to hear Deangelo Carroll  
4 trying to talk to Luis Hidalgo. You're not going to hear him  
5 say to Anabel Espindola, Look, I have to talk to Mr. H.  
6 You're not going to hear him approach Mr. H and say to him,  
7 Mr. H, I need to talk to you, so that at least Mr. H would be  
8 heard on the tape saying, No way.

9 Now, what does that tell you? That tells you that  
10 Deangelo Carroll, whose credibility has been, I think, dealt  
11 with in this case, never intended to try to talk to Mr. H.

12 The police have told you that Luis Hidalgo, Jr. was  
13 in Simone's. They had a surveillance set up two days in a  
14 row. He was in Simone's. What would it have taken? If  
15 Carroll really could do it, what would it have taken for him  
16 to at least walk up to Mr. Hidalgo and try to talk to him?

17 And more importantly, why didn't he? He certainly  
18 had no -- no concern about talking to Anabel Espindola. When  
19 you listen to those tapes, you're going to hear on the first  
20 one, just the first tape, the word "I" used by her 57 times.

21 Now, we had -- that thing about pronouns and my  
22 cross-examination of her with respect to pronouns tells you  
23 everything about her state of mind, tells you everything about  
24 her role in this situation. And she is an accomplice. And so  
25 what the law requires is that if there is not such independent

1 evidence which tends to connect the defendant with the  
2 commission of the offense, the testimony of the accomplice is  
3 not corroborated. And the offense we are talking about is the  
4 offense of murder because we concede the accessory after the  
5 fact.

6 And, you know, think about this for a second. He  
7 didn't have to get up there and tell you that. He didn't have  
8 to do that. He could have just sat right over there and they  
9 wouldn't have been able to prove that he knew anything at all  
10 about the payment of the money except through Anabel  
11 Espindola. But he did. He got up on that stand.

12 And we're going to get to Jerry DePalma as compared  
13 to Mr. Oram at some point in time, but let me ask you this:  
14 It looks like every one of you has a notebook. Lots of notes  
15 have been taken in this case. Are you saying that none of you  
16 are as smart as Mr. Oram, none of you can remember only 13 or  
17 14 days later absolutely everything that was said in an  
18 important meeting? This is clearly an important meeting. I  
19 submit to you that Mr. Oram has notes. I submit to you that  
20 if Mr. Oram's notes were produced, it would have impeached  
21 Anabel Espindola. And more importantly, it would have made  
22 him complicit in the subornation of perjury. Because it makes  
23 no sense that somebody would meet with a client 80 or 90 times  
24 in a death penalty case, literally life and death, and handle  
25 200 or 300 or 400 other cases during that time and be so

1 cavalier and arrogant as to think that they would have  
2 independent recollection.

3           You know, you're supposed to approach this case and  
4 your decision making process as you would important affairs in  
5 your own life. Let's say you were going and you needed a  
6 lawyer, and let's say you were smart enough to lawyer shop  
7 instead of just going to the first guy and hiring him. All  
8 right. And let's say during that first meeting you were in  
9 with the lawyer and the lawyer -- you're talking to the lawyer  
10 and the lawyer's making notes. You leave that office and  
11 think, you know, the guy's pretty good, but maybe his price is  
12 a little high.

13           So you go to the next lawyer and the lawyer tells  
14 you, Listen, I'd love to have your case. I could do a great  
15 job, but I don't take notes, and it might take two or three or  
16 four years before this case is decided. Which one would you  
17 hire? Don't you think you might want to be comfortable that  
18 the guy's going to remember who you are and what it was that  
19 you said and when you said it? That was the most ludicrous  
20 testimony you will ever hear in a courtroom, no matter how  
21 many times you come back.

22           The determination of whether someone is an  
23 accomplice is left to the jury. This is the one that I was  
24 telling you about a little while ago. It's your decision. Is  
25 Rontae Zone an accomplice? And if Rontae Zone is an

1 accomplice, whether he's charged or not, he can be an  
2 accomplice. Then you have to set his testimony aside as well.

3 Now, there's lots of other reasons, and we will go  
4 through them, as to why Rontae Zone's testimony is not  
5 something you'd want to rely upon, but if you make a  
6 determination that he had enough time with the rest of that  
7 crew to be considered an accomplice, then you have to ignore  
8 his testimony too, and at that point in time you really have  
9 nothing left.

10 In deciding whether to believe the testimony given  
11 by an accomplice, and this applies to both Rontae, but Anabel  
12 for sure, you should use greater care and caution than you do  
13 when deciding whether to believe the testimony given by an  
14 ordinary witness. I don't think he had any ordinary witnesses  
15 in this case. Okay. But if you -- you did have other  
16 witnesses. Because an accomplice is also subject to  
17 prosecution for the same offense, an accomplice's testimony  
18 may be strongly influenced by the hope or expectation that the  
19 prosecution will reward testimony that supports the  
20 prosecutor's case by granting the accomplice leniency.

21 For this reason, you should view with distrust  
22 accomplice testimony that supports the prosecution's case.  
23 Whether or not the accomplice testimony supports the  
24 prosecution's case, you should bear in mind that the  
25 accomplice's interest in minimizing the seriousness of the

1 crime and the significance of the accomplice's own role in its  
2 commission, Mr. Zone, the fact that the accomplice's  
3 participation in the crime may show the accomplice to be an  
4 untrustworthy person and an accomplice's particular ability  
5 because of inside knowledge about the details of the crime to  
6 construct plausible falsehoods. And boy, oh, boy, did you get  
7 that from Anabel Espindola.

8           In determining the credibility of any witness, an  
9 ordinary witness, you could consider anything which tends in  
10 reason to prove or disprove the truthfulness of his or her  
11 testimony such as his or her conduct, attitude and manner  
12 while testifying, whether the facts testified to by him or her  
13 are inherently believable or unbelievable, like not taking  
14 notes on a death penalty case, his or her ability to -- an  
15 opportunity to hear or see that about which he or she  
16 testified, his or her memory, his or her ability to relate  
17 such matters, whether or not there was any bias, interest, or  
18 other motive for him or her not to tell the truth.

19           Also, any statement previously made by him or her  
20 that was consistent with his or her testimony; or, conversely,  
21 any statement previously made by him or her that was  
22 inconsistent with his or her testimony, any admission by him  
23 or her that he or she did not tell the truth and the  
24 reasonableness of his or her testimony considered in light of  
25 all the evidence in the case.

1 Evidence of good character for truthfulness may be  
2 considered in judging the credibility of a witness, and you  
3 heard lots of that about Luis Hidalgo.

4 Now, let's -- you've seen the instruction. Let's  
5 talk about what the facts in the case were. Rontae Zone. Is  
6 there anything that I just read dealing with what to take into  
7 consideration about judging somebody's credibility that this  
8 guy didn't have? All right. We know that during the time  
9 frame involved he admits to smoking dope all day long. Now,  
10 he says it makes him smarter. You may want to believe that,  
11 but I don't think so. Okay. I don't think you're going to  
12 believe that.

13 You saw his demeanor, his mannerisms on the stand  
14 when he was becoming confrontational with Paola Armeni. You  
15 saw that. That's something you can take into consideration.  
16 You know that this man is concerned that if he doesn't  
17 perform, something bad might happen to him. He's got another  
18 trial to testify in. He's got to testify in Deangelo  
19 Carroll's trial.

20 Rontae Zone testified six times. He was  
21 cross-examined by Ms. Armeni. He went over all kinds of  
22 statements that he made on earlier occasions when he spoke  
23 that were different from what he said in court today. Those  
24 are called prior inconsistent statements. Now, the truth,  
25 generally speaking, even without notes, is something that you

1 can remember. Okay. That's why it's so hard to lie because  
2 you can't remember what you said. Okay. And there's nobody  
3 in this room that hasn't told a lie in their life. We all  
4 know that. So this man is not malignant, he's not inherently  
5 evil. He's also not particularly bright even without smoking  
6 dope.

7 And so I submit to you that -- you know, you've  
8 heard me use the word foundation a lot and I use it in a very  
9 technical sense because it really deals with what you have to  
10 prove before you can prove the next thing, but foundation has  
11 a lot of meanings and in this instance when I use the word  
12 foundation this is not the person who you want to use as your  
13 foundation in coming to a decision that involves Luis Hidalgo,  
14 Jr.'s life. There is no way that you could rely upon it and  
15 rest assured with it.

16 Anabel Espindola, well, we've just gone through the  
17 accomplice instructions. This lady got on the stand and  
18 talked about her involvement in this case, and frankly, if you  
19 listen to it carefully, she didn't do anything. What did she  
20 do? She contends that she didn't know -- that she got a phone  
21 call, that Luis and his son were in the room, that she reports  
22 to Luis that she gets this phone call, that there's this  
23 blowup, but she has no idea what was discussed after that.

24 The next involvement that she gets with this is  
25 she's over at the Palomino and she sees Deangelo Carroll leave

1 the room with Luis Hidalgo, Jr., according to her, so she  
2 doesn't know what they talked about then. And then the next  
3 thing that happens is she's told to go and make a phone call  
4 by saying something like, Go to plan B, all right. And at the  
5 time that she goes and makes this phone call, she doesn't know  
6 anything about that -- that something bad is supposed to  
7 happen to Hadland, but she has this tremendous visceral  
8 sensitive response that somehow tells her -- gives her the  
9 ability to connect those few things and say that a man 54  
10 years old at the time who's never done anything bad to anybody  
11 has suddenly become involved in killing a man or harming a man  
12 that there's no motive for harming. Why is that important?

13 Well, you saw the accomplice instruction about  
14 downplaying your own role and being on the inside so that you  
15 can put together a plausible story because you know what  
16 really happened and so you're trying to make it fit. This  
17 lady lied to you. There's no way that you could take her  
18 testimony in this courtroom, compare it with her statements on  
19 those tapes, and say that she did not lie to you. There's no  
20 way, if you're going to compare what's at risk for somebody  
21 like OB Perez to come in here and perhaps incur the wrath of  
22 the State of Nevada -- let's face it, she's weak. She told  
23 you she's got a case pending. Okay. Now, you're not going to  
24 find somebody to get a statement from someone in jail unless  
25 they're in jail. All right.

1           So I'm going to say to you, you know that she was  
2 not convicted of a felony, ignore the fact that maybe -- well,  
3 not ignore it, don't ignore it. Yeah, she wrote some bad  
4 checks. She's got to pay 900 bucks back. All right. But she  
5 came in here and told you something that was not impeached by  
6 the State. She told you that Anabel conceded that she was the  
7 one who had Deangelo Carroll in motion to receive it. Anabel  
8 was mad, had something wrong -- something that she was mad  
9 at -- the guy who got killed, she never even said who he was.  
10 She said the guy that got killed, Anabel had something against  
11 the guy that got killed, and so did Deangelo Carroll, but she  
12 doesn't know what it was.

13           That woman came in here at risk, at great risk to  
14 herself, and she told you that. Anabel Espindola is at no  
15 risk at all. Anabel Espindola is a puppet, a marionette on  
16 the strand. She is looking for leniency. She is looking for  
17 probation. She wants to go home. If that was not the case,  
18 why did she spend the last year in jail instead of saying to  
19 the Judge, Sentence me now? Why? Can you think of any  
20 legitimate reason for that? The answer is because is she's  
21 got to get help, and if it took another year, it beats the  
22 heck out of the death penalty, which was what was hanging over  
23 her head.

24           And Deangelo Carroll, you know, nobody believes  
25 Deangelo Carroll. Even Rontae Zone doesn't believe Deangelo

1 Carroll. Did you hear anyone come into this courtroom and say  
2 anything good about the guy, anything that would make you want  
3 to trust the things that he is saying? And let's think about  
4 it. You've got Anabel Espindola, an accomplice that you're  
5 supposed to ignore, to start with. You've got Rontae Zone, a  
6 guy who spends his life high, and an accomplice, and they are  
7 saying to you that they heard Deangelo Carroll say a couple of  
8 things.

9 Now, if Carroll is himself inherently untrustworthy  
10 and if they, repeating what he said, are people who you can't  
11 trust, then what do you have? What do you have? You have to  
12 reach to believe any of it.

13 Motive. Motive. We've already gone over Rontae  
14 Zone's motive. We've already gone over Anabel Espindola's  
15 motive. And clearly Deangelo Carroll had a motive at the  
16 time, if he said these things, if he said these things, he had  
17 a motive at the time he said them. And I said if he said them  
18 because you have to rely upon Zone to remember them and  
19 accurately report them because he's the only one that you  
20 heard from in that regard.

21 Bias, there she is. There is no question that this  
22 woman at this point in time not only has a bias in favor of  
23 the State but has a bias against Luis Hidalgo. There is no  
24 question. She came up here. She said she still loves him.  
25 Please save me from someone who loves me as much as she claims

1 to love Mr. Hidalgo. Please don't let that happen to you.  
2 All right. This lady doesn't love him. She doesn't care at  
3 all. And, you know, part of it -- and you heard the  
4 testimony, part of it stems from the fact that she kept  
5 sending women to Louie to help and then was jealous of them or  
6 thought that he was cheating on her. You know, I don't get  
7 it.

8 Prior felony convictions. Well, you know what, in  
9 the big pictures of things, that's not such a big deal. If  
10 that's the only thing that destroys the credibility of  
11 Deangelo Carroll, then we don't have much going. It's just  
12 that simple.

13 And prior inconsistent statements, well, you heard  
14 lots of them about Zone, you heard lots of them from  
15 Espindola. You know, let me ask you something, and this could  
16 really be outcome defining in this case. She stood up there  
17 and she swore that she spent no time with Jerry DePalma and  
18 she swore a second time and a third time, because that's the  
19 way I cross-examined her. None, zero time with Jerry DePalma.  
20 She walked in. He said, You have to wait outside. She went  
21 out in the parking lot and waited there. Okay.

22 Of course, Mr. DePalma came in, Mr. Dibble came in  
23 and they told you about the meeting. And Mr. DePalma who's  
24 obviously not as smart as Chris Oram, brought his notes and  
25 they're in evidence and you're going to have them back there.

1 Now, why is that important? Well, you're going to see when  
2 you go through these notes that there's some things but for  
3 putting Jerry DePalma on the stand and Louie Hidalgo on the  
4 stand would have never come into this case. And some of them  
5 corroborate Anabel Espindola, such as she got a phone call  
6 from Deangelo Carroll. But if you take a look at the big  
7 picture in terms of what's on here, because this was the very  
8 first recorded statement -- and it's really not a statement,  
9 it's his notes, but it's really the very first, the oldest,  
10 the most trustworthy document in this case time line wise  
11 because it was created about 36 hours after Mr. Hadland was  
12 killed. And I encourage you to take a look at this document.

13           You heard Mr. DePalma and Mr. Dibble corroborate  
14 each other in terms of who did the talking. Take what's on  
15 here, compare it to what's being said a few days later on that  
16 first tape by the woman who is saying "I" 57 times, is it so  
17 hard to believe that she spent 90 percent of the time in that  
18 meeting talking? And is it really possible that she has  
19 forgotten that? Is it really believable that she has  
20 forgotten that, to say that it didn't happen at all? You  
21 think that maybe she wanted to forget it? Do you think that  
22 maybe she was taking a shot that DePalma was like Oram and  
23 didn't make notes?

24           It's up to you, but you know what? Common sense.  
25 Mr. Pesci encouraged you to use it, so do I, common sense.

1 Treat them like people that you would meet in your life and  
2 make a decision as to whether you are willing to trust them  
3 because it really does boil down to that when you're  
4 fulfilling the role that you're fulfilling in this case. Are  
5 you willing to trust them in your own life? If you are, you  
6 fulfill your function here. If you're not, you fulfill your  
7 function here. Just make sure that you treat them in terms of  
8 their credibility the way you would treat them if you met them  
9 in your own life knowing what you know about them now.

10 Zone, as I recall when he was talking about Deangelo  
11 Carroll, bringing him into the police, I think his words were,  
12 I didn't know which truth Deangelo wanted me to tell. Okay.  
13 And he talked about the fact that after the event, after  
14 Mr. Hadland was killed, the next day before Deangelo went to  
15 the police -- because if you recall, Deangelo went to the  
16 police on the evening, Friday evening, about 7:00 o'clock,  
17 7:30, something like that. I think Detective Wildemann told  
18 us that the interview ended pretty close to midnight and it  
19 lasted a couple of hours, so it was later in the evening.

20 And Zone told us that that day after the event is  
21 when Deangelo started talking to him about Mr. H and things  
22 like that. So that didn't even come up until the day after  
23 this homicide. He was putting the story in Zone. He saw it  
24 coming.

25 Character for truthfulness. All right. Well,

1 again, I don't want to beat a dead horse. It's that simple.  
2 Everybody who came in here, whoever met this guy who talked  
3 about it, testified about him, said that he's not a  
4 trustworthy person.

5           The opinion of others. Who is -- who is Luis  
6 Hidalgo, Jr., and why is it important? Well, it's important  
7 because we've all heard that a leopard doesn't change its  
8 spots. It's a statement that we've all heard about, okay,  
9 many of us abuse. People don't tend to change. 54-year-old  
10 people don't tend to become murders because somebody talked  
11 bad about their club or about their business. I mean, it just  
12 doesn't happen, all right. It's going to take something a lot  
13 stronger than that. And you sure don't have that in this  
14 case. And so it just doesn't factor in. But who is he?

15           He's a family man, you know that. You know that he  
16 spent a good deal of time as a younger man in law enforcement.  
17 You know that -- you saw him, you heard him testify, you've  
18 had enough time with him on the stand both on direct and  
19 cross-examination to get a sense about the man. Bottom line  
20 to it is that it's unexplainable. It makes no sense that he  
21 would become involved in something like this. It makes no  
22 sense at all.

23           Motive is important and they do not have any kind of  
24 a genuine motive for him to want to do harm to TJ Hadland,  
25 certainly not badmouthing the Palomino Club to cab drivers.

1 And you saw the kind of cash that was in the safe. You see  
2 the size of the club. I mean, this is not a -- it's not a  
3 small club. You know that there's a historic practice of  
4 paying cabs and you heard Kevin Kelly come in, and I think  
5 he's the next slide, actually, and you heard him say to you  
6 that, you know, if you paid a cab driver -- and you heard  
7 Louie say it to you, if you pay the cab drivers, it doesn't  
8 matter, they're going to bring you the customer.

9 And where is a guy like TJ Hadland, who, again --  
10 ladies and gentlemen, there is no reason that man should be  
11 dead. It is a disaster. It is an awful thing that happened  
12 here. All right. And we're not trying to suggest anything to  
13 the contrary, but it would be a more awful thing to convict  
14 Louie Hidalgo, Jr. of his murder or of conspiring. That's not  
15 going to make Mr. Hadland come back to life and it's not going  
16 to make anything better.

17 And the fact of the matter is that Kevin Kelly and  
18 Louie Hidalgo, both of whom had been in that business, Kevin  
19 has a very successful operation, he's not going to come in  
20 here and tell a lie for somebody -- there's no percentage for  
21 him. He's doesn't need to do that. And what did he tell you?  
22 He said, you know, say anything you want to say, as long as  
23 we're paying the cab drivers, they're going to bring us the  
24 business. And so under the circumstances of this case, that  
25 certainly is not a motive. It certainly is not a motive that

1 he says -- if it's true that TJ Hadland was reported --  
2 because let's remember, we don't know that it's true at all  
3 that he did actually did badmouth the club to a cab driver or  
4 that he actually did say something bad about the club to  
5 another club. We don't know that. There's been no proof of  
6 that.

7           The only thing that's in this record about that is  
8 that Deangelo Carroll said it to Louie Hidalgo and Anabel  
9 Espindola claims that she got a phone call from Deangelo  
10 Carroll and reported it to Louie Hidalgo. Now, Louie has told  
11 you that he learned it from Deangelo. Okay. He did not learn  
12 it from Anabel. The notes indicate that there was a phone  
13 call to Anabel, DePalma's notes, but be that as it may, it  
14 really doesn't matter because it's just simply not enough to  
15 get a 54-year-old man who's got a successful business to go  
16 out and want to do harm to this guy. There's just no  
17 percentage in it.

18           Rontae Zone said it in this trial, said it before,  
19 there were lots of cabs there. Mr. McWhorter, when he came in  
20 here to testify, said that there was a queue of cabs. They  
21 were -- they were in line. They had to wait to get the first  
22 pickup. So, you know, it just doesn't make any sense that  
23 that's the reason.

24           You know, I'm glad I'm at this slide right now  
25 because -- I mean, at this slide. That's a safe full of

1 money. Up and down, it had 150 -- \$155,000. All right. And  
2 that's when they searched it. And he testified -- Louie  
3 Hidalgo testified it had 160,000 in it, you know, the week  
4 before.

5           Look, I'm sure that if he could take back the  
6 decision that he made, he might do it. He might want to do  
7 it. But he was confronted with a situation and he was afraid.  
8 And fear can be a very strong motivator and it was here. Was  
9 it right? Well, it depends on how you look at it. It wasn't  
10 legal, it wasn't lawful, but that doesn't mean it wasn't  
11 right. He's got somebody in his office who just returned from  
12 a murder that apparently clearly was not intended by the guy  
13 that's in his office at this moment, and that man is telling  
14 him -- and that's Deangelo Carroll -- that man is telling him  
15 that outside the shooter is in the club outside, that he wants  
16 the money or he's going to harm somebody.

17           Now, you could talk about ideal, you could talk  
18 about what maybe should be done. We all know what should be  
19 done, but that doesn't mean that what was done here amounted  
20 to a conspiracy to commit a murder. And it didn't. He paid  
21 the money.

22           Now, let's talk about a couple of facts that need to  
23 get cleared up. Mr. Pesci showed you this note. It's  
24 Exhibit 200-IA. You'll have it back there with you. This is  
25 the one about, Keep your mouth shut. And he said to you that

1 it was found by the pool table. We all know that it was found  
2 sitting on a magazine that itself was sitting on top of a  
3 stool by a pool table. Let's go back to the Simone's diagram.  
4 Mr. Pesci says that it must have had some connection with  
5 Rontae Zone pulling -- being pulled into the bathroom at  
6 Simone's and being told to shut up. But here's the problem  
7 with that. If that happened, because we're still having to  
8 rely on Rontae Zone's testimony that that happened, if that  
9 happened, it happened on the 20th of May. This note was  
10 seized on the 24th of May. That's when the search took place.  
11 And so there can't be any connection.

12           Mr. Hidalgo stood up here, he testified, and he said  
13 to you, Look, I have no idea how that note got where it was  
14 found. And do you know what? That's very believable because  
15 if there was something sinister about this note, why would he  
16 leave it in a public area? Why would he leave it next to a  
17 pool table on top of a magazine where anybody walking by could  
18 see it? So the timing's off.

19           And there's another little thing that timing is  
20 important about. Timing is everything in this case, and  
21 that's these statements on the 23rd. If you take a look --  
22 you heard Jerry DePalma's testimony that on the 21st Anabel  
23 Espindola told him that Deangelo Carroll came in that night,  
24 the night after the -- the night of the shooting, but  
25 afterwards, and said to her that his home boy shot the guy.

1 All right. You heard Jerry say that. That's in the notes.  
2 Just take a look at it.

3 Anabel, of course, denies that the meeting took  
4 place, denies that she had any discussions with Deangelo  
5 Carroll until the 23rd on tape. But if you listen to this  
6 tape and you read it -- well, you won't read it, but you will  
7 listen to it, it says -- this is Deangelo -- We were going to  
8 call it quits and fucking -- and KC, fucking KC got mad, and I  
9 told you, I told you he went fucking stupid and fucking shot  
10 the dude.

11 When did he tell her? He told her in the office  
12 that night when he came in after the shooting and said, I  
13 fucked up, I fucked up. That's when he told her. He told  
14 her, We went out there and we were getting high and this guy  
15 went off and he shot the dude.

16 And you heard Mr. Hidalgo testify about what Anabel  
17 did. She went, Oh, my God, Oh, my God, oh, my God, you  
18 stupid, stupid man.

19 You heard Mr. Hidalgo testify as to what he did and  
20 you will find that in Mr. DePalma's notes reported to  
21 Mr. DePalma on the 21st of May. So clearly Ms. Espindola  
22 knows a whole lot more and did a whole lot more with respect  
23 to this event than she told you. She lied. And she's lying  
24 because she's trying to make herself look like she didn't do  
25 anything so that she could get probation, and there was only

1 one way for her to buy that, there was only one way for her to  
2 buy that. She had to do something to create a case against  
3 Louie Hidalgo because, ladies and gentlemen, she is the only  
4 thing that's in this case that wasn't in it 45 months ago, she  
5 got arrested.

6 So, you know, I really can't tell you why it  
7 happened. And that's the good news for us because we don't  
8 have that burden. We don't have to go out and prove that not  
9 only is the State's theory wrong with respect to Louie  
10 Hidalgo, but this is what did happen. But you have plenty of  
11 information, plenty of information to take a look at this and  
12 say whatever it was. This wasn't it. And that's really what  
13 you're going to be left with here. It is not our burden.

14 Could it be this? Could it be that when Deangelo  
15 came back when TJ wasn't there anymore after TJ was fired and  
16 Deangelo came back and said to PK Hadley, Don't put me in with  
17 TJ? Could it be that? TJ was still alive at that point in  
18 time. PK told you and the prosecutor pointed it out to you  
19 that PK had caught both of them, both TJ and Deangelo,  
20 skimming money from the cab hustle. All right. So you've got  
21 that in the record. Could that be it? Could it be that  
22 Deangelo wanted to go out there and frighten that man so that  
23 he wouldn't blow the whistle on Deangelo?

24 You know, they're making -- they make a -- and  
25 here's the critical -- the State has made -- they're trying to

1 say on one hand that Louie Hidalgo, Jr. is a vicious murderer,  
2 and on the other hand, they're saying that he needed somehow  
3 Carroll to carry this out for him, to shut up these witnesses  
4 later on, to try to put him into that too, that somehow that  
5 that shows that he knew about the murder and that it was going  
6 to take place -- that it was going to take place that night or  
7 he knew about some harm coming to TJ Hadland? It doesn't  
8 follow.

9           The smart move, if a guy really was a murderer, is  
10 to kill Deangelo Carroll. The other guys don't know him. I  
11 mean, if a guy's a killer, he's going to figure that out. The  
12 only link to him is Deangelo Carroll, if that was a link. So  
13 why would he be messing around with any of this other stuff?  
14 It makes no sense.

15           There's another possibility. Can we make the  
16 transition? I'm going to put a photo up. Okay. How do we  
17 get this to work?

18           You know, while we're waiting for that to get  
19 working, .Paijik Karlson, you may not have caught it, but it's  
20 probably in your notes, but Paijik Karlson said that when TJ  
21 left her at the lake, he had about 50 or \$60 or 40 or \$50, I  
22 forget what she said, but something like that, about 50 bucks  
23 in his pocket. When the police found his body, he had \$6.

24           Now, that in and of itself suggests that perhaps  
25 robbery, if it wasn't the motive for his killing, might have

1    been involved, but I submit to you --

2                               (Pause in proceedings)

3               MR. GENTILE:  -- that photograph, obviously when  
4    poor Mr. Hadland was shot in the head, there was enough force  
5    to knock his glasses not only off of him but at least 10 feet  
6    away from him.  All right.  You will see it.  It will be back  
7    there, at least 10 feet away from him.  Now, if there was that  
8    kind of force to knock his glasses 10 feet away from him, what  
9    the hell is that hat doing on his chest?  Or does that look to  
10   you like somebody placed it there?  And is that not consistent  
11   with a robbery?

12               It's time for you to take this case.  When you take  
13   this case and you follow the instructions and you set aside  
14   the accomplice testimony and now you're looking for something  
15   to connect Louie Hidalgo without the accomplice testimony,  
16   what you're not going to find is any phone calls, you're not  
17   going to find there's any chirps, what you're not going to  
18   find is him on any type, what you're not going to find is any  
19   effort on the part of Deangelo Carroll to actually get him on  
20   tape.  The bottom line is you're not going to find him on  
21   anything except one thing.

22               What you're going to find is that he paid the \$5000,  
23   but who proved that?  He did.  We brought that in.  He got up  
24   there.  He testified.  Jerry DePalma got up there, he  
25   testified.  I hope we didn't make a mistake doing that, but

1 you got the truth, and so I hope you embrace it. I hope you  
2 recognize what the presumption of innocence really is. I hope  
3 you recognize that the burden of proof has to be on the State  
4 for this system to work. And if you do, you will come back  
5 with a not guilty verdict as to the conspiracy and the murder,  
6 flat out not guilty.

7 Thank you.

8 THE COURT: All right. Thank you, Mr. Gentile.

9 Do we need a break before we move into your closing?

10 MR. ADAMS: Yes, ma'am.

11 THE COURT: How long, about, to set up?

12 MR. ADAMS: Five minutes.

13 THE COURT: All right. Ladies and gentlemen, while  
14 we switch over from Mr. Gentile to Mr. Adams, we're going to  
15 take another five-minute break. And once again, the  
16 admonition is still in place, so don't talk about the case or  
17 do anything relating to the case. Notepads in your chairs and  
18 through the double doors. We'll be back at 4:25.

19 (Court recessed at 4:21 p.m. until 4:31 p.m.)

20 (In the presence of the jury.)

21 THE COURT: All right. Court is now back in  
22 session.

23 And, Mr. Adams, are you ready to proceed with your  
24 closing arguments?

25 MR. ADAMS: Yes, ma'am.

1 DEFENDANT HIDALGO, III CLOSING ARGUMENT

2 MR. ADAMS: May it please the Court --

3 Would you like me to wait on Mr. Pesci?

4 MR. DIGIACOMO: No, you can go right ahead. Go  
5 ahead.

6 MR. ADAMS: Sometime right around the night on May  
7 the 19th, early morning on May the 20th, Deangelo Carroll  
8 pulled up to the club with a van full of people. He got out,  
9 sweating, hair -- if you believe PK Hadley, hair ajar like Don  
10 King. He came into the club and he said, I fucked up, PK, I  
11 fucked up. And PK having no idea, no idea what he was talking  
12 about said, Yeah, you did. You didn't get my pickup, yeah,  
13 you did. And what happened at that point? What happened at  
14 that point?

15 PK told us that Deangelo's next words were not the  
16 following, they were not, Where's Little Louie? I fucked up.  
17 We've seen Little Louie in the back.

18 Lou, stand up. I'm going to embarrass you.

19 This is Little Louie. And I told him I was going to  
20 drag him all the way up there, but he told me he would not  
21 come, so this is Little Lou Hidalgo.

22 Stop, please, I know you're nervous. It's okay.

23 In a few minutes, there's not much, if anything,  
24 more I can do for him. And you'll decide what happens with  
25 him. What we know from the evidence and what has been clear

1 and consistent from the beginning of the case, Little Lou  
2 wasn't there, Little Lou didn't pay, and what's clear from the  
3 State's witnesses is Little Lou didn't participate. He didn't  
4 participate. He didn't plan. He didn't participate.

5 Anabel Espindola, star witness, Ms. Probation  
6 Candidate, said there was a disagreement. We've heard the  
7 tape. We'll talk more about the tape later. On the tape you  
8 hear clearly the words of Deangelo Carroll and they mention --  
9 Mr. DiGiacomo mentioned them in the State's opening argument  
10 where he said, You had nothing to do with this, why are you  
11 saying that. We'll talk more about that later. From the  
12 mouth of their evidence, Little Lou had no involvement, no  
13 planning, no participation.

14 MR. DIGIACOMO: Objection, Judge.

15 THE COURT: Well, all right for right now.

16 MR. DIGIACOMO: Thank you.

17 MR. ADAMS: I'd like to ask you to do something that  
18 may be just about impossible to do at 4:30 in the afternoon  
19 and the third week of a trial. And I'm going to ask you after  
20 a long opening statement with lots of slides by the State, I'm  
21 going to ask you to try to let me start with a clean slate.

22 When I was a little kid, for those of you who aren't  
23 the oldest child in your family, you know what it's like to  
24 have an oldest child. For those of you who are the oldest  
25 child, you have no idea what those of us who are younger dealt

1 with. My sister and I would bicker and argue all the time --  
2 MR. DIGIACOMO: Judge, it's --  
3 I apologize, Mr. Adams.  
4 I object.  
5 MR. ADAMS: Judge, I'm making a point.  
6 THE COURT: Right, but try to stay away from  
7 personal reference.  
8 MR. ADAMS: Sure.  
9 There are some families with the oldest children who  
10 argue with the middle child and a parent, a very fair parent,  
11 can come in and say, Wait, wait, wait, let me get to the  
12 bottom of this dispute. And they'll start talking to the  
13 oldest sibling and the oldest sibling will tell them  
14 everything that happened from the oldest sibling's point of  
15 view. Then it gets to the younger kid's turn and they say,  
16 Yeah, but dad, it went like this. And the dad said -- and  
17 they cut you off. And they say, What about this question?  
18 What about this question? And even the fairest parents at  
19 some point figure out that's not really fair to the younger  
20 one. You know, the ones who get to go first get their view  
21 out and so many parents learn they'll wait to the end before  
22 they start assessing and evaluating everything. It's hard to  
23 do that after three works, but I'm going to try to ask you, as  
24 best you can, late in the day to let us start with a clean  
25 slate.

1           My -- well, I don't want to draw an objection. Some  
2 people's grandfather's may have said in the past that the ears  
3 can endure what the seat can absorb. Ears can endure what the  
4 seat can absorb. And I think that's true in the courtroom.  
5 And I know we're late and if you need to stand up some during  
6 the argument, that's fine. I suspect more than one of you in  
7 the back of your mind are going, how long is this guy going to  
8 talk. Are we going to get to start deliberating today. And  
9 what I can promise you is I could do this closing argument in  
10 one minute, in one minute, and if the verdict came out against  
11 me, I would never forget that. If it was one minute and we  
12 got an acquittal, I'd be brilliant, I'd love it. But there's  
13 so much in play here that I'm going to take my time to get  
14 through it. But it could be done in one minute, easily.

15           Anabel Espindola said there was no disagreement.  
16 Deangelo Carroll, you hear his words, cops sent him in to get  
17 evidence. The woman from the jail, she said there was a  
18 confession. The confession from Anabel Espindola did not  
19 involve any involvement in the murder by Little Lou Hidalgo.  
20 Mr. H, he took the stand. He said there was not even a  
21 disagreement. There was no talk at all, no plan. Little Lou  
22 had no involvement in anything. Wasn't in management  
23 decisions. No evidence that he was involved in a murder or a  
24 conspiracy which requires some sort of agreement.

25           As to the solicitation for murder charges, they

1 charged him with two apparently. There's also some comments  
2 about doing something with Kenneth Counts on there. They  
3 didn't charge with him that, but they charged him with two.  
4 There was no evidence that he said anything before Deangelo  
5 Carroll showed up and banged on his door, his room. He made  
6 the rat poison comments. Anabel Espindola, who's known the  
7 guy since he was eight years old, knows him well, said she'd  
8 seen him in all sorts of moods, so she knows when he's serious  
9 and she knows when he's stupid. And how'd she take those  
10 comments? Stupid.

11           What happened after Deangelo Carroll left? Well, he  
12 turned over a bottle of tequila he left with -- or gin that he  
13 left with, but what else happened? Nothing. The next day he  
14 shows back up with a wire. No more conversation. Why didn't  
15 you poison those guys? I told you to get this done. That  
16 didn't exist. You could acquit with a one-minute closing  
17 argument. You have all the evidence you need, but it wouldn't  
18 touch on things like Mr. Pesci raised about the wire. It  
19 wouldn't touch on the Don Dibble note in the room. And I  
20 don't know what all you guys may talk about back in the  
21 deliberation room, so I'm going to take a little more time  
22 with that.

23           As for the wire, Anabel Espindola said, she  
24 testified, When I was in the room, we asked him about a wire.  
25 Nobody frisked him. Little Lou didn't pat him down and do a

1 body search. He pulled his shirt up and said, Ms. Anabel, I'm  
2 not wired. And right after that part on the tape, within 30  
3 seconds of that, Anabel starts talking for the first time.  
4 She's in the room. He pulls his shirt up and is wired.  
5 Little Lou wasn't the bodyguard frisking anybody down.  
6 There's no evidence of that. Mr. Pesci argued something that  
7 there's no evidence to support.

8           The note by down Dibble in there, well, he knew --  
9 he knew May 23rd and knew like May 24th when the search  
10 warrant was done that his father wasn't acting normal. He  
11 knew he was seldom withdrawn. He knew Anabel really well.  
12 She, in that time -- we'll talk about the time line in a  
13 minute -- she lost a day. She thought the meeting with the  
14 lawyer occurred a day earlier and her explanation for that is  
15 that she just doesn't know what happened to the time. Things  
16 were so crazy then.

17           They went to see a lawyer, they got cards and they  
18 came back and said, Don't talk to -- don't talk to Deangelo.  
19 If anything -- and his father said, If anything happens to us,  
20 call these guys. That's not his handwriting on the note.  
21 That's not his handwriting with Don Dibble. It was on his  
22 desk, big smoking gun, I guess.

23           I need to talk with you for a few minutes about some  
24 of the law. And I think that's been done a lot with you  
25 already and I'm just going to talk about a few principles that

1 I hope will help you and will guide you when you're back in  
2 deliberations.

3           The first is the presumption of innocence. We've  
4 all heard that in this country, that you're presumed innocent.  
5 What does that mean? What does it really mean? It doesn't  
6 mean that a bunch of guilty people should get acquitted  
7 because of some principle. What it means is -- and you've  
8 taken an oath to presume Little Lou innocent. You could listen  
9 to every inference, every little fact and you could spin it,  
10 you could twist it, you could turn it in some sinister way  
11 that points to guilt. Nothing anyone can do to stop you at  
12 this point. Or you can take every fact and look at it through  
13 the lens of that presumption of innocence and say, does  
14 this -- must this point towards guilt or is there another way  
15 that this could point. If there's another way that this could  
16 point, then that's what I need to do. I need to look at it as  
17 if this man's really innocent. And if there's multiple  
18 interpretations of a single piece of evidence, it is  
19 consistent with your oath to give the interpretation that lead  
20 you to acquittal.

21           The burden of proof in this case, as in every case,  
22 is not on us, not on us. We don't have to prove a thing. And  
23 maybe we haven't, but we certainly don't have to. The State  
24 has to prove everything. They have to fill in all the holes.  
25 Now, the Judge told you, and you'll get the instruction, you

1 can use your common sense and you absolutely can and we  
2 welcome it. We welcome you especially to use your common  
3 sense when you evaluate what the evidence means on that body  
4 wire on May the 23rd. Please use your common sense on that.  
5 Please use your common sense when you think about the prep  
6 session that McGrath had with Deangelo Carroll before he went  
7 into that room, what Deangelo Carroll was trying to get on  
8 that tape. Please use your common sense for that.

9 But if the government asks you to use your common  
10 sense, please think very carefully. Are they asking me really  
11 to speculate? Are they asking me to fill in holes where maybe  
12 there ought to be real evidence? Because if they're asking me  
13 to do that, my common sense is going to say no. Common sense  
14 can't be used to create evidence where there's gaps and holes  
15 in the government's case.

16 I talked to you a moment ago about you've taken an  
17 oath to follow the law as the Judge gives it and the  
18 presumption of innocence, and I don't mean that to be -- well,  
19 I guess I mean for that to be slightly heavy handed. I don't  
20 mean for that to be too heavy handed. We've taken oaths as  
21 lawyers, the Judge has taken oaths, and there's something that  
22 we really need to search our soul when we think about how we  
23 deal with evidence because you've taken an oath to follow the  
24 law and all of a sudden they gave you 60 principles of law  
25 this afternoon, and I know that's hard to process. You guys

1 have taken your job very seriously. We can all see that. We  
2 thank you for it. You've run through a bunch of pens and a  
3 bunch of pads and you've worked hard with the evidence and we  
4 ask you to continue that for just a few more hours, please.

5 I'd like to talk to you now -- and maybe I'll skip  
6 over some stuff as I -- as I can. I'd like to talk to you now  
7 about the time line in the case and then I want to talk to you  
8 about some things the government promised in their opening  
9 statement that didn't get proved up in court. Then I want to  
10 talk to you about specific charges. But I think to make the  
11 talk about the specific charges to make the most sense and  
12 perhaps be the most concise, it's important to go through a  
13 little bit of the time line. So I've got time line all over  
14 the place.

15 It's starts here with Defense Exhibit CC and it goes  
16 to DD. Then I've got some stuff to add in, which is -- I told  
17 Mr. DiGiacomo at the break, we do that where I'm from and  
18 that's our PowerPoint, so I hope you forgive me. I've got  
19 some things to add in to the time line over here and I suspect  
20 you might not see everything so I may stop and I'll move it  
21 around when we get to that point.

22 Before we get to CC, Defense Exhibit CC, which  
23 starts with a call from PK to Anabel at 3:51 p.m. on the 19th,  
24 the day Mr. Hadland was killed up by the lake, what happened  
25 before then? Well, if we take a step back, we know

1 Mr. Hadland was let go from the club a week or two before.  
2 And there apparently were some suspicions and I'm not trying  
3 to say anything in front of -- his family had been so nice to  
4 us, I'm not saying he was stealing. I don't have -- I don't  
5 know -- I haven't heard any evidence in the courtroom that  
6 that was true. I've heard suggestions of that. But he was  
7 let go. That's clear. He left the club.

8 From the time he left the club up until this day, we  
9 didn't hear a single witness who came in court who said TJ  
10 Hadland was out badmouthing the club, none. Nobody said he  
11 was out at other clubs badmouthing the club, not a single cab  
12 driver came in and said, Boy, TJ came up to us in the cab line  
13 and was saying, boy, never take anybody to the Palomino.  
14 They'll cheat you out of your money you're owed. Nobody was  
15 doing that. So in that time period, there's no motive that we  
16 know of which was created.

17 At noon, and this is important, at noon on May the  
18 19th, what happened? Rontae Zone said -- and you know, I  
19 think -- does Rontae Zone wear a watch? I don't know if he  
20 wears a watch, but he was pretty clear it was early in the  
21 day. He said around noontime. They asked him, Was it  
22 noontime? Yeah. What happened? He said, At noontime  
23 Deangelo Carroll said to me and Jayson, he said, somebody  
24 needs to be dealt with. Needs to be dealt with. Never said  
25 somebody needs to be killed, never said Mr. Hadland needs to

1 be killed. He said somebody needs to be dealt with. How  
2 come? Well, they're snitching, they're ratting, they're  
3 talking. Snitch and rat and talk. It doesn't -- I don't know  
4 what that means. It doesn't sound like somebody is griping,  
5 bitching, and moaning about their old employer. It sounds  
6 like something different, but we don't know.

7           Then he said Deangelo said something about bats and  
8 bags, bats and bags. We know from the evidence no bat was  
9 ever grabbed, no bag was ever gathered up. There was nothing  
10 else about that at all. But they're saying sometime around  
11 this time, bats and bags.

12           In cross-examination of Mr. Zone -- because early in  
13 direct he said, yeah, and he said Little Louie said that, to  
14 bring the bats and bags. In cross-examination, he said  
15 Mr. Zone -- and he ended up talking with me, talking with you  
16 all and he said -- or I'm sorry, talking with you in the  
17 plural sense, he said that Little Lou's name in relation to  
18 Mr. Hadland didn't even get mentioned until the 20th, until  
19 the 20th, the same day Deangelo was coming up with the story  
20 that he was going to work on in case the cops tracked him  
21 down. Do you remember that? I mean, he said that pretty  
22 clearly.

23           He said bats and bags was said, noontime, noontime  
24 on the 19th Little Lou's name wasn't put by Deangelo, put with  
25 Little Lou until the next day. That's going to be important,

1 I think, for you in a second.

2 Let's go back over here to some phone records.

3 Deangelo Carroll called Ms. Anabel Espindola at 4:58 p.m. She  
4 also -- he also called her again at 7:27 p.m. 70-second call  
5 and a 225-second call. Now, we've got a bunch of calls down  
6 here, one with Kenneth Counts' phone to her. Her testimony  
7 is, the best she remembers it, she talked to Deangelo twice on  
8 the 19th, one earlier that had to deal with Mr. Hadland and  
9 one later where she said, Go to plan B, get back here, twice.

10 She was pressed on that, I think, by every lawyer in  
11 the building and she said, No, I only spoke to him twice.

12 Well, I don't know that it's super important which one of  
13 these is supposedly Mr. Hadland's badmouthing the club, but it  
14 does make a bit of a difference because there's two and a half  
15 hours in between. This one's a longer call which suggests  
16 maybe they talked more. This one is -- 70 is shorter. It  
17 really looks as if -- because these certainly would be longer  
18 than just leaving a message. This certainly looks as if they  
19 talked twice early in the night. Maybe Anabel was wrong on  
20 that fact.

21 At any rate, the government's theory is that one of  
22 these two calls, probably the 4:58 one, was -- Hadland says --  
23 Hadland's badmouthing the club, Ms. Anabel, what do you want  
24 me to do? Why is that important? It's important because at  
25 noontime Deangelo -- according to Rontae, Deangelo was already

1 coming up with a plan. He was already thinking ahead about,  
2 got to do something with TJ. Why? Why? Their theory, and  
3 they've maintained it, is that this call set it all in motion  
4 and Little Lou being a hot-headed puck yapped at his old man,  
5 yapped at him, ticked him off, made him so mad that Mr. H  
6 would order the death of somebody. That's their theory. And  
7 that somehow they got back together later and talked, made up  
8 and said, Can you call Deangelo for me and get him over here?  
9 Maybe ask him to bring some bats and bags. Of course, there's  
10 no evidence of that.

11 Anabel says that there was an argument and then  
12 Anabel says, I didn't see -- I was with Mr. H the rest of the  
13 night, we were never apart, and Little Lou was nowhere around.  
14 So where were they supposed to have this conversation about,  
15 Call Deangelo, get him to come over to the club with bats and  
16 bags? I think that's a pretty good question, a pretty fair  
17 question, and it's a question that has not been answered by  
18 any of the evidence presented by the State.

19 So we've got these calls. Little Lou calls at  
20 7:42 p.m. There was a suggestion that was a call about bats  
21 and bags, but Mr. Zone was really helpful on that point.  
22 Mr. Zone testified on cross-examination again that, well,  
23 gosh, sometime before we went out that night Deangelo said  
24 that Little Lou called from work and said they talked about a  
25 pickup and he had to go to work, not about bats and bags.

1 That fits perfectly, perfectly with the 9:00, 9:30 pickup to  
2 get PK's McNealis Construction group into the club and the  
3 limo. Little Lou was responsible for the pickups and he's got  
4 a call to Deangelo's home at 7:42. That's their only call all  
5 night.

6 And Rontae says Deangelo said he had to go by the  
7 club because he got called by Little Lou to come to work, not  
8 bats and bags. And that's it. It's one minute -- or one  
9 minute and 18/10ths of another minute, so somewhere around one  
10 minute and ten seconds or so, plenty of time to say, Yo,  
11 you've got this pickup. Where are you? Are you coming in  
12 tonight? Shouldn't you already be at the club? Is the limo  
13 clean? You know, PK's going to be really hot tempered if this  
14 thing gets screwed up again. Plenty of time for that  
15 conversation.

16 And I'm going to -- since Little Lou is not involved  
17 in any more of these calls -- and I didn't put every call in  
18 the record. You'll have the full records. I didn't put every  
19 call, but I put every one that seemed important for these  
20 issues, so if there's one missing, please understand that I  
21 was trying to do it in a way that would be helpful, the most  
22 helpful for you in analyzing the evidence.

23 Anabel tries Deangelo at 8:13. Anabel tries  
24 Deangelo at 8:15, 6-second call. Anabel talks to PK at 8:42.  
25 You can bet your bottom dollar what that one was about. He's

1 going to screw this up. I've got those guys waiting. This is  
2 going to make me look bad.

3 Deangelo chirps Timothy Hadland at 10:39. Now, at  
4 this point, the evidence certainly suggests Little Lou wasn't  
5 involved in any planning, but there's a lot of communication  
6 between Anabel and a lot with Deangelo, and whatever Deangelo  
7 was starting at noontime seemed to be coming true, coming to  
8 fruition at 10:39 because within about an hour Mr. Hadland lay  
9 shot and left for dead up by the lake.

10 There's a bunch more chirps, 25 seconds, 8 seconds,  
11 12 seconds, 7.6 seconds to Mr. Hadland. DC chirps him again  
12 at 10:54, 21 seconds, very consistent with Paijik Karlson  
13 saying he was called about meeting up for some marijuana, very  
14 consistent with Rontae saying he said he had a blunt for him.  
15 It's very consistent testimony.

16 Let me try this, let me try putting these together  
17 and see if this -- and if you really can't see, just sort of  
18 waive and I'll bring it over. Then we get to around  
19 11:00 o'clock and it really picks up. Anabel chirps Deangelo.  
20 She chirps him again for 13 seconds at 11:08.

21 Then we get to Kenneth Counts. Kenneth Counts' cell  
22 phone calls Anabel Espindola. Did you hear any evidence about  
23 what that was about? I did not and I was listening very  
24 closely for that. The suggestion is that somehow Deangelo's  
25 little chirper was out of range. He must have turned while

1 driving the van and said, Yo, let me borrow your phone. I  
2 need to call Anabel to talk about your envelope in case  
3 something happens out here. That's great, but Kenneth Counts  
4 didn't testify. Deangelo did not testify. Rontae Zone did  
5 testify.

6 Rontae Zone said nothing was passed between Kenneth  
7 Counts and anyone else in that van, anyone else except the  
8 blunt. That was the only thing that was being passed around.  
9 He was sitting right there. There was never a conversation  
10 about changing over. What's that about? Well, maybe Deangelo  
11 borrowed his cell phone and called Anabel. Maybe Kenneth  
12 Counts called Anabel to talk about what the payout would be if  
13 he went through with this.

14 She tried him back at 11:12:58. Deangelo chirps  
15 Mr. Hadland at 11:13 for 13.6 seconds. Very consistent with  
16 what Rontae was saying about, Hey, we're driving around out  
17 here, we can't see you, keep having to go back and get more  
18 cell service. And then we don't -- we don't hear from  
19 Mr. Hadland again after this 11:13 call.

20 Anabel chirps Deangelo at 11:37. Deangelo calls her  
21 right back, 21 seconds. Ms. Anabel, it's done. The first  
22 gentleman who drove by, Ishmael Madrid, I believe was his  
23 name, one of the very first witnesses -- it seemed like so  
24 long ago now -- Mr. Madrid called in 9-1-1 around 11:44.  
25 Sometime during this time, a sweating, a cocaine ingested --

1 and cocaine doesn't make you kill somebody, but we know  
2 Deangelo Carroll told his wife he did cocaine that night. He  
3 was driving Anabel's van back to the Palomino to get paid. He  
4 wasn't asking for Little Lou Hidalgo, asking for Anabel.

5           5/20, May 20th, there's a chirp at 12:10. Those  
6 chirpers are used -- the evidence was they're used so much,  
7 you know, it's hard to know if that means they're still coming  
8 to the club or already there. I don't know that that helps us  
9 tighten down the time line any, but we know that Anabel was  
10 gambling about 2:37, I think, was the testimony at the MGM.  
11 She chirps Deangelo for 7.4 seconds at 2:53 a.m. right around  
12 the time the carwash would have happened, clean that van, try  
13 to get rid of whatever evidence might be there.

14           Anabel did testify she never talked to Deangelo  
15 again after he left the office until he showed up on the  
16 23rd with a wire. I believe that was her testimony. That's  
17 my memory of it. She apparently was contradicted by the phone  
18 records. Unless somebody else had her phone, running around  
19 with her phone, she's chirping Deangelo at these calls which  
20 are in the p.m. I think this one was in the a.m. I may have  
21 mislabeled that. At any rate, there were these four calls,  
22 which combined, aren't really long calls, but they were on the  
23 day of the 20th.

24           A couple of things, backing up to the 19th, that  
25 apparently I skipped over. We had testimony in here and the

1 time line's not real clear, sometime around 8:00 o'clock at  
2 night, 8:00 to 9:00, Mr. Hidalgo was there. He was  
3 reprimanding Arial because he had reports about the van being  
4 trashed and reeking of smoke. PK was upset about his clients,  
5 and that was sometime in that same ballpark, 8:00, 9:00,  
6 10:00 o'clock at night. And we learned later from the tape --  
7 or the CD from the jail call that sometime Deangelo went home  
8 or went somewhere and did some cocaine.

9           Early morning hours, 12:00, 12:30, 1:00 o'clock,  
10 Deangelo comes into the club, again, not looking for Little  
11 Lou. He gets five grand. He leaves the club. We don't know  
12 how he splits it up with Kenneth Counts. There was some  
13 testimony about Kenneth Counts needing some money found --  
14 when they found him in the attic, they went back and flipped  
15 his house pretty good and they got some money back, but it  
16 wasn't \$5,000. And I went through my notes and couldn't find  
17 it. I think it was 2800, but I'm not positive on that, so  
18 please trust your own memory. But there's some unaccounted  
19 for money that Kenneth Counts could have had or Deangelo could  
20 have taken a cut before he gave the rest out.

21           They go to the carwash and then they go home and go  
22 to sleep. The next morning on the 20th they get up and handle  
23 the tires. And it's interesting, they don't go to Simone's  
24 where Mr. H would see them. They get a hundred-dollar bill  
25 and they go somewhere else to cut the tires and try to get rid

1 of the evidence. And they go to the 7-Eleven, they go to the  
2 I-Hop where Deangelo's picking up breakfast for everybody.  
3 Then he goes to the barbershop where -- I don't know if he  
4 looked like Don King before or not. I've seen Don King once.  
5 He's a very distinctive looking man, but certainly when  
6 Deangelo Carroll left the barbershop, he would not be mistaken  
7 for Don King anymore. So we've seen his booking photo. He  
8 was pretty cut.

9           Sometime during this late morning, early afternoon  
10 of the 20th, Deangelo started coming up with a story, and we  
11 heard that from Rontae. Rontae said, Yeah, he was telling me,  
12 boy, here's what we tell the cops if the cops come. Here's  
13 what we've got. He was scared and he was trying to create  
14 some cover so he could not get arrested, wouldn't get put in  
15 jail. That, that day, is when Little Lou was mentioned for  
16 the first time.

17           Later that night the police come, they get Deangelo.  
18 Apparently, there were multiple stories Deangelo told them.  
19 They later went at 1:00 a.m. on the 21st and picked up Rontae.  
20 Rontae came in and he said very candidly, I lied to them. I  
21 told them some lies. Deangelo told me to tell the truth. I  
22 didn't know, you know, kind of -- I didn't know which truth he  
23 was talking about. So he started off telling some lies and he  
24 said the detective scared him pretty good. And I said, They  
25 cussed you? You know, I don't want to say it. We've heard

1 enough of that here. He said, Yeah, I mean, they did. They  
2 cussed me and they did this, but I told them what I knew, as  
3 best he knew it. As he said, he never spoke to Little Lou.  
4 He had no firsthand knowledge. Any information linked back to  
5 Little Lou, he said, came through Deangelo Carroll.

6 And I said, Rontae, how long have you known him?  
7 Five or six -- well, I said, Mr. Zone, how long had you known  
8 him? Five or six years. Know him pretty well? Yes. Living  
9 with him, he and his -- the mother -- I can't remember her  
10 name, Christa, maybe, the woman who was going to give birth to  
11 his child, they moved in to Deangelo and his wife's house.  
12 They were that close of friends. They were sharing an  
13 apartment and they were spending that time together. And they  
14 were coming up with a story on where to shift blame.

15 On the 21st Mr. Hidalgo and Anabel go to meet the  
16 lawyer, Jerry DePalma. Mr. Don Dibble was there. Little Lou  
17 was not there. Mr. Dibble testified he was shocked when he  
18 found out a few days later Little Lou had been arrested. Had  
19 no idea. It wasn't the subject of anything. The talk was  
20 about paying money and how they messed up by paying money in  
21 this fearful situation. Anabel did 90 percent of the talking.

22 Well, Anabel doesn't remember it that way. And  
23 there's certainly been a suggestion out there that she's lying  
24 through her teeth to you. It could be, it could be that she  
25 was still -- that it was so confusing, I mean, really

1 confusing for her during this time. I suspect nobody's  
2 sleeping very well after they find out a van they own is at a  
3 murder scene that they didn't know was going to happen. And  
4 there's a panic and there's fear and there's a lot of stuff  
5 going on that I've never dealt with in my life. I don't know  
6 how I'd react. I'd like to think I'd pick up the phone and  
7 call the police. That's what I'd like to think. I don't know  
8 what I'd do.

9 But what they did is they went to the lawyer on the  
10 21st to try to say, Are we going to have a problem with our  
11 license? We could have problems -- this Deangelo went off.  
12 These people were in the van. We paid money. What are we  
13 going to do? But the important thing for me, the important  
14 thing for John and Little Lou is that he was not there. He  
15 was not part of the top management circle of the club. You  
16 know, he's the son, the young son. He's got a good job at  
17 club, but he's not there getting lawyered up or getting the  
18 advice on, How do we protect the license, what do we do as  
19 damage control. He's just -- he wasn't that -- in that  
20 echelon of management.

21 5/22, Mr. Gentile had come back into town.  
22 Mr. Hidalgo's lawyer, either opponent or his personal lawyer,  
23 depending on which case it was, I guess, and they came and met  
24 and again Little Lou wasn't brought to that meeting. And  
25 again, nobody knew there was a need to bring him.

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LUIS A. HIDALGO, III,  
Appellant,  
v.  
THE STATE OF NEVADA,  
Respondent.

**RESPONDENT'S APPENDIX**  
**VOL. III**

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2 I hereby certify and affirm that this document was filed electronically with the Nevada  
3 Supreme Court on July 12, 2011. Electronic Service of the foregoing document shall be made in  
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21 Employee, District Attorney's Office

22  
23  
24  
25  
26 NAB/Patrick Burns/ed  
27  
28

1 time. If the expert witness who clearly has the training here, I mean, we would  
2 hope so. She's training Nevadans in this area; okay? If an expert witness doesn't  
3 have a publication on the evaluation of Anabel Espindola's surreptitious  
4 statements on tape, then a prosecutor will say that, you know, she doesn't have  
5 expertise in this area. She clearly has expertise in this area. She has enough to  
6 be teaching at UNR in the department. She's -- I can say to you safely, at least in  
7 terms of our current university system, she is the ranking person in that area.

8           John Bersfeld [phonetic] who has testified as an expert for me in other  
9 cases, one in front of Judge Vega a few years ago, the Marshall Silver [phonetic]  
10 case, actually also referred us to her. John is Professor Emeritus and former chair  
11 of the English Department at UNLV. He's a pope and he was qualified as an  
12 expert witness in semantics by Judge Vega. So, you know -- I understand that it's  
13 a discretionary call on your part but I would move for admission of State's ask you  
14 to recognize that it will helpful to the jury in this case.

15           THE COURT: All right.

16           First of all, if she's allowed to testify, her testimony would be so limited  
17 as to just being pretty generic, like, you know, the use of this pronoun connotes  
18 this and the use of that connotes that. And that would be pretty much it. And then  
19 you would be responsible in argument to go through -- because the other evidence  
20 would speak for itself: Okay. You heard from the expert that I means, you know,  
21 this and we means that and she means this and he means that and on this tape  
22 you hear this, and on that grand jury testimony, she acknowledged that she  
23 testified in this way or that way, or something like that. So, I don't know how  
24 helpful it would be. If you were allowed to do, it would be limited just to sort of  
25 general concepts of the use of pronouns in the English language and everything

1 beyond that would be the subject of you having to link it together in your argument.

2 MR. GENTILE: What about the common ground aspect? I mean, the fact  
3 of --

4 MS. DIGIACOMO: She's going to --

5 MR. GENTILE: The part that deals with what is not being said, being  
6 indicative of having earlier communications --

7 THE COURT: Right; I mean, in terms of that --

8 MR. GENTILE: -- but we simply don't know what they were.

9 THE COURT: -- I would consider that general concept in linguistics  
10 although I'm not saying you're going to do it. I mean, first of all, looking at the  
11 publications -- and I recognize people may publish and have an interest in one  
12 area, one subset of a general topic, but that does not mean they don't have  
13 expertise in another area. I would note her publications all indicate she seems to  
14 be an expert in vowels and vowel sounds, particularly with an emphasis in the  
15 South. I mean, I think that that's pretty clear. Beyond that, you know -- but she  
16 may have some expertise in this regard as well. Like I said, I recognize that  
17 people may have an area of interest but still have expertise in other areas.

18 You know, I'm just not sure that this is really an accepted science. I  
19 mean, linguistics is the study of changes in language and things like that I think we  
20 can all say is an accepted science. But whether or not this sort of subset of  
21 linguistics that people will say we when they mean this and they'll say I when we  
22 mean that and they'll say he or she when they mean this other thing, I don't know  
23 how accepted that is in the field. And unfortunately her publications, I think the  
24 relevancy of her publications is, yes, she has been peer reviewed or published in  
25 peer review journals but it's not anything dealing with this topic. It's dealing with

1 more conventional, you know, sounds in linguistics as the study of sound as  
2 opposed to the study of words themselves or the use of words or the use of  
3 pronouns. And I think just sort of that just appears to be what her -- I'll think about  
4 it further. Those are my sort of preliminary thoughts on this. Certainly, you know,  
5 she wouldn't be able to say this is credible or she's trying to minimize her  
6 responsibility in this version and maximize responsibility in that version, nothing  
7 like that, if she's allowed to testify.

8 But I do have some serious reservations on the accepted nature of  
9 this and unfortunately that's why I asked some of the preliminary questions I  
10 asked. Unfortunately, from looking at Dr. Shuy's testimony in other cases, from  
11 looking at her publications, I'm unable to decipher two things: Number one, I'm  
12 unable to decipher whether or not this is an accepted subset of linguistics  
13 accepted within the linguistics community. I can't discern that. And, number two:  
14 I can't discern whether or not this type of linguistic testimony, meaning testimony  
15 relating to the choice and use of certain pronouns has ever been allowed in either  
16 in a civil or a criminal proceeding.

17 So, those are my two, I think, substantial reservations with allowing  
18 the use of this testimony. I mean, obviously, again, linguistics is a big field. There  
19 could be testimony relating to language differences, other things that may be  
20 linguistic testimony. But, again, I cannot decipher from this exactly what area was  
21 involved in these other cases.

22 MR. GENTILE: Your Honor, I would call --

23 THE COURT: Those are my reservations.

24 MR. GENTILE: -- I would call the Court's attention to an exhibit that is  
25 attached to our opposition to the State's motion.

1 THE COURT: All right. And I'm looking at the opposition right now which --  
2 MR. GENTILE: Right; it's Exhibit 6 --  
3 THE COURT: Okay.  
4 MR. GENTILE: -- page four and it is --  
5 THE COURT: And this is her interview?  
6 MR. GENTILE: No, no, Exhibit 6 --  
7 THE COURT: Oh.  
8 MR. GENTILE: -- is not her interview.  
9 THE COURT: Oh, this is her --  
10 MR. GENTILE: Exhibit 6, page four, it's an excerpt representing foreign  
11 nationals and it also shows cultural issues in criminal defense on the third page.  
12 And then the fourth page deals with immigration practice and the National Police  
13 Accountability Project. And in the very middle of that page --  
14 THE COURT: Where it's talking about discourse analysis.  
15 MR. GENTILE: It says: Linguistics is the scientific study of language and its  
16 systems has been accepted by the National Science Foundation as a legitimate  
17 area of scientific research. And it goes on to address, I think, the issue that you're  
18 just bringing up. So, I mean, it has been recognized and it is subject to peer  
19 review. There are people that are involved in it. I mean, I'm not singling out this  
20 one paragraph. We have other materials as well.  
21 THE COURT: No, I know -- like I said, I recognize he's testified in other  
22 cases. Obviously, I'm going to assume that it was in the area of linguistics.  
23 MR. GENTILE: It was.  
24 THE COURT: Right; I mean, obviously --  
25 MR. GENTILE: In fact, it was this Court's analysis because it was -- at least

1 in my experience because it always listening to tape recordings and talking about  
2 the dynamics of the conversation. I mean, he might have some other things in  
3 cases that I'm -- in the many, many, many cases that I wasn't involved with but at  
4 least in mine, it was always every one of 'em dealt with listening to tape recordings  
5 and talking about the dynamics of the conversation from the stand point of a  
6 linguist.

7 MR. DIGIACOMO: Judge, if you read --

8 THE COURT: Yeah, I --

9 MR. DIGIACOMO: -- the whole page 'cause it talks about the majority of  
10 her cases have to do with non-native, English speaking, and when you read the  
11 cases, that's exactly right. When two people are speaking English that we're all  
12 speaking in the courtroom, it's just not a reliable witness.

13 THE COURT: All right. Well I'll consider it further, but those are my initial  
14 impressions. So -- all right. Moving right along. The motion to suppress.

15 MR. GENTILE: To supplement the motion to suppress with oral argument  
16 seems to be kind of waste of time. I think we really set it out. This is a general  
17 warrant. And I don't we need to say -- I don't think I need to submit anything in  
18 addition to that in terms of oral argument. I'm not suggesting to you that the other  
19 issues aren't important. The Family Court issue is a interesting one; okay?

20 THE COURT: Yeah -- and, I mean --

21 MR. GENTILE: And I don't expect you to grant this motion on that issue. I  
22 think it would be presumptuous of you, candidly; okay? But if I don't raise it front of  
23 you --

24 THE COURT: Right; you can't raise it again.

25 MR. GENTILE: Then I can't raise it in the Supreme Court.

1 THE COURT: Right; and, I mean, I think, you know, we're all District Court  
2 judges and a Family Court judge can come and sit over here and hear -- I mean,  
3 like Art Ritchie being a perfect example. He was elected to the Family Court  
4 bench. Now he's the Chief Judge. So, he's hearing other matters that typically are  
5 heard, you know, extradition matters --

6 MR. GENTILE: Well --

7 THE COURT: -- other things. So, I think I recognize this as a separate  
8 issue --

9 MR. GENTILE: Right.

10 THE COURT: -- but I think that they do have jurisdiction --

11 MR. GENTILE: And you know that --

12 THE COURT: -- and the authority to sign warrants. So --

13 MR. GENTILE: And just because things are always -- how do we put it?

14 THE COURT: Well it's that argument --

15 MR. GENTILE: Just because we do things that way --

16 THE COURT: Doesn't mean it's right.

17 MR. GENTILE: -- doesn't mean it's right. And, so, we raised the issue. I  
18 think it's a novel issue, I think it's an interesting issue. Could turn out to be an  
19 important issue someday in some case. But it's certainly not our main issue. Our  
20 main issue is that this is a general warrant. It left entirely too much to the  
21 discretion of the searching officers. And I think that -- let me put it to you this way,  
22 something that we cannot escape.

23 There are judges who are frequently called upon to review probable  
24 cause affidavits and there are some who are not. Some judges, when they look  
25 through an affidavit, will say for the person submitting the affidavit: You know we

1 have enough. Go back and get this. Or maybe they won't even tell 'em what to go  
2 back and get; okay? Although I don't see anything wrong with that. You know,  
3 they make an argument that you don't even have to be a lawyer to issue a search  
4 warrant in Nevada. Well that may be true but that does not mean that you're going  
5 to do it the right way. In this instance, this warrant is a general warrant. It is  
6 entirely overbroad in terms of the empowerment of the -- that it leads the officer to  
7 believe that they have. And, so not only does it violate the Fourth Amendment but  
8 it cannot be saved by the good faith exception.

9 THE COURT: Mr. DiGiacomo.

10 Mr. DiGIACOMO: Yes, Judge, I would almost submit it except I want to  
11 address a couple things he said.

12 Each and every one of the items on here are specifically tied to a  
13 specific crime which is the requirement. The suggestion by Mr. Gentile that there  
14 could have been a more specific definition, I didn't see a suggestion, first of all,  
15 what that specific suggestion would be. Contained in the itemized list in the  
16 warrant or in the affidavit for probable cause was probable cause for each one of  
17 those items that are listed.

18 And, finally, as to the good faith analysis, when you do a good faith  
19 analysis -- and I think the U.S. Supreme Court came out with a case on Monday  
20 where they said: Look, if the exclusionary rule is used to prevent misconduct by  
21 the police if they're reasonably relying upon the actions of the judge. How many  
22 warrants, Judge, have you personally signed that has the same general language  
23 that is contained here in this affidavit to say that the --

24 THE COURT: Well I'm sure Mr. Gentile tells you I'm one of those judges  
25 that just signs everything.

1 MR. DiGIACOMO: Right. The suggestion that somehow the police should  
2 be held liable because a judge did not tell them: Hey, this needs to be more  
3 specific when the items were clearly specific. And then on top of that, they  
4 basically said: We want everything out. They don't specifically list: Hey, where  
5 did the officers go too broad? What did they search that they shouldn't have? I  
6 would note --

7 THE COURT: So, they're saying it's a bad warrant. They're not saying that  
8 the search exceeded the scope of the warrant.

9 MR. DiGIACOMO: Correct.

10 THE COURT: They're saying that the warrant itself is flawed because it's  
11 not with enough specificity. The -- and what you're saying is: Well what else do  
12 they want? I mean, I'll just note one thing. I mean, they don't know what the  
13 evidence is going to be. So, obviously if you're looking for a gun, you know, that's  
14 the murder weapon. You can put in: I'm looking for this type of a firearm; I'm  
15 looking for a handgun. If you know what clothes the assailant was wearing  
16 because it's on the videotape, you can specifically say: I'm looking for, you know,  
17 jeans and sneakers or whatever it is they were wearing. But when you're looking  
18 for sort of -- well maybe there's a letter here or maybe there's a photo here or  
19 maybe there's something in this computer that indicates what this relationship was  
20 with Timothy Hadland or Kenneth Counts or DeAngelo Carroll. I mean, they could  
21 have said: Information in the computer linking the owner of the Palomino Club  
22 with as opposed to generally --

23 MR. DiGIACOMO: Well just so the Court's aware --

24 THE COURT: But they don't know what's in there. They don't know. And,  
25 so, I'm kind of agreeing with you and disagreeing with you at the same time.

1 MS. DiGIACOMO: The only thing I can say is the computers -- the  
2 computers weren't searched under this warrant, they were seized under this  
3 warrant. There is a separate warrant --

4 THE COURT: And then they did the subsequent warrant saying what  
5 they're looking for.

6 MR. DiGIACOMO: -- to search the computer which there has never been a  
7 motion as it relates to that warrant. This warrant is -- they didn't have the right to  
8 seize it. And, obviously, there's probable cause to believe that because these  
9 people are at two different places and communicating in two different places, that  
10 there may be information contained on those computers. The item like videotape,  
11 there's a camera that is -- it's a business and they're looking for establishment of  
12 videotapes related to the crime and the people that were associated at the crime. I  
13 don't know specifically as it relates to the paperwork if there's a listing of probably  
14 cause in there that Mr. -- Little Lou was writing things down and later would burn  
15 some of those pieces of paper, and that they were looking for that paperwork, and  
16 then items of possession.

17 Each and every item that's listed in the warrant is specifically tied to  
18 the probable cause in the case and I'll submit it.

19 THE COURT: Anything else, Mr. Gentile?

20 MR. GENTILE: No, Your Honor.

21 THE COURT: All right.

22 I don't think it's so general as to be a general warrant. Some of these  
23 things maybe they could have been a little more specific to say what they were  
24 looking for. But, again, you know, I gave the example of things where you know  
25 specifically; when you think maybe's there's a photo and maybe there's a letter;

1 maybe there's some writing. You don't know if these things are in existence. That  
2 doesn't mean you can't look for them.

3 And, so, to me that is more what they're doing here than looking for,  
4 you know, like going through clothing when they know what the assailant was  
5 wearing because again, these are things that they don't know. Is there a letter? Is  
6 a there a note? Is there something? They don't know. And, so, you know, I'm at  
7 a little bit of a loss to figure out how much more specific you could be without  
8 saying, you know: Any letters between this person and that person, any letters  
9 between that person and this person, when again, they don't know. They don't  
10 know what's been written. They don't know what's been on the computer. They  
11 don't know what photos were taken. So, it's denied for the reasons I've just stated.

12 And that should be everything. Look for, definitely, by tomorrow. You  
13 will definitely know whether or not Ms. Fridland can be called as a witness and if  
14 there's anything beyond the parameters I've already set or any clarification, I will  
15 indicate as well. Okay.

16 MR. GENTILE: All right. A couple of other things.

17 First of all, when we were here last, the State did not state on the  
18 record and I think I need it stated on the record, at the time the State was  
19 contemplating filing a new pleading in this case. That new pleading has not been  
20 filed. And, so, I'm assuming: A, that we're going to trial on the pleading as it  
21 currently exists --

22 THE COURT: Right. And sorry to interrupt, but just -- and that would be  
23 one pleading as to Hidalgo III and one pleading as to Hidalgo, Jr. which would be  
24 read separately, obviously, to the jury.

25 MR. GENTILE: Right; and I'm also assuming that the State is not going to

1 modify that pleading between now and the time that we commence trial.

2 THE COURT: Is that correct, Mr. DiGiacomo, you're not going to modify the  
3 pleading?

4 MR. DiGIACOMO: That's correct. It was Mr. Gentile's request to use two  
5 separate documents. I've told him I've reviewed the initial Information -- Indictment  
6 against his client and that seems appropriate to me. I've provide a Fourth  
7 Amended Information as it relates to Little Lou to Mr. Arrascada and Mr. Adams.  
8 They're in the process of reviewing that if they haven't already completely  
9 reviewed it and that's the -- there's no substantive change to the Information that  
10 I'm aware of. I believe they've reviewed that as it relates to the original Information  
11 as it relates to --

12 THE COURT: Right.

13 MR. DiGIACOMO: -- Mr. Hidalgo.

14 THE COURT: And, Mr. Arrascada, any objection to the amended pleading  
15 as it pertains to your client?

16 MR. ARRASCADA: Yes, Your Honor. We actually brought this up to Mr.  
17 DiGiacomo. If I could have the Court's indulgence perhaps they'll be striking this.  
18 If not, we'll have to argue it.

19 MR. DiGIACOMO: We won't be striking it. I know exactly what he's going to  
20 say.

21 MR. ARRASCADA: Okay.

22 MR. GENTILE: I'll address it.

23 THE COURT: Okay.

24 MR. ARRSCADA: In count one of the Fourth Amended --

25 THE COURT CLERK: This is case 212667?

1 MR. ARRASCADA: Yes, ma'am.

2 THE COURT: Yes.

3 MR. ARRASCADA: Does the Court have a copy of the proposed Fourth  
4 Amended Information?

5 THE COURT: I do not. Thank you.

6 MR. DIGIACOMO: That's actually the original right there, Judge.

7 MR. ADAMS: That's the original.

8 THE COURT: Okay. It's on it. All right. Go ahead.

9 MR. ARRASCADA: Your Honor, on page two regarding count one, line  
10 eight, after the comment starts: Did commit the acts as set forth in counts two  
11 through four, said acts being incorporated by this reference as though fully set  
12 forth herein.

13 Your Honor, this is charged as the conspiracy to commit murder. And  
14 the murder with use of the deadly weapon would be what is conspired to do.

15 THE COURT: Right.

16 MR. ARRASCADA: Arguably, if there is a conspiracy -- of course, we don't  
17 agree with that, but, Your Honor, by case law, if there is a conspiracy, under  
18 *Grunewald v. State* and *Krulewich*, the conspiracy ends once the objective is  
19 achieved and therefore the solicitations to commit murder counts two and three,  
20 would not be something that would be incorporated into a conspiracy to commit  
21 murder. So, we're proposing striking the S on counts and then the through four so  
22 it just reads: As set forth in count two, said acts being incorporated.

23 MR. DIGIACOMO: If you recall, Judge, this was a subject of a prior motion  
24 by Mr. Gentile. The original Information said: Conspiracy to commit, to wit:  
25 murder, and then it had the original -- as set forth in counts two through four as we

1 believe the solicitation charges are acts in furtherance of the conspiracy under  
2 *Crew v. State*.

3           During the course of a hearing in that case as well as being in  
4 chambers with Mr. Gentile, the Court came to an accommodation which the State  
5 agreed to do that would add the murder of Timothy Hadland to make sure there  
6 was no confusion as to what conspiracy Mr. Hidalgo III was engaged in, and that  
7 you would properly instruct the jury as to the laws it relates to conspiracy and that  
8 to be liable under count one, he had to form the agreement to kill Mr. Hadland prior  
9 to Mr. Hadland's death and that cured any concerns that the defense would have  
10 that the jury might believe merely because he is --may be involved in a conspiracy  
11 to kill those other witnesses, they would convict him of count one. And that was a  
12 resolution worked out prior to Mr. Arrascada being on the case.

13           The original Information in this case says counts two through four.  
14 There is no change. And, so, the fact that he's readdressing a different motion, not  
15 the amended being filed, this amended merely strikes the name of the other  
16 people in the heading and puts them in the body. And, so, there's no substantive  
17 change to the Information as originally put.

18           MR. GENTILE: I know this isn't my motion but may I address it based on my  
19 memory?

20           THE COURT: Sure.

21           MR. GENTILE: First of all, if you permit these two pleadings to go forth to  
22 the jury, then you have to -- you must advise the jury that there are two different  
23 conspiracies because the conspiracy with respect to the Indictment of Luis Jr. does  
24 not include any post --

25           THE COURT: Right.

1 MR. GENTILE: -- killing events. It ended with the killing. Okay. So, you're  
2 really dealing with a separate different conspiracy and it names, if I'm not  
3 mistaken, in the pleading as to Louis III. Louis, Jr. as a co-conspirator which is  
4 going to be very confusing to the jury because he's not charged in that conspiracy.

5 Second, separate, and apart from that, my memory, and I could be  
6 wrong; all right. I want to say that right on the front end. But my memory is that I  
7 addressed this issue with respect to Luis Jr.'s Indictment because if you recall, the  
8 original Indictment of Luis Jr. had two component parts of the conspiracy count,  
9 count one. It had one that ended with the killing of Hadland and then it went into  
10 these other dates, the 23<sup>rd</sup> and 24<sup>th</sup> of May. So, it -- there was one conspiracy that  
11 was May 19<sup>th</sup> and one was the 23<sup>rd</sup> and 24<sup>th</sup>. I said it was duplicitous, that it had  
12 two conspiracies jammed into one, and that the murder conspiracy clearly ends  
13 with the murder. I don't recall -- I think the Court granted that motion. But I know  
14 that we now have -- that has been stricken.

15 THE COURT: Okay.

16 MR. GENTILE: So, it might have been stricken because the DA agreed to it.

17 THE COURT: Voluntarily or I may have granted it. And I don't remember.

18 MR. GENTILE: Or you may have granted it. You know, there's been so  
19 much that's happened in this case.

20 THE COURT: Right; I don't remember.

21 MR. GENTILE: I don't have independent recollection --

22 THE COURT: I don't either.

23 MR. GENTILE: -- of all of it. But in any case, now we're faced with a  
24 situation. I can tell you that beyond any doubt whatsoever, at least with respect to  
25 Luis, Jr.'s case, this is going to require a special verdict form because there are so

1 many different objectives stated by the incorporation language of count one  
2 incorporating count two. But we -- that's not before you now and that's something  
3 we will deal with [indiscernible].

4 THE COURT: And that's fine.

5 MR. GENTILE: The -- but I don't remember ever addressing it on behalf of  
6 Luis III and that's all I'm saying. I'm not saying I didn't do it. I remember vividly --

7 THE COURT: And I don't remember either.

8 MR. GENTILE: -- addressing it for Luis, Jr. and I know that the  
9 accommodation was made. But I do not recall addressing it for Luis III.

10 MR. DiGIACOMO: Well the way to answer that question is to look to see if  
11 there's ever been an amended filed as to Mr. H. There hasn't. I believe the  
12 original Indictment --

13 MR. GENTILE: Yes; there is.

14 MR. DiGIACOMO: Is there an Amended Indictment?

15 MR. GENTILE: Oh, yes, there was.

16 MR. DiGIACOMO: I don't recall that happening. But that may or may not  
17 have happened. But the motion was filed 'cause I have the motion. It was under --  
18 if the Court recall, we were about to start trial on Little Lou and the motion was  
19 related to -- and I actually typed up the Fourth Amended Information to file to start  
20 the trial and we got stayed at the last moment. I don't specifically recall as to what  
21 happened as it relates as to Mr. H or not, but the fact of the matter is it's not two  
22 different conspiracies. It's the same darn conspiracy. He may not have  
23 participated in certain acts in furtherance of that conspiracy so he's not charged.  
24 But it's one conspiracy and that's the conspiracy to murder to Timothy Hadland,  
25 the acts of covering up under Crew, it's still the same conspiracy. It's his acts in

1 furtherance of the conspiracy which is alleged in the Information/Indictment.

2 MR. GENTILE: I submit to the Court that there are two United States  
3 Supreme -- actually there's three. I can't remember. I think *Lachey* is the third  
4 one, but *Grunewold versus The United States* and *Krulewich versus the United*  
5 *States* and I think *Lachey versus the United States* all address the issue.

6 What counsel is really saying is that there was a separate conspiracy  
7 to cover up the first conspiracy.

8 THE COURT: No; he's saying it's part and parcel of the same conspiracy,  
9 that first you have the murder and then you have the attempted cover-up and that  
10 this is what Mr. DiGiacomo was saying as I understand it. And even though Mr.  
11 Hidalgo, Jr. may not have participated in the acts in the cover-up, it's still part and  
12 parcel of the same conspiracy because the point of the cover-up was to cover-up  
13 the murder so that none of the conspirators would be apprehended or whatever. Is  
14 that what you're saying, Mr. DiGiacomo?

15 MR. DiGIACOMO: That's correct. And that's how it's charged. Count one  
16 is the conspiracy to commit murder of Mr. Hadland; count two is the murder of Mr.  
17 Hadland; counts three and four as it relate to Little Lou is his specific intent acts in  
18 furtherance of the conspiracy --

19 THE COURT: Okay.

20 MR. DiGIACOMO: -- after the murder.

21 THE COURT: Okay. Well I will just note whether that's the case or not, the  
22 case that it should be part and parcel of the same conspiracy. I think Mr. Gentile's  
23 certainly entitled to rely on the last Amended Information that was filed --

24 MR. DiGIACOMO: I do.

25 THE COURT: -- in terms of what the evidence is going to be linking his

1 client to the conspiracy because that's what we have. So --

2 MR. DiGIACOMO: No, no, I completely agree with that. No, I was only  
3 addressing Mr. Arrascada's point that counts three and four should be struck [sic].

4 THE COURT: No, no, no. But I think Mr. Gentile is asking for an  
5 instruction, if it is allowed to go forward, that that only pertains to Mr. Hidalgo III. It  
6 doesn't pertain to Mr. Hidalgo, Jr. And what I'm saying to you is whether or not it  
7 still is part of the conspiracy or not part of the conspiracy, I think Mr. Gentile is  
8 entitled to rely on the charging document that was last filed and the history as it  
9 pertains to Mr. Hidalgo, Jr. Do you see what I'm saying?

10 MR. DiGIACOMO: Well --

11 THE COURT: I don't think you can change in midstream your theory.

12 MR. DiGIACOMO: -- that's true although I would note that the original  
13 Indictment had the additional language of that additional stuff and the Court said:  
14 To avoid confusion, I'm still going to allow in the evidence and still allow that to  
15 come in. Go back to the notes.

16 MR. GENTILE: The Court never said that.

17 THE COURT: Well okay. I don't have -- I have pretty good memory but I  
18 don't have a detailed recollection of this whole thing. So, I'm trying to look at the  
19 minutes as I'm sitting up here to refresh my recollection. But as you know, there  
20 are many Defendants in this case and so the minutes are very long and it's very  
21 difficult to find what minutes pertain to what hearing with respect to your client.

22 I'm happy to study this further in chambers and see if I can figure out  
23 what I said. But, obviously, if that was the ruling of the Court, Mr. Gentile's entitled  
24 to rely on the document and the deletions in the document as to this client. We  
25 can't now on the eve of trial say: Oh, well, wait a minute. We're going to do this.

1 And, so, if it goes forward the way it's pled as to Mr. Hidalgo III, I think that Mr.  
2 Gentile, like I just said, is entitled to rely on the fact that that wouldn't be offered  
3 unless I said what you say I say.

4 MR. DiGIACOMO: Right; I mean --

5 THE COURT: But, you know, that --

6 MR. DiGIACOMO: The evidence has always been that Mr. H wrote a note  
7 during the course of the surreptitious recordings and that there was testimony  
8 related to him --

9 MR. GENTILE: No; it isn't.

10 MR. DiGIACOMO: -- being present during those surreptitious recordings  
11 outside a room and being consulted with by Anabel. And that was all part of the  
12 original Indictment. This was a language issue that he didn't want the jury to  
13 believe that Mr. H formed and joined the conspiracy after the murder. That was  
14 the argument, not that: I'm not suddenly on notice that the State thinks that I  
15 participated in actions that occurred days later.

16 THE COURT: Okay. I do not have independent recollection of this. I'm  
17 going to review the minutes. I'm going to figure out the date of the hearing. This  
18 having been a death case, will already have a transcript. I'll read the transcript and  
19 I'll see what I said. That's the best I can do.

20 MR. DiGIACOMO: Right.

21 THE COURT: Because, honestly, for you to say what I said, I don't  
22 remember what I said. I'm going to see what I said and then go forward  
23 accordingly. That's just one issue as to Mr. Gentile's client. We still have the  
24 remaining issue as to Mr. Adams and Mr. Arrascada's client which may be  
25 dispositive and then maybe Mr. Gentile's issue won't matter.

1 MR. GENTILE: Let me just say one more thing, please.

2 THE COURT: Right.

3 MR. GENTILE: Because as long as you're going to go through this review,  
4 I'd ask you to read those three Supreme Court cases or certain review them. But  
5 more important than anything else, in order for a statement to be admissible as a  
6 co-conspirator's statement, it has to be made during the course of --

7 THE COURT: Right; of course.

8 MR. GENTILE: -- any furtherance. If my conspiracy ends with the murder,  
9 which it does, then the events of the 23<sup>rd</sup> and the 24<sup>th</sup> are not admissible as to  
10 Junior. And you can cure that instructing the jury; okay? But they're not  
11 admissible.

12 MR. DiGIACOMO: There's so many different ways I want to say no to that  
13 but first of all, *Crew v. State* says that those acts are -- that the conspiracy  
14 continues until the co-conspirators have completed their affirmative acts of  
15 concealment. So, obviously, those statements.

16 Not only that, Mr. Gentile last week, and I don't want to get that much,  
17 but he said a statement that I don't want the Court be -- rely too much upon  
18 because there's briefings related to that. His client doesn't necessarily have to be  
19 a member of the conspiracy at the beginning of the conspiracy when other co-  
20 conspirators for those statements to come in. As long as the person speaking at  
21 the time was a member of the conspiracy and the statement was made in  
22 furtherance of the conspiracy, if he joins that conspiracy later, I'll allow Mr. Counts  
23 join the conspiracy. But the statements made by DeAngelo Carroll before Mr.  
24 Counts joined that conspiracy were still admissible [indiscernible]. We've briefed  
25 that issue in a number of writs and motions with the Court. And, so, I just want to

1 make sure that the Court is -- has reviewed that law. I'm sure you know that law.

2 THE COURT: Right.

3 MR. DiGIACOMO: But those statements will be coming in.

4 THE COURT: Right; I mean, all I'm saying is I think Mr. Gentile -- whatever I  
5 said, whether it be right whether it wrong, he's entitled to rely on that. And, so, I  
6 need to refresh my memory as to exactly what the history of the case is. It may  
7 be, you know -- anyway -- anything else for me?

8 MR. DiGIACOMO: I just don't know what you're going to rule as to Mr.  
9 Arrascada. If you strike -- and through count four --

10 THE COURT: Right; it's not an issue as to Mr. Gentile obviously.

11 MR. DiGIACOMO: -- if you strike it, then obviously there's no issue.

12 THE COURT: Isn't that what I just said? I try to say these things to speed  
13 things up but it never works because everybody just says it again.

14 Yes, Mr. Arrascada, anything else?

15 MR. ARRASCADA: Your Honor, creating no issue is better than having one  
16 at times. So, we'd ask that -- it appears Mr. DiGiacomo is saying that the Court's  
17 already ruled on this and we're going to rely on your review of the minutes. And if  
18 the Court finds that you have ruled on this, we're asking you to reconsider it  
19 because it's highly prejudicial.

20 THE COURT: Okay.

21 MR. ARRASCADA: And it doesn't make sense to have a conspiracy to  
22 commit murder and then they're saying: And then others conspired to kill people  
23 who are part of the conspiracy. It doesn't -- its two different conspiracies. So, two  
24 and four -- three and four should not be a part. And we just ask that you rely on  
25 your minutes and if you rule differently, we ask that you end any issues on this and

1 strike the S and through four.

2 THE COURT: All right.

3 MR. DiGIACOMO: As long as there is no evidentiary consequence of the  
4 ruling, I could literally case less. I mean, my only concern is somehow they're  
5 going to think that there's an evidentiary consequence to what the charging  
6 document which is a merely noticed pleading is. It's not going to change the  
7 nature of the evidence or the arguments of the State.

8 THE COURT: Well either way wouldn't matter because you charge him  
9 separately with solicitation to commit murder. So --

10 MR. DiGIACOMO: No; but I certainly intend to argue to this jury that the  
11 statements made by Mr. -- by Little Lou may be admissible by Mr. H because they  
12 are statements in furtherance of the original conspiracy.

13 THE COURT: Okay.

14 Number one: With respect to Mr. Arrascada. If you're willing to strike  
15 the language but still introduce and argue the evidence which you are able to do  
16 because you've charged it separately, and so you would have to give that  
17 evidence anyway. So, striking the language, not striking the language in the  
18 Fourth Amended Indictment really has no bearing then according to the State on  
19 your presentation of evidence and your argument with respect to Mr. Hidalgo III.

20 With respect to Mr. Hidalgo, Jr, we're back to square one which was:  
21 What did the Court say in the previous motions, because Mr. Gentile, I think, what  
22 he's also saying is that can't be argued to show that his client was part of a  
23 conspiracy. Is that fair what you're saying? Okay. I think I got it.

24 Now I have homework and I'll do that in chambers and try to figure out  
25 where we are on this and you'll definitely have something by tomorrow because I

1 know everybody's preparing for trial. Okay. One final thing and then --

2 MR. GENTILE: Can we start Tuesday? We have these boxes --

3 THE COURT: And that was my final thing.

4 MR. GENTILE: Okay.

5 THE COURT: I anticipated that I was going to ask you want to start Monday  
6 or Tuesday.

7 MR. GENTILE: Tuesday.

8 THE COURT: Court's willing to start Tuesday. We will start Tuesday at  
9 10:30.

10 MR. DIGIACOMO: Smile for it.

11 THE COURT: No; that's optimistic because it's a criminal day and they have  
12 to take the prisoners out and then these guys are downstairs or at least Mr.  
13 Hidalgo III will be downstairs dressed. So, that's like a 20 minute shift. So, I'm  
14 wondering maybe what we should do instead of trying to start in the morning is just  
15 start at 12:30 and not take a lunch break. That may make more sense and then  
16 just go 'til like 5:30 or 6 or whatever.

17 MR. GENTILE: You know, if you want to modify your schedule for the trial  
18 that day that would be great. There's no reason not to. If you have -- if your staff  
19 has an opportunity to have lunch -- finish your calendar, have lunch, and then we  
20 start and go straight through.

21 THE COURT: Right; let's do that.

22 MR. GENTILE: That would be fine with us; wouldn't it?

23 THE COURT: Okay. That's easier.

24 MR. ADAMS: That would be easier.

25 THE COURT: Right; I think that's easier. So, let's just say we're going to

1 start at 12:30 then.

2 MR. DiGIACOMO: Everyday or just on your criminal day?

3 THE COURT: No, no, just on Tuesday, because once we have only 14  
4 people. I'm not as concerned with people waiting around as when you have a  
5 hundred people.

6 MR. DiGIACOMO: Right. Okay.

7 THE COURT: So, let's do that. Tuesday at 12:30.

8 MR. DiGIACOMO: Thank you, Judge.

9 MR. GENTILE: Thank you, Judge.

10 MR. ADAMS: Judge, one very quick matter. We were on the pleadings as  
11 part of the linguist motion. So, I think our joining that is clear.

12 On the motion to suppress, I don't know that we signed on that. So,  
13 we would like to orally join that.

14 THE COURT: Okay.

15 MR. ADAMS: Thank you.

16 THE COURT: All right. Thanks. That's it. And call us tomorrow.  
17 Look it up in Blackstone. Thank you.

18 MR. DiGIACOMO: Thank you, Judge.

19

20 [Proceedings concluded at 11:57 a.m.]

21

22 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
23 audio/video recording in the above-entitled case.

24

25

  
PATRICIA SLATTERY  
Court Transcriber

12  
**FILED**

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*Anna L. Harrison*  
CLERK OF COURT

1 TRAN

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5 **ORIGINAL**

DISTRICT COURT  
CLARK COUNTY, NEVADA

6  
7  
8 THE STATE OF NEVADA,

9 Plaintiff,

CASE#: C212667  
C241394

10 vs.

DEPT. XXI

11 LUIS ALONSO HIDALGO aka LUIS  
12 ALONSO HIDALGO III; LUIS HIDALGO  
13 JR., aka LUIS A. HIDALGO

14 Defendants.

15 BEFORE THE HONORABLE VALERIE P. ADAIR, DISTRICT COURT JUDGE  
16 FRIDAY, MAY 1, 2009

17 **TRANSCRIPT OF PROCEEDINGS**

18 **DEFENDANT, LUIS HIDALGO III'S MOTION FOR JUDGMENT OF ACQUITTAL  
OR IN THE ALTERNATIVE FOR A NEW TRIAL; DEFENDANT, LUIS HIDALGO,  
JR'S MOTION FOR JUDGMENT OF ACQUITTAL**

19 **APPEARANCES:**

20 For the State:

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Chief Deputy District Attorney

21 For the Defendants:

22 DOMINIC P. GENTILE, ESQ.  
23 PAOLA M. ARMENI, ESQ.  
24 JOHN L. ARRASCADA, ESQ.

25 RECORDED BY: JANIE OLSEN, COURT RECORDER

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1 FRIDAY, MAY 1, 2009 AT 10:39 A.M.

2  
3 THE COURT: All right. I've reviewed everything and Mr. Gentile -- first of  
4 all, I have a question and I know Mr. DiGiacomo is going to object to the question  
5 I'm about to ask.

6 MR. DIGIACOMO: I never object to the Court, Judge.

7 THE COURT: Well I'm going to preface the question with my reasoning for  
8 asking the question. And Ms. Armeni was very careful in her affidavit not to  
9 include the portion of the DeAngelo Carroll statement that the jury allegedly relied  
10 on. I think that either the fact that they relied on the statement or part of the  
11 statement, it's either inadmissible or it's not -- it's either inadmissible or admissible  
12 under, you know, NRS 50 in the case law.

13 So, having said that, that's already out there. And knowing myself  
14 whether I should or shouldn't, I'm going to sit there and try to figure out what the  
15 statement was. So, either it can be considered in its entirety or it can't be  
16 considered at all.

17 So, I'm going to ask Ms. Armeni had it not -- having said that I'm going  
18 to consider it, like I said, it's either all or nothing. If the fact that they went beyond  
19 the instruction and considered something that DeAngelo Carroll said for the truth is  
20 out there, then I think -- and we can consider that then we can consider what it  
21 was. Conversely, you know, if you accept the State's position, that's part of the  
22 deliberation and we shouldn't look at it all. But, again, it's already out there. It's  
23 been part of the record both in the argument and -- so, Ms. Armeni, what was the  
24 statement, 'cause like I said, otherwise I'm just going to have sit there and do it to  
25 satisfy my own curiosity.

1 MS. ARMENI: Your Honor, I don't remember exactly what the full statement  
2 was. It was a use of a pronoun. During trial, both the defense and the State  
3 contended that DeAngelo made a statement where he used the pronoun you,  
4 referring to the two people that he was speaking to in the conversation, either Mr.  
5 Hidalgo III or Anabela Espindola. And the jury decided that both the State and  
6 ourselves were wrong and heard the pronoun he, which they used to refer to Mr.  
7 Hidalgo, Jr.

8 THE COURT: All right.

9 MR. DiGIACOMO: If I can tell you where that was, Judge.

10 THE COURT: All right.

11 MR. DiGIACOMO: When Mr. DeAngelo Carroll walks into the room and  
12 Anabel finally joins them, both the defense and the State had on the recording, he  
13 said: You wanted it done. I took care of him. And Anabel interrupts 'em and says:  
14 Listen. What we really wanted for him was to be beat up. What the juror said --  
15 and actually I went back and listened to the tape. They're right. The jury  
16 determined that what DeAngelo Carroll said when he walked in the room was: He  
17 wanted this done and I took -- and we took care of 'em. And what Anabel's  
18 reaction was was what we really wanted. What the jury did was exactly  
19 appropriate what the Court said which is -- and I suggested this to the Court is that  
20 when DeAngelo Carroll says he wanted it done and Little Lou and Anabel are  
21 standing in the room and Anabel's response of that is: What we really wanted is  
22 him to be beat up, they took the we to be Anabel and Louis Hidalgo, Jr. And, so, I  
23 would submit to the Court that while they say they took it for the truth of the matter  
24 asserted, what they really did is exactly what the Court said is give context to the  
25 statements of the other speakers in the case, Judge.

1 THE COURT: And, obviously, what Mr. Gentile and Ms. Armeni are saying  
2 is they took: He wanted this done, because if I'm referring -- if I'm speaking to  
3 Little Lou and Anabel, I'm going to say: You wanted this done. I'm not going to  
4 say: He wanted this done, which would infer that it's Mr. Hidalgo, Jr. I agree. It  
5 does put contents -- context into Anabel Espindola's statement. But, again, if she's  
6 -- if he's talking: You guys wanted this -- or even the plural you, you guys wanted  
7 this done, that's ambiguous. Do mean these two? Do we mean -- but he  
8 obviously means Louis Hidalgo, Jr. because he's the only one that's not in the  
9 room of the Palomino Club players. So -- meaning, the owner, the  
10 management/owners.

11 MR. GENTILE: And we -- that's a good place to start.

12 THE COURT: All right. So, Mr. Gentile, that was my question and if you  
13 want to supplement the written materials --

14 MR. GENTILE: That's a good place to -- yes; here's why.

15 Now you have a *Crawford* problem. We did not have an opportunity  
16 to cross-examine DeAngelo Carroll. This statement was made by Carroll in an  
17 effort to gather evidence for a prosecution. It is absolutely testimonial in nature  
18 because at that time, they thought that Carroll would testify at the trial. Clearly,  
19 Carroll was working to try to get out from under this case. So, he was attempting  
20 to create evidence that would certainly go to his benefit, and Carroll never took the  
21 stand in the case. And, so, this has emerged from a rule of evidence problem and  
22 grown into a confrontation problem now that you've got it in the record as to what  
23 the statement was. Okay. And I was going to try to argue the confrontation  
24 problem without the benefit of having that in the record. It's got to be clear or not.  
25 Okay? This man got on -- this man did not get on the stand and he said on this

1 tape recording, not under oath, and in an effort to create testimonial material that  
2 he, Luis Hidalgo, Jr., wanted something done. And I never got an opportunity to  
3 cross-examine him. Luis Hidalgo, Jr. never got an opportunity to confront this  
4 witness against him. Okay.

5 Now there's lot of other things that I'd like to address but when you  
6 really get down to the final decision, the question becomes: What is the magnitude  
7 of this error? What is the magnitude of their failing to -- of their misconduct in not  
8 following the jury -- the Court's instructions? Okay. And that is of constitutional  
9 magnitude. So, it doesn't get any bigger than that. Now --

10 THE COURT: All right. And first of all, you know, using the term  
11 misconduct, I don't think anyone in this room believes that there was any kind of  
12 intentional misconduct on the part of the jury if, in fact, that's what happened.

13 MR. GENTILE: Well I'm --

14 THE COURT: And I know Mr. Digiacomo is going to say: Hey, we don't  
15 have any -- number one, you can't consider it, and number two: We don't have  
16 any credible evidence in front of the Court that this even happened because we  
17 have the hearsay statement of Ms. Armeni, her affidavit, and that that's hearsay  
18 and the Court shouldn't even consider it. Obviously you can say: Well it's reliable  
19 and the Court can consider it because that's the best thing we have and I know --

20 MR. GENTILE: And we've asked for a hearing and we've asked for, you  
21 know -- I mean --

22 THE COURT: An evidentiary hearing.

23 MR. GENTILE: -- what do we know? What do we know? We know that he  
24 obviously -- Mr. Wallace and others, obviously, told Mr. DiGiacomo because Mr.  
25 DiGiacomo's the one who just told you what it was in the transcript and where it

1 came in the transcript and I don't think he made that up or dreamed it. So, he  
2 learned it from them as well. So, there is no issue as to whether this happened.  
3 Okay.

4 Now when I use the word misconduct, I am not being critical of a --

5 THE COURT: No; I just wanted it to be clear on the record --

6 MR. GENTILE: -- malignant jury.

7 THE COURT: -- that we're not talking about --

8 MR. GENTILE: I'm going to try to do that.

9 THE COURT: -- any kind of intentional misconduct. And I think now that  
10 I've said it, we're all in agreement on that. We can, you know, move on.

11 MR. GENTILE: I use it as the Nevada Supreme Court used it last November  
12 when it decided *Valdez versus the State* because there it said: A jury's failure to  
13 follow a District Court's instruction is intrinsic juror misconduct. I'm reading from  
14 the opinion. Okay. That is at page 475 of 196 Pacific 3<sup>rd</sup>. I read that verbatim. I'd  
15 like to continue to read just a part of that.

16 THE COURT: That's fine. I'm listening.

17 MR. GENTILE: It goes on to say: When the District Court denies a motion  
18 for mistrial based on such misconduct, we review the decision for an abuse of  
19 discretion. A new trial must be granted unless it appears beyond a reasonable  
20 doubt that no prejudice has resulted from the jury misconduct. I'm going to insert:  
21 I can conceive of no way that a *Crawford* violation, a confrontation violation, on the  
22 key substantive issue in the case could ever be proven beyond a reasonable doubt  
23 that it didn't prejudice -- that no prejudice resulted from it. Now I'll go back to  
24 reading: The Defendant must prove the nature of the jury misconduct and that  
25 there's a reasonable possibility that the misconduct affected the verdict. That's the

1 standard, Judge, a reasonable possibility that the misconduct affected the verdict.

2 Now it says -- it goes on and it says -- and we're still at page 475: In  
3 determining whether there's a reasonable probability that the juror misconduct  
4 affected the verdict, the District Court must consider any -- many factors including  
5 the timing of the misconduct -- I'm sorry -- including the timing of the misconduct,  
6 whether it involved a collateral or material issue such as the identity of a  
7 conspirator in a murder case, I'd say that that's pretty material; whether the  
8 information was admissible, which it was not for the truth, and you informed them  
9 of that which is the cause of the whole motion, and it's influence in light of the  
10 entire trial. That's *Valdez*. That case is -- was decided in November and it  
11 represents the most recent articulation of what you're supposed to do here by our  
12 Nevada Supreme Court.

13 Now I don't know that this is necessary and I don't -- I'm not here for  
14 purposes of merely talking. But until this became a confrontation issue, it was  
15 really an evidentiary rules issue first, and then after an evidentiary rules issue, it  
16 became a question of a misconduct issue, a structural issue in terms of fair trial.  
17 Okay. Our evidentiary rule with respect to -- and you probably have already made  
18 this determination by even asking that question.

19 THE COURT: No, I mean, all I'm -- and that's why I prefaced it with it's  
20 either all in or it's not in. So, I mean --

21 MR. GENTILE: Okay.

22 THE COURT: -- the first issue is whether or not that should even be  
23 considered. And I -- you know, I understand Mr. DiGiacomo and the State is  
24 saying: Well except now we have a horrible record on something that shouldn't be  
25 considered. So, even if the Court says, as the first area of inquiry, this shouldn't

1 be considered, it's out there for appellate review. And the -- even if I don't grant a  
2 new trial, the appellate court may say: Well a constitutional issue like this would  
3 trump any kind of evidentiary problem and therefore -- now that we know, this  
4 shouldn't -- so, I haven't said that. And I understand the State's position is this  
5 shouldn't have been inquired into in the first place because that's the whole point  
6 not to get into all of this, is that -- I mean, if I were standing where Mr. DiGiacomo  
7 is standing, that's what I would be thinking.

8 MR. GENTILE: And that's why I want to address the evidentiary rule, okay,  
9 and the distinction between the Federal rules and Nevada rules.

10 I may be -- I'm one of a handful or maybe two handfuls of lawyers that  
11 I can think of, okay, maybe there's more, that practice before the Federal Rules of  
12 Evidence. The Federal Rules of Evidence went into effect in 1974 or '75, one or  
13 the other, and I started practicing in '71. And, so, I was also really active in the  
14 National Association for Defense Lawyers and the ABA when all that was going on  
15 and there was a lot of debate going on. In any case, our Nevada statute  
16 is based on the advisory committee's first draft. Okay. It's not based on the  
17 Federal Rule. It's based on the advisory committee's first draft of the rules. And  
18 it's not the only part of the Nevada code that differs from the Federal Rule. We  
19 encountered one during trial. In Nevada, if you read the statutes strictly to the  
20 black letter, then you're not entitled to impeach a co-conspirator statement that  
21 comes in because it talks about the ability to impeach witnesses. And the State  
22 even cited that to the Court. Okay? Although, the State didn't press it hard  
23 because sooner or later that's going to result in a big problem in an appellate case.  
24 But that's one case.

25 Another case -- an example that maybe you have encountered under

1 51.0352, I think. Let me see. Our Nevada statute permits the use of a prior  
2 inconsistent statement that is not under oath to be used as truth of the matter  
3 asserted. If a witness is on the stand, the witness who made the prior inconsistent  
4 statement, if that witness is on stand under oath, you can have an out of court  
5 statement that is not sworn.

6 THE COURT: Right.

7 MR. GENTILE: You can confront the witness with it. The witness can  
8 continue to deny it but say: I lied when I said that, and Nevada permits that out of  
9 court statement to be used substantively. The Federal Rule, which is 801(d)(1)  
10 says: That a statement is not hearsay but we say that that statement is not  
11 hearsay, but it says: A statement is not hearsay if the declarant testifies at the trial  
12 or hearing and is subject to cross-examination concerning the statement, which is  
13 all that the Nevada statute says. But the Federal Rule goes onto say: And the  
14 statement is inconsistent with the declarant's testimony and was given under oath  
15 subject to the penalty of perjury at a trial, hearing or other proceedings. So, in the  
16 Federal system, you can get that out of court statement into impeach the witness,  
17 but if you impeach the witness's in-court testimony, you're left with a zero, you're  
18 left with nothing. Okay. What he said in Court is not to be believed because what  
19 he said out of court was different but you can't believe what he said out of court.

20 THE COURT: Right; it's not substantive.

21 MR. GENTILE: Okay. So, it's not -- this is not novel in Nevada. We, some  
22 might say, made mistakes. And our Legislature perhaps was not quite as well  
23 advised by the Legislative Council Bureau as Congress was maybe. I mean, I  
24 don't know.

25 THE COURT: Yeah, but at the end of the day, we're left with --

1 MR. GENTILE: With what we got.

2 THE COURT: -- Nevada adopted the first draft and certainly, you know,  
3 they've been free for all these years. I don't know when that statute was enacted  
4 off of the top of my head, free all these years to reconsider it and say: You know  
5 what? There's subsequent drafts and this was what was enacted federally and to  
6 change it. But --

7 MR. GENTILE: Right. But they haven't.

8 THE COURT: Well, no, they didn't do it themselves and nobody sought to  
9 introduce a bill doing that and so we were left with what we're left with.

10 MR. GENTILE: All right. And now that makes us focus on the distinction  
11 between what we have and the Federal Rule, number one; and number two:  
12 Makes us focus on how *Tannery, United States versus Tannery*, has absolutely no  
13 bearing on you. It's not even binding on you because it's nothing more than an  
14 interpretation of the Federal Rule. It's not of a constitutional magnitude; all right?  
15 And, so, in Nevada, our statute says: A member of the jury shall not testify as a  
16 witness in the trial of the case -- we'll get past that.

17 THE COURT: Right.

18 MR. GENTILE: And number two: Upon an inquiry into the validity of a  
19 verdict or indictment, which means that such inquiries are contemplated because it  
20 says: Upon an inquiry into the validity of a verdict or indictment.

21 THE COURT: Well, right, which you would have all the time. Let's say  
22 there's an allegation that during voir dire, a juror didn't disclose that the victim was  
23 their neighbor or it turns out that they visited the scene without authorization or  
24 they did independent research or anything like that. I mean, those issues are  
25 visited all the time.

1 MR. GENTILE: It goes on to say: A juror shall not testify concerning the  
2 effect of anything upon his or any other juror's mind or emotions as influencing him  
3 to assent or dissent from the verdict or indictment or concerning his mental  
4 processes. Now I want to read now the Federal Rule because the Federal Rule  
5 puts an additional clause in. I'm going to repeat ours: A juror shall not testify  
6 concerning the effect of anything upon his or any other juror's mind or emotions.  
7 The Federal Rule says: Upon an inquiry into the validity of a verdict or indictment,  
8 a juror may not testify as to any matter or statement occurring the course of the  
9 jury's deliberations. We don't have that in our statute.

10 THE COURT: Right; but aren't you -- I mean, we have -- don't we clearly  
11 have the effect of something on the mind --

12 MR. GENTILE: No.

13 THE COURT: -- of the juror?

14 MR. GENTILE: No; what we have -- you can eliminate that. You just ask for  
15 that. Okay. You can even eliminate the transition of not guilty to guilty. You can  
16 even eliminate that. But what you cannot eliminate, what is the objective fact, and  
17 that's what *Barker* talks about. *Barker* and *Valdez* talk about objective facts versus  
18 deliberations and the workings of the mind. The objective fact here is --

19 THE COURT: They didn't follow the instruction. They considered it  
20 substantively.

21 MR. GENTILE: Exactly. All 12 of them will say: We considered it  
22 substantively. We considered he as being a truthful assertion by Carroll.

23 THE COURT: Well actually if may be only all three of them considered it  
24 substantively because you had a split of 9 to 3 --

25 MR. GENTILE: But you're not --

1 THE COURT: So --

2 MR. GENTILE: All of them will say that they considered it. All of them will  
3 say that in that jury room --

4 THE COURT: It was considered.

5 MR. GENTILE: Right. Maybe they, as individuals --

6 THE COURT: But they -- that's what I'm saying.

7 MR. GENTILE: -- it didn't matter to them.

8 THE COURT: Right. They didn't consider it, but it was considered.

9 MR. GENTILE: It was considered. And that's an objective fact, okay; just as  
10 a newspaper article was considered. I mean, it's different because the newspaper  
11 article was not in evidence.

12 THE COURT: Was not evidence.

13 MR. GENTILE: But you know? This wasn't in evidence for what they used it  
14 for and you told them that. And it's the very same instruction later on, however,  
15 that I object to, Instruction number 40, which deals with the confusion growing out  
16 of slight evidence but that's unrelated to this issue. So, we know they read the  
17 instruction. Okay. I mean, we have -- you read it for them, you read it to them.  
18 Whether they read it in the jury room or not we don't know.

19 THE COURT: We don't know.

20 MR. GENTILE: And it doesn't matter, all right, because they were so  
21 instructed.

22 And, so, I submit to you that the -- that *Barker* and *Valdez* -- that  
23 *Crawford* because of the confrontation clause issue and of course the Sixth  
24 Amendment and the Eighth Amendment -- well Sixth Amendment at least in this  
25 instance, and our Nevada constitutional equivalent. I want to make sure that that's

1 considered as well. They all really mandate here that when you apply the test that  
2 Valdez says that you have to in terms of what you're to consider, there's no way,  
3 there's no way, Judge, there's no way that they can establish beyond a reasonable  
4 doubt that prejudice didn't result from this. There's no way. And it's rare that I  
5 would take that staunch of a position on anything 'cause there's always room for  
6 argument but not in case, not on those facts.

7 And, so, under the circumstances, Judge, this man is entitled to a new  
8 trial.

9 THE COURT: All right. Mr. DiGiacomo, any response?

10 MR. DIGIACOMO: Just a little.

11 And first of all, I don't know if Mr. Arrascada was going to even join in  
12 that because --

13 THE COURT: Oh, I'm sorry.

14 MR. DIGIACOMO: -- the statement that is at issue, which relates to jury  
15 misconduct, it was exculpatory as to Little Lou. So, I don't know how it is they'd  
16 even be arguing that this at all applies to --

17 THE COURT: Right.

18 MR. DIGIACOMO: -- Luis Hidalgo III.

19 I need to back up 'cause, you know, Mr. Gentile ended with, you  
20 know: It's rare that I've -- taking such a hard line position. I've never walked into a  
21 courtroom before with having more law on my side on a particular issue than I am  
22 standing here before this Court. If you were to suggest that in a criminal trial that  
23 you could have an evidentiary hearing in which we put the jurors up there to say:  
24 Okay. What was your understanding of the jury instructions, what did you find the  
25 evidence to be, and how did you apply those two together, we would never, ever

1 have a verdict affirmed because we would be having these hearings all of the time.  
2 And that's the whole purpose for the rule. And Mr. Gentile can stand up here and  
3 say: Hey, in 1969 someone wrote some language and Nevada adopted that  
4 language but the Nevada Supreme Court has held you can't get into it. That's it.  
5 That is -- I don't know how else to say it. They repeatedly do not refer to the ruling  
6 in *Meyer* which is the seminal case on the issue. And *Meyer* clearly says that  
7 intrinsic influences involve improper discussion among the jurors. And I said this  
8 before, such as considering a Defendant's failure to testify. They could have sat  
9 back there and said: Each one of us decided to convict him beyond a reasonable  
10 doubt 'cause he didn't testify. The Court couldn't get into that. And they're  
11 suggesting in their distinction to you is: Well it's not a mental process. Really?  
12 The determination of how you use the evidence in a particular case is not a mental  
13 process? The determination of how you interpreted the jury instructions in a  
14 particular case is not a mental process? The fact that three people had a  
15 reasonable doubt at some point in time is not a mental process?

16 Each and every case suggests -- not suggests, clearly indicates that it  
17 does, Judge. So, at the end of the day -- because truthfully -- I know the Court  
18 says there's two interpretations to take when they said -- 'cause they didn't do  
19 anything wrong 'cause you told them the tape controls. And the fact that he says  
20 it's now a *Crawford* problem, they always argue that that tape was a *Crawford*  
21 problem as it related to DeAngelo Carroll. We've briefed that on numerous  
22 occasions. It's not a *Crawford* problem. So, you would have to ask the jury:  
23 Okay. Which way did you do this? Did you say -- well he said he so therefore we  
24 know that DeAngelo Carroll said he. So, that means that DeAngelo Carroll was  
25 referring to Mr. H and therefore we convicted Mr. H. Or you'd have to ask the

1 juror: Or was it the response from Anabel when she said we that you knew that  
2 the we now meant myself and Mr. H? And one of those interpretations would be  
3 appropriate and one of those wouldn't be.

4 THE COURT: And apparently Little Lou.

5 MR. DIGIACOMO: What?

6 THE COURT: And apparently Luis Hidalgo III because they convicted him  
7 too.

8 MR. DIGIACOMO: Well -- yes and no. I suggest to you that --

9 THE COURT: Well, I mean, either way -- if she --

10 MR. DIGIACOMO: -- from Anabel's testimony, she doesn't know at that  
11 point that Little Lou was -- is necessarily involved and it's a whole long issue. I  
12 mean --

13 THE COURT: Well, I mean, I agree. The use of the pronoun he is  
14 exculpatory as to Little Lou --

15 MR. DIGIACOMO: Correct.

16 THE COURT: -- because as I started this whole thing out with -- if you were  
17 saying you -- if you're talking to two people, you don't use the pronoun he. So,  
18 obviously, DeAngelo Carroll was not talking about Little Lou or Anabel.

19 MR. DIGIACOMO: Correct. So, at the end of the day, Judge -- I mean,  
20 there's simply no way that you can consider the affidavit of Ms. Armeni in making  
21 the determination as to whether or not --

22 THE COURT: Of whether or not to hold an evidentiary hearing.

23 MR. DIGIACOMO: Correct. You can't do it. There's nothing in the affidavit  
24 that would allow you to do it and it's -- I mean, it's about as clear as any legal issue  
25 has ever been before the Court.

1 THE COURT: All right. Anything else, Mr. Gentile?

2 MR. GENTILE: Obviously, I don't want to -- my silence is taken --

3 THE COURT: As an acquiescence. It's not.

4 MR. GENTILE: It's not. Okay.

5 THE COURT: Anything else? Mr. Arrascada. I mean, again, the statement  
6 of DeAngelo Carroll he, I think, is clearly exculpatory to your client.

7 Now what Anabel knew about Little Lou, why Mr. Digiacomio is  
8 obviously more familiar with the evidence than I having -- I just heard it. But I don't  
9 think that the we necessarily would have excluded Little Lou for purposes of what  
10 the jury knew when they're considering this and what Anabel Espindola knew at  
11 that point. I don't remember that coming in but it may have and I just don't recall  
12 off the top of my head. But, again, I think the use of the pronoun he certainly  
13 makes Hidalgo II the sort of ringleader, the one that gave the direction which was  
14 consistent with what Anabel Espindola had testified to. So -- yes, did you change  
15 your mind?

16 MR. GENTILE: No; I didn't change my mind. I just wanted -- given that both  
17 the State and the defense are in agreement as to what happened at least in terms  
18 of the substantive use and the word --

19 MR. DIGIACOMO: I would disagree with that.

20 MR. GENTILE: Okay. Well the use, that's for sure. I mean, how could it be  
21 anything other than substantive if they took he? It can't be. Okay. But my point  
22 is --

23 THE COURT: Well Mr. Digiacomio is saying it's just like a question asked a  
24 witness. It puts context to the response. Is that what you were going to say?

25 MR. GENTILE: Not without the truth of it, not without the truth of it. And the

1 response wasn't: Yes, he did. If the response was: Yes, he did but, okay, maybe.  
2 But that's not what the response was. And, so, under the circumstances here,  
3 there is no question about the fact that they used it, Judge. All right. Whether you  
4 want to hold an evidentiary hearing and make Mr. Wallace come in here or not;  
5 you know, there's a little -- it bothers me. I don't think anything wrong happened  
6 but it bothers me that the State now admits that they were contacted by Mr.  
7 Wallace apparently after --

8 MR. DiGIACOMO: We never denied that, that we were contacted.

9 MR. GENTILE: Well you never said anything. Silence --

10 MR. DiGIACOMO: 'Cause we didn't think it's appropriate to bring before the  
11 Court.

12 MR. GENTILE: All right. But the point is that he did contact them and who  
13 knows to what extent his discussion with them created a disincentive for him to  
14 sign the affidavit that he had previously said he would sign.

15 MR. DiGIACOMO: The only thing I would say is the only thing I'm saying is  
16 the tape speaks for itself and you shouldn't consider anything that happened inside  
17 that room.

18 THE COURT: All right. I think it's pretty clear where everybody stands and  
19 what the issues are.

20 The first issue is whether or not the Court considering it is precluded  
21 under the thing, in which case again, the whole thing can't be precluded or whether  
22 or not you accept Mr. Gentile's interpretation that that doesn't go into the mind and  
23 the thought processes. It's really just them saying: We didn't -- we used the  
24 evidence -- we used the instructions incorrectly. I think Mr. Gentile makes a great  
25 analogy about when they consider or talk about the Defendant didn't testify and

1 talk about that even though we tell 'em: Don't talk about that. So, obviously, we  
2 can't consider it, you can't consider it. That's the first inquiry.

3 The second inquiry then is whether or not if you are going to consider  
4 it, that entitle them to an evidentiary hearing in which case, at a minimum, the  
5 foreperson would have to testify. So, I want to look at this a little bit more. I know  
6 time is of the essence.

7 MR. GENTILE: Your Honor, I'm going to ask for -- I might as well advise the  
8 Court now and I've already told Mr. DiGiacomo.

9 THE COURT: You're going to ask for a stay if the Court --

10 MR. GENTILE: No; I'm going to ask for a continuance of the sentencing.

11 THE COURT: Oh.

12 MR. GENTILE: Here's why. As a result of I don't know who, but somehow  
13 the Pre-Sentence Report for Luis Hidalgo, Jr. was sent to the law clerk of  
14 Dickerson, the Dickerson firm, not to us. Dickerson doesn't even have an  
15 appearance in this case. I thought I got fired. I thought maybe Dickerson got hired  
16 to replace me in the case.

17 THE COURT: I think if they're going to fire you it's probably not Mr.  
18 Dickerson they're going to fire.

19 MR. GENTILE: Well my point is that we -- I, myself, didn't get the Pre-  
20 Sentence Report until Monday. Now it's my understanding it was faxed to our  
21 office by the Dickerson firm late last week after the Dickerson firm got it. What we  
22 did get was Luis Hidalgo III's Pre-Sentence Report but we didn't get Luis Jr's.  
23 Okay. There are a lot of mistakes in it. One of the things that I have learned over  
24 the years and I'm sure the Court's aware of it, is that unless a corrected version is  
25 indirected --

1 THE COURT: That's -- right, otherwise what goes to the prison --

2 MR. GENTILE: Exactly. And, so, under the circumstances --

3 THE COURT: -- if -- is the incorrect version.

4 MR. GENTILE: -- I've advised Mr. DiGiacomo that there's no way that I can  
5 get it to you in time for them to correct it by Tuesday and so we would be asking  
6 for a continuance. We were going to do that anyhow no matter whether you  
7 wanted to take this under submission or not. And, so, since you're going to take it  
8 under submission, I want you to know that should you grant our request for a  
9 continuance, and I think we have a legitimate reason for it, then you definitely have  
10 the time to think it through.

11 THE COURT: Mr. DiGiacomo, any objection -- and if we're going to  
12 continue it, we'll continue it as to both because obviously the family members don't  
13 need to come out here two times to make their statements twice.

14 MR. DiGIACOMO: What I told Mr. Gentile is that my only reservation -- and  
15 I asked him if he could give me a specific --

16 THE COURT: As to what's wrong with the PSI.

17 MR. DiGIACOMO: Which would be --

18 MR. GENTILE: There's a laundry list.

19 THE COURT: All right.

20 MR. DiGIACOMO: Because it's getting to the point where I actually feel like  
21 I'm torturing this family with this case. I mean, the number of continuances, my  
22 inability to give them an answer to almost anything, you know, I just want finality  
23 for them. And, so, I was hoping that there was something really big that was going  
24 to stop us from having to go forward if that's what he needs. But he just says  
25 there's a laundry list until I said I told him I'd submit it to the discretion of the Court.

1 I don't know what's wrong with it. I haven't looked at 'em. So --

2 MR. GENTILE: And it would seem to me, Your Honor, that you really ought  
3 to rule on this motion before --

4 THE COURT: Obviously. I meant like take it under advisement like for this  
5 afternoon. I didn't mean like take it under advisement for a long period of time.

6 MR. GENTILE: Well we still -- all right. But we --

7 THE COURT: And that's why I say I recognize time is of the essence  
8 because, of course, I have to rule on it before I -- I mean, I agree. It doesn't make  
9 sense to put the family through a sentencing and make 'em speak and everything  
10 like that just to tell 'em: Oh, oops, we're not doing this. He's not going to prison  
11 after all. There's a new trial. So, no, I wouldn't do that. I have to rule ahead. But  
12 like I said, I meant like today or Monday or something like that meaning, you know.  
13 So, if it's continued than that -- you know, I still want to do it sooner rather than  
14 later for a number of reasons including the family sort of right to know what's going  
15 on with the conviction and their uncertainty, and I would like them to know one way  
16 or another, sooner rather than later, as well as obviously your clients and you  
17 wanting to know. So, Mr. Arrascada.

18 MR. ARRASCADA: Your Honor, we have actually neither Mr. Adams or my  
19 office has ever been served by Parole and Probation with the PSI. It went --

20 THE COURT: So you never got Luis -- I'm sorry, Hidalgo, III's PSI?

21 MR. GENTILE: Well he has it now.

22 MR. ARRASCADA: We have it now and it has a laundry list of  
23 inconsistencies and problems that we see. But we haven't had an opportunity to  
24 study it yet, Your Honor.

25 THE COURT: All right.

1 MR. ARRASCADA: And then also, Your Honor, I just want to make sure  
2 that -- I can appreciate the magnitude of the issue that was argued today before  
3 the Court but that the Court also intends to take and still has under submission the  
4 motion that we argued regarding new trial and judgment of acquittal for Mr. Hidalgo  
5 III which is, as you can surmise, extremely significant to him.

6 THE COURT: All right. Here's what I'm going to do. I'm going to somewhat  
7 reluctantly continue the sentencing but I'm doing that based on your representation  
8 that there are significant errors in the PSI that it's important to correct on the  
9 record. So, not -- I mean, there may be -- I'm trusting you on that. Obviously, the  
10 Court's going to be upset if when we get to the sentencing, there's just a few minor  
11 errors. But I'll trust your representation that there are a significant number as well  
12 as significant in terms of the substance on the errors.

13 MR. GENTILE: But the number absolutely is significant and the report itself  
14 being properly crafted when it goes with -- assuming that you --

15 THE COURT: Right.

16 MR. GENTILE: -- that somebody's going to go to prison here. Okay. If that  
17 happens, that report's got to be right. And, so, to my way of thinking, you know, I  
18 mean, it was there was a single date that was in error, I wouldn't be asking for a  
19 continuance. I'd just tell you and maybe we could interlineate it. But that's not  
20 what it's about.

21 THE COURT: Okay. Right. I mean, obviously, if he says he had five  
22 brothers and he's really got two brothers, that has no impact on his classification.

23 MR. GENTILE: Well it would if a guy named Hidalgo whose brother, if it isn't  
24 his brother, you know, might be in a Nevada prison, I mean, you know what I'm  
25 saying?

1 THE COURT: Well, I mean, it has to be something that's going to affect  
2 what happens at the prison.

3 MR. DiGIACOMO: On this particular subject matter, I am -- I mean, Mr.  
4 Gentile's got a lot more juice than I do. I don't know how it is they're going to get  
5 the Department of Corrections in a reasonable time period to re-write this in a  
6 manner which is correct. Normally what I thought we do is --

7 THE COURT: I think -- 'cause he would supplement it on the record.

8 MR. DiGIACOMO: He'd supplement it on the record or he wants to file  
9 some document with an errata to it and then the Court can make a determination  
10 as to truth of that error. I don't know that you're going to be able to --

11 THE COURT: Right.

12 MR. DiGIACOMO: -- repeatedly send this back to P and P to get 'em to fix  
13 it.

14 MR. GENTILE: Well, Your Honor, it's certainly going to be in my request.

15 THE COURT: All right. Well before we do that, you need to file something  
16 with the Court --

17 MR. GENTILE: We will.

18 THE COURT: -- indicating these are the errors in the PSI. Now those errors  
19 may be disputed. I mean -- so before I say P and P you have to correct the report,  
20 I need to know what we're talking about here. If they're so important that I say  
21 P and P make the changes, then that'll happen otherwise what you'll have is on file  
22 a document that can go with the PSI hopefully.

23 MR. GENTILE: Well I would want an order of the Court, signed by the  
24 Court.

25 THE COURT: With that to consider, right; that that be made part of the

1 record and the whole thing go together 'cause I understand what your concern is.

2 MR. GENTILE: Sure.

3 THE COURT: But like I said, you know, P and P is really reluctant to amend  
4 reports and obviously if I order them to do it, they'll have to do it. But before I do  
5 that, as I just said, I think I need to know what we're talking about here.

6 So, I'm going to go ahead and grant the defense's request for a  
7 continuance of the sentencing. And, Mr. Gentile, how long, assuming for purposes  
8 of right now, that the Court does not grant the motion for a new trial or obviously  
9 the judgment of acquittal -- I can tell you right now that's not going to be granted.  
10 How long do you need --

11 MR. GENTILE: The judgment of acquittal's not going to be granted.

12 THE COURT: Right; how long do you need to prepare your --

13 MR. GENTILE: A week.

14 THE COURT: Okay. And Mr. Arrascada, is that sufficient for you as well --

15 MR. ARRASCADA: Yes.

16 THE COURT: -- to correct the record regarding your client?

17 MR. ARRASCADA: Yes, Your Honor.

18 THE COURT: All right. So, let's move this out. We'll give you a week and  
19 then Mr. DiGiacomo's going to have to look at it and consider it. I think we need to  
20 move this at least two weeks if we're flying people in from out of town. But at that  
21 point, I don't care if you want to move it three weeks or whatever.

22 MR. GENTILE: You know, with all due respect to the Court and, you know,  
23 it's certainly not -- maybe what you want to do is have a status on it because he  
24 may have some travel problems with those witnesses.

25 MR. DiGIACOMO: Well what I'm thinking --

1 THE COURT: You want a status check.

2 MR. DiGIACOMO: -- what I'm thinking is we should status check --

3 THE COURT: Right.

4 MR. DiGIACOMO: -- this. I'm not suggesting to the Court that I want you to  
5 take this long to rule on the motion, but if we status check this, let's say the week  
6 of the 12<sup>th</sup>, you know, some time --

7 THE COURT: I agree. That makes more sense.

8 Mr. DiGIACOMO: -- a week later.

9 THE COURT: I agree.

10 MR. DiGIACOMO: And that might be close enough that we could set the  
11 sentencing date near DeAngelo Carroll's trial --

12 THE COURT: Okay.

13 Mr. DiGIACOMO: -- and I can bring him in for trial as well as the sentencing.

14 THE COURT: Okay. Here's the deal. So --

15 MR. ARRASCADA: Your Honor, may I be heard from this on this  
16 calendaring?

17 THE COURT: Sure.

18 MR. ARRASCADA: I start a three week jury trial the 11<sup>th</sup> of May.

19 THE COURT: Okay.

20 MR. ARRASCADA: And, so, I'm out of pocket, and I'm available the  
21 beginning of June. Mr. Adams is available --

22 THE COURT: Okay. Well that works perfectly.

23 MR. ARRASCADA: -- the entire beginning of June.

24 MR. DiGIACOMO: Yeah, that's good.

25 THE COURT: That works perfectly because DeAngelo Carroll's trial is the

1 end of June; right?

2 MR. GENTILE: June 15<sup>th</sup>.

3 MS. ARMENI: June 15<sup>th</sup>.

4 THE COURT: Right; that's sort of the middle end of June. So, why don't we  
5 do this? Mr. Gentile and Mr. Arrascada's brief, supplements are due Friday, May  
6 8<sup>th</sup>.

7 MR. GENTILE: You don't mean supplements to the brief, you mean  
8 objections to the Pre-Sentence Report?

9 THE COURT: That's what I meant.

10 MR. DIGIACOMO: You don't need to brief the legal issues. Just tell me  
11 what's wrong.

12 MR. GENTILE: I don't want to tell you what you mean but I just want --

13 THE COURT: No; that is what I meant. I misspoke. I don't care.

14 MR. GENTILE: Okay.

15 THE COURT: I clearly misspoke. And then Mr. DiGiacomo, if he wants to  
16 file something can do that and we'll move it. If you have a three week trial, the  
17 11<sup>th</sup>, the 18<sup>th</sup>, the 25<sup>th</sup>, we could do it. When do you want to do it, have the status  
18 check then? How about June 1<sup>st</sup>?

19 MR. ARRASCADA: Could we -- give us that week before that.

20 THE COURT: I'm sorry.

21 THE COURT CLERK: June 5<sup>th</sup>.

22 MS. DIGIACOMO: That'll give 'em time to physically get here then after --

23 THE COURT: Right;

24 MR. ARRASCADA: This is the status check.

25 MR. GENTILE: This is the status check.

1 THE COURT: Well if that's just a status check.

2 MR. DiGIACOMO: Right; 'cause then I'm going to have to give them time to  
3 get here -- well I guess I'm [indiscernible] either way by DeAngelo Carroll's trial so  
4 it doesn't matter. So, that's fine.

5 THE COURT: Right; so that's why I thought. Well it's actually not going to  
6 be June 1<sup>st</sup>, it's going to be June 2<sup>nd</sup> which is our criminal day.

7 MR. DiGIACOMO: That's fine. I'm in the jurisdiction.

8 THE COURT: June 2<sup>nd</sup> at 9:30.

9 MR. DiGIACOMO: What I would suggest is to maybe is move the defense's  
10 status check an extra week because if they provide me a list, they won't have to  
11 file it with the Court. If they provide me a list, we can go over it and then if there's  
12 anything in dispute, we can do it; otherwise, we can do it by way stipulation as to  
13 corrections with the Court. So, maybe we should have it so that we'll get together  
14 next week and they give me their list and I'll look at the PSI and we might be able  
15 to resolve a number of issues so that when we come in here for the status check.

16 THE COURT: Okay. Then we'll move then the filing date, if there is going  
17 to be one, to May 15<sup>th</sup>.

18 MR. DiGIACOMO: And then give me a week to respond, which will be fine.

19 THE COURT: Respond if need be Friday, May 22<sup>nd</sup> and then it's on for  
20 status check, Tuesday, June 2<sup>nd</sup> at 9:30.

21 MR. DiGIACOMO: Great. That's fine.

22 THE COURT: All right.

23 MR. DiGIACOMO: Thank you, Your Honor.

24 THE COURT: Thank you. And we'll -- as soon as you guys clear your  
25 tables, Jeff will tell the civil lawyers to come back.

1 MR. GENTILE: Is the Court contemplating entering a minute order with  
2 respect to the motion?

3 THE COURT: If I -- yeah, it would be a minute order but it would be fairly  
4 detailed in the minute order unless I get really ambitious, do the order myself.

5 MR. DIGIACOMO: Thank you, Judge.  
6

7 [Proceedings concluded at 11:21 a.m.]  
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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
22 audio/video recording in the above-entitled case.

23   
24 PATRICIA SLATTERY  
25 Court Transcriber

ORIGINAL  
DISTRICT COURT  
CLARK COUNTY, NEVADA

10  
FILED

NOV 24 2009

*Alma L. Blum*  
CLERK OF COURT

STATE OF NEVADA,

Plaintiff,

vs.

LUIS ALONSO HIDALGO, aka  
LUIS ALONSO HIDALGO, III, and  
LUIS ALONSO HIDALGO, JR.,

Defendants.

CASE NO: C212667/C241394  
DEPT NO: XXI

Transcript of  
Proceedings

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

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RA 551  
CLERK OF THE COURT

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 --

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

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.

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.

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.

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.

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.

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,

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.

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?

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.

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

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,

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.

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

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.

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

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

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

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?

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.

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