

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 MAURICE MANUEL SIMS,

4 Petitioner,

5
6 vs.

7 THE HONORABLE JUDGE DOUGLAS
8 W. HERNDON, EIGHTH JUDICIAL
9 DISTRICT COURT OF THE STATE OF
10 NEVADA

11 Respondent.

Supreme Court Electronically Filed
District Court Case No. C287414
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APPENDIX TO PETITION FOR
WRIT OF MANDAMUS OR
WRIT OF PROHIBITION
VOLUME IV
(PA 627- PA 705)

12 ANTHONY P. SGRO, ESQ.
13 Nevada Bar No. 3811
14 PATTI, SGRO, LEWIS & ROGER
15 720 S. 7th Street, 3rd Floor
16 Las Vegas, NV 89101
17 TEL: (702) 385-9595
18 FAX: (702) 386-2737

19 IVETTE A. MANINGO, ESQ.
20 Nevada Bar No.: 7076
21 LAW OFFICES OF IVETTE A.
22 MANINGO
23 720 S. 7th Street, 3rd Floor
24 Las Vegas, NV 89101
25 TEL: (702) 385-9595
26 FAX: (702) 386-2737

27 ATTORNEYS FOR THE
28 PETITIONER

THE HONORABLE JUDGE
DOUGLAS W. HERNDON
REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 16TH FLR
LAS VEGAS, NEVADA 89155
TEL: (702) 671-0591
FAX: (702) 671-0598

STEVEN B. WOLFSON
Clark County District Attorney
Attn: Appellate Division
200 Lewis Avenue 3rd Floor
Las Vegas, NV 89101

CATHERINE CORTEZ-MASTO
Attorney General
100 North Carson Street
Carson City, NV 89701-4717

ATTORNEYS FOR THE STATE

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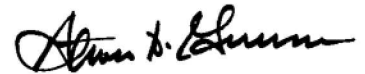
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TRAN
CASE NO. C-287414
DEPT. NO. 3

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
MAURICE SIMS,)
SASHA WILLIAMS,)
BRANDON RANGE,)
DARON MORRIS,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT
OF
PETITION FOR WRIT
MTN FOR SEVERANCE

BEFORE THE HONORABLE DOUGLAS HERNDON
DISTRICT COURT JUDGE

DATED: TUESDAY, SEPTEMBER 10, 2013

REPORTED BY: SHARON HOWARD, C.C.R. NO. 745

1 APPEARANCES:

2 For the State: MARC DIGIACOMO, ESQ.

3 PAM WECKERLY, ESQ.

4
5 For the Defendant: IVETTE MANINGO, ESQ.

6 ANTHONY SGRO, ESQ.

7 ALZORA JACKSON, ESQ.

8 CARL ARNOLD, ESQ.

9 MICHAEL HYTE, ESQ.

10 LANCE HENDRON, ESQ.

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1 LAS VEGAS, NEVADA; TUESDAY, SEPTEMBER 10, 2013

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

3 * * * * *

4
5 THE COURT: Page 6 through 9, all defendants are
6 present in custody.

7 Case number C-287414, Maurice Sims, No. 1; Sasha
8 Williams, No. 2; Brandon Range, No. 3; and Daron Morris,
9 No. 4.

10 We'll get all the attorneys' appearances on the
11 record.

12 MS. JACKSON: Alzora Jackson, I'm here together
13 with Michael Hyte from the office of the special public
14 defender.

15 We represent Mr. Brandon Range.

16 MR. ARNOLD: Carl Arnold, and I represent Mr.
17 Daron Morris.

18 MR. HENDRON: Lance Hendron for Sasha Williams.

19 MS. MANINGO: Ivette Maningo on behalf of Maurice
20 Sims.

21 MR. SGRO: Tony Sgro on behalf of Maurice Sims.

22 MR. DIGIACOMO: Mark DiGiacomo and Pam Weckerly
23 on behalf of the State.

24 THE COURT: Before we get going, I know it's
25 been a long morning. I apologize to you all. It's coming

1 up on noon. At some point we'll need to take a break and
2 let the people who work in court go to lunch.

3 MR. HENDRON: I have an issue. I have a 1:00
4 prelim down in Boulder City.

5 THE COURT: So we can go and get as much done
6 before we break for lunch. I'm fine with doing that,
7 going for an hour or whatever.

8 Is there anybody we can call down there for you.

9 MR. HENDRON: You can call the department, but I
10 don't know what that's going to do.

11 THE COURT: Is it supposed to be going forward.
12 Is it resolved. What's the issue.

13 MR. HENDRON: It's not resolved.

14 MR. DIGIACOMO: I'm sure we're willing to submit
15 motions on calendar.

16 THE COURT: I don't know how you were making
17 that anyway. I would have gotten my calendar done quicker,
18 based upon what I perceived to be the desire to argue.

19 MR. HENDRON: With respect if we were going at
20 10:30, my assumption was Mr. Sgro is going to go for an
21 hour. Our argument is a half hour. That would give me
22 time to get down there.

23 THE COURT: Let's go ahead and start addressing
24 things. We'll see what we can do, then revisit it.

25 Ask Molly to find out in Boulder City which

1 department, and what's going on.

2 MR. SGRO: We do have a power point for the
3 motion. We need some technical help.

4 MR. DIGIACOMO: Aren't we going to start with
5 the writs.

6 MR. SGRO: I don't mean to dictate. I didn't
7 know where we were going to go. I do have witnesses and
8 others interested in the motion. Some are here. Some
9 left because of the timing. I would like to suggest we do
10 that one first.

11 THE COURT: I'm planning on doing that last
12 because it's the longest. I want to get some things done
13 and maybe Mr. Hendron can get on his way.

14 MR. SGRO: Okay.

15 THE COURT: If you want to get your stuff hooked
16 up, we can do that so that's out of the way. Are you
17 hooked into the table.

18 (Brief recess taken.)

19 THE COURT: Back on the record. Same parties
20 present.

21 I was just going through -- you don't have to stand
22 up. You can sit down.

23 Mr. Range doesn't have anything pending today. There
24 was a previous stipulation to request to sever in regard
25 to severing him from the other 3 defendants, correct.

1 MS. JACKSON: That's correct, your Honor.

2 THE COURT: That's the writ filed for Mr.
3 Range.

4 As to Mr. Sims, the motion to sever counts, if I
5 understand the request that got filed last night, was to
6 withdraw the motion to sever counts, correct.

7 MS. MANINGO: At this time we'll withdraw that
8 motion.

9 THE COURT: His motion to sever the trial from
10 Mr. Morris and Ms. Williams. As well as his petition.

11 And Ms. Williams' motion to sever trial and petition.

12 And then Mr. Morris' petition.

13 Mr. Morris is still not requesting to sever,
14 correct.

15 MR. ARNOLD: That's correct, your Honor.

16 THE COURT: State, I have that all, correct.

17 MR. DIGIACOMO: I believe so.

18 THE COURT: So as I said earlier, I want to take
19 up the death penalty motion last. I think it's the
20 longest. I want to try and get through these other things
21 beforehand, before we take our break. In which case,
22 why --- do you want to do the writs and the motions to
23 sever.

24 MR. DIGIACOMO: I thought we were half way
25 through the last motion to sever.

1 THE COURT: We talked about the propriety of
2 moving forward on the motion to sever in an effort to try
3 to get a separate attorney in regard to Mr. Morris and
4 those issues. We never really got to the meat of arguing
5 the motion to sever.

6 We talked about some of the problems that existed as
7 to why you agreed that Mr. Morris was asking it, and
8 things of that nature, but we can deal with the
9 severance.

10 Ms. Maningo.

11 MS. MANINGO: Your Honor, we touched upon this a
12 little the last time, but it never is ideal to have 4
13 trials, or whatever it is.

14 Really, the number one concern is obviously the
15 rights of each individual defendant in this case and clean
16 trials.

17 The State had already stipulated, or was on the verge
18 of stipulating to 3 separate trials, because, again, they
19 acknowledge there is some joint-trial issues here.

20 Basically our position is that there is two accusers
21 here, and Ms. Sims is not going to have the opportunity to
22 confront them. There are Bruton issues here. And that's
23 basically our first issue.

24 Those two accusers are Morris and Williams. Again,
25 the State conceded that there was some Bruton issues with

1 regard to Sims placing Morris at the scene, as well as
2 Williams' statement against Morris basically makes him the
3 shooter in the case. Those are her statements.

4 What the opposition says is that there is no legal
5 basis for Sims to be severed from Morris. Of course they
6 offered him the severance, but not us. And we disagree
7 with that, your Honor. There is Bruton issues here, with
8 regard to Sims and Morris as well.

9 The State failed to address the fact that although
10 Morris denies being at the scene and doesn't give any
11 details of what occurred, what he does tell the police is
12 that after the fact my client, Mr. Sims, went knocking at
13 his window in order to try to explain to him what had gone
14 down and to dispose of closing from the actual events.
15 So, of course, that's incriminating. And, again, the
16 State didn't address that.

17 That's definitely a problem for Mr. Sims. For that
18 type of evidence to come through, Morris, through their
19 presentation of Morris' statements and through of course
20 Morris' defense attorney at trial.

21 The other issue is that Morris does fully implicate
22 my client in the battery of Mr. Scott, which is 4 days --
23 allegedly 4 days before this occurred.

24 His statements are that he was there the whole time.
25 And that he actually witnessed my client assault

1 Mr. Scott. So both of those things obviously are very
2 incriminating, and neither of them were addressed by the
3 State.

4 So again, those issues are a problem for us. And we
5 can't confront Mr. Morris at trial, because he's a
6 non-testifying co-defendant in this case.

7 With regard to Williams, her statements too are very
8 incriminating. She specifically says that my client had a
9 weapon, that he had a gun, and that he instructed others
10 to pull their guns. And that he was the one who demanded
11 money and/or the TV from this group of individuals.

12 So the response from the State there is, well, you
13 know what, she never said he's the shooter, or I think
14 their words were the killer. The point is it's a felony
15 murder case, and she's basically putting him as leading
16 the robbery, which is very incriminating.

17 Again, these are not testifying co-defendants. And
18 admitting all these statements with my client sitting
19 there is violating their rights. And we can't ignore the
20 practical limitations of a jury to put all that aside and
21 not consider it against our clients.

22 And that brings me to the redactions, because of
23 course they have suggested that it's simple. We redact
24 these statements. It's not simple, Judge. I have been in
25 situations where we tried to redact statements, and in the

1 end sometimes the judge ends up severing anyway. It's
2 very difficult to redact these types of statements.

3 The case law is, you can't just take away and put
4 blanks in a statement and have the person sitting here.
5 The jury is going to infer that the person that they're
6 not talking about is the person sitting there. And in
7 this case, it would be Sims.

8 So I disagree that we can easily redact these
9 statements. And the State hasn't offered any type of
10 redactions. I looked at the statements myself and I
11 personally can't see how they can redact these statements
12 and have a jury fairly -- they are human. There is
13 limitations. They're going to infer that the person that
14 Ms. Williams is talking about -- which, by the way,
15 everyone refers to as her boyfriend -- is Sims. And he
16 will be sitting in the courtroom. I don't really see any
17 way to get around that.

18 The other issue is the mutually antagonistic
19 defenses, your Honor. The fact that -- well, it's pretty
20 clear already, Mr. Morris was offered a severance. They
21 are not going to take a severance. It's pretty clear to
22 us, at least, the position Mr. Morris is going to take.
23 He did not decline the severance to team up with us.
24 That's pretty clear.

25 The point is that they're going to be going after my

1 client. That's clear, I think to everyone here. Again,
2 Williams is in a similar situation, where she's already
3 told the police -- and, again, we don't know exactly what
4 the co-defendants are going to do, but based on the
5 discovery and based on what has occurred so far, the
6 writing is on the wall. What she has to say is that our
7 client leads the robbery. Our client's statement is that
8 it's completely contrary to that. The point is that he
9 says we're there for a different purpose, and he makes no
10 incriminating statements with regard to the robbery or the
11 murder.

12 So this is going to be a situation where everyone is
13 pointing a finger at each other. All of our defenses are
14 contrary -- are inconsistent. And it's giving us the
15 inability to present our theory of defense without having
16 to defend against a second prosecutor, and, yet, a third
17 prosecutor.

18 That also spills over into sentencing. That's
19 important, although I know the State disregards that
20 argument. But we all have critical, tactical differences
21 in how we're going to choose a jury. If I'm sitting next
22 to Williams, of course, Mr. Hendron's goals and his reason
23 for wanting to keep a juror is going to be different from
24 mine.

25 Our number one, as your Honor knows, our number one

1 goal in picking a jury in a death case is to make sure
2 that our -- is really more focused on the sentencing
3 phase. That's not what Mr. Hendron is focused on. So
4 because we have tactical differences and we have to share
5 preempts, this type of -- these issues spill over into
6 sentencing. So do the antagonistic defenses, in the sense
7 that the reality is when we get to sentencings and two
8 people are together, it becomes a comparison among the two
9 people, you know. You don't want it to be where there is
10 almost like a gladiator arena, where one person is trying
11 to stay alive. That's what's going to happen. If we get
12 to a sentencing phase, sitting next to Mr. Morris, those
13 defenses that start the first phase are going to spill
14 over.

15 It's going to be who is the worst of the worst. Who
16 is the person here who deserves the death penalty. We're
17 going to be saying it's the shooter. They are going to be
18 saying it's the person who in the leader. And that's what
19 the argument is going to be.

20 So, although the State dismisses that, it's very
21 important to us. This is a death case. Death is
22 different. And it's not irrelevant. All these issues
23 really spill over and are also important in the sentencing
24 phase here.

25 THE COURT: All right.

1 Mr. Hendron.

2 MR. HENDRON: Counts (1) and (2) are solely
3 against Morris and Range. There is nothing there to place
4 on January 4th, two days before the incident the State
5 alleges Ms. Williams was involved in, collectively with
6 the co-defendants. There is nothing there that gives rise
7 that Ms. Williams was involved in any way with that
8 January 4, incident, Counts (1) and (2).

9 Counts (1) and (2) involve a violent incident.
10 There was a firearm that was involved. There was a
11 battery that took place against a fellow neighbor.

12 If you relate this to the Tabish case, our Supreme
13 Court has said if it's a close case, your Honor should
14 take the position of severing the Defendants. This isn't
15 even a close case, your Honor.

16 Any information, if Ms. Williams was tried alone, the
17 January 4th, incident is no way relevant, both logically
18 and legally. It's not relevant at all. And if there were
19 some reason for relevancy, anything that comes in by way
20 of relevance, the arguments made from a legal relevancy
21 standpoint, the unfair prejudice of introducing that
22 information, weighed against any probative value, the
23 unfair prejudice clearly outweighs any probative value.

24 There is absolutely nothing tying Ms. Williams to the
25 January 4th, incident. I believe in the opposition the

1 State cites to something about one of the witness'
2 neighbor saying Ms. Williams was there. If you read over
3 the grand jury transcript, your Honor, the reason she was
4 there was to grab Sims away from the incident.

5 If there was anything there, the State had the
6 opportunity to charge her. She's not charged with
7 anything with regard to the January 4th, incident.

8 Bringing this information in at trial, if she's tried
9 collectively with the other co-defendants, there is a
10 clear spill-over affect. You can certainly try to present
11 a limiting jury instruction, but, again, I think as Ms.
12 Maningo introduced, juries are human. They are going to
13 hear that information, which they otherwise wouldn't. If
14 Ms. Williams had her own trial, the limiting instruction
15 is not going to do the justice that it serves.

16 And I think, again, if you go back to the Tabish
17 case, they had a similar circumstances in that case. They
18 tried to give a limiting instruction. And our Nevada
19 Supreme Court said that wasn't enough.

20 Again, it's a close call. Your Honor needs to sever
21 Ms. Williams from the other defendants. But I don't think
22 this is a close call. I think it's clear that there would
23 be nothing that would introduce that January 4th incident
24 in a sole trial by Ms. Williams alone. And the
25 significance amounts to the prejudice that will happen

1 against her, if any of that evidence is presented to the
2 jury.

3 With regard to having a death qualified jury, if
4 Ms. Williams is by herself, obviously she would not be
5 subjected to that. But now the fact of the matter is she
6 is.

7 As a result it's going to affect her ability to pick
8 jurors that she would feel is appropriate for having a
9 fair trial.

10 The perfect example, I believe I provided it in my
11 supplemental motion, was the Jehovah Witness. Where it's
12 possible that would be an outstanding juror for Ms.
13 Williams, someone we would want. The problem is if it's
14 determined, based upon their religion, they can come to
15 terms with sentencing someone to death, they are going to
16 be excused for cause. Ms. Williams is losing the benefit
17 of that potential juror.

18 Secondly, with regard to death qualified jurors. We
19 have to share peremptory challenges with the other
20 co-defendants, as your Honor is aware. As Ms. Maningo has
21 already spoke about, we're going to have a different
22 premise as to how we stratigize our case. We're not
23 viewing this as a death case, because they're not seeking
24 death against Ms. Williams. Strategy-wise, we want the
25 best possible jury in there for Ms. Williams for possible

1 acquittal at trial.

2 The strategy for the co-defendants, because they are
3 exposed to death, they may very well have to accept the
4 fact that we might have unfavorable jurors in our pool,
5 but what we're willing to do is take them because of a
6 possible instance that, you know what, we could possibly
7 persuade them at the time, if it gets that far, of capital
8 sentencing.

9 Lastly, as Ms. Maningo also spoke about, was the
10 antagonistic defenses. I believe your Honor is also aware
11 of the Chartier case the Nevada Supreme Court heard. And
12 in that case the co-defendant, Chartier, Wilcoxes'
13 attorney throughout the trial was finger pointing at
14 Chartier the entire time. So in essence what Chartier's
15 defense attorney now had to do was not only battle against
16 the state, but he had to battle against the co-defendant's
17 attorney.

18 What is going to happen in this situation -- it's
19 evident -- what happened last time when we were here as
20 far as the motion to sever the State was handing out on a
21 silver platter to Range's attorney, and he declined
22 that.

23 THE COURT: That's Morris. Range accepted.

24 MR. HENDRON: Excuse me.

25 Morris' attorney took the -- declined to take that.

1 What ends up happening now is we know that there is
2 supposition that they're likely -- that his attorney is
3 likely to take a position that is adversarial to ours.

4 In essence what you're doing is putting all of these
5 co-defendants in a cage, while the government sits as a
6 spectator and watches, whoever ends up surviving that,
7 then they'll decide who they want to go after. It's not a
8 fair trial.

9 THE COURT: But what you have to realize is
10 Chartier didn't stand for the proposition that just
11 because you're adversarial against another defendant it
12 warrants a severance. There's more exploration in what
13 you're prohibited from putting on in an antagonistic
14 defense as to why you'd want a severance.

15 I think it's a little more involved. All the time we
16 have multiple defendants that are pointing a finger at
17 each other. That doesn't necessarily equate to
18 antagonistic defense and the inability to present your
19 case from him being there.

20 MR. HENDRON: I'm not clear as to -- there's
21 only an assumption as to what the theory is ultimately
22 going to be. But it's going to be one of these theories
23 that the court should at least take high caution on that
24 it's going to be mutually antagonistic and so prejudicial
25 that the co-defendants are going to be fighting against

1 one another, that it's not going to entitle Ms. Williams
2 to a fair trial as a result of that.

3 That's just following the Chartier lead. I think
4 there is some analogy to it, your Honor.

5 MS. MANINGO: If I may add, your Honor, in
6 addition to that my point that -- I understand your
7 point -- but there is more involved in that case.

8 But we also have other things here. And I would
9 point out that that case also took into consideration the
10 sentencing problems that we have touched upon.

11 THE COURT: I agree.

12 MS. MANINGO: In addition to that, we have
13 serious Bruton issues. It's not just that we're coming to
14 you saying, oh, there's antagonistic defense. That's it.
15 There is more to it.

16 We went through what all the problems are with all of
17 these statements coming in. It's violating our client's
18 right to confront these witnesses, which to me is a key
19 issue in our severance. I just wanted to add, we're not
20 just saying that --

21 THE COURT: I didn't think you'd rest on one
22 thing.

23 MS. MANINGO: I wanted to make that clear. I
24 understand your Honor's point.

25 THE COURT: Okay.

1 Mr. Hendron.

2 MS. JACKSON: Alzora Jackson, on behalf of Mr.
3 Range.

4 Just a minor correction to the record. The January
5 4th, incident, my understanding is that Mr. Brandon Range
6 is not charged in that incident. I think counsel
7 indicated that he was.

8 MR. HENDRON: Did I refer to him.

9 THE COURT: I thought he was talking about being
10 severed on the January 8th murder count, not his alleged
11 involvement in the January 4th Scott incident.

12 Am I correct.

13 MR. HENDRON: That's correct. Again, I
14 appreciate the appearance for Range. Now I thought
15 basically, it's just the 3 co-defendants trying to --

16 THE COURT: I'm just trying to make sure her
17 client is not charged with that. The incident you said, I
18 read to mean that we're talking about severance from that
19 incident. You are just talking about severance among the
20 4 defendants from the murder incident.

21 MR. HENDRON: That's correct.

22 THE COURT: Okay.

23 Anything further.

24 MR. HENDRON: No, your Honor.

25 THE COURT: Mr. DiGiacomo.

1 MR. DIGIACOMO: Briefly.

2 Some of the simple issues here, the death
3 qualification is pretty well established. The fact that
4 you have a capital or non-capital defendant for policy
5 reasons, as well as they've never been able to produce any
6 evidence that suggests that it's prejudicial to face a
7 capital jury when you're a non-capital defendant. It's
8 not a legal basis for severance.

9 To address Chartier, they're missing the main point
10 in Chartier, which is the co-defendant wanted to put in a
11 piece of evidence that he couldn't because he was joined
12 with this co-defendant. It was a recording of a
13 conversation that he wanted to place into evidence.

14 What the court essentially said is that was the
15 specific right that was violated. Hence, why the
16 severance was required was because of that.

17 They talk about all the other issues, but at the end
18 of the day that came down to a piece of evidence that was
19 not admissible.

20 So what you're left with is 3 defendants -- Morris,
21 Sims, and Williams. Mr. Morris doesn't want a severance.
22 I can tell the court I offered Mr. Morris a severance
23 because the State intends to play the tape recording of a
24 conversation between Ms. Williams and Mr. Sims, in which
25 they make sufficient admissions to not only place them at

1 the scene, but at least to be able to tie them based upon
2 the live victim who was inside the house to the crime.
3 And we can litigate whether or not any other statements of
4 theirs would be admissible.

5 But, for example, they make statements like I told
6 the police this. And whether or not we could offer what
7 they did tell the police, not for the truth of the matter
8 asserted, but to corroborate the statements they made
9 during the recording, is open and questionable, which we
10 can litigate later on. But certainly for those two
11 defendants, that will be sufficient, no matter what your
12 ruling is on the statements to the police. That will be
13 sufficient to try those two individuals together.

14 And I also believe that we were not willing to offer
15 to redact from that, what their story is in that
16 statement. Which is, hey, we both threw it on Max. And
17 Max being allegedly Mr. Morris. So I offered Mr. Morris
18 the opportunity to sever, but there's good reason not to
19 because he has a non-antagonistic defense in the case.
20 It's the defense he presented to the police.

21 I'm Max, but I wasn't there. I'm known as Max. It's
22 some other Max you're talking about. He has a it wasn't
23 me defense. And it doesn't require him -- for them to be
24 guilty for him to be, it wasn't me defense.

25 THE COURT: We raised this or I raised it with

1 you all on the 8th. The issue that you perceived to be
2 problematic for him before he stated that he didn't want a
3 severance, doesn't go away just because he doesn't
4 physically request a severance now. That issue of I want
5 to introduce something that normally would require a
6 severance is going to hang there. It will hang in trial.
7 It will hang on post-conviction. Regardless of the wisdom
8 of what Mr. Arnold is saying, I don't want a severance
9 because I think I look better then them at trial.

10 MR. DIGIACOMO: Yes and no.

11 I can't force a defendant to say I want a severance
12 because the State is going to offer this. There's nothing
13 that precludes me from offering the statement against Ms.
14 Williams and Mr. Sims. Nothing precludes me from doing
15 that. They are not entitled to request redaction.

16 Mr. Morris' lawyer can request a redaction. And if
17 this court decides you are going to redact it to such a
18 point I won't admit it, then I can move to sever Mr.
19 Morris.

20 But at this point I have no legal basis to sever Mr.
21 Morris. Because as far as I know, I'm offering this
22 statement and it's coming in in its entirety, until such
23 time as there's some future discussion. But as it relates
24 to Mr. Sims and Ms. Williams' request, they have no legal
25 basis to make the request. It's why I made the offer to

1 Mr. Morris.

2 So it is something that's going to have to be
3 litigated, probably either from Mr. Morris coming and
4 saying I want it in unredacted. That goes to my theory of
5 defense. Which I can see as something he'll do. Or he
6 may argue that he wants a redaction. We'll redact it.
7 And we can make a decision as to whether the State wants
8 to move to sever for Mr. Morris. It has nothing to do
9 with Ms. Williams and Mr. Sims and their legal right to
10 request a severance.

11 THE COURT: I'm not saying that it forms a basis
12 for them. It inhibits them somewhat in what they're
13 trying to do. Just like the decision not to request a
14 severance. But I agree that the conversation we're really
15 having is about Morris and post-conviction issues about
16 what all is coming in at trial, you all sitting here
17 during trial.

18 MR. DIGIACOMO: It doesn't relate to any rights
19 of Ms. Williams and Mr. Sims, which is what I'm arguing to
20 the court today.

21 I don't think they have the right to raise Mr. Morris
22 should have asked for a redaction. He may have a reason
23 not to ask for redaction. Mr. Morris should have asked
24 for a severance. Well, he may have a strategic reason to
25 say I don't want a severance. And me and the State can

1 work out an agreement. Why should they have the right to
2 get in the middle of that. They don't. That doesn't
3 affect their rights. It's their client's statements, and
4 they're admissible to their clients.

5 To the extent we're arguing Ms. Williams and
6 Mr. Sims' motion to sever, it's irrelevant to the court.
7 Which leaves us to the statements of Mr. Morris.

8 I recognize Bruton. And Bruton is a rule of hearsay.
9 And I can tell you that the State is never going to be
10 offering a statement of Mr. Morris for the truth of the
11 matter asserted that he happened to be in his house and
12 Mr. Sims came over and told him what happened in the
13 crime. That's never going to happen.

14 Whether or not that could be redacted in some manner
15 to be relevant, I can't even imagine what the relevance of
16 admitting that at any particular point in time. So the
17 post-murder statements that Mr. Morris makes about Mr.
18 Sims coming over, the State doesn't believe any of that is
19 true, so we're certainly not going to be offering it for
20 the truth of the matter asserted. So to that extent, I
21 don't know that that raises an issue for severance.

22 THE COURT: So you're not offering it, or you're
23 not offering it believing it to be hearsay and looking for
24 an exception.

25 MR. DIGIACOMO: Well, it's very hard for me to

1 take a firm stance without knowing what anybody's defense
2 is. You know severance is a fluid thing.

3 What I'm talking about now is the standard here
4 today. I can't think of a reason why I'd offer that
5 particular statement of Mr. Morris. But I'm not saying
6 that that's something I'm saying will happen for all time.
7 I have no idea what the defenses are.

8 I would note at this hearing, it's their burden to
9 establish the prejudice. And as I stand here today I
10 don't hear anything coming out of them as to what the
11 antagonistic defense is. What piece of evidence is going
12 to come in that is not admissible against them.

13 As I stand here today, I can't think of a reason to
14 admit Mr. Morris' statements that says Mr. Sims came to my
15 house later on, because I don't believe any of that to be
16 true.

17 The second part of that is different for Ms. Williams
18 as it is for Mr. Morris. Mr. Morris acknowledges being
19 present on the June 4th incident, but claims to be merely
20 present. I don't see any problem with asking the
21 detective, Detective, in your conversation with Mr. Mortis
22 did he acknowledge to you that he was the Max that Brad
23 and the other victim, Kenneth, described as being present.
24 No.

25 It doesn't implicate any of the other defendants in

1 any manner. And that's all he said. I was present. And
2 then there is -- it's not as clear cut as counsel made it
3 seem in how he fully described the incident and how it
4 started, whatever else. Basically, I was there, but that
5 wasn't my gig. I didn't have anything to do with it.

6 So I don't see any problem with redaction as it
7 relates to Mr. Morris' statement as it relates to the June
8 4th incident.

9 Which leads us to the final argument, which is really
10 Ms. Williams' argument. Which is, hey, I'm not charged in
11 June 4th. So guess what. I agree with Mr. Hendron on one
12 thing. Which is Ms. Williams committed no crime I can
13 tell on January 4th. But there are some things that are
14 true that she acknowledges, which is she's present for
15 that incident. And you have to recall the charging
16 document. Ms. Williams is charged with vicarious
17 liability. Just to you, this January 4th incident would
18 never come in in a trial in which she was severed out.
19 And that answer is, well, almost completely incorrect for
20 multiple reasons. As addressed in Mr. Sims' motion, it
21 establishes the identity of both Mr. Sims and Mr. Morris,
22 as well as being in possession of the murder weapons in
23 this particular case.

24 So it would come in to establish their possession of
25 the murder weapons, in a vicarious liability case, one.

1 But maybe the court would say, well, maybe, maybe not. So
2 you have to remember what else for Ms. Williams. It comes
3 in for the additional reason that it does not come in
4 for -- necessarily in the case of Sims and Morris. And
5 that is she's charged with acts and crimes that involve
6 the reasonable, foreseeable actions of her coconspirators
7 during the course of this conspiracy.

8 And her knowledge of what happened at the scene, her
9 knowledge of their behavior on the 4th, the fact that
10 they're continuing that behavior a couple of days later,
11 together when she decides to drive all of them to an
12 apartment after she tells them she has a problem with
13 those people in that apartment, all goes to the knowledge
14 of Ms. Williams as to what's going to happen when those
15 people wind up at that door and the people inside refuse
16 to pay.

17 All of which is relevant to both her knowledge and
18 her intent. And therefore, even in a separate trial, the
19 evidence of what happened at the earlier incident would be
20 admissible even in Ms. Williams separate trial. So it
21 cannot be a basis for her severance.

22 So at the end of the day, there is absolutely no
23 legal basis to sever Ms. Williams and Mr. Sims. The only
24 legal basis to sever Mr. Morris would be his claim to be
25 merely present on the January 4th incident. Which is

1 certainly subject to easy redaction and no need to sever.

2 I think the court needs to consider the balancing of
3 rights when you consider Mr. Morris. Mr. Morris has a
4 lawyer who has said to you, I want to be joined. And
5 while I recognize that they're arguing that inhibits them.
6 But I also think you severing it on the request of Mr.
7 Sims harms Mr. Morris, because his strategic decision is
8 he wants to be joined. So unless they can come up with a
9 really good reason to sever the case -- it's their burden,
10 they haven't shown it to the court, the motion should be
11 denied.

12 THE COURT: Let me ask you this. I have
13 always -- I'll be honest with you. I was the guy in
14 charge of trying to redact the Lyle Lopez statements. I
15 didn't think it was going to fly. It did. And it got
16 upheld on appeal. He wanted me to figure out how to
17 redact them. We did.

18 I've always viewed things as when you're talking
19 about multiple defendants, kind of like having kids.
20 There's a little bit of a difference between 1 and 2 for a
21 parent, but once you get up to 3, it becomes vastly
22 different.

23 At what point does beyond 2 defendants become so
24 functionally different in terms of having less preempts
25 then you'd have if you were charging forgery for instance.

1 You have with 3 defendants there and all of a sudden you
2 have less then you'd normally have in a normal trial
3 charged in a capital case.

4 You've got so many multiple statements you're trying
5 to redact, at what point do you cross over between -- I
6 know the Supreme Court doesn't point to it and say with
7 black letter finality, if you've got this number of
8 defendants and you're trying to redact statements it's
9 inherently prejudicial. But there has got to be some
10 cumulative concern for the court.

11 A couple of people redacting things, I get that. But
12 once we get upwards of that, it becomes functionally much
13 more difficult.

14 MR. DIGIACOMO: I can't imagine this aligned to
15 a 13 co-defendant case. Eight were together at one point
16 in time.

17 But the court has got to remember we're only offering
18 to redact one small, tiny statement of Mr. Morris, which
19 is I was merely present on June 4th. We're not offering
20 to redact --

21 THE COURT: That's what you're offering to
22 redact. But assuming they stay together, you're going to
23 be offering a hell of a lot more that needs to be redacted
24 then just that if you're seeking the introduction I'm
25 sure.

1 MR. DIGIACOMO: But I don't know what else they
2 would be seeking. I guess theoretically Sims and Williams
3 could get together and say we want to redact our
4 statements to the police. And if the redaction gets to
5 the point where we lose any of the -- we'll go without it.
6 We have their statements in the car. There's no way
7 around their statements in the car.

8 THE COURT: I agree that there's a difference
9 between the statements recorded in the car when they're by
10 themselves talking to each other, are different then the
11 taped statements they give individually to the police.

12 Your argument is going to be that's still conspiracy
13 as to whether they were arrested or not. But I'm just
14 saying that I'd fall out of my chair if they don't --
15 assuming they stay together -- say we also want this
16 redaction. They'll use that statement in this redaction,
17 if they're going to use that statement.

18 MR. DIGIACOMO: That may be true. But Mr.
19 Morris isn't going to argue about -- sorry.

20 The two defendants aren't going to be arguing about
21 anything more of Mr. Morris, because Mr. Morris' statement
22 is literally, I was merely present. I ain't the guy
23 involved in the murder. You got the wrong guy. I'm sorry,
24 sir, I don't understand. You think it's me, but it's not
25 me.

1 And then, oh, by the way. Yeah, later on that
2 night Sims did come to me and tell me a story of what
3 happened, which we're offering not to offer.

4 So what are you left with. Your redaction of a very
5 minor thing of Morris.

6 I guess it's hard to make the argument without
7 knowing the court's ruling. But I can't comprehend a
8 situation where Williams and Sims get severed. To me the
9 argument here is do you sever Morris over his objection on
10 the request of Sims. And the analysis is, well, there's
11 one tiny little redacted statement that's going to come
12 in. Does the court sever that. And the answer is no.

13 THE COURT: What about the jury issue I was
14 talking about. I realize you have the Hell's Angels case,
15 the Mongrels case, gang cases, they're not necessarily
16 capital cases. But when -- I can give a guy in a breach
17 of contract case more peremptories than we'd normally
18 have, but I can't do it in a capital murder case when I
19 have multiple defendants.

20 MR. DIGIACOMO: I don't know that that's true,
21 your Honor.

22 THE COURT: What authority do I have to do it
23 anywhere in the statute.

24 MR. DIGIACOMO: I think the statute --

25 THE COURT: I did it in one of your cases, and I

1 think I was wrong. It never came up on appeal. You
2 objected to it. The defense wanted it. I said I'll give
3 you a couple of extras.

4 MR. DIGIACOMO: I did. But from a standpoint --
5 set it aside a second.

6 I was prepared to argue whether or not you can or
7 can't. I actually have seen the statute. They state
8 right in the statute as long as you gave us an additional
9 one, you give them. So if we say instead of 10 preempts,
10 we got 14. They got 14, and they split it between them,
11 or do whatever they do. As long as we give both the same
12 to each side, that that potentially is not a problem under
13 the statute. But we can litigate that at another time.

14 You have to then say to yourself, first of all, you
15 take the legislative function here. The legislature made
16 a determination. The Supreme Court said there's no
17 prejudice from it, you're taking a practical view. I
18 don't like the rule. I don't like the way the rule is
19 imposed.

20 THE COURT: I'm not sure the legislature has
21 said here's the number of peremptories you get. I'm not
22 aware of -- I tried to look. The Supreme Court has never
23 said in a jury selection setting when there's multiple
24 defendants, we find no prejudice in each guy in a capital
25 case ending up with 3 challenges or whatever.

1 MR. DIGIACOMO: I have not seen a published
2 opinion of that. But think to yourself how many case we
3 have all done, multiple capital defendants, what request
4 is always made of the court. It's always made that they
5 get extras because there are multiple defendants. It is
6 always denied because of the way the statute is written.
7 And we have yet to see a case come down that says we are
8 going to get reversed on it.

9 At what point do you say to yourself this is just
10 what the rules are. Why are we presuming a prejudice that
11 I don't see necessarily existing.

12 A good juror for a capital case may be somewhat
13 different in the defense's mind from a good juror for
14 non-capital. But you only have a right to a fair juror,
15 and that juror is the same whether or not it's capital or
16 non-capital. Can you follow the law or not follow the
17 law.

18 So at the end of the day, there's kind of the
19 argument of petitioners about the affective, from a legal
20 argument, legally it should make no difference if there is
21 50 defendants sitting there, or if there is two defendants
22 sitting there. I don't know that the court should take a
23 practical line-by-line analysis saying I'm never going to
24 do a case with more than this many defendants in a capital
25 case, or more than this many defendants in a non-capital

1 case. I just don't see that as a --

2 THE COURT: I don't think it's a black letter
3 proposition, even at the trial court level. You may have
4 5 defendants, but all of them are maintaining an alibi
5 defense and they're all on board with it. So there's no
6 real -- they're all going to agree on who they want to
7 challenge -- maybe not all. But I mean, it's a little
8 different when people are saying I'm pointing a finger at
9 him and I'm pointing a finger at her and she's pointing a
10 finger at me.

11 So even though we might not have Chartier type
12 antagonism, we still have the want of different jurors.

13 MR. DIGIACOMO: I'm not positive that that's --

14 THE COURT: It was raised and part of the
15 argument that's being made that there's a prejudice in
16 jury selection warranting severance.

17 MR. DIGIACOMO: I've just never seen a court
18 ever rely upon it for granting of severance, or the
19 Supreme Court ever coming down and saying there's a
20 problem. From a statutory standpoint, there is no
21 problem. I would say that --

22 THE COURT: I would love to have found
23 something, because I looked. I didn't. That's why I
24 don't know if it's ever really gone up unpublished and
25 spoken to.

1 MR. DIGIACOMO: From the standpoint of this
2 motion, it's their burden. The answer to the question,
3 they can't -- I can't tell you what their defense is.
4 Apparently they can't tell you.

5 As far as I know Morris says ID, and Sims and
6 Williams was, it wasn't us. We left before any of the
7 problem happened. It was whoever was left back in that
8 apartment.

9 As far as I can tell, that's their defense. I have
10 no indication that Williams and Sims are necessarily
11 antagonistic at this particular point in time, based upon
12 what happened in the car with the police subsequent to
13 their interview. Their conversation was, yeah, look. I
14 said you were there, but we left. So they don't tell the
15 exact same story as to what happened, but clearly both of
16 them deny culpability for each other and place it on a
17 third party. Which in this case we believe to be Mr.
18 Morris. But perhaps it's somebody else.

19 THE COURT: Let me ask you one other question.

20 You're not suggesting that there is some kind of
21 authority that suggests Mr. Morris has a right to stay
22 joined.

23 Here's the thing. Mr. Morris, Mr. Sims, and Ms.
24 Williams want to be severed. But their impeded in that
25 request because Mr. Morris won't request it, even though

1 the State is willing to agree to it. So Mr. Morris wants
2 to stay joined. He's impeded because they're requesting
3 severance.

4 Each of them is impeding each other. I don't think
5 he really has a right to stay joined. He has the same
6 right they have, which is for me to decide on the legal
7 and factual merits of their motion to sever.

8 MR. DIGIACOMO: I think that's what my point is,
9 Judge. My point is Mr. Sgro's arguing I'm getting harmed
10 by this decision of Mr. Arnold. My point was Mr. Arnold
11 is getting harmed by the decision of Mr. Sgro.

12 THE COURT: Harmed by Sgro.

13 MR. DIGIACOMO: Because the statute says, you
14 know, it can't be -- a party can move for severance, or a
15 party can move for joinder. It's an equal right they
16 shared between them. They can't consider the fact Mr.
17 Sgro really wants the severance and Mr. Morris doesn't
18 want to give it to him, that that's somehow something you
19 should take into consideration. Because the flip is also
20 true here. Mr. Morris doesn't want it, so you cannot
21 consider that fact in analyzing this motion. It's a
22 wash.

23 THE COURT: All right.

24 Ms. Maningo.

25 MS. MANINGO: It's our position you have the

1 discretion to sever these trials. I understand we're
2 going back and forth on what Morris wants and what the
3 State is agreeing to stipulate. But basically if you feel
4 that one of the defendants --

5 THE COURT: I agree I have the discretion.

6 MS. MANINGO: So -- I mean, I appreciate your
7 Honor is looking at the big picture. All the issues
8 involved, including jury selection. Which is our position
9 that absolutely Mr. Sims -- and, I mean, I'm sure he's
10 going to get up and say the same thing, that Mr. Morris
11 will be prejudiced by the fact we do have different goals
12 in jury selection. And we do have to share preempts.

13 So I appreciate the fact that your Honor is
14 considering those. All of that is relevant.

15 The other thing the State said that it wasn't
16 relevant of any of these issues about what Morris'
17 problems are. The fact he doesn't want to be severed,
18 bottom line. That's not true.

19 First of all, there is a problem with these issues.
20 Regardless of whether he wants to be severed or not. I
21 think that's the case and that's why they've offered him a
22 severance.

23 Two, there is more than just the statement that
24 occurs between my client and Ms. Williams after they give
25 their statements to the police, by the way. Because

1 really they are reiterating what they told the police.
2 That's what he's focusing on. But there is more
3 statements.

4 THE COURT: Assuming they're being honest with
5 each other about what they told the police.

6 MS. MANINGO: Pointing out that it's after the
7 fact they've given incriminating statements to police
8 individually. And that they incriminate other people.
9 But that's not the only statement that's relevant. There
10 are other statements that are used that also are relevant
11 in this situation. And we have, aside from that, we have
12 other issues of our own, which I'm not going to go through
13 all of them again.

14 So Morris has his own issues with regard to Bruton.
15 The fact that he's not wanting to sever is really -- he
16 says it's because of -- that we should not consider the
17 rest. I say it's irrelevant what he wants, because if
18 this court believes this is not going to be a fair trial
19 because of the issues and not a clean trial and we have to
20 do this again because of the fact that whether down the
21 line it's a post-conviction issue or whatever the case is,
22 then your Honor has the discretion to sever the case. And
23 that's what we're asking you to do.

24 Another thing that Mr. DiGiacomo talked about was the
25 detraction of the battery statement -- of the battery

1 statement with regard to -- I'm sorry -- the statements
2 with regard to the battery case.

3 What he said was what he can easily redact those
4 statements because -- and Mr. Morris gave no details on
5 what happened. The point is that he actually said my
6 client, Mr. Sims, pistol whipped this person. He said I
7 saw that. I saw it all.

8 Okay. After that he may not go into every single
9 detail that occurred, but he certainly says those things.
10 So for him to say that, well, Mr. Morris didn't give any
11 details, it's okay. Well, he gives big details, that my
12 client was armed and he is the person that pistol whipped
13 him. So again, it's not that simple as Mr. DiGiacomo has
14 set forth.

15 And one other thing. He said a couple of times we're
16 offering not to offer this. We are -- we can go without
17 those statements. He -- I appreciate that he does not
18 know what everyone may do. And those decisions may change
19 tomorrow. He might decide he wants to offer that. We
20 can't rely on the fact that at this point Mr. DiGiacomo is
21 saying without the statement we'll offer not to offer
22 this. That's speculation. He can turn around and change
23 his mind, and he has a right to. I'm not saying he --
24 just like we can't tell you exactly what everyone is going
25 to do at trial and every defense exactly. We can only

1 look at what we have so far. I appreciate he can't tell
2 you exactly what he's going to offer and not offer.

3 The point is they're out there. When we get into
4 trial, they're going to be wanting a conviction. The
5 statements are out there. They are going to try and use
6 them, in my experience. They may at the last minute
7 decide not to offer something. But we can't rely on the
8 fact that he may or may not, or he thinks it's really not
9 important at this time. So I want to make that point.

10 But we're all doing our best to tell you what
11 defenses will be. And he's doing his best to tell you
12 what he may or may not offer. But at the end of the day,
13 I think you're taking a big picture approach in this case.
14 There are a lot of issues, a lot of problems, a lot of
15 things to discuss. And as cumbersome as it is, the best,
16 cleanest way to do this is to sever everybody from each
17 other, and all these issues we're discussing are not a
18 problem.

19 THE COURT: With regard to Williams and Sims, if
20 the secretly recorded conversation is admissible against
21 both of them in a joint trial, assuming I decided the law
22 was part of an ongoing conspiracy, then what's your
23 position as to how that lessons, or not, in your mind, the
24 prejudice that would result from redacted statements they
25 each have given to police that can be introduced as well.

1 They're in different positions. It's not a true Bruton,
2 when you're talking about redacting a statement someone
3 gave to the police. There are joints statements of them
4 that would be admissible in the conspiracy theory as
5 well.

6 MS. MANINGO: The joint statement doesn't go
7 into all the details. Basically they're in the car and
8 there's a short statement. And it's basically, I told them
9 that we were gone. She says, I saw -- I told them I saw
10 the shooter. It's not this long drawn out discussion
11 about everything that occurred.

12 THE COURT: I agree. It's 9 pages. Everything
13 else is more than 9 pages. I understand that.

14 I mean, in my mind, to be honest with you, I think
15 any prejudice is lessened by that joint statement being
16 admissible against both of them in a joint trial. Because
17 you are not dealing singularly with one of their
18 statements to police being redacted and introduced in a
19 joint trial. You've already got a joint statement of them
20 that addresses kind of some of what was going on in their
21 ongoing conversation about it.

22 MS. MANINGO: It's a joint statement. All I can
23 say is the details that -- it's really, there's not much
24 there. We have spent a lot of time -- and whether that
25 comes in, again, we'll have to litigate that. Whether it

1 comes in at all.

2 But if it does come in, there still exists the fact
3 that these two gave full statements. Ms. Williams says --
4 and by the way, just to point something out. The
5 difference between those two things. Ms. Williams says in
6 her statement to police, my client was armed. My client
7 had a gun already. That the others got the gun -- implied
8 that maybe my client handed them out. She says that he
9 was the one that asked for the money. She says that he
10 basically instructed everyone else to take out their guns.
11 She says a lot of bad things. And during the statement
12 between them, she doesn't say any of that.

13 THE COURT: That's why I said assuming they're
14 honest with each other about what they told the police.

15 Mr. Hendron.

16 MR. HENDRON: We were looking at the issue on
17 the challenges. In the supplemental I believed I supplied
18 the case law which specifies the fact that peremptory
19 challenge rights from the exercise of privilege granted by
20 legislature and authority has seen fit to treat several
21 defendants for this purpose as one defendant. That's
22 Anderson Wright in the brief. They are going to be
23 sharing peremptory challenges. I think they're stuck with
24 it. Ms. Williams is stuck with it against the other two
25 defendants, or facing capital exposure here.

1 To kind of clean up the record on my end from
2 what Mr. DiGiacomo was talking about. I believe he said
3 something to the affect of Ms. Williams -- or I concede
4 that Ms. Williams was there at the time. That's not
5 true.

6 I'm relying upon what was in the grand jury
7 transcript from a witness who saw -- purportedly saw the
8 January 4th incident. I'm not conceding anything at this
9 point.

10 He goes own to say things about step back and look at
11 the collaboration and talks about this being a common plan
12 and scheme. There is no common plan or scream, your
13 Honor, with regard to the January 8th incident and January
14 4th incident. Entirely different victims here. Not at
15 the same place or location. There is no correlation with
16 the two.

17 Mr. DiGiacomo is taking this position, well, we can
18 reintroduce it at her own trial. Again, that's not true.
19 We would take the position from the relevant standpoint,
20 the unfair prejudice it would have against her. We would
21 dispute that she was there. But even if she is there, she
22 was helping to get Sims away from the victim on the
23 January 4th incident.

24 THE COURT: I understand where you're going with
25 all of that. But it really is different then Tabish.

1 Tabish is talking about one guy two series of criminal
2 acts and severing those two things. You're talking about
3 your client wasn't even charged in the original acts. But
4 you want a severance because you're going to trial with
5 somebody that was charged in those. And whom has
6 withdrawn the motion to sever.

7 So now we have a triumvirate of people who would
8 benefit from somebody else's decision if they make the
9 decision they want.

10 MR. HENDRON: I can't take the position of what
11 Mr. Sgro and Ms. Maningo is going to do for their client.
12 I have no control over that. If they decide to keep it or
13 not. But if we go forward at trial and that information
14 is presented, that evidence is presented to the jury, it
15 has zero relationship to what Ms. Williams is being
16 charged with presently. There is no correlation.

17 Again, close calls. The court should be inclined to
18 sever. This isn't a close call.

19 THE COURT: All right. Here's what I think. I'm
20 going to grant the motion to sever Mr. Morris from Mr.
21 Sims and Ms. Williams. But I'm going to deny it for right
22 now as it pertains to Mr. Sims and Ms. Williams. Without
23 prejudice to reraise it as we move forward in discussing
24 these redaction issues that would affect their trial.

25 If there is a point in time where either side feels

1 like, you know what, we can't get the evidence on we want
2 to get on, under them being joined, you can bring it back
3 up. Or if the defense feels like the evidence, now that
4 we know what the redactions are, we feel it's overly
5 prejudicial, you can reraise it.

6 But I think that the fact that -- on the Williams'
7 motions -- the fact that she would be going to trial with
8 Mr. Sims who's charged in the January 4th incident, the
9 very fact she's not charged is kind of an indication to a
10 jury that the State doesn't think she had any culpability
11 in those acts. That doesn't mean her relationship to Mr.
12 Sims and potentially her relationship to Mr. Morris and
13 Mr. Range isn't relevant to the things that occurred on
14 January 8th. Both series of events that occurred on
15 January 8th, whatever you want to call it, event back at
16 Mr. Scott's apartment where the folks are and later on
17 obviously what occurred when the gentleman was shot.

18 So the fact that you are establishing a link between
19 all of these people as knowing each other, being involved
20 with each other, helping each other in whatever fashion, I
21 think is relevant, as you're explaining what occurs over
22 those 4 days leading up and through the time of the
23 shooting that results in the killing.

24 So I don't think that there is a prejudice to her to
25 go to trial with Mr. Sims, just because he's charged in

1 the two earlier events.

2 As it pertain to Mr. Morris, I'm looking at this from
3 a totality standpoint. It's fact specific. I'm not
4 trying to establish a precedent that I think legally you
5 can never try 3 people together in a capital case. That's
6 not what I'm saying at all.

7 I'm not saying you can never try capital and
8 non-capital people together, because of penalty hearing
9 prejudice that can't be overcome. I'm not saying any of
10 that at all. I'm saying in this particular case, the
11 global consideration of everything that's occurred and the
12 complexities of what we're dealing with, I think it would
13 be problematic for the Supreme Court to look at, assuming
14 they all get convicted. That's kind of part of my
15 concern, has to be what's going to happen with this if I
16 rule in a certain way. Will it stand up or not.

17 I don't think the issue that the State acknowledges
18 was present that would have allowed them to agree to
19 Mr. Morris' severance. As I said, I don't think it goes
20 away just because he's not requesting a severance. It's
21 still there. It's an elephant sitting there. And it's
22 germane to this issue in terms of the Williams' motion to
23 sever.

24 So I think if you're uncomfortable with my belief
25 that trying to have a third defendant and whatever

1 redactions would need to occur because of the third
2 defendant and all these other things, they warrant
3 severing Mr. Morris out.

4 The other two defendants, though, as I said, I think
5 that -- first off, that that recording in the car, I think
6 that you have to view that as that's coming in jointly
7 against them to begin with. It certainly somewhat lessens
8 the prejudice that would enure to them by a co-defendant's
9 redacted statement being introduced. I'm not saying that
10 that ends the discussion. As I said, you've got the
11 ability to bring it back up later on, once you get a feel
12 for what your redactions are going to be. But for right
13 now, I'll keep the other defendants together.

14 That's the motion to sever. Mr. Hendron, do you want
15 to run back and talk to Molly real quick and see what she
16 found out about your prelim.

17 MR. HENDRON: Are we going to proceed with
18 argument on the writs.

19 THE COURT: I would like to keep going forward,
20 assuming we can keep you here.

21 MR. HENDRON: Sure.

22 (Break in the record.)

23 THE COURT: Back on the record, C-287414. Four
24 defendants are all present. All of our parties are still
25 present as well.

1 We're going to take our lunch break, and we'll start
2 back at 2:00.

3 Whatever you can find out in that time, whether you
4 have to go out there and that affects your ability to get
5 back by 2:00, call and let me know. We'll have to start
6 back up. We still have the writs, and everybody needs to
7 be here for this.

8 MR. HENDRON: Come back at 2:00.

9 THE COURT: Yes. We'll plan on 2:00.

10 (Lunch recess taken.)

11 THE COURT: Back on the record in C-287414,
12 State of Nevada vs. Mr. Sims, Ms. Williams, Mr. Range and
13 Mr. Morris. They are all present in custody. Defendant's
14 attorneys are all present that we announced on the record
15 earlier today.

16 We'll continue on with our hearing today.
17 Picking up on the petitions for writ of habeas corpus on
18 behalf of Mr. Sims, Ms. Williams, and Mr. Morris.

19 Who wants to go first on those.

20 MR. SGRO: What are the court's pleasure.

21 THE COURT: Let's do Mr. Morris first. Mr.
22 Arnold hasn't had the chance to talk yet.

23 MR. ARNOLD: You have something specific you
24 want to ask.

25 THE COURT: No. You can, as I said earlier, I

1 wasn't making anybody submit anything on the pleading.
2 You are free to do so. I'll let you argue as to --

3 MR. ARNOLD: In regards to the conspiracy to
4 murder charge, we have all throughout the record, I
5 believe the State's own witness said this is a conspiracy
6 to rob. It wasn't a conspiracy to kill anyone.

7 I don't think there was any evidence ever presented
8 in the grand jury -- before the grand jury that would
9 indicate that they went over there with a plan to kill
10 anyone.

11 Secondly, in regard to the charges of battery, I
12 think it's very evident that my client had no involvement
13 in that battery, whatsoever. The only indication that
14 there might be some involvement is Mr. Sims walking by my
15 client, then coming back with some guns. However, the
16 victim never states that Mr. Sims got those guns from
17 Mr. Morris. So the State presents another witness and
18 that witness says that Mr. Morris had no involvement
19 whatsoever in the battery, and he just stood there and
20 watched.

21 So going through the record, hopefully you had a
22 chance to review the transcript too, your Honor. I cannot
23 find anything that would indicate that my client would
24 have any responsibility for that battery or the conspiracy
25 to commit a battery.

1 THE COURT: All right.

2 Mr. DiGiacomo.

3 MR. DIGIACOMO: Very briefly, Judge.

4 Conspiracy to commit murder, first of all it's a
5 probable cause determination. And the intent of the
6 perpetrators is a question for the jury. But the standard
7 is a coordinated series of acts to infer the existence of
8 an agreement.

9 And certainly 4 people going to a house, 3 of them
10 are armed with weapons, and ultimately killing them,
11 particularly since these people easily identified who the
12 perpetrators were in this case is sufficient evidence for
13 purposes of writ.

14 As it relates to the first incident, I call the
15 January 4th incident, there was a witness who says Mr.
16 Sims has no weapons. There is another witness who says
17 Mr. Sims, early on, when the conflict begins sends a text
18 or phone call -- it's not real clear -- doing something
19 with his phone. Next thing you know Mr. Morris shows up.
20 Mr. Sims goes to Mr. Morris and now when he comes back,
21 he's holding the two weapons and pistol whips the victim.
22 It's certainly sufficient for probable cause.

23 I'll submit it to the court.

24 THE COURT: Mr. Arnold.

25 MR. ARNOLD: Your Honor, that is contradictory

1 to what the State's other witness said, that Mr. Morris
2 was present at all times. I think Mr. -- the victim, he
3 was too caught up to know. And there was no indication in
4 the record when Mr. Morris showed up actually.

5 The other witness that wasn't involved in the fight,
6 he was always stating that Mr. Morris was a by-stander
7 during that time.

8 So with that we'd submit.

9 THE COURT: That really gets us parceled down to
10 decide the credibility of these folks. I don't think it's
11 really my job at this point to look at the 4 corners of
12 the transcript and the indictment and say this guy is
13 credible and that guy is credible. They are going to get
14 in front of the jury and say they like this guy or not
15 like this guy. It's just if there is sufficient evidence
16 that was given to them to justify --

17 MR. ARNOLD: I agree with that. I guess what I
18 have problems with was this transfer of the firearms, and
19 if the victim never saw that, he just saw Mr. Sims walking
20 by Mr. Morris. That's it. And that shouldn't be enough
21 to say, well, there is way more slight evidence to suggest
22 that he was involved in giving those firearms to Mr. Sims,
23 just because he walked by him.

24 THE COURT: Well, I mean in terms of that
25 argument is that argument going toward -- what.

1 MR. ARNOLD: That argument is going to the
2 fact --

3 THE COURT: Conspiracy battery.

4 MR. ARNOLD: Right.

5 My client wasn't involved in the battery. That's
6 obvious.

7 But in regard to the conspiracy, that's where that
8 argument goes to. Just because he was present, mere
9 presence argument. Just because he was present, doesn't
10 mean there was an agreement.

11 THE COURT: Well, here's the thing. I think
12 that you can't look at these situations in terms of
13 expressly what it was that somebody said they saw and then
14 judge it in a vacuum. Obviously you have to have -- the
15 grand jury has the same ability as a jury has in terms of
16 making inferences from everything that they get.

17 Whether they want to infer their conduct together
18 meaning something was conspired upon, or whether they want
19 to infer their conduct as your guy merely being present
20 and the other guy being the sole actor here, they can do
21 that.

22 But, again, these are -- it leads us to a jury
23 question as opposed to sufficiency of the evidence and
24 dismissal of the indictment. So I'll deny the petition
25 for writ of habeas corpus. I think there was sufficient

1 evidence of the involvement of Mr. Morris with Mr. Sims.

2 The Scott incident, such that the grand jury could
3 have returned the indictment that they returned, how much
4 credibility the jury wants to give to the testimony of the
5 various folks and what weight they want to afford a piece
6 of evidence is up to them. But under the totality
7 standard, I think the indictment stands.

8 Likewise with regard to the January 8th, incident,
9 the presence of everybody at the scene, the weapons
10 involved, the activities, the surviving victim's
11 testimony, all of those things I think lead to the
12 indictment standing on those issues as well.

13 The intent of the individual actors, what knowledge
14 was or wasn't, you guys have very good arguments to make
15 on every single defendant in those regards. But those are
16 questions for the jury to decide as well.

17 MR. ARNOLD: In light of the court's earlier
18 rulings, severing my client, I would like permission to
19 leave so I don't have to stick around for everything else.
20 I do have a question in regards to the trial date.

21 THE COURT: We're going to -- a couple of
22 things. Do you not want to stay for the argument on the
23 motion to strike the death penalty.

24 MR. ARNOLD: Not really. I can see your
25 ruling.

1 THE COURT: We do need to at some point discuss
2 trial dates. My thinking was I would probably just ask
3 you to get together with your calendars. We can try to do
4 that today when we're done with everything.

5 MR. DIGIACOMO: Do we have a trial date.

6 THE COURT: You have a trial date of -- they are
7 all on for March 3, 2014.

8 MR. DIGIACOMO: I'd say we leave Sims and
9 Williams and Mr. Arnold and the State will discuss
10 Mr. Range, discuss what we're going to do about those
11 dates. Why don't we leave it all. The State be prepared
12 to try somebody on that date.

13 THE COURT: I wanted to get an understanding as
14 to everybody as to who is likely to go first. I can't
15 necessarily promise I can run them all one after the other
16 throughout the stack.

17 MS. WECKERLY: Our pretence is to try Sims and
18 Williams first.

19 MR. SGRO: We're going to object to the extent
20 you are going to hear argument on that.

21 THE COURT: I'll set a status check. I'll ask
22 you all to get your calendars and come back down and talk
23 about the trial date. We have a status check already on
24 the 17th, which was the original status that we set for
25 whatever pending issues. That's 90 days. So we'll come

1 back on the 17th.

2 MR. SGRO: What month.

3 THE COURT: September, next week.

4 So at that time you guys have had some informal
5 discussions among yourselves about who you think is going
6 to be requested to go first, who doesn't want to go first,
7 who wants to go first, what kind of trial dates we're
8 looking at in terms of time, now that we have some
9 severance issues decided. And I'm going to leave March
10 3rd as a trial date obviously, because I plan on somebody
11 being ready. Then we'll figure out when we reset the
12 others for.

13 Mr. Arnold, you are free to go.

14 MR. ARNOLD: Thank you, your Honor. See you on
15 the 17th.

16 THE COURT: Okay.

17 Then Mr. Sgro.

18 MR. SGRO: I'll go ahead, your Honor.

19 What we did in our writ is we divided what we saw as
20 problem areas into two different components.

21 One deals with the overall taint that occurred within
22 the proceedings. The other deals with whether or not the
23 sufficiency of evidence prong has been met to a couple of
24 specific counts.

25 So I want to start out just by way of background, so

1 we're on the same page. I know you have indicated you
2 read the transcript. Just for the record, there are 6
3 witnesses that were called before this grand jury. Of the
4 6, 2 of them had to do with the January 4th battery or
5 pistol whipping. That's the event and terms used to
6 describe it.

7 The other 4 deal with all the balance of charges,
8 relative to the murder, the attempt murder, conspiracy to
9 commit murder, et cetera. I just want to, by way of
10 background, go through them real quickly.

11 Lisa Gavins (ph) the coroner, she was one of the 4.
12 Lorice Brightman (ph) is the surviving victim in the case
13 who was shot in the buttocks area. The third is Barry
14 Jensen (ph), who is a crime scene guy. And the fourth --

15 THE COURT: He's a detective.

16 MR. SGRO: Yes, sir. He was given -- he was
17 the one who imparted to the grand jury the status of the
18 crime scene and what was going on.

19 THE COURT: I thought you were saying he was
20 like a CSA guy.

21 MR. SGRO: I apologize.

22 And then you have Martin Wildamen (ph), he's the
23 individual who took all the Defendant's statements that
24 were what we talked about this morning relative to
25 severance issues.

1 So we have 4 witnesses then. And the reason it's
2 important to look at it from this perspective is because
3 when you get to sufficiency of the evidence issues -- I'll
4 just use that as an example -- Detective Jensen, there's a
5 question on page 65 of the transcript when he's talking
6 about -- describing the scene. He's talking about a
7 broken table, where the sofas were, and there is a
8 question that goes like this. As the scene -- at the
9 scene, Detective, that night, you worked with a crime
10 scene analyst deciding what evidence to collect; is that
11 fair.

12 Answer: That's correct.

13 Question: I would assume most of that evidence is
14 still being analyzed.

15 Answer: Yes.

16 The reason that's relevant is because when you get to
17 the sufficiency of the evidence argument, for example,
18 there are casings found in the residence. There are
19 enough casings in the residence to have all the shots that
20 inflicted all of the fatal wounds in this case that come
21 from the same gun. Right. Mr. Sims is attributed with
22 the possession of a revolver in the case. Revolvers, as
23 you know your Honor, don't leave a casing. Right.

24 So the difficulty is with this particular proceeding
25 is there really is a paucity of evidence relative to what

1 happened at the scene. And there is no forensics that
2 exist to tell the grand jurors who is and isn't
3 responsible for what particular offence.

4 The corner, for example, was asked about the wounds
5 and from all but one of the wounds, for example, as to
6 Ms. Anderson, she was able to recover the bullets.
7 There's one that's missing. That sort of thing.

8 The point of the coroner's testimony from our
9 perspective was when she was asked, can you tell what
10 caliber they were, or in other words, did it -- can you
11 tell did it come from a revolver or .9 millimeter. These
12 are the two weapons we've heard of. She said no. I can
13 tell you that they are small caliber type projectile
14 wounds. I can tell you it's not a target shooting rifle,
15 is how she put it.

16 So now with the dearth of evidence that exists,
17 relative to who did what within the scene, then one must
18 look at the taint that occurred in the case. Here are our
19 criticisms relative to the taint. Some of them are very
20 subtle and some of them are less important for sure. But
21 I want to talk specifically about the attempt murder
22 instruction versus the conspiracy instruction.

23 When you look at the attempt murder charge, your
24 Honor, as we pointed out in our brief, the State never
25 bothered to tell the grand jurors for the crime of attempt

1 murder you need a specific intent to kill. So from a
2 factual predicate standpoint, Mr. Brightman testified. He
3 says these guys came in. He goes through a litany of
4 different activities that they were told to do. Who did
5 what. Who said what. That sort of thing.

6 There came a time, according to the surviving victim
7 in this case, that one of the victims restrained the
8 person that Mr. Brightman knew as Mr. Sims. The person
9 who restrained Mr. Sims weighed 370 pounds. He's a very,
10 very large man. And according to Mr. Brightman had gotten
11 the better of Mr. Sims, which caused Mr. Sims to ask for
12 help.

13 Well, when Mr. Brightman saw that Mr. Sims was in
14 trouble -- these are -- I'm obviously paraphrasing. Then
15 Mr. Brightman saw that he tried to take advantage of an
16 opportunity to try to restrain Mr. Morris. Now,
17 Mr. Morris at that point, according to Mr. Brightman,
18 that's when he shoots him in the butt area.

19 At that point Brightman turns around because Sims is
20 now asking for help. Again, assuming all of this is true
21 and all that, Sims asks for helps.

22 Now, Morris run to aid Mr. Sims. Brightman runs out
23 the back window.

24 Then you have to fast forward to there are two dead
25 bodies in that residence. Okay. I understand, you know,

1 what the felony murder rule is, but there is no felony
2 conspiracy to commit murder rule. There's no felony
3 attempt murder rule. So I understand that part of the
4 underpinnings of this would be a theory under which a
5 robbery, felony murder situation would exist.

6 But when I say the taint, one of the things that
7 happens with the instructions is that the grand jurors are
8 told, listen. Here's how it works in conspiracies. You
9 can -- you are instructed that the statements of
10 coconspirators, one is admissible as to the other, once
11 you have slight or marginal evidence that a conspiracy
12 existed. We see that in jury instructions every day. So
13 we don't -- we don't quarrel with that instruction in a
14 vacuum.

15 Then what happens is at the end of each of the
16 presentations of these various statements that Detective
17 Wildamen testifies about, Wildamen being the officer who
18 took each of the Defendants' statements. The State then
19 says -- remember, this statement is only offered as to
20 Sasha Williams or Maurice Sims, or whoever it was at the
21 time they're talking about. What they never do is they
22 never say, but even if you find a conspiracy exists, you
23 still can't use what. For example, what Sasha Williams
24 said against Maurice Sims.

25 So what they do is they leave this big black hole out

1 there. So on the one hand, once a conspiracy is
2 established everything among the conspirators is fair
3 game.

4 On the other hand, as I'm eliciting one statement at
5 a time, these are I think very reasonable inference is to
6 lay people who don't do this every day. These statements,
7 okay, I get it. I'm a grand juror hearing what Sasha
8 Williams says. And I know I can only use it against her
9 now. But now I find that there is a conspiracy. So now I
10 can use Sasha's statements to find, for probable cause
11 purposes, that Maurice Sims has a gun. That Maurice Sims
12 was there at the scene directing traffic -- again
13 paraphrasing. But there is never a clarification in the
14 instruction relative to the distinction between what
15 co-conspirator statements you can't use, one against the
16 other, versus a statement which you can never use to
17 establish guilt on behalf of another co-defendant.

18 So that's one of the areas that we see very
19 problematic relative to the taint that existed in the
20 proceedings.

21 The other issue is specifically against circling back
22 to the attempt murder. Mr. Sims is charged with the
23 attempt murder of Mr. Brightman. Now, under Charma, as
24 you know, you have to show a specific intent. That was
25 the case that changed the aiding and abetting rules. So

1 you have 3 theories, the aiding and abetting, the
2 conspiracy and direct commission.

3 So the only viable theory that applies in an aiding
4 and abetting situation for a specific intent relative to
5 that count has got to be the conspiracy theory. Right.
6 But there is nothing -- the record is devoid of a specific
7 intent to kill. And you can't buy a specific intent to
8 kill via any other mechanism other than the evidence of
9 that specific intent. This isn't a credibility issue,
10 your Honor. Which I understand those matters are left to
11 the jurors to resolve. This is an instruction issue
12 relative to attempt murder, because it didn't say you had
13 to have a specific intent. And it's a legal impossibility
14 of how they got there.

15 So that's why we move to dismiss the conspiracy to
16 commit murder count, as well as the attempt murder count
17 because of the insufficient instruction coupled with the
18 lack of evidence relative to each of those two counts.

19 Now, relative to the general taint, which we would
20 submit, your Honor, is grounds for setting aside the
21 entire indictment, would be the areas we articulated that
22 fall into the following category -- the prior bad act
23 evidence. I understand the criticism we drew from the
24 State is that we only gave cases that talked about prior
25 bad acts in the trial context. Well, that's where prior

1 bad act litigation happens is in the context of a trial,
2 but the holding is still the same. The law is still the
3 same. You can't bring in acts just to taint the character
4 of an individual and then convict him or her based on
5 character.

6 Just in this one indictment, which is a pretty brief
7 indictment relatively speaking for a double homicide case
8 with multiple defendants, about 150 page transcript.
9 Those 150 pages or so they talk about Sims' gang
10 affiliation. That came from witness Brad Matsky (ph).
11 The one stalking incident that occurred, that came from
12 Matsky and Scott. Scott, the alleged victim, Counts (1)
13 and (2).

14 Witness Scott said that Maurice Sims sells weed to
15 kids, and witness Scott said that Maurice Sims stole his
16 children's Christmas presents Christmas Eve, prior to the
17 January date where all of these events occurred.

18 Not one of those things has one thing to do with the
19 charges in the case. And if you look at the State's
20 response -- I want to make sure I bring to your attention
21 a couple of things.

22 One is a couple times in the State's response, not
23 once, but many times they say Sims was the shooter. They
24 don't have -- my point is this. Even sophisticated
25 attorneys that are immersed in the stuff can sometimes

1 make a mistake. What I mean by that is this. There is no
2 evidence that Maurice Sims was a shooter of anybody,
3 unless you make the fatal flaw of relying on a
4 co-defendant's statement in order to find that.

5 Because understand, Mr. Brightman ran out the door.
6 He didn't see anything. He testified he heard shots as he
7 was running away. If then you cannot use co-defendant's
8 statements to demonstrate what occurred in that room --
9 again, I understand felony murder. I get it. But there
10 is two dead bodies, but who did what inside is absolutely
11 going to be based on whatever theory they want to advance.
12 But to suggest to you, your Honor, that somehow the grand
13 jurors knew that Sims was the shooter demonstrates how
14 critical and easy this mistake occurred.

15 The drafter of that motion created -- did the same
16 thing we complain that must have happened to lay people.
17 Which is he used the co-defendant's statements against Mr.
18 Sims. So the prior bad act evidence is a problem.

19 We also talked about the counts being joined
20 together. Which I'm going to submit that, because I heard
21 what the court's comments were earlier in the severance
22 motions.

23 Then we have the cumulative error. I would suggest
24 to your Honor, none of these things individually are so
25 glaring such that because there is vouching the whole

1 thing needs to be set aside. But you do have a situation
2 where Detective Wildamen testified they knew Sasha
3 Williams' statement, the first version she gave was a lie.
4 Because they'd already spoken to Mr. Brightman, who they
5 knew to be telling the truth. You are not allowed to do
6 that.

7 They go on and they say, again, in a vacuum one
8 question at a time, not that big a deal. But taken in
9 conjunction. I also complained of the leading questions
10 that were asked.

11 I want to go to just one example, your Honor. It's
12 at page 43 of the transcript. The State is asking
13 Mr. Brightman to tell him about -- tell them about the
14 gun. The gun that was kind of pushed through the door.
15 They saw a hand and a gun and a shot went off in the
16 air.

17 Now, can you describe the gun he's holding. This is
18 at line 17 of page 43 of the transcript.

19 Answer: It was like a silver gun. An old gun. You
20 know the one with the little rose and shit. My bad.
21 Excuse me.

22 Now, here's the next question. So the gun, you said
23 it's silver. And you said it has a wheel. So you're
24 saying it's a revolver. Okay.

25 No.

1 He didn't. He didn't say it had a wheel. And he
2 didn't say it was a revolver.

3 Then the witness says, yeah.

4 So that's the quote, unquote testimony adduced via
5 the witness. It's a remarkable example of how leading the
6 questions were in this case. Again, it's the combination
7 of all that occurred in the case that's problematic.

8 The other issue we had, your Honor, was relative to
9 the improper victim impact evidence, which had to do with
10 Scott's testimony that he had to leave the complex. Move
11 his family because he was afraid of repercussions of the
12 incident, et cetera.

13 So, your Honor, two different points we need to make.
14 One is relative to flat out sufficiency of the evidence
15 relative to the two counts, the attempt murder count, and
16 the conspiracy to commit murder count. Under the -- it
17 points out the inadequate instruction as to the attempt
18 murder count because the transcript is devoid of the
19 specific intent to kill. So as to those two counts, we'd
20 move for dismissal.

21 As to the balance of the writ, we'd move for
22 dismissal based on the totality of the impropriety of the
23 proceedings.

24 Thank you, your Honor.

25 THE COURT: What is your position on what the

1 legal requirements are for the instructions that a grand
2 jury gets.

3 MR. SGRO: I saw that because they said, you
4 know, we can't -- we don't have to tell them what all the
5 elements are, I think is what he said.

6 THE COURT: Obviously, traditionally when we
7 impanel a grand jury as a court, there's instructions that
8 they're given generally by Judge Bell, or whomever it is
9 in the past, that kind of gets them started on general
10 propositions.

11 Then when the district attorneys go in to prosecute a
12 case, they're given specific instructions that relate to
13 the case they're going to prosecute.

14 MR. SGRO: Correct.

15 So our position is it has to be an adequate statement
16 of the law. And very recently we litigated, it was a
17 child abuse case, and we complained of an inadequate
18 statement of the law. It had to do with the definition of
19 physical injury. This is within the last 30 or 60 days.

20 We just got something back where the Supreme Court
21 agreed with our position relative to an adequate statement
22 of the law. So what we're suggesting to your Honor is
23 we're not complaining they didn't put the date it happened
24 and the date was wrong. We're not suggesting that they
25 did anything other than they failed to instruct adequately

1 on the law.

2 The law of attempt murder, the most important
3 component of attempt murder is that it's different from
4 the transferred intent you get from the felony murder
5 situation. So the -- any argument advanced, well, he
6 couldn't be guilty of murder. He's only guilty of the
7 robbery. Obviously, that's a nonsensical argument in the
8 face of the law that we have today, in terms of how you
9 bootstrap first degree murder responsibility.

10 You don't get that in an attempt murder case, where
11 there is a specific intent. And that's the Charma
12 decision. And there's a significant distinction in terms
13 of instructing lay people, grand jurors, how to define
14 what the levels of intent were. And otherwise they'd
15 never do it.

16 So they talk about the specific intent to rob. Why
17 didn't they talk about the specific intent to kill. In
18 other words, not only in this one, we've had many cases
19 together, right. I see it all the time. They always say
20 in the robbery cases, as long as you have a specific
21 intent to rob, he's guilty of robbery. Then that's
22 typically the precursor to the felony murder instruction.
23 So none of this is magic here.

24 The failure results specifically from the failure to
25 tell the grand jurors there is a difference between the

1 mechanism of criminal responsibility that attached to
2 attempt murder, versus just a robbery, or conspiracy, or
3 whatever is the case. So my position is, failure to
4 adequately instruct on the law.

5 Mr. DiGiacomo.

6 MR. DIGIACOMO: Judge, I was going to submit it,
7 but I want to correct a factual error that Mr. Sgro made
8 that there was some mistake in our return that says
9 Mr. Sims is not the shooter.

10 MR. SGRO: I'm sorry. I thought I said there --

11 THE COURT: He's not saying there's a mistake.
12 He just said there wasn't any evidence.

13 MR. SGRO: Correct.

14 MR. DIGIACOMO: He said we made a mistake by
15 relying upon somebody else in determining that Maurice
16 Sims is the shooter.

17 First Lorice Brightmen says the person holding the
18 silver revolver put his arm through the door and fired the
19 round. That's the first shot.

20 And that when her boyfriend came through the door,
21 he's holding that silver revolver. He got back up and
22 sees him holding the silver gun. He shoot 1. There's 8
23 bullet holes inside these victims, and 6 casings inside
24 the residence. That means there is a semi-auto that fired
25 6 shots. There's a revolver that fired 2 more rounds.

1 MR. SGRO: They don't know that.

2 MR. DIGIACOMO: Based on the evidence, those are
3 the inferences you can make.

4 THE COURT: Why are those the inferences you
5 make.

6 MR. DIGIACOMO: Because there is 6 shell casings
7 found inside the home. Unless a shell casing left the
8 home --

9 MR. SGRO: Which Wildamen said stuff got
10 kicked. And it's only 7 --

11 MR. DIGIACOMO: I'm sorry. Did I interrupt Mr.
12 Sgro at all during the argument.

13 MR. SGRO: I was pretty accurate.

14 MR. DIGIACOMO: He'll have a chance to reply.

15 So the inference from the evidence is, one, he is the
16 shooter. You have direct evidence he's the shooter
17 because he fired a round inside the house.

18 But two, the semi-automatic only fired 6 times, based
19 upon the physical evidence located at the scene. And
20 there's two more bullet holes. It's clearly subjective
21 that the revolver fired the other two rounds.

22 There are only two live weapons we could determine
23 were inside that residence. They were held by Mr. Sims
24 and Mr. Morris. Making those two individuals the shooters
25 in this case.

1 And Mr. Range hung back in the kitchen area and never
2 engaged anybody, until Lourice Brightman left the
3 apartment. Then he's, in fact, the guy who tried to jump
4 out to the vehicle after the co-conspirators all get back
5 into the vehicle. And he appears to be least involved in
6 the case.

7 So it was an inference from the evidence. Mr. Sgro
8 made an error by viewing other people's statements about
9 who the shooters were.

10 Two, Mr. Sgro apparently didn't read the
11 instructions, because my recollection of the attempt
12 murder instruction -- I'm sure you have it there in front
13 of you -- is attempt murder is an act which tends but
14 fails to kill somebody with the deliberate intention to
15 unlawfully take the life of a fellow human being. That is
16 what we call the specific intent to kill.

17 The conspiracy instruction specifically delineated
18 those two. But even if all of that were wrong, Judge,
19 even if the instructions were wrong, and everything else,
20 the court would still do either in Mr. Sgro's case -- I
21 don't know whether there was an analysis, sufficient
22 evidence for the grand jury to return it.

23 Back up for just another step, because the court
24 asked the question. To what point do you have to instruct
25 the jury, and what point do you not have to. The only

1 requirement that the State of Nevada has at a grand jury
2 is instructing on the element of the offence. There is no
3 requirement for any instruction on the law. Meaning, they
4 don't get self-defense instructions, they don't even get
5 voluntary manslaughter instructions. They get no
6 instructions -- they're not required to get any
7 instructions on the law.

8 We have a habit and custom of providing them
9 instructions on how to utilize evidence in multiple
10 co-defendant cases. And I would note from Mr. Sgro, he
11 said how are they supposed to know what they could and
12 could not use. They're repeatedly told when the statement
13 came in that they were not allowed to use it against
14 somebody else. That they were not allowed to use it
15 against anybody but the speaker.

16 They were also instructed that they were allowed to
17 use statements of a co-conspirator in the course and in
18 furtherance of the conspiracy. And a grand jury, like all
19 juries, are presumed under Richardson to follow the
20 instructions of the court.

21 So unless the court has any specific questions, I'll
22 submit it.

23 THE COURT: I was trying to see what the
24 language was. At page 8 of the transcript, line 17 it
25 says -- the language they were instructed on for attempt

1 murder was, quote. "Attempt murder is the performance of
2 an act or acts which tend but fail to kill a human being
3 when such acts are done with express malice. Namely with
4 the deliberate intention unlawfully to kill." End
5 quote.

6 Mr. Sgro.

7 MR. SGRO: Briefly, your Honor.

8 First of all, my recollection of the coroner's
9 testimony was that there was one shot in Mr. Brightmen's
10 butt. There was one shot, and again, I believe I have
11 this right. One victim had two wounds according to the
12 coroner. One missile projectile caused both of those
13 wounds. That's two. And there are 5, according to the
14 coroner in Mr. Anderson. So that's 7. Not 8. There are
15 6 casings --

16 MR. DIGIACOMO: One in the ceiling that came
17 through the door.

18 THE COURT: You just got mad at him for
19 interrupting you.

20 MR. DIGIACOMO: I apologize.

21 MR. SGRO: The difficulty here is, I mean, this
22 case is not about firing a round in the air when the door
23 was cracked open. So that doesn't make Mr. Sims a shooter
24 in the sense of and under the rubric of homicide.

25 I was talking about Mr. Sims and what evidence there

1 was or was not relative to him being a shooter into a
2 human being's body. So I hope that that's clear.

3 And Detective Wildamen testified about evidence
4 appeared as if it was kicked around or knocked around -- I
5 can't remember the euphemism he used -- in the scene. So
6 the issue is there's an equal inference that all the
7 bullets that inflicted fatal harm, not the one sticking
8 his hand through the door firing in the air -- the fatal
9 shots all came from the same gun.

10 The issue is for, your Honor, when Jensen testifies
11 under oath -- we have a bunch of evidence that's all being
12 analyzed. That's all the grand jurors have. That's all
13 the grand jurors have.

14 I think it's at page 65, of the grand jury
15 transcript, where Jensen says everything is being
16 analyzed. So where then do you draw the inference, you
17 have to then say, okay. There is one extra round found
18 among 3 victims. Right. One survivor, two dead. We're
19 going to assume further that it was not a casing that they
20 just didn't find. Okay. And we're going to assume
21 further that because there is only 6 and not 7, that
22 that's how we get to Sims being the shooter. Of who. Of
23 whom.

24 In other words, they don't even distinguish between
25 either of the two victims, into who did what activity. So

1 they threw it all out there and gave the grand jurors a
2 statement that everything is being analyzed, and the grand
3 jury returns an indictment.

4 As to the attempt murder language you just read, your
5 Honor, is an incomplete -- in my view -- recitation of
6 what it takes to convict someone of attempt murder when
7 you're the shooter of the person who's the victim of the
8 attempt murder count. You have to demonstrate that
9 specific intent to kill. Charma instructs us of that when
10 they revamped the aiding and abetting language.

11 THE COURT: Is your quarrel with the fact they
12 don't use the word specific and instead use the word
13 deliberate. Or that they don't go further and say
14 something different.

15 MR. SGRO: Our theory in this case, ladies and
16 gentlemen, as to Mr. Sims is that he had the specific
17 intent to kill Mr. Brightman, and that's why we're seeking
18 the indictment as to him. Even though he didn't pull the
19 trigger. They could tell the grand jurors what they are
20 actually being called upon to find. They told the grand
21 jurors the generic language about the specific intent to
22 kill and it failed.

23 THE COURT: Would it be appropriate for them to,
24 quote, unquote, argue to the grand juror a theory as
25 opposed to giving them the legal elements off the crime,

1 putting on their witnesses and saying now deliberate.

2 MR. SGRO: Tell them before you transfer the
3 intent, before you find Mr. Sims guilty of the attempt
4 murder of Mr. Brightmen, you must find that Mr. Sims had
5 the specific intent to kill him. That's not arguing a
6 theory. That's a correct statement of the law.

7 Frankly, I don't see how you get there. Again, there
8 is a difference between us in this room that do this all
9 the time. You are talking about a lay person who does not
10 know that Mr. Sims has to think, I really hope
11 Mr. Brightmen dies. And you have to assume that that
12 factual assessment is being made while he's, according to
13 the State, under attack, asking for help. He doesn't know
14 Brightmen is going to attack the other defendant in this
15 case.

16 At that time he's being subdued by a 370 pound man.
17 How he's forming any intent, other than get this huge guy
18 off of me, is beyond me. So even the underpinnings of the
19 exact factual predicate in this case, suggests that the
20 only intent he had was to seek assistance. It would have
21 made sense that if the co-defendant came over and shot the
22 person subduing him and he survived, okay. I get it.

23 But some other event that's occurring 10, 15, 20 feet
24 away from him, while he's defending himself. Ironically,
25 if he'd have been killed -- if Mr. Brightmen had been

1 killed, he would be on the hook for murder, and I would
2 have a much weaker argument. It's ironic as a survivor my
3 argument is better. But it is what it is.

4 In this particular case, your Honor, because they
5 didn't instruct on specific intent to kill, and the fact
6 specific mechanism that is in place here, i.e., he's being
7 attacked, that's why there's an inadequate instruction and
8 that's why the count has to be dismissed.

9 THE COURT: What did you want to say.

10 MR. DIGIACOMO: I was just correcting him
11 misstating the bullet in the ceiling.

12 THE COURT: You squabble on the math.

13 MR. DIGIACOMO: Not the math.

14 THE COURT: Obviously, there's a number of
15 things to work through with regard to Mr. Sims' motion to
16 sever -- excuse me, his petition.

17 In terms of the legal instructions, I agree with the
18 State that I don't think -- obviously, you don't have
19 trial standards for the instructions given to a grand
20 jury, as opposed to those that are given to a trial jury.

21 As I kind of alluded to earlier, there's a
22 conglomeration of what happens when a grand jury is
23 impaneled and given some of the basic instructions from
24 the court then what's incumbent upon the prosecutors when
25 they present a case to a grand jury to give them.

1 I agree that basically their obligation is to give
2 them the instructions on the elements of the crimes that
3 they're impaneling -- they're holding that grand jury
4 session for.

5 On the other hand, I agree that it can't be so bear
6 bones that it isn't a correct statement of the law, as Mr.
7 Sgro is talking about, or inadequate instructions on the
8 law. But as I said, I don't think it goes to the
9 standards of what you would present in front of a jury.

10 That being said, I don't think that the instruction
11 that's enunciated in the record about having the
12 deliberate intention to kill is a failure on a specific
13 intent to kill element. Yeah, could you say out of an
14 abundance of caution you should go further and tell them
15 what the theory is. I guess you could make that argument,
16 certainly. I can foresee if the State started trying to
17 make more theoretical pronouncements to a grand jury,
18 people would start objecting to it under kind of arguing
19 in front of a grand jury as opposed to presenting certain
20 instructions and putting on the witnesses.

21 But all in all, in looking at that, I don't think
22 that there were inappropriate instructions that were
23 given. I don't think that they were inadequate to
24 instruct them on the law. So I think in regard to the
25 attempt murder and the conspiracy murder counts, the

1 argument is more about the sufficiency of the evidence
2 there.

3 Is it a colorable argument to make that the revolver
4 was never fired and the casing had been lost or kicked out
5 the door or somehow lost in some other manner.
6 Particularly if the detectives tell you things are being
7 kicked around. Yeah, sure.

8 Is it also a colorable argument to make that we have
9 more bullet holes in the physical area, meaning space,
10 bodies, ceilings, whatever you want to couch it as, then
11 we have in a particular weapon. Therefore, a reasonable
12 inference can be drawn that multiple weapons had to be
13 fired. Yeah, that can be made as well. For grand jury
14 purposes, we are looking at probable cause for the
15 indictment.

16 So I think each side can use that argument, but I
17 certainly think it's proper for the State to use that
18 argument in saying, look. There is clearly a reasonable
19 inference that Mr. Sims' weapon had to have been fired to
20 account for everything that was found at the crime
21 scene.

22 Did he specifically intend that Mr. Brightmen die,
23 even though Mr. Brightmen survived. That's getting
24 straight into what is a jury going to think about his
25 intent or his specific -- specific state of mind when