

1 stand at that time.

2 Now, if you -- if your question isn't asked,
3 I've told you here don't speculate about why, but don't
4 tell the other jurors that I sent the judge this
5 question, asked him to ask it and he didn't do it. Just
6 forget about it. Means for one reason or another that
7 this is a subject that's not going to be covered. Don't
8 speculate what the answer was. Don't talk about it with
9 the other jurors.

10 I'm not going to call people back to ask a
11 question a juror wants to be asked once that person has
12 been excused. So you have to do it while that person is
13 on the witness stand. That means, you'll see this as we
14 go through the trial. Somebody's going to be called.
15 After they've given direct examination,
16 cross-examination, sometimes further direct, further
17 cross, back and forth.

18 When nobody has any questions left, I'm going
19 to turn to the attorneys and say, may this witness be
20 excused? That's your cue. If you have a question that
21 you're thinking of putting together or you're in the
22 middle of writing it out, speak now. Speak then or
23 forever hold your peace. Don't be shy. Put your hand
24 up and say hold it. Hold it. I've got to finish a
25 question. Then you can write it out. Pass it to Pete.

26 I'll look at it and talk to the attorneys about
27 it, and we can ask that question of a witness if you
28 want me and to it's an admissible question. The problem

1 is, so you understand, once that witness is gone, you
2 come back later or after a break and say I've got a
3 question I'd like to ask of the witness. If that's
4 person's been excused, you're not going to get a chance
5 to have the answer to that question.

6 A little complicated. That's hopefully clear
7 what the purpose of those questions will be.

8 Do we have anybody speaking through an
9 interpreter in this case?

10 MR. THOMAS: There's a possibility that one
11 of the witnesses will.

12 THE COURT: Okay. Would that person be
13 speaking Spanish?

14 MR. THOMAS: Korean.

15 THE COURT: I'm always embarrassed when I
16 make assumptions and I'm wrong.

17 "Some testimony may be given in
18 Korean. An interpreter will provide a
19 translation for you at the time of the
20 testimony. You must rely on the
21 translation provided by the
22 interpreter even if you understand the
23 language spoken by the witness. Do
24 not retranslate any testimony for
25 other jurors. If you believe the
26 court interpreter translated testimony
27 incorrectly, let me know immediately
28 by writing a note and giving it to the

1 bailiff."

2 You can see when this is done a witness might
3 be speaking Spanish. It's more likely in Southern
4 California that someone is going to be able to
5 understand what the interpreter is saying and understand
6 what's being said in Spanish. Korean, I think it's less
7 common, but maybe someone might speak Korean.

8 Why would we not want you to be back in the
9 jury room telling the other jurors something like this;
10 you know, this person who was the interpreter got that
11 wrong? The witness said it was dark outside, and the
12 interpreter said it was black outside. You can see that
13 we have 1 of the 12 people in charge of deliberations.
14 We don't want that.

15 Again, if somebody does speak through an
16 interpreter, if you understand that language and you
17 hear something you think is a mistake, that's all right.

18 We'll get it out in the open here. We'll ask the
19 interpreter to explain why that particular word was used
20 and everyone will be on the same footing as far as the
21 decisions that are made.

22 Witness identified as Jane Doe?

23 MR. THOMAS: Probably.

24 THE COURT: (Reading):

25 "There's a possibility that one
26 of the witnesses in this case is going
27 to be identified as Jane Doe. This
28 name is used only to protect her

1 privacy as required by law. The fact
2 that a person is identified in this
3 way is not evidence and do not
4 consider that fact for any purpose."

5 All right. That's how far I'm going to go on
6 the instructions that you're going to hear. On Monday
7 morning, you're going to hear the opening statements by
8 the attorneys -- I'm sorry, you're going to hear the
9 opening statement by Mr. Thomas. I'm sure he's going to
10 give you one.

11 As I've already explained, Mr. Sanders will
12 then have an opportunity to give you an opening
13 statement or reserve to a later time if he ever chooses
14 to make an opening statement.

15 One more time, you're admonished that it is
16 your duty not to converse among yourselves or with
17 anyone else about any matter connected with this case
18 nor form or express an opinion on it until it's
19 submitted to you. Don't come here tomorrow. Saturday
20 you're watching football? Just all Sunday?

21 MR. THOMAS: Just all Sunday.

22 THE COURT: I don't know what you're going to
23 do on Sunday, but -- I mean Saturday. Watch football
24 on Sunday. Don't talk about this case. Have a nice
25 weekend, folks. See you Monday morning at 9:00.

26 (Whereupon the jury exited the courtroom and the
27 following proceedings were held:)

28 THE COURT: Back on the record in the case of

1 People of the State of California versus John Henry
2 Yablonsky. Mr. Yablonsky's here with his attorney,
3 Mr. Sanders. When we were last together, we were
4 discussing various issues regarding the admissibility
5 of the two prior rapes under 1108. We talked about
6 the case -- the various cases. We talked about the
7 Story case 45 Cal.4th 1282, 2000. The case we talked
8 about the Falsetta case, 1999, 29 Cal.4th 903. We
9 talked about the factors that should be taken into
10 consideration by the Court in exercising its
11 discretion.

12 I gave both of you the understanding that today
13 was the time I was going to expect that you're going to
14 tell me how those factors mitigate in favor of your
15 position, specifically, why it should be admitted,
16 Mr. Thomas, and why it shouldn't be admitted,
17 Mr. Sanders.

18 Mr. Thomas.

19 MR. THOMAS: Well, as far as the -- I don't
20 know if we were saying 1981 or I misheard, but the
21 event of the first alleged rape occurred on July 16th
22 of 1982 in El Paso, Texas, and I've already gone
23 through most of the facts with the Court.

24 THE COURT: Right. I'm talking about
25 doesn't -- don't you feel that there are factors that
26 I need to consider according to the Story case?

27 MR. THOMAS: Yeah. Under Story, if the Court
28 were to find that it comes in under 1108, and I think

1 from the chambers conversations that's where the Court
2 was leaning, the Court has to consider the factors
3 under Falsetta and 352. The factors are, the nature
4 of the -- the offenses or the actions, the relevance,
5 the possible remoteness, the degree of certainty of
6 its commission, and the likelihood of confusing,
7 misleading or distracting the jurors from their main
8 inquiry, similarity to the charged offense, likely
9 prejudicial impact on the jurors, the burden on the
10 defendant in defending against the uncharged offense,
11 and the availability of less prejudicial alternatives
12 to its outright admission, such as, admitting some but
13 not all of the defendant's other sex offenses or
14 excluding irrelevant though inflammatory details.

15 In this case, the People intend to bring in two
16 complaining witnesses. We don't intend to bring in any
17 doctors or medical personnel. I think it boils down to
18 an issue of credibility that the jurors themselves can
19 determine for themselves as far as if these witnesses
20 are actually telling the truth and same goes for if
21 Mr. Yablonsky takes the stand, and they can compare the
22 stories and figure out which one is more believable to
23 them.

24 THE COURT: Just one second. Maybe I didn't
25 make myself clear. I'd like you to -- here's what I
26 want you to tell me. Talk to me about each of these
27 cases in -- one occurred in 1982 and one occurred in
28 1991?

1 THE DEFENDANT: '96.

2 MR. THOMAS: '96.

3 THE COURT: '96. Okay.

4 MR. THOMAS: It would be October.

5 THE COURT: Let's call it the '82 and '96
6 cases. I really think what your job right now for me,
7 Mr. Thomas, is to tell me how the factors apply to
8 each of those cases.

9 MR. THOMAS: Okay. As far as the nature and
10 relevance of each of those cases, I think that both
11 cases involve alleged rapes and in this particular
12 case, the People are alleging that the murder was
13 committed in the attempted commission or commission of
14 a rape. I think they're similar in nature.

15 The possible remoteness as far as three years
16 before this particular crime -- and I'm talking about
17 the 1982 -- it's not that remote. I can see somewhat of
18 an argument on the remoteness of the '96 rape.

19 The degree of certainty of its commission and
20 likelihood of confusing, misleading and distracting the
21 jurors from their main inquiry, I don't think it's going
22 to confuse, mislead, or distract the jurors. I think
23 the ultimate issue in this case is whether or not the
24 sexual relations between Mr. Yablonsky and the victim in
25 this case were consensual or nonconsensual.

26 I think both of these cases show that
27 Mr. Yablonsky has, if the jury were to believe the
28 victims in those two cases, has in the past forced

1 himself on victims, and which would support the
2 prosecution's theory in this case that he forced himself
3 on Rita Cobb before he ended up killing her.

4 As far as the prejudicial impact on the jurors,
5 of course there's going to be some prejudicial impact,
6 and that's just the cost of doing business, as you say.

7 As far as the -- there's always going to be some
8 prejudicial impact of probative evidence. That
9 prejudicial impact in this case I don't think outweighs
10 the probative value of that evidence for the jury. I
11 think that the jurors are entitled to hear that
12 Mr. Yablonsky has raped people in his past if they
13 believe these two witnesses that come in.

14 The -- I don't believe that there's any less
15 prejudicial alternatives to its outright admission in
16 this case. There's -- I can see if the People were
17 seeking to introduce medical documents or other
18 documents that would bolster the credibility of the
19 witnesses in this case or in the 1982 case and the 1996
20 case. I could see where the Court might want to limit
21 that, but -- there's case law regarding limiting the
22 medical opinions or the medical experts coming in to
23 testify. I think it's just basically going to be
24 credibility -- a credibility issue for the jury.

25 I don't think there's anything that's going to
26 be irrelevant as far as admitting the testimony of these
27 two victims in this case as to what occurred back in
28 1982 and back in 1996. I think if the Court were to

1 engage in that 352 analysis, I think that the overall
2 probative value of this evidence outweighs any
3 prejudicial effect it might have on the defendant.

4 THE COURT: Does that conclude your comments?

5 MR. THOMAS: Yes.

6 THE COURT: Mr. Sanders.

7 MR. SANDERS: Thank you, your Honor.

8 THE COURT: Let me ask a question, by the
9 way, I think one of the things that I should do if --
10 do we all agree that the issue of whether -- the issue
11 of remoteness in time is not today? The point to
12 determine the relevant temporal proximately would be
13 the alleged crime?

14 MR. THOMAS: Yes.

15 MR. SANDERS: Yes.

16 THE COURT: Okay. Mr. Sanders.

17 MR. SANDERS: Thank you, your Honor. I guess
18 it would be difficult for me to imagine a case where I
19 would differ so greatly from the district attorney as
20 I do in this one in my analysis of his offer of proof.

21 The statement was made that if there is any
22 prejudice. There's enormous prejudice

23 THE COURT: Speak up.

24 MR. SANDERS: Yes.

25 THE COURT: I heard what you said.

26 MR. SANDERS: There's enormous prejudice in
27 this kind of evidence, enormous prejudice. The
28 question is, is there even a little bit of relevance,

1 even a little bit of relevance, not that there could
2 be enough relevance to overcome the prejudice in this
3 matter.

4 What I believe the Story case says that's
5 important to note -- in Story the gentleman was charged.
6 There was two other instances that the Court allowed in
7 on the 1108 evidence. The Court noted they allowed them
8 in because, Number 1, the two 1108 allegations were
9 similar to each other in a number of respects and that
10 they were also similar to the murder.

11 In the first place, that distinguishes Story
12 from our case. There is no way in which those two
13 offers of proof are similar to each other let alone in a
14 number of respects, and, second of all, neither one of
15 them are similar to the allegations in the instant case.

16 The first case happened in a bar off a military
17 base that was frequented by GIs. The second case
18 happened in the house where my client was living with
19 his then girlfriend. There's almost nothing the same
20 about them, and I notice in the district attorney's
21 argument the only similarity we have is that they're all
22 called rape. All rapes are not the same, and the Court
23 in Story found a number of respects where they were
24 similar. In this case there are none.

25 Now we go to the factors. The Court indicated
26 there are a number of factors. What we're comparing is
27 we are comparing a case that happened in 1982, an
28 allegation of forcible sex in a rest room of a bar, a

1 pool hall, that allegedly involved a knife, and we're
2 comparing that to a 19- -- 1996 case where my client and
3 his girlfriend were having a domestic dispute over a
4 number of issues. Then we are comparing that to the
5 instant case, but in what respect?

6 In the instant case, there is no evidence of a
7 sexual assault other than that there was sperm found in
8 the victim's vagina and on a piece of cloth next to her
9 body. We don't know if the semen was left before or
10 after she died. We don't know if the semen was left the
11 day before or 36 hours before. There is no evidence of
12 that. There was nothing about the case involving the
13 instant case that would give anyone reason to believe
14 that a knife was involved. There was nothing about the
15 instant case that would show that any clothing was torn.
16 No clothing that was in the room was disturbed or torn.
17 There were no buttons missing. There was no zippers
18 that were torn.

19 The allegation in 1996 was that some panties
20 were forcibly torn in that case. There was no trauma to
21 the victim's female parts in the instant case. There's
22 nothing -- there's no evidence on her body, in the room,
23 anywhere, that would normally be associated with a rape.

24 To say that those other two cases are similar
25 in a number of respects is -- is completely false.
26 There's -- the only respect they're the same is that
27 they involve what some people would say was a rape.

28 Remoteness is extreme in the '96 case. It is

1 there in the '81 case.

2 Relevance. This basically is a homicide trial.
3 The main issue here is whether or not my client killed
4 Ms. Cobb, and the -- there is a side issue that -- a
5 special circumstance, and it's important to note that
6 the offered evidence only speaks to the special
7 circumstance, not the charge in Count I.

8 The next is the degree of certainty of
9 commission. Neither one of these cases involve a
10 criminal prosecution. Neither one of these cases
11 involved a conviction. Neither one of these cases
12 involved any findings by a magistrate, a judge, a jury,
13 or anyone, that they were actually committed.

14 In both of the cases, there was only an arrest,
15 of course, in each case by an officer that had no
16 personal knowledge and then no further steps were taken.
17 The cases were never filed. It wasn't like they were
18 dismissed. They just never were filed in the first
19 place. The degree of certainty of commission is modest
20 at best.

21 The only evidence of commission are the
22 statements of the two women that they gave years and
23 years ago. As far as I know, they have never given
24 statements since. I've never been provided with a
25 statement. I don't know of any investigative officer
26 that has taken a statement from them since that day
27 where they re-allege that any of these things happened.

28 The next is likelihood of confusing, misleading

1 or distracting the jury from their main task. Their
2 main task is the charge in Count I, the only charge,
3 which is a homicide. Basically, what we're asking the
4 jury to do is try three cases. They have to try -- they
5 have to decide, did the case in El Paso actually happen?
6 Did the case in Long Beach actually really happen? If
7 it did, did it have any relevance to the special
8 circumstance, which is attached to the main charge in
9 this case?

10 The next factor is similarity to the crime
11 charged. That's of the same nature and relevance. I've
12 already pretty well addressed that. We know of no
13 similarities because we don't have any information as to
14 what happened in the crime charged.

15 The prejudicial impact is extreme. It's
16 devastating. If this evidence is allowed to be brought
17 in -- this goes with the burden on the defendant of
18 defending against it. The prejudicial impact is extreme
19 because in -- this -- this alleged evidence by these two
20 women, if they say what they said years ago, is the only
21 evidence -- is the only evidence there is in this case
22 of a rape. There isn't any other evidence.

23 So if you say, of all the evidence in this
24 case, it only adds five percent, then the prejudice
25 isn't so great. Because there is no physical evidence
26 of rape that was collected in 1985 in the situation with
27 Ms. Cobb, that other evidence is 100 percent basically
28 of the evidence that there was a rape.

1 Burden of the defending against this; as I
2 indicated, I was not aware that these women were going
3 to be called until a week or so before trial. When that
4 occurred, my investigator and I made some phone calls
5 and found out that neither one of these women are where
6 they were in those days. The district attorney was kind
7 enough to provide me last week with their current
8 addresses, but, of course, that doesn't mean that they
9 talked to me.

10 In each of those cases, it's impossible to
11 find, for example, in the 1981 case, the other GIs that
12 were in that bar that night with my client, the
13 investigating officer or his supervisor that determined
14 that they were going to let my client go shortly after
15 he was arrested, anyone to testify to the fact that
16 there was no knife there. My client was arrested.
17 There was no knife there. The witness was impeached on
18 that issue.

19 The 1996, we can't find or we don't know how to
20 get ahold of the officers at the jail that overheard the
21 telephone conversation between my client and the
22 prosecutrix where she basically admitted that, yeah,
23 okay, you didn't really rape me, but, you know, you did
24 rape my soul. That's why I called it a rape is because
25 I felt that you had raped my soul, and the -- the police
26 after hearing that conversation on the telephone didn't
27 follow through with filing any charges.

28 I don't know where these people are. I can't

1 find them. It's almost impossible for us to defend
2 against either one of those allegations at this point.
3 I don't know of a less prejudicial alternative.

4 I believe that neither one of these should come
5 in and this case should rise and fall on its own merits.
6 One less prejudicial alternative that was discussed in
7 Story was that the judge perhaps should have chosen one
8 of those instances, but that isn't the same case in our
9 case because, as I said, there is just no evidence of a
10 common plan, similarity, similar circumstance or
11 anything in any of those cases and the present case.
12 Thank you, your Honor.

13 MR. THOMAS: May I respond?

14 THE COURT: Sure.

15 MR. THOMAS: As far as the convictions go, it
16 looks like in Story all four of those rapes that came
17 in --

18 THE COURT: If I may, that's something I
19 don't want to pass by. Mr. Sanders, you indicated
20 that the two in the instant case -- in the Story case,
21 there were four separate victims that testified.

22 MR. SANDERS: And I don't think that's an
23 important factor. That's --

24 THE COURT: You mentioned there was something
25 about limiting -- in the Story case, limiting the
26 number of people that were allowed to testify.

27 MR. SANDERS: On the less prejudicial
28 alternative.

1 THE COURT: In this instance, they were --
2 all four people were allowed to testify.

3 MR. SANDERS: Because they were all similar
4 in a number of respects.

5 THE COURT: Right. Four.

6 MR. SANDERS: Yes.

7 THE COURT: Thanks.

8 MR. THOMAS: As far as the four victims that
9 were allowed to testify, there was no mention that the
10 defendant in this case -- the Story case was ever
11 convicted of any of them. So it would be similar to
12 this.

13 In Story, the crime occurred in 1976. The
14 Court admitted two prior rapes, one that occurred in
15 1974, another one occurred in 1976, and then admitted
16 two subsequent rapes that the defendant committed, one
17 in 1980 and one in 1986. The 1986 rape that was
18 admitted was approximately ten years after the murder
19 was committed in Story.

20 Similarly in this case, we have a rape that
21 occurred in 1996, which is approximately just over ten
22 years, it's eleven years after the murder occurred in
23 the present case.

24 Mr. Sanders kept mentioning there's no physical
25 evidence, and Story it shows -- from my reading of it,
26 doesn't show that the DA admitted any physical evidence
27 except for one in 1986 that it looks like that might --
28 well, no, even in the 1986 case it was all three or four

1 victims that came in and testified for the jury that the
2 defendant in Story had committed these rapes, and there
3 was no physical evidence or mention of physical evidence
4 in the appellate opinion.

5 Mr. Sanders kept pointing out there was a lack
6 of trauma in -- in the Rita Cobb murder. Admitting the
7 two prior rapes would explain why there was a lack of
8 trauma because in the two prior rapes he used weapons,
9 one time in the 1982 case he used a knife, and then on
10 top of that he used his left hand to choke the victim.
11 In this case, the victim in the Rita Cobb case, she was
12 strangled.

13 The Story opinion talks about the fact that in
14 Story the victim was also strangled on Page 1300 of the
15 opinion.

16 THE COURT: 1300?

17 MR. THOMAS: Yeah.

18 MR. SANDERS: The case number?

19 MR. THOMAS: Case number --

20 THE COURT: Let me get there. Go ahead.

21 MR. THOMAS: The California Supreme Court
22 said:

23 "The fact that the defendant
24 strangled his victim to death after
25 the sexual intercourse permits a
26 reasonable jury to infer that Vickers
27 did resist," Vickers being the victim
28 in that case, "did resist and did --

1 and indeed died for that resistance."

2 The same argument can be made in this case. If
3 the jury were to believe that the sex occurred at or
4 near the time of death, the jury could come to the same
5 conclusion as they did in the Story case, that Ms. Cobb
6 was strangled because she resisted the defendant.

7 I would argue as far as the physical evidence
8 goes, prosecution's going to argue that because the bed
9 and the condition of the bed and the bedspread that
10 would indicate some evidence that there was a struggle
11 of some sort. It wasn't neat as far as the bed goes.
12 It wasn't made up neat, and I'm sure Mr. Sanders has a
13 contrary argument to that, but I think that that's one
14 of the arguments that the People could put forth and the
15 jury could believe.

16 Then as far as the 1996 case, this was a woman
17 that was known to Mr. Yablonsky, and he came uninvited
18 and basically took the sex if you believe the victim in
19 that case.

20 Same could be said for this case as far as
21 Rita Cobb's concerned. He knew the victim, and he --
22 the People are going to argue based on his 1996 case
23 that he did the same thing in this case. He invited
24 himself in and basically took sex from Ms. Cobb. In the
25 process of doing that, he murdered her. So I think
26 there's enough similarities and enough evidence there
27 for the Court to find that both the 1982 and the 1996
28 case have probative value, that probative value

1 outweighs any prejudicial effect on the defendant.

2 THE COURT: Anything else, either side?

3 MR. SANDERS: Please, your Honor. It's one
4 thing in the abstract to say that if you're charged
5 with certain crimes you can bring in similar crimes to
6 bolster your argument, to bolster your position, but
7 what those cases didn't suggest is exactly what the
8 prosecutor uses those cases for.

9 It's one thing to say, in the Rita Cobb case,
10 he used a knife. In the El Paso case, he used a knife.
11 You can show a common scheme, plan, purpose, all those
12 things. It's one thing to say in the Rita Cobb case, he
13 came uninvited, and in the Long Beach case, he came
14 uninvited, but even his own argument shows that that's
15 not what he's doing here.

16 What he suggested is, we don't know what
17 happened to Rita Cobb, but we know in El Paso, he used a
18 knife; therefore, he probably used a knife in this case.
19 We can argue that's why it's a rape because he used a
20 knife. In the 1996 case he came uninvited; therefore,
21 he must have come uninvited in this case. That's not
22 what Story or Falsetta or Pierce stand for; that you
23 can -- that you can bring in these other elements that
24 you don't have in your main case. They're to show
25 similarities. They're not to -- to try to bootstrap
26 other things into them that weren't there to start with.

27 If that's the similarity, if that's why it's
28 relevant, then it isn't and the prejudice, which is

1 huge, hasn't been overcome. Thank you.

2 THE COURT: Anything else?

3 MR. THOMAS: I would point out in Story that
4 the murder victim was strangled and the prior rapes
5 that were admitted the defendant did use a gun, and
6 so, therefore, it's not similar and the Court still
7 allowed its admission because -- under 1108, and that
8 would be -- we'd submit on that.

9 THE COURT: Anything else?

10 MR. SANDERS: No, your Honor. I've submitted
11 points. Thank you.

12 THE COURT: I'm struck by how, in my opinion,
13 the Story case is so close to the case that is before
14 me, and I think Story is just on all fours with People
15 versus Yablonsky. What Story stands for, I believe,
16 is allowing the fact that someone was killed --
17 someone who was killed after having had sexual
18 relations, allows the jury to be told of prior similar
19 forcible sex crimes to infer that this was not just a
20 murder but was a forcible sex crime.

21 I didn't hear much discussion about this, but
22 what strikes me mostly about the Story case is here on
23 Page -- I guess it would be on -- starting on Page 1285:

24 "Evidence presented at trial on
25 October 22nd, 1976, 26-year-old,
26 Betty Yvonne Vickers was found dead
27 lying on her stomach on the right side
28 of the bed in the bedroom of her