

1 MR. THOMAS: No.

2 THE COURT: That means that when we come back
3 today, we're going to have to finish talking about
4 jury instructions. We'll have to take a recess.

5 MR. THOMAS: Can I put something else on the
6 record so it's clear as far as the transcript along
7 with the redacted interview? As far as any other
8 objections, I don't believe Mr. Sanders has any
9 objections other than that regarding my redaction?

10 THE COURT: That's what he said.

11 MR. SANDERS: No, I was -- I thought the
12 other redactions were very well done.

13 MR. THOMAS: Okay.

14 THE COURT: Well, by now, everyone should
15 know that the jury knows much more than the attorneys
16 do. Here's a question that was handed out -- handed
17 over too late. Jury -- this is from a juror; isn't
18 it?

19 THE BAILIFF: Yes, it is, your Honor.

20 THE COURT: The tape ended when the detective
21 said to the defendant quote "You're under arrest for
22 the murder of Rita Cobb." Question: Was the
23 defendant read the Miranda rights at that time?
24 Please let us know on Monday or when convenient.
25 Thanks.

26 I worry about little things like this. I don't
27 want the jurors to be worried about little things like
28 that, and I will tell you, quite frankly, I wish that I

1 had had this before I let the jury go. I may very well
2 allow either one of you to reopen to discuss this. I
3 don't want the jury to be confused on something that is
4 of no moment and should not enter into their
5 consideration. I don't know how we're going to do it.

6 MR. THOMAS: I think we can draw up a
7 stipulation that he was read his Miranda rights, and
8 everything was done properly.

9 THE COURT: Maybe you guys can do whatever
10 you want to do. I don't know the answer to what
11 you're going to want to do. I need to have you here
12 at 8:30 in the morning on Monday so we can get these
13 things straight.

14 In the meanwhile, we're going to take a
15 15-minute recess.

16 MR. THOMAS: Okay.

17 (Whereupon a recess was taken.)

18 THE COURT: Back on the record in the case of
19 People of the State of California versus John Henry
20 Yablonsky who is here with Mr. Sanders, his attorney.
21 Mr. Thomas is here along with Detective Alexander.

22 Did you get a chance to review the exhibits?

23 MR. THOMAS: Yes, we did.

24 MR. SANDERS: Yes, sir.

25 THE COURT: Mr. Thomas, what are the -- there
26 is the list right here.

27 THE CLERK: Yes.

28 THE COURT: Looks like we have 1 through 49A.

1 MR. THOMAS: And Mr. Sanders and I spoke. I
2 think we've agreed to all the exhibits would go into
3 evidence except for Exhibits 30, 31, 32, 38, and 40.

4 THE COURT: By stipulation?

5 MR. SANDERS: Yes, your Honor, we agree that
6 all of them will go into evidence except the ones that
7 the district attorney mentioned.

8 THE COURT: So stipulate, Mr. Thomas?

9 MR. THOMAS: Yes, your Honor.
10 (Whereupon Exhibits 1 through 29, 33 through 37 and 39
11 through 49A were admitted into evidence.)

12 MR. THOMAS: As far as the transcript is
13 concerned, both of us don't have a problem with the
14 jury getting it as an aid to Exhibit 49 itself.

15 THE COURT: Okay.

16 MR. SANDERS: That's correct.

17 THE COURT: Fine. Did anybody want to do
18 something like write a stipulation regarding the
19 Miranda issue?

20 MR. SANDERS: I like the Court's suggestion,
21 and I thought the words you used were even appropriate
22 words.

23 THE COURT: Since I never listen to myself, I
24 have no idea what I said.

25 MR. SANDERS: Something to the effect of,
26 I'll instruct the jury that they are to disregard that
27 issue.

28 THE COURT: You want me to do it informally

1 or do you want something we write up?

2 MR. SANDERS: If you prefer, I'll write
3 something up, but I think it's fine if you do it
4 informally.

5 MR. THOMAS: In the past, I used to do the
6 drug cases, and an issue that would come up would be
7 whether or not the defendant's vehicle or a person or
8 house was searched in accordance to law. The special
9 instruction that would be given usually in that case
10 would be something to the effect that, it's -- this is
11 a matter for the Court to decide, and the Court has
12 decided that it was a lawful search.

13 THE COURT: Yeah, but that's not really what
14 I'm asking you. I'm asking you whether you want to
15 write something up or for me to informally advise
16 them.

17 MR. THOMAS: I'm fine with the Court
18 informally advising them.

19 MR. SANDERS: As am I.

20 THE COURT: Somebody remind me on Monday,
21 somebody wearing glasses seated to my left. You can
22 show me that note again on Monday.

23 All right. I drafted some instructions. You
24 have them there, I think in blue. I'm going to run
25 through these, and you all can tell me -- you can tell
26 me what you think I should do when I get through telling
27 you what I'm intending to do.

28 I'm intending to give 200, 201, 202, 207,

1 208 -- no, 208 is no longer needed because it has to do
2 with somebody testifying as Jane Doe. No one has
3 testified as Jane Doe. 220 and 222, 223, 224, 226,
4 included in 226 are several bullet points. The last is,
5 has the witness engaged in other conduct that reflects
6 on his or her believability. We already have, has a
7 witness been convicted of a felony. There's only one
8 person about whom we heard of a felony conviction. The
9 next one, has the witness engaged in other conduct that
10 reflects on his or her believability. That was the one
11 that would apply to Mr. Yablonsky only under certain
12 circumstances that the evidence didn't bear those
13 circumstances out.

14 MR. SANDERS: Correct.

15 THE COURT: I'm going to strike that last
16 bullet point. Do you agree?

17 MR. THOMAS: Yes, your Honor.

18 MR. SANDERS: Yes, your Honor.

19 THE COURT: Everybody turn to 251. Anybody
20 have a problem with that language?

21 MR. SANDERS: No, sir.

22 MR. THOMAS: The only thing is with the
23 allegation, can we include special circumstance
24 instead of allegation?

25 THE COURT: Or to find the special
26 circumstance of murder committed while in the
27 commission or attempted commission of a rape. Is that
28 a fine thing to call that, a special circumstance?

1 MR. THOMAS: That's fine.

2 THE COURT: I'm giving 300, 302, and 303.
3 You know what? 303, during the trial, certain
4 evidence was admitted for a limited purpose.

5 What evidence would that have been?

6 MR. SANDERS: I can't think of any.

7 THE COURT: Taking 303 out. 316 has two
8 paragraphs, the first one refers to felony conviction,
9 the second paragraph refers to other conduct, usually
10 misdemeanors or uncharged criminality. I'm taking
11 that out.

12 MR. SANDERS: I agree, your Honor.

13 MR. THOMAS: Agreed.

14 THE COURT: 318, 332, 333, 355, 358, 359,
15 362, 370. 375 no longer applies if it ever did.

16 MR. SANDERS: Which? 375?

17 THE COURT: 375, uncharged conduct.

18 MR. SANDERS: Right.

19 THE COURT: 460 needs to be fixed. I don't
20 know how we're going to do that yet. I'm going to
21 pass over 460 for a moment.

22 MR. SANDERS: All right.

23 THE COURT: I think maybe we'd get out of
24 chronological, so we go directly to Murder 500, 520,
25 540A. That's strange language. 540A. I don't know
26 if this is something that I included that made it
27 cumbersome and confusing, but right now one says, the
28 defendant committed or attempted to commit rape or

1 attempted rape.

2 MR. SANDERS: That's correct.

3 THE COURT: That's obviously wrong. It's
4 going to be the defendant committed or attempted to
5 commit rape.

6 MR. SANDERS: Right.

7 THE COURT: The defendant intended to --
8 intended to commit rape or attempted rape and while
9 committing or attempting to commit rape, the defendant
10 did an act that caused the death of another person.

11 MR. SANDERS: You'll cross out, or attempted
12 rape?

13 THE COURT: Yes. Last paragraph, or
14 attempted rape is removed. Please refer to the
15 instruction that I will give you on that crime; right?

16 MR. SANDERS: Yes, sir.

17 MR. THOMAS: Yes.

18 THE COURT: 640, at the top of Page 13,
19 there's a blank line. The only thing that will be
20 there is the word to capital T-O. As with all the
21 charges, this is the only charge.

22 Is that instruction complete then?

23 MR. SANDERS: I believe it is, your Honor.

24 MR. THOMAS: I believe so too.

25 THE COURT: Then 700, 704, 706, 730. Now, is
26 there an allegation and a special circumstance or not?
27 Is there a special allegation?

28 MR. THOMAS: It's just a special

1 circumstance.

2 THE COURT: All right. 730 I will give you
3 on that crime. Then I'll give 1,000. After 1,000, I
4 will give 460. I think it's 460, the attempt
5 instruction? Everybody agree with that concept?

6 MR. SANDERS: Yes, sir.

7 MR. THOMAS: As far as --

8 THE COURT: Just one second.

9 MR. THOMAS: Okay.

10 THE COURT: 191 does not go in. Let's talk
11 about 460. What were you going to say?

12 MR. THOMAS: I was going to ask the Court on
13 1,000 --

14 THE COURT: Yeah.

15 MR. THOMAS: -- to add the -- the sentence
16 after, a woman must be alive at the time of the sexual
17 intercourse for a rape to occur. Intercourse with a
18 deceased victim may constitute attempted rape if the
19 defendant intended to rape a live victim under
20 People V Kelly.

21 THE COURT: Okay. But I think that doesn't
22 go at 1,000. I think it goes into 460, the attempt
23 instruction.

24 MR. THOMAS: Okay.

25 THE COURT: I think. Let's take a look
26 at 460 now. It's, the defendant is charged with
27 attempted rape. It should say --

28 MR. SANDERS: The defendant is charged --

1 THE COURT: The special circumstance -- in
2 fact, let's go up to 1,000. The defendant -- there is
3 a special circumstance alleged as to -- as to the
4 charge of murder. I'm going to take out, there is,
5 and say, a special circumstance alleged as to the
6 charge of murder is that -- or that -- what's the
7 language of the special circumstance? The -- is that
8 the murder occurred in the process?

9 MR. THOMAS: Commission or attempted
10 commission.

11 THE COURT: Occurred in the commission of --
12 commission or attempted commission of rape. To prove
13 that special circumstance...

14 MR. SANDERS: To prove the defendant is
15 guilty of that special circumstance --

16 THE COURT: I'm taking that out. To prove
17 the defendant -- to prove that special circumstance is
18 true, the People must prove that. Then I'll give 1,
19 2, 3 and 4. I'll give that whole -- I'll give the
20 whole instruction, 1,000?

21 MR. SANDERS: Yes, sir.

22 THE COURT: Then for 460 --

23 MR. SANDERS: We're going to start off the
24 same way we did in 1,000?

25 THE COURT: No. Should -- under 1,000,
26 should it say, Number 1, the defendant had sexual
27 intercourse -- had or attempted to have sexual
28 intercourse with a woman?

1 MR. SANDERS: I don't think so if we're going
2 to have 460.

3 THE COURT: I'm thinking what I would do --
4 so 1,000 could read, there is a special circumstance
5 alleged as to the charge of murder that the murder
6 occurred in the commission or attempted commission of
7 rape. To prove that special circumstance is true, the
8 People, may prove that the defendant raped
9 Rita Mabel Cobb by establishing all of the following.
10 Then put everything here that goes into 1,000. Then
11 I'd put the same preamble on 460 and say, to prove
12 this special circumstance is true, you know, that --
13 use the term attempted rape. Say, to prove that the
14 defendant attempted to rape -- you know what,
15 Mr. Thomas, why don't you do this?

16 MR. THOMAS: I would suggest instead of may,
17 use the word must, and as far as the bottom paragraph
18 is concerned, 1,000, refer to Instruction 460 for
19 elements of an attempted rape.

20 THE COURT: What I'd like you to do is I'd
21 like you to draft 1,000 and 460 any way that you think
22 makes sense and email it to me.

23 MR. THOMAS: I'll email a copy of it to
24 Mr. Sanders.

25 MR. SANDERS: That's fine.

26 THE COURT: You can do that tomorrow; right?

27 MR. THOMAS: Yeah.

28 THE COURT: So I can get it in final form.

1 MR. THOMAS: That's fine.

2 THE COURT: Mr. Sanders is going to be here;
3 right?

4 MR. SANDERS: I am, your Honor.

5 THE COURT: You don't object to Mr. Sanders
6 coming by and talking about instructions if he comes
7 up with something?

8 MR. THOMAS: No.

9 THE COURT: Okay. What we'll do is talk
10 about the -- whether or not that -- this is
11 satisfactory. I'm concerned that we're going to be
12 taking -- I do think that 1,000 should be used and 460
13 should come after 1,000. It needs to be cleaned up.
14 It's obviously a special circumstance. It's not an
15 allegation. It's not a charge.

16 Does that satisfy everyone?

17 MR. SANDERS: Yes, sir.

18 MR. THOMAS: That's fine.

19 THE COURT: So other than that --

20 MR. SANDERS: We're not using 1191?

21 THE COURT: We're not using 1191. We're
22 going to -- straight to 3550.

23 MR. SANDERS: No objection to that.

24 THE COURT: Did you look at the verdict forms
25 and statement of the offense?

26 MR. SANDERS: The ones that were provided by
27 Mr. Thomas?

28 THE COURT: Yes.

1 MR. SANDERS: Yep.

2 THE COURT: I would tract this language for
3 1,000, the -- for the preamble to 1,000 and to 460. I
4 would pull the language from the statement of the
5 offense, and I would seriously consider combining
6 these instructions into one. 1,000 and 460 don't
7 necessarily have to be separate instructions. You can
8 say, this special circumstance can be established by
9 the act being committed or the attempted act. You can
10 put in attempted in 1,000 perhaps.

11 MR. THOMAS: Okay.

12 THE COURT: Okay. I think that's it.
13 Anything else that needs to be said?

14 MR. SANDERS: No, sir. We'll see you what
15 time on Monday?

16 MR. THOMAS: No, your Honor.

17 THE COURT: 4:00 in the morning is what I was
18 thinking. If I'm not here yet, just hold the light
19 open (sic). 8:30.

20 MR. SANDERS: 8:30, Monday. I hope I
21 remember that. I'll try to remember that. I'll do my
22 best.

23 THE COURT: Write it down somewhere,
24 Mr. Sanders. I'm sure you'll do fine. Thank you
25 everyone.

26 MR. THOMAS: Thank you.

27 (Whereupon proceedings in the above-entitled
28 matter were concluded for the day.)

1 VICTORVILLE, CALIFORNIA; JANUARY 31, 2011;
2 DEPARTMENT NO. V-2 HONORABLE JOHN M. TOMBERLIN, JUDGE
3 A.M. SESSION

4 (Appearances as heretofore mentioned.)

5 (Shawna Manning, Official Reporter, CSR No. 12827.)

6 -oOo-

7 (Whereupon the following proceedings were held outside
8 the presence of the jury:)

9 THE COURT: Back on the record in the case of
10 People of the State of California versus John Henry
11 Yablonsky. The jury's not present. Mr. Yablonsky is
12 with his attorney, Mr. Sanders. Mr. Thomas and
13 Detective Alexander are here for the People.

14 Did you each get a copy of the jury
15 instructions now?

16 MR. THOMAS: Yes, your Honor.

17 MR. SANDERS: Yes, your Honor.

18 THE COURT: Did you get a chance to run
19 through them and look at them?

20 MR. THOMAS: Yes, your Honor.

21 MR. SANDERS: Yes, sir.

22 THE COURT: Are these in agreement with what
23 I said I was going to give?

24 MR. SANDERS: I did not notice anything
25 either way that you said you weren't and it's there
26 and you said it would be there and it's not.

27 MR. THOMAS: The only thing that I noticed is
28 that the Court is giving 1,000 and 460.

1 THE COURT: Okay. That's not supposed to
2 have happened.

3 MR. SANDERS: That's true.

4 THE COURT: Would you call Dana back?

5 MR. THOMAS: The only thing that should be
6 shown should be 460 instead of 1,000.

7 THE COURT: Yeah. That concerns me, frankly,
8 that in some way Cheryl did not leave the final draft
9 with Ms. Tyler because there was more -- I actually
10 have proposed in my final draft it would read 1,000
11 slash 460, that is to say, the single instruction.

12 Off the record.

13 (Whereupon proceedings were
14 held off the record.)

15 THE COURT: Counsel, those of you who may not
16 recall, I like to do what you -- what's more
17 comfortable for you. I can instruct first, and you
18 can argue second, or you can argue first, and I can
19 instruct second.

20 What do you like to do, Mr. Thomas?

21 MR. THOMAS: I'd like the Court to instruct
22 first.

23 THE COURT: Mr. Sanders, I know that's your
24 preference.

25 MR. SANDERS: It is my preference.

26 THE COURT: That's what we're going to do.
27 The other thing, I guess, I want to say is, you know
28 I'm not going to give the verdicts -- final

1 verdicts -- I will give them a statement of offense,
2 but the verdict and that kind of stuff I give with
3 3550, which I do after you finish your closing
4 arguments.

5 MR. THOMAS: That's fine.

6 MR. SANDERS: Good.

7 MR. THOMAS: Did the Court want to put on the
8 record as far as the stuff we discussed?

9 THE COURT: I don't think I needed to other
10 than to say there's an issue that the juror brought up
11 something about Miranda.

12 Also, Mr. Sanders did propose a jury
13 instruction that essentially tells the jury that the
14 statement -- statements made by a police officer to a
15 defendant in an interview are hearsay. While that may
16 be correct, it wasn't an objection at the time. I'm
17 afraid going backward might affect how the jury would
18 understand it and get confused.

19 I thought I would talk to them about that and
20 explain that the things that Detective Alexander says
21 aren't necessarily true; that that was even part of what
22 they heard you ask Detective Alexander in your direct
23 examination.

24 You both agreed that was a sufficient covering
25 of those two issues; right?

26 MR. THOMAS: Yes.

27 MR. SANDERS: Yes, your Honor, with one
28 exception. I did make an objection back then. In

1 fact, I made two of them. I just want this to be part
2 of the record, please.

3 THE COURT: Sure.

4 MR. SANDERS: The first one was when
5 Mr. Thomas gave me the transcript, I marked the places
6 that I objected to. He indicated he would delete
7 those.

8 THE COURT: There was one he did not delete.

9 MR. SANDERS: There was one he did not
10 delete. When I noticed it, I didn't want to draw
11 attention to it right then. Immediately afterwards, I
12 told the Court and asked the jury be instructed to
13 disregard that part, and the Court did --

14 THE COURT: Did that.

15 MR. SANDERS: -- did not, and I submitted a
16 jury instruction. I would like that jury instruction
17 to be part of the record.

18 THE COURT: Did you submit it in writing or
19 just an email?

20 MR. SANDERS: Just an email.

21 THE COURT: Get a copy of it. We'll mark it
22 and make it part of the record.

23 MR. SANDERS: I'll do that. That was denied.

24 THE COURT: Right, because I believed that
25 you said it was sufficient when -- when we had an
26 off-the-record discussion this morning or it may have
27 been on the record, but informal discussion, I thought
28 you said that my talking about it would be sufficient

1 if I explain what the officer said isn't true.

2 MR. SANDERS: That would be my alternative
3 choice. My first choice is still to have an
4 instruction. If the Court does not want to give that
5 one, then I agree with the Court's procedure.

6 THE COURT: Okay. Well, if Mr. Thomas says
7 there's no authority for that instruction, I don't --

8 MR. SANDERS: My authority is People versus
9 Goshen, your Honor, where the Court did give that
10 instruction.

11 THE COURT: No requirement of it being -- no
12 authority for it being required is what I meant to
13 say.

14 MR. SANDERS: That's right.

15 THE COURT: I think I'm going to be able to
16 cover it in such a way that's going to avoid any
17 problems.

18 Let's get the jury in.

19 (Whereupon the following proceedings were held in open
20 court in the presence of the jury:)

21 THE BAILIFF: Remain seated. Come to order.
22 Court is now in session.

23 THE COURT: Good morning, ladies and
24 gentlemen. Welcome back to Department 2, where we are
25 continuing in the trial of the People of the State of
26 California versus John Henry Yablonsky. Mr. Yablonsky
27 is here along with his attorney, David Sanders.
28 John Thomas is here for the People along with

1 Detective Alexander, his investigating officer.

2 This is the time, ladies and gentlemen, that
3 you're going to hear the instructions on the case.
4 Before I get to that point, there are two matters that I
5 want to cover, and I'm going to do it informally.

6 Someone on the jury writes this question: The
7 tape ended when the detective said to the defendant,
8 quote "You're under arrest for the murder of Rita Cobb."
9 Then it says question; was the defendant read the
10 Miranda rights at that time? Please let us know on
11 Monday or when convenient.

12 So the Miranda rights that we refer to comes
13 from a case called Miranda versus Arizona from back in
14 the 1960s. Sometimes it's something that people know a
15 little bit about -- a little bit about, but they may not
16 know everything about it. Let me say this: Whether or
17 not a statement is in violation of a Miranda right or
18 Miranda rights is a decision that is made by a judge and
19 not a jury. It's a legal question.

20 If the judge determines that Miranda rights
21 should have been given but were not, the jury would
22 never hear the statement. I would simply say that
23 statement can't be heard by the jury. In this instance,
24 you've heard the statement. Suffice it to say, I have
25 ruled the statement is admissible and that Miranda
26 rights are nothing that the jury should be concerned
27 about. I hope that's clear to everyone. Don't
28 speculate about something that's not part of what's

1 going on in this case.

2 Counsel, do you agree?

3 MR. THOMAS: Yes.

4 MR. SANDERS: Yes, sir.

5 THE COURT: All right. We started talking
6 about the statement that was made by Mr. Yablonsky. I
7 will remind you of something. That is this:
8 Mr. Thomas even brought it out with the direct
9 examination of Detective Alexander. Sometimes the
10 police intentionally lie or make things up when
11 they're talking to defendants.

12 A defendant's statement can be used against
13 him. So what he says is called an admission, by the
14 way. You can take that as something you can use against
15 him, but you can only take the statements of the
16 policeman, interviewer, as true to the extent that it
17 helps you to understand the response the defendant
18 gives.

19 As you've heard, a police officer might say
20 something intentionally to a defendant that is not true.
21 So it's -- what's important is not what the police
22 officer says except to the extent that it helps you
23 understand the defendant's answer. That is what you are
24 concerned with, whether you believe it or not is up to
25 you, but you can use that as an admission against the
26 defendant.

27 Have I explained that correctly, Mr. Thomas?

28 MR. THOMAS: Yes, your Honor.

1 THE COURT: Mr. Sanders?

2 MR. SANDERS: I believe so, sir.

3 THE COURT: Now, I'm going to tell you to put
4 down your pencils and pens and notebooks because I've
5 got quite a bit of reading to do. These are the
6 instructions that I'm going to give you on the law
7 that applies to this case. Some of these are general
8 instructions, some of these are specific instructions.

9 Just know that I'm going to go through them
10 rather quickly as I read because I don't believe that
11 reading them more slowly gives any benefit in your
12 comprehension. I'm going to be flashing these
13 instructions up on the board so you can read them along
14 with me. I will give you copies of these instructions
15 in writing to go back into the jury deliberation room,
16 and you'll have plenty of chance to look at them when
17 deliberations start.

18 I haven't been in the 21st Century for long
19 yet. I'm kind of low-tech generally.

20 Remember when you saw the transcript, I told
21 you to go by the transcript, see if it helps you
22 understand what's on the tape, but the tape-recorded
23 media is the original. Here we go.

24 "Members of the jury, I will now
25 instruct you on the law that applies
26 to this case. I will give you a copy
27 of the instructions to use in the jury
28 room. The instructions that you