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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO
BEFORE THE HONORABLE ANNE-CHRISTINE MASSULLO
DEPARTMENT 613

COPY

THE PEOPLE OF THE STATE OF)
CALIFORNIA,)
)
Plaintiff,) Case No.: 16013940
)
vs.) Volume 10 - Pages 1629 through 1822
)
MICHAEL SMITH,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Monday, December 12, 2016

A P P E A R A N C E S:

For the Plaintiff:

OFFICE OF THE DISTRICT ATTORNEY
GEORGE GASCON, District Attorney
By: Dane Reinstedt, Assistant District Attorney
850 Bryant Street
San Francisco, California 94103

For the Defendant Michael Smith:

OFFICE OF THE PUBLIC DEFENDER
JEFF ADACHI, PUBLIC DEFENDER
By: Jeff Adachi, Public Defender
555 Seventh Street, Second Floor
San Francisco, California 94103

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1 Monday, December 12, 2016

8:18 A.M.

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

3 **THE COURT:** Back on the record in People versus Smith.
4 Appearances, please.

5 **MR. REINSTEDT:** Dane Reinstedt for the People.

6 **MR. ADACHI:** Jeff Adachi for Mr. Smith who's present in
7 court.

8 **THE COURT:** Thank you.

9 All right. So a couple of things I wanted to go over this
10 morning before we proceed. Mr. Smith is present. He's able to
11 go forward today with cross-examination?

12 **MR. ADACHI:** Yes. He's feeling much better.

13 **THE COURT:** Good. Okay.

14 **THE BAILIFF:** Excuse me, Your Honor. Someone appears to be
15 filming in the hallway.

16 **THE COURT:** Filming?

17 **THE BAILIFF:** Filming you.

18 **THE COURT:** Filming me?

19 **THE BAILIFF:** Yeah. He just walked away.

20 **THE COURT:** Okay. So was there someone videotaping out
21 there? I did see someone peering in, and I didn't actually --

22 **MR. ADACHI:** There was someone carrying a camera, but
23 they're not videotaping because there's no video --

24 **THE BAILIFF:** I saw someone focus --

25 **MR. ADACHI:** I checked with them. They said no.

26 **THE COURT:** Okay. Very well.

27 So a couple things. I've reviewed People versus Brown over
28 the weekend, and I believe the People are correct, that Brown

1 specifically indicated, at page 169, that in lieu of the expert
2 testimony that there could have been an instruction going to the
3 point. And so for that reason, I am going to give the request
4 of the force on not excessive.

5 And I think probably what we should do, if you want to look,
6 Mr. Adachi, at 2670, please, that the People provided.

7 **MR. ADACHI:** Are you talking about the first instruction?

8 **THE COURT:** The force. Force is not excessive.

9 **MR. REINSTEDT:** Here's a copy, Counsel (handing).

10 **MR. ADACHI:** The Court's referencing 2670, or are you
11 talking about the special that was requested?

12 **THE COURT:** Well, the special is added on to 2670. If you
13 want it as a stand-alone, we can just simply put it as a
14 stand-alone, which is fine. Maybe we should just do that.

15 **MR. ADACHI:** I mean, I wrote a written opposition to the
16 Brown versus Conner instruction, and I've just filed it with the
17 Court; so I'd like the Court to consider what I have. It's a
18 very brief argument.

19 **THE COURT:** Well, I looked, again, over the weekend, and
20 specifically, Brown talks about that at 169. I mean, it was
21 very clear that that's what was indicated by the Court. That
22 that is the way to cure this issue of the instruction, and I'll
23 quote:

24 "The prosecutor was, of course, entitled to ensure that the
25 jury understood 'there will be virtually always a range of
26 conduct that is reasonable.'" And then it goes on.

27 But if she wished to emphasize these points, she was fully
28 entitled to do so by requesting a special jury instruction on

1 the Graham factors and then elaborating on that instruction in
2 closing argument.

3 So I don't think that the Court of Appeals could have been
4 clearer that that's really what a prosecutor is supposed to do
5 in these circumstances but not rely on the experts to invade the
6 province of the jury; so I've excluded and limited their expert,
7 based on your request and based on Brown, and the Court's going
8 to apply that language in Brown to give this instruction.

9 I asked that Mr. Reinstedt modify the language, which he
10 has, which is appropriate saying "you may" to the jury. They're
11 not required. You may consider the following, among other
12 factors, and listing the three Graham factors. So it doesn't
13 limit them to those, but it guides them.

14 So I am going to give that. It's just whether or not that's
15 going to be a stand-alone instruction. And if you want that to
16 be a stand-alone instead of add-on to 2670, I'm happy to do
17 that.

18 **MR. ADACHI:** Yes. I would ask that it be a stand-alone.

19 Also, I'm curious. It looks like some of the language from
20 2670 was not included. This is the first time I'm seeing
21 Mr. Reinstedt's, I guess, revised.

22 But 2670 has a number of other components, which I requested
23 which are not in this instruction.

24 **THE COURT:** Very well. And where -- your 2670 was filed;
25 correct?

26 **MR. ADACHI:** Yes.

27 **THE COURT:** Okay. And tell me where it is.

28 **MR. ADACHI:** Well, it's filed with the original motion.

1 **THE COURT:** I understand.

2 **MR. ADACHI:** I'm asking for the entire 2670. I have a copy.

3 (Counsel confer off the record.)

4 **MR. REINSTEDT:** It's the same version of 2670 I provided
5 both Counsel and the Court last week.

6 **MR. ADACHI:** If you look at your version, it leaves out --
7 you've left all this out here (indicating).

8 **MR. REINSTEDT:** Yeah.

9 **MR. ADACHI:** It's part of the instruction. This is part of
10 your original submission. All this language here about the
11 officer telling intent to arrest. That all needs to be in
12 there.

13 **MR. REINSTEDT:** So that was not part of anything that I put
14 in the instruction that I gave Counsel and the Court last week
15 because --

16 **THE COURT:** Right.

17 **MR. REINSTEDT:** -- my understanding is the issue is use of
18 force. The instruction is split out into an A, B, and C: A is
19 about unlawful detention; B is about unlawful arrest. They
20 include sections on instructing the jury about which facts the
21 officer may know, exactly the rules for dealing with
22 misdemeanors, infractions, and felonies for a stop. So in my
23 mind, those things were at issue in this case. It's about the
24 use of force, which is (c) in 2670.

25 **MR. ADACHI:** Absolutely, they're all at issue. We have
26 testimony about the detention, about the arrest, about the
27 reason for it, about the information that the police officers
28 had. Here, there's language that the officer must tell a person

1 that the officer intends on arresting her, why the arrest is
2 being made, the authority for the arrest.

3 So, I mean, the prosecution can't simply pick and choose,
4 you know, portions of 2670. The only part of 2670 --

5 **THE COURT:** May I ask why we're doing this on the day that
6 we're supposed to instruct when last week, we had a jury
7 instruction conference? I'm just wondering.

8 **MR. ADACHI:** Because I didn't get this until today.

9 **MR. REINSTEDT:** That's not true. I provided that to Counsel
10 and the Court last week.

11 **THE COURT:** I have copies of what we went over last week.
12 We never went over this, Mr. Adachi.

13 **MR. ADACHI:** I did. 2670 --

14 **THE COURT:** No, no. Mr. Adachi, please don't interrupt the
15 Court. Okay? We have had delay after delay, primarily caused
16 by the defense.

17 So I'm -- we're on the day of literally the closings and
18 jury instructions. And for the first time, you're making an
19 issue of 2670 when we had a jury instruction conference, and we
20 carefully went over the jury instructions. And you never raised
21 this argument last week.

22 **MR. ADACHI:** Well, because I had already submitted, two
23 months ago, what 2670 should look like.

24 **THE COURT:** I understand that.

25 **MR. ADACHI:** And the Court obviously didn't look at my copy.

26 **THE COURT:** No, I did, Mr. Adachi. I sat here -- please,
27 sir, don't say I didn't look at it. You were sitting here, as
28 was Mr. Reinstedt, when I pulled up -- which I'm standing up

1 right now, there are three volumes. I'm looking at your
2 instruction. I looked at them. In fact, I went over your
3 entire list to see where there was the difference between what
4 Mr. Reinstedt had presented and you had presented.

5 So I did, in fact, look at your jury instructions --

6 **MR. ADACHI:** Well, perhaps it was --

7 **THE COURT:** -- and do not -- and do not represent to the
8 contrary because you were standing in this courtroom when I was
9 doing it.

10 **MR. ADACHI:** Perhaps there was an error made. But this 2670
11 should be given as is, not as modified.

12 **THE COURT:** Where is your version?

13 **MR. ADACHI:** Right here.

14 **THE COURT:** No, no. Mr. Adachi --

15 **MR. ADACHI:** I gave it to the Court two months ago. Here.

16 **THE COURT:** Mr. Adachi, I want a version that can go to a
17 jury --

18 **MR. ADACHI:** This is it.

19 **THE COURT:** -- not something pulled out.

20 **MR. ADACHI:** This is it. This is exactly it right here.

21 The only thing that we would leave out is the section -- since
22 it's the prosecution's Graham versus Connor factors that we're
23 objecting to is going to be a stand-alone and not going to be
24 included, then the Court can simply read this as is; so let me
25 provide it.

26 **THE COURT:** Well, the copy that you gave me two months ago
27 has --

28 **MR. ADACHI:** This is exactly --

1 **THE COURT:** Show it to Mr. Reinstedt, please.

2 (Counsel confer off the record.)

3 **MR. REINSTEDEDT:** So I have a number of issues with this. It
4 includes sections that the instructional notes to 2670 indicate
5 shall only be given if there's an issue as to whether the
6 officer had a legal basis to detain someone in Section A. I
7 don't think that that's been challenged in this case.

8 **MR. ADACHI:** Absolutely, it's challenged. We're challenging
9 not only the so-called justification for the detention, but also
10 the detention itself. The amount of force that was used.

11 **THE COURT:** That's excessive force. That's different
12 from --

13 **MR. ADACHI:** No, no.

14 **THE COURT:** No, no. No. That is different, Mr. Adachi,
15 from -- this whole case has been about excessive force. This
16 entire case. There isn't a shred of evidence that the
17 officers -- the 911 call dispatch, what they got from the call,
18 you'll have that in evidence. But that does not mean that these
19 officers, when they pulled their weapons, didn't have
20 information to detain your client.

21 **MR. ADACHI:** Our position is that the information they had
22 was the naked phone call, and there was conflicting information
23 about it. And, you know, part of what we're going to show is
24 that if you listen to the dispatch tapes and calls that -- what
25 started off as a call stating that there was an attempt to rob
26 somebody --

27 **THE COURT:** I'm now giving --

28 **MR. ADACHI:** If I can finish --

1 **THE COURT:** I'm giving you a moment for arguments because
2 we're now at 8:30. You were late this morning, again,
3 Mr. Adachi. And so our jury, ladies and gentlemen of the jury
4 are held waiting. So please summarize your argument. Thank
5 you.

6 **MR. ADACHI:** Sure. That we have a call of an attempted
7 robbery and a complaint that the individual possibly had a
8 weapon and that that, then, becomes he did, in fact, have a
9 weapon.

10 Now, in between those, there's also statements that property
11 was stolen from one person without any mention of a weapon; so
12 you've got all this conflicting information on a naked phone
13 call without any confirmation --

14 **THE COURT:** What expert testimony do you have to say that
15 that is not enough for an officer to detain someone? Because
16 it's got to be expert testimony. That's not up to a jury. That
17 is clearly the basis for expert testimony; so tell me what
18 expert testimony?

19 **MR. ADACHI:** That's not true. The jury decides whether
20 there's a detention or an arrest. That's an issue of fact for
21 the jury, and that's why we have this instruction. There's no
22 need that there be expert testimony on the issue of a detention
23 or arrest. That's an issue for the jury. And so that's why
24 2670 includes a statement of what's required for a detention and
25 what's required for an arrest.

26 **THE COURT:** Thank you. Mr. Reinstedt.

27 **MR. REINSTEDEDT:** Had Mr. Adachi wanted to challenge these
28 things, he could have filed a 1538 motion challenging the

1 legality of the detention or the arrest. No such motion was
2 filed. The jury instructions, as proposed, have been in front
3 of Counsel since last week. This issue was not brought up then.

4 I would note that the version of instructions that was just
5 handed to me by Counsel includes sections from how to enter a
6 home without a warrant and what officers are required to tell
7 people under those circumstances, which is clearly inapplicable
8 in a case like this.

9 **MR. ADACHI:** I crossed that out.

10 **MR. REINSTEDT:** No, you didn't. This whole section about
11 the officer must tell the person the officer intends to arrest
12 him is from the section entering a home without a warrant.

13 **MR. ADACHI:** No, it's separate from that.

14 **THE COURT:** Mr. Adachi, you're not prepared.

15 **MR. ADACHI:** No, I am prepared.

16 **THE COURT:** No, you're not prepared.

17 **MR. ADACHI:** I submitted this two months ago. The Court had
18 a chance to read it two months ago. If the Court looks
19 carefully at this instruction, you'll see that you have to give
20 this language.

21 **THE COURT:** Mr. Adachi, we had a jury conference, and you
22 never once -- I went down the list of your instructions. I said
23 you've asked for this, and the People haven't. We had an
24 extensive conference, and you never once, once mentioned
25 anything or made an argument on behalf of your client regarding
26 2670.

27 **MR. ADACHI:** We haven't even completed our case. My client
28 is still on the witness stand. I'm still going to be producing

1 the dispatch, which is relevant to this issue, and so the Court
2 needs to reserve this issue until it hears --

3 **THE COURT:** I'm not sure -- how is the Court -- this is a
4 misdemeanor case that has gone on now almost two weeks. All
5 right? The preparedness of counsel is important. And of
6 concern is you are modifying 2670 and including provisions that
7 are not applicable in this case.

8 **MR. ADACHI:** The prosecutor --

9 **THE COURT:** No, Mr. Adachi, please. You're not prepared.
10 And --

11 **MR. ADACHI:** That's not true.

12 **THE COURT:** You are not prepared on this instruction,
13 period.

14 **MR. ADACHI:** I submitted my instructions two months before
15 the prosecutor did. The prosecutor submitted his last Friday,
16 and that's why we're having this late delay. If the prosecution
17 had filed his jury instructions on the day of trial as it's
18 required to do by the Rules of Court, then we wouldn't be having
19 this discussion.

20 So the reality is is that I'm the one who has been prepared.
21 The prosecutor was not prepared. The reason why --

22 **THE COURT:** 2670, Mr. Adachi. We went through all of these
23 instructions, and the record will speak for itself. I'm not
24 going to keep talking over things.

25 So there's also a motion that was just filed this morning
26 about five minutes ago concerning Mr. Endo. The Court has
27 reviewed it. Your request to --

28 **THE CLERK:** There's an objection to it.

1 **THE COURT:** -- to admit the videotape of the body-worn
2 camera, of Velasquez's body-worn camera.

3 **MR. ADACHI:** Right.

4 **THE COURT:** Why are all these motions coming right now? I
5 mean, this is the last day of trial.

6 **MR. ADACHI:** Because the Court ruled on these on Friday, and
7 so this is the first opportunity for us to hear them.

8 **THE COURT:** I don't think so.

9 **MR. ADACHI:** You don't think what?

10 **THE COURT:** I don't think so. I've ruled on Graham. That
11 motion's denied. I believe on the Endo tape, I've already ruled
12 that he testified that there were snippets that came out and
13 that it wasn't complete; so the Court has already ruled on that.

14 **MR. ADACHI:** Well, the Court said that because it's
15 demonstrative evidence --

16 **THE COURT:** No, I've already -- I'm sorry, Mr. Adachi --

17 **MR. ADACHI:** -- it can't be admitted, and that's wrong.

18 **THE COURT:** Mr. Adachi.

19 **MR. ADACHI:** I've got a case in there that says that's
20 wrong.

21 **THE COURT:** The argument was already made. It was submitted
22 to the Court. I made my ruling.

23 **MR. ADACHI:** We ask the Court to reconsider.

24 **THE COURT:** Motion for reconsideration is denied.

25 All right. What is the last --

26 **MR. ADACHI:** Did the Court even read the motion?

27 **THE COURT:** All right. What is the last --

28 I read Mr. Endo's.

1 The last one is the motion to admit the tape of Velasquez?

2 **MR. ADACHI:** Yes.

3 **THE COURT:** Okay.

4 **MR. ADACHI:** And Mr. Smith is on the stand, and he's
5 testified that force was used against him in the break room.
6 And as he was brought to the police car, he complained about the
7 handcuffs being too tight. And under 356, we made a motion to
8 admit the video. The Court excluded it.

9 However, it is now relevant under 356, given that the
10 defendant has testified that he, in fact, was the victim of the
11 use of force by Officers Chung and Velasquez.

12 **THE COURT:** I understand. Thank you.

13 All right, Mr. Reinstedt.

14 **MR. REINSTEDEDT:** There's an issue that's been litigated and
15 relitigated already in this case, including the entire section
16 at this stage of the case of what happens in the break room
17 would have major 352 problems. It's not probative to what
18 happens a signification portion of time later by the patrol car.

19 We've already established a buffer around what happens in
20 the patrol car so that it's clear what the context of that
21 particular situation is when the spit occurs there. Everything
22 else that is charged occurs on the platform. What happens
23 afterwards has no relevance to it.

24 **THE COURT:** Very well. Under Evidence Code 352, the Court
25 will exclude the admission of --

26 **MR. ADACHI:** I'm going to have marked at this time a copy of
27 the disk so we have it for the record. This is the Velasquez
28 entire video.

1 **THE COURT:** I believe it is already in. If not, you can
2 have it marked.

3 **MR. ADACHI:** Thank you. And there's a motion for additional
4 time for closing argument. I don't know if the Court has seen
5 that.

6 **THE COURT:** I'm going to give both sides an hour and
7 20 minutes. Okay? Mr. Reinstedt, will that be enough?

8 **MR. ADACHI:** This will be next in order.

9 **MR. REINSTEDEDT:** And that's for?

10 **THE COURT:** That's for both your opening and your rebuttal.

11 **MR. REINSTEDEDT:** Okay.

12 **THE COURT:** I don't know if you need an hour and a half. If
13 you do, I'll give both sides an hour and a half.

14 **MR. REINSTEDEDT:** I can do an hour and 20 minutes.

15 **THE COURT:** An hour and 20?

16 **MR. REINSTEDEDT:** That's fine.

17 **THE COURT:** Okay. An hour and 20 minutes each.

18 And I will note, Mr. Adachi, on Friday, and I do not
19 intend -- I hope you will not take this in front of the jury.
20 On Friday, when I gave time limitations, you yelled that you
21 were not going to abide by the limitations.

22 You also, in chambers -- and this is on the record -- said
23 that you would be held in -- you wanted to be held in contempt,
24 but you were not going to abide by the Court's order.

25 I do not want any comments made like that in front of this
26 jury or in closing. I also --

27 **MR. ADACHI:** I did not --

28 **THE COURT:** I also --

1 **MR. ADACHI:** I did not say that. I mean, that's --
2 preposterous. And I filed a written motion today on this issue
3 because I was very concerned -- I talked to everyone at the Hall
4 of Justice, and they said no judge had ever given a prosecutor
5 more time for --

6 **THE COURT:** Well, it's one thing to say more time,
7 Mr. Adachi. You've been arguing your case in front of the jury.
8 I've allowed this to go on because you always want -- you've
9 said you want to make a record, and that's fine; so we've had a
10 lot of time making records. The Court has been very generous in
11 terms of your cross-examination, which has gone on probably
12 twice as long as the questioning of Counsel.

13 That being said, the Court has a responsibility to make sure
14 that this trial moves in an orderly manner, and that's what the
15 Court is trying to do.

16 So what the Court's concern is: It is now twice you have
17 said that you will not obey Court orders to the Judge, and so I
18 want to make sure that that is not said in front of the jury.

19 I do have a list of topics that may not be argued in
20 closing. I'll give it to you after we're done. And I will look
21 at the 2670 again. But, again, this is late in the game for you
22 to be bringing this up and not bringing it to the Court's
23 attention, as you should have, last week.

24 **MR. ADACHI:** For the very reason --

25 **THE COURT:** Very well. So I think we need to bring our
26 ladies and gentlemen of the jury in. Thank you so much.

27 (Jurors enter at 8:41 A.M.)

28 **THE COURT:** Good morning, ladies and gentlemen. We have our

1 members of the jury who are present. We're just missing one,
2 our alternate juror.

3 **THE BAILIFF:** I'll go to the other side.

4 **THE COURT:** Thank you.

5 We're missing our alternate juror, and the reason that we
6 need to wait is that I know Juror Number 7, you have travel
7 plans, I believe, on the 14th.

8 **JUROR NO. 7:** I do.

9 **THE COURT:** Yes. And so we want to make sure that we have
10 our alternate here; so we'll just have to wait a little longer.
11 We've had Madam Clerk call and just got a voicemail; so
12 hopefully, she'll be here soon.

13 All right. We have our alternate juror here. It is the
14 Court that should be apologizing to all of you. I know we've
15 had a lot of delays, and I really apologize for those. We've
16 tried our best, but sometimes, we can't help it.

17 So in any event -- all right. Mr. Smith, sir, if you want
18 to take the stand, we're going to continue with your
19 cross-examination.

20 Very well, Mr. Reinstedt.

21 **CROSS-EXAMINATION BY MR. REINSTEDEDT (Continued)**

22 **MR. REINSTEDEDT:** Q. Good morning, Mr. Smith.

23 **A.** Good morning.

24 **Q.** I want to pick back up on a topic that we talked about a
25 little bit at the end of last week, and that is the time period
26 right after you were flipped over onto your side, onto your
27 back, and then there was a scuffle, and your legs went out
28 towards Officer Chung.

1 Do you have that time period in mind?

2 **A.** Yes,

3 **Q.** So what I want to be clear about is what you were doing in
4 that time period.

5 Now, there's been a little bit of confusion about what
6 exactly was going on.

7 Is it your testimony that your legs involuntarily went out?

8 **A.** Can you re- -- can you re- --

9 **Q.** Rephrase the question for you?

10 **A.** Yeah.

11 **Q.** So you recall last week, we went over video of that section?

12 **A.** Yeah.

13 **Q.** And we could see in the video that your legs were free, and
14 then they extended out towards Officer Chung; right?

15 **A.** Yes.

16 **Q.** My question is: Did you purposefully or involuntarily
17 extend your legs out towards Officer Chung?

18 **A.** I would say involuntarily because he flipped me over. And
19 after the figure-four, I just kind of like -- my legs just kind
20 of wore out. He kind of flipped me over.

21 **Q.** And your legs just kind of what?

22 **A.** They kind of just, like, were loose.

23 **Q.** So it's your testimony that it was a physical reaction, not
24 something that you chose to do?

25 **A.** Yes.

26 **Q.** So that we're clear, then, that means you did not kick your
27 legs out in order to defend yourself. It was just something
28 that happened?

1 **A.** Yes.

2 **Q.** Now, you also testified, I believe, when we went over the
3 video, that one of the reasons that your leg may have looked
4 extended in the video was that Officer Chung held on to your
5 foot.

6 Do you recall saying that?

7 **A.** Yeah.

8 **Q.** So, again, I just want to be clear about what your testimony
9 is for what happened.

10 Is your testimony that your legs involuntarily went out
11 because of the figure-four or that they were pulled out by
12 Officer Chung?

13 **A.** It's from the figure-four.

14 **Q.** Okay. Now, I want to move us past what happened during what
15 we were just talking about.

16 The officers then had you on your back. Do you remember
17 that?

18 **A.** I couldn't hear you.

19 **Q.** The officers had you on your back. Do you recall that?

20 **A.** Yes. At first they had me on my stomach.

21 **Q.** And then you came to your back; right?

22 **A.** Yes.

23 **Q.** And then they flipped you back over again onto your stomach
24 one more time; right?

25 **A.** Yes.

26 **Q.** Okay. So that's the time period that I want to pick up on
27 is after they had moved you back onto your stomach.

28 Do you have that in mind?

1 **A.** Yes.

2 **Q.** So I want to play for you a portion of Officer Velasquez's
3 body camera from that time period after you've been moved back
4 onto your stomach. Okay?

5 Can you see the screen from where you are?

6 And this is starting at 6 minutes and 16 seconds. This is
7 People's Exhibit 9.

8 (The video was played.)

9 I'm pausing it there at 6 minutes and 23 seconds.

10 So during this little clip that we just watched, would you
11 agree with me that nobody's hitting you?

12 **A.** No one is hitting me?

13 **Q.** During the clip that we just watched.

14 **A.** You can't see it.

15 **Q.** Well, according to you, then, what we see in the clip, was
16 anyone hitting you during this time period?

17 **A.** No, but you wouldn't see -- see it -- see their legs from --
18 if they don't have their body camera. You can't see their knees
19 and everything from their body camera. You can't see their
20 lower legs.

21 **Q.** So that's fine. My question for you is: Was anyone hitting
22 you during this time period, regardless of what we can see on
23 the screen?

24 **A.** No, not on camera. Not from that angle.

25 **Q.** And was anyone hitting you at all?

26 **A.** Like, kept shifting their weight back and forth with their
27 knees.

28 **Q.** So the officers were holding you down at this point, but no

1 other force was being used on you; correct?

2 **A.** No.

3 **Q.** Now, the next portion of what happens here, starting at
4 6 minutes and 23 seconds, I want to play for you.

5 (The video was played.)

6 I'm pausing it at 6 minutes and 33 seconds.

7 This is the portion where you spit in Officer Velasquez's
8 face; right?

9 **A.** I'm not too sure. I can't see -- see nothing. I just see a
10 whole bunch of commotion and interaction after that. I just
11 seen faces just get pushed to the ground.

12 **Q.** So you couldn't tell from the video there whether or not
13 that's where you spit at Officer Velasquez?

14 **A.** No, sir.

15 **Q.** Do you have a memory, aside from the video, of after you
16 being on your stomach, you leaning your head up and spitting on
17 Officer Velasquez?

18 **A.** I remember the spit, but it wasn't -- it wasn't
19 intentionally.

20 **Q.** It was not intentionally?

21 **A.** No.

22 **Q.** It was an accident?

23 **A.** Yeah.

24 **Q.** So your testimony is that you accidentally sprang your head
25 up at the officer?

26 **A.** Yes. Because, like, if he's -- have you ever been in
27 handcuffs? Like your face is like this, and --

28 **Q.** If you could just answer my question, sir.

1 **A.** -- lift your head up and spit.

2 **Q.** So you did not spit on purpose?

3 **A.** No.

4 **Q.** You understand that's different than what you said last week
5 to Mr. Adachi?

6 **A.** I don't recall. You have to refresh my memory.

7 **Q.** So last week, you testified with Mr. Adachi that you did
8 spit on the officer on purpose.

9 **A.** Not "intentionally" intentionally. But, I mean, I'm
10 spitting that way. Only way I could spit is left or right. If
11 I would have spit forward, I would have spit directly right back
12 in my face. If I would have spit right, I would have spit on
13 another officer. Either way, left or right, I would have spit
14 on somebody.

15 **Q.** So, sir, do you remember last week, Mr. Adachi asked you:
16 "Did you spit on the officer?"

17 And your response was: "Yes, I did."

18 **A.** Yeah.

19 **Q.** And do you recall him asking you why, and you said because
20 you were angry?

21 **A.** Yeah, I was angry. But what can I -- what can I do?

22 **Q.** So I want to be clear. Is your testimony that it was an
23 accident, or that you did it because you were angry?

24 **A.** It was an accident, but I was angry. Yeah, I would be angry
25 at the whole situation in the heat of the moment. I mean --

26 **Q.** So in what way was it an accident?

27 **A.** The way I had to spit, left or right. I had blood in my
28 mouth, and my face was on the ground; so, like --

1 Q. All right. So I'd like you to take a look at this portion
2 of the video again. Starting at 6 minutes and 23 seconds.

3 (The video was played.)

4 **MR. REINSTEDT:** Q. Can you see yourself on the screen
5 there?

6 A. Yeah. I just see an inch or so.

7 Q. So I'm going to move it forward right there (indicating).
8 You see your head come up towards the officer here?

9 A. I'm watching the video, but yeah.

10 Q. You see you draw your head back here?

11 A. Yeah.

12 Q. You see the spit come out of your mouth there?

13 A. Yeah.

14 Q. And that was after you were down on the ground, and you
15 craned your head up towards the officer; correct?

16 A. Yeah.

17 Q. And you purposefully pointed your mouth directly at the
18 officer's face; correct?

19 A. You can clearly see -- see that I pointed my lips at --

20 Q. So that's right?

21 A. I'm not sure on that.

22 Q. And the time period just before you spit, no officer had hit
23 you; correct?

24 A. No. Not from that angle.

25 Q. And not from any angle; correct?

26 A. I'm not sure. But as I recall, there were two people
27 sitting on my legs and still pushing me.

28 Q. So officers were holding you down, but no other force was

1 being used on you; correct?

2 **A.** No.

3 **Q.** And nothing changed over the course of the 30 seconds before
4 this; correct? The officers were just holding you there?

5 **A.** I'm not too sure.

6 **Q.** Right. Before you spit on Officer Velasquez in his face,
7 you said, "Mother fucker, fuck you"; right?

8 **A.** I'm not too sure.

9 **Q.** Now, the officers later took you off of the platform. And
10 after some time had passed, they took you to a patrol car;
11 correct?

12 **A.** After they walked a block. They didn't take me directly to
13 the patrol car. They had to call a patrol car to meet them on
14 Embarcadero, which we walked across the street, like, in a
15 circle, a block away.

16 **Q.** Okay. But my question is: After some time period, the
17 officers took you to a patrol car; correct?

18 **A.** Yes.

19 **Q.** And when they did that, you spit on Officer Velasquez;
20 correct?

21 **A.** Yes.

22 **Q.** And you did that because you were angry?

23 **A.** Yes. That was -- yeah.

24 **Q.** Before you did that, Officer Velasquez, nor any other
25 officer used force on you; correct?

26 **A.** Yes, they did.

27 **Q.** And what was that force?

28 **A.** They slammed me on the car.

1 Q. They slammed you on the car?

2 A. They slammed me on the car, and while we were walking, they
3 were pulling the cuffs down, that's how I got the scars on my
4 hands. And I clearly still just -- when he sat me down inside
5 the car, pushed me backwards, like -- I mean, through the whole
6 thing, it was all forceful. But --

7 Q. Now, you testified with Mr. Adachi yesterday that when the
8 officers took you to the patrol car, they searched you again.

9 Do you remember that?

10 A. Yes. They searched me four or five times.

11 Q. Including when you got to the patrol car?

12 A. Yes.

13 Q. And that's part of why you were angry?

14 A. No.

15 Q. So I want to play for you what happened at the patrol car,
16 then I'm going to ask you a couple of questions about it.

17 Starting at 1622.

18 (The video was played.)

19 **MR. REINSTEDT:** I'm going to pause there at 1645.

20 Q. Is what we saw what you just described as slamming you on
21 the patrol car?

22 A. Yes. Maybe you should go in slow motion like you did the
23 other video.

24 Q. I'm going to start again at 1645.

25 (The video was played.)

26 **THE WITNESS:** (While video is played) Maybe you should go
27 backwards, like, 20 seconds.

28 **MR. REINSTEDT:** I'm pausing at 17 minutes and 35 seconds.

1 Q. So you can see the officer put you in the patrol car there;
2 correct?

3 A. Uh-huh.

4 Q. No one searched you; right?

5 A. Yes.

6 Q. Did we just see an officer search you?

7 A. No. Not on this video.

8 Q. Now, once they had put you in the patrol car, you spit on
9 Officer Velasquez; right?

10 A. Yeah.

11 Q. And right afterwards, you called him a "Fucking bitch";
12 right?

13 A. No. I called him a "Fucking dick."

14 Q. Okay. The last thing that I want to ask you about is
15 injuries that you claim happened to you as a result of this
16 incident.

17 So you looked at some pictures yesterday with your counsel.
18 Now, when this incident happened, the police actually called for
19 paramedics to come and take a look at you; correct?

20 A. Yes. And they told me that it wasn't that serious and that
21 you would get a \$30,000 bill because we have to take you there.
22 And they have to do some type of thing, like scare tactic,
23 because they did not want to take me in. And they was, like,
24 "It would waste our time." And he took a long time talking to
25 Sergeant, I think, Powers or whoever.

26 **MR. REINSTEDT:** I would ask to move that answer -- to move
27 to strike that answer as nonresponsive.

28 **MR. ADACHI:** It's responsive. He's explaining what

1 happened.

2 **MR. REINSTEDT:** I asked a yes or no question.

3 **THE COURT:** It was a yes or no question. So the answer will
4 be stricken. I don't even know if we got --

5 I'm going to strike the answer, ladies and gentlemen.

6 You're to disregard it for any reason.

7 You may ask the question again so we get a yes or no.

8 **MR. REINSTEDT: Q.** Just as a yes or no question, Mr. Smith:
9 Did the police call paramedics to come and see you?

10 **A.** Yes.

11 **Q.** Do you recall telling the paramedics on a pain scale of 1 to
12 10, with 10 being the most painful and 1 being the least, that
13 your pain level was at a 2?

14 **A.** I never tell them my pain level was at a 2.

15 **Q.** Do you recall telling them that your leg hurt?

16 **A.** Yes. I told them that my leg hurt; told them that my back
17 hurt.

18 **Q.** Do you recall also telling them that you already had an
19 injury to your leg?

20 **A.** Yes.

21 **Q.** And in the end, they offered to treat you and take you to
22 the hospital, and you refused all treatment from them; correct?

23 **A.** Yeah, 'cause they told me that it would take them longer to
24 process me and everything; so I'm like -- I just wanted to get
25 it over.

26 **Q.** But you told them that you didn't want any medical
27 attention; right?

28 **A.** Yeah, but I still needed it.

1 **MR. REINSTEDT:** That's all I have. Thank you.

2 **THE COURT:** Redirect.

3 **REDIRECT EXAMINATION BY MR. ADACHI**

4 **MR. ADACHI: Q.** Michael, you were just asked by the
5 district attorney about being searched multiple times.

6 Where did those searches occur?

7 **A.** It happened, like, three times on the platform, twice in the
8 break room, and once at the patrol car.

9 **Q.** Now, we saw a video of Officer Velasquez's body camera on
10 the platform, and we saw video that showed you being placed in
11 the patrol car.

12 Was there something that happened in between?

13 **MR. REINSTEDT:** Objection. 352. Relevance. Subject to
14 prior motions.

15 **MR. ADACHI:** It's now open because the prosecution went into
16 it. I'm entitled to show, through Michael and the video, what
17 happened because he was asked about it.

18 **THE COURT:** Okay. I think the Court has previously
19 instructed both counsel about no speaking objections.

20 **MR. ADACHI:** Yes.

21 **THE COURT:** Okay. So why don't we --

22 **MR. ADACHI:** Because I want to play the video.

23 **THE COURT:** Okay. Sidebar, please? Thank you.

24 (Counsel and the Court confer in chambers.)

25 **THE COURT:** All right. Thank you.

26 Move on, Mr. Adachi. Thank you.

27 **MR. ADACHI: Q.** Michael, you just said to the district
28 attorney that the officers continued to use force on you after

1 you were taken from the platform.

2 Can you tell us how they used force?

3 **MR. REINSTEDT:** Objection. 352. Relevance. Subject to
4 motion.

5 **THE COURT:** I'm not sure where this is going, but you may
6 answer, Mr. Smith.

7 **MR. ADACHI:** Let me repeat the question.

8 **Q.** You told the district attorney that the officers continued
9 to use force on you after you were taken from the platform.

10 Can you please tell the jury what force they used against
11 you?

12 **MR. REINSTEDT:** Same objections.

13 **THE COURT:** Well, sustained as to that question.

14 **MR. ADACHI:** **Q.** Please describe for us what force the
15 officers used after you were taken from the platform.

16 **MR. REINSTEDT:** Same objections. Same question.

17 **THE COURT:** Sustained. Sustained, Mr. Adachi. Move on,
18 please. Mr. Adachi --

19 **MR. ADACHI:** How about the first question, then, since the
20 Court didn't sustain that objection?

21 **THE COURT:** Well, perhaps the Court didn't -- after our
22 sidebar, didn't come back and sustain. But I'm sustaining this
23 line of questioning.

24 **MR. ADACHI:** So I can't ask him what force?

25 **THE COURT:** Mr. Adachi, please. The Court has sustained the
26 objection.

27 **MR. ADACHI:** **Q.** You just told the district attorney that
28 the officers were using the handcuffs to hurt you; is that

1 right?

2 **A.** Yes.

3 **Q.** And that occurred after they took you from the platform; is
4 that right?

5 **MR. REINSTEDT:** Objection. Leading. Same type of objection
6 to this line of questioning. And I would object to all of this
7 line of questioning. I believe Counsel has already been
8 admonished.

9 **THE WITNESS:** All of them.

10 **THE COURT:** Okay.

11 **THE WITNESS:** For all the examples for the whole entire
12 time --

13 **MR. ADACHI:** Hold on.

14 **THE COURT:** Okay. So this is limited to handcuffs?

15 **MR. ADACHI:** Right.

16 **THE COURT:** And pulling on the handcuffs?

17 **MR. ADACHI:** Yes.

18 **THE COURT:** Very well. You may proceed.

19 **MR. ADACHI:** **Q.** Michael, when did they hurt you when you
20 had handcuffs on? When did that occur?

21 **MR. REINSTEDT:** Same objections.

22 **THE COURT:** Overruled.

23 **THE WITNESS:** If you clearly see the bruises on handcuffs,
24 they're kind of very deep for them to be that coloration of
25 purple through the whole time. And there was no need for them
26 to pull down on the handcuffs the entire time walking up the
27 stairs, the break room, the car.

28 And if you clearly -- if you can clearly play the video in

1 slow motion, you clearly see -- hear the slam when they pushed
2 me back. My hands was in the back -- my back; so when he pushed
3 me, it kind of pushed the handcuffs even further, deeper into my
4 skin.

5 **MR. ADACHI: Q.** And was this going on all the way up until
6 the time you got into the car?

7 **A.** Huh? I couldn't hear you.

8 **Q.** When you say that they were pulling down on the handcuffs
9 causing injuries to your wrists, was this going on the entire
10 time before you were brought to the police car?

11 **MR. REINSTEDT:** Same objections as previously stated.

12 **THE COURT:** Sustained. I believe that part of it was
13 leading; so sustained, please.

14 **MR. ADACHI: Q.** Tell us how long this went on for when they
15 were hurting your hands with handcuffs?

16 **MR. REINSTEDT:** Same objections.

17 **THE COURT:** Overruled.

18 You may answer.

19 **THE WITNESS:** The entire time. They're supposed to double
20 lock it, but they clearly never did that because, obviously,
21 there were injuries; so --

22 **MR. ADACHI: Q.** And I'm going to show you the photographs
23 that we looked at previously and look at Exhibit E-2.

24 **MR. ADACHI:** May I approach the witness?

25 **THE COURT:** You may.

26 **MR. ADACHI: Q.** Can you please look at this and show the
27 jury where the injuries were from the officers pulling down on
28 the handcuffs?

1 **A.** (Witness complies.)

2 **Q.** And for the record, you're pointing to Exhibit B at the top?

3 **A.** Well, if you clearly see the discoloration and the bruising?
4 Like, the handcuffs were moving. Like, the handcuffs are not
5 supposed to move that much.

6 I mean, I had room, but they were kind of like -- they kept
7 squeezing because they never double locked them, and it kept
8 moving. And every time you pull it down, they were moving up
9 and down.

10 **Q.** Okay. And it shows some injuries in those photos. Are
11 those the injuries from -- what caused those injuries?

12 **A.** Can you rephrase?

13 **Q.** What caused the injuries here in the two photos?

14 **A.** These two injuries?

15 **Q.** Yes.

16 **A.** The handcuffs.

17 **Q.** Now, Michael, the district attorney showed you various
18 videos. And I'm going to ask you to take a look at certain
19 portions of this video which was played earlier in court.

20 Now, this first segment is at .01. This is on Exhibit B.

21 (The video was played.)

22 **MR. ADACHI:** **Q.** Now, at this point of the video, which is
23 at .39, was there anything in your hands?

24 **A.** No.

25 **Q.** Did you ever attempt to walk away at this point?

26 **MR. REINSTEDT:** Objection. Leading.

27 **THE WITNESS:** No.

28 **THE COURT:** Sustained. Redirect.

1 **MR. ADACHI:** Q. And when you saw the officers, what was
2 your immediate reaction?

3 **A.** I was stunned and shocked in fear of a pistol in my face.
4 And just stopped when he said "Stop." He said, "You stop. Get
5 on the ground."

6 **Q.** Now, they're yelling at you to get on the ground.
7 (The video was played.)

8 **MR. ADACHI:** Now, let me go back just one second.
9 (The video was played.)

10 **MR. ADACHI:** Q. Now, I notice when they're saying, "Get on
11 the ground," there appears to be an officer right behind you.
12 What was going on there?

13 **A.** Can you say it again?

14 **Q.** Sure. I notice here -- I know it's kind of confusing -- we
15 see an officer who's right behind you. What's going on there?

16 In other words, they're yelling "Get on the ground," and
17 there's an officer that's doing something to you.

18 **A.** Yeah, he's grabbing my hand.

19 **Q.** So at the same time they're saying "Get on the ground,"
20 they're grabbing your hands?

21 **MR. REINSTEDT:** Leading.

22 **THE COURT:** Sustained.

23 **MR. ADACHI:** Q. And were they grabbing your hands?

24 **A.** Yes.

25 **THE COURT:** Sustained.

26 **MR. ADACHI:** Q. And how were they grabbing your hands?

27 **A.** They're holding my hand. Holding my hand back like he's
28 going to get ready to put me in handcuffs, but he never -- he

1 never did until I got on my stomach.

2 **Q.** Can you stand up and show the jury how you were standing
3 when the they grabbed your hands? The officer grabbed your
4 hands?

5 **A.** I was standing --

6 **Q.** Can you move up a little bit? I'm sorry. If you could
7 stand right here (indicating)?

8 **A.** I was stand -- standing like this (indicating). And as soon
9 as he said "Get on the ground," he's standing behind me, and
10 he's holding my hand like this (indicating).

11 **Q.** Stay in that position for a moment. Let me move this back
12 just a few seconds. So take a look at the orange box, please.

13 (The video was played.)

14 **MR. ADACHI: Q.** Now, do you see the picture that's titled
15 "BART cam"? Is the position you're demonstrating, is that the
16 same position that's in the BART cam?

17 **A.** Yes.

18 **Q.** Okay. And also in the orange box, is the position you're
19 standing in the same position you were in when the officer
20 grabbed your hands?

21 **A.** Yeah, but it looks like he's grabbing my hand and his other
22 hand is, like, on this side --

23 **Q.** Okay.

24 **A.** -- searching me.

25 **Q.** Thank you.

26 **MR. ADACHI:** And for the record, the witness is turned
27 around. The hands are behind his back in close proximity to one
28 another.

1 You can be seated.

2 **THE COURT:** Agreed, Mr. Reinstedt?

3 **MR. REINSTEDT:** Yes.

4 **THE COURT:** Thank you.

5 **MR. ADACHI: Q.** Now, why didn't you get on the ground when
6 the officer had your hands behind your back?

7 **A.** That had me kind of confused, and I didn't know what was
8 going on.

9 **Q.** Okay. Why were you confused when they were saying, "Down on
10 the ground," and you were in that position?

11 **A.** Because my knee -- grabbed my arm. And for two, I was
12 confused because I didn't know what was going on. I just didn't
13 know why he was stopping me.

14 **Q.** Okay. And you said last week that when they stopped you,
15 you asked them what the probable cause was or what for.

16 Do you remember precisely what you said?

17 **A.** I said, "What's the probable cause that you arresting me?
18 Why are you stopping me? And no, I'm not getting on the ground?
19 For what?"

20 **Q.** Why were you questioning the police?

21 **A.** Because I didn't know why they were stopping me or what was
22 going on. If I knew what was going on, I would have followed
23 orders and got on the ground.

24 **MR. ADACHI:** This is at 42.

25 (The video was played.)

26 **MR. ADACHI: Q.** Now, right before they take you down --
27 let's just go back to that moment in time.

28 **THE COURT:** Okay. Mr. Adachi, I'm going to remind you the

1 time that you told me this would take last week.

2 **MR. ADACHI:** Well, the Court had --

3 **THE COURT:** I understand. But it's redirect. Thank you.

4 **MR. ADACHI: Q.** So right at this point in time, this is at
5 .42.

6 (The video was played.)

7 **MR. ADACHI: Q.** Okay. Right before they take you down to
8 the ground, as you can see there, were you resisting at all?

9 **A.** No.

10 **Q.** What was going on there at that moment when they took you
11 down?

12 **A.** All I just remember is just falling forward. That's it.

13 **Q.** Okay. And when you were falling forward, where were your
14 hands?

15 **A.** He was holding one of them 'cause the other officer came and
16 swept me, and he was holding my arm.

17 **Q.** Okay. This is at .46. Now, do you see that there are other
18 officers around you in the BART cam here?

19 **A.** Yeah.

20 **Q.** And what were those officers doing at that point?

21 **A.** They were still at their stance.

22 **Q.** Okay.

23 **A.** They were still posing.

24 **Q.** And could you see the officer with the gun at this point?

25 **A.** Yeah.

26 (The video was played.)

27 **MR. ADACHI: Q.** Now, you're down on the ground at this
28 point. It's at one minute; correct? You're down on the ground

1 at this point at one minute?

2 **A.** What you say?

3 **Q.** Yeah. You're down at the ground -- I'm sorry. I'm saying
4 that the tape is at one minute. But you're down on the ground
5 at this point?

6 **A.** Yes.

7 **Q.** And when you say that you were searched, was this the first
8 time that you were searched?

9 **A.** Yeah. Now --

10 **Q.** Okay.

11 **A.** -- but as they was putting the handcuffs on me, I
12 remember -- as I remember it, someone was still on the back of
13 my hands and on the side of my leg.

14 **Q.** Okay.

15 **A.** I got to do another search because I didn't get a thorough
16 search.

17 **Q.** So let's take a look at this.

18 (The video was played.)

19 **MR. ADACHI: Q.** When you say that they searched on the side
20 of your leg, what do you mean? What part of your body could you
21 feel being searched?

22 **A.** Well, I had my shorts and knee -- I remember having a phone,
23 and my --

24 **Q.** Can you speak in the microphone?

25 **A.** Well, I had on shorts, and I had my phone in my left pocket.
26 And he was feeling on the bottom of my shorts, and he moved up,
27 and I had my wallet in my left pocket, too.

28 **Q.** Now, could you feel the officer feeling underneath you at

1 all at that point?

2 **MR. REINSTEDT:** Leading.

3 **THE COURT:** Sustained.

4 **MR. ADACHI: Q.** Where could you feel the officer searching
5 you? Where else?

6 **A.** In my waist. He felt the back of my waist. Yeah, his knee
7 was in my ass.

8 **Q.** Okay. Take a look at this next segment at 1:04.

9 (The video was played.)

10 **MR. ADACHI: Q.** Now, you see in the video here, it appears
11 that you're struggling with the officers?

12 **A.** Yeah.

13 **Q.** Okay.

14 **A.** A little.

15 **Q.** Do you stop struggling at some point?

16 **MR. REINSTEDT:** Leading.

17 **THE COURT:** Sustained. Mr. Adachi, this is redirect.

18 **MR. ADACHI:** Yeah.

19 **THE COURT:** You're not supposed to have leading questions,
20 please. Thank you.

21 **MR. ADACHI: Q.** What is it -- you had testified that you
22 said, "She's pregnant." Why did you stop moving after you said
23 that?

24 **A.** You said why did I stop moving?

25 **Q.** Yeah.

26 **A.** Because I told him once -- I'm like -- I tried to turn
27 around in a different direction, and I was, like, "She's
28 pregnant." Like, stop. And then they got all jumpy and then

1 turned around again and --

2 **MR. ADACHI:** Okay. Continue.

3 (The video was played.)

4 **MR. ADACHI: Q.** Do you recall at this point in the video --
5 it's two minutes -- were you being searched at this point?

6 **A.** Yeah.

7 **Q.** What part of you was being searched at this point?

8 **A.** The lower body.

9 (The video was played.)

10 **MR. ADACHI: Q.** And during this time, the officer appears
11 to be doing something with your backpack. What is that?

12 **Q.** He's removing the backpack, and the other officer is
13 handcuffing me and the other officer is searching me.

14 (The video was played.)

15 **MR. ADACHI: Q.** Now, when you hear the officer say "Stop
16 moving," are you moving?

17 **A.** No. I'm moving my head, but --

18 **Q.** And why --

19 **A.** That's -- my head is moving.

20 **Q.** Why were you moving your head?

21 **A.** I was watching.

22 **Q.** And why were you watching?

23 **A.** Because my baby mother was in the back of me, and I was
24 watching a movie [sic].

25 (The video was played.)

26 **MR. ADACHI: Q.** Now, the backpack that is being searched
27 there and appears by Officer Trabanino, whose backpack is that?

28 **A.** Mine.

1 (The video was played.)

2 **MR. ADACHI: Q.** Now, the person that's shown in that frame,
3 do you know who that person is?

4 **MR. REINSTEDT:** Objection. Outside the scope of redirect.

5 **THE COURT:** Sustained.

6 (The video was played.)

7 **MR. ADACHI: Q.** Now, at this point in the video, at 3:07,
8 other than moving your head, are you moving any other parts of
9 your body?

10 **A.** No.

11 (The video was played.)

12 **MR. ADACHI: Q.** Now, when they're turning you at this
13 point, at 3 minutes and 12 seconds, what is the condition of
14 your legs; in other words, where are your legs?

15 **A.** Underneath Chung. Right underneath his legs.

16 **Q.** And at this point, what condition were your legs in? How
17 did you feel? How did your legs feel?

18 **A.** They were hurt.

19 **Q.** And when you say "hurt," can you be more specific?

20 **A.** Like a Charley Horse.

21 **Q.** Now, you had said at some point you became upset.

22 Was it at this point or some later point?

23 **A.** I mean, through -- during the whole situation, it was -- I
24 was upset. But I was kind of more upset because I was in pain.

25 **Q.** Now, I'm just going to play a portion of this.

26 (The video was played.)

27 **MR. ADACHI: Q.** Now, was it your intention to kick
28 Officer Chung or any other officer when they turned you over?

1 **MR. REINSTEDT:** Leading.

2 **THE WITNESS:** No.

3 **THE COURT:** Sustained.

4 **MR. ADACHI: Q.** Why did you extend your leg?

5 **A.** Because they flipped me over, and then they took me out of
6 the figure-four. Took me out of the pretzel.

7 (The video was played.)

8 **MR. ADACHI: Q.** Now, at 3:36, can you see what happens to
9 your chest at that point?

10 **A.** Yeah. I have a knee directly in the middle of my ribcage.

11 **Q.** And what else? What's this right here (indicating)?

12 **A.** A hand.

13 **Q.** And where is the hand?

14 **A.** On my chest.

15 **Q.** Okay.

16 **A.** His hand is on my chest.

17 **Q.** Did that cause any reaction -- physical reaction from you?

18 **A.** Gasping of air.

19 (The video was played.)

20 **MR. ADACHI: Q.** Okay. When they flip you over, again, on
21 your chest, did they say anything before they flipped you over?
22 Did they tell you that they were doing that?

23 **MR. REINSTEDT:** Leading.

24 **THE COURT:** Sustained, Mr. Adachi.

25 **MR. ADACHI: Q.** What did they say to you before they
26 flipped you over?

27 **THE COURT:** Okay. May I please see counsel at sidebar?
28 Thank you.

1 (Counsel and the court confer in chambers.)

2 **MR. ADACHI:** Q. What was going on in this video?

3 **A.** Which one?

4 **MR. ADACHI:** Let me just play it again.

5 (The video was played.)

6 **MR. ADACHI:** Q. What's going on at this point?

7 **A.** This what?

8 **Q.** Speak into the mic.

9 **A.** What did you say?

10 **Q.** What's going on at this point?

11 **A.** I mean, he clearly got -- he still -- I really can't see.

12 **Q.** Okay.

13 **THE COURT:** If you need to get up, sir, and go closer to the
14 screen, you may.

15 **MR. ADACHI:** Maybe if we turn the lights down a little bit,
16 that would help you.

17 **THE COURT:** Yes. Thank you.

18 (The video was played.)

19 **MR. ADACHI:** Q. What's going on up until that point in
20 time?

21 **THE COURT:** Do you want to put a time on it for the record?

22 **MR. ADACHI:** Oh, sure. It's 4:16.

23 **THE COURT:** Thank you.

24 Sir, can you see that?

25 **MR. ADACHI:** Q. Can you go back to the witness stand so we
26 can hear you?

27 **A.** Well, they put me back into a pretzel.

28 **Q.** I'm sorry. Could you speak into the mic and start again?

1 **A.** He clearly put me back in a pretzel, and the other officer
2 has his hand on my back.

3 **Q.** Now, how did you feel when they put you back in a pretzel
4 the second time?

5 **A.** I was hurting. I was back in the same pain where I started.

6 **Q.** Now, at this point in time, do you have anything in your
7 mouth?

8 **A.** A little bit of blood.

9 **Q.** Okay. So at this next portion of the video -- let's
10 actually look at it first.

11 (The video was played.)

12 **MR. ADACHI:** This is at 4:18.

13 (The video was played.)

14 **MR. ADACHI:** 4:09.

15 (The video was played.)

16 **MR. ADACHI:** **Q.** Now, did you see that on the video?

17 **A.** Uh-huh.

18 **Q.** Okay. When your head came up from the ground and you spit,
19 what was going through your mind?

20 **A.** I had to get up all the blood and stuff that was in my
21 mouth. And my lips was on a dirty floor where people walk. I
22 mean, what I did, it was just a quick reaction.

23 **Q.** You also said that you were upset. Why were you upset at
24 that point?

25 **A.** The whole entire time I was upset. I mean, look at the
26 situation. I mean, look how forceful it was. And then I'm in
27 handcuffs. You already -- they already put me in a pretzel and
28 got your knee directly on, like, a pretzel, like, in the middle

1 of both of my legs. And then, you know, he just -- he just
2 socked me, and I'm in handcuffs. What else could I do?

3 **Q.** Why did you spit at the officer?

4 **A.** I had blood in my mouth, and I was angry. But I wasn't
5 angry to where I would spit on them. I mean, I had a whole
6 bunch of blood in my mouth overflowing.

7 **Q.** When you spit, were you aiming for a particular part of the
8 officer?

9 **A.** No, not necessarily.

10 (The video was played.)

11 **MR. ADACHI: Q.** So we played most of the video.

12 Does that video accurately represent the events that you
13 experienced on July 29th of 2016?

14 **MR. REINSTEDT:** Objection. Vague. Overbroad. Multiple
15 video clips.

16 **THE COURT:** Sustained.

17 **MR. ADACHI: Q.** Well, based on what you just saw in the
18 video --

19 **THE COURT:** Which one? There are three videos; so are you
20 talking about the middle?

21 **MR. ADACHI:** I'm talking about the entire video. The
22 complete video that we just saw.

23 **THE COURT:** Very well.

24 **MR. ADACHI: Q.** So you just saw the video that we just
25 played. Does that video accurately portray the events as they
26 occurred on July 29, 2016?

27 **A.** Can you repeat that?

28 **Q.** Sure. The video that we just saw, that I just showed you,

1 does that accurately represent the events that you experienced
2 on July 29th of 2016?

3 **A.** Yeah. I need you to repeat that again. I'm just kinda
4 like --

5 **Q.** The video that we just saw that I just showed you that we
6 watched on the screen together, does that video accurately
7 represent the events that you experienced on July 29, 2016?

8 **A.** Yeah. But I'm just wondering the full video, like the
9 entire time, like, is it broke off in sections of, like, what I
10 did from here to here with the full video? I don't know.

11 **THE COURT:** Anything further?

12 **MR. ADACHI:** **Q.** Were you afraid the entire time?

13 **MR. REINSTEDT:** Leading.

14 **THE COURT:** Sustained.

15 **MR. ADACHI:** **Q.** How did you feel the entire time that this
16 was going on?

17 **A.** Well, I felt, like, very -- like scared, confused, and angry
18 and, like, stressed out and just vulnerable. I couldn't do
19 nothing. And just hurt and paranoid 'cause I didn't know if
20 they was still going to continue, and they still continued to be
21 forceful and -- but, yeah.

22 **MR. ADACHI:** Thank you, Michael.

23 **THE COURT:** Anything further?

24 **MR. REINSTEDT:** Very briefly.

25 **THE COURT:** Very briefly.

26 **RE-CROSS EXAMINATION BY MR. REINSTEDT**

27 **MR. REINSTEDT:** **Q.** Sir, you testified on Friday with
28 Mr. Adachi that you did, in fact, resist the officers; correct?

1 **A.** Yeah, but I wanted to say something on that note. I clearly
2 was sick; so, you know --

3 **Q.** Sir, I just asked you just a yes or no question. Your
4 counsel can ask you follow-up.

5 In fact, part of that resisting was that you were straining
6 against the handcuffs that you had on; right?

7 **A.** I mean, my muscles was tensing up, and I guess they call
8 that "resisting."

9 **Q.** And when you say "tensing up," they were tensing against the
10 handcuffs; right?

11 **A.** No. Not that I recall.

12 **Q.** And, in fact, any abrasions that you may have had on your
13 wrists were caused by you pushing against the handcuffs; right?

14 **A.** No.

15 **MR. REINSTEDT:** Okay. Thank you.

16 **THE COURT:** Very well. May the witness be excused?

17 **MR. ADACHI:** Yes.

18 **THE COURT:** Thank you, Mr. Smith.

19 Next witness or stipulations?

20 **MR. ADACHI:** Next in order are BART dispatch calls and --
21 marked as an exhibit next in order.

22 **THE COURT:** Exhibit I.

23 (Defendant's Exhibit I was marked for identification.)

24 **THE CLERK:** Thank you.

25 **MR. ADACHI:** They're all on one disk.

26 **THE COURT:** Okay. Thank you.

27 **MR. ADACHI:** We previously stipulated to the dispatch calls,
28 and we're going to just play a series of the calls. They won't

1 be very long.

2 **THE COURT:** Very well. Do we have a transcript for the
3 ladies and gentlemen of the jury?

4 **MR. ADACHI:** Yeah.

5 **THE COURT:** So we'll have -- it will be I-A -- or I-1 will
6 be the transcript.

7 (Defendant's Exhibit I-1 was marked for identification.)

8 **THE COURT:** And, again, ladies and gentlemen, the
9 transcripts are just for your aid. They're not the evidence.
10 The actual CD is the evidence. Thank you.

11 **MR. ADACHI:** I have three boards to mark next in order.

12 **THE COURT:** So this will be J.

13 **MR. ADACHI:** Yes.

14 **THE COURT:** Can we do J, K, and L, or are they all the same?

15 **MR. ADACHI:** I think we should do J, K, and L. This is J.

16 (Defendant's Exhibits J, K, and L were marked
17 for identification.)

18 **MR. ADACHI:** These are the three pages of the transcript,
19 except in blowup.

20 Just for the record, each of the files is marked with a
21 number: 1.6, 2.11. And previously, only some of the calls were
22 played. And we're going to actually play them in order of each
23 call. And most of them are very short. And these are only the
24 dispatch calls, not the 911 call.

25 (The dispatch call was played.)

26 **MR. ADACHI:** That was 1.6. This is call 2.11.

27 (The dispatch call was played.)

28 **MR. ADACHI:** The next call is 2.13.

1 (The dispatch call was played.)

2 **MR. ADACHI:** Next call is 3.17.

3 (The dispatch call was played.)

4 **MR. ADACHI:** Next is 4.20.

5 (The dispatch call was played.)

6 **MR. ADACHI:** Next is 5.22.

7 (The dispatch call was played.)

8 **MR. ADACHI:** The next one is 6.24.

9 (The dispatch call was played.)

10 **MR. ADACHI:** I think there is a page missing on here.

11 **THE COURT:** There is. The last call.

12 **MR. ADACHI:** Yeah. Well, there's --

13 **THE COURT:** Or is it mixed up?

14 **MR. ADACHI:** There's actually two more calls. Let's see.

15 **THE COURT:** I can have Madam Clerk make copies, if you wish.

16 **MR. ADACHI:** Yeah, I apologize.

17 **THE COURT:** That's all right.

18 **MR. ADACHI:** 6.24. Let's see.

19 **THE COURT:** The one that I have ends at 6.24.

20 **MR. ADACHI:** Yeah.

21 **THE COURT:** Could we just put the boards up, maybe?

22 **MR. ADACHI:** You know what we could do is perhaps I could
23 give the Court and Counsel a copy, and the jurors just simply
24 listen?

25 **THE COURT:** Because that's the only evidence, in any event.
26 That's an aid. But --

27 Ladies and gentlemen, I leave it up to you. We can put the
28 blowups of the last -- there are two pages left off of the

1 transcript. It's going to take a while to make copies.

2 So do you want to look at the blowups as you go along, or do
3 you want copies? And if you want copies, that's fine. I'll
4 have Madam Clerk make them. Anyone? Anyone feel strongly that
5 they want copies?

6 No one does. Okay. So, Mr. Adachi, if you just want to put
7 whatever the blowup is?

8 **MR. ADACHI:** The problem is it's not reflected on the
9 blowup, either.

10 **THE COURT:** Okay.

11 **MR. ADACHI:** So I can either simply play it, and the jury
12 can listen to it.

13 **THE COURT:** Okay. Why don't we play it, and then if you
14 think you need a transcript, we'll have them made. Thank you.

15 **MR. ADACHI:** Thank you.

16 So I'm going to start, again -- again, we're at 7.26. And,
17 again, these are all in consecutive order.

18 **THE COURT:** Okay. Thank you.

19 (The dispatch was played.)

20 **MR. ADACHI:** This is 8.28.

21 (The dispatch was played.)

22 **MR. ADACHI:** This is 9.30.

23 (The dispatch was played.)

24 **MR. ADACHI:** This is 10.32.

25 (The dispatch was played.)

26 **MR. ADACHI:** This is 11.34.

27 (The dispatch was played.)

28 **MR. ADACHI:** This is 12.37.

1 (The dispatch was played.)

2 **MR. ADACHI:** Now, this is 13.43.

3 (Dispatch was played.)

4 **MR. ADACHI:** That's at 13.43. This is 14.46.

5 (The dispatch was played.)

6 **MR. ADACHI:** This is 15.49.

7 (The dispatch was played.)

8 **MR. ADACHI:** This is 16.51.

9 (The dispatch was played.)

10 **MR. ADACHI:** This is 17.57.

11 (The dispatch was played.)

12 **MR. ADACHI:** This is 18.59.

13 (The dispatch was played.)

14 **MR. ADACHI:** And finally, this is 19.61.

15 (The dispatch was played.)

16 **MR. ADACHI:** And there are two additional files which are
17 essentially inaudible, but I'll just play them very quickly.

18 20.63.

19 (The dispatch was played.)

20 **MR. ADACHI:** 21.65.

21 (The dispatch was played.)

22 **MR. ADACHI:** And 22.67.

23 (The dispatch was played.)

24 **MR. ADACHI:** That's all. Thank you.

25 And I also have a video that we stipulated to -- to the
26 admissibility, and it's already been marked as Exhibit B. And
27 we stipulated that it would come in -- 4:57?

28 **MR. REINSTEDT:** I would need to check the exact time, but

1 around there. We can confirm it.

2 **MR. ADACHI:** So I'd like to play it at this point. It's
3 just four minutes long.

4 **THE COURT:** Certainly.

5 **MR. ADACHI:** Thank you.

6 And this is known as "the Hampton video." It's one of the
7 videos taken by a civilian.

8 (The video was played.)

9 **MR. ADACHI:** Lights, please.

10 **THE COURT:** Thank you, Madam Clerk.

11 **MR. ADACHI:** Thank you very much.

12 (The video was played.)

13 **MR. ADACHI:** We played from zero to 4.38, and that's the
14 portion that we've agreed will be marked.

15 **THE COURT:** On Exhibit B?

16 **MR. ADACHI:** Yes.

17 **THE COURT:** Thank you. Okay.

18 **MR. ADACHI:** And with that, we move all the exhibits in, and
19 we rest.

20 **THE COURT:** All right. Any objection to any of the
21 exhibits?

22 **MR. REINSTEDT:** Yes. We've been over those before on the
23 record, a number of times.

24 **THE COURT:** All right. So as to those, the Court's already
25 ruled; so we'll need to do some cleanup on those.

26 So, ladies and gentlemen, what we're going to do is we're
27 going to take a break now. When you come back, I'm going to
28 start jury instructions --

1 I'm sorry, Mr. Reinstedt. Any rebuttal case?

2 **MR. REINSTEDT:** No, thank you.

3 **THE COURT:** Okay. So all the evidence is now in so this is
4 a really important time for you to remember the admonitions.

5 When you go back to the jury room, you can talk about the
6 evidence but you can't do it before then. So please just wait,
7 stay off social media, don't make up your minds because you
8 haven't begun your deliberations.

9 When you come back, I'm going to go over the instructions,
10 and then we'll start closing arguments. So that you know, I've
11 given an hour and 20 minutes to each side to do their closing
12 arguments. I'm going to be mindful of the time, and I'll give
13 them a warning when their time is almost up so that we are sure
14 that you will get this case today.

15 And then when you begin your deliberations, it takes you as
16 long as it takes you to carefully consider the evidence and
17 reach a verdict, if you can.

18 I know Juror Number 7, we're mindful of your having to
19 depart for the 14th, and if the juror needs to go in, we do have
20 our alternate jurors; so no worries at this point in time.

21 Please, ladies and gentlemen, let's take a 20 minute break,
22 and so we'll be back on the record at 25 to 11:00. Thank you.

23 (A brief recess was taken.)

24 **THE COURT:** The ladies and gentlemen of the jury have left.
25 Let's talk about the exhibits.

26 Which ones have you objected to -- which ones has the Court
27 not ruled on?

28 **MR. REINSTEDT:** Go down the list.

1 **THE COURT:** So A, the Court already ruled.

2 Very well. So, Mr. Reinstedt, the People's objection was
3 sustained without prejudice to revisit A.

4 **MR. REINSTEDT:** I believe that's correct.

5 **THE COURT:** Mr. Adachi? And we need to make this quick,
6 please.

7 **MR. ADACHI:** Yes. We would admit those -- move to admit
8 those.

9 **MR. REINSTEDT:** All right. Same objections as before.
10 They're clips from other videos that are in evidence, and
11 they're labeled in very inflammatory ways.

12 **THE COURT:** Okay. That's going to be sustained; so A will
13 not be admitted.

14 B was not going to be admitted. That's your letter to
15 Officer Trabanino. C -- so I'm sustaining that objection.

16 C?

17 **MR. REINSTEDT:** I maintain my earlier objection.

18 **THE COURT:** I'm going to sustain the objection. C will not
19 be admitted.

20 D?

21 **MR. REINSTEDT:** So D contains a number of social media
22 videos. I believe that they are all in without my objection.
23 I'd like an opportunity to look at the CD just to confirm there
24 aren't additional videos on there.

25 **THE COURT:** Okay. So D would be admitted, subject to your
26 looking at it.

27 (Defendant's Exhibit D was admitted into evidence.)

28 **THE COURT:** E is admitted. E-1, E-2 is admitted.

1 (Defendant's Exhibits E, E-1, and E-2 are admitted
2 into evidence.)

3 **THE COURT:** F, the Court has already ruled on the Endo
4 video; so that objection is sustained. That will not be
5 admitted.

6 G, Officer Velasquez's body camera video.

7 **MR. ADACHI:** We're moving that in under 356.

8 **MR. REINSTEDT:** As has previously been, the People are
9 objecting to the whole section of that video.

10 **THE COURT:** That objection is sustained. G will not come
11 in.

12 H?

13 **MR. ADACHI:** H, we move in.

14 **THE COURT:** H is what? It's not that same video clip; in
15 other words, what happened in the break room? What is H?

16 **MR. ADACHI:** H is dispatch.

17 **MR. REINSTEDT:** No, that's I.

18 **THE COURT:** I think it's a duplicate. Isn't H Velasquez?
19 H is G.

20 **MR. ADACHI:** I'm a little confused because H is Velasquez.

21 **THE COURT:** Well, Madam Clerk had G as Velasquez. What is
22 G?

23 **MR. ADACHI:** You know what happened? They marked two disks
24 identical; so they marked the same exhibit.

25 **THE COURT:** So G and H are the same?

26 **MR. ADACHI:** Yeah.

27 **THE COURT:** Okay. So H is sustained for the same reason as
28 G under 352, and the other grounds that we've gone over

1 extensively.

2 I through L? Any objection to those?

3 **MR. REINSTEDT:** I'm fine with I being in. I think the other
4 marked things are not evidence. They're just blowups of the
5 transcript.

6 **THE COURT:** So I'm going to sustain the objection as to J,
7 K, and L; however, you can use those in your closing,
8 Mr. Adachi.

9 **MR. ADACHI:** Thank you.

10 (Defendant's Exhibit I was admitted into evidence.)

11 **THE COURT:** Okay. I think that's all the exhibits.

12 As to 2670 -- so I just want to be clear, Mr. Adachi. Is it
13 your position that when he stepped off the BART train and the
14 police officers had their guns pointed at him, that was a
15 detention?

16 **MR. ADACHI:** It was a detention that quickly went into an
17 arrest.

18 **THE COURT:** Tell me what the detention was.

19 **MR. ADACHI:** The detention, which is a question of fact for
20 the jury, not for the Court. It's different than --

21 **THE COURT:** No, I understand. So the position would be, by
22 the Public Defender, that when officers had their guns drawn on
23 someone and they say "stop" and they were, let's say, to ask a
24 question of that person and that person would give an
25 inculpatory answer that that wouldn't be excluded because it was
26 still a detention.

27 **MR. ADACHI:** Right. I understand --

28 **THE COURT:** That's your position?

1 **MR. ADACHI:** No, I understand that the prosecution --

2 **THE COURT:** Well, no. That's -- I'm asking you: Is that
3 your position?

4 **MR. ADACHI:** Well, that's only part of what happened here.
5 You have him to the ground --

6 **THE COURT:** We don't have enough time to go over it. You
7 continue to make things longer than they need to be. Okay? I
8 get your point.

9 But my question to you specifically is: Officers have their
10 guns drawn, and they say to someone "Stop." Your position is
11 that's a detention.

12 **MR. ADACHI:** Yeah. The case law says when you point a gun
13 at somebody, that's a detention.

14 **THE COURT:** That's a detention. Okay.

15 Mr. Reinstedt.

16 **MR. REINSTEDEDT:** So 2670 requires that there be substantial
17 evidence of there being an actual issue around the requested
18 part of the instruction.

19 My belief is that what the evidence has shown justifies
20 giving Section C relating to use of force, but not Sections A or
21 B.

22 **THE COURT:** All right. Well, in an overabundance of
23 caution, I will give the -- I don't think there is substantial
24 evidence, and I think this is a last-minute sandbagging by the
25 Public Defender; however, in overabundance of caution so there
26 is not an issue with the jury instruction, I will give the
27 sections, but this was a felony.

28 All the testimony is -- because there's a section about a

1 misdemeanor and not having an arrest warrant. That doesn't
2 apply in this case because all the evidence is is that the
3 officers thought it was a robbery, which is a felony; so that
4 part of the instruction needs to be modified.

5 Mr. Reinstedt, if I may ask, I'm having computer problems so
6 could you please e-mail -- have you already e-mailed the
7 instructions to Jean?

8 **MR. REINSTEDEDT:** Not the latest version. I have them on a
9 flash drive, though.

10 **THE COURT:** Oh, great. If you can do that, and I can
11 probably pull it up.

12 But, Mr. Adachi, where is your version of 2670? Here's what
13 I want you to do. I want you to please --

14 Oh, the other thing, do you want the jury instruction? I
15 asked if you wanted to stipulate about Ms. Appleton's health
16 issues rather than make it a separate jury instruction.

17 **MR. ADACHI:** My suggestion is that we just go with the
18 first -- I think it was two sentences? Let me check.

19 **MR. REINSTEDEDT:** We've already been over this.

20 **THE COURT:** We've been over this. All I asked is: Would
21 you rather stipulate than have it as a jury instruction? So are
22 you telling me you want it as a jury instruction instead of
23 stipulating?

24 **MR. ADACHI:** Right. The only thing I was going to say is
25 that --

26 **THE COURT:** I don't want to go over it. We'r*e not going
27 over it again.

28 **MR. ADACHI:** The issue of raising the health status for --

1 **THE COURT:** No, no, no, no. We are not going --

2 **MR. ADACHI:** -- pregnancy.

3 **THE COURT:** We are not going over it again.

4 **MR. ADACHI:** Well, we left that open last time.

5 **THE COURT:** No, we didn't. I said to meet and confer, and
6 did you want it as a stipulation or did you want it as an
7 instruction? Since you won't stipulate, it will be an
8 instruction, and that's in the jury instructions.

9 So I want you and Mr. Reinstedt to work on 2670, please, and
10 we're going to go off the record. Thank you.

11 (A brief recess was taken.)

12 **THE COURT:** So we're back on the record in the matter of
13 People versus Smith.

14 Just a couple of things, counsel. As I was going through
15 the 945 -- and I'll just change this as we go along. As to 960
16 and 915, what I'm going to say is -- I'm going to change the
17 original language because it's not a charge of battery. He's
18 not been charged with simple battery.

19 If I can just say "the crime of battery," or I can start
20 with "Battery in violation of Penal Code Section 242 is a lesser
21 included offense."

22 **MR. ADACHI:** You know what's odd, though, is that assault is
23 not a lesser battery on a peace officer. I looked that up.

24 **MR. REINSTEDEDT:** But it's a lesser of a lesser -- 242 is a
25 lesser, and 240 is a lesser of the 242.

26 **THE COURT:** That's what I'm looking at. Because you're
27 right, it's not a battery. But it is a simple battery; right?

28 **MR. ADACHI:** That's not clear because there's two theories

1 of battery; right? There's either -- attempted battery can be
2 an assault or an assault with apprehension, and here, we don't
3 have either of those; so I don't think it's a lesser related. I
4 don't think factually, it should be given.

5 I was confused when the Court said it was going to give an
6 assault instruction.

7 **THE COURT:** Okay. You know, we had a jury instruction
8 conference last week.

9 **MR. ADACHI:** And I objected to it.

10 **THE COURT:** Correct. But you did not say at that time that
11 you had done research and that it was not a lesser included. A
12 judge has a sua sponte duty to include on the lesser-included
13 offenses. That was what the Court was looking at. And we have
14 simple battery as a lesser included of battery on a peace
15 officer --

16 **MR. ADACHI:** I understand that.

17 **THE COURT:** Okay. And then simple assault is a lesser
18 included of simple battery. And we went ad nauseam through that
19 in changing the language. So I -- what case do you have that
20 says it's not? What case, please?

21 **MR. ADACHI:** I just know this from law school. I mean,
22 assault is not a lesser included of battery; so I don't know why
23 the Court decided to include that.

24 **THE COURT:** I -- first of all, if the People ask for it, I'm
25 giving the instruction. If you have a case that says that I
26 should not, then I will look at it over the noon hour. But it's
27 your obligation to give me that case, please. Thank you.

28 All right. Mr. Reinstedt, anything further?

1 **MR. REINSTEDT:** No.

2 **THE COURT:** Okay. So I do have, for both counsel, these are
3 the topics that you may not argue because we had --

4 **MR. ADACHI:** Is there a list?

5 **THE COURT:** There is a list. Just a moment. I want to
6 preface this.

7 The reason the Court is going to the extent of giving these
8 topics is that there have been numerous -- the Court has made
9 rulings, and those rulings seemed to have been ignored.

10 So to make it very clear about what may or may not be argued
11 in closing, I have two lists -- I have a list. I'll give it to
12 both counsel, and I'll have it marked as a court exhibit.

13 (Court's Exhibit 3 was marked for identification.)

14 **THE COURT:** First, you may not argue that the incident
15 caused any harm to Ms. Appleton's unborn child.

16 Two -- Madam Clerk, do you want to give this -- to comment
17 about the defendant's absence during the trial or his falling
18 asleep or being sick.

19 Three, that either side failed to call Rodriguez.

20 Four, that the report made by Rodriguez was a lie or was
21 false.

22 **MR. ADACHI:** Wow.

23 **THE COURT:** Five, issues concerning implicit bias.

24 Six, that the officers were motivated by racial bias.

25 Seven, comments on the Court's rulings or reference to
26 evidence that was excluded.

27 And, eight, references to "Black Lives Matter" or "black
28 crime."

1 There's no evidence in the record to support argument in any
2 of these. Does either side wish to be heard?

3 **MR. REINSTEDT:** No.

4 **MR. ADACHI:** Absolutely. What was number seven again?

5 **THE COURT:** You have a list.

6 **MR. ADACHI:** Oh.

7 **THE COURT:** The Court has handed both counsel a list.

8 **MR. ADACHI:** Yes. I don't have anything with respect to one
9 or two. On three, that either side failed to call Rodriguez,
10 either side can talk about the failure of proof on either side.
11 Rodriguez was a percipient witness in this case.

12 **THE COURT:** You had him subpoenaed. And you said you were
13 going to call him, and then you didn't; so I don't want
14 Mr. Reinstedt commenting on the fact that you didn't call him,
15 and I do not want you commenting on the fact that the People
16 didn't. Because, in fact, you had represented to the Court that
17 you were going to call Mr. Rodriguez. So I will --

18 **MR. ADACHI:** The defense has no obligation to present any
19 witness.

20 **THE COURT:** Correct. But you told --

21 **MR. ADACHI:** But we can comment on the failure of the
22 prosecution to sustain their burden.

23 Now, in this case, Rodriguez --

24 **THE COURT:** Okay, wait. No, no --

25 **MR. ADACHI:** -- is a percipient witness --

26 **THE COURT:** Okay. We -- no.

27 **MR. ADACHI:** I though I could make a record.

28 **THE COURT:** No. You've made your record. This trial has

1 gone on probably two days more than it should have by the Court
2 allowing you to make records, Mr. Adachi; so --

3 **MR. ADACHI:** This is the first time I'm seeing this from the
4 Court.

5 **THE COURT:** I told you that I would provide guidance to you
6 about what you may or may not say in closing.

7 What happened with Rodriguez on the train, the Court
8 originally ruled was irrelevant under -- marginal relevance
9 under 352. You violated the Court's ruling in numerous ways
10 with your questioning.

11 I want to make it clear that the issue of what happened on
12 the BART train is not -- what you had said was that
13 Mr. Rodriguez lied. What he said was false.

14 Something happened on that BART train. For you to say it's
15 false and it's a lie, Rodriguez never testified; so I --

16 **MR. ADACHI:** It goes -- it goes directly to the question of
17 both reasonable suspicion for the detention, and probable cause.
18 Because the information that was conveyed through dispatch,
19 there were at least four different versions. Somebody was
20 stealing something --

21 **THE COURT:** What is the evidence -- what is the evidence
22 that what Rodriguez -- the report that he made was a lie or was
23 false? What is the evidence?

24 **MR. ADACHI:** The officers testified to that.

25 **THE COURT:** What's the evidence at the time the call --

26 **MR. ADACHI:** Officer Trabanino.

27 **THE COURT:** -- at the time the call was made? That's what's
28 relevant. When the officers received the dispatch call. That's

1 what I -- what's the evidence that at the time that call was
2 made, it was a lie or it was false?

3 **MR. ADACHI:** Well, because Officer Turner was told by
4 Laura Gottlieb, who testified in court, that it never happened
5 and that the man was the antagonist. That he was the one that
6 was, as she said, aggressive and threatening towards the kids.

7 **THE COURT:** Mr. Reinstedt?

8 **MR. REINSTEDEDT:** It's fine to comment that Dr. Gottlieb said
9 what she said. I think that taking it a step further and saying
10 this absolutely was a lie or a false report as a fact as opposed
11 to a hearsay statement relayed to the police officers at the
12 scene goes a step beyond what the evidence shows.

13 **MR. ADACHI:** There was evidence, through Dr. Gottlieb's
14 testimony, that was false. She told the officers that it was
15 false. It's our argument that at that point --

16 **THE COURT:** What's the evidence? I'm sorry.

17 **MR. ADACHI:** At that point the detention was illegal.

18 **THE COURT:** Hold on. We're not doing this, Mr. Adachi. You
19 may comment on what Dr. Gottlieb said. You cannot say Rodriguez
20 lied. Rodriguez gave a false -- made a false 911 call. That's
21 what the Court is saying. All right? Because there is no
22 evidence that at the time he made the call it was either false
23 or a lie.

24 You may absolutely comment on what the officers knew from
25 Dr. Gottlieb. That is completely fair, and you may comment on
26 it.

27 **MR. ADACHI:** But the officers --

28 **THE COURT:** But no, I'm sorry. But those words --

1 **MR. ADACHI:** I asked the officers whether or not it was a
2 false accusation, and both Turner and Trabanino said yes. That
3 they determined it was a false accusation.

4 **MR. REINSTEDT:** I believe that whenever that question was
5 raised, I objected to it.

6 **MR. ADACHI:** You objected after the answer.

7 **THE COURT:** If I sustained the objection, they're not
8 supposed to -- remember? They're to disregard the answer if the
9 Court sustains the objection; so there's no evidence in the
10 record.

11 All right. Anything else?

12 **MR. ADACHI:** Yeah. Sure. I mean, the idea that you can't
13 talk about implicit bias, that is the --

14 **THE COURT:** What's the evidence?

15 **MR. ADACHI:** That's the strangest ruling I've ever heard.

16 **THE COURT:** What's the evidence?

17 **MR. ADACHI:** Implicit bias --

18 **THE COURT:** What's the evidence?

19 **MR. ADACHI:** -- is a concept --

20 **THE COURT:** Let's talk about this case. What is the
21 evidence in this case? All you may argue in closing is the
22 evidence in this case. That's what you're limited to. So what
23 was the evidence?

24 **MR. ADACHI:** Here's what the closing --

25 **THE COURT:** What was the evidence?

26 **MR. ADACHI:** -- argument says.

27 **THE COURT:** What was the evidence?

28 **MR. ADACHI:** "The right protects not only the

1 opportunity to argue, but to do so
2 meaningfully. The right of discussing
3 the merits of the cause both as to the law
4 and facts is unabridged. The range of
5 discussion is wide. Counsel may be heard
6 in argument upon every question of law. His
7 illustrations may be as various as the
8 resources of his genius. His argumentation
9 as full and profound as his learning can make
10 it. And he may, if he will, give play to
11 his wit, wings, and imagination."

12 That's People versus Manson, 1976 61 Cal.App 3d 102,
13 page 199. And it says here:

14 "Closing argument clarifies issues for the
15 jury and is the last clear chance for the
16 defense to raise reasonable doubt in the
17 jurors' minds. Thus, it is a basic element
18 of the necessary fact-finding --

19 **THE COURT:** What is the evidence?

20 **MR. ADACHI:** -- "process in a criminal trial."

21 **THE COURT:** Okay. Mr. Adachi, you are interrupting the
22 Court. I've asked you what the evidence is, please. What
23 evidence supports your arguing implicit bias?

24 **MR. ADACHI:** We have here a young African-American man who
25 was wrongfully detained by officers and arrested.

26 Now, even if you grant the fact that they had this report
27 and they could detain him, they continued to use force, even
28 after they learned that he had no gun.

1 **THE COURT:** Again, what is the evidence of implicit bias?

2 **MR. ADACHI:** It's clear. That the reason why they want to
3 use force --

4 **THE COURT:** That's what you want to say -- that's what you
5 want to say, but there's --

6 **MR. ADACHI:** The reason why they used force in this case
7 against him is because he's a young African-American man.
8 That's why they used force. Maybe the Court doesn't understand
9 that.

10 But for young African-American men in this country, they are
11 subject to what's called "black crime bias," which is when a
12 young man like this is seen by the officers and is perceived as
13 being a criminal, a crook, and they treat him as such.

14 Once they determined that he did not have a gun, they should
15 have stood him up and let him go. They didn't do that. And
16 they continued to use force.

17 So the motive for the officers in this case is that their
18 treatment of him was, in fact, a result of black crime bias, was
19 the result of their own implicit bias --

20 **THE COURT:** Where is the evidence? Where is the evidence of
21 that?

22 **MR. ADACHI:** The evidence is through their own testimony.
23 Their actions. You know, the Court expects the witnesses to get
24 up on the stand and say, "Oh, yes. I'm racist"; right? We
25 asked one of the officers --

26 **THE COURT:** No. Mr. Adachi -- Mr. Adachi --

27 **MR. ADACHI:** The government is --

28 **THE COURT:** Well, no. Mr. Adachi, you have made this

1 case -- even your own client, you asked him on the stand about
2 the spitting. And you said to the Court, before he took the
3 stand, that spitting -- or I'm sorry. Saying to particularly a
4 black person, "they smell," is racially offensive.

5 **MR. ADACHI:** Yes.

6 **THE COURT:** You never elicited that on the stand.

7 **MR. ADACHI:** Why? Because the Court stopped me.

8 **THE COURT:** No, I -- Mr. Adachi? Mr. Adachi?

9 **MR. ADACHI:** The Court would not allow me to ask
10 questions --

11 **THE COURT:** Mr. Adachi?

12 **MR. ADACHI:** -- in that area.

13 **THE COURT:** No, Mr. Adachi.

14 **MR. ADACHI:** The Court stopped me.

15 **THE COURT:** No, Mr. Adachi.

16 **MR. ADACHI:** The Court stopped me.

17 **THE COURT:** No. You know what?

18 **MR. ADACHI:** Check out the record. That's exactly what was
19 done.

20 **THE COURT:** Mr. Adachi, I did not stop you from asking that
21 question.

22 **MR. ADACHI:** Yes, you did.

23 **THE COURT:** You never even asked that specific question for
24 the Court to have --

25 **MR. ADACHI:** Because you shut me down.

26 **THE COURT:** Mr. Adachi, you continue to interrupt the Court.
27 You failed to get that evidence out. I was waiting to hear
28 it. I was waiting for you to ask the question: For a young

1 black man, Mr. Smith, what does it mean when someone says "you
2 stink" or "you smell"? You never asked that question.

3 **MR. ADACHI:** You shut me down.

4 **THE COURT:** Mr. Adachi.

5 **MR. ADACHI:** You wouldn't let me ask any questions about any
6 statements that were made.

7 **THE COURT:** Mr. Adachi, in fact, I did allow you to make
8 reference to what happened on the BART train in a limited
9 fashion.

10 You never asked that specific question of your client. Had
11 you asked that question, this may be a little different. But
12 you have failed to demonstrate at all --

13 **MR. ADACHI:** Well, the Court's, I think, missing the point
14 because it's not Rodriguez's bias, although I think that was
15 clear he is a biased person or a racist -- I don't know -- but
16 this is about the officers' bias. There's a whole area by the
17 Department of Justice that has --

18 **THE COURT:** Mr. Adachi, I do not -- Mr. Adachi, the Court's
19 aware of this. But you have failed to put it in evidence in
20 this case. That's the problem. You wanted to call an expert
21 belatedly on implicit bias. The People objected, I sustained
22 the objection. So you don't have any evidence of implicit bias
23 and how it works.

24 That's why I'm saying you cannot argue implicit bias in this
25 case because you have no evidence of it. All right?

26 That the officers were motivated by racial bias. What is
27 the evidence of that?

28 **MR. ADACHI:** Their actions. We are allowed to argue that

1 officers treat a young African-American man differently than
2 they do a white person.

3 **THE COURT:** Did you ask -- did you ask them those questions?
4 Did you ask them those questions?

5 **THE WITNESS:** I don't have to. I can argue -- the authority
6 I just cited says that I can provide illustrations as various as
7 the resources --

8 **THE COURT:** All right. I've heard you.

9 Mr. Reinstedt, do you wish to be heard on six?

10 **MR. REINSTEDEDT:** I don't think there was any evidence that
11 that was the case. I think that the very fact that the
12 defendant is African-American is not a sufficient basis for
13 being able to make that argument when there's nothing in the
14 record that would otherwise support that as evidence.

15 **THE COURT:** Very well.

16 **MR. ADACHI:** With all due respect, this ruling by the Court
17 is biased. This is a biased ruling because you're not
18 acknowledging the fact that my client is African-American.
19 You're not acknowledging the whole mindset and history about the
20 treatment of young African-American men in our country, and
21 you're not acknowledging the fact the officers in this case used
22 excessive force because of his race. Now, no officer is going
23 to get on the stand and say, "Yes, I'm racist."

24 **THE COURT:** Mr. Adachi, please. You're saying the same
25 thing again and again and again. All right? Similar to your
26 questions. When I sustain an objection, you come back, and you
27 ask pretty much the same question, maybe two or three times; so
28 you have no evidence.

1 **MR. ADACHI:** I think this is outrageous.

2 **THE COURT:** You could have -- you could have -- you called
3 your client to the stand. You told me that you were going to
4 ask -- that there was -- the issue starting on the BART train
5 about Mr. Rodriguez saying an offensive comment. You never --
6 you never asked that question. That specific question.

7 So the record has literally no information by which this
8 evidence, by which this jury is -- that's why I'm being very
9 clear about what may and may not be reviewed.

10 So the reference to "Black Lives Matter," I believe that you
11 did have "black crime bias"; so I'm going to take that out
12 because there was a reference to "black crime bias" in the
13 record, and so you can talk about that to the extent there's
14 evidence in the record.

15 But again, Mr. Adachi, it is not your testimony. It has to
16 be something that someone said on the stand or otherwise
17 admitted into evidence; otherwise, the argument is improper.

18 Are we understanding?

19 **MR. ADACHI:** I think the Court's rulings are, with all due
20 respect, outrageous. And you're limiting the discussion of
21 racism in a criminal case where a young African-American man is
22 assaulted by BART police officers, or at least that is our
23 defense.

24 And, you know, this is a situation where the Court is
25 over-inserting itself into the closing argument of counsel and
26 not allowing defense counsel, in particular, to make arguments
27 which go directly to the implications and direct evidence in
28 this case of racism.

1 **THE COURT:** What is -- it's lost on me.

2 **MR. ADACHI:** Obviously.

3 **THE COURT:** It truly is. What is the evidence? Were there
4 racial slurs? What did the BART officers do in any way that
5 would indicate that they did it to your client because he's
6 African-American versus anyone else of any other ethnicity where
7 they receive a call, robbery, armed, gun?

8 What is -- I mean, you could have cross-examined them and
9 asked about other calls and ethnicity of other individuals. You
10 were free to do that, but you didn't. So I don't understand how
11 the evidence is in the record, and I need to know in very short
12 order.

13 **MR. ADACHI:** The question is whether or not I can argue to
14 the jury, based on the facts, that Mr. Smith was treated the way
15 he was because he's a young black kid.

16 Now, once the officers searched his person and his backpack,
17 they should have let him go at that point. The Court seems to
18 think that if the officers have a reason to think that you have
19 a gun or a reason to believe you attempted robbery that allows
20 them to continue to beat on you, you know, for the duration of
21 the incident.

22 The point that we're raising here is that the officers --
23 even though the officers were of various nationalities,
24 including white, Asian, et cetera, that they suffer from black
25 crime bias just like any other police officer who is trained in
26 that way.

27 Of course, Officer Turner said, "Oh, I've never seen any
28 evidence of racism or I've never seen any evidence of bias

1 during this five years that I've been on the BART police." Of
2 course they're gong to say that. You're not going to get a
3 police officer to admit that they're racist or they're wearing a
4 white hood.

5 And in this case, the question is whether or not, by virtue
6 of their training, their experience and more importantly, their
7 perception of a young African-American man and the assumptions
8 that they made about him, whether or not, because of those
9 things, they treated him --

10 **THE COURT:** What assumptions -- what assumptions did they
11 make?

12 **MR. ADACHI:** They treated him like a dog. That's what they
13 did.

14 **THE COURT:** Mr. Adachi --

15 **MR. ADACHI:** They beat him like a dog.

16 **THE COURT:** Well, it's up to this jury to determine that.

17 **MR. ADACHI:** That's right.

18 **THE COURT:** Okay.

19 **MR. ADACHI:** And I should be able to argue --

20 **THE COURT:** That every action that they took, starting from
21 when they pulled their weapons in the BART train, every action
22 was taken because he's a young African-American man. Is that
23 what you're saying?

24 **MR. ADACHI:** Yeah. That's why they continued to beat him
25 when they --

26 **THE COURT:** No, no. You do not answer my question.

27 Are you saying that when they -- immediately when that BART
28 train came, they were racially biased at that point?

1 **MR. ADACHI:** Because they --

2 **THE COURT:** Is that a yes or no?

3 **MR. ADACHI:** Because they made an assumption that it was a
4 young black man, who just did a robbery with a gun, and out
5 comes Michael. Does he fit that stereotype? Does he fit
6 that --

7 **THE COURT:** I'm sorry. I thought there was a description of
8 someone in a Mickey Mouse shirt, and there was only one person
9 with a Mickey Mouse shirt and tan pants.

10 **MR. ADACHI:** Right. And based on that information, they
11 made certain assumptions of him that they had to point guns at
12 him and order him to the ground; that they had to jump on top of
13 him, had to put him in a figure four; they had to put their
14 knees into him, into his back, and so it goes on and on and on.

15 And the Court seems to think --

16 **THE COURT:** What's the evidence of it?

17 **MR. ADACHI:** Well, that --

18 **THE COURT:** That's what I keep coming back to. What's the
19 evidence?

20 **MR. ADACHI:** The prosecutor --

21 **THE COURT:** No, what's the evidence?

22 **MR. ADACHI:** It's my argument in this case that one of the
23 reasons he was treated the way that he was and why they didn't
24 tell him what he was charged with, why they didn't bother when
25 he was handcuffed on the ground --

26 **THE COURT:** Mr. Adachi, I don't need your closing argument
27 now. I need answers to my questions. What's the evidence?

28 **MR. ADACHI:** The evidence is their actions. That we can

1 make arguments as to what motivates a person's actions.

2 The Court seems to think --

3 **THE COURT:** Mr. Adachi, I have -- we've now gone on 20
4 minutes with your argument.

5 **MR. ADACHI:** Well, the Court came up with this list.

6 **THE COURT:** I did come up with the list, Mr. Adachi.
7 Because you have said twice that you would not obey the Court's
8 orders, and in chambers, you said, "You can hold me in contempt
9 because I'm not going to do that."

10 **MR. ADACHI:** I did not say that.

11 **THE COURT:** Yes, you did. And Mr. Reinstedt was there, and
12 we've already put it on the record.

13 **MR. ADACHI:** That's why I said we should put everything on
14 the record --

15 **THE COURT:** Mr. Adachi --

16 **MR. ADACHI:** -- because the Court is mischaracterizing what
17 I say.

18 **THE REPORTER:** Can you speak one at a time for me, please.

19 **MR. ADACHI:** The Court is mischaracterizing what I'm saying
20 repeatedly. And --

21 **THE COURT:** Mr. Adachi? Mr. Reinstedt, we put it on the
22 record. You have twice said that you would ignore Court orders.
23 And I will say, no attorney has ever said that once, let alone
24 twice to the Court, which courts take seriously. If we can't
25 have rules of law and the rulings can't be followed by counsel,
26 it makes it very difficult; so that's why I put together this
27 list.

28 **MR. ADACHI:** Even if that were the case, the Court

1 reversed --

2 **THE COURT:** So what we're going to do is you cannot
3 reference "Black Lives Matter," but "black crime bias" you may.
4 You may not comment on the Court's rulings or reference to -- so
5 in other words, you can't say you didn't get all the evidence by
6 pointing to the Court that I excluded things.

7 **MR. ADACHI:** I can talk about the absence of evidence.

8 **THE COURT:** You may talk about the absence, but you may not
9 reference the Court excluding it.

10 For example, the video that the Court said in the break
11 room, you can't reference that so that we are clear.

12 **MR. ADACHI:** The Court's saying I can't reference it --

13 **THE COURT:** It was excluded. You can reference your
14 client's testimony about what happened in the break room, but
15 you can't reference the video, or the fact that you don't know
16 what that video is, ladies and gentlemen. You can't reference
17 that.

18 **MR. ADACHI:** Here's where the argument --

19 **THE COURT:** No. No, Mr. Adachi --

20 **MR. ADACHI:** I can say that the prosecution is only
21 presenting part of Officer Velasquez's body-worn camera.

22 **THE COURT:** Mr. Reinstedt?

23 **MR. REINSTEDEDT:** Well, I think that that's pretty clearly
24 commenting on the Court's rulings. There's a reason that only
25 part is being offered and that's because it's not relevant, and
26 it's been excluded because of 352 problems. To comment upon
27 that in closing when it's been the subject of no evidence from
28 either side -- specifically, because that area has been

1 excluded -- would clearly be asking a jury to speculate and draw
2 conclusions about: A, things that are not in evidence; and, B,
3 why the Court ruled the way it did, neither of which is
4 appropriate for closing argument.

5 **MR. ADACHI:** The jury is going to wonder why there's a big
6 gap in Officer Velasquez's body-worn camera.

7 **THE COURT:** The jury has excluded it under 352. We're not
8 going to get into my rulings. That's improper.

9 **MR. ADACHI:** And I can comment on the fact that there's no
10 evidence of that.

11 **THE COURT:** That's improper because it was excluded for a
12 legal reason; so that's improper. That's why I wanted to
13 include this so that we're all on the same page. Do you
14 understand what the Court is referencing by seven? Okay.

15 **MR. ADACHI:** I want to know --

16 **THE COURT:** Hold on. Even though there is no evidence, I'll
17 allow you to get into racial motivation, but you can't talk
18 about implicit bias. Your expert was specifically excluded on
19 the issue of implicit bias. He was untimely; so you can't get
20 into that, and there's no evidence in the record about that.

21 **MR. ADACHI:** How can you talk about racial bias without
22 talking about implicit bias? I mean --

23 **THE COURT:** You said that there's evidence. You said that
24 this is evidence --

25 **MR. ADACHI:** Yes.

26 **THE COURT:** -- that you can argue from. But you can't get
27 into implicit bias because you have no expert. You have no
28 testimony about it; so we're --

1 **MR. ADACHI:** By definition --

2 **THE COURT:** No, Mr. Adachi, we're going to bring our ladies
3 and gentlemen of the jury in.

4 **MR. ADACHI:** I can't understand why the Court has a problem
5 with mentioning "Black Lives Matter." This is a civil rights
6 movement in the United States. It is something that people are
7 familiar with and, you know, to prevent me from saying those
8 three words, "Black Lives Matter" is --

9 **THE COURT:** It is making --

10 **MR. ADACHI:** -- a risk of my client's right to counsel.

11 **THE COURT:** Mr. Adachi, it's injecting sympathy, passion,
12 and prejudice, and all the things that we're not supposed to in
13 front of a jury. We tell the jury you can't consider
14 sentencing. You can't consider sympathy. There's a general
15 instruction that goes to all these things, and that is what
16 you're trying to do.

17 So I'm limiting this, very clearly, in terms of what you can
18 or cannot say; so it's one, two, three, four, five, seven, and
19 eight, just with reference to "Black Lives Matter."

20 All right. Let's bring our ladies and gentlemen of the
21 jury.

22 **MR. REINSTEDT:** Can I have one moment to use the restroom
23 before we get started?

24 **THE COURT:** Yes.

25 **MR. ADACHI:** May I use the restroom, too?

26 **THE COURT:** Yes.

27 (Short break.)

28 **THE COURT:** Let's bring our ladies and gentlemen of the jury

1 in.

2 All right. Thank you. We have our ladies and gentlemen of
3 the jury who are present.

4 So I'm going to read from these jury instructions, ladies
5 and gentlemen. As I told you, I'm going to send six copies into
6 the jury room so you have them. Feel free to take notes, but
7 you don't have to. You'll have a set of these.

8 **JURY INSTRUCTIONS**

9 Members of the jury, I will now instruct you on the law that
10 applies to this case. I will give you a copy of the
11 instructions to use in the jury room.

12 Each of you -- you must decide what the facts are. It is up
13 to you exclusively to decide what happened based only on the
14 evidence that has been presented to you in this trial.

15 Do not let bias, sympathy, prejudice or public opinion
16 influence your decision. Bias includes, but is not limited to
17 bias for or against the witnesses, attorneys, defendant, or
18 alleged victim based on disability, gender, nationality,
19 national origin, race or ethnicity, religion, gender identity,
20 sexual orientation, age, or socioeconomic status.

21 You must follow the law as I explain it to you, even if you
22 disagree with it. If you believe that the attorneys' comments
23 on the law conflicts with my instructions, you must follow my
24 instructions.

25 Pay careful attention to all of these instructions and
26 consider them together. If I repeat any instruction or idea, do
27 not conclude that it is more important than any other
28 instruction or idea just because I repeated it.

1 Some words or phrases used during this trial have legal
2 meanings that are different from their meanings in everyday use.
3 These words and phrases will be specifically defined in these
4 instructions. Please be sure to listen carefully and follow the
5 definitions that I give you. Words and phrases not specifically
6 defined in these instructions are to be applied using their
7 ordinary, everyday meanings.

8 Some of these instructions may not apply, depending on your
9 findings about the facts of the case. Do not assume, just
10 because I give you a particular instruction, that I am
11 suggesting anything about the facts. After you have decided
12 what the facts are, follow the instructions that do apply to the
13 facts as you find them.

14 Do not do any research regarding this case on your own or as
15 a group. Do not use a dictionary, the Internet, or other
16 reference materials. Do not investigate the facts or law. Do
17 not conduct any experiments or visit the scene of any event
18 involved in this case. If you happen to pass by the scene, do
19 not stop or investigate.

20 I'm going to go a little off script for a moment to just say
21 when you're in the jury room, please don't use -- cell phones
22 are really now personal computers, very small computers.
23 They're very powerful. Please don't do any research on your
24 cell phones. You know, you may have them on, but just stay off,
25 again, the cell phones for purposes of doing any research in the
26 jury room because you're not permitted to do that. So thank you
27 in advance.

28 You have been given notebooks and may have taken notes

1 during the trial. You may use your notes during deliberations.
2 The notes are for your own individual use to help you remember
3 what happened during the trial. Please keep in mind that your
4 notes may be inaccurate or incomplete. If there is a
5 disagreement about the testimony at trial, you may ask that the
6 court reporter's record be read to you. It is the record that
7 must guide your deliberations, not your notes.

8 You must accept the court reporter's record as accurate.
9 Please do not remove your notes from the jury room. At the end
10 of the trial, your notes will be collected and destroyed.

11 The fact that a criminal charge has been filed against the
12 defendant is not evidence that the charge is true. You must not
13 be biased against the defendant just because he has been
14 arrested, charged with a crime, or brought to trial.

15 A defendant in a criminal case is presumed to be innocent.
16 This presumption requires that the People prove a defendant
17 guilty beyond a reasonable doubt. Whenever I tell you the
18 People must prove something, I mean they must prove it beyond a
19 reasonable doubt.

20 Proof beyond a reasonable doubt is proof that leaves you
21 with an abiding conviction that the charge is true. The
22 evidence need not eliminate all possible doubt because
23 everything in life is open to some possible or imaginary doubt.
24 In deciding whether the People have proved their case beyond a
25 reasonable doubt, you must impartially compare and consider all
26 the evidence that was received throughout the entire trial.

27 Unless the evidence proves the defendant guilty beyond a
28 reasonable doubt, he is entitled to an acquittal, and you must

1 find him not guilty.

2 You must decide what the facts are in this case. You must
3 use only the evidence that was presented in this courtroom.
4 Evidence is the sworn testimony of the witnesses, the exhibits
5 admitted into evidence, and anything else I told you to consider
6 as evidence.

7 Nothing that the attorneys say is evidence. In their
8 opening statements and their closing arguments, the attorneys
9 discussed the case, but their remarks are not evidence. Their
10 questions are not evidence. Only the witnesses' answers are
11 evidence. The attorneys' questions are significant only if they
12 helped you to understand the witnesses' answers. Do not assume
13 that something is true just because one of the attorneys asked a
14 question that suggested it was true.

15 During the trial, the attorneys may have objected to
16 questions or moved to strike answers given by the witnesses. I
17 ruled on the objections according to the law. If I sustained an
18 objection, you must ignore the question. If the witness was not
19 permitted to answer, do not guess at what the witness might
20 have -- what the answer might have been or why I ruled as I did.
21 If I ordered testimony stricken from the record, you must
22 disregard it and must not consider that testimony for any
23 purpose.

24 You must disregard anything you saw or heard when court was
25 not in session, even if it was done by one of the parties or
26 witnesses. The Court has made a record of everything that was
27 said during the trial. If you decide that it is necessary, you
28 may ask the court's record be read to you. You must accept the

1 court's record as accurate.

2 Facts may be proved by direct or circumstantial evidence or
3 a combination of both. Direct evidence can prove a fact by
4 itself. For example, if a witness testifies he saw it raining
5 outside before he came into the courthouse, that testimony is
6 direct evidence that it was raining.

7 Circumstantial evidence may also be called "indirect
8 evidence." Circumstantial evidence does not directly prove the
9 fact to be decided, but it is evidence of another fact or group
10 of facts from which you may logically and reasonably conclude
11 the truth of the fact in question. For example, if a witness
12 testifies that he saw someone coming inside wearing a raincoat
13 covered with drops of water, that testimony is circumstantial
14 evidence because it may support a conclusion that it was raining
15 outside.

16 Both direct and circumstantial evidence are acceptable types
17 of evidence to prove or disprove the elements of a charge,
18 including intent and mental state and acts necessary to a
19 conviction and neither is necessarily more reliable than the
20 other. Neither is entitled to any greater weight than the
21 other. You must decide whether a fact in issue has been proved
22 based on all the evidence.

23 Before you may rely on circumstantial evidence to conclude
24 that a fact necessary to find the defendant guilty has been
25 proved, you must be convinced that the People have proved each
26 fact essential to that conclusion beyond a reasonable doubt.

27 Also, before you may rely on circumstantial evidence to find
28 the defendant guilty, you must be convinced that the only

1 reasonable conclusion supported by the circumstantial evidence
2 is that the defendant is guilty. If you can draw two or more
3 reasonable conclusions --

4 Mr. Adachi? Thank you. Do you need to type?

5 **MR. ADACHI:** I'm just taking some notes, but that's fine.

6 **THE COURT:** Thank you. I'm sorry. I'm having difficulty.

7 If you can draw two or more reasonable conclusions from the
8 circumstantial evidence and one of those reasonable conclusions
9 points to innocence and another to guilt, you must accept the
10 one that points to innocence; however, when considering
11 circumstantial evidence, you must accept only reasonable
12 conclusions and reject any that are unreasonable.

13 You alone must judge the credibility or believability of the
14 witnesses. In deciding whether testimony is true and accurate,
15 use your common sense and experience. You must judge the
16 testimony of each witness by the same standards, setting aside
17 any bias or prejudice you may have.

18 You may believe all, part, or none of any witness's
19 testimony. Consider the testimony of each witness and decide
20 how much of it you believe. In evaluating a witness's
21 testimony, you may consider anything that reasonably tends to
22 prove or disprove the truth or accuracy of that testimony.

23 Among the factors that you may consider are: How well could
24 the witness see, hear, or otherwise perceive the things about
25 which the witness testified? How well was the witness able to
26 remember and describe what happened? What was the witness's
27 behavior while testifying? Did the witness understand the
28 questions and answer them directly? Was the witness's testimony

1 influenced by a factor such as bias or prejudice, a personal
2 relationship with someone involved in the case, or a personal
3 interest in how the case is decided? What was the witness's
4 attitude about the case or about testifying? Did the witness
5 make a statement in the past that is consistent or inconsistent
6 with his testimony? How reasonable is the testimony when you
7 consider all the other evidence in the case?

8 Did other evidence prove or disprove any fact about which
9 the witness testified? Did the witness appear to be untruthful?
10 Do not automatically reject testimony just because of
11 inconsistencies or conflicts. Consider whether the differences
12 are important or not. People sometimes honestly forget things
13 or make mistakes about what they remember. Also, two people may
14 witness the same event, yet see or hear it differently.

15 If you decide that a witness deliberately lied about
16 something significant in this case, you should consider not
17 believing anything that witness says. Or if you think the
18 witness lied about some things but told the truth about others,
19 you may simply accept that part that you think is true and
20 ignore the rest.

21 The crime charged in this case requires the proof of union
22 or joint operation of act and wrongful intent. For you to find
23 a person guilty of the crime in this case, the person must not
24 only commit the prohibited act, but do so with wrongful intent.
25 A person acts with wrongful intent when he or she intentionally
26 does a prohibited act; however, it's not required that he or she
27 intend to break the law. The act required is explained in the
28 instruction for that crime or allegation.

1 Neither side is required to call all witnesses who may have
2 information about the case or to produce all physical evidence
3 that might be relevant. The testimony of only one witness can
4 prove any fact. Before you conclude that the testimony of one
5 witness proves a fact, you should carefully review all of the
6 evidence.

7 If you determine there's a conflict in the evidence, you
8 must decide what evidence, if any, to believe. Do not simply
9 count the number of witnesses who agree or disagree on a point
10 and accept the testimony of the greater number of witnesses. On
11 the other hand, do not disregard the testimony of any witness
12 without a reason or because of prejudice or a desire to favor
13 one side or the other. What is important is whether the
14 testimony, or any other evidence convinces you, not just the
15 number of witnesses who testify on a certain point.

16 You have heard evidence of statements that a witness made
17 before trial. If you decide that the witness made those
18 statements, you may use those statements in two ways: One, to
19 evaluate whether a witness's testimony in court is believable;
20 and, two, as evidence that the information in those earlier
21 statements is true.

22 Witnesses were allowed to testify as experts and to give
23 opinions. You must consider the opinions, but you are not
24 required to accept them as true or accurate. The meaning and
25 importance of any opinion are for you to decide. In evaluating
26 the believability of an expert witness, follow the instructions
27 about the believability of witnesses generally.

28 In addition, consider the expert's knowledge, skill,

1 experience, training and education, the reasons the expert gave
2 for any opinion, and the facts or information on which the
3 expert relied in reaching that opinion. You must decide whether
4 information on which the expert relied was true and accurate.
5 You may disregard any opinion that you find unbelievable,
6 unreasonable, or unsupported by the evidence.

7 An expert witness may be asked a hypothetical question. A
8 hypothetical question asks the witness to assume certain facts
9 are true and give an opinion based on the assumed facts. It is
10 up to you to decide whether an assumed fact has been proved. If
11 you conclude that an assumed fact is not true, consider the
12 effect of the expert's reliance on that fact in evaluating the
13 expert's opinion.

14 Witnesses who were not testifying as experts gave their
15 opinions during the time. You may, but are not required to
16 accept those opinions as true or accurate.

17 You may give the opinions whatever weight you think
18 appropriate. Consider the extent of each witness's opportunity
19 to perceive the matters on which his opinion is based; the
20 reasons the witnesses gave for any opinion; and the facts or
21 information on which each witness relied in forming that
22 opinion. You must decide whether information on which each
23 witness relied was true and accurate. You may disregard all, or
24 any part of an opinion that you find unbelievable, unreasonable,
25 or unsupported by the evidence.

26 You have heard evidence that the defendant made an oral or
27 written statement before trial. You must decide whether the
28 defendant made any such statement in whole or in part. If you

1 decide that the defendant made such a statement, consider the
2 statement along with all the other evidence in reaching your
3 verdict. It is up to you to decide how much importance to give
4 the statement. Consider with caution any statement made by the
5 defendant tending to show his guilt, unless the statement was
6 written or otherwise recorded.

7 The defendant may not be convicted of any crime based on his
8 out-of-court statements alone. You may only rely on the
9 defendant's out-of-court statements to convict him if you
10 conclude that other evidence shows that the charged crime was
11 committed. The other evidence may be slight and need only be
12 enough to support a reasonable inference that a crime was
13 committed.

14 The identity of the person who committed the crime may be
15 proved by the defendant's statements alone. You may not convict
16 the defendant unless the People have proved his guilt beyond a
17 reasonable doubt. If you find the defendant failed in his
18 testimony to explain or deny evidence against him and if he
19 could reasonably be expected to have done so based on what he
20 knew, you may consider his failure to explain or deny in
21 evaluating that evidence. Any such failure is not enough by
22 itself to prove guilt. The People must still prove the
23 defendant guilty beyond a reasonable doubt.

24 If the defendant failed to explain or deny, it is up to you
25 to decide the meaning and importance of that failure. The
26 People are not required to prove the defendant had a motive to
27 commit any of the crimes charged. In reaching your verdict, you
28 may, however, consider whether the defendant had a motive.

1 Having a motive may be a factor tending to show that the
2 defendant is guilty. Not having a motive may be a factor
3 tending to show that the defendant is not guilty.

4 The defendant is charged in Counts 1 through 6 with battery
5 against a peace officer in violation of Penal Code Section 243.
6 To prove that the defendant is guilty of this crime, the People
7 must prove that: One, the named officer was a peace officer
8 performing the duties of a BART police officer; two, the
9 defendant willfully touched the named officer in a harmful or
10 offensive manner; three, when the defendant acted, he knew or
11 reasonably should have known that the named officer was a peace
12 officer who was performing his or her duties; and, four, the
13 defendant did not act in self-defense or in the defense of
14 someone else.

15 Someone commits an act willfully when he or she does it
16 willingly or on purpose. It does not require that he or she
17 intend to break the law, hurt someone else, or gain any
18 advantage. The slightest touching can be enough to commit a
19 battery if it is done in a rude or angry way. Making contact
20 with another person, including through his or her clothing, is
21 enough. The touching does not have to cause pain or injury of
22 any kind.

23 A touching can be done indirectly by causing an object to
24 touch the other person. A person who is employed as a police
25 officer by BART Police Department is a peace officer.

26 The defendant is charged in Counts 1 through 6 with battery
27 upon a peace officer in violation of Penal Code Section 243(b).
28 Battery in violation of Penal Code Section 242 is a lesser

1 included offense of these charges. To prove the defendant
2 guilty of this crime, the People must prove that: One, the
3 defendant willfully and unlawfully touched someone in a harmful
4 or offensive manner; and, two, the defendant did not act in
5 self-defense or in the defense of someone else.

6 Someone commits an act willfully when he or she does it
7 willingly or on purpose. It is not required that he or she
8 intend to break the law, hurt someone else, or gain any
9 advantage. The slightest touching can be enough to commit a
10 battery if it is done in a rude or angry way. Making contact
11 with another person, including through his or her clothing, is
12 enough.

13 The touching does not have to cause pain or injury of any
14 kind. The touching can be done indirectly by causing an object
15 to touch the other person. Words alone, no matter how offensive
16 or exasperating, are not an excuse for this crime.

17 The defendant is charged in Counts 1 through 6 with battery
18 upon a peace officer in violation of Penal Code Section
19 243(b) --

20 **MR. ADACHI:** I'm sorry. Was the Court going to reserve this
21 until after lunch?

22 **THE COURT:** I wasn't. Are you going to provide the Court
23 with a case?

24 **MR. ADACHI:** Yes.

25 **THE COURT:** Will you provide it by 12:15?

26 **MR. ADACHI:** Yes.

27 **THE COURT:** Thank you.

28 The defendant is charged in Count 7 with resisting or

1 obstructing or delaying a peace officer in the performance or
2 attempted performance of his or her duties in violation of Penal
3 Code Section 1488. To prove that the defendant is guilty of
4 this crime, the People must prove that: One, the named officers
5 were peace officers lawfully performing or attempting to perform
6 their duties as peace officers; two, the defendant willfully
7 resisted or obstructed or delayed the named officers in the
8 performance or attempted performance of those duties; and,
9 three, when the defendant acted, he knew, or reasonably should
10 have known that the named officers were peace officers
11 performing or attempting to perform their duties.

12 Someone commits an act willfully when he or she does it
13 willingly or on purpose. It is not required that he or she
14 intend to break the law, hurt someone else, or gain any
15 advantage. A person who is employed as a peace officer by the
16 BART Police Department is a peace officer. A peace officer is
17 not lawfully performing his or her duties if he or she is using
18 unreasonable or excessive force in his or her duties.

19 Instruction 2670 explains when force is unreasonable or
20 excessive. The People allege that the defendant resisted or
21 obstructed or delayed Officer Trabanino, Officer Velasquez,
22 Officer Chung, and Officer Turner. You may not find the
23 defendant guilty unless you all agree that the People have proof
24 that the defendant committed at least one of the alleged acts of
25 resisting or obstructing or delaying a peace officer who was
26 lawfully performing his or her duties, and you all agree on
27 which act he committed.

28 The People have the burden of proving beyond a reasonable

1 doubt that Officers Trabanino, Velasquez, Chung, and Turner were
2 lawfully performing their duties as peace officers. If the
3 People have not met this burden, you must find the defendant not
4 guilty of battery upon a peace officer and resisting a peace
5 officer. A peace officer is not lawfully performing his or her
6 duties if he or she is using unreasonable or excessive force
7 when making or attempting to make an otherwise lawful arrest or
8 detention.

9 A peace officer may legally detain someone if the person
10 consents to the detention or if: One, specific facts known or
11 apparent to the officer lead him or her to suspect that the
12 person to be detained has been, is, or is about to be involved
13 in activity related to crime; and, two, a reasonable officer,
14 who knew the same facts, would have the same suspicion. Any
15 other detention is unlawful.

16 In deciding whether the detention was lawful, consider
17 evidence of the officer's training and experience and all the
18 circumstances known by the officer when he or she detained the
19 person. A peace officer may legally arrest someone if he or she
20 has probable cause to make the arrest. Any other arrest is
21 unlawful.

22 Probable cause exists when the facts known to the arresting
23 officer at the time of the arrest would persuade someone of
24 reasonable caution that the person to be arrested has committed
25 a crime. When deciding whether the arrest was lawful, consider
26 evidence of the officer's training and experience and all
27 circumstances known by the officer when he or she arrested the
28 person.

1 In order for an officer to lawfully arrest someone without a
2 warrant for a misdemeanor or infraction, the officer must have
3 probable cause to believe that the person to be arrested
4 committed a misdemeanor or infraction in the officer's presence.
5 In order for an officer to lawfully arrest someone for a felony
6 without a warrant, the officer must have probable cause to
7 believe that the person to be arrested committed a felony.
8 However, it is not required that the offense be committed in the
9 officer's presence.

10 Attempted robbery is a felony. Resisting arrest is a
11 misdemeanor. Battery on a peace officer is a misdemeanor.

12 The officer must tell the person that the officer intends to
13 arrest him or her, why the arrest is being made, and the
14 authority for the arrest. The officer does not have to tell the
15 arrested person these things if the officer has probable cause
16 to believe that the person is committing or attempting to commit
17 a crime, is fleeing immediately after having committed a crime,
18 or has escaped from custody. The officer must also tell the
19 arrested person the offense for which he or she is being
20 arrested if he or she asked for that information.

21 Special rules control use of force. A peace officer may use
22 reasonable force to arrest or detain someone, to prevent escape,
23 to overcome resistance, or in self-defense. If a person knows
24 or reasonably should know that a peace officer is arresting or
25 detaining him or her, that person must not use force or any
26 weapon to resist an officer's use of reasonable force; however,
27 you may not find the defendant guilty of resisting arrest if the
28 arrest was unlawful, even if the defendant knew or reasonably

1 should have known that the officer was arresting him.

2 If a peace officer uses unreasonable or excessive force
3 while detaining or attempting to detain a person, that person
4 may lawfully use reasonable force to defend him or herself. A
5 person being arrested uses reasonable force when he or she:
6 One, uses that degree of force that he or she actually believes
7 is reasonably necessary to protect himself or herself in the
8 officer's use of reasonable [sic] or excessive force; and, two,
9 uses no more force than a reasonable person in the same
10 situation would believe is necessary for his or her protection.

11 Force is not excessive if it is reasonably necessary under
12 the circumstances to detain. In deciding whether force is
13 reasonably necessary or excessive, you should determine what
14 forces -- what force a reasonable law enforcement officer on the
15 scene would have used under the same or similar circumstances.
16 You may consider the following among other factors: A, whether
17 the defendant reasonably appeared to pose an immediate threat to
18 the safety of the officers or others; B, the seriousness of the
19 crime at issue; and, C, whether the defendant was actively
20 resisting detention.

21 Defendant's belief about whether the officer was or was not
22 acting lawfully is irrelevant. The question of whether the
23 officer's conduct was lawful is an objective one.

24 The defendant is not guilty of the crime of battery against
25 a peace officer if the officer was not lawfully performing his
26 or her duties because he or she was unlawfully arresting
27 someone. However, even if the arrest was unlawful, as long as
28 the officer used only reasonable force to accomplish the arrest,

1 the defendant may be guilty of the lesser crime of battery.

2 On the other hand, if the officer used unreasonable or
3 excessive force and the defendant only used reasonable force in
4 self-defense or defense of another, then the defendant is not
5 guilty of the lesser crime of battery.

6 The People have the burden of proving beyond a reasonable
7 doubt that the officer was lawfully performing his or her
8 duties. If the People have not met this burden, you must find
9 the defendant not guilty of battery upon a peace officer or
10 resisting a peace officer.

11 The defendant is not guilty of battery upon a peace officer
12 as charged in Counts 3, 4, and 5, if he acted without the intent
13 required for that crime, but instead acted accidentally. You
14 may not find the defendant guilty of battery upon a peace
15 officer as charged in Counts 3, 4, and 5, unless you are
16 convinced, beyond a reasonable doubt, that he acted with the
17 required intent.

18 Self-defense is a defense to the charges in Counts 1 through
19 6, battery upon a peace officer. The defendant is not guilty of
20 those crimes if he used force against the other person in lawful
21 self-defense or defense of another.

22 The defendant acted in lawful self-defense if: One, the
23 defendant reasonably believed that he or someone else was in
24 imminent danger of suffering bodily injury or was in imminent
25 danger of being touched unlawfully; two, the defendant
26 reasonably believed that the immediate use of force was
27 necessary to defend against that danger; and, three, the
28 defendant used no more force than was reasonably necessary to

1 defend against that danger.

2 Belief in future harm is not sufficient no matter how great
3 or how likely the harm is believed to be. The defendant must
4 have believed there was imminent danger of bodily injury to
5 himself or someone else, or an imminent danger that he, or
6 someone else would be touched unlawfully. The defendant's
7 belief must have been reasonable, and he must have acted because
8 of that belief.

9 The defendant is only entitled to use that amount of force
10 that a reasonable person would believe is necessary in the same
11 situation. If the defendant used more force than was
12 reasonable, the defendant did not act in lawful self-defense.

13 When deciding whether the defendant's beliefs were
14 reasonable, consider all the circumstances, as they were known
15 to and appeared to the defendant, and consider what a reasonable
16 person in a similar situation with similar knowledge would have
17 believed.

18 If the defendant's beliefs were reasonable, the danger does
19 not need to have actually existed. The slightest touching can
20 be unlawful if it is done in a rude or angry way. Making
21 contact with another person, including through his or her
22 clothing is enough. The touching does not have to cause pain or
23 injury of any kind.

24 The People have the burden of proving beyond a reasonable
25 doubt that the defendant did not act in lawful self-defense. If
26 the People have not met this burden, you must find the defendant
27 not guilty of Counts 1 through 6, battery upon a peace officer.

28 A person does not have the right to self-defense if he or

1 she provokes a fight or quarrel with the intent to create an
2 excuse to use force.

3 The defendant is charged with resisting a peace officer in
4 Count 7. The People have presented evidence of more than one
5 act to prove the defendant committed this offense.

6 You must not find the defendant guilty unless all of you
7 agree that the People have proved that the defendant committed
8 at least one of those acts, and you all agree on which act he
9 committed.

10 Each of the counts charged in this case is a separate crime.
11 You must consider each count separately and return a separate
12 verdict for each one.

13 Okay. So I believe because we have the one instruction that
14 you're going to send me the case on, Mr. Adachi, we'll turn to
15 the People.

16 Mr. Reinstedt, your closing, please.

17 **MR. REINSTEDT:** Thank you.

18 **PEOPLE'S CLOSING ARGUMENT**

19 **MR. REINSTEDT:** I started off this case talking with all of
20 you about the concept of duty. And that concept is at the heart
21 of what this case is about.

22 Police officers have a duty to respond when they get a call
23 of distress. When they get report of a crime. They don't have
24 a choice about that. It's part of their job. It's part of what
25 they sign up for.

26 In this case, officers received a report of an armed
27 robbery happening on the BART train. They were told that the
28 defendant had a gun. They didn't have a choice about responding

1 to that incident.

2 In most other walks of life, people have a choice about when
3 they deal with things that exceed the bounds of the law. They
4 can choose to call the police as their backup. If you're a
5 teacher in a classroom and a high school student were to go
6 crazy in a classroom and you needed backup, you could always
7 call the police to come in.

8 The police don't have backup that they can call. It's
9 their duty to deal with situations as they find them. And here,
10 they had the duty to deal with the situation of an armed robbery
11 reported, and a man with a gun.

12 And there's a corresponding duty, and that is the duty
13 of civilians to cooperate with police officers. They have a
14 duty to follow lawful commands given by police officers. To not
15 resist police officers.

16 And police officers are, in fact, authorized to use force as
17 part of their duty to effect arrests because they're going into
18 situations that are dangerous not only to themselves, but to
19 civilians and people that are around them.

20 In this case, they were dealing with a situation that was on
21 a crowded BART platform with civilians all around. They were
22 told that there was a serious felony that was in the midst of
23 commission on the train as it pulled into the platform. And
24 they were told that there was a gun that was involved.

25 Under those circumstances, the officers had a duty to act as
26 they did to protect people that were on the BART platform,
27 people that were on the train, and themselves from that
28 situation.

1 The defendant also had a duty to cooperate with them,
2 something he didn't do from the very beginning.

3 Now, from the context, the information the officers were
4 given --

5 (The CD was played.)

6 **MR. REINSTEDT:** That was the information that the officers
7 were responding to. And you've heard numerous dispatch calls.
8 But this was the call that came through telling them: We
9 re-reviewed the call. Here's the real information that we have.
10 A very specific description of the defendant, and the fact that
11 it involved a gun. And they already knew that it was an
12 attempted robbery, a very serious felony.

13 **MR. ADACHI:** I'm going to object. That misstates the
14 evidence with respect to any evidence of a gun.

15 **THE COURT:** Overruled.

16 **MR. REINSTEDT:** So there are seven charges in this case.
17 The first six of them are for battery upon a peace officer, and
18 I'm going to walk you through what each of those particular acts
19 was. The seventh one is for resisting arrest.

20 I'm actually going to start by talking about the seventh one
21 because it's actually the most straightforward of all of them.

22 Count 7 is for resisting arrest. Now, there are three
23 elements that the judge just read to you about resisting arrest.
24 I'm going to talk about Elements 1 and 3 first, and then
25 Element 2. The reason I'm doing that is because Elements 1
26 and 3 are very straightforward in this circumstance.

27 The officers were peace officers lawfully performing, or
28 attempting to perform their duty as peace officers. They had a

1 duty to respond to this call. Their dispatch told them what was
2 happening, they had to go and deal with it.

3 And the defendant knew or should have known that the
4 officers were peace officers performing, or attempting to
5 perform their duties.

6 The defendant knew that he was confronted by police officers
7 when he got off the train. Every single witness that we've
8 heard from was immediately aware that these were police officers
9 performing their duties.

10 They were in uniform, in bright yellow letters with the word
11 "Police" stitched across their backs, every insignia of their
12 office on those uniforms. Not really in dispute is that the
13 defendants both knew and should have known that these were
14 police officers that he was dealing with.

15 Now, Element 2 is that the defendant willfully resisted or
16 obstructed or delayed -- in the disjunctive, any of those
17 things -- the officers in the performance or attempted
18 performance of those duties.

19 There's a very basic question you ask here. Was the
20 defendant cooperative? Was he going along with what the
21 officers were asking him to do? We know that he wasn't.

22 We actually have an interesting case study here in one
23 person being cooperative, following the lawful orders of the
24 police, and what happened to her.

25 And we have the stark contrast of someone who, from the very
26 beginning, did not follow the orders of the police, physically
27 resisted them at every turn, and chose to try and fight them, to
28 use force against them, and not cooperate. And we see the stark

1 contrast of what happened under both of those circumstances.

2 And the very fact that there is such a contrast is clear
3 evidence of the fact that the defendant was, in fact, resisting.

4 What are the specific acts that the defendant did that were
5 resistive of the officers? There is a host of them.

6 From the very beginning, he was ordered to get down on the
7 ground, get down on the ground, get down on the ground, get down
8 on the ground, over and over and over again the officers
9 repeated it to him. He did not follow that instruction. That
10 was a lawful order for them to give.

11 We also know that Officer Velasquez came up behind the
12 defendant and placed his hands on his arms, and it is the
13 defendant's own testimony, in support of what Officer Velasquez
14 had to say, that he tensed his arms. He strained against it. I
15 showed him the video of that portion, and the defendant said,
16 "Oh, yeah, I see it. I see that I was actually straining
17 against him there." He physically resisted from the very first
18 contact with the officers.

19 That continued on during the course of the handcuffing. The
20 officers struggled to be able to get the handcuffs on him
21 because he was pulling away, because he was grabbing the hand of
22 Officer Turner. And though they told him to relax and stop
23 grabbing their hands, he also didn't follow those orders.

24 He twisted his legs and body from under the officers. You
25 can see in the video when he tries to twist away. Officer Chung
26 actually almost topples over the top. He bit Officer Turner.
27 He refused lawful orders to turn on his side when the officers
28 needed to search the front of his waistband to see if he might

1 still have a gun in that location. He said, "I'm not turning
2 nowhere. I'm not turning nowhere" twice, and then he physically
3 tried not to turn with them.

4 He kicked Officer Chung. Officer Chung had his hand on him,
5 and he gouged with his fingernail into Officer Chung's finger.
6 He spit in Officer Velasquez's face. You can see in the video
7 there are multiple times, as the officers try and lift him up to
8 get him off the platform, he goes limp, causing them to have to
9 actually have to physically lift him up.

10 Kicks Officer Chung again as they're going off the platform
11 and spits on Officer Velasquez in the patrol car. Any single
12 one of these things -- his resisting or obstructing or delaying
13 the officers -- it's not cooperative. And basic questioning.
14 In this instance, was he cooperating? And the answer for all of
15 those is no. It's overwhelming that he wasn't cooperative. In
16 fact, you know that in part because we had defense testimony
17 about it.

18 The very final question that Dr. Gottlieb was asked was:
19 Who used force here? Her answer? Both parties. The defendant,
20 in fact, was struggling against the officers. He was using
21 force against them, too. And the defendant's own testimony:
22 Did you resist? At one point, yes. I was angry so at one point
23 I did resist. I was, like, "What the fuck?"

24 The defendant admits to the fact that he was resistive
25 against the officers; that he was not cooperating with them;
26 that he was combative. This count is very clear.

27 Now, the remaining six counts are all batteries against a
28 peace officer. And as the judge just instructed you, a couple

1 of things to keep in mind from the get-go. A battery does not
2 require actual injury. Though some of the officers here
3 actually did sustain some injuries, it does not require that
4 anyone is actually injured. Nor does it require that there be
5 any harmful intent to consider. As long as the act is done
6 purposefully, that's what matters.

7 In fact, the instructions tell you that any angry or rude
8 act is sufficient to constitute battery.

9 So what are the particular elements? The first one: That
10 the officer involved was a peace officer, performing the duties
11 of being a peace officer.

12 We talked about this one with resisting arrest. These were
13 BART police officers responding to a 911 call, as they had a
14 duty to do. That fact is undisputed.

15 Second element: Defendant willfully and unlawfully touched
16 an officer in a harmful or offensive manner. So what are the
17 six different charges here? What are the acts that constitute
18 each of those unlawful touchings?

19 The first one is biting Officer Turner. I'm going to go
20 through the evidence on each of these one by one, but I want to
21 give you a list upfront of what the six are.

22 Two and three are when he lashes out kicking at Officer
23 Chung.

24 Four is when he uses his fingernail to gouge into
25 Officer Chung's hand when he's holding his wrist. You saw the
26 photographs that -- the injury that resulted to Officer Chung
27 from that.

28 And five and six are the two instances of him spitting on

1 Officer Velasquez.

2 Now, on Friday, when the defendant testified, he actually
3 testified that he did both of those on purpose. His testimony
4 earlier today was slightly different -- and we will talk about
5 some of the inconsistencies in his testimony -- but he admitted
6 very clearly on Friday he spit on the officers purposefully.
7 And that's well borne out as the video evidence shows as well.

8 The third element: When the defendant acted he knew, or
9 reasonably should have known that the officer was a peace
10 officer who was performing his or her duties.

11 As we talked about with resisting arrest, the defendant
12 clearly knew that he was dealing with police officers during the
13 course of this entire incident. Not disputed.

14 And finally, that the defendant did not act in self-defense
15 or in defense of someone else. And I'm going to address this
16 element a little bit later.

17 So now, to go through the evidence of the six specific
18 instances of battery, I want to talk about each one, one by one,
19 give you little clips. You've seen a bunch of the video
20 already, but I'm going to show you a few little clips and point
21 you to the specific parts that you can review when you're in the
22 jury room to show that there is, in fact, proof of every single
23 one of these.

24 So the first one: Biting on Officer Turner. I'm going to
25 show you a small piece of a clip here. This is from Officer
26 Velasquez's body camera.

27 (The video was played.)

28 **MR. REINSTEDT:** You can see the defendant's head turn, move

1 directly to Officer Turner before he gets pulled back.

2 I'll play it one more time for you.

3 (The video was played.)

4 **MR. REINSTEDT:** Now, as you may recall, this particular clip
5 of the video, I went through frame by frame with the defendant.
6 And here's one particular frame that I froze for you.

7 You can see he's turned his face all the way to Officer
8 Turner. As he, himself, testified when I showed him this
9 section of the video, he moved his head towards her. His face
10 made contact with her.

11 And then, we can actually see the sliver, right there, of
12 white -- of the concrete showing through from when he is opening
13 and closing his mouth.

14 There's little doubt that as he turns his head, he's making
15 biting motions, and you can see the concrete when his mouth
16 opens.

17 Now, here's another angle of the same scene. This is from
18 Officer -- I'm sorry -- this is from one of the cell phone
19 videos. And it shows first the defendant with his head turned
20 to the left, and then he turns it to the right and moves it
21 directly to Officer Turner. I'll play this clip for you as
22 well.

23 (The video was played.)

24 **MR. REINSTEDT:** You can see him torque his body as he moves
25 his head towards her before he's pulled off. Officer Turner
26 ended up with a small abrasion on her hand as a result of this,
27 and it's a still frame from her looking at her own hand.

28 Now, I wanted to encourage you to be able to go back frame

1 by frame. From Officer Velasquez's body camera, it shows you
2 the best view of being able to actually see the defendant turn
3 his head, move it into Officer Turner's body, and open and close
4 his mouth. It's the section from 3 minutes and 30 seconds, and
5 in Officer Velasquez's body camera says 3 minutes and
6 36 seconds.

7 Now, you probably saw me do it -- and some of you may be
8 much more technically savvy than I am anyways -- but the way you
9 do it, you right click on the video, you go into a section that
10 allows you to see the playback speed change, and then that
11 allows you to click frame by frame through the video to see
12 what's happening.

13 The defendant's own statements, when I played that portion
14 of the video, he admitted that he turned his head, moved his
15 face until it touched Officer Turner. And was, in fact, opening
16 his mouth, but just claims that he wasn't biting.

17 By contrast, we have direct testimony from both Officer
18 Turner and Officer Velasquez that they watched this happen.
19 They watched him bite. Now, because of the way that the angles
20 of the body camera are, there is, unfortunately, not a perfect
21 frame of it. The best is from Officer Velasquez's body camera
22 that I just described to you. But the testimony of both of
23 those officers was unequivocal. They watched the defendant bite
24 Officer Turner.

25 We also know that their immediate reaction in the moment --
26 this is not something they thought of later -- was to say, "Stop
27 biting me. Stop biting. He's biting." Clear evidence that
28 that is what they were seeing; that that is what they were

1 reacting to in that very moment.

2 And, in fact, Officer Turner went through extensive
3 follow-up. She went to the hospital. She got a tetanus shot.
4 She got antibiotics prescribed to her. She didn't take them,
5 but that is clear evidence of the fact that Officer Turner had a
6 true belief that she had been bitten and went through the
7 follow-up required in order to deal with that, including getting
8 a tetanus shot.

9 Second and third batteries. These are the two batteries of
10 the kicks on Officer Chung. Before I talk about and show you
11 the video of what exactly happened with these kicks -- and I
12 know you've seen some of it before -- I want to highlight some
13 of the inconsistencies in the defendant's testimony about this
14 portion.

15 He seemed as though he couldn't quite make up his mind
16 between what he was going to say about this action; that is,
17 whether it was an involuntary reflex of his legs because of the
18 figure-four leg lock. In fact, that was Counsel's argument or
19 opening statement was that because his legs had been bent, when
20 they became unbent, he had no control, and they just went out
21 straight.

22 He also equivocated about whether, oh, well, maybe my leg
23 extended because Officer Chung grabbed it and pulled it out.
24 And finally, there was one point on Friday when the defendant
25 seemed to be saying that, well, maybe this was a somewhat
26 defensive action on my part.

27 What the video evidence shows and what is very clear -- and
28 again, the frame by frame very much helps with the kicking -- is

1 that this was a purposeful action. As the officers turned him
2 to his side and he said, "I'm not turning nowhere. I'm not
3 turning nowhere," he was angry. He was pissed. That was his
4 own testimony. And he lashed out. He kicked at the officer
5 when this happened. This was probably the most egregious of the
6 assaultive behavior on the part of the defendant, but let's look
7 a little bit at what happened.

8 Here's from Officer Chung's body camera. He's the one who
9 actually got kicked. They're trying to turn the defendant to
10 his side. He tells them he's not turning anywhere. They're
11 trying to move him. He's struggling with them.

12 (The video was played.)

13 **MR. REINSTEDT:** And then he turns, his leg is free. He
14 kicks directly into the body camera that Officer Chung is
15 wearing.

16 We also can see it from the Hampton video, one of the cell
17 phone videos that you saw a little bit earlier today. At first,
18 she's looking in another direction. When she turns back is when
19 the kicks happen. As you can see, Officer Chung is actually
20 physically kicked backwards as a result of the defendant lashing
21 out at him.

22 Officer Turner's body camera also provides us an angle to be
23 able to see him kicking out twice at Officer Chung.

24 Now, the defense claim is unclear --

25 **THE COURT:** Is now a good time for a break? We've gone over
26 a little bit.

27 **MR. REINSTEDT:** Sure.

28 **THE COURT:** Okay. So, ladies and gentlemen, we're going to

1 take our lunch break. We'll be back at 1:30. Remember the
2 admonition. Don't talk about the case amongst yourselves or
3 with anyone else. Don't do any research. No social networking.
4 We'll see you back here at 1:30.

5 (Jurors excused at 12:03 P.M.)

6 **THE COURT:** All right. Thank you.

7 So what's the case, please, Mr. Adachi, that I need to look
8 at over the noon hour for the simple assault?

9 **MR. ADACHI:** Pardon?

10 **THE COURT:** The case I need to look at for simple assault as
11 to whether it's a lesser?

12 **MR. ADACHI:** I have to do the research. The Court told me
13 to stop typing. I was looking at it earlier.

14 **THE COURT:** I need it by 12:15 so I can look at it.

15 **MR. ADACHI:** Okay.

16 **THE COURT:** Okay? Could you please -- well, actually --

17 **MR. ADACHI:** Why don't I give it to --

18 **THE COURT:** Can you do it here, and I'll just wait for it so
19 I can let the staff go and you can provide it?

20 **MR. ADACHI:** Sure.

21 **THE COURT:** Okay. Thank you.

22 (Lunch recess taken from 12:04 P.M. to 1:26 P.M.)

23 **THE COURT:** So we're on the record a little early in the
24 matter of People versus Smith. Counsel are present. Mr. Smith
25 is not here, but may we proceed without him?

26 **MR. ADACHI:** Yes.

27 **THE COURT:** Thank you. All right.

28 As to the instruction on simple assault, Mr. Adachi, you

1 just said off the record, but to summarize, that your office has
2 been unable to find a case that says that simple assault should
3 not be given in this context; is that correct?

4 **MR. ADACHI:** That's correct.

5 **THE COURT:** Okay. Thank you. The Court's gone over, again,
6 the CALCRIM instructions, and if you look at the 243
7 instruction, it does have assault as a lesser included offense.
8 There's also People versus Jones, People versus Hood.

9 And what the Court's concerned about is instructional error.
10 And since the Court does not have any case that says the Court
11 should not give it, and given CALCRIM and the obligations of the
12 Court and the request by the People for the instruction, I will
13 give the instruction.

14 You can always argue it doesn't apply at all, Mr. Adachi,
15 given the facts of the case. I'm not sure how you want to argue
16 it, but you can argue that. But I am going to give it.

17 I've modified the language as well to include in the top
18 that assault in violation of Penal Code Section 240 is a lesser
19 included offense of simple battery, the lesser included offense
20 of battery on a peace officer. I made that change.

21 And then Element Number 4 was missing. "When the defendant
22 acted, he had the present ability to apply force to a person."

23 Was there a reason that was omitted, Mr. Reinstedt?

24 **MR. REINSTEDEDT:** No.

25 **THE COURT:** Okay. So I added that back in with my pen. If
26 counsel wants to look at the changes?

27 **MR. ADACHI:** Sure.

28 **THE COURT:** Then I will give you that.

1 And then 3517 was the other one that I didn't give yet
2 because of the issue on the simple assault; so we will have
3 that. Okay.

4 And I will give a gentle reminder. Mr. Reinstedt, how much
5 of the hour and 20 minutes do you think you're going to be
6 using?

7 **MR. REINSTEDT:** I would guess -- my intent is to leave
8 myself a half an hour at the end, between half an hour and 20
9 minutes. If you could let me know when 15 is?

10 **THE COURT:** Okay. So you've used 20 minutes this morning.
11 Agreed?

12 **MR. REINSTEDT:** Sure.

13 **THE COURT:** Okay. So that means that -- so at what point do
14 you want me to give you a five-minute warning?

15 **MR. REINSTEDT:** If you could let me know at 2:00 o'clock.

16 **THE COURT:** 2:00 o'clock. I will let you know.

17 **MR. ADACHI:** And if you could do the same for me?

18 **THE COURT:** Absolutely. But I don't know when you're
19 starting. But your time is going to be an hour and 20 minutes;
20 right, Mr. Adachi?

21 **MR. ADACHI:** Exactly. If you give me a five-minute warning.

22 **THE COURT:** Five-minute warning? Absolutely. I will do
23 that.

24 **MR. ADACHI:** Thank you.

25 **THE COURT:** And then before, at today's end, if both counsel
26 could look at the verdict forms and approve those, please, that
27 would be good.

28 And, Mr. Adachi, is your client planning to be here?

1 **MR. ADACHI:** He's in the restroom.

2 **THE COURT:** Okay. Well, we can wait for him, then.

3 (Off the record from 1:30 P.M. to 1:32 P.M.)

4 **THE COURT:** We're back on the record.

5 Mr. Adachi is here. His client is here.

6 On Item 2, it says: "The defendant willfully touched,"
7 CALCRIM has a bracket, and "unlawfully." I don't know if that
8 was -- Mr. Adachi, are you asking for that because your theory
9 goes back and forth. And I just want to make sure if you want
10 it, it's covered.

11 **MR. ADACHI:** This is on --

12 **THE COURT:** Battery against a police officer, Element 2
13 says: The defendant willfully, bracket, and unlawfully
14 touched --

15 **MR. ADACHI:** Yes.

16 **THE COURT:** You want the "unlawfully"?

17 **MR. ADACHI:** Yes.

18 **THE COURT:** Okay. You need to make that -- okay. So I'm
19 going to go back -- have you reviewed all the instructions to
20 make sure all the brackets are there? Because my concern is --
21 I want to make sure that if you want something, you need to tell
22 me that you do. So if we could maybe, before we send the packet
23 back, look at it?

24 **MR. ADACHI:** Okay.

25 **THE COURT:** Okay. So I'll read that one again, too. Is it
26 okay if I just read Element 2 again rather than the whole
27 instruction?

28 **MR. ADACHI:** Yeah.

1 **MR. REINSTEDT:** That's fine with me.

2 **THE COURT:** Okay. Thank you. Anything else before we bring
3 the jury in?

4 **MR. ADACHI:** Nope.

5 **THE COURT:** No? Okay. So I'm going to read the assault
6 instruction. I'm going to do this, and then the assault
7 instruction so both of you can argue. Yes?

8 **MR. ADACHI:** Sure.

9 **THE COURT:** Okay. Thank you.

10 (Jurors enter courtroom at 1:34 P.M.)

11 **THE COURT:** Okay. Thank you. We have our ladies and
12 gentlemen of the jury who are back.

13 So, ladies and gentlemen, I'm going to go back and read --
14 there was an instruction that counsel and I had to talk about
15 over the lunch hour; so I'm going to read that, and then I'm
16 going to read additional language in Element 2 of the battery
17 against a peace officer.

18 Battery against a peace officer, Element 2, the People must
19 prove that the defendant willfully and unlawfully touched the
20 named officer in a harmful and offensive manner -- or offensive
21 manner. I'm sorry.

22 And I will read to you the simple assault instruction. The
23 defendant is charged in Counts 1 through 6 with battery upon a
24 peace officer in violation of Penal Code Section 243(b).
25 Assault in violation of Penal Code Section 240 is a lesser
26 included offense of simple battery, the lesser included offense
27 of battery on a peace officer. To prove that the defendant is
28 guilty of this crime, the People must prove that: One, the

1 defendant did an act that, by its nature, would directly and
2 probably result in the application of force to a person; two,
3 the defendant did that act willfully; three, when the defendant
4 acted, he was aware of the facts that would lead a reasonable
5 person to realize that his act, by its nature, would directly
6 and probably result in the application of force to someone;
7 four, when the defendant acted, he had the present ability to
8 apply force to a person; and, five, the defendant did not act in
9 self-defense or in defense of someone else.

10 Someone commits an act willfully when he or she does it
11 willingly or on purpose. It is not required that he or she
12 intend to break the law, hurt someone else, or gain any
13 advantage. The terms "application of force," "by force," mean
14 to touch or make harmful or offensive manner. The slightest
15 touching can be enough if it is done in a rude or angry way.
16 Making contact with another person, including through his or her
17 clothing is enough.

18 The touching does not have to cause pain or injury of any
19 kind. The touching can be done directly by causing an object or
20 something else to touch the other person. The People are not
21 required to prove that the defendant actually touched someone.

22 The People are not required to prove that the defendant
23 actually intended to use force against someone when he acted.
24 No one needs to actually have been injured by the defendant's
25 act. But if someone was injured, you may consider that fact,
26 along with other evidence, in deciding whether the defendant
27 committed an assault.

28 And I'll save the 3517 until later. Okay?

1 **MR. REINSTEDT:** Okay.

2 **THE COURT:** Is that all right, Mr. Adachi?

3 **MR. ADACHI:** Yes.

4 **THE COURT:** All right. Thank you. You may proceed.

5 **MR. REINSTEDT:** Thank you.

6 Your Honor, if you'd give me a head's up in half an hour?

7 **THE COURT:** I will.

8 **MR. REINSTEDT:** Thank you.

9 We left off right before lunch talking about the kicking.
10 Two of the batteries are charged as the kicking. And one of the
11 things that I wanted to highlight for you is the inconsistency
12 of the defendant's testimony on this point.

13 The defendant testified today, just a couple of hours ago,
14 that he did not kick out in self-defense. His claim was that it
15 was an involuntary act as a result of having his legs folded in
16 the figure-four leg lock.

17 Now, I highlight that because -- and we'll talk about this
18 in more detail in a little bit -- but self-defense requires an
19 actual belief that one is using the force in order to defend
20 oneself. That's not the defendant's testimony. He told you
21 directly otherwise earlier today. So he does not have a claim
22 for the fact that he kicked out, supposedly, in self-defense.
23 His claim is that it was involuntary. That's not true, and it's
24 belied by the video evidence.

25 Places that I want to highlight for you --

26 **MR. ADACHI:** I object to the statement. Actually, the
27 prosecution has the burden of proving self-defense beyond a
28 reasonable doubt.

1 **THE COURT:** Correct. So what do you wish from me? Well,
2 ladies and gentlemen --

3 **MR. ADACHI:** To cure that, please.

4 **THE COURT:** So, ladies and gentlemen, in the instructions
5 that I just read to you, I told you that the comments that the
6 attorneys make during closing argument, it's not the evidence.

7 All right. Thank you.

8 Is that satisfactory, Mr. Adachi?

9 **MR. ADACHI:** If you could, please, instruct the jury that
10 it's the prosecution's burden to prove self-defense beyond a
11 reasonable doubt?

12 **THE COURT:** All right. So in the instructions that you get,
13 ladies and gentlemen, it will say the prosecution has the burden
14 of proving self-defense beyond a reasonable doubt as well.

15 **MR. ADACHI:** Thank you.

16 **THE COURT:** Thank you.

17 **MR. REINSTEDT:** So the first piece of video evidence that I
18 want to point your attention to is Officer Chung's video. And
19 there are -- more than any other acts, there are very
20 instructive things to be seen by going through frame by frame of
21 the video showing the defendant kicking.

22 In Officer Chung's video, between 4:10 and 4:14, I went
23 through it with the defendant. You can actually see his leg is
24 free. The leg lock is no longer being used when he's turned
25 onto his side. He then takes his leg, puts it down on the
26 ground, picks it back up, draws it back towards him, and kicks
27 out towards Officer Chung. We can see the defendant's leg is
28 clearly free. It's no longer in a figure four leg lock, and

1 this is before he puts his foot down on the ground, picks it
2 back up again, and then kicks out.

3 Now, there's a question that Mr. Adachi raised, based upon
4 one of the cell phone videos, about where exactly the defendant
5 kicks out at Officer Chung. That question is answered by
6 Officer Chung's own body-worn camera footage. Why? Because we
7 know exactly where he wore that camera. It was on his lapel,
8 right next to his neck.

9 And where does the defendant's foot go as he kicks out? You
10 can see it frame by frame come towards the camera, and actually
11 kick the camera off of Officer Chung's body.

12 There is no doubt that the place where the defendant kicked
13 out with his foot was exactly towards the spot on the camera,
14 and that's where he landed his blow.

15 The Hampton cell phone video, between 1:59 and 2:01, also
16 shows the kicking. It's a quick clip, but it also is
17 instructive, and going frame by frame is helpful. One freeze
18 frame that I found for you from that two-second clip clearly
19 shows defendant's left leg extended, the right leg drawing back.
20 The left leg has already made contact with Officer Chung, and
21 you can see it is bodily kicking him backwards. It has kicked
22 his leg out from under him, in fact, as the defendant's right
23 leg draws back in order to kick out again at Officer Chung.

24 Finally, I would point you to Officer Turner's body-worn
25 camera. Here, the timestamp that I would invite you to look at
26 is between 3:16 and 3:21. The frame by frame here is
27 particularly instructive with respect to the defendant making
28 multiple actions with his foot and his leg from the time that

1 it's released to the time he kicks out.

2 And this disproves the idea that it was some involuntary
3 reaction because the defendant had the time to be able to do
4 multiple different acts with his foot before he extended it out
5 and kicked Officer Chung.

6 A few examples of those. Here, we can see from the first
7 section of this video, the defendant's leg is, in fact, free.
8 His foot is down on the ground. It's not in any kind of a
9 figure-four leg lock here.

10 A few frames later, we can see that his foot is actually
11 raised up in the air and pulled back towards his body. It's not
12 as though his foot was on the ground and it slid further along
13 the ground as he extended it. He drew it up into the air, drew
14 it back towards his body, and then kicked out.

15 Here shows the full extension of his leg. Again, there is
16 no physiological evidence that this could be an involuntary
17 reaction to anything that happened. This is a full extension of
18 him kicking out forcefully at Officer Chung. And you can see
19 the bottom part of his sneaker right here, the white, as it
20 kicks out at Officer Chung.

21 Now, this video also belies the fact that he did this
22 because Officer Chung was somehow holding on to his foot and
23 pulling it towards him. Why? Because a couple of frames later,
24 we see the defendant's foot, and it is clearly still free. It's
25 now come back down at this point.

26 So the video shows it was not an involuntary act, nor is
27 that consistent with any testimony that you heard from any of
28 the officers who are trained and who have a semblance of

1 experience in a figure-four leg lock that it would cause some
2 sort of involuntary reflex to kick out, nor is it consistent
3 that Officer Chung somehow grabbed on to the defendant's foot
4 and pulled it.

5 What does that mean? It means that you should use your
6 common sense about what actually happened here. The defendant's
7 own testimony was that he was angry. You can hear him on the
8 video, right before he's turned over, saying twice, "I'm not
9 turning nowhere. I'm not turning nowhere."

10 He's angry at the officers. He doesn't want to cooperate,
11 and when he gets the opportunity, because his legs are free and
12 he can flip himself and kick out, that's exactly what he does.
13 And the video footage, particularly the frame-by-frame video
14 footage, shows that this was a purposeful assaultive act on
15 Officer Chung.

16 We also have Officer Chung's own testimony about being
17 kicked in the throat and the head. And we can see in the video
18 that it comes directly at his throat. And in the defendant's
19 testimony, he admits that his legs were free before the time
20 that he actually flipped. And on Friday, his testimony was, "I
21 moved my foot forward." Purposeful, not reflexive.

22 We also can see Officer Chung suffered an abrasion to his
23 throat right here. That's where he was kicked. And this photo
24 also shows you the precise location, in fact, where
25 Officer Chung wore his body camera. Here it is. Right next to
26 his neck on his lapel. And that's exactly where we can see the
27 defendant's foot rise up to as he kicks him.

28 The fourth battery, the gouging of Officer Chung's finger.

1 Now, there is no angle of the videos that we have that captures
2 this particular act. Why is that? Because Officer Chung's body
3 camera had been bodily kicked off of him before this happened.
4 So when Officer Chung had his hands then down by the defendant's
5 hands, holding his wrist -- had his hands behind his back, there
6 was no camera to be able to show that angle because it had
7 already been kicked off of him.

8 We do, however, have Officer Chung's own testimony that
9 during this time period, the defendant used his nail to dig into
10 his finger, and he pulled a chunk out of it. We also know, in
11 terms of timing, that it happened after the kicking. That it
12 was once they had flipped the defendant back on his stomach and
13 were holding him there. That that's when he was gouging and
14 digging at Officer Chung's hand.

15 Now, this video, which is the Larson video, does show
16 Officer Chung actually checking out his own hand right after
17 this has happened. This is after the kicking, when the
18 defendant is on the ground, and you can see Officer Chung look
19 at his hand where the injury has occurred. Right there
20 (indicating).

21 We also have the photographs that Officer Chung took of the
22 injury where there's a little piece of his flesh that's been dug
23 out.

24 The fifth battery is seen in Officer Velasquez's face. The
25 defendant testified on Friday, unequivocally, "Yes, I did. I
26 spit in Officer Velasquez's face." That was his admission. He
27 also testified that he did it for two reasons: One was that he
28 was angry; the other is that he claims he had blood in his

1 mouth.

2 Let's watch the video of exactly what happened.

3 (The video was played.)

4 **MR. REINSTEDT:** Immediately prior to the spitting, you can
5 see from Officer Velasquez's perspective here on his body
6 camera, there's nothing that spurs this act. The defendant
7 makes a conscious decision that he's pissed, and he's going to
8 spit in the officer's face. He's not happy about what's going
9 on, and he's going to do this as a retaliatory thing.

10 There's no action that precipitates this on the part of any
11 of the officers. Another video shows us a good example of this.
12 This shows just prior to the spit exactly what's happening. And
13 watch Officer Velasquez.

14 (The video was played.)

15 **MR. REINSTEDT:** Immediately prior to being spat in his face,
16 he simply crouched over, doing nothing. The defendant makes a
17 conscious choice to arch his neck up. There was no question
18 about the fact that he was doing this purposefully in the
19 direction of the officer's face. He looks back up behind him,
20 reaches his neck up towards him and immediately, before he
21 actually spits, says "Mother fucker, fuck you," and spits in his
22 face.

23 That's not the action of somebody who's defending
24 themselves. That's the action of somebody who's angry and
25 looking to get revenge.

26 Here, we can see a freeze frame of Officer Velasquez's
27 camera, the actual moment when the spit starts to come out of
28 the defendant's mouth pointed directly at his face.

1 The section of Officer Velasquez's camera, if you want to
2 watch this over yourself, is between 6 minutes and 23 seconds
3 and 6 minutes and 27 seconds. It's clear that there was no
4 precipitating action on the part of the officers to provoke
5 this. It was a choice the defendant made. He told you himself
6 he did it because he was angry and claims that he had blood in
7 his mouth.

8 There's no evidence of the latter part of that. And, in
9 fact, from the freeze frame that we can see in the video, it
10 looks like a normal piece of white spittle. You don't see
11 anything that indicates he was trying to spit out a mouthful of
12 blood. His is the only claim that supports that.

13 The last battery. Again, the defendant spat on Officer
14 Velasquez. Again, the defendant admits that he spat on Officer
15 Velasquez. Nor do the circumstances around this spit provide
16 any basis for him to try and argue that he was defending
17 himself. The officers were simply escorting him to the patrol
18 car, placing him in the car. You can hear the conversation.
19 He's still angry. He's saying, "You should just let me go."

20 The officers are telling him, well, the problem is you've
21 been fighting us. They placed him in the car. He decides at
22 that moment to spit on the officer and cuss at him. And here's
23 the scene.

24 (The video was played.)

25 **MR. REINSTEDT:** Clearly unprovoked; clearly purposeful.
26 That's a battery.

27 So those are the six acts that you have to evaluate, in
28 addition to the more basic question of whether the defendant

1 resists arrest. What is the defense side of the case?

2 It's based upon two things: One, it's hyperbole. You have
3 the videos in front of you, but you are going to hear a very
4 colorful vocabulary during the defense closing. Rather than the
5 officers using a trained technique of a leg sweep to bring the
6 defendant to the ground in the way that they are trained to do
7 that is controlled, you're going to hear that the defendant was
8 slammed face first into the concrete.

9 Rather than putting hands on him to be able to make sure
10 that he's not going to go for a weapon, you're going to hear
11 that he was manhandled. You're going to hear that the officers
12 assaulted him at every turn.

13 You have the video in front of you, and that vocabulary is
14 nothing more than hyperbole. You have a chance to review what
15 actually happened, what the actions of the officers were in this
16 case, and you have the information about what it was that they
17 were responding to.

18 They were told that there was an armed robbery, and a man
19 with a gun. That poses a safety hazard to the entire public
20 that is present, and it poses a hazard to them. That's what
21 they were reacting to, and you get to see what their own
22 reactions are, and we'll walk through those.

23 What are the defense goals in this case? They want to
24 characterize any force on the part of the officers as being
25 excessive force. Those are not the same thing. Officers, in
26 fact, are authorized to use force in order to effect a detention
27 and an arrest. We know the circumstances they were responding
28 to. They are authorized, because it's part of their duty and

1 it's part of what they have to do to keep the public safe.

2 But that's not what you're going to hear from the defense.
3 You're going to hear that the slightest touching, the slightest
4 use of force at all is excessive force, and violates the
5 defendant's rights.

6 They're also going to pick at every detail of the officer's
7 actions. You heard this during cross-examination. Whether
8 there was an "S" on the end of the word "leg" in an officer's
9 report. Whether when an officer felt the defendant tense, as he
10 himself admitted when he was on the stand, and he said, "Well, I
11 felt like the defendant was trying to walk away." Whether he
12 could actually see the defendant's feet trying to move at that
13 moment or if he just felt him walk away -- every little detail
14 is going to be picked at. That does not mean that the officers
15 used excessive force. The officers have to use reasonable
16 force, and that is exactly what they did.

17 The third defense. They want to turn the defendant into the
18 victim in this case. The complaint alleges here that there are
19 four victims and every single one of those victims are the
20 officers that were involved in this case when they were battered
21 by the defendant. The defendant is not the victim in this case;
22 he is the defendant. And it was his actions that precipitated
23 this chain of events.

24 When we talked earlier about the contrast between what the
25 defendant's girlfriend's reaction was and how she was treated
26 and what his reaction was, that answers the question of who
27 precipitated the series of events.

28 Finally, there's going to be an attempt to minimize and

1 excuse the defendant's actions. You already heard this during
2 direct. "No, I didn't bite." "No, the spitting was just
3 accidental. I wasn't trying to aim at anyone." The kicking was
4 just a reflex." Every single act now has an excuse.

5 But, again, what is the easier explanation for what actually
6 happened? What the defendant, himself, told you. He was angry.
7 He was pissed at the cops, and he was reacting.

8 The defense story is going to be that there was excessive
9 force by the police, and the defendant was trying to defend
10 himself and his girlfriend.

11 Let's talk about why that's not the case. First, as a
12 threshold matter, there is no right to self-defense unless and
13 until you find that the officers in this case acted with
14 excessive force. The defendant does not get to claim that he
15 was defending himself, unless the officers first used excessive
16 force.

17 And the exact question that's given to you in the jury
18 instructions -- the instruction here: "If a person knows or
19 reasonably should know that a peace officer is arresting or
20 detaining him or her, the person must not use force or any
21 weapon to resist an officer's use of reasonable force."

22 That is the law. There is no right to resist unless and
23 until excessive force is used. The defendant resisted from the
24 very beginning, and the force used by the officers was not
25 excessive.

26 Notably, the defendant's subjective belief about this is
27 also irrelevant. The fact that he did not know why he was being
28 stopped doesn't matter. His belief that they didn't have a good

1 reason to stop him doesn't matter. You don't get to fight the
2 police just because you're not sure why they're stopping you.
3 That's not how this works. It's an objective standard to
4 evaluate whether or not the actions of the officers were
5 reasonable from the perspective of a reasonable officer.

6 And here's the actual instruction about how to evaluate
7 reasonable force. "Force is not excessive if it is reasonably
8 necessary under the circumstances to detain. In deciding
9 whether force is reasonably necessary or excessive, you should
10 determine what force a reasonable law enforcement officer on the
11 scene would have used under the same or similar circumstances.
12 The perspective is an objective one of that of a reasonable
13 officer under the same or similar circumstances."

14 More specifically, the jury instructions tell you to look at
15 certain factors in making this evaluation about whether it was
16 reasonable. First and foremost, did the defendant pose a
17 danger?

18 We've already answered that question. There was a report of
19 someone with a gun committing an armed robbery. Undoubtedly, he
20 posed a danger. And we know that the officers never had a
21 chance on the platform to conduct a full search. They only had
22 managed to check his sides and his back. When they tried to
23 flip him over to see if he could have a gun in his waistband,
24 that's when he kicked out, and there was no chance for them to
25 ever confirm whether or not there was a weapon.

26 The seriousness of the crime at issue. Here, it's an
27 attempted robbery. A serious felony. That's something that the
28 officers had no choice but to take very seriously as potentially

1 constituting a danger to themselves and to the public.

2 And finally, whether the defendant was actively resisting
3 detention, and we've been over this already. There are a litany
4 of ways in which the defendant actively resisted. From the very
5 first moment of not following lawful orders, and straining
6 against the officer who put his hands on him.

7 What did the officers actually know? They knew they were
8 coming into a situation with someone who had a gun, an armed
9 robbery. That the person they encountered was not following
10 their lawful orders. They don't know. When he doesn't follow
11 that first order to get down on the ground -- the officer's
12 testimony was he might be thinking about going for his weapon.
13 They don't know. They have to treat that as a serious threat.
14 And there are civilian bystanders around. This is on a crowded
15 Muni platform.

16 Additionally, they're responding to a very specific
17 description. They're not picking this person randomly out of a
18 crowd. They're told a person with a gun who is committing the
19 robbery is wearing a Mickey Mouse T-shirt, tan shorts, and a
20 backpack. That was the defendant.

21 You also know, from the expert who testified in this case,
22 Ed Flosi, that the initial approach that the officers made to
23 the scene was absolutely consistent with training and the way
24 that officers are taught to respond to this sort of situation.
25 That when a report consists of an armed robbery and somebody
26 with a gun, it's consistent with their training to come out with
27 their guns drawn in a low-ready position. And it's also
28 consistent to ensure the safety of everyone around, to point

1 those guns at the person to make sure that they can have a safe
2 detention. The person doesn't immediately go for a weapon and
3 create a situation that could be a shootout.

4 In fact, Ed Flosi, and every single one of the officers who
5 testified in this case, indicated it would actually be
6 irresponsible for them to have approached the situation
7 differently; namely, if they had approached the situation and
8 said, "Hey there, we have a report you may have a gun. You may
9 have just robbed somebody on the train," that's an irresponsible
10 approach because it gives the person the opportunity to go for
11 their weapon if they want to.

12 It means that that person may have the drop on the officers.
13 They may be able to create a situation where a hostage could be
14 taken. There are people coming off of the train with the
15 defendant. That would be the irresponsible approach.

16 The officers have to come in with speed and they have to
17 come in ensuring that the situation is safe for everybody
18 around, and then they can do their investigation. They don't
19 start by saying, "Hey, let's talk about this." Not when there's
20 a gun involved. Not when there's a report of an armed robbery.

21 We also know, once we move past the initial approach, that
22 officers in California are trained to calibrate their response
23 to the level of resistance that they're getting from the
24 defendant. Here, the officers are trained on specific physical
25 controls. And every one of these controls was used in response
26 to something that the defendant did. What specifically?

27 First, the leg sweep. That happened after the officers
28 approached and told the defendant to get down on the ground more

1 than half a dozen times, and he didn't. We also know, from the
2 defendant's own testimony, that he resisted and strained against
3 Officer Velasquez when Officer Velasquez put his hands on his
4 arms in that approach.

5 That right there, combined with a report of somebody with a
6 gun and an armed robbery, that's reason to take somebody onto
7 the ground. And the officers did exactly what they are trained
8 to do, using a controlled method for doing that -- a leg sweep,
9 hands on the upper body to guide the body down to the ground.

10 Weight controls. When were those implemented? Again, after
11 the defendant had strained. He was down on the ground. He's
12 grabbing hands as they're trying to handcuff him. He's
13 continuing to strain his muscles. And the officers are trying
14 to make sure that he's under control with their hands first, and
15 then as he twists and turns underneath them, they start to put
16 weight controls on him. Specifically, the figure-four leg lock.

17 And you heard from Ed Flosi, the figure-four leg lock, A, is
18 only painful depending upon what somebody's personal flexibility
19 is; and, B, causes no permanent damage, unless you're somebody
20 with, like, a brittle bone syndrome or something along those
21 lines. This is a control that essentially stretches out the
22 muscle and keeps somebody from being able to kick back and
23 resist.

24 This happened after the defendant first twisted under the
25 officers. You can see Officer Chung start to topple in that
26 first twist. He can't keep his balance. And then the second
27 time that he's put in a figure-four leg lock is after he's
28 assaulted the officers by kicking out at them. Both appropriate

1 responses on the part of the officers to the situation that they
2 were encountering.

3 And finally, the distraction strike. This is the punch that
4 Officer Velasquez throws after he's been spit in his eye.

5 Now that, I understand, is emotionally and viscerally the
6 most impactful moment from the video, to see him throw that
7 punch. But Officer Velasquez's testimony was that he had gotten
8 the spit in his eye, he was temporarily blinded, and he already
9 had a suspect who was under him who had assaulted the officer
10 next to him, who was actively resisting, and who they still
11 didn't know if he had a weapon on him, nor is there evidence
12 that this is retaliatory on the part of Officer Velasquez.

13 He threw one strike in order to get the situation back under
14 control and then immediately just went back to placing his hand
15 on the defendant's neck. There were no follow-up strikes.
16 There's no attempts to beat the defendant up or anything like
17 that. In fact, when he got spit on later, when it didn't get in
18 his eye and it didn't pose a control problem, he had essentially
19 no reaction at the patrol car. He just simply said, "Why are
20 you spitting on me again? What is up?"

21 This is not a retaliatory strike, but a final note for you.
22 Even if you didn't think that that strike was appropriate, that
23 it was appropriate to throw a punch at the end, that happened
24 after the five batteries that occurred on the platform. That
25 means the defendant cannot say, I was reacting to this punch.
26 That's why I assaulted these officers. That's why I kicked,
27 that's why I bit, that's why I gouged their fingers because all
28 of those things happened before this punch was ever thrown.

1 In evaluating the reasonableness of force, there's guidance
2 given by the Supreme Court in a case called Graham V. Connor,
3 and it says: The reasonableness of a particular use of force
4 must be judged from the perspective of a reasonable --

5 **MR. ADACHI:** I'm going to object. This is a statement of
6 law from a case, but it's not a jury instruction.

7 **THE COURT:** Very well. Why don't we take this down. I'll
8 sustain the objection. If you want to read from the
9 instruction, you may.

10 **MR. REINSTEDT:** So I actually have case law that supports
11 using this during closing. I can provide it to the Court.

12 **THE COURT:** All right.

13 **MR. ADACHI:** Well, we still object and ask that it be taken
14 down. It's not part of the law that's going to be applied in
15 this case. I don't know what the purpose of it would be.

16 **THE COURT:** Just a moment. If he's permitted to do this, he
17 can do it. I just need to know, that's all.

18 Can we take it down for a moment, Mr. Reinstedt.

19 **MR. REINSTEDT:** Sure.

20 **THE COURT:** Thank you. Do you want to show Mr. Adachi the
21 case you have, please, and I will look at it.

22 **MR. REINSTEDT:** People v. Brown that we disused at length.
23 Footnote 11 (handing).

24 **THE COURT:** Thank you.

25 All right. I think what the Court's going to do is, based
26 on this footnote, you can't put it on the screen, but you can
27 quote from it.

28 **MR. REINSTEDT:** Okay.

1 **THE COURT:** Okay. So based on Footnote 11 in *People versus*
2 *Brown*, I'm going to sustain the objection in part, overrule in
3 part.

4 **MR. ADACHI:** Judge, I was going to say, if he's going to
5 read from it, why not put it on the screen.

6 **THE COURT:** Very well. Thank you.

7 **MR. REINSTEDT:** The reasonableness of a particular use of
8 force must be judged from the perspective of a reasonable
9 officer on the scene rather than with the 20/20 vision of
10 hindsight. The calculus of reasonableness must embody allowance
11 for the fact that police officers are often forced to make
12 split-second judgments in circumstances that are tense,
13 uncertain, and rapidly evolving about the amount of force that
14 is necessary in a particular situation.

15 **MR. ADACHI:** And this is a quote over our objection,
16 obviously.

17 **THE COURT:** Correct. But I gave the option, based on the
18 footnote in *Brown*, that he could read it, which is what *Brown*
19 said. But why don't you take it down now.

20 **MR. REINSTEDT:** Sure.

21 **THE COURT:** Now that excerpt is down.

22 **MR. REINSTEDT:** What that means is that the evaluation of
23 use of force by officers is not a Monday morning quarterbacking
24 situation. We're here parsing frame by frame through video,
25 trying to see exactly what it was that happened at every moment
26 in this case.

27 The officers involved in the moment don't have that luxury.
28 They're responding to a situation that can change in a second

1 and is potentially deadly, given what the report is.

2 Now, in addition to there being a finding of excessive
3 force, you would also have to find that the defendant's response
4 was proportional to that force, and there's a couple of elements
5 here: First, that he actually believed it was reasonably
6 necessary to protect himself; and, secondly, that he used no
7 more force than a reasonable person in the same situation would.

8 The first part of this is the actual belief requirement.
9 But the defendant's own testimony, when he was talking about
10 spitting on the officer, he said, "I didn't think that an
11 officer would actually strike me. I didn't think that they
12 would get that angry. I was handcuffed, and they're there to
13 protect and serve." That's the defendant's testimony.

14 He didn't actually believe that he was in danger. And that
15 actual belief is a requirement for him to be able to use any
16 force against the officers. Instead, he testified that he was
17 acting because he was angry. Over and over again, he told you
18 that he was angry.

19 Additionally, it requires that no more force than a
20 reasonable person in the same situation would use. So the
21 question is: Would a reasonable person who had been detained,
22 under the circumstances the defendant had been in, decide to
23 bite; decide, as they were turned over so their waistband could
24 be searched, that they needed to kick out forcefully at the
25 officers.

26 Would a reasonable person, under those circumstances, think
27 that they should turn their face and spit up into the face of
28 the officer? The answer to all of those things is no.

1 **THE COURT:** It's 2:10 now.

2 **MR. REINSTEDT:** Thank you.

3 Instead, he constantly escalated the situation and attacked
4 the officers. The question is: What was he protecting himself
5 from? As I went through earlier, every use of force by the
6 officers came after and in response to actions of the defendant.

7 There is no indication that the officers were out to get him
8 in any way. They were acting and responding to the scene. And
9 his actions, more to protect himself from anything. There were
10 no precipitating events.

11 If you watch each of the batteries and watch the video in a
12 continuous way, there were no precipitating events that caused
13 him to act the way that he did. He chose to do each of those
14 things himself.

15 Now, the defense case is that he was trying to defending
16 himself or trying to defend his girlfriend. I'm not going to go
17 through each of these elements because they mirror very closely
18 what we just talked about in terms of proportionality with
19 respect to excessive force and an actual belief that he was
20 defending himself. They're the same elements, just rephrased in
21 a different instruction for you.

22 It requires that he believed he was in imminent danger and
23 that he both actually and reasonably believed that he was in
24 that imminent danger. Reasonably, there's no reason for him to
25 think that.

26 As far as the idea that he was defending his girlfriend
27 during the course of these interactions, a couple of notes.
28 First, there was no charged battery on him from the time period

1 that his girlfriend was actually on the ground. She was up, the
2 officers were getting her out of the way. She was calm. She
3 had no problems. There was no force being used against her
4 during the course of any of the batteries that are being charged
5 against the defendant. He bit, kicked, spit, and gouged.

6 When she was standing up and totally fine -- in fact,
7 yelling at him, "just cooperate, just cooperate," over and over
8 again.

9 I'm going to skip ahead a little bit here. The defendant's
10 testimony, we also know, is contradicted by the video. He
11 claims that he asked the police, when they first arrived on the
12 scene, "What's your probable cause? Why are you stopping me?"
13 You'll have the video. He says nothing of the sort.

14 You can hear the officer behind him saying, "Get down on the
15 ground, get down on the ground, get down on the ground."

16 He says, "I'm not getting on the ground." He doesn't ask
17 any other questions. That's not something that happened.

18 He claims that he wasn't biting. You can see from the video
19 that he turns his face towards Officer Turner and opens his
20 mouth against her arm. He claims he couldn't turn to his side
21 when, again, the video evidence contradicts that; that he was
22 actively saying, "I'm not turning nowhere," and you can see his
23 body tensing as the officers try and turn him.

24 He claims he never kicked. He claims that he was searched
25 at the patrol car at the end. We have the video. Never
26 happened. His testimony is contradicted by the video. And the
27 fact you have the video puts you in a unique position because it
28 means that you get to evaluate the other aspects of his

1 testimony when he was telling you he was angry. That he was
2 resisting. That he purposefully spit on the officer twice.
3 Those things are borne out by the video. And we know that those
4 things happened.

5 Here's what the officers knew going into the scene. They
6 were coming in for a robbery, there was somebody with a gun,
7 they had to respond to it. It was their duty. And we have the
8 contrasting reactions. And his girlfriend who cooperated, who
9 had a momentary 30-seconds-or-so period when an officer knelt
10 down on top of her and put restraints on her and then stood her
11 up and got her out of the way. That was the extent of any force
12 used against her as she cooperated with the officers.

13 By contrast, here's where the defendant kicked out at the
14 officers. When he makes that decision, I'm going to fight. I'm
15 angry. I don't want to cooperate with these officers. That's
16 why he's charged with the six batteries that he is and the
17 resisting arrest. Because he made those decisions because, as
18 he told you himself, he was angry. And that's why you have to
19 find him guilty at the end of this case.

20 **THE COURT:** Thank you. Mr. Adachi.

21 **MR. ADACHI:** I'm going to need about eight minutes to set
22 up.

23 **THE COURT:** How many minutes?

24 **MR. ADACHI:** About eight minutes.

25 **THE COURT:** Is there someone here who can help you set up
26 while you start?

27 **MR. ADACHI:** I can do it faster this way.

28 **THE COURT:** Okay.

1 **MR. ADACHI:** May I proceed?

2 **THE COURT:** You may.

3 **MR. ADACHI:** Thank you.

4 **DEFENDANT'S CLOSING ARGUMENT**

5 **MR. ADACHI:** I promised you, in my opening statement, that
6 this case would be one of the most important cases that you
7 could sit on. It's an important case not because you'll read
8 about it in the headlines or anything. Because it's a case of
9 what happened to just an ordinary young man, Michael Smith.

10 Maybe it's not such a significant case. After all, he
11 didn't get shot or killed. But in many ways, it's a case like
12 this that defines who we are as a community, as a society, as
13 his peers.

14 You may not know anyone like Michael. You may look at him
15 and not see in his face someone you recognize. But nonetheless,
16 he is one of us. He is someone who is entitled to justice and
17 fairness.

18 We're not here for hyperbole. We're not here for sympathy.
19 We're here for one reason, and that's justice. We're here for
20 justice.

21 All of you have taken time from your busy, busy, demanding
22 lives, and all of the responsibilities you have. And you have
23 been incredibly attentive during this case. You watched
24 everything, and let me tell you, I'm not going to go through
25 every video and slice and dice this event.

26 I'm going to be talking to you, in the time that I have,
27 about the real issues in this case that we haven't talked about.
28 What really matters in this case in determining what justice is.

1 In this country, we give the power to decide guilt or
2 innocence -- it's a huge amount of power to have -- not to the
3 police, not to prosecutors, not even to judges. We give that
4 power to juries. Each of you today is a judge. And you're
5 going to decide this case.

6 You're not only going to be deciding the charges and counts
7 against one 22-year-old man, but you're going to be deciding
8 whether what happened here to Michael was the right thing.

9 The prosecutor, going through his itemized list, is telling
10 each of you the police did the right thing. The police did the
11 right thing. They did the right thing. This is by the book.
12 This is exactly how you should expect to be treated. And I know
13 we think, you know what? I would never be in a situation that
14 Michael was in. I would never be in a situation. And if I
15 were, I would react completely differently. The police wouldn't
16 come after me. The police wouldn't throw me on the ground. The
17 police wouldn't put me in a figure four. The police wouldn't
18 put their weight on top of me. The police wouldn't grab my
19 head. If I yelled, "She's pregnant," the police would listen to
20 me. They would listen to me.

21 If my girlfriend was on the ground and I cried out to them,
22 they would listen to me. Protect and serve. I know that.
23 That's how they would treat me.

24 I hope you're right. But what if you're not? What if
25 you're treated exactly the way that Michael Smith was treated?

26 And it's still true today. He's being treated the same way.
27 No one even said, you know what? I'm sorry. We didn't hear you
28 cry out when you saw an officer's knee in your pregnant

1 partner's back. I'm sorry we didn't listen to you right away.
2 No. We're not going to get that here, Michael. Instead, we're
3 here to defend Michael against charges that he battered police
4 officers.

5 You're also going to get what's called lesser included
6 charges of battery and assault; so you're going to have
7 something like 19 charges and verdict forms that you're going to
8 be giving. Kind of like rolling a bunch of hooks out into the
9 ocean. You know, maybe something will catch. Something will
10 catch here. Maybe we'll just split the baby. Convict him of
11 half.

12 The district attorney seems like a nice person, and he's put
13 his time into this case and deserves something; right?

14 This is a case of black crime bias. This is a case where
15 there were assumptions that were made about Michael Smith. Not
16 because he was Michael Smith, a young man walking out of a train
17 with a Mickey Mouse T-shirt and his tan shorts and his backpack
18 as he sauntered on the platform following his pregnant
19 girlfriend after he had let other people out of the train. No.

20 The police expected a violent robber. A violent robber.
21 Somebody who had the tenacity, had the gall to commit an armed
22 robbery on a BART train in broad daylight and had a gun and used
23 a gun. That was the report that they had, or was it?

24 You'll have all of the 911 calls and dispatch calls. You'll
25 be able to listen to them in the jury room. And, of course, you
26 will hear the call that started this whole thing. The call that
27 started this whole thing from a man named Rodriguez. And
28 Rodriguez called the police, and you'll be able to hear his

1 voice and the way that he speaks. And he says, "Yeah. Two
2 black guys -- two black guys, they threatened to rob me. And
3 one of them is armed with a weapon." That's what started this
4 whole thing.

5 So what does the dispatcher say? Well, the first couple of
6 dispatchers are pretty accurate. Dispatch -- and these are
7 calls that are going back and forth between various agencies.
8 And because this is BART, one of the agencies is the California
9 Highway Patrol, called the CHP; and the other is dispatch for
10 BART, and they're going back and forth.

11 So dispatch says, "What was he reporting?"

12 Said there were two black male adults who just threatened to
13 rob him.

14 Dispatch: "Were there any weapons?"

15 Caller: "He believes they were armed." Okay?

16 So that's pretty accurate. So you have a couple of those.
17 One that threatened to rob him, and he believes is armed.

18 Now, it starts to diverge, and they start saying this was a
19 call of somebody trying to steal something from another
20 passenger. There's two calls about that where, again, this
21 information is being conveyed. That's a big difference between
22 attempted robbery, possibly having a weapon, and then just
23 trying to steal something from a passenger.

24 But here's the one that you really want to pay attention to.
25 It's marked 1343. 1343.

26 Speaker One: Units intercept on this train.

27 CHP. CHP apparently played the call back. CHP apparently
28 played the call back. They listen to the 911 call and played it

1 back. And they believe the male is the one with the gun wearing
2 a Mickey Mouse T-shirt and tan shorts. Believe that the male is
3 the one with the gun wearing a Mickey Mouse T-shirt and tan
4 shorts and has a backpack. That's where this came from. It
5 came from the CHP.

6 Why should we care? These folks are in the business of
7 accurately conveying information. So a report of somebody who
8 possibly had a weapon, suddenly becomes a black guy with a gun
9 who just tried to rob people. A black guy with a gun who just
10 tried to rob people.

11 Now, do we know who listened to that tape and made that
12 mistake? No. Do we know whether it was a simple mistake?
13 Maybe they got confused with another case.

14 **MR. REINSTEDT:** Objection. Calls for speculation. Not
15 commenting on the evidence.

16 **MR. ADACHI:** Exactly my point. We don't know.

17 **THE COURT:** Sustained.

18 **MR. ADACHI:** We don't know. But we know there was a mistake
19 made.

20 And what's interesting to me is that the prosecution --
21 because they just played a little bit of that. They had texts
22 on there. Do they care about that? Do they even point that out
23 that somebody made a mistake? A big mistake?

24 Think about the consequences of making a mistake like that;
25 right? Oh, yeah. He's possibly got a weapon. Black guy with a
26 gun.

27 How does that happen? The CHP had a hand in what happened
28 here. And it's true, we don't know. But we know that it

1 happened.

2 The prosecutor's going to tell you, you know what? Don't
3 worry about it. Don't worry about it. Not a big deal. Why?
4 Oh, because we know information all the time is miscommunicated.

5 We don't know that. We don't have that. Think about the
6 consequences. You're reporting black guy with a gun. Black man
7 with a gun. What consequence does that have for Michael when he
8 gets out of the train? Oh, yeah. The cops are ready. They got
9 their guns in the low-ready position.

10 They're looking for a violent robber who's got the tenacity
11 [sic] to commit a robbery in broad daylight, on a BART train, in
12 front of hundreds of witnesses, and out comes Michael.

13 So Rodriguez, who makes the call, and the CHP, who distorts
14 the call and gets it wrong, set the stage for what is about to
15 happen.

16 So when Michael gets on the train, and he's going to
17 San Francisco to spend some time with his lady, he's got the
18 whole world in front of him. They're going to have a child and
19 is confronted by Rodriguez: "You stink. You smell. You smell.
20 Get -- go away. Go on the other side of the train."

21 Andrea says, "We don't smell."

22 Sure, they exchange words. Who wouldn't?

23 When someone says that to you, particularly someone like
24 Michael and Andrea, do you think that that is a pleasant thing
25 to say to somebody? Would you say that to anyone? How would
26 you react? Or maybe you'd just walk away.

27 Well, that's what Michael did. They exchanged some words,
28 but he walked away, and he moved to the other side of the train.

1 What did Dr. Laura Gottlieb say? These kids did nothing.
2 She told the cops that they did nothing. They were innocent of
3 wrongdoing. It was the other guy. It was the other guy who
4 antagonized them. It was the other guy who was causing the
5 problem. They avoided it. They moved away from it. That's
6 what Dr. Gottlieb told the police and told you.

7 So when Michael's getting off the train, he's got no idea
8 about the other forces that are operating right now. These
9 calls that are going back and forth -- right? -- in the
10 beginning of threatened a robbery, might have a weapon. Then it
11 goes down that, oh, stole some property belonging to another
12 passenger and then, boom.

13 CHP, we listened to the message. You're going to hear the
14 message they listened to, but they got it wrong. And so as
15 Michael is waiting to get off the train, spending some time with
16 Andrea, enjoying their new life together, he's got no idea
17 what's going to happen when he walks out that door.

18 So they're waiting for the notorious robber, the gun-toting
19 robber to get off the train. And so they respond with as much
20 force as they can. They take their guns out, and they have them
21 pointed right at Michael. You heard that there were two
22 officers that had their guns pointed at Michael's chest, and
23 Michael's head. And as Michael -- you saw him coming out of the
24 train. He's walking like this (indicating).

25 What else is wrong with that picture? What's wrong with
26 that picture? What would you look for? What would you look
27 for? All right. This guy is supposed to commit a robbery on
28 the train? You'd have everybody else on the train going, "Hey,

1 man, that guy tried to rob me. Hey, that guy, he pulled a gun
2 out." You'd have people running out of there. You'd see people
3 coming out of there. Kids coming out, parents coming out.

4 Do you see anything that spells out that there was a robbery
5 on that train? Nothing. No circumstance, except a young man
6 and his girlfriend, walking out, with his Mickey Mouse T-shirt,
7 and his short pants.

8 But the first thing they do, before they even assess the
9 situation, is they take out their guns, and they point at him.
10 They point at him. And they've got him surrounded at this
11 point. It's four to one. Not only that, they have a police
12 officer who's got Michael's arms behind his back. And you can
13 see that on the video, he's got his arms behind his back.

14 If all they wanted to do was detain him at that point, all
15 they needed to do is handcuff him. What's he going to do at
16 that point? He's got two guns pointed at his chest. He's not
17 getting out of that situation. He's not going anywhere. But
18 the officer comes behind him, grabs his arm, both arms. And
19 what does the officer do? He takes him down to the ground.

20 Now, they say hey, that's standard procedure. Is it? Is
21 that standard procedure? Is that the way that we investigate a
22 naked phone call? That's all there was here. This is a phone
23 call. One phone call. They couldn't even contact the person to
24 confirm because Rodriguez wasn't answering his phone. No
25 confirmation. This naked phone call was enough to take Michael
26 down.

27 Now, think about this. They already have his arms behind
28 his back. They have two people pointing guns. Two trained

1 officers pointing guns at his head and at his chest. Simple.
2 They could have handcuffed him if that's what they wanted to do
3 at that point, or just move him off the platform. Do a quick
4 pat search, take his backpack, look in his backpack, and that
5 would be it. And we wouldn't even be here right, now and
6 neither would Michael. But that's not what they did.

7 You saw Michael. He wasn't resisting. He was just standing
8 there. Standing there. True, if you listen to the video, you
9 do hear him say, "I'm not getting down on the ground." And he
10 asked them, he says, "I didn't do anything." "I didn't do
11 shit," is what he says. It's his way of saying, "Hey, what's
12 this? I didn't do anything." He wants to know why do they have
13 guns pointed at him?

14 The prosecutor says, oh, they didn't have time to tell him.
15 Oh, really? You got two guns on a guy who's unarmed, and he's
16 got his arms behind his back, and you can't take a few seconds
17 to tell him why? What did Michael say? He said, if they told
18 me what this was about, I would have cooperated. But he had no
19 idea what was going on here.

20 There's four officers, they have him surrounded, there's two
21 guns pointed at him, another officer has his hands behind his
22 back, and they can't take the time to explain that to him?

23 The other crazy thing -- you see this on the video -- right
24 as they're telling him "Get on the ground, get on the ground,
25 get on the ground," as they're telling him that, the officer has
26 his hands behind his back. How is he supposed to get on the
27 ground with an officer holding his hands behind his back and his
28 arms? How is he supposed to do that? (Indicating gesture.) Is

1 that what he's supposed to do? Do a little kamikaze, fall?

2 How is he supposed to get on the ground? Think about that
3 command; right? How are you supposed to do that? There's no
4 way he could have complied. There's no way he could have won.

5 And the big question, I think, is why Trabanino? Why did
6 Trabanino take him to the ground. Why did Trabanino take him to
7 the ground? Because he already had his hands behind his back.
8 He could have nipped this in the bud by simply handcuffing
9 Michael and searching him. Why did he take him down to the
10 ground?

11 Because he's listening to the other cops, his fellow
12 officers saying, "Down on the ground. Get down on the ground."
13 And so that's what he does. He takes Michael to the ground.
14 He's following their response. He's doing what they say.
15 That's why he takes him down to the ground.

16 If they took a minute to think, they would realize that the
17 commands that they were giving didn't match Michael's situation,
18 you know?

19 It's like if I gave you a pogo stick to jump on, and I tie
20 your legs. You're not going to be able to jump on that pogo
21 stick. Why? Because it's impossible. And see the dilemma that
22 the police put Michael in?

23 So now, we've got this dispatch, the 911 call dispatch;
24 right? So there's a mistake, there's a mistake, and then
25 there's another mistake. And this mistake means Michael is down
26 on the ground. And I don't think I'm being dramatic or I'm
27 asking for sympathy.

28 You see the swelling in his face. That's what happened to

1 him when his face hit the ground. And, yeah, it hurts when your
2 face hits the ground. That's hard ground. It's not like this
3 where you've got a rug covered on it. It's hard cement.

4 And he's not only thrown to the ground, but he has no hands
5 to break his fall. Nothing at all. And that's what happened.
6 They took him down to the ground. So they get him down to the
7 ground, and then they handcuff him; right? He's handcuffed from
8 behind. He's handcuffed. He's handcuffed the entire time. His
9 hands are immobilized behind his back, 100 percent steel keeping
10 his hands tied behind his back.

11 But that's not enough. Then they're going to jump on top of
12 him, put their weight on him without even explaining why.
13 Without even telling him why.

14 **THE COURT:** Mr. Adachi, would now be a good time for our
15 midafternoon break? We usually do it about a quarter to, or do
16 you want a couple more minutes?

17 **MR. ADACHI:** I'm working my way, but that's fine.

18 **THE COURT:** Is that okay?

19 **MR. ADACHI:** Yeah.

20 **THE COURT:** Ladies and gentlemen, we'll be back on the
21 record at about two after 3:00; so please be prompt. We will be
22 as well. Remember the admonition. Leave your notebooks here.
23 Don't make up your minds. Don't talk about the case amongst
24 yourselves or with anyone else. We'll see you back here at two
25 minutes after 3:00. Thank you.

26 (A brief recess was taken.)

27 **THE COURT:** We have our ladies and gentlemen who are back.
28 Mr. Adachi, you may continue with your closing. And I'll

1 give you a five minute warning before your time's up.

2 **MR. ADACHI:** Thank you.

3 **THE COURT:** Thank you.

4 **MR. ADACHI:** Michael Smith was on the ground. He's right
5 where they wanted him to be. He's handcuffed. Officers have
6 their legs and knees on him. He's got almost, what? 380
7 pounds, almost 400 pounds on top of him. He ain't going
8 nowhere.

9 The only thing Michael can do at that point, when he sees
10 Andrea on the ground, too, with an officer's knee in her back,
11 and he thinks about her and he thinks about their baby and he
12 does the right thing. He tries to save her. He tries to save
13 her by the only way he can. He tries to scoot closer to her and
14 say, "She's pregnant." What is he supposed to do?

15 What do the jury instructions say you're supposed to do when
16 you see your loved one on the ground with an officer, who may or
17 may not know she's pregnant, even though she's told him twice,
18 with his knee in her back?

19 Yes, sir, Officer. Yeah, I ain't resisting. Go ahead. Do
20 whatever you want to her. Not my problem. I just don't want to
21 be arrested for resisting. Michael does the right thing.

22 You did the right thing. And don't let them tell you
23 anything otherwise. You did the right thing.

24 **MR. REINSTEDT:** Objection. Improper argument.

25 **THE COURT:** Sustained, Mr. Adachi.

26 **MR. ADACHI:** You did the right thing.

27 Of course, they don't want to talk about that. That's why
28 all the officers on the witness stand say, "Well, I didn't hear

1 him say it.

2 "You hear it on the video?

3 "Oh, yeah. I hear it."

4 How is it that four trained officers who went to the police
5 academy, who are trained, supposedly, on how to deal with
6 pregnant people miss that? How did they miss that? And why is
7 it that Trabanino continued to have his knee in Andrea's back
8 for 20 seconds after she told them that she was pregnant.
9 That's why I had Mr. Endo come in and give you the time
10 estimates as to what was going on.

11 And so when Michael cried out, he cried out because that's
12 the only thing he could do. At the same time they were
13 searching Michael -- and you'll be able to see on the
14 videotape -- I'm not going to play it back right now -- you'll
15 be able to see how they're searching him, how they search his
16 short pants. He's not wearing long pants. He's wearing short
17 pants. And you can see them even touch under here. Remember
18 Michael said they were also searching my sides and down here
19 (indicating)? You can see Officer Chung putting his hand down
20 there and searching him.

21 Why couldn't they just let him go at this point? Oh, they
22 need to check the backpack. They needed to check the backpack.
23 So here, we have -- here, we have the backpack --

24 **THE COURT:** Mr. Adachi, there's nothing on the screen.

25 **MR. ADACHI:** I apologize.

26 **THE COURT:** That's all right.

27 **MR. ADACHI:** I'm not sure what happened here. I apologize.

28 **THE COURT:** That's okay. Mr. Adachi, if you would like your

1 assistant to sit up here.

2 **MR. ADACHI:** It's okay. Just a problem with the computer.

3 **THE COURT:** No worries.

4 **MR. ADACHI:** So this is the point where Turner is searching
5 the bag.

6 (The video was played.)

7 **MR. ADACHI:** So what you see right there in that snippet is
8 Officer Turner gets the bag -- right? -- searches it. What does
9 she find in it? Does she find a gun? A weapon? Anything at
10 all? Nothing. But she doesn't even bother to tell the officers
11 who are holding Michael.

12 They've already searched him. They've already looked at his
13 backpack at that point. He's got no gun. He's got no gun. Yet
14 what do they do? They continue to use force on him.

15 Now, what does the law say about what you can and you can't
16 do? There are six ways that you get to not guilty on all the
17 charges in this case. That is the first one. This all comes
18 from the Jury Instruction 2670, which is really the main jury
19 instruction in this case because it talks about what the police
20 can and can't do.

21 So this is what it says about unreasonable force. It says,
22 "If a peace officer uses unreasonable or excessive force while
23 arresting or detaining or attempting to detain a person, that
24 person may lawfully use reasonable force to defend himself or
25 herself." Okay? So what does that mean?

26 It means that if an officer uses too much force in detaining
27 somebody or arresting somebody, you can use force and reasonable
28 force to defend yourself. Think about it. It makes sense;

1 right?

2 I mean, let's say you get stopped for jaywalking, and you're
3 really innocent. All right? And the officer stops you for
4 jaywalking. Does that mean you can punch the officer and say,
5 "No, I'm innocent"? No. Why? Because the officer didn't use
6 any force in that situation; so you would be in the wrong.

7 But even the law recognizes that when a police officer goes
8 beyond using reasonable force in a given situation, you have an
9 absolute right to defend yourself. It's absolutely just common
10 sense that our laws would be that way.

11 Why? Because we recognize that people have a right to
12 defend themselves against unreasonable force. In some
13 countries, you don't have that. In some countries, it doesn't
14 matter what the police do. They're always right.

15 Under our laws, a police officer who uses unreasonable
16 force, in a given situation, in a given situation, you have a
17 right to use reasonable force in response. You can't use
18 unreasonable force.

19 The second rule -- and this comes from the same instruction,
20 2670 -- is unlawful detention. And this is another way where it
21 becomes not guilty. It says, "The People" -- that's the
22 prosecution -- "has the burden of proving beyond a reasonable
23 doubt that the officers are lawfully performing their duties as
24 a peace officer."

25 In other words, they have to prove that they're acting
26 lawfully beyond a reasonable doubt. And if they fail on that,
27 the verdict is not guilty on everything.

28 Then it goes on to say, "A peace officer is not lawfully

1 performing his or her duties if he or she is unlawfully
2 arresting or detaining someone or using unreasonable or
3 excessive force when making or attempting to make an otherwise
4 lawful arrest or detention." Right?

5 So again, we see that if an officer either does not have
6 grounds to detain or is using too much force in making a
7 detention, it's not guilty. The verdict is not guilty.

8 And you may have a question as to what is required for a
9 detention. "Specific facts known or apparent to the officer
10 that lead him or her to suspect that the person to be detained
11 has been or is about to be involved in a crime." And, number
12 two, "a reasonable officer who knew the same facts would have
13 the same suspicion."

14 All right. Now, this is a situation where you detain
15 somebody. Hey, how you doing? You might be involved in some
16 criminal activity here, I'm going to investigate it. That's
17 what a detention is.

18 See, a detention is different from an arrest because an
19 arrest is where you're actually taken into custody; whereas a
20 detention is simply an investigatory mode. So that's the
21 difference between the two. Detention, investigation; right?
22 And an arrest, you're taken into custody.

23 Now, an arrest, like when you're taken into custody, what is
24 the rule on that? And this is in the same instruction. The
25 defendant is not guilty of the crime of battery against the
26 peace officer if the officer was not lawfully performing his or
27 her duties because she was unlawfully arresting someone;
28 however, even if the arrest was unlawful, as long as the officer

1 used only reasonable force to accomplish the arrest, the
2 defendant could be lesser, not of battery on a police officer,
3 but of a lesser crime.

4 The instruction continues, and it says, "On the other hand,
5 if the officer used unreasonable or excessive force and the
6 defendant used only reasonable force in self-defense or defense
7 of another, then the defendant is not guilty of the lesser
8 crimes of assault and battery."

9 And then it continues to say that "The prosecution has the
10 burden of proving beyond a reasonable doubt that the officer was
11 lawfully performing his or her duties. If the People have not
12 met this burden, then you must find the defendant not guilty of
13 battery on a peace officer and assault and battery."

14 So it comes down to the same thing of whether they're
15 lawfully performing their duties. Now, what does this all mean
16 to this case?

17 Had they taken the time, even five seconds to explain to
18 Michael why they were stopping -- they already had two guns on
19 him, and they had his hands behind his back; right? That would
20 have been a detention. Why? Investigation. But they took this
21 directly to an arrest.

22 **MR. REINSTEDT:** Objection. Misstates the law.

23 **MR. ADACHI:** No, it doesn't.

24 **THE COURT:** Sustained.

25 **MR. ADACHI:** They took this immediately to an arrest.

26 **MR. REINSTEDT:** Same objection.

27 **THE COURT:** Sustained.

28 **MR. ADACHI:** As a jury --

1 **THE COURT:** Sustained, Mr. Adachi.

2 **MR. ADACHI:** -- your job will be to apply this and determine
3 whether or not an arrest occurred. And we contend that when you
4 throw somebody down on the ground and you handcuff them and you
5 search them, they're under arrest.

6 **MR. REINSTEDT:** Objection. Misstates the law.

7 **MR. ADACHI:** It doesn't misstate the law.

8 **THE COURT:** May I see counsel at sidebar quickly? Thank
9 you.

10 (Counsel and the Court confer in chambers.)

11 **THE COURT:** All right. Again, ladies and gentlemen, I just
12 remind you of the jury instruction that says that counsels'
13 statements aren't evidence. They're free to argue, but the jury
14 instructions and the evidence will be provided to you. Thank
15 you.

16 **MR. ADACHI:** What time do I have till?

17 **THE COURT:** You have until five to.

18 **MR. ADACHI:** The only evidence that they had, after they had
19 put Michael on the ground, sat on top of him, had searched him
20 and had searched his backpack was this naked phone call. There
21 was no corroboration from anybody inside the train; in fact, the
22 only information they had was from Laura Gottlieb who told them,
23 "Hey, these kids are innocent. It didn't happen that way."

24 So they have him on the ground. They have him handcuffed.
25 They've searched him. They've searched his backpack. They
26 haven't found a gun. Why is this a problem for the prosecution?

27 This is what you'll also see in 2670. It says the officer
28 must tell the person that the officer intends to arrest him or

1 her, why the arrest is being made, and the authority for the
2 arrest. And it says the officer does not have to tell the
3 arrested person these things if the officer has probable cause
4 to believe that the person is committing or attempting to commit
5 a crime, is fleeing, immediately having committed a crime, or
6 has escaped from custody. The officer must also tell the
7 arrested person the offense for which he or she is being
8 arrested; that he or she asked for that information. This is
9 right in the law that the judge read to you. 2670.

10 So they still have Michael on the ground after having
11 searched him, after having looked in his backpack and found
12 nothing. Whatever probable cause they might have thought they
13 had evaporated. Was gone.

14 At that point at a minimum, they should have helped Michael
15 up from the ground and said, "Hey. Sorry about that. We didn't
16 realize you don't have a weapon." And maybe taken him, and if
17 they could find Rodriguez -- because Rodriguez never came
18 forward; right? What you see on the video is him looking back
19 watching this whole thing, not saying anything until Andrea
20 bravely said, "Hey, that's the guy that started the whole
21 thing," and then he shouts something out. "Oh, they tried to
22 rob me."

23 But that's after Michael is on the ground, after they had
24 searched him and after they had looked in his backpack. Not
25 before. You can't put the cart before the horse. You can't
26 jump to conclusions. You can't just say, "You know what? Black
27 boy with a gun, that's enough for me." No. You got to have
28 probable cause.

1 Did the officers ever do this? Did they ever take the time
2 to tell Michael why they intended to arrest him? Why the arrest
3 was being made? How they had authority to arrest? At any time
4 do they do this?

5 They have him on the ground. He's hogtied. They have him
6 in a figure four twice. Did they ever communicate this to him?
7 They have time to communicate with the crowd. They have time to
8 communication with their partners. Oh, they can't take the time
9 to communicate about Michael.

10 What do they keep saying to you? It wasn't the right time.
11 It wasn't the right time. Well, when is the right time?
12 Christmas? And Michael told you if they explained to him,
13 communicated with him like he's a human being and told him, he
14 would have cooperated. But he had no idea what the heck was
15 going on. Why they were doing what they were doing.

16 All of these lead to the same place. Not guilty. You could
17 find one of these to be true. You could find all of these to be
18 true. You could find two of them to be true, but it all leads
19 to the same place. Not guilty on everything. Why? Because the
20 officers are not acting lawfully, for resisting arrest and
21 battery, if you find that they were not acting lawfully.

22 Now, are we trying to say that police don't have a right to
23 investigate situations where there's a violent crime? No. Of
24 course we want officers to do that. This isn't some rant
25 against police. They have an important job to do.

26 When there is a report of a violent crime, do we want them
27 to investigate? Absolutely. But we want them to do it the
28 right way. We want them to follow the law. We want them, if

1 they're going to detain somebody, to do it the right way and not
2 to use too much force and not to throw somebody on the ground
3 when it's not necessary, when you have two guns pointed at them
4 and two separate officers, and you have Michael's hands behind
5 his back.

6 But even if we give them that and we say, you know what?
7 You know what? I want to give you the blue chip award for
8 police officers of the year for throwing Michael on the ground
9 and putting him in that position and handcuffing him and
10 searching him and searching his backpack. After they did all of
11 that, and they found nothing. And Rodriguez didn't step
12 forward.

13 And Dr. Laura Gottlieb told the officers frantically, just
14 like Terina told you that she saw her do. He's innocent. It
15 was the other guy that was antagonizing. They weren't doing
16 anything. They moved away.

17 Even after all that, they kept Michael on the ground. They
18 kept him in a figure four. They kept him with officers' weight
19 on him. They kept him all tied up.

20 And, of course, we've been playing and replaying this on
21 video and everything else for the past two weeks. It's easy, in
22 hindsight, to sit there and think, oh, yeah. I wish it went
23 this way. I wish it went that way. I wish that didn't happen.

24 And that's what the prosecutor is doing. Slicing and
25 dicing. Like one of those chefs at Benihana. You know, we're
26 going to take this event, this fine event, and cut it into the
27 smallest pieces. And then I'm going to put it, you know, on a
28 video screen and move it frame by frame.

1 Self-defense. You're going to get that instruction. You
2 did, again. Self-defense is a defense to battery on a peace
3 officer so long as you're only using reasonable force, and the
4 police are using unreasonable force.

5 Also, the People have the burden of proving beyond a
6 reasonable doubt that the defendant did not act in lawful
7 self-defense or defense of another.

8 If the People have not met this burden -- and, again, they
9 have to prove the nonexistence of self-defense. It's not that
10 we have to prove self-defense. They have to prove that he did
11 not act in self-defense. They have to prove beyond a reasonable
12 doubt.

13 So looking at both of these -- right? -- this concept of
14 excessive force, let's take a look at who did what here.

15 This is a chart I put together, and it reads, "BART police
16 used excessive force in arresting Michael. Michael used
17 reasonable force in response."

18 **MR. REINSTEDT:** Counsel, can you put that where I can see
19 it?

20 **THE COURT:** Do you have an extra copy for the Court?

21 **MR. ADACHI:** Yes.

22 **THE COURT:** Thank you.

23 **MR. ADACHI:** This is what happens. We have two charges
24 here. On the left side, it says, "Police use excessive force."
25 On the right side, it says, "Michael used reasonable force."
26 And let's see. I just stated facts here on what happened.

27 Okay. So we know that the police didn't identify
28 themselves. They came out with their guns. They explained

1 absolutely nothing. They pointed the guns at his face and
2 chest, and they yelled, "Get down on the ground." They then
3 sweep his legs from under him. It causes him a bloody lip, and
4 his face to hit the ground. You saw the swelling. And they sit
5 on him, two officers, 350 pounds, on his torso and his legs
6 while they're yelling, "Don't move." All right?

7 Michael hasn't done anything yet. Okay? And then, they tie
8 his arms back, and they handcuff him. And they're holding him
9 by his arms. And it's at this point that they claim that he
10 squirmed when he yelled, "She's pregnant."

11 So who's using the force here? Who's using reasonable force
12 and who's using unreasonable force? Now, here they claimed that
13 Turner -- we'll talk about that in just a minute. Let's look at
14 what goes on next.

15 In response to Michael yelling, "She's pregnant," they have
16 already handcuffed him. They already have him by his arms.
17 They put him in a figure-four leg lock; right? They tie his
18 legs up like a pretzel. Then they search him. They search his
19 person, they search his backpack, and they find nothing. No
20 weapon. And I'm going to mark that.

21 The reason why I'm marking that right there is because even
22 if you conclude that everything they did up to this point in
23 time -- all right? -- not identifying themselves, explaining
24 nothing, point a gun at him, sweep his legs from under him, sit
25 on him with 350 pounds, tie his arms back, handcuff him, pull
26 him by his arms, use a figure-four leg lock. Even if you
27 forgive all of that and you say, right on. These officers are
28 doing exactly what they should have been doing. Once they found

1 no weapon, that's when they should have stopped. That's when
2 the excessive force should have stopped. But does it? No.

3 Instead, they put their knee in his back, both officers,
4 numerous times. They order him to turn over; right? They say,
5 oh, the force he uses is that he doesn't turn over when he's
6 ordered to turn over; right? They say, "Hey, turn over."

7 And he says, "No. I don't want to turn over." They put
8 their hand on him and pushed him over, forcibly. It's not a
9 situation where he voluntarily just rolls over. And you'll see
10 that when you look at the video; right?

11 The officer grabbed his leg as Michael is turning over; so
12 he goes from a figure four, to being sideways with Officer Chung
13 still on top of him, and then they push him over forcibly. And
14 he's saying, "Don't turn me over. I don't want to turn over."
15 And then they grabbed his leg. And you see that in all the
16 videos.

17 And then at this point they say, "Oh, he kicked Chung and
18 scratched Chung's finger." They then hit him with closed fists
19 twice. Both Chung and Velasquez do this. They crush his chest
20 with their legs. They punch Michael in the face -- right? --
21 when he supposedly spits at Velasquez. You can see that on the
22 video. He spits, and Velasquez punches him. Velasquez holds
23 Michael by his neck. They continue to use force against him in
24 the break room. Michael testified to that.

25 They then continue to use force as they bring him up to the
26 car, the patrol car. They talked about what they did with the
27 handcuffs. And this wasn't just complaining about injuries with
28 the handcuffs. Look at the two photos, A and B. That's worse

1 than any of the injuries that any of the officers received in
2 this case, supposedly; right?

3 They parade him in public on Market Street, after finding no
4 gun. At the car, for the first time, he says on the video,
5 "Hey, you're being arrested because of a report of a man with a
6 gun." The first time they tell him. And then they throw him in
7 the car.

8 They continue to use force on him -- right? -- they throw
9 him against the police car and they push him in the car and they
10 put their hands on him. They touch his chest, and at this
11 point, he spits at Velasquez's shirt. So there's a little spit
12 on Velasquez's shirt.

13 So, again, if you look at the force that Michael used versus
14 the force that these four officers used, it's no contest, you
15 know. This isn't WWF World Wrestling here. This is four
16 officers on one guy who's got his hands cuffed and is on the
17 ground. This is what happens.

18 And so when we talk about the right to use reasonable force
19 in order to defend yourself and the right to use reasonable
20 force against excessive force, this is a classic case. A
21 classic case.

22 Now, maybe Michael should have let them sit on Andrea or
23 maybe they would have figured it out at some time. But the fact
24 that he yelled out to save her made a difference, at least he
25 thought.

26 The reality is that Michael didn't stand a chance. He
27 didn't stand a chance because this is what he was up against.
28 This is what he experienced.

1 And I love it, again, how the district attorney does the
2 Benihana thing with this incident and suddenly, you know, you're
3 told, oh, Michael should have done this and he should have done
4 that, and he would have figured this out. And when he's in that
5 position, he should have done that. And he should have let his
6 leg turn over.

7 I mean, can you imagine everything that Michael went through
8 that day? I mean, being tied up in a figure four for as long as
9 Paul Endo told you that he was, according to the videotape.
10 Being tied up in a figure four and how painful that is?

11 And then, they're going to turn you over after being on your
12 legs for a little less than two minutes? Your circulation's cut
13 off, you've got a 180 pound guy that's on top of your legs,
14 you're smashed like a pretzel, and then they tell you they're
15 going to roll you over? And they forcibly roll you over, and
16 your leg kicks out. And then you have the prosecutor saying,
17 okay. Let's look at this in slow motion. You know, let's
18 figure this out.

19 You'll also receive an instruction on accident and
20 misfortune. And this talks about situations where a person
21 commits an act but without the intent. And so Michael said,
22 "Yeah, I was upset. But when they turned me over, my instinct
23 was to put my foot out."

24 Now, the prosecutor says that that's an intentional act and
25 that he did it on purpose. I mean, come on. In all that
26 confusion, you're going to hold Michael to that standard? He's
27 not Bruce Lee. He's the guy who's tied up in a figure four for
28 two minutes who's finally getting loose.

1 But see, the law doesn't put you in that situation. The one
2 instruction, which is an important one, is what they call
3 "circumstantial evidence." And "circumstantial evidence" is
4 when, from the evidence, you really can't tell, unless you draw
5 an inference from it. That means you look at it carefully and
6 figure out what it really says.

7 But law of circumstantial evidence -- this is CALCRIM 224,
8 that's the number -- if you can draw two or more reasonable
9 conclusions from the circumstantial evidence, and one of those
10 reasonable conclusions points to innocence and another to guilt,
11 okay? So we have two interpretations of the evidence that we're
12 looking for. So one points to guilt; the other points to
13 innocence. Green for innocence; red for guilt.

14 What does the law say you have to do? You must accept the
15 one that points to innocence and reject the one that points to
16 guilt. Why is that? Because with circumstantial evidence, you
17 don't know. You can't be certain. And the benefit goes to the
18 defense.

19 Let me give you another example that I think has a lot of
20 practicality in terms of this case.

21 **MR. REINSTEDT:** I'm going to object. I don't know what this
22 is. It's certainly not something in evidence.

23 **MR. ADACHI:** It's just one fun slide I have. I gave him
24 one. It has nothing -- it's just an example.

25 **MR. REINSTEDT:** If it's not in evidence, I'm objecting to it
26 because I don't know what it is.

27 **THE COURT:** Did you preview it to Mr. Reinstedt if it's not
28 in evidence?

1 **MR. ADACHI:** He didn't preview his slide to me.

2 **THE COURT:** Okay. Mr. Adachi, did you preview -- is it a
3 live feed?

4 **MR. ADACHI:** No.

5 **THE COURT:** I heard sound.

6 **MR. ADACHI:** Well, yes. It's not a live feed. It's an
7 example of a story that proves a point in this case.

8 **THE COURT:** Well, if you haven't shown it to Mr. Reinstedt,
9 I'm going to sustain the objection.

10 **MR. ADACHI:** He didn't show me his slide, either.

11 **THE COURT:** Mr. Adachi.

12 **MR. ADACHI:** I know. I'm not in third grade. I understand.

13 So anyway, you might remember a few years ago after Obama,
14 President Obama was elected president, there was this picture
15 all over the web. And it showed President Obama, and it looked
16 like he was leering at a young woman who was at the
17 GA Summit. And so they publish this all over the Internet and
18 they said, "What's Obama doing?" And it was a still photo. And
19 there was all kinds of, you know, conversations about it and
20 this and that.

21 Well, then they released the video. And the video clearly
22 shows that President Obama wasn't turning and looking at this
23 young lady who had her back turned to him. When you look at the
24 video, what he was really doing was he was turning and helping
25 an older woman get down from the stairs that she was on. And
26 you could clearly see that; right?

27 But it just goes to show that pictures can be deceiving.
28 Pictures can be deceiving. And so can video. And I'm not

1 telling you not to believe what you see on video. But don't
2 believe what's not there.

3 And so when the prosecutor tells you, well, geez, you know,
4 the evidence in this case shows that Michael bit Officer Turner.
5 Look at the video. It doesn't show that. Not even in the
6 least. It shows that they said at some point, "Don't bite,
7 don't bite," but there's no evidence whatsoever of any biting.

8 You can say that maybe Michael's head was near
9 Officer Turner -- or Michael's head was near Officer Turner, but
10 you can't conclude from that that he bit her. She doesn't say,
11 "I was bit." Remember what she says later in the break room? I
12 don't even know if this abrasion on my hand is from that. She
13 doesn't even know herself. She doesn't even realize anything
14 happened until one of these other officers said, "Hey, you were
15 bit, right?"

16 And she says, "Yeah. Let's add that charge." You know, I
17 never say -- I never thought I'd say, you know, if the glove
18 don't fit, you gotta acquit. But in this case, is there any
19 evidence of damage to the glove? Think about it. If somebody
20 bites you, you have a glove on, there's going to be some damage
21 to the glove.

22 Is there any damage to the glove? Even a little hole?
23 Anything at all that shows that she was bit? The teeth?
24 There's nothing. In fact, she threw the glove away. She didn't
25 even keep the glove. How can you believe that evidence beyond a
26 reasonable doubt; right?

27 That's the standard you have to deliver. Beyond a
28 reasonable doubt. If you have one doubt about their evidence,

1 you must vote not guilty. Presuming Michael to be innocent, we
2 turn to the prosecution, and say prove it beyond a reasonable
3 doubt.

4 They have all the resources to prosecute cases. Crime labs,
5 you name it. So where's the glove? Where is the evidence of
6 this bite? Oh, you want us to believe, because President Obama
7 was looking that way in the photo, that must mean he was leering
8 after that young woman and not helping the older woman off the
9 stairs like the video shows.

10 So be very suspicious -- and I know you will -- of those
11 kinds of arguments. Like the kick; right? We're going to show
12 frame by frame. If I ask you, does that so-called kicking video
13 really show a kick, or does it show a young man's legs after he
14 was tied up like a pretzel and forcibly turned over, struggling
15 to get one of his legs free after, as he said, he felt like he
16 suffered a Charley Horse.

17 And, again, it's easy for us to say, oh, yeah. That's a
18 bunch of hogwash. Because we've never been tied up in a figure
19 four -- I never have -- with two cops on top of me, 380 pounds,
20 for less than two minutes. I don't want to find out what that's
21 like. And then he turned over, and then say, "Hey, look, man.
22 Your leg -- your leg swung out that way and now, I'm going to
23 charge you with a serious crime."

24 But that's how it is in Michael's world; right? That's the
25 sales piece. That's what they're trying to get you to go along
26 with here, but that's okay. It's okay because it's just
27 Michael.

28 When you look at the evidence in this case -- and you'll

1 have the video evidence. You'll have each of the body-worn
2 camera from the officers. We brought you the cell phone social
3 media videos, and you'll get all those. And there's some pretty
4 colorful language in there by some of the folks who took the
5 footage.

6 But you know who does a pretty good job? Somebody who
7 didn't testify here, but we admitted her film today is a woman
8 named Mikaela Hampton. And it's "the Hampton video," and you'll
9 have this video. Because what Ms. Hampton does is she actually
10 moves and films the various events that are happening; so she
11 captures a lot of the essential interactions between Michael and
12 the police. And you can really see in her video, like, wait a
13 minute. Officer Turner's hand is nowhere near Michael's head.

14 And the so-called kicking incident, you can see the officer
15 who's holding his other leg go back and basically pull on
16 Michael's foot and come back in. You can see that the foot
17 that, you know, the prosecutor claims is a kick and hits the
18 area of the camera, that Officer Chung immediately gets control
19 of the feet and is able to not only pull Michael's legs, but use
20 it to come back up. And he comes back up on top of Michael.

21 Now, there's a struggle that goes on there, but Michael
22 wasn't the only one involved. Velasquez is there as well.
23 They're very close in proximity to each other. Have they proven
24 to you that this mark on Officer Chung's neck came from the
25 bottom of Michael's shoe? I don't see anything that indicates
26 that. There's a mark on his neck.

27 But the only thing that you'll see on the video -- and I
28 want to make sure I don't make the same mistake about the people

1 who thought President Obama was leering at the young woman and
2 made a mistake there -- but you don't see anything on there that
3 indicates that Michael kicked him in the neck or kicked him in
4 the head. And that's what they're claiming. They're saying he
5 kicked him in the neck; he kicked him in the head. And that's
6 the basis for the counts that Michael was charged with, and it's
7 simply not true.

8 But even if -- even if there were two interpretations of the
9 evidence -- right? -- the interpretation that you heard from
10 Michael and you heard from our witnesses and you see in the
11 video, including the social medial video, innocence. And you
12 equally believe as reasonable the prosecution's theory, whatever
13 they're showing you on their video; right?

14 What do you have to do? You have to accept that version
15 that points to innocence. You have to. It doesn't say you may.
16 It doesn't say you might. It says you must accept that version
17 which points to innocence.

18 So on these close calls, it's like, you know, when you're at
19 a Giants game or Warriors game and, you know, there's something
20 that happens, and there's a big question. Did it happen? Was
21 there a foul? Was it this? Was it that? Oh, we have it do a
22 photo finish. If there are two reasonable interpretations of
23 the evidence, you have to accept that which points to innocence.
24 And in this case, all of these supposed events are suspect.

25 Think about it. Think about if you didn't have body cameras
26 in this case; right? What does Officer Trabanino say; right?
27 What did Officer Trabanino say? What did Officer Velasquez say;
28 right? What did Officer Turner say? What did Officer Chung say

1 about these events in their reports?

2 Well, first of all, you have Officer Velasquez, who writes
3 in his report, oh, Michael was trying to walk away. Now, you
4 notice I asked all the other officers about that. They all said
5 no, he didn't try to walk away. Even though their partner had
6 wrote that in his police report, they all denied that Michael
7 had tried to walk away.

8 Why is that? Because there was a body camera video. They
9 looked at their video and they realized they were stuck. They
10 went up there and agreed with Velasquez, and they would look
11 pretty silly, and they knew that. And that's why body camera
12 videos are really a godsend in many ways because they do give us
13 the truth. And in that case, there's no question that Michael's
14 not moving.

15 But what does Officer Velasquez say? "Oh, I could feel his
16 muscle tension." What are you, a masseuse? And I'm not trying
17 to make fun of him. Because he has a dangerous job, and I
18 understand that. But the idea that you're going to charge
19 somebody for resisting arrest, and you're going to make the
20 decision to slam them on the ground by their face because you
21 feel a little muscle tension is ridiculous. You know? But that
22 was his explanation because he had to explain why he wrote that
23 in his report.

24 And the reason he wrote that in his report, even though it
25 never happened, is because of why? Because he wanted to justify
26 why he threw Michael to the ground. Michael's just standing
27 there. He's already got his hands behind his back. He knows
28 that.

1 So, Michael, you were walking away. He was walking away.
2 He decided to walk away; right? He's trying to get away.
3 That's why they took him to the ground. That's why they took
4 him down. It's a lie. It's a straight-up lie.

5 And from that alone -- the detention, the arrest, everything
6 that happened here is suspect because it started off. And
7 remember, it wasn't the first mistake in this case. It was the
8 911 call. It was the dispatch -- right? -- reporting that there
9 was a gun. There was the miscommunication from the CHP, the
10 California Highway Patrol, to the BART police.

11 The BART police act on that information. And instead of
12 taking Michael in custody when they have -- for detention when
13 they have the hands out with the guns and his arms behind his
14 back, what do they do; right? They take him down to the ground.

15 And they have to justify it; so Velasquez is going to say,
16 you know what? Hey, I saw him walking away. He's walking away.
17 Walking away. Thank God we have that body-worn camera video
18 because otherwise, how many of you would have believed him when
19 he said that without the body-worn camera? Yeah, we wouldn't
20 believe it.

21 **THE COURT:** Mr. Adachi, I don't want to interrupt. You have
22 four minutes left.

23 **MR. ADACHI:** You sure? I thought it was five.

24 **THE COURT:** Well, I missed a minute. I was supposed to do
25 it at ten till; so I'm a minute behind. I'm sorry.

26 **MR. ADACHI:** Well, my machine broke. I'm just kidding. I'm
27 going to wrap this up.

28 He'll get up again and talk to you some more, and he's going

1 to do his best to try and turn you around and get you to convict
2 him. I didn't know Mr. Reinstedt before we got to know each
3 other in this case, and I have a lot of respect for him and the
4 job that he does. He's always prepared, he's smooth, and he's
5 tried to do his job by representing his side of the case.

6 But one thing that's very important to remember -- because
7 it might seem like sometimes it's a battle between us, a battle
8 of wills or, you know, a battle of strategies or whatever.
9 Maybe give him half and give me half or something like that.
10 That's not what this case is about. Again, it's about justice
11 and about the right thing in this case.

12 You know, there's a saying that the prosecutor wins -- and I
13 hope he repeats this when he gets up here -- the prosecutor wins
14 when justice is done. And when there's a not guilty verdict,
15 the prosecutor should rejoice, not feel bad about it. Why?
16 Because it's the right thing. If you think that it's the right
17 thing, then it's the right thing.

18 I'm going to ask you not to compromise in this case.
19 Justice is not always about compromise. Justice is about the
20 right thing and doing the right thing.

21 And I know you know that as juror. That's why we chose you
22 in this case. And the district attorney is really asking for
23 your stamp of approval. For you to say, as fellow citizens in
24 San Francisco, people who live and care about this community,
25 they want you to say everything is okay. Everything in this
26 case was A-okay. Everything in this case was by the book.
27 Ed Flosi said so. Everything in this case.

28 What you did, Officer Chung; what you did, Officer

1 Velasquez; what you did, Officer Turner; what you did, Officer
2 Trabanino is A-okay. And that's exactly how I would want to be
3 treated if I was Michael Smith. And you can do that. You can
4 convict Michael. You can vote guilty. You can vote guilty on
5 everything. But what about the next Michael Smith? What about
6 the next young African-American kid?

7 **MR. REINSTEDT:** Objection. Improper argument.

8 **MR. ADACHI:** Or maybe anybody. Forget I said that.
9 Anybody. Anybody who steps off that train, and through no fault
10 of their own, finds themselves in the circumstance that Michael
11 Smith did. And that's really the question for all of you.

12 Make this right. Set him free. Tell him that it was okay
13 for him to support his girlfriend and call out to the officers,
14 "She's pregnant." Tell him that's okay. Tell him that as a
15 young man, he doesn't have to put up with unreasonable force.

16 The only way that you can send that message and the only way
17 that you can change the way things are done -- BART police,
18 what's going on around this country -- is to send a message.
19 And the message is not that we don't support the police --

20 **THE COURT:** Mr. Adachi, you're a little over, but if you can
21 wrap it up. Thank you.

22 **MR. ADACHI:** Okay. Thank you.

23 **THE COURT:** Thank you.

24 **MR. ADACHI:** We want the police to do their job right. We
25 know they have tough jobs. We know it's tough being a police
26 officer. We want police to respond to the situations. But not
27 like this. Not at this cost.

28 Let's do it. Let bring Michael back his dignity. Let's

1 help him heal. And at the same time, let's make our police
2 force better. Thank you.

3 **THE COURT:** Thank you. All right.

4 Mr. Reinstedt.

5 **MR. REINSTEDEDT:** Mr. Adachi, do you mind if I put a few
6 things on the podium?

7 **MR. ADACHI:** It's all yours.

8 **MR. REINSTEDEDT:** Thank you.

9 I'd like to start --

10 **THE COURT:** Mr. Reinstedt, if you want to wait until folks
11 leave. Okay. You may proceed.

12 **REBUTTAL CLOSING ARGUMENT**

13 **MR. REINSTEDEDT:** I'd like to start exactly where defense
14 counsel left off.

15 He is asking you to do something that frankly is not your
16 job as a juror. He's asking you to send a message. He's asking
17 you to pass some sort of moral judgment not just about this
18 case, but on the system in some broader way. He's asking you to
19 try and make a statement about the next defendant who encounters
20 the police.

21 I want you to think for a second about why he's asking you
22 to do those things when that's not what a juror is and that's
23 not what the jury instructions tell you to do.

24 The jury instructions tell you that your role is a very
25 limited one. You're to evaluate the evidence in this case,
26 apply the law as the judge has read it to you based on the
27 instructions, specific charges, specific elements, and you make
28 a determination based on the combination of those two things.

1 Here are the facts; here are the elements of the law. Do they
2 match? That's your job as a juror. Jurors are fact-finders.

3 Defense counsel is asking you to do something entirely
4 different. I want you to think about why that is. It's because
5 if you focus in on the facts of this case and the specifics and
6 don't make this about some broader moral imperative and sending
7 a message to the police force and trying to look at racism in a
8 broader sense, the facts of this particular case support finding
9 a conviction.

10 And I want to highlight one thing, in particular.
11 There are seven charges in this case. Six batteries against
12 police officers, and one charge for resisting arrest. Three of
13 those charges -- spitting on Officer Velasquez's face, spitting
14 on Officer Velasquez again at the patrol car, gouging
15 Officer Chung's finger -- defense counsel was just up here for
16 almost an hour and a half and didn't mention any of those
17 things. Not once. Not a word.

18 And the reason is if you look at the actual particulars, the
19 facts of this case, those things are batteries. They were
20 committed against police officers. And that's your job, as a
21 jury, is to evaluate those very specific facts and apply the
22 law, based upon the elements that the judge has read to you, and
23 those things meet those elements.

24 Now, instead, defense counsel also focused you heavily on a
25 lot of preliminary matters. The telephone effect and dispatch
26 has one set of information. As it gets relayed, it's slightly
27 modified. The information from the 911 call. What the
28 interaction was between Gilbert Rodriguez and Michael Smith on

1 the train, how much of a fight they got into.

2 Again, I want you to ask yourself, why the focus on those
3 things? Because those things are not part of any charge in this
4 case. They're none of the decisions that you actually have to
5 make, as jurors, about did battery one happen? Did it match
6 with the law? Did the second battery happen? Did it match with
7 the law?

8 And the reason, again, is because defense counsel is trying
9 to refocus you on, oh, well, clearly, it had to have been racism
10 that caused a change between dispatch record one, and then when
11 CHP reviewed the call, and dispatch record two. When really,
12 what the law requires and asks you to do is look at the
13 situation from the perspective of a reasonable officer, based
14 upon what they knew at the time.

15 Officers have an obligation to respond to 911 calls.
16 Counsel keeps calling it a "naked 911 call." When somebody
17 calls 911, the police have to go and respond to it, especially
18 if it's a violent report of a crime. Especially if it involves
19 a weapon.

20 And to focus on all of those preliminary things, what
21 happened on the train, is again, an attempt to distract you from
22 the very specific questions that you actually are asked as a
23 jury.

24 So looking at those specific questions, then, defense
25 counsel brought up with him a board that included his recounting
26 of the acts of force used in the case. Now, he listed the
27 charges in this case, namely, the batteries from the defendant.
28 And then to me, it's a little bit ironic that he's saying I'm

1 Benihana, he thinks. He listed out every time that any officer
2 touched the defendant in any instance including, for example,
3 they touch his chest, and that's in the excessive force column.

4 That's exactly what I highlighted for you would happen when
5 I first talked to you, namely, that he would say any force is
6 excessive force. That's not the law, though. And the reality
7 is that the officers approached this situation exactly
8 consistent with what their training is.

9 When they have a report of something like violent armed
10 robbery, including a gun -- the testimony of every officer, and
11 the expert who trains the officers told you that it would be
12 irresponsible to approach the situation by just saying, "Hey,
13 here's what's going on. We'd like to talk to you." Because
14 when there's a report of a gun, it changes things. It makes the
15 situation different. When there's a report of an armed robbery,
16 you're not just having a conversation with somebody about
17 jaywalking. It's different circumstances.

18 The officers testified that if you had fare evasion,
19 somebody who didn't pay their BART ticket, yeah. That would be
20 appropriate. To go up and just talk to them. That is not this.
21 And the testimony was consistent, from every single person you
22 heard, was that's not the approach that you can take, nor did
23 that change as the circumstances evolved.

24 From the initial encounter of the police, which was
25 consistent with their training to limit the danger, they then
26 made the decision to bring the defendant down to the ground.

27 Why did they make that decision? It's a combination of
28 things. It's based upon the evidence that they -- the report

1 that they were given going into this situation, but also, what
2 the defendant's reaction was. He did not follow lawful orders
3 to get down on the ground over and over and over again.

4 The officers testified that to their minds, that man might
5 be considering going for his weapon. Officer Velasquez went
6 behind him and put his arms on him.

7 And it's interesting to me that Counsel highlights that as
8 an example of an officer lying because that was the defendant's
9 testimony, also, when I played that section of the video back
10 for him was, oh, yeah. I do remember that now. I did strain
11 against him.

12 Under those circumstances where the defendant is not under
13 control, where he's not following lawful orders -- and the
14 officers have no idea if he may still have a weapon in his
15 waistband, in his pockets that he's going to try to go for. The
16 testimony of the officers, and of the expert, Ed Flosi, was that
17 you can use the ground as a controlling agent. It helps to
18 bring the situation under control.

19 Somebody who is free and standing has a lot more flexibility
20 to be able to try and pull away from an officer, to try and
21 reach for a weapon. It's a much less controlled situation when
22 you don't have that extra surface of the ground. And so the
23 officers did what is consistent with their training, and that
24 was to bring him to the ground.

25 And, again, the question that you're being asked is: From
26 the perspective of a reasonable officer, was the force used here
27 reasonable under the same or similar circumstances?

28 And, again, I want to note that defense counsel didn't talk

1 about any of the factors that you're actually to consider when
2 you're trying to figure out whether the force was reasonable.
3 Whether or not the defendant posed a danger to the officers or
4 to other people. The seriousness of the crime that was
5 reported. The level of resistance, if there was active
6 resistance of the person involved.

7 All of those factors support that the force used by the
8 officers here was appropriate. They responded by bringing the
9 defendant down to the ground, and then using basic weight
10 controls while they tried to get him in handcuffs, and he
11 struggled, grabbing their hands, and tensing his muscles.

12 Beyond that, it's the figure-four leg lock. That's the only
13 thing that really can be pointed to as use of force on the part
14 of the officers. And that only happened after the defendant
15 twisted underneath the officers, moving his legs free, and they
16 felt like they needed to get that under control. They still
17 didn't know if he had a weapon.

18 And the second time was after the defendant had kicked out
19 of the officers, which poses a serious danger. Being kicked in
20 the throat is no small deal. That was the second time that they
21 put him in a figure-four leg lock.

22 No active force on the part of the defendant was responsive
23 to those things. He wasn't trying to prevent a particular thing
24 from happening, for example, by biting Officer Turner. There's
25 no evidence that he was trying to prevent anything, in
26 particular, from happening by kicking out at Officer Chung,
27 kicking him in the throat. And particularly, there's no
28 evidence that he was trying to prevent anything in particular

1 from happening by spitting in Officer Velasquez's face.

2 The self-defense instructions indicate that it has to be
3 reasonable force used to defend one's self. Spitting in
4 somebody's face is not a defensive action, particularly under
5 these circumstances where the prelude video, if you watch the
6 Hampton video, shows Officer Velasquez is in a crouch next to
7 the defendant with a hand on it. He's not moving. He's not
8 doing anything. The defendant leans up and spits directly in
9 his face blinding him.

10 That is not an act of self-defense. That is not an attempt
11 to prevent some force by the officers. Officer Velasquez was
12 crouched, doing nothing.

13 The same thing with the second spit at the patrol car.
14 There was no force being used by the officer, beyond what
15 Counsel has labeled as they touched his chest as they put him in
16 the car. That's not excessive force. Officers are allowed to
17 put people that they are arresting in police cars. That's part
18 of their job. They don't deserve to be spit upon for doing it.
19 That's against the law. That's a battery.

20 One other thing that I would note about the initial
21 encounter between the officers and the defendant when they bring
22 him down to the ground, there was testimony from the officers
23 that that was not only for the safety of the people on the
24 platform and the safety of themselves, but actually, for the
25 safety of the defendant, too.

26 Counsel asked a number of times, well, they had guns pointed
27 at him. That should have been plenty of force to be able to
28 effectuate whatever investigation they needed to do at that

1 point.

2 The officers testified that they wanted to get out of the
3 situation where they had guns pointed. That is the most
4 volatile situation that they can be in. They wanted to get out
5 of that situation and have the defendant under physical control
6 so that they could then conduct their investigation.

7 And, in fact, investigate, they did. The videos show that
8 Officer Turner was going around the scene trying to find
9 witnesses. She talked with Dr. Gottlieb. She went onto the
10 train asking if there were additional witnesses. She was trying
11 to find who the victim was. Who was the 911 caller.

12 Officer Trabanino actually spoke with the 911 caller. If
13 you watch his body-worn camera, he has the defendant's
14 girlfriend standing calmly by, and he talks to the 911 caller
15 who reaffirms, "They threatened to rob me," to the officer.

16 And Officer Turner testified about how they need to be able
17 to investigate the whole scene. They can't take the word of a
18 single witness and say, oh, okay. Now, it's all good. We're
19 just going to end this detention and let everybody go. They
20 need to investigate what the actual situation is.

21 And that's another point to highlight that defense counsel
22 is representing to you in a different way than the evidence
23 actually shows. Over and over again, he told you, well, they
24 searched the defendant. They had a chance to search his
25 backpack. Partially, they had a chance to pat down his pockets.
26 They did have a chance to search his backpack.

27 But you can see in the video -- and it was the testimony of
28 the officers -- that the most common place a weapon is kept is

1 the front of a waistband. And you can hear Officer Chung and
2 Officer Velasquez talking to each other saying, "Oh, have you
3 had a chance to check the front yet?"

4 "No, I haven't." That's why they flip him over. And, in
5 fact, that's the only force that is being used when the
6 defendant violently kicks out at the officers. That's the
7 moment -- I don't know what he would have supposedly been
8 defending himself from. There was no force being used upon him,
9 other than trying to turn his body. But that's the moment at
10 which he kicks.

11 And that meant the officers not only had not been able to
12 search his waistband to that point, they never got to search his
13 waistband. Because when they tried to when they flipped him on
14 that side, he reacted violently. He kicked out at them. It
15 lead to a chaotic confrontation. They didn't have a chance to
16 search.

17 So when we're talking about detention for investigatory
18 purposes, all that's required is that the officers have some
19 specific facts that this person may be involved in a crime.
20 They had a 911 calling, report of a robbery and a gun, and a
21 description of someone: Mickey Mouse T-shirt, tan shorts,
22 backpack. That was this person. Those were the circumstances.
23 That's sufficient to detain.

24 And then everything from there, they're trying to conduct
25 their investigation. But what's happening instead? Defendant
26 is resisting, and then defendant batters the officers. And
27 interestingly, they actually do tell him that he's under arrest
28 for battery, and that's what they arrest him for. Not the

1 original robbery, and that's not in front of you, either. He's
2 not charged with a robbery here.

3 What he's charged with is his reaction to the situation.
4 And that reaction -- I want to highlight, again, how different
5 it was from his girlfriend's.

6 Defense counsel is telling you that he wanted to save her.
7 He wanted to save his girlfriend. And, frankly, there are
8 aspects of the defendant's situation and his girlfriend's
9 situation that are sympathetic. There was no gun found at the
10 scene. We know that from the evidence that you've heard.
11 That's unfortunate that that's what happened in this situation.
12 But it does not change the duty that civilians have not to
13 resist police officers, and not to fight them.

14 Just because they found themselves in an unfortunate
15 circumstance didn't mean that the defendant had a right to fight
16 the police. And the contrast between the way he acts and the
17 way his girlfriend does highlights that. She's fine. There's
18 no real use of force against her at all.

19 Twenty seconds, defense counsel told you, an officer had his
20 knee on her back. Her own testimony was it certainly wasn't his
21 full weight. She said 20 to 30 pounds, that's what she thought,
22 on her back. That's just for a few seconds while he's getting
23 her in handcuffs. And he gets her up, gets her out of the way,
24 very polite to her, even. Keeps her out of any of the struggles
25 that are going on with the defendant at their feet.

26 And the idea that the defendant's actions, that he was
27 kicking, biting, gouging, spitting in order to defend his
28 girlfriend, those things are contradicted by the fact that she's

1 standing there calmly, smiling at times, even, yelling at him,
2 "Just cooperate, just cooperate, just cooperate," over and over
3 again.

4 He's acting not to try and save her, but based upon what he
5 told you was going on, he was angry. And the words that you can
6 hear throughout the video support this.

7 From the very beginning, Counsel told you his words are not
8 as he testified here. But what you can actually hear on the
9 video when the police first encountered him, "I didn't do shit.
10 I'm not getting on the ground."

11 That's not asking the officers what is your probable cause
12 and why are you stopping me? That's taking a combative approach
13 from the very beginning.

14 When they try and turn him over, "I'm not turning nowhere.
15 I'm not turning nowhere." Right before he spits in Officer
16 Velasquez's face, "Mother fucker, fuck you," spits in his face.
17 Right after he spits on Officer Velasquez the second time,
18 "Fucking bitch," he says to him.

19 Those are not the actions of somebody who is trying to
20 defend himself or defend his girlfriend. Those are the actions
21 of somebody who's angry.

22 And the video evidence, I agree with Counsel, is incredibly
23 important for you to have in this case. You got to hear all the
24 officers testify. And actually, that's evidence too, despite
25 what Counsel would say.

26 So when Officer Turner told you about being bitten, the fact
27 that we can see most of the bite occur on the video, but you
28 don't actually get to see the teeth close down on the fist, it

1 doesn't mean it didn't happen. It just means that our angle
2 didn't quite capture it and, in fact, quite strongly supports
3 that it did happen. And Officer Turner told you unequivocally,
4 "I saw him biting me." Went to the hospital and got a tetanus
5 shot because of it.

6 The video evidence is very important in this case. And
7 Counsel made fun of me, a little bit, for showing you the
8 frame-by-frame portions of the video. But that's crucial to be
9 able to see what actually happened here. And I would especially
10 highlight that for the kicking. You can see the defendant's
11 legs are free. He moves them down; he moves them up; he draws
12 them back; he lashes out.

13 **THE COURT:** Mr. Reinstedt, I don't mean to interrupt you,
14 but you have five more minutes.

15 **MR. REINSTEDEDT:** Thank you.

16 When you review the video evidence, that's what you can see.
17 And it's important that that's there because it contradicts the
18 story that this was some reflexive involuntary action that
19 happened.

20 It's also contradicted, by the way, by the testimony of the
21 officers who have been in figure-four leg locks many times. The
22 testimony of Officer Flosi, Ed Flosi. And they all told you,
23 no, no such thing. I've never heard of anybody reflexively
24 kicking their legs out after being in a figure-four leg lock.

25 I don't doubt that it's not the most comfortable thing to be
26 in. That doesn't mean that it's excessive force and it doesn't
27 mean that you get to kick somebody in the throat afterwards.

28 One last closing thing here. Defense counsel is

1 characterizing this case as one where no one even apologized to
2 the defendant. As I said, I think that there are sympathetic
3 aspects of this situation from both sides. Both from the police
4 officers and the defendant. But everybody had to operate on the
5 information that they had.

6 The police officers had to operate on being told that they
7 were encountering an armed robbery, and that somebody was the
8 defendant. And they had to treat the situation under those
9 terms. They didn't have a choice about that.

10 And what they encountered from the defendant was somebody
11 who was angry at being stopped and who decided he was going to
12 resist them and fight them. He bit, he kicked, he spit, he
13 gouged, and those were his ways of trying to resist the police
14 officers.

15 And as much as defense counsel would like you to think
16 otherwise, this is not a great moral conundrum for you. This is
17 not a question of sending any sort of a message.

18 Your role, and what the judge has instructed you on is to
19 evaluate the evidence. Did this happen? Does the law and the
20 elements of the law match what happened? And the answer for
21 every single one of these batteries is simply yes.

22 They were not defensive actions. They were actions that
23 were done in anger. The video supports that. The testimony
24 that you heard supports that. And at the end of the day, that's
25 really what your job is. Not to send a message, but to make a
26 factual decision.

27 And the facts in this case support that the defendant
28 committed six batteries, and resisted officers. And so as a

1 result, I'm asking you all to come back with guilty verdicts on
2 the six counts of six misdemeanors. Thank you.

3 **THE COURT:** Thank you.

4 All right, ladies and gentlemen, I just have a few more
5 instructions, and then rather than breaking for the day, I'll
6 have you come back tomorrow morning, if you will, here, at
7 9:00 o'clock. We'll assemble in this room, and then I'll just
8 have you walk down to the jury room because the instructions
9 will take a couple more minutes.

10 All right. A question was asked regarding whether
11 Ms. Appleton's health condition was impacted by the incident.
12 An objection to the question was sustained, and the answer was
13 stricken. You're to disregard both the question and any answer
14 and not consider them in your deliberations. There is no
15 medical evidence of any connection between this incident and
16 anything about Ms. Appleton's health status after the incident.

17 Questions were asked of Officer Trabanino, a victim named in
18 the complaint, about whether he had chosen to speak with the
19 defense. Under the California constitution, a named victim of a
20 crime has an absolute right to refuse an interview, deposition,
21 or discovery request by the defendant, the defendant's attorney,
22 or any other person acting on behalf of the defendant.

23 If all of you find that the defendant is not guilty of a
24 greater charged crime, you may find him guilty of a lesser crime
25 if you are convinced, beyond a reasonable doubt, that the
26 defendant is guilty of that lesser crime. A defendant may not
27 be convicted of both a greater and lesser crime for the same
28 conduct.

1 Now I will explain to you the crimes effected by this
2 instruction, including lesser crimes of lesser crimes.

3 Simple battery, in violation of Penal Code Section 242, is a
4 lesser crime of battery upon a peace officer, charged in Counts
5 1 through 6.

6 Simple assault, in violation of Penal Code Section 240, is a
7 lesser crime of simple battery which is a lesser crime of
8 battery upon a peace officer, charged in Counts 1 through 6.

9 It is up to you to decide the order in which you consider
10 each crime and the relevant evidence. But I can accept a
11 verdict of guilty of a lesser crime only if you have found the
12 defendant not guilty of the corresponding greater crime.

13 You will receive verdict forms of guilty and not guilty for
14 the greater crime, and also verdict forms for guilty and not
15 guilty for the lesser crimes. Follow these directions before
16 you give me a completed and signed final verdict form. Return
17 any unused verdict forms to me unsigned.

18 If all of you agree the People have proved that the
19 defendant is guilty of the greater crime, complete and sign the
20 verdict form of guilty of that crime. Do not complete or sign
21 any other verdict form for that count.

22 If all of you cannot agree whether the People have proved
23 that the defendant is guilty of the greater crime, inform me
24 only that you cannot reach an agreement and do not complete or
25 sign any verdict form for that count.

26 If all of you agree that the People have not proved that the
27 defendant is guilty of the greater crime and you also agree that
28 the People have proved that he is guilty of the lesser crime,

1 complete and sign the verdict form for not guilty for the
2 greater crime and the verdict form for guilty of a lesser crime.

3 If all of you agree the People have not proved that the
4 defendant is guilty of the greater or lesser crime, complete and
5 sign the verdict form for not guilty of the greater crime and
6 the verdict form for not guilty of the lesser crime.

7 If all of you agree that the People have not proved that the
8 defendant is guilty of the greater crime, but all of you cannot
9 agree on a verdict for the lesser crime, complete and sign the
10 verdict form for not guilty of the greater crime and inform me
11 only that you cannot reach an agreement about the lesser crime.
12 Whenever I tell you the People must prove something, I mean they
13 must prove it beyond a reasonable doubt.

14 When you go to the jury room, the first thing you should do
15 is choose a foreperson. The foreperson should see to it that
16 your discussions are carried on in an organized way and that
17 everyone has a fair chance to be heard.

18 It is your duty to talk with one another and to deliberate
19 in the jury room. You should try to agree on a verdict if you
20 can. Each of you must decide the case for yourself, but only
21 after you have discussed the evidence with the other jurors.

22 Do not hesitate to change your mind if you become convinced
23 that you are wrong, but do not change your mind just because
24 other jurors disagree with you.

25 Keep an open mind and openly exchange your thoughts and
26 ideas about this case. Stating your opinions too strongly at
27 the beginning or immediately announcing how you plan to vote may
28 interfere with an open discussion.

1 Please treat one another courteously. Your role is to be an
2 impartial judge of the facts, not to act as an advocate for one
3 side or the other.

4 As I told you at the beginning of the trial, do not talk
5 about the case or about any of the people or any subject
6 involved in it with anyone including, but not limited to, your
7 spouse or other family members, friends, spiritual leaders, or
8 advisors or therapists.

9 You must discuss the case only in the jury room and only
10 when all jurors are present. Do not discuss your deliberations
11 with anyone.

12 During the trial, several items were received into evidence
13 as exhibits. You may examine whatever exhibits you think will
14 help you with your deliberations. These exhibits will be sent
15 into the jury room with you when you begin to deliberate.

16 We'll also send, by the way, a computer. I'll have counsel
17 agree on a computer so that you can replay videos. A caveat
18 about the computer, just like your cell phones, it will be in
19 the jury room with you, but please don't use it to do any
20 research. Just to review the videos. Thank you.

21 If you need to communicate with me while you are
22 deliberating, send a note through the bailiff, signed by the
23 foreperson or by one or more members of the jury. To have a
24 complete record of this trial, it is important that you not
25 communicate with me except by a written note. If you have
26 questions, I will talk with the attorneys before I answer so it
27 may take some time. You should continue your deliberations
28 while you wait for my answer.

1 I will answer any questions in writing or orally here in
2 open court. Do not reveal to me or anyone else how the vote
3 stands on the question of guilt or issues in this case unless I
4 ask you to do so.

5 Your verdict on each count must be unanimous. This means
6 that to return a verdict, all of you must agree to it. Do not
7 reach a decision by the flip of a coin or by similar act.

8 It is not my role to tell you what your verdict should be.
9 Do not take anything I said or did during this trial as an
10 indication of what I think about the facts, the witnesses, or
11 what your verdict should be.

12 You must reach your verdict without any consideration of
13 punishment. You will be given verdict forms. As soon as all
14 jurors have agreed on the verdict, the foreperson must date and
15 sign the appropriate verdict forms and notify the bailiff. If
16 you're able to reach a unanimous decision on only one or only
17 some of the charges, fill in those verdict forms only and notify
18 the bailiff. Return any unsigned verdict form.

19 So ladies and gentlemen, I'm going to have just -- our
20 alternate juror, I'm going to have you wait because I do have --
21 actually, I can do that tomorrow. I'm going to thank and excuse
22 all of you. It's been a long day. You've been very patient.
23 Thank you.

24 So remember to leave your notebooks here. We're going to
25 have those ready for you to take into the jury room with you
26 tomorrow. Very important that you don't discuss the case
27 amongst yourselves or with anyone else. We'll see you here at
28 9:00 o'clock tomorrow, and then we'll have the bailiff escort

1 you.

2 As I understand it, the jury deliberation room on this floor
3 is down on the other side. I hope you don't take it as though I
4 don't know what I'm doing in this courthouse. This is not my
5 regular courtroom. This is a different courtroom so that's why
6 I'm a little uncertain about where things are. But the bailiff
7 said the jury deliberation room is down the hall.

8 So you'll come here, and he'll then take you down the hall.
9 Okay. Thank you so much.

10 And actually, our alternate juror, ma'am, if you want to
11 stay here today, if you just want to stay here, I have one
12 instruction to read to you and that way, you don't have to come
13 back tomorrow. Okay? Thank you.

14 (The jurors were excused at 4:28 P.M.)

15 **THE COURT:** All right. 4080666?

16 **JUROR NO. 13:** Yeah.

17 **THE COURT:** Yes. Okay. So I wasn't thinking, and I
18 apologize. Since you are the alternate juror in this case, I
19 can read this last instruction to you, and then you don't have
20 to come in tomorrow, but you need to be on telephone standby,
21 and I will tell you why. Juror -- if you want to have a seat?

22 So the jury's going to begin deliberating tomorrow, but you
23 are still an alternate juror, and you are bound by my earlier
24 instructions about your conduct.

25 So you're not to talk about the case or about any of the
26 people or subject in the case with anyone because you're still
27 an alternate juror, and you can't talk even with your family and
28 friends. Don't have any contact with the deliberating jurors.

1 Don't decide how you would vote if you were deliberating. Do
2 not form or express an opinion about the issues in this case,
3 unless you're substituted for one of the deliberating jurors.

4 So here's the caveat. What I'd look you to do is check in
5 tomorrow -- or maybe we can call tomorrow at about 4:00 o'clock,
6 and the reason is Juror Number 7 told us in the beginning that
7 he has, I think, a business trip that starts on the 14th, which
8 is Wednesday; so you may be substituted in as an alternate
9 juror, but we'll let you know tomorrow. Okay?

10 **JUROR NUMBER 13:** Okay. So you have my phone number?

11 **THE COURT:** We have your phone number. Is that a good phone
12 number to contact you?

13 **JUROR NUMBER 13:** The cell phone number?

14 **THE COURT:** Let's make sure. I'm going to go off the record
15 for the number.

16 (Discussion held off the record.)

17 **THE COURT:** So we would call you in the afternoon and let
18 you know.

19 So let's go back on the record. So we'll call you and let
20 you know, and if you do have to come in, we'll have everyone
21 report tomorrow at 9:00 o'clock -- I mean, on Wednesday at
22 9:00 o'clock.

23 **JUROR NUMBER 13:** Okay.

24 **THE COURT:** Do you have any questions?

25 **JUROR NUMBER 13:** Oh, okay. Yeah. So I could tell also my
26 work that, you know, like --

27 **THE COURT:** Correct. So you could go into work tomorrow --

28 **JUROR NO. 13:** It's my day off. It's the Wednesday part.

1 They expect me to come back if -- you know.

2 **THE COURT:** Okay. Well, just tell them that you won't know
3 until about 4:30 tomorrow, if that's okay. We'll do our best.

4 **JUROR NO. 13:** Yeah. I do need, also, a note of my
5 reporting days here.

6 **THE COURT:** Yes. We will get those for you. Do you have an
7 e-mail address where we could send it, if necessary?

8 **JUROR NUMBER 13:** I don't know if I --

9 **THE COURT:** We do. So we're all set. Thank you. Have a
10 good evening.

11 (Juror Number 13 was excused.)

12 **THE COURT:** All right. So, Mr. Reinstedt, what I'm going to
13 do is I'm going to give you the Court's copy with the changes
14 that I made. There are not many, but I think I've tabbed them
15 all. And if you could just make those changes just to those,
16 and we'll print them out tomorrow, I'd appreciate it.

17 **MR. REINSTEDT:** Sure.

18 **THE COURT:** Anything else we need to put on the record,
19 folks?

20 **MR. REINSTEDT:** Three of the body-worn camera videos, I have
21 cut or redacted versions that cut off before the break room that
22 need to be substituted in for the full length DVDs that are
23 currently in the basket. I can make those tonight and provide
24 them tomorrow morning.

25 **THE COURT:** Okay. So why don't we do this. Let's be here
26 at 8:30 tomorrow so that we can go over that so that we know,
27 when the jurors come in, that we're ready to give them all the
28 evidence and we're sure on those videos. Does that work?

1 **MR. REINSTEDT:** Sounds good.

2 **THE COURT:** Okay. We'll see you tomorrow. Thank you.

3 **MR. ADACHI:** Okay. Take care.

4 (Whereupon, the Proceedings adjourned at 4:33 P.M.)

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