

Motions Hearings March - November 2010, Jury Trial of John Graham, December 1-10, 2010 and Sentencing Hearing January 24, 2011

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by The John Graham Defense Committee

Foreword

This Table of Contents is meant as a guide. It is not comprehensive. The documents below have been scanned in. The court has not provided the digital version. Though the text is searchable, the page numbers have not been indexed and some text in the body may also not have been indexed. Please send notification of unindexed text or any other issues to info@grahamdefense.org. The free program PDF-XChange Viewer is recommended for ease of searching (see <http://www.tracker-software.com/product/downloads>).

See also “[Court Documents](#),” particularly “[Motions by John Graham's lawyer John Murphy in the State of South Dakota case Feb. 12 - May 7, 2010](#)” (PDF, 652 KB).

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
)
) Plaintiff,)
)
) VS.)
)
) JOHN GRAHAM,)
)
) Defendant.)

TRANSCRIPT OF
MOTIONS HEARING

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
MARCH 8, 2010

COPY

* * A P P E A R A N C E S * *

1
2
3 MR. ROD OSWALD
4 Assistant Attorney General
5 MR. ROBERT MANDEL
6 Assistant U.S. Attorney
7 Representing the State of South Dakota

8
9
10
11
12 MR. JOHN MURPHY
13 Attorney at Law
14 Representing John Graham
15
16
17

* * I N D E X * *

13 WITNESS (ES) : DIRECT CROSS REDIRECT RECROSS

14 (None.)

18 EXHIBITS: OFFERED/ADMITTED

19 (None.)

1 * * P R O C E E D I N G S * *

2 **THE COURT:** We're here, Mr. Murphy, right on
3 time I take it?

4 **MR. MURPHY:** Yeah.

5 **THE COURT:** Lawyer time.

6 **MR. MURPHY:** That's right.

7 **THE COURT:** And you are seeking?

8 **MR. MURPHY:** I am seeking disclosure of the
9 documents that were expressly referenced by the
10 Attorney General's Office at the first appearance in
11 state court that -- from the Canadian Government that
12 authorizes the state court prosecution.

13 At that first hearing representatives from
14 the Attorney General's Office said that they had
15 documents from Canada authorizing this prosecution.
16 We have asked for disclosure of those and they have
17 resisted.

18 **THE COURT:** Mr. Oswald?

19 I am trying to understand what power the
20 Canadian Government would have to authorize anybody to
21 do anything in the United States. That's my first
22 question. I don't know that that power exists.

23 Does it, Mr. Murphy?

24 **MR. MURPHY:** Your Honor, the government --
25 the United States Government went to Canada back in

1 2003 and asked permission to bring Mr. Graham here.
2 He was held pursuant to that permission for a number
3 of years.

4 **THE COURT:** Right.

5 **MR. MURPHY:** The Canadian Consolate was in
6 consultation with my client and me about that. In
7 fact, we met with them once.

8 At some point, when the United States
9 Government decided they were considering dismissing
10 the federal charges, the state petitioned or
11 something. We don't have a formal document, but we
12 were in discussion with the U.S. Attorney's Office at
13 that time. That they were asking the Canadian
14 Government for permission to turn Mr. Graham over to
15 state authorities. They represented that they, in
16 fact, got that permission. And they made an express
17 representation to the Court, not an ambivalent or
18 equivocal representation; they said they got that
19 permission. And so we are seeking disclosure of that.
20 Their position seems to be that they don't have the
21 duty to turn that over.

22 My position is that if their representations
23 to the Court were untrue, that constitutes
24 prosecutorial misconduct, which implicates due
25 process, which is material to my client's defense; and

1 that makes it discoverable under 23(a)-13-3.

2 And they've have cited a line of cases that
3 have stood for a number of propositions, none of which
4 are right on point in this case; and I frankly have
5 not had a chance to research those cases because I
6 just came back from Chicago Saturday night and I have
7 been gone for about eight days. But during the --
8 that period of time this response was filed.

9 But I believe we have legitimate grounds when
10 they have raised the issue -- brought that to the
11 forefront -- by representing that they had gotten this
12 permission, that now they have a duty to disclose that
13 so that we can pursue all defenses and -- when --

14 The statutes talk about items that are
15 material to the preparation of my defense -- or my
16 client's defense, I believe that has to be read in an
17 all encompassing nature which would mean any defenses
18 we may have which could be due process violations
19 based on misconduct by the prosecution, the
20 legality --

21 **THE COURT:** What would be the foreseeable or
22 imagined -- I am not trying to say illusions. I am
23 just saying in terms of -- what would constitute
24 misconduct that would give rise to a due process?

25 I mean, my general understanding of

1 extradition law is -- or being brought to trial is --
2 you know, bounty hunters bring you in. However you
3 get here really doesn't matter much, as long as you
4 get here.

5 **MR. MURPHY:** I think the remedy is, then, if
6 in fact there is no authorization, then there is
7 certainly potential for a writ of habeas corpus
8 because my client's body may be being held illegally.

9 My client is a member of a First Nation band
10 in Canada, the autonomous region within Canada. There
11 is a number of complicated matters that go into even
12 bringing him to the United States in the first place.

13 And so that's something that -- I mean, there
14 is a lot to explore here. The United States
15 Government had to go up to Canada and put on quite a
16 dog-and-pony show just to get Canada to consider
17 bringing him here.

18 In some of those extradition documents on the
19 federal side, they mention some of the racial
20 components, which it's my understanding went to this
21 idea that my client is a member of a band that resides
22 within a autonomous region, the Yukon Territory.

23 And so I believe if, in fact, the government,
24 or the state in this case, doesn't have the proper
25 documentation, that then either through the Canadian

1 Consolate or through the state process, we would be
2 able to seek a writ of habeas corpus that his body is
3 presently being held in violation of the law.

4 **THE COURT:** Mr. Oswald?

5 **MS. OSWALD:** Judge, I believe the Court did
6 state it correctly that if he's here, it doesn't
7 matter. He can't -- it doesn't matter how he got
8 here.

9 The remedy in South Dakota law as I
10 understand it from the *Spotted Horse* case is that they
11 would invoke the exclusionary rule for any evidence
12 obtained, confessions, statements, things like that,
13 while he was illegally here. That has not happened.

14 Besides, Canada brought him here. The United
15 States Government, as I understand it, did not go up
16 there and get him. His asylum country brought him
17 here. And we feel that this is -- has no bearing and
18 no *Brady* material.

19 **THE COURT:** Well, one of the questions -- and
20 I am coming at it, apparently, at an angle that is
21 different than I am hearing expressed.

22 The question that hits my mind is in the
23 terms of the discussion, negotiations, and all of
24 this, were there representations as to evidence and
25 other materials that might be discoverable or should

1 be discoverable by Mr. Murphy that has not otherwise
2 been obtained?

3 My tendency, without having formed a firm
4 conclusion, is to believe that, absent those processes
5 containing discoverable material, I tend to agree with
6 the state that you are here and you are stuck here.

7 But I am concerned as to -- and have no idea
8 to think there is or isn't. Don't mistake me. But if
9 there is discoverable material which may or may -- may
10 have been presented to Canadian authorities, that that
11 material would be potentially relevant to the defense
12 in this case.

13 Now, if -- I am presuming underlying
14 Mr. Murphy's request is something of that ilk rather
15 than just -- I don't know -- I really don't know how
16 to get beyond the fact in terms of just that he's here
17 he's here. The due process by the Canadian Government
18 and sovereign nations in bringing him here, albeit let
19 us say heated and continued requests from the United
20 States Government or the State of South Dakota's
21 Government. That's where I am kind of stuck on that.

22 I am concerned that there may be -- I think
23 it may raise a question as to information there,
24 otherwise discoverable, that in representations that
25 may have been made to the Federal Government or to the

1 Canadian Government in terms of seeking assistance
2 from them in coming back to South Dakota for either
3 federal or state prosecutions.

4 Mr. Murphy?

5 **MR. MURPHY:** One, it's my understanding,
6 contrary to what Mr. Oswald represented to the Court,
7 that the U.S. Marshals actually traveled to Canada to
8 obtain my client and bring him back.

9 **THE COURT:** U.S. Attorney have any idea of
10 that?

11 **MR. MANDEL:** Your Honor, ultimately that's
12 correct.

13 This was initially -- if I could explain the
14 procedure a little bit, that might help. Initially
15 the United States sought the arrest of Mr. Graham up
16 in Canada and his extradition from Canada; that the
17 arrest actually took a substantial period of time
18 before they located him and arrested him. The arrest
19 was initially sought in early 2003. He wasn't even
20 arrested there until the end of 2003. Approximately.

21 Then the entire matter of the extradition was
22 litigated up in Canada from 2003 -- the end of 2003
23 through the end of 2007 before he was ultimately sent
24 back to the United States.

25 He did have representation up there that was

1 kind of fought tooth and nail every bit of the way up
2 there.

3 There was -- to answer another question the
4 Court mentioned, there is no discoverable material
5 that was provided to the Canadians. There was a
6 synopsis of the facts of the case that was provided.
7 But that was based upon the discovery that has been
8 provided to the defendant in this case.

9 In any event, once there was finally a
10 decision made by the Canadians that he could be
11 extradited to the United States, to stand trial in
12 Federal Court, for the charge that was pending, the
13 first degree murder. Then the Marshals did actually
14 travel up to Canada to transport him back here at the
15 expense of the United States.

16 I noticed that Mr. Murphy used the expression
17 "permission" a lot of times. And I don't know that
18 permission is the appropriate word, but the Court
19 there did make a determination that he could be
20 extradited under Canadian law. He was brought back
21 here.

22 When the transfer from federal to state
23 jurisdiction took place, it is what they refer to in
24 Canada as a waiver of the Rule of Specialty. And
25 again, the Court -- excuse me. The Administer of

1 Justice up there considered the similarities between
2 the state case and the federal case and waived the
3 Rule of Specialty to put him here in state court for
4 the state to proceed against him.

5 **THE COURT:** I assume those are public
6 records?

7 **MR. MANDEL:** Um --

8 **THE COURT:** And what records in this
9 proceeding would not be public?

10 **MR. MANDEL:** I guess I don't know what the
11 procedure is up in Canada.

12 **MR. MURPHY:** I have not been able to obtain
13 those documents on my own, Your Honor. I don't know
14 what process --

15 **THE COURT:** Have you been in contact with the
16 counsel in Canada?

17 **MR. MURPHY:** I have.

18 **THE COURT:** And we don't have an answer as to
19 how to get these because the description I get from
20 Mr. Mandel is perfectly -- I mean, seems entirely
21 rational. And is saying the decision is typical of
22 those that we routinely make here. And that after the
23 trial in the matter and the hearing, the determination
24 was he was, I guess, extraditable and -- under the
25 provision that he was coming back to face federal

1 charges.

2 I don't understand the Rule of Specialty,
3 but --

4 **MR. MURPHY:** We have what we believe to be
5 the synopsis that we're not able to verify.

6 As for the waiver of the Rule of Specialty,
7 my client did not have counsel during that process.
8 My client's counsel was for the initial matter, the
9 transfer.

10 **THE COURT:** Do we know that it matters
11 whether or not he has counsel or not?

12 **MR. MURPHY:** Well, as lawyers, we always
13 matter, don't we?

14 **THE COURT:** Understand.

15 But he may not have had any input to the
16 decision?

17 **MR. MURPHY:** He did not, Your Honor. I was
18 his only counsel at that point.

19 **THE COURT:** Maybe was not entitled to any
20 input on the decision.

21 **MR. MURPHY:** Again, that's something I don't
22 know. I was attempting to get him representation in
23 Canada, but was unable to do so.

24 So at least the waiver of the Rule of
25 Specialty -- I mean, now this is the second hearing

1 where the state has admitted this document and said
2 that that's what justifies my client's body being here
3 and being in chains.

4 **THE COURT:** What's the problem with providing
5 the waiver of specialty?

6 I mean, one of my concerns, in all candor, is
7 let us assume for the sake of discussion only that
8 this matter proceeds to trial and goes badly for
9 Mr. Murphy's client. I'm not fond of having habeas
10 corpus proceedings follow a year or two later; and
11 then having the option, if successful, of retrying the
12 case if one can gather all its witnesses again and all
13 of that.

14 And if there is such a document, whether he
15 be entitled to it or not, my question is, where is the
16 harm in providing it and -- first of all, does it
17 exist; and secondly, if the proceedings for whatever
18 this waiver of specialty is are available, have you
19 had the opportunity to review those?

20 Mr. Mandel?

21 **MR. MANDEL:** To review the --

22 **THE COURT:** Well, to actually see them?

23 Know what they are and know what they consist
24 of, this proceeding to waive the Rule of Specialty,
25 which I assume it applies only to the given -- to the

1 Federal Government unless they otherwise allow the
2 extradition for determination as the South Dakota --
3 the United States authorities feels appropriate.

4 **MR. MANDEL:** Well, I will try and explain it
5 as best I can. You know, I'm not -- I don't consider
6 myself an expert on this, but I have at least been
7 through it so I have some experience with it.

8 The waiver of the Rule of Specialty does not
9 go back through the court system in Canada. That's a
10 determination made by the Canadian Minister of Justice
11 whether it's permissible to make this transfer.

12 And I'll add to that, you know, the rest of
13 the world doesn't understand the difference between
14 state and federal courts. That's an oddity of the
15 United States that doesn't exist anywhere else quite
16 like it does here.

17 So that -- the start is, it's a difficult
18 thing to convey to them how the court systems interact
19 here and what the differences are. That's a
20 determination that is not -- again, not made in the
21 court system. It was made by the Minister of Justice,
22 the equivalent of the United States Attorney General,
23 as to whether or not we're allowed to do this. And
24 under Canadian law, there is not a right for
25 representation. There, frankly, is not a proceeding

1 in the sense of a court proceeding. The defendant is
2 not entitled to representation at that which is why
3 they didn't provide him representation up there.

4 I guess --

5 **THE COURT:** My question is, do you have, A, a
6 copy of the ruling by the whoever it is in Canada that
7 made that ruling?

8 And if so, is there some problem with or some
9 reason why it should not be provided?

10 You know, is it a secret document?

11 Is it a public record?

12 **MS. OSWALD:** I actually don't know the
13 answer, whether or not they make that record public up
14 there.

15 I guess my objection would be that we're
16 litigating an issue that really isn't before this
17 court.

18 **THE COURT:** I don't know that were litigating
19 it.

20 My point is, if we don't need to, we
21 shouldn't. And -- simply because it's easy enough, I
22 assume, for the state, or in this case assistance from
23 the Federal Government, to obtain that record, find
24 out if it's a public record and available to peruse
25 the record and decide if there is some objection to

1 producing it. At which point it can come before me in
2 the wisdom of in camera proceeding and we can examine
3 it subject to those rules and make a decision.

4 I -- you know, I -- I don't like the concept
5 of post conviction, and I am not trying to convey
6 anything other than a post conviction that wanders
7 around in the clouds of I requested this information,
8 it may have been of value to the defense, nobody will
9 even show us at this date what it is, and it was
10 absolutely refused for anybody to get a copy of it and
11 make some sort of a determination.

12 Now, whether that's a successful habeas or
13 not, I don't have a clue. And I suspect it may depend
14 on the judge and the other data. But in any event, I
15 don't see the profit in that for anybody. That's my
16 problem.

17 So it would be my thought that the government
18 will, A, determine if it's a public record. If it is,
19 they will either advise Mr. Murphy how to get it or
20 will get it and provide it to Mr. Murphy.

21 Is there is an objection -- if it's a secret
22 record, you -- which wouldn't surprise me -- but if it
23 is somehow a confidential document that the government
24 can obtain or provide evidence that it can't obtain
25 it, then we -- and you object to giving it to

1 Mr. Murphy, we'll have an in camera review. And if
2 it's innocuous, Mr. Murphy will be satisfied, you will
3 be satisfied, and we'll get on the way with trying
4 this matter.

5 Should it reveal information useful to the
6 defense, then we have resolved that question as well.
7 You know, I don't -- given the Denver box, I don't
8 want to walk further down that road than I have to. I
9 have no idea what the Denver box is other than it
10 appeared in the paper.

11 And in any event, I don't want this procedure
12 tainted unless it's done by me by accident and I can
13 take the fall for it. That's my job, to make the
14 decisions and take the heat. I suspect -- I would be
15 affirmed in not proceeding this any further. But as I
16 indicated, I don't want it coming back for a habeas
17 and then shifting over, if denied, to a habeas within
18 the federal system. I don't see any profit in that
19 for the state or any profit in it for Mr. Murphy.

20 So my direction is, find out if it's a public
21 record and if it is, inform Mr. Murphy how he can get
22 it or the government will get it and provide it.

23 Other than that, if there is some objection,
24 I need to know about it. And we'll review it in
25 camera if we can. If we can't get it at all, then

1 data from the Canadian Government that says that
2 should be -- you know, at that point I can't subpoena
3 anything in Canada that I know of.

4 **MR. MURPHY:** Well, what I am concerned about,
5 Your Honor, and this goes to the due process issue.
6 At a previous hearing in this case they said they had
7 the document. Now you've kind of asked Mr. Mandel
8 whether he has it and he hasn't answered that
9 question. He skirted that question. So, I mean, I
10 think at --

11 **THE COURT:** I perceived him to say he didn't.

12 **MR. MURPHY:** Well, I don't think he said
13 that. And --

14 **THE COURT:** Well, I understand that.

15 **MR. MURPHY:** There is the candor to the Court
16 issues that have been plaguing this issue.

17 **THE COURT:** All right. So we'll, just ask
18 that question flat out.

19 Do you have a copy any of the documents that
20 relate to the Canadian Government's waiver of the --
21 of specialty?

22 **MR. MANDEL:** Your Honor, I think I -- I have
23 some of them electronically. But what I don't -- even
24 if I don't, through main justice, I think whatever
25 they've got copies of, assuming that it's -- can be

1 made public, I can get from them. That's not an
2 issue.

3 **THE COURT:** Well, would we do that?

4 **MR. MANDEL:** My only -- first of all, I have
5 no problem with anything the Court -- not that it
6 would matter.

7 **THE COURT:** I realize I am talking to federal
8 people, but I can run it through Mr. Oswald and then
9 he can lateral to you.

10 **MR. MANDEL:** My only question is, are you
11 just talking about the document under which the
12 Canadians waived the Rule of Specialty or are you
13 talking about more documents?

14 **THE COURT:** That's what I am talking about
15 right now.

16 I am presuming from what I heard that the
17 question of the propriety of extradition to the United
18 States was established in the litigation in Canada.
19 If that's incorrect, somebody let me know. But it
20 would seem to me that that would resolve that issue.

21 And then the question came up as to the
22 Federal Government -- for the potentiality of them
23 dismissing the charges. And there is some sort of a
24 rule in Canada that apparently would restrict
25 extradition to the entity to which it was granted and

1 not to another sovereign, which would be the State of
2 South Dakota. And would, given the federal nature of
3 our system, I am advised that they waived that Rule of
4 Specialty. At least that's the context in which it
5 seems to enter my cranial fog. And I would like to
6 clarify that if we can.

7 **MR. MANDEL:** I think we could do that. I
8 don't see any problem, Your Honor.

9 **THE COURT:** I think that tends to solve the
10 problem at this point in time.

11 Mr. Murphy?

12 **MR. MURPHY:** That -- what I will do is I will
13 draft an order that I hope conforms to what the
14 Court's ruled and I will run it by Mr. Oswald.

15 **THE COURT:** If they agree with form -- if not
16 both send me one by email and I will cobble together
17 the order I sign.

18 **MR. MURPHY:** Okay.

19 Thank you.

20 **THE COURT:** Let's -- I assume you would do it
21 without the order, but let's keep the record clean,
22 all right.

23 Thank you.

24 Anything else?

25 **MR. MURPHY:** Not from the defense, Your

1 Honor.

2 **THE COURT:** I should have put you first.

3 Thank you.

4 Are there any further hearings set or do I
5 need to set them?

6 **MR. MURPHY:** What's that?

7 **THE COURT:** If you need to schedule a further
8 hearing, call me.

9 (Whereupon, the proceedings in this matter
10 were then concluded.)

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1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
 2 COUNTY OF PENNINGTON)

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I, TINA RAE PRUSS, Official Court Reporter
 and Notary Public in and for the County of Pennington,
 State of South Dakota,

DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 questions asked, the testimony given, and of the
 proceedings had.

I FURTHER CERTIFY that I am not of kin or in
 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.

COPY

Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 Pennington County, South Dakota
 My Commission expires: 10-04-2012

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 2 COUNTY OF PENNINGTON) SS. SEVENTH JUDICIAL DISTRICT

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 THE STATE OF SOUTH DAKOTA)
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 Plaintiff,)
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 VS.)
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 THELMA RIOS)
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 and)
)
 JOHN GRAHAM)
 Defendant.)

TRANSCRIPT OF
 MOTIONS HEARING
 CRI 09-3954
 CRI 09-3953

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
 Circuit Court Judge
 Pennington County Courthouse
 Rapid City, South Dakota
 AUGUST 2, 2010

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* * A P P E A R A N C E S * *

MR. MARTY JACKLEY
Attorney General
MR. ROD OSWALD
MR. ROBERT MANDEL
Assistant Attorney Generals
Representing the State of South Dakota

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

MR. MATT KINNEY
MR. RANDY CONNELLY
Attorneys at Law
Representing Thelma Rios

MR. DANA HANNA
Attorney at Law
Representing Dick Marshall

* * I N D E X * *

WITNESS (ES) :

(None.)

1 * * P R O C E E D I N G S * *

2 **THE COURT:** Okay.

3 We're here to handle a stack of motions that
4 have been filed by various folks. Mr. Murphy was kind
5 enough to provide me a list of motions pending between
6 Mr. Graham and the state.

7 Is there any reason not to follow that order?

8 **MR. JACKLEY:** We didn't receive that list,
9 Your Honor, to my knowledge.

10 **THE COURT:** Okay.

11 Doesn't have much in it except cites to
12 motions and the pages and court records that --
13 filings. That's his summary of -- not how they should
14 be decided but what motions are pending.

15 **MR. JACKLEY:** That would be fine with the
16 state, Your Honor.

17 We have it in chronological order, but as
18 long as the Court is patient, we'll get there.

19 **THE COURT:** I suspect the Court is going to
20 have to be patient no matter what would be my guess.

21 What's the problem, Mr. Murphy, with the --
22 the opposition -- where are we on the extradition
23 documents?

24 I thought that was fairly clearly taken care
25 of.

1 **MR. MURPHY:** Yeah. That's not addressed in
2 this, Your Honor.

3 The ones in bold -- the first three have been
4 resolved.

5 We're starting at number four, the demand for
6 an alibi. We filed a motion. We discussed that at
7 one hearing, but the Court, to my knowledge, never
8 issued a definitive ruling on that.

9 **THE COURT:** Well, I have some problems with
10 the state's posture, and then I can address the alibi
11 matter.

12 Number one, does the state consider itself
13 stuck or held to the December 10 to 12 dates?

14 **MR. JACKLEY:** No, Your Honor.

15 **THE COURT:** What other dates are in issue?

16 **MR. JACKLEY:** It's alleged on or about
17 December 10 through the 12th is where this began in
18 Denver and then moved forward. I think we can get by
19 on or about.

20 I think with respect to the alibi notice, if
21 it falls outside of that time frame, then defendant
22 would have an opportunity to not be bound by or
23 foreclosed by the notice of alibi.

24 In other words, the state is just asking
25 within that isolated time frame, December 10 through

1 12, because that's really when this began in Denver
2 and moved forward to Rapid and then to Rosebud and
3 then to Pine Ridge and then to Amiotte's place; that
4 within that time frame, within that scheme of events,
5 that if there is in fact an alibi, we should be
6 entitled to hear about what the alibi is and receive
7 the proper notification.

8 **THE COURT:** Mr. Murphy?

9 **MR. MURPHY:** Your Honor, the statute I cited
10 permits the Court to exempt us from having to disclose
11 it for good cause. And I think this is one of those
12 cases that fits squarely within that. We're talking
13 about an event that allegedly occurred over 30 years
14 ago.

15 The state is proceeding under the on or about
16 language. This is not like an aggravated assault
17 where we know that it happened between 11:00 and 11:45
18 last Tuesday. They are saying that a scheme of events
19 started somewhere between December 10 and 12. We
20 don't even have an end date.

21 And so for my client to be required to
22 provide an alibi defense for a time period that they
23 can't even define here today after two years of
24 litigation is unreasonable, and frankly, impossible.

25 **THE COURT:** Well, and then they sit here with

1 the scenario standing up in front of a jury where
2 Mr. Graham may or may not take the stand, but have
3 testimony -- I don't have a clue. I can't remember
4 where I was on December 11 or December 12 or
5 December 10.

6 The response of the state then runs along the
7 line, and there is good reason for being unable to not
8 remember on those dates. And it pins -- it pins
9 Mr. Graham to a time and particularity that may be
10 very difficult.

11 I am -- reputedly, I have a first rate
12 memory, near photographic in context, and if you think
13 I could tell you the year in which I was married --
14 and it wasn't that long ago -- and I am not sure of
15 the date though I can give you an on or about. My
16 secretary has a responsibility to let me know. I
17 can't remember. And it's the standing joke in the
18 family. But that was a significant event.

19 And you are talking about significant events
20 alleging that Mr. Graham was involved in those events
21 and then asking him to recall in detail where and what
22 he was.

23 I don't have an objection to Mr. Graham
24 having to provide as best he can, but I do have
25 objection, then, to a response of the state, if indeed

1 some evidence is presented about lack of memory where
2 we sit here and then claim, as I indicated above,
3 that, well, he was there. And of course he can't
4 remember. I have a little problem with that argument.
5 Because we're sitting here saying that -- and it is a
6 few decades ago.

7 **MR. JACKLEY:** If I may, we fought about this
8 in the federal case and I can appreciate that
9 doesn't -- that that has no binding precedence in
10 these proceedings. And Mr. Murphy can correct me if I
11 am wrong. I think the way it was ultimately resolved
12 the judge ruled in favor of the government's alibi,
13 but made it clear that it didn't affect, you know,
14 Mr. Graham from taking the stand and testifying -- his
15 right to testify as to what may or may not have
16 happened.

17 What it did foreclose him for doing, for
18 instance, if we're in the middle of the trial and he
19 produces a plane ticket December 11, 1975, and says he
20 was flying to Canada or some other place, he's
21 required to give us that notice pursuant to the notice
22 that was provided.

23 Does that make sense?

24 That's what I think the judge ultimately
25 ruled that the alibi would not foreclose Mr. Graham

1 from his right to testify.

2 **THE COURT:** I assume that -- I mean, that's
3 the identical issue that the first appeal I had on
4 behalf of defendant to the State Supreme Court in 1977
5 or 78 that indicated that anybody accused of a crime
6 and having a plea of not guilty retains the right to
7 respond to state's allegations of time and place on
8 his own, but could not call third-party people to
9 establish that. That is consistent --

10 And I think Mr. Murphy could allow -- but if
11 he can establish by independent witnesses as to
12 whereabouts, I think that is discoverable.

13 **MR. MURPHY:** That was the federal ruling and
14 we would certainly abide by that.

15 **THE COURT:** I am trying to remember -- his
16 name begins with a B.

17 In any event, the Supreme Court held that he
18 could not be precluded from testifying that he was not
19 present.

20 **MR. MURPHY:** And we have no problem with that
21 limitation.

22 Just the way the notice of alibi was worded
23 was so broad as to impede his Fifth Amendment right to
24 testify in his own defense in any way he saw it.

25 **THE COURT:** That would be the ruling.

1 **MR. CONNELLY:** May we, on behalf of Mr. Rios,
2 ask for the same exemption with the same
3 qualification?

4 **THE COURT:** Yes.

5 **MR. CONNELLY:** Thank you.

6 **THE COURT:** In terms of the ligature marks
7 and request for a *Daubert* hearing.

8 **MR. MURPHY:** We've got number five. You went
9 from four to six.

10 **THE COURT:** Oh, okay. Yeah.

11 The scope, I think, that Mr. Murphy's
12 objection addresses is his right and the essential
13 requirement that he be able to use the discovery
14 information in the course of his investigation of the
15 crime or of the alleged crimes. And I feel that it --
16 seems to me if I say he can't do that, that there is a
17 real problem.

18 **MR. JACKLEY:** Your Honor, we're not objecting
19 to that.

20 Where the concern came up -- and I want to
21 make this clear -- it's not necessarily directed at
22 Mr. Murphy, but in the history of this case, we've had
23 Federal Grand Jury matters placed on the internet. We
24 have had a lot of issues. I am not saying it was from
25 Mr. Murphy. I am just saying there has been a lot of

1 concern with where some of the discovery has been
2 disseminated in the public and to witnesses. So that
3 was why we were requesting some type of a protective
4 order.

5 We have no objection if they responsibly use
6 this information in the scope of their investigation
7 in defending Mr. Graham and Ms. Rios.

8 **THE COURT:** And understanding that I don't
9 know that I have much power over the people with whom
10 he may discuss it.

11 While I have some power over counsel for the
12 respective defendants -- and I certainly would expect
13 them to advise the people with whom or in the contact
14 in the course of the investigation that they are not
15 allowed to distribute it, internet, or make it public.

16 Mr. Murphy?

17 **MR. MURPHY:** Well, where this came to a head
18 in the federal case, there was a broadly worded
19 protective order issued. I wanted to review an FBI
20 agent's statement with that FBI agent. He was a
21 witness of mine.

22 Mr. Mandel took the position in that case
23 that that was a violation of the protective order and
24 that they -- the FBI agent that was my witness could
25 review his own statement at their office, which I

1 think is a complete impediment to my ability to
2 prepare a defense.

3 What I want to do and what I put in my
4 objection is, if I sit down with one of my witnesses,
5 I want to be able to show them their statements or
6 show them discovery and go through --

7 **THE COURT:** Absolutely.

8 **MR. MURPHY:** And that's why I objected
9 because the federal one should have been litigated.
10 Wasn't until too late..

11 **MR. JACKLEY:** We're okay with that, Your
12 Honor.

13 But we take it to the next step, if he
14 provides a copy of that statement or Grand Jury
15 material to that witness to keep, he's responsible for
16 what happens to that material.

17 **MR. MURPHY:** Understood.

18 **THE COURT:** All right.

19 Are we dealing there with Ms. Rios in the
20 same posture?

21 **MR. KINNEY:** Well, yes, Your Honor. I mean,
22 you entered an order to protect the discovery
23 materials before Mr. Connelly or I were appointed to
24 the case. And I would take the same position as
25 Mr. Murphy. These haven't been disseminated at all.

1 **THE COURT:** Yeah. Same ruling.

2 Back to the the ligature and *Daubert* issues
3 and however I pronounce Ecoffey.

4 **MR. MURPHY:** Ecoffey.

5 **THE COURT:** I have some difficulty with
6 Mr. Ecoffey's description, particularly based upon
7 what I read here of Dr. Peterson's responses who would
8 appear to be eminently better qualified. And I don't
9 know that Mr. Ecoffey is qualified.

10 **MR. MURPHY:** That's one of the reasons why we
11 brought this on and asked for a *Daubert* hearing.

12 They haven't noticed up Ecoffey as an expert.
13 But ligature marks are beyond the ken of common
14 understanding. That's a matter of expert testimony.

15 **THE COURT:** I agree with that.

16 **MR. MURPHY:** So they have the burden of
17 establishing the reliability and the foundation. And
18 they haven't done so. They didn't do so at the other
19 trial but that was because it more or less came up
20 during the course of that trial. It wasn't a
21 litigated issue.

22 But if they are going to put on one of their
23 witnesses who contradicts a recognized expert who
24 happens to be their other witness, fundamental issues
25 of due process and reliability require we get a

1 hearing before they do that so they can prove how
2 Ecoffey is somehow better qualified than Peterson on
3 this issue.

4 **THE COURT:** Mr. Jackley?

5 **MR. JACKLEY:** Well, Your Honor, I didn't sit
6 through Peterson's testimony. I stayed away from the
7 Marshall federal trial.

8 But my understanding is, he didn't say they
9 weren't ligature marks. He just said he couldn't
10 render an opinion either way. There is a big
11 difference.

12 **THE COURT:** Which means he shouldn't have
13 testified in the first place.

14 I think the criteria for relevance is that it
15 makes some fact in issue more or less likely. And if
16 one can't move in one direction or the other, it would
17 seem to me that, then, the testimony isn't relevant.

18 **MR. JACKLEY:** I would tell the Court that the
19 state's main purpose of calling Peterson in the
20 state's trial was to, number one, establish through
21 the autopsy the bullet was the cause of death; and any
22 custody -- chain of custody issues foundation wise
23 when it comes to the bullet.

24 Number two, and we'll get to that later
25 today, I assume, of the phosphatase with respect to

1 the rape.

2 The ligature marks are not a primary deal of
3 Peterson. The reason the ligature marks came up is
4 you have a law enforcement officer with vast
5 experience. He's been the United States Marshal.
6 Been in law enforcement a long time. He renders an
7 opinion based upon his training and experience as a
8 law enforcement officer.

9 **THE COURT:** I don't know what his training
10 and experience is and that's the purpose of a *Daubert*
11 hearing.

12 **MR. JACKLEY:** But I don't believe the state
13 should be required -- that every time it calls a law
14 enforcement officer that's going to give an opinion
15 based upon that training and experience should have to
16 go through a *Daubert* hearing. I believe that the
17 state should have to lay a proper foundation for that.

18 **THE COURT:** Well, but the purpose is is I
19 don't have a clue whether Mr. Ecoffey -- I don't know
20 how many times he's offered opinions as to ligature
21 marks. And I don't know the extent to which his view
22 of ligature marks are consistent with the prevailing
23 community of people entitled to render opinions as to
24 that.

25 When we get into a *Daubert* hearing, we have a

1 whole bunch of criteria we have to establish. One is
2 the training, competence, and experience of the person
3 tendering the opinion.

4 Number two, that he does indeed tender an
5 opinion based upon certain facts or factors.

6 And number three, that those same facts and
7 factors are accepted as reliable indicators, in this
8 case of ligature marks, within a specified community
9 of specialists that deal with the issue.

10 I think that fairly summarizes what a *Daubert*
11 hearing must do, does it not?

12 **MR. JACKLEY:** It does, but this is more in
13 the nature of a law enforcement officer saying I saw
14 this witness. This witness -- in a domestic violence
15 setting, for example. This witness had bruises on
16 her.

17 **THE COURT:** Well, we know what bruises are.

18 But I am of the view with Mr. Murphy that
19 ligature marks are not within the common
20 understanding. Most people know what a blue or black
21 eye looks like and are able from photographs to
22 determine their own.

23 I secondly have -- when we talk about
24 opinions, each opinion that's going to be offered that
25 requires any degree of expertise to render that

1 opinion has to be disclosed with particularity, does
2 it not?

3 **MR. JACKLEY:** Yes, Your Honor.

4 And he has at least one trial transcript --

5 **THE COURT:** But it has to be disclosed in
6 this trial with an itemized statement that Mr. Ecoffey
7 will testify it is his opinion, based within a
8 reasonable degree of some probability. And I am not
9 sure what the field is. Forensic medical would strike
10 me as one of the fields that A equals B.

11 And I think each opinion to be offered by
12 witnesses that are expert must be specified and given
13 to the defense with particularity.

14 I don't think medical reports or records in
15 and of themselves, unless they state the opinion in
16 particular, constitute notice.

17 I have held that in -- routinely in civil
18 cases that a tendering of medical records taken for
19 one purpose certainly do not constitute opinions
20 for -- as an expert, and conclusions that are not
21 contained in the report.

22 It's quite possible there are reports that we
23 conclude that this is a ligature mark. We conclude --
24 or it's obvious that the cause of death is X, Y, or Z.

25 But it has to be significantly sufficient so

1 that the defense knows it's an opinion; that is able
2 to determine whether or not there is an appropriate
3 challenge to the opinion; and the area or expertise or
4 possible witnesses to contest that.

5 So if you are going to offer opinions by
6 Mr. Ecoffey, or attempt to, then Mr. Murphy needs to
7 be -- and likewise Mr. Kinney, need to be advised of
8 those opinions and have the opportunity to challenge
9 them *Daubert* or otherwise.

10 I think the ligature -- and I am not saying
11 he can't be qualified to do it, but I am not going to
12 let him issue that kind of testimony unless I am
13 comfortable that he's qualified to do it; and that the
14 basis of his investigation is sufficient to warrant
15 the conclusions that he has reached.

16 **MR. MURPHY:** If I may supplement the record,
17 should this go any further, one of the things I think
18 distinguishes this case from the domestic violence
19 analogy that Mr. Jackley wanted to make, this is not
20 something where Mr. Ecoffey came on the scene and
21 looked down and saw marks and is going to render an
22 opinion that I saw something that looked like ligature
23 marks.

24 My understanding is his first presentation of
25 these marks as being ligature marks was 19 years after

1 the fact, 1994, when he's shown some Polaroids.

2 Essentially, he got the same information as
3 Dr. Peterson who was asked on the day of trial to once
4 again rereview those. And that's the big issue with
5 Peterson. Here they have an eminently qualified
6 pathologist who the day of trial was asked to look at
7 the same evidence that Ecoffey was asked to look at
8 and he said, once again, I can't tell you that those
9 are ligature marks.

10 And that brings to a head why this is a
11 matter of expert testimony as opposed to a mere
12 observation like a cop showing up on the scene.

13 **THE COURT:** Why are we concerned with
14 ligature marks?

15 **MR. JACKLEY:** Because there is going to be
16 evidence introduced that Annie Mae Aquash on or about
17 December 10 was bound and tied and thrown in the back
18 trunk area of Theda Clarke's red Pinto. That bolsters
19 or adds credibility to those witnesses that give an
20 indication that her hands were bound and tied after
21 Thelma Rios made the phone call and they put her in
22 the Pinto and so that's further evidence of that.

23 **THE COURT:** Why don't we talk about alleged
24 kinds of things rather than positive statements since
25 we have people covering the trial and matters. After

1 she was alleged to do that. I would be more
2 comfortable with that. And make sure that I have
3 accurate statements that come out in the press
4 as any -- we're going to have a stack of potential
5 jurors that read the paper and I don't want to do
6 that.

7 **MR. JACKLEY:** Well, I apologize, Your Honor.
8 I just anticipate -- because that's what's come out in
9 the Looking Cloud trial, in the Marshall trial, that I
10 anticipate.

11 You know, I have no idea what the witnesses
12 will actually testify to, but based upon that, that is
13 the anticipation of the evidence in relation to the
14 ligature marks.

15 **THE COURT:** Okay.

16 Well, like I said, disclose the opinions and
17 it is my expectation that we will have a *Daubert*
18 hearing to that end.

19 Number seven, Graham's motion in limine RE
20 Marshall's criminal history in connection to Russell
21 Means.

22 The state's response to the motion in limine.
23 I have read those.

24 Mr. Murphy?

25 **MR. MURPHY:** Well, Your Honor, first off, I

1 think the issue of Marshall's criminal history and
2 Russell Means only becomes relevant -- and I think the
3 state more or less concedes that in its response -- if
4 Mr. Marshall -- Mr. Graham or Ms. Rios were to impeach
5 Arlo Looking Cloud as to the change in his story in
6 2008 as to going to Dick Marshall's house. That was a
7 huge issue in Dick Marshall's trial. I can say fairly
8 confidently it's much less of an issue here.

9 **THE COURT:** Was that not the federal issue at
10 the time of the impeachment that there was allowed to
11 be a response?

12 **MR. MURPHY:** That's exactly right, because
13 for 20 years Arlo Looking Cloud had -- never
14 mentioning the fact that he had gone to Dick
15 Marshall's house. 2008 after he works a deal with the
16 government, he says, we went to Dick Marshall's house.
17 The government brings in that, hey, the reason he now
18 changed his story is he's no longer afraid of Dick
19 Marshall.

20 **THE COURT:** That ruling does make sense to
21 me.

22 How about to Mr. Jackley?

23 **MR. JACKLEY:** Your Honor, I think there is
24 two ways that this evidence becomes relevant. And
25 it's a -- little different parts of evidence. I agree

1 with Mr. Murphy that with respect to allegations of
2 recent fabrication by Looking Cloud it becomes
3 relevant.

4 There is another area that -- not necessarily
5 the criminal history, but the fact that Dick Marshall
6 was standing -- or had a murder charge over his head
7 explains why Dick Marshall's wife, at the time they
8 were at the house said, Dick -- allegedly said or it's
9 anticipated will testify that Dick had -- you know,
10 they can't stay here. You can't do this. And so it
11 gives the rationale or the reason why they went from
12 Dick Marshall's house elsewhere because Marshall had a
13 pending murder charge. So I think it becomes somewhat
14 relevant to explain why they left that residence.

15 **THE COURT:** That ties into the note?

16 **MR. MURPHY:** Well, and then may tie into the
17 note.

18 But that goes to Cleo Gates' testimony which
19 is completely different than Arlo Looking Cloud's
20 testimony because Arlo Looking Cloud at the federal
21 trial -- and Mr. Oswald and Mr. Mandel, I think, can
22 verify this -- was, as I put it, a loose cannon. They
23 didn't elicit, in statements, about Russ Means being
24 an enforcer and Dick Marshall being the bag man.

25 In fact, we had long delays in that trial

1 where Arlo Looking Cloud had to be reprimanded. The
2 Court had to give limiting instructions. At one point
3 Mr. Mandel asked permission to go back -- I think that
4 was after the enforcer comment -- and tell Arlo to
5 stick with the script, essentially. Arlo came back
6 out and then made some new inflammatory allegation.
7 And at one point Mr. Mandel advised the Court that he
8 had little control over the witness.

9 So what I want to know or I want to have
10 accomplished here is a very strict limiting order that
11 Arlo Looking Cloud is not going to be able to get into
12 that stuff. It's hearsay or triple hearsay or double
13 hearsay depending on where it comes from because it
14 wasn't stuff he said he knew from personal knowledge.
15 It was basically word on the street that Russ Means
16 was Dick Marshall's croney and that Dick was his bag
17 man and enforcer and all of that stuff.

18 That has no relevance to anything, especially
19 what Mr. Jackley was just talking about. If Cleo
20 Gates is going to testify that one of the reasons why
21 she asked these people to leave her house was because
22 of the pending murder charge, that's a different
23 story. That's not what she's testified to so far.

24 She testified a couple times that they had
25 kids, they both had jobs, and they wanted to go back

1 to bed so they asked these guests to leave. But
2 that's a much different issue than Arlo Looking
3 Cloud's testimony from Russ Means and tying him to
4 Dick Marshall.

5 The other important note is that there has
6 never been any issues or any facts presented that --
7 by anybody that John Graham had any knowledge of Dick
8 Marshall and his criminal history or any of that. In
9 fact, Dick Marshall has said -- and multiple witnesses
10 have said in other proceedings that there is no
11 knowledge that John Graham and Dick Marshall ever knew
12 who each other were. So there is really an attenuated
13 issue there as opposed to the Cleo Gates issue.

14 **MR. JACKLEY:** Your Honor, may I quickly
15 respond?

16 **THE COURT:** Yeah.

17 **MR. JACKLEY:** I agree with Mr. Murphy, there
18 are two issues. There is the Cleo Gates why we didn't
19 stay in the house because we had a pending murder
20 charge. And then there is the recent fabrication by
21 Arlo Looking Cloud. In other words, the claim that,
22 Mr. Looking Cloud, you didn't mention Dick Marshall's
23 house in one of your statements did you? And then
24 that's a claim of recent fabrication. I think the
25 door then gets opened --

1 **THE COURT:** I agree.

2 **MR. JACKLEY:** -- like it did in the federal
3 trial to say, well -- us to come back and say,
4 Mr. Looking Cloud, why didn't you talk about it and he
5 should be entitled to say because I was allegedly
6 scared of Dick Marshall.

7 **THE COURT:** I think that's fair. And I think
8 most sides agree with that.

9 And then the question is Cleo's statement.
10 We'll address that a little later. I think that's a
11 separate issue.

12 So I believe that as far as that goes, the
13 folks are in agreement.

14 Time of death testimony.

15 Mr. Murphy?

16 **MR. MURPHY:** Your Honor, what the state
17 provided us was some supplemental discovery where FBI
18 Agent McRoden speculates that Ana Mae Aquash may have
19 been alive after she was shot in the back of the head
20 based on his observation of some photographs as to her
21 body posture. Mr. McRoden was not an FBI agent on the
22 scene or involved in the investigation until
23 probably -- I am guessing -- he's here today -- but
24 five or ten years ago.

25 We're asking this court to prohibit the

1 introduction of that testimony. One, it hasn't been
2 noticed up. Just like the other expert witnesses with
3 Ecoffey. We have the Blehm -- *State v. Blehm* issue
4 about them providing notice of the opinions of their
5 experts.

6 But more importantly, this is again something
7 that Dr. Peterson testified to at the federal trial.
8 He said unequivocally based upon questions elicited by
9 the government that Ms. Aquash died instantaneously;
10 that the .32 caliber round going relatively close to
11 point blank through the back of her head killed her
12 instantly.

13 So again, this is one of those issues where a
14 non expert is being proffered to render an opinion
15 that clearly is within the ken of experts and their
16 own expert has already said that's not true. So we
17 want that testimony to be prohibited.

18 **THE COURT:** What are we talking about as to
19 conditions or postures or whatever that is,
20 Mr. Jackley?

21 **MR. JACKLEY:** The state would not object to
22 the Court granting a motion in limine that we can't
23 get into that in our case in chief.

24 We would request the opportunity if he opens
25 the door to be able to come in and discuss with the

1 Court potential admissibilit. Where the posturing
2 is -- I will be frank with the Court -- it's with
3 respect to time frames and I think this just kind of
4 came out during the federal trial. I don't think it
5 was a material issue and --

6 **THE COURT:** I have a little trouble figuring
7 what it has to do with anything.

8 **MR. JACKLEY:** Yeah.

9 I don't object to the Court granting it and
10 just ask that if it for some reason becomes relevant
11 that we can approach it.

12 **THE COURT:** Okay.

13 That's granted subject to it being reopened.

14 We have Graham's motion in limine RE
15 Mr. Marshall's statements.

16 Mr. Murphy?

17 Understand, we start with -- and speaking of,
18 primarily, confrontation; and secondly, hearsay.

19 And --

20 **MR. MURPHY:** Well, we're talking about two
21 statements, essentially, Mr. Marshall's alleged
22 statement to Serle Chapman that back in the day you
23 did what you were told. That's the one that involves
24 Dick Marshall.

25 In their response the state recites a laundry

1 list of reasons why you should find these statements
2 to be not hearsay such as verbal acts, verbal objects,
3 et cetera, words of independent legal significance.
4 There is no analysis or case law support for any of
5 that. In fact, verbal acts and verbal objects don't
6 appear to be concepts recognized in South Dakota. At
7 least I was unable to find any case law outside the
8 area of testamentary capacity that even recognizes
9 those.

10 So -- and then there -- I think that's just
11 not a real issue. The state has the burden of putting
12 forth the reasons why this evidence should be
13 admitted. And the confrontation clause is the big
14 issue here as you pointed out.

15 Theda Clarke is not apparently going to be a
16 witness although her unavailability has not been
17 established. We don't know, but let's proceed under
18 the assumption that Dick Marshall is not going to be
19 on trial or a witness. And so the state is seeking
20 admission by -- of statements by Dick Marshall in this
21 instance that inculcate Mr. Graham.

22 **THE COURT:** I thought the state could call
23 Mr. Marshall.

24 **MR. MURPHY:** Well, that -- there is a motion
25 to quash pending. I understand we're going to hear

1 some testimony about that later. So we don't know
2 what's going to happen.

3 I am proceeding here because the
4 confrontation clause issues, if he doesn't testify,
5 are the paramount considerations. And this fits
6 squarely within a *Brutten* issue if they do try to
7 admit Dick Marshall's out-of-court statements to Serle
8 Chapman that inculcate Mr. Graham. Because they are
9 going to go to great lengths to establish that
10 Mr. Graham and Mr. Marshall were members of AIM. So
11 Mr. Marshall's statement is broadly that back in the
12 day if you were an AIM member, you did what you weret
13 told which is clearly being admitted to try to prove
14 up the inference that my client was taking orders and
15 followed through on them.

16 There is a host of case law that says that
17 violates his right to confrontation. And I don't
18 think they can circumvent the confrontation issue by
19 any of their other excuses. There is not a
20 co-conspirator statement. It was made 30 years after
21 the fact. So it wasn't made in furtherance of the
22 conspiracy. It is being offered for the truth of the
23 matter asserted. And that's the reality.

24 The only purpose of admitting the --

25 **THE COURT:** I thought I saw a statement that

1 it was not being offered for the truth of the matter
2 asserted.

3 **MR. MURPHY:** I think they said that in regard
4 to Theda's statements.

5 But Dick's statements, what other purpose --

6 **THE COURT:** Well, that's -- that was my
7 thought when I read the statement.

8 What are you trying to build with it that's
9 relevant?

10 **MR. JACKLEY:** Your Honor, depending upon
11 which statemnet -- I will use as an example the
12 baggage note. We don't care whether they were taking
13 out the baggage or not. What the purpose of the
14 baggage note is is to show what their state of mind
15 is; to show that they had already made that decision
16 back in Rapid City -- allegedly back in Rapid City
17 tying back into Thelma Rios.

18 So the whole baggage note, we don't care
19 whether they are going to take out the baggage or not.
20 We care about that a decision had been made. It shows
21 that it's evidence of that and we should be able to
22 argue from that..

23 **MR. MURPHY:** The baggage note is a separate
24 motion that we haven't got to yet.

25 **THE COURT:** Yeah. We'll address that

1 separately.

2 Here we're talking about, you do what you are
3 told.

4 **MR. JACKLEY:** Okay.

5 Let me -- can I back up just a second so -- I
6 want to make sure that I am clear on the statements.

7 With respect to this motion, I took this
8 motion to really deal with two separate statements.
9 Number one, the statements that Mr. Graham allegedly
10 made to Bob Ecoffey up in Canada.

11 And the state's position on that is some of
12 what was said in those statements are not necessarily
13 hearsay. Some of the acts -- some of what he had done
14 are not necessarily hearsay. And --

15 **THE COURT:** You said Mr. Graham. I am
16 assuming you meant Mr. Marshall.

17 **MR. JACKLEY:** No, I -- I am sorry.
18 Mr. Marshall. Yes. I apologize.

19 So some of them would be non hearsay. Others
20 may be for use of impeachment purposes.

21 But then when you look at Serle Chapman
22 talking to Dick Marshall and he talked to Dick on a
23 couple of different occasions. So one has to be
24 careful which conversation we're talking about. One
25 of the conversations is on tape. And the other one

1 is -- there is memorialized notes. So it's the
2 state's position when Dick Marshall had discussions
3 with Serle Chapman, first and foremost *Crawford*
4 doesn't apply.

5 **THE COURT:** Why?

6 **MR. JACKLEY:** Because the case law -- and I
7 think we provided to the Court -- says when it's non
8 testimonial.

9 **THE COURT:** It is testimonial. He's -- it's
10 being done to a law enforcement officer.

11 **MR. JACKLEY:** No. Serle is not -- he's an
12 informant. He's not a law enforcement officer. He's
13 an informant.

14 And I provided the Court with the case law,
15 about five or six cases, and that was the ruling by
16 Judge Duffy in the federal matter also that statements
17 made to an informant or a confidential cooperating
18 witness are non*Crawford*.

19 **MR. MURPHY:** And we haven't alleged this is a
20 *Crawford* issue in regard to Chapman. This is
21 *{i}Brutten{n}* issue because it's Marshall's
22 statements. That's what we have said in our brief.

23 **MR. JACKLEY:** But Marshall is not a defendant
24 in this case, so it wouldn't be *Brutten*.

25 **MR. MURPHY:** Yeah, it would. *Brutten* applies

1 even if it's unindicted co-conspirators. It's that
2 third-party declarant who is inculcating my client who
3 presumeably is not going to be testifying so *Brutten*
4 would apply.

5 **THE COURT:** If he testifies, that's -- that
6 takes care of that?

7 **MR. MURPHY:** That takes care of that.

8 But we don't know --

9 **THE COURT:** If he doesn't testify, and he --
10 Certainly it's made in the context of a
11 conspiracy, is it not?

12 **MR. MURPHY:** They have alleged that Marshall
13 and Graham were part of the same conspiracy. They
14 charged them as codefendants. They were set for trial
15 as codefendants. So we say -- we're of the position
16 *Brutten* firmly applies if an inculpatory statements by
17 Marshall is introduced through Chapman and it
18 inculcates Graham.

19 **MR. JACKLEY:** I legally disagree with that,
20 Your Honor. I don't think --

21 **THE COURT:** Why?

22 **MR. JACKLEY:** Because Marshall -- if you
23 break this down -- first of all, I don't believe
24 Marshall has a Fifth Amendment right.

25 **THE COURT:** If he testifies, we don't have a

1 problem with that.

2 **MR. JACKLEY:** So we're assuming he's not
3 going to testify for whatever reason. So if he
4 doesn't testify, these are statements that Marshall
5 made directly to a nonlaw enforcement officer. These
6 are clearly statements against interest. I mean, that
7 wasn't in Marshall's interest to talk about either a
8 baggage note or in reference to the gun back in the
9 day statement. Those were statements against
10 interest. I think under the rules of evidence they
11 apply.

12 And I don't believe *Brutten* applies. First
13 of all, it's not a direct -- it's not a direct
14 confession. I think the Richardson Rule applies
15 because you have to take additional evidence to deal
16 with, you know, what does that mean, baggage, and what
17 does that mean, back in the day with the gun. And
18 that standing alone isn't a direct confession. It
19 takes more evidence to get there.

20 Therefore, I don't believe *Brutten* applies.
21 I think the Richardson analysis applies of to the
22 extent that defense counsel feels they need a limiting
23 instruction, I think the Court can provide that
24 limiting instruction.

25 **MR. MURPHY:** If I can address the statements

1 against interest allegation, that's the 19-16-31
2 issue. You know, the state hasn't discussed it's
3 burden, and it's burden is proving that Marshall's
4 statement to Chapman is corroborated by circumstances
5 that clearly indicate its trustworthiness.

6 Now, that statement wasn't recorded. Of all
7 the statements that Chapman took by all the witnesses
8 where he recorded just hours and hours of interviews,
9 this one magical statement back in the day, you know,
10 you did what you were told wasn't recorded.

11 **THE COURT:** I wasn't sure that in the context
12 I read that that it answered the question that was
13 asked.

14 **MR. MURPHY:** Well, and that was part of the
15 other issue is that there is some real issues as to
16 how that fit in. Whether it was nonresponsive.

17 What the state said in their response was
18 the -- that statement -- statements -- Marshall's
19 statements are consistent with other facts known to
20 the state that indicate its trustworthiness.
21 That's -- unquote, page 6.

22 They haven't provided the Court with anything
23 substantive that indicates the trustworthiness of
24 Marshall's alleged statement to Chapman. Basically
25 they are asking you to find, because you have to find

1 as a foundational requirement, that there are
2 circumstances clearly indicating the trustworthiness
3 of that statement. If you are going to allow it in as
4 a statement against interest, you have the burden of
5 finding that foundation.

6 But they are basically saying we have facts
7 known to us, but we're not revealing and we're not
8 going to litigate pretrial, that tell us that this
9 statement is trustworthy. They can't meet their
10 burden that way. They can't meet their burden by
11 saying they have facts they know but they are not
12 telling us about.

13 When you look at the facts that we know about
14 the making of this statement, it wasn't recorded.
15 Neither of the declarants -- in this case Marshall,
16 but either Marshall or Clarke in any of their recorded
17 statements said anything similar to that. We've got
18 hours of recordings and none of them -- at no time did
19 Marshall ever say anything indicating anything close
20 to what Chapman says he said in an unrecorded context.

21 We know that Chapman was a paid informant.
22 That goes to the trustworthiness. We know that he was
23 writing a book at the time. So there is a lot of
24 issues that go into whether or not this statement
25 meets the statement against interest foundation.

1 And in their response the state hasn't put
2 forward any of that foundation. We haven't been been
3 able to litigate it or respond to it. So if that's
4 the premise that they are going under, that it's a
5 statement against interest, they have the burden of
6 proof --

7 **THE COURT:** Assuming it's relevant, which I
8 have some problem with, what is your other evidence?

9 **MR. JACKLEY:** Arlo Looking Cloud, Your Honor.
10 I believe --

11 **THE COURT:** The loose cannon.

12 **MR. JACKLEY:** I disagree with that, Your
13 Honor. I happen to have handled him in federal Grand
14 Jury. I was the one that questioned him, and I
15 disagree with that.

16 That said, I believe and anticipate that Arlo
17 Looking Cloud will provide evidence that in that room
18 Dick Marshall allegedly did provide that gun. And so
19 there is your witness; there is your other evidence
20 with respect to that.

21 With respect to the claims about everything
22 was recorded, there is a good explanation why this
23 particular phone call was not recorded was because it
24 was a follow-up phone call. If you look at and listen
25 to the tapes, what occurred here is that Dick Marshall

1 basically said, go talk to Cleo for more specific
2 information.

3 **THE COURT:** So why isn't it recorded?

4 I don't understand the connection that it's a
5 follow-up phone call so we don't record it.

6 **MR. MURPHY:** Especially in light of the fact
7 that many other phone calls were recorded.

8 **THE COURT:** So how does that explain why it
9 wasn't recorded?

10 **MR. JACKLEY:** Because it was a follow-up
11 phone call and he didn't record it. I didn't make
12 that decision, Your Honor.

13 All these inquiries -- the whole litany of
14 what he just discussed, that goes to weight not
15 admissible. The trustworthiness is there. It's not
16 that high of a threshold. I mean, you have a witness
17 that had taken down information and clearly met with
18 Marshall on occasions. You have proof of that through
19 the recordings.

20 And, you know, you have Looking Cloud that
21 testifies to exactly what is being discussed on that
22 telephone conversation between Serle Chapman and Dick
23 Marshall. There is your trustworthiness. There is
24 your extra witness that you have.

25 You also have further evidence of that that

1 goes through Cleo Gates confirming that they were in
2 fact in Dick Marshall's bedroom allegedly and that the
3 door was closed and they were doing something in
4 there. And that phone call -- the discussion of Dick
5 Marshall talks about what in fact they were doing in
6 that bedroom.

7 **MR. MURPHY:** Your Honor, the burden is high.
8 They are saying this is a low burden. The case law
9 and the statutes say, they have to show that there is
10 clear indications of trustworthiness in the making of
11 the statement.

12 You know, the fact that they may have other
13 evidence that comes in ancillary to this that they say
14 proves up their case -- what we're talking about is a
15 statement that says back in the day if you were an AIM
16 you did what you were told.

17 Now, where is the corroboration clearly
18 indicating that Dick Marshall made that statement?
19 Because we don't have a recording, and that, in fact,
20 that that statement was true.

21 Now they point to a lot of other
22 corroborating circumstances that indicate that Dick
23 Marshall was involved in this case.

24 But what we're talking about is corroborating
25 circumstances involved in the making of this

1 statement. And that's where the issue about lack of
2 recording; that this guy is a paid informant; that
3 he's writing a book about it so he has a motive to
4 flesh things up or amp things up. Those all go into
5 that determination that is a high burden for the state
6 to meet.

7 **THE COURT:** I will give you a ruling on that
8 later. Within a week.

9 **MR. JACKLEY:** Your Honor, is that --

10 **THE COURT:** I assume that will apply to
11 Clarke's as well.

12 **MR. JACKLEY:** Your Honor?

13 **THE COURT:** Yes.

14 **MR. JACKLEY:** Just to advise the court, and I
15 don't know if now is the time. I -- the state had
16 subpoenaed Dick Marshall for the hearing today. I
17 know his attorney is here today. I didn't know if
18 that was part of this or if we're dividing up the back
19 in the day gun comment versus the baggage note and
20 other Dick Marshall issues, but I just want to advise
21 the Court that that was done.

22 **MR. MURPHY:** I have no objection to taking up
23 Mr. Hanna's motion to quash the subpoena if you want
24 to do that now.

25 **THE COURT:** Mr. Hanna?

1 **MR. HANNA:** My client, Your Honor, was
2 subpoenaed to appear at 10:00 and I would like to
3 address this with the Court. I would respectfully ask
4 that we wait until Mr. Marshall arrives for me to do
5 that. I would like him to be able to hear what is
6 being discussed. He was subpoenaed for ten o'clock.

7 **THE COURT:** All right.

8 **MR. JACKLEY:** Would the state be permitted to
9 inquire of Mr. Marshall as to whether or not he, in
10 fact, had a telephone conversation with Mr. Chapman
11 before the Court rules on the motion with respect to
12 the baggage note and/or the back in the day comment?

13 **MR. HANNA:** Can we deal with this at
14 ten o'clock when my client gets here?

15 **THE COURT:** I think that's fair.

16 **MR. HANNA:** I have made a motion to quash.
17 My client should not be required to testify here
18 today.

19 **THE COURT:** Okay.

20 Administrative motions. They look pretty
21 simple. Those are the traditional clothes.
22 Restraints.

23 **MR. JACKLEY:** We don't object, Your Honor.

24 **THE COURT:** Now, they talk about Graham's
25 motion in limine RE Theda Clarke-Nelson's statements.

1 And a lot of -- I see in the state's responses, a
2 number of times, to the decade or two later statements
3 that were addressing the course of the conspiracy on
4 the basis that it's still a conspiracy.

5 Is that a fair assessment?

6 I mean, it seems to me that unless that's the
7 case, Mr. Murphy wins in a walk.

8 **MR. MURPHY:** Right.

9 And that's our position is there is no way
10 that her statements decades after the event can be
11 considered statements in furtherance of the
12 conspiracy. Especially when they are merely
13 descriptive at best.

14 If it's true she made these statements when
15 she was talking to her friend Kamook Nichols who was
16 not part of the conspiracy -- or Kamook Ecoffey now --
17 who was gathering information as a paid informant.
18 They were merely descriptive at best. Narrative.

19 *United States vs. Mitchell*, plus a host of
20 other federal cases that we've cited to say those just
21 aren't in furtherance of a conspiracy.

22 And the state has tried to argue that any
23 time you try to throw the authorities off the trail by
24 making up a statement or something like that, that
25 that is in furtherance of the conspiracy.

1 Well, in this case if Ms. Clark was making
2 statements that were at least mildly inculpatory, then
3 that theory doesn't even go in because she's not even
4 throwing the authorities off the trail of the
5 investigation.

6 It should also be noted that by the time
7 Ms. Clarke made these statements to law enforcement,
8 there had already been multiple Grand Jurys meetings
9 since 1994 and whatnot. So the investigation was
10 fully on and she's just -- at this point these are no
11 longer co-conspiracy statements.

12 **THE COURT:** Mr. Jackley?

13 **MR. JACKLEY:** Number one, I think this is a
14 constant theme where Mr. Murphy and I disagree. Those
15 were not statements to law enforcement. Theda Clarke
16 is talking to an informant or a cooperating witness.
17 The case law is very clear under those circumstances
18 that that is not -- is nontestimony and *Crawford* does
19 not apply.

20 So the state's position is is that the
21 statements Theda Clarke made, number one, to Kamook
22 Nichols is nontestimonial. The statements that Theda
23 Clark made to Arlo Looking Cloud regarding Durham and
24 whatnot during the conspiracy need to be treated
25 differently. But some of those statements are non law

1 enforcement statements.

2 Number two --

3 **THE COURT:** But at the time they were made,
4 the -- he was a paid informant?

5 **MR. JACKLEY:** No. Not a paid informant. I
6 mean, his position is they are paid informants. But
7 whether or not they are paid or not doesn't make any
8 difference under the *Crawford* analysis. They are
9 cooperating witnesses and informants, and the case law
10 says that that's nontestimonial.

11 **MR. MURPHY:** I've never alleged they were --
12 there is a *Crawford* issue on this. I am not --
13 We're on Theda Clarke?

14 **MR. JACKLEY:** I know, but you just talked
15 about law enforcement officers. These weren't made to
16 law enforcements officer.

17 Maybe I should back up. The Theda Clarke
18 statements that were made were, number one, to Kamook
19 Nichols after Anna Mae was killed, but still in -- as
20 a co-conspirator statement due to concealment
21 purposes.

22 The other statement --

23 **THE COURT:** You don't make them to another
24 human being if there is a concealment purpose. I
25 mean, when we go into privileged matter, if you are

1 talking to people outside the scope of the privilege,
2 it's -- it takes away the privilege. It destroys the
3 very thing that is alleged to exist.

4 Here you have someone that is alleged in a
5 conspiracy to keep things quiet talking to a third
6 party with no reason to talk to them.

7 **MR. MURPHY:** If I said there was a law
8 enforcement -- I apologize. I meant to say she was
9 talking to an informant decades after the event that
10 were merely descriptive. That law enforcement had
11 already begun it's investigation. So if I misstated
12 that, that wasn't my intent.

13 My position is that these aren't in
14 furtherance of any conspiracy. She's not talking to
15 a -- to somebody else in furtherance of the
16 conspiracy. She was merely describing events decades
17 after they allegedly happened.

18 **MR. JACKLEY:** Back to what the Court just
19 indicated, I would generally agree that this is a --
20 this is a unique circumstance when she's making
21 statements to Kamook Nichols, who is Dennis Banks'
22 ex-wife, who has been very active in the AIM Movement.
23 So I think that separates it. She's talking to
24 somebody within the AIM Movement believing she's
25 somebody that's a favorable witness. So I think that

1 does take this out of the normal case law and normal
2 situations.

3 The other thing I wanted to point out with
4 respect to Theda Clarke, she also made statements --
5 and I don't know whether that's bound up in this
6 motion or not. We provided some additional notice --
7 directly to Looking Cloud during the alleged time
8 frame that this was occurring that basically
9 references to Durham that -- who was an informant --
10 that this type of activity was never going to happen
11 again. Basically inferring, you know, that's why we
12 killed Annie Mae Aquash to make sure that everybody
13 and these informants knew that this stuff wasn't going
14 to be tolerated within the AIM Movement.

15 So there is a whole bunch of different Theda
16 Clark statements. And so I want to make clear that
17 we're talking some that go to Kamook Nichols, some
18 that are to Arlo Looking Cloud. So I think it's
19 important to keep that separate.

20 And, again, Theda Clarke's statement, even if
21 the Court were to rule that it was not -- it was not a
22 statement in furtherance of the conspiracy for
23 concealment purposes, it clearly was a statement
24 against interest and admissible under 804(b)3. I
25 mean, that was not in her interest to say that. And

1 so I think that that particular rule of evidence
2 allows the state to go into that.

3 **MR. MURPHY:** As for the statement against
4 interest issue, Your Honor, it's the same analysis as
5 we talked about Dick Marshall's statements. It's the
6 state's burden to prove to you that these statements
7 are corroborated by circumstances clearly indicating
8 their trustworthiness.

9 This, again, is one of those factual issues.
10 Once again the statements that Theda supposedly made
11 by Kamook Nichols were not recorded. She made many
12 other recordings of conversations with Theda Clark.
13 Kamook Nichols made many other recordings. In those
14 recordings when Theda was on tape she never made any
15 statements that were inculpatory.

16 And I've got for the Court Exhibit N, which
17 I'd like to admit, which is a compellation of
18 statements of portions of recorded statements that
19 Theda Clarke made that the government provided us
20 where she routinely laughs and discounts any knowledge
21 of any involvement in this matter and discounts the
22 government's theory.

23 So what they are trying to do as a statement
24 against interest is admit through a non-testifying
25 witness because they have indicated they are not going

1 to call Theda. Now, I don't know how they get around
2 that because they haven't proven her unavailability
3 yet. But if they don't call Theda, they are talking
4 about bringing in a non-testifying witness's
5 statements through a third party who didn't record
6 them, who was a paid informant, and who has no
7 explanation, really, as to why the few statements
8 Theda supposedly made where she admits doing something
9 wrong weren't recorded where all the other statements
10 where Theda said I didn't do anything wrong were
11 recorded. So that's the issue there.

12 The issues with Arlo Looking Cloud's
13 statements are different. Arlo is going to be a
14 testifying witness.

15 The state did also vaguely reference that
16 they may provide -- tried to admit Theda statements to
17 Mr. Ecoffey and FBI Agent Garber. Those would clearly
18 be testimonial statements. Those would be covered by
19 *Crawford*.

20 And so those were only mentioned in passing
21 in the state's responses, but if they are going to try
22 to bring those in, then we need specific notice
23 because *Crawford* would clearly apply to a
24 non-testifying witness's statements given to a law
25 enforcement officer during the course of an

1 investigation.

2 **MR. JACKLEY:** Your Honor, I understand this
3 was in the federal case and we can get one in the
4 state case, but Theda Clarke's attorney filed Theda
5 Clarke's invocation under the Fifth Amendment, filed
6 April 18, 2010, saying she was not going to testify.
7 So based upon that assumption, she will do the same
8 thing in the state case. But we will -- I will ensure
9 that we also -- Greg Erlandson is her lawyer and --

10 We would be more than happy to have her
11 testify and I can subpoena her, but her lawyer is
12 likely to take the same position.

13 The other thing I would like to point out to
14 the Court, unrecorded statements come into courtrooms
15 every day. There is no requirement --

16 **THE COURT:** I understand that. But that's
17 not the point, I don't think, from Mr. Murphy.

18 The point is if the only unrecorded
19 statements from all the record -- and a stack of
20 recorded statements, and the only ones that have
21 incriminating data in them are those that are
22 unrecorded by a paid informant; and we're talking
23 about establishing the trustworthiness of the
24 statements, the fact that they are unrecorded has some
25 significance.

1 **MR. JACKLEY:** If I could just add two things.
2 One -- and I apologize if I got the Court on the route
3 of a paid informant. That's the position that the
4 defense has taken. We have taken the position that
5 these informants were paid for expenses only. So I
6 think there is a difference there, but I understand
7 that there is that issue there.

8 But it's the state's position that these
9 informants were properly reimbursed by the federal
10 government for expenses related to their cooperation.

11 Number two, I can give you an explanation as
12 to why the two statements at issue were not recorded.
13 I wish they were, but they weren't. Number one, as I
14 indicated, the Serle Chapman phone call to Dick
15 Marshall was an after-the-fact follow-up.

16 Number two, the Kamook Ecoffey discussion
17 with Theda Clark was a tape recording malfunction.
18 They tried to tape record it. The recorder
19 malfunctioned. And we can submit evidence on that.

20 But, again, that goes to weight, not
21 admissibility. I mean, I don't think you have to have
22 a recorded statement. There are plenty of recorded
23 statements, Your Honor, that the state is going to try
24 to introduce in this case.

25 **THE COURT:** No, it's not necessarily

1 admissibility. It is weight. But when we're talking
2 about the indicia of trustworthiness, then that's a
3 pretrial determination by me.

4 **MR. JACKLEY:** And I would advise the Court
5 that it is my understanding that they attempted to
6 tape record it; that the tape recorder had a
7 malfunction. I can't do anything about it.

8 **THE COURT:** Well, I understand that.

9 **MR. MURPHY:** See, this is part of the burden
10 shifting. When the state is trying to get these
11 out-of-court statements through a non-testifying
12 declarant. And they have the firm burden of proving
13 the foundation. And that, in this case, the
14 foundation is clear indications of trustworthiness,
15 surrounding the making of the statement.

16 So the fact that they were unrecorded; the
17 fact that she was an informant; the fact that they
18 came three decades after the fact; all of that is
19 stuff that you can take into consideration in making
20 your determination.

21 The state hasn't met it's burden.
22 Mr. Jackley wants to provide you with post facto
23 explanations. But the fact of the matter before you,
24 the record you got before you, is when the recorder
25 was on, Theda Clarke said I didn't do anything wrong.

1 This is a bunch of made up nonsense. Supposedly when
2 the recorder was off or malfunctioning, she's willing
3 to inculcate herself. Same thing with Dick Marshall.
4 For years he maintains his innocence. One phone
5 conversations that isn't recorded and suddenly that's
6 the one where he magically makes self-incriminating
7 statements.

8 You have to make the foundational
9 requirement. And so it's not a weight issue. It is
10 an admissibility issue.

11 **MR. JACKLEY:** And Your Honor, I would point
12 out that the state does intend to call Kamook Nichols
13 to testify regarding that conversation.

14 **THE COURT:** I would assume so.

15 **MR. MURPHY:** But then again, the
16 admissibility issue has to be resolved pretrial under
17 104 and whatnot.

18 So I was frankly expecting the witness here
19 today, but evidently we don't have her.

20 **MR. JACKLEY:** Well, we got 50 motions and so
21 rather than bring in a hundred witnesses -- I don't
22 have her here today. I can have her here if the Court
23 wants her.

24 **THE COURT:** Well, I don't know where we're
25 going to be at the end of the day, but we can set a

1 further hearing on that. I am reluctant to rule on it
2 in any event today.

3 **MR. JACKLEY:** Okay.

4 **THE COURT:** The duration of exposure.

5 **MR. MURPHY:** This goes to yet another expert
6 testimony area. At Mr. Marshall's trial a number of
7 law enforcement officers were allowed, without
8 objection because it wasn't really an issue in
9 Mr. Marshall's trial, to speculate or opine as to how
10 long Ms. Aquash's body had probably been out there
11 before it was discovered on February 24, 1976.

12 The state has failed to provide any notice so
13 far of any expert that's going to render an opinion as
14 to exposure or duration. So we want -- we're moving
15 in limine now because it is an issue in our case,
16 unlike Mr. Marshall's case, as to how long her body
17 was out there. So we -- until such time as they
18 provide an expert and we have the chance to respond to
19 the expert notice, and perhaps litigate that matter,
20 nobody should be allowed to opine as to how long her
21 body was out there.

22 **THE COURT:** Seems rational.

23 **MR. JACKLEY:** The only thing I'd ask is, Your
24 Honor, the state has received no discovery from
25 defense regarding this issue regarding expert

1 testimony. So, number one, we would reserve the right
2 to do any rebuttal testimony with respect to this
3 issue.

4 And number two, I would ask the Court for 30
5 days to the extent we need to explore updating our
6 current expert disclosures. I mean, our expert
7 disclosures are fairly detailed and somewhat unique
8 because, for instance, Dr. Peterson is now --
9 testified and cross-examined in two trials. The
10 defense has that information. But to the extent
11 that --

12 **THE COURT:** But you have to identify the
13 opinions that he's going to offer here.

14 **MR. JACKLEY:** I understand.

15 **THE COURT:** All right.

16 **MR. JACKLEY:** But I am kind of shooting at
17 the dark not having received any discovery from
18 defense whatsoever in this case regarding this issue.
19 And so this may -- I guess I would ask the Court,
20 number one, for 30 days to evaluate it and update our
21 expert disclosures, if necessary. And it may be a deal
22 where we may be back to the Court saying this becomes
23 rebuttal expert testimony until we find out exactly
24 what their position is.

25 **MR. MURPHY:** Yeah. If I have expert

1 witnesses, I would disclose them as the rules require.

2 But the issue here is a preemptive matter on
3 our part to prevent their non-expert witnesses from
4 rendering opinions. And I think that's something that
5 can be --

6 **THE COURT:** Identify your opinions.

7 You have your 30 days and that gives us
8 adequate time to handle any necessary hearings on it
9 be they *Daubert* of court evaluation of X, Y, Z.

10 Twenty peremptory challenges.

11 Mr. Murphy?

12 **MR. MURPHY:** Your Honor, in light of the
13 nature of this case, the amount of pretrial publicity,
14 the history of AIM, and the motions that that
15 allegation brings in the community, this is not your
16 garden variety murder case and we'd ask for 20
17 peremptories so that we can pick a fair jury.

18 **MR. CONNELLY:** We join in that motion, Your
19 Honor.

20 **MR. JACKLEY:** It's the state's position that
21 it's not necessary, but to the extent the state does
22 that, the state would request a similarly increased
23 number of peremptory challenges to make it fair.

24 **THE COURT:** I think I have to give same
25 numbers do I, not?

1 **MR. MURPHY:** I don't know the rule on it.

2 **THE COURT:** I do in civil cases. I had one
3 where I was looking at 65 peremptories. So I think
4 that response is well taken.

5 Unless there is an objection to the 20,
6 that's where we are.

7 **MR. MURPHY:** That's fine.

8 **THE COURT:** And I am assuming Ms. Rios is on
9 the same boat?

10 **MR. CONNELLY:** Yes, Your Honor.

11 Thank you.

12 **MR. JACKLEY:** So I am clear on the number of
13 peremptory challenges, is the Court saying -- how many
14 peremptory challenge does the state get under the
15 Court's ruling?

16 **THE COURT:** The Court is uncertain but you
17 will get 20 or 40.

18 **MR. JACKLEY:** Can I ask for 40?

19 **THE COURT:** You can ask for 40. You have to
20 figure out what the law is and go from there.

21 My reaction from the civil trial is you get
22 as many as the defendants get *in toto*.

23 **MR. JACKLEY:** Even if the law doesn't require
24 it, I would ask it as a matter of fairness, Your
25 Honor.

1 **THE COURT:** Understand.

2 I will give you a response to the number of
3 peremptories you get.

4 We have the baggage note and I think that
5 goes back with the same thing we have --

6 **MR. MURPHY:** Well, actually, they noticed it
7 up under the residual exception and so their burden is
8 even higher because there the ex -- the case law is
9 express. The confrontation clause is implicated in
10 their foundation that they must be -- and where the
11 issue in the residual exception is more pronounced is
12 that the case law is clear. The circumstances that
13 they provide establishing its trustworthiness must go
14 directly to the making of the statement.

15 All their evidence about whether or not the
16 crime was committed or what Arlo Looking Cloud might
17 have to say about what happened on particular days is
18 by and large irrelevant.

19 The issue before the Court when it makes its
20 trustworthiness determination under the confrontation
21 clauses, are there particularized circumstances around
22 the making of the statement. And that's what's so
23 unusual in this case because the presumption under
24 *Frazier* -- *State vs. Frazier* is that the statements
25 are inadmissible. So there is a rebuttable

1 presumption. The state has to bring forward evidence
2 establishing the foundation.

3 But in this case it has been acknowledged by
4 the state in their responses. We don't have the note.
5 We don't know who the author is. We don't know
6 exactly what it was alleged to have said. The one
7 witness that they have identified is going to testify
8 as to its contents, Cleo Gates, they acknowledge has
9 changed her story as to what she recalls being told by
10 yet another person the note said.

11 Depending on what Mr. Marshall does, we may
12 never have in front of the jury anybody who has
13 actually seen the note or read the note. Because Arlo
14 Looking Cloud has already said he never read it. And
15 so what we've got here is a confrontation --

16 **THE COURT:** Does he say he ever saw it?

17 **MR. MURPHY:** He says he saw a note being
18 handed from one person to another. Didn't read the
19 contents. Wasn't told the contents. Doesn't know
20 from other parties what the contents were. So we've
21 got triple hearsay at best. At best we've got Dick
22 Marshall --

23 **THE COURT:** How is the state going to tie --
24 my first -- that a piece of paper being passed happens
25 to be this note?

1 **MR. JACKLEY:** Your Honor, let me walk it
2 through by what I anticipate we're going to allege at
3 trial, and that is through Arlo Looking Cloud. I
4 believe Arlo Looking Cloud is going to testify that
5 when he walked into the closed room, Dick Marshall's
6 room, he saw a note being passed between Theda Clark
7 and Dick Marshall.

8 He can't testify that he read the note. But
9 he certainly can testify that he saw a note being
10 passed and he saw what occurred after that note was
11 being passed; ie that all of a sudden a gun was
12 exchanged and shells were exchanged. So he can
13 testify as to how that note appeared to affect
14 people's state of minds and their activities.

15 The second line of witness information that
16 we anticipate will come through Dick Marshall. It may
17 either come from his live testimony, depending upon
18 how the Court sorts that out, or Dick Marshall has
19 talked about that baggage note with two people. He's
20 talked to Cleo about it and we anticipate that she's
21 going to testify that after Dick Marshall came up to
22 the room and they were trying to ascertain or decide
23 what they were going to do with Annie Mae Aquash; that
24 there was a discussion about the baggage note.

25 So that, again, is affecting people's

1 decision making at a time -- an important time in this
2 case when they were at Dick Marshall's house.

3 **THE COURT:** Why didn't they just say
4 something rather than pass a note?

5 We're in a room where allegedly we're passing
6 a gun and shells and nobody will say anything?

7 They got to do it in secret?

8 **MR. JACKLEY:** One explanation would be is the
9 note came from somebody higher above which I believe
10 also is going to tie in Rios. So that basically one
11 position may be that Theda Clarke, Arlo Looking Cloud,
12 and John Graham did not have the stature within the
13 AIM community to order somebody to be executed. And
14 so there is a lot of plausible explanation.

15 I don't know, Your Honor. I can just tell
16 you that we have the evidence from Arlo Looking Cloud.
17 We have the evidence either through Dick Marshall or
18 if it doesn't come through Dick Marshall, from the
19 statements that Dick Marshall made to Cleo Gates
20 and/or Serle Chapman. That's where it ties back in.

21 This claim about triple hearsay is not
22 accurate. The baggage note is not hearsay. It's not
23 for the truth of the matter asserted. We don't
24 care whether --

25 **THE COURT:** Sure you are.

1 **MR. JACKLEY:** Not whether they are going to
2 take out the baggage. Just what affect this note had
3 on people's actions. On their state of mind.

4 **THE COURT:** Well, which implies exactly that
5 you are offering the note to prove somebody is on
6 directions to take care of, quote, the baggage.
7 And -- I mean, I have a little trouble saying that
8 that's not offered to prove the truth of the matter
9 asserted. It's offered to prove the justification,
10 first of all, for passing a gun and shells which are
11 alleged to be .32 caliber, which is the same caliber
12 as the bullet found in the decedent. And I am trying
13 to think of any other reason to pass the note. It
14 says take care of the baggage other than to go kill.

15 **MR. MURPHY:** If it wasn't being offered for
16 the truth of the matter asserted then they wouldn't
17 need to bring in the contents of the note. They could
18 just bring in the fact that the note was passed. But
19 the fact that they are trying so hard through what we
20 see as triple hearsay, the note to Dick Marshall to
21 Cleo Gates to the jury shows that they are --

22 **THE COURT:** And I think that that argument
23 has some logic. A note was passed and a gun and
24 bullets were -- or cartridges were transferred without
25 the contents of the note. Otherwise, it's being

1 offered to prove the purpose for the use of the gun
2 and the bullets.

3 **MR. JACKLEY:** But the way I always analyze
4 the for the truth of the matter asserted, if you look
5 at the actual language of the note, let's just make
6 for assumptions of this argument that the note said,
7 take care of this baggage or luggage.

8 **THE COURT:** You are going to tell the jury it
9 meant to take some luggage out to a car?

10 **MR. JACKLEY:** But it takes further evidence.
11 It takes the further evidence of what happened; the
12 bullet in the back of Annie Mae's head; the exchange
13 of the gun. I mean, the note standing alone doesn't
14 speak to -- doesn't speak directly to what it stood
15 for. It takes independent evidence to get us there.

16 **THE COURT:** But you are trying to establish
17 that it stands for the truth of the matter asserted.
18 And that the matter asserted -- you are saying at this
19 point AIM speak is to go kill her; and you are going
20 to show by other evidence that that's precisely what
21 the note means and which is -- it was the passing of
22 an order to go kill her and at that point the gun and
23 shells were exchanged.

24 I have a little trouble saying it's not --
25 under any explanation that you are going to try and

1 establish that the note meant precisely what the note
2 said, if we assume take care of this baggage means to
3 go kill the decedent.

4 **MR. JACKLEY:** What about for the concept that
5 with respect to state of mind and the decision to
6 kidnap and murder, and maybe in specific reference as
7 the allegations are against Rios, that the decision
8 had been made in Rapid City to commit this murder
9 rather than the decision being made at Dick
10 Marshall's?

11 In other words, the note wasn't -- nobody --
12 no witness says they saw the note being drafted up at
13 Dick Marshalls' place. That that note had been
14 provided at --

15 **THE COURT:** There is a lot of people
16 testifying they never saw the note at all. And if you
17 are talking about it, that, again --

18 The point of origin, is that an issue?

19 **MR. MURPHY:** And that's where -- if they are
20 going under state of mind, it's the state of mind of
21 the declarant. That's what the rule applies to. We
22 don't know who the declarant is because nobody knows
23 who wrote the note.

24 **THE COURT:** And if it extends to explaining
25 the state of mind of those allegedly involved in

1 killing Ms. Aquash, then it's offered to prove that
2 they were acting to fulfill the directive in the note.

3 If it were concerned about who ordered it, I
4 don't think there is any evidence to establish from
5 whence it came.

6 **MR. JACKLEY:** I think you can draw an
7 inference that it didn't come from the Marshall house.

8 **THE COURT:** What difference does that make?
9 What's that relevant to?

10 **MR. JACKLEY:** I am just going to -- let's
11 just say Ms. Rios takes the position that, yeah, she
12 made the phone call to have the informant brought
13 forth. But at that time they hadn't made a final
14 decision to kill Annie Mae Aquash. And her defense
15 may be that when they left Aquash's (SIC), she didn't
16 know they were going to kill her; that that decision
17 was made at Dick Marshall's house. That baggage note
18 is evidence that, no, that decision was made prior to
19 going to Dick Marshall's house. Because Thelma Rios
20 was not at Dick Marshall's house to my knowledge.

21 **THE COURT:** I am missing something.

22 **MR. MURPHY:** Well, then, I think we're back
23 exactly to the issue of them trying to prove the truth
24 of the matter asserted; that this note carried an
25 execution order and the execution order was take care

1 of the baggage.

2 And when they are talking about state of
3 mind, we get back into the *United States vs. Shepard*
4 issue which we site somewhere elsewhere where Justice
5 Cardozo said, if you are going to use state of mind as
6 an exception to the rule against hearsay to prove the
7 existence of a past act, then the rule against hearsay
8 goes out the window. It no longer has any meaning.

9 And that's what they are trying to do here is
10 say, well, this note evidenced some state of mind
11 which led to a specific act being committed; ie, the
12 execution of Anna Mae Aquash.

13 This is just -- I mean, there is so many
14 problems with admitting that note. Other than -- I
15 mean, the observations of the witnesses, that they saw
16 a piece of paper being passed, we don't have an
17 objection to because there isn't an objection to be
18 made. But once they try to get into the contents of
19 that note, then we got all sorts of problems.

20 **MR. JACKLEY:** Your Honor, with respect to the
21 contents of the note and with respect to the argument
22 he just made, if in fact it was an execution order,
23 it's not hearsay because it's a co-conspirator
24 statement.

25 **MR. MURPHY:** Well, we don't know who the

1 co-conspirator is.

2 **MR. JACKLEY:** You don't have to know who the
3 co-conspirator is for a co-conspirator's statement to
4 be admissible.

5 **THE COURT:** We have to know whether it's a
6 co-conspirator.

7 I mean, I am inclined -- and I will make a
8 more definitive and explanatory ruling. At this point
9 I got problems with it in terms of truth of the matter
10 asserted. I can't see any way in which it's not being
11 offered directly or indirectly to establish the truth
12 of the matter asserted.

13 The state of mind, I think, should be the
14 state of mind of the declarant. We don't have a clue
15 who that is other than some unknown unnamed
16 co-conspirator. I have to look at that.

17 The passing of the note, I don't have any
18 problems with. I agree with Mr. Murphy that what was
19 seen is certainly subject to testimony. I don't know
20 that the state doesn't accomplish the same end by
21 saying a note was passed and --

22 Do I have any testimony that it was opened
23 and read?

24 **MR. JACKLEY:** Well, I think you can infer
25 that when Dick Marshall leaves the bedroom and tells

1 Cleo Marshall something to the effect that, here
2 what's happening. They have a note to take care of
3 this baggage. I mean, somebody has read it.

4 **MR. MURPHY:** There goes to then why it's not
5 a co-conspirator statement. They set forth in one of
6 their responses at page 4. What they are trying to
7 do -- they set forth that a reasonable interpretation
8 of the note could be that it was an order to eliminate
9 an informant.

10 So they are taking the position that whatever
11 value this note has, it's merely inferential. And we
12 don't have anybody who even says that they saw Dick
13 Marshall read the note.

14 What we have is this attenuated explanation
15 that Cleo Gates has come forward 25 years after the
16 event and says that her then husband Dick Marshall
17 said something vague about luggage or baggage and a
18 note. Really that's what we've got about the
19 contents.

20 It goes now to a reliability issue. Can the
21 Court even on these facts say that it passes the
22 fundamental reliability threshold for admission when
23 not only we don't know who wrote the note, what
24 exactly it said. But what we got is conflicting
25 versions of events two-and-a-half decades after the

1 fact as to what the note might have said. Whether it
2 said luggage or baggage or whatnot, that's what we've
3 got.

4 **THE COURT:** How clearly is the alleged
5 sequence between the note followed by the gun and the
6 shells, as opposed to gun and shells transferring
7 before the note?

8 **MR. JACKLEY:** Yeah. We're talking about a
9 matter of seconds because they are in the room for
10 just a --

11 **THE COURT:** What evidence do we have that one
12 occurred first and the other event occurred second?

13 **MR. JACKLEY:** The eye-witness testimony of
14 Arlo Looking Cloud who was standing in the room.

15 **MR. MURPHY:** Although the Court needs to
16 take into consideration that that was the testimony
17 provided at the Dick Marshall trial. If the jury were
18 to have accepted that, Dick Marshall would have been a
19 convicted person. The jury very quickly acquitted him
20 of the charge.

21 And so even then, even when we're talking
22 about the facts the state might have to support
23 admission, we're talking about facts that were
24 thoroughly unpersuasive to a jury of 12 people just a
25 couple months ago.

1 **THE COURT:** I don't know how that impacts on
2 my decision. I think it's probably -- if one accepts
3 the -- if the jury were to accept the exchange of gun
4 and bullets and accept that that was the same gun and
5 bullet that caused the death of the decedent, then I
6 think it's a fair inference that some instruction came
7 from somewhere and one could infer, then, under those
8 circumstances that it came in the form of a note or
9 some other thing.

10 I am troubled with it, again, by the hearsay.
11 I am troubled with it -- obviously you all see much
12 greater importance than I do if we're talking that
13 it's not offered for the truth of the matter asserted.
14 The state is -- tells me pretty plainly that that's
15 what they are trying to get it in. That this is an
16 order. And I don't --

17 Why would I care from whence it came?

18 Why is that of any importance whatsoever?

19 **MR. JACKLEY:** It's of importance if Thelma
20 Rios takes the position that when they left Rapid
21 City, after she had made the phone call, after the
22 WKLDOC acquisition -- alleged WKLDOC questioning and
23 the other activity that occurred at Thelma Rios's
24 house; that at that point in time her state of mind
25 was is they were not going to kill her. Rather, that

1 was formulated at some point in time at Dick
2 Marshall's. Then it has relevance when it comes to
3 point in time reference.

4 Your Honor --

5 **THE COURT:** How do you establish the point in
6 time reference?

7 **MR. JACKLEY:** By the chain of events of when
8 they -- whence they came. That note was logically
9 provided and created at WKLDLOC. I mean, there are no
10 witnesses in the -- Dick Marshall's house that testify
11 that they wrote out a note. And that wouldn't make
12 any sense why they would write out a note when they
13 were there. I mean, that note logically came from
14 some consequence of events before that. And it's our
15 position that that sequence of events arose out of
16 what occurred at Thelma Rios's residence and at
17 WKLDLOC.

18 **MR. MURPHY:** But, you know, now, Your Honor,
19 they are taking a position that's inconsistent to a
20 position they have taken in other tribunals, that they
21 went to Bill Mean's house before they went to Dick
22 Marshall's house.

23 They have argued strenuously that they --
24 there was an intermediate stop before they ever ended
25 up at Dick Marshall's house. And that they got an

1 order at some point there. Of course, no witnesses
2 about any order.

3 But Arlo Looking Cloud saying they went into
4 that house and there was a bunch of people there.
5 They talked about -- Arlo Looking Cloud has testified
6 as to stops in Potato Creek and other areas.

7 So for them to say now that the inference can
8 only be that they got this note at WKLDODC when they
9 previously established through sworn testimony
10 multiple other stops before they got the Dick
11 Marshall's house is very problematic to me because
12 it's a whole new version of events.

13 **MR. JACKLEY:** Well, in fairness, I suppose
14 the note could have been written at Means also so
15 that's part of the chain of events. But I think the
16 evidence is a phone call was made there. Maybe not a
17 note written. But these are all evidentiary issues.

18 And I go back to, the jury ought to be
19 provided this information. The federal jury heard
20 about the baggage note. It's part of the sequence of
21 events. It's what occurred. It's what people talked
22 about directly when Dick Marshall walks out of that
23 room. That's one of the first things he talks to Cleo
24 Gates about, his wife, about this baggage note.

25 And I go back to the truth of the matter

1 asserted. It's not to take out the baggage. It's
2 what they took that note to mean. It takes other
3 evidence outside of that note to get us there. I
4 understand that. But we feel that we have that
5 evidence by the exchange of the gun and the ultimate
6 execution of Anna Mae Aquash.

7 **THE COURT:** You are trying to prove that the
8 note and its intention was to direct people and to
9 kill. So you are indeed offering it to -- the sole
10 purpose you are offering it is to prove the truth of
11 the matter asserted that an order was made and the
12 imperative phrasing of the alleged note, says to take
13 care of. It doesn't say would you or could you or
14 this, but the allegation is its directive.

15 **MR. JACKLEY:** That's fair, Your Honor.
16 That's fair.

17 **THE COURT:** So we would accept that it's
18 offered to prove -- to establish, I -- I think what
19 you believe is established by a stack of other
20 evidence?

21 **MR. JACKLEY:** It's not -- it's not to prove
22 that they were to take out baggage. It's to prove
23 that they were to execute somebody that they believed
24 was an informant.

25 **THE COURT:** Same same.

1 What's the difference?

2 **MR. JACKLEY:** It takes other evidence to get
3 there.

4 **THE COURT:** You are asserting mafia-type
5 orders spoken in language that is designed to not
6 directly address something, but is clearly understood
7 by the parties. And the inference here is going to be
8 absolutely certain that taking care of the baggage --
9 the trunk -- is to do exactly what you want the jury
10 to believe it means, which is, go kill her.

11 I really don't want to try this case twice,
12 you know.

13 **MR. JACKLEY:** Well, if it's -- it's still
14 admissible because it's a co-conspirator statement,
15 Your Honor.

16 **MR. MURPHY:** And we dispute that.

17 **THE COURT:** Well, it's a co-conspirator
18 statement, allegedly, only if it means what you want
19 it to mean.

20 **MR. JACKLEY:** And so I think I should be
21 able to --

22 **THE COURT:** Then I would argue -- not argue,
23 but I would at least understand that it is a directive
24 within a group of people to do something.

25 **MR. JACKLEY:** Which they carried through and

1 did is our position.

2 **MR. MURPHY:** And then -- at that point, then,
3 we go -- at that point, then, we get to the
4 confrontation issue. Since -- they haven't identified
5 who wrote the note. We can't confront the actual note
6 because according to them it doesn't exist. And we
7 don't have access to anybody who can affirmatively say
8 what in fact the exact contents were.

9 **THE COURT:** End of the week, I hope.

10 The disclosure of immigration benefits,
11 reimbursement receipts, and record of payments. Part
12 of this --

13 Is that taken care of?

14 **MR. MURPHY:** No, Your Honor.

15 And this is a -- I've got another exhibit for
16 the Court which is previously provided discovery from
17 the state. It's marked as Defendant's Exhibit A.
18 What it is is 27 pages of FBI confidential human
19 source payment receipts. The top one from May -- goes
20 from June of this year.

21 Essentially, here is our position. They have
22 admitted that they have paid about \$140,000 of federal
23 monies to Kamook Ecoffey and Serle Chapman. About
24 100,000 to Mr. Chapman and about 40,000 to Ms.
25 Ecoffey.

1 **THE COURT:** Why is it income?

2 **MR. MURPHY:** Well, this is the issue. They
3 have --

4 **THE COURT:** I got an FBI statement here that
5 says confidential human source payment receipt and
6 paying official advised that monies paid for services
7 are considered taxable income and must be reported to
8 the appropriate tax authorities.

9 **MR. MURPHY:** Exactly.

10 And see, what they have done in every one of
11 these receipts, they have put zero for services and
12 all of the dollar value, \$140,000, as expenses so that
13 it's not taxable. And that's the issue.

14 And what their position has been is that they
15 don't have to provide us with any receipts showing
16 that these were actually valid expenses.

17 Now, all along -- and you heard Mr. Jackley
18 just a few moments ago bristling at the idea that
19 these are paid informants. Well, we don't know if
20 they are paid informants because they are saying,
21 well, they are just reimbursed for expenses but they
22 won't give us --

23 **THE COURT:** The amount is kind of struggling.

24 **MR. MURPHY:** Yeah.

25 Well, there is checks for \$20,000. Lump some

1 checks for \$20,000. They are saying it's expenses.
2 So what we got here is -- Mr. Oswald in his response
3 said, well, they shouldn't have to provide every
4 receipt for Burger King expenses. We're talking
5 \$140,000 worth of hamburgers, then.

6 What we believe is that they have either
7 never required these informants to provide a single
8 receipt. And if that's the case, we have to know that
9 because that means that the government was willing to
10 do whatever they could to get these informants to
11 testify.

12 **THE COURT:** One of the things -- you know, I
13 both worked in and ran a law office for a period of
14 time. And the number of times my bills came out to
15 the penny were few and far between. That should be
16 one one hundredth of the time or probably a little
17 higher than that, particularly if you talk round
18 numbers.

19 But we have 610. I have \$502. I have \$180.
20 I have \$20,000. I have \$350. I've got \$18,000.

21 **MR. MURPHY:** And we know there is reporting
22 requirements. And so they either have to acknowledge
23 that they didn't follow their own rules or that these
24 informants got \$140,000 that they haven't declared for
25 taxable income and -- but weren't really for

1 reimbursed expenses.

2 I mean, what we're asking for is not onerous.
3 We're saying, provide us the receipts. If these guys
4 follow the rules, then before they cut checks for
5 \$140,000 they said, okay, show me the receipts. Let
6 me get copies of the receipts.

7 This is not an onerous request because this
8 all started in 2002. So it's not like we're asking
9 them to go back to 1975.

10 Mr. Oswald declared this is a fishing trip
11 that we're going on and that it's an onerous request.
12 It's not a fishing trip. We know these informants got
13 paid 140 grand. We want to see what it was paid for
14 and if it was legitimate. And that all goes to bias,
15 credibility, the extent to which this investigation --

16 **THE COURT:** I really don't have a problem
17 with that. Particularly when I deal with 15,000,
18 18,000, \$20,000 round figures. And assuming now that
19 may be a partial payment in round numbers. But it
20 seems to me that that -- the quantity of money we're
21 talking about, the number of very large checks that
22 are rounded out, give a reasonable index of suspicion
23 that I think any lawyer would say, you know, this
24 doesn't feel right.

25 It may be right, but it requires further

1 investigation to determine that. The issue between a
2 paid informant and a cooperative informant are
3 probably a little bit different. I am not sure that
4 these things would not be admissible directly as to
5 credibility that -- I had three big ones in a row, I
6 thought. I had 15,000 from 803 to 804. And you got
7 another \$1,617.56 within the same period of time.

8 **MR. MURPHY:** And Your Honor, I am not saying
9 that exhibit is complete. That is what we've gotten.

10 But we know because they have acknowledged in
11 letter form \$140,000 total.

12 **THE COURT:** I got 18,000, again, covering
13 some of the same period as the prior one. So I'm --
14 Produce it.

15 **MR. MURPHY:** The second part of that --

16 **THE COURT:** I am getting a point here and I
17 don't know whether that's a directive or --

18 Mr. Mandel.

19 **MR. MANDEL:** Let me start at the outset by
20 saying we're discussing an amount of money spread out
21 over a ten-year period.

22 **THE COURT:** I understand.

23 But I see -- I see checks written on multiple
24 checks in the same period covering some of the period
25 of time that are extensive. And they are, in their

1 nature, round figures repeatedly for large sums of
2 money. If they don't raise the index of suspicion in
3 a lawyer, the lawyer should write his carrier. Okay.
4 I mean, that has to say, wait a minute. I want to
5 look at the basis for the calculations. I just looked
6 quickly and I got 40 and 33 -- I got \$53,000 in three
7 receipts. All three of them 18,000, 15,000, 20,000.

8 **MR. MANDEL:** Understand, Your Honor, that
9 these -- aside from expenses such as travel, meals,
10 and the more mundane things like that. They involve
11 some relocation expenses for these individuals due to
12 their safety issues that arose as a result of what
13 they were doing.

14 **THE COURT:** Well, that's fine.

15 But I don't know what the relocation issue
16 is. And, again, round figures sound like we think
17 that's a fair amount to relocate. So here is \$20,000.

18 And I -- you know -- and I don't know what
19 the cost of relocating is. Mr. Murphy doesn't. I
20 don't know if you do. But I think -- I think it is
21 not unreasonable to say show me the receipts.

22 What's the problem with that?

23 **MR. MURPHY:** Or alternatively acknowledge
24 they never got receipts because that's what they won't
25 do. They won't -- they are saying we're not going to

1 give you the receipts but they won't acknowledge that
2 they never even asked --

3 **THE COURT:** What's the problem in giving the
4 receipts?

5 If they back up what they show, then we don't
6 have an issue. If they don't back up what they show,
7 I wonder why -- well, I'm -- I don't even want to
8 think about that being a bad result.

9 I can understand not having receipts although
10 that's going to create problems for you. I can't --
11 certainly an explanation to a jury because the numbers
12 are going to come out.

13 But I can't believe you are sitting on them
14 saying that you don't have them. I wouldn't -- I
15 mean, that thought just is inconceivable to me.

16 So you have the receipts or there weren't any
17 taken. If they have the receipts, give them. If you
18 don't have receipts, or don't have all the necessary
19 receipts, you need to disclose that. Those are the
20 only two ways it's going to happen.

21 What's the problem with that?

22 Why -- explain to me why it shouldn't be
23 done.

24 I can't imagine a lawyer -- any lawyer in a
25 civil or criminal case that's not going to say -- when

1 you are looking at reimbursement of costs in a civil
2 case and you get those kind of numbers and round
3 numbers are you going to say show me. And I can't
4 imagine any lawyer not. If that was the claim over
5 here, you would be screaming and dancing up and down
6 saying show me the receipts.

7 Show them.

8 **MR. JACKLEY:** Your Honor, I don't have all
9 the answers as to why they haven't been shown or not.
10 But we will certainly get to what ones we can.

11 And we just ask that given the sensitivity
12 nature of this that they can be reviewed at either the
13 U.S. Attorney's Office or the AG's Office.

14 And I think the Court needs to understand,
15 some of the sensitivity with this is --

16 **THE COURT:** Location. If we're doing that
17 kind of stuff I can understand that.

18 **MR. JACKLEY:** But when I talk about
19 sensitively, I talk about -- this issue goes way back
20 where -- I mean, we're talking about Dennis Banks
21 showing up at Kamook Nichols' house area. And we're
22 talking about some very serious issues. We're talking
23 about addresses being put up on websites. I mean,
24 several times I as United States Attorney having to
25 write letters and call and say, leave these people

1 alone. Your investigators -- they don't want to talk
2 to them.

3 So there has been -- very sensitive over the
4 years. Not just during my time the last four years
5 with this file, but the conduct in this case is
6 concerning. So that's the reason that some of this
7 has been pretty guarded.

8 But I will tell you that we will try to get
9 what documents we can, what information we have. But
10 I ask that given the conduct that has occurred --

11 **THE COURT:** It will be reviewed by Mr. Murphy
12 and Mr. Kinney at your office. If they wish any
13 further stuff, we'll have an in camera hearing on the
14 matter and I will take a look and make any further
15 decisions I need to make.

16 I am cognizant of the factors that you are
17 talking about. But on the other hand, there is some
18 significant questions and they just have to be asked.

19 **MR. JACKLEY:** Your Honor, can I ask --
20 because they are not the state's documents, and I
21 don't want to create issues with the FBI. So can that
22 be done at the U.S. Attorney's Office?

23 Would that be okay?

24 **THE COURT:** I don't have a problem with them
25 being looked at there.

1 If there is questions that arise, then they
2 will come to me one way or the other.

3 **MR. MURPHY:** Could we say within 30 days so
4 that we're not right up on the eve of trial?

5 It shouldn't take them that long to get these
6 together.

7 **THE COURT:** The answer is yes.

8 **MR. MURPHY:** And just so the record is clear,
9 anything that Mr. Banks did or -- I want to make sure
10 there is no implication that Mr. Graham was behind any
11 of the witness issues that Mr. Jackley has referenced.
12 He's been in custody since December of 07.

13 **MR. JACKLEY:** Well, actually Mr. Graham's --
14 there is a --

15 **THE COURT:** I am not going there at this
16 point in time. We're going to look at the exhibits
17 and that's the end of that.

18 **MR. MURPHY:** The second part of this motion
19 was for the immigration documents. We're asking for
20 the same immigration documents that were turned over
21 by the United States Attorney's Office to Mr. Hanna
22 when he was defending Mr. Marshall.

23 There was -- there has been a long history of
24 where there was a denial by the government of any
25 benefits given to Mr. Chapman regarding his

1 immigration status.

2 Mr. Hanna did some incredible litigation,
3 subpoenaed top officials from the Immigration and
4 Customs Enforcement, and subpoenaed files.

5 The federal court denied the government's
6 motion to quash those subpoenas and suddenly
7 Mr. Hannah was presented with immigratio documents
8 showing that their informant, Mr. Chapman, has been
9 given immigration benefits for many years. S visas,
10 extensions, a green card and whatnot as a result of
11 his cooperation.

12 We're entitled to those documents and we
13 haven't gotten them yet so we would like them.

14 **THE COURT:** Yeah. They were previously
15 disclosed in Mr. Hanna's case?

16 **MR. MANDEL:** Your Honor, let me say, the
17 characterization of benefits granted to Mr. Chapman
18 would certainly be taken in issue by him as to whether
19 or not there was any benefit. The United States
20 obviously had an interest in keeping him here as a
21 witness.

22 And having said that, getting into an
23 argument over whether they were benefits or not is
24 probably not going to gain us anything.

25 But as to the documentation that was provided

1 to Mr. Hannah, we would be willing to provide the same
2 documentation under the same conditions.

3 **MR. MURPHY:** That's fine.

4 **THE COURT:** Done.

5 We're going to take a 15-minute recess,
6 folks.

7 (Off the record.)

8 **THE COURT:** Okay.

9 All right. We're back in session.

10 Are we going to deal with the subpoena of
11 Mr. Marshall now?

12 **MR. JACKLEY:** If we could, Your Honor.

13 **THE COURT:** Yeah. Let's do that.

14 **MR. JACKLEY:** The state didn't receive the
15 motion to quash.

16 **THE COURT:** The substance of the motion,
17 which I was just handed, is pretty simple. Says it's
18 premature. The request to come in and ask him the
19 questions you wish to ask him is premature because
20 it's a decision that must be made at the -- the
21 ultimate decision has to be made at the time of trial.

22 And that any answer he would give today, yes
23 or no, that might or might not be helpful because he
24 could well change his mind at trial time. That leaves
25 one or the other -- one side or the other scrambling

1 unless they are prepared for both.

2 It seems to me it's premature. That's my gut
3 reaction to the motion. And that's the only basis for
4 it as I recall.

5 Mr. Hanna, is that correct?

6 **MR. HANNA:** Your Honor, we mailed copies of
7 the motion to quash --

8 **THE COURT:** I understand.

9 **MR. HANNA:** -- to all parties on Friday. I
10 have a copy. Mr. Jackley can read my copy.

11 But there is basically two basis for our
12 motion to quash the subpoena that is served on him
13 today. One is it's -- he's been called here for an
14 improper purpose. I asked Mr. Oswald why are you
15 expecting to -- what testimony -- in essence I asked,
16 what testimony do you intent to adduce from Richard
17 Marshall at this hearing. He said, we're going to ask
18 him whether he intends to take the Fifth Amendment at
19 the trial.

20 I had a conversation with Mr. Jackley over
21 the phone the other day. I advised him, I don't think
22 that's a proper question to ask a witness four months
23 before the trial. Things can change. New facts can
24 arise. It can affect our decision one way or the
25 other. We'll make that decision at the time of trial

1 or close to the time of trial. And when we do, we
2 will advise the court and all parties if Mr. Marshall
3 intends to take the Fifth Amendment at the trial.

4 I can inform the Court that I will be making
5 a motion to quash the subpoena for the trial, and it
6 is premature. There is no proper reason to call
7 Mr. Marshall, who has been acquitted in trial, to put
8 him up on the stand, and submit to a deposition by the
9 prosecutor. We are not prepared to do that. We think
10 he's been called here for an improper reason, Your
11 Honor.

12 I have also asked defense counsel, do you
13 have any reason to believe that Mr. Marshall has
14 any -- are you going to elicit any facts from him in
15 testimony relevant to any issue here today and they
16 said no.

17 So we're moving to quash the subpoena because
18 he's been called here for an improper purpose, to find
19 out our strategy, to ask whether or not he's going to
20 take -- assert a constitutional right that gets also
21 into attorney/client privilege by conversations with
22 my client.

23 **THE COURT:** Well, your conversations are his
24 decision.

25 But I agree with you, it's premature and it's

1 not binding. And yet it sets up a witness for
2 inconsistent statements. And actually -- and could,
3 quite well, set up a continuance of the trial to
4 respond to unexpected testimony despite statements
5 made in open court prior to the trial of X when Y
6 comes out at the trial. And all of a sudden people
7 are hopping around to address that change and I don't
8 know which side it would favor. That would depend on
9 what the answer is today.

10 And I think it's essential for the trial that
11 both parties be prepared to address that question and
12 that issue regardless of what the -- what the matter
13 would be at the trial.

14 Now, a motion to quash filed before the
15 trial, I don't -- as a subpoena to trial, Mr. Hanna
16 would have quite a hill to climb, I think, but I will
17 look at that hill when it comes up.

18 I am not about to allow any statements taken
19 from Mr. Marshall at this time.

20 **MR. JACKLEY:** Your Honor, may I just --

21 **THE COURT:** Sure.

22 **MR. JACKLEY:** Just so we're clear, I believe
23 it's inappropriate for a prosecutor to call a witness
24 that they believe is going to take the Fifth Amendment
25 at trial. And so I believe I have protected myself

1 with this subpoena.

2 And I just ask that if he is going to take
3 the Fifth Amendment that I, as a prosecutor, be
4 advised of that prior to me calling him as a witness.
5 I think that's fair.

6 **THE COURT:** Well, Mr. Hanna indicated that he
7 intended at this time, subject to future
8 consideration, to file a motion to quash his subpoena
9 for trial. And I think at that point in the game, we
10 can address your concern.

11 **MR. JACKLEY:** And aside from the issues of
12 whether he's going to testify at trial or not, I mean,
13 there are matters that are pertinent to the motions
14 here today that his client has information on. One
15 example of that is the baggage note discussion where
16 defense counsel is attacking the trustworthiness and
17 reliability in relation to the baggage note.

18 I am looking at notes that would indicate a
19 discussion that occurred between Serle Chapman and
20 Dick Marshall that, quote, confirm content of note as
21 told by Cleo about keeping baggage et cetera, end
22 quote.

23 So if Mr. Marshall has information regarding
24 the content of the baggage note, and the Court is
25 going to make an evidentiary ruling in relation to the

1 baggage note, I think the state should be able to call
2 a witness in relation to what occurred --

3 **THE COURT:** Doesn't the Fifth Amendment apply
4 to that as well?

5 **MR. JACKLEY:** It does not. And the reason it
6 does not apply is Mr. Marshall has been acquitted in
7 federal court. Under 11-53, the United States
8 Government has exclusive jurisdiction over
9 Mr. Marshall. All of Mr. Marshall's activities in
10 relation to the death of Annie Mae Aquash occurred
11 within the boundaries of the Indian Reservation.

12 It is my understanding that Mr. Marshall is
13 an enrolled member of a federally recognized Indian
14 Tribe; so therefore, based upon his federal acquittal,
15 it would be double jeopardy and so he does not have a
16 Fifth Amendment right with respect to testifying in
17 either this motions proceeding or with respect to the
18 state trial.

19 **THE COURT:** He would have exposure to
20 perjury.

21 **MR. JACKLEY:** Every witness that takes the
22 oath that doesn't testify truthfully does have
23 exposure to perjury. So as long as he testifies to
24 the truth, that didn't an issue for him.

25 **THE COURT:** Well, I am not sure how we decide

1 what the truth is here.

2 **MR. JACKLEY:** That's for the jury, Your
3 Honor.

4 **THE COURT:** Yes, it is. And if they come out
5 with a different version than Mr. Marshall's, I don't
6 know that that establishes perjury either.

7 But having said that, I am inclined to grant
8 the motion to quash.

9 Mr. Murphy?

10 **MR. MURPHY:** We take no position.

11 We have no testimony to elicit from
12 Mr. Marshall here today.

13 The issue as to trustworthiness goes to
14 Mr. Chapman, not Mr. Marshall.

15 **THE COURT:** Well, and I don't know what the
16 Fifth Amendment and how that will stand when we have
17 that motion to be filed then. But I think we need --
18 I don't think for this purpose it's -- it behooves me
19 to address that at this point.

20 **MR. HANNA:** Thank you, Your Honor.

21 **THE COURT:** I think there will be a point at
22 which I need to address that issue.

23 **MR. JACKLEY:** Then the only thing that I
24 would ask, Your Honor, with respect to the baggage
25 note consideration, on the prong of the

1 trustworthiness, I submit to the Court, and I'd ask to
2 make it as an exhibit, the notes in relation to a
3 phone call between Dick Marshall and Cleo Gates that
4 talks about the confirming the contents of the note
5 about keeping baggage, et cetera.

6 **MR. MURPHY:** We'd object because we don't
7 have foundation. It's not a --

8 It's a note from Serle Chapman, correct?

9 **MR. JACKLEY:** In relation to the conversation
10 held between Dick Marshall and Serle Chapman.

11 **MR. MURPHY:** And so we need Mr. Chapman here
12 to give some indication.

13 **THE COURT:** Well, I understand that.

14 But I will take in as an exhibit those notes.

15 I understand your point on confrontation and
16 that. But I --

17 **MR. MURPHY:** What are we going to mark that
18 as?

19 **THE COURT:** Say again.

20 **MR. MURPHY:** What exhibit number?

21 **THE COURT:** I have to get that. Number one,
22 I gave the exhibit -- my court reporter's -- did you
23 put them back, the markers?

24 **MR. MURPHY:** Yes.

25 **MR. HANNA:** Your Honor, I would ask the Court

1 to -- to appoint me to represent Mr. Marshall.
2 Mr. Marshall is requesting that I be appointed to
3 represent him. This is going to require counsel --
4 legal counsel to him throughout the trial.

5 **THE COURT:** I don't have a clue as to my
6 authority to do that. And at this motion -- at this
7 time, that's denied until I know what my authority is
8 and I have a chance to hear counsel do it.

9 And then I have to address the separate issue
10 as to whether we're entitled to private counsel or
11 public defenders and I get to dance around that --

12 **MR. HANNA:** Judge, I will make it easy for
13 everybody, I am going to represent Dick Marshall pro
14 bono.

15 **THE COURT:** I understand.

16 **MR. HANNA:** And also since my client is the
17 subject of this exhibit that has just been put forward
18 to the Court, I would also ask the Court to take
19 judicial notice of the trial testimony of Serle
20 Chapman in which he stated that the first time he ever
21 told anybody about this alleged conversation between
22 him and Richard Marshall that took place in 2001 was
23 in 2008, seven years later. About the time the
24 government was seeking to indictment Richard Marshall
25 for murder.

1 I just thought that is a fact that the Court
2 should be made aware of in determining whether this
3 information is accurate or not.

4 With that, Your Honor, am I excused?

5 **THE COURT:** Yes.

6 Thank you.

7 **MR. MURPHY:** I believe we left off starting
8 on motion number 17.

9 **THE COURT:** I would hear from you.

10 **MR. MURPHY:** Your Honor, we previously
11 provided the Court with Exhibits A through F when we
12 submitted the motion.

13 I am providing the Court with Exhibit G. I'd
14 like the Court to receive this as well as I would
15 informally move to admit Exhibits N and A, which I
16 previously provided to the court. And so I just want
17 to make sure they are all part of the record.

18 The only import of Exhibit G for the purpose
19 of this hearing, it's just yet another document. If
20 you see the second paragraph, where it's an FBI 302 of
21 an interview of Mr. Gates. And he says that he was a
22 Medicine Man in a private way. So it's just -- it's
23 cumulative to the other exhibits, but yet, again,
24 reasserts that Mr. Gates both himself -- he, himself,
25 declared himself to be a Medicine Man.

1 And then other persons who lived and worked
2 in the Pine Ridge -- on the Pine Ridge Reservation,
3 specifically Mr. Ecoffey, who is an enrolled member of
4 the Oglala Sioux Tribe, identified Mr. Gates as a
5 Medicine Man to whom people -- Indian people and
6 people affiliated with the AIM Movement went to for
7 spiritual advice. And that's the factual record. We
8 have established it with all of the other exhibits as
9 well.

10 What we got are -- in this motion are really
11 two sets of statements. We got Graham's alleged
12 statements to Mr. Gates and Graham's statements to law
13 enforcement when they confronted him with Mr. Gates'
14 alleged statements.

15 Just as a preliminary matter, Mr. Graham has
16 and continues to invoke his privilege. Throughout the
17 government's pleadings, or the state's pleadings,
18 they've referenced in several -- on several occasions
19 that Mr. Graham hasn't invoked his privilege. I don't
20 know how more clearly we need to invoke his privilege
21 than by doing so in these repeated pleadings, but he
22 has done that. He is going to do that.

23 As another matter, I think it's beyond
24 contravention here that Mr. Gates was in fact a
25 Medicine Man. We have Grand Jury transcripts that we

1 submitted by him where he says, under oath, he's been
2 practicing the Indian religion for 40 years or he was
3 before he died.

4 Again, we have Mr. Ecoffey's statements
5 acknowledging that Mr. Gates was a spiritual leader
6 and a Medicine Man. So those are the factual
7 prerequisites for establishing the privilege.

8 The state in this case has never filed any
9 notice under any of the rules for notice of its intent
10 to admit Mr. Gates' out-of-court statements.

11 Mr. Gates has been dead since I believe 2003. So we
12 have a deceased declarant's statements that they
13 propose to admit, but yet they have not tendered any
14 notice as required by the various rules when you have
15 an unavailable declarant.

16 You know, one of the -- the two statements
17 that Graham supposedly made aren't really statements.
18 And that's one of the first things that I think the
19 Court needs to go through.

20 What we have is -- in regard to Mr. Chapman,
21 Mr. Chapman in an unrecorded portion of his interview
22 with Mr. Graham allegedly sets forth this litany of
23 facts. Fills a whole paragraph. And those are
24 contained in Exhibits D and E. And to that,
25 Mr. Graham's sole response is uh-huh.

1 Mr. Graham's -- tries to continue speaking
2 and then Mr. Chapman cuts him off and asks him
3 something completely different about Vern Bellecourt.
4 There is a question as to whether or not Mr. Graham's
5 alleged statements that the government has sought
6 admission of or said they are going to admit is
7 actually even a response. Because it was
8 nonresponsive and witnesses are supposed to be able to
9 continue their answer. Before the prior inconsistent
10 statement or out-of-court statement is being brought
11 in, there has to be some sense of completeness or
12 whatnot, and none of that was afforded him in this
13 case.

14 Similarly, the statement that Graham
15 allegedly made to Ecoffey. That's Exhibit C. Ecoffey
16 confronts Graham up in Canada, recites a whole slew of
17 facts and accusations and rumors and whatnot. Doesn't
18 put them in question form. And the only response that
19 Graham is alleged to have made is yeh, Y-E-H. At
20 which point then Ecoffey continues on other
21 accusations. And Graham previously had invoked his
22 right to counsel even before that meeting as indicated
23 in there.

24 So I don't know if these even constitute
25 statements. But if they are statements, there is

1 multiple grounds to exclude. The first being the
2 privilege.

3 If Gates' statement is true, then there is a
4 recognized spiritual leader. He says that Mr. Graham
5 came to him seeking spiritual advice. There is no
6 indication of any waiver. There is no indication that
7 there is any third parties present or that Mr. Graham
8 disclosed the same contents, discussions, or facts to
9 any other party. So we got a privilege that should be
10 recognized. And this is no different and should not
11 be treated any different than the priest penitent
12 privilege that is well recognized.

13 I recognize this is a case of first
14 impression in South Dakota. But the fact of the
15 matter is that Mr. Gates' role as a spiritual leader
16 and my client's alleged approaching of him to talk
17 about spiritual matters should be respected and should
18 be covered by the privilege.

19 The other thing is, then, aside from the
20 privilege is we go back to the confrontation clause
21 issues is that Gates' statements are not subject to
22 cross-examination by my client. Gates died. The only
23 time he provided testimony was in a Grand Jury
24 proceeding. So he -- there was no right to
25 confrontation there.

1 It was provided in a testimonial context.
2 There can't be any question that this was -- or this
3 is a *Crawford* issue because he's testifying pursuant
4 to a subpoena and a Grand Jury that sought the
5 indictments of my client. So we got the confrontation
6 clause issue supporting the privilege.

7 As to my client's supposed statement to
8 Chapman, that presents double and triple hearsay
9 issues. Chapman never talked to Gates. At the time
10 Chapman was interviewing my client, Gates was already
11 in an Alzheimers ward. And so we have no indication
12 that there has ever been -- there has ever been any
13 direct contact.

14 So Chapman must have been told about Gates'
15 statements from somebody else. And that he relays
16 them to my client to which my client makes a very
17 ambiguous response.

18 We can't assume that Chapman's statements are
19 true. But yet we know they are being offered for the
20 truth of the matter asserted. Same with Gates'
21 statements.

22 And at every step in this process my client's
23 confrontation rights are implicated because he can't
24 confront Gates and he doesn't know and hasn't been
25 told who relayed Gates' information to Chapman. So

1 there is another confrontation issue. We don't know
2 where along this chain the information got distorted
3 or what was really said.

4 I think there is a valuable public argument
5 behind recognizing the privilege and the basis behind
6 the privilege in this case. We want people to have
7 the ability to go to spiritual leaders and speak in
8 confidence.

9 We also don't want the police to abuse that
10 privilege. And that's what we got here is we got
11 Ecoffey, a law enforcement officer, taking privileged
12 information -- because Mr. Gates, even though he is a
13 spiritual leader, did not show the discretion that his
14 role would have called for. Mr. Gates, without
15 permission from my client, reveals allegedly
16 confidential statements. And then Ecoffey goes up
17 there and confronts my client. And so he's misusing
18 privileged information.

19 The same would go for Chapman but even more
20 so because what we -- what appears to be the case is
21 that Grand Jury testimony was leaked to Mr. Chapman;
22 who then went out and confronted my client with it to
23 which my client made very ambiguous responses.

24 So we have a public policy argument where we
25 shouldn't allowed law enforcement or the prosecution

1 to make an end run around privilege by releasing
2 privileged information and then having somebody go
3 confront a defendant and asking them to affirm or deny
4 it.

5 We have reliability issues that carry through
6 the hearsay and carry through the confrontation issue.
7 Chapman did not record his interview with my client.
8 Which is interesting because he recorded a huge
9 portion of that conversation. And then he, Chapman,
10 not at my client's request, turns off the recorder.
11 Says that my client made these statements and then
12 turns it back on again. Ecoffey, a trained law
13 enforcement officer, he doesn't record it. As I said
14 the responses my client made are ambiguous at best.

15 And I think that's -- you know, I could keep
16 going on. I have outlined them in the pleadings which
17 are lengthy. But this is a matter where these
18 statements simply should not be admitted against my
19 client.

20 **THE COURT:** Mr. Jackley?

21 **MR. JACKLEY:** Your Honor, if you break these
22 down, we're talking about three statements. Without
23 question two of the statements are statements directly
24 by John Graham. I mean, all this evidentiary
25 discussion -- I mean, these are statements that John

1 Graham is making to individuals and therefore it's
2 admissible under 19-16-3. 19-16-3, as this court
3 knows, says a statement is not hearsay if it is
4 offered against a party and is his own statement.

5 So if you break -- I mean, that's all
6 interesting about Medicine Man theory and everything
7 else. But these are Graham's statements that
8 Mr. Graham is allegedly making.

9 And so if you break it down, the first
10 statement is the statement of February 11, 2001. It's
11 to cooperating witness Sierra confirming that
12 defendant Graham had gone to see Al Gates and that he
13 was having a hard time with what he had done to Annie
14 Mae Aquash. This is Graham saying this. So to the
15 extent there even is a privilege, he's waived it.
16 He's talking about it.

17 Similarly, on the second statement, which is
18 the statement of April 21, 1994, to Bob Ecoffey,
19 defendant Graham makes admissions about what happened
20 to Annie Mae quash. He wanted to know what he could
21 do in a spiritual way to make up for it. And that he
22 wanted Al Gates to perform a ceremony.

23 This is John Graham talking to law
24 enforcement. These are admissions under 801. They
25 are not hearsay. They are not blocked. To the extent

1 there even is a privilege, he's waived it.

2 And the reason I say to the extent there is a
3 privilege, John Graham has taken a position that he's
4 not a federally recognized Indian; that he's Canadian
5 Indian which is why we're here and not in federal
6 court. So I am not even convinced he gets the benefit
7 of this Medicine Man spiritual privilege, but to the
8 extent he does, he's waived it.

9 The more troubling -- and I will be straight
10 to the Court -- the more troubling statement of the
11 three statements -- and we listed in our brief -- is
12 Al Gates' testimony of August 16, 1994, to the Grand
13 Jury where he talks about Graham admitting to Gates
14 that Graham was present when Annie Mae Aquash was
15 killed and expressed concern regarding her killing.

16 I would agree that that will be admissible
17 for only really two purposes: One would be
18 impeachment evidence. Or second of all, with respect
19 to allegations of inappropriate police activity.
20 Throughout at least the briefings there has been
21 allegations of inappropriate -- you know, law
22 enforcement not being straight forward on questioning
23 and other things. Investigation impropriety. We have
24 given the case citation to the court.

25 So to the extent it becomes relevant through

1 either impeachment of defendant Graham or Rios opens
2 the door, we would like to go into it.

3 I am not opposed to the Court issuing a
4 motion in limine on that statement saying, counsel,
5 don't go there unless you approach and the door is
6 opened.

7 But with respect to the other two statements,
8 those are admissions by defendant Graham.

9 **THE COURT:** Mr. Murphy?

10 **MR. MURPHY:** Yeah. I would direct -- if we
11 got Al Gates' Grand Jury testimony resolved, that's
12 good. We'll put that one aside.

13 But I would ask the Court to look when it's
14 making the decision at Exhibits C and E. Mr. Jackley
15 has just narrated what my client supposedly said; that
16 my client said that he went to Al Gates because he
17 needed spiritual assistance and whatnot.

18 Exhibits C and E are the government's own
19 discovery documents. And those are the ones that say
20 what Mr. Graham actually said. And the sum total of
21 what Mr. Graham actually said listed by Mr. Ecoffey as
22 yeh, Y-E-H, after Ecoffey said he told Graham that
23 Gates came forward with that information; that he told
24 Graham a whole litany of things. That's the second
25 page of Exhibit C. And this sum total of a Graham's

1 response to all of it was the word, yeh, Y-E-H.

2 Similarly, we go to Exhibit E and that's
3 Serle Chapman where he recites two different
4 paragraphs of what he told Graham. Not even asking.
5 And that's one of the key things in this. Neither
6 Ecoffey nor Chapman put these as questions to Graham.
7 They make statements of fact. Graham's total response
8 is uh-huh. At which point Chapman says, I thought you
9 should know what others were saying. And Graham
10 starts to say, well, you know, and then Chapman cuts
11 him off.

12 So Mr. Jackley would like to say that
13 Mr. Graham made these statements that he just
14 described to you. That's not what the evidence shows.
15 Graham never made those kind of statements.

16 If there were long narrative statements by
17 Graham, that would be one thing. Still doesn't get
18 around the public policy and the misuse of the
19 privilege issue, which I think is incredibly important
20 here because this is just a misuse of a privilege.

21 But Graham's responses are so vague and
22 ambiguous and there is no indications of
23 trustworthiness or anything else because neither of
24 these were recorded; that they shouldn't be admitted.

25 **MR. JACKLEY:** May I respond briefly, Your

1 Honor?

2 **THE COURT:** Uh-huh.

3 **MR. JACKLEY:** Under that theory if I was a
4 suspect in a bank robbery, and a law enforcement
5 officer said, did you rob the bank down at Norwest
6 Bank, and I said, yeah. That wouldn't be an admission
7 because that was a question posed to me and a
8 response.

9 I mean, the whole thing comes in and the jury
10 gets to decide -- I mean, it's admissible, but decides
11 what weight to place upon it by what questions were
12 asked and what the response was.

13 **MR. MURPHY:** But these weren't questions.

14 As the exhibits show, each of these witnesses
15 took Al Gates' testimony and other facts that don't
16 even come from Al Gates' testimony.

17 After my client -- and in Mr. Ecoffey's case
18 where my client invoked his Sixth Amendment right to
19 counsel and said I am just here to listen, and Ecoffey
20 says, this, this, this, and this. Doesn't ask him a
21 question. And my client's only response is Y-E-H.

22 Similarly, with Chapman, he's told a bunch of
23 things. He's not asked any questions. So it has
24 nothing to do with the bank-robber-type damning
25 admission or somebody is asked, did you commit the

1 crime and the guy says yes.

2 Here they have taken privileged information,
3 gone around the privilege, thrown it in my client's
4 lap, mixed it up with some other facts, don't put it
5 to him as a question just say here is what we know
6 about you, and then they take ambiguous non-word
7 responses and try to turn that into an admission. And
8 that doesn't work.

9 **THE COURT:** Where do I come with the taking
10 of use of information gained by the breaking of the
11 privilege by the Medicine Man to the use of that
12 information and confronting a witness?

13 **MR. MURPHY:** That's what we're arguing is
14 that Mr. Gates, like a priest or a minister or a
15 therapist, can imprudently disclose privileged
16 information. But that doesn't mean it's admissible
17 against the privilege holder. My client is the
18 privilege holder.

19 What they have done is the privilege
20 receiver, Mr. Gates, breached the privilege; breached
21 the relationship. But that should not be used to my
22 client's detriment. So Mr. Gates told law enforcement
23 and testified in front of a Grand Jury. They run
24 around with it. Somehow it gets in Serle Chapman's
25 notebook and now they are trying to use that against

1 my client. And the privilege has never been waived by
2 my client.

3 **THE COURT:** You know, Mr. Jackley, how do we
4 get around the use of -- you know, we get around the
5 poisoned fruit of the poisonous tree when the
6 privilege is waived inappropriately or given up --

7 First of all, do we accept a privilege exists
8 there?

9 **MR. JACKLEY:** No.

10 And the reason is, you know, number one, he's
11 taken the position -- excuse me. I believe that
12 defendant Graham has taken the position that he's not
13 a federally recognized Indian, which is why we're
14 sitting here today. I don't know how --

15 **THE COURT:** There is a difference between a
16 federally recognized Indian and an Indian. My farming
17 partner is one-eighth Standing Rock and he's not --
18 can't register, though he goes to the Indian Health
19 Service. But he can't register. Nobody disputes the
20 fact that his mother was quarter blood. And I don't
21 know if that's what you are talking about a federally
22 recognized Indian.

23 But other than -- you know, I don't
24 understand the ins and outs of that so give me the ins
25 and outs of federally recognized.

1 **MR. JACKLEY:** Well, I think at some level he
2 bears the burden to prove that he is, in fact, part of
3 this religion, a part of this belief to gain the
4 possibility of a privilege.

5 I mean, that would be like the peyote cases
6 where I am not using it for any ceremonial purposes
7 and I am caught with it during the motorcycle rally.
8 A case that I handled as a prosecutor. You can't
9 claim that, oh, I have a ceremonial privilege of
10 having peyote under that circumstance.

11 So I think he bears the burden to say, number
12 one, it was ceremonial; and number two -- but I think
13 the overlying reason he doesn't have a privilege is
14 he's waived it, Your Honor.

15 Al Gates waived it and I also believe that --

16 **THE COURT:** Al Gates doesn't have -- assuming
17 the privilege exists, Gates doesn't have the power to
18 waive it. The priest can't go wandering around town
19 spouting my sins. At least I hope he can't. Okay.
20 He has to have my authority to release the
21 information. Gates does not have that authority.

22 Just like the lawyer doesn't have the
23 authority to divulge his client's secrets, matters
24 given to him in a confidential nature, in the course
25 of that relationship. The physician has no right to

1 disclose the patient's information. The information
2 exists privilege to the person providing the
3 information and it is the duty of the receiver of that
4 information to protect it absent specific waiver or
5 permission to do otherwise.

6 So if we assume that, can the information --
7 and that's the law. At least that's the way I taught
8 it in criminal law.

9 The question in my mind comes up to, if it's
10 improperly disclosed, then can the state take
11 advantage of the improper disclosure to confront and
12 say, you know, you did this or the priest said you did
13 this, and then take a yeh response as an admission to
14 multiple facts or factors. Which a question down that
15 road if the courtroom would be sustained. The
16 objection to it is multiple questions.

17 But in any event, the real question is, can
18 law enforcement take what should be recognized, if a
19 privilege exists, that a given -- inappropriately by a
20 person duty bound to keep it sacred and privileged and
21 use that as confronting material to a witness -- a
22 defendant, or anybody else?

23 **MR. JACKLEY:** I would answer the question yes
24 and in further evidence that is based upon the fact
25 that he voluntarily waived it during both of those

1 discussions.

2 **THE COURT:** By answering the question?

3 **MR. JACKLEY:** Yes.

4 **THE COURT:** But if you don't have the right
5 to ask the question in the first place.

6 **MR. JACKLEY:** That would take a whole bunch
7 of assumptions. Number one, that would have to take
8 the assumption there even does in fact exist a
9 Medicine Man privilege, which I don't feel defendant
10 has proven.

11 Number two, it would have to demonstrate that
12 he satisfies or fits with the criteria to gain benefit
13 of such a privilege, which I don't feel he has
14 demonstrated.

15 **THE COURT:** Doesn't Gates' own statement --
16 assuming Gates is a qualified Clergyman, doesn't the
17 statement of Gates itself establish the nature of the,
18 quote, confession and the ceremony involving dealing
19 with that?

20 The evidence -- you know, I don't know.
21 Who's non Catholic around here? I am so it doesn't
22 count. But if I weren't and wandered in to the
23 confessional and told the priest, you know, I had
24 murdered my wife or I had stolen from the bank, and
25 you get, you know, absolved, In nomine Patris, et

1 Fillii -- even if I am not Catholic, is that not
2 privileged?

3 **MR. MURPHY:** Your Honor, the case law on
4 this, it's the nature of the relationship and why the
5 person went to it.

6 This red herring about my client not being
7 part of a federally recognized tribe and somehow that
8 denying him of the right of the privileged
9 relationship is absurd.

10 **THE COURT:** I assume that -- as far as I know
11 I have no Native American blood. But it seems to me
12 that if I would be accepted by -- at least
13 theologically, that I wish to be part of and to join
14 in the celebration of Tribal religious ceremonies
15 could I not in that sense convert?

16 **MR. MURPHY:** That's why the peyote example is
17 such a fiction because this is not my client giving
18 some --

19 **THE COURT:** I don't have any trouble with the
20 peyote at the Sturgis Rally.

21 **MR. MURPHY:** Right.

22 And the state -- and the government in their
23 previous submissions has declared over and over again
24 their acknowledge my client is an enrolled member of a
25 Canadian Tribe. As a matter of -- I can say this

1 without, I think, any chance of being contradicted.
2 There are many more people in this country that are
3 Native American that are not part of federally
4 recognized tribes than are.

5 So that's -- I mean, the issue about his
6 federal recognition is just -- it doesn't --

7 **THE COURT:** I am not quite sure.

8 **MR. MURPHY:** Yeah.

9 It was an esoteric jurisdictional issue that
10 the Eighth Circuit resolved and that we've resolved in
11 federal litigation which is why we're here.

12 So my client, like you said, went there for
13 spiritual guidance from a recognized spiritual leader.

14 The waiver issue -- the government or the
15 state would like to say that my client's ambiguous
16 responses constitute waiver.

17 Well, *Guthrie* and the other cases we cited
18 said waiver is very specific. For him to waive his
19 privilege he has to say to third parties substantially
20 what he allegedly said to Gates and that constitutes
21 the waiver. He didn't do that. Even if you took as
22 true that my client made the response, yeh and uh-huh,
23 he did not restate to a third party substantially what
24 he supposedly said to Gates. And so there is no
25 waiver.

1 They have the burden of proving waiver. Once
2 the privilege is recognized, if you recognize this
3 privilege and this relationship, they have the burden
4 of proving waiver. And they can't do so through these
5 ambiguous --

6 **THE COURT:** My threshold question here is
7 whether the Medicine Man counts as a Clergyman within
8 the scope of that privilege.

9 **MR. MURPHY:** You know, to say otherwise, I
10 think would just offend all notions of cultural
11 recognition especially in that part of the country.

12 I mean, how could we say that a priest up at
13 the Cathedral has the right or a penitent has the
14 right to confidentiality? But somebody who goes to a
15 person who has been practicing the Lakota religion or
16 Indian religion for 40 years somehow doesn't get the
17 protection and the privilege. That would be so
18 culturally insensitive to take that position. I think
19 is just can't be sustained.

20 **THE COURT:** Does there have to be a
21 recognition on the part of the Clergyman of an -- and
22 an understanding of the privilege?

23 I mean, part of the nature of the privileges
24 between physician/patient, Clergyman and penitent, and
25 lawyer and client is the concept that this information

1 is private, disclosed for the purposes for which I
2 come to priest, physician, or attorney and that the
3 attorney, the priest, and the Clergyman all recognize
4 that there is a confidentiality about information
5 received in those circumstances, which here Mr. Gates
6 did not.

7 **MR. MURPHY:** Well, one of the reasons we
8 submitted Exhibit G where Mr. Gates himself advised
9 that he is a Medicine Man in a private way. That
10 statement taken in conjunction with his other
11 statements where he talked about this being my client
12 specifically coming to him for spiritual guidance and
13 whatnot to talk about a troubling matter or give --

14 **THE COURT:** Well, but that can kind of ducks
15 my question. My question is -- let us assume that the
16 status of a Clergyman -- of a Medicine Man meets the
17 requirement for a Clergyman.

18 But does there not -- and I don't know the
19 answer to the question -- have to be an understanding
20 on both parties that the information given is intended
21 to be private and not disclosed and the receiver of
22 the information understands and receives the
23 information on that same basis?

24 **MR. MURPHY:** I would argue no because let's
25 go back to your issue about a priest running around

1 saying what was said in the --

2 **THE COURT:** The priest in theory -- and I
3 know the priest in Catholic theory -- he's under pain
4 of serious sin and he knows that from the get go. And
5 I am assuming in general purpose, the Protestant and
6 other religions that recognize some sort of a
7 spiritual guidance that we deal with know it.

8 But I am talking about an instance where --
9 it would appear that Gates does not understand that
10 privilege.

11 **MR. MURPHY:** Well, we don't know that because
12 the first time he talked about it was over 20 years
13 after and we know some time after that he went into an
14 Alzheimers unit.

15 **THE COURT:** How was he -- was he interviewed
16 before then?

17 **MR. MURPHY:** It appears he was interviewed in
18 93 and he was before the Grand Jury in 94.

19 **THE COURT:** Okay.

20 But he hadn't -- nobody had asked him in the
21 preceding 15, 18 years?

22 **MR. MURPHY:** Not that I am aware of. Not
23 that we have discovery of.

24 But going back -- and I understand what you
25 are saying, priests are trained. But what if you had

1 a priest running around town talking about what was
2 said in the confessional and his response was, I slept
3 through that day of class.

4 Would that do anything to diminish the
5 privilege?

6 No, because you, going to confessional, went
7 there to a recognized spiritual leader for the purpose
8 of getting spiritual advice.

9 **THE COURT:** But don't I have to understand
10 that the Clergyman in that case is duty bound under
11 pain, death, and torture to not disclose that?

12 I do have, by way of a document on ethics
13 under fire, where in the military, I have a high
14 muckity muck Brigadier General Air Force Chaplain
15 being asked questions about a service member coming in
16 to see him about some atrocities on that video, the
17 North Casanese. That was obviously a Vietnam time
18 era. And he acknowledges that the man in question who
19 is under deep and dark suspicion by military
20 authorities did in fact come to visit him.

21 The Jesuit Bishop sitting at the same round
22 table said I can't even answer that. I have to say,
23 let's go to the baseball game or how about a game of
24 cards. I cannot even respond that the gentleman came
25 to see me.

1 **MR. MURPHY:** Right.

2 **THE COURT:** Okay.

3 Now, there is a distinction here. I have a
4 very high ranking military Chaplain. I forget which
5 faith. But clearly Protestant and Christian, and I
6 have a Catholic Jesuit giving different responses.
7 The Protestant Colonel did not disclose why, but the
8 implication is certainly there. Where as the Jesuit
9 Chaplain won't even acknowledge that he saw the guy.

10 **MR. MURPHY:** Which I think makes our point,
11 is the focus is not on the subjective level of
12 knowledge or understanding of the priest or the
13 receiver. It goes to why the person came to them.
14 Because there you got two people both falling within
15 the confines of the priest/penitent privilege, whether
16 it's a minister or a priest, and they have different
17 understandings of what their duties are.

18 But that should not affect the person who
19 goes to see them.

20 **THE COURT:** There has to be an establishment
21 that, first of all -- you know, the question, in terms
22 of Medicine Man and --

23 In this case Oglala?

24 **MR. MURPHY:** Yes.

25 **THE COURT:** Okay.

1 An Oglala Medicine Man is not free to
2 disclose it. There is no third party present. A
3 third party would absolutely destroy privilege of that
4 nature. You go in -- other than those third parties
5 that belong to the Clergyman.

6 **MR. MURPHY:** I believe you are superimposing
7 more into that than the law on privilege requires.
8 But if we need an evidentiary hearing, we certainly
9 can bring in Lakota and Indian spiritual leaders to
10 talk about the privilege.

11 I think you deviated from where the case law
12 is in regard to -- I think the focus is on what
13 Mr. Graham's subjective intent was. And that's only
14 been --

15 **THE COURT:** I don't know what Mr. Graham's
16 subjective intent was. And I don't know whether
17 that's a reasonable intent given the circumstances of
18 Lakota culture. That's the question to me.

19 If in the Lakota culture members of that
20 culture have no understanding -- well, frankly it
21 isn't privileged. That is, its circumstances can be
22 disclosed to other people. Then it's hard to impute
23 to Mr. Graham --

24 **MR. MURPHY:** If we could hold this one in
25 abeyance.

1 **THE COURT:** -- that as an Indian that he has
2 a different understanding than the culture would
3 warrant.

4 **MR. MURPHY:** If we could hold it in abeyance,
5 we'll -- I am assuming at the end of the day we will
6 get an evidentiary hearing date.

7 **THE COURT:** Yeah.

8 Then I want the poisonous tree stuff, too,
9 becuse to me that's a significant problem if the
10 privilege does exist.

11 **MR. JACKLEY:** Your Honor, with respect to
12 that, it would be the state's position, number one,
13 that any concerns of the poisonous tree were corrected
14 by Graham's voluntary responses and discussion about
15 what he had done or not done.

16 **THE COURT:** I don't know that you can go out
17 and say, you got aids, huh, after you got the
18 information from the doctor. The question is not
19 going to be asked.

20 And the opportunity to waive, even if the
21 statement given is considered by me to be a waiver,
22 the issue would never have come up. And to then have
23 it deliberately come up, as a result in knowing that
24 the -- or should be knowing that the information was
25 inappropriately gathered, seems to me to raise

1 significant questions.

2 **MR. JACKLEY:** The state's secondary position
3 on that is that Gates clearly didn't understand or
4 recognize the privilege because he openly talked about
5 it.

6 **THE COURT:** Well, that's my question. If he
7 has as a matter of cultural obligation the duty to
8 keep his mouth shut, and that is generally understood
9 within the cultural environment, and is recognized as
10 a duty, then the fact that he is ignorant of it may
11 not be controlling.

12 The duty relies on the attorney whether the
13 attorney recognizes some of the information as --
14 because not all of it is. Not everything your client
15 says to you is privileged information as a lawyer.
16 And you have to understand both your duty to stay
17 quiet and to distinguish between what is
18 attorney/client privilege and what is not, and fully
19 understand what matters fall within and without and
20 what circumstances would make otherwise privileged
21 information unprivileged. And there is a number of
22 things that eat up privileges by actions by -- what
23 you are talking about here is a waiver.

24 But my threshold question, and the one I have
25 there is, assuming the privilege exists, and the state

1 obtains the privilege, knowing that the privilege --
2 knowing or should have known that the privilege
3 exists, can they then use that to back door somebody?

4 I don't know the answer to the question. But
5 it certainly raises problems for me. We will have an
6 evidentiary hearing on it and go from there.

7 **MR. MURPHY:** The next one, I think, is
8 partially resolved. The media interviews.

9 **THE COURT:** You are going to get me in
10 trouble again.

11 **MR. MURPHY:** Well, no. This one -- their
12 media interviews, not yours.

13 We just need a date certain. We ask for 30
14 days from today's date for them to produce the exact
15 statements they intend to admit. So that then we --
16 if there is portions of that that we have objections
17 to, we'll make at that point.

18 **MR. JACKLEY:** Your Honor?

19 **THE COURT:** Yes.

20 **MR. JACKLEY:** With respect to that, I think
21 since it's on this topic, I should indicate to the
22 Court what our intention is and you may want to advise
23 us that we might want to do more.

24 With respect to those -- what he's talking
25 about is the interviews of a defendant John Graham.

1 They are video and audio. Okay. My intent would be
2 to introduce those under the silent witness theory to
3 rely on Rule of Evidence of 901. I cite the
4 *US v. Zappata* case to defense counsel,
5 478 Fed 3rd 1213, Tenth Circuit, 2007.

6 In essence, the Court upheld the
7 admissibility of the video based upon testimony from
8 an FBI agent who worked the case. Even though the
9 agent played no role in creating the tape, the Court
10 found his identification of the defendant as the
11 person on the video served as proper foundation and
12 authentication. So it would be our intent to
13 introduce those videos in our case in chief through
14 that method.

15 To the extent the Court would require more,
16 it would be our intent to essentially bring in
17 testimony from a media specialist asserting the video
18 was genuine and demonstrated no evidence of any
19 editing or alteration.

20 My position would be that that would be a
21 waste of judicial resources and the jury's time unless
22 the defense comes up with some theory that we have
23 edited it inappropriately or that something is not
24 proper. I mean, is the defendant talking about this
25 case on TV?

1 **MR. MURPHY:** And that's not the issue, at
2 least from what we see it as.

3 The general interviews that we got and up
4 till -- we had an October 6 trial date. And on
5 October 3 I met with the government. Went through the
6 larger interviews. They contain video montages. They
7 contain pictures of Ms. Aquash as a child and whatnot.
8 That's prejudicial. It's inflammatory. There is
9 foundational authenticity issues regarding that stuff.

10 We just want it boiled down to what exactly
11 they are going to show the jury. If it's John Graham
12 on a camera talking about materials relevant to
13 this -- and the state has already said they are not
14 going to introduce his comments about Governor Janklow
15 and all of that.

16 If we get to that point there is not going to
17 be any authenticity issues. Did I --

18 **MR. JACKLEY:** I think I have given you copies
19 of what we're going to introduce short of you opening
20 the door further.

21 Is that fair?

22 **MR. MURPHY:** Well, and we still have the big
23 ones. We don't have the actual videos that correspond
24 to the transcripts that they provided as exhibits
25 here.

1 So that's what I need to see is exactly
2 what -- you know, they provided us now transcripts
3 saying this is what we're going to introduce. Let's
4 get those. Because if it's something where it's
5 Mr. Graham talking, but there is a picture of Anna Mae
6 Aquash and her two daughters behind it, we're going to
7 ask the Court at that point to make it an audio only
8 because then we get --

9 **THE COURT:** I think we need to get a look at
10 them and objections made. And we'll consider that at
11 the time.

12 **MR. MURPHY:** Yeah.

13 But I would like -- if we could get that done
14 in 30 days.

15 During Mr. Marshall's trial, Mr. Oswald had
16 to run out of the courtroom at one point to do further
17 redactions because there was some mistakes. Didn't
18 appear to be his mistakes, but any way, it caused a
19 delay in the trial.

20 **THE COURT:** Yeah.

21 I want to make the presentation as smooth as
22 we can without -- with any redactions necessary being
23 not so painfully evident.

24 **MR. JACKLEY:** Okay.

25 **THE COURT:** Graham's motion if in limine RE

1 rape allegation.

2 Mr. Murphy?

3 **MR. MURPHY:** Well, Your Honor, we've briefed
4 this matter extensively. We believe this is not res
5 gestae, and it's not 404(b), and it's not reliable.
6 It doesn't meet the beginning threshold requirements
7 for admissibility.

8 Just very briefly, the basic -- I am going to
9 just do a rundown of the basic theory of the
10 prosecution as they've stated in previous motions and
11 briefs and whatnot. That my -- that Ms. Aquash was
12 brought to Rapid City to face a trial at the WKLDOC
13 office; that after that trial was completed, she was
14 brought down to Mr. Mean's house, Bill Means' house.
15 There was some other stops along the way. She ended
16 up at Mr. Marshall's house. And then she was taken
17 out to the Badlands and killed.

18 The allegation that my client raped her
19 allegedly happened before the WKLDOC house on the --
20 it appears the first day she was brought up here from
21 Denver. That's the allegation.

22 So if their theory is consistent that sexual
23 contact happened before the trial, before the order
24 for execution, or before the execution itself. Days
25 before -- we're not quite sure of the whole time

1 frame, but some time -- somewhere in the nature of two
2 or three days before.

3 The rape allegation itself that they
4 continually used the word rape has some real issues
5 regarding veracity and reliability. There is one
6 unsworn statement by Frank Dillon where he says my
7 client admitted to raping Ms. Quash. He has testified
8 in a number of situations where -- saying that, in
9 fact, was not the case.

10 And I am going to provide the Court with
11 Exhibit M which is Mr. Dillon's Grand Jury transcript
12 where he says what he knows about this alleged rape he
13 learned from the autopsy and from what somebody else
14 might have told him; and the autopsy merely says that
15 there was some chemical evidence that Ms. Aquash had
16 sexual contact or had sex with somebody some time
17 before her death.

18 Mr. Dillon also says he was drunk when he
19 spoke with Mr. Graham. And he says -- Mr. Dillon says
20 that the statements made about his interviews with law
21 enforcement were not true.

22 What the state has done in this case in their
23 brief, they quoted Mr. Dillon's unsworn statements and
24 not referenced in any way the sworn statement about
25 the sexual contact allegation. So that calls into

1 question the veracity of the whole issue as well as
2 the lack of candor towards the Court in their
3 submissions.

4 The state also cites as evidence of this rape
5 allegation to Arlo Looking Cloud's testimony. Well,
6 Arlo Looking Cloud has given sworn testimony on this.
7 What he said is there was a time when Mr. Graham and
8 Ms. Aquash were in a room alone and he walked by and
9 he heard sounds consistent with, quote, making love,
10 unquote. So there we go. Again, to this issue about
11 the veracity and the fundamental reliability.

12 What kind of buttresses that is that the
13 autopsy does not saying anything consistent with rape.
14 There is nothing indicating sexual trauma, just a
15 chemical issue.

16 And the DNA testing, which was instigated at
17 my client's request over the government's objection --
18 we tried to find the missing sanitary napkin that was
19 in their custody at one point or in somebody in law
20 enforcement's custody, but has subsequently been lost,
21 proved that he did not have sex with her. We had the
22 panties tested. Those did not show any DNA
23 attributable to him.

24 And so there is nothing to support factually
25 this issue that Anna Mae Aquash was ever raped.

1 So going -- that threshold, that's your threshold
2 inquiry.

3 But then we go to *res gestae*. Under the case
4 law before you get to whether it's *res gestae* or not,
5 you have to look at the balancing of prejudice and
6 probative nature and how inflammatory it is.

7 And what we know in this case is that the
8 allegation that Mr. Graham raped Ms. Aquash is so
9 inflammatory and would be so prejudicial to him that
10 without overwhelming evidence that this in fact did
11 occur, it shouldn't be admitted because there is no
12 way he can address the prejudice and inflammatory
13 nature of the allegation.

14 For it to be *res gestae*, it has to be so
15 blended or connected with the crime charged that proof
16 of one is proof of the other. That's really what it
17 boils down to. And what their theory is is that up in
18 Rapid City before the WKLDOC trial, my client had some
19 form of sexual contact with her is not so blended or
20 connected with everything that's alleged in this case
21 to make it admissible.

22 They say Ms. Aquash was killed based on
23 orders from upper echelon AIM leaders, which my client
24 was not one of, because she was suspected of being an
25 informant. They've never tied together anything

1 alleging her death with any sexual crime that was
2 perpetrated against her by anybody.

3 And so this is really just kind of this loose
4 fact that's out there that is just going to be used to
5 damage and destroy my client's character without being
6 consistent with the facts that they presented at two
7 trials already or their theory of prosecution that
8 they outlined in opening and closing and briefs.

9 So the prejudicial nature and the lack of the
10 tie in to the charges makes it inadmissible. The same
11 thing with the 404(b) issue. It's just -- they have
12 given you a laundry list of 404(b) possibilities, but
13 they have never tied it in to say that this somehow
14 makes it admissible under a prior bad acts issue.

15 The cases they cite are so factually
16 distinguishable to make them not even valuable. I
17 mean, those are cases -- like one of them says, I am
18 going out to get a girl. He goes out and rapes and
19 murders a girl. And he's charged with murder.
20 Convicted of murder. And the Supreme Court said, of
21 course the rape was admissible even though he wasn't
22 charged with the rape because that was the whole
23 theory of the prosecution, that he went out to get a
24 girl, he got a girl, he raped her and then he killed
25 her. We don't have anything close to that in this

1 case. For that reason, the damage would be so
2 overwhelming --

3 **THE COURT:** What's the burden of proof in
4 establishing that a rape did occur?

5 **MR. MURPHY:** It's theirs.

6 **THE COURT:** At what level?

7 **MR. MURPHY:** Preponderance, I believe, is the
8 evident. I can't say that for certain, but I believe
9 that's the standard that seems to be used across the
10 board on evidentiary issues for foundation.

11 **THE COURT:** My vague recollection was it was
12 higher than that, but it may well not be.

13 **MR. MURPHY:** I can look into it.

14 **MR. JACKLEY:** Your Honor, it's the state's
15 position that the evidence that we would present at
16 trial, allegedly, and we anticipate this is, number
17 one, the physical evidence through the autopsy report
18 of Dr. Brown that would come in through the testimony
19 of Dr. Peterson, that there is phosphatase in the
20 vaginal area which is evidence or indicative of sexual
21 activity.

22 We would anticipate, number two, calling the
23 eyewitness testimony --

24 **THE COURT:** How long does that last?

25 **MR. JACKLEY:** Our position would be is that

1 the --

2 **THE COURT:** It indicates there was also a
3 sanitary napkin in use?

4 Did I hear you say that?

5 **MR. MURPHY:** There was a sanitary napkin that
6 was part of the autopsy. It was removed from
7 Ms. Aquash's undergarments. We believed that would
8 have had the DNA to show if she had had sex with
9 somebody who had had it. He tried to get the FBI to
10 produce that --

11 **THE COURT:** So how long does the chemical
12 matter exist in the midst of a menstruation cycle?

13 **MR. JACKLEY:** I don't have the answer for you
14 on that, Your Honor, but I can obtain that.

15 My understanding is that -- my anticipation
16 is, based upon all the matters reviewed by
17 Mr. Peterson, that evidence will be submitted that
18 that was indicative of sexual relations.

19 **THE COURT:** I don't have any problem with
20 that as far as I know.

21 But I do have a problem if Mr. Murphy
22 suggests several days have passed --

23 **MR. JACKLEY:** She would have been murdered
24 the next day.

25 **THE COURT:** That wasn't what Mr. Murphy said.

1 **MR. MURPHY:** What I said is the -- we don't
2 know how many days because today when we were talking
3 about what the date is, they are saying between the
4 10th and 12th of December is when this trip started
5 from Denver.

6 What we're under the understanding of is
7 their allegation is that my client had sex with
8 Ms. Aquash in Rapid City before the WKLDOC trial,
9 before the trip to Bill Means' house before the trip
10 to Dick Marshall's house and before the trip to the
11 Badlands. Those -- that sequence of events, WKLDOC,
12 Means, Marshall, that's when they say the decision to
13 kill Ms. Aquash was made.

14 So my client -- which we're not admitting in
15 any way, shape, or form -- that if they allege he had
16 sex with her before then, then there is no connection
17 between their sexual act and the decision to -- by
18 whomever to kill Ms. Aquash. That's -- they tried to
19 tie it in saying this is -- the rape is somehow so
20 inexorably linked with the murder to make it *res*
21 *gestae*. Well, that connection doesn't exist based on
22 their own stated theory of the prosecution.

23 **THE COURT:** Mr. Jackley, I mean, I have to --
24 rape is ugly. I am not sure how convincing the
25 evidence is if we assume sexual contact -- that it was

1 rape as opposed to consensual sex.

2 But let's assume it was rape for the purpose
3 of the discussion before a trial, et cetera.

4 How is that *res gestae*?

5 **MR. JACKLEY:** It's relevant to explain both
6 Aquash and Graham's state of mind and to prove
7 Graham's motive and intent and opportunity. And I
8 cite the Huber decision at paragraph 57 for that.

9 Graham's rape of Annie Mae Aquash or alleged
10 rape of Annie Mae Aquash at Rios' apartment is
11 evidence and proof that Graham knew at that point in
12 time that Aquash was to be killed. Evidence of
13 defendant's conduct immediately before --

14 **THE COURT:** Before the trial?

15 **MR. JACKLEY:** Pardon me?

16 **THE COURT:** Before the trial?

17 **MR. JACKLEY:** Well --

18 **THE COURT:** How do I get to the point that
19 Mr. Graham knew at that time that Ms. Aquash was going
20 to be murdered, and still the connection, I mean,
21 other than last chance. I mean, which sounds kind of
22 crude. Excuse me.

23 **MR. JACKLEY:** I believe it's plausible for
24 the jury to conclude, and the government may well
25 allege --

1 **THE COURT:** 404(b) -- reading me the litany
2 of the reasons it can come in is just a waste of time.
3 You tell me which of those reasons you are going to
4 use and then we aren't going to even talk about the
5 others.

6 **MR. JACKLEY:** Motive, intent --

7 **THE COURT:** Motive of what, murder?

8 **MR. JACKLEY:** Yes.

9 **THE COURT:** Rape is motive of murder?

10 **MR. JACKLEY:** Yeah.

11 To carry through with it. He had raped her
12 so it wasn't his intent to let her go. He had knew
13 that the order had been made. He knew that she was
14 not going to get by and that gave him then the
15 motive --

16 **THE COURT:** You are asserting that the order
17 had been given prior to the sexual contact?

18 How are you going to establish that?

19 **MR. JACKLEY:** How am I going to establish it?

20 **THE COURT:** Yeah. That the order to kill her
21 -- as far as I know, that order was first apparent at
22 this level from a note, you tell me, that was passed
23 in Means' house or Marshall house.

24 **MR. JACKLEY:** That's further evidence of it.

25 What the evidence we believe will show is

1 this -- and I will use the words of the *Bettelyoun*
2 case, this couple days of terror began when Angie
3 Begay -- allegedly when Angie Begay, the girlfriend of
4 John Graham, receives a phone call from Thelma Rios to
5 bring forth Aquash the informant. That's when this
6 began.

7 So a discussion is held at Troy Lynn
8 Yellow Wood's house in Denver, Colorado. They
9 then take -- and when I say they, Theda Clarke,
10 allegedly, John Graham, and Arlo Looking Cloud tie up
11 and take against her will Annie Mae Aquash in the back
12 of Theda Clarke's Pinto. They then drive to Rapid
13 City. At which point they -- and there will be
14 evidence or issues about Thelma Rios' apartment and
15 her mother's apartment -- but they ultimately utilize
16 Thelma Rios' apartment. I mean, Annie Mae Aquash has
17 already been kidnapped.

18 **THE COURT:** How do you establish that it's
19 Graham versus somebody else?

20 **MR. JACKLEY:** As far as the sexual relations?

21 **THE COURT:** Uh-huh.

22 **MR. JACKLEY:** The three points of evidence
23 that I started to talk about. Number one, there is
24 the physical evidence.

25 Number two, we have the eyewitness of Arlo

1 Looking Cloud.

2 **THE COURT:** What's the physical evidence?

3 **MR. JACKLEY:** Phosphatase in the vaginal area
4 would indicate sexual relations occurred.

5 **THE COURT:** Okay.

6 And a piece of evidence disappears.

7 Sexual relations occurring don't tell much
8 until you can tell me how long it lasts and put a time
9 frame on that and then how long it lasts with a
10 menstruating woman --

11 **MR. JACKLEY:** But Judge --

12 **THE COURT:** -- and how you tie Mr. Graham as
13 the exclusive person that could have had sex with her.

14 **MR. JACKLEY:** But Judge, the other two pieces
15 of evidence, in addition to the physical evidence, if
16 you take it all together is Arlo Looking Cloud. We
17 had an eyewitness that was in Thelma Rios' house that
18 went upstairs and heard them making love.

19 **THE COURT:** Well, there is a hell of a
20 difference between making love and being raped. At
21 least in my recollection.

22 **MR. JACKLEY:** Judge, she's just been tied up
23 and thrown in the back of a Pinto.

24 **THE COURT:** Well, making love, as the
25 description, is not consistent with somebody being

1 raped.

2 **MR. JACKLEY:** And those are arguments that go
3 to -- that go to what was occurring, but it's evidence
4 that she's having sexual relations after she's been
5 tied up and thrown in back of a Pinto and driven
6 against her will to Rapid City.

7 Now, if the defense wants to argue that she
8 was voluntarily having sexual relationships with John
9 Graham in that room they should have that right. But
10 the government should have the right to be able to
11 say --

12 **THE COURT:** Making love is rape?

13 **MR. JACKLEY:** Well, she wasn't making love,
14 Judge.

15 **THE COURT:** How do we know?

16 **MR. JACKLEY:** Because we know she was tied
17 and bound up.

18 **THE COURT:** Let's assume that's true.

19 How do you know -- it seems to me the sounds
20 involved, unless there is absolute silence and bed
21 springs, are different, right?

22 **MR. JACKLEY:** I don't know of very many
23 cases, Your Honor, where somebody is bound and tied up
24 and thrown in a trunk and then has voluntary sex.

25 And I think we are entitled as the state to

1 argue that she was sexually abused as part of this
2 deal which shows why her state of mind, her
3 submissiveness, why she chose to not run --

4 **THE COURT:** What's Mr. Looking Cloud going
5 to say?

6 Anybody ask him what making love sounds like?

7 **MR. JACKLEY:** I have talked to him and we
8 have talked about it. His federal Grand Jury
9 transcript has been disclosed. His state Grand Jury
10 transcript has been disclosed. He's been
11 cross-examined. I mean, it is what it is. He didn't
12 walk in. He heard what sounded like sexual relations.

13 **MR. MURPHY:** And that -- when Mr. Jackley
14 says an eyewitness, let's make clear,
15 Mr. Looking Cloud never said he saw anything. He
16 heard, as he was walking down a hallway, sounds come
17 from a room that he thought was occupied by Mr. Graham
18 and Ms. Aquash consistent with making love. His
19 quote. So there is no eyewitness testimony.

20 The phosphate isn't DNA attributable to my
21 client.

22 The only other statement is Frank Dillon's
23 drunken statement which he later recanted in sworn
24 testimony.

25 So -- you know, they are trying to prove an

1 event -- you know, remember this case originally
2 started where my client was charged with three counts
3 of murder. One of them was felony murder and the
4 underlying felony was rape. They got an indictment
5 but they decided -- they decided, unilaterally, not to
6 bring that charge forward. That's indicative of the
7 weakness of that allegation.

8 But now what they want to do is make an end
9 run around it and try to crucify my client --

10 **THE COURT:** That's not necessarily weakness.
11 There is a lot of reasons.

12 **MR. JACKLEY:** I will tell the Court the
13 reason why we didn't proceed on it.

14 **THE COURT:** That's not helpful to me.

15 **MR. JACKLEY:** Well, it had absolutely nothing
16 to do with what was implied upon why, though.

17 **THE COURT:** Well, all I am saying is there is
18 a lot of reasons and I don't say and don't accept that
19 that's the only reason. One is simply to a void
20 confusion of a lesser charge with a greater one.

21 **MR. MURPHY:** Well, whatever the case may be,
22 my client is not charged with rape. And this alleged
23 allegation -- you know, they keep reconstruing the
24 sequence of events.

25 But by the sworn testimony that's happened

1 now at two trials, they have consistently
2 maintained -- which is why they indicted Dick Marshall
3 and why they tried to bring other indictments -- is
4 the decision to kill Ms. Aquash was either made at
5 WKLDOC or at Bill Means' house, in either of those
6 cases based on Arlo Looking Clouds' unrebutted --

7 **THE COURT:** Mr. Jackley is asserting the
8 outcome was not in doubt to start with is basically
9 the statement he's making. And from that same
10 scenario that the sex at best would be because there
11 is no way to stop it.

12 **MR. MURPHY:** Well, that's a new assertion
13 because, frankly, what would the necessity of the
14 WKLDOC trial be?

15 What would the necessity for the trip to Bill
16 Means' house where there was this alleged meeting with
17 upper echelon AIM leader?

18 Why would they need to send these folks from
19 Rosebud -- or Pine Ridge to Rosebud to get a gun from
20 Dick Marshall if from the time they left Denver the
21 decision had been made.

22 You know, that's -- that's just -- now we're
23 going into such a foray that departs so much from what
24 they previously asserted as the sequence of events.

25 **THE COURT:** You know, our Supreme Court has

1 shifted ground sometimes from a rule of inclusion to a
2 rule of exclusion in 404(b) stuff.

3 **MR. MURPHY:** But as a threshold matter, you
4 have to find that there is some reliability to the
5 accusation. And really what it boils down to --

6 **THE COURT:** Well, I want to address the level
7 of proof that is necessary, first of all, for me to
8 find it and I -- that the act actually occurred and
9 it's a rape. And I also --

10 The *res gestae* gives me some trouble. I
11 don't know where I am going with this, in all candor.

12 **MR. JACKLEY:** Your Honor, because I --
13 sometimes I am a little concerned that defense doesn't
14 always recognize some of the evidence that we
15 anticipate that will be brought in and I know the
16 Court is kind of in a vacuum because we've lived with
17 this case for the last four years.

18 Also what occurred in Denver, just so the
19 Court is aware, we anticipate there will be testimony
20 that when the phone call came from Rios to Begay about
21 bringing Annie Mae forth, that the individuals around
22 the table at the meeting said this is what we do to
23 informants and gave the motion as to cut the throat.
24 We anticipate that that evidence will come in. They
25 have received that discovery. They know about it. So

1 that is what's going on in that time frame when the
2 phone call first comes in.

3 **THE COURT:** Well, there is no question that
4 the state wants it in because it's helpful evidence
5 although it has little or nothing to do with
6 Mr. Graham killing her. It has to do with -- if it's
7 a rape, with him taking advantage of the situation as
8 it exists.

9 **MR. JACKLEY:** It could be further motive,
10 though, Your Honor.

11 I mean, we're entitled to have more than one
12 motive.

13 **THE COURT:** Come on.

14 **MR. JACKLEY:** What about this motive. That
15 they go to Dick Marshall's house and Dick Marshall
16 because he's -- he has a pending murder charge against
17 him. Him and his wife have a discussion that they are
18 not going to carry through with it but they just get
19 the gun and the shells.

20 John Graham knows he's raped her. He's got
21 to do something with her. And then that gives him the
22 reason to shoot her because he can't let her go now.

23 **THE COURT:** Why?

24 **MR. JACKLEY:** Because he's raped her.

25 **THE COURT:** So.

1 **MR. JACKLEY:** Well, he's going to get in
2 trouble for that.

3 **THE COURT:** I don't mean to belittle rape. I
4 don't think rapists, as a rule, end up killing people
5 for the most part. I know they do. And I know that
6 there are serial rapists that rape and kill a lot of
7 people. But there is quite a few rapes, even by
8 famous people, that don't have -- are not followed by
9 death.

10 **MR. MURPHY:** And if that's their position now
11 that this -- that John Graham made -- that John Graham
12 came up with the decision to kill Ms. Aquash some time
13 at Dick Marshall's house or some time thereabouts
14 afterwards, after leaving Dick Marshall's house
15 because he wouldn't hold her, well then Ms. Rios
16 shouldn't be sitting here.

17 **MR. JACKLEY:** That doesn't have anything to
18 do with Rios' motive. You can have separate motives
19 by different individuals. They don't have to have the
20 same motive.

21 **THE COURT:** All right.

22 You are talking to me about Marshall already
23 gave the gun and bullets up is what you are telling me
24 when he comes out of the bedroom. Now he's decided
25 not to do it. I am sorry. The ball has left his

1 court it would seem to me by that description.

2 So -- I gather from your evidence that at the
3 time the note was passed, and the bullet and the
4 shells were passed out, she's a done deal. It's just
5 a question of minutes or hours and she's dead.

6 **MR. JACKLEY:** I think that it's fair to infer
7 from the evidence that when that phone call was made
8 from Angie Begay -- or from Thelma Rios to Angie Begay
9 that that decision was for practical purposes already
10 made.

11 There will be a lot of evidence and
12 discussion about -- and I understand the state has to
13 prove that --

14 **THE COURT:** I don't know what the jury will
15 do, but certainly that is a permissible inference a
16 jury could draw.

17 **MR. JACKLEY:** But, Your Honor, I want to go
18 back because the Court has asked, you know, what
19 evidence do we have. Understanding the state has to
20 prove that this rape occurred. And I talked about the
21 phosphatase -- the physical evidence relating to that.
22 I talked about Arlo Looking Clouds' view.

23 And then the third piece is with respect to
24 Frank Dillon. And that evidence is alleged -- and I
25 understand there is inconsistent statements, but that

1 doesn't mean it's not evidence to be admitted -- that
2 Frank Dillon basically was interviewed on May 20,
3 1998. It was a recorded interview that we have the
4 transcript of. We don't have the recording, but we
5 have the transcript. The question was from a law
6 enforcement. "John Boy told you he was the shooter?
7 Dillon, yeah. Alonzo. Did John Boy mention what type
8 of weapon was used? Dillon. It was a .38, I think.
9 It was a pistol. He also told me that he started
10 praying before it happened -- that she started praying
11 before it happened; that he had raped her. Alonzo.
12 John Boy said that Anna Mae was praying? Dillon.
13 Before he shot in the head. Alonzo. And he had raped
14 her? Dillon. He had raped her previously. Alonzo.
15 Did he say when? Dillon. Not exactly when, but I
16 don't know if maybe it was the same night or the night
17 before. I don't know."

18 So we have basically statements by John
19 Graham in relation to the rape; we have physical
20 evidence that sexual activity had occurred; and we
21 have an eyewitness that's going to place John Graham
22 and Annie Mae Aquash in the room at least making love,
23 without -- I admit without specifics of a brutal rape.
24 If she was submissive and didn't do anything, you are
25 not going to be able to tell the difference, or we

1 certainly would be able to make that argument that
2 after somebody is bound and tied and thrown in the
3 trunk of a car, they are not likely to have voluntary
4 sex. This all goes into the scheme, the state of
5 mind --

6 **THE COURT:** That's a rational statement.
7 Don't mistake me, Mr. Jackley. Some --

8 I am more troubled by, number one, does it
9 have anything to do with the crime other than it
10 happened.

11 And had it not happened, the suggestion that
12 murder would not have occurred just ain't going to
13 fly. That's not the basis on which you procured the
14 indictment and these cases have been tried.

15 **MR. JACKLEY:** The indictment also includes a
16 charge of felony murder, kidnapping. It occurred
17 during the kidnapping. The kidnapping started when
18 her hands were bound and tied in Denver on or about
19 December 10.

20 As the case law indicates, evidence of
21 defendant's conduct immediately before, during, and
22 after the murder is admissible as part and parcel of
23 the entire transaction, and is an indication of the
24 intent to commit and carry through with the aiding and
25 abetting of murder.

1 I cite, specifically, *Thomas v. Jones*,
2 891 Fed 2nd --

3 **THE COURT:** Get met the information on the
4 burden of proving that it did in fact happen as a
5 rape.

6 **MR. MURPHY:** Your Honor, I would also ask --
7 because this is such a significant issue, and it's one
8 that's ripe for pretrial determinations -- that the
9 state be required to produce Mr. Dillon at an
10 evidentiary hearing. One, he's given conflicting
11 statements at various times. I think there is twice
12 he's recanted statements he's made to law enforcement
13 saying they've put words in his mouth.

14 My understanding is right now --

15 **THE COURT:** To what extent do we know whether
16 the recantations were accurate or the statement made
17 before the recantation?

18 **MR. MURPHY:** All the more reason to have him
19 here because my last information is that he has a
20 severely debilitating condition. He lives in a
21 nursing home.

22 And so the state is really premising this all
23 on, you know, if we got Arlo's testimony and an
24 autopsy report that doesn't say really anything other
25 than she may have had sex with somebody at some

1 indefinite time, the state's real basis for
2 reliability now rests on Mr. Dillon.

3 We should hear from Mr. Dillon so you can
4 determine whether or not the state has -- is going to
5 meet its burden. Whatever that burden may be, he's
6 the pivotal guy and there is questions about his
7 veracity that should be addressed pretrial.

8 **MR. JACKLEY:** Your Honor, all three pieces of
9 the evidence, the physical evidence --

10 **THE COURT:** Is Mr. Dillon going to testify at
11 the trial?

12 **MR. JACKLEY:** Yes.

13 Well, I mean, I have subpoenaed him.

14 **THE COURT:** You assume if he doesn't this
15 ain't coming in?

16 **MR. MURPHY:** Then we get into an issue of
17 voir dire and all of that stuff.

18 I mean, if we don't know if he's going to
19 testify before trial, then we're going to have a trial
20 within a trial and we will be voir diring for a day on
21 people who won't be able to sit fairly if there is an
22 allegation of rape being made and all of those things.
23 That's why --

24 **MR. JACKLEY:** Your Honor, I still have to
25 believe that if Arlo Looking Cloud testifies and he's

1 asked about the chain of events of what is occurring,
2 he should be able to testify that at one point he went
3 up and John Graham was in the room with Annie Mae --

4 **THE COURT:** Well, that's not what you said
5 previously. You said he thought they were in this
6 room.

7 **MR. JACKLEY:** No. That's what John Murphy
8 said.

9 I am convinced, and I believe, he's going to
10 testify that when he walked upstairs to go to the
11 bathroom, that he heard Annie Mae Aquash and John
12 Graham in a room; that he believed they were making
13 love. That's what I say.

14 **THE COURT:** So what does Mr. Looking Cloud
15 say?

16 **MR. MURPHY:** That he walked by the room; that
17 he didn't stop -- you know, again, it's -- the
18 issue --

19 **THE COURT:** Yeah.

20 Well, I will think about Dillon being called
21 pretrial.

22 Folks, we're going for lunch. We'll
23 reconvene some time between 1:15 and 1:30.

24 (Off the record.)

25 **THE COURT:** We're on 20?

1 **MR. MURPHY:** That's correct, Your Honor.

2 **THE COURT:** Motion in limine in RE Peltier?

3 **MR. MURPHY:** That's correct.

4 **THE COURT:** All right. Let me go back and
5 look at that.

6 Talk to me, Mr. Murphy.

7 **MR. MURPHY:** There is two related motions in
8 limine. The first, docket number 43, is regarding
9 Mr. Peltier's alleged confession where he is alleged
10 to have admitted to killing the two FBI agents in June
11 of 1975.

12 The first point is the state hasn't
13 established Mr. Peltier's unavailability. They have
14 asserted it. My understanding -- but it's not by any
15 means the gospel -- is that Mr. Peltier is available
16 and that he would like to testify.

17 But notwithstanding that issue, what we're
18 addressing in this motion is the possible relevance of
19 Mr. Peltier's alleged admission to killing these two
20 FBI agents. To Mr. Graham's case -- and what I want
21 to run through is the facts because you haven't been
22 litigating this case for as many years as Mr. Jackley
23 and I have.

24 **THE COURT:** Not even close.

25 **MR. MURPHY:** June of 75 these two FBI agents

1 are killed down at Wounded Knee. Mr. Graham is not
2 alleged to have been present or part of that crime.

3 Mr. Peltier goes on the run, I believe, in
4 September of 75. Mr. Banks, who was supposed to be
5 going to sentencing on a case involving a rioting
6 action in either Custer County or Minnehaha County --
7 I can't keep that -- I am not sure about that -- he
8 decides to go on the run, too.

9 So that in October of 1975 Mr. Peltier,
10 Mr. Banks, Kamook Banks, at the time, her sister
11 Bernie Lafferty, and a couple other people get in a
12 motor home and they leave Pine Ridge and they travel
13 out to the west coast ending up in Washington State.

14 Again, Mr. Graham is not alleged to have been
15 present to be a part of the upper echolon involved in
16 anything regarding that.

17 At some point there is a shoot-out,
18 November 14, 75, in Oregon. The motor home is pulled
19 over by a highway patrolman. There is a shootout.
20 Banks and Peltier escape. Kamook Ecoffey and her
21 sister are apprehended.

22 And some time, 25, 30 years later,
23 Ms. Ecoffey, Kamook Ecoffey, says to the police for
24 the first time that during that motor home ride,
25 Peltier admitted to killing the FBI agents.

1 Now, from -- what the collateral testimony is
2 is that none of these people had any relationship to
3 Mr. Graham nor was he alleged in the escape or
4 anything else.

5 So the question is, how does this become
6 relevant to Mr. Graham when he's facing the murder
7 charge involving Ms. Aquash, they asserted in their
8 pleadings that somehow the killing of the FBI agents
9 is now somehow related to the decision for Ms. Aquash
10 to be killed. That's pure speculation. They don't
11 have anything to connect those dots. Frankly, it
12 appears to be more of internet chat rooms, conspiracy
13 theorists, that have been following this case than
14 anything presented in any of the testimony in the two
15 trials up to this point.

16 There is -- just -- you know, the relevance
17 is not there. There is the reliability issues of this
18 alleged confession coming in decades after the fact.
19 And what we're doing is we're going to be prejudicing
20 Mr. Graham by tying him to this horrible event that
21 has kind of lived in infamy in this part of the world
22 since 1975, that being the killing of these FBI
23 agents.

24 So the damage to him -- the danger of
25 prejudicial speculation by the jury and all of those

1 other factors that go into the Court's probative
2 versus prejudicial balancing factor weigh against
3 allowing this in.

4 **MR. JACKLEY:** Your Honor, both the Peltier
5 matters are relevant issues with respect to the
6 informant matter. They go to motive, intent, and
7 state of mind with respect to Mr. Graham.

8 I would point out to the Court that defendant
9 Graham's theory to exclude this witness testimony
10 surrounding the informant accusations has been
11 specifically rejected in *United States v. Looking*
12 *Cloud* at 419 Fed 3rd 781, pages 786 to 90. I
13 understand that that is not binding on this court, but
14 I wanted to take a minute to read that rational
15 because I think it shows a relevancy and kind of goes
16 to many of these evidentiary issues we've talked about
17 today.

18 The anticipated witness testimony surrounding
19 informant accusations constitutes non hearsay
20 admissibility pursuant to 801(c). The Looking Cloud
21 court recognized that, quote, the murder of Aquash
22 could only be explained within the context of the
23 American Indian Movement and its activities, end
24 quote. Specific events depicting a violent conflict
25 between the Movement and the federal government showed

1 why the Movement would be enraged if one of its
2 members turned against it to become a government
3 informant. The Looking Cloud court recognized that,
4 quote, an out-of-court statement is not hearsay if
5 it's not offered for the truth of the matter asserted,
6 end quote.

7 **THE COURT:** So what's the matter going to be
8 asserted?

9 **MR. JACKLEY:** It's for motive.

10 **THE COURT:** What?

11 **MR. JACKLEY:** We don't care whether or not
12 Annie Mae Aquash was an informant. What is relevant
13 is the state of mind of defendant Graham and Rios and
14 others. They believed she was an informant. The
15 evidence is going to show at trial, we believe, that
16 she was not an informant. However, the main actors in
17 AIM including these two defendants allegedly believed
18 she was an informant and that's why they took these
19 steps to silence her. And that's exactly what Judge
20 Piersol ruled and was affirmed by the Eighth Circuit
21 in the Looking Cloud case.

22 **MR. MURPHY:** I think we're mixing -- the
23 issue -- the next motion goes to the issue about
24 Peltier threatening Aquash for being an informant.
25 That's a different issue than Peltier's alleged

1 confession to shooting these agents.

2 **MR. JACKLEY:** It's not a different issue. It
3 all goes to the informant thing. What information
4 Annie Mae Aquash knew about as an informant that could
5 cause problems or damage certain people; that being
6 she was privy to very inside information on AIM
7 including the Peltier murders --

8 **THE COURT:** How do we know that?

9 **MR. JACKLEY:** Pardon me?

10 **THE COURT:** How do we know that?

11 **MR. JACKLEY:** Because we have a witness that
12 will testify, that was present during Peltier's
13 statement or confession, of these activities and
14 that's Kamook Nichols-Banks who is going to testify at
15 trial regarding this as she did in the federal case.

16 **THE COURT:** And he's (SIC) going to testify
17 as to what?

18 **MR. JACKLEY:** That sitting in a motor home
19 was, among others, John Graham, Kamook Nichols, and --
20 excuse me. Peltier, Kamook Nichols, and Aquash.
21 Peltier gave this statement about what he had done to
22 the agents and Annie Mae Aquash was privy to that.

23 It's then the government's theory that based
24 upon that type of information, she would be a
25 dangerous informant to these folks, which is motive as

1 to why they needed to silence her based upon the
2 information that they believed she had.

3 **THE COURT:** Mr. Murphy?

4 **MR. MURPHY:** That could arguably be relevant
5 if Mr. Peltier or Mr. Banks or some of the upper
6 echelon were on trial. But there is nothing that ties
7 Mr. Graham to knowledge that that conversation ever
8 occurred; that he was aware that Peltier had confessed
9 to this killing or was in some way, shape, or form
10 involved in that aspect of the case.

11 This was argued in the Arlo Looking Cloud
12 case, but it was not presented in this context. It
13 was brought in as a state-of-mind issue. It wasn't
14 brought in as to whose state of mind and whatnot. It
15 wasn't really well litigated.

16 The issue for state of mind goes to the
17 declarants state of mind or the state of mind of
18 Ms. Aquash, the recipient.

19 But what they are talking about now is trying
20 to make this part of Mr. Graham's state of mind, a
21 conversation that he wasn't privy to, information that
22 didn't relate to him, and that there has never been
23 any connection with him to that whole aspect of this
24 case that predates his involvement in any of this.
25 June of 75 or this road trip, there is just nothing

1 that ties him to any of that and they never -- nobody
2 has ever come forward and said that Graham knew about
3 that or ever accused Ms. Aquash of being an informant
4 that could cause Mr. Peltier's demies. Anything like
5 that.

6 So that's -- when we look at the state of
7 mind exception, we have to look at what does the rule
8 require. And we're talking about the declarant's
9 state of mind, and Mr. Graham isn't the declarant. He
10 never referenced anything about the incident in
11 Oglala.

12 **MR. JACKLEY:** Your Honor, we're back to,
13 again, talking about the state of mind and declarant
14 and everything. But again -- and I agree with the
15 Eighth Circuit, this was introduced and admissible
16 under 801(c).

17 When you look at this, if you look at the
18 government's theory, that part of this was that she
19 was -- that they believed she was an informant. And
20 you have to be more than just an informant. You have
21 to have information that's damaging to these people.
22 Damaging to this conspiracy. Part of that --

23 **THE COURT:** Well, your suggestion as I take
24 it is that Mr. Graham is a member of AIM; and
25 therefore, as a member of AIM, he's privy to knowledge

1 or understanding that anybody that informs is going to
2 die?

3 **MR. JACKLEY:** No, not that broad, Your Honor.

4 But he was certainly a member -- allegedly a
5 member of this conspiracy that dealt with this
6 particular instance; and therefore, it is relevant
7 with respect to what that group's mentality was,
8 beliefs were.

9 **THE COURT:** How about his state of mind?

10 **MR. JACKLEY:** His state of mind is, we
11 believe, that when that phone call was made to his
12 girlfriend, that his state of mind was that he
13 believed she was in fact an informant.

14 **THE COURT:** Well, what does -- you know, how
15 does that -- let's assume that's true.

16 How does that tie to the conversation in the
17 trailer?

18 Other than to say they didn't like informers
19 and informers could endanger their own lives in the
20 organization. Therefore, informers tend to meet
21 unpleasant ends.

22 How does that conversation to which
23 Mr. Graham was not privy, to the best of my knowledge.
24 Was not even aware that it went on.

25 How is that conversation and Mr. Peltier's

1 confession or statement that he killed a couple of
2 agents, which is not an insignificant statement by any
3 stretch, go to establish Mr. Graham's role in the
4 killing of Ms. Aquash?

5 And I am assuming for the sake of the
6 discussion that there was a roll there, and not as a
7 matter of proof, but to get rid of that question.

8 **MR. JACKLEY:** Let me use the words of the
9 Eighth Circuit Court of Appeals. "The murder of
10 Aquash could only be explained within the context of
11 the American Indian Movement and its activities.
12 Specific events depicting a violent conflict between
13 the Movement and the federal government showed why the
14 Movement would be enraged if one of its members turned
15 against it to become a government informant. What
16 occurred in that motor home shows further evidence of
17 the information that she would have if she was in
18 fact an informant that would very damning to those
19 that were involved in the conspiracy. Hence, provided
20 the motive for them to carry through with what
21 occurred."

22 **THE COURT:** I think the Eighth Circuit is
23 excluding by definition all other reasons for
24 Ms. Aquash's death. That may well be a reason, but to
25 say the only explanation for her death is this, I --

1 **MR. JACKLEY:** It's a potential motive.

2 **THE COURT:** -- I just think -- I don't
3 understand that statement. The Eighth Circuit is not
4 that narrow. And to say that's the only possible
5 explanation just strikes me as preposterous. Now, it
6 is certainly an explanation. No question about that.

7 **MR. JACKLEY:** And I don't think the state is
8 narrowed down to being able to only argue one motive.
9 I think it's certainly permissible to argue the
10 different motives.

11 **THE COURT:** And kind of throw darts at the
12 board and take your pick?

13 **MR. JACKLEY:** Well, this isn't throwing
14 darts.

15 I mean, there is going to be anticipated
16 evidence specifically regarding the informant issue.
17 I mean, that phone call --

18 **THE COURT:** To the extent the motives are
19 inconsistent, what do you do, throw them up on the
20 board and say, pick one, jury.

21 **MR. JACKLEY:** But they are not inconsistent.
22 The motives that related to the informant is not
23 inconsistent for the motive for John Graham to ensure
24 that she was silenced because of the rape. I mean,
25 those aren't inconsistent. Those are very consistent.

1 **THE COURT:** Well, that's assuming he knows
2 that.

3 Let's assume he did what's alleged. I am
4 still trying to figure out how you tie this to that.
5 I mean, when we've had organizations -- mafia is a
6 good example -- where the persons or people that
7 commit the crimes don't have a clue what motivated the
8 order to commit the crime. And you are suggesting
9 that Mr. Graham is guilty or likely guilty even though
10 he wasn't aware of this. And that is a motive because
11 he understands that if she was an informer this would
12 do it; but he's not related -- he's not related to
13 that conversation.

14 **MR. JACKLEY:** But he doesn't have to be, Your
15 Honor.

16 **THE COURT:** Then you can't put the
17 conversation into evidence.

18 **MR. JACKLEY:** If it's part of the conspiracy,
19 a part of the overall scheme as to why they needed to
20 get rid of her, and he helped aid and abet and carry
21 through with it through aiding and abetting and felony
22 murder kidnapping --

23 **THE COURT:** So we're going to talk about
24 Pellitier's murders. And because of that, somebody
25 that might have heard that -- and -- and Ms. Aquash

1 heard it and maybe informed, that that's evidence
2 somehow against Mr. Graham?

3 **MR. JACKLEY:** It is.

4 The same reason the Eighth Circuit held it
5 was. And the same reason Judge Piersol help it
6 because it's from the scope of the criminal venture.

7 **THE COURT:** Well, the criminal venture is
8 what, killing FBI agents?

9 **MR. JACKLEY:** No.

10 The criminal venture, Your Honor, was
11 basically she -- it was believed that Annie Mae Aquash
12 was an informant. And that's produced by the evidence
13 beginning with the initial phone call.

14 **THE COURT:** Let's say the other people in
15 that trailer are, I believe -- if what's described is
16 true, believed that.

17 All right. So where do I go from there?

18 **MR. JACKLEY:** When you say the trailer, are
19 you talking about -- which trailer?

20 **MR. MURPHY:** The motor home.

21 **THE COURT:** The motor home.

22 Let's -- I agree. They believe that.
23 Whether it's true or not, it's irrelevant. They
24 believe that. And they may well have, in the course
25 of that belief, if they did so, decide that Ms. Aquash

1 was going to leave this world. Okay.

2 And then from that we go to, therefore, they
3 ordered it; and therefore, even unaware of that,
4 Mr. Graham had part in the demies of Ms. Aquash; and
5 therefore, the evidence of Mr. Peltier's murder of two
6 FBI agents would be the --

7 What's wrong with the testimony that they
8 simply believed she was a traitor?

9 I mean, why do we need to go into
10 Mr. Peltier's murder of other people to which he
11 has -- he had no part?

12 Is there some dispute in this case that she
13 was believed to be a traitor?

14 I don't know if the defense is arguing that.

15 **MR. JACKLEY:** In addition to being a traitor,
16 she had to have some information that would be
17 hurtful. Just because she's a traitor wouldn't
18 necessarily justify executing her. But she was
19 somebody they believed to be an informant; and in
20 addition to being an informant had valuable
21 information that would be damaging to parts of the
22 Movement. That's why this is relevant.

23 **THE COURT:** So what you are saying is that
24 known informants would get executed if and only if
25 they knew something important?

1 **MR. JACKLEY:** That's what distinguished her
2 from other informants, yes, Your Honor.

3 **THE COURT:** Other known informants?

4 **MR. JACKLEY:** For instance, Durham.

5 **THE COURT:** Mr. Murphy?

6 **MR. MURPHY:** Well, I think what the state
7 wants to do is use the term conspiracy to describe
8 every event that AIM participated in.

9 **THE COURT:** That's my impression.

10 **MR. MURPHY:** Yeah.

11 And that would include bombings of the BIA
12 building in DC; activities in Detroit, Saint Paul, the
13 incidents at Oglala. And say that any of those
14 incidents could somehow be attributed to my guy who,
15 at that point, was a 19-year-old Canadian guy who
16 nobody connects with upper-echelon decision making,
17 this conversation, or any of those other activities.

18 They are trying to use conspiracy in the
19 broadest sense of the term as opposed to what they
20 have alleged in this case is that some time in the
21 middle of December, in Denver, a call was made. And a
22 decision was made up at the WKLDODC office or at Bill
23 Means' office to kill Ms. Aquash.

24 So they have gone from the micro to say that
25 any hearsay or unavailable declarant's statement about

1 any other violent activity by any other AIM member
2 could then be attributed to my client and admitted
3 before a jury regardless of how inflammatory or
4 prejudicial that may be.

5 **MR. JACKLEY:** Your Honor, this is much more
6 specific than that. The state intends to produce the
7 witnesses of what these events were, but intends to,
8 beginning with the call -- with respect to the initial
9 call that came from -- allegedly from Thelma Rios to
10 John Graham's girlfriend to say basically bring forth
11 Annie Mae Aquash who is an informant -- a suspected
12 informant.

13 So -- I mean, this isn't a shot in the dark.
14 I mean, we have specific evidence that it was believed
15 she was an informant. We have other evidence that if
16 she wasn't an informant the damaging information that
17 she obtained. Part of that damaging information is
18 she was privy to a discussion of a very serious murder
19 of two FBI agents. She needed to be silenced. It's
20 our position that that's what the criminal venture
21 did, they silenced her.

22 **THE COURT:** It's my understanding that that's
23 not an issue.

24 **MR. MURPHY:** And not only is that really not
25 an issue, the informant allegation that they are

1 making, the next motion deals with evidence that
2 predates the killing of the FBI agents where they say
3 Mr. Peltier threatened to kill her.

4 So this issue with the FBI agent to say that
5 that's the generating event that led to Ms. Aquash's
6 death strains credibility in light of the fact that
7 they've argued that she was suspected of being an
8 informant going back to the -- there was a processing
9 plant, a protest well before any of this.

10 There was testimony preceding this that she's
11 been accused of being an informant as had everybody
12 else in the Movement at some point or another.

13 The idea that the generating call to Denver
14 from Ms. Rios -- again, now Ms. Rios -- and I am not
15 going to speak for her counsel -- I have never seen
16 anything in the 6,000 plus pages of discovery that
17 link her to the execution of those FBI agents down at
18 Jumping Bull Place.

19 So again, they haven't tied this event -- the
20 killing of the FBI agents, which was part of a
21 shoot-out which most people are pretty well familiar.
22 It was a discrete event to Mr. Graham and Ms. Rios.

23 **THE COURT:** And it's your view that had she
24 not been privileged to that conversation, she would
25 not now be dead?

1 **MR. JACKLEY:** I think that's a logical
2 inference from that.

3 Part of that is based upon what I say because
4 there was a letter from -- a letter from the United
5 States Attorney's Office to Bob Riter during that
6 relevant time frame which stated -- the letter was an
7 offer to plea to lesser charges if she would fully
8 cooperate and tell all.

9 She's privy to a confession by Leonard
10 Peltier, a description of events that can be labeled
11 nothing other than a confession. And I think
12 that that -- it's fair to draw the inference from that
13 that that was certainly part of the decision, if not a
14 very controlling part of the decision to ultimately
15 silence her.

16 **THE COURT:** What's the time frame of the
17 letter?

18 **MR. JACKLEY:** Early November of 1975, I
19 believe. I don't have it in front of me, but from
20 recollection, Mr. Oswald and I believe it's early
21 November of 1975.

22 **MR. MURPHY:** And I can put that letter in the
23 context of Mr. Aquash facing multiple gun and
24 explosive charges stemming from a raid on the -- Al
25 Runnings' property down on the reservation in

1 September of 75 where she was found in a tent with
2 explosives, grenades, guns with obliterated serial
3 numbers. And she was there with Dino Butler and his
4 wife and they were all arrested and she was asked to
5 cooperate. She had those charges pending. She was
6 not facing any charges regarding the killing of the
7 FBI agents.

8 Her attorney for that case was Bob Riter.
9 And she was offered a plea bargain and she rejected it
10 summarily and would not testify against Mr. Butler or
11 his wife or anything else regarding the guns and
12 explosives charges that were pending at that time.

13 **MR. JACKLEY:** Your Honor, I take from that
14 that there is a dispute between the state and the
15 defense with respect to the informant; and therefore,
16 the state should be allowed to present the evidence
17 that it has regarding the informant and what
18 information she had.

19 **THE COURT:** The issue is not whether she was
20 an informant at all, is it?

21 **MR. MURPHY:** No.

22 The issue is --

23 **THE COURT:** The question is -- that's raised
24 is whether she was thought to be an informant.

25 **MR. MURPHY:** At both trials so far they

1 provided ample evidence from people about the
2 accusation or the belief that Ms. Aquash was an
3 informant. That's not the issue here.

4 The issue here is these very precise
5 extremely prejudicial statements about an infamous
6 event that are being connected to my client though he
7 has no connection to them.

8 **THE COURT:** Are you suggesting it's the
9 motive --

10 **MR. MURPHY:** For his action.

11 **THE COURT:** -- for Mr. Graham to take part in
12 her killing?

13 **MR. MURPHY:** Exactly.

14 **THE COURT:** His motive or AIM's motive?
15 And does it matter?

16 **MR. JACKLEY:** It doesn't matter in a criminal
17 venture of this nature, Your Honor.

18 **MR. MURPHY:** And mind you they haven't
19 charged this as a conspiracy.

20 **MR. JACKLEY:** We have charged aiding and
21 abetting and under the law we don't have to charge it
22 as a conspiracy.

23 **MR. MURPHY:** If they had charged it as a
24 conspiracy, they would have to define the parameters
25 of the conspiracy and we would be in a position to

1 argue what is and is not part of the conspiracy or
2 whether there were multiple conspiracies or whatnot.

3 They have opted not to do that so they tried
4 to blend everything that AIM has done, an organization
5 that has been in existence since, from what I
6 understand, the late 60s all the way through 1976 are
7 the events in question going all the way up through
8 76.

9 **THE COURT:** Would you want it in if it was a
10 confession for stealing money from a bank?

11 **MR. JACKLEY:** Yeah, because I believe it
12 further goes to -- I mean, to just being an informant
13 standing alone doesn't necessarily get you to an
14 execution of her.

15 But being an informant with something -- you
16 know, of an offense, I think gives it -- I mean,
17 that's what you need to prove, the motive. Just to be
18 an informant that doesn't know anything isn't damaging
19 to the Movement or the conspiracy or the criminal
20 venture. But she's not just believed to be an
21 informant; she's believed to be an informant that has
22 information regarding a very serious matter.

23 **MR. MURPHY:** Another factual issue that goes
24 to this is that outside the people in that motor
25 home -- from the time that the shoot-out happened in

1 Oregon on October 14, 1975, Peltier is on the run in
2 Canada; Banks is on the run somewhere else. There is
3 no evidence at all that the conversation that happened
4 in that motor home was communicated outside the motor
5 home.

6 So to try to say this was some widespread
7 knowledge that Aquash knew about Peltier's confession
8 is a fiction. Ms. Ecoffey, or was Banks, didn't even
9 reveal that she had heard this confession until
10 decades after the fact. And so -- and apart from her,
11 it's unclear as to anybody else who claims to have
12 ever heard the utterance.

13 In one of the documents given to us by the
14 government, Bernie Lafferty denied hearing this. So
15 to indicate that this was some widespread information
16 communicated; that it would even be in the penumbra of
17 AIM activists that Ms. Aquash knew about Peltier's
18 confession, it's just not supported by anything in the
19 record.

20 **THE COURT:** The biggest problem is the use of
21 the verbs. I mean, obviously I presume that defense
22 counsel wants no evidence in that paints ugly other
23 crimes and the prosecution wants evidence in that
24 does. And I think probably any other assumption is --

25 The part of this that troubles me is the

1 underlying crime which is the part that you believe to
2 be the strongest point for letting it in. And I am
3 stuck with figuring out if I am going to consider
4 letting it in; the prejudicial value of that relevant
5 to the issues it pertains to.

6 **MR. MURPHY:** That was not an issue debated by
7 the Eighth Circuit when they brought it in. If that
8 issue -- there was no balancing test that I recall
9 done by the Eighth Circuit or by the District Court.
10 It was brought in under another exception that doesn't
11 really apply here.

12 But Your Honor, Mr. Connelly and I have a
13 2:00 o'clock arraignment in front of Judge Trimble on
14 the Fish Garbage Service case.

15 Could we ask the Court to recess?

16 It should be very brief.

17 **THE COURT:** Uh-huh.

18 We're in recess.

19 (Off the record.)

20 **THE COURT:** Please be seated.

21 Well, I think I have heard enough about the
22 last. And at the moment, I don't have a clue how I am
23 going to rule on it. I am extremely troubled by the
24 degree of prejudice that attends a double murder
25 admission and would allow an inference.

1 On the other hand to a fair degree I
2 understand Mr. Jackley's point and there have to be a
3 reason.

4 I am not sure that anybody cares why the
5 order came down if the order was issued. And as
6 Mr. Marshall is purported to have said, you do what
7 you are told to do. It didn't much matter why you
8 were told to do it. In fact, it sounds like
9 Mr. Marshall thought you didn't bother to think about
10 why; you just did it.

11 So the degree of relevance that's there and
12 the degree of prejudice associated with it are the
13 issues I am going to look at.

14 I am not comfortable in just making a summary
15 ruling. I want to think about -- I understand
16 Mr. Murphy's point quite well. I want to make sure I
17 grasp the significance of Mr. Jackley's so --

18 **MR. JACKLEY:** Your Honor, although we didn't
19 discuss it, would a possible limiting instruction be
20 an avenue?

21 In other words --

22 **THE COURT:** Obviously, I am thinking about
23 that. Certainly, if I am going to let it go in, there
24 is going to be a very detailed limiting instruction.
25 And, you know -- I really don't have a clue what -- I

1 think it has to have a limiting instruction if it
2 comes in. That was one of the areas I was going to
3 think about and address.

4 **MR. JACKLEY:** We wouldn't object to a
5 limiting instruction that limited it to the issue of
6 motive, and I would --

7 **THE COURT:** If we do as we have to do, then I
8 don't know how relevant motive is except to do what we
9 have to do on that theory of the law. It doesn't
10 matter why the God Father sent out the order. If the
11 God Father did, it was just, when you got the order,
12 you do it. And I mean, that's Marshall's point of
13 view and nobody cares at that level why it occurred.
14 At least not if the don't want to join the informer,
15 at least under that theory. So I don't know what I am
16 going to do with it to be specific.

17 The threat from Peltier?

18 **MR. MURPHY:** Your Honor, this is a --
19 factually a bit of a different issue. Some of the
20 arguments made before carry over, but there is
21 factually enough distinction that I think we should go
22 through it.

23 The gist of the state's argument is that at
24 the AIM National Convention in Farmington, New Mexico
25 in June of 1975, that Mr. Peltier, Dino Butler, and

1 Ms. Aquash went up to a bluff. At that point
2 Mr. Peltier accused Ms. Aquash of being an informant
3 and put a gun to her head. And then a discussion was
4 had and nothing else happened.

5 The state in their submissions say they are
6 not trying to prove the truth of the matter asserted.
7 But let's look at what the state is trying to prove.
8 They are trying to prove that Aquash was killed
9 because she was a suspected informant. And that this
10 was an order by AIM leaders. And what they are trying
11 to introduce is that an AIM leader put a gun to her
12 head in 1975.

13 So they are trying to admit an out-of-court
14 statement from -- presumably because they have said
15 Peltier is not available -- from an out-of-court
16 witness or a witness who doesn't have personal
17 knowledge because there is -- under the allegations
18 that have been presented to us so far, three people
19 are present: Peltier says this didn't happen. Dino
20 Butler in a long recorded interview with their
21 informant, Mr. Chapman, said this didn't happen. And
22 Ms. Aquash who is deceased.

23 So whomever this statement comes in through
24 heard it through the rumor mill. And I will
25 acknowledge the rumor mill is such that there were

1 people who said that they believed this thing
2 happened. But Butler unequivocally said they went out
3 to the bluffs, he, Peltier, and Aquash to smoke some
4 marijuana. They smoked some marijuana, hung out, and
5 then went back to camp.

6 What we also know from the facts of this case
7 is that one of the state's other witnesses, John
8 Trudell, was presented with the same allegation and
9 asked whether he believed this had happened. He
10 brought up an incident where he said at the same
11 convention he had heard that Ms. Aquash has been
12 banished from the convention and had to live out in a
13 place called Chacco Canyon. And he said that's
14 nonsense. I invited her to go out to Chacco Canyon
15 because it was a beautiful place and we went on a day
16 hike. So we know that some of the gossip around the
17 AIM National Conference is just not true.

18 But here what we got is we got hearsay
19 through a witness who doesn't have personal knowledge
20 because whomever they bring it in through will have to
21 say they weren't in the car. So we got hearsay from a
22 non-available declarant. That invokes the
23 confrontation clause.

24 The other issue is the lack of probative
25 value and whatnot because here is another inflammatory

1 allegation that strains reliability or veracity.
2 There is no connection with Mr. Graham. Again, this
3 is one of those issues where Ms. Aquash, who was
4 somebody who was familiar with the upper echelon of
5 AIM and hung with these people, is purported to be
6 involved in some conduct; that there is no connection
7 factually whatsoever with my client. He's not alleged
8 to have been present in this car or present when this
9 threat was made or involved in any way, shape, or form
10 with Mr. Peltier, Mr. Butler, and Ms. Aquash's trip up
11 to the bluff.

12 There also is no association ever established
13 between --

14 **THE COURT:** Who is going to come in and say
15 this?

16 No, it's to you --

17 I assume you know, Mr. Jackley.

18 **MR. JACKLEY:** Parts of it Kamook Banks and
19 parts of it Troy Lynn Yellow Wood. I mean, he's
20 talked about a lot of things, so I think between those
21 two different witnesses it would be covered.

22 **THE COURT:** What's their source of knowledge
23 as to the gun incident?

24 **MR. JACKLEY:** Annie Mae directly, and of
25 course, I can't call Annie Mae.

1 **THE COURT:** So the statement is that Annie
2 Mae told him that?

3 **MR. JACKLEY:** Yeah.

4 **THE COURT:** Who is the witness?
5 Who is the witness that's going to say it?

6 **MR. JACKLEY:** Troy Lynn Yellow Wood.

7 It was her place in Denver, her apartment,
8 that this -- that the felony murder began with the
9 phone call.

10 **MR. MURPHY:** So there is the confrontation
11 and lack of personal knowledge issue.

12 The other issue is they tried to bring it in
13 under state of mind. That's the purported basis and I
14 cited at length the U.S. Supreme Court case of *Shepard*
15 *v. United States*, which is a 1933 case. I shepardized
16 it. It's been cited over 350 times with approval.

17 And in that, Justice Cardozo says, if you
18 allow evidence like this from non-available
19 declarants -- in that case it involved a dead
20 declarant as well -- if you allow evidence of past
21 acts in before the jury through the state of mind
22 exception, we might as well throw out the rule against
23 hearsay. He said it a little more eloquently than
24 that, but we quoted it at length in our brief.

25 That's what the state is exactly trying to

1 do. They got a deceased declarant. They are trying
2 to admit her alleged out-of-court statement to
3 somebody else, whether it's Troy Lynn or Ms. Ecoffey
4 that this event happened to prove a past act because
5 that's why it's being admitted.

6 As much as they want to candy coat it and say
7 it goes to something else, they are trying to prove
8 that Leonard Pellitier took her out to the bluffs,
9 said you are an informant, and put a gun to her head.

10 The *Shepard* case is directly on point. There
11 is nothing I have seen that limited its application
12 and it seems to be factually right on board here.

13 **THE COURT:** Mr. Jackley?

14 **MR. JACKLEY:** Again, I cite back to the *US v.*
15 *Looking Cloud* case. I understand that that isn't
16 controlling of this evidence, but they give a very
17 good rational to it.

18 The same analysis that we just discussed for
19 the last hour applies with the additional basis that
20 this gun matter also goes to Aquash's state of mind,
21 how these folks had treated her, her submissiveness
22 during the kidnapping, during the rape, during the
23 other activities.

24 I mean, it goes to explain why, at some point
25 during the two days of her felony murder kidnapping,

1 she didn't take off. Because these people had put
2 guns to her head. These people had raped her.

3 **THE COURT:** How do -- don't we get into a
4 state of mind from her that is purely an inference and
5 speculation on your part and others?

6 **MR. JACKLEY:** Well, it's not --

7 **THE COURT:** Why she didn't run is because of
8 an alleged incident that's hereby hearsay. Why she
9 didn't run was because of XYZ. I mean, I can make
10 those statements. I can conjure up reasons why she
11 didn't. And they are tentatively -- they may well be
12 valid but they may not be.

13 **MR. JACKLEY:** But it's coming directly from
14 her. She's the one that spoke directly of the
15 incident to Troy Lynn Yellow Wood and directly to
16 Kamook Banks. It's coming directly from her; and I
17 can't call her any more because she was executed.
18 That's my only witness.

19 **MR. MURPHY:** It's not coming before the jury
20 through her. So it would be a different issue if she
21 was a witness. This is coming through another witness
22 so my client can't confront the original declarant and
23 so all those confrontation issues exist. It's being
24 introduced for the purpose of proving what they say
25 happened.

1 You know, they are making the inference.
2 They are saying this in fact happened. In June of 75,
3 six months before this alleged killing -- or this
4 killing -- the allegation against my client, six
5 months before that, a gun was put to her head which
6 put her in such fear that that's why she didn't run
7 six months later during the course of the kidnapping.

8 The inference they are drawing from trying to
9 prove up the fact -- they are trying to prove that
10 Mr. Peltier put a gun to her head. That's why they
11 are introducing it so then they can argue the
12 inference.

13 **THE COURT:** My biggest problem is relevance
14 to the issues of the case. I mean, I really fail to
15 see what it has to do with what you are trying to
16 prove. So Peltier, according to a hearsay statement,
17 put a gun to her head. Okay.

18 And when was that in -- related to the motor
19 home incident?

20 **MR. MURPHY:** It would have been five months
21 before.

22 **THE COURT:** Say again.

23 **MR. MURPHY:** Five months before.

24 **MR. JACKLEY:** Pretty close in time.

25 **THE COURT:** Five months before?

1 **MR. JACKLEY:** Yeah.

2 Pretty close in time when you are looking at
3 an accusation around the informant stuff.

4 **THE COURT:** And so because of that alleged
5 incident, Peltier in the motor home has no qualms with
6 her in there talking about two murders that he did?

7 **MR. JACKLEY:** Part of in addition to relevant
8 to her state of mind. As I indicated earlier, the
9 same reason the Eighth Circuit --

10 **THE COURT:** Well, how do we get her state of
11 mind?

12 I am not sure how we prove her state of mind
13 and I am not sure how anybody can get there except by
14 guess and by golly. If I were in that position, this
15 is how I would feel. I don't think that's evidence.

16 **MR. JACKLEY:** Your Honor, I think it's fair
17 for the state if an issue comes up as to why she
18 didn't try to leave at some point in time, for
19 instance, at Dick Marshall's, for the state to produce
20 the evidence that the reason she didn't try to leave
21 is five months before that they put a gun --

22 **THE COURT:** Is that issue going to come up?

23 **MR. JACKLEY:** It may well come up.

24 **THE COURT:** Has it come up in previous
25 trials?

1 I mean, how is it going to come up?

2 **MR. MURPHY:** Goes to the timing issue and
3 Mr. Jackley is talking about five months being
4 relatively close in time.

5 If you look at the Federal Rule of Evidence
6 803 or the state counter part, 19-16-7, it says, the
7 state of mind exception is expressly limited to an
8 admission of evidence to prove the declarant's present
9 thoughts and feelings; not to prove an act committed
10 by someone else. And that's what *Shepard* goes on.

11 So what they are saying is -- they are
12 introducing an act in June of 75, and they are saying
13 it's relevant to prove her state of mind in December
14 of 75.

15 So it's not being introduced to prove her
16 state of mind in June of 75 when she's up on the bluff
17 allegedly with Mr. Peltier. They are trying to expand
18 the rule to include inferences that may be drawn about
19 what she did or did not do six months later.

20 **THE COURT:** So -- and I go back to my
21 question. How is she didn't run going to come in to
22 play in this case?

23 At what point is that relevant?

24 **MR. JACKLEY:** Your Honor, this was a two-day
25 ordeal for her from the minute she was kidnapped and

1 tied and bound in Denver, Colorado.

2 **THE COURT:** That would be one reason she
3 didn't run.

4 **MR. JACKLEY:** Right.

5 And then she wasn't bound and tied the whole
6 time, including at Marshall's place.

7 **THE COURT:** But how does the fact --

8 Let us assume that she didn't try and get
9 away. So what?

10 I mean, how does that play into this at all?

11 **MR. JACKLEY:** It goes to her submissiveness
12 during the process.

13 **THE COURT:** What does that matter?

14 Who cares if she was submissive?

15 I mean, how is that part of the case?

16 It differs if she's submissive or bound the
17 whole time?

18 **MR. JACKLEY:** I am concerned that the jury
19 may make an inference that she had some opportunities
20 at these different stops. Why didn't she try to
21 escape. I think the state is permitted to present
22 evidence --

23 **THE COURT:** She's dead, right?

24 **MR. JACKLEY:** Yes.

25 **THE COURT:** She was murdered, right?

1 **MR. JACKLEY:** Yes.

2 **THE COURT:** She did not escape, right?

3 **MR. JACKLEY:** Correct.

4 **THE COURT:** And so we're going to argue that
5 it's her own fault she's dead because she didn't run?
6 That's not going to sell. I mean, it doesn't sell
7 with battered spouses. You know, he broke your jaw
8 before and you went back. That's not a defense to ag
9 assault.

10 She didn't run. We don't know if she tried.
11 There is no evidence that she tried that I know of.
12 There is no evidence that she didn't try other than a
13 complete absence of evidence.

14 But my question is still the same, so what?

15 **MR. JACKLEY:** Let me try to approach it this
16 way. Earlier today we had a discussion about whether
17 or not she was voluntarily making love or whether or
18 not it was forceable rape in the room.

19 I have to believe that two pieces of evidence
20 that were discussed today go directly to that. Number
21 one, the fact that she was tied up would indicate it
22 probably wasn't voluntary.

23 Number two, five months before that these
24 guys put a gun to her head. I think those things
25 indicate -- at least, allow a jury to draw an

1 inference why somebody in the room alone with --
2 allegedly with John Graham and would be submissive and
3 not fight back. I mean, those are logical inferences
4 to be drawn.

5 **THE COURT:** Now, we're going to from run away
6 from the murder to submitting to a sexual attack.

7 **MR. JACKLEY:** Submissive throughout the
8 process of the two days.

9 **THE COURT:** So what difference does it make?
10 What are you trying to prove?

11 Does that make it more or less likely that
12 she was killed?

13 More or less likely that Mr. Graham was
14 involved with it?

15 More or less likely that Ms. Rios was
16 involved in it?

17 That's my problem with it.

18 **MR. JACKLEY:** It makes it more likely for a
19 couple of reasons. Number one, I believe it goes to
20 the submissiveness.

21 Number two --

22 **THE COURT:** How is submissiveness an issue?

23 She was killed. I am sure she did not
24 volunteer for it.

25 **MR. JACKLEY:** And I am sure she didn't

1 volunteer to be raped in Thelma Rios' apartment.

2 **THE COURT:** I agree with you.

3 **MR. JACKLEY:** But I thought we just had a
4 discussion earlier, Your Honor, that you talked about
5 how they were making love. And I --

6 **THE COURT:** What difference does it make to
7 whether Mr. Graham or Ms. Rios -- the fact that she
8 didn't run and was submissive -- were involved in her
9 death?

10 **MR. JACKLEY:** I think it goes directly to
11 Annie Mae's state of mind December 10 through
12 December 12.

13 I think it also goes directly to the
14 informant issue; that these guys believed she was an
15 informant. That's why they took her out and put a gun
16 to her head and asked her about --

17 **THE COURT:** What is her state of mind
18 relevant to?

19 What is her state of mind relevant to?

20 I mean, maybe I am missing it. I don't think
21 murder victim's state of mind have a whole lot to do
22 with it. They are frightened. They don't want to
23 die.

24 **MR. MURPHY:** And it's her present state of
25 mind. And that's --

1 What I keep going back to is an event that
2 happened in June of 75 in Farmington, New Mexico when
3 my client is not present, they are saying that her
4 state of mind about that event now carries forward in
5 perpetuity.

6 **THE COURT:** I am not troubled by the concept
7 that the behavior of some AIM people, to include
8 Leonard Peltier, may have indeed contributed to a
9 non-resistive course of action on her part.

10 What I don't see is an issue which that
11 addresses. I really don't see -- so she was
12 submissive. I am still back to, so what.

13 **MR. JACKLEY:** Because I believe that a
14 victim's state of mind is relevant. I specifically
15 cite to the *Huber* decision, paragraph 57. Quote, the
16 Court concluded that all the evidence was relevant to
17 explain both Pam's and Huber's state of mind; and to
18 prove Huber's motive, intent, and absence of accident,
19 end quote.

20 Paragraph 57 of Huber. The victim's in --

21 **THE COURT:** All right.

22 There is not going to be testimony here that
23 she was shot in the head by accident. I mean --

24 **MR. JACKLEY:** But motive and intent are
25 clearly at issue.

1 **THE COURT:** Well, Peltier putting a gun to
2 her head when this gentleman is not aware of it is not
3 his motive. It doesn't apply to Mr. Graham at all.

4 Now, the submissiveness has got me just way
5 astray. For the life of me, I don't know what it --
6 what it's relevant to.

7 **MR. JACKLEY:** I have to believe that the
8 state can produce evidence when somebody is kidnapped,
9 raped, and murdered what her actions were during that
10 two-day ordeal; that what she did or didn't do is
11 relevant with respect to --

12 **THE COURT:** Well, it would be relevant
13 perhaps to sentencing.

14 **MR. JACKLEY:** Well, to cite the verse of the
15 *United States v. Bettelyoun*, the evening of terror is
16 all admissible with respect to the *res gestae* and the
17 occurrence of the criminal venture which is what we
18 have here.

19 **THE COURT:** But you don't have evidence to
20 connect A with B other than speculation. And frankly,
21 you don't have a lot of evidence about the evening in
22 question, I don't think.

23 **MR. MURPHY:** To counter the *Bettelyoun*
24 argument, they are talking in that case about events
25 that happened contemporaneous with the crime.

1 Here they are trying to admit evidence that
2 happened a half year before the crime by different
3 people in a different state. That's -- I mean, that's
4 where we get to. If this was something that had
5 happened --

6 **THE COURT:** If Peltier put a gun to her head
7 between December 10 and December 12, I wouldn't have
8 any doubts about it coming in.

9 **MR. JACKLEY:** But the other important thing
10 is the reason that he put a gun to her head. And it
11 ties back into the informant issue. It's all about
12 proving the fact that they believed she was an
13 informant. That goes directly to the informant issue.
14 The reason he put a gun to her head as she explained
15 to Troy Lynn Yellow Wood and as she explained to
16 Kamook Banks related directly to --

17 **THE COURT:** So he's so comfortable,
18 Mr. Jackley, that he's scared her to death and out of
19 informing that he, in her presence, with one other
20 person talks about having killed two FBI agents?

21 **MR. MURPHY:** And I would say in the interim
22 was involved in bombings with him; was caught in a
23 tent full of explosives with other AIM upper echelon.
24 The intervening events between June and December show
25 her actively involved in about 20 crimes committed by

1 upper echelon AIM people in multiple jurisdictions.

2 So the causal break between what happened in
3 June or didn't happen in June and what happened in
4 December is so significant that it shouldn't be
5 admitted.

6 **THE COURT:** Next item?

7 **MR. MURPHY:** The remaining motions are more
8 or less procedural. We filed a motion and order for
9 transcripts. I understand the Attorney General's
10 Office actually already ordered the transcripts
11 because we talked to the court reporter. But we're
12 going to need to get our own copy made.

13 So we have an order there for Pennington
14 County to pay for our copy of the transcripts. And if
15 you agree, then I'd ask you to execute the order
16 that's already on file in the case so that we can get
17 that made.

18 **THE COURT:** Why shouldn't I?

19 **MR. JACKLEY:** No objection.

20 Just with the understanding that we don't
21 have it yet either.

22 **THE COURT:** Well, I am not suggesting you do.

23 Just, why shouldn't I allow them to get a
24 copy?

25 **MR. JACKLEY:** And the other thing, just so

1 the Court is aware, we only ordered the witness
2 testimony. We didn't order openings and voir dire and
3 closings, just so that everybody is on the same page
4 with that.

5 **MR. MURPHY:** Yeah. We talked to the court
6 reporter on Friday.

7 **THE COURT:** Sounds good.

8 **MR. MURPHY:** The next thing is docket number
9 52, 53, and 54 are the state's notices of expert
10 witnesses.

11 The state has said that they -- these notices
12 are sufficient because these witnesses have testified
13 at trial previously.

14 **THE COURT:** I discussed that previously.

15 **MR. MURPHY:** So since no opinions have been
16 disclosed yet under *Blehm*, we would be asking the
17 Court to limit their experts --

18 **THE COURT:** I think that's covered. We have
19 had that. The state will provide detailed opinions
20 sufficient for you to prepare -- to consider those
21 opinions and prepare a defense if you feel it
22 necessary or appropriate.

23 **MR. JACKLEY:** And we have 30 days to do that
24 is my understanding?

25 **THE COURT:** Yes, sir.

1 **MR. MURPHY:** I didn't have access to the
2 Court's file. There was a docket number 61 that said
3 brief memo. I wasn't sure what that pertained to.

4 **THE COURT:** 61 is a defendant Graham's reply
5 brief regarding the Medicine Man privilege issue. Was
6 filed on 6/7/10.

7 **MR. MURPHY:** We will take a look at that. We
8 already addressed that motion. I think that must have
9 been filed twice then.

10 The state's notice of intent to use specified
11 evidence. Docket entry 72. Our response is,
12 essentially, that their notice is meaningless.

13 **THE COURT:** Yeah.

14 You have to be a little more specific if
15 we're going to use specific evidence, fair?

16 **MR. MURPHY:** Yeah.

17 **MR. JACKLEY:** I am not going to argue against
18 that, Your Honor.

19 Can we have 30 days, Your Honor?

20 **THE COURT:** Yes.

21 **MR. JACKLEY:** Thank you.

22 **MR. MURPHY:** When we did our first discovery
23 motions, which you have already granted, we asked for
24 the criminal records of witnesses. That was already
25 granted. We did file a motion to join the motion by

1 Ms. Rios for the Triple Is. So that's all we have
2 left.

3 **THE COURT:** I assume that be would granted
4 without objection?

5 **MR. JACKLEY:** With the understanding that we
6 don't have to run Triple Is on witnesses that we're
7 not going to call.

8 And we would also similarly request that they
9 provide us a witness list with respect to the Triple
10 Is.

11 I think theirs was pretty broad, which is
12 what the issue was. My recollection was -- I don't
13 have it in front of me. I can find it. Was that they
14 were asking us to run a Triple I and then naming a
15 bunch of witnesses and my understanding is to the
16 extent the state is going to call a witness, we
17 need -- for non law enforcement, we need to provide
18 that information to them.

19 But we're not just going to be a source and
20 any time they give a witness name to run a Triple I if
21 we're not going to call them as a witness.

22 **MR. MURPHY:** That was my motion. If they got
23 a witness they are going to call, we should get the
24 rap sheet.

25 We're not going to provide a witness list to

1 them or ask them to do Triple Is on our witnesses.

2 **THE COURT:** All right.

3 **MR. JACKLEY:** Was it Rios's motion that was
4 broad or asked -- I mean, the motion listed a bunch of
5 witnesses, some of which we're not going to call. So
6 we don't have an objection to doing a Triple I of
7 those witnesses that we're going to call.

8 **THE COURT:** You are not going to call
9 witnesses that you don't give a timely Triple I on,
10 even for rebuttal purposes.

11 **MR. JACKLEY:** Well, I am going to object for
12 rebuttal purposes because I haven't received one shred
13 of discovery from them so I don't know what I am
14 rebutting yet.

15 **THE COURT:** Well, I do understand that point,
16 but if necessary, and the Triple Is haven't been
17 shown, then we're going to have to take a stop and get
18 the Triple Is.

19 Yeah?

20 **MR. KINNEY:** Judge, the state did not object
21 to a witness list and suggested two weeks before
22 trial. If they disclose a case in chief witness list,
23 that doesn't give us any time to get an FBI order to
24 run Triple Is.

25 I would like them to disclose their state

1 witnesses at least a month ahead of time. Then I will
2 know who they are going to call and then those people
3 will have their Triple Is run by Virginia.

4 **MR. JACKLEY:** Well --

5 **THE COURT:** What I would say is known
6 witnesses to be called. And I am assuming that will
7 be a reasonably -- as complete a list as you can make.
8 And I will allow a sup -- a supplement to that. But
9 supplements should be pretty short.

10 Two weeks before trial. Okay.

11 And you write the order broad enough to cover
12 additions.

13 **MR. JACKLEY:** Is the Court going to require
14 the defense to give the government a witness list?

15 **THE COURT:** There comes a point in time when
16 you are entitled to have that, I believe.

17 **MR. MURPHY:** I don't believe so, Your Honor.

18 **MR. JACKLEY:** I disagree.

19 **MR. MURPHY:** It's a Ninth Circuit case that
20 we litigated and a case that Mr. Jackley and I were
21 involved in in federal court, the *Bowers* case, where
22 it was dead on point that the defense has no
23 obligation to disclose a witness list. It's a matter
24 of -- basically a matter of constitutional
25 protections, the right to present a trial, and the

1 fact that the rules of discovery don't mandate it. I
2 mean, our rules of discovery are very specific to what
3 the defense has to turn over. And outside those
4 specific mandates --

5 **THE COURT:** Well, Mr. Jackley, I assume
6 within a matter of a few minutes you may draw a Triple
7 I on any witness they call, could you not?

8 **MR. JACKLEY:** If we know their date of birth
9 and all the proper information, yes.

10 But we may be scampering for that.

11 **THE COURT:** Well, I don't see any reason why
12 you wouldn't be required to do that. And you could
13 examine the witness as to that.

14 In fact, I would give you leave to do that if
15 it's not brought out on the first set of questions so
16 you would have time to do it.

17 I mean, I think it's a fair question you
18 could ask in any event. Once you have that, it's
19 pretty simple. I assume your resources work faster
20 than -- from your end than they are from the defense
21 in getting that information.

22 I am taking at this point Mr. Murphy's
23 statement that you are not entitled to it, but I
24 believe once the trial is going and the statement
25 there, if you can gather that data, you are sure

1 welcome to do it.

2 **MR. MURPHY:** And I don't take any position
3 against that.

4 **THE COURT:** And for the smoothness of the
5 trial, it would be handy to have that information
6 available as the witnesses testify so we don't
7 interrupt and have the jury try and figure out what
8 we're talking about; and why every time you call a
9 witness the state requests to inquire before you get
10 going and takes biographical data. So if you have the
11 data to present as you are going to call witnesses,
12 that would be helpful.

13 **MR. JACKLEY:** The only comment I am going to
14 make is, you know, I am not yet concurring that I
15 don't have a legal right to it. He cited a Ninth
16 Circuit case. I am not standing in the Ninth Circuit
17 so I would like an opportunity to maybe look at that.

18 **THE COURT:** Yeah.

19 I don't have any problem with that. I have
20 with some frequency required the defense to do that in
21 state trials. I have not had any objection to it as
22 long as I held it very tightly to the trial date.

23 The problem is, too, it discloses defense
24 theories which they are under no obligation to do.
25 And that creates a problem and gives some idea to what

1 extent and the areas in which they plan to defend the
2 charges. To whatever extent that is.

3 But I think once the trial is on and the
4 witnesses are called, they are fair game.

5 **MR. MURPHY:** Well, we'll be disclosing them
6 during voir dire anyway.

7 **THE COURT:** Yeah. There you go.

8 **MR. JACKLEY:** I understand, but they are not
9 going to be disclosing dates of birth; and the concern
10 I have is I start cross-examining a witness and start
11 brow beating them over something they didn't do
12 because I have misinformation.

13 **THE COURT:** Well, I am trusting that -- I
14 don't have a problem with that at all. I was about to
15 be cute, but there is no point in it. And some might
16 not find it cute.

17 **MR. MURPHY:** Especially seven hours into the
18 hearing.

19 **THE COURT:** Yeah.

20 **MR. MURPHY:** I believe that is all the
21 motions both from the state and the defense in regard
22 to Mr. Graham.

23 **THE COURT:** All right.

24 For Ms. Rios, I have one on statements trying
25 to be restricted from the state --

1 **MR. CONNELLY:** Yes, Your Honor.

2 On Georgia McGaa we filed a motion to
3 prohibit the kind of blanket aspersions in the form of
4 an opinion that Thelma Rios -- that Georgia McGaa
5 recalls her as being very aggressive and somewhat of a
6 bully.

7 Did you hear anything?

8 **THE COURT:** Yeah, I got it. I can read it,
9 too.

10 **MR. CONNELLY:** Essentially, this kind of
11 gratuitous remark would be inappropriate and should be
12 the subject of, we feel, an out of the presence of the
13 jury determination that such an opinion, if legally
14 permissible, would require -- as I believe the rules
15 of evidence do -- that it be based on fact. That it
16 be rationally based on something she has perceived.

17 And that if I may say, Your Honor, combined
18 with the allegation that Ms. Rios at some time or
19 another in a bar -- again, without provocation --
20 maced her in some form would be a 404(b) type --

21 **THE COURT:** Without provocation from whose
22 view point?

23 **MR. CONNELLY:** Well, with or without
24 provocation.

25 **THE COURT:** Okay.

1 **MR. CONNELLY:** But we just feel that we
2 should have the opportunity, prior to and out of the
3 presence of the jury, to examine Ms. McGaa on what is
4 really 404(b). What is otherwise prohibited as
5 character evidence, which is specifically prohibited.

6 And if the state is offering it for some
7 exception, we'd like to know what that is.

8 **THE COURT:** Problem with an out of the
9 presence hearing prior to a determination of the
10 admissibility?

11 **MR. JACKLEY:** No, Your Honor.

12 **THE COURT:** I don't have any problem with
13 that.

14 I can see circumstances where every one of
15 the statements would be admissible. I am not saying
16 those circumstances would arise, but I can -- I can,
17 without too much difficulty, imagine where all such
18 statements would be permissible. And whether they
19 apply to this case, I don't have a clue.

20 **MR. JACKLEY:** Is the Court's ruling -- there
21 is one other -- I think there is five statements, but
22 one in relation to her hierarchy or ranking within the
23 AIM Movement.

24 And I would just submit the relevancy of that
25 is -- allegedly, we anticipate the evidence is going

1 to be that she made the initial phone call to start
2 this criminal venture.

3 And the fact that she is high up in the AIM
4 Movement is relevant as to explain why she would be
5 the one making a phone call.

6 Can we be allowed to get into that limited
7 area and then any of the other matters be addressed
8 not in opening statement and by approaching?

9 **THE COURT:** Just the basis of knowledge for
10 that statement would be the only question I could
11 think of. It may be street talk. It may be personal
12 knowledge of the relationships of the various people.

13 I think there is something -- and I read that
14 Ms. Rios spent a fair amount of time with the higher
15 ups or those alleged to be higher up in the
16 organization.

17 So depending on the source of her knowledge,
18 other than scuttlebutt, is likely admissible without
19 further ado.

20 **MR. CONNELLY:** Well, Your Honor, it's highly
21 prejudicial to suggest -- and to fill in a gap that
22 the state obviously lacks through any evidentiary
23 production --

24 **THE COURT:** I don't know what the gap is,
25 Mr. Connelly.

1 **MR. CONNELLY:** The gap is the allegation
2 that -- or the implication at least that Thelma Rios
3 somehow was in the higher echelons or hierarchy of
4 authority; whereby, she could order that Anna Mae
5 Aquash be executed or she be brought here or brought
6 there.

7 **THE COURT:** I don't know whether the concept
8 is she ordered it or passed the order.

9 **MR. CONNELLY:** Exactly.

10 **THE COURT:** There is a difference.

11 **MR. CONNELLY:** There is a difference, Your
12 Honor.

13 And I think it would be highly prejudicial
14 and inappropriate without some foundation to just
15 blurt out that kind of thing --

16 **THE COURT:** I indicated that I want the
17 foundation to establish the source of knowledge. So I
18 think that's -- I understand your concern that it
19 can't just be an assumption. There must be a basis
20 for the statement and I don't know what it is. And
21 enough of the reading here. I can see areas where
22 that conclusion could be drawn.

23 The extent this witness is in a posture to
24 state that, I don't have a clue.

25 **MR. CONNELLY:** Thank you, Your Honor.

1 **THE COURT:** Others from Ms. Rios?

2 **MR. KINNEY:** Your Honor, there is the motion
3 to sever.

4 **THE COURT:** Mr. Jackley?

5 **MR. JACKLEY:** We oppose that. This is the
6 same criminal venture. There are no *Brutten* issues.

7 The reference statement that was made -- let
8 me get it in front of me -- isn't a direct
9 incriminating statement. It goes back to the
10 Richardson deal. I don't think there should be a
11 concern but to the extent that there is, a limiting
12 instruction would be able to fix it. And I don't
13 think there is grounds for severance in this case.

14 **THE COURT:** Mr. Murphy?

15 **MR. MURPHY:** Your Honor, we haven't taken a
16 position on the motion. I believe the implications
17 are adverse to Ms. Rios.

18 **THE COURT:** I will give you an answer to
19 that. My inclination is to deny the motion, but I
20 want to look at it a tad further. But that's where I
21 sit at this stage. I am not inclined to sever.

22 I've got a bunch of things to give you within
23 a week or so, and I will do that.

24 Other matters?

25 The state had a reciprocal discovery. Have

1 we taken care of that?

2 **MR. MURPHY:** I indicated that we don't have
3 an objection to it.

4 **THE COURT:** All right.

5 Anything further?

6 I am assuming the general responses to
7 Mr. Murphy's motions apply to Ms. Rios', as well?

8 **MR. KINNEY:** Yes.

9 **THE COURT:** All right.

10 **MR. MURPHY:** So I think just setting an
11 evidentiary hearing. We had three or four matters
12 where it appeared there was going to be need to take
13 testimony.

14 **THE COURT:** Take the bulk of a day?

15 **MR. MURPHY:** I would imagine so.

16 **THE COURT:** How far down the pike?

17 **MR. MURPHY:** I am ready any time, but --

18 **MR. CONNELLY:** Could we go the first week of
19 September?

20 **THE COURT:** Of September?

21 **MR. CONNELLY:** Yes.

22 Or second for that matter.

23 **MR. MURPHY:** I will be gone the 2nd through
24 the 6th, the Labor Day holiday.

25 **THE COURT:** What I have best is, number one,

1 on the 8th, I have a pretrial conference that I
2 cannot imagine going.

3 And number two, I have a default judgment
4 hearing on a forfeiture that should not take long at
5 all. My suspicion is ten minutes, but I could be
6 wrong.

7 So we could start at 9:00 o'clock in the
8 morning.

9 **MR. MURPHY:** On the 8th of September?

10 **THE COURT:** On the 8th.

11 And I would have probably the afternoon of
12 the 10th, if necessary, to continue.

13 So questions?

14 **MR. MURPHY:** None.

15 **THE COURT:** We'll be in recess, then.

16 I will see you all on the 8th.

17 (Whereupon, the proceedings in this matter
18 were then concluded.)

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STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF PENNINGTON)

I, TINA RAE PRUSS, Official Court Reporter
and Notary Public in and for the County of Pennington,
State of South Dakota,

DO HEREBY CERTIFY that the foregoing
transcript is a true and accurate transcript of the
questions asked, the testimony given, and of the
proceedings had.

I FURTHER CERTIFY that I am not of kin or in
any way associated with any of the parties to said
cause of action, or their counsel; and that I am not
interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my
hand this 2nd day of November, 2010.

COPY

Tina Rae Pruss
Official Court Reporter and
Notary Public
Pennington County, South Dakota
My Commission expires: 10-04-2012

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
)
Plaintiff,)
)
VS.)
)
)
JOHN GRAHAM,)
)
)
)
Defendant.)

TRANSCRIPT OF
MOTIONS HEARING

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
NOVEMBER 8, 2010

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* * A P P E A R A N C E S * *

MR. MARTY JACKLEY
Attorney General
MR. ROD OSWALD
Assistant Attorney General
MR. ROBERT MANDEL
Assistant U.S. Attorney
Representing the State of South Dakota

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

MR. MATT KINNEY
MR. RANDY CONNELLY
Attorneys at Law
Representing Thelma Rios

* * I N D E X * *

WITNESS (ES) :	DIRECT	CROSS	REDIRECT	RECROSS
DONOVIN SPRAGUE	41	62	75, 95	94

1	EXHIBITS:	OFFERED/ADMITTED
2	1 - Grand Jury Transcript, Al Gates	93/93
3	A - Book Cover	42/42
4	B - Sprague Resume	42/42
5	C - 2010 Letter	43/43
6	D - 1936 Letter	44/44
7	E - Historical Document	45/45
8	F - 1940 License	45/45
9	G - License	46/46
10	H - Resolution	46/46

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

1
2 **THE COURT:** Are you ready to proceed,
3 counsel, for the state?

4 **MR. OSWALD:** Yes.

5 **THE COURT:** And for Mr. Graham?

6 **MR. MURPHY:** Yes, Your Honor.

7 **THE COURT:** And for Ms. Rios?

8 **MR. KINNEY:** Yes, Your Honor.

9 **THE COURT:** All right.

10 I want to take care of probably a nickel/dime
11 matter first. Audio visual during the course of the
12 trial. State has advised ELMO and ancillary
13 equipment.

14 Is that sufficient for counsel?

15 **MR. MURPHY:** ELMO and we'll also need a video
16 reproduction unit for the DVDs.

17 **THE COURT:** Yeah. Understand. Okay.

18 Now, I have been given to understand that
19 Ms. Rios has reached a plea agreement with the State
20 of South Dakota involving a plea to a charge of
21 attempted kidnapping, which is a Class 5 felony.

22 **MR. OSWALD:** Accessory.

23 **THE COURT:** I'm sorry. Accessory to
24 kidnapping, which is a Class 5 felony carrying a
25 maximum possible prison sentence of five years in the

1 penitentiary, and a \$10,000 fine, or both such fine
2 and imprisonment.

3 Is that the understanding of the state?

4 **MR. OSWALD:** Yes.

5 **THE COURT:** I have a plea agreement in front
6 of me.

7 Does that plea agreement as executed by the
8 state set forth all the requirements, all the terms
9 and conditions?

10 **MR. OSWALD:** Except for certain terms of
11 probationary --

12 **THE COURT:** Left in the discretion of the
13 Court?

14 **MR. OSWALD:** Correct.

15 **THE COURT:** And Mr. Kinney, is your client
16 aware of the details of that?

17 **MR. KINNEY:** She is, Your Honor.

18 **THE COURT:** Ms. Rios, have you had the
19 opportunity to read and review the plea agreement
20 which is signed by your attorney?

21 **THE DEFENDANT:** Yes, sir.

22 **THE COURT:** I understand it's an agreed
23 disposition which would allow the Court to impose a
24 five-year penitentiary sentence, suspended for a
25 period of five years, subject to a period of

1 incarceration of approximately 90 days with credit for
2 time served. And the terms and conditions of the
3 probation to be set in the mind of the Court.

4 Is that a fair statement, counsel?

5 **MR. KINNEY:** Yes, Your Honor.

6 **MR. OSWALD:** Yes.

7 **THE COURT:** Is that your understanding,
8 Ms. Rios?

9 **THE DEFENDANT:** Yes, sir.

10 **THE COURT:** All right.

11 This is a new charge, Ms. Rios, so to dot the
12 Is and cross the Ts, I must treat it as though this is
13 your first appearance in the court on this charge and
14 advise you of all your rights that attend a criminal
15 proceeding. If you should have any questions about
16 these rights, you must inform me when I ask you about
17 them.

18 Because this is brought by other than an
19 indictment, that is it's brought about simply by the
20 issuance of a complaint, which requires a first
21 appearance and a preliminary hearing to decide if
22 there is enough evidence to establish there is
23 probable cause to believe a crime was committed, and
24 probable cause to believe that you are the person
25 committing the crime, that would precede a formal

1 arraignment here.

2 I am expecting that you have discussed with
3 counsel the waiving of that, but I will get to the
4 question of that after we discuss your rights in their
5 entirety.

6 In this charge, as with any other charge, you
7 begin with the presumption of innocence. That is,
8 specifically, you have done nothing wrong and at this
9 point of the game there is no evidence whatsoever to
10 suggest you have done anything wrong.

11 You have an absolute right to silence and a
12 right against self-incrimination. And those rights
13 stay with you unless this matter is resolved or you
14 waive them.

15 You have a right to have copies of the papers
16 that spell out the charges against you, specify
17 exactly what the state must prove in order to obtain a
18 conviction. In this case, there are two sets of
19 papers. One is the initiating complaint; and the
20 second is the information which is the document upon
21 which this formal arraignment will be made.

22 You have a right to be represented by
23 counsel. That right includes, as you know, the right
24 to represent yourself, the right to hire attorneys of
25 your own choosing, or the right to ask the Court if

1 you cannot afford a lawyer, to appoint counsel for you
2 at county expense. The county will, of course, expect
3 its money back at a later date.

4 That is the option you have exercised so far
5 in these proceedings and Mr. Kinney and Mr. Connelly
6 are the counsel appointed for you.

7 Are you satisfied with their services to
8 date, ma'am?

9 **THE DEFENDANT:** Yes, sir.

10 **THE COURT:** Do you wish to continue with
11 their representation in this matter?

12 **THE DEFENDANT:** Yes, sir.

13 **THE COURT:** Now, the state, as in all
14 criminal charges, has the burden of proving every act,
15 fact, or omission alleged in a crime and necessary to
16 complete the crime beyond a reasonable doubt. They
17 must prove that to the unanimous satisfaction of a
18 jury.

19 In that regard, you are entitled to a speedy
20 and public trial before a jury of your peers here in
21 Pennington County, South Dakota. And a jury of your
22 peers means a jury composed of ordinary, everyday
23 citizens of Pennington County.

24 At that trial, not only does the state have a
25 burden of proving its case, but you have a couple of

1 serious constitutional rights. The first one is what
2 we call the right of confrontation. And that,
3 essentially, means the right to see and hear the
4 testimony of the witnesses called by the state when
5 they are placed under oath, and for you to have the
6 opportunity to question or cross-examine them.

7 That is the confrontation our -- the U.S.
8 Constitution talks about and the meet the witnesses
9 face to face that our state constitution addresses.

10 You have a second right. The state issues
11 subpoenas to make people come to court and testify.
12 You have a right to do the same thing. It's called a
13 right to compulsory process. What it means is you
14 have the power and the right to my assistance in the
15 issuance of order courts or subpoenas to make people
16 come to court and testify on your behalf.

17 With any charge you have a -- eventually you
18 are called upon, as you will be today, to answer the
19 charge and that is to respond by making a plea of the
20 guilty or not guilty varieties. You are aware of
21 those pleas from your previous arraignment, but I will
22 go over them again.

23 The not guilty pleas are essentially two: A
24 not guilty plea; and a not guilty by reason of
25 insanity. Both of those pleas are usually made

1 simultaneously if the insanity plea is used.

2 The guilty pleas are commonly three: A
3 straight forward guilty; a guilty but mentally ill
4 whose major impact affects the sentencing options
5 available to the Court; and a no-contest plea,
6 officially known as nolo contendere. But the no
7 contest plea essentially has you admitting to the
8 judge that -- or saying to the judge, Judge, I won't
9 admit I committed the crime or every act necessary for
10 that crime, but on the other hand, I won't deny it.

11 And I understand that if I plead no contest,
12 you can sentence me just as though I plead guilty or
13 if a jury convicted me of the crime. In other words,
14 I am exposed to the same maximum possible sentence
15 that I could get if I plead guilty. It takes special
16 permission of the Court to use that plea and it
17 doesn't come very often -- I think twice in the ten
18 years I have been here -- so that plea is hard to get.

19 The critical factor when one enters a guilty
20 plea is making sure that you do so voluntarily; that
21 is, after considering all the facts, you have had
22 enough time and -- to discuss it with counsel, think
23 about it, and weigh your options, and decide for your
24 own personal view and benefit this is the best way to
25 resolve the case against you.

1 And if you enter a plea of guilty, most of
2 the rights I just discussed will go away. Obviously
3 the presumption of innocence disappears.

4 You get to keep two essential rights: Your
5 right to have copies of the papers and know what you
6 are supposed to have done wrong; and your right to the
7 assistance of attorneys.

8 But you have to give up part of your right to
9 silence and the right against self-incrimination.
10 Obviously, if you enter a plea of guilty, you are
11 speaking and you are incriminating yourself.

12 Secondly, you have to give me enough
13 information so that I believe you actually committed
14 the crime. If I don't think you committed the crime,
15 I will not accept a plea of guilty.

16 You give up -- the state upon a plea
17 agreement has nothing left to prove so its right or
18 its obligation to prove its case beyond a reasonable
19 doubt disappears.

20 If you enter a plea of guilty, there is no
21 need for a trial so you are giving up your right to
22 the speedy and public trial before a jury of your
23 peers here in Pennington County.

24 And again, if there is no trial, your rights
25 that are part of that trial, your rights to see, hear,

1 and question the witnesses of the state, and your
2 right to use my court orders to make people come to
3 court go away as well. There is simply no place in
4 the remaining proceedings to do this.

5 Once you enter a plea of guilty, and I am
6 satisfied that you committed that crime, the only
7 thing left to occur is the sentencing as a result of
8 that plea.

9 Do you have any questions about the rights
10 that I just explained?

11 **THE DEFENDANT:** No, sir.

12 **THE COURT:** Do you understand them?

13 **THE DEFENDANT:** Yes, sir.

14 **THE COURT:** Need any further explanation of
15 them?

16 **THE DEFENDANT:** No, sir.

17 **THE COURT:** All right.

18 Do you know what the maximum possible
19 sentence for this charge is?

20 **THE DEFENDANT:** Yes, sir.

21 **THE COURT:** What is it?

22 **THE DEFENDANT:** Five years.

23 **THE COURT:** Five years in the penitentiary
24 and/or a \$10,000 fine.

25 Any questions about that?

1 **THE DEFENDANT:** No, sir.

2 **THE COURT:** This is presented to the Court as
3 an agreed disposition, meaning the Court will accept
4 the agreement of the parties as to the disposition or
5 sentence it will impose at least insofar as those
6 terms go. It's a very rare thing for the Court to do.

7 Upon consideration of the matters here for me
8 to accept the plea agreement and let you plead to it,
9 I have to accept the agreed disposition. I have
10 looked at the papers and I am willing to do so in this
11 case, which means that if you accept the plea
12 agreement and enter the plea of guilty, as is
13 indicated, you will be sentenced to a five-year
14 penitentiary sentence suspended except for a period of
15 approximately 90 days and credit for the time served,
16 which would make you eligible for release,
17 essentially, immediately.

18 There would be a probationary period of five
19 years; and the terms would be very simple: Number
20 one, you would follow the recommendations of your
21 Court Service's Officer.

22 Number two, you would obey all laws and
23 commit no crimes. I am obviously not talking about
24 speeding tickets, but I wouldn't get very careless
25 after that.

1 Do you understand me?

2 **THE DEFENDANT:** Yes, sir.

3 **THE COURT:** There would be a requirement that
4 you make regular payments within your means to
5 reimburse the county for the expenses it has incurred
6 on your behalf.

7 Do you have any questions about that?

8 **THE DEFENDANT:** No, sir.

9 **THE COURT:** Now, as I indicated earlier,
10 since this is a new charge resulting from the plea
11 agreement, and it's brought by way of a complaint
12 signed by the state, you have a right to a preliminary
13 hearing. They are commonly held in Magistrate Court
14 though they can be held in front of a Circuit Court
15 Judge. The real purpose of that is to see if there is
16 enough evidence to make any sense to go forward with
17 the crime or the prosecution. The Grand Jury serves
18 that function in an indictment, but without an
19 indictment, an intervening judge makes a judicial
20 decision in that regard.

21 To come before me and enter the plea, you
22 either have to have the preliminary hearing or waive,
23 give up, your right to the preliminary hearing.

24 It is my understanding that you are going to
25 give that up and enter the plea today; is that

1 correct?

2 **THE DEFENDANT:** Yes, sir.

3 **THE COURT:** The state needs to read the
4 charge.

5 If you would be so kind.

6 (Whereupon, the Information was then read
7 aloud in open court.)

8 **THE COURT:** Is that -- do you have any
9 questions about the charge, Ms. Rios?

10 **THE DEFENDANT:** No, sir.

11 **THE COURT:** Do you need any further
12 explanation of any elements or things contained in
13 that charge?

14 **THE DEFENDANT:** No, sir.

15 **THE COURT:** Do you have any questions at all
16 about your rights, the consequences, or the nature of
17 the charge?

18 **THE DEFENDANT:** No, sir.

19 **THE COURT:** Are you ready to proceed?

20 **THE DEFENDANT:** Yes, sir.

21 **THE COURT:** Have you had enough time to think
22 about this?

23 **THE DEFENDANT:** Yes, sir.

24 **THE COURT:** Have you had sufficient time to
25 talk with your attorneys and weigh the pluses and

1 minuses, pros and cons, of entering this agreement?

2 **THE DEFENDANT:** Yes, sir.

3 **THE COURT:** Now, lastly, it must be your own
4 specific and voluntary decision. After all the input
5 from whoever you discussed it with and however much
6 thought you gave it, you must come to the decision
7 that says I, myself, Thelma Rios think this is the
8 best way to go and I do so willingly. Okay.

9 Is that -- can you say that to me openly and
10 honestly that you thought about it, you seriously
11 considered it, and you wish to do this?

12 **THE DEFENDANT:** Yes, sir.

13 **THE COURT:** Anybody make any threats or
14 promises to you except for the plea bargain as a
15 promise and the implied possible consequences of
16 former charges?

17 If you understand what I am saying, obviously
18 being charged with a serious crime has an implied
19 threat, and a plea bargain has some promises. If you
20 do this they will give you this.

21 Other than those things, anybody made any
22 threats or promises to you?

23 **THE DEFENDANT:** No, sir.

24 **THE COURT:** Are you under the influence of
25 drugs or alcohol today?

1 **THE DEFENDANT:** No, sir.

2 **THE COURT:** All right.

3 Would you please come forward, ma'am.

4 Okay. Ma'am, you are charged here today with
5 an accessory to kidnapping. The formal charge was
6 read aloud, but specifically, it alleges, again, that
7 between December 1975 and September of 2009, in
8 Pennington County, South Dakota, you committed a
9 public offense known as accessory to kidnapping.
10 That's the Class 5 felony carrying the five years
11 potential sentence to the penitentiary and a \$10,000
12 fine. And in committing that offense, you did, with
13 the intent to hinder, to delay, or prevent, basically,
14 the discovery, detection, apprehension, prosecution,
15 conviction, or punishment, all or any one of those, of
16 John Graham, Theda Clarke, and other known or unknown
17 principles and accessories to the crime for the
18 commission of a felony or render assistance to them in
19 violation of 22-3-5. That, in the State of South
20 Dakota, if you did those things, is a Class 5 felony.

21 Do you understand the charge?

22 **THE DEFENDANT:** Yes, sir.

23 **THE COURT:** Now, in the charge -- to that
24 charge, what is your plea?

25 **THE DEFENDANT:** Guilty, Your Honor.

1 **THE COURT:** All right.

2 In here it says -- did you with some intent
3 to hinder, delay, or prevent the discovery in any way,
4 shape, or form, detention, apprehension, prosecution,
5 conviction, or punishment, of John Graham, Theda
6 Clarke, or any other principles and accessories
7 involved in this felony which here, I believe, is the
8 murder of Anna Aquash. All right.

9 Did you do those things?

10 **THE DEFENDANT:** Yes, sir.

11 **THE COURT:** All right.

12 In particular, were you aware of relaying a
13 message to have Anna Mae brought to Rapid City?

14 **THE DEFENDANT:** Yes, sir.

15 **THE COURT:** And did you hear others
16 discussing Anna Mae?

17 **THE DEFENDANT:** Yes, sir.

18 **THE COURT:** And the bringing of her to Rapid
19 City?

20 **THE DEFENDANT:** Yes, sir.

21 **THE COURT:** Did you provide your apartment to
22 others?

23 **THE DEFENDANT:** Yes, sir.

24 **THE COURT:** Regarding Anna Mae, for purposes
25 related to Anna Mae?

1 **THE DEFENDANT:** Yes, sir.

2 **THE COURT:** Okay.

3 Did you hear or -- hear any discussions among
4 others about the possibility or the thought that Anna
5 Mae should be killed or offed?

6 **THE DEFENDANT:** Yes, sir.

7 **THE COURT:** Okay.

8 Now, if those statements are true, that you
9 just made to me, there is a factual basis for my
10 finding you guilty and accepting your plea of guilty
11 to the charge of accessory to kidnapping.

12 So I am going to ask you once again, are the
13 statements and admissions you just made to me true?

14 **THE DEFENDANT:** Yes, sir.

15 **THE COURT:** Based upon those statements, the
16 plea agreement, other matters of evidentiary value
17 that are contained within the file, I will find that
18 there is a factual basis to find you guilty and will
19 hereby find you guilty of the crime of accessory to
20 kidnapping.

21 Now, there has been a question of sentencing
22 and when it would occur. You have an automatic right
23 to 48 hours between now and the sentencing to be done.
24 You can waive that right if it is your desire, but to
25 do that, you would also have to waive the right to a

1 presentence investigation. The state would have to
2 waive its right for a presentence investigation, which
3 is normally an accumulation of facts, evidence,
4 opinions, and other matters that the judge might want
5 to consider both in aggravation and mitigation; that
6 is, making the crime worse or less blame worthy than
7 it otherwise would. That can be a compilation taking
8 a number of weeks and provide information to the
9 Court.

10 If you are -- if you wish to be sentenced
11 today -- and I have no idea how fast you wish to
12 proceed -- you would have to waive that as would the
13 state. With an agreed disposition, as indicated, I am
14 not so concerned about it. But it may be necessary if
15 at some point and another if there is to be what we
16 call an interstate transfer of probationary terms
17 because another state will have to decide whether they
18 are willing to accept you for supervision within their
19 system. And to do that they may want to know more
20 about this than appears on a relatively cold record.

21 Do you understand that?

22 **THE DEFENDANT:** Yes, sir.

23 **THE COURT:** So defense counsel, Mr. Kinney,
24 how does your client wish to proceed at this time?

25 **MR. KINNEY:** Your Honor, she intends to waive

1 the 48-hour time period and proceed with sentencing
2 today.

3 **THE COURT:** And is that true, ma'am, you wish
4 to be sentenced in about the next three minutes?

5 **THE DEFENDANT:** Yes, sir.

6 **THE COURT:** How does the state feel about the
7 presentence investigation?

8 **MR. OSWALD:** We're fine with the waiver,
9 Judge. We feel it's knowingly, voluntarily, and
10 intelligently entered.

11 Can I speak with Mr. Kinney for one minute,
12 Judge?

13 **THE COURT:** Yes.

14 **MR. KINNEY:** Your Honor, at this time, I
15 would make a motion to seal the unredacted plea
16 agreement that is before the Court. As we discussed
17 in chambers there are two versions, and we make that
18 motion at this time.

19 **THE COURT:** There is, for diverse interest
20 discussed with me by both the state and the defense
21 concerning the plea agreement, there will be a
22 redacted version of the plea agreement placed in the
23 public record. And a complete and full plea agreement
24 will be placed within the court file in a sealed
25 version which is openable only by my order or some

1 court higher than I.

2 And that's the motion by both the state and
3 the defense?

4 **MR. JACKLEY:** Yes, Your Honor.

5 **THE COURT:** So be it.

6 Is there any reason -- do you have anything
7 anybody wishes to say?

8 **MR. KINNEY:** No, Your Honor. We ask the
9 Court adopt the agreed upon disposition.

10 **THE COURT:** Well, I think I am bound to that
11 or we can go back to --

12 **MR. KINNEY:** Square one.

13 **THE COURT:** I am content to do that.

14 Is there any reason why I should not impose
15 sentence upon you today?

16 **THE DEFENDANT:** No, sir.

17 **THE COURT:** All right.

18 That having been said, and with the Class 5
19 felony, the parameters of this sentence are not beyond
20 or particularly unusual in sentences given for Class 5
21 felonies. That is, some of them are harsher than the
22 one agreed to and some of them are markedly less
23 harsh.

24 But there is a five-year penitentiary
25 sentence imposed. I am going to suspend the execution

1 of that sentence on the following terms and
2 conditions: Number one, you serve a period of 90 days
3 in jail with credit for time served.

4 You will obey all laws and follow all of the
5 recommendations of your Court Service's Officer.

6 Those are relatively simple probationary terms; but
7 because they are that simple, I will expect absolute
8 and complete compliance with those terms.

9 Do you have any questions about that?

10 **THE DEFENDANT:** No, sir.

11 **THE COURT:** You will be required to reimburse
12 the county for all expenses incurred on your behalf
13 and to set up a stream of payments to that end.

14 Understood?

15 **THE DEFENDANT:** Yes, sir.

16 **THE COURT:** I believe the attorney's fees
17 will be substantial. My guess somewhere between ten
18 and \$20,000 at this stage and could exceed that. I
19 don't know where they are, but they are up there. I
20 have been signing vouchers that have a lot of numbers
21 on them.

22 There is filing fees of \$104. There will be
23 some transcript costs from the Grand Jury. The
24 amounts are not specific but as a rule those are not
25 horrendous, particularly compared to any other costs.

1 Any other costs other than filing fees and
2 transcript costs from the state?

3 **MR. JACKLEY:** No, Your Honor.

4 **THE COURT:** Number one, you may appeal this
5 judgment and sentence within 30 days of when it is
6 signed and filed. I will sign and file it, in all
7 likelihood, the first part of next week. And so your
8 30 days would run from some time the first part of
9 next week.

10 The parole eligibility, should you go to the
11 penitentiary, is -- I don't have a clue. I am
12 assuming 25 percent, but I don't know that. Parole
13 eligibility depends upon the number of prior felonies
14 one has had -- prior convictions for felonies. I
15 don't know where we sit on that. I don't believe
16 there are any.

17 And secondly, sometimes the nature of the
18 underlying crime, crimes of violence and the like, can
19 carry an enhanced one of 30, 35, 40 percent. Things
20 of that nature. What I am telling you at this stage
21 is I don't have a clue. But it's a minimum of
22 25 percent of your time and 40 percent of your time, I
23 believe.

24 **MR. KINNEY:** Your Honor, because the
25 information alleges that the time period was all the

1 way up to September of 2009, the new system of parole
2 would apply as opposed to the old system. And if
3 accessory to kidnapping is considered a violent crime
4 we're under the understanding of 50 percent.

5 **THE COURT:** All right.

6 So there is a chance if you go to the pen you
7 got to serve two-and-a-half years before you are
8 eligible for parole less credit for time served.

9 If you don't go to the penitentiary, it
10 doesn't matter. But if you do go to the penitentiary,
11 the time you actually sit in the big house until you
12 are set out would be two-and-a-half years.

13 Understood?

14 **THE DEFENDANT:** Yes, sir.

15 **THE COURT:** Questions about that?

16 **MR. KINNEY:** Your Honor, as far as the costs
17 go, she will have to make payments.

18 **THE COURT:** Understood.

19 **MR. KINNEY:** As well as the court-appointed
20 attorney's fees and that is what she was asking about
21 to me.

22 **THE COURT:** Yeah. You are going to set up a
23 payment schedule.

24 Frankly, I don't know what your means are,
25 but I would be surprised if you will get them all paid

1 before your probation runs out. I do expect a
2 significant and serious effort to pay those fees.
3 Regardless, whatever is remaining unpaid, if and when
4 your probation is terminated, it will become a lien or
5 judgment against you for collection from any assets
6 you may thereafter incur.

7 I mean, those things are not going to go
8 away. And simply because they won't go away, and you
9 won't be able to pay them in their entirety, I do
10 expect a meaningful attempt to pay them. I mean, ten
11 dollars a month ain't going to fly.

12 So there is also, of course, with this a new
13 charge that requires, I believe, additional processing
14 with the Sheriff's Department. So what I am going to
15 do is issue a warrant of arrest with a PR bond which
16 will allow you to go over and be processed and
17 released on that bond, all right.

18 I think that is sufficient, is it not,
19 counsel?

20 **MR. OSWALD:** It is.

21 **THE COURT:** And that's consistent with the
22 plea agreement; is that correct?

23 **MR. OSWALD:** Yes.

24 **MR. KINNEY:** Your Honor, upon entry of the
25 written judgment, will the bond posted by a third

1 party be exonerated?

2 **THE COURT:** Yes. I think that was
3 substantial as I recall it, after numerous discussions
4 on that issue.

5 **THE DEFENDANT:** Thank you, sir.

6 **THE COURT:** Yeah.

7 We will turn now to the State versus John
8 Graham. We have a number of motions pending, but the
9 first thing I want to clarify is, I am assuming that
10 this process, to date, has reduced the question about
11 the number of peremptory challenges to what I am
12 assuming are going to be somewhere in the vicinity of
13 25 a side, plus or minus a couple, to account for the
14 base 20, plus the additional challenges that are
15 associated with alternate jurors?

16 **MR. MURPHY:** That would be my understanding,
17 Your Honor, although, of course, during voir dire if
18 it appears that we're having a substantial difficulty
19 finding unbiased jurors or those who have not been
20 affected by pretrial publicity, we would certainly
21 revisit the issue at that point.

22 **THE COURT:** I understand that.
23 The state have any questions about that?

24 **MR. JACKLEY:** No, Your Honor.

25 **THE COURT:** Considering the age of the case,

1 and the fact that a good share of the potential jurors
2 will not have been either born or old enough at the
3 time of the alleged event to have recollections from
4 that point in time, realizing there has been publicity
5 in the current time, I am thinking an original call of
6 100 jurors would be sufficient.

7 Does anybody disagree with that?

8 To go larger than that, I have to do the
9 jurors in relays or go down to the Civic Center.

10 **MR. MURPHY:** Well, Your Honor, my main
11 concern about going with a 100 jurors is that the case
12 in and of itself has some sensational components, but
13 as the Court is aware, the state is alleging that my
14 client has committed a sexual assault against
15 Ms. Aquash. And my past experience is that that
16 allegation alone will affect a number of jurors. I
17 picked a jury out in Kadoka on a rape case and we had
18 82 jurors and I recall probably 15, 18 for cause just
19 on that issue alone.

20 **THE COURT:** Yeah.

21 **MR. MURPHY:** And so when you get into the
22 pretrial publicity, the feelings about the American
23 Indian Movement and the sexual assault you kind of got
24 a perfect storm of potential cause challenges.

25 **THE COURT:** And my experience in the sexual

1 offenses runs the same way. The percentage of jurors
2 that are acquainted with either relatives, themselves,
3 family members, or claims, whether justified or
4 unjustified, is always a very surprising number to me
5 and I think that creates a bit of a problem for us.

6 Mr. Jackley? Mr. Oswald?

7 **MR. JACKLEY:** Your Honor, were you talking 25
8 perempts or 20 each?

9 **THE COURT:** Well, you have a base 20, but
10 once we start adding alternate jurors and we're
11 sitting here looking at Thanksgiving to Christmas,
12 although I expect we won't be going that long at this
13 stage, could be in error, but I think were -- we're
14 still going to look at several days of jury selection.
15 We're going to take half a day or better to take care
16 of the peremptory challenges once we have a panel
17 seated.

18 So we're talking about Christmastime looming
19 over the horizon and having jurors who thought that
20 Monday was about their last day of -- Tuesday would be
21 their last day of jury service be called in to sit for
22 two or three weeks on a trial.

23 I am concerned about where we go.

24 **MR. JACKLEY:** We would request at least a
25 hundred then, Your Honor.

1 **THE COURT:** Well, I don't think we get by
2 with less than a hundred.

3 My concern is do we need a hundred and a
4 half. And as I think about it -- I am thinking I do,
5 but I think we could start with a panel of a hundred
6 and have a panel of 50 on standby if we need to come
7 in and start over with the voir dire.

8 Mr. Krattenmaker, how do you prefer to do
9 that? If we say we need -- we want at least a standby
10 of 150.

11 Do you prefer we do them here in relays?

12 **MR. KRATTENMAKER:** That would be my
13 suggestion. I will leave it to counsel.

14 **THE COURT:** Mr. Krattenmaker is our court
15 administrator responsible for arranging the facilities
16 necessary to handle this matter.

17 And is that agreeable to counsel?

18 **MR. JACKLEY:** Yes, Your Honor.

19 I was going to add, too, my understanding --
20 again, anticipating from the Marshall trial, but in
21 the last two federal trials they were able to do it --
22 and I know voir dire is different in the federal
23 system -- but for less than a hundred, so I think that
24 makes sense.

25 **THE COURT:** Well, it's -- I hope it does.

1 And I remain somewhat optimistic that we can get that
2 done. But absent the sexual allegations I would be
3 extremely comfortable with a hundred, but you never
4 know whether you are going to get two or 40 of those.
5 And that's the -- going to be the big unknown, coupled
6 with the time frame from basically black Friday to
7 Christmas Eve. So that's going to create some
8 problems as well.

9 So we'll start with a panel of 100, Jeff.
10 And however we call up the second one to have them
11 available. I suspect we should at least have them
12 come in and be videoed or -- they already will have
13 been.

14 Anything else?

15 **THE CLERK:** When do you want to release the
16 jurors' names to counsel, Your Honor?

17 **THE COURT:** Mr. Murphy?

18 **MR. MURPHY:** Tomorrow.

19 That was one of the things on my list. If we
20 can get the preselect going, we're going to have --

21 **THE COURT:** I doubt we're going to do
22 preselects because we're not -- you know, no matter
23 what we call, we don't have a clue how many are going
24 to show up here. And we're going to have to shift
25 them around.

1 We can give you the names of the potential
2 jurors. I can give those to you well in advance, but
3 preselect just makes no efficiency for us here at all.

4 **MR. MURPHY:** Well, if we could get the names
5 and the questionnaires, copies of the questionnaires
6 and all that as soon as possible, because the
7 logistics of managing between 100 and 150 individual
8 jurors is something that's pretty burdensome.

9 **THE COURT:** Monday, folks?

10 **MR. JACKLEY:** That would be good for the
11 state, Your Honor.

12 **THE COURT:** Okay.
13 You can do that, Stan?

14 **THE CLERK:** We should be able to, Your Honor.

15 **THE COURT:** Say again.

16 **THE CLERK:** We should be able to, Your Honor.
17 That's not a problem.

18 And then have we decided on the alternates
19 yet or to be determined?

20 **THE COURT:** It will be determined, but there
21 will be within that number -- I have to go back and
22 read the statute, but you get quite a number of extra
23 peremptorys for alternates. It surprised me that the
24 number was that high, but it is. So I am guessing
25 they'll be another five a side.

1 Two alternates?

2 **MR. MURPHY:** That would be fine by me, Your
3 Honor. If we had two alternates, randomly dismissed
4 at the end of the case as opposed to being the last
5 picked. And I think the statute would require five
6 additional peremptories or four. I am not sure.

7 **THE COURT:** That's my thought.

8 And I prefer the random extraction, pull a
9 number out of the hat, and those two go home.

10 Anything else logistically we need do?

11 **MR. MURPHY:** Your Honor, the only other
12 thing -- and Mr. Oswald and I briefly talked about
13 it -- he emailed you quite some time ago saying the
14 state anticipated starting their witnesses on
15 December 2.

16 In light of Ms. Rios' situation, I questioned
17 whether that had changed. It appears their witnesses
18 are going to be ready on the 2nd. So even if we
19 finish jury selection early, it's my understanding now
20 that we aren't going to start taking testimony until
21 the morning of December 2.

22 **THE COURT:** Okay.

23 Are we --

24 **MR. OSWALD:** Yes. Originally, Judge, I
25 thought, from leave of the Court, I asked permission

1 to have it start at one o'clock. And just to be on
2 the safe side, I have them coming in at 8:30 on
3 December 2.

4 **THE COURT:** They also are aware they may not
5 go until the next day as well?

6 **MR. OSWALD:** Yes.

7 **THE COURT:** I have no idea how fast or slow
8 jury selection is going to go. All counsel here are
9 experienced at what they are doing and I suspect we
10 will get it done in workman-like manner. All right.
11 That takes care of the logistics.

12 Now, we have some motions pending.

13 Mr. Murphy?

14 **MR. MURPHY:** Your Honor, I have my -- the one
15 that requires evidence is my motion in limine
16 regarding the Medicine Man issue. I do have Donovan
17 Sprague, the expert that we noticed up, here and ready
18 to testify and so if you want to take him, that would
19 be great my us.

20 Otherwise, I know Mr. Hanna has his motion to
21 quash the Dick Marshall subpoena also pending, and I
22 don't know if he has evidence on that.

23 **THE COURT:** Mr. Hanna?

24 **MR. HANNA:** Judge, that depends on whether or
25 not the prosecutor will stipulate to certain facts. I

1 do have witnesses who are available to testify if that
2 becomes necessary.

3 Otherwise, I had anticipated primarily just
4 argument today.

5 **THE COURT:** State?

6 **MR. JACKLEY:** I don't know what facts he
7 wanted to stipulate to so it's hard for me -- we don't
8 have any witnesses. We don't know what's all being
9 alleged at this point.

10 It is our intent to request that Dick
11 Marshall be subpoenaed and testify at trial. If he
12 takes the fifth, which is my understanding that he's
13 indicated he's going to do now, it would be our desire
14 to request the Court for an order to compel under a
15 grant of immunity.

16 **THE COURT:** I understand there is potential
17 immunity to what? Prosecution for?

18 **MR. JACKLEY:** My understanding is it would be
19 a grant of immunity for prosecution with the exception
20 of perjury.

21 **THE COURT:** Okay.

22 Including -- is there a probationary factor
23 in here?

24 **MR. JACKLEY:** The status of the probation --

25 **THE COURT:** Or of parole?

1 I don't know about y'all, but I consider the
2 possibility of going back to jail to be -- in the
3 course of testimony to be incriminating. I may be
4 wrong, but --

5 **MR. JACKLEY:** Your Honor, our request would
6 be for derivative use -- an order to compel for
7 derivative use immunity.

8 **THE COURT:** Mr. Hanna?

9 **MR. HANNA:** I am not certain what they mean
10 by derivative use immunity.

11 **THE COURT:** I think I understand. It's kind
12 of the fruit of the poison tree doctrine; that it
13 cannot be used for prosecution for anything coming out
14 of -- arising out of his testimony.

15 **MR. HANNA:** I am --

16 **THE COURT:** Is that a fair statement?

17 **MR. JACKLEY:** Yes, Your Honor.

18 **MR. HANNA:** Judge, I would like to see
19 whatever their motion is in terms of immunity. What
20 exactly they are going to be offering.

21 My argument would be -- first of all, he is
22 taking the Fifth Amendment.

23 Secondly, if they try to seek an order to
24 immunize his testimony, such an order would not be
25 sufficient to protect him from criminal liability in

1 at least two other states. Crimes were committed here
2 in the state of Colorado, in the state of Wyoming, and
3 in the state of South Dakota. The government's theory
4 is that a woman was kidnapped in Colorado, driven
5 against her will while being kidnapped through Wyoming
6 and into South Dakota.

7 So regardless of what the boundaries they are
8 talking about in terms of derivative use immunity, the
9 South Dakota Attorney General does not have the
10 authority to bind Colorado or Wyoming to refrain from
11 using any testimony that Mr. Marshall had in a
12 prosecution that could bring in either of those
13 states.

14 **THE COURT:** That would be my understanding
15 without any effort at research.

16 Mr. Jackley?

17 I mean, my view is -- as to the underlying
18 motion to quash is your client, if subpoenaed, has to
19 come to court and has to exercise his right.

20 **MR. HANNA:** Uh-huh.

21 **THE COURT:** He's always subject to changing
22 his mind no matter how many affidavits are signed
23 before hand. And I think he has to stand up to the
24 plate and the pitch gets thrown and then he decides to
25 swing or step out of the box.

1 **MR. HANNA:** Well, I think the proper
2 procedure is he is called into the box outside of the
3 presence of the jury. He is then asked a question.
4 He then asserts his Fifth Amendment because he is not
5 supposed to be taking his Fifth Amendment privilege in
6 front of the jury. Which is why the preferred process
7 is to --

8 **THE COURT:** If that's the procedure,
9 Mr. Hanna, that's what will happen. I frankly don't
10 know at this stage. But if that's the procedure -- I
11 have not even looked at that. If that's the
12 procedure, I am more than content with doing that.

13 **MR. HANNA:** So with regard to this motion --
14 this request they are making for an order to give
15 Mr. Marshall derivative use immunity, which I frankly
16 don't know what it means. I know there is such a
17 thing as transactional which means we're not going to
18 charge him with anything. And I know there is such a
19 thing as use immunity which is we promise not to use
20 his testimony in a future prosecution.

21 The idea of derivative use immunity is
22 frankly something I have never heard of.

23 **THE COURT:** Well, as I described it to
24 Mr. Jackley, it's either included in normal use
25 immunity or it's an extension of it. They won't use

1 that to go find additional evidence of any way, shape
2 or form. That's what I perceive it to be, but
3 Mr. Jackley can spell it out.

4 But in any event, that issue will come up if
5 and when we get to the crux of the problem and I will
6 certainly be prepared to address it at that point in
7 time.

8 **MR. HANNA:** Thank you.

9 What I would ask the Court to do is I would
10 like to address an issue today that has nothing to do
11 with the Fifth Amendment or an order to immunize with
12 the issue of immunity. And that is the issue of the
13 government's improper purpose for seeking to compel
14 the testimony of Richard Marshall. And it is on that
15 issue that I would ask to be heard and ask leave to
16 call witnesses should it be necessary to do so.

17 And that issue has nothing to do with
18 immunity or an order to immunize if, in fact, the
19 government's purpose here is to seek testimony that
20 they intend to use in a prosecution to revoke parole
21 for a perjury charge, then that is an illegitimate
22 purpose, it is unconstitutional, and the Court can
23 make a ruling on that that has nothing to do with
24 immunity or use immunity or the Fifth Amendment.

25 If that is their purpose then the Court

1 should quash the subpoena on those grounds. And I am
2 prepared to address that today.

3 **THE COURT:** Mr. Jackley?

4 **MR. JACKLEY:** Your Honor, that is not the
5 state's purpose. We stated in our response what the
6 state's purpose is.

7 With respect to the parole issue, I
8 identified in our filing that the Attorney General
9 doesn't bring a parole violation proceeding, the
10 Attorney General doesn't adjudicate a parole
11 revocation hearing.

12 The issue with respect to parole really
13 doesn't have anything to do with perjury. Although, I
14 don't bring it. The issue with respect to parole came
15 up at Dick Marshall's detention hearing. The issue
16 and the problem that he has with the parole board, and
17 where all the discussions have been, he's already been
18 adjudicated a first strike --

19 **MR. MURPHY:** Your Honor --

20 **THE COURT:** Just a minute.

21 **MR. MURPHY:** I apologize for interrupting
22 you, Mr. Jackley. Can I call my witness? He's been
23 here since 2:45. He teaches a college class at 4:00.
24 I will do an expedited direct.

25 **THE COURT:** Yeah. Let's do that.

1 **MR. MURPHY:** Thank you.

2 And then Mr. Hanna and Mr. Jackley can argue
3 this out.

4 **MR. HANNA:** Fifteen minutes or so, Judge?

5 **THE COURT:** Yes.

6 **MR. MURPHY:** Your Honor, at this time the
7 defense, Mr. Graham, would call Donovan Sprague as a
8 witness.

9 **THE COURT:** Please come here and raise your
10 right hand, sir.

11 DONOVIN SPRAGUE,
12 called as a witness herein, having been duly sworn,
13 under oath testified as follows:

14 **THE COURT:** Please take a seat over there.
15 The microphone should be sufficient.

16 **DIRECT EXAMINATION**

17 **BY MR. MURPHY:**

18 **Q.** Mr. Sprague, I have just put in front of you
19 a series of exhibits --

20 **MR. MURPHY:** And Your Honor, I am going to
21 provide you a copy. The originals are with
22 Mr. Sprague.

23 **Q. (BY MR. MURPHY)** In order to expedite matters,
24 because I understand you have to teach a class at
25 4:00 o'clock today, I am going to go through the

1 exhibits and the government will let me know if they
2 object.

3 Before you is Exhibit A. That's the front
4 cover of a book you wrote?

5 **A.** Yes, it is.

6 **MR. MURPHY:** Okay.

7 The defense would move to admit Exhibit A.

8 I will elicit further testimony in a minute
9 on the actual objects and the relevance.

10 **MR. JACKLEY:** No objection other than this is
11 the first time we have been provided this information.

12 **MR. MURPHY:** I understand that. It's listed
13 in the --

14 **Q. (BY MR. MURPHY)** Turning your attention to
15 Exhibit B, that's the resume that we previously
16 provided to all the parties, correct?

17 **A.** Yes.

18 **Q.** And that lists numerous publications, the
19 fact that you are an author of a number of books?

20 **A.** Right.

21 **MR. MURPHY:** Move to admit Exhibit B?

22 **MR. JACKLEY:** No objection, Your Honor.

23 **THE COURT:** Will be received.

24 **Q. (BY MR. MURPHY)** Exhibit C is a letter that
25 you received just in October of 2010 as a contributor

1 to this book that is yet to be published. It's just
2 being put out now by the Smithsonian Institute?

3 **A.** That's correct.

4 **Q.** And this is The Infinity of Nations, which is
5 going to be or is being put out by the National Museum
6 of the American Indian?

7 **A.** That is correct.

8 **Q.** And you have contributed a number of articles
9 about Indian culture for this book?

10 **A.** Yes.

11 **Q.** This is your only copy of the book?

12 **A.** Yes, it is.

13 **MR. MURPHY:** So I am not going to admit the
14 book, but I would ask that Exhibit C be introduced or
15 admitted.

16 **MR. JACKLEY:** No objection, Your Honor.

17 **THE COURT:** Will be received.

18 **Q. (BY MR. MURPHY)** Exhibit D, could you explain
19 to the judge what Exhibit D is?

20 **A.** What Exhibit D is, it's a letter from 1936
21 regarding Chips, the Medicine Man. And if -- it's
22 concerning desire to have restoration or permission to
23 use old Indian remedies in the form of roots and
24 herbs. So this is presented to the -- it's a U.S.
25 Department of the Interior.

1 **Q.** We'll talk a little bit about the
2 significance of this later, but part of your job as a
3 historian and a scholar is to collect antique
4 documents, ancient documents, regarding Indian
5 culture?

6 **A.** Yes. I have a variety of documents like
7 this.

8 **Q.** Okay.
9 And this is a copy from your collection?

10 **A.** Yes, it is.

11 **MR. MURPHY:** Move to admit Exhibit D.

12 **MR. JACKLEY:** No objection, Your Honor.

13 **THE COURT:** Will be received.

14 **Q.** **(BY MR. MURPHY)** Exhibit E, is this also a
15 document from your collection of historical Indian
16 Documents?

17 **A.** Yes, it is. This is excusing the student
18 so-called of the Chips family based on a study in
19 medicine.

20 **Q.** Okay.
21 When you talk about medicine, you mean
22 spiritual practice --

23 **A.** Traditional, yeah, Indian medicine.

24 **Q.** And he was exempted from attending regular
25 school because he was essentially an apprentice to a

1 Medicine Man?

2 **A.** That's correct.

3 **MR. MURPHY:** Move to admit Exhibit E.

4 **MR. JACKLEY:** No objection, Your Honor.

5 **THE COURT:** Received.

6 **Q.** (BY MR. MURPHY) Exhibit F is a license from
7 1940 authorizing a particular individual to be a
8 Medicine Man on the Pine Ridge Reservation?

9 **A.** Yes. That being Charles Horn Chips of Pine
10 Ridge Reservation.

11 **MR. MURPHY:** Move to admit Exhibit F.

12 **MR. JACKLEY:** May I have just a minute with
13 counsel?

14 **THE COURT:** Uh-huh.

15 **MR. MURPHY:** I misspoke. It was Rosebud.
16 This it is on Rosebud.

17 **MR. JACKLEY:** No objection, then, Your Honor.

18 **THE COURT:** Will be received.

19 **Q.** (BY MR. MURPHY) Is that correct?

20 **A.** Yes. Charles Horn Chips was from the Pine
21 Ridge Indian Reservation.

22 **Q.** Okay.

23 The regulation or the license --

24 **A.** To practice is on Rosebud.

25 **Q.** Okay.

1 And Exhibit G is, in fact, that license?

2 **A.** Yes.

3 **MR. MURPHY:** All right.

4 Move to admit Exhibit G.

5 **MR. JACKLEY:** No objection, Your Honor.

6 **THE COURT:** Received.

7 **Q.** **(BY MR. MURPHY)** If you could explain the
8 significance or what Exhibit H is.

9 **A.** Exhibit H is a resolution of the Oglala Sioux
10 Tribe basically recognizing the Horn Chips, Ellis
11 Chips, the third generation direct descendant of Chips
12 Medicine Man and Crazy Horse's friend; and
13 acknowledging the practice and -- of traditional
14 Indian medicine and recognizing him on this particular
15 day, and it was proclaimed in April of 1990.

16 **MR. MURPHY:** Move to admit Exhibit H.

17 **MR. JACKLEY:** No objection.

18 **THE COURT:** G and H will both be received.

19 **MR. MURPHY:** Thank you.

20 **Q.** **(BY MR. MURPHY)** All right.

21 We just kind of railroaded through those
22 exhibits because of time. I want to start now with
23 your examination.

24 Your name is Donovin Sprague, that's

25 D-O-N-O-V-I-N?

1 **A.** That's correct.

2 **Q.** And would you spell your last name?

3 **A.** S-P-R-A-G-U-E.

4 **Q.** Could you summarize your family and ethnic
5 background along with your family lineage?

6 **A.** Yes. I'm Minnecojou Lakota. My great,
7 great, great grandfathers are high back bone or hump.
8 And we're from the Crazy Horse family. And Fred
9 Dupree, from the French man, is also part of our
10 family. All grandfathers.

11 **Q.** All right.

12 And which reservation are you formally or
13 officially recognized by?

14 **A.** I'm from the Cheyenne River Sioux
15 Reservation.

16 **Q.** And could you explain to the Court the
17 similarities between folks who live on the Cheyenne
18 River Sioux Reservation and those who live on Pine
19 Ridge and Rosebud and how they are different?

20 **A.** Well, one thing that's -- that has a common
21 theme among all of that is that the people have a
22 respect for the confidentiality of medicine men and
23 counselors; and among my -- five of my other six
24 books, they all pertain to Rosebud and Pine Ridge and
25 Standing Rock, Cheyenne River. So I've traveled out,

1 you know, to traditional communities to gather this
2 information.

3 Q. Okay.

4 And I don't want to put words in your mouth,
5 but the Cheyenne River Sioux Tribe is not ethnically
6 or culturally distinct from the Lakota, Nakota, or
7 Dakota, is it?

8 A. They are all together.

9 Q. It was -- was it the reservation system or
10 U.S. Government that more or less fractured these
11 populations?

12 A. Yes, it was. It split them up and divided
13 them.

14 Q. How long back do we have to go before these
15 were all one people?

16 A. Well, prior to the -- mid 1880s, you had a
17 group that traveled and lived together, you know, as a
18 large group. And then the mid 1880s a reservation
19 system that then split those into -- in this case in
20 western South Dakota five Lakota reservations.

21 Q. The cultural traditions, the religious
22 traditions, are similar, if not the same, among these
23 groups?

24 A. Yes. All the same.

25 Q. Would you briefly summarize for the Court

1 your formal education?

2 **A.** I have a Master of Arts degree from the
3 University of South Dakota plus 15 hours, and I teach
4 undergraduate and graduate studies as Black Hills
5 State. I also have a Bachelor's from Black Hills
6 State University.

7 **Q.** Okay.

8 Could you summarize your employment history
9 paying particular attention to those matters that
10 relate to the study or relate to Indian culture and
11 Indian religion?

12 **A.** I spent my whole life pretty much except for
13 maybe a couple years working in American Indian
14 organizations or studies. Most recently Black Hills
15 State University for a number of years as an adjunct
16 instructor in graduate studies, undergraduate studies.
17 A consultant for American Indian organizations
18 presently in the area of health.

19 And also as an author of books. I am a
20 writer, an author, and I present at a lot of tribes
21 and universities. Crazy Horse Memorial, I worked
22 there since -- from 1996 to 2010.

23 Prior to that, I was general manager of KILO
24 Radio on Pine Ridge Reservation from 94 to 95.

25 And then prior to that I was with the Iowa

1 Regents Universities where I was the head of American
2 Indian education for the three Iowa universities.

3 Q. What did you do at Crazy Horse or what do you
4 do at Crazy Horse?

5 A. When I worked there, I worked with bringing a
6 lot of speakers in, which included elders and people
7 that talked about traditional culture.

8 Q. And you mentioned that you are an author.
9 How many books have you written?

10 A. The one that you have over there would --
11 that's a contributing author, but I have six of my
12 own, plus that one, plus 20 other major publications
13 that I have written for.

14 Q. Okay.

15 Would it be fair to say the majority of those
16 relate to Indian culture and Indian traditions?

17 A. They all do.

18 Q. All right.

19 You have worked with school systems and other
20 institutions to develop curriculum or curricula for
21 Indian cultural issues?

22 A. Yes. I have developed some Bachelor of
23 Science degree programs for universities as well as
24 working on some Master of Arts programs, specifically,
25 in American Indian studies. I formed several American

1 Indian student organizations at major universities
2 including Iowa.

3 Q. All right.

4 You have also acted as a lecturer around the
5 country on Indian issues?

6 A. Yes. I traveled throughout the United States
7 and Canada and I have spoke at a lot of major
8 universities and I have visited just about every
9 American Indian Reservation in the U.S. and a lot of
10 the first nations in Canada.

11 Q. I want to ask you about your preparation for
12 your testimony today.

13 Do you recall what books or articles or other
14 reference materials you've relied upon other than
15 those you have written yourself when formulating the
16 opinions that I have asked you to testify to?

17 A. Yes. I looked at Lakota Belief and Ritual by
18 James Walker; Black Elk Speaks, writings by John
19 Neihardt; and I also consulted with some, what you
20 would call, traditional medicine men.

21 Q. Okay.

22 And we'll get to those folks in a minute.

23 What materials of your own have you relied
24 upon or referred to when forming the opinions that
25 I'll discussing?

1 **A.** Probably, a lot of it just would be born and
2 raised on the Cheyenne River Reservation. I have a
3 lot of traditional family and that from communities of
4 Cherry Creek and Thunder Butte, Red Scaffold, Iron
5 Lightning, and other suburbs there. But you know, a
6 lot of -- I was around traditional people all my life.

7 **Q.** Okay.

8 And some of the documents we've looked at as
9 exhibits, particularly Exhibits D through H, did you
10 rely or did you refer to documents such as these?

11 **A.** Yes, I did.

12 In fact, as a part of this, that's of a
13 confidential nature, I have a huge document of Horn
14 Chips who was the Medicine Man for Crazy Horse. And
15 that's where some of this comes from. It's an
16 incredibly thick document of his personal diary of his
17 travels and actually doctoring people including many
18 of my own family. It's all written in Lakota and --
19 except the last names appear.

20 So the other part of that is a winter count,
21 which is a calendar. It's a Lakota calendar. And
22 that calendar starts in the late 1700s and comes up
23 the early 1900s. And it's Lakota -- it's all written
24 in Lakota. It's the most important event of the year
25 that took place.

1 **Q.** And the documents that you collect such as
2 these, and the diary you just referred to, you're
3 asked to be an archivist and a contributor to the
4 Smithsonian Institution and other museums in Europe
5 because of your collection of documents related to
6 Indian culture and religion?

7 **A.** That's correct.

8 And I have several other documents with the
9 Smithsonian, but that's the first kind of hard cover
10 big book. And then that coincides with a large
11 exhibit that's on display at the Smithsonian called
12 Infinity of Nations by the same title.

13 **Q.** All right.

14 And essentially, the import of the documents
15 that we've talked about, Exhibits D through H, are --
16 even the United States Department of the Interior and
17 the Tribal governments have a long history going back
18 to the 30s of recognizing in an official way the
19 practices of Indian medicine men in the Dakotas?

20 **A.** That's correct.

21 **Q.** Okay.

22 Let me ask you about the people you've
23 individually consulted with pursuant to my request
24 that you act as an expert witness in this case.

25 Who have you talked to?

1 **A.** The people that I talked to -- and I didn't
2 specifically say I was going to a courtroom. I didn't
3 know for sure what all was going to transpire there.
4 But the people that I consulted with were, just last
5 week I was with Orville Looking Horse, who is the
6 keeper of our sacred white buffalo calf bundle. I
7 have talked to Rick Two Dogs. I have talked to Wilmer
8 Mesteth. And that being the key people right there.

9 **Q.** Would you explain who Rick Two Dogs is?

10 **A.** He's a Medicine Man and leads a lot of
11 ceremonies and sweats.

12 **Q.** What reservation is he from?

13 **A.** He's from Pine Ridge Reservation.

14 **Q.** And Mr. Mesteth?

15 **A.** Mr. Mesteth is -- he's a Lakota studies
16 instructor, language instructor, and also he runs a
17 lot of sweats and that at -- he's also from Pine
18 Ridge.

19 **Q.** All right.

20 And --

21 **A.** Excuse me.

22 And Mr. Looking Horse is from Green Grass,
23 South Dakota, at Cheyenne River where pipe is held.

24 **Q.** And he is the pipe keeper?

25 **A.** Yes.

1 **Q.** Let us talk about the subject matter. We're
2 talking about the confidentiality of communications.

3 Before we get specifically into
4 confidentiality between medicine men and those who are
5 seeking spiritual guidance, could you explain to the
6 Court whether confidentiality as a concept exists in
7 the Lakota, Dakota, Nakota population group?

8 **A.** All of those they require confidential and
9 they respect the privacy and -- within the culture.

10 **Q.** Okay.

11 And what examples outside of the Medicine Man
12 penitent relationship -- what other examples do you
13 know of where confidentiality is a concept that is
14 recognized and --

15 **MR. JACKLEY:** Objection. Relevance, Your
16 Honor.

17 **MR. MURPHY:** Your Honor --

18 **THE COURT:** At ease.

19 **A.** We --

20 **THE COURT:** Hold on. I am still figuring out
21 how I am going to answer the objection.

22 When you speak about peoples, what are you
23 talking about?

24 **MR. MURPHY:** Your Honor, at the last
25 hearing --

1 **THE COURT:** I am not interested in
2 Norwegians.

3 **MR. MURPHY:** No. I said the Lakota, Dakota,
4 Nakota group, which is what we're talking about.

5 At the last hearing you said, at one point, I
6 don't even know if confidentiality is a concept among
7 Indian people as a concept. So I wanted to start
8 there and just get that the notion of confidentiality
9 exists as a concept because we know not all cultural
10 concepts are universal. One that, you know, obviously
11 comes to mind are things like personal space.

12 **THE COURT:** Yeah. And I am much more
13 interested with that point in -- you know, there is a
14 lot of books here, whether any of them mention that
15 and in what context they mention it. And I assume
16 we're going to get to that and I am going to get to
17 read the books.

18 But the concept of confidentiality I think is
19 key in a number of respects, and we'll go. But I
20 don't want to spend -- we can go medicine men as I
21 understand it have probably different roles in
22 different Tribal groups, and I am saying Sioux, and
23 Cherokee, and Comanche and that kind of a thing.

24 **MR. MURPHY:** Let me back up then.

25 **Q. (BY MR. MURPHY)** The population we're talking

1 about is the Lakota, Dakota, Nakota?

2 **A.** Yes.

3 **Q.** Could you explain to the Court what
4 population that is geographically and culturally?

5 **A.** Geographically it includes all of South
6 Dakota today, and it also includes a little bit of
7 northeastern Nebraska and southeastern North Dakota,
8 and a large portion of Minnesota. But prior to that,
9 a much larger area.

10 **Q.** And you've studied cultural practices among
11 Indian or indigenous people nationwide and into
12 Canada?

13 **A.** Yes.

14 **Q.** But I ask you, because the Medicine Man at
15 issue in this case was from this area, to focus on the
16 cultural concepts for the LDN, Lakota, Dakota, Nakota
17 group?

18 **MR. JACKLEY:** Your Honor, I am going to renew
19 my objection because I believe that Mr. Graham is a
20 Canadian Indian, Southern Tutchone, and he's not one
21 of the above-classified categories that he is being
22 asked about.

23 **MR. MURPHY:** Well, Your Honor, the response
24 is that Mr. Gates, the Medicine Man at issue, was
25 identified in the exhibits we have previously provided

1 the Court by Robert Ecoffey as a Lakota Medicine Man.
2 And so it's his traditions that we're talking about.
3 I am going to get to the issue about Mr. Graham being
4 from Canada.

5 But this would be -- if we were talking about
6 the traditional practices of Roman Catholic Priests,
7 we would have to talk about Roman Catholic Priests as
8 apart from their penitence. And that's what I am
9 talking about here --

10 **THE COURT:** Well, I am not sure how tight
11 that is. I am not sure -- I am not sure anybody
12 talking to a Catholic Priest is entitled to the seal
13 of the confessional.

14 **MR. MURPHY:** Well, we're going to get to
15 that.

16 **THE COURT:** Okay.

17 **Q. (BY MR. MURPHY)** So let's talk about Medicine
18 Man from the LDN group. First off, though, we are
19 talking about confidentiality.

20 In the Lakota, Dakota, Nakota traditional
21 group is confidentiality a concept that is understood?

22 **A.** Yes, it is very understood.

23 **Q.** All right.

24 And give me an example of where
25 confidentiality is a well understood concept?

1 **A.** Well, we talk about things as simple as a
2 talking circle or we discuss things among our own
3 people and we say, you know, what stays inside here
4 stays inside versus, you know, this could be told
5 outside.

6 But a Medicine Man and spiritual leader like
7 that, that's his role. It's just a protocol that they
8 honor, the confidentiality of the person they're
9 advising.

10 **Q.** And you've -- so basically what you are
11 saying is if somebody comes to a Medicine Man and
12 seeks spiritual guidance, it is understood that the
13 communication is confidential?

14 **MR. JACKLEY:** Objection. Leading, Your
15 Honor.

16 **THE COURT:** It is indeed that.

17 I am much more interested in the explanation
18 and the proof of that rather than statements.

19 **Q. (BY MR. MURPHY)** Where do you derive that
20 opinion from?

21 What resources, references, conversations, et
22 cetera, have you relied upon to form that opinion?

23 **A.** It's widespread in all the writings of Lakota
24 belief and ritual, of the James Walker, of Black Elk
25 Speaks, of the medicine men that I talked about, as

1 well as it crosses over into ceremony.

2 Q. And how does it cross over into ceremony?

3 A. It crosses over into ceremony like when a
4 person does a sweat lodge or vision quest, and as they
5 are practicing those, and that's all of a
6 confidentiality nature. You don't go and tell people,
7 you know, these matters of what happened. That's
8 between the Medicine Man and the -- you might say the
9 client.

10 Q. Okay.

11 Now, let's get to the client aspect
12 Mr. Jackley has brought up that my client, Mr. Graham,
13 is from an indigenous group out of Canada. One of the
14 first bands of Canada or First Nations of Canada.

15 Have you had experience with Canadian
16 indigenous groups?

17 A. Yes, I have.

18 Q. Now, apart from United States recognition and
19 whether Canadian Indians are recognized as Indians by
20 the U.S. Department of Interior, among Indian people
21 in the Lakota, Dakota, Nakota group, are people from
22 First Nations recognized or accepted as being Indian?

23 A. Yes, they are. They are all like brothers
24 and sisters of ours.

25 And I do have even a Choctah Nation book

1 which is totally outside of this area and they have
2 the same commonality.

3 Q. So from what you've gleaned from the research
4 you've done, and you've talked about if somebody like
5 Mr. Graham came -- or say somebody who was
6 Caucasian -- say if I came to a traditional, spiritual
7 leader or practitioner, a Medicine Man, on Pine Ridge,
8 and sought spiritual guidance from him, and if he was
9 willing to meet with me about that, the fact that I'm
10 Caucasian or he's Canadian, would that affect the
11 confidentiality of the communications?

12 A. No, it would not, and they would honor their
13 confidentiality.

14 Q. All right.

15 Do you have any doubt in your mind about
16 that?

17 A. No, not at all.

18 Q. And let me ask you -- I mean in years, how
19 many years have you been studying Indian culture and
20 religion?

21 A. About 40 years.

22 Q. All right.

23 I understand your class has already started
24 over at BH so I am going to finish my direct
25 examination at this point.

1 You will have to answer questions --

2 **THE COURT:** Whoever is pitching.

3 **CROSS-EXAMINATION**

4 **BY MR. JACKLEY:**

5 **Q.** Mr. Sprague, it's my understanding you are
6 not an enrolled Oglala Sioux Tribal member?

7 **A.** I am enrolled Minnecojou Lakota. It's one of
8 the seven bands of the Lakota. We were, like I said,
9 all together as one, but we were separated by
10 reservation creation.

11 **Q.** So you are not an enrolled member of the
12 Oglala Sioux Tribe, correct?

13 **A.** No.

14 **Q.** And you are not a certified or enrolled
15 member of the First Nations of Canada, correct?

16 **A.** No, I am not.

17 **Q.** And that would include the Southern Tutchone,
18 correct?

19 **A.** That's correct.

20 **Q.** You discussed your formal training to include
21 a Master in Arts, but you have no formal training to
22 be a Medicine Man, correct?

23 **A.** That's correct.

24 **Q.** You have no certification to be a Medicine
25 Man, correct?

1 **A.** That's correct.

2 **THE COURT:** Is there such a thing as
3 certification of medicine men?

4 **THE WITNESS:** No. Only in the world of new
5 age.

6 **Q.** **(BY MR. JACKLEY)** What do you mean by in the
7 world of new age?

8 **A.** It's the non-Indian people. We call them
9 wannabes who want to be Indian and they are charging
10 for our ceremonies in cities and trying to imitate our
11 culture in a negative manner.

12 **Q.** Describe to me what a traditional Medicine
13 Man ceremony is and what it looks like?

14 **A.** Well, a traditional ceremony, there were
15 seven originally talked about from -- like you could
16 find those in the seven rights of the Lakota. And one
17 of the central and most important was described as a
18 sun dance which would take place at least once a year
19 where they actually sacrificed a flesh offering or
20 blood.

21 And another real common one is inipi or sweat
22 ledge, a purification, and that's very commonly done.
23 And that's done before you do any of the other
24 ceremonies.

25 So there were several others which I could

1 also name but they all have to do with, like, making
2 relatives or restoring the earth or making a
3 brother -- or a girl becomes a woman. There is
4 ceremony for that.

5 Q. What would -- let me give you an example.
6 The example that Mr. Murphy talked about where he --
7 let's say him or I came to you for spiritual help;
8 that we had done something that troubled us. And what
9 would -- would there be a ceremony that would come
10 about from some type of a communication if there was
11 some type of a spiritual exchange from a Medicine Man
12 and somebody?

13 A. Yeah. It would be at the discretion of the
14 counselor or Medicine Man, but typically you would do
15 a sweat first and everything that took place would be
16 of a confidential manner.

17 Q. And then isn't it true that -- depending upon
18 the size of the problem or the size of the concern, it
19 may include more people involved in either the
20 ceremony or the dance; isn't that fair?

21 A. Yes.

22 Q. In fact, you may have many people that are
23 singing as part of the ceremony, correct?

24 A. Yes.

25 Q. So it just simply isn't a ceremony between,

1 in that example, Mr. Murphy and you. It could broaden
2 to include more individuals, correct?

3 **A.** As spectators, but only the one with actual
4 piercings, say like of sun dance. That's from the
5 Medicine Man, you know, to the individual.

6 **Q.** Well, they would involve the dancers,
7 correct?

8 **A.** Yeah, but first it's a one on one with each
9 one.

10 **Q.** And then it expands out, doesn't it?

11 **A.** Yes, just as they dance together.

12 **Q.** The ceremony can expand out to dancers,
13 correct?

14 **A.** Yes.

15 **Q.** It can expand out to singers, correct?

16 **A.** Yes.

17 **Q.** And it really depends upon the size of the
18 concern or the problem, the spiritual problem,
19 correct?

20 **A.** Yes.

21 **Q.** Have you ever conducted a spiritual ceremony
22 of that nature where there have been singers and
23 dancers involved in trying to cleanse the spirit?

24 **A.** Not really, other than just, you know,
25 praying to my God, you know. And my brother -- I

1 punch the time clock, but he's -- he doesn't work in
2 the so-called white man's way and he does ceremony,
3 you know. All day long he's doing ceremonies. When
4 his daughter became a woman, he had a ceremony for
5 her. They made a teepee and -- out of buffalo robes
6 and made everything in there and then on her day they
7 gave her the name -- her Indian name, and that's also
8 one of the seven rights.

9 Q. Now, you would agree that as a Medicine Man,
10 the main purpose of this communication, this
11 confidential communication, is to assist in spiritual
12 help; is that fair?

13 A. That's right.

14 Q. Would it be fair to state that an improper
15 spiritual communication would be one that would
16 involve avoidance of the law?

17 A. I don't understand that.

18 Q. Why do -- why do traditional Lakota religious
19 individuals come to a Medicine Man? For what purpose?

20 A. It could be for anything, any kind of a
21 regular -- like church, you know. It doesn't have to
22 be Sunday. You can just go in and have a ceremony at
23 any time.

24 And I don't proclaim at all to be a Medicine
25 Man. I am not a Medicine Man.

1 **Q.** But you -- let me back track.

2 Understanding you are not a Medicine Man.

3 But would be the purpose that somebody would come to a
4 Medicine Man for spiritual help?

5 **A.** Yes.

6 **Q.** They wouldn't come to a Medicine Man for
7 avoidance of the law?

8 **MR. MURPHY:** Objection. Calls for
9 speculation.

10 **THE COURT:** Overruled. I'd like a little
11 more clarification, however, for avoidance of the law.
12 I think that would be helpful to Mr. Sprague as well
13 as myself.

14 **A.** Well, in a confidential manner, you wouldn't
15 even know that. Somebody could be in the sweat lodge
16 or whatever and you don't know that because it's a
17 confidential matter.

18 **Q.** **(BY MR. JACKLEY)** Let me give you an example.
19 We were talking about why an individual would come to
20 a Medicine Man and we were talking about confidential
21 communications.

22 Would it be appropriate or part of that
23 confidential communication to come to a Medicine Man
24 to talk about when you were present when somebody was
25 killed?

1 Is there any spiritual value for that?

2 **A.** There would be no spiritual value, but the
3 person could say what he wants in confidentiality.

4 **Q.** So you are saying that the confidentiality
5 would pertain to matters of trying to avoid the law
6 or --

7 **A.** No. Just the relationship between the
8 Medicine Man and, like, the client.

9 **Q.** Here is why I ask. I am Catholic. So if I
10 were to go and confess my sins, there is forgiveness.
11 But if I talk about a particular crime and avoidance
12 of the crime, or steps that would maybe further the
13 crime, I lose that confidence.

14 **MR. MURPHY:** Objection. That's a
15 misstatement of the canons and it's a misstatement of
16 the covenants of the privilege --

17 **THE COURT:** Excuse me.

18 All of us Catholics can sit here, but it
19 seems to me that the steps furtherance would probably
20 not fall within the seal of the confessional. The
21 past events, my understanding would. The intent to
22 commit future crimes, I don't think are. That's my
23 understanding of the rule.

24 But past events, I murdered or I raped or I
25 did -- I robbed a bank, I think that is sealed. I am

1 going to rob one tomorrow I think is not. I could be
2 in error on my theology, but I think that's the rule.

3 Q. (BY MR. JACKLEY) Have you ever, as a Medicine
4 Man, not to ask names, but in a situation where -- I
5 understand you are not a Medicine Man?

6 A. I am not a Medicine Man.

7 Q. Are you ever aware of any of the teachings
8 and the discussions of confidential communications of
9 a situation where an individual came that admitted to
10 a crime and asked the Medicine Man what to do about
11 it?

12 A. No, I'm not.

13 My mother was a medicine woman, which was
14 rare.

15 Q. But you are never aware -- she had never
16 communicated to you any instances where somebody had
17 came and said that they had killed somebody and asked
18 furtherance of what to do?

19 A. No.

20 Q. Do you know who Al Gates is?

21 A. From the computer world?

22 Q. No.

23 Are you aware of an Al Gates that lived in --
24 on the Pine Ridge/Rosebud area?

25 A. No, I'm not.

1 Q. So you have never met an Al Gates?

2 A. Not that I know of.

3 Q. So you are not opining today whether or not
4 he was an Medicine Man?

5 A. What was that?

6 Q. You have no opinion of whether or not he was
7 actually a Medicine Man?

8 A. He was.

9 Q. Why do you say he was?

10 A. I believe that I have read that he was.

11 Q. Would it surprise you that in his Grand Jury
12 transcript he testified, quote, I'm different than
13 these what-you-call medicine men, end quote.

14 Would that surprise you?

15 A. I don't know him so I couldn't really say.

16 Q. So you really have no opinion as to whether
17 or not he was a Medicine Man, correct?

18 A. Right.

19 Q. In the Medicine Man tradition that you
20 studied, would it be fair that there is often times an
21 exchange of a spiritual symbol such as tobacco?

22 A. Yes.

23 Q. Do you know who John Graham is?

24 A. Never met him.

25 Q. You would agree that if there is a symbolic

1 exchange, such as tobacco, that that would give
2 credence to that it was spiritual in nature; is that
3 fair?

4 **A.** Tobacco is a protocol -- we give tobacco all
5 the time for assistance.

6 **Q.** Mr. Sprague, you talked about some of the
7 writings and confidentiality, and they are contained
8 in your books, when Mr. Murray was questioning you.

9 Do you recall that?

10 **A.** Yes.

11 **MR. JACKLEY:** May I approach the witness,
12 Your Honor?

13 **THE COURT:** You may.

14 **Q.** **(BY MR. JACKLEY)** I am handing you The
15 Infinity of Nations. Could you please direct me to
16 where it talks about communications of non-tribal
17 members to a Medicine Man is considered confidential.

18 **A.** Non-tribal --

19 What was that again?

20 **Q.** A non-tribal member communication to a
21 Medicine Man is considered confidential.

22 **A.** I do know that the main author here had
23 contact with a lot of people in the making of the book
24 and found that there were areas that they just
25 couldn't go there because it was a confidential

1 nature. And she's not Indian and they were from
2 various tribes in North America and South America.

3 **Q.** Can you point to me in the book that I have
4 just provided to you where it talks even so much as
5 it's considered a confidential communication
6 irrespective of who was involved?

7 **A.** Well, I haven't read the book yet. It just
8 came out last week. But I do have -- it's mainly in
9 the area of art and history.

10 **Q.** I misunderstood your testimony. I thought
11 when there was a questioning occurring that there was
12 a confidential communication that you referred to
13 several books.

14 Did I misunderstand you?

15 **A.** There were -- there is lots of references to
16 it even in the area that -- the areas that I wrote in
17 here.

18 **Q.** Can you point to me a single instance of
19 those references?

20 **A.** One area was this drum here was of a sacred
21 manner and there were things that were not told about
22 this out of respect for the individual who may have
23 made this drum or the tribe that was involved.

24 Maybe another example here -- anyway, I don't
25 see it in here, but there is a shirt in here that was

1 attributed to Crazy Horse. And the non-Indian author
2 knew that we didn't say that was Crazy Horse's shirt
3 although it's written on there. We said it has scalp
4 locks on it and we were always -- learned that he left
5 his -- those scalp locks for other people, other men
6 of his tribe to pick up. And so he would not wear
7 those. So out of, you know, respect and
8 confidentiality, that was not told. So you don't read
9 about that whole story in there. It's still listed as
10 Crazy Horse's shirt.

11 That drum is listed as Sitting Bull's drum.
12 It's not his drum. I found a man from Fort Peck that
13 made drums just like that. Almost identical. That's
14 about the best example.

15 **Q.** Let me ask you this. Assuming that I were to
16 go to a Medicine Man, and I were to talk about
17 something I had done; and then I were to go talk to
18 Mr. Oswald later on about that same thing that I had
19 done, would that demonstrate to you confidentiality or
20 secrecy of nature?

21 **A.** Well, I think there is no boundaries with the
22 confidentiality. I mean, I think it's present all the
23 time in every manner or situation. And I think -- you
24 have to think of more traditional times, probably when
25 there -- before there was a -- or an IRA government

1 and all of that that made laws and rules. But I think
2 they would want to counsel that -- the person and help
3 them in some manner, but it wouldn't be a matter of
4 going and reporting this or make an announcement in
5 the camp. That would be the last thing.

6 **Q.** But Mr. Sprague, in that example that I had
7 gave, if I had communicated to a true Medicine Man of
8 something that I had done, I am still free to
9 communicate to anybody else what I have done; is that
10 fair?

11 **A.** Yeah, you could. There are various medicine
12 men of different personalities just like there are of
13 all of people.

14 **Q.** In other words, just because I go talk to a
15 Medicine Man, that doesn't preclude from me talking to
16 other people about whatever I talked to the Medicine
17 Man about, correct?

18 **A.** Right.

19 **MR. JACKLEY:** No further questions, Your
20 Honor.

21 **THE WITNESS:** I have one comment, if I could.

22 **THE COURT:** Hold on. No, you don't.

23 Mr. Murphy?
24
25

REDIRECT EXAMINATION

1
2 **BY MR. MURPHY:**

3 **Q.** I want to bring your attention to a quote
4 Mr. Jackley presented to you. And I am looking at
5 Exhibit A to my motion in limine regarding statements
6 to medicine men, Exhibit A, page 3669.

7 He said -- he was asking you questions about
8 Mr. Al Gates and he said -- the quote was, quote, well
9 I'm different than these what-you-call medicine men,
10 and he said the quote ended there.

11 I want to read you the whole quote and I want
12 you to keep in mind what you were talking about
13 wannabes. Quote, while I'm different than these
14 what-you-call medicine men. These medicine men --
15 there is no -- just a very few that pretty near lost
16 all their power. So now they do that with money.
17 They charge money. Big money. And they are all
18 pretty well off, but I don't do that, unquote.

19 Is that what you were talking about the
20 new-age medicine men and whatnot?

21 **A.** Yes.

22 **Q.** So taken in its entirety, not the snippet
23 that Mr. Jackley quoted to you, that would indicate
24 Mr. Gates was saying, I'm the real deal. I am not one
25 of these new-age guys that charges money for his

1 medicine man services, would it not?

2 **A.** Yes.

3 **Q.** So if you were to learn that Mr. Al Gates
4 told various law enforcement officers that he had been
5 practicing the Indian religion since 1944 through
6 2003, that would indicate to you he had a long history
7 of practicing traditional practices, correct?

8 **A.** Yes.

9 **Q.** All right.

10 Now, Mr. Jackley asked you about the public
11 nature of some ceremonies where dancers may be
12 involved, drum circles, and whatnot. But you said
13 something before that. You said, it would be at the
14 discretion of the Medicine Man.

15 Could you explain what you mean about the
16 discretion of the Medicine Man and how they shape or
17 form a ceremony?

18 **A.** Well, they have their own personalities in
19 the way that they run their ceremonies and it's
20 usually just out of respect that you go with the way
21 they run their ceremony, and recognizing that this is
22 of a confidential manner, somebody that you can trust.
23 And sometimes they will put colors up for -- you know,
24 the four directional colors maybe at different
25 directions than somebody else. But it doesn't mean

1 that it's wrong or anything. It's just that they have
2 another way of doing that.

3 Q. So not every ceremony is going to involve
4 drum circles or dancers?

5 A. Right.

6 Q. Could be a private, intimate conversation?

7 A. Right.

8 Q. Or what you were talking about like at the
9 sun dance, the Medicine Man might have a private
10 communication with somebody and that's part of a much
11 larger ceremony but it doesn't reveal the disclosure
12 of the materials to everybody?

13 A. Yes.

14 Q. So at a sun dance or an inipi, there might be
15 a dozen or 15 people in the sweat lodge and none of
16 them might know what the communication was between
17 each of them and the Medicine Man?

18 A. Exactly.

19 Q. And then Mr. Jackley asked you a series of
20 questions about are you aware of anybody ever going to
21 a Medicine Man who committed a crime and was trying to
22 avoid detection or similar-type questions.

23 If it's confidential, how would you know why
24 a particular person went to a Medicine Man?

25 A. That's right, you wouldn't know.

1 **Q.** Okay.

2 Do you consider that somebody who might feel
3 remorse over their involvement or their knowledge in a
4 particular act, whether it's criminal or not, might go
5 to a Medicine Man for their feelings?

6 **A.** Yes, they would.

7 **Q.** Okay.

8 **THE COURT:** Let me ask you a question. Most
9 of the traditional groups that I am aware of at least
10 in the western Caucasian cultures have an abundance of
11 literature on the meaning and circumstances in which
12 what the Catholics call the seal of the confessional;
13 that is, the confidentiality of things told. When it
14 exists, to what extent it exists.

15 Now, it's my understanding if we go back a
16 couple hundred years that most of the Tribal
17 encampment were relatively small, a hundred people.
18 How many teepees, how many families, but relatively
19 small?

20 **THE WITNESS:** Yes.

21 **THE COURT:** And I am going to ask you this
22 question. Let us assume for the sake of the question
23 that there is an encampment of 15, 20 families. That
24 would be a fair-sized camp, right?

25 **THE WITNESS:** In some way, but I have my

1 great, great grandfather's surrender list and he has
2 714 in his band.

3 **THE COURT:** All right.

4 So let's deal with 714 and how many it is.
5 How many medicine men would there be in that
6 group?

7 **THE WITNESS:** There could be many.

8 **THE COURT:** And let us suppose that in that
9 group on some morning people get up and find a raped
10 and brutally killed five year old. And let us suppose
11 that nobody knows who did it. Let us suppose further
12 that, number one, a non-tribal member comes to the
13 camp and talks to one of your medicine men and says I
14 raped and butchered that child.

15 You are telling me that that person is going
16 to walk out of the camp unscathed, and that everybody
17 is going to say, that's fine, go forth and sin no
18 more?

19 **THE WITNESS:** There would be some kind of,
20 you know, repercussions.

21 **THE COURT:** Well, what kind of repercussions?

22 **THE WITNESS:** Well, there is such a variety
23 amongst different tribes to --

24 **THE COURT:** Hold on. Hold on.

25 You are telling me that if the

1 confidentiality, as I understand it exists, there can
2 be no repercussions because the Medicine Man cannot
3 say anything to anybody and cannot in any way disclose
4 what he or she, as the medicine woman may be, was told
5 by the Tutchone or Choctaw that came in and talked to
6 a Lakota Medicine Man in that camp.

7 And so you have a dead girl there. And I use
8 the example because it's awful. Please understand me.
9 Because that's the real test of confidentiality if,
10 despite the gruesomeness, awfulness of it, the
11 Medicine Man or woman says, my spiritual obligations
12 are such that I cannot reveal what you told me to
13 anybody and it remains a secret between you and I.

14 **MR. MURPHY:** Your Honor, I'm --

15 **THE COURT:** Now, I encourage you to go forth
16 and confess or tell other people what you did, but I
17 can't do that for you and I can't make you do that.

18 **MR. MURPHY:** Your Honor, can I level an
19 objection to the question?

20 **THE COURT:** Sure.

21 **MR. MURPHY:** Because it's so compound. You
22 mixed so many things in there. I mean, the question
23 is, you said -- asked if there was consequences. The
24 first question is, is the communication between the
25 non-tribal member and the Medicine Man confidential.

1 **THE COURT:** What that means is that under no
2 circumstances can he reveal the contents of that
3 conversation.

4 **MR. MURPHY:** Right, but that's not the way
5 you started the question. You said, are there going
6 to be consequences which assumes that the secret has
7 been revealed.

8 **THE COURT:** No.

9 I am saying that under those circumstances,
10 unless the gentleman who raped and butchered that
11 five-year-old girl tells somebody else, or somehow he
12 or she is linked -- I guess it would be a he -- linked
13 to that murder by something other than communication
14 to you, and to somebody else, he will not be caught
15 and -- I mean, you can't reveal it.

16 **THE WITNESS:** Well, again, I know there is
17 different variations among different tribes, but I
18 know usually that would be settled in a way but it
19 wouldn't have to be announced or anything.

20 **THE COURT:** If it's going to be settled,
21 somebody has to let some cat out of the bag somewhere.

22 **MR. MURPHY:** Well, that's assuming so many
23 facts that aren't part of your hypothetical.

24 I mean, the question is fairly, if the person
25 comes after this rape and murder of a five year old

1 and talks to a Medicine Man, is the Medicine Man
2 allowed to reveal that publicly. That's the issue.

3 **THE COURT:** No, is he allowed to reveal it to
4 anybody.

5 **MR. MURPHY:** Well, okay, is he allowed to
6 reveal it to anybody.

7 You keep talking about consequences which
8 assume the cat is out of the bag and that could come
9 from 150 sources.

10 **THE COURT:** Well, I am saying it can come
11 from no other source than the Medicine Man. All
12 right.

13 So, if that's the case, and the information
14 comes from no other source, and unless the Medicine
15 Man says something, this person who committed a very
16 nasty crime is going to be able to walk -- and I mean
17 nobody can tell anybody that he committed a crime.

18 **THE WITNESS:** I don't think the non-Indian
19 would have a relationship there with him in the first
20 place.

21 **THE COURT:** Well, how about a Tribal member?
22 Suppose --

23 **THE WITNESS:** I think it would be
24 confidential.

25 **THE COURT:** So if another member of the tribe

1 came to a Medicine Man and said I raped and tortured
2 the child of so and so who is a member of this band,
3 again, you would not -- the Medicine Man would not be
4 able -- would be absolutely prohibited from taking any
5 action on that or telling anybody about it or doing
6 anything that would reveal, directly or indirectly,
7 that such a statement or admission had been given to
8 him?

9 **THE WITNESS:** Traditionally I don't really
10 think they would. I don't think it would be revealed,
11 but I -- people would find out in other manner
12 somehow.

13 **THE COURT:** That's a different problem.
14 But if they don't find out in another manner,
15 then that person will not ever be charged or found or
16 whatever the Tribal method of dealing with such crimes
17 and atrocities is?

18 **THE WITNESS:** I think it would remain
19 confidential.

20 **THE COURT:** Okay.

21 Now, is there in any of the books you
22 referenced any discussion of the nature of the
23 confidentiality dealing with what we would call
24 criminal behavior that specifically addresses in the
25 role of the Medicine Man prior conversations?

1 And as far as I am concerned, sir -- and my
2 ruling will be this, if there is any third party
3 involved be they dancers, singers, otherwise, there is
4 no confidentiality. Okay. So we're down to the
5 Medicine Man and the person seeking the assistance.

6 Is there anything in any of the writings and
7 books you have read that specifically addresses the
8 restrictions on the Medicine Man's ability to disclose
9 that kind of information?

10 I am serious. I am not saying I have
11 searched all this and looked for it, but I have
12 searched quite a bit of it and I am looking for some
13 discussion on medicine men that says, in plain simple
14 terms, in our society, whatever society it might be,
15 that any wrongdoings disclosed to a Medicine Man could
16 never, under any circumstances, be revealed to any
17 other person without the permission of the person
18 involved.

19 That is, if I came to you as a member of the
20 tribe and you were a Medicine Man, and I told you that
21 I had done something wrong, not immoral, just flat
22 criminally what we would call a crime, robbed
23 somebody, killed somebody, raped somebody, of that
24 nature, is there any discussion in any of the books
25 and literature that you have which describes the roles

1 of medicine men in any of our tribes and in particular
2 any of our -- the Sioux Nation as I understand it that
3 specifically discusses that?

4 **THE WITNESS:** I would have to research that.

5 I know there is a lot written on Akicita,
6 which is a policing society, and they'll throw up an
7 example of something that happens.

8 But on the whole, there is no written thing.
9 There is no -- you have to imagine in traditional
10 times, there is no written this is the rule and this
11 isn't or whatever. It's just -- it's based on the
12 families, you know. And the knowledge of medicine men
13 was handed down from father to son.

14 Another Medicine Man might operate in a
15 totally different manner, but there wasn't, like, a
16 written, you know, set of rules governing, you know,
17 what we're talking about here, really. All that comes
18 into play with the modern government after the Indian
19 Reorganization Act, say, of 1934 and government.

20 **THE COURT:** I understand that this decision
21 is made pursuant to the rules of evidence, law, and
22 procedure within the State of South Dakota; and to
23 meet that criteria, the medicine men are going to have
24 to qualify under our Clergymen statute or it's not
25 going to fly. And that's what I am looking for and I

1 am looking for any similarities between the cases and
2 the decisions that have described the Clergymen
3 privilege or the Clergy penitent, whatever it is,
4 privilege of confidentiality and something that will
5 tell me that that same concept -- which is not broad.
6 It's a very tight concept. And it doesn't cover all
7 kinds of things that would sound to me like you would
8 consider covered.

9 So I'm looking for anything that will tell me
10 from the studies, we have things -- all kinds of books
11 telling us things medicine men did, the ceremonies
12 ran. We are here on a request to use herbs and other
13 things as medicines and healers and that kind of
14 stuff.

15 I am not making light of it at all. I want
16 something that addresses this within the scope of the
17 Clergyman issue that I have to address.

18 **THE WITNESS:** I think what it boils down to
19 with all of that usage is a traditional world and a
20 contemporary world. And I even see our whole history
21 like that, too. There is a whole traditional story
22 telling and ways -- confidential things we have in our
23 history. And then we get non-Indian people who write
24 books and they change it all. They write their own
25 history.

1 And we still have -- have to write those
2 things. I see the medicine men struggling in that
3 manner. They are operating in a traditional world.
4 And they are bombarded by -- well, right now, you
5 know, how do you become a Medicine Man. Well, that
6 doesn't exist in the rules. And so it's really two
7 worlds.

8 **THE COURT:** Question. Who decides who is a
9 Medicine Man?

10 My impression is it's the medicine men.

11 **THE WITNESS:** Nobody really.

12 They -- it used to be in families, handed
13 down all the knowledge they could and you trained
14 throughout your life just like --

15 **THE COURT:** Okay. Mr. Sprague, I understand
16 that.

17 But who, and at what point, decides somebody
18 is a Medicine Man? Has gone beyond training and is
19 now sufficiently skilled and in touch with the spirits
20 as required for a Medicine Man to function as one in
21 the service of the Tribal group and community.

22 How is that decision made?

23 **THE WITNESS:** The elders based on their
24 ability like to be healing or medicine or counselor
25 and how effective they were. It would be recognized.

1 **THE COURT:** So if I understand you, and I am
2 taking a leap here, it's because other people begin to
3 rely -- begin to rely on that person, and the
4 perception they have of the spiritual contacts,
5 powers, and healings?

6 **THE WITNESS:** Yes.

7 **THE COURT:** So it's the acceptance of that
8 person by the community rather than anybody saying I
9 declare you a priest?

10 **THE WITNESS:** Right.

11 **THE COURT:** All right. Fair enough.

12 Mr. Murphy?

13 **Q. (BY MR. MURPHY)** We have talked about the
14 traditional leaders and medicine men that you have
15 talked to, correct?

16 **A.** Yes.

17 **Q.** And those are all people that are widely
18 regarded in the Lakota, Nakota, or Dakota communities
19 as medicine men, correct?

20 **A.** Yes.

21 **Q.** What has their consistent message been to you
22 about the confidentiality of communications between
23 them and people receiving spiritual guidance?

24 **MR. JACKLEY:** Objection. Hearsay, Your
25 Honor.

1 **MR. MURPHY:** It's -- an expert witness can
2 rely upon --

3 **THE COURT:** One, I am going to allow it. I
4 am not yet sure that Mr. Sprague qualifies as an
5 expert witness on medicine men as he is not a Medicine
6 Man. But nonetheless I will allow the question.

7 **Q. (BY MR. MURPHY)** Why don't you answer that
8 question, then, about the people you have talked to.

9 **A.** They would all hold with the confidentiality.

10 **Q.** All right.

11 **THE COURT:** And who are those people?

12 **MR. MURPHY:** We have previously put them in
13 the record.

14 **A.** Orville Looking Horse, Wilmer Mesteth, Rick
15 Two Dog.

16 **THE COURT:** Have they ever written anything?

17 **THE WITNESS:** Orville Looking Horse is in a
18 lot of books.

19 As far as his own writings, I am not sure if
20 he has anything written. Again, it's -- they're
21 recognized.

22 **THE COURT:** Okay.

23 **THE WITNESS:** An example might be, I teach at
24 Oglala Lakota college. Like people with lots of
25 knowledge of herbs and medicine and they don't even

1 have, like, a Bachelor degree or Master's degree but
2 they will say known expertise in Lakota studies and
3 they are equally side by side with degrees.

4 **Q. (BY MR. MURPHY)** Why is it -- why wouldn't a
5 true Medicine Man come into this hearing and testify?

6 **A.** Because it would -- it would go against
7 everything that they stand for.

8 **Q.** Could you please explain more to the Court so
9 that the Court understands what they stand for.

10 **A.** Well, they stand for bravery, generosity,
11 respect, and wisdom, but they are -- they are there to
12 help people in ceremony and consultation. And we're
13 touching on a modern contemporary like a -- like I
14 said, the IRA, you know, with government and all that
15 structure. And it's just -- I see the whole thing as
16 a traditional versus a contemporary world.

17 **Q.** And when you say IRA, you are talking about
18 the Indian Reorganization Act?

19 **A.** Yes.

20 **Q.** So this is part of the white world?

21 **A.** Yes.

22 **Q.** And one of the values of medicine men is
23 humility?

24 **A.** Yes.

25 **Q.** And to hold themselves out here as an expert

1 in what medicine men do would be antithetical to what
2 medicine men do?

3 **A.** Yes.

4 **THE COURT:** You are telling me that a
5 Medicine Man wouldn't describe for us by way of
6 teaching or otherwise what he or she, Medicine Man or
7 Woman -- what he or she does in the scope of helping
8 their society and community members within the role
9 and goal of a Medicine Man?

10 **THE WITNESS:** From what I am aware of, they
11 do not want to come forward in these sittings.

12 **THE COURT:** I don't -- I understand that.

13 But you are telling me that they wouldn't.
14 No, I can't imagine they would want to come here, but
15 I would also think -- it would surprise me that,
16 particularly when we talk about mutual cultural
17 understandings of the white community and the Native
18 American communities and the Hispanic, that that sort
19 of an education would be beneficial to all parties --

20 **THE WITNESS:** It would be --

21 **THE COURT:** -- it's hard for me to imagine
22 that they would not come in and explain that.

23 **THE WITNESS:** It would be beneficial probably
24 but they just wouldn't come in in a formal setting.

25 They would -- you could take them some

1 tobacco and they would take you out to Green Grass and
2 put you in a sweat or put you on a hill or something
3 and start that way.

4 **MR. MURPHY:** And Your Honor, I will make as
5 an offer of proof, I had two lengthy discussions in
6 Pine Ridge with two recognized medicine men who gave
7 the exact same answer that, though they understood the
8 value, they understood the bridge-building capacity,
9 and they resented the notion that this court might
10 treat their religion as secondary to Catholicism or
11 something like that, they would not come into a
12 structured white court system and be subject to
13 cross-examination about the sanctity of their
14 ceremonies or the inner workings or hold themselves
15 out as experts in the area.

16 **THE COURT:** That's interesting. I don't see
17 any of those things would be at issue here.

18 **MR. MURPHY:** They may very well be. We have
19 had questions about ceremonies from Mr. Jackley.

20 **THE COURT:** Sure, but we haven't had anything
21 about the sanctity of them. Nobody is challenging
22 that. Nobody is challenging that they are an integral
23 part of the various Tribal communities. I think they
24 are.

25 **MR. MURPHY:** Well, notwithstanding that, that

1 was not something that was part of the tradition. I
2 spoke to two at length down on the reservation and
3 it's just not part of their tradition to come into a
4 public court forum.

5 So any way, that's the end of my questioning
6 of Mr. Sprague. I don't know if that elicits more
7 from Mr. Jackley.

8 **MR. JACKLEY:** Briefly, Your Honor.

9 I would like to introduce as Exhibit 1 the
10 Grand Jury transcript of Al Gates. I think it was
11 referred to by both counsel, and specific reference to
12 page 55.

13 And the other thing, just in light of that,
14 Your Honor, with respect to Mr. Murphy's statements,
15 the state has not challenged anything about the Lakota
16 religion or anything.

17 The issue in this case is whether or not John
18 Graham had a confidential communication with a
19 recognized medicine person and didn't waive that
20 communication.

21 **MR. MURPHY:** I have no objection to the Grand
22 Jury transcript. It's already been admitted as
23 Exhibit A in its entirety, but if it needs to
24 readmitted for the purposes this hearing, that's fine.

25 **THE COURT:** It will be admitted, but a

1 cautionary word to counsel, in addition to traditional
2 foundational requirements, a multi-page document to be
3 admitted into evidence requires a staple or some other
4 fastening. Otherwise, I promise you, I will lose it,
5 misplace it, or scatter it amongst a half a dozen
6 different files.

7 I have a stapler.

8 That's going to be State's Exhibit 1?

9 **MR. JACKLEY:** Yes.

10 **RE-CROSS-EXAMINATION**

11 **BY MR. JACKLEY:**

12 Q. Mr. Sprague, you and the Court were having a
13 discussion about a non Indian coming into an
14 encampment and committed a horrible butchery or crime.

15 And I want to expand that discussion to be an
16 instance not of a non Indian or not of a Tribal
17 member, but of a cross Tribal member. For instance,
18 assume in this example that a Tribal member from
19 Rosebud came to Cheyenne River and committed a
20 butchery, an assault upon a two-year-old child.

21 And then the next day came to a recognized
22 Medicine Man on Cheyenne River and discussed about the
23 butchery, discussed about what they had done, and then
24 left.

25 Would it be fair to state that under that

1 scenario, the true Medicine Man would have the ability
2 to talk to the Tribal elders or the dancers or the
3 singers about what he had learned -- he or she had
4 learned; is that fair?

5 **A.** He would use his discretion in what he wanted
6 to do.

7 **MR. JACKLEY:** I have no further questions,
8 Your Honor.

9 **THE COURT:** Thank you.

10 Mr. Murphy?

11 **CONTINUED REDIRECT EXAMINATION**

12 **BY MR. MURPHY:**

13 **Q.** But would that -- if he were to disclose that
14 information publicly or to other people, would that
15 violate the confidentiality?

16 **A.** Yeah, it would.

17 **Q.** And that confidentiality you said is a
18 recognized concept?

19 **A.** It is recognized.

20 **MR. MURPHY:** Nothing further.

21 Does the Court have anything further for
22 Mr. Sprague?

23 I think he's missed half of his class.

24 **THE COURT:** He can blame me. I am missing
25 half of mine, too.

1 Anything further, Mr. Jackley?

2 **MR. JACKLEY:** No, Your Honor.

3 **THE COURT:** Thank you, sir.

4 You may be excused.

5 (Witness excused.)

6 **MR. MURPHY:** Your Honor, that's all I have on
7 the Medicine Man motion.

8 I don't know if Mr. Hanna -- yeah, he's still
9 here.

10 Are we ready to continue?

11 **THE COURT:** I thought we had pretty much
12 resolved where we're going with Mr. Hanna.

13 We have the question of the immunity for the
14 state of Colorado, and likewise, which would be -- I
15 assume his statements on that are correct, and then we
16 have the unlawful purpose. I don't know where I am
17 going to decide that at this date or how I am going to
18 do that.

19 **MR. HANNA:** May I make this request and
20 suggestion, Your Honor?

21 Since we only have ten minutes or so left, I
22 would ask that this hearing be continued until after
23 the government submits its motion to request an order
24 for immunity. And I would ask that the -- because at
25 that hearing I would like to produce witnesses who

1 will testify as to statements made by Mr. Jackley,
2 which I submit prove an intent to bring an accusation
3 against Mr. Richard Marshall for perjury if he is
4 compelled to testify in this trial.

5 And I would ask the Court to direct mister --
6 because our -- I don't have enough time to make that
7 argument in ten minutes, Judge. But I am asking the
8 Court to direct Mr. Jackley to make a specific factual
9 offer of proof as to what questions and what facts he
10 intends to elicit from Mr. Marshall. Why these facts
11 are necessary. Especially in view of the fact that 90
12 percent of them are coming in through other witnesses.

13 But I will want to call witnesses at an
14 evidentiary hearing and I would ask that this matter
15 be adjourned until after Mr. Jackley has made a
16 written motion for an order and that I can respond to.

17 **THE COURT:** How does Monday grab you?

18 **MR. JACKLEY:** Well, Your Honor, I don't mind
19 making a written motion for an order to compel, but I
20 object to a couple things. I object to, number one,
21 having to tell Mr. Hanna exactly what I am going to
22 ask Mr. Marshall at trial because I am going to be
23 straight with the Court, I don't know exactly what
24 those questions will be at this point. I have a
25 feeling they will pertain to what occurred at his

1 house the evening in question, mainly. But I don't
2 know exactly -- I mean, I have never been in a
3 situation as a prosecutor, or frankly even as a
4 defense lawyer, where I have asked for or been
5 required as a prosecutor to submit questions as to
6 what I am going to ask of somebody.

7 The continued allegation and reference by
8 Mr. Hanna regarding perjury is baseless. Number one,
9 with respect to the 2003 Grand Jury testimony, that's
10 beyond the statute of limitations, and it's not an
11 offense.

12 With respect to his future testimony, I will
13 restate -- and it's true what Dana Hanna has in his
14 motion, and I think I told the Court this, as long as
15 he tells the truth, he won't have any problem.

16 **THE COURT:** Who is to decide what's the
17 truth?

18 **MR. JACKLEY:** Just like any case, Your Honor,
19 at the end of the day if the state believes he
20 committed perjury, the state would proceed to bring
21 the matter to a Grand Jury; present whatever evidence
22 there would be of perjury. The Grand Jury would then
23 make a decision whether or not there was a reason to
24 believe the crime was committed and he committed it.
25 It would then have all the other protections of a

1 perjury case. That's a premature decision because we
2 don't know what he's going to testify to or what he's
3 not going to testify to.

4 **THE COURT:** Well, are we satisfied that if we
5 don't -- if there is no immunity from Colorado and
6 Wyoming that he's probably not going to testify?

7 **MR. JACKLEY:** Well, I can't --

8 **THE COURT:** I assume, you don't have the
9 authority to grant that?

10 In fact, I am sure you don't.

11 **MR. JACKLEY:** I guess if the Court is telling
12 me that if I'm going to make a motion for an order to
13 compel that I need to go talk to an Attorney General
14 in Wyoming and an Attorney General in Colorado, I can
15 do that. But I don't have the authority to grant him
16 immunity in those states.

17 **THE COURT:** Yeah, I understand that.

18 But I think a grant of immunity for the State
19 of South Dakota would be insufficient because of the
20 nature of what we're talking here which is really
21 involvement in criminal activity alleged to run over
22 several states. I mean, we do have a kidnapping from
23 Colorado, and we do have transport from Colorado
24 through Wyoming to South Dakota, as I understand it,
25 but I don't know that.

1 And certainly there is -- obviously, federal,
2 state, and multi-state charges that could arise out of
3 that. So based on what I know, I perceive that to be
4 a problem.

5 **MR. JACKLEY:** My position is the federal is
6 taken care of based upon the federal trial so that
7 would be double jeopardy. So the issue would be --
8 obviously, I could give it in South Dakota and my
9 understanding is -- what I am -- what I am hearing
10 from the Court is I better talk to Wyoming and
11 Colorado, and I would ask more time than Monday for
12 that.

13 **THE COURT:** Well, I mean, I think that point
14 in time comes -- I mean, I think Mr. Hanna's client is
15 going to have to come to court to exercise the right.
16 Assuming that assertion is correct -- I have no reason
17 to believe it isn't -- that discussion takes place out
18 of the presence of the jury. We make a determination
19 at that point, and his client decides whether to
20 testify or not.

21 Motion to compel, then, to me, in my view, is
22 pointless if it does not grant the immunity necessary
23 to protect the person for prosecution based, you know,
24 on his testimony or it incriminates him in crimes in
25 all jurisdictions.

1 You know, we used to play that game which is
2 why the Fourth and Fifth Amendments were finally made
3 applicable to the states through the
4 Fourteenth because search and seizure and
5 incriminating statements taken under state law
6 enforcement were not precluded by such. And then the
7 information was transferred to the federal authorities
8 and ultimately the U.S. Supreme Court began to apply
9 the principles of the various Bill of Rights to the
10 states, and that's one of them. And I think the same
11 principle applies here. That to give immunity here it
12 must be an effective immunity or we're all just
13 pretending it's something it's not. And that's where
14 I see that to be.

15 **MR. JACKLEY:** I will discuss the matters with
16 Colorado and Wyoming and I guess I just would ask time
17 until the trial to sort that out.

18 **THE COURT:** I don't have a clue, Mr. Hanna,
19 how to address the other issue you are raising.
20 Absolutely we will have further opportunity to address
21 that. And I am not quite -- I mean, in all candor, I
22 don't have a clue where to go with it at this time or
23 how to even resolve the questions. I fully understand
24 your point. And I am just -- I am not quite sure
25 where it goes.

1 I think there is some issue of the extent to
2 which -- the inquiry, I assume, has to be relevant to
3 the matters at issue and that kind of stuff. But I
4 can't go beyond that at this point.

5 We will have further hearing on it, and I
6 expect we're going to need to do that reasonably
7 quickly.

8 **MR. HANNA:** I would hope so, Judge.

9 I don't think it can wait until the trial.
10 The prosecutor has known that this problem was going
11 to arise for some time. They have spoken months ago
12 to people saying that they intend to --

13 **THE COURT:** Well, Mr. Jackley has to decide
14 if he's going to be in a position to make a motion to
15 compel.

16 We have given him the outlines of that and if
17 he's in a position to do that, then the question you
18 raise becomes important. Other than that, it's a Part
19 Two Information that hits the trash can.

20 **MR. HANNA:** I see.

21 And I would ask that we be given a week to do
22 that, Judge.

23 **THE COURT:** We go to trial the 29th of this
24 month so it be now the 8th. We got 21 days.

25 So can you handle it ten days from today, a

1 week from Friday?

2 I am just asking for Mr. Jackley's input at
3 this point.

4 **MR. JACKLEY:** I venture a guess that neither
5 Colorado or Wyoming wants to prosecute Mr. Marshall so
6 I think I can probably get that taken care of within a
7 week.

8 **THE COURT:** My guess is they don't either,
9 but my guess isn't good enough.

10 **MR. JACKLEY:** I will -- can I have ten days?

11 **THE COURT:** Yeah. You have a week to Friday.
12 That should be ten, a little more than that. Five and
13 four plus weekend.

14 **MR. HANNA:** Since this is a matter of law, I
15 would also point out that according to the trial
16 testimony, the statements of Arlo Looking Cloud, after
17 the murder of Anna Mae Aquash, the perpetrators drove
18 through Nebraska. So it may very well be that
19 Nebraska might have a criminal liability, may be able
20 to impose criminal liability on anybody who fled the
21 scene through that state.

22 **THE COURT:** I am not going to run this
23 through the 50 states, all right.

24 **MR. JACKLEY:** Thank you.

25 **THE COURT:** Somebody is going to have to

1 establish there is some realistic basis upon which
2 Nebraska could bring a charge. And the fact that he
3 drove through the state of Nebraska after committing a
4 crime, I am not sure that's anything but a potential
5 federal offense.

6 I don't think if I kill somebody in South
7 Dakota and wander off through Montana that I have
8 committed a crime in Montana. I may be wrong.

9 **MR. HANNA:** All right, Judge.

10 If I can just make one more point which is
11 the reason I am asking Mr. Jackley to present some
12 kind of specificity is he is seeking an order to
13 compel testimony from a witness who has taken the
14 Fifth Amendment. It is disingenuous for him to tell
15 the Court I have no idea what Richard Marshall is
16 going to testify to. We have had two trials.
17 Mr. Marshall has testified in the Grand Jury.

18 Mr. Marshall has made statements to law enforcement
19 officers. And the essence of those statements was
20 that four people came to his house and he has very
21 little memory of anything that happened after that.

22 So Mr. Jackley is going to have to show
23 why -- what facts he intends to prove. Because --

24 **THE COURT:** Give me authority for that and
25 then we'll have a discussion on it. But I understand

1 your point. I also understand -- I understand
2 witnesses say different things all the time. And it's
3 one of the reasons why everybody likes to have
4 depositions and Grand Jury testimony and preliminary
5 hearings because almost nobody can say the same thing
6 twice.

7 So you have to show me authority for that
8 proposition. I am not opposed to it. I just simply
9 need to see some authority that that kind of
10 disclosure is required. I don't know. Show me. I
11 will play the Missouri role.

12 **MR. HANNA:** What I am asking the Court to do
13 is to direct Mr. Jackley -- for him to show the Court
14 why this order is necessary.

15 **THE COURT:** Show me the authority that I can
16 make him do that.

17 **MR. HANNA:** All right, Judge.

18 **THE COURT:** That's my point. Show me
19 authority for what you want. The two rules of
20 presentation as I perceive them to a court or a jury
21 is the Court must understand two things: What you
22 want, which I do; and why I should give it to you,
23 which I don't.

24 **MR. HANNA:** All right.

25 **THE COURT:** I understand what you want. Now

1 show me why I should or have to give it to you.

2 **MR. HANNA:** So do I understand that in ten
3 days from now Mr. Jackley is ordered to make his
4 written motion setting --

5 **THE COURT:** I think ten days from now he's to
6 establish that he can make a motion to compel or that
7 he will provide the requisite immunity from the states
8 of Colorado and Wyoming. Okay. And then if he can do
9 that from -- has their authority or they grant that
10 immunity, and his, he may be in a position to issue a
11 motion to compel.

12 **MR. HANNA:** All right.

13 **THE COURT:** But until we know that, I am of
14 the position that he cannot do that until and unless
15 he can.

16 **MR. HANNA:** Thank you.

17 **MR. JACKLEY:** Your Honor, may I just speak to
18 a couple of things?

19 **THE COURT:** Yes.

20 **MR. JACKLEY:** The inquiry is why I need to
21 call him.

22 **THE COURT:** Well, I didn't.

23 **MR. JACKLEY:** I have submitted Mr. Marshall's
24 different statements to the Court and I think I will
25 stand behind that basis as to why I need to call him.

1 They are not all consistent.

2 The other thing that I would point out, there
3 has been a lot of discussions about parole. The
4 Attorney General -- I've cited the authority -- does
5 not control parole.

6 Where Mr. Marshall has a problem with parole
7 and -- we litigated this at the federal level at Dick
8 Marshall's detention hearing, is the fact not about
9 Annie Mae Aquash, but the fact that he's on his third
10 strike. And so that's why that's relevant. If I
11 could, I would just like to submit that to the Court
12 so the Court has that because Mr. Hanna had made a lot
13 of allegations regarding that. And I think that the
14 parole record, the same exhibit that was submitted at
15 the federal trial, demonstrates that the state is not
16 calling Dick Marshall for purposes of some parole
17 revocation trap.

18 His parole revocation problems stem from a
19 2007 DUI and admission; not from anything related to
20 Annie Mae Aquash. So if I could submit that, Your
21 Honor.

22 **MR. HANNA:** I object to that.

23 **THE COURT:** Just a minute. At ease. I need
24 a gavel.

25 The point is, is at least what it seems to

1 me, if that's the case, and this is the problem, then
2 somebody should be in a position to tell me that the
3 derivative use immunity you are talking about will
4 include the use of that data or doctrine to -- in any
5 parole revocation matter. And I assume --

6 **MR. JACKLEY:** I think I can tell you that. I
7 mean, I think if I, as Attorney General, grant him
8 derivative use immunity, I mean, that can't be used in
9 any State of South Dakota proceedings. That would be
10 a parole proceeding, that would be prosecuting him for
11 accessory to kidnapping. I can't -- I can't use it
12 for that and neither can any --

13 **THE COURT:** If that's the case, are you
14 satisfied with that?

15 **MR. HANNA:** Judge, we will present
16 evidence --

17 What I am saying is that Mr. Jackley wants to
18 put Richard Marshall on the stand. And when Richard
19 Marshall says, I did not give a gun to anybody,
20 Mr. Jackley is going to determine that's not the
21 truth. And then he's going to charge Richard
22 Marshall -- or have the state charge Richard Marshall
23 with perjury in a parole violation, and I base that
24 conclusion on statements Mr. Jackley has made to me
25 and two other attorneys.

1 That -- it has nothing to do with anything
2 that happened in 2007. The reason --

3 **THE COURT:** Then I will hear that evidence
4 and we will go from there, but we will address that at
5 the time when it becomes more of an issue and I
6 understand your concern with it. And somehow I need
7 to know a whole lot more about the law of that than I
8 know now.

9 **MR. HANNA:** Thank you.

10 **MR. MURPHY:** We got some other outstanding
11 motions.

12 Do you have some time on your calendar in the
13 near future?

14 **THE COURT:** I have Monday.

15 **MR. MURPHY:** Works for me.

16 What time?

17 **THE COURT:** I have any time Monday you like.

18 **MR. MURPHY:** I'd be ready to go at nine in
19 the morning if the state is ready to go or one of the
20 prosecutors is ready to go.

21 **THE COURT:** I can tell you phosphatase isn't
22 coming in through law enforcement in any way, shape,
23 or form.

24 Next question?

25 **MR. JACKLEY:** We didn't object to that.

1 **MR. MURPHY:** We got the motion in limine
2 regarding Denise Maloney and we got the notice of
3 recorded testimony that involves Lorelei Decora Means.

4 I have already advised the Court and counsel
5 that I am having some trouble getting Mr. Leach in.
6 He's already indicated -- I have submitted a letter --
7 but he's going to have his client invoke the Fifth
8 Amendment. So we need to at least get the Denise
9 Maloney motion in limine and the Lorelei Decora Means
10 matter --

11 **THE COURT:** I have to confess. I am -- I am
12 swimming around and trying to understand the structure
13 of Denise's testimony, the purpose of it.

14 I understand that there is two statements by
15 Arlo Looking Cloud, both of which involve Arlo Looking
16 Cloud as a direct participant in the murder of Anna
17 Mae. One statement says he and -- no. Wait a minute.
18 Strike that. Graham and Theda Clarke went out and the
19 next statement says he and Graham went out. Is that
20 correct?

21 Both of those statements -- both of those
22 statements say that Graham went out. In one case it
23 says Graham actually shot, and the other one just says
24 Graham was one of two people that went out and Anna
25 Mae was dead.

1 I am trying to figure out, for the life of
2 me, of what significance the distinction is.

3 **MR. MURPHY:** Well, Your Honor, I think what
4 the distinction is, is they would like to put on an
5 inherently sympathetic witness to prejudice the jury
6 against my client.

7 **THE COURT:** Well, I understand.

8 My question is directed to Mr. Jackley --

9 **MR. MURPHY:** I know.

10 **THE COURT:** -- as to where you are going with
11 that.

12 **MR. JACKLEY:** From experience, the defense
13 will likely challenge Arlo Looking Cloud's
14 credibility. I think that's fair. And --

15 **THE COURT:** Yeah. I would guess that that's
16 fair.

17 **MR. JACKLEY:** Part of that challenge will be
18 that he has been convicted of murder and he has swung
19 a deal with the state and he's made up this story.

20 Well, witnesses that he talked to about what
21 had occurred prior to his conviction basically takes
22 care of the challenge of recent fabrication, so to
23 speak. So it evidentiarily has value. And it shows
24 that he didn't just make up a story the day after we
25 convicted him. Rather, this has been consistent with

1 what he has indicated, not only --

2 **THE COURT:** Well, can't that be set up -- if
3 it can be set up at all -- in the course of rebuttal?

4 Could it not fit more appropriately in
5 rebuttal than in your case in chief?

6 Mr. Murphy?

7 **MR. MURPHY:** Exactly.

8 What they are talking about is calling her on
9 direct to testify as to Arlo's statements which they
10 believe are perjurious.

11 **MR. JACKLEY:** Well, we wouldn't call her
12 until -- assuming he attacks Arlo, and depending on
13 what that attack is, I think that gives us the
14 evidentiary basis to call her in case in chief.

15 **THE COURT:** Well, I agree that may. Okay.
16 But I don't think that that's a decision I can make
17 now.

18 I understand the point that Denise's
19 statement -- Arlo made the statement to Denise, what,
20 three decades later or something?

21 **MR. MURPHY:** 2002.

22 And so it's after the motive to fabricate
23 because --

24 **MR. JACKLEY:** He's not convicted yet.

25 **MR. MURPHY:** That's not --

1 **THE COURT:** We'll come back on Monday.

2 Call your time.

3 **MR. MURPHY:** Nine o'clock.

4 **THE COURT:** Sounds good.

5 (Whereupon, the proceedings in this matter

6 were then concluded.)

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1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
 2 COUNTY OF PENNINGTON)

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I, TINA RAE PRUSS, Official Court Reporter
 and Notary Public in and for the County of Pennington,
 State of South Dakota,

DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 questions asked, the testimony given, and of the
 proceedings had.

I FURTHER CERTIFY that I am not of kin or in
 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.

COPY

Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 Pennington County, South Dakota
 My Commission expires: 10-04-2012

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
 Plaintiff,)
)
 VS.)
)
 JOHN GRAHAM,)
)
)
 Defendant.)

TRANSCRIPT OF
MOTIONS HEARING

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
NOVEMBER 15, 2010

COPY

1 * * A P P E A R A N C E S * *

2 MR. MARTY JACKLEY (telephonically)
3 Attorney General
4 MR. ROD OSWALD
5 Assistant Attorney General
6 Representing the State of South Dakota

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12 MR. JOHN MURPHY
13 Attorney at Law
14 Representing John Graham

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* * I N D E X * *

21 WITNESS (ES) : DIRECT CROSS REDIRECT RECROSS

22 (None.)

23

24

25

26 EXHIBITS: OFFERED/ADMITTED

27 I - FBI Agent Garber Document

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1 * * P R O C E E D I N G S * *

2 **THE COURT:** Mr. Oswald, you are under
3 staffed?

4 **MR. OSWALD:** Yes, sir.

5 If we could dial up my other one.

6 (Whereupon, Mr. Jackley was then called to
7 participate by telephone.)

8 **THE COURT:** I think we're all here. Let me
9 close down my existing realtime and bring up another
10 one so I can keep it for this case. Give me a second.
11 Should be up.

12 **MR. MURPHY:** Your Honor, if we can, to begin
13 with, just finish where we left off last week. We had
14 to shut down pretty quickly.

15 I am handing you what's marked as Exhibit I.
16 Mr. Oswald already has got a copy of that and we
17 agreed that you could review that prior to the
18 beginning of this hearing. This was not an exhibit
19 intended for Mr. Sprague because it's not something
20 that he generated.

21 This is a report from FBI Agent -- Special
22 Agent Allen Garber documenting an a interview with --
23 between Bob Ecoffey, at that time Bureau of Indian
24 Affairs head, and Al Gates, the now deceased Medicine
25 Man who is at issue in the Medicine Man privilege

1 motion.

2 In my -- the document speaks for itself in
3 many ways, but I think there is three points I wanted
4 to highlight, as I know the Court has got this matter
5 under its consideration. This is probably the most
6 relevant of all the documents.

7 The first is in the second paragraph.
8 Mr. Gates talks about that he is a Medicine Man in a
9 private way. He does practice Indian medicine
10 ceremonies, but only upon special request. That goes
11 to, immediately, his understanding of the
12 confidentiality of the services he provides.

13 It also addresses some of the suggestions
14 that there may have been dancers present or drummers
15 or anything like that. None of that -- you know, we
16 had at the last hearing discussions about, well, if
17 there was drummers or dancers would that remove
18 confidentiality through a third-party waiver.

19 The Court has already got in its possession
20 the Grand Jury transcripts in the other matters, none
21 of which intimate in any way, shape, or form that
22 there was any third persons present, but this goes to
23 that point that he is a private Medicine Man; he only
24 does ceremonies upon special request. Does not
25 advertise.

1 The next point is the second paragraph from
2 the bottom where it says Gates said that he advised
3 Patton -- that being my client -- to keep this
4 information to himself and if he was questioned by
5 authorities then to seek further advice from Gates.

6 This I think goes to the point, he has --
7 Gates, the Medicine Man, has established a
8 confidential relationship with my client. He is
9 telling my client, according to his own statement,
10 that my client is only to talk to him about these
11 matters. And that they have a relationship that is
12 premised upon the idea that there not be dissemination
13 or communication to third parties.

14 The last important point in this multi-page
15 document comes on the second page and it's in the
16 fourth paragraph. The quote is, Gates said that he
17 strongly believes this because in a spiritual way
18 Patton trusts Gates and sought his aid, unquote.

19 Again, this reinforces the idea that my
20 client had a spiritual relationship with Gates; that
21 Gates understood this to be a spiritual relationship;
22 and that they had essentially had a trust based on
23 that confidentiality and spirituality.

24 I am asking the Court to accept Exhibit I.
25 If we need to, at trial we could always, outside the

1 presence of the jury, have Mr. Ecoffey come in and
2 verify that this is in fact a description of his
3 conversations with Mr. Gates, but I don't really think
4 that is subject to much debate.

5 And I think this closes the record, at least
6 from our perspective, on the confidential nature of
7 the relationship between my client and Al Gates, the
8 now deceased Medicine Man.

9 **MR. OSWALD:** May I, Judge?

10 **THE COURT:** Yes.

11 **MR. OSWALD:** Judge, the document, first of
12 all, talks about Mr. Gates being a Medicine Man in a
13 private way. As pointed out, he's qualifying that.
14 Anybody -- anybody can say that they are clergy or a
15 Medicine Man. It's if they really are.

16 And Mr. Gates testified under oath that he
17 was a helper and he was not a true Medicine Man. That
18 testimony stands as the only one that has been under
19 oath by this -- by Mr. Gates.

20 Nevertheless, there is -- if Mr. Gates felt
21 that he was a true Medicine Man and the
22 confidentiality existed, he is telling Ecoffey and
23 he's telling FBI Agent Garber and he's rattling off
24 what he knows. Nothing in here suggests that even
25 Mr. Patton believed there was a confidential

1 relationship that exists.

2 So therefore, I'd like to stand on the
3 previous record that's made, and the previous
4 exhibits.

5 And furthermore, just to remind the Court,
6 the clergy penitent privilege is statutory; it is not
7 constitutional. And there is the difference, then,
8 when the Court makes that decision on whether we are
9 allowed to use Mr. Gates' testimony or not.

10 I don't know if Mr. Jackley has any comments
11 on that or not, Judge. If he could be heard.

12 **THE COURT:** Mr. Jackley?

13 **MR. JACKLEY:** Judge, kind of in tow with what
14 Mr. Oswald indicated that, you know, I think it's
15 important we look at the three statements at issue.
16 There are the two statements that John Graham gave
17 that tie in with Al Gates and the Medicine Man
18 information. And I think that clearly goes -- that's
19 an evidentiary privilege.

20 So even if the Court would determine that Al
21 Gates was a Medicine Man, even if the Court determined
22 that there was a communication privilege that didn't
23 exist, a proper waiver, it still fails and it becomes
24 of evidentiary value because the case law that we
25 provided to the Court is clear that it's an

1 evidentiary privilege and not a constitutionally-based
2 privilege; and therefore, the case law says that the
3 fruit of the poisonous tree does not apply.

4 So with respect to Graham's two statements of
5 confessions or admissions, or whatever you want to
6 call them, in relation to this, the law clearly allows
7 its admissibility.

8 With respect --

9 **THE COURT:** Wait a minute. The poisonous
10 tree is things that come from the statement, not the
11 statement itself; wouldn't that be correct?

12 **MR. JACKLEY:** Correct.

13 But if you look at the analysis -- I mean,
14 the statement we're talking about is John Graham is
15 speaking to law enforcement, or other individuals,
16 about him going to this ceremony and talking about in
17 relation to what happened or in the questioning that
18 comes up that, you know, the law enforcement officer
19 says, you know, our information is you have admitted
20 this and then Graham himself -- this isn't coming from
21 Al Gates -- Graham himself talks about the presence in
22 the instance, et cetera, and our position is that that
23 would be admissible because it's Graham speaking.
24 That's his admissions.

25 And irrespective of what is determined on

1 this Medicine Man theory, it doesn't affect that
2 because the Medicine Man theory is wholly evidentiary
3 based it is not constitutionally based; and the case
4 law that we presented to the Court indicates that when
5 it's not constitutionally based, the fruit of the
6 poisonous tree does not apply. And so with respect to
7 Graham's statements about the Medicine Man theory or
8 in relation to what he told Al Gates is not
9 foreclosed.

10 **MR. MURPHY:** May I be heard on those points,
11 Your Honor?

12 **THE COURT:** Uh-huh.

13 **MR. MURPHY:** First, in response to Mr. Oswald
14 saying that Gates, under oath, said that he was not a
15 true Medicine Man, you have the exhibits. What's
16 clear is he was deriding new-age practitioners and he
17 said, I am not one of those guys that takes money for
18 ceremonies. And so this document corroborates that he
19 sees himself as a Medicine Man who is actually the
20 real deal. He practices in a private way. He does
21 not advertise.

22 And in the Grand Jury transcript --

23 **THE COURT:** You know, it also seems to me
24 that even if I assume that to be true, he does not
25 accept the proposition that a Medicine Man is bound or

1 that things said to him are confidential. His
2 statement here is, don't tell anybody, which I am not
3 sure has anything to do with any bond of
4 confidentiality between the two of them.

5 But I -- here I have somebody supposedly
6 standing in a Clergyman's stead that talks very freely
7 about what people said to him.

8 So in terms of this, and evidence -- I mean,
9 I don't know that I have any evidence that Mr. Graham
10 considered it confidential. So what I have here on
11 display is no evidence or feeling on the part of
12 anybody involved considering this a confidential
13 communication.

14 It's clear Gates did not, fair?

15 **MR. MURPHY:** No, I don't think that is fair.

16 And if you look to the second page, that
17 fourth paragraph, he's talking to Ecoffey and he says,
18 if anybody can get Graham to talk, it's me. And he
19 says because of our spiritual relationship he thinks
20 he can bring Graham to the table. And so, clearly,
21 he's indicating there that he and Graham identify this
22 as a confidential, private communication. And Gates
23 acknowledges that and says that if he gives Graham the
24 word, that Graham may, in fact, talk to authorities.

25 So there is clearly a recognition that this

1 was something that Graham felt was confidential
2 because Gates is saying he -- I could get him to talk
3 if I was so asked to do so.

4 But the other thing is is that this case
5 would be no different -- you talked about Gates not
6 recognizing the confidentiality. Well, he's got
7 statements like in this exhibit where he clearly talks
8 about this as being a private communication, but then
9 he blabs to the authorities. That's the
10 contradiction.

11 **THE COURT:** I don't see where he talks about
12 it being a private communication. And he also has --
13 I mean, that's -- one can put that interpretation on
14 it, but I certainly don't see it express.

15 And then he talks about Sue Casper coming to
16 him, him performing a ceremony, and he -- that she had
17 been threatened by Theda Nelson because Casper had
18 been present when Aquash was murdered, and he
19 performed a ceremony. She's no longer afraid, but he,
20 again, has no qualms about discussing that.

21 **MR. MURPHY:** Well, so that's why I said.
22 This would be no different than any of the cases that
23 have come before courts on this issue where a priest
24 or minister or a Rabbi blabbed to the authorities
25 notwithstanding their understanding of the -- that it

1 was supposed to be confidential. And that's how these
2 cases are litigated is when a priest or some
3 recognized member of the clergy doesn't live up to the
4 expectation.

5 If they always kept everything sacracent,
6 then we would never have any litigation on the
7 parameters of the privilege. I mean, it's obvious
8 that's how these things get before the courts is when
9 an individual member of the clergy who should have
10 kept things private for whatever reasons, because they
11 think it's the right thing to do or because they get
12 drunk at a cocktail party or whatever, they don't keep
13 things privileged.

14 So we got Gates saying that he had advised
15 Patton to keep this information to himself and only
16 communication with him about it. That's what he
17 said --

18 **THE COURT:** No. That's before he talked to
19 somebody to talk to him about it.

20 **MR. MURPHY:** Right.

21 But, I mean -- he's saying, keep this between
22 you and I and before you talk to somebody else talk to
23 me first. So that's something that clearly indicates
24 confidentiality or privacy. He talks about that he's
25 a Medicine Man in a private way. Private is --

1 **THE COURT:** I have no clue what that means,
2 by the way.

3 **MR. MURPHY:** Well, nor does any of us because
4 the guy died in 2003.

5 But we have to, I think, presume or give my
6 client the benefit of the doubt on these matters
7 because it's his privilege that's being asserted, he's
8 the one who has asserted it, and we don't have Gates
9 subject to cross-examination. We can never confront
10 him. We can never put him on the stand and ask him
11 any of this stuff.

12 So what we're left with are these documents
13 and so he says I am a private Medicine Man. I do this
14 on special request. I had communication with Patton.
15 I told him not to talk to anybody else but me and then
16 he tells the FBI that because of the -- because Patton
17 trusts him in a spiritual way, that --

18 **THE COURT:** My problem, Mr. Murphy, goes back
19 to, I don't have a clue what in a spiritual way means.
20 Okay. At least the Lakota people, the local Sioux
21 Tribes that I have talked to and we deal with in
22 A and Ns all the time use the term spirt or spiritual
23 or sacred in a context that is completely foreign.

24 And when you get down to children are sacred,
25 and I ask what that means, it says you are supposed to

1 take care of them and not harm them. Well, that's
2 exactly what exists as far as I know in every society
3 in the world. It's not a special standard for Native
4 American children.

5 But the use of the term is almost universal
6 to describe ordinary, for the most part, social
7 values. We take care of our children. We take care
8 of our family. We don't pray or we're not predators.
9 We live a wholesome life. We stay in good spiritual
10 contact with the creators. I mean, all of these terms
11 seem to me to be much like if I use German to describe
12 sacred and it encompasses the same thing that we're
13 talking about for everybody.

14 **MR. MURPHY:** But you're assuming that you
15 need to understand what the word spiritual means. And
16 I don't believe that's the days because what we're
17 establishing by saying that it was a spiritual
18 communication is if somebody goes to a priest and is
19 talking about the weather and just blurts out, I
20 killed Mr. Jones, the case law says, well, there
21 wasn't dissemblance of the spiritual communication
22 going on. They were talking about the weather and the
23 guy blurted it out, so it's not protected by
24 privilege.

25 What we have over and over again in the

1 exhibits we provided you from Gates is --

2 **THE COURT:** My problem here is establishing,
3 first of all, that Gates stands in a position where
4 that is a recognize -- I mean, I can't come up to you
5 and say, John, you have been my adviser all my life on
6 things and conscience and how to behave. I know
7 something about a crime or another. I don't want you
8 to tell anybody about it. I don't think that creates
9 it, and yet I am looking at you as some sort of a
10 spiritual mentor or guidance.

11 **MR. MURPHY:** That's not a fair reading of
12 this record, though. Everything we put before you,
13 all of the exhibits that involve Gates' statements --
14 and there has been a number of them -- have all said
15 that he was involved with members of AIM as a
16 spiritual leader; he was an -- any conversations he
17 had with Mr. Graham were of a spiritual context. This
18 is not something where you can create a record that
19 doesn't exist.

20 You've got a record in front of you, multiple
21 exhibits. Every single one of them --

22 **THE COURT:** But I don't have -- at least what
23 I am not sure that I have is a record that the
24 Medicine Man within the standards of practice of a
25 Medicine Man is a person that stands in a Clergyman's

1 posture.

2 We have discussions and a statement from your
3 expert that says it was discretionary. He
4 specifically used that term. That doesn't strike me
5 as a standard. I have no statements in books or
6 anything on the Lakota culture that indicates there is
7 a confidentiality that accompanies spiritual
8 ceremonies.

9 **MR. MURPHY:** Well, we met our burden, Your
10 Honor. We -- they haven't put up any evidence.

11 I understand you seem to be doing your own
12 independent investigation. But we're talking about --

13 **THE COURT:** It's a question of law for me. I
14 have to do that. I don't have any authority that I
15 know of that says medicine men qualify.

16 **MR. MURPHY:** Well, we had a witness on the
17 stand --

18 **THE COURT:** I don't have any case authority.

19 **MR. MURPHY:** Well, I understand that.

20 If we had some case authority, we would all
21 be --

22 **THE COURT:** It would be an easy question.

23 **MR. MURPHY:** Yeah.

24 And I assume the government is in the same
25 position. I -- having done a nationwide search, and I

1 believe this is a first impression issue nationwide,
2 which is stunning.

3 **THE COURT:** Oh, good.

4 **MR. MURPHY:** But we had a witness on the
5 stand who is an expert. He has written books, he
6 testified, he talked to medicine men, he's grown up in
7 the culture; and he told you repeatedly one thing and
8 one thing only: That communications by a person to a
9 Medicine Man are presumed to be confidential.

10 Now, the state hasn't rebutted that.

11 **THE COURT:** I don't think he's -- he was
12 anywhere near that positive, Mr. Murphy.

13 But regardless, that's the question I have in
14 front of me is whether there is a standard as a
15 Medicine Man to that standard. If that is, that's
16 probably outcome determinative of the questions here.

17 **MR. MURPHY:** Okay.

18 **THE COURT:** Because I agree with you that if
19 it is so, Gates has no privilege to waive the
20 statement. I don't know where we go from there with
21 the poisonous tree doctrine, but I haven't gotten that
22 far in the analysis because the fundamental question
23 to me is, first of all, Gates' standing and status.
24 That's where I see the -- that's the problem for me.

25 **MR. MURPHY:** Okay.

1 And just so my record is complete, the last
2 issue, Mr. Jackley and Mr. Oswald both referenced the
3 statutory nature and the evidentiary privilege. I do
4 want to address one thing. Mr. Jackley said that my
5 client, when confronted, admitted to being in a
6 ceremony and talking about the -- what his
7 communications with Mr. Gates were. We've provided
8 you previously as exhibits the sum total of the
9 statements. There was a statement to Mr. Ecoffey and
10 a statement to Mr. Chapman. To, one, after the person
11 recited all the allegations that Al Gates supposedly
12 made, my client said, yeh, Y-E-H. And that was
13 after -- that was to Ecoffey after he had told Ecoffey
14 he was just there to listen.

15 To Chapman I think the sum total of the
16 response was uh-huh, and I may be wrong, or huh. So
17 for any -- either of the State's Attorneys in this
18 case to reference that my client make some grand
19 adoption of what was put in front of him is just not a
20 statement that's accurate, and the record that we
21 provided also addresses that.

22 **THE COURT:** Understand.

23 **MR. MURPHY:** Okay.

24 I -- I was under the understanding that today
25 we were going to have Mr. Hanna here, but perhaps I am

1 wrong. I think the only things that we have left, we
2 filed late, but -- well, it wasn't necessarily late --

3 **THE COURT:** The motion on impeachment and
4 convictions?

5 **MR. MURPHY:** Yeah, Mr. Dillon.

6 And I emailed that to everybody, I believe,
7 on Thursday of last week. And I will have another one
8 on Arlo Looking Cloud. I reviewed his rap sheet at
9 the Attorney General's Office on Friday. He's got, I
10 believe, three prior felonies and a number of prior
11 misdemeanors for false statements or making false
12 reports. He's already been impeached at the other
13 trial thoroughly on his criminal record so --

14 **THE COURT:** I am assuming the state has no
15 objections to the granting of that motion?

16 **MR. OSWALD:** Judge, we have no objection as
17 long as it's in to the general question that we have
18 to use when we impeach defense witnesses, have you
19 been convicted of a crime of dishonesty or felony in
20 the past.

21 **MR. MURPHY:** Well -- and with Mr. Dillon I
22 may agree with that.

23 Mr. Looking Cloud is going to be a different
24 story if he testifies anything like he did at the
25 Marshall trial.

1 **THE COURT:** Well, my understanding, first of
2 all, is that the statement as to the general nature of
3 the inquiry is, generally, correct. Years ago there
4 was a trial involving a sexual molestation of a child
5 in which the existence of the prior conviction was
6 raised but not as to the specific -- it was for the
7 same thing, and the parameters being virtually exact.
8 And the only question asked was -- which surprised
9 me -- was have you had a prior conviction for a
10 felony.

11 And my understanding of review of the law is,
12 depending on the specific nature of the event, that
13 the specifics may be necessary and indeed require a
14 burden of proof. My thought was, I am thinking, at
15 least a burden of a preponderance of the evidence or
16 something of bad acts as opposed to prior convictions.

17 **MR. MURPHY:** Well, in Mr. Dillon's case, his
18 misdemeanors are relevant to the actual fact that he's
19 going to be testifying under oath and that he's been
20 convicted on a number of occasions of making false
21 statements to law enforcement or false police reports.
22 So that bears on his ability to uphold the oath.

23 As to the felonies, I would agree that,
24 generally speaking, the prior nature of the felonies
25 is -- it's just a general question unless they were to

1 involve something like -- you are talking about where
2 it related to the particular case where it would touch
3 on 404(b) or if it was a crime of dishonesty.

4 In Mr. Looking Cloud's case, his prior
5 misdemeanors, he has 40 or 50 of them. There are a
6 number of them that are crimes of dishonesty, false
7 statements, false reports, and those kind of things.

8 But where I see his going beyond the typical
9 606(a) impeachment is at the Marshall trial he feigned
10 a complete absence of knowledge of how the criminal
11 justice system works. He pretended as if this was all
12 some new mystery and he didn't understand things like
13 plea agreements and beneficial agreements,
14 recommendations by the government to help him.

15 So he was impeached very thoroughly on his
16 35-year history through the criminal justice system
17 with convictions about every six to eight months,
18 multiple plea bargains, and whatnot; and I would fully
19 intend that if he does anything close to what he did
20 at the Marshall trial in pretending to be some
21 neophyte to the criminal justice system, that we would
22 be allowed to impeach him on that basis.

23 **THE COURT:** Oh, I don't have any doubt you
24 would. It would probably -- never mind.

25 **MR. MURPHY:** So that's what we had.

1 We had the Denise Maloney motion in limine.
2 We barely touched upon that. I would say, first off,
3 there is no admissible grounds. It's not just the
4 prejudicial nature. There is no admissible grounds in
5 John Graham's trial for Arlo Looking Cloud's
6 self-serving, moderately exculpatory statements to her
7 in 2002 to be admitted in his trial. I mean, they are
8 not co-conspirator statements because they are not in
9 furtherance; they are self-serving; they are
10 perjurious in the sense that they go contrary to what
11 he said on other occasions of what the state's theory
12 of the case is. And they are certainly not statements
13 against interest because Looking Cloud is available as
14 a witness.

15 And so I don't, you know, understand in any
16 way, shape, or form evidentiarily or on the probative
17 versus prejudicial balancing how they can do this and
18 I do stand behind my statement they want to put the
19 daughter of the victim on the stand and they are going
20 to construct any way of trying to get that in front of
21 the jury. And I think that -- it should go under the
22 consideration of why this is inadmissible.

23 **THE COURT:** Any comments, Mr. Oswald?

24 I want to deal with those items separately.
25 One is, I am assuming the impeachment testimony will

1 be fairly standard. And I haven't gone into Arlo
2 Looking Cloud's things. If the novice event is coming
3 through, I don't see any way to keep that out.

4 **MR. OSWALD:** Well, speaking to the Denise
5 Maloney issue, I just think it's premature for the
6 Court to make a definitive ruling on keeping it out
7 until the Court has seen and heard all of the
8 testimony.

9 **THE COURT:** Well, that may be.

10 My inclination at this point is to suggest,
11 however, that somebody is going to have to convince me
12 to let it in because I am inclined to keep it out.
13 And somebody is going to have to convince me that
14 there is a basis to let it in.

15 **MR. JACKLEY:** Judge, can I do that right now?

16 **THE COURT:** No. If it's premature for me to
17 make a decision, then, I think -- I think it's wasted
18 time, Mr. Jackley. I will consider it when the time
19 is appropriate.

20 But somebody at this point is going to have
21 to overcome what I consider to be Mr. Murphy's,
22 basically, well-founded objections to letting it in.

23 I am not saying that it can't come in. I am
24 not saying that there is not going to be a basis to
25 let it in. But I am going to have to have something

1 set up through Mr. Looking Cloud before we're going to
2 look at that. And we would have any discussion in
3 camera or out of the presence of the jury to deal with
4 that before the daughter is called. Period. So
5 that's where that will go.

6 I am assuming the same impeachment standards
7 on stuff applies to the state as it does to the
8 defense, and we are going to follow those rules as far
9 as they go.

10 I will make a decision on the -- and put it
11 out in writing on the Medicine Man.

12 And I thought -- on Mr. Hanna's, I thought we
13 were, for all practical purposes, virtually finished.
14 That is, that issue comes up before the jury because
15 his client can change his mind before it -- and I
16 don't think we can let him take the Fifth in *absentia*.

17 **MR. MURPHY:** All right.

18 I was mistaken. I thought there was
19 discussion about witnesses being called today and
20 that's why --

21 **THE COURT:** There is the allegations that
22 he's been called for an improper purpose and somebody,
23 again, is going to have to raise the bar quite a ways
24 to convince me that he could not testify on that
25 ground. I think he -- if the materials presented are

1 as what -- I mean, he's going to take the Fifth
2 Amendment and he's out of here.

3 But if he doesn't, and he chooses to testify
4 upon the subpoena, that's a different ball game. But
5 I am thinking that's more than likely an appeal issue
6 for somebody beyond me.

7 Questions?

8 **MR. MURPHY:** I just had a question.

9 Mr. Jackley, in a letter, indicated he was going to
10 give further update to the Court on the Wyoming and
11 Colorado issue at this hearing. I don't know if
12 that's relevant at this point.

13 **THE COURT:** Well, are we anywhere near there,
14 Mr. Jackley?

15 **MR. JACKLEY:** We are. In fact, I just
16 received an email from the Colorado Attorney General.
17 I will file a supplement this morning. The gist of
18 the supplement is this, so everybody knows. In South
19 Dakota the Attorney General has concurrent
20 jurisdiction everywhere. That is not the case in
21 Colorado nor in Wyoming. So if, in fact, we were to
22 gain use and derivative use immunity in those two
23 states, it would have to be in every county involved.

24 I am filing a supplemental response telling
25 the Court that and also citing the federal and state

1 authority that indicates any immunized testimony is
2 tainted in every other jurisdiction.

3 In other words, if Dick Marshall were to
4 testify under oath truthfully -- because if you don't
5 testify truthfully you will lose your immunity. But
6 if he's to testify truthfully, then that evidence or
7 that testimony cannot be used by a prosecutor in
8 Colorado, cannot be used by a prosecutor in Wyoming,
9 because it's tainted; and I have that authority and I
10 will provide it to the Court this morning.

11 **THE COURT:** What about transactional immunity
12 which I think has largely ceased to exist?

13 **MR. JACKLEY:** Short of me being ordered to do
14 that by the Court, I am not going to give him that
15 immunity.

16 **THE COURT:** Okay.
17 Anything further I need do today?

18 **MR. MURPHY:** Not from Mr. Graham's
19 perspective.

20 **MR. OSWALD:** I don't believe from us unless,
21 Marty, you have anything?

22 **MR. JACKLEY:** I don't.

23 **THE COURT:** I have been advised, at least
24 tentatively at this stage, that the matter may be
25 tried in one of the upper courtrooms -- one of the

1 larger, upper courtrooms, Judge Davis's probably.

2 Whether that's final or not, I do not know.

3 In any event, it -- somebody else has said
4 that decision is above my pay grade. And I will do
5 whatever is decided to do, but I want people on alert
6 to that.

7 **MR. OSWALD:** Judge, I understand that we're
8 summoning, on hand, about 200 jurors.

9 **THE COURT:** I am not sure we need that many
10 at this stage.

11 Stan?

12 **THE CLERK:** Your Honor, we're -- we are going
13 to pool that many jurors for a potential of a hundred
14 the first day, a hundred for the second day, because
15 once we get through the 30th, these November jurors
16 are done. So that's why we have drawn that many
17 initially.

18 **THE COURT:** All right.

19 **THE CLERK:** What we would also like to
20 address for an administrative-type issue is the final
21 list of any jurors mutually agreed upon by counsel and
22 the Court to be excused. When we could get that.

23 If we could have that by Friday?

24 **THE COURT:** Yeah.

25 **MR. MURPHY:** We can probably email between

1 the group of us as to which ones we think.

2 **THE COURT:** Yeah. That will work.

3 And include the Clerk of Courts on the email,
4 if you would.

5 Okay, folks, anything else?

6 If not, thank you and have a nice day.

7 (Whereupon, the proceedings in this matter
8 were then concluded.)

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1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
 2 COUNTY OF PENNINGTON)
 3

4 I, TINA RAE PRUSS, Official Court Reporter
 and Notary Public in and for the County of Pennington,
 5 State of South Dakota,

6 DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 7 questions asked, the testimony given, and of the
 proceedings had.
 8

9 I FURTHER CERTIFY that I am not of kin or in
 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 10 interested in the event thereof.
 11

12 IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.
 13

14 COPY

15 _____
 16 Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 17 Pennington County, South Dakota
 My Commission expires: 10-04-2012
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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
)
) Plaintiff,)
))
) VS.)
))
) JOHN GRAHAM,)
))
))
))
) Defendant.)

TRANSCRIPT OF
MOTIONS HEARING

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
NOVEMBER 22, 2010

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* * A P P E A R A N C E S * *

MR. ROD OSWALD
Assistant Attorney General
MR. ROBERT MANDEL
Assistant U.S. Attorney
Representing the State of South Dakota

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

* * I N D E X * *

WITNESS (ES) : DIRECT CROSS REDIRECT RECROSS
(None.)

EXHIBITS: OFFERED/ADMITTED
(None.)

1 * * P R O C E E D I N G S * *

2 **THE COURT:** Okay.

3 Folks, we're here in the continuing matter of
4 State versus John Graham, 09-3953 file.

5 I want to take care of some administrative
6 matters before we get anything else done, primarily
7 directed towards jury selection and the like.

8 Does anybody here have the distinct
9 impression we're going to have our jury picked by the
10 end of Tuesday?

11 **MR. MURPHY:** I think it's possible.

12 **MR. JACKLEY:** I thought it was possible.

13 **THE COURT:** Okay.

14 Because one of our thoughts is how far are we
15 going to push November jurors without an uprising of
16 the masses because they think they are done.

17 Because one of the concepts is, if we're not
18 done by Tuesday, pulling in the subsequent panels from
19 December's list. I don't know of any impediment to
20 that in the legal system.

21 Anybody here?

22 I can't think of any reason why that poses a
23 problem.

24 **MR. MURPHY:** I haven't reviewed that subset
25 of statutes.

1 **THE COURT:** Understand.

2 Well, I haven't either, but I don't know that
3 it requires --

4 Kersten, you know anything about it?

5 Came up in my conversation not many minutes
6 ago.

7 **MR. MURPHY:** What I would anticipate, if we
8 pick Monday, because we got one set of jurors then,
9 and we get some jurors and some jurors Tuesday, we
10 would probably have to swear them then as a group on
11 Wednesday because that would be the first time the
12 jurors from the first day and the jurors from the
13 second day are put together.

14 **THE COURT:** Yeah.

15 **MR. MURPHY:** We may be doing voir dire the
16 first two days and exercising our peremptories on
17 Wednesday when we've got the whole combined group.

18 **THE COURT:** Yeah. And I think that may be a
19 reasonably good plan, too, because it's going to take
20 a whale of a long time to do 45, 50 peremptories?

21 **MR. MURPHY:** Exactly.

22 **THE COURT:** So it's -- that's a fair chunk.
23 I think it's 50, 25 a piece is my thought, but we'll
24 check that, but it certainly is in that vicinity.

25 My understanding is that the state has no

1 objections to any of the jury panels to suggest a
2 mutual exclusion; is that fair?

3 **MR. OSWALD:** That is correct.

4 **THE COURT:** Mr. Murphy?

5 **MR. MURPHY:** Your Honor, I emailed you over
6 my concerns, and without putting the name on the
7 record, because of the confidential nature of the case
8 that that one juror was in, I don't know how fairly,
9 without invading her privacy, we could voir dire on
10 that particular juror. And so that's something in the
11 past I have never had any problems having somebody
12 like that excused just like if you represented a kid
13 in the juvenile case who has then become an adult.
14 They are going to get asked the question, well, do you
15 know any of the attorneys and how so and how does that
16 affect your relationship.

17 **THE COURT:** Understand.

18 The state have any objection to that
19 particular request to excuse the juror?

20 It seems a very rational request to me.

21 **MR. OSWALD:** Yes, it does.

22 **THE COURT:** So that's taken care of.

23 **MR. MURPHY:** That would be the only one,
24 then, I believe, that was identified specifically.

25 **THE COURT:** Okay.

1 So other administrative matters we need to --
2 We'll probably be trying this in Judge Kern's
3 courtroom. Every time I think about the logistics
4 down here I just say it can't be done. We'll pick it
5 in Davis's court and try the case in Judge Kern's.
6 There is just too many problems down here that can
7 lead to difficulties. I just as soon not have to deal
8 with those.

9 **MR. MURPHY:** I think we have covered this
10 sufficiently in emails, but what my understanding is,
11 December 3rd we're going to go 8:30 to noon?

12 **THE COURT:** Yes, and December 10 we aren't
13 going at all.

14 **MR. MURPHY:** We aren't going at all. All
15 right, that's fine.

16 **THE COURT:** Any other administrative --
17 Stan?

18 **THE CLERK:** Yes, Your Honor, if I may. Do
19 you want -- we're going to use -- put the cards in
20 the --

21 **THE COURT:** We are pretty much going to have
22 to depending on who shows up and all of that.

23 **THE CLERK:** Did you want to ask the question
24 of if they can be here for the duration right from the
25 onset and then before we put the cards in the bingo

1 bin remove those jurors?

2 **THE COURT:** Unless there is objection from
3 counsel I do. I just as soon remove that group with
4 bona fides. I tend to shut it down pretty quickly of
5 those that can't be here. You know, with questions
6 like, if you were in the hospital, you know, you would
7 have the same problem you have here. And I tend to
8 shut it down as quickly as I can.

9 But if we're going to lose five, ten, or
10 fifteen jurors with all kinds of travel plans and
11 things before the holidays, I just as soon do it
12 before we start calling the individual jurors. But I
13 believe that to counsel's objection if you understand
14 the manner in which I am posing the question.

15 **MR. MURPHY:** I am wondering how you would do
16 that. I mean --

17 **THE COURT:** We swear them in -- we would call
18 roll and swear them in. And then I would -- then I
19 would pose that question to them. And certainly allow
20 counsel to ask anybody that indicates there is a
21 problem, as you wish; and at that point, whichever
22 ones we determine to be excused from duty would leave
23 and then we wouldn't spend time calling them up and
24 going through an individual voir dire again with them
25 and then have to call another one and all of that

1 stuff.

2 **MR. MURPHY:** Yeah. I have no problem with
3 that if both counsel are present and have the
4 opportunity to follow up.

5 **THE COURT:** Yeah. I think counsel would have
6 the opportunity to step in; and I will inquire first
7 and then if there is -- if you have questions about
8 the explanation, then I will make whatever ruling
9 strikes me is appropriate.

10 **MR. OSWALD:** That is acceptable to us.

11 **MR. MURPHY:** And I should have pointed out,
12 when talking about the other juror issue, Stan, I went
13 through all of the questionnaires and there were three
14 or four -- and I can give you their names -- that said
15 on the questionnaire they had served within the past
16 two years. I don't know what kind of double checking
17 you do on that, but -- to see whether or not it's
18 true.

19 **THE COURT:** They usually turn out to be
20 federal.

21 Can we get the blinds turned so Mr. Murphy
22 can look in that direction and see to whom he is
23 talking.

24 **MR. MURPHY:** Thank you.

25 And I can email those over to you. One of

1 them did say in parentheses federal.

2 **THE CLERK:** We usually verify, and then if
3 they have --

4 **CLERK TWO:** Sometimes it's the case of where
5 they may have been on for another month and never
6 reported.

7 **THE COURT:** All right.

8 Other administrative matters?

9 **THE CLERK:** I am just going to advise the
10 Court and counsel that we're going to have three
11 bailiffs working during the voir dire, and then break
12 down to two.

13 We'll also have two clerks working. Once we
14 get into the trial, the clerks will alternate half
15 days in order to keep some continuity with the Court.

16 I wanted to confirm that -- it was discussed
17 at one of the meetings that we're not going to allow
18 people to come in and out?

19 **THE COURT:** We're going to try, once you are
20 in, short of bona fide serious problems, you are in
21 until recess. There will be absolutely, under no
22 circumstances, any electronics other than plain,
23 ordinary, everyday watches in the courtroom and that
24 is the flat limit of it. If your watches take
25 pictures, they are out of here. That will apply to

1 the jury, and their cell phones can be kept by the
2 bailiffs.

3 **MR. MURPHY:** For counsel, are we exempted
4 from that, Your Honor, because we'll have witnesses
5 who are trying to get ahold of us, and we won't take
6 calls, obviously.

7 **THE COURT:** Have them on vibrate and deal
8 with them on the breaks, but that's it.

9 I had a request from the Associated Press to
10 allow laptops into the courtroom and I decline to do
11 that.

12 **MR. MURPHY:** While Stan is here, do we know
13 which panels are you going to call day one and which
14 you are going to call day two.

15 **THE CLERK:** That is correct. I have panel
16 one, three, four, seven will be day one. Bring them
17 in for orientation at 7:45. That would keep us going
18 up to 8:30, and then getting ready and seated starting
19 at 8:45 or nine o'clock. Whatever the Court deems
20 appropriate.

21 **THE COURT:** We'll see where it is. I think
22 we're optimistic if we get rolling before 9:00. I
23 think 9:00 is a very reasonable time to be rolling.

24 **THE CLERK:** Tuesday brings us a potential
25 problem. I wasn't sure what your thoughts were. If

1 we were bringing all of that group in and going
2 through that group of 93, or were we still going to
3 have the group of 58 sitting. How that was going to
4 transition. Were we going to have --

5 **THE COURT:** Let me make sure I understand the
6 problem.

7 How many jurors, approximately, are we
8 calling for Monday?

9 **THE CLERK:** One hundred twelve if everybody
10 shows.

11 **THE COURT:** And you are suggesting at the end
12 of the day we have 40 or 50 left sitting, do we call
13 in the next panel?

14 **THE CLERK:** That's what I was trying to
15 ascertain.

16 **THE COURT:** I would say -- my guess would be
17 we inform them on the call-in that night that they
18 need to report in by noon. And I assume we can -- I
19 don't know that we can get anything out. They can
20 check at noon and report in by one o'clock.

21 Will they have been computered?

22 **THE CLERK:** No. The next group will have to
23 receive orientation as well.

24 **THE COURT:** Then you need to require that
25 they come in some time like at ten o'clock the next

1 morning and get it done. By noon we should know
2 whether we need them in the afternoon.

3 **THE CLERK:** So you would like the whole group
4 of 93 to come in and then do orientation and then work
5 through them?

6 **THE COURT:** Yeah. Unless we tell you
7 otherwise during the trial, yes -- or during the voir
8 dire. Then they are available. If we have enough
9 that realistically that we go through the morning on
10 Tuesday with the remaining jurors we have, and then if
11 we need more, they will be oriented and we'll -- they
12 will be here right after lunch and we can go that way.
13 At least we will inconvenience them somewhat less.

14 **THE CLERK:** We're going to still use
15 courtroom C2 for this?

16 **THE COURT:** Yeah.

17 **THE CLERK:** And then we'll hold that group of
18 93 in C2 where?

19 **THE COURT:** Yeah. We'll figure out what
20 we're going to do after that. I mean, I think I got
21 to play a little bit by ear as do counsel at this
22 stage.

23 **THE CLERK:** Just to make sure I understand,
24 have them report around ten o'clock, and do the
25 orientation?

1 **THE COURT:** Yeah.

2 And then somewhere around that time we should
3 have an idea of where we are and what we need and
4 we'll get the word to you, and then you can either let
5 them go or keep them, or we'll say keep one or two
6 panels, three panels, whatever it is.

7 **THE CLERK:** Another alternative, Your Honor,
8 if you so choose, would be staggered. Bring two
9 panels in at 7:45, do orientation. They would be
10 available to you by 9:00 --

11 **THE COURT:** Well, you know, we can do that,
12 too, but let's see where we are close of business on
13 Monday.

14 And other than that, have them call in Monday
15 night and we'll give them the best we can. You know,
16 I want to inconvenience them as little as possible,
17 but there is frankly going to be some inconvenience
18 and there is not much I can do about it.

19 **THE CLERK:** So the group of panels coming in
20 on Tuesday that are projected are panel two, nine,
21 twelve, and panel fourteen.

22 **THE COURT:** Okay.

23 Other administrative details?

24 **MR. OSWALD:** I have one, Judge.

25 Does the Court have any prohibition against

1 the case agent being here the whole time?

2 I know in federal court, Agent McRoden was
3 allowed in during the whole trial.

4 **THE COURT:** My point would be, having been on
5 the federal court where I was caught by surprise by
6 that, my answer is, I have no objection if he's not
7 going to testify. But if he's going to testify, I
8 think he's subject to the same sequestration as
9 anybody else.

10 **MR. OSWALD:** He will testify.

11 **THE COURT:** Because he's going to come in
12 after sitting there and he'll be able to cherry pick
13 data. Unless he qualifies as some sort of an expert,
14 the rule is no.

15 **MR. OSWALD:** Okay.

16 **THE COURT:** Next question?

17 **MR. MURPHY:** I am going to have my paralegal
18 be sitting with me at counsel table.

19 **THE COURT:** That's fine. I have no problem
20 with paralegals. I like them, and I think you are
21 welcome to use them in any way that you feel is --
22 helps your case.

23 **MR. OSWALD:** Judge, also, in response to
24 not -- people not coming and going, I am going to have
25 my administrative assistant watching, but she'll --

1 since the state has the burden --

2 **THE COURT:** Sure. No. I understand that.

3 I am talking about the gallery and spectators
4 and news people and all of that. I just don't -- I
5 don't want the trial interrupted. I don't want an OJ
6 trial. I want it calm, cool, and collected. It's a
7 small enough courtroom upstairs in Judge Kern's. It
8 has the big advantage of separate counsel tables where
9 you are not staring at one another from both sides.

10 I find conceptually disturbing -- I don't
11 know how counsel do, but I do -- after the fifth grade
12 everybody I know can read upside down. I don't think
13 that's particularly helpful. That's why we're in
14 Judge Kern's courtroom.

15 Were you satisfied with Mr. Jackley's
16 response to your question in terms of disclosures?

17 **MR. MURPHY:** Not sure.

18 **THE COURT:** You asked for disclosures of
19 contributors.

20 **MR. MURPHY:** Oh, yes.

21 **THE COURT:** That's taken care of?

22 **MR. MURPHY:** That's taken care of.

23 **THE COURT:** Other questions of the
24 administrative nature?

25 Then we have to deal with a number of things.

1 Anybody have a particular order you would like to
2 address them?

3 **MR. MURPHY:** Well, Your Honor, I thought the
4 primary motion we were here today on was the large
5 motion I filed after getting the state's final
6 transcript they delivered to me -- well, they sent it
7 to me on November 15. I think I got it on the
8 17th or the 16th -- the transcript they plan to
9 allow the jury to view while listening to the
10 interview between my client and Mr. Chapman.

11 When I got the transcript, I emailed over to
12 Mr. Oswald and sought information as to whether he
13 planned to play the entire recording. I was not aware
14 that that was their intention. He indicated that that
15 was their plan.

16 So then I immediately drafted this motion and
17 I provided the Court with the color-identified
18 portions, which I believe for a number of reasons
19 which are set forth in my motion, need to be redacted.

20 Here today I got two other sections that I
21 didn't make part of that motion that I believe need to
22 be redacted and also a number of spots. I spent the
23 morning with my ear up next to the speaker. It's a
24 very poor quality audio -- and I got my copy here for
25 the Court -- where there is things in the transcript

1 that are attributed to my client that I believe are
2 just not on the tape. And so I want to get those
3 things before the Court and make a record on that as
4 well today.

5 **THE COURT:** Who did the transcription?

6 **MR. MURPHY:** It appears somebody at the
7 Attorney General's Office. I don't know whom. There
8 is no indication.

9 **MR. OSWALD:** My legal assistant.

10 **THE COURT:** Okay.

11 **MR. OSWALD:** It was based upon -- it was a
12 transcript originally done by the cooperating witness
13 Mr. Serle Chapman. But instead of using his, I had my
14 administrative assistant redo it, look at it, and then
15 I checked it for as accurate as I can.

16 Mr. Murphy is correct in part that there is
17 some difficulty in some words to hear. He's
18 absolutely right on that. But this -- in interviews
19 with Mr. Chapman, this is what was said, he was there,
20 and that's what we go with.

21 **THE COURT:** How about the suggested
22 redactions?

23 **MR. OSWALD:** We oppose.

24 **THE COURT:** All of them?

25 **MR. OSWALD:** Yes.

1 **THE COURT:** Okay.

2 Do you have any further explanation -- when
3 do you plan to call Mr. Chapman?

4 **MR. OSWALD:** It would probably be the
5 following week. I suspect December 6 is Monday or the
6 7th.

7 **THE COURT:** Okay.

8 How long will it take you to redact your
9 recording assuming that I grant some of Mr. Murphy's
10 requested redactions?

11 **MR. OSWALD:** We're using the computer
12 technician for the federal government and I don't know
13 his schedule. So he's pretty good at it.

14 **THE COURT:** I would assume he is.

15 **MR. MURPHY:** I guess on that point I would
16 note that during the federal trial, this came up, and
17 they were able to redact out individual words within a
18 half hour. You know, there was some disputes. As I
19 put in my motion the redaction issue had come up the
20 Monday night, or Monday, and Mr. Chapman was on the
21 stand a couple days later. There was some discussion
22 that morning that the redactions weren't up to par or
23 whatever the case was. And so Mr. Chapman was on the
24 stand. They took a break and Mr. Oswald and the
25 technician were able to do further redactions per

1 Judge Piersol's order in about 40 minutes. So they
2 got some technology that allows them to do it quickly
3 and precisely.

4 **THE COURT:** Okay.

5 Now when did this interview take place?

6 **MR. MURPHY:** 2001. February 11, 2001.

7 **THE COURT:** Now, why, when the word is -- we
8 have to guess at what it says, why should that not be
9 taken out?

10 **MR. OSWALD:** Because the witness will say
11 that's what he heard.

12 **THE COURT:** Yeah, but it's nine years later.

13 **MR. OSWALD:** Right.

14 **THE COURT:** He's a cooperating witness.

15 **MR. OSWALD:** Correct. That's subject to his
16 credibility and his cross-examination, but he has a
17 very good memory.

18 **THE COURT:** Well.

19 **MR. OSWALD:** He says this is good.

20 And the transcript -- there are jury
21 instructions that say the transcript is not to be --
22 for the jury to consider the truth of that
23 conversation. It is the recorded conversation that
24 they hear.

25 **THE COURT:** Then why don't we let them here

1 it as opposed to read it while it's being said.

2 **MR. OSWALD:** They will.

3 **THE COURT:** You are not going -- come on.

4 You don't read and hear at the same time. What you do
5 is you listen and then you -- you are either reading
6 the transcript -- and usually if I am reading one, I
7 am pages ahead of where the tape is.

8 But the only thing you would use it for is to
9 tell you what the tape said when you either didn't
10 hear it or understand it. In other words, it's giving
11 them the benefit of testimony they get from no other
12 witness.

13 And I don't know if Mr. Murphy has objection
14 to that or not, but --

15 **MR. MURPHY:** Well, that's our point is that
16 if it's not audible, to put it in the transcript, you
17 are actually creating evidence that doesn't exist. If
18 it can't be heard or if it's so indecipherable -- they
19 have their witness who can say on their direct, well,
20 yeah, there is things on here that I heard that you
21 might not be able to hear on the tape.

22 But for them to actually insert things
23 that -- like I said, I got a copy of the tape -- that
24 are either not audible or as I pointed out in the
25 motion he puts in things in the transcript -- it's

1 only an audio. There was never a video -- of my
2 client nodding affirmatively or shrugging his
3 shoulders or doing things like that which he can
4 testify to but they should not be part of an
5 uncertified transcript. This is different in --

6 **THE COURT:** Makes sense to me in terms of the
7 characterization of physical conduct, would you not
8 agree?

9 **MR. OSWALD:** I thought about that when I was
10 doing this. Honestly, Judge, I did. And I thought
11 maybe it's interjecting testimony when it shouldn't
12 be.

13 **THE COURT:** Yeah, it sure is interjecting
14 testimony. There is no question about that.

15 **MR. OSWALD:** But then I thought, it would
16 make it run much smoother by putting that in there at
17 that particular time then stopping it, starting it --
18 what did he do here, what did he do there.

19 **THE COURT:** Yeah. But -- and I assume he's
20 not going to have a transcript, right? The witness.

21 **MR. OSWALD:** You mean while testifying?

22 **THE COURT:** Yeah.

23 **MR. OSWALD:** I don't know.

24 **THE COURT:** Well, I mean so he's got a
25 transcript as it sits right now and you stop and say

1 now what did he do at this time? Oh, he shrugged. I
2 have no idea whether he has a memory or not. If he's
3 sitting there -- we do it with anybody else, which is
4 a recollection and is a number of things. You either
5 have a present recollection or you refresh your memory
6 as to a -- to give you a present recollection or you
7 have -- you cannot recover a present recollection. In
8 which case you put in whatever record it is. In that
9 case it would be the audio.

10 Here we're doing kind of all three things.
11 We're providing him with a record to which he would --
12 otherwise nobody else would be able to refer to one
13 without consent of opposing counsel. I will grant you
14 traditionally -- or I don't know traditionally, but a
15 great many cases where a police officer is testifying.
16 He's sitting there reading the notes and I don't hear
17 an objection, but if I heard one it would be
18 sustained, because he's not testifying from a present
19 recollection. He's reading something that was written
20 days, week, months, years ago.

21 And what he's supposed to do in theory is
22 look at that and then be able to put it aside and say
23 that has refreshed my recollection. I recall that
24 incident in particular, and this is what I
25 specifically recall. Or he does that and says I don't

1 have a clue if that's what happened. That's my notes
2 so I assume it did. So then you put the note in and
3 he doesn't get to testify on it.

4 Now, which of these am I doing here?

5 Unless I am mistaken, that's the rule.

6 **MR. MURPHY:** I can make it clear we would not
7 be consenting in any way, shape, or form to him
8 reading off this transcript. He's going to have to
9 play by the rules of evidence as any other witness.

10 And I think one of the things that's brought
11 up -- I know you had a chance to read the
12 transcripts -- he talks in the transcript about being
13 so tired -- he uses some language that he's having a
14 hard time keeping things straight as he's doing the
15 interview.

16 So now ten years later he's going to get up
17 and say, yeah, I distinctly remember a head shrug or a
18 nod or something like that. It's all subject to
19 cross-examination, but he shouldn't be afforded the
20 transcript to make it seem as if it's a real thing.

21 **THE COURT:** And you know, when was his --
22 what's the time frame in which the report he's giving
23 as to relate to the transcript that was made in 2001?

24 What's the time lapse in that?

25 You said he had one version of what was said

1 and we had a transcript made from the audio. How
2 contemporaneous is the interview with Mr. Chapman's
3 written report of what transpired?

4 **MR. OSWALD:** I don't know the certain date,
5 but when he transcribed the tape after listening to
6 it, I couldn't begin to tell the Court. I think it's
7 in a couple of months.

8 **THE COURT:** Of when the --

9 **MR. OSWALD:** Of his interview.

10 **THE COURT:** After the interview?

11 **MR. OSWALD:** Yeah. I don't want to be
12 quoted. I mean, it could be longer, it could be less,
13 Judge.

14 The fact is --

15 **THE COURT:** Has his version been provided to
16 Mr. Murphy?

17 **MR. OSWALD:** Oh, yes.

18 **MR. MURPHY:** Yeah. His version which has, I
19 mean, all sorts of problems with it that I don't think
20 we need to get too far into. He puts in lengthy
21 sections about what supposedly happened at lunch and
22 while the tape recorder was off and large dramatic
23 passages of gut-wrenching experiences he had as a
24 child.

25 I mean, his transcript I would consider as

1 much a fictional piece of work as a transcript, and I
2 have no idea when -- in relation to when the interview
3 was that he transcribed it or claimed to have
4 transcribed it.

5 **MR. OSWALD:** I did a lot of redaction of
6 those things already, Judge.

7 **THE COURT:** I am not quibbling with that at
8 all, Mr. Oswald.

9 What I am concerned about is a witness
10 supposedly testifying from memory that's reading a
11 transcript. I know of no place that that's
12 technically allowed.

13 **MR. OSWALD:** I can tell the Court this
14 particular man has an excellent memory and he won't
15 need the transcript. We'll just end it right there.

16 **THE COURT:** Okay. Sounds good.

17 **MR. OSWALD:** If there is such a thing, rules
18 of evidence will apply, and I know how to deal with
19 past recollection recorded, refreshing, and all of
20 those things. Understood. So we can cut the
21 conversation here short.

22 **THE COURT:** Sounds good.

23 I will have to make a ruling on the
24 individual sections, I think, that you have indicated.
25 I will attempt to have that done some time during the

1 voir dire process so counsel have an opportunity. I
2 don't -- you are making a general objection.

3 Do you have any specific comments?

4 Mr. Murphy has provided a number of reasons.

5 Do you need to give me more information as to
6 individual segments?

7 **MR. MURPHY:** I do, and they are sections that
8 actually weren't in the original motion.

9 Do you have the transcript in front of you?

10 **THE COURT:** Kersten does.

11 **MR. MURPHY:** Okay.

12 If the Court can turn to page 19, the very
13 bottom paragraph starts with Serle Chapman. So when
14 this had occurred. That paragraph is subject to
15 redaction for all the same reasons as the others. As
16 you can see in there, Dennis Banks told me this. And
17 Madonna hadn't denied this. Lorelei, Thelma, Bruce,
18 Candy, this is another one of these collections of
19 hearsay, many of which are not true hearsay statements
20 but statements where he's attributing comments to
21 other witnesses that weren't in fact made.

22 Violates all the same provisions of hearsay,
23 confrontation, reliability that I previously
24 referenced. I apologize for not getting that to you
25 in the original list. As I indicated, I was trying to

1 get the motion to you before the weekend.

2 The other thing that would be subject to
3 exclusion, if we could turn to page 30, going to the
4 third from the -- third paragraph from the bottom,
5 starting with, so from that period. It's my position
6 that, essentially, everything from that point to the
7 end of the transcript should be omitted.

8 What's happening there is that at that point
9 Mr. Chapman begins asking my client questions about
10 activities, his life, et cetera, in Canada once he
11 returned to Canada some time in the summer or fall of
12 1976. He starts by talking about an incident that I
13 believe happened in 1978 when some AIM members, Dino
14 Butler particularly, was involved in an alleged murder
15 in the pacific northwest over some artifacts and a
16 grave robber. That stuff -- it's other acts by AIM
17 members in Washington State or Seattle that have
18 nothing to do with this case. There is no relevance.
19 My client is asked questions about that.

20 And so, really, there is nothing that appears
21 probative to any of the issues before the jury from
22 that point forward. And so we would say, after my
23 client says no, which is the fourth paragraph from the
24 bottom on page 30, that the entire remainder be
25 excluded as not relevant and highly prejudicial, and

1 should have to go through kind of a 404(b) weighing
2 because of the inflammatory nature of activities of
3 other AIM members years after this event.

4 **THE COURT:** Mr. Oswald?

5 **MR. OSWALD:** Yes. Thank you.

6 As far as that particular segment from
7 page 30 on, I do note -- and if you look on page 33,
8 fourth paragraph, where it starts, up yonder, then we
9 are talking about this whole business surrounding Anna
10 Mae. There are some relevant conversations in there.
11 Relevant conversations as the Court, I assume -- and
12 the Court's clerk will look at it and find that there
13 are some issues in there that need to be addressed by
14 the state that can be given to the jury.

15 The other matters, I would like to ask the
16 Court or inform the Court that what Mr. Murphy is
17 seeking goes more towards manifesting a belief in the
18 statement itself. And it's not going to the truth of
19 the matter asserted. And the confrontation clause
20 doesn't have a hill of beans to do with that.

21 Police --

22 As the Court knows police interrogators do
23 this all the time. Witness so and so saw you at the
24 scene. Whether witness so and so did or did not isn't
25 the point. The point is whether that suspect then

1 admits whether witness so and so saw them at the
2 scene. Those aren't necessarily subject to redaction.

3 **THE COURT:** No, it doesn't admit whether so
4 and so saw him at the scene. Admits whether he's at
5 the scene, I am assuming.

6 **MR. OSWALD:** So if he uh-huh, acknowledges,
7 or huh-uh, disavows, either way, that's what is
8 relevant, and the Court can fashion either a
9 limiting --

10 **THE COURT:** Wait a minute. So you are taking
11 the defendant's statement of yes or no and offering it
12 for what purpose?

13 **MR. OSWALD:** To acknowledge the statement
14 that was originally posed to him. Whether witness so
15 and so heard this or saw this, and whether -- if he
16 acknowledges it, I think it's fair game then.

17 It's -- this came up in the federal trial and
18 Judge Piersol was faced with kind of the same issue,
19 and he commented that if someone acknowledges or
20 agrees that the statement is correct it doesn't
21 matter --

22 **THE COURT:** Well, the statement would be I
23 saw you and if he says no, let me say that answer
24 requires some interpretation. That means I didn't see
25 you or it may be a denial that I was there.

1 **MR. OSWALD:** Okay.

2 **THE COURT:** And so am I supposed to allow a
3 jury to take their guess from that?

4 **MR. OSWALD:** Yes.

5 **THE COURT:** We have a lot of questions that
6 the answers to which are not helpful. That answer, in
7 particular -- I saw you at the station, and the answer
8 is no, you don't have a clue what that means. I don't
9 either. It means you didn't see me at the station; it
10 could mean I wasn't at the station; it could mean I
11 didn't see you.

12 I mean, where -- that's pure speculation as
13 to what it means, is it not?

14 It's another thing if he says yes, perhaps;
15 but if he says no --

16 **MR. OSWALD:** But that's why we have the 12
17 finders of fact. It's not a --

18 **THE COURT:** Objection. Speculation.
19 Sustained.

20 **MR. OSWALD:** It's not a matter of law, Judge.
21 It's a matter of fact. And that's what closing
22 arguments are for.

23 **THE COURT:** No. Speculation as to what
24 another person -- you know, deputy, what did your
25 partner think? Speculation. Sustained.

1 Fair?

2 **MR. MURPHY:** If I could chime in here, I
3 don't think this is even the kind of adoption or
4 acknowledgment. I think that is frankly a red herring
5 being thrown out.

6 In the federal trial what Judge Piersol was
7 confronted with was Dick Marshall was asked a question
8 by Serle Chapman, something to the effect of, did you
9 give these guys a gun. And his response was, well,
10 back in the day you did what you were told. And the
11 judge said, well, that's close enough of a response to
12 adopt the statement that he may have given the gun.

13 What I have identified here are statements
14 where Serle Chapman sets forth a slew of facts and he
15 says I verified this, I have corroborated them, I have
16 reason to disbelieve this. And then at the very end
17 he will say something like, and Theda was driving a
18 red car wasn't she. And my client will say yeah.

19 They want to admit an entire paragraph of
20 facts, speculation, invasion of the province of the
21 jury to get in the last question or to get in where my
22 client will say yeah when he's answering the very last
23 section of that. And that's why I have done the
24 selective reactions that I have done.

25 Look at page 71. I mean, he goes --

1 **THE COURT:** The standard objection to that is
2 compound question.

3 **MR. MURPHY:** Well, exactly, but it shouldn't
4 go before the jury when Mr. Chapman is not allowed to
5 testify as to stuff that goes outside his personal
6 knowledge. So he's setting forth -- if you look at
7 this transcript, he probably does about 80 percent of
8 the talking.

9 **THE COURT:** Seems to be.

10 **MR. MURPHY:** And he's talking about stuff
11 that's not true -- and I understand what Mr. Oswald is
12 saying. A cop can say, you know, we got your
13 fingerprints and a person says, okay, you got me.

14 That's not what is going on here. He's
15 saying, talked to Dino and Dino told me this and Theda
16 verified this and Arlo said this and blah, blah, blah,
17 blah, blah which are all presented as assertions of
18 fact which are not fact, and they want that to go in
19 front of the jury merely because at the end of the
20 statement like that, my client says something like
21 uh-huh. Which is completely unresponsive to this
22 litany of facts and there really isn't even a question
23 put to him. He's just being told over and over again
24 that these are these things that have supposedly
25 happened or he's supposedly been told or other

1 witnesses have said.

2 So I think the redactions I did -- I could
3 have asked for a lot more redactions based on just
4 straight hearsay, things like Arlo has said. Arlo is
5 going to be on the stand. So I will note there is
6 many places where I did not move to redact those
7 because Arlo is going to be subject to
8 cross-examination.

9 Leonard Peltier, Dino Butler, Dennis Banks,
10 all of these -- Lorelei, Madonna, all of these people
11 are not going to be on the stand. They are not going
12 to be subject to examination. We shouldn't allow
13 Mr. Chapman to essentially lie to the jury and say he
14 was told these things by these people; he verified the
15 information backwards and forwards; they are true, and
16 by the way, Mr. Graham, wasn't her car red. They want
17 to get in the red car part. I left that out of the
18 paragraph. I said they could bring that in. But all
19 of these other nonsensical things that Mr. Chapman is
20 presenting should not go before the jury.

21 **THE COURT:** I will look at those matters. If
22 you have initial things to say, send them. And
23 Mr. Oswald, if you have things to say in reply, get
24 them to me.

25 **MR. MURPHY:** Your Honor, would you like a

1 copy of the tape because what I will do is email
2 over --

3 **THE COURT:** Yep.

4 **MR. MURPHY:** This is my only copy of the
5 tape, but I am going to hand it to you. And I will
6 just ask that by trial at some point we get it back.

7 I will email to you and counsel a list of
8 about 15 things that are included in the transcript on
9 particular pages that I believe are not said at all on
10 the tape and would ask those to be redacted, as well.

11 **THE COURT:** Okay. I will look forward to
12 that.

13 All right. People need to know what I am
14 going to do with the Medicine Man thing. And I've
15 made up my mind on that, and it creates another
16 problem. But for a number of reasons I don't believe
17 that Mr. Gates qualifies. I can go into those in some
18 detail, and I haven't written the decision in its
19 entirety, but I am comfortable with where I am going
20 with it.

21 There is a whole lot of reasons but I can
22 start with the basics. I appreciate Mr. Murphy's
23 expert who was not a Medicine Man, and I am still
24 waiting for a citation from any authority in a written
25 piece of work that sets that out, and I don't have

1 any.

2 He also at one point said it would be
3 discretionary near the end of the testimony.
4 Mr. Murphy redirected on that, but you can't take the
5 discretionary language away from the witness.

6 In doing some looking at various cases,
7 people to whom folks obviously go to spiritual
8 guidance, deacons, nuns, are frequently held not to
9 qualify. Admittedly there are cases that qualify a
10 nun, but they are relatively routinely held not to
11 count. You go to the priest, and you don't go to the
12 deacon.

13 And I have no nothing that -- I have no
14 comfortable information available to me that Mr. Gates
15 declares himself to be a Medicine Man. There is
16 nothing that indicates he was generally accepted as a
17 Medicine Man by the particular community in which he
18 claims to hold such status. I don't probably quibble
19 with the fairly common interpretation of a Medicine
20 Man or Medicine Woman's roles within the society. But
21 I have nothing that suggests that either party had a
22 look at it as a truly absolute confidential thing
23 where the Medicine Man should go to his death rather
24 than even acknowledge talking to Mr. Graham.

25 I don't -- I mean, I realize others under

1 that privilege have spoken, but the rule is you are
2 supposed to go to your death rather than give up that
3 information. I don't have any understanding -- I have
4 nothing in front of me that convinces me that's the
5 degree of privacy in which it was held. And in some
6 more detail that will come out.

7 But I also think it creates a significant
8 *Crawford* issue. That has to be addressed because I
9 think *Crawford* poses a huge impediment to that coming
10 into evidence.

11 **MR. MURPHY:** And we made that point in our
12 motion. You know, he's been dead since 2003. This
13 was statements made at a Grand Jury proceeding so they
14 are sworn statements and clearly fall under the
15 testimonial context. And so that's --

16 I want to make sure in your ruling you
17 incorporate or at least reference all of the exhibits
18 that we provided because you mentioned just now not
19 having anything before you that he was recognized as a
20 Medicine Man. We do have the transcript where
21 Mr. Ecoffey says that he was a spiritual leader for
22 AIM and we did submit the exhibit where he said he was
23 a Medicine Man and practitioner since the 40s. So I
24 want to make sure those are --

25 **THE COURT:** Well, I am a little bit -- by

1 the, I am a private practitioner. And I realize
2 people are construing that to say he's not -- in the
3 private way that he's not in the modern whatever we
4 call it. To some extent perhaps huckster scope of
5 some of the practices that truly deviate from the
6 cultural basis for medicine men and women.

7 But I'm just not comfortable I get to the
8 degree that that relationship in virtually any way,
9 shape, or form imposes the degree of confidentiality
10 that's required to establish that evidentiary
11 privilege.

12 **MR. MURPHY:** But are you excluding his
13 1994 -- I believe was the year -- Grand Jury
14 transcript?

15 **THE COURT:** Yes.

16 **MR. MURPHY:** Okay.

17 **THE COURT:** Well, I mean, I'm -- I don't
18 think he's a Medicine Man.

19 So -- but his problem is *Crawford*. And with
20 *Crawford*, the state has to either reply to me or
21 that's gone. And I'm not sure what the exception to
22 it is. There are some. Whether they will apply or
23 not -- but I need that specifically addressed by the
24 state.

25 **MR. MURPHY:** The only other issue I have -- I

1 actually have two. One is -- and I just want to keep
2 the Court abreast of things. We got a second witness
3 list late last week which included the name Russell
4 Means on it. Over the weekend I emailed the state
5 asking them for both his rap sheet, because that
6 wasn't included in the rap sheets that I was allowed
7 to review at Mr. Oswald's office, as well as all
8 statements he's made.

9 Mr. Jackley emailed back and advised me that
10 there was Grand Jury testimony out there. The state
11 has said they will get that to us by close of business
12 today. I have no idea since I have been working this
13 case for three years and have not seen anything
14 regarding Russell Means in this case what new issues
15 that may bring up. But I want -- I don't want you to
16 think if we come in on the 29th and I say, wholly
17 cow, Judge, there is all sorts of stuff and I am
18 bringing all of these issues forward, that it's
19 something I have sandbagged.

20 I have yet to see -- I will hopefully see by
21 the end of today what Mr. Means' relationship in any
22 way, shape, or form is to this case. That's where
23 we're at on that.

24 **THE COURT:** Okay.

25 **MR. OSWALD:** Understood.

1 **MR. MURPHY:** The only other issue is the Dick
2 Marshall subpoena issue. I haven't heard of any new
3 court hearing being scheduled on Mr. Hanna's motions.
4 Mr. Jackley referenced in an email this weekend that
5 he thought it was going to be handled on the 29th.

6 **THE COURT:** It will be handled during the
7 voir dire process. Exactly where in that process, I
8 do not yet have a clue, but it will be handled at a
9 time convenient there that does not impact on the jury
10 or the potential jurors.

11 **MR. MURPHY:** So about seven p.m. at night?

12 **THE COURT:** Well, no. Y'all may get paid by
13 the hour. I don't. And I am going to have jurors
14 that are going to be throwing things at us as
15 five o'clock approaches, so I suspect we will close at
16 five o'clock.

17 We will routinely have an hour and fifteen
18 minutes for a lunch break. We will break once in the
19 afternoon and once in the morning.

20 Bench conferences will be held to an absolute
21 minimum. Objections should consist of one word if at
22 all possible. Speaking objections will not be had.
23 If I need more than the objection itself to figure out
24 what I am going to do, I will ask counsel either in
25 open court or under a whisper mic.

1 The whisper mic is exceedingly sensitive and
2 you may intrude. Pick it up and I will read it on my
3 screen so we don't even need to talk in a very low
4 voice. You will whisper. Otherwise, I can't
5 understand you. With whispers I don't have a clue
6 what's being whispered. So that mic will work well,
7 and you will be faced away from the jury and will be
8 easy enough for me to handle. Tina will have a
9 headset to use and we'll get a good transcript of it
10 and go from there.

11 If we're going to have to take breaks other
12 than those I have specified, I want to know about them
13 in advance so perhaps we can either adjust a trial
14 schedule to provide less inconvenience for the jury.
15 They are going to be sitting here with their lives
16 severely disrupted with wholly inadequate
17 remuneration, and I wish to make it as easy as
18 possible for them.

19 **MR. MURPHY:** And you will be advising them
20 that they -- for instance, if we have some jurors that
21 are diabetic and need to use the restroom more
22 regularly, they can call for breaks themselves?

23 **THE COURT:** Absolutely.

24 **MR. MURPHY:** All right.

25 **THE COURT:** So anything else we need to do

1 today?

2 **MR. MURPHY:** Not from the defense.

3 **MR. OSWALD:** I don't think so, Judge.

4 **THE COURT:** Thank you.

5 Unless we have something further, we shall
6 see you Monday morning.

7 There is a possibility that you can reach me
8 over the holiday. Bear in mind I am not the world's
9 sharpest tool and I have only used wireless once. But
10 I will have a computer at my farm and I would suggest
11 you use my two email addresses. One is the official
12 one here and the other one would be Jack and Diane,
13 like the diddy, spelled out, at hotmail dot com. And
14 with any luck I will have one of these two computers
15 up and on the air and able to retrieve those messages,
16 okay, because I will be at the farm from Wednesday and
17 back Sunday.

18 So if you need me, the farm number is
19 869-2560. You will need -- let it ring. Some of us
20 take a dozen rings to realize it's the telephone.
21 It's a 605 in front of that.

22 I think that's all the information I can give
23 you about that. Call and I will try and do it by
24 conference -- I am sure I can arrange something
25 somewhere.

1 We'll go from there. Thank you, folks.

2 (Whereupon, the proceedings in this matter
3 were then concluded.)

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1 STATE OF SOUTH DAKOTA)
 2 COUNTY OF PENNINGTON) SS. CERTIFICATE

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I, TINA RAE PRUSS, Official Court Reporter
 and Notary Public in and for the County of Pennington,
 State of South Dakota,

DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 questions asked, the testimony given, and of the
 proceedings had.

I FURTHER CERTIFY that I am not of kin or in
 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.

COPY

Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 Pennington County, South Dakota
 My Commission expires: 10-04-2012

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
Plaintiff,)
)
VS.)
)
JOHN GRAHAM,)
)
)
Defendant.)

TRANSCRIPT OF
JURY TRIAL

VOLUME 1 OF 10

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
NOVEMBER 29, 2010

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* * A P P E A R A N C E S * *

MR. MARTY JACKLEY
Attorney General
MR. ROD OSWALD
Assistant Attorney General
MR. ROBERT MANDEL
Assistant U.S. Attorney
Representing the State of South Dakota

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

* * I N D E X * *

WITNESS (ES) : DIRECT CROSS REDIRECT RECROSS
(None.)

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EXHIBITS:

OFFERED/ADMITTED

(None.)

1 * * P R O C E E D I N G S * *

2 **THE COURT:** Okay.

3 We have a number of things to discuss. We'll
4 deal with Marshall's motion in a moment. What I want
5 to talk about, first of all, is to make counsel aware
6 of some things that are going to go on.

7 Number one, other than counsel and their
8 assistants, there ain't going to be any cell phones or
9 anything capable of carrying any device. Those who
10 came in with them today will shut them off; and if we
11 hear one they will be out of here for the duration,
12 except for jurors, but we're short of those the way it
13 stands.

14 You get one alternate -- you get one
15 additional peremptory challenge because of the two
16 extras as I read the statute.

17 **MR. MURPHY:** Say that again.

18 **THE COURT:** One -- two alternates, one
19 additional challenge.

20 You can check that against me, but that's
21 what I pulled out of the code this morning. For one
22 or two alternate jurors, there is an additional
23 peremptory challenge. It comes out of the civil code,
24 but --

25 **MR. MURPHY:** So we get 21 peremptories?

1 **THE COURT:** You get 21 apiece.

2 So we'll have to seat 56. We got 75, I
3 think, moving up towards 80 in there this morning.

4 I realize people from time to time will have
5 to leave the courtroom, but it's going to be limited.

6 We're going to try the case in Judge Kern's
7 courtroom. The acoustics are better for me. I will
8 have access to her chambers and things of that ilk.
9 It's a smaller audience than we have here.

10 In terms of the audience, I am going to try
11 and get the media in more or less a front row seat.
12 Gives me a barrier. And I don't mind them taking some
13 hits.

14 One of the things I am very concerned with is
15 audience reactions to testimony. Noddings of head or
16 oh no kind of horse shit. I am not supposed to say
17 that on the record. But I will throw them out of the
18 courtroom because, it gets going, that's going to be a
19 mistrial. That's testimonial in nature and the jury
20 is going to be able to see it. And if you have any
21 people here from either side, Mr. Murphy's side or
22 victim's here, they best be forewarned.

23 **MR. MURPHY:** We got nobody.

24 **THE COURT:** Okay.

25 But I don't -- I mean, I will make that

1 statement to the jury -- or to the audience, as well.
2 But I simply won't tolerate it and -- because it
3 impacts the jurors' thought processes, those that see
4 it; and for all practical purposes, it's unsworn
5 neither affirmative or contrary visual testimony. And
6 ain't going to fly.

7 I am going to make opening comments somewhat
8 longer than I normally make because this is a somewhat
9 longer trial than I ordinarily have. The only thing I
10 want to be clear on -- and I will need some help -- is
11 a brief, incomplete but accurate, statement of the
12 charges and advising the jury that the charges will be
13 read if full by the state just prior to opening
14 argument.

15 I want to give them obviously a heads up. I
16 suspect most of them know at this stage of the game
17 that this is the trial dealing with murder charges.

18 **MR. JACKLEY:** Judge, on that point -- and
19 Mr. Murphy and I have talked -- obviously in the
20 indictment Thelma Rios is listed. Is there a problem
21 with me redacting her out or do you want it read in
22 full.

23 **THE COURT:** No. No.

24 Mr. Murphy?

25 **MR. MURPHY:** Well, she's listed by both the

1 state and the defense as a witness.

2 **THE COURT:** I am assuming she will testify.
3 I don't know that. But if she is, I am assuming it's
4 fair grounds to say you were indicted on these charges
5 and -- by virtue of the plea signed --

6 **MR. MURPHY:** As long as we got that covered.

7 **THE COURT:** I am assuming that's a fair
8 inquiry.

9 Other than it, I haven't yet figured out how
10 I am going to describe the charges and I will need to
11 do that. I will get your prior approval before I do
12 that.

13 I am going to explain the number of jurors
14 and the peremptory challenges. I am going to give
15 them the warnings on discussions of the case because
16 we're going to be here through a number of breaks and
17 things of that ilk, and I am going to give a brief
18 explanation of that.

19 If there is electronic devices, trial jurors
20 can bring theirs in, but they will be given to the
21 bailiffs at the start of the day and they will be
22 returned at the close of the day.

23 **MR. MURPHY:** Are you going to go through
24 personal hardships?

25 **THE COURT:** Yeah, I'm gonna.

1 What I have there is -- there are obviously
2 some people -- I'm going to lay a guilt trip on them.
3 Who cannot possibly serve because of serious and
4 unchangeable obligations. I am going to ask you to
5 identify yourselves if you cannot possibly serve. In
6 doing so, please take a look at your obligations to
7 public service and its priorities over other matters.

8 Perhaps give some thought to our National
9 Guards and Reservists who have been repeatedly
10 deployed into hazardous zones, and place the duty of
11 public service before all things, including life.
12 Within that parameter, I expect most of us can find
13 the time to sit as jurors in this case.

14 Then I will ask for a show of hands that
15 after consideration of the fact those that cannot --
16 just simply cannot handle the time frame for the
17 trial.

18 I am telling them it's scheduled for three
19 weeks. We're anticipating that we'll end by mid week
20 the last one and perhaps a day or so earlier, but it
21 might not. I am advising them of Friday afternoon off
22 and Friday the 10th off.

23 **MR. MURPHY:** I would plan during my voir dire
24 to go back into the personal hardships to talk about
25 ability for people to remain attentive for this period

1 of time.

2 **THE COURT:** Yeah.

3 **MR. MURPHY:** You got kind of a heavy-handed
4 approach there and I know people are going to back
5 off, but I just want to make sure we're able to go
6 into that as well.

7 **THE COURT:** Yeah.

8 And we can talk physically as well.

9 **MR. MURPHY:** Yeah. We got hardships,
10 disability, hearing, diabetes, but also a lot of
11 students.

12 **THE COURT:** I don't have any problem with
13 that at all, either side for that matter.

14 Anything before we bring Mr. Marshall in?

15 **MR. JACKLEY:** Not from the state.

16 **THE COURT:** I had two things from you, John.
17 I'm trying to remember.

18 **MR. MURPHY:** The redactions and --

19 **THE COURT:** Alternate charges is one.

20 **MR. MURPHY:** The alternate charges is one and
21 the redactions.

22 **THE COURT:** Yeah.

23 I am about done with the redactions. I am
24 sorry, I have not been up to speed over the weekend,
25 but I got good input from Kersten.

1 And the fundamental problem with a lot of the
2 questions is as Mr. Murphy says, fact A, B, C, D, E,
3 as in a compound question routinely objected to and
4 sustained, any time the answers can be inconsistent to
5 the matters. And then we have statements of fact and
6 then a question and I don't think the question is
7 commonly, are these things true. Okay.

8 So it's possible that we are talking about
9 the sun rose yesterday at 7:15 and you had lunch at
10 Romeo's Cafe; that the same answer doesn't apply to
11 both, and I think that's a problem. Because the
12 implication is an answer that -- however vague, can be
13 interpreted as an affirmative response, by its nature
14 then adopts all the stated facts.

15 **MR. JACKLEY:** Does that go to weight and not
16 admissibility, though?

17 **THE COURT:** Compound question. Sustained.

18 **MR. JACKLEY:** But we're talking about the
19 witness interview, correct?

20 **THE COURT:** Yeah.

21 **MR. JACKLEY:** Not a lawyer's question to a
22 witness.

23 **THE COURT:** That's true. I understand that.
24 But nobody here in the room can even make a guess as
25 to what the response means and whether it applies to

1 all of them or not.

2 In any event, I will give you whatever it is
3 as rulings on it; particularly if we acknowledge --
4 and I thought Mr. Oswald -- I thought there was a
5 point that some of the things are just flat not true.

6 And we acknowledge an interesting thing that
7 law enforcement frequently can make some statements
8 that are not true and are not held to the same level
9 of responsibility as others in the system. And
10 particularly when we're doing that and asking somebody
11 by an answer which -- whether clear or ambiguous, at
12 best, to adopt things that we know to be false. I
13 think that's -- violates our duty as officers of the
14 Court not to misrepresent something by act or omission
15 to the Court. So that's kind of where I sit on that,
16 buy I'll give you details on that.

17 I have Mr. Murphy's motion for alternate
18 charges and I kind of poked Rod this morning and said,
19 can you explain to me how I can look at a man on the
20 street and say somebody can intentionally and
21 unintentionally kill the same person. And I am hard
22 pressed to think that anybody walking down the street
23 would say, well, that's easy. I understand that.

24 And I am somewhat leary of things that --
25 legalisms that defy reason. And so somebody -- and

1 somebody has got to give me the law on that and
2 explain to me how that can be done because I really
3 have a problem with that concept that we can charge
4 somebody in Count One -- you know, we do DUIs in the
5 alternative all the time.

6 And how we can intentionally kill someone as
7 an essential element of the crime and have the same
8 jury find that there was an unintentional thing in a
9 separate count. To me it's inherently impossible.
10 And it's just -- it's asking a jury to say it's
11 raining and it's not raining. It rained at noon
12 yesterday and it didn't rain at noon yesterday, both
13 of them beyond a reasonable doubt.

14 Now, I also understand there is some rulings
15 and circumstances, like, I don't understand and I
16 never will why simple assault is not a lesser included
17 of aggravated assault. I never will understand that
18 ruling until the day I die. I think that's the
19 statement of law. At least some simple assaults are
20 not lesser includeds and it's -- how can you walk down
21 the street and say that to people.

22 But -- so anyway, I want to know what's going
23 on there and how we get around what seems to be just
24 an absolute impossible statement.

25 Mr. Murphy?

1 **MR. MURPHY:** The only other thing I wanted to
2 bring up now is we had a lot of motions in limine; and
3 you know, to preserve the issues for appeal, they have
4 to be reobjected to. You said the other day you want
5 one word objections and so --

6 **THE COURT:** Well, there can be two or three
7 words. What I don't want is a lecture to the jury as
8 to how dumb the other side is --

9 **MR. MURPHY:** Right.

10 **THE COURT:** -- or the Court itself.

11 **MR. MURPHY:** So in the motions in limine, my
12 plan would be to say something to the effect where
13 it's going into one of those areas where you may have
14 to reassess a prior ruling just, objection based on
15 the prior motion and leave it at that. You'll know
16 then and the state will know that it's based on
17 whether we're talking the rape allegation, the Peltier
18 threat --

19 **THE COURT:** I am assuming we're not even
20 going to try the phosphatase thing. That word is
21 probably not even going to come up, right?

22 **MR. JACKLEY:** I respectfully respect the
23 opportunity to have it come up.

24 **THE COURT:** In what respect?

25 **MR. JACKLEY:** The phosphatase was found in an

1 autopsy. We have noticed the expert testimony --

2 **THE COURT:** Of who?

3 **MR. JACKLEY:** -- of what acid phosphatase it.

4 **THE COURT:** Of who?

5 **MR. JACKLEY:** Dr. Peterson.

6 **THE COURT:** How much acid phosphatase was
7 found.

8 **MR. JACKLEY:** The words of the autopsy report
9 are strong. Doesn't have an exact amount but it says
10 strong contents of acid phosphatase.

11 **THE COURT:** And how -- is there semen found
12 with it?

13 **MR. JACKLEY:** No.

14 **THE COURT:** And acid phosphatase is vaginal
15 secretion as well, and there is a threshold, as I read
16 the studies on it, that indicates sexual activity and
17 we don't know the levels.

18 How do we get there?

19 We're to assume the word strong establishes a
20 certain level or we're going to have testimony as to
21 how much and how we distinguish between vaginal
22 secretions; and I am assuming however the term is
23 pronounced, seminal components or semen components?

24 **MR. JACKLEY:** Your Honor, what I would
25 anticipate coming in is really -- and again, all I can

1 do is anticipate because I don't know what the
2 witnesses will say. But three areas of inquiry
3 regarding the sexual relations: We have the Arlo
4 Looking Cloud statements regarding what he heard in
5 the room.

6 We have the Frank Dillon statements as to
7 what he heard John Graham tell him.

8 And then we have Dr. Peterson that can
9 indicate that -- define to the jury generally what
10 acid phosphatase is; and define basically that it's an
11 indicator of sexual relations. He's not going to go
12 so far as to say with whom us because there is no
13 semen.

14 **THE COURT:** Well, what level of certainty
15 does he have to say that this amount, unknown to him,
16 is an indication -- would indicate scientific
17 probability of sexual intercourse?

18 **MR. JACKLEY:** I think he's limited to saying
19 it's an indicator of sexual relations.

20 **THE COURT:** But it's not, in and of itself.
21 It exists without sexual intercourse in the vagina.

22 **MR. MURPHY:** Actually in all living cells.

23 **THE COURT:** What?

24 **MR. MURPHY:** In all living cells it exists.
25 It also exists in all decomposing cells.

1 **THE COURT:** I mean, its presence is
2 absolutely normal.

3 **MR. JACKLEY:** But not at the levels
4 indicated --

5 **THE COURT:** We don't know what the levels
6 are, you are telling me, other than the word strong.

7 **MR. JACKLEY:** That's correct.

8 **MR. MURPHY:** And that was by the autopsy from
9 the guy who missed by bullet. That wasn't
10 Peterson's autopsy.

11 **MR. JACKLEY:** I all fairness, the x-ray
12 machine wasn't working. I'm not going to beat up on a
13 dead guy.

14 **MR. MURPHY:** So our position would be this
15 doesn't pass any threshold level of probativeness or
16 reliability. You know --

17 **THE COURT:** Yeah. I'm going to have to hear
18 what his testimony is going to be because I really --
19 I mean, it's normal -- it's normal. It's not abnormal
20 to have it found vaginally. And -- at least that's
21 what my readings indicate. And, of course, I'm not a
22 doctor.

23 **MR. JACKLEY:** So do you want -- does the
24 Court want a pro offer of evidence from counsel or are
25 we going to have a hearing outside of the presence of

1 the jury?

2 What is the preferred method?

3 **THE COURT:** Well, I want to know what he's
4 going to say, so I am assuming the appropriate method
5 will be to have him here.

6 You know, near as I can tell, it requires his
7 interpretation of what strong means. And that is --

8 **MR. JACKLEY:** That and defining to the jury
9 what acid phosphatase is because I don't think that's
10 a common term.

11 **THE COURT:** Depending on -- what we get to is
12 it may or may not indicate sexual intercourse. Okay.
13 And if that's the statement, it may or may not, then
14 it -- I mean, I always have trouble when we bring in
15 the forensic examiner for child sexual abuse that has
16 no findings that support or deny it and is only called
17 if they are raised in question that it means it didn't
18 happen. But the state routinely calls one and the end
19 result is within the reasonable degree of medical
20 probability I can't tell whether there was or was not
21 a sexual penetration. Objection. Irrelevant.
22 Sustained. I mean, it has to be of assistance in
23 proving or disproving some fact in issue. And if he
24 can't tell, how is that a fact in issue?

25 **MR. JACKLEY:** Because it's circumstantial

1 evidence from which appropriate inferences may be
2 drawn that is consistent with what Arlo Looking
3 Cloud will -- is anticipated to testify to, and what
4 Frank Dillon is anticipated to testify to. It's
5 corroborating circumstantial evidence of that fact.

6 **MR. MURPHY:** But if it has no threshold of
7 reliability --

8 **THE COURT:** That's where I am stuck with it.
9 If he can tell me how he gets there, that there is a
10 reasonable probability -- within a reasonable
11 scientific probability --

12 **MR. MURPHY:** And that would be the
13 quantification issue, which you've read the studies
14 and I've read the studies where as a threshold matter
15 they are not supposed to indicate that it's an
16 abnormally high level until they have done the
17 quantitative analysis that tells them there is more
18 than 3 milligrams per whatever -- quantitative
19 numbers.

20 **THE COURT:** Of course we don't have any DNA
21 samples. That's probably understandable given the
22 time frame.

23 **MR. MURPHY:** Well, DNA tests were done --
24 semen tests were done way back then with the FBI and
25 came back negative, as well.

1 **MR. JACKLEY:** Well, they came back unable to
2 find a testable sample. They didn't come back
3 negative towards your client. They came back with
4 unable to find a testable sample. There is a
5 difference.

6 **MR. MURPHY:** Well, the report I got said
7 items Q1 through QA were studies and --

8 **THE COURT:** I am not sure in reality there is
9 a significant difference if I can't find a sample I
10 realize like not guilty doesn't mean innocent but the
11 end result is the same.

12 But in any event, I am somewhat concerned
13 about this. I still have some questions about
14 relevancy and -- of testimony of sexual intercourse
15 and an indication of rape. I find it highly
16 prejudicial and have some concerns about that as I
17 don't know how it makes it more or less likely that
18 Mr. Graham had a part in the killing of Ms. Aquash.

19 **MR. JACKLEY:** It provides both a motive
20 and --

21 **THE COURT:** So we're suggesting that it had
22 nothing to do with being an informer. He just killed
23 her to keep her from saying he raped her?

24 **MR. JACKLEY:** We're allowed to have more than
25 one motive, Your Honor. He had compound motives.

1 **THE COURT:** What evidence do you have of that
2 other than I am going to suggest to you that he
3 wouldn't have killed her but for that?

4 **MR. JACKLEY:** Well, the evidence -- of
5 course, as to the informant, there is a considerable
6 amount of evidence when it comes to that.

7 When it comes to the sexual relations, I
8 mean, he kidnapped -- as part of the integral act, the
9 criminal venture, he kidnapped, raped. That evidence
10 goes to both his motive to kill her along with an
11 explanation of her state of mind why she didn't run.

12 **THE COURT:** Did that go into the Grand Jury?
13 Was the charge even proposed to the Grand
14 Jury on that?

15 **MR. JACKLEY:** The Grand Jury has made a
16 probable cause finding of felony murder rape.
17 However, Canada doesn't have felony murder rape and
18 has not allowed us to proceed.

19 So I can tell the Court that a Grand Jury has
20 made a probable cause finding, but I can't move
21 forward on that count because of Canada.

22 **THE COURT:** You can't?

23 **MR. JACKLEY:** I don't want to create an
24 international incident, so no, I can't because of the
25 extradition agreement. My understanding is we can

1 neither move forward on the felony murder rape nor --

2 **THE COURT:** Aren't you doing the same thing
3 indirectly?

4 **MR. JACKLEY:** No. It's evidence that goes
5 directly to the kidnapping and the murder which are
6 existing counts.

7 **THE COURT:** You are suggesting to me that the
8 kidnapping was to enable Mr. Graham to have sexual
9 intercourse with Anna Mae?

10 **MR. JACKLEY:** It's an integral part of the
11 events.

12 **THE COURT:** You are telling me that that was
13 the reason for the kidnapping?

14 **MR. JACKLEY:** No, I'm not telling you it was
15 the reason for the kidnapping, but that became a part
16 of -- an integral part of the kidnapping and the
17 murder.

18 So I don't get confused -- so we are moving
19 forward on the first degree premeditated murder and
20 we're moving forward on the felony murder kidnapping;
21 but because of the extradition agreements, we are
22 unable to move forward on the felony murder rape. But
23 there has been a probable cause finding by a Grand
24 Jury as to the existence of the felony murder rape.

25 **THE COURT:** I will address that further, but

1 I -- I don't like it.

2 John?

3 **MR. MURPHY:** I think that's one of those
4 things we need to get addressed before voir dire.
5 It's just one of those things that -- because if it's
6 coming in in any way, shape, or form, I'm going to
7 voir dire on that extensively because it's always --
8 one of those atomic bombs in jury selection is past
9 sexual violence, victims of violence, friends, family,
10 children.

11 **MR. JACKLEY:** Your Honor, I understand that
12 when issues come up the ability to relitigate, but
13 this is a matter that has been extensively litigated
14 that the Court has issued an order directly addressing
15 this issue on, I believe, August 10, 2010, indicating
16 in the order at paragraph 10, denying the defendant's
17 motion with conditions, explaining it's probative
18 value as to motive, as to the felony murder
19 kidnapping, and the charge of premeditated murder.
20 Finding that it is -- arose out of the same
21 transaction or series of transactions as charged in
22 the offense citing the *Owen* case, 729 N.W.2d 363. It
23 has probative value. *It's res gestae* evidence along
24 with 404(b) evidence.

25 **THE COURT:** I don't think it has diddley to

1 do with murder, frankly. I don't think rational minds
2 can conclude that. I don't think -- if we assume for
3 the sake of discussion that Mr. Graham or someone
4 associated with Mr. Graham murdered Anna Mae, I don't
5 think that had anything to do with it and I don't
6 think anybody else thinks that.

7 I think they think that she would have been
8 murdered in any event by whoever did it whether or not
9 Mr. Graham had sexual relationships with her or not.
10 That's the problem I have with it.

11 But I do agree that it is a course of events
12 that there may have been sexual relationships between
13 the two. I think that -- whether I am going to let
14 the phosphatase in or not, I don't know. I think we
15 have to let Arlo Looking Cloud's discussion come in as
16 well as what's his name.

17 **MR. JACKLEY:** Frank Dillon?

18 **THE COURT:** Yeah.

19 But I think that has to come in.

20 **MR. JACKLEY:** I need to advise the Court,
21 too, just in lines with what the Court is saying as
22 far as witness scheduling, Dr. Peterson has an event
23 he has to attend to Thursday so our plan is to call
24 him this Friday morning. That's the only time we can
25 get him here is what I am advising the Court.

1 **THE COURT:** Well, we will -- we will have to
2 have the gist of his testimony presented at
3 eight o'clock in the morning.

4 **MR. MURPHY:** So my record is complete, I am
5 just renewing -- we've had this relitigation on the
6 rape issue, renewing my previous objections. I
7 believe it is not *res gestae* or 404(b) --

8 **THE COURT:** Understand.

9 We will not discuss phosphatase in the course
10 of the voir dire. Period.

11 **MR. JACKLEY:** Am I permitted, Your Honor, to
12 discuss what I anticipate Arlo Looking Cloud will
13 testify to regarding sexual relations in opening
14 statements? In the context of what --

15 **THE COURT:** My thought is he said it sounded
16 like people were having fun.

17 **MR. JACKLEY:** No, having sex.

18 **THE COURT:** Well --

19 **MR. JACKLEY:** After she was bound and tied.

20 **MR. MURPHY:** I think that's an overstatement
21 of the record. He said making love on one occasion,
22 heard sounds of sex on another. Nothing about bound
23 and tied.

24 **MR. JACKLEY:** Well, Your Honor, we anticipate
25 bringing in three to four witnesses that will testify

1 she was bound and tied in Denver.

2 **THE COURT:** Do you have any as to say she was
3 unbound and tied at any point in time?

4 **MR. JACKLEY:** She was bound and tied
5 throughout the incident at times. I mean, in Denver
6 she was bound and tied and then throughout the trip
7 there was times she was and there was times she
8 wasn't.

9 **THE COURT:** And how about -- do we have any
10 evidence at the time of the alleged rape that she was
11 bound and tied?

12 **MR. JACKLEY:** Not during that time.

13 **THE COURT:** Then we're not going to go there.

14 **MR. JACKLEY:** I didn't say while it was going
15 on, but there is evidence from three to four witnesses
16 that just prior to that in time, during the kidnapping
17 process, she was bound and tied.

18 **THE COURT:** And unbound and tied, as well.

19 **MR. JACKLEY:** Correct.

20 **THE COURT:** So we have no evidence which
21 tells us she was bound and tied at the time there was
22 a sexual relationship alleged. So we're not going to
23 make that statement in conjunction with it.

24 You may discuss that she was bound and tied
25 in Denver. You can suggest that on the trip she was

1 bound and tied --

2 **MR. JACKLEY:** And that's all I am asking,
3 Your Honor.

4 **THE COURT:** -- at various times.

5 But we're not going to make any statement
6 that she was bound and tied during the alleged sexual
7 congress.

8 **MR. JACKLEY:** I didn't intend to indicate
9 that to you, Judge.

10 **THE COURT:** Okay.

11 **MR. JACKLEY:** But during this entirety --

12 **THE COURT:** She spent times tied and times
13 untied.

14 **MR. JACKLEY:** That's fair.

15 **THE COURT:** I think that's probably
16 permissible testimony.

17 Questions?

18 **MR. OSWALD:** Judge, as far as Dr. Peterson,
19 he's being flown in with the state airplane and he's
20 not scheduled to be here until about nine o'clock in
21 the morning. And then we get him from the airport and
22 get him here. So I asked him to be here by ten.

23 **THE COURT:** I suggest we try and get him here
24 earlier. I don't know what else I am going to do.
25 But if he's going to testify at ten o'clock, he's apt

1 to be the last witness before we break for noon and I
2 want an opportunity to hear what he's going to say
3 before I allow him to address the question of acid
4 phosphatase. And I want to hear his authorities for
5 it and the like.

6 **MR. MURPHY:** I guess while we're on the
7 phosphatase --

8 **THE COURT:** Sounds like a minimal -- a minor
9 *Daubert* to me. I mean, he has to be making a
10 statement that would be accepted within the scientific
11 community which he is part. And that would be that
12 phosphatase is present in vaginal secretions as well
13 as the semen and any number of other anatomical parts.
14 And that it's indicative of sexual intercourse at what
15 level? I mean, I know the studies show one level that
16 I have read but I don't know what other studies may
17 show.

18 **MR. MURPHY:** On the phosphatase issue, I
19 guess it would be presumed that none of the other
20 witnesses -- we have a number of FBI agents --

21 **THE COURT:** They aren't talking about it.

22 **MR. MURPHY:** Okay. We took care of it with
23 McRoden.

24 **THE COURT:** I want to hear what the doctor
25 has to say.

1 **MR. JACKLEY:** So the Court is aware, I
2 believe there are three witnesses that touch upon the
3 rape issue.

4 I also need to alert counsel that there is a
5 proposed exhibit which is Dr. Brown's autopsy report
6 that also makes mention of the acid phosphatase. I
7 mention that to the extent there are limiting rulings
8 that will need to be addressed before this exhibit is
9 introduced.

10 **MR. MURPHY:** We would be objecting to the
11 admission of Dr. Brown's autopsy anyway. It's a
12 hearsay document. He's not here.

13 And in light of what the Court is talking
14 about, we would certainly say that as a preliminary
15 matters, it doesn't go in front of the jury until such
16 time as Peterson's foundation is laid. And then if
17 that goes against the state then there would be a
18 redaction of that portion, the phosphatase finding.

19 **THE COURT:** Fair enough.

20 I am -- if we don't have testimony as to what
21 it means, then I don't think we're going to talk about
22 it, even if the report comes in. At least without
23 explaining to the jury that -- somewhere that acid
24 phosphatase is a common finding in human beings both
25 male and female. I don't know to what extent it's

1 always traceable in males or females. I need to know
2 that.

3 Let's bring Mr. Marshall in.

4 **MR. MANDEL:** Judge, can I ask you one
5 question?

6 What's the Court's rules on attorney's having
7 laptops in the courtroom?

8 **THE COURT:** No.

9 **MR. MURPHY:** We're going to plan to play our
10 CDs through the computer. Is that going --

11 **THE COURT:** Yeah. Counsel can have a laptop.

12 **MR. MURPHY:** Okay.

13 **THE COURT:** Yeah. I don't mind counsel
14 having laptops. I do mind the media having laptops.
15 I think you are trying the case and we have laptops
16 and zingy wingies in all of our trials nowadays. And
17 things that I haven't a clue how they work and don't
18 really care. So, no, counsel can have access to their
19 laptops. Good God, for just maintaining track of
20 exhibits and statements and things of that nature, I
21 think they are essential.

22 All right. Can we have Mr. Hanna and
23 Mr. Marshall come in.

24 **MR. OSWALD:** Judge, there is several members
25 of the press that want in here, too.

1 **MR. JACKLEY:** For the record the state did
2 not call them.

3 **THE COURT:** I'm sure that's true.

4 **MR. OSWALD:** They said that Mr. Hanna
5 contacted them. Hazel Bonner and somebody from the
6 Associated Press.

7 **THE COURT:** I don't know that I can keep them
8 out.

9 I understand the press has been invited?

10 **MR. HANNA:** Not by me.

11 **THE COURT:** Yeah. I can't keep them out so
12 let them in.

13 Just a statement, folks. We're looking at a
14 potential change of venue based simply on the article
15 appearing in the newspaper a day or two ago. I don't
16 know that that will happen, but there certainly may be
17 a question about it come about. And I suspect if we
18 get significant coverage of this, we may well be
19 there.

20 Mr. Hanna?

21 **MR. HANNA:** Your Honor, Mr. Marshall is here
22 in response to the subpoena that was served upon him.
23 We have filed a motion to quash the subpoena on two
24 grounds. The issue we are discussing now is whether
25 or not the prosecutor's offer of state immunity for

1 his testimony would be sufficient to supplant the
2 Fifth Amendment.

3 Mr. Marshall is here to advise the Court that
4 he intends to assert his right under the Fifth
5 Amendment to refuse to give evidence that the
6 government can use against him.

7 There are two issues which the Court has to
8 decide. And the first issue is whether Mr. Marshall
9 has a legitimate fear that his testimony could be used
10 against him as evidence; that is whether he has a
11 right to invoke the Fifth Amendment.

12 And the second issue is whether or not the
13 state's immunity statute would give Richard Marshall
14 the same protection that the Fifth Amendment would
15 give him.

16 First question, he certainly has a legitimate
17 fear that evidence that he would give is -- the
18 testimony he would give could be used against him as a
19 link in an evidentiary chain in a criminal proceeding.

20 I presume that the Court got my response --
21 my written response last week to Mr. Jackley's letter
22 brief informing the Court that Colorado and Wyoming
23 would not give immunity to Mr. Marshall.

24 Mr. Marshall has a legitimate fear that
25 testimony he would give could be used as a link in an

1 evidentiary chain in a criminal proceeding for these
2 reasons. First of all, most obviously, he has been
3 indicted, prosecuted, for what the government said was
4 his involvement in the death of Anna Mae Aquash. And
5 he was acquitted on that charge. Nevertheless, double
6 jeopardy would not bar further prosecution in federal
7 or state courts or Tribal courts. He has not been
8 charged with felony murder. So the federal government
9 could charge him with that.

10 Moreover, the government's evidence -- the
11 prosecution's evidence is that Anna Mae Aquash was
12 kidnapped in Colorado, driven through Wyoming, and
13 into South Dakota. She was driven through the Pine
14 Ridge Reservation and the Rosebud Reservation.

15 That being the case, there are five other
16 jurisdictions that could conceivably bring
17 prosecutions against Richard Marshall.

18 In addition to the federal government there
19 is the state of South Dakota, state of Colorado, state
20 of Wyoming, Oglala Sioux Tribe, and the Rosebud Sioux
21 tribe. The crime was committed -- the murder was
22 committed on the Oglala Sioux Tribe's lands, Pine
23 Ridge Reservation.

24 And the evidence is that Anna Mae Aquash and
25 three other people stopped at Richard Marshall's house

1 on the Pine Ridge Reservation. So the Oglala Sioux
2 Tribe could most definitely bring a prosecution here.

3 Now, according to the prosecution's theory,
4 crimes were committed in Colorado, Wyoming, South
5 Dakota, on the Pine Ridge Reservation, and the Rosebud
6 Reservation.

7 Therefore, this Court has recognized that
8 Mr. Marshall faces exposure -- potential criminal
9 exposure in Colorado and Wyoming which is why you
10 directed the Attorney General to determine whether
11 those states would give immunity and they have said
12 they will not.

13 More over, this Court has ruled already that
14 certain out-of-court statements by Mr. Marshall are
15 admissions against penal interest; and therefore, they
16 are admissible.

17 That being the case, this court has
18 essentially already ruled that statements made by
19 Mr. Marshall can be used as evidence against him in a
20 potential prosecution. That's why they were
21 admissible.

22 So his fear of potential use at his testimony
23 against him is legitimate and he does have a right to
24 exercise the Fifth Amendment and to ask this court to
25 respect and protect that right.

1 In response to this we have advised the Court
2 that he's going to take the Fifth Amendment. The
3 Attorney General comes to the Court and says, in spite
4 of his Fifth Amendment right to remain silent, we want
5 you, Your Honor, to order him to testify on pain of
6 contempt because the State of South Dakota has
7 promised not to use his testimony or evidence against
8 him in any criminal proceeding or investigation in
9 South Dakota. The Attorney General relies on the
10 state's immunity statute for that.

11 Now, under the *Kastegard* test, a state
12 immunity statute cannot override a constitutional
13 right unless that state immunity statute gives him the
14 same exact protection that the Fifth Amendment would
15 give him, and would leave him in the same position
16 after he were to testify as if he had never given
17 testimony at all.

18 So the question for Your Honor in this case
19 is, does the South Dakota Attorney General's promise
20 not to use Richard Marshall's testimony against him in
21 any criminal proceeding or investigation in South
22 Dakota automatically bind any other prosecutors or
23 investigators in any other jurisdiction, specifically,
24 in Colorado or Wyoming or on the Pine Ridge Indian
25 Reservation. The answer is, obviously, no.

1 Pursuant to the *Murphy* case, United States --
2 Murphy against Waterfront Commission case -- if the
3 Attorney General of South Dakota were to give use
4 immunity to a witness, that would be automatically
5 binding on -- then prohibits federal prosecutors from
6 using his testimony in a prosecution. That was a
7 judge-made rule the federal courts authorized or came
8 up with as part of their supervisory authority over
9 federal courts.

10 Absolutely no case has ever held that one
11 state's immunity order binds the prosecutors or
12 investigators in any other state. And what the
13 prosecutor here is presenting to you that somehow
14 your -- the Attorney General's immunity would
15 automatically bind every other state has no basis in
16 law. No case has ever held that.

17 Moreover, the Pine Ridge Indian Reservation
18 is Indian country. It is another government whom
19 crimes have been committed against, the Oglala Sioux
20 Tribe. They could bring a prosecution for kidnapping,
21 they could bring a prosecution for homicide; and it is
22 a legal no brainer that the Attorney General's
23 authority in South Dakota has absolutely no binding
24 authority on the Pine Ridge or Rosebud Sioux Indian
25 Reservation.

1 So unless the immunity that is being offered
2 here by the prosecutor would automatically prevent a
3 county attorney in Denver or in Wyoming or a Tribal
4 prosecutor in Oglala Sioux Tribe's court from taking
5 Richard Marshall's testimony and using it against him
6 in a prosecution -- unless the immunity went that far,
7 then you must allow Richard Marshall to assert his
8 Fifth Amendment privilege, Your Honor.

9 **THE COURT:** Mr. Jackley?

10 **MR. JACKLEY:** Your Honor, it is my
11 understanding -- and that understanding is based upon
12 the case law that was presented to the Court in the
13 state's reply brief or supplemental brief, is that
14 under the state statute, once the Attorney General or
15 other prosecutor grants the use and derivative use
16 immunity as set forth in that statute, any of the
17 witness's testimony regarding that becomes tainted.

18 In other words, a prosecutor whether it be a
19 federal prosecutor, another South Dakota prosecutor,
20 or any prosecutor from another state --

21 **THE COURT:** How about from another country
22 like a sovereign nation?

23 **MR. JACKLEY:** Your Honor --

24 **THE COURT:** How binding is it -- first of
25 all, forgetting questions of immunity, and forgetting

1 questions of a prior trial, could the Oglala Sioux
2 Tribe prosecute Mr. Marshall for kidnapping and
3 murder?

4 **MR. JACKLEY:** In fairness, this is the first
5 time I believe that Mr. Marshall has raised that
6 issue. I am not aware of any case law on point. I am
7 not aware of what the statute of limitations is on the
8 offenses that he has talked about so I am not prepared
9 to look the Court in the eye and answer that question.
10 I don't know the answer to it.

11 It would seem to me that federal law would
12 protect against that. I cite the *Kastegard* case
13 because it's tainted evidence, and I don't believe --

14 **THE COURT:** Well, it is, but we go back a
15 long time ago where the states used to do the work for
16 the federal government, and the evidence obtained by
17 the state, which would not have been attainable by the
18 federal government absent following procedures under
19 the United States Constitution as opposed to the
20 State's Constitution eventually led to the Fourteenth
21 Amendment being applied to apply all of the
22 consequences or all of the rights attained under the
23 Fourth and Fifth Amendments to the states. And to
24 present -- to prevent the golden platter presentation
25 of evidence that could not otherwise be obtained or

1 used.

2 And I have a problem here to the extent --
3 you know, we talk about sovereign nations and the
4 reservations and I find that a very vague term because
5 they are not completely sovereign in many respects.

6 But if they would have the ability to try --
7 accuse and try Mr. Marshall for the kidnapping and/or
8 the murder -- and we're well aware that different
9 jurisdictions can try people for the same events. You
10 can be tried for murder in the military system and the
11 civil system or the federal criminal system or the
12 state system is my understanding. Each king has his
13 own realm, and if a crime is committed within that
14 realm, they can be prosecuted by that king.

15 And I really have some concerns -- I mean, I
16 have a concern about one practicality. I don't
17 believe for a minute that Wyoming or Colorado is going
18 to charge Mr. Marshall, but that doesn't answer the
19 questions.

20 I think the question is, can they. And the
21 question is, can the Oglala Tribe -- to some extent
22 the Rosebud Tribe -- do they have sufficient
23 sovereignty to charge and try Mr. Marshall in their
24 court system?

25 It's been -- you know, it's only been 30

1 years since I delved into that at all. And my memory
2 is somewhat foggy to be kind. As to what level of
3 crimes the tribe has jurisdiction to try. And I am
4 assuming it doesn't come under the Major Crimes Act
5 because that would -- but I don't have a clue as to
6 whether the tribe can try the case; and if they can,
7 that would seem to pose a significant problem if your
8 grant of immunity would not extend that far.

9 And we're talking about, again, whatever
10 federal rulings are, in many respects don't have any
11 impact on the state at all. And we go back to the
12 golden platter although perhaps reversing it. But in
13 terms of binding another nation -- and we are to treat
14 for these purposes the respective tribes as sovereign
15 nations, then do we not have a problem?

16 **MR. JACKLEY:** Let me approach it this way,
17 Your Honor. Yes, the initial question is, do these
18 different sovereigns have the ability to charge
19 Mr. Marshall and bring an offense to trigger a Fifth
20 Amendment. And I think the answer is probably yes.

21 The real question is, do any of these
22 separate sovereigns have the ability to use tainted
23 testimony. Tainted in a sense that it's under a use
24 or derivative use immunity in that prosecution.

25 And I think the answer from the case law that

1 I have provided to the Court is no. They do not have
2 the ability to prosecute Mr. Marshall with tainted
3 evidence. The reason being is the United States
4 Constitution protects Mr. Marshall in all of the
5 jurisdictions that is talked about. And so when he is
6 provided use and derivative use immunity, both the
7 federal and the state case law makes it very clear --

8 **THE COURT:** All right.

9 So let's assume that's the case. It's my
10 understanding that the United States Constitution does
11 not apply to the reservation. Now that's an old
12 perception of mine, but it's pretty bloody old, and I
13 could be in error on that. But that's -- I think we
14 have a number of cases that directly say the United
15 States Constitution does not apply to reservations.

16 **MR. HANNA:** That is absolutely correct and
17 that is why Congress had to pass the Indian Civil
18 Rights Act.

19 **THE COURT:** So, you know, where do I go?

20 I mean, I think we have a real serious
21 problem if the immunity -- I am -- I tend to be along
22 with you in terms of the states. But I am not along
23 with you in terms of the sovereignty of the Indian
24 tribes.

25 And there is probably a sub question to that,

1 and that is, if it doesn't technically, so what?

2 That is, could Germany try and would that be
3 sufficient to preclude the testimony here? I mean,
4 because, again, Germany -- if we're treating the
5 reservations as sufficiently sovereign to raise that
6 issue, would it be different for any other country?
7 And I don't know the answer to that question either.

8 **MR. JACKLEY:** But isn't it incumbent upon
9 Mr. Marshall that carries that burden as I've outlined
10 in my brief to demonstrate that he does, in fact, have
11 a legitimate Fifth Amendment right. And he has not
12 done that with respect to his new argument regarding
13 the Oglala Sioux Tribe. He hasn't identified which
14 charge it would be.

15 **THE COURT:** I assume it could be any charges
16 that are -- that could arise from this case and his
17 testimony.

18 **MR. JACKLEY:** What about statute of
19 limitations?

20 **THE COURT:** Well, I don't know what the
21 statute of limitations is -- I am just checking
22 grammar -- we're talking about both reservations and I
23 don't know what the statutes of limitation are.

24 **MR. HANNA:** May I?

25 **THE COURT:** Yes.

1 **MR. HANA:** We're talking about a
2 constitutional right here that the State of South
3 Dakota is saying Mr. Marshall has to give up against
4 his will. Therefore, if any party has the burden of
5 proof or the burden of persuasion it is obviously the
6 state. The state has to show that the Oglala Sioux
7 Tribe or Colorado or Wyoming could not take his
8 testimony and use it.

9 What he's saying about *Kastegard* has
10 absolutely no basis in *Kastegard*. There is no Supreme
11 Court case that says immunized testimony is tainted
12 for all purposes in any court. That's what he's
13 telling you, but that's not -- there is no case law to
14 support that. He quotes *Kastegard* to support that.
15 All *Kastegard* says is that in order for a state
16 immunity statute to overcome the Fifth Amendment, that
17 immunity given by the state has to be -- in that
18 case --

19 **THE COURT:** I understand that. We have been
20 down that road a couple times.

21 **MR. HANA:** -- has to be co-extensive.

22 **THE COURT:** I understand the statement.

23 **MR. HANA:** I am just saying *Kastegard* does
24 not stand for what he's saying it stands for.

25 **THE COURT:** I heard that the first time, too.

1 And again, to me that's a relatively easy
2 question to resolve compared to the questions about
3 the sovereignty of the tribes. And that's the issue
4 that is right now. I can resolve the other on the
5 basis of authorities given me and go there.

6 But I do really wish to know, and I have no
7 authority, as to what effect a United States
8 immunity -- immunity granted by a state or the United
9 States and/or both of them impacts the ability of a
10 foreign country -- of a distinct sovereign entity to
11 use that information. I don't have a clue what the
12 law is --

13 **MR. HANA:** Judge, let me address that. First
14 of all there is a United States court case *Balys*,
15 B-A-L-Y-S, which says that the fact that a person
16 might be prosecuted in a foreign country, in the
17 middle east or someplace, the Fifth Amendment doesn't
18 apply there.

19 We're not talking about a foreign country.
20 We're talking about a government within the United
21 States of America that is recognized by the United
22 States of America. It's part of the United States of
23 America. And it is absolute basic number one rule in
24 Indian law which the Attorney General should
25 acknowledge is the state court has no authority on an

1 Indian reservation in South Dakota. Attorney
2 General's promise of immunity doesn't bind any Tribal
3 prosecutor on any state -- on any Tribal Court in
4 South Dakota. That is basic, that is undebatable,
5 that is not even something we should be discussing
6 here.

7 **THE COURT:** Well, I want to know if the
8 Courts are capable of trying that charge. I don't
9 know that. And -- of those charges.

10 And I want to know if there are statutes of
11 limitation that apply. And I think I need the
12 information. I expect you will have it to me by close
13 of the day.

14 **MR. HANA:** Would we be able to have a ruling
15 on this by the close of the day?

16 **THE COURT:** If I have it by the close of the
17 day you will have a ruling tomorrow.

18 Mr. Marshall, please raise your right hand.

19 RICHARD MARSHALL,
20 called as a witness herein, having been duly sworn,
21 under oath testified as follows:

22 **THE COURT:** Is it your intention if you are
23 called as a witness to refuse to testify on the
24 grounds of the protections offered you and the rights
25 offered you under the Fifth Amendment of the United

1 States and the South Dakota Constitution?

2 **MR. MARSHALL:** Yeah.

3 **THE COURT:** Questions on that line?

4 Establishing that he will not respond. And
5 if we need to raise that again after I make rulings
6 tomorrow, we could do for that. But for the moment, I
7 am satisfied the issues are fairly joined and we will
8 get me the information before the close of the day.

9 **MR. JACKLEY:** The state is satisfied that he
10 has exercised his Fifth Amendment, Your Honor.

11 **MR. MURPHY:** No discussions of his testimony
12 during opening until this matter is resolved?

13 **THE COURT:** No. You may -- you may -- if I
14 rule the other way on opening statements, you may
15 address that. But I don't see any particular need to
16 address it in voir dire. Other than if we're talking
17 about names of witnesses or potential witnesses.

18 **MR. MURPHY:** Well, names of witnesses, that's
19 not the issue.

20 The Court has already ruled on the baggage
21 note issue and that that was not coming in. So I
22 don't want that part of the opening absent some
23 determination by this court, reversing the prior
24 ruling that the baggage note does not come in. And I
25 didn't want the Attorney General's Office to argue

1 that Dick Marshall was going to somehow now validate
2 the note or authenticate it.

3 **MR. JACKLEY:** It's not my intent, Your Honor,
4 because of the Court's ruling to go into the baggage
5 note. I mean, my understanding of the Court's ruling
6 is that the baggage note is about double hearsay and
7 it's not coming in unless I can get Mr. Marshall on
8 the stand and ask him the question. And we're sorting
9 that out right now.

10 **MR. MURPHY:** Right.

11 **THE COURT:** For the time being -- at least
12 for the time being we have. Now that we demonstrated
13 to the jury what court time means --

14 **MR. HANA:** Judge, do you want us back here
15 tomorrow morning or are you just going to advise us of
16 your ruling?

17 **THE COURT:** I suggest you should show up in
18 the morning. I will give you either an oral or a
19 written response by then.

20 **MR. HANA:** Nine o'clock?

21 **THE COURT:** No. About eight o'clock.

22 (Off the record.)

23 **THE COURT:** Ladies and gentlemen, you have
24 been selected as potential jurors for a trial of the
25 State of South Dakota versus John Graham. I am going

1 to ask the clerk to call the roll of the jurors. You
2 need answer allowed as to whether you are here, and
3 then I will address some further matters after we have
4 sworn you as prospective jurors.

5 **THE CLERK:** As I call your name, please
6 respond by saying here.

7 (Whereupon, the roll call of the prospective
8 jurors was then taken.)

9 **THE CLERK:** Is there any name that I missed?

10 **THE COURT:** I believe the case is ready for
11 trial.

12 Mr. Jackley?

13 **MR. JACKLEY:** Yes, Your Honor.

14 **THE COURT:** Mr. Murphy?

15 **MR. MURPHY:** Yes, Your Honor.

16 **THE COURT:** At this time I am going to ask
17 counsel for the respective parties to introduce them
18 testifies and their staff.

19 Mr. Jackley, for the State of South Dakota?

20 **MR. JACKLEY:** Marty Jackley, Rod Oswald, Bob
21 Mandel.

22 **THE COURT:** Mr. Murphy?

23 **MR. MURPHY:** My name is John Murphy, my
24 client John Graham, and paralegal Erin Duchaneaux.

25 **THE COURT:** At this time, we go through one

1 more step. And that is you will all stand and raise
2 your right hand as you may be sworn as prospective
3 jurors.

4 (Whereupon, the prospective jury panel was
5 then sworn.)

6 **THE COURT:** Ladies and gentlemen, please
7 excuse my voice. It's not what it should be, and I
8 trust it will be better by tomorrow.

9 To start with, I wish you all to know that to
10 say I am hard of hearing, as you are, sir, may be an
11 understatement. I have transcription on the computer
12 screen that tells me what is being said as it is being
13 said. And so if I am watching the screen, I am not
14 ignoring either you or a witness or counsel.

15 As I indicated you have been selected as
16 potential jurors in this trial. And I am going to
17 tell you that Mr. Graham is accused, in very brief
18 form, of number one, murder; and number two, murder in
19 the course of a felony that is kidnapping. A more
20 detailed recitation of those charges will be given to
21 you as the indictment is read by the State's Attorney
22 immediately prior to the opening statements to those
23 jurors selected.

24 This trial is going to take a considerable
25 period of time. It's tentatively scheduled for three

1 weeks. Our anticipation or hoped-for result would be
2 slightly less than that, although it's unlikely it
3 would end any earlier than the end of next week.

4 It's -- all of us are concerned, realizing
5 the imposition this will put on you, your lives, and
6 your families during the time this trial will take.

7 The jury selection process itself will likely
8 take a full day, day and a half, and maybe a tad more.
9 We must first select 56 potential jurors that have
10 been passed for cause by counsel. Then from those
11 jurors which will account for a jury of 12 plus two
12 alternate jurors, the counsel for the respective sides
13 are required by law to remove 21 apiece. That will
14 reduce us to the 14 jurors that will try the case.
15 Two of those jurors will be alternate jurors unknown
16 to them or anybody else, including me. In the event
17 we lose a juror or two during the course of the trial.
18 It's designed to ensure that when we're all said and
19 done we still have 12 jurors to decide the case.

20 The two alternates, or remaining alternates,
21 as the case may be, will simply be chosen by lot, or
22 chance, from a drawing of appropriate numbers.

23 The numbers of the peremptories and the
24 required jurors -- and we do have another set of jury
25 panels on call by the way -- is set bylaw. And

1 neither I nor counsel can change that law and we will
2 go by it.

3 Our trial days will begin at 8:30 and they
4 will end by 5:00. I promise you those two things.
5 The start can be delayed on pretrial motions and
6 things that I must decide out of the presence of the
7 jury. I will do my dead level best to start at 8:30
8 in the morning, and we will schedule any hearings
9 outside of the jury's presence before that time. Noon
10 hour will be from 12:00 to 1:15. And there will be a
11 morning break and an afternoon break, and I hope no
12 others.

13 From time to time, I hope seldom, it will be
14 necessary for me to resolve questions, again, outside
15 the presence of the jury as they will be questions of
16 law to determine some events during the course of the
17 trial.

18 The -- I am going to give you some warnings
19 that will apply now and that is a solemn obligation of
20 all jurors whether during the jury selection process
21 or the actual trial jurors to refrain or not discuss
22 anything about this trial. Period. Until after you
23 are released from the jury selection process as not
24 having been chosen as a trial jury, or if you are on
25 the trial jury, until all the evidence and final

1 arguments have been made. I will briefly explain why.

2 In any discussion of a case you begin to
3 order your thoughts so that you can describe it. In
4 doing that, you will begin, as human nature requires,
5 to form or process an opinion just in the sequence of
6 the discussion you make. And I think we would all
7 agree that once we have formed an opinion or a
8 tentative opinion, we tend to filter any new
9 information. That is, we will emphasize and cheer for
10 information that supports our opinion, and we will
11 downplay or make fun of information which would tend
12 to be in opposition to our opinion.

13 And consequently, any effort you make to
14 discuss or otherwise form an opinion is harmful to one
15 side, the other, or both.

16 The second reason is we can only have one
17 side talk at a time. And if you are making decisions
18 and forming opinions before the other side has had its
19 opportunity to present evidence, then again, it will
20 already fit into your opinion and either be emphasized
21 or disregarded, at least to some degree, because of
22 that opinion. I am asking you to do that. It's a
23 very difficult thing.

24 I think we need to swear the jurors at this
25 time.

1 **THE CLERK:** We did that already.

2 **THE COURT:** I blew that, then.

3 There will be no electronic devices in the
4 courtroom. I realize some folks may have brought cell
5 phones with them. You will right now turn them off.
6 Those that are finally selected for jurors will give
7 them to the bailiffs during the times the court is in
8 session.

9 Anybody outside the jury that's found with
10 such an item will be removed from the courtroom for
11 the duration of the trial.

12 Any questions about that?

13 There are obviously some of you who cannot
14 possibly serve because of serious and unchangeable
15 obligations. There may be physical effects or
16 limitations that will not allow you to sit for two
17 weeks or two-and-a-half weeks or three weeks. I am
18 shortly going to ask you to identify yourselves if you
19 cannot possibly serve.

20 But I ask you in making that decision to give
21 some serious considerations to your obligations for
22 public service. Give some thought, perhaps, to our
23 National Guard and Reservists who are called,
24 repeatedly I might add in recent years, to serve in
25 Afghanistan or other places of danger. And that

1 public serve for them takes precedence over all other
2 matters, sometimes including life.

3 Within that parameter, I believe most of us
4 could sit for this trial, and I am asking you to put
5 that same classification of the importance of your
6 being a juror in this matter. Mr. Graham and the
7 State of South Dakota are both entitled to have a jury
8 representative of this community.

9 Now, having said that, and before we begin
10 the jury selection process by counsel, which is a
11 process by which they will inquire of you as a group,
12 or individually, concerning your abilities or possible
13 knowledge that may make it difficult or impossible for
14 you to sit as -- without any preconceived opinions.

15 But before I get to that, I want to ask those
16 to raise your hands and identify yourselves who truly
17 believe you cannot be a juror in this case. All
18 right.

19 We're going to start, I believe --

20 Ma'am, what's the problem?

21 **PROSPECTIVE JUROR:** I was almost kidnapped in
22 2006 and it bring --

23 **THE COURT:** We will -- at the moment I just
24 want to talk about time. And then I will let counsel
25 go into things other than time.

1 Thank you.

2 On a time basis, ma'am?

3 **PROSPECTIVE JUROR:** I am scheduled to leave
4 the country for ten days on the 4th. And
5 rescheduling that isn't an option. I am going to a
6 graduation ceremony of a niece and I have been holding
7 the tickets for six months.

8 **THE COURT:** Mr. Jackley?

9 Mr. Murphy fee.

10 **MR. JACKLEY:** No objection, Your Honor.

11 **MR. MURPHY:** No objection, Your Honor.

12 **THE COURT:** You have a call back time to
13 address.

14 **THE CLERK:** Your service would be complete
15 after today. I just need to know your name.

16 **PROSPECTIVE JUROR:** Boyer.

17 **THE COURT:** God, I hate to let that news out.
18 You may be excused.

19 **THE CLERK:** Is it Mary?

20 **PROSPECTIVE JUROR:** Yes.

21 **THE COURT:** May I have the next person over
22 here.

23 Yes, ma'am? Please stand. It will help us
24 hear you, particularly me.

25 Why could you not serve?

1 **PROSPECTIVE JUROR:** On the 22nd I was struck
2 with a severe case of arthritis in my wrist and hands
3 and I am on two types of medication. I also have a
4 splint on my wrist.

5 **THE COURT:** Mr. Murphy?

6 **MR. MURPHY:** No objection.

7 **MR. JACKLEY:** No objection.

8 **THE COURT:** Thank you, ma'am. You may be
9 excused. I believe that's a satisfactory reason.

10 **THE CLERK:** Can we get your full name,
11 please?

12 **PROSPECTIVE JUROR:** Joan Gustafson.

13 **THE COURT:** There were other hands raised on
14 this side of the room.

15 Yes, ma'am?

16 **PROSPECTIVE JUROR:** My only objection is that
17 I am a nurse at a local clinic and about two to three
18 days a week I am the only nurse available so they
19 would not be able to see patients.

20 **THE COURT:** Mr. Murphy?

21 **MR. MURPHY:** I have no objection.

22 The clinic won't be able to operate or see
23 patients without you?

24 **PROSPECTIVE JUROR:** Right.

25 **MR. MURPHY:** No objection.

1 **MR. JACKLEY:** No objection, Your Honor.

2 **THE COURT:** Thank you, ma'am.

3 **THE CLERK:** Your full name?

4 **PROSPECTIVE JUROR:** Sarah Mauer.

5 **THE COURT:** Is there someone directly behind
6 you? How come all of these are ladies?

7 **PROSPECTIVE JUROR:** I am a research nurse for
8 Rapid City Regional Hospital and I am scheduled to
9 travel to San Diego on the 4th for work. I would be
10 gone for a week.

11 **THE COURT:** What happens if you don't go?
12 What happens if you broke your leg today?

13 **PROSPECTIVE JUROR:** I don't know.

14 **THE COURT:** I mean, that's a pretty good
15 question.

16 What happens if you go to the hospital today?
17 I realize she wouldn't have gone to Europe either, or
18 wherever she's going. But --

19 Mr. Murphy?

20 **MR. MURPHY:** No objection.

21 **MR. JACKLEY:** No objection, Your Honor.

22 **THE COURT:** Thank you, ma'am.

23 **PROSPECTIVE JUROR:** Michele Sargent.

24 **THE COURT:** Anybody else in this section?
25 Yes, ma'am?

1 **PROSPECTIVE JUROR:** I work graves every night
2 and I don't feel like I can do the jury because I will
3 be tired. And I am going to have three kids under the
4 able of five and I don't have a baby-sitter to watch
5 them.

6 **MR. MURPHY:** No objection.

7 **MR. JACKLEY:** No objection, Your Honor.

8 **THE COURT:** They are kinder than I.

9 You may be excused.

10 **THE CLERK:** Your name, please?

11 **PROSPECTIVE JUROR:** Jilian Jankord.

12 **THE COURT:** Anyone else in that section?

13 Thank you very much.

14 Over here?

15 Ma'am?

16 **PROSPECTIVE JUROR:** I am not asking you to
17 excuse me, but I wanted to know whether I am qualified
18 because yesterday in the paper all the three pages
19 involved this case, so it's up to you.

20 **THE COURT:** We will address that issue a
21 little later. But thank you, ma'am.

22 Other folks -- yes, sir?

23 **PROSPECTIVE JUROR:** I have finals at the
24 School of Mines the next two weeks. So --

25 **MR. MURPHY:** No objection.

1 **THE COURT:** In my class?

2 I would excuse you.

3 Mr. Murphy has no objection.

4 Mr. Jackley?

5 **MR. JACKLEY:** No objection, Your Honor.

6 **PROSPECTIVE JUROR:** Mike Hodge.

7 **THE COURT:** Ma'am?

8 Front row?

9 **PROSPECTIVE JUROR:** I have a sister who is in
10 the hospital with end-stage lymphoma and I am a PA and
11 I am her spokesperson for medical reasons.

12 **MR. MURPHY:** No objection.

13 **MR. JACKLEY:** No objection.

14 **THE COURT:** Thank you, ma'am.

15 **THE CLERK:** Ma'am, can I get your full name,
16 please.

17 **PROSPECTIVE JUROR:** Grace Scholl,
18 S-C-H-O-L-L.

19 **THE COURT:** Other folks here?

20 Yes, sir?

21 **PROSPECTIVE JUROR:** I have the most frivolous
22 reason but I have tickets to the National Finals Rodeo
23 starting next week.

24 **MR. MURPHY:** In Las Vegas?

25 **PROSPECTIVE JUROR:** Yeah.

1 **THE COURT:** How many more do I have?

2 It's looking pretty good.

3 Mr. Murphy?

4 **MR. MURPHY:** No objection.

5 **MR. JACKLEY:** No objection, Your Honor.

6 **THE COURT:** As the saying goes, is this your
7 first rodeo?

8 **PROSPECTIVE JUROR:** Darrell Wenzel.

9 **THE COURT:** Anybody else?

10 Yes, ma'am.

11 **PROSPECTIVE JUROR:** I am sorry. I am here
12 taking care of my grandmother three days a week. She
13 has dialysis. She cannot drive. As well as, I don't
14 know if this is related, but I have a mandatory hockey
15 game I need to be at. But the main reason is my
16 grandmother.

17 **THE COURT:** Well, the hockey game doesn't --
18 that's not going to get you out of here.

19 **MR. MURPHY:** No objection.

20 **MR. JACKLEY:** No objection, Your Honor.

21 **THE COURT:** Thank you, ma'am. You may be
22 excused.

23 **PROSPECTIVE JUROR:** Emily Hirschman.

24 **THE COURT:** I want to thank you, folks. I
25 frankly expected more difficulty because of the length

1 of the trial and I am appreciative of your effort.

2 At this point we're going to go through the
3 process where -- where are we going to sit these
4 jurors?

5 **THE BAILIFF:** We'll start in the first row
6 there, the first seven. We'll have to move them as we
7 go.

8 **THE COURT:** All right.

9 We're going to be calling the 56 jurors that
10 we will start the questioning with. The remainder of
11 you not chosen will not be sitting on this side, but I
12 want you listening to the questions although not
13 answering at that point in time unless counsel so
14 indicate.

15 If you are called up, you will be addressed
16 as to those questions and we'll save a lot of time if
17 you remember your objections.

18 I am going to ask you just to call by name.
19 I think we cleared that with counsel.

20 **THE CLERK:** Jacqueline Dittman, Zachary
21 Pelofske, Cadey Reisner, Cody Weiland, Mark West,
22 Gilbert Martinez, Russell Anderberg, Nancy Hanson,
23 Robert Bennett, Matthew Almeida, James Harbert,
24 Mildred Fisher, Elaine Kocher, Jacqueline Anderson,
25 Robert Christensen, Britt Brown, Scott Denotter,

1 Sheila Garrigan, Bonnie Lang, Wayne Rosby, Robert
2 Rasch, Greg Nepstad, Jennifer Plasencio, Shelly
3 Broderick, Robert Tindall, Jacob Solano, Justin
4 Amundson, Cynthia Christensen, Danny Kemp, David
5 Rietveld, Valerie Begeman, Jo Ann Paulson, Hildur
6 French, Kyle Huling, Calvin England, Tania Little,
7 Cassandra Heying, Brett Bassham, Jan Parker, Lindsey
8 Hildebrand, Stephanie Bond, Cara Boehler, Twyla
9 Israel, Kenneth Heiser, Nathaniel Spencer, Michelle
10 Shelton, Jake Spreizer, Barry Winter, James Eppard,
11 Jeffrey Adkins, Neal Pierce, Melanie Stephens, Barbara
12 Fisher, Thomas Jimboreez, Laura Hill, Amy Schmidt.

13 **THE COURT:** Unless somebody needs a break
14 right now, we will begin the questioning by counsel
15 and that will take us certainly into the noon hour and
16 thereafter.

17 And please raise your right hand, sir.

18 Would you administer the oath.

19 (Whereupon, a prospective juror was then
20 sworn.)

21 **THE COURT:** Mr. Murphy?

22 **MR. MURPHY:** Thank you.

23 **THE BAILIFF:** Muriel Anderson has not been
24 sworn.

25 **THE CLERK:** Muriel, would you please raise

1 your right hand. I am going to give you the oath.

2 (Whereupon, a prospective juror was then
3 sworn.)

4 **MR. MURPHY:** Good morning, folks. You made
5 it so close to end of the month, and you know, I feel
6 like right away I am starting out like the bearer of
7 bad news. You were almost over the wall. It's only a
8 30-day month and you made it to day 29, and now we're
9 on the cusp of picking a jury that will likely be here
10 for two and a half to three weeks.

11 Initially, I want to start and say none of
12 us, nobody here, intended to have you guys picked as a
13 jury for this duration at this time of year. It's a
14 miserable time of year with, you know, kids' school
15 programs and finals and all of that. Everybody here
16 is going to be missing some activity with our kids or
17 our family, and we know you guys are. But when a case
18 is called to the docket, the Judge only has so many
19 trial days. He has all of these other things going on
20 and if your case comes to call, then you got to be
21 ready to try it whether it's winter, summer, holidays,
22 or not.

23 So, I guess, on behalf of all of us I
24 apologize for calling you out in the middle of the
25 winter especially on cyber Monday. I heard on the

1 radio on the way in, this is the least productive day
2 of the year. It just beat out the first day of the
3 Final Four or the NCAA tournament. So we're going to
4 try to be very productive.

5 As I said earlier in the introductions, my
6 name is John Murphy. I represent John Graham. My
7 paralegal is going to be here throughout the trial
8 unless she has to run and grab witnesses or something
9 like that.

10 And to start with, I am going to be talking
11 to you 56. If somebody has to be removed -- if one of
12 the people for whatever reason isn't going to be able
13 to sit on this jury, then one of the other people is
14 going to be called to fill in their seat. And rather
15 than start from scratch again, which if I did that I
16 am sure people would start picking up shoes and
17 throwing them at me. I am just going to ask you, did
18 you hear any question previously that you had an
19 answer to and then we'll start from there as opposed
20 to starting all the way in the beginning.

21 This is the most unique part of the trial
22 because it's the only time that we get to speak to
23 each other. Once you are sworn as a juror, then it's
24 pretty much one-way communication. You sit and
25 listen, we do the talking, or the witnesses do the

1 talking. And so I want to encourage you during this
2 time period to feel free to talk. There are no wrong
3 answers. There is no judgments.

4 One thing that I will tell you, if, for any
5 question, it brings up anything that is of a personal
6 nature or even of a professional nature that you don't
7 want to discuss in this forum, we have the ability to
8 go in the back and have a private meeting. And for
9 those of you who have been through this process before
10 you may know that happens all the time. I picked a
11 jury out in Kadoka where 12 jurors had answers to
12 questions that they said, Judge, we don't want to talk
13 about it in public. So what we did, we took down
14 their names, and at a recess one by one went in and
15 talked about their issues. We want to make this a
16 process that you feel comfortable answering and giving
17 us full information.

18 And the reason why that interchange -- that
19 exchange of information is so important is we're
20 trying to pick the right jury for this case. And
21 that's an important concept. Sometimes people think
22 that we're trying to weed out good versus bad jurors.
23 Well, that doesn't make sense. That's not a concept
24 that really applies.

25 Every case is different. There is a case

1 that you are right for and there is a case that you
2 are wrong for because of your personal experience,
3 your background, whatever. We need to know whether
4 this is the case for you and you need to let us know
5 if it's not the case for you.

6 My client is going to be on trial for weeks
7 and he's going to be reviewed -- the case is going to
8 be reviewed by 12 or 14 people, and he needs to know
9 from the beginning, that the people that are sitting
10 in judgment of him are people that aren't coming into
11 the process with some personal experience that's going
12 to make them biased or unable to listen to his side of
13 the case, and the state has the same interest.

14 So I always think back to my father who died
15 in June, but he was 89 when he died. He was one of
16 those guys I would think would be great on most
17 juries. He served in World War II; he raised five
18 boys; he had his own business; had a wealth of
19 experience. Really a fair guy. But he had some
20 feelings about the Internal Revenue Service that he
21 just couldn't have been fair to a case where the IRS
22 was one of the parties, and he would be the first to
23 admit it. He would just say, you know, with my
24 feelings about taxation, I just don't think I'm the
25 right juror for the case.

1 So that's where we're starting. I know
2 nobody volunteered to be here. I am going to say in
3 fairness to you guys, I won't ask anything that I
4 don't think is necessary in some way, shape, or form.
5 I don't want to keep you here for days. And you know
6 because I am going to be asking questions about you I
7 will give you a little more detailed introduction of
8 myself and who I am here with today.

9 My name is John Murphy. My wife, Denise, is
10 a social worker in town. I have a law firm that's way
11 above the ice rink in that big old historic building.
12 I've got three kids. My youngest is a fifth grader
13 and she has her school program coming up in about a
14 week so I am going to miss that. I have been here for
15 about 20 years, so I am not related to like Jeremiah
16 Murphy and some of the Murphy attorneys on the east
17 side of the state. All of my family is from Chicago.

18 My client, John Graham, is from the Yukon
19 Territory up in Canada and he's got two daughters
20 Chusia and Naneeek. Naneeek will be down here later in
21 the trial. Chusia is pregnant so she can't come down
22 for the trial.

23 And next to John is my paralegal, Erin. Erin
24 is Erin Duchaneaux. Her husband Cam is a local police
25 officer and they have three kids. And she grew up in

1 this area. But her family all hales from Harding
2 County, the Bennett family and the Jensen family.

3 And I will drink at least a gallon of water a
4 day because I am a bit nervous. This is a huge group
5 to talk to. Normally we have maybe 40 jurors in the
6 typical case, but because of the nature of this case,
7 we have a lot more.

8 What I am going to do is I am going to break
9 the voir dire, the jury selection -- and by the way,
10 the word voir dire, which is what this process is
11 actually called, it's a French phrase and it means to
12 speak the truth. That was -- really the principle of
13 that and why we use that is the only standard was that
14 you speak the truth.

15 And with that in mind, I am going to start
16 with nuts and bolt issues like knowledge of witnesses
17 and participants. Then we're going to get into some
18 legal principles that are going to be applied. And
19 the reason we're going to get into those is because
20 the judge is going to be giving you the law. You as
21 the jury will be the judges of the facts. That's what
22 the phrase is called. And you will have to know
23 whether you can be a judge of the facts and apply the
24 law. You will have to know something about the law.
25 We can't tell you all about the law because the jury

1 instructions that the judge will give at the end of
2 the case are 30 to 40 pages long. So we're not going
3 to do that. But we're going to talk about some key
4 principles.

5 Then we're going to go into some specific
6 issues that relate to this case. When we're talking
7 about specific issues, though, one of the things that
8 I always come across when talking to jurors is you
9 guys justifiably, understandably want to know more
10 about the case. You want to say, how can I tell you
11 if I can be fair until I know the facts of the case.

12 Unfortunately, the rules of jury selection
13 say we can't talk about the facts in any detail. We
14 will talk about some of the facts and some of the
15 allegations to ferret out whether that causes any bias
16 or concern. But we really can't go into the full
17 blown explanation of what the case is about.

18 So let's talk first -- I just want to revisit
19 for a second what the judge went over about personal
20 hardships or other things that may make this --
21 anybody in this group of 56 unable to sit and pay
22 attention morning to night for three weeks.

23 Is there anything that we didn't cover or
24 that you didn't raise your hand beforehand about?

25 Were you raising your hand, sir?

1 **PROSPECTIVE JUROR:** Kind of.

2 **MR. MURPHY:** And I'm am going to ask -- one
3 of the things I will ask this for everybody, when I
4 call on you, I will ask your name so Tina, our court
5 reporter, can identify you.

6 **PROSPECTIVE JUROR:** Jeff Adkins.

7 **MR. MURPHY:** Okay.

8 **PROSPECTIVE JUROR:** I should have raised my
9 hand earlier. I work two jobs. I work security and
10 clean two bars at 8:00 o'clock in the morning and
11 3:00 o'clock in the afternoon till close. At least
12 five days a week.

13 **MR. MURPHY:** All right.

14 And you believe that your work commitments
15 can't be filled in by somebody else?

16 **PROSPECTIVE JUROR:** Yeah.

17 **MR. MURPHY:** Okay.

18 And if you were to close, what do you work,
19 till 2:00?

20 **PROSPECTIVE JUROR:** 2:30, 3:00 o'clock,
21 sometimes 3:30.

22 **MR. MURPHY:** In light of that, Your Honor, I
23 have no objection to Mr. Adkins being excused.

24 **MR. JACKLEY:** No objection.

25 **THE COURT:** Thank you, sir. You may be

1 excused.

2 **MR. MURPHY:** Before we get to you, ma'am,
3 we'll fill in his seat. Then I will get back to you.

4 **THE CLERK:** Joseph Gion.

5 **MR. MURPHY:** All right.

6 I believe was that -- ma'am, your name?

7 **PROSPECTIVE JUROR:** Lindsey Hildebrand.

8 **MR. MURPHY:** Okay.

9 Ms. Hildebrand, what's your situation?

10 **PROSPECTIVE JUROR:** I feel I should have
11 raised my hand earlier, too. I also feel it's my duty
12 to be here. But I have finals next week also. Next
13 two weeks. And I am the only employee where I work.
14 And things would fall drastically behind if I was
15 chosen.

16 **MR. MURPHY:** Where are you a student?

17 **PROSPECTIVE JUROR:** On line through USD
18 working on my MBA.

19 **MR. MURPHY:** Okay.

20 And you got --

21 **PROSPECTIVE JUROR:** Graduate level class.

22 **MR. MURPHY:** And you've got to take the
23 finals in this two-week period.

24 **PROSPECTIVE JUROR:** In the next two or three
25 weeks.

1 **MR. MURPHY:** In light of that, I have no
2 objection.

3 **MR. JACKLEY:** No objection.

4 **THE COURT:** Thank you, ma'am.

5 **THE CLERK:** Kathleen Repstein.

6 **MR. MURPHY:** Sir, are you Mr. Rietveld?

7 **PROSPECTIVE JUROR:** Yes, sir.

8 **PROSPECTIVE JUROR:** I have a contracting
9 business, my son and myself together. And we have
10 signed contracts that need to be fulfilled by the end
11 of this coming month due to the window is going to be
12 closed down for their tax.

13 **MR. MURPHY:** So you have to fulfill those
14 obligations?

15 **PROSPECTIVE JUROR:** Yes.

16 **MR. MURPHY:** If you were here till the
17 17th of December, the remaining time wouldn't give
18 you enough time to finish those?

19 **PROSPECTIVE JUROR:** No.

20 **MR. MURPHY:** No objection, Your Honor.

21 **MR. JACKLEY:** No objection, Your Honor.

22 **THE COURT:** Thank you, sir.

23 **THE CLERK:** Larry Gruba.

24 **PROSPECTIVE JUROR:** My employer again. I am
25 self-employed and I am the only income of the family.

1 And I think I would be worrying about where my next
2 house payment is coming from.

3 **MR. MURPHY:** If you are not at work no money
4 is coming in, Mr. Gruba?

5 **PROSPECTIVE JUROR:** Right. Exactly.

6 **MR. MURPHY:** No objection, Your Honor.

7 **MR. JACKLEY:** No objection.

8 **THE COURT:** You may be excused.

9 **MR. MURPHY:** That was Mr. Gruba.

10 **THE CLERK:** I know I am going to mispronounce
11 this, Vijaya Ramakrishnan.

12 **MR. MURPHY:** You are Ms. Bond?

13 **PROSPECTIVE JUROR:** Yes. I am a nursing
14 mother. My daughter is ten months old and I have a
15 two-year-old son and three older kids and my husband
16 works full-time, and I am not quite sure that I will
17 be able to hand all the responsibilities off to my
18 husband with picking kids up from school. And if
19 there will be allotted amounts of times that I could
20 go and pump because I am a nursing mom.

21 **MR. MURPHY:** Sure. I don't know whether
22 there would be times when we would be able to recess
23 for that. My wife went through the same thing.

24 And so in light of that, Judge, unless the
25 Court had some provisions where recesses would be

1 allowed for her to return home, I would say that I
2 would have no objections to her being removed.

3 **THE COURT:** Mr. Jackley?

4 **MR. JACKLEY:** No objections, Your Honor.

5 **THE COURT:** I think that would be difficult
6 for us to accomplish and maintain a schedule for the
7 trial.

8 Thank you.

9 **THE BAILIFF:** We have six left, Your Honor.

10 **THE COURT:** I understand. We're down to six.

11 **THE CLERK:** Scott Schaible.

12 **MR. MURPHY:** Is it Ms. Hill?

13 **PROSPECTIVE JUROR:** Yes.

14 **MR. MURPHY:** What's your situation?

15 **PROSPECTIVE JUROR:** I am a single mother of
16 two who are in grade school and I work two jobs.

17 **MR. MURPHY:** What hours do you typically
18 work?

19 **PROSPECTIVE JUROR:** Usually nine in the
20 morning depending on which job I am at until
21 nine o'clock at night.

22 **MR. MURPHY:** If you were asked to be here
23 there wouldn't be anybody to care for your children
24 and fill in for you at work?

25 **PROSPECTIVE JUROR:** At certain times, no.

1 **MR. MURPHY:** At certain times, no.

2 Would it be fair to say you would be thinking
3 about your kids more than what's going on here in
4 court?

5 **PROSPECTIVE JUROR:** Yes.

6 **MR. MURPHY:** All right.

7 I have no objection, Your Honor.

8 **MR. JACKLEY:** No objection.

9 **THE COURT:** Thank you.

10 You may be excused.

11 **THE CLERK:** Muriel Anderson.

12 **MR. MURPHY:** I am still working on that side,
13 but I see Ms. Begeman.

14 **PROSPECTIVE JUROR:** Yes. I have severe
15 osteoarthritis in my hips and I have never had to sit
16 for three weeks solid before. I am willing to give it
17 a shot, but I don't know.

18 **MR. MURPHY:** What will probably happen is
19 we'll be sitting for an hour-and-a-half-long periods.
20 I estimate we'll go from like 8:30 to 10:00 or 10:30
21 and 10:30 to noon take another break, probably 2:30
22 take another break.

23 **PROSPECTIVE JUROR:** I don't know.

24 **MR. MURPHY:** One thing because this happens
25 also especially with people with bad backs, typically

1 any time you need to stand up, move around, you know,
2 there is actually one of our Justices of the U.S.
3 Supreme Court that has to get up and walk around
4 during oral arguments and it would distract the
5 attorney, but his back would seize up.

6 **PROSPECTIVE JUROR:** Sure, I mean I am game,
7 but if you are sitting in a frozen position, I may be
8 not be able to get up.

9 **MR. MURPHY:** We'll make all accommodations
10 for anything physical like that.

11 Okay. I saw some hands -- did I catch
12 everybody over here?

13 Okay. There was a hand -- are you -- what's
14 your name?

15 **PROSPECTIVE JUROR:** Bonnie Lang.

16 **MR. MURPHY:** Okay.

17 Ms. Lang, what's the situation?

18 **PROSPECTIVE JUROR:** There wouldn't be --

19 **MR. MURPHY:** Could you please stand up so
20 Tina can hear you.

21 **PROSPECTIVE JUROR:** There wouldn't be anybody
22 at work to fill in for me if I was gone and I would
23 fall drastically behind.

24 **MR. MURPHY:** May I ask what you do for a
25 living?

1 **PROSPECTIVE JUROR:** I work at Behavior
2 Management Systems and I help people get medication
3 that can't afford them.

4 **MR. MURPHY:** Okay.

5 **PROSPECTIVE JUROR:** There is nobody else
6 trained to do that?

7 **MR. MURPHY:** All right.

8 I have no objection, Your Honor.

9 **THE COURT:** Behavior Management doesn't have
10 somebody to sit in for you, ma'am?

11 **PROSPECTIVE JUROR:** Do they?

12 **THE COURT:** Yeah.

13 I mean, do they not?

14 **PROSPECTIVE JUROR:** They don't right now.

15 **THE COURT:** Mr. Jackley?

16 **MR. JACKLEY:** No objection, Your Honor.

17 **THE COURT:** Thank you.

18 You may be excused.

19 **THE CLERK:** Michael Leiby.

20 **MR. MURPHY:** Anybody over here on this side?
21 Okay. Good.

22 All right. Well, let's talk first -- one of
23 the first nuts and bolts things is whether anybody
24 here has a personal or professional relationship with
25 any the participants; and I will start with myself,

1 Mr. Graham, and Erin.

2 Does anybody here have a relationship, past
3 business dealings, personal relationship that might
4 affect your ability to set fairly?

5 You are?

6 **PROSPECTIVE JUROR:** Jan Parker.

7 **MR. MURPHY:** Mr. Parker?

8 **PROSPECTIVE JUROR:** I don't think it would
9 have too much -- wouldn't be a problem, but I don't
10 know if the judge remembers that we were in a play
11 together.

12 **MR. MURPHY:** Did he steal your lines or
13 impinge on your scene.

14 **PROSPECTIVE JUROR:** He had to make sure he
15 knew his own lines.

16 **MR. MURPHY:** Well, I don't think that's the
17 kind of thing that would cause you to be excused for
18 cause, but I appreciate it and I will get into some of
19 the other participants in a bit.

20 Sticking with my office, myself, my wife,
21 Jennifer Plasencio. I recognize you.

22 You are good friends are Erin's sister?

23 **PROSPECTIVE JUROR:** Yes.

24 **MR. MURPHY:** In fact, you guys used to be
25 roommates?

1 **PROSPECTIVE JUROR:** Yes.

2 **MR. MURPHY:** Okay.

3 Do you think any part of that relationship
4 would affect your ability to be fair to both sides in
5 this case and listen to all the evidence?

6 **PROSPECTIVE JUROR:** I don't think it would.

7 **MR. MURPHY:** You don't think so. Okay.

8 Anybody else?

9 Let's look at the prosecution. We have
10 Mr. Jackley, Mr. Oswald, and Mr. Mandel. Mr. Mandel
11 is from the U.S. Attorney's Office; Mr. Oswald is from
12 the Attorney General's Office; and Mr. Jackley is the
13 Attorney General for the State of South Dakota.

14 Any personal or professional relationships
15 with any of those individuals?

16 **PROSPECTIVE JUROR:** Does being a state
17 employee have any bearing on that?

18 **MR. MURPHY:** Do you work --

19 **PROSPECTIVE JUROR:** I work in corrections.

20 **MR. MURPHY:** In corrections.

21 Have you had any contact with Mr. Jackley or
22 Mr. Oswald?

23 **PROSPECTIVE JUROR:** No, not directly.

24 **MR. MURPHY:** Sir, you are -- and I should
25 have said the last person who spoke is Mr. West.

1 And you are Mr. Kemp?

2 **PROSPECTIVE JUROR:** Yeah.

3 I don't have any personal contact with
4 Mr. Jackley, but I believe my boss does at my place of
5 employment.

6 **MR. MURPHY:** What is that?

7 **PROSPECTIVE JUROR:** RPM Solutions.

8 **MR. MURPHY:** Do you have any contact or any
9 knowledge or anything --

10 **PROSPECTIVE JUROR:** No.

11 **MR. MURPHY:** Anybody else?

12 Sir, you are Mr. Christensen?

13 **PROSPECTIVE JUROR:** Yes.

14 Mr. Jackley and I went to college together.

15 **MR. MURPHY:** Oh, okay.

16 So you could tell us some stories?

17 **MR. JACKLEY:** Objection.

18 **MR. MURPHY:** Were you roommates or were you
19 close friends during college?

20 **PROSPECTIVE JUROR:** No. Just knew each
21 other.

22 **MR. MURPHY:** Anything about that that thinks
23 you might sway towards one side or the other?

24 **PROSPECTIVE JUROR:** No.

25 **MR. MURPHY:** Okay.

1 Anybody else?

2 All right. As most of you probably know,
3 just on November 2, there was the election.
4 Mr. Jackley was elected to be the State's Attorney
5 General.

6 Were any of you involved in his election
7 campaign either by contributing to his campaign or
8 doing get-out-the-vote activities or working for the
9 republican party on his behalf.

10 Anybody involved any of those things?

11 **THE COURT:** Mr. Parker?

12 **PROSPECTIVE JUROR:** I was supporting him.

13 **MR. MURPHY:** Were you doing so in more of a
14 capacity -- more than just as a voter by contributing
15 to his campaign financially?

16 **PROSPECTIVE JUROR:** No. I worked for the
17 republican party.

18 **MR. MURPHY:** Did you do any specific
19 activities regarding Mr. Jackley's reelection?

20 **PROSPECTIVE JUROR:** Phone calling.

21 **MR. MURPHY:** Phone calls.

22 Do you think knowing that you had that
23 investment of time and energy on his behalf to get him
24 elected, would that affect you in this case?

25 **PROSPECTIVE JUROR:** No.

1 **MR. MURPHY:** Okay.

2 Anybody else? Okay.

3 All right. Now, we already briefly touched
4 upon Judge Delaney. There is Judge Delaney and Tina
5 Pruss. Tina is the court reporter and she's going to
6 remind me throughout the trial to talk slower. She's
7 already whispered over me to breathe once.

8 But anybody have a relationship with either
9 his honor or Tina that might affect how you view this
10 case or have anything to do with it?

11 We're going to have a rotation of clerks and
12 bailiffs and so I am not going to get into that unless
13 somebody has a strong connection to one of the clerks
14 of court or one of the bailiffs. On any given day
15 there will be one or two clerks and one or two
16 bailiffs but we don't always know who is going to be
17 here on a day-to-day basis.

18 The next nuts and bolts thing is witnesses
19 and there is a long list. There is about 50 potential
20 witnesses and so I am going to go through name by
21 name. If you would, raise your hand if you have a
22 recognition, relationship, anything about that
23 particular name that causes you to have any reaction.
24 And I am going to do it name by name rather than go
25 through the whole list of 50, because it would be

1 hard at the end for you to recall who I had said.

2 I am going to do them in alphabetical order.
3 There is no significance. First is Charlie Abourezk.
4 He's an attorney here in Rapid City.

5 Abe Alonzo. He is a former Denver Police
6 Department Detective.

7 Roger Amiotte. He's a rancher from down --
8 Ma'am, you are?

9 **PROSPECTIVE JUROR:** Cadey Reisner.

10 **MR. MURPHY:** Yes?

11 **PROSPECTIVE JUROR:** My parents ranch with
12 him. I live down in the same area as him.

13 **MR. MURPHY:** Okay.

14 Known him for years?

15 **PROSPECTIVE JUROR:** My parents have, yes.

16 **MR. MURPHY:** Do you have a -- he is going to
17 be a key prosecution witness in this case.

18 Does that relationship -- do you think that
19 you are going to factor that in or that might
20 influence your ability to sit fairly and just listen
21 to the testimony?

22 **PROSPECTIVE JUROR:** I couldn't say. Just my
23 parents they were -- they knew him well with ranching
24 and stuff; knew the case a little bit because of that.

25 **MR. MURPHY:** Have you learned about the case

1 through your parents?

2 **PROSPECTIVE JUROR:** Yes.

3 **MR. MURPHY:** Okay.

4 That's another issue, but why don't we
5 explore that while we're talking.

6 You have learned information about this case
7 outside the witness chair?

8 **PROSPECTIVE JUROR:** Uh-huh.

9 **MR. MURPHY:** Okay.

10 Would it be fair to say it's going to be hard
11 to put out of your mind what you heard in the past
12 from people that were involved in the case and just
13 focus on what's in the -- what comes from the witness
14 chair?

15 **PROSPECTIVE JUROR:** I would say yes with my
16 dad growing up down there and stuff.

17 **MR. MURPHY:** All right.

18 Your Honor, based on the past experience and
19 knowledge, I would ask her to be excused.

20 **THE COURT:** Mr. Jackley?

21 **MR. JACKLEY:** May I voir dire the witness for
22 just a moment, Your Honor?

23 **THE COURT:** You may.

24

25

1 **MR. MURPHY:** You had indicated that you know
2 Mr. Amiotte; is that fair?

3 **PROSPECTIVE JUROR:** Uh-huh.

4 **MR. JACKLEY:** And he is going to take the
5 stand and he is going to provide some -- is
6 anticipated to provide some information as a witness.

7 Would you be able to separate your knowledge
8 from him and be able to listen to him as to what he
9 says and to fairly evaluate his testimony or do you
10 have concerns with that?

11 **PROSPECTIVE JUROR:** I think I would be fairly
12 go over his testimony. Just with me growing up down
13 there and with my parents growing up there, I think
14 other factors would contribute to being hard to be
15 unbiased.

16 **MR. JACKLEY:** You would not be able to
17 separate your background, the information, you know,
18 from the evidence you would hear at trial?

19 **PROSPECTIVE JUROR:** No.

20 **MR. JACKLEY:** If you were seated in my chair,
21 knowing what you know, would you have concerns of
22 having somebody like you be a juror?

23 **PROSPECTIVE JUROR:** I would be like pre -- I
24 don't know what the exact word.

25 **MR. JACKLEY:** Predisposed.

1 **PROSPECTIVE JUROR:** Predisposed thoughts,
2 yes.

3 **MR. JACKLEY:** No objection from the state.

4 **THE COURT:** Thank you, ma'am. You will be
5 excused.

6 **THE CLERK:** Heather Bendowski.

7 I believe you need to be sworn in; is that
8 correct.

9 **PROSPECTIVE JUROR:** Yes.

10 (Whereupon, a prospective juror was then
11 sworn.)

12 **THE CLERK:** Thank you.

13 Take a seat where she left from.

14 **MR. MURPHY:** Ms. Bendowski, before we go
15 further, were there any issues that were raised when
16 you weren't in the panel of 56 that bear on this
17 process.

18 **PROSPECTIVE JUROR:** Just that I am the only
19 provider for my family.

20 **MR. MURPHY:** Can you explain that?

21 **PROSPECTIVE JUROR:** My husband is a
22 stay-at-home dad. He goes to school and I am the one
23 that goes to work and does all that.

24 **MR. MURPHY:** Is your employer going to pay
25 you while you are here or no?

1 **PROSPECTIVE JUROR:** I think they do, but I am
2 not a hundred percent sure of that.

3 **MR. MURPHY:** So financially, you will still
4 be receiving the same income?

5 **PROSPECTIVE JUROR:** Like I said, I am not a
6 hundred percent sure. I have never been on a jury
7 before. So I don't know how it works with my work.

8 **MR. MURPHY:** All right.

9 I left off at Mr. Amiotte. Anybody else know
10 Mr. Amiotte?

11 Next one is Barry Bachrach. He's an attorney
12 from Massachusetts.

13 Clyde Bellecourt. A man from Minnesota,
14 former activist or leader in the American Indian
15 Movement.

16 What's your name?

17 **PROSPECTIVE JUROR:** Tania Little.

18 **MR. MURPHY:** Could you say your name again?

19 **PROSPECTIVE JUROR:** Tania Little.

20 **MR. MURPHY:** Okay.

21 **PROSPECTIVE JUROR:** He's a relative of mine.

22 **MR. MURPHY:** What degree of relative?

23 **PROSPECTIVE JUROR:** Probably second cousin.

24 **MR. MURPHY:** Do you know him well?

25 **PROSPECTIVE JUROR:** No.

1 **MR. MURPHY:** Anything about your knowledge,
2 the family relationship, that would cause you to
3 believe you couldn't be fair to both sides?

4 **PROSPECTIVE JUROR:** No.

5 **MR. MURPHY:** Okay. Anybody else with
6 Mr. Bellecourt?

7 Serle Chapman is a man from Great Britain,
8 from England, but he's a writer. He runs a tour
9 company in this part of the world in the hills.

10 Theda Clarke. She's a woman from Pine Ridge,
11 originally. Lived in Denver and Pine Ridge. Now
12 lives in Nebraska.

13 Jean Ann day from Minnesota -- from
14 Wisconsin, excuse me.

15 Don Dealing, a retired FBI agent that used to
16 live and work in the Rapid City area.

17 Frank Dillon, a gentleman originally from
18 Denver. I believe he lives in Yankton or over on the
19 eastern side of the state.

20 Jeannette Eagle Hawk. From Denver.

21 Kamook Darlene -- Darlene or Kamook, first
22 name, Nichols. Also known as Kamook Banks or Kamook
23 Ecoffey. She runs the Subway restaurant down on Pine
24 Ridge. Lives in Rapid City. Her husband is Robert
25 Ecoffey.

1 Next one is Robert Ecoffey. Robert Ecoffey
2 is the president/superintendent of the Pine Ridge
3 Indian Reservation. He was a United States Marshal
4 and a law enforcement officer.

5 Kim Edwards.

6 Is Kim Edwards still a witness?

7 **MR. JACKLEY:** Not per the stipulation.

8 **MR. MURPHY:** Allen Garber. A retired FBI
9 agent. Also worked in Rapid City and South Dakota for
10 many years.

11 Cleo Marshall Gates. Cleo Marshall or Cleo
12 Gates. A woman who, I believe, works down in a school
13 on Rosebud. Is from the Rosebud Indian Reservation.

14 James Graf. Another retired FBI agent. I
15 believe he still lives in Rapid City.

16 Naneek Graham, my client's daughter from the
17 Yukon Territory in Canada.

18 Dr. Don Habbe. Dr. Habbe works at Clin Lab.
19 He's a pathologist here in Rapid City. Been here
20 forever.

21 Candy Hamilton. She's a journalist that
22 lives in Pine Ridge. Has lived in Rapid City. Been
23 here for about 35 years, forty years.

24 Ray Hand Boy. Mr. Hand Boy, I think,
25 presently lives in Rapid City. Used to work at Sioux

1 San.

2 Sir, you are?

3 **PROSPECTIVE JUROR:** Joe Gion.

4 **MR. MURPHY:** Mr. Gion. Yeah.

5 **PROSPECTIVE JUROR:** I actually used to play
6 in a band with Ray Hand Boy.

7 **MR. MURPHY:** Did you?

8 **PROSPECTIVE JUROR:** Yeah.

9 **MR. MURPHY:** Close personal friend?

10 **PROSPECTIVE JUROR:** You could call him that.

11 **MR. MURPHY:** During the course of your band
12 playing together, did you guys ever talk about
13 anything about this case or anything like that?

14 **PROSPECTIVE JUROR:** No.

15 **MR. MURPHY:** Do you believe you can set aside
16 your personal friendship and just listen to what's
17 presented on the witness stand?

18 **PROSPECTIVE JUROR:** Yeah.

19 **MR. MURPHY:** Okay.

20 Ma'am, I am sorry.

21 **PROSPECTIVE JUROR:** So it's Ray Hand Boy
22 that's like 20 some years old?

23 **MR. MURPHY:** No. He's probably in his 50s.

24 **PROSPECTIVE JUROR:** Okay.

25 **PROSPECTIVE JUROR:** I know who he is.

1 **PROSPECTIVE JUROR:** That's a different Hand
2 Boy, then. The other one would probably be younger.

3 **MR. MURPHY:** And your name.

4 **PROSPECTIVE JUROR:** Hildur French.

5 **MR. MURPHY:** And how do you know the older
6 Mr. Hand Boy?

7 **PROSPECTIVE JUROR:** I just know him because I
8 know his son.

9 **MR. MURPHY:** Okay.
10 Anything about that relationship that would
11 cause you --

12 **PROSPECTIVE JUROR:** No.

13 **MR. MURPHY:** Okay.

14 Anybody else?

15 Evan Hodge. Anybody know Mr. Hodge?

16 Angie Begay also known as Angie Janis.

17 Mary Johnson.

18 Fritz Arlo Looking Cloud. Also known as Arlo
19 Looking Cloud. Anybody familiar with Mr. Looking
20 Cloud?

21 How about Denise Maloney?

22 Vine Richard, also known as Dick, Marshall.

23 Mike McRoden. He's a local FBI agent. Still
24 works at the FBI here in Rapid City.

25 Russell Means. AIM activist, spokesperson.

1 Actor.

2 Anybody have any personal or professional
3 connection with Russell Means?

4 David Melmer. He's a journalist. I believe
5 he comes from the twin cities but he writes in the
6 nationwide publications.

7 Nathan Merrick. Former BIA law enforcement
8 officer.

9 George Palfy. A gentleman from Denver.

10 Dr. Garry Peterson. He's a retired
11 pathologist, forensic pathologist, from the twin city
12 area.

13 Mitch or Mitchell Pourier. He was, I
14 believe, with the U.S. Marshals as well as with the
15 BIA.

16 David Price. Former FBI agent that lived in
17 the Rapid City area for many years.

18 Thelma Rios. Ms. Rios is a resident of Rapid
19 City. Has been a spokesperson for various causes in
20 the community.

21 Bob Riter. He's an attorney from Pierre.

22 Madonna Gilbert, also known as Madonna
23 Thunderhawk. Used to live here in Rapid City. May
24 still.

25 Gene Roach from Rapid City.

1 William, also known as Bill Wood. Long term
2 FBI agent that lived in Rapid City for many years.

3 Troy Lynn Irving, also known as Troy Lynn
4 Yellow Wood.

5 Okay. We got through the long list of
6 witnesses.

7 Do you want to take a break?

8 **THE COURT:** I could use a break because it's
9 been a spell since I've had one.

10 You got a question.

11 **MR. MURPHY:** Ms. French?

12 **PROSPECTIVE JUROR:** Well, I am just
13 wondering. I don't even know if that is the same Ray
14 Hand Boy that I would know since he said this is
15 another one. I don't --

16 **MR. MURPHY:** But in any case it wasn't
17 somebody that --

18 **PROSPECTIVE JUROR:** No.

19 **MR. MURPHY:** All right.

20 **THE COURT:** All right, ladies and gentlemen,
21 we're going to take a brief break. No more than 15
22 minutes. With this size of a crowd we're going to
23 need at least that.

24 When you come back, please come back and sit
25 in the same seats you are. That is, the 56 still

1 being examined retain your places until we end up with
2 a final jury.

3 You are reminded of my instruction on
4 discussion of the case with nobody. Mothers, fathers,
5 aunts, brothers, sisters, friends, enemies. Nobody.
6 Including counsel or the lawyers. You may see us pass
7 you in the hall and feel offended because nobody says
8 high. If they say hi, then they are in trouble with
9 me and with the whole judicial system. So don't
10 expect you to greet them and I don't expect them to
11 greet you.

12 Thank you. We are in recess.

13 (Off the record.)

14 **THE COURT:** Mr. Murphy?

15 **MR. MURPHY:** Thank you.

16 I am going to go a little bit out of order.
17 Ms. Schmidt, I understand it was brought to my
18 attention that you are feeling a bit antsy just being
19 in this courtroom?

20 **PROSPECTIVE JUROR:** Uh-huh.

21 **MR. MURPHY:** Is that something -- would you
22 like to address it in private or is it fair to say
23 that based on your past experience, the process of
24 sitting through a trial like this would be traumatic
25 to you?

1 **PROSPECTIVE JUROR:** Yes.

2 **MR. MURPHY:** You have to talk loud.

3 **PROSPECTIVE JUROR:** It would be traumatic to
4 me.

5 **MR. MURPHY:** All right.

6 In light of that, Your Honor, I have no
7 objection to Ms. Schmidt being excused for cause.

8 **MR. JACKLEY:** No objection, Your Honor.

9 **THE COURT:** Thank you, ma'am.

10 **THE CLERK:** Craig Greenwalt.

11 **MR. MURPHY:** While Mr. Greenwalt is getting
12 seated, are there more jurors that need to be sworn.

13 **THE CLERK:** There are a few more.

14 **MR. MURPHY:** Why don't we make sure we take
15 care of that.

16 **THE CLERK:** Any jurors that have not been
17 sworn in, would you please stand and raise your right
18 hand.

19 (Whereupon, the prospective jurors were then
20 sworn.)

21 **MR. MURPHY:** All right. Going back for the
22 five jurors that just were sworn, I wasn't aware of
23 what time or how far into the process it was before
24 you guys came. You are not part of the 56 that have
25 already been selected as our talk-to panel.

1 What I am going to ask you folks to do is
2 listen to the questions so that in case like you just
3 saw somebody got removed, somebody from the spare
4 jurors gets put in their position. So we don't have
5 to go back through all of the questions, although I
6 will have to run through some of those because people
7 have come in late.

8 At least from this point forward, whenever
9 you come forward, listen to the questions and then I
10 can just say, was there anything that causes you
11 concern and you can just address that at that point.

12 Now, I want to start this part talking about
13 familiarity with the case. This is the State of South
14 Dakota versus John Graham. But during the trial, you
15 are going to hear about three other cases, I believe.
16 You are going to hear about a case called *United*
17 *States vs. Fritz Arlo Looking Cloud* or Arlo Looking
18 Cloud. That was a federal prosecution involving the
19 same allegations that are here. At one point my
20 client was charged in federal court with Mr. Looking
21 Cloud. Mr. Looking Cloud went to a jury trial and was
22 convicted. And that will all be presented.

23 And I wanted to ask first if anybody recalls
24 the media coverage about that case or hearing about
25 that case in any way, shape, or form?

1 Sir, you are?

2 **PROSPECTIVE JUROR:** Greg Nepstad.

3 **MR. MURPHY:** What do you know about that case
4 and how does it affect you?

5 **PROSPECTIVE JUROR:** Just whatever I read in
6 the paper.

7 **MR. MURPHY:** Okay.

8 **PROSPECTIVE JUROR:** Also this whole AIM
9 affairs in the 80s. Read in *The spirit of Crazy*
10 *Horse*.

11 **MR. MURPHY:** And I am going to get into the
12 books and media coverage in a bit.

13 While we're talking about you, is there
14 anything about your historical interest or the
15 interest in the subject matter of case that is going
16 to make it hard for you to listen to the evidence as
17 it comes in from the witness stand and just focus on
18 that as opposed to what you might have read in a book
19 or heard outside?

20 **PROSPECTIVE JUROR:** Just judging by what I
21 know about the cases --

22 **MR. MURPHY:** Would you mind standing?

23 **PROSPECTIVE JUROR:** Sure.

24 There was government misconduct at times. It
25 makes it hard to do it without a reasonable doubt.

1 **MR. MURPHY:** Okay.

2 Do you think if the judge tells you that it's
3 your duty as a juror to put that aside and base your
4 decisions solely on what was presented through the
5 witnesses and the documents and exhibits, can you do
6 that or do you think that the outside influences are
7 going to make it hard for you?

8 **PROSPECTIVE JUROR:** It would be difficult.

9 **MR. MURPHY:** Impossible or just --

10 **PROSPECTIVE JUROR:** Not impossible.

11 **MR. MURPHY:** Not impossible.

12 Do you feel comfortable sitting as a juror?

13 **PROSPECTIVE JUROR:** Like I say, I have a hard
14 time convicting just because of the reasonable doubt.

15 **MR. MURPHY:** Okay.

16 That you have already formed outside the
17 course --

18 **PROSPECTIVE JUROR:** That's correct.

19 **MR. MURPHY:** You know most books are fiction?

20 **PROSPECTIVE JUROR:** Absolutely.

21 **MR. MURPHY:** Okay.

22 Even if they say they are nonfiction, there
23 is probably a good portion of the book that is
24 fiction?

25 **PROSPECTIVE JUROR:** Yeah.

1 **MR. MURPHY:** In light of that, would you be
2 able to put aside what you read and focus on just what
3 you hear here in this courtroom?

4 **PROSPECTIVE JUROR:** I would attempt to.

5 **MR. MURPHY:** You would attempt to. Okay.

6 I don't mean to put you on the spot, but
7 we're getting dangerously short of jurors and I want
8 the communication to be free and open and honest. All
9 I guess I want from you is to know whether you think
10 if -- if the judge says that your verdict has to be
11 based on the evidence presented here and not what you
12 read somewhere else, could you do that or could you
13 not do that?

14 **PROSPECTIVE JUROR:** I don't know. I mean,
15 it's hard because, like I say, I followed this case
16 just because I had an interest in it since the 70s,
17 basically.

18 **MR. MURPHY:** Okay.

19 Well, I don't have a basis for cause on this
20 in light of his response so I will just proceed unless
21 the state wants to voir dire.

22 **THE COURT:** I think we leave him sit.

23 **MR. MURPHY:** You are fine. Thank you, sir.

24 Anybody else regarding Mr. Looking Cloud?

25 Maybe I will just announce the other trials.

1 There was also a trial and it was just in April of
2 this year. The trial of *United States vs. Dick*
3 *Marshall or Richard Marshall*, his real legal name is
4 Vine Richard Marshall. It was front page of the Rapid
5 City Journal. He was acquitted. He was charged in
6 the same crime, same case essentially. In fact, he
7 and Mr. Graham were once codefendants also in the
8 federal system. Mr. Graham's charges were dismissed
9 and he was brought over to state court. Mr. Marshall
10 went ahead in the federal system and was acquitted.

11 Anybody here have any recollection of that
12 case since it was just six or seven months ago?

13 We got a couple. We have -- I am going to
14 slaughter your name, so I --

15 Ma'am, would you state your name and if you
16 wouldn't mind standing up so Tina can here.

17 **PROSPECTIVE JUROR:** Vijaya, my first name.
18 Ramakrishnan my last name.

19 **MR. MURPHY:** All right.

20 And you indicated you have knowledge of
21 Mr. Marshall's case?

22 **PROSPECTIVE JUROR:** Yeah, since I read that
23 before yesterday also.

24 **MR. MURPHY:** And you indicated before you
25 read yesterday's newspaper article, and we're going to

1 get to that in a second.

2 But talking about Mr. Marshall's case,
3 anything you read or heard about that case, will that
4 affect your ability to be fair here and base your
5 opinions just on what's in the witness stand?

6 **PROSPECTIVE JUROR:** It would convince more --

7 **MR. MURPHY:** It would convince more?

8 **PROSPECTIVE JUROR:** Yeah. I mean, then I
9 can -- which one is more convince me.

10 **MR. MURPHY:** Okay.

11 **PROSPECTIVE JUROR:** Do you understand?

12 **MR. MURPHY:** Yeah, I do understand.

13 So you are saying basically what evidence you
14 hear is going to help you decide which way you go?

15 **PROSPECTIVE JUROR:** Which way I go.

16 **MR. MURPHY:** Would it be fair to say what you
17 heard about Mr. Marshall's case isn't going to affect
18 that?

19 **PROSPECTIVE JUROR:** I don't really know about
20 that.

21 **MR. MURPHY:** Okay.

22 Ma'am, you also raised your hand?

23 **PROSPECTIVE JUROR:** Yeah.

24 **MR. MURPHY:** And your name?

25 **PROSPECTIVE JUROR:** Jo Ann Paulson.

1 **MR. MURPHY:** Okay.

2 **PROSPECTIVE JUROR:** You know, like anybody
3 who has been in the area, I have read and heard lots.
4 As a teacher I spent over 30 years teaching kids how
5 to tell the difference fact and opinion when we read
6 or we wrote something. I don't see that I would have
7 a problem.

8 **MR. MURPHY:** All right.

9 Nothing that you have read about in the paper
10 or heard is going to have you firmly convinced?

11 **PROSPECTIVE JUROR:** One way or the other I
12 have read things. I can tell when it's Dateline-type
13 stuff and I can tell when there is fact. I don't see
14 a problem.

15 **MR. MURPHY:** All right.

16 Well, let me -- maybe so we can broaden the
17 discussion rather than going through each individual
18 case, there was also recently in the paper *State vs.*
19 *Thelma Rios*. Ms. Rios was also charged in this case
20 and she reached a plea bargain just a few weeks ago
21 and that was covered by the press. She got a
22 probationary sentence and that was something covered.

23 But we've also talked, and a couple of you
24 have hit upon, there has been books, The Spirit of
25 Crazy Horse, a widely read book. There was a book not

1 long ago, 2007, called American Indian Mafia. The
2 Unquiet Grave, which was written by a guyed named
3 Steve Hendricks. Who Will Unbraid Her Hair is a book
4 by Jo Ann Brand. And then there has been movies and
5 documentaries. There was the docudrama Incident At
6 Oglala. It involved AIM and the activities at Wounded
7 Knee and the activities involved in this case in the
8 70s. This case is involving something that's alleged
9 to have happened in 1975 or 1976.

10 Anybody here have a historical background or
11 exposure to the media?

12 We saw -- if you got the Sunday paper
13 yesterday, it was the front page and a full insert.

14 Who has read articles about this case? Okay.
15 Let's start for a change in the back.

16 Sir, what's your name?

17 **PROSPECTIVE JUROR:** Dale Pierce.

18 **MR. MURPHY:** Mr. Pierce?

19 **PROSPECTIVE JUROR:** Yes, sir.

20 **MR. MURPHY:** Okay.

21 What have you read and how has it influenced
22 you if at all?

23 **PROSPECTIVE JUROR:** It has allowed me to make
24 a conclusion of what I think of guilt and innocence.

25 **MR. MURPHY:** It has?

1 **PROSPECTIVE JUROR:** Yes, sir, it has.

2 **MR. MURPHY:** And without getting into what
3 your conclusion is --

4 **PROSPECTIVE JUROR:** Yes, sir.

5 **MR. MURPHY:** -- is it fair to say -- you have
6 spoke pretty directly -- that that's going to
7 influence how you hear the evidence and you are going
8 to go into this prejudging the case?

9 **PROSPECTIVE JUROR:** Yes, sir, that is
10 correct.

11 **MR. MURPHY:** Even if the judge tells you,
12 come into it with a clear mind, that's not going to be
13 able to be possible.

14 **PROSPECTIVE JUROR:** No, sir. I already know
15 what I decided.

16 **MR. MURPHY:** All right.

17 Your Honor, in light of that, I'd ask
18 Mr. Piece to be allowed to be excused.

19 **THE COURT:** Mr. Jackley?

20 **MR. JACKLEY:** No objection, Your Honor.

21 **THE COURT:** Thank you, sir. You may be
22 excused.

23 **THE CLERK:** Debra Rosser.

24 I believe you need to be sworn in. Please
25 raise your right hand.

1 (Whereupon, a prospective juror was then
2 sworn.)

3 **THE CLERK:** Please be seated where that lady
4 just left.

5 **MR. MURPHY:** Ms. Rosser, you just arrived?

6 **PROSPECTIVE JUROR:** Yes.

7 **MR. MURPHY:** Okay.

8 The rest of the people bear with me a bit.
9 We have been going at this for over an hour now. And
10 we covered a number of topics so I have to kind of go
11 back through and discuss some of those things.

12 I will do it a little more briefly than I did
13 the first time. And -- but I want you to stop me at
14 any time if I say something that you don't understand
15 because I don't want to hurry through things.

16 First, of my name is John Murphy and I am the
17 defense attorney for Mr. Graham. That's my client
18 Mr. Graham and my paralegal Erin Duchaneaux. We've
19 got on the prosecution team Mr. Jackley, who is the
20 Attorney General, and Mr. Oswald and Mr. Mandel.

21 Do you know any of us professionally or
22 personally to any extent?

23 **PROSPECTIVE JUROR:** No.

24 **MR. MURPHY:** Okay.

25 And Mr. Jackley was just elected to the

1 Attorney General's position. Were you involved in his
2 campaign efforts either as a campaign contributor or
3 somebody who helped get out the vote or made phone
4 calls or anything like that?

5 **PROSPECTIVE JUROR:** No.

6 **MR. MURPHY:** What we're going to do here --
7 Have you been through jury selection before?

8 **PROSPECTIVE JUROR:** No.

9 **MR. MURPHY:** All right.

10 What we're doing is called voir dire and it's
11 the process by which both sides ask all of the jurors
12 potential questions to determine whether you can be a
13 juror on this case. It's not whether you are a good
14 person or a bad person or anything like that.

15 If at any time there is an issue that I bring
16 up that is for whatever reason sensitive, that you
17 don't want to share with 60 other people, all you need
18 to do is let us know and we have the ability to go in
19 the back -- there is rooms in the back and the court
20 reporter sets up her equipment -- and we can handle it
21 that way.

22 We'll try not to ask you anything that is
23 going to embarrass you, but there are issues that are
24 sensitive. What we're looking at here -- one of the
25 things is this is a case involving allegations of

1 murder. My client is charged with committing a murder
2 that is alleged to have happened back in 1975 or 76.

3 The trial is likely to go through
4 December 17. That's our best estimate. Basically
5 three full weeks of trial.

6 And first off, are there any physical
7 limitations, work situation, child situations,
8 anything else like that that is going to make it
9 reasonably difficult for you to be here from 8:30 to
10 5:00 for the next three weeks?

11 Would you mind standing up so Tina with hear
12 you.

13 **PROSPECTIVE JUROR:** I have some surgery
14 coming up to be scheduled on December 1 and I am not
15 exactly sure if they are going to keep me that day or
16 going to reschedule me. So I have been kind of in
17 limbo waiting for that.

18 **MR. MURPHY:** And I am not going to dive into
19 the medical history or anything like that. But if
20 they have surgeries available for you on the first, is
21 it your intention have them?

22 **PROSPECTIVE JUROR:** Absolutely.

23 **MR. MURPHY:** Okay.

24 In light of that, Your Honor, I would excuse
25 Ms. Rosser.

1 **THE COURT:** Mr. Jackley?

2 **MR. JACKLEY:** No objection.

3 **THE COURT:** Thank you, ma'am. You may be
4 excused.

5 **THE CLERK:** Karen Malenius. If you will
6 please take a seat where Ms. Rosser left.

7 **MR. MURPHY:** Good morning, Ms. Malenius.
8 Am I pronouncing your name right?

9 **PROSPECTIVE JUROR:** Malenius.

10 **MR. MURPHY:** Thank you.

11 I didn't notice when you came in. I know you
12 were one of the latter jurors who came in. Where were
13 we at, if you recall, when we came?

14 **PROSPECTIVE JUROR:** You were reading the
15 names off.

16 **MR. MURPHY:** Reading the names off. Okay. I
17 was in the midst of reading the names off. Okay.
18 I --

19 You may have a seat.

20 I will try to cover what we brought up to
21 then. First off, we're in the process of jury
22 selection. I am trying to orient my voice so Tina can
23 hear me, too. If I turn my back it's hard for her to
24 hear.

25 I am going to ask you questions like you just

1 heard. If you need a private meeting that's fine.
2 Just trying to get to the truth. And there is no
3 judgments or anything like that.

4 The first biggest issue is we are here
5 planning to be here potentially through December 17.
6 And that's three weeks. 8:30 to 5:00. Conceivably,
7 if you were out in deliberations, it could go beyond
8 the 17th because jurors deliberate for however long
9 it takes, hours, days, sometimes longer.

10 Is there anything about that schedule that is
11 going to cause you a particular hardship?

12 **PROSPECTIVE JUROR:** No.

13 **MR. MURPHY:** All right. Thank you.

14 Anything about your relationship or knowledge
15 of Mr. Jackley, Mr. Oswald, Mr. Mandel, myself, my
16 paralegal, my client, that would cause you any concern
17 that you might have any bias?

18 **PROSPECTIVE JUROR:** No.

19 **MR. MURPHY:** Do you happen to recall about
20 witness I was on when you came in?

21 **PROSPECTIVE JUROR:** No, I'm afraid not.

22 **MR. MURPHY:** Well, I am just going to start:
23 Charlie Abourezk, Abe Alonzo, Roger Amiotte, Barry
24 Bachrach, Clyde Bellecourt -- I am sorry, Tina --
25 Serle Chapman, Theda Clarke, Jean Ann Day, Don

1 Dealing, Frank Dillon, Jeanette Eagle Hawk, Kamook
2 Banks or Kamook Ecoffey, Robert Ecoffey, Allen Garber,
3 Cleo Marshall Gates, James Graf, Naneek Graham,
4 Dr. Don Habbe, Candy Hamilton, Ray Hand Boy, Evan
5 Hodge, Angie Begay Janis, Arlo Looking Cloud, Denise
6 Maloney, vine Richard also known as Dick Marshall,
7 mike McRoden, Russell Means, David Melmer, Nathan
8 Merrick, George Palfy, Dr. Garry Peterson, Mitchell
9 Pourier, David Price Thelma Rios, Bob Riter, Madonna
10 Gilbert Thunderhawk, Gene Roach, William or Bill Wood,
11 Troy Lynn Irving Yellow Wood.

12 Any of those names familiar?

13 **PROSPECTIVE JUROR:** No.

14 **MR. MURPHY:** What about connections with
15 Judge Delaney or Tina Pruss?

16 **PROSPECTIVE JUROR:** No.

17 **MR. MURPHY:** Okay.

18 We were just getting up to the media, books,
19 movies, press coverage. I know there was other hands
20 and I just started with Mr. Piece in the back row.
21 Let's start this back row here.

22 Anybody with media -- that has read anything
23 about the case or read books or has formed an opinion
24 about the case?

25 In the third row?

1 Okay. Second row?

2 Ma'am, your name again?

3 **PROSPECTIVE JUROR:** Cara Boehler.

4 **MR. MURPHY:** What's the --

5 **PROSPECTIVE JUROR:** You know, Googling has a
6 lot to do with it. You read an article and go to
7 another, so I've done quite a bit of that.

8 **MR. MURPHY:** And that's -- you Googled the
9 Anna Mae Aquash case?

10 **PROSPECTIVE JUROR:** Yes.

11 **MR. MURPHY:** All right.

12 For historical reasons or just general
13 information?

14 **PROSPECTIVE JUROR:** Something would come up
15 in the news and you kind of look something up and it
16 leads to something else and then I was into it.

17 **MR. MURPHY:** All right.

18 When you say you were into it, did it become
19 kind of a subject matter of interest or fascination
20 for you?

21 **PROSPECTIVE JUROR:** Yeah. Well, yeah.

22 **MR. MURPHY:** Okay.

23 In light of that -- I mean, there is tons of
24 stuff out there on the internet, do you feel that you
25 have already come to some conclusions about how she

1 died, and who is responsible, or any of those other
2 things?

3 And I don't want to you get into the
4 conclusions, but have you formed some opinions?

5 **PROSPECTIVE JUROR:** I have.

6 **MR. MURPHY:** All right.

7 And what the opinions are doesn't matter.
8 That's why I don't go into that.

9 Is it fair to say that you would have a hard
10 time putting those opinions aside or can you
11 completely put those aside and just listen to what
12 comes in on the witness stand and disregard everything
13 else you have read about the case?

14 **PROSPECTIVE JUROR:** I think it would be hard
15 to do. I don't know about impossible.

16 **MR. MURPHY:** Okay.

17 Well, let's talk about how hard. You know,
18 it's impossible -- why I say it that way is we don't
19 want to find out -- and it happens from time to time
20 that a juror sitting on a case, one of the 12 or 14
21 picked, suddenly says, boy, I didn't realize I had
22 these feels, but I'm filtering everything through what
23 I read or heard from somebody else, and then we start
24 the whole process over. We don't want to do that.
25 Nobody wants to try the case twice.

1 That's why I ask you to kind of search your
2 sole for a second and answer candidly, do you think
3 you can completely put that aside or do you have
4 doubts about your ability to do so?

5 **PROSPECTIVE JUROR:** I have doubts. I think
6 I'm pretty open-minded but --

7 **MR. MURPHY:** Sure. And we all try.

8 **PROSPECTIVE JUROR:** A lot of people want to
9 think that of themselves. It would be --

10 **MR. MURPHY:** If you were in my client's
11 shoes, would you want to have a jury of people -- or
12 if you were in the state's shoes. It could go either
13 way -- would you want to have a jury of 12 or 14
14 people with your preconceptions deciding the case?

15 **PROSPECTIVE JUROR:** Probably not.

16 **MR. MURPHY:** Sometimes a way for us to look
17 at it.

18 All right. I would then ask this juror be
19 allowed to be removed for cause, Your Honor.

20 **THE COURT:** Mr. Jackley?

21 **MR. JACKLEY:** May I voir dire?

22 **THE COURT:** You may.

23 **MR. JACKLEY:** Morning, ma'am.

24 **PROSPECTIVE JUROR:** Morning.

25 **MR. JACKLEY:** I'm going to anticipate that if

1 we go through the media and the different books that a
2 lot of people will have heard about this case or about
3 some the players in this case and other information
4 from the internet, the newspaper, the TV, et cetera.

5 So I just want to ask you a couple questions.
6 You said you could be an open person.

7 Do you feel you are an open person?

8 **PROSPECTIVE JUROR:** I'd like to think that I
9 am the, but I'm probably not.

10 **MR. JACKLEY:** You can -- do you consider
11 yourself a fair person?

12 **PROSPECTIVE JUROR:** I would say fair, but
13 judgmental a little.

14 **MR. JACKLEY:** In a trial -- in a jury trial,
15 such as this, the judge is going to provide jury
16 instructions, instructions on the law.

17 Do you feel you are the type of person that
18 could follow what those instructions are?

19 **PROSPECTIVE JUROR:** Probably.

20 **MR. JACKLEY:** Okay.

21 Do you feel that you could sit here and
22 separate what you may have seen in the newspaper, or
23 the TV, or in your case on the internet, and separate
24 that from what you would anticipate seeing or hearing
25 from the witness stand?

1 Could you separate that?

2 **PROSPECTIVE JUROR:** I don't know. I don't
3 think so.

4 **MR. JACKLEY:** Okay.

5 So, again, knowing what you know, what you've
6 seen on the internet, you don't feel that you would
7 make a good juror either for Mr. Graham or for the
8 State of South Dakota?

9 **PROSPECTIVE JUROR:** Probably not.

10 **MR. JACKLEY:** Okay.

11 No objection, Your Honor.

12 **THE COURT:** Thank you, ma'am. You may be
13 excused.

14 **THE CLERK:** Leah Lutheran.

15 **MR. MURPHY:** While Ms. Lutheran gets seated,
16 I think that dialogue where somebody was willing to
17 say, you know, I may be judgmental, that's what jury
18 selection is about is really bringing to the front
19 those kinds of things even when sometimes you feel
20 they are not so flattering about yourself and just
21 being straight forward and tell me your decisions
22 based on that.

23 Ms. Lutheran, you were one of the late
24 arrivals?

25 **PROSPECTIVE JUROR:** Definitely. Sorry.

1 **MR. MURPHY:** So what I am going to do is I am
2 going to cover some of the topics you heard me go
3 through with a couple of the other late arrivals.

4 First, do you have any questions about what
5 we're doing here in the jury selection process?

6 **PROSPECTIVE JUROR:** No.

7 **MR. MURPHY:** All right.

8 Do you have any relationships with anybody
9 here that is seated in front of the bar?

10 **PROSPECTIVE JUROR:** No.

11 **MR. MURPHY:** What about the personal hardship
12 issue of being in trial 8:30 to 5:00?

13 **PROSPECTIVE JUROR:** No.

14 **MR. MURPHY:** Okay.

15 You heard me read the witness list. Any
16 folks there that you know, had had contact with
17 personally, professionally, or otherwise?

18 **PROSPECTIVE JUROR:** I don't know him
19 personally. I hear names, but other than that, no.

20 **MR. MURPHY:** All right.

21 Then we're up to where we basically started.
22 Let me -- that was -- anybody else in this second row
23 have any media exposure, prejudgment based on what
24 you've read, seen on the internet, books you have
25 read, movies?

1 **PROSPECTIVE JUROR:** No.

2 **MR. MURPHY:** How about the first row?

3 I already mentioned -- already talked with
4 you, ma'am, about yours.

5 Let's start here in the first row here.
6 Anybody here been following this case in media or any
7 of the other cases?

8 **PROSPECTIVE JUROR:** I haven't been following,
9 this but I do work part time in media here in Rapid
10 City at Rushmore Radio. And it's not news oriented
11 and it won't affect anything, but I wanted to make
12 sure that wasn't an issue.

13 **MR. MURPHY:** Sure.

14 You are Mr. West?

15 **PROSPECTIVE JUROR:** Yes.

16 **MR. MURPHY:** All right.

17 Anybody in the second row there following the
18 case?

19 Have any in the third row?

20 Sir?

21 **PROSPECTIVE JUROR:** Wayne Rosby.

22 **MR. MURPHY:** Mr. Rosby, what have you learned
23 about the case?

24 **PROSPECTIVE JUROR:** I read the article
25 yesterday in the paper. I don't know much more about

1 it. You asked about historical stuff.

2 **MR. MURPHY:** Uh-huh.

3 **PROSPECTIVE JUROR:** I graduated approximate
4 high school in college in Sioux Falls so from time to
5 time I have heard things or read things. I can't tell
6 you a lot of specifics other than I know a little bit
7 about the AIM Movement. I have taken classes in
8 Indian studies from Augustana and graduate studies,
9 but I don't think any of that affects my opinion one
10 way or the other.

11 **MR. MURPHY:** All right.

12 And nothing about what you read in the
13 article in the paper yesterday affects your thought
14 process going in?

15 **PROSPECTIVE JUROR:** No, I don't see that it
16 would.

17 **MR. MURPHY:** Okay. Thank you.

18 Somebody else raise their hand?

19 Anybody else in the third row?

20 Okay. Going back to Mr. Nepstad.

21 **PROSPECTIVE JUROR:** That's correct. Just
22 back to listening to the discussions as a matter of
23 fairness, guilt or innocence, preconceived notions,
24 and I do have those. And that's my concern, just out
25 of fairness. I take jury duty very seriously.

1 **MR. MURPHY:** Sure.

2 **PROSPECTIVE JUROR:** I just wanted it to be
3 out there that I have --

4 **MR. MURPHY:** In going back to the discussion
5 we just had with the previous juror. Do you feel that
6 you just can't put those aside?

7 **PROSPECTIVE JUROR:** It would be difficult.
8 Just out of pure fairness.

9 **MR. MURPHY:** And that's what we want. That's
10 why we're here.

11 Kind of following up on the discussion that
12 both Mr. Jackley and I had with Ms. Boehler, how hard
13 would it be -- you said, candidly, it would be
14 difficult. It's hard to say what would be impossible
15 or not, but going into it, do you think that that is
16 going to be an impediment for you to listen to the
17 evidence from both sides freely?

18 **PROSPECTIVE JUROR:** Yes. Pretty opinionated
19 so --

20 **MR. MURPHY:** Pretty opinionated. My wife
21 tells me I am, too. So I won't hold that against you.

22 In light of this repeated discuss now, Your
23 Honor, I believe that this probably is a for-cause
24 issue now, Your Honor.

25 **MR. JACKLEY:** No objection, Your Honor.

1 **THE COURT:** Thank you, sir. You may be
2 excused.

3 **THE CLERK:** Vincent Steele.

4 **MR. MURPHY:** Mr. Steele, I see that you were
5 one of the late arrivals, as well?

6 **PROSPECTIVE JUROR:** Yeah.

7 **MR. MURPHY:** Do you recall about when you
8 came into the courtroom?

9 **PROSPECTIVE JUROR:** The names were starting
10 to be read.

11 **MR. MURPHY:** Okay.

12 Now we've seen with a couple of the other
13 jurors I have gone through those topics. Let's start
14 with participants here. Any of us that you know, had
15 past contact with, positive negative, any of us look
16 familiar enough to you?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** What about any of the names that
19 I have read a couple times?

20 **PROSPECTIVE JUROR:** I am friends with Thelma
21 Rios.

22 **MR. MURPHY:** Would you mind standing. It's
23 hard for Tina to hear you.

24 **PROSPECTIVE JUROR:** I am friends with Thelma
25 Rios.

1 **MR. MURPHY:** You are friends with Thelma
2 Rios?

3 **PROSPECTIVE JUROR:** Yeah.

4 **MR. MURPHY:** Who else?

5 **PROSPECTIVE JUROR:** That's it.

6 **MR. MURPHY:** Anything about your friendship
7 with Ms. Rios -- she's not on trial here today. She
8 may be a witness.

9 Is it a friendship such that if she's a
10 witness you are going to accept her testimony in a way
11 differently than any other witness or are you going to
12 favor it more and just assume that it's the gospel
13 even if there is evidence to contrary?

14 **PROSPECTIVE JUROR:** I would -- probably will,
15 yeah.

16 **MR. MURPHY:** Okay.

17 Have you been friends with her for a long
18 time?

19 **PROSPECTIVE JUROR:** Yes.

20 **MR. MURPHY:** Years?

21 Been friends with her for years?

22 **PROSPECTIVE JUROR:** Yes.

23 **MR. MURPHY:** Okay.

24 If the judge instructs you to try to put
25 aside your friendship and just listen to the evidence

1 that's presented from the witness stand, are you going
2 to be able to do that or is your friendship going to
3 cause you difficulties?

4 **PROSPECTIVE JUROR:** It is going to cause a
5 lot of difficulties.

6 **MR. MURPHY:** A lot of difficulties?

7 Your Honor, I believe there is a basis for
8 cause.

9 **MR. JACKLEY:** May I have just a minute, Your
10 Honor?

11 May I voir dire for just a moment, Your
12 Honor?

13 **THE COURT:** You may.

14 **MR. JACKLEY:** Good morning, sir.

15 **PROSPECTIVE JUROR:** Good morning.

16 **MR. JACKLEY:** I would anticipate that we're
17 going to hear from a wide variety of witnesses and we
18 may well hear from Thelma Rios.

19 So my question to you, sir, is would you be
20 able to put aside in your mind that relationship and
21 weigh her testimony, if she testifies, fairly?

22 Would you be able to do that?

23 **PROSPECTIVE JUROR:** I probably would agree
24 with her.

25 **MR. JACKLEY:** You would.

1 So you wouldn't be able to judge her
2 testimony outside of that relationship that you have
3 with her?

4 **PROSPECTIVE JUROR:** Probably not.

5 **MR. JACKLEY:** No objection, Your Honor.
6 Thank you, sir.

7 **THE COURT:** Thank you, sir. You may be
8 excused.

9 **THE CLERK:** Brett Kavanaugh.

10 **MR. MURPHY:** Mr. Kavanaugh, before I get to
11 you, I saw Mr. Harbert, you raised your hand?

12 **PROSPECTIVE JUROR:** Yes, sir. James Harbert.

13 I have a professional relationship with a
14 missionary that was down at Sharps Corner on the
15 reservation. And he said that he and his family were
16 driven off the reservation by the American Indian
17 Movement which has kind of colored my feelings about
18 that particular issues. I don't know if that's an
19 issue in this trial or not, but I thought I would make
20 that known.

21 **MR. MURPHY:** Well, it may very well be in the
22 sense that the -- there is going to be a lot of
23 evidence presented or at least we anticipate about the
24 American Indian Movement. Many of the witnesses are
25 going to be people that are going to be perceived as

1 supporters of the American Indian movement, including
2 my client, at that time.

3 Do you feel that because of that experience
4 or that knowledge that that may taint your ability to
5 treat each witness fairly and my client fairly and put
6 all of that aside and just listen to what they have to
7 say or is it going to taint your view of the people
8 that come before the Court that have affiliations with
9 the American Indian movement?

10 **PROSPECTIVE JUROR:** I think I can listen to
11 the other. I only have one side of the story from the
12 missionary. I haven't heard the other side of the
13 story.

14 **MR. MURPHY:** Sure.

15 Are you saying that you can put it aside
16 completely?

17 **PROSPECTIVE JUROR:** Yes, sir.

18 **MR. MURPHY:** Great. Thank you.

19 Mr. Kavanaugh. I apologize for disregarding
20 you for a moment. You were one of the late arrivals.

21 Do you recall where I was when you came in?

22 **PROSPECTIVE JUROR:** It was just before you
23 started reading the list.

24 **MR. MURPHY:** Okay.

25 So let's talk about participants, any

1 connections with any of us?

2 **PROSPECTIVE JUROR:** No, sir.

3 **MR. MURPHY:** What about any of the witnesses
4 that you heard me list?

5 **PROSPECTIVE JUROR:** No, sir.

6 **MR. MURPHY:** The trial duration issue, is
7 there anything about your work, school --

8 **PROSPECTIVE JUROR:** There is, sir. I am a
9 student at the School of Mines. And up until --
10 actually December 17 is the day I take my last final.
11 But before that I have numerous exams and numerous
12 presentations and in-class time and I have to be in
13 school for -- the last three weeks of the semester.

14 **MR. MURPHY:** Before you got here we were down
15 that path with somebody else.

16 Your Honor, in light of the -- this
17 gentleman's school schedule, I move to release him.

18 **MR. JACKLEY:** No objection, Your Honor.

19 **THE COURT:** Thank you, sir. You may be
20 excused.

21 **THE CLERK:** Loren Kasuske.

22 **MR. MURPHY:** Seems to be the hot seat.
23 That's the third juror.

24 So before I go back with Mr. Kasuske, I saw
25 Mr. Almeida.

1 **PROSPECTIVE JUROR:** Yeah.

2 **MR. MURPHY:** What's your situation.

3 **PROSPECTIVE JUROR:** I go to Western Dakota
4 Tech for law enforcement. I talked to my adviser on
5 the break, and that three weeks is going to be taking
6 tests and finals. He said he could make provisions
7 for me if you need me as a juror so I put that out
8 there.

9 **MR. MURPHY:** Sure.

10 What -- were the provisions the kind of
11 provisions that you can live with?

12 **PROSPECTIVE JUROR:** Yeah, they are.

13 **MR. MURPHY:** All right.

14 Then I appreciate you relaying that
15 information. If he's willing to make those
16 provisions --

17 Thank you.

18 Mr. Kasuske?

19 **PROSPECTIVE JUROR:** Kasuske.

20 **MR. MURPHY:** No even close.

21 So what point in the jury selection did you
22 come in?

23 **PROSPECTIVE JUROR:** From the beginning.

24 **MR. MURPHY:** Great. We're up to media.

25 Anything so far in?

1 **PROSPECTIVE JUROR:** No.

2 **MR. MURPHY:** Nothing. All right.

3 Saved me about four pages. Mr. West said us
4 too.

5 This is where sometimes it's nice to go
6 first, sometimes it's not so nice. You kind of have
7 to be the bad guy here.

8 Okay. Anybody -- I think I covered the
9 fourth row.

10 Anything about media coverage, anything else,
11 that affects anybody?

12 All right. I suppose if you worked for the
13 Rapid City Journal you probably wouldn't would be
14 happy that not many people read that article.

15 Okay. Let's talk about the agencies involved
16 in this case. I have already talked about my law
17 office and Mr. Mandel at the U.S. Attorney's Office,
18 these two gentlemen from the Attorney General's
19 Office.

20 Just go back to those agencies. Anybody had
21 any experiences or business or personal dealings with
22 any of those agencies that causes them to -- not
23 even -- do you have any contacts with these agencies?

24 What about the FBI or the Pennington County
25 State's Attorney's Office?

1 All right. There is some organizations in
2 town that work closely with the court system. There
3 is one called the CASA Program, Court Appointed
4 Special Advocates. There is WAVI, Working Against
5 Violence Incorporated. And MADD, Mothers Against
6 Drunk Driving.

7 Anybody here worked with or support any of
8 those organizations?

9 Okay. And you are Ms. Bendowski?

10 **PROSPECTIVE JUROR:** Uh-huh.

11 **MR. MURPHY:** What organization do you work
12 with?

13 **PROSPECTIVE JUROR:** WAVI and MADD.

14 **MR. MURPHY:** Okay.

15 And in what capacity in?

16 **PROSPECTIVE JUROR:** WAVI through Wal-Mart.
17 We team up with them every year during Christmas and
18 during the holiday seasons.

19 And then MADD, I am part of through --
20 started in high school and then just stuck with it.

21 **MR. MURPHY:** Okay.

22 Now, you work with WAVI. Do you work fairly
23 closely or support that mission pretty closely?

24 **PROSPECTIVE JUROR:** Yes.

25 **MR. MURPHY:** One of the things -- the

1 allegations in this case is that my client is
2 responsible for the death of a woman. He's charged
3 with two counts of murder. The victim is the same
4 person Anna Mae Aquash.

5 And going -- we'll talk about that later in a
6 more general context, but in light of the fact that
7 you worked with WAVI, knowing that, does that cause
8 you to feel that you might not be able to be fair to
9 my client because the allegation is a crime against a
10 woman?

11 **PROSPECTIVE JUROR:** No, I think I can be
12 unbiased.

13 **MR. MURPHY:** Nothing about the Mothers
14 Against Drunk driving activity?

15 This isn't a DUI case.

16 **PROSPECTIVE JUROR:** No.

17 **MR. MURPHY:** Anybody else on this side worked
18 with anybody?

19 Mr. Rosby?

20 **PROSPECTIVE JUROR:** Yes. I am an elementary
21 school principal and I've had contacts with those
22 organizations from time to time with the children that
23 I serve.

24 **MR. MURPHY:** Okay.

25 Does that -- do you think that will affect

1 you in how you view the case?

2 **PROSPECTIVE JUROR:** No.

3 **MR. MURPHY:** None of the people from WAVI or
4 CASA are going to be witnesses but I just wanted to
5 know.

6 Nothing there?

7 **PROSPECTIVE JUROR:** No.

8 **MR. MURPHY:** Mr. Kasuske?

9 **PROSPECTIVE JUROR:** My wife and I are foster
10 parents and adoptive parents and we deal with CASA
11 from time to time.

12 **MR. MURPHY:** All right.

13 **PROSPECTIVE JUROR:** For some of our foster
14 children.

15 **MR. MURPHY:** Sure.

16 Anything about that that causes you concern
17 about -- because they are involved in the court
18 system -- that might lead you to be unbiased in this
19 case?

20 **PROSPECTIVE JUROR:** No, sir.

21 **MR. MURPHY:** Let's go --

22 Sir, your name?

23 **PROSPECTIVE JUROR:** Just before you were
24 talking about the FBI, I do have friends that -- one
25 friend is a retired FBI agent and one friend is

1 current State's Attorney. But the FBI agent worked
2 after the time involved so he's told --

3 **MR. MURPHY:** Has he talked to you about the
4 case?

5 **PROSPECTIVE JUROR:** Not specifics just
6 general things he's heard about, but nothing specific.

7 **MR. MURPHY:** Do you mind me asking which FBI
8 agent that is?

9 **PROSPECTIVE JUROR:** William Grode.

10 **MR. MURPHY:** Okay.

11 And his son is a State's Attorney.

12 **PROSPECTIVE JUROR:** Yeah.

13 **MR. MURPHY:** So you know Patrick?

14 **PROSPECTIVE JUROR:** I do. Since grade
15 school.

16 **MR. MURPHY:** Anything -- are you going to be
17 able to put what they said aside?

18 **PROSPECTIVE JUROR:** Yes.

19 **MR. MURPHY:** Completely?

20 **PROSPECTIVE JUROR:** Yeah.

21 **MR. MURPHY:** Anybody else over here?

22 Okay. They covered the clock. Looks like
23 we're going into legislative session.

24 **THE COURT:** Ten minutes before the magic
25 hour.

1 **MR. MURPHY:** Ten minutes. Good. All right.

2 I want to talk to folks about their
3 experience or your experiences with the criminal
4 justice system.

5 And again, I want to really stress this is a
6 situation where private meetings are available. We
7 can do this in private if it is at all sensitive. I
8 want to start out by talking about people who have
9 been either victims of a crime, of a crime themselves,
10 or their spouse, their kids, a friend. I mean, it's
11 not just about you. It could be anybody that you have
12 a close relationship, and I want to talk about how
13 that experience of being close with someone who was a
14 victim of a crime may affect their ability to be
15 unbiased here.

16 And I am going to start with -- and one of
17 the allegations -- and this is -- let me start
18 generally with crimes of violence that do not have
19 anything to do with sexual assault or rape or child
20 molestation. Just general crimes of violence, I am
21 thinking aggravated assaults, murders, kidnappings,
22 anything like that.

23 Anybody here had any experience either
24 themselves or with somebody close to them regarding
25 any of those?

1 Okay, we will start in the front row.

2 Your name?

3 **PROSPECTIVE JUROR:** Russell Anderberg.

4 **MR. MURPHY:** What's your situation? Is it
5 something you would like to talk about in private?

6 **PROSPECTIVE JUROR:** Yeah.

7 My aunt --

8 **MR. MURPHY:** I'm sorry --

9 **PROSPECTIVE JUROR:** An aunt of mine --

10 **MR. MURPHY:** Did you want to talk in private
11 about that?

12 **PROSPECTIVE JUROR:** No. I'm fine.

13 An aunt of mine was kidnapped by one of my
14 uncles, and my grandma and my mom were pregnant at the
15 same time so he's like three months younger than I am.
16 She called me, of course -- I got some size to me --
17 to go hunt him down and take care of him. You know.
18 So, yeah.

19 **MR. MURPHY:** Well, and that's -- one of the
20 allegations is when the charges are read, there is two
21 charges pending against my client. One is
22 premeditated murder and one is called felony murder.
23 And felony murder is a murder that occurs during the
24 commission of some other felony, in this case that
25 other felony is alleged to be kidnapping. You have

1 had some personal experience with a kidnapping case.

2 How do you think that will affect your
3 ability to be completely unbiased going into this
4 case? Because that's.

5 **PROSPECTIVE JUROR:** It won't be unbiased.

6 **MR. MURPHY:** You won't be unbiased?

7 **PROSPECTIVE JUROR:** No. Because I know -- I
8 mean -- it took probably ten years where she was
9 always looking behind her. Even if we were at a
10 family function.

11 **MR. MURPHY:** All right.

12 **PROSPECTIVE JUROR:** Because she was always
13 jumpy.

14 **MR. MURPHY:** I hear you.

15 I would ask that Mr. Anderberg be excused.

16 **MR. JACKLEY:** May I voir dire, Your Honor?

17 **THE COURT:** You may.

18 **MR. JACKLEY:** Sir, the incident that you
19 talked about -- the matters you talked about that was
20 something wholly unrelated to this case; is that fair?

21 **PROSPECTIVE JUROR:** Correct.

22 **MR. JACKLEY:** Something that happened a long
23 time something?

24 **PROSPECTIVE JUROR:** Yeah.

25 **MR. JACKLEY:** In this trial, when the jury is

1 selected, you will hear evidence regarding, as
2 Mr. Murphy indicated, a murder and then a kidnapping
3 associated with the murder.

4 Do you believe that you could sit fairly and
5 hear that evidence regarding this case?

6 **PROSPECTIVE JUROR:** No.

7 **MR. JACKLEY:** No?

8 **PROSPECTIVE JUROR:** I could not.

9 **MR. JACKLEY:** And that's based upon those
10 prior experiences?

11 **PROSPECTIVE JUROR:** Yeah.

12 **MR. JACKLEY:** You are telling me that you
13 couldn't separate that prior experience from this
14 particular case in?

15 **PROSPECTIVE JUROR:** Probably not.

16 **MR. JACKLEY:** Okay.

17 Fair enough for me, and thank you.

18 I have no objection, Your Honor.

19 **THE COURT:** You may be excused.

20 How many we got left?

21 **THE CLERK:** Two left.

22 Jo Ann Lemke.

23 **MR. MURPHY:** Morning, Ms. Lemke.

24 Do you happen to be Dr. Lemke, the
25 pediatrician's, sister or mother?

1 **PROSPECTIVE JUROR:** No.

2 **MR. MURPHY:** Okay.

3 My daughter is there seems about every other
4 week. She skates competitively in ice skating and she
5 has a way of landing on her head a lot. I should be
6 getting frequent points or something.

7 Were you here from the beginning?

8 **PROSPECTIVE JUROR:** Uh-huh.

9 **MR. MURPHY:** All right.

10 Was there anything that we covered?

11 **PROSPECTIVE JUROR:** No problems at all.

12 **MR. MURPHY:** No problems? No witness issues?

13 **PROSPECTIVE JUROR:** No.

14 **MR. MURPHY:** Nothing about the media?

15 **PROSPECTIVE JUROR:** No.

16 **MR. MURPHY:** Okay.

17 We were just talking about crimes of violence
18 not of a sexual nature and there were some other
19 hands. Let me start the second row.

20 Third row?

21 Ma'am, your name?

22 **PROSPECTIVE JUROR:** Sheila Garrigan.

23 **MR. MURPHY:** Ms. Garrigan.

24 **PROSPECTIVE JUROR:** When I was around 15
25 years old, my uncle was stabbed by a bunch of

1 classmates of mine. And it took them about a month to
2 capture all of them. At that time I was sent to
3 Wyoming because I had to give my statement, I guess.
4 I was a key witness because I knew who they all were.

5 **MR. MURPHY:** Does that -- probably not a very
6 pleasurable experience on any level?

7 **PROSPECTIVE JUROR:** No.

8 **MR. MURPHY:** Is it something that even today
9 influences the way you look at the criminal justice
10 system or the way people who are accused of crimes are
11 treated?

12 **PROSPECTIVE JUROR:** No.

13 **MR. MURPHY:** No effect whatsoever on your
14 view of this case?

15 **PROSPECTIVE JUROR:** No. I think they got the
16 time they needed.

17 **MR. MURPHY:** Okay.

18 Anybody in the back row there?

19 Okay. Let's turn our attention over here.

20 Anybody on this side that has past exposure with the
21 criminal justice system, crimes of violence?

22 Ma'am?

23 **PROSPECTIVE JUROR:** Melanie Stephens.

24 **MR. MURPHY:** Ms. Stephens, would you mind
25 standing up so Tina can hear.

1 **PROSPECTIVE JUROR:** My sister was kidnapped
2 when we were in high school.

3 **MR. MURPHY:** Okay. All right.

4 As you heard, kidnapping is going to be a
5 very big part of this case. It's what's called a
6 predicate offense to one of the charges. There will
7 be a requirement, if you are selected as a juror, to
8 determine whether a kidnapping occurred.

9 How is your experience with your sister going
10 to affect your ability to be completely fair?

11 **PROSPECTIVE JUROR:** It's still affecting us
12 today.

13 **MR. MURPHY:** It does.

14 **PROSPECTIVE JUROR:** Our relationship, yes.

15 **MR. MURPHY:** And it appears it's still a
16 matter of emotion?

17 **PROSPECTIVE JUROR:** Yes. Very much so.

18 **MR. MURPHY:** Just talking about it in the
19 abstract here, it's tough for you?

20 **PROSPECTIVE JUROR:** Yeah.

21 **MR. MURPHY:** I am not going to ask you any
22 further questions.

23 I'd ask that she be removed for cause.

24 **MR. JACKLEY:** No objection, Your Honor.

25 **THE COURT:** Thank you, ma'am.

1 **THE CLERK:** Michael Stevenson.

2 **MR. MURPHY:** Mr. Stevenson, were you here
3 from the getgo?

4 **PROSPECTIVE JUROR:** Shortly after you
5 started.

6 **MR. MURPHY:** Shortly after.
7 Let's start with the personal hardship issue.

8 **PROSPECTIVE JUROR:** Yes. That's my only
9 concern would be leaving on the 10th.

10 **MR. MURPHY:** Okay.
11 Is that something you prearranged?

12 **PROSPECTIVE JUROR:** Yes.

13 **MR. MURPHY:** Is it -- I am not going to ask
14 you what it is, but is it something that is of
15 substantial importance to you?

16 **PROSPECTIVE JUROR:** Yeah, it is.

17 **MR. MURPHY:** All right.

18 Would it be fair to say that if you were
19 forced to stay here as a juror, that you might not
20 give your full attention to the process?

21 **PROSPECTIVE JUROR:** A little bit, yes.

22 **MR. MURPHY:** Okay.

23 Your Honor, I move for cause.

24 **MR. JACKLEY:** May I ask John a question real
25 quick?

1 **MR. MURPHY:** Sir, when do you plan to be
2 back?

3 **PROSPECTIVE JUROR:** On the 22nd.

4 **MR. JACKLEY:** I have no objection, Your
5 Honor.

6 **THE COURT:** You may be excused.

7 **THE CLERK:** This is our last one.

8 Tony Randolph.

9 Mr. Randall, if you will raise your right
10 hand. I need to swear you in, please.

11 (Whereupon, a prospective juror was then
12 sworn.)

13 **THE CLERK:** Thank you.

14 If you will please take a seat where
15 Mr. Stevenson left.

16 **MR. MURPHY:** Mr. Randolph, I notice you just
17 arrived a few minutes ago and we have been going at
18 this for a couple hours now. I am going to go through
19 things relatively briefly.

20 First off, if you wouldn't mind looking
21 around, we got Bob Mandel from the U.S. Attorney's
22 Office, Rod Oswald from the Attorney General's Office,
23 Mr. Marty Jackley, the Attorney General, my paralegal
24 Erin Duchaneaux, my client, John Graham, myself. I am
25 John Murphy.

1 Do you recognize any of us?

2 **PROSPECTIVE JUROR:** No.

3 **MR. MURPHY:** And if you wouldn't mind because
4 she has to take down everything you say, if you could
5 answer out loud.

6 **PROSPECTIVE JUROR:** No, I don't.

7 **MR. MURPHY:** You have been sworn as a juror.
8 We're here to exchange information. If there is any
9 question that I ask you that you don't want to answer
10 in front of this crowd, we have the ability to do in
11 private.

12 Have you been through jury selection before?

13 **PROSPECTIVE JUROR:** No. This is my first
14 time.

15 **MR. MURPHY:** You didn't get a chance to see
16 the video or anything?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** The trial is expected to last
19 through December 17, for the next three weeks, 8:30
20 to 5:00. We will be doing half day on the 3rd we will
21 have all day off on the 10th.

22 Is there any personal or professional
23 hardship or substantial inconvenience that is going to
24 be caused to you by that?

25 **PROSPECTIVE JUROR:** No.

1 **MR. MURPHY:** Have you heard me read the names
2 of the witnesses?

3 **PROSPECTIVE JUROR:** No, I haven't.

4 **MR. MURPHY:** Okay.

5 I will go through these slowly so Tina gets
6 them down. Just say stop if you hear any name that
7 you have a relationship with.

8 Charlie Abourezk, Abe Alonzo, Roger Amiotte,
9 Barry Bachrach, Clyde Bellecourt, Serle Chapman, Theda
10 Clarke, Jean Ann Day, Don Dealing, Frank Dillon,
11 Jeanette Eagle Hawk, Kamook Banks or Kamook Ecoffey,
12 Robert Ecoffey, Allen Garber, Cleo Marshall Gates,
13 James Graf, Naneek Graham, Dr. Don Habbe, Candy
14 Hamilton, Ray Hand Boy, Evan Hodge, Angie Begay Janis,
15 Arlo Looking Cloud, Denise Maloney, vine Richard also
16 known as Dick Marshall, mike McRoden, Russell Means,
17 David Melmer, Nathan Merrick, George Palfy, Dr. Gary
18 Peterson, Mitchell Pourier, David Price Thelma Rios,
19 Bob Riter, Madonna Gilbert Thunderhawk, Gene Roach,
20 William or Bill Wood, Troy Lynn Irving Yellow Wood.

21 None of those?

22 **PROSPECTIVE JUROR:** No.

23 **MR. MURPHY:** This case is a case that
24 involves the killing of a woman named Anna Mae Aquash.
25 There is dispute that she was, in fact, killed. And

1 it's been the subject of multiple court cases. It was
2 the *United States vs. Arlo Looking Cloud* back in 2004.
3 Mr. Looking Cloud was convicted in the same
4 allegations or set of allegations as here today.

5 Dick Marshall went to trial in federal court
6 just in April. He was acquitted.

7 Thelma Rios was a defendant in this case up
8 until a couple weeks ago, and she entered a plea
9 bargain.

10 Any of those cases that have been covered by
11 the media -- any of those ring a bell?

12 **PROSPECTIVE JUROR:** No.

13 **MR. MURPHY:** Did you happen to read the Rapid
14 City Journal's article yesterday?

15 **PROSPECTIVE JUROR:** No, I didn't.

16 **MR. MURPHY:** Anything about the Aquash case
17 whether it be on the internet, books, movies,
18 documentaries, anything?

19 **PROSPECTIVE JUROR:** No.

20 **MR. MURPHY:** All right.

21 The agencies, the U.S. Attorney's Office, my
22 law office, the Attorney General's Office, FBI, any
23 relationships with any of those?

24 **PROSPECTIVE JUROR:** No.

25 **MR. MURPHY:** What about CASA, WAVI, MADD?

1 **PROSPECTIVE JUROR:** No.

2 **MR. MURPHY:** All right. Crimes of violence
3 outside of the context of a sex offense. Any
4 experiences with the court system or somebody close to
5 you that has been the victim?

6 **THE COURT:** Mr. Murphy, how much longer in
7 the general here? We're after 12:00.

8 **MR. MURPHY:** Okay. Just one more question.
9 You may sit down, sir.

10 I just want to make sure I -- we are
11 finishing with crimes of violence where you might have
12 been a victim or somebody close to you.

13 Was there anybody I missed on that side?

14 Okay. I think this would be a good breaking
15 point.

16 **THE COURT:** Ladies and gentlemen, we will
17 recess until approximately 1:15. The same instruction
18 applies. You may not under any set of circumstances
19 whatsoever discuss this case with anybody. Period.

20 Thank you.

21 (Off the record at 12:04 p.m.)

22 **THE COURT:** Ladies and gentlemen, obviously
23 we're running short of prospective jurors. I am going
24 to tell you what I think we're going to do. That is,
25 we're going to go as far as we can today. Whatever

1 number we are left with is prequalified. Once I know
2 where we are at the end of the day, I will tell you
3 whether you are coming back early in the morning or
4 not until the afternoon because we will attempt to go
5 through another panel without having you sit here like
6 bumps on a log.

7 That's the best I can do for you. The
8 weather and other things have gotten in our way and we
9 will do our best to handle that.

10 Mr. Murphy will continue his voir dire at
11 this time.

12 **MR. MURPHY:** Thank you.

13 I saw everybody shake their head. You don't
14 want to sit through this again.

15 Well, we left off --

16 I am sorry, your name?

17 **PROSPECTIVE JUROR:** Michelle Shelton. I have
18 a history of abuse. I didn't know if I should --

19 **MR. MURPHY:** Well, let's touch base. That's
20 kind of where I was going next so we'll start with
21 you.

22 Obviously it's of concern. Is that something
23 you feel comfortable talking in public or did --

24 **PROSPECTIVE JUROR:** Probably private.

25 **MR. MURPHY:** Private. Okay.

1 Would you write down -- start a list,
2 Ms. Shelton.

3 Your Honor, would we anticipate going through
4 those who are comfortable speaking in public and then
5 taking a recess?

6 **THE COURT:** Yes.

7 **MR. MURPHY:** So, again, anybody -- we'll just
8 recess 30, 40 minutes from now and anybody who had
9 responded that they would like to talk about something
10 in private we'll arrange that. It takes a while. We
11 have to get the court reporter's machine back there
12 and up and running.

13 Sir, your name.

14 **PROSPECTIVE JUROR:** Craig Greenwalt.

15 **MR. MURPHY:** Anybody else before we get
16 further into the problem? Okay.

17 I left off talking about people who either
18 themselves their family, friends, kids, whatever, who
19 have been victims of crimes. And I said I wanted to
20 talk before lunch about those crimes not involving
21 sexual assault, rape, child molestation, those kind of
22 things.

23 Now I want to talk about those experiences.
24 And this is obviously a very sensitive issue. And
25 it's why I broke it apart because we're about ten

1 minutes before lunch. And I didn't want to start down
2 this road and then break for lunch. So I reserved it
3 for after lunch.

4 One of the allegations -- my client is not
5 charged with rape. But one of the state's allegations
6 is that prior to Ms. Aquash being killed she was, in
7 fact, raped and they allege that my client did that.
8 That will be an issue in contest.

9 However, in my experience of doing this kind
10 of work for 17 years now, I understand there are a
11 number of people in the community, men and women, who
12 have been very strongly affected by sex crimes.
13 That's a pretty broad category, whether as a child or
14 one of their own children, whether as an adult,
15 whether one of their kids.

16 So that's going to be an issue. This is
17 where really the rubber hits the road in the sense of
18 asking you to be candid, whether in private or in
19 public, about how your experiences or the experiences
20 of those who you love or care for may affect your
21 ability to be impartial in this case when you know now
22 that the state is going to allege, essentially accuse
23 my client of committing a rape against a woman.

24 So I will start over on this side. The left
25 side here. Would anybody who has an issue -- some

1 response to that, raise your hand and then we'll
2 decide whether we're going to talk about it in public
3 or private. Anybody whether it was yourself or your
4 kids or friends.

5 Ma'am, you are Ms. Israel?

6 **PROSPECTIVE JUROR:** Yes.

7 **MR. MURPHY:** Is that something you would like
8 to reserve for a private discussion?

9 **PROSPECTIVE JUROR:** I would.

10 **MR. MURPHY:** Sure, Ms. Israel.

11 Anybody else on this side?

12 And you are Ms. --

13 **PROSPECTIVE JUROR:** Repstein.

14 **MR. MURPHY:** Is that also something you would
15 like to talk about in private or in public?

16 **PROSPECTIVE JUROR:** No. I can just -- my
17 grandson was abused. Not sexually, but verbally and
18 physically.

19 **MR. MURPHY:** Is it something -- is that
20 experience something that would affect your ability to
21 sit fairly here?

22 **PROSPECTIVE JUROR:** No.

23 **MR. MURPHY:** Okay.

24 Anybody else who has any connection with any
25 victim of a sexual assault of any kind or a child

1 molestation that would be willing to discuss that?

2 And we're asking that you please be willing
3 to discuss it. We'll use the most amount of
4 discretion as possible. It's not something to
5 publicize.

6 Anybody over here?

7 Okay. Let's turn to this side of the room.

8 Same issue. Sir, your name?

9 **PROSPECTIVE JUROR:** Robert Rasch.

10 **MR. MURPHY:** And Mr. Rasch, would you like to
11 talk about that in private?

12 **PROSPECTIVE JUROR:** Yeah.

13 **MR. MURPHY:** Okay. Anybody be else?

14 Ms. Bendowski?

15 **PROSPECTIVE JUROR:** My best friend's son was
16 and then my husband's -- my God -- my daughter's God
17 father's niece was.

18 **MR. MURPHY:** Okay.

19 Is that experience of having people close to
20 you that have been the victims of sexual assault
21 something that weighs heavily on your mind as you sit
22 here today?

23 **PROSPECTIVE JUROR:** Not really. It's
24 different circumstances.

25 **MR. MURPHY:** Not going to affect you in your

1 deliberations?

2 **PROSPECTIVE JUROR:** No.

3 **MR. MURPHY:** Anybody else that might be
4 affected by a crime of sexual.

5 **PROSPECTIVE JUROR:** Does that include
6 professionally?

7 **MR. MURPHY:** Yeah.

8 **PROSPECTIVE JUROR:** I work with a lot of
9 adjudicated youth who have sexual abuse issues.

10 **MR. MURPHY:** All right.
11 Both as victims and perpetrators?

12 **PROSPECTIVE JUROR:** Yes.

13 **MR. MURPHY:** All right.

14 Is that something that has caused you to form
15 opinions or biases that might influence the way you
16 view the evidence here?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** You work in corrections?

19 **PROSPECTIVE JUROR:** Yes.

20 **MR. MURPHY:** Okay.

21 Anybody else?

22 All right. Your Honor, would you like to --
23 we've got four people on the list that would like to
24 discuss the matter in private.

25 Should we recess now?

1 **THE COURT:** We should.

2 The rest of you folks kind of stay put and
3 you may talk about anything but this case. The
4 weather would be a good start.

5 **MR. MURPHY:** Should we call them one by one?

6 **THE COURT:** Yes.

7 **MR. MURPHY:** Ms. Shelton.

8 (Whereupon, the following proceedings were
9 then had in chambers.)

10 **MR. MURPHY:** We're back in chambers. We're
11 with Ms. Shelton. Just for the record, it's apparent
12 you are visibly distraught about the topic.

13 And so rather than dive too much into the
14 facts, I am just going to ask you initially if
15 whatever your experience or somebody's experience
16 close to you was, it's still present enough that this
17 case, if you were presented evidence in this case that
18 involved evidence of a sexual assault, would you find
19 it hard to remain unbiased and to focus purely on the
20 evidence that comes before you and not allow that
21 outside influence to come in?

22 **PROSPECTIVE JUROR:** The abuse I suffered was
23 as a child and it's hard for me because I haven't told
24 very many people. I think I can look at the facts. I
25 just really understand how it affects your life.

1 **MR. MURPHY:** Sure.

2 And one of the concerns, obviously here, is
3 the state is accusing my client of committing this
4 act. He's not charged with. But in light of your
5 personal experience and the effects it's had on you to
6 this day, do you think you could be fair to my client
7 because he's not charged with rape, but not allow that
8 allegation to affect the way you view him or the other
9 evidence that's presented?

10 **PROSPECTIVE JUROR:** Yeah. I think -- if I
11 just go off the facts.

12 I've been on a jury before that involved post
13 traumatic stress, which that was something I was
14 diagnosed with, but I know that you just go off the
15 facts.

16 **MR. MURPHY:** Okay.

17 And you feel comfortable -- if you we're in
18 my client's position, if we had a juror pool of all
19 the people that had past experiences and whatnot, you
20 would feel comfortable being judged by that group?

21 **PROSPECTIVE JUROR:** Uh-huh.

22 **MR. MURPHY:** I have no motion.

23 **THE COURT:** Mr. Jackley?

24 **MR. JACKLEY:** I will make it real brief.

25 Appreciating that all the jurors come with

1 different backgrounds and difference experiences, and
2 we're really asking everybody to set those aside to
3 view the evidence the best that they can as it comes
4 out, do you feel you could do that?

5 **PROSPECTIVE JUROR:** I do.

6 **MR. JACKLEY:** I appreciate that. I have
7 nothing further, Your Honor.

8 **THE COURT:** Thank you very much, ma'am.

9 (Off the record.)

10 **THE COURT:** Have a seat.

11 **PROSPECTIVE JUROR:** I didn't specifically
12 touch bases when you called me, and no offense taken,
13 but it did give me some time to do some reflection
14 over the lunch break.

15 And there is two things that you need to be
16 aware of. One is that my brother was hit in
17 California about -- a little over a year ago by a
18 hit-and-run driver was that eluding law enforcement.
19 And I was -- I was scheduled to leave Wednesday
20 morning to go pick up his remains which has been a
21 somewhat contentious situation in itself. And I was
22 actually going to put that aside. You deliver a very
23 persuasive point about civic duty.

24 But I also -- and you talked about news
25 articles, but I think beyond the immediate articles

1 and web research, the kids that were in this
2 jurisdiction and in this geography back in the 70s
3 were somewhat deeply -- affected by the events. And
4 not so much as a part of racial prejudice, but I think
5 the political organization at the time left a lot of
6 very significant and longstanding feelings within the
7 people -- at least some of the people in the
8 community.

9 And having thought about that over lunch, I
10 wouldn't want to be -- wouldn't want to be a defendant
11 on a trial with someone walking into it with that --
12 those long held feelings and impressions. And I think
13 you mentioned some individuals that were associated
14 with AIM. And I don't think I could regard their --
15 take into account their testimony with any
16 credibility.

17 **MR. MURPHY:** Sure. So basically if I hear
18 what you are saying, you personally lived through that
19 period of time?

20 **PROSPECTIVE JUROR:** Yes.

21 **MR. MURPHY:** Your were affected by it at the
22 time?

23 **PROSPECTIVE JUROR:** Yes.

24 **MR. MURPHY:** And you carry forward from that
25 views about the American Indian Movement and some of

1 the participants in the movement and you can't set
2 those aside?

3 **PROSPECTIVE JUROR:** No.

4 **MR. MURPHY:** Okay.

5 And they are pretty deeply held -- and sounds
6 from your voice very firmly held beliefs.

7 Essentially what you are saying
8 notwithstanding what instructions the judge might give
9 you about putting aside personal experiences and only
10 listening to the witnesses as they testify, folks who
11 might testify like Russell Means I am assuming you are
12 eluding to and Clyde Bellecourt, you could not treat
13 those like other witnesses but you would bring in your
14 past experiences?

15 **PROSPECTIVE JUROR:** Right.

16 **MR. MURPHY:** Your Honor, in light of that, I
17 would move for cause.

18 **THE COURT:** Mr. Jackley?

19 **MR. JACKLEY:** Sir, understanding that all of
20 the potential jurors bring with them background and
21 other life experiences, and appreciating that anybody
22 in the area over the age of let's just say 45 or 50
23 would have lived here when that was going on, let me
24 ask you a couple questions about that.

25 Was there anything that happened in the 70s

1 that happened specifically to you in other --

2 **PROSPECTIVE JUROR:** No.

3 **MR. JACKLEY:** So this would --

4 **PROSPECTIVE JUROR:** Actually, I would have to
5 retract that and the -- the posturing of AIM -- and I
6 probably have to coach that. I can't specifically say
7 they were AIM members, but I think that there were
8 individuals of that age group, young men, who did a
9 lot of posturing within the community as a show of
10 strength. And you know, given the fact that youth
11 will do that, it did have an impact on me specifically
12 and there were events that did affect me personally.

13 **MR. JACKLEY:** And you understand that AIM is
14 not on trial here?

15 **PROSPECTIVE JUROR:** I understand that.

16 I am talking about the individuals who were
17 in a leadership position of that organization at that
18 time, and the fact that they will be -- or they are
19 proposed to be witnesses in this trial.

20 **MR. JACKLEY:** Anyone in particular come to
21 mind?

22 **PROSPECTIVE JUROR:** Russell Means for one.
23 And that's -- he's the primary. I think he was
24 probably the most visible in the movement and I think
25 that he certainly scored high points and leaving the

1 longest impression certainly at that time was a very
2 negative impression and I haven't been able to absolve
3 myself of that.

4 **MR. JACKLEY:** So what are you telling me is
5 you have a hard time separating that prior knowledge
6 with what you may hear in this particular trial?

7 **PROSPECTIVE JUROR:** Yes, I will.

8 **MR. JACKLEY:** I have no objection, Your
9 Honor.

10 **THE COURT:** Any objections?

11 **MR. MURPHY:** No objection.

12 We both have no objection.

13 **THE COURT:** Fine.

14 Thank you, sir. You may be excused.

15 We have one potential juror left and we'll
16 call him or her in to replace in gentleman, but we
17 have a couple left to interview.

18 Okay.

19 (Off the record.)

20 **THE COURT:** Afternoon.

21 **MR. MURPHY:** Ma'am, I apologize. This is
22 about as private as we can get.

23 **PROSPECTIVE JUROR:** That's fine.

24 **MR. MURPHY:** These are the necessary court
25 personnel. Nothing I can do about that.

1 **PROSPECTIVE JUROR:** That's fine.

2 **MR. MURPHY:** When I brought up the topic of
3 past crimes, involving sexual violence whether
4 friends, family, whatever, you indicated you had
5 something you wanted to talk about.

6 Would you mind at this point explaining what
7 the response you had was and share it with us.

8 **PROSPECTIVE JUROR:** My son.

9 **MR. MURPHY:** A victim of a crime?

10 **PROSPECTIVE JUROR:** Molested.

11 **MR. MURPHY:** Okay.

12 And it goes without saying, but we have a
13 make a record, a fairly traumatic experience for a
14 mother to go through?

15 **PROSPECTIVE JUROR:** Yes.

16 **MR. MURPHY:** Very traumatic for your son.
17 May I ask how many years ago this was?

18 **PROSPECTIVE JUROR:** Probably about 24.

19 **MR. MURPHY:** Is it something that carries
20 with you today?

21 **PROSPECTIVE JUROR:** Oh, yeah. You never
22 forget.

23 **MR. MURPHY:** The issue before us is fairness.
24 And the state is going to allege that my client
25 committed a sexual crime against somebody who wasn't

1 in a position to resist. And I would assume that's
2 similar, at least factually, in a broad sense to what
3 happened to your son?

4 **PROSPECTIVE JUROR:** Right.

5 **MR. MURPHY:** Can you -- can you be fair to
6 somebody who is accused of a crime or something like
7 that knowing that your son went through something like
8 that?

9 **PROSPECTIVE JUROR:** I would try.

10 **MR. MURPHY:** Okay.

11 **PROSPECTIVE JUROR:** You know, I can't
12 necessarily say.

13 **MR. MURPHY:** Well, and that's -- everybody
14 can try. It's hard.

15 That's really why this is one of those stuff
16 points. We don't want to get into a situation where
17 at a later time once the jury is picked you realize
18 that you just can't put it aside especially once
19 evidence starts coming in. And especially evidence
20 that may be graphic of one kind or another.

21 Kind of looking ahead or projecting ahead, if
22 you start hearing evidence that the state puts
23 forward, that my client did in fact rape Anna Mae
24 Aquash even though he's not charged with that, how do
25 you envision that affecting your ability to be fair

1 and listen to all of the evidence and with murder
2 which he is charged with?

3 **PROSPECTIVE JUROR:** It -- it would have a
4 bearing I'm sure.

5 **MR. MURPHY:** Okay.

6 Is it -- is it a bearing that you can say
7 now, unequivocally, you could set aside or are you
8 saying I can't tell you? Or are you saying I can't
9 say with some sense of surety that I am going to put
10 that aside?

11 **PROSPECTIVE JUROR:** I can't necessarily say
12 that I can put it aside.

13 **MR. MURPHY:** All right.

14 **PROSPECTIVE JUROR:** The other thing I should
15 be candid about is where I grew up, we had issues with
16 Native Americans and I have to say that as well.

17 **MR. MURPHY:** Sure. And that's going to be a
18 topic.

19 **PROSPECTIVE JUROR:** My home town is Moberidge.
20 And Russell Means was a big part of that up there.

21 **MR. MURPHY:** Okay.

22 And let's talk about that now because then we
23 don't have to do another private conference.

24 **PROSPECTIVE JUROR:** Okay.

25 **MR. MURPHY:** Russell Means is expected or

1 it's participated that he will be a witness as well as
2 perhaps other AIM leaders. There is going to be a lot
3 of evidence about AIM and we're also talking about the
4 race issue, too, about Native Americans.

5 Sounds like you have a pretty strong feelings
6 about Mr. Means and his conduct during the period of
7 time in the 70s.

8 **PROSPECTIVE JUROR:** Yes. very. And as well
9 as the ones that lived right across the river from us.

10 **MR. MURPHY:** Okay.

11 In a perfect world, each witness is supposed
12 to come to the witness stand --

13 **PROSPECTIVE JUROR:** Clean.

14 **MR. MURPHY:** -- clean. And that the jurors
15 are not supposed to have any preconceived notions,
16 favorable or unfavorable, about them. Just listen to
17 what comes out of their mouth and asses it for what it
18 is.

19 **PROSPECTIVE JUROR:** Right.

20 **MR. MURPHY:** Sounds to me what you are saying
21 when somebody like Russell Means comes to the stand or
22 other witnesses who may have been AIM activists or AIM
23 participants you are going to already have
24 preconceived notions about them and their character?

25 **PROSPECTIVE JUROR:** Certain individuals,

1 yeah.

2 **MR. MURPHY:** And they are not going to be
3 favorable impressions?

4 **PROSPECTIVE JUROR:** Correct.

5 **MR. MURPHY:** And even if you were asked to
6 set those aside, those are part of who you are right
7 now?

8 **PROSPECTIVE JUROR:** Correct.

9 **MR. MURPHY:** And you know, it's also easy for
10 a judge to say you got to set those aside, but what
11 we're trying to find out is if it's really something
12 you can do.

13 **PROSPECTIVE JUROR:** Right.

14 **MR. MURPHY:** Sounds to me like you are saying
15 you couldn't set those aside?

16 **PROSPECTIVE JUROR:** On top of what happened
17 with my son, it would probably be pretty difficult.

18 **MR. MURPHY:** All right.

19 **PROSPECTIVE JUROR:** Sum total. I don't mean
20 to --

21 **MR. MURPHY:** No.

22 **PROSPECTIVE JUROR:** No offense.

23 **MR. MURPHY:** That's why we're here. I really
24 mean it when we say my client -- we all want you to be
25 as candid as possible. There is no judgments here.

1 Everybody comes to the table with biases and
2 prejudices.

3 All right. Well, I guess one of the things
4 maybe to put this in another context is if you were on
5 trial, 12 jurors who had your experiences and your
6 feelings about the Indian people and AIM activists and
7 also the sex sexual assault, you wouldn't want to be
8 on trial with a juror like you?

9 **PROSPECTIVE JUROR:** No.

10 **MR. MURPHY:** Sometimes that's a good model.
11 I would move for cause.

12 **THE COURT:** Mr. Jackley?

13 **MR. JACKLEY:** Ma'am, in your discussions with
14 Mr. Murphy you were talking about it would be
15 difficult, and as you know all the jurors or potential
16 jurors that are here today come with them life
17 experiences.

18 **PROSPECTIVE JUROR:** Sure.

19 **MR. JACKLEY:** And with those experiences come
20 good and bad. And you are talking now a little bit
21 about your experiences you generally had in the
22 Mobridge area along with an experience that was 24
23 years ago?

24 **PROSPECTIVE JUROR:** Uh-huh.

25 **MR. JACKLEY:** Was there ever a specific

1 instance involving you and any particular AIM member
2 or are you just talking about general atmosphere?

3 **PROSPECTIVE JUROR:** Walking down the street
4 during the real focus on the AIM Movement, especially
5 in Mobridge and that area -- I and my sisters were
6 walking down the street and we were young at the time.
7 And some Native American men forced us to walk around
8 them off the sidewalk because they were in charge.

9 **MR. JACKLEY:** And you would agree that that
10 happened a long time?

11 **PROSPECTIVE JUROR:** It happened a long time
12 ago, but it sticks with you and I think it happened
13 because I was young and my sisters were younger than
14 I.

15 **MR. JACKLEY:** You have been very candid
16 today.

17 **PROSPECTIVE JUROR:** Yes.

18 **MR. JACKLEY:** Do you consider yourself a fair
19 person?

20 **PROSPECTIVE JUROR:** Yes.

21 **MR. JACKLEY:** Do you consider yourself
22 somebody that is able to follow instructions? For
23 example, if the judge were to give particular
24 instructions on what the law is, and those type
25 things, could you follow those instructions?

1 **PROSPECTIVE JUROR:** Regarding the law, yes.

2 **MR. JACKLEY:** And you talked about how
3 this -- it may be difficult but you would agree that,
4 you know, given certain life experiences to hear a
5 murder case with a murder/kidnapping allegation in and
6 of itself can be difficult; would that be fair?

7 **PROSPECTIVE JUROR:** True.

8 **MR. JACKLEY:** Do you think you could sit
9 there and set aside -- even though it would be
10 difficult -- but set aside those past experiences and
11 view the evidence as it would come in in this trial?

12 Could you do that?

13 **PROSPECTIVE JUROR:** I could possibly with
14 everything except the molestation of my son.

15 **MR. JACKLEY:** Okay.

16 **PROSPECTIVE JUROR:** As a mother, it's just
17 very difficult.

18 **MR. JACKLEY:** Okay.

19 That's the incident that happened about 24
20 years ago?

21 **PROSPECTIVE JUROR:** Uh-huh.

22 **MR. JACKLEY:** When you say except for that,
23 what do you mean by that?

24 **PROSPECTIVE JUROR:** Being protective and him
25 being forced at that age and a rape.

1 I also had a couple of gals that worked for
2 me that were raped, you know, and I was the manager.
3 I'm retired now. But from that perspective and
4 knowing what they went through so it's kind of hard.

5 **MR. JACKLEY:** It's hard --

6 **PROSPECTIVE JUROR:** To be objective.

7 **MR. JACKLEY:** It's hard, but could you
8 separate those instances to give both in this instance
9 the state and the defendant a fair trial as fair as
10 you could do?

11 **PROSPECTIVE JUROR:** I would try.

12 **MR. JACKLEY:** I pass for cause, Your Honor.

13 **THE COURT:** I am not going to. I think the
14 response to the question about sitting on a jury was a
15 very flat emphatic no.

16 I think the combinations of feelings which
17 ran high in that time era on both sides are such that,
18 unlike politicians, are not disremembered. I think
19 she has a clear recollection of those events. They
20 sound real. They were certainly power plays on both
21 sides. And her feelings, I gather, are much akin to
22 the old folks trying to vote when the Black Panthers
23 were standing in front of the Pennsylvania voting
24 booth.

25 I think you couple that with the incidents

1 with her son, I don't think I would risk either the
2 state or Mr. Graham's position when she's as candid as
3 she has been.

4 So the challenge for cause is granted. You
5 may be excused ma'am.

6 Thank you.

7 (Off the record.)

8 **THE COURT:** Mr. Fur.

9 **MR. MURPHY:** This is as private as we can
10 get. There is a number of people that are designated
11 as essential courtroom personnel. This is as private
12 as we can go.

13 You indicated you had a response on the topic
14 of crimes of violence, specifically sex crimes. You
15 indicated you had a response so this is our time to
16 hear from you as to what your experience and the
17 experience of somebody close to you was and how that
18 will affect your ability to be a fair juror here.

19 **PROSPECTIVE JUROR:** Okay.

20 Somebody very close to me, I don't know,
21 about 14, 15 years ago in another state was affiliated
22 with a biker gang who I later found out raped her and
23 sewed her mouth shut. And I guess when I still look
24 at the scars to this day -- I don't know. It's pretty
25 hard to deal with.

1 **MR. MURPHY:** Okay.

2 Obviously it affects you to this day?

3 **PROSPECTIVE JUROR:** Uh-huh.

4 **MR. MURPHY:** Is this some person close to you
5 presently?

6 **PROSPECTIVE JUROR:** Uh-huh.

7 **MR. MURPHY:** All right.

8 Let's tie that to this case. The state is
9 alleging and is going to present evidence that my
10 client raped Anna Mae Aquash. Knowing that, that they
11 are going to make that allegation -- and they haven't
12 charged him with that, but it's going to be some of
13 the evidence they're going to put out against him --
14 initially what is your thoughts of how you are going
15 to be able to -- how you are going to react to that
16 evidence and how you are going to set that aside in
17 determining whether or not he was responsible for
18 that?

19 **PROSPECTIVE JUROR:** Well, I guess the way I
20 feel about that is I know that this person or people
21 that did this were never -- never went to -- this
22 person never went to the police and it was never --
23 justice was never served. And I just don't know if
24 that's going to have a bearing on my opinion or the
25 way I feel that the outcome of anything should be, I

1 guess.

2 **MR. MURPHY:** I mean, would you feel that part
3 of your role here might be then to see that justice is
4 serviced here in regard to this case because it wasn't
5 served in your friend's case?

6 **PROSPECTIVE JUROR:** I don't know if I can
7 honesty -- I mean, maybe. I can't say, you know. Not
8 being if that position I can't say.

9 **MR. MURPHY:** One of the things that's unique
10 about this case, as a juror, it's conceivable that you
11 could determine in your mind that my client raped Anna
12 Mae Aquash, but still have to decide whether or not he
13 killed her. Those are separate events. And you don't
14 have to -- whether or not he committed the rape is a
15 separate and distinct issue from whether or not he
16 committed the crime of murder.

17 What I am trying to ask you, and I am not
18 doing a great job of it -- is if you were to come to
19 the conclusion that my client ask did in fact rape
20 Anna Mae Aquash, in light of your personal experiences
21 with the crime of rape, is that going to affect your
22 ability to look fairly at whether the evidence
23 supports a finding that he committed the crime of
24 murder?

25 **PROSPECTIVE JUROR:** Probably not.

1 **MR. MURPHY:** Probably not -- it won't
2 affect -- you won't be so outraged by the issue of the
3 rape that it would affect your ability to look fairly
4 at the evidence as it would pertain to murder?

5 **PROSPECTIVE JUROR:** Probably not.

6 **MR. MURPHY:** Probably not. Okay.

7 **PROSPECTIVE JUROR:** I mean, I can't say.

8 **MR. MURPHY:** No, I know. None of us can
9 until you are presented with the issue. We're just
10 trying to get our best sense of it.

11 You would endeavor to try to put those things
12 apart, separate them, and look fairly at the evidence
13 whether it's for a finding that he committed the crime
14 of murder and not allow your experiences as somebody
15 close to a rape victim affect that?

16 **PROSPECTIVE JUROR:** Yeah. I could possibly
17 try, I guess. I mean, I -- I can't say.

18 **MR. MURPHY:** Okay.

19 **THE COURT:** Mr. Jackley, do you have
20 anything?

21 **MR. JACKLEY:** Sir, you talked about an event
22 that happened to somebody close to you 14 or 15 years
23 ago.

24 Do you feel you would be able to separate
25 that event and keep an open mind to the evidence you

1 hear in this trial?

2 Do you feel you could do that for us?

3 **PROSPECTIVE JUROR:** Yeah, I think so.

4 **MR. JACKLEY:** And do you feel you also could
5 follow the Judge's instructions as the Judge may
6 instruct you with respect to what may or may not be
7 evidence relating to what Mr. Murphy has talked about?

8 Can you follow the Judge's instructions?

9 **PROSPECTIVE JUROR:** Yeah.

10 **THE COURT:** I have some questions because the
11 gentleman is obviously emotionally distraught about
12 this.

13 Is that fair?

14 **MR. JACKLEY:** Uh-huh.

15 **THE COURT:** Kind of in light of what
16 Mr. Murphy questioned about was the rape is a separate
17 event. But the question in my mind is if there are
18 allegations or arguments about one of the reasons she
19 was killed or part of the reasons or motive for
20 killing her was a rape, how is your ability to
21 separate that out and address only the murder without
22 any consideration of the rape?

23 **PROSPECTIVE JUROR:** I don't know. I honestly
24 can't say, I guess.

25 **THE COURT:** On the Court's motion, the Court

1 is going to excuse the juror for cause. Simply
2 believe because of that potential connection.

3 **MR. JACKLEY:** Thank you, sir.

4 **THE COURT:** Thank you.

5 **MR. MURPHY:** That's all we've got for
6 privates.

7 **THE COURT:** Yeah.

8 (Whereupon, the following proceedings were
9 then had in open court.)

10 **THE CLERK:** Marvin Lockman.

11 If would you please raise your right hand. I
12 need to swear you in, please.

13 **THE COURT:** Thank you.

14 **THE CLERK:** Please have a seat next to the
15 lady there in the brown sweater.

16 Okay.

17 **MR. MURPHY:** My name is John Murphy. I
18 really hate to do this to the rest of your folks. We
19 have been waiting for somebody to throw something. We
20 have been going since 9:30 this morning, and we've
21 covered a number of topics, and so I have to go back
22 through those with you.

23 I am going to go back through with you in an
24 abbreviated way, but I still have to do a meaningful
25 job of taking the time to make sure that none of the

1 topics we covered so far caused you to not be able to
2 be fair to one side or the other in this case.

3 As I said, my name is John Murphy. I am John
4 Graham's attorney, John Graham, who is the defendant
5 in this case. You are going to find out he is charged
6 with murder. There is two counts: Premedicated
7 murder and felony murder. Felony murder in this case
8 means someone was killed during the course of another
9 felony, and in this case that was a kidnapping.

10 Next to John is my paralegal Erin Duchaneaux.

11 The far end of the table is Marty Jackley,
12 the Attorney General for the State of South Dakota,
13 his Assistant Attorney General, Rod Oswald, and Bob
14 Mandel from the U.S. Attorney's Office.

15 Do you know any of us or have any personal or
16 professional contacts with any of us?

17 **PROSPECTIVE JUROR:** No, I don't.

18 **MR. MURPHY:** We're going to have clerks
19 coming and going so we wont' go through that. But we
20 have Judge Delaney and Tina Pruss is who is the court
21 reporter.

22 Do you have any contacts personally or
23 professionally with either of them.

24 **PROSPECTIVE JUROR:** No, I don't.

25 **MR. MURPHY:** The trial that we're here about

1 is expected to last through December 17. And we'll be
2 going 8:30 to 5:00 each day. December 3 will be a
3 half day and we'll recess at noon, and December 10 we
4 will have off.

5 Any personal, work, family, medical
6 obligations between -- it's three weeks -- the next
7 three weeks that it's going to make it extremely
8 difficult for you to sit as a juror for that duration?

9 **PROSPECTIVE JUROR:** No.

10 **MR. MURPHY:** Have you had any involvement or
11 were you involved in the reelection campaign of
12 Mr. Jackley?

13 **PROSPECTIVE JUROR:** No.

14 **MR. MURPHY:** I am now going to go through
15 this long list of witnesses one by one. I am going to
16 read them so if -- during -- I say a name, and you
17 recognize the name, just say stop out loud and I will
18 stop, okay?

19 **PROSPECTIVE JUROR:** Okay.

20 **MR. MURPHY:** Charlie Abourezk, Abe Alonzo,
21 Roger Amiotte, Barry Bachrach, Clyde Bellecourt, Serle
22 Chapman, Theda Clarke, Jean Ann Day, Don Dealing,
23 Frank Dillon, Jeanette Eagle Hawk, Kamook Banks or
24 Kamook Ecoffey, Robert Ecoffey, Allen Garber, Cleo
25 Marshall Gates, James Graf, Naneek Graham, Dr. Don

1 Habbe, Candy Hamilton, Ray Handboy, Evan Hodge, Angie
2 Begay Janis, Arlo Looking Cloud, Denise Maloney, vine
3 Richard also known as Dick Marshall, mike McRoden,
4 Russell Means, David Melmer, Nathan Merrick, George
5 Palfy, Dr. Gary Peterson, Mitchell Pourier, David
6 Price Thelma Rios, Bob Riter, Madonna Gilbert
7 Thunderhawk, Gene Roach, William or Bill Wood, Troy
8 Lynn Irving Yellow Wood.

9 Any of those?

10 **PROSPECTIVE JUROR:** No.

11 **MR. MURPHY:** Okay.

12 Now let's talk -- every time I read that list
13 I dry out.

14 Just so you know, you weren't the only late
15 arrival. We have been through this process so I don't
16 want you --

17 **PROSPECTIVE JUROR:** So I'm not special?

18 **MR. MURPHY:** Not special.

19 This case is -- has been well publicized.
20 This involves the murder of a woman named Anna Mae
21 Aquash. It was on the front cover of the Rapid City
22 Journal yesterday. There has been three other cases
23 involving the same facts and allegations. Arlo
24 Looking Cloud went to trial in 2004. And he was
25 convicted of that offense.

1 Dick Marshall, Richard Marshall, went to
2 trial in just April of this year, and he was
3 acquitted.

4 And Thelma Rios was charged up until about
5 two or three weeks ago and she entered a plea bargain.

6 Have you follow any of those cases on the
7 news, internet?

8 **PROSPECTIVE JUROR:** I haven't really followed
9 them, no.

10 **MR. MURPHY:** Are you familiar with the topic
11 or the subject matter?

12 **PROSPECTIVE JUROR:** I have read, like, the
13 headlines. That would be about the extent of it.

14 **MR. MURPHY:** Anything from reading that
15 that's caused you any -- to form any opinions as to
16 what happened or who did what or anything like that?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** Okay.

19 What about some of the books that have been
20 written about the incidents -- the allegation was that
21 this crime occurred in 1975 or 76. And that was the
22 time during which the American Indian Movement was
23 active down in Pine Ridge. There was books like In
24 The Spirit of Crazy Horse and some movies like
25 Incident at Oglala about that time frame.

1 Do you recall watching or reading any of
2 those things?

3 **PROSPECTIVE JUROR:** No.

4 **MR. MURPHY:** Okay.

5 A number of agencies involved in this case.
6 There is my law office, Murphy Law Office, and the
7 U.S. Attorney's Office and the Attorney General's
8 Office and the Pennington County State's Attorney's
9 Office.

10 Do you have any involvement professionally or
11 personally with people involved in any of those
12 agencies?

13 **PROSPECTIVE JUROR:** No.

14 **MR. MURPHY:** What about with the FBI or the
15 Bureau of Indian Affairs?

16 **PROSPECTIVE JUROR:** No.

17 **MR. MURPHY:** Any involvement with Court
18 Appointed Special Advocates, WAVI, which is Working
19 Against Violence Incorporated or Mothers Against Drunk
20 Driving?

21 **PROSPECTIVE JUROR:** No.

22 **MR. MURPHY:** All right.

23 Now, we covered people who have, either
24 themselves, or a friend, a family member, children,
25 spouses, whatever, who have been the victims of

1 crimes. That's where we just started off here or left
2 off.

3 Have you or anybody close to you --

4 Let me start this by saying we just came back
5 from having private hearings.

6 If there is anything in response to that that
7 you don't want to take up in this public forum, all
8 you have to do is say, yes, I have an answer but I
9 would like to talk in private.

10 Has anybody close to you or yourself been
11 involved as a victim of a crime whether that's rape,
12 sexual assault, any crime of violence or any crime to
13 any extent where you feel that it might affect your
14 ability to sit fairly in this case.

15 **PROSPECTIVE JUROR:** No.

16 **MR. MURPHY:** Okay.

17 Well, we caught you up to speed pretty
18 quickly. I'm sure everybody is saying, boy, I wish
19 the whole morning had gone that quick.

20 All right. We're going to move past some of
21 the things we just talked about and go into whether or
22 not you have ever been a juror in a criminal case.

23 Of the 56 here, or I guess we're down to 54,
24 who has about juror that has actually sat on a jury
25 before? Okay. Lots of you.

1 Who has sat on a criminal case before?

2 **PROSPECTIVE JUROR:** Which means what?

3 **MR. MURPHY:** Where a crime was charged. It
4 wasn't a case involving, like, a fight over money but
5 it was where somebody was charged with DUI or
6 aggravated assault or something like that.

7 I am not going to go into what individual
8 cases you sat on, but I want to ask, did anybody who
9 sat on a jury in a criminal case come out of it having
10 had a negative experience?

11 And what I'm talking about are having been
12 involved in jury selection where somebody reports they
13 were on a jury and they felt that they got browbeaten
14 by the other jurors or that they were forced into
15 rendering a verdict that they didn't feel comfortable
16 with or they were dismayed by the level of the
17 process.

18 Anybody have any negative experiences as
19 jurors? Good. Okay.

20 All right. Well, now we're going to go -- we
21 talked about some of the specific issues. Now we're
22 going to talk about some of the legal principles
23 involved in this case or in any criminal case. And
24 the reason we're going to talk about those is because
25 the judge is going to give you the law.

1 And he's going to tell you, like I said,
2 it's -- many of you who have been on juries know you
3 get this big packet of law. And one of the
4 instructions says, if you are a juror, you are the
5 judges of the facts. That is, you decide what
6 happened. But Judge Delaney is the judge of the law.
7 He tells you what law you have to follow.

8 And it's not in every case that people say I
9 can follow the law and that's why I am going to talk
10 to you about this. Some people say, you know what, I
11 would like to, I try to, but I know in advance I
12 can't. And that's why I am going to talk about some
13 of these things.

14 The first of those is the presumption of
15 innocence. Who here understands the concept of
16 presumption of innocence?

17 Sir, your name?

18 **PROSPECTIVE JUROR:** James Harbert.

19 **MR. MURPHY:** Mr. Harbert, just explain what
20 you understand the presumption of innocence to be.

21 **PROSPECTIVE JUROR:** The defendant is innocent
22 until proven guilty at a reasonable -- proof of guilt,
23 I guess you could say. That's how I understand it.

24 **MR. MURPHY:** Anybody have any serious
25 disagreement with that discussion? Not that you would

1 probably attack the guy. I volunteered him for you.

2 Anyways, the presumption of innocence. So
3 now I am going to give you basically a quiz. I am
4 going to ask you, when -- for those 54 of you that are
5 left, if the judge got an email from the governor that
6 said, boy, the budget is tight. Are you going to have
7 to wrap this trial up right now and get a vote. You
8 had a choice, first choice, find my client guilty;
9 second choice, find my client not guilty; third option
10 ask for more information. Say I need more information
11 before I can vote.

12 Who would vote guilty?

13 Who would vote not guilty?

14 Okay. Who would vote need more information?

15 Okay. Really big problem for me because I'm
16 never supposed to tell jurors they are wrong, but
17 almost everybody except for three of you are wrong.
18 They always say, you know, when you read the trial
19 books, never tell juror they are wrong.

20 But my client is sitting here presumed
21 innocent and the state hasn't put on any evidence.
22 And so if the governor says, we're out of money, we
23 got to wrap this thing up, the only vote that you
24 could reasonably come back with -- legally come back
25 with is that he is innocent. He's not guilty of the

1 crime because no evidence has been put forward.

2 As the gentleman said just a moment ago, he's
3 presumed innocent and that presumption carries all the
4 way to the end of the trial.

5 Now, dovetailing into the presumption of
6 innocence is -- part of this is, yeah, he's presumed
7 innocent but he's been charged with a crime. I see
8 some head shaking. He's sitting here charged with a
9 cry. You know, when we're dealing with our daily
10 affairs, the daily way we go about our lives, there is
11 that saying, well, where there smoke there is fire.
12 And I want to ask you seriously to look inside
13 yourselves for a moment and say, can I really presume
14 that Mr. Graham innocent because the state has gone
15 through all the effort of charging him. And we're
16 sitting now here in a courtroom about to start a jury
17 trial.

18 And so, ma'am, your name is?

19 **PROSPECTIVE JUROR:** Jackie Andersen.

20 **MR. MURPHY:** I saw you nodding your head
21 right away. And --

22 **PROSPECTIVE JUROR:** To me to get where you
23 are here, you are going to prove you are innocent, not
24 guilty.

25 **MR. MURPHY:** Okay. And that's why I am

1 bringing this up.

2 **PROSPECTIVE JUROR:** And that's what I have --
3 to me if you got this far, there were some
4 circumstances, and now you have to prove the
5 innocence, not the guilty.

6 **MR. MURPHY:** So you are saying that because
7 of the fact that we're here today --

8 **PROSPECTIVE JUROR:** There is some question
9 about he is really innocent.

10 **MR. MURPHY:** Your belief is, and not at all
11 unusual, that it's his job to show that he's innocent
12 of the crime, not the state's job to show that he's
13 guilty?

14 **PROSPECTIVE JUROR:** Because he's gotten this
15 far.

16 **MR. MURPHY:** Okay.

17 Did you have more?

18 **PROSPECTIVE JUROR:** If it was -- no.

19 **MR. MURPHY:** Anybody else share that view or
20 can relate to that view?

21 Okay. Well, what -- let's go back then. If
22 the judge says that Mr. Graham has no duty to prove
23 anything, he is presumed innocent, the state carries
24 the burden every step of the way from the beginning to
25 the end, can you reconcile that with your own personal

1 beliefs because he's gotten this far he should have to
2 prove that he's innocent?

3 **PROSPECTIVE JUROR:** Can I -- say that again.
4 What?

5 You want to know if I can change to the fact
6 that he's innocent until proven guilty?

7 **MR. MURPHY:** Can you accept that he doesn't
8 have to prove anything? I don't have to ask a single
9 question.

10 **PROSPECTIVE JUROR:** No.

11 **MR. MURPHY:** You are saying no?

12 **PROSPECTIVE JUROR:** No.

13 **MR. MURPHY:** No matter what the instructions
14 of the law?

15 **PROSPECTIVE JUROR:** No, I am sorry. That's
16 honest.

17 **MR. MURPHY:** I want you to be honest. Don't
18 ever apologize. That's why I said in the beginning
19 we're here not about judging, not about anything else.
20 We just want candor. You have seen 30 and people have
21 already been excused because a lot of it because they
22 were candid.

23 I heard you now say, regardless of what the
24 judge tells you, in light of the posture of the case,
25 my client is going to need to prove that he didn't

1 commit the crimes?

2 **PROSPECTIVE JUROR:** Correct.

3 **MR. MURPHY:** That's a pretty strongly held
4 belief?

5 **PROSPECTIVE JUROR:** I have --

6 **MR. MURPHY:** I am asking you. You are
7 pretty --

8 **PROSPECTIVE JUROR:** Judgmental, yes. Or
9 however, yeah.

10 **MR. MURPHY:** Okay. All right.

11 Your Honor, in light of that I ask that the
12 witness be excused for cause.

13 **THE COURT:** Mr. Jackley?

14 **MR. JACKLEY:** May I voir dire?

15 **THE COURT:** You may.

16 **MR. JACKLEY:** Ma'am, I agree with counsel in
17 part. Under the rules and under what the Judge's
18 instructions are going to be is that a defendant is
19 presumed innocent until such time as the state proves
20 beyond a reasonable doubt guilt.

21 Do you consider yourself a fair person?

22 **PROSPECTIVE JUROR:** I try.

23 **MR. JACKLEY:** And that's all I can ask.

24 And if the judge were to instruct you that
25 the defendant -- that this defendant is presumed

1 innocent until such time as the government proves
2 beyond a reasonable doubt the guilt, could you follow
3 that instruction?

4 No?

5 **PROSPECTIVE JUROR:** I can tell myself that's
6 what I am supposed to be doing, but I don't think that
7 way. So honestly, no. It would have to -- they would
8 have to prove innocent or not enough evidence or
9 whatever because to me, to get to a point, there has
10 to be some burden of guilt to get you here to begin
11 with. I mean, That's just how I think.

12 **MR. JACKLEY:** Could you -- do you think you
13 could set aside that background or that perception and
14 follow what the Judge would instruct in this case?

15 Could you do that?

16 **PROSPECTIVE JUROR:** No.

17 **MR. JACKLEY:** I will pass for cause, Your
18 Honor.

19 **THE COURT:** Ma'am, I am going to excuse you
20 from the jury. I thank you for your candor.

21 In accordance with what Mr. Murphy is asking,
22 his statements of the law are indeed correct. There
23 is a presumption of innocence that follows the
24 defendant, Mr. Graham, throughout until each of you
25 are satisfied beyond a reasonable doubt that the state

1 has proved -- has proven every element of a crime
2 charged.

3 The defendant at no point in time --
4 Mr. Graham, at no point in time has the obligation to
5 prove or disprove anything.

6 If you will recall, you heard time and again
7 on television and radio, that there is a right to
8 silence. That right is absolutely worthless if
9 Mr. Graham can remain silent and you draw an inference
10 because of that that he must be guilty.

11 You may not take his exercise of silence --
12 he's the only one that can waive it. What he will do
13 I don't have a clue. But if he remains silent, you
14 cannot base anything upon that silence. It is not a
15 hint of guilt in any way, shape, or form, and you must
16 accept that principle if we're going to try this case
17 or any other criminal case.

18 And the fact that this is murder makes it no
19 different under the rules of law than DUI or
20 shoplifting. The rules apply across the board and you
21 need be comfortable with that.

22 Thank you.

23 **MR. MURPHY:** Ma'am, you had a question.

24 **PROSPECTIVE JUROR:** I had a question. I
25 agree with her.

1 **MR. MURPHY:** You agree with her?

2 **PROSPECTIVE JUROR:** Yeah.

3 **MR. MURPHY:** And going back to -- even though
4 the judge has just told you that the law says you
5 should presume my client innocent and not require that
6 he put forward any evidence --

7 **PROSPECTIVE JUROR:** But it is just --

8 **MR. MURPHY:** It's in your mind?

9 **PROSPECTIVE JUROR:** Uh-huh.

10 **MR. MURPHY:** Yeah.

11 And we have had a very candid discussion with
12 Ms. Andersen about that.

13 Is it fair to say that regardless of what the
14 judge just instructed as to the law, if you were to
15 sit on this jury, you would expect my client prove
16 that he was not guilty?

17 **PROSPECTIVE JUROR:** I obey the rules --

18 **THE COURT REPORTER:** Mr. Murphy, I am not
19 able to understand her.

20 **MR. MURPHY:** You were saying, if you were to
21 obey your conscience, you would retire this he prove
22 that he was not guilty?

23 **PROSPECTIVE JUROR:** Yeah.

24 **MR. MURPHY:** That's what you feel is part of
25 your personal thoughts?

1 **PROSPECTIVE JUROR:** It is -- and obey --

2 **MR. MURPHY:** Okay.

3 Would it be fair to say that you are going to
4 require, if you are a juror on this case, that my
5 client prove that he's not guilty?

6 **PROSPECTIVE JUROR:** That's what I say unless
7 there is proof that -- the evidence would be -- that
8 he did all these things then I can say. But otherwise
9 if I am not convinced that the state's thing is --
10 which is what we learn to this day, what we are
11 reading and all that kind of stuff and you if all the
12 evidence -- I mean, can't put in all that, then
13 nobody -- it is not -- then I can't --

14 **MR. MURPHY:** Okay.

15 Your Honor, may we approach briefly?

16 **THE COURT:** Yes.

17 (Whereupon, a discussion was then held off
18 the record.)

19 **MR. MURPHY:** Ma'am, thank you for your
20 candor. I have moved for cause for you to be excused.
21 And --

22 **MR. JACKLEY:** No objections, Your Honor.

23 **THE COURT:** Thank you, ma'am.

24 **MR. MURPHY:** We have had some discussion now
25 about the presumption of innocence.

1 Does that jog anybody's mind in you are
2 willing to say, boy; I don't know if I could really
3 hold the state to its burden? I would expect
4 Mr. Graham to come up with something to prove that
5 he's not guilty?

6 Sir, your name?

7 **PROSPECTIVE JUROR:** Britt Brown.

8 **MR. MURPHY:** Mr. Brown, what's your feelings
9 on the matter?

10 **PROSPECTIVE JUROR:** In my eye you are
11 depending him.

12 **MR. MURPHY:** Uh-huh.

13 **PROSPECTIVE JUROR:** The state is trying to
14 incarcerate him.

15 **MR. MURPHY:** Right.

16 **PROSPECTIVE JUROR:** In my eye you are
17 defending him and not plead him guilty. They are
18 trying to presume guilt.

19 **MR. MURPHY:** Right.

20 **PROSPECTIVE JUROR:** So in my eye, one of the
21 things is that you are on side of the fence and they
22 are on the other. And it's one of the things that I
23 don't think is going to come to -- that I am going to
24 meet here.

25 **MR. MURPHY:** Is part of that were you talking

1 about two sides here. Are you --

2 **PROSPECTIVE JUROR:** One is trying to prove
3 guilt and one is trying to prove innocent.

4 **MR. MURPHY:** Correct.

5 Are you saying that the defendant should have
6 to try to prove his innocence as part of this?

7 **PROSPECTIVE JUROR:** In a way, yes, sir.

8 **MR. MURPHY:** Okay.

9 And you -- knowing the law says Mr. Graham
10 could sit here during the trial, I could decide not to
11 ask a single question, not call a single witness, he
12 could decide not to testify, but in your view, then
13 that would mean he's given up?

14 **PROSPECTIVE JUROR:** Yes, sir.

15 **MR. MURPHY:** And it's not about whether the
16 state has met their case, it's that he has to put on a
17 case against theirs?

18 **PROSPECTIVE JUROR:** Yes.

19 **MR. MURPHY:** As you heard the judge, that's
20 not the way the technical law is written.

21 **PROSPECTIVE JUROR:** Right.

22 **MR. MURPHY:** You believe that in your heart?

23 **PROSPECTIVE JUROR:** Yes, sir.

24 **MR. MURPHY:** Pretty firmly convinced that
25 that's the way things should be?

1 **PROSPECTIVE JUROR:** Yes.

2 **MR. MURPHY:** Your Honor, based on that I'd
3 ask that Mr. Brown be excused for cause.

4 **MR. JACKLEY:** May I voir dire, Your Honor.

5 **THE COURT:** Uh-huh.

6 **MR. JACKLEY:** Afternoon, Mr. Brown.
7 Would you consider yourself a fair person?

8 **PROSPECTIVE JUROR:** Yes.

9 **MR. JACKLEY:** Would you be, in general, be
10 able to follow the instructions if a judge gives an
11 instruction whether it be about reasonable doubt, or
12 be about presumption of innocence, do you feel you
13 would be able to look at that instruction and to the
14 best of your ability follow that instruction?

15 **PROSPECTIVE JUROR:** No, I do not.

16 **MR. JACKLEY:** And is that -- is that because
17 of the discussions you had with Mr. Murphy regarding
18 the presumption?

19 **PROSPECTIVE JUROR:** Yes.

20 **MR. JACKLEY:** If I told you -- and this kind
21 of goes along with the discussion that I had with the
22 other potential juror that, you know, I would
23 anticipate that the judge will instruct -- and the
24 judge has indicated that there exists a presumption of
25 innocence that exists until such time as the state

1 proves all of the elements beyond a reasonable doubt.

2 Are you telling me that you could not follow
3 that instruction?

4 **PROSPECTIVE JUROR:** Unless he has proven
5 himself not guilty and you have proven him guilty.

6 **MR. JACKLEY:** And you would hold me, as the
7 state, to my burden under that instruction and I would
8 have the burden or the requirement to prove each of
9 the elements beyond a reasonable doubt?

10 You would hold me to that?

11 **PROSPECTIVE JUROR:** I wouldn't hold you
12 accountable, but I would hold you to the evidence put
13 forth.

14 **MR. JACKLEY:** And that's all I ask.

15 Your Honor, I would pass for cause.

16 **MR. MURPHY:** I would like to voir dire
17 because you just said he would have to unprove his
18 guilt. I believe that's the word you used or until it
19 was unproven that he was guilty.

20 **PROSPECTIVE JUROR:** Until you unproved he was
21 guilty.

22 **MR. MURPHY:** Yeah. Until I unprove it.

23 So in your view, the way things should work
24 is that he has a duty to prove that he's not guilty
25 just as they have a duty to prove that he is guilty?

1 **PROSPECTIVE JUROR:** Yes, sir.

2 **MR. MURPHY:** Okay.

3 That's not subject to negotiation?

4 **PROSPECTIVE JUROR:** Yes.

5 **MR. MURPHY:** Okay.

6 Your Honor, I renew my motion to strike him.

7 **THE COURT:** Yeah. I am going to grant it.

8 It's a very difficult position to be in and
9 that's a very common -- you know, even with your kids
10 that we do that. But it's not the premise upon which
11 our law is built. And that's truly and firmly a
12 constitutional issue under both our state and federal
13 constitutions. And the candor of saying -- it's much
14 easier to say sure I can do that. So I appreciate
15 people that say they can't and leave us with a jury
16 that everybody is absolutely comfortable with, can and
17 will indeed apply the principles I express.

18 So I am going to grant the challenge. And
19 again, thank you for your straight forward answer,
20 sir.

21 **MR. MURPHY:** Thank you, sir.

22 You will allowed to go now.

23 Mr. Harbert, you had your hand raised?

24 **PROSPECTIVE JUROR:** Yeah. I was on a murder
25 trial jury and where there was only one witness to the

1 crime. And since then I have come to the conviction
2 that there had to be at least two witnesses to a crime
3 in order to accept their testimony. That the crime
4 was committed.

5 I don't know if that plays a role in this
6 trial, but that's the conviction I have come to since
7 then. Every matter must be established by at least
8 two witnesses.

9 **MR. MURPHY:** All right.

10 Not an issue at least for what we're talking
11 about now but thank you for bringing that to my
12 attention.

13 We now had kind of a protracted discussion
14 about the presumption of innocence. In light of what
15 the judge just said about the state of our laws, both
16 state and federal that it is not subject to debate
17 that the law says my client is presumed innocent. And
18 we have seen two people have somewhat contrary views
19 to that and that's understandable. Anybody else have
20 any thoughts they are comfortable sharing about that
21 or feelings that they may not be able to really give
22 my client the benefit of the presumption of innocence?

23 One of the things that we kind of suggested
24 or talked about a bit is where there is smoke there is
25 fire. That's how we deal with our kids and spouses

1 and whatnot. One of the issues is my cline has in
2 fact been charged. He's been indicted. And many
3 people have confidence in our governmental
4 organization and system and so they might think, boy,
5 it's not a mistake that he -- my client, John Graham,
6 is here. That they why don't make mistakes like that.
7 Is there anybody here who just has a hard time
8 believing that this is a mistake that the state has
9 erred in charging him with these very series crimes.

10 **MR. JACKLEY:** I am going to object to the
11 compound nature of that question.

12 **THE COURT:** Run the question by me again. I
13 can't read lips behind you and I don't have a screen
14 up.

15 **MR. MURPHY:** You don't have a screen up.
16 Okay.

17 The question, Your Honor, anybody here
18 believe that it's unlikely that the state mistakenly
19 charged my client with the crimes that we talked
20 about, murder?

21 **PROSPECTIVE JUROR:** Can you rephrase that?

22 **THE COURT:** Yeah. I'm not -- if -- I find
23 the question difficult to follow.

24 **MR. JACKLEY:** With that I withdraw my
25 objection at this time.

1 **MR. MURPHY:** Let me -- I appreciate you -- if
2 I ask a question, especially since we have been going
3 for about five hours my tongue may get tangled up a
4 bit.

5 Mr. Graham is sitting here and we know he's
6 been charged with two counts of murder. And we're at
7 a process now we're about to start a trial. The state
8 has brought charges against him. He's been arrested
9 and now he's facing those charges. Do you find it
10 hard to believe that that's -- could be a mistake. Is
11 it something where you say, boy, they just can't be
12 wrong about charging somebody with such serious
13 crimes?

14 **PROSPECTIVE JUROR:** My opinion on that, let's
15 see if I can phrase this correctly for -- to get it
16 out the way I feel in this social security ass speck.
17 Okay. Mistakes can happen no matter where you are at
18 and what are you doing. For myself -- and I have a
19 little different perspective. I am on the Rapid City
20 school board. Just a little bit about myself. And we
21 actually have hearings that affect students, staff and
22 everything. And as a school board member, I have to
23 set as a -- well juror and the judge per se. My
24 administration has to bring forth the expectations
25 that we expect for them to show that this is really

1 correct. And that -- in that, it's -- I cannot and I
2 will not judge whoever they will bringing forward
3 until I have heard everything. So I also know that
4 mistakes can happen. And that -- I have also had
5 where I have known that a person -- somebody could
6 give the wrong information that make a person look
7 guilty and they are not. Okay.

8 **MR. MURPHY:** All right.

9 **PROSPECTIVE JUROR:** So that's why I'm asking
10 you to rephrase that question because this person
11 might be here because of this evidence -- but is it
12 true evidence until you hear it, see it, and can take
13 it in and -- hear, see, feel all those things.

14 **MR. MURPHY:** Sure.

15 **PROSPECTIVE JUROR:** I need to have in order
16 to make my decision.

17 **MR. MURPHY:** So you are willing to conceive
18 that this might be a mistake in prosecution.

19 **PROSPECTIVE JUROR:** Could be, yeah.

20 **MR. MURPHY:** Okay.

21 That's exact -- thanks for clarifying it.
22 You put it in a little better phraseology than I did.

23 That's what I am wondering if there is
24 anybody out here who says, boy, I really have a hard
25 time believing that it could be possible that somebody

1 could be charged with two counts of murder and have
2 made it all the way through the system and that it was
3 all a mistake; that the prosecution got it wrong or
4 law enforcement got it wrong.

5 And I saw you shaking your head, Mr. West.
6 What's your comments?

7 **PROSPECTIVE JUROR:** I was just echoing your
8 thoughts before about what you were going to say.
9 Because I -- I was thinking about how to rephrase the
10 question and that's exactly the way I would have
11 expressed it. You are absolutely right.

12 **MR. MURPHY:** And it is something that you can
13 conceive of that this could be a mistaken prosecution?

14 **PROSPECTIVE JUROR:** No, not for me
15 personally.

16 **MR. MURPHY:** You can't?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** In your situation --

19 **PROSPECTIVE JUROR:** Let me start over.
20 Ask me your question again.

21 **MR. MURPHY:** Are you able to concede to
22 believe that this could be a mistaken prosecution?

23 **PROSPECTIVE JUROR:** Absolutely. It could be
24 a mistake, sure.

25 **MR. MURPHY:** Anybody disagree -- I mean, if

1 you are thinking about -- just being candid with
2 yourself --

3 Ma'am, I am sorry I don't know your name.

4 **PROSPECTIVE JUROR:** Casandra Heying.

5 **MR. MURPHY:** You were shaking your head.

6 **PROSPECTIVE JUROR:** I don't believe so. I
7 don't think we should have made it this far if there
8 was any mistake.

9 **MR. MURPHY:** Okay. That's what I am getting
10 at.

11 You're of the mind that it's just not likely?
12 Going into this you think John must have done
13 something wrong to get here?

14 **PROSPECTIVE JUROR:** Yeah.

15 **MR. MURPHY:** Okay.

16 And even though the judge will tell you he's
17 presumed innocent and all of that stuff, and that's
18 the law, sitting here today, you are saying, no, that
19 isn't the way it is?

20 **PROSPECTIVE JUROR:** That's what I believe,
21 yeah.

22 **MR. MURPHY:** Okay. And that's why we're
23 having this discussion.

24 Firmly held belief?

25 **PROSPECTIVE JUROR:** Yeah.

1 **MR. MURPHY:** Okay.

2 Even if the judge reiterates two or three
3 times what the law is, you are still going to believe
4 that my client did something wrong to get himself
5 here?

6 **PROSPECTIVE JUROR:** Yes.

7 **MR. MURPHY:** All right.

8 Your Honor, I would move for cause on this
9 juror.

10 **THE COURT:** Mr. Jackley?

11 **MR. JACKLEY:** May I voir dire, Your Honor?

12 **THE COURT:** Uh-huh.

13 **MR. JACKLEY:** There has been a lot of
14 discussion about a mistake, and my questioning will
15 focus more on what's required when it comes to burdens
16 of proof. Okay.

17 You heard Mr. Murphy talk before about asking
18 whether any of you had served on a jury before and
19 that there was talk about a civil jury, which of
20 course is a different burden of proof. We call that a
21 preponderance. My law school professor used to get
22 mad when lawyers would say that means 51 percent. We
23 don't deal in percentages, but I think that's an easy
24 way to understand that.

25 So there is a different burden of proof when

1 it comes to a civil matter versus a criminal matter.
2 And a criminal case, which is what we're here for
3 today, it's a much more serious matter, and the state
4 carries a much more serious burden and that is beyond
5 a reasonable doubt.

6 Mr. Murphy has been talking to you about
7 charges. And I, as a prosecutor, don't necessarily
8 bring a charge, but another body, a Grand Jury, may
9 bring a charge. And there is a different standard of
10 proof that a Grand Jury may have versus what a jury
11 would have.

12 In that context, do you think you would be
13 able to be a fair person and view the evidence as it
14 may come in by the witnesses -- could you do that for
15 us?

16 **PROSPECTIVE JUROR:** Yes.

17 **MR. JACKLEY:** As if the judge would instruct
18 in more detail about what a Grand Jury indictment
19 means or doesn't mean, would you be able to follow
20 what the judge says on that?

21 **PROSPECTIVE JUROR:** Possibly.

22 **MR. JACKLEY:** You think you could do that for
23 us?

24 **PROSPECTIVE JUROR:** Yes.

25 **MR. JACKLEY:** Your Honor, I would pass for

1 cause.

2 **THE COURT:** Mr. Murphy?

3 **MR. MURPHY:** I'd like to further voir dire.

4 Ma'am, you probably feel like, oh, boy. Boy
5 did I -- you said --

6 And I appreciate your candor. You said
7 possibly you could follow the instructions. That's
8 not a ringing endorsement?

9 **PROSPECTIVE JUROR:** Yes.

10 **MR. MURPHY:** And I want to go back to what
11 you said when we were talking before. The judge can
12 tell you that the presumption of innocence is. You
13 can read it. Give it to you ten different ways --

14 **PROSPECTIVE JUROR:** Yes.

15 **MR. MURPHY:** -- but what you were telling me
16 when I was talking before, regardless of all that, in
17 your heart of heart, you see my client charged,
18 whether he was charged by Mr. Jackley individually or
19 a Grand Jury or whomever, you believe he got here
20 because he did something wrong?

21 **PROSPECTIVE JUROR:** He made some kind of
22 mistake, yes.

23 **MR. MURPHY:** And, again, regardless of what
24 the judge tells you in the instructions, you are going
25 to continue to believe that?

1 **PROSPECTIVE JUROR:** Yes.

2 **MR. MURPHY:** And you said that very
3 unequivocally?

4 **PROSPECTIVE JUROR:** Uh-huh.

5 **MR. MURPHY:** Okay.

6 I would you renew my motion, Your Honor.

7 **THE COURT:** I am going to grant it,
8 Mr. Murphy -- or Mr. Jackley. And as with all things
9 here, that's fine. And it's exactly something we need
10 to know.

11 There is a -- you know, the fact that a Grand
12 Jury found or didn't find something doesn't matter.
13 They do both. And they are mistaken from time to time
14 as to both. Either in not indicting or indicting on a
15 charge that turns out not to be correct. I have seen
16 both of them in ten years. So they are neither always
17 right nor always wrong.

18 But you will be instructed that the fact that
19 someone has been charged with a crime does not mean
20 they did something wrong. It cannot even be used as,
21 again, like the right to silence is even a hint that
22 they did something wrong.

23 It is simply a matter of saying, this -- we
24 think you committed a crime and this is the crime we
25 think you committed. That is not evidence. All of us

1 will say that to our children from time to time, I
2 think you did this, and I have no proof of it, but I
3 think you did it. We do that all the time and that is
4 not how and why we're here. What the Grand Jury did
5 is completely irrelevant to this case. We are
6 starting from scratch.

7 And with that, and your candor, ma'am, I am
8 going to excuse you. And if anybody has questions
9 about that, that's -- this is the time to bring it up.

10 **MR. MURPHY:** You are free to go. Thank you
11 for your candor.

12 Before we leave that topic, now that the
13 judge has given more information about how this works,
14 anybody else have any feeling along the lines of what
15 Ms. Haines just talked about?

16 Okay. Your Honor, we're at 2:30 or a little
17 past.

18 Do you want to take a break or want to keep
19 going.

20 **THE COURT:** Are you going to pass at this
21 point?

22 **MR. MURPHY:** No.

23 **THE COURT:** I think we'll go to 3:00 anyway
24 unless there is an emergency out there?

25 All right. We'll continue a spell.

1 **MR. MURPHY:** Okay. Good.

2 The judge has talked about it a bit and
3 now -- it stems right from the presumption of
4 innocence, and that is the right of my client not to
5 testify if he so desires. And if the state has the
6 burden from the beginning to the end, and my client is
7 presumed innocent, then that means as we've talked
8 about, he doesn't have to put on any evidence, he
9 doesn't have to ask any questions or call a single
10 witness, and he doesn't have to get up on the stand
11 himself.

12 But we're a courtroom full of humans. And
13 many of you may say, boy, you know, if he doesn't get
14 up and tell his side of the story, he must have
15 something to hide. Or I am not going to be able to
16 vote not guilty unless I hear his side of the story or
17 have him subjected to cross-examination.

18 This is where -- again, we talk about the
19 real human dynamics. And so I need to get candid
20 responses from any of you folks who think in any way,
21 shape, or form in my client decides not to testify
22 that you are going to think he must have something to
23 hide or he's probably guilty or there is something
24 else being kept from us.

25 Anyone?

1 **PROSPECTIVE JUROR:** I wouldn't think that.

2 **MR. MURPHY:** You wouldn't think that,
3 Mr. Parker?

4 **PROSPECTIVE JUROR:** No.

5 **MR. MURPHY:** You feel very comfortable with
6 the idea that, as a defendant, if they have got the
7 burden, he shouldn't have to get up on the stand and
8 provide any evidence?

9 **PROSPECTIVE JUROR:** No. Because the one
10 reason that -- there is several reasons why he
11 shouldn't get up there. He might mess it himself up
12 when he's actually innocent.

13 **MR. MURPHY:** Sure.

14 Anybody disagree with what Mr. Parker said?

15 He said, that's just not the way I view
16 thing. If I was the defendant, I'd certainly want to
17 get up and answer my accusers.

18 Anybody sitting -- sir, your name?

19 **PROSPECTIVE JUROR:** Jake Salano.

20 **MR. MURPHY:** Okay, Mr. Salano?

21 **PROSPECTIVE JUROR:** If I was in his shoes, I
22 would want to get up and tell everybody, hey, my side
23 of the story. That way is sounds better coming from
24 him or whoever. That A, it's a mistake. I was --
25 whatever. The evidence is wrong. I just -- I just

1 disagree with him.

2 **MR. MURPHY:** Sure. That's fair.

3 And do you think, when you are thinking about
4 this, if my client were to decide not to testify, for
5 whatever reason, that you would say, boy, it must mean
6 that he did it or he's got something to hide or I am
7 going to hold that against him in some way because I
8 wouldn't do that?

9 **PROSPECTIVE JUROR:** Not necessarily.

10 I am just saying that I think it would be
11 better if I got up or whoever and tell the jury that
12 their side of the story.

13 **MR. MURPHY:** Sure.

14 **PROSPECTIVE JUROR:** You know, I ain't saying
15 he's guilty or anything like that.

16 **MR. MURPHY:** Okay. All right.

17 All right. I appreciate your candor.

18 Ma'am, I am sorry, your name?

19 **PROSPECTIVE JUROR:** Nancy.

20 **MR. MURPHY:** Nancy, what's your last name?

21 **PROSPECTIVE JUROR:** Hanson.

22 **MR. MURPHY:** Okay.

23 Ms. Hanson, what are your feelings about the
24 notion that somebody who is charged with two counts of
25 murder might go through an entire jury trial and

1 decide not to get up on the stand?

2 **PROSPECTIVE JUROR:** I don't have a problem
3 with that.

4 **MR. MURPHY:** Okay.

5 **PROSPECTIVE JUROR:** It's up to the
6 prosecution to prove him guilty.

7 **MR. MURPHY:** Okay.

8 So you wouldn't hold that against him?

9 **PROSPECTIVE JUROR:** No.

10 **MR. MURPHY:** Again, I kind of use that
11 looking in your heart-of-hearts-sole-searching-type
12 thing. Anybody here saying, boy, yeah, I know that's
13 the answer I am supposed to give, but I really think
14 that if the defendant doesn't testify, he's hiding
15 something or is probably guilty?

16 Great. I appreciate that.

17 And we're going to keep moving along. We're
18 going to go into the beyond a reasonable doubt
19 standard. We talked about. We talked about the
20 state's burden that if my client is presumed innocent,
21 the state has the burden.

22 And who here has heard the phrase on TV or
23 Law and Order or in books beyond a reasonable doubt?

24 Everybody --

25 Let me ask you this, has anybody not heard

1 that phrase?

2 Okay. I want to take some time to talk about
3 the real words, what that means, beyond a reasonable
4 doubt. The state has to prove their case beyond any
5 reasonable doubt. If you think of doubts, say, there
6 is numbers, if you had one doubt, and it's based on
7 reason, it's not just some fantastical notion that you
8 know the prosecution is a group of aliens from the
9 planet sorb or anything like. You all made it this
10 far. You made -- you are all reasonable.

11 If you have any one doubt that's reasonable,
12 based on the state of their evidence, on any one of
13 the elements or any material fact, your duty --

14 **MR. JACKLEY:** Your Honor, I am going to
15 object. That's a misstatement of the law.

16 **MR. MURPHY:** I don't believe it is.

17 **THE COURT:** Hold on.

18 Well, I am going to correct the statement as
19 to material fact, but as to any one of the elements
20 necessary to the crime, the question is fair.

21 **MR. MURPHY:** Okay.

22 Well, and my mistake, Your Honor. I believed
23 the instructions said that the jury has to find by
24 proof beyond a reasonable doubt of all elements and
25 any material fact therein.

1 **THE COURT:** Well, I think all elements may or
2 may not include material facts, but all of the acts or
3 omissions necessary to constitute the crime which is
4 charged.

5 **MR. MURPHY:** All right.

6 And maybe this a good way to start talking
7 about elements. For those of you who haven't served
8 on a jury in a criminal case, you aren't asked to
9 decide one thing. It's not just -- you are not just
10 asked is the defendant guilty of the crime of murder
11 in Count One or Murder in Count Two.

12 The judge will break down the crime alleged
13 into a bunch of elements, and maybe three, four, or
14 five. They are separate facts that you have to find.
15 And you have to find each and every one of them beyond
16 a reasonable doubt. So that's what we're talking
17 about.

18 So let me -- I am going to use this banister.
19 It's kind of a -- it helps me kind of conceptualize
20 beyond a reasonable doubt. We're starting a trial or
21 we will start a trial in the next couple days. At
22 that point there will be no evidence in front of you.
23 My client is presumed innocent. So therefore, since
24 no evidence is presented, all you have in front of you
25 is reasonable doubt.

1 But the case is going to go along and
2 probably early on into the case, you are going to
3 learn that Anna Mae Aquash was killed. She was shot
4 in the back of the head. So you are going to have
5 evidence that establishes that somebody died and it
6 wasn't by accident.

7 And evidence will come in at various times
8 that may move the kind of doubt meter back and forth
9 in your mind as you are processing information. And
10 you may get to a point where you believe the state has
11 proven pretty -- quite a bit. Proven a lot. Put in a
12 lot of evidence. Had a lot of witnesses.

13 But you get to a point you have a doubt based
14 on reason about one of the elements. Any one of the
15 elements. You believe they have proven all that
16 stuff, but you got a doubt about that one last thing.

17 And I want to ask you, who here feels
18 comfortable with the notion that as a juror, under the
19 law, even if they have proven all that other stuff
20 behind me, your duty is to find the defendant not
21 guilty?

22 Ma'am, Ms. Lemke, you are shaking your head.
23 Can you tell me what your thoughts are about that?

24 **PROSPECTIVE JUROR:** Well, they haven't proven
25 everything in my mind and there is still some elements

1 there that they haven't proven to me, I guess, and
2 that's reasonable doubt.

3 **MR. MURPHY:** Okay.

4 And would you feel comfortable in that
5 situation even though they have proven a lot, that
6 still voting not guilty because they haven't proven
7 everything beyond a reasonable doubt, all the elements
8 beyond a reasonable doubt?

9 **PROSPECTIVE JUROR:** If the judge has the
10 different elements and that one is not proven, he has
11 to be not guilty.

12 **MR. MURPHY:** All right. And that's what
13 we're talking about here.

14 Now, who here has kids? Many of you.

15 I have raised three kids. I have never
16 employed the reasonable doubt standard in my
17 household. Okay. I don't know, is there any parent
18 here who actually has? Raise your hand.

19 That's not the way we deal with the common
20 affairs and certainly not the way my wife deals with
21 me. You know, that's -- you get hunches, you get
22 suspicions, and you form conclusions based on those.
23 You know, you see that your kids did things or there
24 is a toy they used to play with that is no longer
25 around and you've kind of figure, without knowing

1 beyond a reasonable doubt, that they lost it, they
2 left it on the playground. I go through two winter
3 jackets a year. It seems they evaporate. I don't
4 have proof beyond a reasonable doubt that my youngest
5 daughter has lost her jackets, but I have a pretty
6 good reason to believe that they has.

7 But this is much more serious than that.
8 We're in the criminal justice system here. And I want
9 to have the discussion with anybody who feels that
10 they are going to have a hard time applying the beyond
11 a reasonable doubt standard for Mr. Graham in light of
12 the severity of the charges.

13 **PROSPECTIVE JUROR:** Is it possible for us to
14 get more information about that?

15 **MR. MURPHY:** No. No. That's -- and it's a
16 great question. No. The state has the burden of
17 putting forth their evidence. And if at the end of
18 the presentation of the state's case or the
19 presentation of the state and the defense's case, if
20 you go back there in the jury room and you are going
21 through those elements, you have any one reasonable
22 doubt about any of those elements, the law that the
23 judge will give you will say it's your duty to -- it's
24 your job as a juror to vote not guilty. You won't be
25 able to ask for the trial -- to have the trial

1 reopened again to put more information on. You are
2 struck with what you got.

3 **PROSPECTIVE JUROR:** You are allowed to ask
4 questions, though?

5 **MR. MURPHY:** There are times when you are
6 allowed to ask question, but you are not going to be
7 able to get more evidence. Okay. That's -- once the
8 trial is done, your job as a juror at that point is to
9 deal with the evidence that you have been given and
10 decide whether or not the state has met their burden,
11 proven beyond any reasonable doubt each and every
12 element of the offenses.

13 Does that cause you pause?

14 **PROSPECTIVE JUROR:** But if we have -- if
15 there was some confusion within jury, there would be a
16 way to try and clarify it?

17 **THE COURT:** Do you want me to address that?

18 **MR. MURPHY:** I suppose you better, Your
19 Honor.

20 **THE COURT:** On occasion during deliberations,
21 jurors, one or more of them, may have a question.
22 That question will be reduced to writing by any juror
23 that has one. Need not be the foreman or foreperson
24 that does it. Ask it will be given to me by the
25 bailiff.

1 I will have to call counsel together and we
2 will look at the question and decide whether I can
3 answer it. And sometimes I may tell you you go with
4 what you got; and other times I may provide some
5 clarifying instruction or something that I believe
6 will help resolve that issue.

7 I will always have to make a record of it.
8 Everything we do here has a record, but there is the
9 distinct possibility that you can request additional
10 information and -- let me say guidance.

11 You are not going to get more evidence.
12 That's done. But you may have questions about
13 something, some process, some instruction, you are
14 entitled to ask about that and I may or may not be
15 able to help you.

16 Yes, ma'am?

17 **PROSPECTIVE JUROR:** If something was said
18 during the trial and we're deliberating, but one
19 person heard it this way, one person heard it that
20 way, since it's already in the record can we get that
21 part of it?

22 **THE COURT:** No.

23 There are a number of reasons for that and
24 the reasons are it emphasizes -- the primary is it
25 emphasizes one piece or one sentence of evidence over

1 all the other. And you are to rely upon your own
2 memory. You will have the opportunity to discuss the
3 case with others, those that you are sitting in
4 determination with. And you will eventually be called
5 upon to make up your mind as to how to vote.

6 Again, there sometimes can be clarification,
7 but I don't -- I am hard pressed to think of
8 circumstances in which I will give you a partial
9 transcript of what was said. Okay. Or what was done.

10 So -- and I will allow you to take notes
11 during the trial.

12 **PROSPECTIVE JUROR:** I was going to ask that
13 question, too.

14 **THE COURT:** But your notes don't control over
15 your memory and someone's else's notes certainly don't
16 control over your memory. They are yours notes to
17 help you remember, but they are not the transcript nor
18 a record.

19 Your notebooks will be left here whenever you
20 leave the courtroom.

21 **MR. MURPHY:** Before I get to your question,
22 sir, you asked the question originally. Now you have
23 been told that you are not going to get more evidence.
24 You may get clarification on what a word means or
25 something like that.

1 But how does that make you feel, then, if you
2 know that you may be asked as a juror and told that
3 it's your duty to vote not guilty if you have any
4 reasonable doubt, even though you think the state has
5 proven the vast majority of its case?

6 **PROSPECTIVE JUROR:** I have no problem with.

7 **MR. MURPHY:** You believe that's the way the
8 system should work.

9 **PROSPECTIVE JUROR:** Absolutely.

10 **MR. MURPHY:** Sir, you raised your hand.

11 Your name for Ms. Pruss?

12 **PROSPECTIVE JUROR:** Mr. Huling.

13 Now, from what I understand -- it's my first
14 time -- but there is two -- multiple counts alleged
15 against the gentleman. Now, if they prove beyond a
16 reasonable doubt for, like, one of them, and the
17 second one there is a doubt for, then we can -- is not
18 guilty for the entire thing or just that specific that
19 there is a doubt for?

20 **MR. MURPHY:** The judge will give you the
21 instructions that are very detailed as to each over
22 fence. And each offense has a number of elements.
23 And so when you are asked to consider the case, you
24 will be presented with Count One and there will be --
25 let's just say five elements. And for each of those

1 elements, for you to vote guilty, you have to believe
2 that the state has resolved all of the doubts that you
3 had in regard to each of those elements.

4 And then we'll go on to the next count which
5 may have five or six elements, too. So you treat each
6 charge separately.

7 **PROSPECTIVE JUROR:** Okay.

8 **MR. MURPHY:** But, for each of those, the
9 state has to prove all of the elements beyond a
10 reasonable doubt.

11 **PROSPECTIVE JUROR:** All right.

12 **MR. MURPHY:** Does that clarify it for you?

13 **PROSPECTIVE JUROR:** Yeah.

14 **MR. MURPHY:** Do you have any -- does that
15 seem to put too much of a burden on the state?

16 **PROSPECTIVE JUROR:** No.

17 **THE COURT:** You can vote -- your reactions to
18 both counts may be the same or they may be different.
19 The fact that you determine one way on one count or
20 believe one way on one count does not control nor
21 should it impact your decision on another count.

22 All of that stuff will be covered later in
23 instructions.

24 **MR. MURPHY:** We have been talking about the
25 reasonable doubt standard and how we apply it. Before

1 I move to kind of a related issue, anybody have qualms
2 about applying that standard in this case?

3 Just knowing what you know about yourself, do
4 you think you would say if I have a really strong gut
5 feeling that Mr. Graham committed crime A or crime B,
6 that's going to be enough for me?

7 I don't think the state should have to prove
8 all and resolve all of the elements beyond a
9 reasonable doubt. I am going to be okay with a hunch,
10 a suspicion, good enough type deal?

11 Okay. We have talked -- we have used terms
12 today, guilty, not guilty, and innocent. Talked about
13 the presumption of innocence.

14 Who here would volunteer to explain the
15 difference between not guilty and innocent?

16 Anybody feel they have kind of a grasp?

17 **PROSPECTIVE JUROR:** I will give it a shot.

18 **MR. MURPHY:** Sure.

19 Mr. West?

20 **PROSPECTIVE JUROR:** I would say not guilty
21 means that the evidence presented did not present a
22 conclusion beyond a reasonable doubt that the
23 defendant did indeed commit the act. And I would say
24 innocent would mean that he did not do the act.

25 **MR. MURPHY:** Okay. Great.

1 **PROSPECTIVE JUROR:** I hope I am right.

2 **MR. MURPHY:** You are right. Exactly.

3 This is one of those things that sometimes
4 people talk about it like lawyer speak. When you
5 listen to TV or radio or you are watching a crime
6 drama, the verdict is always guilty or not guilty,
7 it's not guilty or innocent. And the reason why is
8 what we have just been talking about. It's the
9 state's burden to prove the client -- or the defendant
10 guilty.

11 The client, the defendant, Mr. Graham, has no
12 duty to prove that he's innocent. All that has to be
13 shown whether through the state's case or the state
14 and the defense case is that the state hasn't met its
15 burden of proving each and every element. If there is
16 one doubt or there is ten doubts left, he's not guilty
17 because the state hasn't proven him guilty beyond a
18 reasonable doubt.

19 Does that make sense?

20 That seem kind of hyper lawyerly to any of
21 you?

22 Sir, in the black vest, what's your name?

23 **PROSPECTIVE JUROR:** Tom.

24 **MR. MURPHY:** Did you have any -- I saw you
25 kind of roll your eyes in regard to that whole thing.

1 Does the beyond a reasonable doubt standard
2 or the idea that the state has to prove each and every
3 element -- does that cause any qualms?

4 **PROSPECTIVE JUROR:** No.

5 **MR. MURPHY:** You feel that's the right way
6 things should be done?

7 **PROSPECTIVE JUROR:** Yes.

8 **MR. MURPHY:** All right.

9 We're going to go back and talk a little bit
10 more about the American Indian Movement. We talked
11 about that earlier before lunch. As you have heard
12 Russell Means is potentially a witness, Clyde
13 Bellecourt. The state is going to present a lot of
14 evidence about the activities of the American Indian
15 Movement in the 1970s.

16 Show of hands, who lived in this part of the
17 world in the 1970s, say 1975?

18 All right. I am going to start in the first
19 row.

20 Ma'am, your name for the court reporter?

21 **PROSPECTIVE JUROR:** Jo Ann Paulson.

22 **MR. MURPHY:** Ms. Paulson, what are your
23 recollections of the time when AIM was a presence down
24 on Pine Ridge and there was Wounded Knee and the
25 Courthouse riots and whatnot?

1 **PROSPECTIVE JUROR:** Okay. At that time, in
2 75, I had moved to Moorcroft, Wyoming just previous to
3 that. I had taught at Eagle Butte, South Dakota. And
4 I think I should inform the defense that the Tribal
5 Chief of Police at the time for the Cheyenne River
6 Reservation was at that time my brother-in-law. We
7 never -- by the time -- by 75 he was my ex
8 brother-in-law. So, you know, I have heard from other
9 people about his activities. Very briefly. I know
10 there were interactions there with AIM.

11 You know, we got the Rapid paper in Moorcroft
12 and my family lives in Spearfish. So, you know, I saw
13 some things.

14 **MR. MURPHY:** Anything that stuck in your mind
15 that caused you either to be fearful or to form an
16 opinion about the American Indian movement that is
17 either favorable or not favorable?

18 **PROSPECTIVE JUROR:** Oh, there were things
19 both ways. I had many Native American friends. I
20 attended the Pow Wows. The family into which I had
21 been married was more traditional so, you know, their
22 take on AIM was somewhat negative. They didn't like
23 being told, for example, how to be Indian. You know.
24 It wasn't any -- ever anything personal for me.

25 **MR. MURPHY:** All right.

1 **PROSPECTIVE JUROR:** I should also probably
2 tell you that when I was in Riverton, Wyoming in let's
3 see -- in the 90s probably. It was early 90s. I
4 dated for a time retired FBI Agent Gary Adams. He and
5 I were both in professions that required a high level
6 of confidentiality. I didn't talk about my job; he
7 didn't talk about his. I knew that he was here in
8 Rapid City during the time of the AIM.

9 **MR. MURPHY:** Right.

10 **PROSPECTIVE JUROR:** That was it. We did not
11 talk about his involvement.

12 **MR. MURPHY:** Okay.

13 **PROSPECTIVE JUROR:** So, you know, I had
14 peripheral views and nothing really too much one way
15 or the other.

16 **MR. MURPHY:** All right.

17 Anybody else in the first row?

18 How about the second row?

19 Ms. Lutheran?

20 **PROSPECTIVE JUROR:** I was raised here,
21 basically.

22 **MR. MURPHY:** All right.

23 **PROSPECTIVE JUROR:** So my husband will never
24 move out of this area.

25 So what would you like to know?

1 **MR. MURPHY:** Did you form any opinions during
2 that time about the American Indian Movement?

3 **PROSPECTIVE JUROR:** Well, I was just -- we
4 got married in 72. So, you know, we were young. We
5 had gone through high school. We had our thing we
6 were doing. No, not really.

7 **MR. MURPHY:** Okay.

8 **PROSPECTIVE JUROR:** It wasn't anything
9 negative in that aspect. No. I -- no.

10 **MR. MURPHY:** That's fine.

11 Anybody else in that second row that lived in
12 the area or had experiences with AIM?

13 Okay. Let's go to the third row.

14 Sir, your name?

15 **PROSPECTIVE JUROR:** Barry Winter.

16 **MR. MURPHY:** Okay.

17 Mr. Winter, you lived here or in South
18 Dakota?

19 **PROSPECTIVE JUROR:** Born and raised here.

20 **MR. MURPHY:** Born and raised.

21 What were your experiences with AIM?

22 **PROSPECTIVE JUROR:** They visited our
23 business. I have people on both sides that have
24 people that are -- that we did business with, were
25 partners with, and everything else that were Native

1 American.

2 **MR. MURPHY:** Okay.

3 **PROSPECTIVE JUROR:** But there were also some
4 other ones that I didn't want to be around. There was
5 just a mixture of both.

6 **MR. MURPHY:** Okay.

7 And we're talking about when you say other
8 people you didn't want to be around, were they members
9 of the American Indian Movement or people you believe
10 were supporters of the American Indian Movement?

11 **PROSPECTIVE JUROR:** Well, my experience with
12 them is that they did a lot of things from my point of
13 view that were not right.

14 **MR. MURPHY:** Okay.

15 **PROSPECTIVE JUROR:** And also had some friends
16 that had a business down there in Wounded Knee. What
17 they had to go through because of things that were
18 taking place down there wasn't right.

19 **MR. MURPHY:** And you are talking about -- for
20 those that might not have been here -- the occupation
21 of Wounded Knee in 1973?

22 **PROSPECTIVE JUROR:** Right.

23 **MR. MURPHY:** The American Indian Movement
24 took over that community.

25 **PROSPECTIVE JUROR:** Yeah.

1 **MR. MURPHY:** Your friends, their business was
2 affected?

3 **PROSPECTIVE JUROR:** Right.

4 **MR. MURPHY:** Yeah.

5 Would it be fair to say terminated their
6 business?

7 **PROSPECTIVE JUROR:** Yes.

8 **MR. MURPHY:** Were they ever able to recover?

9 **PROSPECTIVE JUROR:** Yes, they were able to
10 recover through the government.

11 **MR. MURPHY:** Okay.

12 Because AIM is going to be a part of this
13 case and you are going to hear evidence that during
14 the time period in question my client was somebody who
15 supported the American Indian Movement. He lived down
16 in Denver at that time, but he was a supporter.

17 Do you believe that's going to affect your
18 ability to give him the presumption of innocence and
19 to treat him fairly because he's associated with the
20 group that caused damage to your business and you said
21 some of their activities were not positive, even
22 negative.

23 **PROSPECTIVE JUROR:** My experience with AIM is
24 that there is good ones and there is bad ones.

25 **MR. MURPHY:** Okay.

1 **PROSPECTIVE JUROR:** The good ones -- they had
2 a good point of view about some stuff.

3 **MR. MURPHY:** All right.

4 **PROSPECTIVE JUROR:** And then there was others
5 that took it a lot further than I would.

6 **MR. MURPHY:** Okay.

7 So you are willing to look at individual
8 members?

9 **PROSPECTIVE JUROR:** Yes.

10 **MR. MURPHY:** And that's why we're talking
11 about this. We're talking about this kind of in the
12 context of guilt by association. And so appreciate
13 your perspective on that.

14 Let me continue in that row.

15 Anybody else here?

16 Ms. Shelton?

17 **PROSPECTIVE JUROR:** I guess I was really
18 young and I really didn't know anything about it. I
19 never really paid much attention to it. My parents
20 just kind of thought it was -- I don't really know
21 anything about that. I didn't get into it.

22 **MR. MURPHY:** All right.

23 Anybody -- let's go to the back row.

24 Ma'am, your name?

25 **PROSPECTIVE JUROR:** Muriel Anderson.

1 **MR. MURPHY:** Okay.

2 Ms. Anderson, what are your recollections
3 with AIM?

4 **PROSPECTIVE JUROR:** I had just recently moved
5 to the area and so there is a lot of names that I
6 recognize. I remember what happened.

7 **MR. MURPHY:** When you say what happened, what
8 are you referring to?

9 **PROSPECTIVE JUROR:** Snippets in newspaper
10 articles. I don't remember a lot of -- yeah. There
11 was some opinions formed back then and there was a lot
12 of prejudice back then, but it was a long time ago.
13 And I think I have grown up a lot and I think that I
14 can be very open minded.

15 **MR. MURPHY:** Okay. Good.

16 Anybody else in the back row?

17 All right. Let's take a gander over here.
18 Folks, in the front row?

19 Anybody that lived in the area?

20 Ma'am, your name?

21 **PROSPECTIVE JUROR:** Jackie Dittman.

22 **MR. MURPHY:** What were your recollections?

23 **PROSPECTIVE JUROR:** I was pretty young. I
24 just remember my parents about it. It was a big deal.

25 **THE COURT REPORTER:** Mr. Murphy, I can't hear

1 her.

2 **PROSPECTIVE JUROR:** I just remember my
3 parents talking about it. I don't know any of the
4 details. I just recognize the name Russell Means.

5 **MR. MURPHY:** Okay.

6 Didn't form any hard and fast opinions about
7 all AIM people or anything like that in?

8 **PROSPECTIVE JUROR:** Huh-uh.

9 **MR. JACKLEY:** Anybody else here in the front
10 row?

11 Second row?

12 How about the third row?

13 Sir?

14 **PROSPECTIVE JUROR:** I was in high school and
15 college at the time, and from my perspective, the
16 American Indian Movement was created because there was
17 a perception, right or wrong -- I am not going to make
18 that judgment -- that the United States Government was
19 treating the Native Americans unfairly. And there
20 were a lot of bad things that happened.

21 I don't know for sure, but I think the reason
22 that Wounded Knee was taken over was because of the
23 historical -- the Wounded Knee Massacre that happened
24 back in the 1800s.

25 I don't have any issue with AIM per se. But

1 I do have issues with any kind of violence -- violent
2 protestations. There -- our world is a violent place.
3 And more from a perspective of Gondii where he resists
4 and, I believe, in more civil disobedience. And I
5 look at AIM as being a form -- they were created to
6 have civil disobedience to the wrongs that they
7 believed were committed.

8 So I don't have an opinion of what they did
9 was right or wrong other than when it becomes violent,
10 it's wrong.

11 **MR. MURPHY:** Okay.

12 Would you be willing to acknowledge that just
13 because somebody might be part of a group or a
14 supporter of a group, they shouldn't be held
15 responsible for the conduct of everybody in that
16 group?

17 **PROSPECTIVE JUROR:** Definitely not. They
18 should not be held accountable.

19 **MR. MURPHY:** Because you have talked about
20 there is violent activities, but there was also
21 nonviolent activities?

22 **PROSPECTIVE JUROR:** Right.

23 **MR. MURPHY:** All right. Good.

24 Anybody else in the third row?

25 **PROSPECTIVE JUROR:** I was raised here, but I

1 was too young.

2 **MR. MURPHY:** All right.

3 Anybody else who was?

4 Nobody wants to admit they were old enough to
5 remember. I was still in diapers.

6 Let's talk to the back row.

7 Ma'am?

8 **PROSPECTIVE JUROR:** I moved here in 73.

9 **MR. MURPHY:** Right in the start of things.

10 **PROSPECTIVE JUROR:** Yeah.

11 **MR. MURPHY:** Where did you move here from?

12 **PROSPECTIVE JUROR:** Illinois.

13 So we didn't have --

14 **MR. MURPHY:** Yeah.

15 **PROSPECTIVE JUROR:** Caught on to that right
16 away.

17 But a lot of the exposure of what was
18 happening here, we really didn't hear that much when I
19 was growing up. And went to Vermillion so I was on
20 the campus and that was my first exposure to AIM and
21 all the people involved against that organization and
22 everything. So now -- I was young. I work with a man
23 that was a member of AIM for a few years.

24 **MR. MURPHY:** Okay.

25 And, you know, 73, 74, 75, are when things

1 really heated up. There was the courthouse riots in
2 both Custer and Minnehaha County in 74. Seventy-five
3 there was the shoot-out at Jumping Bull, the incident
4 at Oglala where the two FBI agents were killed.

5 Do you recall those instances?

6 **PROSPECTIVE JUROR:** Uh-huh.

7 **MR. MURPHY:** Did it cause you to form at that
8 time any feelings about AIM?

9 **PROSPECTIVE JUROR:** Yes.

10 **MR. MURPHY:** What were the feelings.

11 **PROSPECTIVE JUROR:** I am sure -- I didn't
12 have enough understanding of what was going on. So
13 usually it was just what the media threw at us. The
14 local newspaper and the television stations at that
15 time. And being young, in your 20s you didn't pay a
16 whole lot of attention to what was going, you know, if
17 it didn't really relate to you. I don't have any hard
18 core judgments.

19 **MR. MURPHY:** Okay.

20 Nothing that's carried forward to this day?

21 **PROSPECTIVE JUROR:** No.

22 **MR. MURPHY:** Anybody else in the back row?

23 Well, I am going to ask something kind of
24 related to that. But we talk -- who -- I am not going
25 to ask who here is a member of a political party?

1 **MR. JACKLEY:** Objection, Your Honor.
2 Relevance.

3 **THE COURT:** I don't know where it's going
4 yet, but the moment we're going to take a 15-minute
5 recess in any event and I am going to talk to counsel
6 about something else.

7 Thank you.

8 (Off the record.)

9 **THE COURT:** Let me know when we are all here.

10 **THE BAILIFF:** I believe we're all here, Your
11 Honor.

12 **THE COURT:** Are we ready?

13 **THE BAILIFF:** I think we're good.

14 **THE COURT:** Okay.

15 Folks, we may get real close to five o'clock
16 and have 10 or 15 minutes left to go with your group
17 because we're going to have to bring in another panel
18 tomorrow. But if you are going to stay that extra 10
19 or 15 minutes, you won't have to come in until
20 substantially later tomorrow. I think as investments
21 go, that might be not too bad.

22 I am going to assume, unless I hear
23 otherwise, you are willing to do that. I will
24 likewise try and hold the lawyers to the number of
25 questions. I had one one day say, a few questions,

1 Judge, and I shut him down at 73. So I am promise
2 they will do better than that.

3 **MR. MURPHY:** Yeah. And I am not even going
4 to go down the political route I left off at.

5 I am just going to sum up that topic by
6 asking if there is anybody here who feels that they
7 may judge my client not on what he did, but on the
8 activities of the AIM. That's what I was getting at.

9 Whether it's a political party or an
10 environmental group or advocacy organization, each
11 person should be judged and tried on what they did as
12 opposed to maybe what their leader of their group did
13 or some other members of that group; is that fair?

14 Okay. Good.

15 And by the way, although we're going to try
16 what we can to get this done by 5:15, Tina has
17 instructed me that does not give me permission to talk
18 quicker. And so I am going to keep my pace because I
19 have been yelled at by court reporter since I started
20 practicing about talking too fast.

21 The next and probably the last very sensitive
22 issue -- and we brushed upon it, but we need to go
23 back to it -- is the issue of race. And my client is
24 a member of a Canadian Indian Tribe. Many of the
25 witnesses in this case are going to be Indian. And I

1 need to have that discuss with you.

2 And I am going give you some examples of
3 where race has come up in my own experiences when I
4 think about the voir dire. My 11 year old was a huge
5 fan of the Laura Ingalls Wilder series. She read all
6 of the books in sequence. When she finished with one
7 we would go right down to Borders and get her the next
8 one.

9 Part of her practice was to read out loud.
10 Now, for those of you that have read those books, you
11 know there is some statements in there that are just
12 downright racist. I remember a statement by the
13 mother saying, if she had to choose between wolves and
14 Indians, she would always choose wolves. That's part
15 of our experience. Race and race dynamics are part of
16 our experience.

17 During the summer my daughter and one of her
18 friends from day care wanted to go down to the old
19 Storybook Island area. There is the creek that goes
20 through there, and wander, and get their feet wet
21 because the day care was actually right near there.
22 There was an Indian family sitting on the banks of the
23 creek having a picnic and we were going to walk over
24 because there was a rope there that they could swing
25 out. Not much of a swing because it would be about

1 6 inches of water.

2 As we walked over there, the girl that was
3 with my daughter, who has great parents, is a great
4 kid said I don't want to go over there. I am afraid
5 they will stab me. And I said, who, and she said
6 those Indians.

7 That was something that she had picked up
8 through her environment and it's not right or wrong.
9 It's just part of what she had experienced. We all
10 have prejudices, whether it's gender or sexual
11 orientation or height or race, economics, there is
12 many, many things that we have that we might not be
13 particularly proud about, but this is the time to talk
14 about them.

15 And, you know, when I bring up this topic I
16 am almost always assuming that nobody is going to say,
17 boy, race plays a part in this for me. But I did have
18 a case where it was an aggravated assault case. My
19 client was Indian. And a woman in the juror pool
20 raised her hand and this is what I meant about when we
21 say we appreciate candor. She said, you know, the way
22 I was raised, I was raised out in the Valley, I was
23 raised just to believe that Indian people were not
24 honest, and they were dangerous, and I don't think I
25 could be fair to your client. And I have never

1 appreciated a juror's honesty more.

2 So I need to ask here, any of you -- and
3 again we can have a private meeting if you need.
4 We're all adults -- if the fact of race -- the fact
5 that most of the fact witnesses or many of the fact
6 witnesses are going to be Indian, whether that's going
7 to play any part, favorable or unfavorable, against
8 those witnesses and against my client?

9 Anybody have any feelings at all that they
10 might allow race or race might insert itself into the
11 process?

12 Okay. I am going to take y'all for your
13 word. Nobody has raised their hand. And we'll just
14 hope, together as a community, that we're above
15 allowing those kind of things in the process.

16 We've talked about the burden of proof and I
17 am not going to go book into that. The presumption of
18 innocence. Some those things.

19 One of the things I want to talk to you about
20 is this notion of solving the crime. I'd like you to
21 raise your hand if it would make it easier for you to
22 vote not guilty if I proved to you who did it. I
23 proved -- I got some witnesses together or got one of
24 the state's witnesses to confess on the stand that
25 they did the killing, not John Graham.

1 Would that make it easier for you to vote not
2 guilty than if there wasn't such a confession?

3 Maybe I am not wording that right.

4 Sir, your name?

5 **PROSPECTIVE JUROR:** Matt Almeida.

6 **MR. MURPHY:** Mr. Almeida, would it make it
7 easier if we were able to prove somebody else? I
8 mean, I proved it beyond a reasonable doubt?

9 **PROSPECTIVE JUROR:** Yeah. Obviously if you
10 proved that someone else did it beyond a reasonable
11 doubt, obviously he wasn't the one who did it.

12 But on the flip side, if someone goes up
13 there and says that they did it, and you can't prove
14 it, they can't prove it, and they proved that your
15 client beyond a reasonable doubt committed the crimes
16 that are against him, then it doesn't matter what she
17 said because they proved beyond a reasonable doubt
18 that your client did it.

19 **MR. MURPHY:** That's a good point. I never
20 thought it about it way. Okay.

21 What I'm getting at is we got CSI, there is
22 like 19 different versions of Law and Order and John
23 Grisham novels and movies are some of the most popular
24 in the country. We like to solve the crime, you know.

25 And one of things about this process is my

1 client doesn't have to solve the crime. Often times
2 jurors either want the defense to solve the crime or
3 want to solve it themselves. And that's not the role
4 of the jury.

5 The role of the jury is, again, to look at
6 the evidence that the state has put forward or the
7 evidence that has been presented and say, has the
8 state resolved all reasonable doubts. Have they
9 proven each and every element?

10 I want to address that -- there is not really
11 a lot of questions to ask, but that's part of the s
12 process is to pull back and say, my role isn't to
13 solve the crime. It's to determine whether the state
14 has met it's burden. And that's where the job of the
15 juror ends.

16 And that may not be where you want it ended.
17 As amateur sleuths, you may want to be in the process
18 of either solving the crime yourself or having me
19 solve it. But I don't have that responsibility. I
20 have been doing that 17 years. Never had that perry
21 Mason moment. I am really, really waiting for it, but
22 it just hasn't happened yet.

23 Couple other topics. This courtroom, once
24 you -- once the jury is seated, is probably going to
25 be packed. And it's a public trial. Neither side has

1 any control over who comes. And really, we don't have
2 any control over what happens in the gallery.

3 I need you to know that now because I need to
4 know -- I need to make sure that nobody holds my
5 client or the state possible if there is conduct in
6 galley that is disruptive. And I'm not assuming there
7 is going to be any riots or fights, but just talk or
8 people making comments or anything like that.

9 There has been a couple trials already and
10 everything has been more or less orderly, but there
11 has been times when people have more or less blurted
12 out things. Said thing that are on their minds. This
13 is a pretty contentious case.

14 Knowing that there is going be a packed
15 galley, does anybody have any concerns about their own
16 safety that -- their own safety might be in jeopardy
17 if they sit on this case because it's got this
18 political dynamic that goes back all the way to the
19 70s?

20 All right. The last thing I want to talk to
21 you about is sympathy. One of the judge's
22 instructions is going to be that as a juror you put
23 sympathy and bias aside. You don't decide the case
24 based on who you feel sorry for.

25 Anna Mae Aquash was a relatively young woman

1 in her 30s when she died. She had two daughters that
2 were young. She was a woman and she was a mother.

3 Who here would agree that it's wrong -- raise
4 your hands if it's wrong for anybody to die in an
5 unjustified homicide?

6 Keep your hands raised if you think it's
7 worse for a mother to be killed than a non mother.

8 Got couple hands. You, sir, had your hand
9 raised.

10 Do you think it's worse for somebody who is a
11 mother to be killed than somebody who isn't?

12 **PROSPECTIVE JUROR:** Yeah.

13 **MR. MURPHY:** Okay.

14 And that's a real natural reaction. I was
15 raised by an Irish mother of five boys. She would
16 have been right there with you shaking her head.

17 What -- how do you think that's going to
18 affect your view if this case?

19 **PROSPECTIVE JUROR:** Just like the punishment
20 phase probably. If he gets found guilty. Maybe like
21 the death penalty or something like that.

22 **MR. MURPHY:** I will tell you punishment won't
23 be any part of the jury's process. The jury simply
24 finds guilty or not guilty. Punishment is up to the
25 judge.

1 Do you think that your sympathies for a young
2 mother who was killed are going to cause you to view
3 the evidence differently in a way against Mr. Graham
4 just by virtue of the fact that she was a young mother
5 at the time she was killed?

6 **PROSPECTIVE JUROR:** No.

7 **MR. MURPHY:** Okay.

8 Mr. Almeida, I saw you also had your hand
9 raised.

10 **PROSPECTIVE JUROR:** It's more of a -- we're
11 here to decide if he did it or not from the evidence
12 put forward.

13 That doesn't mean that I can say -- of
14 course, it's going to -- have more of an affect on
15 somebody that's a mother. It's going to have more of
16 a impact on the kids' life so obviously, yeah, it's a
17 little bit worse.

18 **MR. MURPHY:** You can factor that in and it's
19 going to affect?

20 **PROSPECTIVE JUROR:** But it doesn't affect the
21 evidence they put forward of whether he's guilty or
22 not.

23 **MR. MURPHY:** Anybody else in the last two
24 rows thinking as we're talking about this that they
25 may be sympathetic or they may allow sympathy to play

1 into how they view the evidence by virtue of the fact
2 that the person who was kill was a woman and was a
3 mother?

4 Anybody over here that would allow sympathy
5 to get involved or be part of the process?

6 Or do think you should be allowed, as a
7 juror, to consider those kind of factors, whether the
8 person was young or old, rich or poor, mother on non
9 mother?

10 Is that part of the process that the jury
11 should be allowed to consider?

12 Ms. Lutheran?

13 **PROSPECTIVE JUROR:** I don't know -- no, it's
14 not part of the process the jury can consider. It's
15 hard to take sympathy out of anything. Nobody should
16 die.

17 **MR. MURPHY:** Right.

18 **PROSPECTIVE JUROR:** Whatever way that they
19 die.

20 So the sympathy is the fact that the person
21 is no longer with you.

22 **MR. MURPHY:** Right.

23 **PROSPECTIVE JUROR:** In that aspect as far as
24 it judging me, no. I mean, my way, I judge things, I
25 will cry at movies. I will do all those things

1 because that's the type of person I am.

2 But as far as making the judgment, it has to
3 be proven to me.

4 **MR. MURPHY:** Okay.

5 **PROSPECTIVE JUROR:** In that aspect.

6 **MR. MURPHY:** Anybody feel differently?

7 You know, we're almost asking an impossible
8 task. When the instructions are given to you and it
9 says you cannot consider sympathy, when are you doing
10 your deliberations, it's all -- it's part of trying to
11 impose the legal system on humans. But what we're
12 basically asking to you do is do the best job you can
13 and not allow that to affect you.

14 All right. My last question is going to
15 be -- we've covered a lot of topics.

16 Is there anything that I should have asked
17 you or that during the course of the process of voir
18 dire you said, boy, there is something they should
19 know about that we haven't talked about yet that may
20 affect my ability to sit as a juror over the next
21 three weeks?

22 Is there anything at all that I missed or
23 that you think should be brought to our attention, the
24 judge's attention, before I sit down?

25 Mr. Parker?

1 **PROSPECTIVE JUROR:** What about the evidence?
2 Will evidence be brought into this courtroom?

3 **MR. MURPHY:** Yeah. Evidence is testimony,
4 documents -- evidence is anything really, other than
5 what the attorneys say. One of the good parts of the
6 law is you are told whatever we say doesn't matter.
7 It's what you hear from there. What you see on a
8 document or a map or something like that.

9 **PROSPECTIVE JUROR:** What about evidence
10 that's -- that the jury never even knew existed?

11 **MR. MURPHY:** You are going to hear it all
12 here. I mean, and that's --

13 **PROSPECTIVE JUROR:** Because that's one thing
14 I don't like. Where maybe that evidence could save
15 the person from going to the electric chair.

16 **MR. MURPHY:** Like the innocence project and
17 stuff like that?

18 **PROSPECTIVE JUROR:** Right.

19 **MR. MURPHY:** We can't talk too much about the
20 facts.

21 **MR. JACKLEY:** Your Honor, may we approach
22 with respect to that colloquy?

23 **THE COURT:** Yes.

24 (Whereupon, a discussion was then had at the
25 bench and off the record.)

1 **THE COURT:** Let me talk a little bit about
2 evidence because it seems we're going back over some
3 ground we have been over before.

4 Evidence consists of exhibits that I allow in
5 as evidence. There are two kinds. One is
6 demonstrative, just to illustrate a point that isn't
7 evidence. The point it illustrates is the evidence.
8 Exhibits which are offered. For instance they could
9 be a map, they could be photographs, that I let into
10 the record, those things are evidence.

11 You will be allowed to view the exhibits and
12 take them with you into the jury deliberation room.
13 There may be very rare exceptions to that but at the
14 moment I can't think of any that apply here.

15 The only other evidence is the testimony that
16 comes from the mouth of a witness. Period. And those
17 things are all you get. If they are not complete, as
18 my mother would say, is is. That's what you get to
19 live with.

20 It is the objective of the state to put in a
21 complete case. They are not going to leave anything
22 out on purpose. And it's the objective of this trial
23 to present the evidence to you that allows you to make
24 a determination.

25 But once the case is closed, Mr. Jackley

1 rests for the state, Mr. Murphy rests for the defense,
2 and whenever any rebuttal, if there is any, is
3 finished, it's all done.

4 The things counsel say, questions,
5 objections, none of those things are evidence. Their
6 opening statements are not evidence. That's simply to
7 tell you what they believe the case -- the evidence
8 will show. Mr. Murphy may make his opening statement
9 at the start of the trial or may reserve it until the
10 end of the state's case. I have not a clue what
11 Mr. Murphy plans to do. And I expect he will tell us
12 sooner or later. Maybe he won't.

13 The closing arguments are exactly what that
14 says, they are arguments. They are not evidence.
15 They are an attempt to convince you of what each side
16 believes the evidence has shown or not shown. And
17 then you get to go back and decide what it did show
18 and what it didn't show. That's really your job.

19 I will take care of the law. You will decide
20 the facts. Okay. My law -- my job is pretty simple.
21 Yours is pretty hard. My job gets reviewed by other
22 people on occasion from time to time and your decision
23 will control the outcome, folks. And it's your job to
24 do it well and fairly and in accordance with the law I
25 give you. I trust that you will do that.

1 **MR. MURPHY:** I hope that answers your
2 question.

3 Does anybody else have a point that they
4 thought of that might affect their ability.

5 Mr. Harbert?

6 **PROSPECTIVE JUROR:** Yes, sir. The time in
7 which the crime was alleged to be committed, 35 years
8 ago?

9 **MR. MURPHY:** Correct.

10 **PROSPECTIVE JUROR:** Sounds to me like an
11 unusual length of time between the commission of the
12 crime and the bringing a personal to trial. And I
13 don't know how that weighs on anybody else's mind.

14 Why has it taken 35 years to finally come up
15 with the charge?

16 **THE COURT:** I will take care of that.

17 The first response, sir, is it doesn't
18 matter. Okay?

19 **PROSPECTIVE JUROR:** Okay.

20 **THE COURT:** We're dealing with a crime that
21 occurred some time ago. The passage of time does not
22 make it not a crime. Okay?

23 **PROSPECTIVE JUROR:** Okay.

24 **THE COURT:** There may be reasons which are
25 simply not relevant to the issues or the facts you

1 have to decide.

2 You have to decide what happened from the
3 information you get, the evidence you get, 35 years
4 ago. And giving wonderment about the 35 years, why,
5 or putting any importance on that at all is a mistake
6 and takes you beyond your rolls as a jury. Okay?

7 **PROSPECTIVE JUROR:** Yes.

8 Thank you.

9 **THE COURT:** That's not a bad question,
10 however, but my answer, I think, is clear enough to
11 control that.

12 **PROSPECTIVE JUROR:** Yes, sir.

13 Thank you.

14 **MR. MURPHY:** Anything else before I sit down?
15 Ma'am?

16 **PROSPECTIVE JUROR:** Jackie Dittman.

17 I just have a question being it a murder
18 trial, is there any risk to the jurors.

19 **MR. MURPHY:** Do you have a concern that there
20 is any risk to you? I mean --

21 **PROSPECTIVE JUROR:** I would hope not.

22 **MR. MURPHY:** Okay.

23 I guess to the extent that any -- we have had
24 multiple trials in this case. There has never been
25 any harm or violence towards anybody involved in any

1 of the juries or anything like that. So I hope that
2 answers your concern.

3 Is it something that weighs heavily on your
4 mind or might make you think you have to wrote one way
5 or another?

6 **PROSPECTIVE JUROR:** No.

7 **THE COURT:** I have no concern whatsoever for
8 me or the proceedings in the courtroom. And I frankly
9 have no concerns for you.

10 But something should arise, I need to know
11 about it immediately. As far as can happen. Anybody
12 tries to talk to you about this case, you shut them
13 down and you call the courthouse immediately and we
14 will take care of that. Okay?

15 **MR. MURPHY:** And that includes the media?

16 **THE COURT:** That includes the media.

17 Anybody tries to talk to you -- that includes
18 your husband or wives as the case may be. Shut them
19 down.

20 **MR. MURPHY:** And the Court also will
21 appreciate getting that call from the spouse.

22 Ms. Plasencio, you had your hand raised?

23 Would you mind standing up so Tina can hear
24 you.

25 **PROSPECTIVE JUROR:** I wanted to go back to

1 the mother or not mother and the sympathy thing. And
2 I really didn't think about it until you mentioned it.
3 And I have been thinking about it since then.

4 But I feel like someone who is part of a
5 jury, someone who is a mother still might have some
6 sympathy knowing that a young mother lost her life.

7 **MR. MURPHY:** Sure.

8 **PROSPECTIVE JUROR:** You know, and not -- I
9 mean, was not by accident.

10 So I feel like I would have a little sympathy
11 for that knowing that I am a mother and --

12 **MR. MURPHY:** By the way, congratulations. I
13 haven't seen you since you had your child.

14 But, yeah, that's something that I would want
15 to hear about.

16 Do you think it's something that you are
17 going to be able to put aside?

18 If the judge tells you that you shouldn't
19 allow sympathy to be part of your deliberations or
20 your consideration --

21 **PROSPECTIVE JUROR:** Like I said, never
22 crossed my mind until you brought that up and then I
23 really started thinking about it.

24 **MR. MURPHY:** Do you think that's going to
25 stick with you throughout the trial.

1 **PROSPECTIVE JUROR:** I think it might. Yeah.

2 **MR. MURPHY:** How strongly?

3 Because you know there is lots of mothers and
4 lots of fathers in the audience.

5 **PROSPECTIVE JUROR:** I realize that.

6 **MR. MURPHY:** And that's not to diminish your
7 experience in any way. I am just saying there is a
8 lot of parents -- you don't even have to be a parent
9 to love children and to be sympathetic towards
10 children who are left orphaned.

11 Do you think you can -- set that aside and do
12 your best to just consider the evidence that comes
13 from the witness stand or from the exhibits and
14 whatnot and not allow that to --

15 **PROSPECTIVE JUROR:** Yeah. I mean, I would
16 try. I wouldn't want to use that against him just
17 because she was a mother. I don't know the situation.
18 But I would try.

19 **MR. MURPHY:** You would try your best?

20 **PROSPECTIVE JUROR:** Yeah.

21 **MR. MURPHY:** Kind of a hard follow-up, but do
22 you think you are going to be successful in trying?

23 Do you think you can do it?

24 If you are saying I just can't, then let's
25 know that now and I will move to strike.

1 **PROSPECTIVE JUROR:** It's hard to say. When I
2 look at it for my daughter, I wouldn't want that for
3 her.

4 **MR. MURPHY:** Sure.

5 **PROSPECTIVE JUROR:** So I kind of look at it
6 as her daughters -- she no longer there.

7 **MR. MURPHY:** Do you think it might affect
8 your ability to sit fairly in regard to Mr. Graham
9 because the victim of the crime was a mother and left
10 two daughters?

11 **PROSPECTIVE JUROR:** Maybe. Yeah.

12 **MR. MURPHY:** I will move to strike, Your
13 Honor.

14 **THE COURT:** I am sorry?

15 **MR. MURPHY:** I will move to dismiss the
16 juror.

17 **THE COURT:** Do you wish to voir dire,
18 Mr. Jackley?

19 **MR. JACKLEY:** No objection, Your Honor.

20 **THE COURT:** Let me make a point.

21 You have been excused, folks --

22 Anybody here that doesn't have sympathy for a
23 mother and children of that mother, I think there is
24 probably something wrong with you.

25 However, that doesn't mean that somebody, in

1 particular, did it, and it's the job of the state to
2 establish who did do it. And the fact that the mother
3 died, was killed, has little to do with that.

4 The evidence must establish who killed or not
5 establish who killed beyond a reasonable doubt that
6 mother. And the sympathy for the mother makes you
7 decide that somebody charged with it in the absence of
8 proof, that's wrong.

9 I think all of you believe that that's a
10 tragedy and I think all of you believe that whoever
11 did it should be brought to justice. But that who did
12 it must be proved beyond a reasonable doubt by the
13 state's case. And sympathy is not a substitute for
14 doubt -- or for proof, rather.

15 Questions?

16 All right. Thank you, ma'am.

17 **MR. MURPHY:** Anybody else in?

18 **PROSPECTIVE JUROR:** I have a quick
19 clarification.

20 **MR. MURPHY:** Mr. West?

21 **PROSPECTIVE JUROR:** What you were talking
22 about with the trial itself, you know everybody at
23 work where I work knows that I am on jury duty. I can
24 say I am on jury duty. I will be out for three weeks
25 and that's perfectly fine. I don't want to say

1 anything else.

2 Is that a good boundary line to make?

3 **THE COURT:** That's it.

4 Anybody that's paying attention to what goes
5 on and you say that you are in trial for three weeks,
6 knows what trial you are in.

7 **PROSPECTIVE JUROR:** I understand that, but I
8 also don't want to say --

9 **THE COURT:** I mean we give them -- even those
10 who don't read the Journal will know what trial you
11 are in. And that's okay. You don't have to explain
12 it. You just -- the response is, I simply cannot talk
13 to you about it.

14 If it goes beyond that, that's when I want to
15 be called. You are going to have friends and
16 associates just eager to know what's going on. And
17 you have to shut it down right now. Otherwise you are
18 forming opinions, and you can't do that.

19 **MR. MURPHY:** And I said that was going to be
20 my last question.

21 That brings up a point. Is anybody here
22 going to have a hard time -- because one of the
23 instructions the judge will give to the jury that is
24 picked is that during the course of that trial, you
25 are not to read the paper on any article involving

1 this, you are not to watch the news or listen to the
2 radio for any information about the case as it's going
3 on.

4 Some of you may work in the media field where
5 it's just completely impossible for you to avoid that.
6 It may be part of your job or just part of who you
7 are, you are a news junky.

8 Is that going to cause anybody difficulty
9 professionally or personally if you are to abstain
10 from the paper and internet and TV and radio for the
11 next three weeks?

12 **PROSPECTIVE JUROR:** We can't watch the
13 national news at night?

14 **MR. MURPHY:** Not unless --

15 **THE COURT:** How many of you think I am going
16 to say you can read the newspaper?

17 How many of you think -- wrong.

18 How many of you think I am going to say go
19 home and watch the evening news? No.

20 **PROSPECTIVE JUROR:** There is national news
21 and then there is local news.

22 **THE COURT:** That's right. If I were you -- I
23 don't want you watching any of the local news. Okay.

24 **PROSPECTIVE JUROR:** National news?

25 **THE COURT:** That's dangerous.

1 I mean, I simply don't know to what extent
2 this will be picked up nationally. Most of our trials
3 here, it's not going to happen. This one has enough
4 interest that it may appear. And you may accidentally
5 come across it and you may hear about it on the radio
6 if you are listening.

7 You are honor bound to shut it down because
8 later it will be hard to tell where you got this
9 feeling or this information. And none of us deserve
10 of that. Okay.

11 Questions?

12 Yes, ma'am.

13 **PROSPECTIVE JUROR:** Can I have my husband
14 pull out the comics and the cross word for me?

15 I have to do the cross word.

16 **MR. MURPHY:** No problems there.

17 **THE COURT:** Or the Sodoku or whatever that
18 is.

19 **MR. MURPHY:** Thank you very much for your
20 attention. I know it's been a long day. I really
21 appreciate it.

22 I pass for cause, Your Honor.

23 **THE COURT:** Mr. Jackley?

24 **MR. JACKLEY:** May I, Your Honor?

25 **THE COURT:** Yes, you may.

1 **MR. JACKLEY:** Good afternoon.

2 My name is Marty Jackley. I am the Attorney
3 General for South Dakota. I know that it's been a
4 long day. We've been going at this for some time.

5 Fortunate for you there are certain kinds of
6 personalities. Some personalities, if they ask you
7 what time it is, they built you a clock; other
8 personalities when you ask them what time it is, they
9 tell you what time it is.

10 I am going to try to get done by 5:00 or
11 5:15. I will do my best. Okay. So bear with me. I
12 have some important questions to ask so I appreciate
13 your attentiveness.

14 When Mr. Murphy started out a better part of
15 six hours ago, he introduced himself and talked a
16 little bit about himself. The reason he did that is
17 to try to pick your brain to see if there is anything
18 in your background that you can think of to see
19 whether or not there is any business dealings or
20 anything that you had with him. So I am going to do
21 the same thing.

22 I grew up in Sturgis. My dad is Mike
23 Jackley. He's a long time lawyer in Sturgis. He was
24 also a prosecutor.

25 Any of you know or had any dealings with Mike

1 Jackley out of Sturgis? Makes it easy.

2 You know, when you ask that questions you
3 hope he hasn't prosecuted somebody.

4 When I -- when I was finished with law
5 school, I became a lawyer and practiced here if Rapid
6 City at a law firm named Gunderson Palmer Goodsell and
7 Nelson. It's name has changed a little bit.

8 But have any of you had any business dealings
9 with that law firm, anything of that nature that
10 either I or Mr. Murphy should know about?

11 Ma'am?

12 **PROSPECTIVE JUROR:** Are you asking personal
13 or business?

14 **MR. JACKLEY:** Let me ask you this.

15 If you've had any dealings with Gunderson
16 Palmer that you think Mr. Murphy or I should know
17 about in trying to analyze whether or not you would be
18 a fair juror.

19 **PROSPECTIVE JUROR:** No.

20 **MR. JACKLEY:** Okay.

21 Prior to becoming attorney -- I am sorry.

22 **PROSPECTIVE JUROR:** Shelly Broderick.

23 My sister-in-law works at Gunderson Palmer.

24 **MR. JACKLEY:** Anything about that that will
25 have any effect on you sitting in judgment here today

1 either with respect to the state or with respect to
2 Mr. Graham?

3 **PROSPECTIVE JUROR:** No.

4 **MR. JACKLEY:** Okay.

5 Sir?

6 **PROSPECTIVE JUROR:** I manage the IT company
7 that supports their network.

8 **MR. JACKLEY:** Okay.

9 Again, same question. Anything about that
10 working at Gunderson Palmer and my prior relationship
11 as a partner there have any affect on your sitting as
12 a potential juror?

13 **PROSPECTIVE JUROR:** No, sir.

14 **MR. JACKLEY:** Anybody else?

15 Okay. After I was done in private practice
16 here in Rapid City I became the United States Attorney
17 and, of course, Bob Mandel is with the United States
18 Attorney's Office.

19 Is there anything about my time as the U.S.
20 Attorney or the Attorney General's office that causes
21 you any concern that would prevent you from being fair
22 either to the state of South Dakota or to Mr. Graham?

23 And finally, now, in my capacity as Attorney
24 General, I represent the State of South Dakota.

25 Is there anything in that background of me

1 being representative of the state that would cause you
2 any concern?

3 Do you have any dealings with the state that
4 you think would be important for either Mr. Murphy or
5 I to know?

6 **PROSPECTIVE JUROR:** Does working for them
7 matter?

8 **MR. JACKLEY:** We talked -- I heard you talk
9 earlier.

10 Anything -- anybody else that would have any
11 relationship with the state that you think we should
12 know about?

13 I know we went through a lot of names and a
14 lot of witnesses. And I need to go through a couple
15 more. They are not necessarily going to be witnesses
16 in the case. Their names may come up and it may
17 trigger something in your memory, a potential bias.
18 That's why I ask the questions.

19 You have been introduced to the lawyers here
20 today. There may be a few more lawyers involved in
21 either representing a witness or another other aspects
22 of case and I just want to go through them.

23 If you know them, would you please raise your
24 hand and we can talk about that. And when I say know,
25 if you recognize the name, it's no concern; but if

1 you've had any business dealings or you have had a
2 type of relationship which may affect your judgment
3 then I would ask that you raise your hand.

4 The first one is Dana Hanna?

5 How about Jim Leach?

6 Greg Erlandson?

7 How about Bob Van Norman?

8 How about Judge John Schlimgen out of Sioux
9 Falls? Okay.

10 We talked about a lot of witnesses. Let me
11 ask you about the victim in this case, Annie Mae
12 Aquash. Understanding that she died in the 1975, 76
13 time frame.

14 Did any of you happen to know Annie Mae
15 Aquash prior to her death?

16 How about either of her two daughters, Denise
17 Maloney? Does anybody know Denise?

18 How about Debbie Pictou? Anybody know
19 Debbie?

20 Okay. A couple of potential witness or names
21 that may come up during the trial. If you could give
22 me a hand signal in you know these individuals.

23 Angie Palfy?

24 Richard Two Elk.

25 John Trudell?

1 Bruise Ellison? He is also an attorney here
2 in town?

3 Loralie Decora?

4 You guys are making it easy for me.

5 Bill Means? He also goes by Kills Means.

6 **PROSPECTIVE JUROR:** I don't have -- as an
7 acquaintance, kind of, in college. You know, my
8 maiden name was Carr. We occasionally sat within a
9 few desks of each other in class. I never really knew
10 him, just who he was.

11 **MR. MURPHY:** Did you know him as Russell
12 Means' brother?

13 **PROSPECTIVE JUROR:** Later.

14 But I knew that he was, but, you know, by
15 then I was out of college and gone. So I guess -- I
16 guess what I'm saying -- you know, I went to the
17 college library, and once in a while he would come
18 around behind the stacks and say, whoo.

19 **MR. JACKLEY:** His name may come up in the
20 trial -- not testify, but his name may come up in the
21 trial.

22 Anything based on that prior knowledge keep
23 you from being a fair juror either to Mr. Graham or to
24 the State of South Dakota?

25 **PROSPECTIVE JUROR:** You know, I don't think

1 so because, like I said, it was why I knew who he was
2 and we -- we passed in the hall and would say hi, you
3 know. Once in a while he would show up in the
4 library. But you know, other than that --

5 **MR. JACKLEY:** And even based upon that prior
6 association, do you think you can sit in fair judgment
7 when witnesses testify and listen to the testimony and
8 judge it to the best that you can in?

9 **PROSPECTIVE JUROR:** Oh, yeah. He was just
10 another one of -- you know, you have your friends and
11 then there are a lot of people that you just say hi
12 to.

13 **MR. JACKLEY:** And that's all that we can ask
14 of you.

15 **PROSPECTIVE JUROR:** Yeah. I would have no
16 basis to judge him.

17 **MR. JACKLEY:** Okay.

18 How about his other brother Ted Means? Does
19 anybody know Ted Means?

20 Dennis Banks? Anybody know Dennis Banks?

21 How about David Hill? Does anybody know
22 David Hill?

23 And lastly, Leonard Crow Dog. Does anybody
24 know him?

25 Okay. I think it was Ms. French who knew Ray

1 Hand Boy.

2 Do you recall that?

3 **PROSPECTIVE JUROR:** Yeah.

4 **MR. MURPHY:** Ray Hand Boy was married to
5 Evelyn Bordeaux. Evelyn has since passed. Does that
6 help?

7 **PROSPECTIVE JUROR:** That's not the right one.

8 **MR. JACKLEY:** Okay.

9 The other question I had -- Ms. Little, are
10 you any relation to Peggy Little that used to be at
11 the U.S. Attorney's Office?

12 **PROSPECTIVE JUROR:** I am married to a Little.

13 **MR. JACKLEY:** Okay. Okay.

14 You have heard the judge talk a little bit
15 about it and Mr. Murphy talked quite a bit about it
16 that this is a murder case; a felony murder kidnapping
17 case.

18 I am not allowed to talk about sentencing
19 issues other than I can say that this is not a capital
20 case or a death penalty case. So you don't have to
21 worry about any of those type issues, okay?

22 With respect to any other sentencing issues,
23 that is going to be left solely to the judge.

24 So can I see a hand of those of you that will
25 accept that and put sentencing out of your mind and

1 just leave that up to the judge?

2 Everybody agree with that concept in?

3 Okay. This is a murder case. You know, we
4 don't know what evidence you will see yet. But it's
5 plausible that there could be some graphic evidence.
6 The lawyers will try to be respectful on what is
7 introduced. Much of it may come through x-rays or
8 other things, but you may see some graphic evidence.
9 And I just need to tell you up front about that.

10 Does that concern anyone that there may be
11 more graphic evidence that we need to talk about?

12 We're okay with that?

13 Okay. Mr. Murphy touched on it a little bit
14 with a couple questions about the fact that this is a
15 1975 case. And I know that the question came up --
16 there is no statute of limitations with respect to
17 murder. I need to ask you with respect to that
18 concept. And the judge talked to you a little bit
19 about the rule of law and that it doesn't matter about
20 1975.

21 But my question to you is, does that concern
22 anybody?

23 Does anybody have a concern about the fact
24 that a case this old can be brought?

25 If you'd raise your hand and we can talk

1 about it if you have a concern about that concept.

2 Everybody is okay?

3 Can I see a raise of hands of those of you
4 that will treat this 1975 murder case just like you
5 would any other murder case coming from two years ago?

6 Can I see a show of hands?

7 Okay. I think we covered this in pretty good
8 detail with the media coverage. And I know the judge
9 has instructed you to not look at any additional media
10 coverage that may come about the case.

11 But I look back and I understand that we all
12 come to the jury pool with life experiences. We can't
13 take that away from you. You see certain things and
14 really those life experiences can -- is what makes a
15 jury strong.

16 Is anybody -- when you -- when we talk about
17 the media coverage, the Aquash case, anything that you
18 are seen, does that cause you any cause or concern
19 that you want to talk to me further about?

20 Anything that you have read, anything that
21 you've saw, anything of that nature, that you feel I
22 should know about as the lawyer for the state?

23 **THE COURT:** We're about 5:15.

24 **MR. JACKLEY:** Everybody agree, then -- can I
25 see a show of hands that you will judge this case not

1 based upon what you read in the newspaper or the TV,
2 but you will base it upon what you have see from the
3 witness stand?

4 Can I see a show of hands of those of you
5 that will do that? Thank you.

6 Mr. Murphy talked a little bit about the
7 indictment and the charge of murder and felony murder
8 kidnapping. I want to talk to you about the concept
9 of aiding and abetting.

10 And with all of the legal matters that
11 Mr. Murphy and I have talked about, we would
12 anticipate that the judge would give you a more
13 detailed instruction on the exactness of the law.

14 My goal here is to just have a general
15 discussion about the topic and then to talk to any of
16 those of you that may have a concern about that topic.

17 Aiding and abetting, generally, is a concept
18 that a defendant has to know a crime was being
19 committed and knowingly participate in that crime. If
20 that happens, then a defendant is held responsible for
21 the crime just like the principle offender.

22 I will give you an example. The most common
23 example would be a robbery. I am going to pick on
24 Mr. Mandel and Mr. Oswald. Let's assume they are
25 going to rob a bank. And Mr. Oswald is going to be

1 the driver and Mr. Mandel is going to go in and rob
2 the bank. So they pull up. Mr. Oswald has got the
3 getaway vehicle. Mr. Mandel goes in. He robs the
4 bank, comes out, Oswald and Mandel take off.

5 Mr. Oswald aided and abetted. He knew that a
6 crime was being committed and he knowingly
7 participated. He helped out in the crime.

8 Does anybody have a problem with that general
9 concept that if you didn't do the full act, you
10 shouldn't be held responsible?

11 Can I see a show of hands of those of you
12 that think Mr. Oswald, you know, if instructed on
13 aiding and abetting, should be just as responsible as
14 Mr. Mandel in that scenario?

15 Can I see a showing of hands?

16 **PROSPECTIVE JUROR:** That he should be?

17 **MR. JACKLEY:** That he should be.

18 We had about an hour discussion on reasonable
19 doubt. And it's dangerous for me to go back into it,
20 but it's a very important concept. And it's one that
21 the judge is going to give you further instructions
22 on. I know there were a lot more questions kind of
23 coming towards that, what is reasonable doubt.

24 And understanding the judge will instruct on
25 that, I want to read you a sentence regarding it and

1 then ask you whether or not you can follow this
2 general concept. Proof beyond a reasonable doubt is
3 proof that leaves you firmly convinced of the
4 defendant's guilt. There are very few things we know
5 with absolutely certainty. In other words, reasonable
6 doubt is not an absolutely certainty.

7 If you are given an instruction along those
8 terms, would you be able to follow it?

9 Can I see a showing of hands of those of you
10 that would be able to follow it?

11 Okay. Is there anybody in this jury that
12 would require the state to prove beyond all doubt?

13 Okay. I want to take a minute -- and there
14 was a question a little bit ago about evidence, and
15 the judge gave a little further instruction on that
16 and I want to talk to you about two types of evidence,
17 direct and circumstantial evidence.

18 And again, as with all of these questions, I
19 would anticipate that you may receive more information
20 from the judge on it, but I want to just talk to you
21 about a concept. I want to -- and maybe I will do
22 this through example what direct evidence is.

23 I am going to use a stabbing example. Once
24 again, I am going to pick on Mr. Mandel and
25 Mr. Oswald. And let's assume Mr. Mandel is in his

1 house and Mr. Oswald goes in, and I am sitting there,
2 and I watch Mr. Oswald stab Mr. Mandel. I have seen
3 direct evidence. I mean, I am a witness. I saw it
4 happen. My testimony would be direct evidence of the
5 crime happening. You don't have to draw any
6 inferences from that.

7 Taking the example a little further in
8 dealing with circumstantial evidence, I am going to
9 use the same players. Although this time instead of
10 me being in the house witnessing it, I am in the front
11 yard. I am able to say that I know that Mr. Mandel is
12 in the house. He's the only one in the house. I see
13 Mr. Oswald run in the house with the knife. I hear
14 Mr. Mandel screaming. And I see Mr. Oswald run out of
15 the house with a bloody knife.

16 Now, I -- I am not direct evidence of exactly
17 what happened in there. But I can testify to the
18 circumstantial evidence of just that, that there was
19 only two people in the house; I heard screaming; and I
20 seen Mr. Oswald with a bloody knife. The jury from
21 that can draw inferences from that that a stabbing
22 occurred and who did it.

23 Now, I need a -- to see a show of hands of
24 those you, would you feel you would be able to use
25 common sense when it comes to drawing inferences or

1 viewing circumstantial evidence.

2 Would everybody be able to use common sense?

3 I am always hesitant to ask the question
4 about CI shows because I don't get to watch them at
5 home because my wife says, you yell at the TV about
6 how that can't really happen. I am probably not an
7 expert on it, but it came up in previous questions so
8 I need to ask a couple questions regarding it.

9 Let me see a show of hands of how many of you
10 watch CSI or Law and Order or those type of shows.
11 Everybody but lawyers get to watch those. There was a
12 few hands go up.

13 Under most circumstances, legal issues,
14 unless there is like a voluntariness on Miranda and
15 search and seizure, those are all dealt with by the
16 judge ahead of time, and the lawyers.

17 So for the most part in a jury trial, unless
18 the jury specifically instructs you on a particular
19 voluntariness-type issue, you know, you won't be
20 dealing with Miranda, you won't have to be wonder
21 whether somebody was given Miranda. You won't have to
22 be wondering whether or not there should have been a
23 search warrant for something. We will already have
24 resolve those issues.

25 Everybody understand that?

1 Anybody going to be disappointed that it's
2 not like CSI where we're fighting about Miranda and
3 stuff you will be okay with that?

4 Okay. Similarly, this is a 1975 case. Many
5 of the forensic shows and the CSI there is all kinds
6 of DNA and smoking gun issues and those type of
7 things. You know, I don't anticipate that you are
8 going to necessarily see that in this case.

9 Again, does -- are you till going to be able
10 to view the evidence that you view and place weight
11 into that evidence without seeing fancy
12 forensic-file-type evidence?

13 Will you be able to do that?

14 Can I see a showing of hands?

15 Now, a question had come up -- I am -- I want
16 to be careful not to pick on somebody too much -- a
17 question had come up. I think it was -- was it you
18 regarding you had been on a jury before?

19 **PROSPECTIVE JUROR:** Yes, sir.

20 **MR. JACKLEY:** Okay.

21 And the question come up and I think you said
22 it was a murder jury.

23 **PROSPECTIVE JUROR:** Uh-huh.

24 **MR. JACKLEY:** And that only one witness had
25 testified and you would feel more comfortable if there

1 would have been two witnesses.

2 Is that a fair characterization?

3 **PROSPECTIVE JUROR:** Yes.

4 **MR. JACKLEY:** I am not picking on you but let
5 me talk about that concept with respect to the long
6 discussion we had about presumption of innocence and
7 reasonable doubt. I appreciate that the state bears
8 the ultimate burden of proof in this case; that the
9 state bears the burden to prove beyond a reasonable
10 doubt that the certain elements of the offense
11 occurred. And the presumption of innocence exists
12 until such time as the state proves beyond a
13 reasonable doubt all of the elements. And then the
14 presumption goes away.

15 If we're going to do that with one witness --
16 I am not suggesting that it's only going to be one
17 witness -- under the law, if the state is able to
18 prove beyond a reasonable doubt with one witness, and
19 the judge instructs you that under the law you must
20 convict if it's proven beyond a reasonable doubt,
21 would you be able to do that even though you had that
22 prior experience?

23 **PROSPECTIVE JUROR:** No. No. I believe there
24 would have to be two witnesses.

25 **MR. JACKLEY:** There would have to be two

1 witnesses?

2 **PROSPECTIVE JUROR:** Right.

3 **MR. JACKLEY:** That comes from that previous
4 matter that you sat on?

5 **PROSPECTIVE JUROR:** Right.

6 It also just comes from my personal
7 experience with having been found guilty by one
8 witness who said something different than I did and
9 people accepted his testimony rather than mine. So
10 that's why I believe there has to be two witnesses.

11 **MR. JACKLEY:** I will come back to that
12 example.

13 Let me use the example I did with direct and
14 circumstantial evidence. Where I am the witness and I
15 am sitting at the kitchen table. Mr. Oswald comes in
16 and stabs Mr. Mandel. And you know there is only
17 going to be one witness to it because in this example
18 Mr. Oswald didn't survive the stabbing. I am the only
19 witness and I come in and testify and you are sitting
20 there as a juror.

21 And even though you feel -- the state proved
22 beyond a reasonable doubt that all of the elements for
23 that stabbing murder were there, you still would not
24 be able to convict?

25 **PROSPECTIVE JUROR:** Well, you are talking

1 about one eyewitness and then you mentioned
2 circumstantial evidence after that.

3 **MR. JACKLEY:** You would be willing to
4 consider that circumstantial evidence?

5 **PROSPECTIVE JUROR:** Right. That would be
6 part of being a witness against the accused.

7 **MR. JACKLEY:** And you would be able to draw
8 reasonable inferences from that circumstantial
9 evidence?

10 **PROSPECTIVE JUROR:** Right.

11 **MR. JACKLEY:** And you would be willing to use
12 your common sense in drawing those inferences?

13 **PROSPECTIVE JUROR:** Yes.

14 **MR. JACKLEY:** That's all I can ask. Thank
15 you.

16 This came up in earlier questioning, the
17 issue of plea agreements. It was talked about with
18 Thelma Rios and, you know, it was further kind of
19 talked about a little bit with Arlo Looking Cloud.

20 I want to talk to you for a minute about plea
21 agreements. Plea agreements are a deal where a
22 defendant and the government reach an agreement and
23 there is a resolution made short of trial. It's a
24 fairly common practice. I want to ask you about your
25 feelings for -- about it.

1 Does anybody have concerns with plea
2 agreement practice?

3 In other words, does anybody sitting here
4 think that's absolutely wrong?

5 There should be no reason why the government
6 should reach a plea agreement?

7 Everything should go to trial?

8 Anybody have that type of belief?

9 Okay. Now, often times with plea agreements,
10 or deals there -- there is a benefit exchanged between
11 the government and a potential witness. And you will
12 likely hear some evidence of that at trial.

13 Are all of you willing to at least view that
14 evidence with an open mind as to what the witness is
15 saying and what potential benefits may exist for the
16 witness?

17 Will you look at that with an open mind?

18 Can I see a showing of hands?

19 Okay. Is anybody here of the belief that --
20 that because there is a plea agreement, there is no
21 way in heck you are going to listen to word one from
22 that witness at all?

23 I mean, does anybody have that kind of
24 belief?

25 Okay. The indictment in this matter -- and

1 it will be read as the judge had indicated by me at
2 the time of opening statement. And it talks about on
3 or about a certain date. And I would anticipate that,
4 again, the judge will give further instructions, but
5 that the state does not have to prove an exact date
6 and time.

7 In other words, we don't have to prove that
8 something happened on December 11 at 8:15. We have to
9 prove on or about.

10 Does that concern anybody?

11 The fact that we don't have to be -- have to
12 have that kind of exactness. That it can be on or
13 about.

14 Does that cause any problems or concern?

15 Is everybody telling me -- can I see a show
16 of hands of those of you that will be willing to
17 follow the judge's instruction on the on or about
18 part?

19 Thank you.

20 Another topic that I need to be very careful
21 about, Mr. Murphy asked some questions about race and
22 I feel the need to do just a little bit of follow up.
23 I am very appreciative of the way that everybody
24 answered that, but I need to also ask it a little
25 further.

1 He asked it about the defendant. And the
2 victim in this case, Annie Mae Aquash, is a Native
3 American person.

4 Does that in any way affect anybody's
5 judgment on how they will view this case and the
6 evidence whether she's Native American or non Native
7 American?

8 Does everyone here believe that a Native
9 American should be treated just the same that a non
10 Native American should be?

11 Thank you.

12 We also had a lot of discussion about AIM.
13 AIM stands for the American Indian Movement. I will
14 tell you right now that AIM is not on trial. AIM is
15 not going to be an essential element of the offense,
16 but it's become part of the discussion.

17 Again, we all come to this courtroom with
18 experiences in life. You may have read something
19 about AIM. You may have seen something about AIM. I
20 am sure the word AIM will be discussed a little bit in
21 the courtroom.

22 But did anybody have any specific run-ins
23 with AIM or specific issues with AIM in addition to
24 what you talked about with Mr. Murphy that you think I
25 should know about that would prevent you from sitting

1 in fair judgment to either the defendant or the State
2 of South Dakota?

3 I am just kind of going to close out. I got
4 about two or three more little areas to talk about. I
5 represent the State of South Dakota; and you know, you
6 will be hearing from law enforcement officers.

7 I need to ask you the question, have you ever
8 had any run-ins with law enforcement or issues with
9 law enforcement that you think would affect your
10 judgment in this case?

11 You are just mad as heck that you got that
12 speeding ticket or you felt you weren't treated
13 fairly?

14 Anything that would spill over and affect
15 your judgment as with respect to either me as the
16 lawyer or with respect to any of the law enforcement
17 officers that testify?

18 Okay. I need to ask you kind of the catchall
19 question that Mr. Murphy asked. This is the last time
20 I am going to be able to talk to you for a while. The
21 next time really you will see me again is at opening
22 statement if you are selected for the jury.

23 So it's been a long day. Have there been any
24 questions that you think either Mr. Murphy or I should
25 have asked that you think would be important if you

1 are standing in my shoes to know about in representing
2 the state or if you are standing in Mr. Murphy's shoes
3 representing Mr. Graham?

4 Anything in your backgrounds or that we
5 talked about today that you want to ask me about or
6 that you feel we should know about?

7 Kind of the catchall question.

8 Sir?

9 **PROSPECTIVE JUROR:** I know most of the guys
10 in public safety down on Pine Ridge and the BIA
11 criminal investigators and stuff. But I mean none of
12 them were around at this time so shouldn't have any
13 affect.

14 **MR. JACKLEY:** I think the only two would have
15 been around are --

16 **PROSPECTIVE JUROR:** Ecoffey, Bob, was around.

17 **MR. JACKLEY:** Ecoffey and Mitch Pourier.

18 **PROSPECTIVE JUROR:** Yeah.

19 But the rest of them ain't.

20 **MR. JACKLEY:** Anything about working there --

21 **PROSPECTIVE JUROR:** They have never discussed
22 any of this.

23 **MR. JACKLEY:** Okay.

24 No concern to you?

25 **PROSPECTIVE JUROR:** Not really.

1 **MR. JACKLEY:** Okay.

2 Anything else that I should have asked you --
3 I am kind of asking to you do my job for me.

4 **PROSPECTIVE JUROR:** I used to work for -- I
5 used to work in law enforcement. I don't know if that
6 had any bearing.

7 **MR. JACKLEY:** It has no bearing.

8 Let me ask you anything about those
9 experiences that would affect the way that you would
10 fairly judge the evidence as it would come in in the
11 trial?

12 **PROSPECTIVE JUROR:** No.

13 **MR. JACKLEY:** Okay.

14 Anybody have anything else that we should
15 know about?

16 I am going to take just a second and talk to
17 my co-counsel and -- if that's okay -- Your Honor?

18 **THE COURT:** Absolutely.

19 **MR. JACKLEY:** Your Honor, the State of South
20 Dakota would pass for cause.

21 **THE COURT:** Mr. Jackley underestimates
22 himself. He told me it would take an hour or more.
23 He did very well.

24 Ladies and gentlemen, what we're going to do
25 is one o'clock tomorrow, 1:15 or these folks maybe

1 later?

2 Mr. Murphy?

3 **MR. MURPHY:** There is only going to be 34.

4 **THE COURT:** We have 34, but I am going to
5 have other panels for -- they are going to get
6 oriented.

7 **MR. MURPHY:** What time are we starting?

8 **THE COURT:** We're going to start about 8:30.
9 The other panel, in addition to the 34, will be
10 oriented by then so we can bring in another panel
11 besides that. Should give us enough.

12 Our difficulty is how many more we can seat
13 so if we have these folks come in 3:00 o'clock.

14 **MR. MURPHY:** I would say 2:00 o'clock.

15 **MR. JACKLEY:** Yeah.

16 **THE COURT:** We're going to continue jury
17 selection for the additional jurors to make up the
18 necessary 56, with panels coming in tomorrow morning.
19 Following that, of course -- we will have a complete
20 jury plus the additions to come to 56 -- at that time
21 we will start the peremptory challenge process which
22 means eventually all but 14 of you will be set free at
23 that time.

24 So when we'll start that precisely, folks, I
25 don't have a clue, but certainly not before

1 2:00 o'clock. And if you would be back here at
2 2:00 o'clock, we may have you sitting in a jury room
3 or another courtroom until such time as we're ready do
4 that.

5 But I think that's a fair estimate of the
6 time it will take. So if you will be so kind as to
7 come back at 2:00 o'clock, remembering the instruction
8 about news, newspaper, and simply shutting down
9 conversation. If somebody is pushing you, let me
10 know.

11 Yes, ma'am?

12 **PROSPECTIVE JUROR:** So we should know by the
13 end of tomorrow if we're staying?

14 **THE COURT:** I want you back here reporting to
15 the bailiffs at 14:00, 2:00 o'clock.

16 **PROSPECTIVE JUROR:** Ten four.

17 **THE COURT:** Yes, sir.

18 **PROSPECTIVE JUROR:** When will we know if
19 we're one of the 14.

20 I think that's what she's asking.

21 **THE COURT:** You will know that some time
22 tomorrow or Wednesday, depending on how far we get
23 tomorrow. We originally expected this to take until
24 Friday, and we're way ahead of schedule.

25 That's -- all I can say is, thank you, folks,

1 for where we are.

2 Thank you for your patience.

3 (Whereupon, the proceedings in this matter
4 were then concluded.)

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1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
 2 COUNTY OF PENNINGTON)

3

4 I, TINA RAE PRUSS, Official Court Reporter
 and Notary Public in and for the County of Pennington,
 5 State of South Dakota,

6 DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 7 questions asked, the testimony given, and of the
 proceedings had.

8 I FURTHER CERTIFY that I am not of kin or in
 9 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 10 interested in the event thereof.

11

12 IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.

13

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14

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16 Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 17 Pennington County, South Dakota
 My Commission expires: 10-04-2012

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
)
Plaintiff,)
)
VS.)
)
)
JOHN GRAHAM,)
)
)
)
)
Defendant.)

TRANSCRIPT OF
JURY TRIAL

VOLUME 2 OF 10

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
NOVEMBER 30, 2010

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* * A P P E A R A N C E S * *

MR. MARTY JACKLEY
Attorney General
MR. ROD OSWALD
Assistant Attorney General
MR. ROBERT MANDEL
Assistant U.S. Attorney
Representing the State of South Dakota

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

* * I N D E X * *

WITNESS (ES) : DIRECT CROSS REDIRECT RECROSS

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EXHIBITS:

OFFERED/ADMITTED

(None.)

1 * * P R O C E E D I N G S * *

2 (Whereupon, the following proceedings were
3 had in chambers outside the presence of the
4 perspective jury panel.)

5 **THE COURT:** We're here for my ruling on the
6 motion to quash the subpoena for the appearance of
7 Mr. Marshall.

8 Mr. Hanna?

9 **MR. HANNA:** Your Honor, I submitted filings
10 to you --

11 **THE COURT:** I got it.

12 **MR. HANNA:** -- which I presume you got.
13 Those --

14 **THE COURT:** I have questions. What's the
15 statute of limitations at Pine Ridge?

16 **MR. HANA:** I am not sure about the statute.

17 **THE COURT:** Why not?

18 **MR. HANA:** However, I will say this --

19 **THE COURT:** No. I asked a question.

20 **MR. HANNA:** All right.

21 **THE COURT:** The statute of limitations
22 appears to be one year, which would indicate it ran
23 some 35 years ago. And if you are not sure of it, I
24 want to know why you are not sure of it.

25 I have wasted -- I've spent three hearings on

1 this and nobody gives me the statute of limitations
2 until 4:00 o'clock last night.

3 **MR. HANA:** Judge, the statute of limitations
4 would not necessarily bar a prosecution in this case.

5 I would remind the Court that three weeks ago
6 Thelma Rios plead guilty to accessory to kidnapping in
7 a document -- or accusatory instrument that stated the
8 crime took place between 1975 and 2009. Therefore, a
9 prosecutorial theory could accommodate an ongoing
10 crime that began in 1975 --

11 **THE COURT:** I don't accept that.

12 **MR. HANA:** You accepted it three weeks ago,
13 Your Honor.

14 **THE COURT:** What I did in the plea agreement
15 has nothing to do with this case. The statute of
16 limitations --

17 What's the penalty for homicide in the Tribal
18 Court?

19 **MR. HANA:** One --

20 **THE COURT:** What's the penalty?

21 **MR. HANA:** The maximum is a year. The
22 federal law has just been changed to allow Tribal
23 courts to impose a three-year sentence.

24 **THE COURT:** Why doesn't the Major Crimes Act
25 have, according to its terms, the exclusive

1 jurisdiction over this?

2 **MR. HANA:** It does not have exclusive
3 jurisdiction. Tribal courts have jurisdiction over
4 the same -- they are -- there are dual sovereignties.

5 **THE COURT:** Doesn't the major crimes act
6 state it has the exclusive jurisdiction?

7 **MR. HANA:** No, it does not.

8 It states it has exclusive jurisdiction as
9 opposed to states, but the United States Supreme Court
10 has decided in cases involving *Wheeler* and United
11 States against *Lara*, L-A-R-A, the tribes and federal
12 prosecutions and the federal government are dual
13 sovereigns.

14 **THE COURT:** I think they did not address that
15 issue although they could have is my recollection of
16 those cases.

17 **MR. HANA:** That is not my recollection of
18 those case.

19 Those cases definitely say that the tribe --
20 that the tribe and the federal government, just as a
21 state and the federal government, can bring the same
22 case based upon the same evidence. Double jeopardy
23 does not apply because they are dual sovereignties.
24 So the Major Crimes Act doesn't say homicide can only
25 be prosecuted in federal court.

1 **THE COURT:** Well, my conclusions are these.
2 Number one, that as far as the other states going
3 anywhere, would be unconstitutional for them after
4 immunity is granted here to prosecute or attempt to
5 prosecute Mr. Marshall.

6 Number two that Pine Ridge has no continuing
7 jurisdiction over this crime. The statute of
8 limitations ran some 30 plus years ago.

9 And I am somewhat concerned that nobody
10 bothered to give me the statute of limitations some 30
11 years ago -- or when we started this, a one year
12 statute of limitations on homicide.

13 It's my understanding --

14 **MR. HANA:** A conspiracy --

15 **THE COURT:** I understand the laws on
16 conspiracy, and I don't believe that this falls within
17 the categories of conspiracy. And I think that
18 Mr. Graham is going to be tried on the events that
19 happened 35 years ago and not on some sort of a
20 conspiracy that continues up and through his trial.

21 Now, it has to be in furtherance of the
22 criminal act and there is all kinds of ifs, whats, and
23 whys about conspiracy and I don't believe it applies
24 to this.

25 And I believe the immunity given Mr. Marshall

1 is sufficient to protect him. And if we're talking
2 about the dual sovereignty, I see there is no
3 difference between the tribe and foreign countries.
4 In indeed, many of our cases indicate that. The
5 Uniform Child Custody Jurisdiction Enforcement Act
6 treats the tribes as foreign countries and it applies
7 to them just as it applies to us.

8 And in terms of that, if the Fifth Amendment
9 does not apply in Germany, it's hard for me to believe
10 it applies here with a separate sovereign nation. And
11 the sovereign nation is there, the states -- if not
12 the federal government has it -- I am going to hold
13 here as a matter of law that Mr. Marshall under
14 immunity must testify.

15 **MR. HANA:** Judge, that brings us to the next
16 issue, which is, I have raised a motion to quash issue
17 on the grounds that the prosecutor is attempting to
18 make Richard Marshall testify for improper reasons;
19 that he -- that it is punitive. And as there is a --
20 I brought this under the state statute that says upon
21 a showing that a subpoena is punitive, it should be
22 quashed.

23 And I have asked the Court for an opportunity
24 to make a showing of that in an evidentiary hearing.
25 The Court has advised that I would have to wait until

1 you ruled on this issue because if you ruled in our
2 favor then we wouldn't have to go to the other issue.

3 Since you have ruled against us, I would ask
4 the Court, prior to Mr. Marshall testifying, set aside
5 time for us to have an evidentiary hearing in which I
6 will be able to make a showing --

7 **THE COURT:** Are you telling, me that if there
8 a bona fide reason to have him testify in this trial,
9 the fact that he may have additional motives, if
10 indeed he has those, would require the quashing of the
11 subpoena?

12 **MR. HANA:** I am saying that a state statute
13 provides that if a subpoena -- if I can make a showing
14 that a subpoena has been served for a punitive
15 purpose, then it should be quashed.

16 Also I can make a showing --

17 **THE COURT:** Do you have any law to suggest if
18 there is a valid reason to call Mr. Marshall to
19 testify in the course of this trial that the fact that
20 there may be other motivations, whether or not there
21 are, on behalf of the prosecutors in issuing the
22 subpoena would invalidate the subpoena for the
23 purposes of this trial?

24 **MR. HANA:** I have authority which I have
25 cited in my original brief that it is a violation of

1 due -- constitutional due process to put a -- call a
2 witness to the stand for the purpose of eliciting
3 testimony --

4 **THE COURT:** That's if the sole purpose --
5 let's say I grant -- let's say I agree with that. If
6 that's the sole purpose that's fine.

7 My question is, if there is a bona fide
8 reason separate and apart from that issue, does that
9 require the quashing of the subpoena and do you have
10 any authority for that proposition?

11 **MR. HANA:** Yes, I do. I have cited it in my
12 brief and it talks about the primary purpose. The
13 cases talk about the primary purpose. If the primary
14 purpose is to elicit testimony that the government can
15 later claim is false in order to bring a perjury
16 prosecution, then that is a violation of the
17 constitutional guarantee of due process.

18 So the fact that there may be some relevance
19 to his testimony is not -- is overcome if we can make
20 a showing that the primary purpose is punitive. If we
21 can make a -- and I can make a showing, I submit, that
22 the primary purpose of calling Richard Marshall is to
23 punish him for having gone to trial and been
24 acquitted.

25 I can make a showing with witnesses, which I

1 would like to call, that Mr. Jackley has threatened to
2 do just that, to charge Mr. Marshall with perjury in a
3 prosecution in front of the parole board if he does
4 not cooperate with the government and goes to trial.

5 I can make an offer of proof that I have two
6 attorneys who will testify that they were told by
7 Mr. Jackley, prior to Mr. Marshall's acquittal, that
8 if he -- that he should go to -- he should cooperate
9 and not go to trial because if you wins a trial, there
10 are going to be perjury charges brought --

11 **THE COURT:** Only if he commits perjury.

12 **MR. JACKLEY:** Correct.

13 **MR. HANA:** Judge, a jury has determined that
14 the government's witnesses were not telling the truth.
15 What I --

16 **THE COURT:** How did -- how did a jury
17 determine that?

18 **MR. HANA:** I believe --

19 **THE COURT:** I have never seen a jury make
20 that decision in its life. They come back guilty or
21 not guilty or hung.

22 **MR. HANA:** I recall Mr. Mandel telling the
23 jury, you decide the facts. And the State Supreme
24 Court has said that prosecutors don't decide the
25 facts, the juries decide the facts.

1 **THE COURT:** I agree.

2 What does not guilty mean, Mr. Hanna?

3 **MR. HANA:** The accusation has not been proven
4 beyond a reasonable doubt.

5 **THE COURT:** All right. That does not mean
6 that they don't believe some or all of the testimony
7 given by witnesses. It simply means that they are not
8 satisfied the proof as to every element of the case
9 has been proven beyond a reasonable doubt. And that
10 could include things like the date.

11 **MR. HANA:** Judge, rather than prejudge the
12 issue, I am asking for a hearing in which I can
13 present testimony.

14 **THE COURT:** How long is it going to take you
15 to do that?

16 **MR. HANA:** Perhaps an hour. No more than an
17 hour.

18 **THE COURT:** You got your hearing at 8:30
19 tomorrow morning.

20 **MR. HANA:** Are we excused, Judge?

21 **THE COURT:** You are.

22 **MR. MURPHY:** Judge, before we go back out
23 there, there is a couple other issues I just wanted to
24 bring up. We were notified, both Mr. Jackley and I
25 this morning, Rachel Embler is on the jury panel this

1 morning. I previously indicated with all of you by
2 email that she is a TV reporter from KOTA and has
3 covered the story. We also were advised this morning
4 that Ms. Embler actually sat in as a professional
5 reporter all day yesterday during jury selection. So
6 she's been through jury selection as a reporter and
7 now she's on the panel and so I would move to have her
8 dismissed for cause because she's sat through jury
9 selection as a reporter.

10 **THE COURT:** Mr. Jackley?

11 At least the paper could get the headline
12 right. That would help. My understanding is that the
13 headlines are not written by the person who wrote the
14 article. I could be wrong.

15 **MR. MURPHY:** The young man who wrote the
16 article is right here.

17 **THE COURT:** Well, headline is wrong.

18 **MR. JACKLEY:** I think she needs to go through
19 the process so at this point I would pass for cause.
20 I mean, I think she has to go through the process. I
21 don't think it should be a automatic removal, but
22 that's just the state's position. I think after a
23 couple questions it may be a for cause issue, but I
24 think at this point just having sat in the courtroom
25 does not exclude somebody from the voir dire process.

1 **MR. MURPHY:** I don't think it's the fact that
2 she sat through. She sat through in a professional
3 capacity and so has now formed conclusions, made
4 assessments of what the strategies of the parties are,
5 et cetera, as a professional; and now we're saying,
6 okay, on Monday you do that and on Tuesday you come
7 in --

8 **THE COURT:** I think if she becomes a
9 potential juror, I agree with Mr. Jackley. I don't
10 think it would take many questions to address the
11 issue and then I will make a decision.

12 Next?

13 **MR. MURPHY:** Lorelei Decora. We've got that
14 motion. I just kind -- I got to get a sense of when
15 we're going to take that up. We believe that her
16 Grand Jury transcript should be read. She's not
17 available as a witness. As we've indicated, Mr. Leach
18 has already indicated in that letter that she is going
19 to take the Fifth Amendment.

20 In light of Ms. Rios's plea where Ms. Decora
21 is not a suspect in this case or has been named as a
22 suspect, she certainly has that right. Mr. Leach
23 needs to come in and assert with her or assert on her
24 behalf that she will in fact be taking the Fifth.

25 And so I just kind of want to get a sense of

1 when you have time on your calendar. Mr. Leach is
2 pretty busy, but he said he would make himself
3 available.

4 **THE COURT:** Mr. Jackley?

5 **MR. JACKLEY:** I mean, I guess the way I look
6 at this, number one, I am not yet convinced she's
7 unavailable.

8 Number two, having gone through now four
9 hearings in regard to our ability to give somebody
10 immunity, I think that could become an issue where if
11 she does come in and take the Fifth, I think the state
12 has an opportunity to asses whether or not the state
13 would provide use and derivative use immunity, and in
14 turn, request the Court to compel testimony. So I
15 don't think that issue is ripe yet at this time.

16 **THE COURT:** When is she scheduled to testify?

17 **MR. MURPHY:** She's one of my witnesses so she
18 would be scheduled on either the 9th or the 13th.
19 We filed the motion and Mr. Leach's letter some time
20 ago and so if there are going to be in discussions
21 with Mr. Leach about offering immunity, I ask that
22 they get on that. They know Mr. Leach has said she's
23 going to assert the Fifth. They are the only ones in
24 the room that have the power to grant immunity. So we
25 need to get on the stick on that.

1 **MR. JACKLEY:** Judge, frankly, I would like an
2 opportunity to see what Thelma Rios tells the jury
3 before we make a decision on whether or not we would
4 grant use and derivative use immunity.

5 **THE COURT:** Would it not be more practical to
6 have the preliminary discussions with Mr. Leach so at
7 least we can streamline the process?

8 **MR. JACKLEY:** I've had some preliminary
9 discussions with Mr. Leach and I believe Mr. Oswald
10 has too. I think they are probably in the nature of
11 plea discussions and inappropriate for me to talk
12 about.

13 I just wanted to advise the Court that we are
14 having discussions but there is a reason why I am not
15 talking about those discussions.

16 **THE COURT:** Okay.

17 You will advise me, Mr. Murphy, in advance
18 several days when you realistically think you are
19 going to call. If we have not resolved the issue by
20 then, we'll schedule a hearing at 8:30 in the morning.

21 Anything further?

22 **MR. JACKLEY:** No, Your Honor.

23 **THE COURT:** Thank you.

24 Let's get to choosing the few after many are
25 called.

1 (Off the record.)

2 **THE COURT:** Please call the roll of the jury.

3 (Whereupon, the roll call of the prospective
4 jury was then taken.)

5 **THE COURT:** Ladies and gentlemen, you have
6 been selected as potential jurors for the trial of the
7 State of South Dakota versus John Graham. Mr. Graham
8 is accused of two crimes. The first one is
9 premeditated murder. The second crime is murder while
10 in the course or commission of a felony. The detailed
11 elements of these crimes will be explained to you
12 later in some detail. That is sufficient to tell you
13 at this time what this case is about.

14 Before we go any further, let me tell you
15 that this is the second day of jury selection and we
16 will have to impanel what we call 56 jurors. Those
17 will be jurors or potential jurors who have passed the
18 examination to demonstrate that they have no biases,
19 life experiences or the like that would prohibit them
20 from giving a truly fair and impartial hearing of this
21 case.

22 We left here yesterday with 49. So we need
23 to pick seven more. And so you are in the position of
24 where many are called and few are chose en. But the
25 process will still likely go into the afternoon.

1 There is a fairly lengthy amount of questioning called
2 voir dire that must happen. And I will give you some
3 further instructions and explanations. But first I am
4 going to ask counsel to introduce themselves.

5 Mr. Jackley?

6 **MR. JACKLEY:** Thank you, Your Honor.

7 My name is Marty Jackley from the Attorney
8 General's Office. I am here with Rod Oswald, also
9 from the Attorney General's Office, and Bob Mandel who
10 is with the United States Attorney's Office.

11 **THE COURT:** Mr. Murphy?

12 **MR. MURPHY:** Morning.

13 My name is John Murphy. I am a sole
14 practitioner in Rapid City and my client is John
15 Graham from Canada. And this is my paralegal, Erin
16 Duchaneaux.

17 **THE COURT:** Thank you.

18 I am going to ask the clerk to take the next
19 step and that is to issue an oath to you that during
20 the course of the voir dire or jury selection you will
21 answer the questions posed to you truthfully and
22 honestly. That is the process by which we end up with
23 a jury.

24 So would you please swear the jury, ma'am.

25 If you would all rise and raise your right

1 hands.

2 (Whereupon, the Prospective jury panel was
3 then sworn.)

4 **THE COURT:** Ladies and gentlemen, I can give
5 you a long welcome speech. I assume you would prefer
6 the short one, which means I am glad you are here.
7 There is a reason you are here and it will become more
8 clear as we go.

9 This trial is going to take some time. There
10 is no way it's going to be short. It's going to run
11 at least through next week and probably some days into
12 the following week. We're not scheduled to go beyond
13 the following Friday, a week from -- two weeks from
14 today, effectively -- three weeks from today,
15 effectively, and that's going to impose problems for
16 all of you. I will address that in a minute.

17 I am aware that it's a severe imposition on
18 your time. The reason we call so many jurors and we
19 end up seating 56 is the process of jury selection
20 that is required by our state laws. We -- here each
21 side gets what we call 20 peremptory challenges. That
22 means of the 56, they must remove 20 per side. They
23 don't have a choice in that matter. They just simply
24 must do that. And it can do that if they need to
25 remove people they really like but 20 have to go. In

1 addition, we're going to have two alternate jurors so
2 we have a total of 14 sitting through the trial.
3 Nobody will know who the alternates are including me.

4 At the end of the trial, we'll pull numbers
5 all of a box and the numbers of those jurors will
6 require them to be excused immediately before the
7 deliberation of the case. For those that have
8 invested that much time in the process, I am sorry.
9 But that's the only way we can do that and ensure over
10 the three weeks we still have 12 when we're done.

11 So when we have additional jurors, each side
12 gets one more of the peremptory challenges. That
13 gives you 42 of those and 14 which comes to the 56 we
14 will have here.

15 Because of the length of the selection
16 process, I want to give you a warning that I normally
17 hold off on until we start the trial, but it's real
18 simple. You cannot talk to anybody about this case.
19 And anybody includes any living human being no matter
20 how close to you that human being may be. You will
21 undoubtedly be asked a question or what's this about
22 or what you are doing or what's going on and your
23 answer to that question is very simple. You can't
24 talk about it. If someone keeps pushing, I need to
25 know about it. That can amount to a crime called jury

1 tampering and that's not a fun place to be. There is
2 reasons for that. And as you will find during voir
3 dire you are not to form any opinions about this case
4 until a couple weeks down the pike. And if you start
5 discussing it with somebody, you automatically pick a
6 sequence of things to tell. And that sequence will
7 begin to form an opinion for you. And those of us
8 that have opinions on controversial matters, global
9 warming or TSA pat downs we will tend to cherry pick
10 information that supports our opinion whatever it may
11 be and to blow off that information or evidence that
12 is contrary to that. So I am asking you not only to
13 not discuss this, but not to form any opinions.

14 And throughout the trial, if you are on the
15 14 or throughout this proceeding, you will avoid the
16 news, you will avoid newspapers, you will avoid local
17 internet stations or things, blogs that may have
18 information about this trial. The reason for that is
19 again pretty simple. At the end of two to three weeks
20 you are going to be asked to decide a case based on
21 the evidence that came to you in this courtroom.
22 After several weeks of reading newspaper accounts or
23 whatever, you will not be able to separate what you
24 read from the newspaper a week and a half ago and what
25 evidence you heard here. And that will then give us

1 the potential of a verdict that is not based upon the
2 evidence in the Court. I realize that's difficult.
3 But, I am going to leave that task to you and give you
4 the honor or the chance of honor to do what you must.

5 When you leave the trial for a break in this
6 selection process to include the noon hour, when you
7 return, I want you to take of those in our potential
8 panel exactly the same seats you had when we left. So
9 everybody approximate can keep track of who is who.
10 None of the counsel and the parties to this case are
11 allowed to talk to you. Even if it's simply good
12 morning from a distance, nobody can tell what was said
13 and it has that ora of they shouldn't be doing that.

14 So if they appear to be rude and get off an
15 elevator if you get on, or refuse to even look at you,
16 they don't have any choice in the matter. That's the
17 way the system works.

18 Now comes the guilt trip. There are some of
19 you who cannot possibly serve because of serious and
20 unchangeable conditions. I will, in a minute, ask you
21 to identify yourselves if you cannot do so. But I
22 want the you to give a thought to public service is
23 something we don't do much any more in this country.
24 They really taken over by all kind of agencies and
25 processes that remove much of that burden. But I want

1 you to give some thought to those who do. We have
2 servicemen, National Guard and reservists whose public
3 service calls them repeatedly to ship out to hazardous
4 areas believing behind family and friends during
5 holidays and other days. They do that. They do it
6 without complaint, inconvenient as it may be. It puts
7 the duty of public service before all else sometimes
8 including life.

9 Now I think if we more military terms get it
10 up and look at that, I think we can all find that most
11 of us can find a way to sit through this even though
12 we're midway between Thanksgiving and Christmas. You
13 will have Friday afternoon off this Friday. You will
14 have the following Friday off and in its entirety.
15 Your weekends will be off. Our daily schedule starts
16 on or about 8:30 depending on whether I have to
17 resolve some matters outside the presence of the jury.
18 We'll have one morning break, noon break from noon to
19 1:15 and an afternoon break and I will promise you
20 that we will end at five o'clock because I am leaving
21 and if I am not here nothing happens. So that's where
22 we are.

23 Now, I would ask those to identify themselves
24 who believe they truly cannot serve for the next two
25 and a half to three weeks. Please raise your hand.

1 Yes, sir, can you tell us why.

2 Please stand.

3 **PROSPECTIVE JUROR:** I am Meyer. I am
4 scheduled to be in Austin Texas, let's see, Thursday
5 through Sunday; Columbus, Ohio, Monday Thursday; and
6 Minneapolis, Friday through Sunday.

7 **THE COURT:** Let me ask, if I may, what causes
8 that interesting itinerary?

9 **PROSPECTIVE JUROR:** Actually, it's Austin,
10 Texas. It's a swim meet for my daughter. Columbus
11 Ohio is work. A meeting. And Minneapolis is my
12 original home.

13 **THE COURT:** Mr. Murphy?

14 **MR. MURPHY:** I pass -- I'd excuse.

15 **MR. JACKLEY:** No objection, Your Honor.

16 **THE COURT:** Okay. Thank you, sir.

17 You may be excused.

18 Back left behind you.

19 Yes, sir. Please stand.

20 **PROSPECTIVE JUROR:** Justin Horner. This
21 coming Monday I have to close on a house and get
22 moved.

23 **THE COURT:** Where are you doing this?

24 **PROSPECTIVE JUROR:** In town.

25 **THE COURT:** Can you not set your closing at

1 noon? That's when I closed mine.

2 **PROSPECTIVE JUROR:** I suppose I could. But
3 work requires me to be out of town frequently and I
4 took vacation next week to be able to get this done.

5 **THE COURT:** Where are you working?

6 **PROSPECTIVE JUROR:** I work in Wyoming
7 sometimes.

8 **THE COURT:** Doing what?

9 **PROSPECTIVE JUROR:** At an ethanal plant over
10 there.

11 **THE COURT:** And do you own it?

12 **PROSPECTIVE JUROR:** No.

13 **THE COURT:** You work there?

14 **PROSPECTIVE JUROR:** Yeah.

15 **THE COURT:** If you broke your leg you
16 wouldn't be there?

17 **PROSPECTIVE JUROR:** Yeah.

18 **THE COURT:** There are many called, few are
19 chosen. Unfortunately you are going to have to take a
20 risk.

21 Thank you.

22 Ma'am?

23 **PROSPECTIVE JUROR:** Patricia Hogan. I am
24 getting married on Saturday.

25 **MR. MURPHY:** No objection.

1 **THE COURT:** Not if you break your leg, right?

2 **PROSPECTIVE JUROR:** No -- well, yeah,
3 probably.

4 **MR. JACKLEY:** No objection.

5 **THE COURT:** I am not that mean.

6 You are excused, ma'am.

7 Yes, sir?

8 **PROSPECTIVE JUROR:** Aaron wood. I am
9 self-employed and I have contracts that have deadlines
10 as a builder.

11 **THE COURT:** Mr. Murphy?

12 **MR. MURPHY:** No objection.

13 **MR. JACKLEY:** No objection.

14 **THE COURT:** You are self-employed?

15 **PROSPECTIVE JUROR:** Yes.

16 **THE COURT:** That means you are the boss?

17 **PROSPECTIVE JUROR:** Yes.

18 **THE COURT:** You have people working for you?

19 **PROSPECTIVE JUROR:** No.

20 **THE COURT:** What are you doing?

21 **PROSPECTIVE JUROR:** Building houses.

22 **THE COURT:** How many you working on right
23 now?

24 **PROSPECTIVE JUROR:** Two.

25 **THE COURT:** Where?

1 **PROSPECTIVE JUROR:** Out in Thunder Plains by
2 the base.

3 **THE COURT:** Mr. Jackley?

4 **MR. JACKLEY:** No objection, Your Honor.

5 **THE COURT:** You may be excused.

6 Yes, ma'am?

7 **PROSPECTIVE JUROR:** Virginia Wright. I am
8 scheduled to work two days next week and three the
9 following because my bosses are gone and there are two
10 of us that will keep our shop open.

11 **THE COURT:** And what are these businesses?

12 **PROSPECTIVE JUROR:** It's the Reflections of
13 South Dakota Art Gallery downtown Rapid City.

14 **THE COURT:** Is this a business as far as
15 you -- are you salaried or do you get paid hourly?

16 **PROSPECTIVE JUROR:** I am paid hourly.

17 **THE COURT:** Ma'am, I am really not inclined
18 for people at work.

19 **PROSPECTIVE JUROR:** Well, if I am not there
20 the place is not open. So that's the way it is.

21 **THE COURT:** Where are your bosses?

22 **PROSPECTIVE JUROR:** They are going on
23 vacation to Cancun, I believe.

24 **THE COURT:** Together?

25 **PROSPECTIVE JUROR:** Yes.

1 **THE COURT:** Is this a private business?

2 **PROSPECTIVE JUROR:** Yes.

3 **THE COURT:** We're are a one-person
4 establishment. It's me, myself, and I when I am
5 there.

6 Mr. Murphy?

7 **MR. MURPHY:** No objection.

8 **THE COURT:** Mr. Jackley?

9 **MR. JACKLEY:** No objection, Your Honor.

10 **THE COURT:** You are excused.

11 **PROSPECTIVE JUROR:** I don't like to do it --

12 **THE COURT:** You are excused.

13 **PROSPECTIVE JUROR:** Thank you.

14 **THE COURT:** We'll get there in a moment, sir.

15 Anybody else on that side of the room?

16 Yes, sir?

17 **PROSPECTIVE JUROR:** Nicholas Roden. I own a
18 karaoke DJ business here in town and I have contracts
19 with a couple bars. I do have other employees but
20 they work the same nights that I do, too.

21 **MR. MURPHY:** May I ask a question?

22 **THE COURT:** Yes.

23 **MR. MURPHY:** If you work in bars, do you work
24 till two, three in the morning?

25 **PROSPECTIVE JUROR:** Correct. When the bar

1 closes, yes.

2 **MR. MURPHY:** We're going to need you to
3 remain attentive from 8:30 to 5:00 during the day.

4 Do you typically go home and then sleep till
5 noon or so?

6 **PROSPECTIVE JUROR:** Correct.

7 **MR. MURPHY:** Do you think it's going to be
8 difficult for you to get here at eight and be bright
9 and chipper and ready to go?

10 **PROSPECTIVE JUROR:** Obviously, yes. I was
11 late this morning.

12 **MR. MURPHY:** I saw.

13 I have no objection, Your Honor.

14 **MR. JACKLEY:** No, Your Honor.

15 **THE COURT:** Thank you.

16 You may be excused.

17 Anyone else?

18 Yes, ma'am?

19 **PROSPECTIVE JUROR:** Megan Ripkama. I am a
20 paramedic student. I am ready to take my initial
21 registry test and the last test is on Tuesday of next
22 week.

23 **THE COURT:** I think you are out of here.

24 You, sir, you are out of here. You are
25 excused, as well. I can't do this with these people

1 and not let you out.

2 **PROSPECTIVE JUROR:** Justin Horner.

3 **THE COURT:** All right.

4 I thank the rest of you for giving up what I
5 know to be valuable time and opportunities to do
6 things within the next coming weeks.

7 We're going to proceed with the opening
8 questions in the jury selection process. Mr. Murphy
9 will begin.

10 We need to fill seven. As your name is
11 called, you get to come up into the first bench. As
12 people are excused from that place, others will be
13 called up, if they are excused.

14 **THE CLERK:** Debbie Scott, Arletta Daily,
15 Robin Buckingham, Kimberly Vanloan, Thomas Vanvlack,
16 James Whitman, Daniel Staddie.

17 **THE COURT:** You may begin, Mr. Murphy.

18 **MR. MURPHY:** Thank you.

19 Good morning, folks. My name is John Murphy.
20 As the judge told you, this is the second day of jury
21 selection. When we started yesterday, I thought, boy,
22 those people are really bad luck because they made it
23 all the way to the 29th of the month. And you made
24 it to the last day, the 30th, and now you are facing
25 possibly to be in a jury trial for three weeks.

1 Initially, I should say nobody wanted to be
2 trying a case of this duration between Thanksgiving
3 and Christmas. The court dockets are incredibly
4 packed so when trial dates become available, we have
5 to take those dates, whether it's winter or summer,
6 and there is always going to be some inconvenience.
7 And I know for many of you just like us, we got kids
8 in Christmas programs at school that we're going to
9 miss and piano recitals and things like that for kids,
10 grandkids, and whatnot.

11 We're going to try to make this process go as
12 smoothly as possible. Trials just don't go -- it's
13 not like TV. There is lots of breaks and stuff like
14 that, so bear with us.

15 I am going to be talking to you seven. You
16 are the panel that we got. As the judge indicated at
17 the end of the day yesterday we were seven short out
18 of the 56. So now we got to fill in and get seven
19 more jurors.

20 What's going to happen, though, is that you
21 folks, as people are excused for whatever reason, then
22 one of you folks will have to sit in and rather than
23 start jury selection from the very beginning with the
24 new person because if I do that you will start
25 throwing your shoes at me because it would take hours.

1 What I will do is just say did you hear my
2 questions and did you have any responses to anything I
3 said before. So we don't go start from the very
4 beginning and go forward.

5 Who among you folks have been through jury
6 selection before?

7 Okay. Less than half of you. But you've got
8 some experience.

9 For those of who haven't been through jury
10 selection, I want to give you some idea of why we're
11 doing this. The judge indicated we got to strike down
12 42 people total to get to the right number.

13 But the broader purpose of this whole process
14 is to find out whether you are the right person for
15 this case. You know, not every person is right for
16 all cases because we all come to the courtroom, the
17 courthouse, with certain personal experiences that
18 might make you predisposed one way or the other or
19 just feeling to the point where you are just not
20 comfortable with the subject matter so much so that
21 you just don't feel like you can sit through it
22 fairly.

23 When I think about this process, I think
24 about my dad who -- he passed away in June, but he was
25 89 at that point. He had led this incredibly rich

1 life. He had served in World War II. He had five
2 sons that he raised. Owned his own business. Really
3 a fair guy. He was always willing to look at both
4 sides and give people the benefit of the doubt.

5 But he had a life long probable with the IRS.
6 He just -- never any legal problems with them. He
7 just didn't like the way the tax system worked and he
8 would have been the first guy to say, if one of the
9 parties was the IRS, I'm not the juror for that case.
10 You know that's -- it's not going to be something that
11 I can sit through and give each side a fair shake.

12 So that's what we're doing here today is
13 trying to see whether you are the right jurors for
14 this case not whether you are bad person or a good
15 person or anything like that.

16 And so when we're talking, what I want is for
17 you to feel comfortable to talk back, to give us
18 information. We can only decide that if we hear from
19 you. And this is strangely the only time during the
20 entire trial -- we might be together for three weeks.
21 And the only time that you get to communicate
22 otherwise -- once you are picked, if you are picked,
23 you will sit there and you will listen to witnesses,
24 listen to the attorneys, and listen to the judge, but
25 you don't get to say anything. So that's why we want

1 to facilitate the communication. If I ask anything on
2 any subject matter that you say, boy, I just don't
3 feel like answering it in a room full of 50 people, we
4 have a mechanism. We go in the back room, get the
5 court reporter's machine back there, and we do what's
6 called a private hearing.

7 And just so you know, yesterday, we did that
8 on a number of occasions. There were topics that were
9 raised where somebody said I have an answer that you
10 should know about but I am not comfortable sharing it
11 in a public forum. That happens in almost all trials.

12 Because I am going to be asking you questions
13 for the next several hours, I think it's fair I give
14 you some information about myself and my situation
15 here so that it's not just me bugging you with
16 questions. I am going to first introduce Erin. Erin
17 Duchaneaux is my paralegal. She has been with my
18 office for a number of years, going on five years now,
19 even though she doesn't look old enough to have done
20 that for that long. Her husband Cam is a local Rapid
21 City police officer and they have three kids. She's
22 got a very young one and one in fifth grade and one in
23 seventh grade.

24 John Graham is my client. He's from the
25 Yukon Territory up in Canada, and he's here. His

1 daughter and long-term companion -- or one of his
2 daughters. His other daughter is expecting so she
3 couldn't come down.

4 As I indicated earlier, I've got a sole
5 practice. I am the only attorney in my law firm. It
6 is located over by the Rapid City ice rink and swim
7 center. There is that old house up on the hill.
8 That's my office. And I live in town. My wife is a
9 social worker. We've got three kids. The youngest is
10 in fifth grade. So that's about me.

11 What I am going to do is I am going to
12 start -- I am going to kind of break jury selection
13 down into three sections. The first is going to be
14 the nuts and bolts stuff, the things about whether you
15 know the participants and then we're going to move
16 into the legal issues.

17 Because if you are picked as jurors, you are
18 going to be the judges of the facts, but you are going
19 to have to follow Judge Delaney's laws. And we're
20 going to talk about the law and whether or not that's
21 law you feel comfortable with. And then at the end we
22 will talk about some specific issues.

23 I want to revisit one issue that we already
24 talked about which is the personal hardship issue.
25 The judge asked if anybody was going to have trouble

1 sitting through the case until what we anticipate
2 December 17 being the last day of the trial.

3 Is there anything that comes to mind that
4 makes you think that you might not be able to sit and
5 be attentive?

6 On most occasions five days a week or four
7 and a half days a week from 8:30 to 5:00 and to go
8 through the trial and be able to really pay attention
9 and listen to the evidence and not be distracted by
10 thoughts that you should be somewhere else or anything
11 like that?

12 Sir, your name?

13 **PROSPECTIVE JUROR:** Tom Vanvlack.

14 **MR. MURPHY:** The reason why I will ask you
15 your name each time I do the question is so Tina can
16 identify who is talking.

17 What's your situation?

18 **PROSPECTIVE JUROR:** I have a root canal
19 tomorrow morning.

20 **MR. MURPHY:** What time?

21 **PROSPECTIVE JUROR:** 7:45.

22 **MR. MURPHY:** Okay.

23 **PROSPECTIVE JUROR:** I don't have a problem --
24 I would just be late if that were the case.

25 **MR. MURPHY:** Is it something that you would

1 be able to reschedule or -- is it one of these things
2 that you had to schedule months if advance?

3 **PROSPECTIVE JUROR:** They scheduled it
4 yesterday because it's extreme right now.

5 **MR. MURPHY:** Okay.

6 Do you know how long you would be out of
7 commission tomorrow?

8 **PROSPECTIVE JUROR:** However it takes them to
9 fill it. I don't know. They drill a hole and put
10 some stuff in, I guess.

11 **THE COURT:** I had one.

12 Don't you want to put it off till after
13 Christmas?

14 **PROSPECTIVE JUROR:** I'd rather not.

15 **MR. MURPHY:** Okay.

16 I am assuming it's not going to be something
17 that is going to be done by nine in the morning or
18 that you are?

19 **PROSPECTIVE JUROR:** They said it's short so I
20 don't know.

21 **MR. MURPHY:** I have never had one before.

22 **THE COURT:** You know, he might be finished by
23 then, but he's not going to be back here so --

24 **MR. MURPHY:** I think I'll move to excuse you
25 because I am not sure how much novocaine and how you

1 are going to be feeling after that.

2 **PROSPECTIVE JUROR:** Either that or the
3 Percocet or one or the others.

4 **THE COURT:** Mr. Jackley?

5 **MR. JACKLEY:** No objection.

6 **THE COURT:** Thank you, sir.

7 You may be excused.

8 **THE CLERK:** Cheryl Adams.

9 **MR. MURPHY:** Ma'am, did you have any response
10 to -- we just started, but is there any personal
11 hardship that you think we need to be aware?

12 **PROSPECTIVE JUROR:** I get migraine headaches,
13 but there is no rhyme nor reason to when I get them.

14 **MR. MURPHY:** All right.

15 There are things -- is it stress or fatigue
16 that cause triggers?

17 **PROSPECTIVE JUROR:** Yeah. And lights.
18 Fluorescent lights.

19 **MR. MURPHY:** One of my nieces gets them, too,
20 so I am familiar with the lighting situation.

21 Is the amount of these lights likely to cause
22 that as an issue?

23 **PROSPECTIVE JUROR:** Possibly could.

24 **MR. MURPHY:** Okay.

25 When you get them are you out for --

1 **PROSPECTIVE JUROR:** Two days, three days.

2 **MR. MURPHY:** Well, Your Honor, I would move
3 to strike.

4 **THE COURT:** I would, too.

5 **MR. JACKLEY:** No objection.

6 **THE COURT:** Thank you, ma'am.

7 Good luck with the migraines. They are
8 pretty ugly.

9 **MR. MURPHY:** That seems to be the hot seat.

10 **THE CLERK:** Barbara Mitzel.

11 **MR. MURPHY:** If you are crowded by your
12 jackets we have this whole bench up here.

13 Ms. Mitzel, did you have any issues with the
14 time frame?

15 **PROSPECTIVE JUROR:** No, I don't.

16 **MR. MURPHY:** Anybody else in this row?

17 Just so you know, Tina, our wonderful court
18 reporter, has reminded me to slow down. So if I seem
19 like I am talking slower, it's because Tina has to be
20 here all day reporting every word. And it's very
21 fatiguing job. It's a tough process. If I talk at my
22 natural speed, we'll get down about every fifth word.
23 So we're going to slow it down a bit.

24 We're going to start by talking about
25 relationships you might have, personal, professional,

1 or whatnot, with any of the participants in the case.
2 And we're going to start with myself, my paralegal,
3 Erin, or my client, John.

4 Do any of you have any history with any of
5 us? I don't recognize any faces. No.

6 What about, we've got three prosecutors
7 handling the prosecution side. We've got Marty
8 Jackley, the Attorney General; Rod Oswald, Assistant
9 Attorney General; and Bob Mandel, from the U.S.
10 Attorney's Office.

11 Professionally or personally any
12 relationships there?

13 Ma'am, your name?

14 **PROSPECTIVE JUROR:** Robin Buckingham.

15 **MR. MURPHY:** What's the --

16 **PROSPECTIVE JUROR:** I know Marty Jackley
17 socially.

18 Rod Oswald helped on a case when I was a
19 teen-ager.

20 **MR. MURPHY:** All right.

21 Is your social relationship with Mr. Jackley
22 one that might in any way shape or form influence the
23 way you handle this case?

24 **PROSPECTIVE JUROR:** No.

25 **MR. MURPHY:** Let me ask you the question this

1 way. If you were to determine at the end of the case
2 that the state had not met it's burden and that you --
3 that they had not proved their case beyond a
4 reasonable doubt, and you were to render a verdict of
5 not guilty based on that, would you feel awkward
6 around Mr. Jackley because of that?

7 **PROSPECTIVE JUROR:** It's his job to do his
8 job.

9 **MR. MURPHY:** You know, that's -- sometimes
10 people say, boy, I would feel like -- I'd feel awkward
11 around somebody. You don't have --

12 **PROSPECTIVE JUROR:** No.

13 **MR. MURPHY:** Okay.

14 What about with Mr. Oswald, your experience
15 with him. Anything that --

16 **PROSPECTIVE JUROR:** No.

17 **MR. MURPHY:** Okay.

18 Anybody else?

19 We have Judge Delaney and Tina Pruss, the
20 judge and the court reporter. Judge Delaney is active
21 in the community.

22 Any involvements with either of them socially
23 or personally?

24 Good.

25 I am going to -- we have got a long list of

1 witnesses, about 50 witnesses. Not all of them will
2 be called, but we have to question you about any
3 potentials because what we don't want to happen is a
4 witness show up and you raise your hand and say, boy,
5 that's my next door neighbor or something like that.
6 And then we're in trouble.

7 Because it's such a long list, I am going to
8 go through one name after another. If you hear a name
9 that you recognize, just say stop and then we'll talk
10 about your knowledge of that person:

11 Charlie Abourezk, a local attorney in town.

12 Abe Alonzo, retired Denver Police Officer.

13 Roger Amiotte, who is a rancher from down in
14 the Wambli area.

15 Barry Bachrach. He is an attorney from
16 Massachusetts.

17 Clyde Bellecourt. He's from the twin cities
18 area and former American Indian movement activist.

19 Serle Chapman, a tour guide, leader, and an
20 author of some books. Photographer.

21 Theda Clarke, a woman from Pine Ridge,
22 originally.

23 Jean Ann Day. She's from Wisconsin.

24 Don Dealing, he was an FBI agent. He's now a
25 retired FBI agent. He was in Rapid City and South

1 Dakota in the 70s.

2 Frank Dillon. A man from Denver.

3 Jeanette Eagle Hawk also from Denver.

4 One of the witness's name is Darlene Nichols.

5 She also goes by Kamook Nichols or Kamook Banks or
6 Kamook Ecoffey. She -- she owns the Subway restaurant
7 down on Pine Ridge. Lives in Rapid City.

8 Robert Ecoffey. He also lives Rapid City.

9 Allen Garber was an FBI agent in South Dakota
10 from the 70s and 80s.

11 Cleo Marshall Gates.

12 James Graf, an FBI agent from Rapid City. I
13 believe still lives in Rapid City.

14 Naneek Graham, my client's oldest daughter.

15 Dr. Don Habbe. He works at Clin Lab and is a
16 pathologist.

17 Candy Hamilton, a local journalist, has lived
18 in Rapid City and down on the reservation.

19 Ray Hand Boy. Ray used to work at Sioux San.
20 May still. Was married to a woman named Evelyn
21 Bordeaux.

22 Evan Hodge is an FBI agent from the east
23 coast.

24 Angie Begay Janis, a woman from Denver.

25 Mary Johnson.

1 Fritz Arlo Looking Cloud, also known as Arlo
2 Looking Cloud. He was a defendant in this case
3 prosecuted in federal court and convicted and
4 sentenced to a life sentence back in 2004.

5 Does that name ring a bell? It was covered
6 by the newspaper in the media quite a bit. It was the
7 same case as this case or the same basic case.

8 Denise Maloney. That is the alleged -- the
9 victim of the crime, was a woman named an Anna Mae
10 Pictou Aquash. Her daughter is Denise Maloney.

11 Dick Marshall, also goes by Richard Marshall,
12 or Vine Richard Marshall. He was a defendant in this
13 case as well. He went to trial in federal court in
14 April and was acquitted. And that was covered
15 extensively by the Rapid City Journal and local media.

16 That ring any bells for anybody?

17 I am beginning to wonder if anybody reads our
18 paper.

19 Mike McRoden. He's a local FBI agent working
20 in the local office as we speak.

21 Russell Means. American Indian activist.
22 Actor.

23 You are nodding your head, ma'am. I am
24 sorry, what's your name?

25 **PROSPECTIVE JUROR:** Debbie Scott.

1 **MR. MURPHY:** Ms. Scott, what's your knowledge
2 of Mr. Means?

3 **PROSPECTIVE JUROR:** Just from movies or
4 hearing of him.

5 **MR. MURPHY:** Any personal feelings one way or
6 the other about him that would make you unable to view
7 his testimony like anybody else's?

8 **PROSPECTIVE JUROR:** Possibly.

9 **MR. MURPHY:** Okay.

10 Is it something that from what you know about
11 him from whatever source might make you prejudge his
12 testimony in one way or another? Whether it's
13 favorable or unfavorable, that doesn't matter, but
14 just not treat him like any other witness.

15 What I mean by that, like any other witness,
16 that's going to be on the witness stand. And when a
17 witness comes up whether they are a cop, a minister, a
18 person of any other profession or age or race or
19 anything, they all take the same oath. And what you,
20 as jurors, are supposed to do is treat them all the
21 same until such time as we hear testimony that helps
22 us form an opinion as to whether they respect that
23 oath, whether they are telling the truth or whether
24 they're competent or anything like that.

25 What we want to avoid in this process is

1 having a situation where because of your feeling about
2 a particular witness or a particular kind of person,
3 that you might not give them the same neutral unbiased
4 perspective when they start their testimony.

5 Is there anything about Mr. Means that you
6 couldn't put aside that and you would prejudge his
7 testimony or prejudge him?

8 **PROSPECTIVE JUROR:** I could, I guess. I
9 just -- there is certain things I don't agree with the
10 way he had done things.

11 **MR. MURPHY:** Okay.

12 Do you think you can try to put those aside
13 to the best of your ability?

14 **PROSPECTIVE JUROR:** I can't -- no.

15 **MR. MURPHY:** Okay.

16 And that's -- that's what we're here about.
17 There is no wrong answers. If it's something where
18 you can't listen to his testimony, like anyone else's,
19 then we need to know that how.

20 And at this point if the judge tells you it's
21 your duty as a juror is that going to really change
22 anything or are you still going to have those
23 preconceived notions of Mr. means?

24 **PROSPECTIVE JUROR:** I could probably still
25 have them.

1 **MR. MURPHY:** You would probably still have
2 them?

3 **PROSPECTIVE JUROR:** Yeah.

4 **MR. MURPHY:** Will you try your best to be
5 fair?

6 **PROSPECTIVE JUROR:** I would.

7 **MR. MURPHY:** Okay. That's all we can ask.
8 Anybody else with Mr. Means?

9 Actually I apologize, but I am only supposed
10 to answer questions of this group because you may
11 never have to be in the hot seats.

12 David Melmer, he's a local journalist who
13 writes a member of the Indian newspapers.

14 Nathan Merrick, a form BIA officer.

15 George Palfy. He is from Denver.

16 Dr. Garry Peterson. He's a pathologist from
17 the twin cities -- he's now retired -- but was for
18 many years.

19 Mitch Pourier was a BIA officer and I believe
20 also worked with the U.S. Marshal Service at one time
21 here in South Dakota.

22 Dave Price. Former FBI agent from South
23 Dakota.

24 Thelma Rios. Thelma Rios lived in Rapid City
25 for many, many years. She was also charged in this

1 case. And she entered a plea bargain about three
2 weeks ago. That was also covered quite a bit by the
3 newspaper, radio, and TV.

4 Anybody recall anything about Ms. Rios or any
5 of her past activities? She's been a community
6 activist for decades. Okay.

7 Bob Riter, an attorney from Pierre.

8 Madonna Gilbert Thunderhawk. She goes by
9 Madonna Big Earth or Thunderhawk and is from Rapid
10 City.

11 Gene Roach.

12 William or Bill Wood, former FBI agent.

13 And last is Troy Lynn Irving, also known as
14 Troy Lynn Yellow Wood.

15 Okay. Great.

16 Really glad everybody showed up. Yesterday
17 because of the weather with people showing up late, I
18 had to go through that list four times. As each new
19 person came in we had to go through that. By the end
20 I was just racing through the names and Tina was
21 scrambling to keep up with me.

22 I talked a bit going through these witnesses
23 that this case has a quite a history. You will learn
24 about -- and you will learn bits about it during the
25 case. And what I mean by that is we had a federal

1 trial over in federal court in 2004 involving
2 Mr. Looking Cloud. And then Mr. Marshall was charged
3 in the same case in federal court, went to trial in
4 April and was acquitted.

5 Recently had the issue with Ms. Rios. And --
6 where she was charged in this case as well and entered
7 a plea bargain. There has also been a lot of
8 coverage -- in fact, Sunday's newspaper, the front
9 page was about this case. And then page 6 and 7 there
10 was a three-page spread all about this case.

11 Have any of you had any contact with any of
12 the forms of media, whether it's internet, radio, TV,
13 newspaper, having anything to do with Mr. Graham's
14 case or Mr. Looking Cloud's, Ms. Rios' or
15 Mr. Marshalls?

16 **PROSPECTIVE JUROR:** I have just read the
17 paper.

18 **MR. MURPHY:** Okay.

19 Your name?

20 **PROSPECTIVE JUROR:** Jim Whitman.

21 **MR. MURPHY:** Sir, did you read the article in
22 Sunday's paper?

23 **PROSPECTIVE JUROR:** Yes.

24 **MR. MURPHY:** Gave a lot of information.

25 **PROSPECTIVE JUROR:** Well, I didn't get it all

1 in. I just read it.

2 **MR. MURPHY:** We kind of skim. You get the
3 headline and --

4 Have you previously on any other occasions
5 read articles about the case?

6 **PROSPECTIVE JUROR:** Just parts of it.

7 **MR. MURPHY:** Anything about any of those
8 articles or any of the information you received cause
9 you to believe you already have something about the
10 case figured out?

11 **PROSPECTIVE JUROR:** I don't think so, no.

12 **MR. MURPHY:** You put aside whatever you might
13 have read?

14 **PROSPECTIVE JUROR:** Yes.

15 **MR. MURPHY:** Anybody else have --

16 **PROSPECTIVE JUROR:** Just skimming the paper.
17 Didn't see Sundays paper at all. I was hunting.

18 **MR. MURPHY:** Successful day?

19 **PROSPECTIVE JUROR:** Very.

20 **MR. MURPHY:** All right.

21 Good for you.

22 And nothing about that exposure caused you
23 to --

24 **PROSPECTIVE JUROR:** Just hints of names, but
25 I couldn't remember them to tell you honestly.

1 **MR. MURPHY:** Okay. Sure.

2 **PROSPECTIVE JUROR:** Bits and pieces.

3 **MR. MURPHY:** All right.

4 Anybody else whatsoever?

5 Any contact -- it was on the news last night;
6 on the radio this morning. Kind of a big case. So --

7 One of the instructions the judge has already
8 given to you -- and it's sometimes a tough one -- if
9 you are picked for this case for the next three weeks
10 basically you will not be allowed to read the news or
11 listen -- you know listen to the news, radio, or if
12 you come across something where you are flipping
13 through channels and there is something, you are
14 supposed to keep flipping.

15 Is that going to cause a hardship? Actually,
16 for some people, that's their job.

17 This case and the context of this case --
18 this case is about the death of Anna Mae Aquash. But
19 that crime -- she was killed. The question for you as
20 a jury is who did that. She was killed in 1975 or
21 1976 down on the Pine Ridge Reservation. It was at a
22 time, a very tumultuous time, in South Dakota history.
23 And there has been a number of books written both
24 about this case and in a broader context. Books like,
25 In The Spirit Of Crazy Horse or American Indian Mafia,

1 there was The Unquiet Grave, We The People. There has
2 been a number of books.

3 There is also the movie produced Robert
4 Redford called Incident At Oglala that involved the
5 shooting of two FBI agents in June of 1975 down on
6 Pine Ridge. Both of those FBI agents were killed.

7 Anybody scene any of those or read any of
8 those books?

9 In the Spirit of Crazy Horse was assigned
10 reading in schools for colleges for many years.

11 So nobody? Okay. All right.

12 I got a number of agencies that are going to
13 be involved in this case. We talked about the
14 participants. There is my law office, Murphy Law
15 Office.

16 Anybody had any experience with my law office
17 at any time? I don't recognize any faces, but --

18 There is also the Attorney General's Office
19 and Mr. Jackley is the Attorney General. That's a
20 large state agency. It covers civil matters as well
21 as criminal, criminal consumer protection, things like
22 that.

23 Have any of you had any dealings with the
24 Attorney General's Office?

25 **PROSPECTIVE JUROR:** My son has been in

1 trouble, but I don't think it had anything to do with
2 the Attorney General.

3 **MR. MURPHY:** Your name?

4 **PROSPECTIVE JUROR:** Daniel Staddie.

5 **MR. MURPHY:** Okay.

6 And you don't recognize it as something that
7 was prosecuted by his agency?

8 **PROSPECTIVE JUROR:** No.

9 **MR. MURPHY:** Ms. Buckingham?

10 **PROSPECTIVE JUROR:** My son was in trouble
11 years ago, too, but I don't think it was the same
12 people.

13 **MR. MURPHY:** All right.

14 And, yeah, it's -- their office is different
15 from the Pennington County State's Attorney's Office,
16 which is the local prosecuting agency. But -- and I
17 was going to get to the Pennington County State's
18 Attorney's Office because they are actually -- though
19 they don't have a prosecutor at the table -- part of
20 this case, too.

21 Any dealings with the Pennington County
22 State's Attorney's Office ma'am?

23 **PROSPECTIVE JUROR:** My niece is Laura
24 Roetzel.

25 **MR. MURPHY:** Okay.

1 Well, Lara is the chief deputy and her
2 husband, Scott, also works there.

3 Are you related to Jim Mitzel?

4 **PROSPECTIVE JUROR:** No.

5 **MR. MURPHY:** He's one of the federal
6 probation --

7 **PROSPECTIVE JUROR:** I know him, but I am not
8 related to him.

9 **MR. MURPHY:** Because you are related by blood
10 to somebody in the State's Attorney's Office and this
11 case was commenced in Rapid City jointly -- it was a
12 joint prosecution between the Pennington County
13 State's Attorney's Office and the Attorney General's
14 Office and Mr. Mandel, who is sitting here from the
15 U.S. Attorney's Office, do you think that would affect
16 in any way how you view the prosecution?

17 It might make you more favorable to the
18 prosecution because your niece is a prosecutor and a
19 well known prosecutor?

20 **PROSPECTIVE JUROR:** No, it wouldn't.

21 **MR. MURPHY:** Okay.

22 You would be able to be put that relationship
23 completely aside?

24 **PROSPECTIVE JUROR:** Uh-huh.

25 **MR. MURPHY:** Okay.

1 Some other agencies that will be involved
2 most notably is the FBI. We have listed -- there is
3 probably going to be six or seven FBI agents or
4 retired FBI agents as witnesses.

5 Anybody here have any familiarity with the
6 FBI or other law enforcement agencies whether it's a
7 Sheriff's Office, the Rapid City Police Department,
8 the BIA, DCI?

9 Close relationships with any law enforcement
10 officers in town? Okay.

11 We've got some organizations that are
12 involved in the court system regularly. There is
13 three that come to mind most. One is CASA, Court
14 Appointed Special Advocates and then there is Working
15 Against Violence incorporated, or WAVI, and Mothers
16 Against Drunk Driving, which is MADD.

17 Do any of you have any past experience with
18 any of those organizations either as a volunteer,
19 financial contractors, somebody who supported them?

20 And you are?

21 **PROSPECTIVE JUROR:** Arletta Daily.

22 **MR. MURPHY:** Ms. Daily.

23 **PROSPECTIVE JUROR:** Sure. I send money to
24 WAVI and --

25 **MR. MURPHY:** Okay.

1 One of the reasons why that's somewhat
2 pertinent to this case, the allegation in this case,
3 just in a nut shell, is that my client, John Graham,
4 who is a man, killed a woman. That's what the state
5 is alleging. And there is no way to beat around the
6 bush about that allegation.

7 Is your involvement with WAVI -- it used to
8 be Women Against Violence and then it changed to
9 Working Against Violence, but primarily it is women
10 who suffered other crimes at the hands of men.

11 Does that cause you to have any --

12 **PROSPECTIVE JUROR:** I don't think I am
13 prejudice that way at all. Except we know that if you
14 take stats, there are more women needing help
15 sometimes than men.

16 **MR. MURPHY:** Sure.

17 **PROSPECTIVE JUROR:** So I suspect there are a
18 lot of places like that.

19 **MR. MURPHY:** Okay.

20 **PROSPECTIVE JUROR:** I am on the board of
21 church response.

22 **MR. MURPHY:** Our community needs more people
23 like you. And there is so many needs. And WAVI does
24 good work.

25 **PROSPECTIVE JUROR:** But I don't think I am

1 prejudice.

2 **MR. MURPHY:** Okay.

3 While we're talking about this, this is --
4 it's a sensitive issue. It's kind of a strange issue
5 in a lot of ways.

6 Would all of you agree -- I would just ask
7 you for a show of hands that it is always wrong for a
8 person to be killed without justification. I mean,
9 where there is not self-defense or some other
10 justification.

11 Would you raise your hand if you believe
12 that's always right.

13 Ma'am, you hesitated.

14 **PROSPECTIVE JUROR:** No. I was just
15 listening.

16 **MR. MURPHY:** Well, now if you would raise
17 your hand if you believe or feel really it's more
18 about a feeling, that it's more wrong when a woman is
19 killed than a man.

20 Anybody -- what about if that woman is a
21 mother?

22 Do you feel that that is -- that's a worse
23 crime than say somebody who is a man or somebody who
24 doesn't have children?

25 Anybody have those feelings? Okay.

1 It's a tough question because all life is
2 sacred and each life means something. But I can tell
3 you my mom, who was a very traditional Irish mother
4 would have been shaking her head yeah. You know,
5 mothers -- she was the kind of lady that you dropped
6 her off in front of the shopping store. And she would
7 stand in front of the doors -- it could be 15 degrees
8 below zero -- and wait until I raced up there and
9 opened the door for her. She had very distinct ideas
10 of what an Irish mother should be treated like; and
11 the queen of England was second rate to an Irish
12 mother.

13 Anyone else?

14 We talked about CASA. Anybody else involved
15 in any other organizations that have anything to do
16 with the court system or victims of crime or
17 prosecution of criminals or anything like that?

18 **PROSPECTIVE JUROR:** Just because I am
19 curious, I own a martial arts school. I teach
20 self-defense. I have parents who are in Game Fish and
21 Parks, the police department, all areas of life but
22 they are parents of students where I am teaching
23 self-defense.

24 Is that relevant?

25 **MR. MURPHY:** Let me ask you, is it something

1 that -- is it relevant to you?

2 Do you think that having -- everybody comes
3 here with prior experience. It may affect you, may
4 not.

5 The relationships that you develop with
6 people in the law enforcement community, are those
7 things that are going to tend to make you believe a
8 law enforcement officer's testimony a little more than
9 somebody else's?

10 **PROSPECTIVE JUROR:** No.

11 **MR. MURPHY:** You are going to treat every
12 witness exactly the same and when they get up there,
13 you are going to judge their testimony based on
14 whether their evidence adds up to anything or whether
15 they respected the oath and told the truth?

16 **PROSPECTIVE JUROR:** People say what they
17 believe.

18 **MR. MURPHY:** Uh-huh.

19 And it doesn't matter whether they are cop or
20 somebody else?

21 **PROSPECTIVE JUROR:** No.

22 **MR. MURPHY:** Okay.

23 And said Game Fish and Parks, that
24 relationship was with your parents?

25 **PROSPECTIVE JUROR:** Yes.

1 **MR. MURPHY:** That's a law enforcement agency
2 in some ways. They've kind of got a dual role.

3 Does that cause to you feel like you might --
4 that you would favor the law enforcement component of
5 a criminal case more than the defense perspective?

6 **PROSPECTIVE JUROR:** Everybody has the right
7 to their side.

8 **MR. MURPHY:** Okay. Good.

9 Anybody else? Okay.

10 I drink about a gallon of water a day while I
11 am up here. So --

12 The next area that I'd like to talk to you
13 about -- let me jump back. I am sorry. Mr. Jackley,
14 the Attorney General, was just elected back on
15 November 2. And the campaign started, six or nine
16 months before that.

17 Were any of you involved in the reelection
18 effort of Mr. Jackley or worked with the republican
19 party specifically, Ms. Rip --

20 You are Ms. Buckingham?

21 **PROSPECTIVE JUROR:** Yes.

22 **MR. MURPHY:** What activities did you --

23 **PROSPECTIVE JUROR:** I belong to Republicans
24 and ambassadors.

25 **MR. MURPHY:** Did you do fundraising and get

1 out the vote activities?

2 **PROSPECTIVE JUROR:** Yes.

3 **MR. MURPHY:** Would it be fair to say you
4 invested time and energy in helping Mr. Jackley get
5 elected?

6 **PROSPECTIVE JUROR:** Yes.

7 **MR. MURPHY:** All right.

8 Were you also a personal financial
9 contributor to his campaign?

10 **PROSPECTIVE JUROR:** Yes.

11 **MR. MURPHY:** In light of the fact that he is
12 the lead prosecutor for the state in this case, and
13 you have invested time, energy, and money in his
14 election, would it be fair to say that that is going
15 to affect you in some way even if it's a small way on
16 how you view his presentation of the evidence?

17 **PROSPECTIVE JUROR:** I believe everybody has a
18 job to do, whether it's anybody here. When it comes
19 to politics, I support who I am going to support. But
20 when it goes it a job -- I am expecting you to do your
21 job. I don't care who you are.

22 **MR. MURPHY:** Sure.

23 **PROSPECTIVE JUROR:** So if you are asking, am
24 I going to favor his whatever he says over somebody
25 else, no. I want him to prove what he's got to say

1 because this gentleman has a right to his rights.

2 **MR. MURPHY:** Okay.

3 And that's -- that's why you are here. And I
4 appreciate --

5 **PROSPECTIVE JUROR:** It's a passion.

6 **MR. MURPHY:** Passion. Yes. And.

7 This next issue is an issue of substantial
8 delicacy. I want to talk about that and remind you
9 again this is an area where, as I said yesterday, we
10 had a number of private hearings based on this issue.

11 And what I am going to ask, essentially,
12 we're going to talk about people who have been victims
13 of crimes and I want you to think -- I am not just
14 talking about yourself. It could be anybody close to
15 you or anybody who, because of something that happened
16 to them, has had an impact on you. It could be a
17 niece or nephew, a spouse, one of your kids, one of
18 your parents. Anything --

19 Something is beeping.

20 **PROSPECTIVE JUROR:** Sorry.

21 **MR. MURPHY:** No problem.

22 And so I want you to think broad because when
23 we're talking about people who have been victims of
24 crimes, we know that it doesn't have to be something
25 that happened to you. It could be something that

1 happened to somebody, you know, years ago. Or
2 somebody that is close to you through a family or
3 professional experience.

4 One of the allegations in the -- in this
5 case -- my client is not charged with rape, but the
6 state is going to allege that he committed the act of
7 rape against Anna Mae Aquash. They are going to
8 allege that that happened in Rapid City in 1975.

9 I want to start out with that and ask if just
10 that topic causes anybody to feel that knowing the
11 state is going to allege that John committed this act
12 makes you feel like you may have personal experiences
13 through whatever associations that render you unable
14 to sit comfortable or fairly in this case?

15 We won't go into the details at this point.
16 We will just talk about if that causes any concern.

17 Ms. Rypkema, you are looking at me kind of
18 intently.

19 **PROSPECTIVE JUROR:** No. Just listening.

20 **MR. MURPHY:** Okay.

21 One of the issues is the allegation of rape
22 is separate and apart from the charges that are
23 brought against Mr. Graham. And that's something
24 that's going to be alleged, but not part of the actual
25 case.

1 Does anybody here have qualms that if they
2 were to find or believe in any way, shape, or form
3 that this act of rape occurred that would so cloud
4 their judgment because of the anger over that
5 allegation that it would affect their ability to look
6 at the evidence regarding the crime of murder as a
7 completely separate and distinct event?

8 Anyone?

9 Do I need to phrase that again? Do you -- I
10 am getting some glossy looks.

11 What about victims, again in the broad
12 context of any other crime that may have affected you
13 whether it be assault, theft, or robbery anything like
14 that?

15 Anybody here, either themselves or somebody
16 close to them, been the victim of a crime?

17 And Ms. Buckingham, is it something you feel
18 you could --

19 **PROSPECTIVE JUROR:** Incest.

20 **MR. MURPHY:** Okay.

21 **PROSPECTIVE JUROR:** In my family.

22 **MR. MURPHY:** I won't -- I am not here to pry
23 or anything, but is it something that -- it's a
24 traumatic crime. It's a substantial issue.

25 Is that something that because of that.

1 experience makes it difficult for you to think that
2 you could sit fairly in this case and asses the
3 evidence in a completely unbiased and neutral way?

4 **PROSPECTIVE JUROR:** I think I can.

5 **MR. MURPHY:** Okay.

6 Sometimes we had -- yesterday some people
7 said, boy, because of the experience I had or my
8 family had just being in the courthouse was difficult
9 for some people. Being in this room was difficult.
10 They didn't think they could sit. Wasn't they were
11 going to favor one side or the other it just --

12 **PROSPECTIVE JUROR:** It's just why do I do
13 what I do?

14 **MR. MURPHY:** All right.

15 Who here has been a juror in a past, actually
16 sat as a juror?

17 Okay. I will start with you, sir.

18 Mr. Whitman, what kind of jury did you sit on
19 and about how long ago?

20 **PROSPECTIVE JUROR:** Two years ago.

21 **MR. MURPHY:** So you just -- not only did you
22 make it to the end of the month you --

23 **PROSPECTIVE JUROR:** Just in time, right.

24 **MR. MURPHY:** You know, you should go out and
25 get a lottery ticket.

1 What kind of jury did you sit on.

2 **PROSPECTIVE JUROR:** Civil.

3 **MR. MURPHY:** Was it a good experience?

4 **PROSPECTIVE JUROR:** Yes, it was.

5 **MR. MURPHY:** Okay.

6 Was the jury deliberations respectful?

7 **PROSPECTIVE JUROR:** Uh-huh. Yeah. We all
8 came to a good consensus.

9 **MR. MURPHY:** Do you recall what the burden of
10 proof was in that civil case?

11 **PROSPECTIVE JUROR:** The burden?

12 **MR. MURPHY:** Were you told that you had to
13 find for one side or the other based on the
14 preponderance of the evidence?

15 **PROSPECTIVE JUROR:** Yes.

16 **MR. MURPHY:** Okay.

17 What do you recall the preponderance of the
18 evidence standard meaning?

19 **PROSPECTIVE JUROR:** As far as the plaintiff?

20 **MR. MURPHY:** Uh-huh.

21 **PROSPECTIVE JUROR:** Whether they were
22 requiring a substantial benefit from it. One person
23 was injured.

24 **MR. MURPHY:** It was an injury case.

25 **PROSPECTIVE JUROR:** That was part of it.

1 **MR. MURPHY:** Do you recall being instructed
2 that for you to find for the plaintiff, the plaintiff
3 had to prove their case more -- just above 50 percent?

4 They had to prove it just more than the other
5 side?

6 The plaintiff didn't have to prove their case
7 beyond a reasonable doubt?

8 **PROSPECTIVE JUROR:** Yes. Correct.

9 **MR. MURPHY:** Just had to prove by a
10 preponderance?

11 **PROSPECTIVE JUROR:** Uh-huh.

12 **MR. MURPHY:** Were you on a jury, too?

13 **PROSPECTIVE JUROR:** Yes, I was.

14 **MR. MURPHY:** And Ms. Mitzel, what was your
15 jury experience?

16 **PROSPECTIVE JUROR:** There was two that I sat
17 on. One was a car accident with injuries; and the
18 other one was a rape.

19 **MR. MURPHY:** Okay.

20 Was that here in Pennington County?

21 **PROSPECTIVE JUROR:** Yes.

22 **MR. MURPHY:** All right.

23 And how long ago was the rape case you sat
24 on?

25 **PROSPECTIVE JUROR:** Probably about eight

1 years.

2 **MR. MURPHY:** Okay.

3 Was it a situation -- did you enjoy the
4 process of being a juror?

5 **PROSPECTIVE JUROR:** I did.

6 **MR. MURPHY:** And the deliberations, were they
7 respectful?

8 **PROSPECTIVE JUROR:** Yes.

9 **MR. MURPHY:** Everybody listened to each
10 other's opinions and respected them.

11 **PROSPECTIVE JUROR:** Yes.

12 **MR. MURPHY:** What do you recall about the
13 standard of proof that the Court asked you to apply in
14 this rape case?

15 **PROSPECTIVE JUROR:** Well, I taught they
16 proved beyond a doubt that he was guilty.

17 **MR. MURPHY:** But the standard was beyond a
18 reasonable doubt?

19 **PROSPECTIVE JUROR:** Yes.

20 **MR. MURPHY:** That the state had to prove?

21 **PROSPECTIVE JUROR:** Yes.

22 **MR. MURPHY:** What do you interpret that to
23 mean?

24 What did those words mean to you?

25 **PROSPECTIVE JUROR:** Without a doubt I was

1 convinced, yeah.

2 **MR. MURPHY:** All right.

3 And let's see, Ms. Vanloan, did you also sit
4 on a jury?

5 **PROSPECTIVE JUROR:** No.

6 **MR. MURPHY:** Ms. Buckingham, how many have
7 you sat on?

8 **PROSPECTIVE JUROR:** I sat on one before.

9 **MR. MURPHY:** How long ago?

10 **PROSPECTIVE JUROR:** Eight, ten years ago.
11 It's been a long time.

12 **MR. MURPHY:** Was it a criminal or civil case?

13 **PROSPECTIVE JUROR:** Civil. Running a red
14 light.

15 **MR. MURPHY:** Did you also have a good
16 experience?

17 **PROSPECTIVE JUROR:** Yes.

18 **MR. MURPHY:** And Ms. Daily, did you sit on a
19 jury before.

20 **PROSPECTIVE JUROR:** No.

21 **MR. MURPHY:** Ms. Scott?

22 **PROSPECTIVE JUROR:** Yes.

23 **MR. MURPHY:** What kind of jury or how many
24 times?

25 **PROSPECTIVE JUROR:** Just once. It was the

1 beginning of the month.

2 **MR. MURPHY:** Lucky you.

3 **PROSPECTIVE JUROR:** Yeah.

4 **MR. MURPHY:** So you are the Veteran.

5 Was that a criminal or civil case?

6 **PROSPECTIVE JUROR:** Criminal. I don't even
7 remember.

8 **MR. MURPHY:** Do you remember what the charge
9 was?

10 **PROSPECTIVE JUROR:** He -- it was for theft.

11 **MR. MURPHY:** How did the process go?

12 Was it an enjoyable experience?

13 **PROSPECTIVE JUROR:** Yeah. Yeah.

14 **MR. MURPHY:** Okay.

15 Did you get tired of the delays and stuff
16 like that or --

17 **PROSPECTIVE JUROR:** No. It went -- it was
18 just one day. It went real quick.

19 **MR. MURPHY:** Okay.

20 With a one-day trial everybody has their
21 ducks in a row. On these longer trials when witnesses
22 are flying in from all other the country things can
23 start and stop. /

24 Anything about that process make you feel
25 like jury duty wasn't for you?

1 **PROSPECTIVE JUROR:** No, I guess not.

2 **MR. MURPHY:** Okay. Good.

3 I am going to talk about some of the legal
4 principles involved and some of have you been jurors
5 especially in criminal cases so you are going to be
6 somewhat familiar with these legal principles.

7 But each case we want to go through and make
8 sure not only that you understand the principles, but
9 that you are willing to apply them. And the reason
10 why we talk about willing to apply them is because at
11 the end of this case the judge is going to give you
12 some jury instructions and one of those jury
13 instructions says that you, as jurors, are judges of
14 the facts. And the judge used that phrase earlier when
15 he was doing his introduction.

16 What does that mean, judges of facts? You
17 decide what happened; you decide what witnesses'
18 testimony was believable, what wasn't believable, what
19 you think has been established.

20 The judge is the judge of the law. He's
21 going to give you the law. And part of your oath as a
22 juror if you are picked is that you are agreeing in
23 advance to follow that law, whatever it is.

24 Now, often times the packet of law that the
25 judge gives you is 30, 40, 50 pages long.

1 Ms. Scott, in your theft case, how thick was
2 the packet?

3 Was it substantial for that case?

4 **PROSPECTIVE JUROR:** I don't think so. I
5 don't remember.

6 **MR. MURPHY:** Okay.

7 Does anybody remember the kind of packet of
8 jury instructions they got when they sat on a jury
9 being pretty substantial? Okay.

10 Well, in this case I will tell you they will
11 probably be a pretty good set of instructions. We're
12 not going to go through all of those, we're just going
13 to hit some of the highlights.

14 The first one of the instructions that the
15 judge is going to give you is that the presumption of
16 innocence carries in this case. Sitting here today,
17 my client, John Graham, is presumed to be innocent.
18 And that presumption stays with him until such time as
19 the state has proven beyond any reasonable doubt
20 otherwise.

21 So as you sit and listen to witness after
22 witness whether they are called by the prosecution or
23 the defense, throughout this presentation of evidence,
24 until you go back and deliberate he sits presumed
25 innocent. And that's a concept that is universally

1 recognized in the states in this country.

2 Who here has heard of the presumption of
3 innocence before?

4 Ms. Mitzel, is that something that means --
5 is that a concept that you are familiar with?

6 **PROSPECTIVE JUROR:** Yes.

7 **MR. MURPHY:** Do you have any thoughts about
8 whether that's a standard that's fair to start a trial
9 with?

10 **PROSPECTIVE JUROR:** It is fair.

11 **MR. MURPHY:** It is fair.

12 One of the things that -- you know, it comes
13 up in a case like this. We're humans. This is a
14 human system. We're trying to apply laws in a very
15 human context.

16 My client has been charged with two serious
17 crimes, murder. Two counts of murder. One person is
18 alleged to be the victim, but it's two different
19 counts. And we have been through this system and we
20 have gotten all the way up to today where this trial
21 is about to begin.

22 It would be very natural for somebody to say,
23 well, you know, he must have done something wrong.

24 Who maybe thinks, just on any level, a gut
25 feeling, he didn't end up here by accident? They

1 don't make mistakes that big?

2 Anybody?

3 Ms. Daily, I see you kind of --

4 **PROSPECTIVE JUROR:** That's kind of a funny
5 question.

6 **MR. MURPHY:** It is a funny question. But you
7 know, it's kind of like --

8 **PROSPECTIVE JUROR:** If you believe the
9 newspapers.

10 **MR. MURPHY:** Right.

11 And sometimes it's hard to believe that the
12 police and the prosecution could make a mistake and
13 charge somebody who hadn't done something wrong.

14 Is it fair to say that your hunch would be
15 probably it's unlikely that this is all a complete
16 mistake?

17 **PROSPECTIVE JUROR:** Not necessarily.

18 **MR. MURPHY:** Not necessarily.

19 What -- by virtue of the fact that my client
20 has been charged with these crimes, do you have any
21 feeling that, well, where there is smoke there is
22 probably fire?

23 **PROSPECTIVE JUROR:** I don't think I would let
24 that enter into it.

25 **MR. MURPHY:** Anybody else?

1 Let me see who I can pick on.

2 Ms. Scott, you've sat on a trial before. You
3 saw somebody who was accused of a crime charged with a
4 crime, et cetera.

5 Did you either before or since get the idea
6 that, well, certainly wasn't a mistake? The
7 prosecution and the police and the FBI are unlikely to
8 make mistakes and charge the wrong person?

9 **PROSPECTIVE JUROR:** I don't think -- I guess
10 I don't know.

11 **MR. MURPHY:** I know I am putting you on the
12 spot. You had the most recent jury experience so you
13 have been through it within the last month. So it is
14 a tough question.

15 **PROSPECTIVE JUROR:** I think what they came up
16 with -- I feel that it is right; that they wouldn't
17 have made a mistake.

18 **MR. MURPHY:** That they wouldn't
19 intentionally?

20 **PROSPECTIVE JUROR:** No, they wouldn't do it
21 on purpose.

22 **MR. MURPHY:** Are you able to conceive that
23 they can make mistakes?

24 **PROSPECTIVE JUROR:** I am sure they can.
25 Everybody does.

1 **MR. MURPHY:** It's kind of one of those
2 things. I think of when my son, who is now 23, got
3 called down to the principals office in fourth or
4 fifth grade. You know, I usually had the belief going
5 in that he had done something to get his behind in the
6 principal's office. You know it wasn't -- even though
7 I would try to be a fair dad, listen to both sides and
8 figure out -- and certainly listen, I kind of figured
9 out in advance, when you get the call, you better come
10 down to the school, that he's done something. He's
11 not been able to sit in his seat. He was one of those
12 kids that can literally fall out of his seat he had so
13 much energy and just land on the floor during the
14 middle of class.

15 Anybody -- you are nodding and you share that
16 experience that these kind of things happen?

17 **PROSPECTIVE JUROR:** Yes.

18 **MR. MURPHY:** Now, this is a much more serious
19 context than that. But it's the same general
20 principles. You have been called in to sit in
21 judgment of somebody who has been accused, who has
22 been charged, and now we're months into the process
23 and he's going to trial.

24 Any of you on any level think just looking at
25 Mr. Graham here today you are saying, boy, I have to

1 believe he did something wrong to get here?

2 **PROSPECTIVE JUROR:** Well, of course, you have
3 to -- they had to have grounds to charge him.

4 **MR. MURPHY:** Uh-huh.

5 **PROSPECTIVE JUROR:** So there was something
6 that they believed was enough to charge him with it.
7 So he must have done something in their eyes to be
8 charged. Whether they can prove their case one way or
9 the other is left up to us to decide.

10 **MR. MURPHY:** I could not have put that better
11 myself. Thank you. That's a per statement of what
12 we're talking about.

13 Anybody here have any disagreements, not that
14 you are going to disagree with a fellow juror, but any
15 modifications of what was just said? Okay.

16 Now, I am going to do something -- I am going
17 to give you a brief quiz. We talked about the
18 presumption of innocence. We're going to assume due
19 to the recession and budget crisis while the judge is
20 up there --

21 You know, Your Honor, if you don't mind, you
22 didn't give this presentation this morning about the
23 use -- what you are looking at on the screen.

24 **THE COURT:** Yes.

25 **MR. MURPHY:** Do you want to tell the jury why

1 you are looking at the screen? We didn't go through
2 that today.

3 **THE COURT:** For all practical purposes in the
4 courtroom I am deaf. And I have realtime
5 transcription on the screen that allows me to read
6 word for word and that helps me make sense of the
7 sounds that I am hearing from various people as they
8 talk. I used to say I can't understand women but let
9 me just say their voices are harder for me to follow
10 in the course of a conversation.

11 **MR. MURPHY:** I didn't want you to think he
12 was paying Pong or Pacman or something during the
13 trial.

14 **THE COURT:** Actually, it's Freecell,
15 Mr. Murphy.

16 **MR. MURPHY:** Okay. And he may be, we don't
17 know. But at least we're understanding if during any
18 of our discussions or when there is a witness on the
19 stand and you may be sitting in the jury box thinking
20 boy this is important but must not be because the
21 judge is looking at the screen, you know he's reading
22 the testimony.

23 All right. Let's assume the governor said --
24 sent an email to the judge and the clerk and said we
25 don't have the money to have a three-week long trial

1 and pay the jurors the outrageous sums of money that
2 you get as jurors. And so you got to take a vote now.
3 And option A was guilty, option B is not guilty, and
4 option C is I need more information before I can
5 render a decision.

6 Who would vote A?

7 Who would vote B?

8 Who would vote C?

9 Okay. Ms. Buckingham, you did not raise your
10 hand.

11 **PROSPECTIVE JUROR:** I don't have any
12 information.

13 **MR. MURPHY:** Okay.

14 So what would your vote be then?

15 **PROSPECTIVE JUROR:** I can't vote him guilty
16 if I don't have any information.

17 **MR. MURPHY:** You got the answer right. As
18 for the other of you, I got to be the one to tell
19 you -- my client is sitting here presumed innocent.
20 And you haven't heard a single bit of evidence. And
21 that's really what the presumption of innocence boils
22 down to is that until and unless the state proves its
23 case beyond a reasonable doubt, you have to carry the
24 assumption that he is not guilty of the crimes and if
25 the state doesn't meet the burden, your duty is to

1 vote not guilty.

2 That's what the presumption of innocence
3 means. That's -- it's kind of the bedrock of our
4 criminal justice system. What goes directly in the
5 presumption of innocence is the right of the defendant
6 in this case John, not to testify if he decides he
7 doesn't want to. This is kind of where we really get
8 down to the nuts and bolts of how you feel about a
9 case and what predispositions come into it.

10 If the state has the burden of proving their
11 case beyond a reasonable doubt and he is presumed
12 innocent, that means Mr. Graham could come in here,
13 not ask a single question, not call a single witness,
14 and not get on the stand himself. Because it's the
15 state's job to prove that he's guilty. He's presumed
16 innocent. He doesn't have to prove himself not
17 guilty.

18 But we're humans. And there is a very human
19 desire to believe that a defendant who doesn't testify
20 must be hiding something or is guilty or otherwise is
21 not fully participating in the process.

22 You know, say there is crumbs on the counter
23 and you asked your kid, did you have one of the
24 cookies before dinner time and they didn't say
25 anything in response, just were silent. You may draw

1 some inferences there that the reason they are not
2 saying anything is because they actually did have the
3 cookie before dinner.

4 Mr. Scott, I am not picking on you. You are
5 just the farthest from me.

6 If Mr. Graham decides not to testify, how are
7 you going to view that?

8 How is that going to influence your thought
9 process?

10 **PROSPECTIVE JUROR:** I would think that he
11 would be hiding something, I guess.

12 **MR. MURPHY:** Okay. That's fair.

13 **PROSPECTIVE JUROR:** I would think if he was
14 innocent or something he would want to let us know
15 that.

16 **MR. MURPHY:** Okay.

17 I will turn to you, Ms. Daily. What are your
18 feelings about that?

19 **PROSPECTIVE JUROR:** About the same.

20 **MR. MURPHY:** About the same.

21 Ms. Buckingham?

22 **PROSPECTIVE JUROR:** It's his right.

23 **MR. MURPHY:** Okay.

24 So you wouldn't make any inference or draw
25 any inference or come to any conclusions if a

1 defendant, in this case John, decided not to get up on
2 the stand?

3 **PROSPECTIVE JUROR:** No.

4 **MR. MURPHY:** Can you think of reasons other
5 than having to hide something why somebody might not
6 want to get up on the stand?

7 **PROSPECTIVE JUROR:** I guess I would assume
8 it's your job to help him through this. Not prove it,
9 but help him -- I don't know quite how to explain it,
10 but he doesn't have to do anything.

11 **MR. MURPHY:** Okay. Good.

12 Ms. Vanloan?

13 **PROSPECTIVE JUROR:** It's his choice.

14 **MR. MURPHY:** Would you hold it against him in
15 any way, shape, or form?

16 **PROSPECTIVE JUROR:** Huh-uh.

17 **MR. MURPHY:** Can you conceive of reasons
18 separate and apart from hiding something or something
19 like that why somebody would not want to get up on the
20 stand.

21 **PROSPECTIVE JUROR:** Uh-huh. Maybe he has a
22 memory impairment or something.

23 **MR. MURPHY:** Okay.

24 Ms. Mitzel?

25 **PROSPECTIVE JUROR:** I believe it's his right.

1 **MR. MURPHY:** Okay.

2 Any qualms at all about sitting in a case --
3 you have sat in a criminal case before?

4 **PROSPECTIVE JUROR:** Yes.

5 **MR. MURPHY:** Did the defendant testify there?

6 **PROSPECTIVE JUROR:** I don't remember.

7 **MR. MURPHY:** It's been years ago.

8 **PROSPECTIVE JUROR:** Uh-huh.

9 **MR. MURPHY:** Any qualms at all about the idea
10 that somebody could go through a three-week long
11 trial, perhaps 50 witnesses called, but not get up on
12 the stand themselves?

13 **PROSPECTIVE JUROR:** That doesn't bother me.

14 **MR. MURPHY:** Mr. Whitman?

15 **PROSPECTIVE JUROR:** I don't have any problem
16 with it.

17 **MR. MURPHY:** You wouldn't draw any
18 conclusions?

19 **PROSPECTIVE JUROR:** No.

20 **MR. MURPHY:** You, ma'am?

21 **PROSPECTIVE JUROR:** I wouldn't have any
22 problem with it either.

23 **MR. MURPHY:** Let's go back to you two because
24 it's a very natural reaction. It's often how we
25 conduct ourselves in our daily lives.

1 The judge is going to instruct you and it's a
2 very direct instruction that you are not allowed to
3 draw any inference whatsoever about the fact that a
4 defendant does not testify.

5 If Mr. Graham decides not to testify, you are
6 not to form any opinion or conclusion or inference
7 based on that, but that's not a law that everybody can
8 apply. That's why we talked about can you follow the
9 judge's instruction.

10 Ms. Scott, if the judge tells you that it's
11 your duty to not form any conclusion or make any
12 inferences, are you really going to be able to do that
13 or are you feeling like you might struggle with the
14 idea of putting aside the fact that my client might
15 not testify?

16 **PROSPECTIVE JUROR:** I might struggle.

17 **MR. MURPHY:** Uh-huh.

18 And that's -- again, that's natural for more
19 people. The right to remain silent, it's a hard
20 concept to accept. We -- we need to, in a sense, now,
21 as opposed to once the jury is impaneled, find out
22 whether that's something -- that struggle is going to
23 be too hard.

24 Would it be fair to say that as you sit here
25 today, even if the judge were to tell you what the law

1 is, and that you are supposed to put that aside, that
2 you think you might continue to believe that if he
3 didn't testify, he was hiding something?

4 **PROSPECTIVE JUROR:** Yes.

5 **MR. MURPHY:** You would. All right.

6 And just having the judge tell you that the
7 law is different isn't going to change your personal
8 feelings on the matter?

9 **PROSPECTIVE JUROR:** Right.

10 **MR. MURPHY:** All right.

11 You know, in light of that, what I am going
12 to ask is if this juror could excused, Your Honor.

13 **THE COURT:** Mr. Jackley?

14 **MR. JACKLEY:** May I voir dire briefly, Your
15 Honor?

16 **THE COURT:** You may.

17 **MR. JACKLEY:** Good morning.

18 I'll get a chance after Mr. Murphy is done to
19 talk to all of you, but I get an opportunity when thee
20 is an issue for cause to come up and ask a couple
21 questions to determine what my position is. That's
22 what I am doing now, okay.

23 We're talking about some legal issues and
24 Mr. Murphy covered earlier that the judge will
25 instruct the jury both initially when the trial begins

1 what the law is, and then at the end of the trial in
2 more detail. Okay. So the judge decides and will
3 instruct on what the law is.

4 We have many laws in society. And I want to
5 use as my example the speed limit. Let's say out by
6 Ellsworth Air Force Base right on the interstate it's
7 65. You know what the law is. You know what the
8 speed limit is. You may not like it, but you
9 generally follow it.

10 In other words you may not agree with the
11 law, you may not agree with a certain thing, but are
12 you able to follow that?

13 **PROSPECTIVE JUROR:** Yes.

14 **MR. JACKLEY:** Similarly, if the judge gives
15 you an instruction of law, you may not agree with it
16 but would you generally be able to follow that?

17 **PROSPECTIVE JUROR:** I would try.

18 **MR. JACKLEY:** Are you generally a fair
19 person?

20 **PROSPECTIVE JUROR:** Yes.

21 **MR. JACKLEY:** Can you be an open-minded
22 person.

23 **PROSPECTIVE JUROR:** I try to be, yes.

24 **MR. JACKLEY:** And that's the best you can do,
25 right?

1 **PROSPECTIVE JUROR:** Yes.

2 **MR. JACKLEY:** That's all we can ask of you.
3 Your Honor, I would pass for cause.

4 **THE COURT:** Mr. Murphy?

5 **MR. MURPHY:** Ma'am -- boy, you probably
6 really feel picked on now. Why did I open my mouth.

7 This is what I talked about at the beginning.
8 There is no judgments here. We're really here because
9 we all care about starting out this process the best
10 way possible.

11 You have said, in a response to Mr. Jackley's
12 question, you would try. That's different from saying
13 you can do it. And this isn't a thing like the speed
14 limit. The speed limits are a pretty easy law to
15 understand and grasp that you have to follow hose laws
16 so you don't cause accidents. This is a personal
17 issue.

18 **PROSPECTIVE JUROR:** Right.

19 **MR. MURPHY:** And I have asked you and I think
20 you have been fairly clear that you would struggle
21 with the presumption of innocence and my client's
22 right not to testify, even if the judge told you that
23 the law is otherwise; is that a fair statement?

24 **PROSPECTIVE JUROR:** Yes.

25 **MR. MURPHY:** And even though you would try

1 you can't guarantee you are going to be able to put
2 that aside and those feelings aside.

3 **PROSPECTIVE JUROR:** Right.

4 **MR. MURPHY:** Right. Okay.

5 Your Honor, I renew my motion.

6 **THE COURT:** I teach a constitutional law
7 class. We talk about the Fourth Amendment. And I
8 tell the students that if I get stopped by a police
9 officer and they ask if I can -- if they can search my
10 car, I say no. And it really bothers some of my
11 students that I would say no. And that's my right to
12 say no.

13 And they say, well, if you don't have
14 anything to hide, why don't you do that. And I said
15 because it's my right to say no. And that's hard for
16 them to understand and I see your point. And that is
17 exactly why I am going to allow you to be excused here
18 for your candor in saying I would do my best, but that
19 may not be good enough. So I thank you for that and I
20 will excuse you.

21 I see people watching the clock and that
22 normally means, let's get out of dodge for a minute or
23 two.

24 Remember not to discuss this case. We'll
25 come back in about 15 minutes or so. If we need more

1 time, we'll do that, too.

2 (Off the record.)

3 **THE COURT:** Okay.

4 One of the statements and warnings I did give
5 yesterday and forgot today is no electronics. That
6 includes Sawsals. I don't want telephones, I don't
7 want anything that's capable of recording. Jurors
8 that are ultimately selected may bring their cell
9 phones, but they will go in the possession of the
10 bailiffs except during breaks or lunch hours.

11 Anybody caught doing that outside of the
12 jurors will be removed from the courtroom for the
13 duration. That's just the way it's going to be. And
14 so that's the rule. And I understand we are addicted
15 to cell phones. I am not. I don't know where mine
16 is. We will have them shut off now. If you brought
17 them in, shut them off. That will be the rule from
18 day -- starting tomorrow flat out.

19 Thank you.

20 **MR. MURPHY:** We need to call a replacement
21 juror for Ms. Scott.

22 **THE CLERK:** Lynell Rice-Brinkworth.

23 **MR. MURPHY:** Ms. Brinkworth, good morning.
24 You have heard what I have said so far?

25 **PROSPECTIVE JUROR:** Yes.

1 **MR. MURPHY:** Rather than go through it again,
2 is there anything at all including those topics that
3 we talked about, victims of crime or anything, that
4 you had any response to whatsoever?

5 **PROSPECTIVE JUROR:** I don't believe so.

6 **MR. MURPHY:** Any particular personal hardship
7 if you have to stay with us till December 17?

8 **PROSPECTIVE JUROR:** I do own my own business.
9 And I do work part time for a nonprofit organization
10 so it's there. I mean to me this is my civil duty. I
11 am willing to be here. I can't deny it, but I am
12 willing to do that.

13 **MR. MURPHY:** Great. That's all we can ask.
14 And I appreciate that.

15 None of the witnesses?

16 **PROSPECTIVE JUROR:** No.

17 And I actually have only been in the area for
18 a little over the year.

19 **MR. MURPHY:** All right. Good.

20 Well, I'm going to start back with you,
21 Ms. Daily. You probably had that idea. You've heard
22 the colloquy we had with Ms. Scott. And essentially
23 what we're getting at is this is an opinion, a feeling
24 you have, and that's not good, bad, or indifferent.
25 It's just who you are. And what we need to explore

1 like we did with Ms. Scott is whether that's a feeling
2 you have that you hold strong enough that it would be
3 difficult for you to set that aside if you were asked
4 to sit on this jury or if it's something that you can
5 set aside and not draw any inference of anything if my
6 client decides not to testify.

7 **PROSPECTIVE JUROR:** I could set it aside,
8 yes. I am pretty strong that way.

9 **MR. MURPHY:** Okay.

10 Ms. Brinkworth?

11 **PROSPECTIVE JUROR:** Yes.

12 **MR. MURPHY:** We just started this discussion
13 on not only the presumption of innocence, but the
14 right to not testify. We had a couple responses of
15 people who said just -- they would believe that if
16 somebody didn't get up to testify, they might be
17 something to hide or that might be indicative of
18 guilt.

19 What are your feelings on that?

20 **PROSPECTIVE JUROR:** Kind of like a couple
21 others said, my first instinct is hum. But I also
22 believe that we are given the laws and we have to
23 abide by them. And I can set that aside.

24 **MR. MURPHY:** Okay.

25 Everybody then at least we know right now --

1 I ask for a raise of a hands -- as a commitment if my
2 client chooses not to testify, that will not be held
3 against him or any inference of guilt or anything else
4 made because he didn't -- you if you can commit to
5 that, please raise your hand. Thank you.

6 All right. We're going to move on to the
7 next legal concept which is the beyond a reasonable
8 doubt standard. And we're going to talk about that.

9 But first, I didn't ask you, have you ever
10 served on a jury before.

11 **PROSPECTIVE JUROR:** No.

12 **MR. MURPHY:** Okay.

13 Some of you have served on jurors involving
14 criminal cases, some of you haven't. Before we get
15 into the reasonable doubt standard, I want to talk
16 about the elements of an offense. Because, you may,
17 if you haven't sat on a criminal jury -- let's use a
18 DUI case. You may think when you go back there you
19 are given an instruction is the defendant guilty or
20 not guilty of DUI. That's the verdict form.

21 But in the instructions the judge would
22 instruct you that before you could find a defendant
23 guilty of DUI, you would have to find beyond a
24 reasonable doubt individual elements. The elements of
25 the offense. The crime may be DUI, but the elements

1 are that the person was driving or in control of a
2 vehicle in the particular county and they had more
3 than .08 alcohol by weight in their blood. So you
4 have to find three things, three elements.

5 I have forgot already who here sat on a
6 criminal jury.

7 Ms. Mitzel, do you recall in the case that
8 you sat on that there were individual elements that
9 you had to find in order to reach a determination?

10 **PROSPECTIVE JUROR:** Yeah.

11 **MR. MURPHY:** The elements -- in this case
12 there is two crimes charged, premeditated murder and
13 felony murder kidnapping. And each of those are going
14 to have a number of elements.

15 And one of the things the judge is going to
16 instruct you is that those elements each must
17 individually be proven by the state beyond a
18 reasonable doubt. There is no hierarchy of elements.
19 There is not some elements that are more important
20 than others. Each element is there.

21 And I don't know -- I am sure in some big
22 securities fraud case they might have a crime that has
23 16 elements. And if you, as a juror, were on that
24 case and you found the state or the government had
25 proved 15 out of 16 but they hadn't proved one of

1 them, one out of 16, the instruction would tell you
2 that it's your duty as a juror to find the defendant
3 not guilty. Even though they had proved 15/16th of
4 their case.

5 Just hearing that, what does that -- does
6 that strike you as a fair way to proceed?

7 **PROSPECTIVE JUROR:** No. It strikes me as a
8 very fair way to proceed because I have kids and, yes,
9 they get just to that line where they think they can
10 get their allowance, but they haven't finished. Yes,
11 they have got 1,516th of it done, but the rule is you
12 have to have this done before you get your allowance.
13 I feel the same way about the law.

14 **MR. MURPHY:** You are a tough mom.

15 My kids are 25, 23, and 11. And my older
16 kids have just bugged me for years now that I treat
17 the 11 year old like she's my granddaughter. So,
18 yeah, 1,216th or 8/16th she's going to get her
19 allowance when it's the last one.

20 Okay. You have endorsed the concept of this.

21 Anybody else?

22 Let me ask you, Ms. Vanloan, how do you feel
23 about the idea that the state has to prove each and
24 every element and if on any one element they haven't
25 met their burden of beyond a reasonable doubt it's

1 your duty to vote not guilty.

2 Does that does concern you?

3 **PROSPECTIVE JUROR:** No.

4 **MR. MURPHY:** Do you feel it's a fair way for
5 us to proceed?

6 **PROSPECTIVE JUROR:** Yes. She explained it
7 very well.

8 **MR. MURPHY:** She did.

9 Ms. Daily, how do you feel about that?

10 **PROSPECTIVE JUROR:** I could go with that.

11 **MR. MURPHY:** I am sorry.

12 **PROSPECTIVE JUROR:** I could go with that.

13 **MR. MURPHY:** Is it something -- I appreciate
14 you can go with it, but is it something you feel is
15 the way our criminal justice system should be
16 structured?

17 **PROSPECTIVE JUROR:** I -- I might go to some
18 judge and question why it's that way.

19 **MR. MURPHY:** Why would you question it?

20 **PROSPECTIVE JUROR:** If I thought all the
21 facts were there before, I might question it. I might
22 wonder.

23 **MR. MURPHY:** Okay.

24 You might think that places too high of a
25 burden on the state to prove their case?

1 **PROSPECTIVE JUROR:** I am not sure I think
2 that but I would probably question it.

3 **MR. MURPHY:** Okay. All right.

4 If the judge tells you that's your job, are
5 you able to follow in this case?

6 And it's phrased as a duty. You know, the
7 jurors have this honor and this duty to follow the law
8 and apply it. That's how we get consistency from one
9 trial to another. If individual jurors could say,
10 well, in this case, you know, it's a serious crime.
11 If I have a pretty strong hunch that person A did it
12 or did something wrong, I am going to find them guilty
13 based on a hunch instead of on individual scrutiny of
14 the evidence. That would leave chaos.

15 Okay. Let's talk about the beyond a
16 reasonable doubt standard. We've got the sense of the
17 elements. This goes into the presumption of innocence
18 forward. And I am just going to say the words, beyond
19 a reasonable doubt. We don't -- we hear it all the
20 time. We watch Law and Order or CSI and we hear that
21 standard, but what does that mean?

22 The state, the prosecution, has to prove each
23 and every element, and those elements often contain
24 facts within them -- they have to prove those beyond a
25 reasonable doubt.

1 Now, I will just ask you if you would raise
2 your hand if you think you are an unreasonable person.
3 None of you. You've made it this far. Well, you are
4 smiling.

5 Do you think you are unreasonable there?

6 **PROSPECTIVE JUROR:** No.

7 **MR. MURPHY:** Okay.

8 This is where I'm sure if my wife was in the
9 back she would be going you --

10 Anyways, you've made it this far. You've
11 filled out the questionnaire. You've shown up, you
12 have answered a bunch of questions.

13 The state has to prove to you each and every
14 element beyond any reasonable doubt that they had met
15 their burden or all the elements. And it's hard to
16 conceptualize because we don't deal with that kind of
17 thing in the way we make day-to-day judgments. We
18 often make assumptions and conclusions based on
19 hunches or imperfect information. We do this all the
20 time with our kids and our family members.

21 Those are -- it's not the way we scrutinize
22 the evidence to make decisions in our daily life. So
23 sometimes it helps to have kind of a visual context.

24 Imagine, if you would, we're at the beginning
25 of this case and the state hasn't proved any evidence.

1 So if I had a jar here of marbles, each marble
2 representing a fact or an element or something
3 material the state had to prove, the jar would be full
4 right now because we're at the beginning of the case.
5 They haven't proved anything.

6 Imagine as the case goes on they prove
7 certain facts to you. And as you go back to the
8 deliberation room you agree they have proven certain
9 things that they have to prove. So you are taking
10 marbles out. You are taking doubts out of the jar.

11 In this case, there is not going to be any
12 dispute that Anna Mae Aquash was killed. There is no
13 dispute about that. That's going to be one of the
14 elements. And so we're taking those out.

15 But what if you get to a point where the jar
16 has one marble left? It's a doubt and it's not an
17 unreasonable doubt. It's not based on some belief
18 that there was some grand marching conspiracy. It's
19 one doubt. You believe they have proved everything
20 else. All the other doubts at out of the jar now.

21 Can you follow the law and say my duty, then,
22 is to vote not guilty because they haven't resolved
23 that last doubt?

24 Can you do that?

25 **PROSPECTIVE JUROR:** Yes.

1 **MR. JACKLEY:** Your Honor, I am going to
2 object and request that the Court instruct the jury as
3 to what reasonable doubt means and I can approach with
4 a further objection but I don't want to give a
5 speaking objection.

6 **THE COURT:** I don't know if the question is a
7 problem. But it is my job to describe reasonable
8 doubt in the jury instructions. And there are
9 probably three or four different descriptions of it
10 that are generally accepted in our jury instructions.

11 Suffice it to say that it has to be a
12 substantial doubt. That is, enough that would make
13 you stop and think and be comfortable before you would
14 proceed.

15 There is all kinds of decisions in our life
16 that we make that. If there is a real possibility
17 that the person is not guilty or that a particular
18 element has not been proven to that level of
19 certainty, then you are down to a not guilty.

20 Lawyers will describe it a different way or
21 different ways when they talk to you, but obviously
22 beyond any doubt is silly. We can't get there. But
23 it is beyond a reasonable doubt and that means
24 something you would comfortably rely on in your own
25 life and important affairs.

1 Mr. Murphy at various times, or this one
2 included, will describe it in words of his choosing.
3 Mr. Jackley will describe it in words of his choosing.
4 But when all is said and done that's where we are
5 going to be.

6 Would you act on the information you have in
7 an important affair of your life or would you need
8 something more before you could go forward in an
9 important affair of your life or would a reasonable
10 person do that?

11 I don't even know how accurate it is, but I
12 always use the expression when I was trying cases that
13 if a physician told me I needed to amputate one of my
14 kid's legs, I would go get a second opinion. Okay.
15 Doesn't mean I wouldn't let it happen, but it sure
16 would mean I want to be pretty sure. And no physician
17 would tell me it's an absolute necessity. But they
18 would certainly give me strong feelings one way or the
19 other that it was necessary or not necessary for a
20 reasonable chance of a good outcome.

21 I don't even know whether that's a good
22 description. That's the one I used and it seemed to
23 pass muster with the courts. You know, simply you got
24 to be comfortable moving forward. A reasonable person
25 would have to be, it's something important. If you

1 wouldn't do it without more evidence, then that's your
2 answer.

3 **MR. MURPHY:** Your Honor, just I want
4 clarification because the words I have been using I
5 want to make sure that we're all on the same page,
6 this is an accurate statement. The state has a burden
7 and that burden is they have to prove each element
8 beyond a reasonable doubt?

9 **THE COURT:** That's correct.

10 **MR. MURPHY:** Okay.

11 And that's, I thought, the words I was using.
12 And I don't know any deviation from those words.
13 That's what I am talking about here. The state has
14 burden of proving beyond a reasonable doubt each
15 element.

16 So going back to the example, 'if at the end
17 of the case you have a reasonable doubt about the case
18 or about one element, that is your duty, then, to vote
19 not guilty. That is a tough standard.

20 We talked before about civil juries versus
21 criminal cases. In the civil law, when people are
22 fighting by and large about money, whether it's a
23 contract dispute or a personal injury case, they are
24 fighting about money. The standard is a
25 preponderance. And a preponderance says that you rule

1 in favor of the side that has proven their case more
2 than the other side. So it could just be
3 50-and-a-half to 49-and-a-half percent if we could
4 really ever quantify these things. We really can't.

5 But if you found that the plaintiff proved
6 its case a bit more than the defendant proved its
7 defense, you would have to find in favor of the
8 plaintiff. Vice versa.

9 There is another standard in law called clear
10 and convincing evidence. It is, the prevailing side
11 has to prove their case more than preponderance but
12 less than a beyond a reasonable doubt. It's a pretty
13 rare standard. It applies a lot of times in cases
14 that don't involve juries.

15 But what we're here today for is a criminal
16 case, and in a criminal at case the state has the
17 burden and the burden stays with it from the very
18 beginning to the very end. It never shifts to
19 Mr. Graham. And they have to prove beyond a
20 reasonable doubt that they have established by
21 evidence every element. It's the highest standard we
22 have in law.

23 Now, I want to go back and -- I will start
24 with you, Mr. Whitman.

25 Do you have any feelings about the kind of

1 evidence or the fairness of requiring the state to
2 prove beyond a reasonable doubt to you, each and every
3 element, before you would be entitled to vote guilty?

4 Does that cause you any concern that that
5 makes it too darn hard on the state?

6 **PROSPECTIVE JUROR:** No, it doesn't bother me.

7 **MR. MURPHY:** Okay.

8 What about you Ms. Mitzel, is that a standard
9 you can fairly apply?

10 **PROSPECTIVE JUROR:** Yes.

11 **MR. MURPHY:** And you, ma'am?

12 **PROSPECTIVE JUROR:** Yes.

13 **MR. MURPHY:** What about you, Ms. Buckingham?

14 **PROSPECTIVE JUROR:** Yes.

15 **MR. MURPHY:** Do you have any qualms about
16 that?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** Ms. Daily, how do you feel about
19 this.

20 **PROSPECTIVE JUROR:** I could handle it.

21 **MR. MURPHY:** You could handle it?

22 **PROSPECTIVE JUROR:** Yes.

23 **MR. MURPHY:** Okay.

24 That is the abstract legal concept. One
25 thing I use sometimes also to demonstrate. The jar of

1 marbles is one way.

2 Another way if you thought of this banister
3 as being the case, we're starting at that end where we
4 have no evidence. Got complete doubt. But as the
5 case goes along and witnesses testify, evidence may
6 come in and it may move us. And if we looked at the
7 other end of the banister, that would be complete
8 certainty. The state doesn't have to prove their case
9 to complete certainty, but they have to prove it
10 beyond a reasonable doubt.

11 We might get to a point where the case ends,
12 the evidence ends, you go back in the room and you
13 said, well, the state proved a lot, 75 percent, but I
14 still have some doubts, reasonable doubts, about some
15 of the elements.

16 What would you vote, Ms. Buckingham?

17 **PROSPECTIVE JUROR:** There is still doubt.

18 **MR. MURPHY:** So the vote would have to be?

19 **PROSPECTIVE JUROR:** You can't vote that he's
20 guilty if there is doubt.

21 **MR. MURPHY:** Right. It's a not guilty vote.

22 What if you get all the way up to where you
23 believe the state has proved 90 percent of their case,
24 but you still have a reasonable doubt about one of the
25 elements. And it may only be one of the elements out

1 of seven or twelve or whatever it is.

2 Mr. Whitman, what would your vote to have to
3 be under the law?

4 **PROSPECTIVE JUROR:** It would have to be not
5 guilty.

6 **MR. MURPHY:** Okay.

7 Ms. Daily, do you have any problems -- I know
8 you said you can handle this, but any problems at all
9 on getting to that point and feeling that, boy, I am
10 not sure if that's the duty I can respect?

11 **PROSPECTIVE JUROR:** No. I can respect it.

12 **MR. MURPHY:** Okay.

13 We're now going to talk about some of the
14 topics that may come up in this case because they may
15 affect for personal reasons your ability to apply the
16 reasonable doubt standard.

17 One of those is the American Indian Movement.
18 This case involves allegations of a crime that
19 happened in 1975 or 1976. It's a long time ago, 34,
20 35 years ago? And at the point in South Dakota, the
21 American Indian Movement was active, particularly down
22 on Pine Ridge.

23 So I am going to start out just by asking you
24 if any of you have any recollections at all of the
25 American Indian Movement whether it was specifically

1 here or in any location?

2 Ms. Daily, what were your recollections of
3 the American Indian Movement?

4 **PROSPECTIVE JUROR:** I was at National College
5 across street. We had to lock our doors for a while
6 because there was a lot of action going across the
7 street and behind the courthouse here. There were
8 some, you know, protests and so forth.

9 **MR. MURPHY:** Did that cause you fear?

10 **PROSPECTIVE JUROR:** Sometimes people on your
11 roof even.

12 **MR. MURPHY:** On your roof. Okay.

13 **PROSPECTIVE JUROR:** No, it didn't, but I am
14 familiar with that time.

15 Yes, I am that old.

16 **MR. MURPHY:** I will tell you, yesterday we
17 had about -- 80 some jurors in here and everybody
18 pretended like they were too young. We are all --
19 almost all of us are old enough to remember.

20 Did that cause you any fear at the time any
21 concern?

22 **PROSPECTIVE JUROR:** No.

23 **MR. MURPHY:** Okay.

24 Anybody else?

25 Did anybody here live in Rapid City or South

1 Dakota in 1975.

2 Ms. Mitzel?

3 **PROSPECTIVE JUROR:** I lived here. I remember
4 reading about it and watching it on TV.

5 **MR. MURPHY:** Did you form any opinions about
6 that?

7 **PROSPECTIVE JUROR:** No.

8 **MR. MURPHY:** About the movement or its
9 members or anything like that?

10 **PROSPECTIVE JUROR:** Not really.

11 **MR. MURPHY:** Okay.

12 Anybody since then -- 75 is a long time ago,
13 but certainly with books and newspapers, movies, and
14 other things, has anybody formed any opinions at all
15 about the American Indian Movement or the members of
16 the American Indian Movement since then?

17 When I say that phrase, the American Indian
18 Movement, what comes to your mind, Mr. Whitman, when
19 you hear that phrase?

20 **PROSPECTIVE JUROR:** Being that it was a such
21 a long time ago I don't know if I have the retention
22 for it.

23 **MR. MURPHY:** All right.

24 **PROSPECTIVE JUROR:** But I don't -- I didn't
25 have any opinions about it at all.

1 **MR. MURPHY:** Okay.

2 Well, you know, at that time -- most of you
3 probably know that this -- there was the wounded need
4 occupation in 1973.

5 Do all of you have -- raise your hand if you
6 don't know what I am talking about when I talk about
7 Wounded Knee.

8 **PROSPECTIVE JUROR:** Can you explain?

9 **MR. MURPHY:** Okay.

10 That was a time period when members of the
11 American Indian Movement occupied a village called
12 Wounded Knee down on Pine Ridge where there was a
13 standoff with law enforcement for about 67 days or
14 something like that.

15 Are you familiar with that event?

16 **PROSPECTIVE JUROR:** No.

17 **MR. MURPHY:** Everybody else is familiar?

18 The other events, kind of key events from
19 that time frame, June 26, 1975, at a place near Oglala
20 called Jumping Bull's place, there was a shoot-out
21 between members of the American Indian Movement and
22 two FBI agents. Both of the FBI agents were killed as
23 well as one of the members of AIM. It was a huge
24 issue, a nationwide issue. It resulted in a massive
25 infusion of law enforcement in this community.

1 Who recalls that incident or has heard of
2 that?

3 All right. Ms. Mitzel, what were your
4 recollections of that or what are your feelings about
5 that incident?

6 **PROSPECTIVE JUROR:** Well, pretty much how you
7 described it. I remember just seeing it on the news
8 and that two FBI agent agents were killed.

9 **MR. MURPHY:** And you as well.

10 **PROSPECTIVE JUROR:** I know of it through
11 history because I am a history major.

12 **MR. MURPHY:** Okay.

13 And then there were subsequent issues. There
14 was some bombings. There were -- there was a
15 shoot-out in Oregon. Some other instances involving
16 AIM. The were courthouse riots where charges were
17 brought both in Custer County and Minnehaha county.

18 Who recalls the courthouse riot cases?

19 Any of you?

20 Okay. The reason why I bring up the history
21 of AIM or these issues is that's going to be something
22 of this case. There is going to be a historical
23 context. The events in question happened within that
24 context. And I suspect that a number of the state's
25 witnesses are going to talk about that.

1 You are going to learn that my client, John,
2 was somebody who supported the goals of the American
3 Indian Movement. You will you hear that it wasn't
4 like -- it wasn't like being a member of a political
5 party where you actually have a card where you are a
6 member of a particular party, but you had supporters.
7 People who considered themselves members.

8 Because the American Indian Movement is
9 alleged to have committed a number of crimes or
10 members have committed crimes, I wanted to see
11 whether -- by virtue of my client's association with
12 the American Indian Movement, whether that's going to
13 make you think he was more likely to commit acts or
14 criminal activity because he was associated with that
15 movement.

16 Do you have any feelings about that,
17 Ms. Brinkworth?

18 **PROSPECTIVE JUROR:** So you are asking if I
19 feel like he --

20 **MR. MURPHY:** Because he was a supporter of a
21 group like AIM that was involved in militant political
22 activities, do you feel that's likely to cause you to
23 believe that he's more likely to have committed acts
24 of violence himself?

25 **PROSPECTIVE JUROR:** No.

1 **MR. MURPHY:** Would it be fair to say that you
2 would agree that somebody shouldn't be determined to
3 be guilty by their association of other people?

4 **PROSPECTIVE JUROR:** Yes.

5 **MR. MURPHY:** What about you, Ms. Daily?

6 **PROSPECTIVE JUROR:** Same.

7 **MR. MURPHY:** Okay.

8 We don't have to look at it necessarily in
9 the context of AIM. There is many organizations,
10 whether it be an environmental group or a chamber of
11 commerce or political parties, there may be members of
12 that group that are corrupt or involved in scandals or
13 whatnot.

14 Ms. Buckingham, if that were the case, would
15 you feel it would be fair to judge all members of an
16 organization by the acts of a few of the members?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** Okay.

19 Same for you, Ms. Vanloan?

20 **PROSPECTIVE JUROR:** Same.

21 **MR. MURPHY:** Ms. Mitzel, since you have some
22 recollection of AIM and the events, do you think in
23 any way the fact that my client supported AIM might
24 cause you to believe that he was more likely to be
25 involved in acts of violence or commit crimes?

1 **PROSPECTIVE JUROR:** No.

2 **MR. MURPHY:** Are you willing to keep an open
3 mind that there may have been many people involved in
4 the American Indian Movement that were there for
5 community organization purposes or completely peaceful
6 reasons?

7 **PROSPECTIVE JUROR:** Yes.

8 **MR. MURPHY:** Okay.

9 That the acts of a few people shouldn't carry
10 over to everybody in that group?

11 **PROSPECTIVE JUROR:** Yeah.

12 **MR. MURPHY:** Okay.

13 Mr. Whitman, do you --

14 **PROSPECTIVE JUROR:** I'd feel the same way.

15 **PROSPECTIVE JUROR:** I feel strongly the same
16 way.

17 **MR. MURPHY:** Okay. Thank you. All right.

18 Okay. This is perhaps probably the last of
19 the very sensitive issues. And I meant it when I said
20 it before, and I know it would be the same for the
21 Attorney General and the judge. This is an area where
22 we really aren't here to cast any judgments and we are
23 certainly able to have those private meetings to talk
24 about it.

25 I want to talk about the issue of race. Race

1 and feelings about race are throughout our society in
2 every state, and frankly, in just about every country.
3 We all come to this courthouse as a complete person
4 who may have their own prejudices whether it's race or
5 orientation or political affiliation or whatever. We
6 all have those type of prejudices.

7 We need to explore that because my client,
8 John, is a Canadian Indian. Anna Mae Aquash was
9 Canadian Indian. And perhaps half or more of the
10 witnesses are Native American whether they are
11 recognized by a federal tribe or not, they are
12 affiliate or associate with Native Americans.

13 And this is a tough issue. You know, I -- I
14 had a case. It was just down the hall, actually,
15 where during jury selection my client was Indian. He
16 was involved in an altercation with somebody being
17 stabbed and we went through this discussion. And one
18 of the jurors --

19 **MR. JACKLEY:** Your Honor, I am going to
20 object.

21 **THE COURT:** Overruled.

22 **MR. MURPHY:** -- where during the course of
23 the voir dire, I asked whether that person -- whether
24 anybody had any issues that might impair their ability
25 to sit fairly. And this woman candidly, openly said

1 yes, I was raised in a family where I came to
2 believe -- and it's hard part of who I am now --
3 whether I -- she said, I am not proud of it -- but
4 that I believe that people who are Indian are
5 dishonest and/or violent. That's who she was. And we
6 appreciated the fact that she was candid. And she was
7 removed because of that.

8 I want to bring that up here because it is
9 somebody that is so important as we go forward that
10 every witness, whatever their race, religion, position
11 in society, be treated the same when they take the
12 oath and it's up to you to decide based on what the
13 testimony is whether you believe them or disbelieve
14 them. But not based on a factor like race.

15 Does anybody here have any feelings about
16 race or race dynamics that might cause them to be in
17 any way, shape, or form biased one way or another in
18 this case?

19 Okay. Did you have any comment?

20 **PROSPECTIVE JUROR:** No.

21 **MR. MURPHY:** Who among you likes to watch CSI
22 or Law and Order, John Grisham movies?

23 Somebody has to because they have 14
24 different Law and Orders, half a dozen CSIs, so
25 somebody has to be paying all of that advertising.

1 One of the parts of watching those shows is
2 you, as a viewer, get to solve the crime. You know,
3 that's why people read whodunits and whatnot.

4 As a juror, that's not your job. It's a
5 harsh way of putting it, but your job is to decide
6 whether the state has met its burden.

7 Ms. Buckingham, if I was able to during the
8 course of this trial establish beyond any doubt that
9 somebody else committed crime. Say I got one of the
10 state's witnesses to jump up and yell I did it, would
11 that make it easier for you to vote not guilty if you
12 believed that witness?

13 **PROSPECTIVE JUROR:** I suppose so.

14 **MR. MURPHY:** Well, I have never had that
15 happen. I am waiting for that day.

16 But that's not -- would you believe that
17 that's my role? My job here is to prove that somebody
18 else did it?

19 **PROSPECTIVE JUROR:** I believe your job is to
20 defend your client.

21 **MR. MURPHY:** Okay.

22 As part of that defense, do you believe that
23 my job to show to you that somebody else committed the
24 crime in?

25 **PROSPECTIVE JUROR:** No.

1 **MR. MURPHY:** Okay.

2 What about you, Ms. Vanloan, do you think
3 that's part of the defense's job to show that somebody
4 else did the crime?

5 **PROSPECTIVE JUROR:** No. Just that he did not
6 do it.

7 **MR. MURPHY:** Okay.

8 Do I even need to show that he did not do it
9 or is it my job to help you determine whether the
10 state has proven that he did do it?

11 **PROSPECTIVE JUROR:** Just prove that he's
12 innocent.

13 **MR. MURPHY:** Okay.

14 Do you believe that's part -- that's my job?

15 **PROSPECTIVE JUROR:** Yes.

16 **MR. MURPHY:** Okay.

17 Let's talk about that because that's a good
18 response in the sense it opens up that dialogue.

19 You know from our previous discussions that
20 it's the state's burden of proving their case,
21 correct?

22 **PROSPECTIVE JUROR:** Yes.

23 **MR. MURPHY:** Are you comfortable with that?

24 **PROSPECTIVE JUROR:** Yes.

25 **MR. MURPHY:** And that I don't have to ask a

1 single question, put on a single witness, submit a
2 single exhibit?

3 Do you understand that?

4 **PROSPECTIVE JUROR:** I understand.

5 **MR. MURPHY:** So do you think I have to prove
6 that my client didn't commit this crime?

7 **PROSPECTIVE JUROR:** Well, you just have to
8 prove that he's innocent, I guess is what I am saying.

9 **MR. MURPHY:** If I were to tell you that I
10 don't have to prove that he's innocent, it's not --
11 because he doesn't have any burden, it's the state's
12 job to prove him guilty, is that something you can --
13 you are comfortable with?

14 This isn't a contest where they have to prove
15 my client guilty and I have to prove him innocent.

16 **PROSPECTIVE JUROR:** No, I am comfortable with
17 that.

18 **MR. MURPHY:** Ms. Mitzel, how do you feel
19 about what we just talked about?

20 Are you comfortable with the idea this is not
21 a contest where I have to prove one thing and they
22 have to prove one thing and you have to decide who
23 proved their case better?

24 That the burden states on the state?

25 **PROSPECTIVE JUROR:** Yes.

1 **MR. MURPHY:** Okay.

2 What about the idea, though, that if the
3 crime in your mind at the end hasn't been solved, but
4 you don't believe the state has met it's burden, do
5 you feel that you can at that point could -- if you
6 haven't figured it out, vote not guilty because the
7 state hasn't proven the case to you?

8 Is that something -- you are looking at me
9 and I am thinking I probably asked a pretty poor
10 question.

11 **PROSPECTIVE JUROR:** I think if I am
12 understanding you correctly you are reiterating it's
13 the state's job to prove the 16 of the 16 elements?

14 **MR. MURPHY:** Right.

15 And even if you get to the end of the case
16 and you can't figure out what happened, are you going
17 to hold that against either side or hold that against
18 Mr. Graham that he didn't prove that, the state did?

19 **PROSPECTIVE JUROR:** I wouldn't hold it
20 against him because it's the state's burden to prove
21 it.

22 **MR. MURPHY:** Thank you.

23 Let's see. I am getting very near the end.
24 I am sure you are much appreciative of that.

25 I am at the end. The only thing I haven't

1 asked at this point is you have been sitting here --
2 we've talked a lot -- about a number of topics. But
3 you may have said to yourself, boy, you know I've got
4 an issue with being on this jury for something that
5 Murphy hasn't asked me about or hasn't come up yet.
6 He should probably know this or the judge should
7 probably know this.

8 Is there anything because the chase involves
9 charges of murder, the fact that there is -- anything
10 that has happened or been said or done that you
11 probably should let us know what's going on?

12 Anything?

13 Okay. Well, great. Thank you very much for
14 your attention. I appreciate.

15 **THE COURT:** One of our 49 from yesterday got
16 significantly ill. Coward. And anyway to remedy
17 that, we're going to call an eighth juror forward at
18 this time to join these seven. Mr. Murphy will
19 probably take a few minutes to get that juror up to
20 speed and we will proceed from there.

21 **MR. MURPHY:** And this row is pretty tight
22 already.

23 **THE COURT:** Yeah. We'll move them to the
24 next row.

25 **THE CLERK:** Rachel Embler.

1 **PROSPECTIVE JUROR:** Maybe I should say I work
2 for KOTA. I am covering this case.

3 **MR. MURPHY:** Yeah. You have to formally sit
4 in the chair.

5 We kind of knew this was coming.

6 **PROSPECTIVE JUROR:** Yeah. I know. I
7 figured.

8 **MR. MURPHY:** Just for the record, you are a
9 TV and internet journalist for KOTA?

10 **PROSPECTIVE JUROR:** That's correct.

11 **MR. MURPHY:** You have been covering this
12 story?

13 **PROSPECTIVE JUROR:** Yes, I was here
14 yesterday.

15 **MR. MURPHY:** For all eight or nine hours of
16 it.

17 **PROSPECTIVE JUROR:** A good portion of it.

18 **MR. MURPHY:** And that wasn't the beginning.
19 You have covered it in the past?

20 **PROSPECTIVE JUROR:** I have covered the AIM
21 stuff and Aquash stuff before, yes.

22 **MR. MURPHY:** So you come to the case with a
23 basic of knowledge separate and apart from what you
24 are going to hear on the witness stand?

25 **PROSPECTIVE JUROR:** I did a whole time line

1 of events leading up to everything yesterday --

2 All right.

3 Your Honor, at this point, based on --

4 **THE COURT:** You're out of here.

5 **MR. MURPHY:** So you can just stay here and go
6 back to work, I guess.

7 **THE COURT:** Get your tablet and get moved to
8 the back row, please.

9 **THE CLERK:** Zackeriah Horn.

10 **MR. MURPHY:** Good morning, Mr. Horn.

11 **PROSPECTIVE JUROR:** Morning.

12 **MR. MURPHY:** During the course of
13 everything -- during the course of everything that's
14 gone on this morning, have you been heard able to
15 hear?

16 **PROSPECTIVE JUROR:** Real quick, I work for
17 NBC, News Center One, and I know about all of this as
18 well. I couldn't avoid the news at all because I work
19 six days a week there. I am in production. I do web
20 stories, too.

21 **MR. MURPHY:** You have covered this case, in
22 particular?

23 **PROSPECTIVE JUROR:** Yeah.

24 **MR. MURPHY:** All right.

25 **THE COURT:** I was going to try and put a

1 little humor in and say working for the newspaper
2 won't get you off.

3 **PROSPECTIVE JUROR:** I know a lot about AIM,
4 too.

5 **THE COURT:** I am suspicious we're going to
6 waive fair well.

7 **MR. JACKLEY:** Yeah.

8 **MR. MURPHY:** Yeah.

9 **THE CLERK:** Sandy Richards.

10 **MR. MURPHY:** Good morning. We have hit two
11 of the three major networks. Let see how we do here.

12 **PROSPECTIVE JUROR:** Hi.

13 **MR. MURPHY:** What news group do you work for?

14 **PROSPECTIVE JUROR:** None.

15 **MR. MURPHY:** Okay.

16 **PROSPECTIVE JUROR:** Sorry.

17 **MR. MURPHY:** All right.

18 Were you able to hear the questions I have
19 asked throughout the morning?

20 **PROSPECTIVE JUROR:** Yes.

21 **MR. MURPHY:** Okay.

22 Just initially, any of them stand out as --
23 that you had issues or concerns or anything about?

24 **PROSPECTIVE JUROR:** No.

25 **MR. MURPHY:** Okay.

1 Why don't -- very briefly, I am just going to
2 go through the December 17 deadline. Is that going to
3 cause you any particular hardships staying in the
4 trial from 8:30 to 5:00?

5 **PROSPECTIVE JUROR:** No.

6 **MR. MURPHY:** Anything involving any of the
7 participants?

8 **PROSPECTIVE JUROR:** No.

9 **MR. MURPHY:** And the witnesses, did those --

10 **PROSPECTIVE JUROR:** No.

11 **MR. MURPHY:** One thing I am going to ask you
12 because Tina is trying to take down both of our
13 answers, please wait until I finish and then answer
14 back so she can get both down.

15 Familiarity with the case through the
16 newspaper, the media?

17 **PROSPECTIVE JUROR:** Not a lot. I mean, I've
18 vaguely heard of the case but nothing really sticks
19 out. I try not to read depressing news.

20 **MR. MURPHY:** Okay. All right.

21 So you didn't form any opinions about
22 anything?

23 **PROSPECTIVE JUROR:** No.

24 **MR. MURPHY:** Did you follow or do you have an
25 interest in the history of the AIM?

1 Have you read the book In the Spirit of Crazy
2 Horse?

3 **PROSPECTIVE JUROR:** No. I grew up in
4 Minnesota. I've only lived here for ten years. I am
5 a science teacher so I am not a history buff.

6 **MR. MURPHY:** Okay.

7 Any of the agencies involved in this case, do
8 you have any personal or professional relationships?

9 **PROSPECTIVE JUROR:** No.

10 **MR. MURPHY:** Where are you teacher at?

11 **PROSPECTIVE JUROR:** Stevens.

12 **MR. MURPHY:** Andy court organizes, WAVI, CASA
13 MADD?

14 **PROSPECTIVE JUROR:** No.

15 **MR. MURPHY:** The issue about you or anybody
16 close to you getting -- being the victim of a crime,
17 is that anything that has raised any issues?

18 **PROSPECTIVE JUROR:** No.

19 **MR. MURPHY:** Caused you any concern?

20 **PROSPECTIVE JUROR:** No.

21 **MR. MURPHY:** Have you ever been a juror
22 before?

23 **PROSPECTIVE JUROR:** No. I was called earlier
24 in the month but I wasn't chosen.

25 **MR. MURPHY:** Okay.

1 You thought you probably got lucky again,
2 too?

3 **PROSPECTIVE JUROR:** Yeah.

4 **MR. MURPHY:** Until the two journalists got in
5 the way.

6 Okay. Presumption of innocence, we talked
7 about that. Sitting here right now my client is
8 presumed innocent and that presumption carries with
9 him until the close of the evidence. It is a standard
10 legal concept.

11 Does that cause you any concern at all?

12 **PROSPECTIVE JUROR:** No. Some people just
13 don't like public speaking and that's his right.

14 **MR. MURPHY:** Okay.

15 And that goes to his ability to be remain
16 silent?

17 **PROSPECTIVE JUROR:** Right.

18 **MR. MURPHY:** Burden of proof, do you think
19 it's too tough for the state to have to prove each
20 element of the crime beyond a reasonable doubt?

21 **PROSPECTIVE JUROR:** No. That's their job.

22 **MR. MURPHY:** And you, as a juror, would hold
23 them to their job?

24 **PROSPECTIVE JUROR:** Yes.

25 **MR. MURPHY:** Even if you got to that point

1 where you thought they had proven each and every
2 element except for one or one part of one, if you had
3 a reasonable doubt about one element, you could say
4 not guilty?

5 **PROSPECTIVE JUROR:** Yes.

6 **MR. MURPHY:** The American Indian Movement,
7 any past history growing up in Minnesota because there
8 was a chapter in Minnesota for quite a while?

9 **PROSPECTIVE JUROR:** No.

10 **MR. MURPHY:** The race issue, any feelings
11 that you bring to the court today about Indians,
12 Native Americans, people of color?

13 **PROSPECTIVE JUROR:** No.

14 **MR. MURPHY:** Law enforcement witnesses, do
15 you have any past experiences with law enforcement
16 that might cause you to either favor or disfavor the
17 testimony of somebody who has a law enforcement
18 background?

19 **PROSPECTIVE JUROR:** No.

20 **MR. MURPHY:** Because my client was a
21 supporter of the American Indian Movement, you are
22 going to hear testimony about people talking about
23 acts of violence or disobedience of AIM.

24 Can you treat him as an individual and not
25 hold him responsible for the acts of other AIM

1 members?

2 **PROSPECTIVE JUROR:** Correct.

3 **MR. MURPHY:** Anything else that you think I
4 should know that might cause you to not be the right
5 juror for this case?

6 **PROSPECTIVE JUROR:** No.

7 **MR. MURPHY:** All right.

8 Is the fact that you are a teacher at
9 Stevens -- are you in the process of doing finals or
10 giving finals?

11 **PROSPECTIVE JUROR:** That's not til January.

12 **MR. MURPHY:** Okay. So you just have to sweat
13 through vacation and do it afterwards?

14 **PROSPECTIVE JUROR:** Yeah.

15 **MR. MURPHY:** I pass for cause, Your Honor.

16 **THE COURT:** Thank you.

17 Mr. Jackley?

18 **MR. JACKLEY:** Thank you, Your Honor.

19 Good morning. My name is Marty Jackley. I
20 am going to be fairly short. I am going to try to
21 work to get you out of here by close to noon, okay, so
22 bear with me.

23 I know it's been a long morning. I can
24 honestly say in all my years of practice that I've
25 never had a juror choose to go get a root canal rather

1 than listen to two lawyers. That might be a hint to
2 keep a short.

3 I need to take a minute to introduce myself a
4 little further to make sure that anybody in addition
5 to Ms. Buckingham doesn't know who I am. I have a
6 wife, Angela. Two little kids, a six-year-old son,
7 four-year-old daughter. I grew up in Sturgis. My dad
8 was a lawyer in Sturgis. He was long time State's
9 Attorney there.

10 Does that ring any bells?

11 Anybody know my dad, Mike Jackley?

12 Okay. Before I became a prosecutor, I was a
13 defense lawyer, a lawyer here in Rapid City, at the
14 law firm of Gunderson, Palmer, Goodsell and Nelson.

15 Do any of you have a professional
16 relationship or do any work with Gunderson Palmer that
17 either Mr. Murphy or I should know about it?

18 Okay. After I left private practice I became
19 the United States Attorney for South Dakota.

20 Do any -- and Bob Mandel works at the United
21 States Attorney's Office.

22 Do any of you have any issues with the United
23 States Attorney's Office of the federal government
24 that would in any way affect the way you hear evidence
25 and your fairness in this trial?

1 As Mr. Murphy indicated, I now am the
2 Attorney General. I work at the Attorney General's
3 office. I represent the State of South Dakota along
4 with Rod Oswald.

5 Do any of you have any issues with the
6 Attorney General's Office?

7 How about anything against the state? Is the
8 DOT coming and being mean to anybody or have any other
9 issues that I should know about that you will be
10 holding against me?

11 Okay. Ms. Richards, you indicated you are a
12 teacher at Stevens. I also have a little sister,
13 Josalyn Hafner (phonetic).

14 Do you know Josalyn?

15 **PROSPECTIVE JUROR:** Yes.

16 **MR. JACKLEY:** Does that in any way affect
17 your ability to sit on the jury and be fair to either
18 the state or to Mr. Murphy's client?

19 **PROSPECTIVE JUROR:** No.

20 **MR. JACKLEY:** Okay.

21 Mr. Murphy went through a long list and I
22 have some additional people that I want to ask you
23 about. Many of these folks probably won't testify but
24 their names may come up in trial and so I am just
25 going to explore whether or not you have a any or have

1 any knowledge of them that would affect how you see
2 these proceedings. Okay.

3 I want to start with a few attorneys that may
4 either be representing clients or their names may come
5 up in the proceedings. One is Dana Hanna. Two is Jim
6 Leach. Greg Erlandson. He's a lawyer at the Bangs
7 McCullen Law Firm. Bob Van Norman. John Schlimgen.
8 He's a judge in Sioux Falls.

9 I want to take just a minute -- the victim in
10 this case is Annie Mae Aquash and she died in 1975.

11 Does anybody know -- did anybody know Annie
12 Mae Aquash?

13 She has two daughters. One is Denise
14 Maloney. Do any of you know Denise?

15 The other daughter is Debbie Maloney. Do any
16 of you know Debbie?

17 Okay. And then just -- I got eight
18 additional witnesses I want to go through with you
19 that the names may come up to see if it rings any
20 bells with you. Angie Palfy. Richard Two Elk. John
21 Trudell. Bruce Ellison. He's also a lawyer here in
22 town. Loralie Decora. Sometimes goes by Loralie
23 Means. Dennis Banks. Dave Hill. Leonard Crow Dog.
24 You guys are easy.

25 As the judge indicated earlier this morning,

1 and as Mr. Murphy talked about, this is a murder case.
2 The two counts in the charge by indictment is murder
3 and felony murder in the commission of a kidnapping.

4 In a murder case, such as this, this is not a
5 capital case. So this is not a death penalty. So
6 nobody has to be worried about the death penalty here.

7 Otherwise, I am not allowed to talk about
8 sentencing issues because any sentencing issues are
9 left to the judge. So can I see a show of hands of
10 those of you that will put sentencing out of your mind
11 and leave that up to the judge at a different time?

12 Okay. It is a murder case. I anticipate
13 that the lawyers will be respectful and not try to
14 bring in too much graphic evidence, but somebody did
15 die. There will be some evidence brought in that may
16 be of a graphic nature. Most of it we can anticipate
17 getting through x-rays and other things, but you will
18 likely be seeing and photos.

19 Does that cause anybody any concern?

20 Okay. This is a 1975 murder case. Happened
21 a while ago. There is no statute of limitations in
22 South Dakota for a murder case. There are statutes of
23 limitations for other crimes, but not for murder
24 cases. And the judge --

25 Let me just state, does that cause anybody

1 any concern that there is no statute of limitations?

2 So you are willing to treat a 1975 murder
3 case just like you would a 2009 murder case?

4 Can I see a showing of hands?

5 Okay. The judge will be reading additional
6 jury instructions about the charges in this case. And
7 as we move forward in the proceedings, the prosecutor
8 has an opportunity to read the actual indictment to
9 you. And within those instructions and within the
10 indictment there is going to be a legal concept called
11 aiding and abetting.

12 Can I see a show of hands, has anybody ever
13 heard of aiding and abetting?

14 Okay. Let me just take a minute and talk
15 about that. What -- in a nut shell what aiding and
16 abetting is, if somebody knows a crime is being
17 committed and they knowingly help out in committing
18 that crime, they are responsible for the crime.

19 Let me give you an example. I am going to
20 pick on Mr. Oswald. Mr. Oswald and I we're going to
21 go rob a bank. And we need to a get-away car and
22 someone needs to go into the bank. I am going to be
23 the bank robber and Mr. Oswald is going to drive the
24 get-away war.

25 So we pull up to the bank. I get out and rob

1 the bank. I get back in the car and Mr. Oswald and I
2 drive away. He's aided and abetted. In other words
3 he knew a crime was being committed and he helped in
4 the commission of the crime. So even though he didn't
5 go in and rob the bank, he's still guilty of robbery.

6 Does anybody have a problem with that
7 concept?

8 Can I see a showing of hands of those of you
9 that think you can apply that concept, the concept of
10 aiding and abetting?

11 Okay. You are going to hear and maybe you
12 have heard because I know a lot of hands went up about
13 CSI, direct evidence and circumstantial evidence. Let
14 me just talk for a minute about that. Direct evidence
15 is when somebody sees something directly. You have
16 knowledge of it actually happening.

17 Circumstantial evidence is something that you
18 have to draw an inference from. Perhaps the best
19 example would be, I am going to use a stabbing
20 example. Again, I will pick on Mr. Oswald. And we'll
21 have Mr. Mandel be part of the scenario. So we have a
22 situation where I will be the witness and I am sitting
23 at the kitchen table and I see Mr. Oswald stab
24 Mr. Mandel. I am direct evidence. I mean, I can
25 testify that I watched Mr. Mandel -- or Mr. Oswald

1 come in and stab Mr. Mandel. That's direct evidence.

2 Now, let me talk to you about circumstantial
3 evidence. Same type of scenario but this I am not
4 sitting at the kitchen table to watch it. I am
5 standing outside. So I see Mr. Oswald go into the
6 house. I see him carrying a knife. I hear screaming.
7 I hear yelling. I watch Mr. Oswald run out with a
8 bloody knife.

9 Now, there is no direct evidence from me
10 that -- I didn't see the stabbing. But there is some
11 circumstantial evidence there. I can testify to what
12 I saw. Some other circumstantial evidence would be a
13 bloody knife. But inferences need to be drawn from
14 that.

15 In other words, it's not direct, but it's
16 evidence that would -- could be considered, but there
17 needs to be inferences.

18 Can I see a showing of hands of those of you
19 that are willing to use your common sense when it
20 comes to circumstantial evidence and drawing
21 inferences?

22 Can you use your common sense?

23 Okay. We talk about CSI shows, and I am at
24 somewhat of a disadvantage because as a lawyer my wife
25 doesn't let me watch those because I scream at the TV

1 when I say that just can't happen that way; it doesn't
2 happen that way. I need to talk to you because I
3 think, generally, the public watches those and
4 sometimes I think those shows leave some
5 misimpressions on how things really work. And I want
6 to talk to you about Miranda and search and seizure.

7 Often times when you watch those shows, that
8 becomes a big part of the shows, whether or not a
9 defendant was given Miranda before he gave a statement
10 or whether or not law enforcement had the right to a
11 search and seizure and properly obtained a warrant.

12 For the most part, those are issues that are
13 handled before trial. There may be limited instances
14 when the judge may instruct you on voluntariness or
15 things of that nature; but for the most part, those
16 legal issues aren't going to be a part of this trial,
17 whether there was a Miranda, whether or not there was
18 a warrant, whether or not evidence seized
19 appropriately.

20 The other thing I want to talk to you about
21 when it come to CSI shows -- and this is a 1975 case.
22 When you watch forensic files or you watch CSI, there
23 is always a ton of scientific evidence, a ton of DNA,
24 a ton of all kinds of different neat technology. You
25 are not likely going to see that in this case.

1 Does that cause anybody a problem?

2 Can I see a showing of hands of those of you
3 that are willing to see whatever evidence is presented
4 on the stand and apply that to the elements of the
5 crime?

6 Can I see a showing of hands of those of you
7 that can do that?

8 Okay. Mr. Murphy talked a little bit about a
9 couple of cases, the Looking Cloud case, the Rios
10 case, and the word plea agreement came up or deals.
11 And I want to just take a minute and talk to you about
12 plea agreements.

13 Plea agreements are a common practice in the
14 criminal justice system where the government reaches
15 an agreement with a particular individual on how a
16 case is going to be resolved. It helps the system
17 flow through. Not every case necessarily goes to
18 trial.

19 Anybody -- let me see a showing of hands of
20 anybody that's heard of plea agreements?

21 Does that process that is engaged in, does
22 that concern anybody?

23 Okay. Another thing that commonly happens
24 are deals are made with respect to -- or -- matters
25 maybe regarding getting somebody immunity or other

1 things that will come out or potentially come out that
2 you will hear about.

3 I need a showing of hands of those of you
4 that are willing to, you know, judge a witness by what
5 the witness says, take into account all the evidence,
6 but that you won't exclude a witness because that
7 witness either has a plea agreement or because they
8 have some type of a deal.

9 You will listen to all of their testimony; is
10 that fair?

11 You won't prejudge it?

12 Okay. Another thing that's fairly routine in
13 the criminal justice system -- and I am going to use
14 something wholly different than this case -- but a
15 drug case. In most drug cases that go on in a
16 criminal courtroom, the main witnesses are all a bunch
17 of drug dealers or they can typically be people that
18 have -- are in the criminal element. Because in real
19 life, the common person isn't going to be real helpful
20 to the government on a drug case because they are not
21 involved in selling the drugs, they are not involved
22 in using a drug.

23 So often times much of the testimony in a
24 case of that nature comes from people either charged
25 with crimes or given a deal or given some type of

1 immunity.

2 Does that concern you with respect to how you
3 would particularly judge a case?

4 Does that cause any concern or pause that
5 many of the witnesses you that will hear from may have
6 a criminal record or some type of a plea bargain or
7 deal?

8 Okay. Here is another concept of the law.
9 And, again, the judge is going to instruct you
10 regarding many areas of law, but one area that I
11 anticipate may come up is the charges that I will read
12 to the jury in opening statements will talk about a
13 crime being committed on or about a certain date. In
14 other words, it isn't on or about this particular date
15 at 10:15 a.m. It's not that precise. It's just on or
16 about.

17 If the judge instructs that all the
18 government has to prove for a particular element is a
19 crime committed on or about a certain date, can you
20 follow that instruction?

21 Can I see a showing of hands of those of you
22 that can follow that?

23 Okay. I want to talk just a minute and talk
24 about reasonable doubt. It's an important concept in
25 our justice system that the government bears -- and

1 that's me -- bears the burden to prove each and every
2 element beyond a reasonable doubt. That's the
3 concept. Once the government proves each and every
4 element beyond a reasonable doubt, the presumption of
5 innocence goes away.

6 You heard some disagreement about Mr. Murphy
7 and I about reasonable doubt and the judge provided
8 you an instruction; and I want to take just a minute
9 and talk about what reasonable doubt is and then ask
10 whether you think you can apply something of this
11 nature.

12 I am going to read you, really,
13 three sentences and then when I am done I am going to
14 ask whether anybody have any concerns about that --
15 concerns about whether you could apply something of
16 that nature.

17 Proof beyond a reasonable doubt is proof that
18 leaves you firmly convinced of the defendant's guilt.
19 There are very few things that we know with absolute
20 certainty. In criminal cases, the law does not
21 require proof that overcomes every possible doubt.

22 Now, if you are given an instruction such as
23 that, or generally in that nature, would you be able
24 to apply that standard to the government?

25 Could I see a showing of hands?

1 Could you apply that?

2 The government has to prove each and every
3 element beyond a reasonable doubt. The government
4 doesn't have to prove all facts beyond a reasonable
5 doubt.

6 Now, remember the example that Mr. Murphy
7 gave you the jar and the marbles. Applying that to
8 the elements of the offense -- let's assume for the
9 hypothetical that there are four elements to an
10 offense. So you have the jar, and you place four
11 marbles in the jar. If the government proves all four
12 of those elements beyond a reasonable doubt, you pull
13 those four marbles out, and you convict.

14 If you talk about facts and everything, if
15 you have a marble jar full of marbles, that include
16 facts and elements, we're back to there are four
17 elements of the offense. Once you pull the four
18 marbles out or once the government has proven beyond a
19 reasonable doubt those four elements, all the other
20 facts can remain in the jar. It's really the elements
21 of the offense.

22 So, can I see a showing of hands of those of
23 you that feel that you can sit on a jury, and that
24 once the government has proven all of the essential
25 elements beyond a reasonable doubt, that you could

1 render a verdict of guilty?

2 Okay. Mr. Murphy talked a little bit about
3 race, which is always a very delicate subject. So I
4 want to talk to you about two general concepts of
5 that. One, there was a discussion about the American
6 Indian Movement. We're going to refer to that as AIM
7 throughout case. I will tell you that AIM is not on
8 trial. And AIM is not an essential element of any
9 offense. Okay.

10 Does anybody have any background with AIM or
11 any additional concerns that you thought about that
12 would not allow you to sit in favor judgment in this
13 case?

14 Okay. The other thing that was talked about
15 was race and there was a discussion about Mr. Graham
16 being a Canadian Indian. I will tell you that Anna
17 Mae Aquash is also Native American. She was the one
18 that was murdered in this case.

19 Would everybody agree with me by a showing of
20 hands that everybody should be treated fairly when it
21 comes to a case such as this irrespective of whether
22 you are a Indian or non Indian?

23 Can I see a showing of hands?

24 That race really has no business in this
25 courtroom?

1 Can I see a showing of hands?

2 Okay. I hate to even going into media
3 coverage because if I bounce somebody we'll have
4 somebody from the Rapid City Journal put on. We've
5 had a unique circumstance. I need to talk about it
6 for just a minute. We all have a lot of experiences
7 in life. That's what makes our jury system such a
8 good system.

9 We don't check all of our life experiences at
10 the door when we walk into the jury. What we have to
11 do is use common sense. We have to be fair. We don't
12 want to prejudge anything, but there are life
13 experience and information that you bring to the jury.

14 And I want to take just a minute -- and there
15 has been a lot of coverage about this case. I mean,
16 it's a murder case. Happened a long time ago. I
17 think some of you had indicated that you have seen
18 either the Rapid City Journal article or you have seen
19 things on TV.

20 And what I really need to do is make sure
21 that you are not prejudging the case at all; that
22 anything you have seen and/or read that really what
23 you will do is pay attention to what the witnesses say
24 in the trial.

25 Can you all do that for me?

1 Can I see a showing of hands?

2 Okay. I am going to be like Mr. Murphy and I
3 am going to ask you to do my job for me now. It's the
4 catchall question.

5 As you sit here now, is there anything that
6 we've talked about that causes a little bit of pause
7 as to maybe you wouldn't be a good juror either for
8 Mr. Graham or the state?

9 I mean, anything that you can think of --
10 this is kind of my last opportunity to speak with you
11 on a dialogue -- that would prevent you from being a
12 fair juror?

13 Can I have just a moment, Your Honor?

14 **THE COURT:** Uh-huh.

15 **MR. JACKLEY:** Your Honor, I want to thank the
16 potential jurors for their attentiveness.

17 And the state would pass for cause at this
18 time.

19 **THE COURT:** Ladies and gentlemen, that kind
20 of ends the process here. So these eight -- this is
21 the November jury panel?

22 **THE CLERK:** Yes.

23 **THE COURT:** Sorry about that.

24 These eight get to come back at 2:00 o'clock.
25 The rest of you are excused, and for the first time

1 you do not have a call back be time. And I thank you
2 for your participation in the system. And we will see
3 you at 2:00 o'clock. That's when the other 48 will be
4 coming back. And we'll go through the strike down
5 process at that time. We will probably start the case
6 some time around nine or ten o'clock in the morning.

7 Thank you.

8 (Whereupon, the prospective jury panel was
9 then in recess.)

10 **THE COURT:** Anything else before
11 2:00 o'clock?

12 **MR. JACKLEY:** I don't need a record if you
13 don't.

14 **THE COURT:** We will start without it.

15 (Whereupon, a discussion was held off the
16 record.)

17 **THE COURT:** Now that you are all here sitting
18 patiently and quietly, you can sit here patiently and
19 quietly for an extended length of time. You may talk
20 quietly among yourselves if you would. Please do not
21 move from where you are. We will take a break if
22 necessary. You just need raise a hand.

23 We're going through the process where the
24 attorneys are going to get those called and those
25 chosen. So we'll end up with 14 of you. The rest

1 will be free to go. And it will take a fair amount of
2 time to do this.

3 So at this point, relax.

4 (Whereupon, the peremptory challenges were
5 then exercised by the state and the defense.)

6 **THE COURT:** Ladies and gentlemen, the Clerk
7 is going to call out the names of the 14 that are
8 going to remain. As those names are called, I am
9 going to ask these people to move out of the jury box
10 and give those 14 a place to sit so we can make sure
11 we have the right 14.

12 You may proceed.

13 **THE CLERK:** Gilbert Martinez, Nancy Hansen,
14 Mildred Fisher, Scott Denotter, Sheila Garrigan, Jacob
15 Solano, Cynthia Christensen, Hildur French, Michelle
16 Shelton, Barry Winter, James Eppard, Jo Ann Lemke,
17 Tony Randolph, James Whitman.

18 **THE COURT:** Mr. Murphy, are you satisfied
19 these are the 14 jurors selected?

20 **MR. MURPHY:** I am.

21 **THE COURT:** Mr. Jackley?

22 **MR. JACKLEY:** I am, Your Honor.

23 **THE COURT:** Ladies and gentlemen, I am going
24 to excuse you. You are free as the end of your month
25 has come and gone. And I want to thank you for your

1 kind attendance here, cooperation, and willingness to
2 go through this for us all.

3 Again, thank you.

4 (Whereupon, the prospective jury panel was
5 then released.)

6 **THE COURT:** Would you all please rise.

7 **MR. OSWALD:** Would you place them under the
8 trial oath before they are dismissed?

9 (Whereupon, the jury panel was then given the
10 trial oath.)

11 **THE COURT:** Folks, we're going to reconvene
12 in the morning in a different courtroom. It's going
13 to be courtroom number five, which is down the
14 hallway. And as you look at it, there is four on the
15 right and five on the left at the end of the hall.

16 You go from here with the bailiffs to your
17 gathering room where you will meet in the morning
18 before you are brought into court.

19 I have a hearing in this matter scheduled for
20 8:30 tomorrow morning which will take place probably
21 in the courtroom. As soon as we're finished with that
22 hearing, we will call you in and commence the trial.

23 Again, the admonition stands as always. You
24 are not to talk to anyone or allow anyone to engage
25 you in conversation about this trial. If anyone

1 attempts to do so, beyond a shut down from friends and
2 acquaintances that are going to obviously ask you, you
3 shut them down.

4 Anybody goes further than that, we need to
5 know about it and know about it now. So call or
6 contact us and we'll go from there.

7 **MR. MURPHY:** What time did you want them to
8 report?

9 **THE COURT:** I think they need not be here
10 until 9:30. That will give us time, I hope, to have a
11 hearing and have a break to get ready for the start of
12 the trial.

13 Thank you very much, and I look forward to
14 having this case tried before you. You got good
15 lawyers here.

16 Thank you.

17 (Whereupon, the proceedings in this matter
18 were then concluded.)

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STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF PENNINGTON)

I, TINA RAE PRUSS, Official Court Reporter
and Notary Public in and for the County of Pennington,
State of South Dakota,

DO HEREBY CERTIFY that the foregoing
transcript is a true and accurate transcript of the
questions asked, the testimony given, and of the
proceedings had.

I FURTHER CERTIFY that I am not of kin or in
any way associated with any of the parties to said
cause of action, or their counsel; and that I am not
interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my
hand this 3rd day of May, 2011.

COPY

Tina Rae Pruss
Official Court Reporter and
Notary Public
Pennington County, South Dakota
My Commission expires: 10-04-2012

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
)
Plaintiff,)
)
)
vs.)
)
)
JOHN GRAHAM,)
)
)
)
Defendant.)

TRANSCRIPT OF
JURY TRIAL

VOLUME 3 OF 10

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
DECEMBER 1, 2010

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* * A P P E A R A N C E S * *

MR. MARTY JACKLEY
Attorney General
MR. ROD OSWALD
Assistant Attorney General
MR. ROBERT MANDEL
Assistant U.S. Attorney
Representing the State of South Dakota

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

* * I N D E X * *

WITNESS (ES) :	DIRECT	CROSS	REDIRECT	RECROSS
PATRICK DUFFY	8	10		
MATT KINNEY	13	17	21	
ROGER AMIOTTE	80	87	91	93
JOHN MUNIS	95	100	103	
WILLIAM WOOD	107	120	152, 158	155
NATHAN MERRICK	159	175		
RAY HAND BOY	188	199		

1	EXHIBITS:	OFFERED/ADMITTED
2	1 - Aerial Photo	82/82
3	2 - Photo	83/83
4	3 - Photo	84/84
5	4 - Photo	85/85
6	5 - Photo	86/86
7	6 - Bracelet	165/165
8	7 - Photo	166/166
9	8 - Bullet in Box	120/120
10	11 - Autopsy Report	103
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* * P R O C E E D I N G S * *

(Whereupon, the following proceedings were then had in open court outside the presence of the jury.)

THE COURT: All right, ladies and gentlemen. We're here to begin a hearing scheduled for 8:30. Puts us pretty close to the clock. I think Mr. Hana is supposed to be on board.

MR. HANA: Thank you, Your Honor.

THE COURT: We're a little short of room here, Mr. Hanna, and I don't know how you wish to proceed, but I will give you the grace of choosing your position.

MR. HANA: Thank you, Your Honor.

Your Honor, we have made a motion to quash the subpoena that was served on Mr. Richard Marshall. Mr. Marshall was served with a subpoena by the state two weeks after he was acquitted in a federal trial in charges related to the charges pending here.

Our motion, sir, is directed toward -- we're asking the Court to quash on the grounds that the motion is punitive and that the primary purpose of the state in subpoenaing Mr. Marshall is to seek to elicit testimony from him that the prosecution will later claim is false in order to charge Mr. Marshall with a

1 perjury charge either by indictment or by a petition
2 to revoke his parole.

3 As the Court is aware, Mr. Marshall is on
4 lifetime parole for a crime that he was convicted of
5 in 1976.

6 And I have witnesses which I would like to
7 present and I would also ask the Court to take
8 judicial notice of the affirmations set forth in the
9 motion to quash.

10 With the Court's permission I have two
11 witnesses here. They are in the courtroom. If you
12 would like me to ask one of them to step out --

13 **THE COURT:** Please sequester the witnesses.

14 **MR. HANA:** Mr. Kinney, could you please wait
15 out site.

16 I have another witness who is present here.
17 Mr. Duffy, could you wait outside for just a
18 minute, please.

19 **THE COURT:** You may proceed.

20 **MR. HANA:** Judge, the record before the
21 Court, as well as the testimony you will hear from
22 these witnesses, support a finding that the prosecutor
23 has no legitimate interest in calling Richard Marshall
24 to testify in this matter.

25 Mr. Marshall, if compelled to testify, will

1 give truthful testimony. But our version and our
2 understanding of the truth is different from that of
3 the government's theory of the facts.

4 And we have a legitimate fear that should
5 Mr. Marshall's testimony conflict with the
6 government's theory of the case, which they have good
7 reason to know that it will, then he would be charged
8 with perjury and he is in a unconscionable situation,
9 which is, if he testifies truthfully as he understands
10 the truth, then he is likely to be charged with
11 perjury in a parole violation or by means of
12 indictment.

13 Mr. Jackley has stated to the Court that
14 Mr. Marshall has -- will have no problem with a
15 perjury prosecution or a perjury charge as long as he
16 tells the truth.

17 The Court asked Mr. Jackley a critical
18 question, which is, who decides the truth in that
19 situation, and Mr. Jackley replied that the state
20 does.

21 Now, juries --

22 **THE COURT:** Well, that's not true. First of
23 all, in any charge of perjury, a jury decides whether
24 the elements of the crime of perjury have been met.
25 The same thing would have to be decided at a parole

1 violation. There may be a different burden of proof.
2 I don't deal with those so they are beyond my ken.

3 But in terms of the criminal charge and
4 perjury, you know, there has to be some element of
5 consciousness of falseness and a defense of telling
6 the truth as -- without -- is a sound defense.

7 So it's not a matter of the state deciding.
8 The state decides, as it does in all cases, who to
9 charge and with what in any criminal case. That's
10 their job. Whether the state can prove the case or
11 has any evidence to back it up is what the jury is
12 for. That's what they do.

13 And I perceive under the worse case where
14 Mr. Marshall would be charged with perjury, that he
15 would -- the state would have to prove the elements.
16 If they can't do that then Mr. Marshall walks, if they
17 can Mr. Marshall has a problem.

18 **MR. HANA:** Judge, the inquiry here, though,
19 for the purpose of the motion is the prosecute's
20 purpose in calling Mr. Marshall.

21 **THE COURT:** I understand that. We have been
22 down that road about three times, so let's get on with
23 it. I mean, I understand the issue, and I have
24 reviewed the statute and I am prepared to go forward
25 with the case.

1 **MR. HANA:** Then I would like to call my first
2 witness, Your Honor.

3 **THE COURT:** Please do.

4 **MR. HANA:** I would call Mr. Duffy.

5 **THE COURT:** Please raise your right hand.

6 PATRICK DUFFY,
7 called as a witness herein, having been duly sworn,
8 under oath testified as follows:

9 **DIRECT EXAMINATION**

10 **BY MR. HANA:**

11 **Q.** Would you state your name.

12 **A.** Patrick Duffy.

13 **Q.** Mr. Duffy, what is your profession?

14 **A.** I'm a trial lawyer.

15 **Q.** And how long have you been a member of the
16 bar in South Dakota?

17 **A.** Twenty-three years.

18 **Q.** Is your practice -- is your office here if
19 Rapid City?

20 **A.** It is.

21 **Q.** Have you followed and taken an interest in
22 the various cases involved in the matter involving the
23 death of Anna Mae Aquash?

24 **A.** I have. My friends have tried these cases.

25 **Q.** Were you present in the United States

1 District Court house here in Rapid City at a hearing
2 in the Magistrate's court in which Richard Marshall
3 was -- had a detention hearing over in Magistrate
4 Court?

5 **A.** I don't think I was present at the hearing.
6 I was in the courtroom, the magistrate courtroom on
7 the third floor of the federal building. I was not
8 there to watch the hearing, but I was there. I don't
9 believe I stayed for the actual hearing itself or I
10 came come after it was over.

11 **Q.** Did you have a conversation with then United
12 States Attorney Martin Jackley in the courtroom?

13 **A.** I did.

14 **Q.** And could you --

15 By the way, are you here today as a result of
16 being served with a subpoena?

17 **A.** I am.

18 **Q.** Okay.

19 Could you relate to the Court your
20 conversation with Mr. Jackley?

21 **A.** What I can remember about my conversation
22 with Mr. Jackley was that I asked him whether there
23 were going to be any more indictments in this case.
24 And Mr. Jackley said to me, no, I think this is it.
25 We'll finish this up and have a couple of perjury

1 trials or perjury cases. I can't tell you the
2 specificity of which word he used, but that's what I
3 remember about that conversation.

4 Q. And this was before Richard Marshall actually
5 went to trial; is that correct?

6 A. It is.

7 MR. HANA: I have no other questions.

8 THE COURT: Mr. Jackley.

9 MR. JACKLEY: Briefly Your Honor.

10 **CROSS-EXAMINATION**

11 **BY MR. JACKLEY:**

12 Q. Good morning, Mr. Duffy.

13 A. Good morning.

14 Q. Mr. Duffy, with respect to that would you
15 have deemed that a confidential conversation or just a
16 conversation in passing?

17 A. It was a conversation in passing, Marty.

18 Q. It wasn't a clandestine-type meeting between
19 you and I or anything?

20 A. No.

21 Q. Anything inappropriate -- did you deem
22 anything inappropriate from that conversation?

23 A. I didn't.

24 Q. Did you deem anything from that conversation
25 that I was threatening anybody with perjury at that

1 time?

2 **A.** To tell you the truth, I didn't give any
3 thought as to the perjury. The thought that I gave to
4 it was this case, these cases, seemed to be coming to
5 an end so I didn't ascribe any significance to that.

6 **Q.** I want to just -- make sure we're clear on
7 the time frame. I was U.S. Attorney at the time of
8 the conversation, correct?

9 **A.** You were.

10 **Q.** So that would have been prior to any
11 acquittal of Richard Marshall?

12 **A.** Yes.

13 **Q.** Mr. Duffy, one final line of questioning.

14 You've followed this case for some time you
15 indicated?

16 **A.** I have.

17 **Q.** Part of that following was during the Arlo
18 look cloud you would have sat in on at least part of
19 the trial; would that be fair?

20 **A.** Well, Jim McMahan is a good friend of mine,
21 and between McMahan and Bob Mandel, both really
22 outstanding lawyers, I watched most of that case to
23 watch and learn.

24 **Q.** You are generally familiar with what I would
25 call the prosecution's theory of the criminal venture

1 traveling from Denver to Rapid City to Rosebud to
2 Richard Marshall's house, and then the death on a
3 bluff; would that be fair?

4 **A.** I was familiar with that I think before the
5 trials. If you just read In the Spirit of Crazy Horse
6 you will have some sense of what happened; but yes, I
7 am familiar with that.

8 **Q.** And given at least the government's position
9 and some witness testimony that just prior to Annie
10 Mae's death she was brought to Richard Marshall's
11 house where they went into a bedroom and there has
12 been accounts of perhaps a gun being exchanged,
13 perhaps shells being exchanged, perhaps a note being
14 exchanged that talks about get rid of this baggage; do
15 you see that there is a legitimate prosecution
16 reasoning to at least want to call Richard Marshall to
17 testify before a jury in the John Graham trial?

18 **MR. HANA:** Judge, I object. This is beyond
19 the scope of the inquiry in this hearing.

20 **THE COURT:** Overruled.

21 **A.** So the question is whether I see legitimacy
22 in you calling Richard Marshall to the stand in the
23 trial of John Graham?

24 **Q. (BY MR. JACKLEY)** That's correct.

25 Not that you necessarily agree that he did

1 any of that but the legitimacy of a prosecutor to
2 subpoena and call Richard Marshall as a witness in the
3 trial of John Graham?

4 **A.** I don't know whether I can say it's
5 legitimate or illegitimate?

6 **Q.** That's fair.

7 **MR. JACKLEY:** No further questions.

8 **THE COURT:** Thank you, Mr. Duffy.

9 (Witness excused.)

10 **MR. HANA:** I would ask Mr. Kinney to step in.

11 **THE COURT:** Please raise your right hand.

12 **MATT KINNEY,**

13 called as a witness herein, having been duly sworn,
14 under oath testified as follows:

15 **THE COURT:** Please take a seat.

16 **DIRECT EXAMINATION**

17 **BY MR. HANA:**

18 **Q.** Sir, will you state your name for the record,
19 please.

20 **A.** Matt Kinney.

21 **Q.** Are you an attorney, sir?

22 **A.** Yes, sir.

23 **Q.** Do you know Mr. Jackley?

24 **A.** I do.

25 **Q.** Friends?

1 **A.** Sort of -- yes, college friends. Known him
2 since law school.

3 **Q.** Okay.

4 Are you here pursuant to being served with a
5 subpoena?

6 **A.** Yes.

7 **Q.** Okay.

8 Did you have a conversation with Mr. Jackley
9 over the telephone during the trial of Richard
10 Marshall in April of this year?

11 **A.** April 15, yes.

12 **Q.** Okay.

13 Could you relate to the Court the substance
14 of your conversation in terms of Mr. Jackley's
15 statements about Mr. Marshall?

16 **A.** This was during the Marshall trial. I was in
17 Spearfish. I believe it may have been day two or
18 three of the trial. And I have had ongoing
19 discussions with Mr. Jackley and Mr. Oswald about
20 Ms. Rios' case because I was representing Thelma Rios
21 throughout all of this year.

22 And Mr. Jackley advised me how the trial was
23 going. Because I -- I am not sure if I called him or
24 he called me, but he had told me that Angie Begay had
25 testified at the Marshall trial. And Ms. Begay or

1 Janis as she's known now, is a central witness in the
2 case against Thelma Rios so we started to discuss
3 that. And I asked him how was trial was going. And
4 he advised me that he thought the trial was going
5 well. Especially the establishment of the Janis
6 testimony. And then we talked a little bit about the
7 implications of a conviction or an acquittal for
8 Mr. Marshall.

9 Q. And did Mr. Marshall -- did Mr. Jackley
10 express to you an opinion that Marshall should take a
11 deal or plead guilty or what might happen should he be
12 acquitted?

13 A. I don't think he told me that he thought
14 Marshall should make a deal. I don't recall.

15 I will state that the conversation didn't
16 rise to any level of alarming thought where I
17 definitely have a strong memory of what occurred.

18 But I do recall him stating that Marshall may
19 continue to have some sort of criminal liability, if
20 you will, whether he is acquitted or not. And of
21 course, I didn't know a lot about Mr. Marshall's
22 history. I didn't think he was a central witness to
23 Ms. Rios' defense from the discovery I was reading.

24 Bear in mind that I was appointed in December
25 of 09 and this was April of 2010. So a case with this

1 much information, I was still learning the case
2 throughout the winter and the spring. So there were
3 times when we would have these conversations and I
4 knew that the state had a lot more information in
5 their minds than I did.

6 So during some of these conversations,
7 Mr. Jackley -- and there were very few, but he would
8 kind of tell me this is the way we perceive it. In
9 these conversations served my client because we -- we
10 had to decide how we wanted to proceed with the case.
11 Will this eventually be a case that would be plead or
12 a case that we would take to trial.

13 So I believe the intent of Mr. Jackley's
14 conversation with me was to advise that Richard
15 Marshall may have criminal liability, in fact, that he
16 could be violated on parole for reasons that I wasn't
17 quite sure of at first. But I don't do a lot of
18 federal law practice. But it was clear to me that
19 Mr. Marshall could be a state witness at some point.
20 And that was relevant to perhaps tying together
21 anything that Mr. Marshall may have known in the eyes
22 of Mr. Jackley in relation to what occurred at Rapid
23 City, which was the last time that my client had been
24 involved in this case.

25 Q. Did Mr. Jackley advise you or discuss with

1 you that Mr. Marshall is on lifetime parole?

2 A. I believe so.

3 Q. Did he advise you or discuss with you the
4 fact that Mr. Marshall has been twice violated on
5 parole, and that if he is violated again, he could go
6 to prison for the rest of his life?

7 A. I do recall something of that nature. Not
8 those exact words. I do recall something that it was
9 a situation where this case could affect his freedom
10 whether he was acquitted or not.

11 Q. Didn't Mr. Jackley advise you that if
12 Mr. Marshall were acquitted, the state could still
13 bring a petition to revoke his parole?

14 A. I thought -- yes. I thought he had mentioned
15 something to that nature, yes.

16 MR. HANA: I don't have any other questions.
17 Thank you.

18 **CROSS-EXAMINATION**

19 **BY MR. JACKLEY:**

20 Q. Mr. Kinney, let me start with this. Did you
21 deem anything with respect to the conversation you and
22 I had as inappropriate?

23 A. Not at all.

24 Q. In fact, it was a plea discussion -- in the
25 nature of plea discussions between a lawyer

1 representing the state and a lawyer representing
2 Thelma Rios, correct?

3 A. Predominantly, yes.

4 Q. In other words, Richard Marshall wasn't the
5 focus, necessarily, of that conversation; is that
6 fair?

7 A. I walked away from the conversation thinking
8 that your thoughts on Ms. Janis' testimony was the
9 focus of that conversation. But you -- we talked
10 about the trial and how it was going.

11 Q. And the time frame, would have been, that
12 discussion, correct, would have occurred prior to any
13 acquittal of Richard Marshall; is that fair?

14 A. Correct.

15 Q. And maybe this isn't a fair question because
16 I don't know how detailed the conversation was, but
17 when you talked to Mr. Hana about criminal
18 liability -- let me just generally discuss that with
19 you -- that you would agree that if a defendant is
20 acquitted in federal court, that the state and the
21 federal government are separate sovereigns and the
22 defendant could still be subject to criminal liability
23 in state court; is that fair?

24 A. Yeah. I know that they are separate
25 sovereigns. That I know. And I think that was

1 implied in our conversation, yes.

2 Q. In other words, an acquittal of Richard
3 Marshall in federal court would not necessarily
4 present a state indictment with respect to the Annie
5 Mae Aquash case; is that fair?

6 A. Yes.

7 Q. And you would agree with me that when it
8 comes to parole violations, that that is not the
9 responsibility of the Attorney General; that there is
10 a separate parole board that handles those matters is
11 that fair?

12 A. Yeah. And you specifically referred to that.

13 Q. So in other words, the Attorney General can't
14 just say, somebody violates parole; there is a whole
15 separate body that deals with parole; is that fair?

16 A. Yes.

17 Q. Is it also fair that if somebody has two
18 strikes and a pending parole matter that they may have
19 some criminal exposure or problems; is that fair?

20 A. Yes.

21 Q. Mr. Kinney, I know you had focused on Rios
22 because that was your client and Rios is what I would
23 refer to as the beginning part of the state's theory
24 of the criminal venture, but I want to ask you a
25 question in regard to Richard Marshall given your

1 familiarity of the case.

2 It's the prosecution's general theory -- and
3 I am not asking you to accept the theory -- but it's
4 the prosecution's theory that a kidnapping occurred in
5 Denver, that the criminal venture went to Rapid City,
6 that the criminal venture then further went to
7 Rosebud, and then on to Pine Ridge at Richard
8 Marshall's house.

9 It is further the government's theory at
10 Richard Marshall's house there may have been
11 discussions about a baggage note, Ms. Aquash may have
12 been held against her will, there may have been an
13 exchange of a firearm, there may have been exchange of
14 ammunition; and within hours after she theft Richard
15 Marshall's house she was killed.

16 Do you see a legitimate prosecution reason
17 for a prosecutor to wish to have Richard Marshall
18 testify in the Graham trial -- not that you
19 necessarily agree with that scenario -- but do you see
20 a legitimate prosecution reason to subpoena Richard
21 Marshall to testimony at Mr. Graham's murder trial?

22 **A.** I will withhold my opinion, but I can
23 definitely say yes.

24 **MR. JACKLEY:** No further questions, Your
25 Honor.

REDIRECT EXAMINATION

1
2 **BY MR. HANA:**

3 **Q.** Mr. Kinney, would you agree that if the
4 primary purpose for calling Richard Marshall would be
5 to elicit testimony from him that would later be used
6 against him in a parole revocation or a perjury
7 charge, that would be illegitimate purpose for calling
8 that witness; would you agree with that.

9 **A.** I would think so.

10 **Q.** And is it your testimony that Mr. Jackley
11 told you in substance, if Mr. Marshall is acquitted,
12 the state can still violate him on parole. The state
13 would have that power to do that?

14 **A.** I believe so, yes.

15 **MR. HANA:** No other questions.

16 Thank you.

17 **THE COURT:** Thank you, sir.

18 You may step down.

19 (Witness excused.)

20 **MR. HANA:** Your Honor, I would ask the Court
21 to take judicial notice of the affirmations that were
22 set forth in my motion. And I affirm again that I had
23 a conversation with Mr. Jackley while Mr. Marshall's
24 case was pending in which we -- Mr. Jackley was
25 discussing why Mr. Marshall should plead guilty to

1 something and cooperate. I advised Mr. Jackley I do
2 not believe the government can prove the accusation
3 and Mr. Jackley responded to me, even -- in effect --
4 words to these effect, even he wins at trial, how are
5 you going to beat the perjury charge. I asked him
6 what -- what do you mean? What perjury charge? And
7 he informed me that the state could bring a parole
8 violation against him if he is acquitted based on the
9 testimony that he gave in 2003 to the Grand Jury.
10 That that statement was made to me.

11 And I would ask the Court whether -- to
12 inquire of Mr. Jackley whether he admits or denies
13 that conversation took place.

14 I would also ask the Court to ask Mr. Jackley
15 whether or not the state has had discussions about
16 bringing some -- bringing or encouraging an action,
17 either a perjury indictment or using his influence
18 with the parole board -- and you can see by law that
19 the Attorney General appoints three members of the
20 parole board. So it is not as though they are
21 entirely separate agencies of the state. Whether or
22 not they have had discussions about charging Richard
23 Marshall with perjury if he in fact testifies to facts
24 that are inconsistent with the government's witnesses.

25 I think at the very least the Attorney

1 General should make that affirmation if, in fact, they
2 are denying this is a purpose.

3 And finally, Judge, I would say in addition
4 to these facts, that Mr. Jackley has made statements
5 that if Mr. Marshall is acquitted, he can be charged
6 with perjury in a parole violation. That this was a
7 contingent plan that was being discussed and
8 considered prior to the acquittal.

9 Given that, in view of the fact that
10 Mr. Jackley knows based upon Mr. Marshall's prior
11 Grand Jury testimony, recordings of statements that he
12 made to Serle Chapman a witness in this case, that --
13 and the evidence that came out in the trial, that
14 Mr. Marshall is going to testify -- if he is compelled
15 to testify -- he did not give a gun to Theda Clarke
16 and that the statements made by Arlo Looking Cloud to
17 that effect are false.

18 Knowing that, the government's purpose in
19 calling him has to be to show -- to try to argue to
20 the jury that the evidence that they elicited from
21 their own witness, Mr. Marshall, is false.

22 It is improper for an attorney to call a
23 witness to the stand to elicit statements from the
24 witness for the purpose of arguing to the jury that
25 the evidence they elicited is false because false

1 evidence has no relevance.

2 Also, it is simply improper. It is
3 misconduct to put on a witness who you believe or --
4 and are going to argue has testified falsely. In the
5 absence of any legitimate reason for calling
6 Mr. Marshall to testify, plus the testimony that shows
7 that Mr. Jackley has essentially -- I perceive that as
8 a threat F Mr. Marshall goes to trial, and is found
9 not guilty, we can still violate him on his parole.
10 The elements and they were already discussing the idea
11 of a perjury charge in a parole violation real
12 violation.

13 Judge, we are asking the Court --
14 respectfully asking the Court not to allow the Court
15 to be manipulated in this way. Mr. Jackley should at
16 least be called upon to say what facts he intends to
17 prove by Mr. Marshall's testimony. And if what they
18 intend to prove is -- or are going to argue is
19 Mr. Marshall gave false testimony, then they have an
20 illegitimate purpose for calling him to the stand, and
21 the primary purpose in this case for calling
22 Mr. Marshall, is to elicit testimony, compel
23 testimony, that they will later claim is false in
24 order to bring a perjury accusation in a vindictive
25 reaction to Mr. Marshall's exercise of his

1 constitutional right to go to trial.

2 We respectfully ask the Court to make those
3 inquiries of the state and to grant Richard Marshall's
4 motion to quash the subpoena, Your Honor.

5 **THE COURT:** Are you suggesting to me that
6 it's improper for the prosecution to consider during
7 the course of a trial a potential perjury charge
8 against a witness in the trial that the state believes
9 to have perjured himself or herself?

10 **MR. HANA:** No, but that is not the facts --

11 **THE COURT:** Please answer my question,
12 Mr. Hanna.

13 **MR. HANA:** All right.

14 Your question is, if a witness --

15 **THE COURT:** Come on. Listen to the question.
16 I don't want you to rephrase it. This isn't politics.
17 All right.

18 My question was, do you somehow think that
19 it's improper for a prosecutorial team to consider the
20 potential of bringing a perjury charge against a
21 witness who testifies falsely at a trial or whom they
22 believe to have testified falsely; and they would have
23 to have sufficient evidence to get it by either a
24 magistrate or a Grand Jury. All right.

25 Now, is it improper to even consider that?

1 **MR. HANA:** No, sir. But it is improper --

2 **THE COURT:** Now, I didn't ask you if it is
3 improper. I asked you if it's improper to do that.
4 Not anything else.

5 **MR. HANA:** No.

6 **THE COURT:** It would be a natural thought in
7 the course of prosecuting?

8 **MR. HANA:** Yes.

9 But to decide before a witness has testified,
10 before Richard Marshall testified in a trial, that if
11 he denies what we're accusing, then we're going to
12 charge him with perjury. To decide --

13 **THE COURT:** Where is your evidence that that
14 decision was ever made?

15 **MR. HANA:** That decision was being
16 considered --

17 **THE COURT:** Of course.

18 **MR. HANA:** -- that if he denies what we're
19 accusing him of, then we are going to take revenge his
20 acquittal by charging him with perjury.

21 If Mr. Marshall has not even testified, and
22 they have already decided that they want to bring a
23 perjury charge against him if he testifies --

24 **THE COURT:** If they believe he testifies
25 falsely. I mean, I think that's rational thought.

1 **MR. HANA:** It is not rational thought if
2 their decision that he's testified falsely is based
3 solely on he has testified differently than our
4 witnesses. Our whole trial in federal court was about
5 essentially one thing, did he give a gun to Theda
6 Clarke.

7 **THE COURT:** All right.

8 Now, answer me this. How can the prosecution
9 in this case, without leaving a hole you can drive
10 trucks through when the issue -- and when an important
11 element of the case at least as I understand their
12 theory is where a gun or where or when a gun or means
13 of obtaining the weapon by which they allege
14 Ms. Aquash was skilled, and there is testimony
15 involving, A, it occurred at Mr. Marshall's house?

16 And B, there is some testimony perhaps, and I
17 am not familiar to that degree, that it came from
18 Mr. Marshall himself. I don't know whether that is
19 his testimony or not, but just the fact that it's
20 allege to have occurred at his house and he is alleged
21 to have been there would make him a witness without
22 which a jury is going to look at Mr. Jackley and say
23 get out of here.

24 **MR. HANA:** The witness who will give that
25 testimony, and I base this on the fact that it

1 happened in federal court, will be one person, Arlo
2 Looking Cloud.

3 If the prosecution has already decided if
4 Mr. Marshall gives testimony that contradicts that of
5 Arlo Looking Cloud, then we are going to charge him
6 with perjury -- if that --

7 **THE COURT:** Without going into Mr. Arlo
8 Looking Cloud's testimony that would still be a matter
9 of proof.

10 My problem, Mr. Hana, is I don't see any
11 basis for your claim that there is a primary motive of
12 calling Mr. Marshall to get him on a perjury charge.
13 I mean, I just don't understand that. I don't see how
14 they cannot call him or at least make him available to
15 be called, if necessary. I don't understand that.

16 As the theory of this case is understood by
17 me now, without having heard any of the evidence of
18 the case, but I have reviewed records and exhibits and
19 motions. So I have some idea of the theory and it's
20 consistent with what Mr. Jackley represented here. I
21 cannot conceive that he would not be at least a
22 witness that is deemed if not essential very important
23 to the case.

24 Now, whether Mr. Marshall is going to support
25 the theory or not is another matter. The ultimate

1 question of perjury is whether the state can prove
2 beyond a reasonable doubt that he did in fact lie
3 under oath about a material matter. And that's an
4 entirely separate charge and case and that's the
5 pressure every single witness that takes this stand is
6 under. Every single witness from the police officers
7 to coconspirators, if there is such a thing, to the
8 forensic examiners to the pathologist to everybody
9 that is here. If you lie about this you are subject
10 to a perjury charge. Mr. Marshall is in no worse
11 position than anybody else.

12 And the fact that the state is aware that he
13 or other witnesses might give testimony that is false
14 for one reason or another certainly raises that issue.
15 I have sat on cases where it's an obvious issue. I
16 have sat on cases -- I just flat told a witness, you
17 know, there is a Fifth Amendment here. It was in a
18 civil case, but it was -- strikes me he was walking
19 down a bad road and I wanted to make sure he was
20 advised of his rights.

21 But that's what every witness is subject to
22 and I don't perceive it's different. If they lie,
23 they are all subject to a perjury charge, but the
24 state still have to prove the testimony, knowingly,
25 intentionally false. And we have -- all kinds of

1 times we have conflicting testimony in civil and
2 criminal cases. The light was red, the light was
3 yellow, the light had turned green. And the fact that
4 people give different versions doesn't create perjury.

5 And Mr. Marshall can testify as to what he
6 believes and understands to be the truth. And unless
7 the state can prove at a later time and place that
8 that statement was intentionally false, there is no
9 perjury charge. And if it is intentionally false,
10 then one would -- a charge need not be brought but it
11 could be brought. Sometimes they are brought,
12 sometimes they aren't. And we have cases all the time
13 where witnesses say things they know not to be true.

14 So I don't -- my problem is I don't perceive
15 any motive, particularly one from the conversations
16 given by the evidence, that says we're going to
17 threaten him to make him testify our way or charge him
18 by perjury. Charging with perjury requires, first of
19 all, proof sufficient evidence to get it past a Grand
20 Jury or to get it past a magistrate in a preliminary
21 hearing. So it can't be just pulled out of the air.

22 And you know, I mean, you are familiar with
23 the cases more than I, but we have Mr. Looking Cloud's
24 testimony and a number of circumstances. And if you
25 are -- you seem to express some concern about stacking

1 Mr. Marshall against Mr. Looking Cloud. I don't know
2 where that goes.

3 But I don't -- I just have trouble seeing any
4 improper purpose here much less a priority -- a
5 primary one.

6 I am sorry, Mr. Hana, I just don't see the
7 argument. I think it's perfectly proper for the
8 prosecutors when they look at calling witnesses to
9 consider what testimony they might give, what
10 testimony they might not give, to look at each witness
11 as every attorney does and to look for motives for
12 them to shade testimony, color testimony, sometimes
13 outright lie about it.

14 And an attorney for every side, both the
15 defense and the prosecution in every case, is looking
16 for the reasons that -- by which they can attack
17 credibility or the veracity of a witness called. I
18 think that's -- any trial lawyer that doesn't do that
19 should quit trying cases. That's where I see it.

20 I don't see that it's an improper purpose
21 even if they believe that from the bottom of their
22 hearts that Mr. Marshall is going to perjure himself.
23 I still think he is a witness that may or may not be
24 essential to the case, but he certainly is one that
25 the prosecution must take considerable thought about

1 calling or not calling. The fact that he's been
2 subpoenaed does not even mean he's going to be called.

3 But a critical element of the case involves
4 Mr. Marshall's house at a time when he's alleged to
5 have been there. So I don't know where to go with
6 that.

7 **MR. HANA:** Let me just -- I am not going to
8 belabor the point and I am not going to argue with the
9 Court.

10 I would just like to say this, though. All
11 that -- all that has to happen in terms of charging
12 him with a parole violation -- there is no magistrate
13 straight, there is no judge. A petition is filed and
14 he goes to prison until there is a hearing.

15 And of course, you are aware that the
16 standard of proof is much lower so there is no
17 judicial gatekeeper there, Your Honor.

18 I would just say this finally -- I don't want
19 to argue with the Court, but I want to make my point
20 which is this -- Mr. Jackley's statements to the Court
21 about Mr. Marshall won't have a problem with perjury
22 as long as he tells the truth, mean, as I understand
23 it, the government's understanding of the truth.

24 And the problem with that is the government's
25 understanding of the truth, the official government

1 version of the truth, changes over time. In 2004, the
2 government told a Court of Appeals that Arlo Looking
3 Cloud gave the murder weapon to the shooter.

4 Now, in 2008, there is a different government
5 version of the truth which is that Richard Marshall
6 gave the gun to -- that was used in the killing. So
7 the government's version of the true changes over
8 time.

9 And my argument here is that the government
10 seeks now, and intends now, to elicit testimony which
11 if it conflicts with their latest version of, quote,
12 the truth, that Mr. Marshall is going to be punished
13 by being sent to prison for the rest of his life
14 through a parole violation.

15 I understand your ruling. My prediction is
16 if Mr. Marshall testifies and says I did not give a
17 gun to Theda Clarke, Mr. Jackley is -- and the state
18 is going to charge him with perjury even though that
19 testimony would be true, and it was proven true in a
20 court of law in my opinion, Your Honor.

21 Thank you.

22 **THE COURT:** I understand your presentation.
23 I also think the case has been under investigation
24 down a wandering road for 35 years. And I assume as
25 you wander down that road, there are different

1 versions that come from different forces, and
2 different sides, and different angles. And as the
3 evidence mounts and changes one way or direction,
4 one's idea of what happened has to alter accordingly.

5 I have no idea when the alterations came and
6 what they do. I understand fair is in the eye of the
7 beholder. I hate that word. Okay. And truth is the
8 same way. Truth is always in the eye of the beholder.
9 If you disagree with me, then -- you know, I have my
10 version of truth, you have yours, and we perceive it
11 and we all have a filter through which we pass other
12 activities.

13 Still there is a burden on Mr. Jackley if the
14 perjury charge is filed to be able to prove that
15 charge.

16 **MR. HANA:** I do appreciate the Court's
17 observation. The conflicting testimony in and of
18 itself doesn't mean anybody committed perjury.

19 **THE COURT:** Absolutely.

20 And it's not unusual in criminal cases or
21 civil cases. Sit in on a divorce if you want to see
22 conflicting testimony. Good grief.

23 **MR. HANA:** Judge, I understand your ruling.
24 You are denying my motion to quash.

25 I would ask this -- two things. One, for the

1 record, Mr. Marshall is not waiving any
2 attorney/client privilege when he testifies.

3 Secondly, I would ask the Court's permission
4 if he is called to testify that I be allowed to stand
5 next to the witness box while he testifies so that I
6 may give him legal advise should he require legal
7 advise. Particularly with regard should he be asked
8 any questions concerning communications he may have
9 with his prior attorney.

10 But I believe he has --

11 **THE COURT:** One, if he's asked that question,
12 I am probably -- I am going to stick my own nose in
13 it.

14 **MR. HANA:** I would hope so.

15 **MR. JACKLEY:** I am not going to ask that
16 question, Your Honor.

17 **THE COURT:** No.

18 And I am not -- it's not going to go there in
19 my court. Okay. And it's just not. And -- because
20 telling a jury they can't consider it, the study shows
21 they remember what they can't consider better than
22 what they remember they can consider.

23 **MR. HANA:** In view of the fact that
24 Mr. Marshall has been subpoenaed, he asserted the
25 Fifth Amendment, that there has been an order of

1 immunity and an order -- court's order directing him
2 to testify, it may become necessary for him to request
3 or be advised as to a legal matter. I would
4 respectfully ask the right to stand next to him --

5 **THE COURT:** You are not going to stand next
6 to him during the course of the trial. If he needs to
7 ask for advice, I can make whatever arrangements I
8 think appropriate at that time. I am not going to
9 have lawyers standing by witnesses. Period.

10 But you are certainly -- I assume you are
11 going to be in the courtroom and if I perceive there
12 is a question or Mr. Marshall raises the issue, we
13 will hear it outside the presence of the jury and if
14 necessary and resolve the issue.

15 **MR. HANA:** Mr. Marshall will testify. And --
16 should he be called to testify --

17 **THE COURT:** If he's called.

18 **MR. HANA:** -- I would simply ask that the
19 state advise me the day before he is to testify so
20 that I can make arrangements to have him here. He's a
21 working man. He lives on the Pine Ridge Reservation.
22 Rather than have him hang around here every day until
23 he's called --

24 **THE COURT:** Given the circumstances, is there
25 any difficulty with that, Mr. Jackley?

1 **MR. JACKLEY:** Can I leave it like we do with
2 every other witness that we will try to, but as the
3 Court is aware we're trying to get it orderly done
4 with respect to the jury's time and we will try to
5 identify --

6 **THE COURT:** You can give him a tentative time
7 that we plan to call him Thursday morning, but it's
8 possible we would call him late Wednesday afternoon.

9 **MR. JACKLEY:** That would be perfect.

10 **THE COURT:** That kind of thing.

11 **MR. HANA:** That's fine.

12 **THE COURT:** Trial time is interesting to say
13 the least.

14 **MR. HANA:** Thank you for hearing me, Your
15 Honor.

16 **MR. JACKLEY:** Your Honor, I understand that
17 the Court has ruled, but for purposes of an appellant
18 record, can I make a statement on the record or make a
19 couple of observations or not?

20 **THE COURT:** You are certainly entitled to
21 respond to the motion although I have made the ruling.
22 Go ahead.

23 **MR. JACKLEY:** For purposes of the record I
24 know that early on Mr. Hana had indicated he wanted
25 certain affirmations that he had placed in his

1 filings, judicial notice, and I strenuously object to
2 that.

3 There was a discussion about his version of
4 perjury, et cetera. And I believe that it's clear
5 that with respect to any claims of a federal perjury
6 charge that federal law has a five-year statute of
7 limitations. So that wouldn't make sense that there
8 were discussions or threats of federal perjury from a
9 2003 Grand Jury because that would have been beyond
10 any statute of limitations.

11 The other thing that I take issue with is the
12 reference to perhaps an improper influence with the
13 parole board. It was placed in both his written
14 briefs and mentioned today. Your Honor, that is an
15 independent board. The Attorney General does seat
16 three on that board, but there is no evidence of any
17 improper influence or improper dealings with the
18 parole board. The parole board decides when there is
19 parole violations, not the Attorney General.

20 And the last point is in discussions with the
21 parole board, the issues and the problems that Dick
22 Marshall has with the paroled board don't have
23 anything to do, necessarily, with the Graham case.
24 They have to do with the fact that he has two strikes.
25 He has a pending third strike, which is a DUI. So it

1 has absolutely nothing to do with any claims of
2 perjury and I just wanted to make that clear for the
3 record.

4 Thank you.

5 **THE COURT:** The appointment process,
6 Mr. Hanna, I am appointed or was appointed by the
7 Governor which is the Executive Branch of the State of
8 South Dakota. I think I cut the arguments between the
9 state -- they win some and they lose some and the
10 defense wins some and loses some; and I feel
11 absolutely no beholdings to the state because I was
12 appointed by the Executive Branch which is, of course,
13 the Attorney General, as well.

14 I have no qualms about -- they've lost a few
15 motions in this case. And I don't believe there is an
16 implied immediate -- it's not that there cannot be
17 improper influence, but I don't think it exists as a
18 matter of general presumption. I -- the appointments
19 are all over the place. Somebody has got to appoint
20 them. They don't --

21 How many members are there on the parole
22 board?

23 **MR. MURPHY:** Nine.

24 **MR. JACKLEY:** Nine. Three by the Attorney
25 General, three by the Governor, and three by the

1 Supreme Court.

2 **THE COURT:** In any event, I think I find no
3 reason to find merit to that. I find reason --
4 understand the fear, but I don't find anything to
5 justify the fear.

6 So there we are. We're done.

7 Thank you.

8 I asked the jury to appear at approximately
9 9:30. We're going to take a break, ladies and
10 gentlemen.

11 I want to, again, advise people, I want no
12 electronics in the courtroom. None. Nada. Zip.
13 That includes cell phones and the like. They will be
14 left behind, placed in cars, or whatever there may be.
15 There are exceptions for counsel and counsel's support
16 staff, but that's it.

17 I ask people in the absence of emergency when
18 you are in here stay in here until there is a break.
19 It's a small courtroom. The traffic in and out can be
20 distracting, particularly, to witnesses who are
21 oriented in that general direction.

22 Also, the jury sits there and they can see
23 people in the audience during testimony, and if people
24 are watching with an interest in the case, there can
25 be head noddings or head shakings of that's true or

1 that's not true. If that occurs, you get out of the
2 courtroom and you don't come back.

3 Thank you.

4 (Whereupon, the following proceedings were
5 then had in open court in the presence of the jury.)

6 **THE COURT:** Mr. Jackley, are you satisfied
7 this is the jury selected?

8 **MR. JACKLEY:** I am, Your Honor.

9 **THE COURT:** Mr. Murphy?

10 **MR. MURPHY:** I am.

11 **THE COURT:** All right.

12 Ladies and gentlemen, we're about to begin
13 the trial. It will proceed in this manner. The
14 prosecution --

15 Who is going to read the indictment?

16 Mr. Jackley, are you starting that?

17 **MR. JACKLEY:** Yes, Your Honor.

18 **THE COURT:** Mr. Jackley will read the
19 indictment. That is a statement of the charges. It
20 will be read aloud by him to you. It is not evidence.
21 It is simply a document which describes the charges
22 and the things the state must prove. You must not
23 draw any inference from that indictment against
24 Mr. Graham's presumption of innocence. It simply sets
25 out the elements which must be proven.

1 Following that, the state will make an
2 opening statement before it begins it's case in chief.
3 An opening statement is not evidence. It's simply an
4 outline of what the state believes the evidence to be
5 or what the evidence will show.

6 The defense will then have an opportunity to
7 present an opening statement at that time. The
8 defense may reserve a statement to be made as the
9 prosecution does before the start of its case in
10 chief. Mr. Murphy will announce that at the time that
11 it's called.

12 In this case, the state has the burden of
13 proving the defendant guilty beyond a reasonable
14 doubt. A reasonable doubt is a doubt based upon
15 reason and common sense; the kind of doubt that would
16 make a reasonable person hesitate to act.

17 Proof beyond a reasonable doubt, therefore,
18 must be proof of such convincing character that a
19 reasonable person would not hesitate to rely and act
20 upon it. However, proof beyond a reasonable doubt
21 does not mean proof beyond all possible doubt.

22 In this proceeding, Mr. Graham has an
23 absolute right not to testify. It is his and will be
24 his decision as to whether to do so. You must not --
25 you are not allowed to draw any inference or even a

1 hint of guilt should he choose to remain silent. That
2 is absolutely contrary against the system of law in
3 the United States and the State of South Dakota.

4 It is your job as a jury to resolve the
5 factual issues in this case. And you must resolve
6 those issues in the course of your deliberation.
7 Factual issues, as I use that term, means for you to
8 decide whether the evidence presented proves beyond a
9 reasonable doubt the elements of a given charge.
10 Those are the facts that are in dispute.

11 I will provide the rules of law which govern
12 your decision making. Those rules are contained in
13 instructions that I give you, these now, those that
14 might be given during the course of the trial, and
15 those that will be given just before you begin your
16 deliberations.

17 We're going to have some discussion of what
18 is evidence and what is not. Evidence is relatively
19 simple. It is the sworn testimony of witnesses. It
20 is documents or other things that I may allow to be
21 received as exhibits. It includes any facts which the
22 parties, that is the state and the defense, stipulate
23 to or are agreed to exist. And any facts that may
24 have been judicially noticed, that is facts which I
25 say you may but are not required to accept as true

1 even without testimony.

2 I may receive evidence at a time during the
3 course of the trial, one or more times, that is
4 allowed in for a limited purpose. Some items of
5 evidence may be used for this purpose, but not that.
6 I will explain to you for which purposes or purpose it
7 may be used and you may not use it to decide any other
8 question of fact.

9 Then we have the question of what isn't
10 evidence. Besides the obvious, it's everything that I
11 didn't just include. But it includes the objections
12 that may be made by counsel to testimony or exhibits
13 that they believe should not be put into evidence.
14 Those objections, and when to make them, are at the
15 prerogative of counsel. There may be objections they
16 could make. That's knowledge. And objections which
17 they should make, and in law school they told us that
18 was wisdom. So the fact that they may object to one
19 type of testimony on one occasion and not at another
20 has nothing to do with the propriety of the objection
21 being made.

22 My rulings on objections should not concern
23 you at all. I will make the best judgment I can at
24 that time as to whether the objection is sound and
25 should be sustained; or whether I believe the

1 objection is not sound and I would then overrule the
2 objection.

3 Things that I -- objections that I sustain or
4 exhibits that I do not allow to be received should not
5 be a concern of yours. I understand curiosity makes
6 you want to know what they are, but by ruling them
7 out, I am forbidding you to consider those matters as
8 evidence presented in the case.

9 There may come a point in time when I tell
10 you some evidence or testimony in the like which has
11 already been made or spoken, I may tell you that you
12 cannot consider that in resolving questions. That's
13 an extremely difficult thing to do once you have heard
14 it. That's the unring the bell sort of thing. And I
15 expect you to make every effort you can to comply with
16 that.

17 You will have the opportunity to take notes.
18 Your notebooks will be left either in the courtroom or
19 with the bailiffs when you are not here. You will be
20 allowed to take them into your deliberations, but the
21 notes do not override your memory. They are to assist
22 your memory and they are not evidence. You are
23 required to resolve the case on what you heard and
24 based on what you heard.

25 You will be outside the courtroom from time

1 to time. You understand this case is going to run for
2 a fair number of days. I have given you the advice
3 previously. I must now give it to you again. At any
4 time you are outside the courtroom, you may not
5 converse with or discuss with anybody, including
6 yourselves, the matters of the trial.

7 You are to not make any decisions or form any
8 opinions as to how you decide this case until all of
9 the evidence has been presented to you. That again is
10 something that is very difficult for human beings to
11 do. But as you understand, we proceed with one side,
12 then the other. And if you start forming an opinion
13 beforehand, that interferes with your ability to hear
14 all other evidence with an open mind that follows your
15 opinion making. You will begin to filter information
16 at that time. Again, that's human nature and the way
17 our minds work so you must be every conscious to avoid
18 forming opinions as this matter proceeds.

19 The attorneys will ignore you. They are not
20 being rude. That is their function and if they are
21 not ignoring you, I will be somewhat irritated and
22 that's not good. If people persist in asking you
23 questions beyond they are curious, you may tell them
24 you are sitting on a jury and you have now said all
25 you can say. If they persist in questioning you that

1 must be brought to the attention of the Court
2 immediately.

3 You are not to watch news broadcasts, read
4 newspapers, or anything else that may have a chance to
5 bring outside information to you. Even if it is
6 reporting what happened here, it may have a different
7 cast or put you in a different frame of mind as to
8 something than what you had when you heard the
9 information. It is someone else's interpretation of
10 what was heard and you will be unable two weeks from
11 now to sort out your source of information.
12 Consequently, you must ignore and take conscious steps
13 to avoid all outside information in deciding this
14 case.

15 At this stage of the game, counsel, are we
16 ready to proceed?

17 **MR. JACKLEY:** The state is, Your Honor.

18 **MR. MURPHY:** So is the defense.

19 **THE COURT:** Mr. Jackley, if you would read
20 the indictment.

21 **MR. JACKLEY:** Thank you, Your Honor.

22 (Whereupon, the Indictment was then read in
23 open court.)

24 **THE COURT:** Thank you, sir.

25 Are you prepared to give your opening

1 statement?

2 **MR. JACKLEY:** I am, Your Honor.

3 **THE COURT:** Please proceed.

4 **MR. JACKLEY:** May it please the Court,
5 Counsel.

6 Good morning.

7 My name is Marty Jackley and I represent the
8 State of South Dakota. I want to begin by thanking
9 you for agreeing to serve on the jury and for your
10 attentiveness throughout the trial.

11 I want to take this opportunity to take you
12 back in time to December of 1975. It's the early
13 morning hours. We're in a location in the South
14 Dakota Badlands just south of Kadoka. There is a
15 highway that runs to the interstate. Highway 73.
16 There is a red Ford Pinto driving north headed to the
17 interstate. Headed to Kadoka.

18 In that car, driving, is a middle-aged lady
19 named Theda Clarke. Sitting next to her is the
20 defendant, John Graham. In the back seat is Arlo
21 Looking Cloud. And then either next to him or in the
22 hatchback part is Annie Mae Aquash, the victim in this
23 case.

24 It's the early morning hours. The sun may
25 just be coming up giving a hint of redness in the sky.

1 It's December. There is a chill in the air. It's
2 been a long journey, but it's a journey coming to an
3 end.

4 The evidence will show that as Theda Clarke
5 drove the Pinto headed north, she stopped. She turned
6 around. She headed south. Stopped again. Turned
7 around heading back north. She's looking for a place.
8 She turned around a third time, headed south, and she
9 found that place.

10 She pulled the red Pinto over on the side of
11 the road. John Graham knew the task at hand and he
12 got out of the vehicle. He grabbed Annie Mae Aquash.
13 Arlo Looking Cloud was more hesitant. Theda Clarke
14 looks to him and says, go with him. Arlo Looking
15 Cloud does.

16 As Arlo Looking Cloud is catching up to John
17 Graham and Annie Mae Aquash on the bluffs overlooking
18 the Badlands the sun is starting to come up. There
19 remains a chill in the air. Arlo Looking Cloud
20 witnesses Annie Mae begging for her life and at times
21 perhaps praying.

22 And then standing over the bluff John Graham
23 takes a 32-caliber revolver, puts it to the back of
24 Annie Mae Aquash's head and fires one shot. Annie
25 Mae's lifeless body falls approximately 20 feet down.

1 the Badland cliffs.

2 How did we get to this point?

3 Earlier that year the evidence will show that
4 there was a lot of rumor and suspecting that Annie Mae
5 Aquash was an FBI informant. The evidence will show
6 that that wasn't true, but that's what the American
7 Indian Movement and those members in the American
8 Indian Movement thought.

9 It really began in June of 1975, the year of
10 the murder, when there was a national American Indian
11 Conference in New Mexico, Farmington. It was at that
12 conference there was again rumors of Annie Mae being a
13 government informant, giving information to the
14 government about criminal activities. A man by the
15 name of Leonard Peltier took Annie Mae out and put a
16 gun to her head to scare her into not being an
17 informant.

18 Then later that month at a place called
19 Jumping Bull's, two FBI agents were killed. Later
20 that fall, just before the murder, in Marlin Brando's
21 motor home were riding, among others, Annie Mae
22 Aquash, Leonard Peltier, and Kamook Banks who now goes
23 by Kamook Ecoffey. It was in that motor home that
24 Leonard Peltier gave the incriminating statements
25 about what he had done to those two FBI agents. So

1 now Annie Mae is suspected as being an informant. She
2 now has seriously incriminating evidence against
3 Leonard Peltier.

4 The third thing then occurs with respect to
5 the informant concerns. Annie Mae had earlier been
6 arrested for firearms violations. She had a court
7 date, November 24, 1975, the year of her murder.

8 Unsuspectingly, a federal judge released her
9 on very limited bond conditions which gave rise to
10 further suspicions she must be an informant. She has
11 incriminating evidence. We suspected it all along.
12 And now a judge has released her without perhaps the
13 best of reasoning.

14 It's November 24, 1975, so members of the
15 American Indian Movement want to get her out of town.
16 You will hear evidence that just prior to another
17 court date, arrangements are made for Ray Hand Boy and
18 Evelyn Bordeaux -- Evelyn since passed away -- to
19 bring Annie Mae from Pierre, South Dakota to Denver.
20 They do just that. Ray travels with her. Ray Hand
21 Boy brings her to Denver to Troy Lynn Yellow Wood's to
22 hide her out.

23 For the next couple of weeks Annie Mae Aquash
24 is closely watched by individuals of AIM. Again,
25 she's suspected of being an informant and she has a

1 lot of information they believe.

2 Then a phone call happens. A phone call
3 involving Thelma Rios and Angie Begay. Thelma Rios is
4 in Rapid City, South Dakota, and calls to have Annie
5 Mae Aquash brought to Rapid City to answer to being a
6 federal informant.

7 The day of the phone call a further meeting
8 is held in Denver at Troy Lynn Yellow Wood's. You
9 will hear from several of the people present for that
10 meeting. Angie Begay, the individual that had taken
11 the phone call or had been involved in the initial
12 phone call. You will hear from George Palfy. You
13 will hear from Troy Lynn Yellow Wood.

14 You would hear about how they had a meeting
15 in Denver. The meeting also involved some individuals
16 with the Crusade for Justice. You will hear further
17 talk of an informant. You will hear about at the
18 meeting an indication of, this is what we do to
19 informants, which is precisely what was done.

20 After the meeting -- and during the meeting I
21 should say, Annie Mae Aquash is in the basement of
22 Troy Lynn Yellow Wood's. She's being watched. She's
23 being watched by John Graham.

24 Arlo Looking Cloud arrives at Troy Lynn's
25 house just in time to assist with her transport --

1 Annie Mae's transport to Rapid City. Before they
2 transport Annie Mae to Rapid City, they tie her hands.
3 She's bound and tied. You will hear from at least two
4 or three witnesses about that. She's taken against
5 her will. She's visibly upset. She's crying.

6 The journey begins. The kidnapping. Against
7 her will she is put in Theda Clarke's red Pinto that I
8 talked to you earlier about. The four that are in the
9 vehicle are Theda Clarke, John Boy Graham, Arlo
10 Looking Cloud, and Annie Mae, tied and bound, is put
11 in the back of the hatchback.

12 They travel -- it's approximately
13 December 10. They travel that evening to Rapid City.
14 They arrive at Thelma Rios' empty apartment at
15 Knollwood Apartments near Rapid City. Remember Thelma
16 was on the call about bringing Annie Mae forth because
17 she's a federal government informant.

18 Thelma Rios had given Theda Clarke the keys
19 to the empty apartment. So that night at Thelma Rios'
20 house the four stay. That's John Graham, Arlo Looking
21 Cloud, Theda, and John Graham. John Graham is
22 watching over Annie Mae Aquash. That night John
23 Graham stays in the bedroom with Annie Mae Aquash.

24 The next day, there is a place in Rapid City
25 called WKLDOC. WKLDOC stand for Wounded Knee Legal

1 Defense Offense Committee. They were involved in some
2 of the reservation defenses. Annie Mae Aquash is
3 brought to WKLDLOC for further discussions of what to
4 do with the informant. Those discussions are had and
5 the decision is made to further travel to the Rosebud
6 Reservation. Annie Mae is again visibly upset at
7 times at WKLDLOC. She's taken against her will.

8 They go to Rosebud Reservation. They being
9 the same group that you will hear me talk about from
10 the minutes of the bluff and that is John Graham,
11 Theda Clarke, Arlo Looking Cloud, and Annie Mae
12 Aquash. The foursome arrives in the evening at a
13 place at Rosebud called Bill Kills Means.

14 When they arrive at Kills Means', they stop.
15 John Boy Patton, the defendant, and Theda Clarke go
16 inside. Arlo Looking Cloud stays to guard Annie Mae
17 Aquash. After about five or ten minutes, John Graham
18 and Theda Clarke emerge. Arlo goes inside at Kills
19 Means' to use the bathroom and comes back out.

20 The foursome then travel in a circular route
21 back to the Pine Ridge Indian Reservation and stop at
22 the next house. They stop at Dick Marshall's house.
23 It's late in the evening of her murder. Perhaps even
24 into the next day.

25 When the foursome arrive at Dick Marshall's

1 house they knock on the door and they awake Dick
2 Marshall and his wife Cleo Marshall. It's now Cleo
3 Gates. They go inside. Annie Mae sits at the table
4 with Cleo Marshall. And for some reason, Dick
5 Marshall, Theda Clarke, Arlo Looking Cloud, and John
6 Graham go into Dick Marshall's bedroom. They are in
7 there for five or ten minutes. Dick Marshall then
8 emerges. And sitting at the table is Annie Mae Aquash
9 and Cleo Gates. Dick Marshall has a discussion with
10 Cleo about Annie Mae and about what they are going to
11 do with her. And Cleo Marshall says, no way, she's
12 not going to stay. We are not going to be involved in
13 this.

14 Dick Marshall then goes back into the bedroom
15 where, again, it's Theda Clarke, John Graham, and Arlo
16 Looking Cloud. He's in there for a few more minutes.
17 They then emerge and the foursome again leaves. John
18 Graham, Theda Clarke, Arlo Looking Cloud, and Annie
19 Mae Aquash.

20 It's late into the evening. The foursome
21 then drives in a circular route. They go to a place
22 at Potato Creek -- and you will see a map where all of
23 these locations are -- and they stop there, because
24 Arlo's Looking Cloud's grandmother lives there, to get
25 gas. They then proceed on.

1 At some point as they proceed on they see law
2 enforcement lights. At this point in time there is
3 now a gun. The gun is passed from Theda Clarke to
4 Arlo Looking Cloud when they see the lights.
5 Fortunately for the officer he went a different way.
6 He had gone a different direction. Was looking for
7 somebody else. So the foursome continue as the gun is
8 continued to be passed back and forth under the seat
9 between Theda and Arlo.

10 They make two more stops in Wambli, South
11 Dakota. They are of little consequence. Nobody was
12 home. And that's when they proceed on 44 to the
13 junction of 73 and travel up that road north to the
14 bluff that I talked to you earlier about.

15 It's now February -- after the shooting, not
16 much is heard until February 24, 1976. A rancher in
17 the Kadoka area, Roger Amiotte, is out checking cattle
18 in a remote area and he comes upon the lifeless body
19 of Annie Mae Aquash.

20 He immediately called law enforcement. Annie
21 Mae has been in the elements for a considerable amount
22 of time. It's South Dakota, it gets warm in the day
23 and cold at night. Annie Mae is not recognizable.

24 An initial autopsy is done and I will tell
25 you up front, Dr. Brown missed the bullet. They were

1 unable to determine who she was and so the method back
2 then used was they amputated both of Annie Mae's hands
3 and sent them in to the FBI lab for fingerprint
4 analysis. So at this point in time, the body has not
5 been identified. It's unidentifiable.

6 On March 2, Annie Mae is buried as an
7 unidentified person. On March 3, the day after the
8 burial, the FBI lab determines that it is in fact
9 Annie Mae Aquash from the fingerprints. Of course,
10 arrangements are made through the family and the body
11 is exhumed for further testing.

12 On March 11, a second autopsy is completed by
13 Dr. Garry Peterson. Through the x-ray machine that
14 was not available in the first autopsy, the bullet is
15 found lodged in Annie Mae Aquash's left temple. Cause
16 of death, gunshot wound to the back of the head. But
17 not just that, a gunshot wound that was so close when
18 the gun was put to the head it left powder burns.

19 We're now talking about 1976, a long time
20 ago. It was a lengthy and continuing investigation.
21 The evidence will show that there has been times of
22 little cooperation by those involved and those with
23 knowledge.

24 And then in 1988 some things broke in the
25 case. Arlo Looking Cloud began talking about his

1 involvement. Those discussions continued, and then in
2 1994, April 24, 1994, South Dakota's United States
3 Marshal Robert Ecoffey and Mitch Pourier, BIA
4 investigator, went up to Canada to talk to John
5 Graham. They met with John Graham in his own
6 territory. They met with him at a park. They began
7 discussing what information they obtained in the last
8 several years of the investigation. They discussed
9 with him the information that they had about what
10 occurred at Troy Lynn Yellow Wood's in Denver; about
11 him tying up Annie Mae Aquash.

12 At that time his response to that was --
13 Graham turned to Marshal Ecoffey and said, looks like
14 you guys have my future planned out for me. You have
15 your case.

16 Shortly thereafter, Marshal Ecoffey and Mitch
17 Pourier showed Graham the photographs of Annie Mae
18 Aquash laying dead below the bluff. Photographs that
19 you may well see here in the courtroom into evidence.
20 When those photographs were shown to John Graham, he
21 teared up.

22 As they continued to discuss -- as he looked
23 at those photographs, John Graham looked in the
24 direction of the White Horse community and said,
25 quote, I'm ready to leave this place. I'll probably

1 spend the rest of my life in jail anyway, end quote.

2 John Graham further disclosed to Marshal
3 Ecoffey and Mitch Pourier that he did in fact take
4 Annie Mae from Denver and took her to the reservation.
5 As Marshal Ecoffey and Mitch Pourier were talking to
6 John Graham at that picnic table and talking about his
7 involvement, and the killing of Annie Mae Aquash, you
8 will hear testimony that John Graham was shaking so
9 bad he shook the picnic table. He knew.

10 John Graham's final indication was that, yes,
11 he had taken her, but he had left her at a safe house
12 in Pine Ridge. The evidence will show that Dick
13 Marshall's house was anything but a safe house.

14 But furthermore, the witness testimony will
15 show that Annie Mae Aquash was not left at Dick
16 Marshall's house. She was taken to a bluff and shot
17 in the back of the head.

18 Further developments came in the case. Two
19 individuals, cooperating witnesses, Kamook Banks
20 Ecoffey, Dennis Banks' former common law wife, and
21 Serle Chapman, a British journalist, came to the
22 United States Government with information and a
23 willingness to help to solve what had happened and
24 prove once and for all what had occurred.

25 John Graham gave an initial statement -- a

1 further statement to Serle Chapman. You will hear
2 about that statement. Arlo Looking Cloud continued to
3 talk.

4 And then in 2003 the United States indicted
5 Arlo Looking Cloud, and yes, he went to trial and he
6 was convicted for his petition in the death of Annie
7 Mae Aquash. And I would anticipate that he will be
8 talking to you at some point in this trial.

9 And yes, he hopes to get a benefit from
10 talking to you. But as you look at that testimony,
11 consider what all Arlo Looking Cloud had said before
12 he was indicted and before he was convicted. You will
13 hear about what he said in 1988, what he said to Annie
14 Mae Aquash's daughter in April of 2002 about not only
15 his involvement, but more importantly, John Graham's
16 involvement and participation in the killing of Annie
17 Mae Aquash that has remained constant even though Arlo
18 Looking Cloud at times minimizes what his involvement
19 was, it's pretty clear that John Graham's involvement
20 was the trigger man. And his role in the kidnapping.

21 At the end of the trial I will have an
22 opportunity to once again come before you in my final
23 closing argument. And I am going to look you in the
24 eye and I am going to ask that based upon the evidence
25 that has been presented that you convict John Graham

1 with the murder and felony murder kidnapping of Annie
2 Mae Aquash.

3 Thank you for your attentiveness.

4 **THE COURT:** Mr. Murphy?

5 **MR. MURPHY:** Thank you, Your Honor.

6 Good morning, folks.

7 We're going to be here together for probably
8 10 to 13 days. And during the course of that time,
9 you are going to hear two bodies of general evidence.
10 Those that are in dispute: Those things that are
11 subject to dispute, and those things that are not.

12 I submit to you what you are going to learn
13 that is not subject to dispute boils down to two
14 things and two things only. First, that Anna Mae
15 Aquash was killed as the result of being shot in the
16 back of the head. You are not going to hear any
17 quibbling with that.

18 Secondly, that that death happened some time
19 between November 24, 1975, and February 24, 1976.
20 That three months window between when she was released
21 from jail in Pierre, November 24, 1975, when she was
22 last seen by law enforcement and the court personnel,
23 and February 24, 1976 when her body was recovered.

24 Now that presentation of the known undisputed
25 facts will probably take all of about a half day to

1 present. So what are we going to be talking about for
2 the remaining eight or ten days and why such a short
3 presentation of known facts?

4 The reason why it's going to be such a short
5 presentation of the known undisputed facts, you are
6 not going to hear evidence about the fingerprints
7 linking my client to the gun that was used to kill
8 Anna Mae Aquash or any other item.

9 You are not going to receive evidence about a
10 ballistic match between the gun and the bullet that
11 was used to kill Anna Mae Aquash and my client.

12 You are not going to hear evidence of
13 footprints in the dirt or any other items recovered at
14 the crime scene that link my client in any way, shape,
15 or form to this crime.

16 You are not going to hear a reported
17 confession where my client says I did it or I was
18 involved in the killing of Annie Mae Aquash.

19 And you are not going to hear anything about
20 DNA evidence or serological evidence linking my client
21 to the crime or the allegation as we talked about
22 during jury selection that there was sexual
23 intercourse or rape involved in this case.

24 In fact, the DNA evidence and the serological
25 evidence that's going to be presented is going to be

1 presented by my client.

2 Because you are going to hear that in
3 2000 during an interview with Serle Chapman, one of
4 the witnesses that Mr. Jackley just referred to, my
5 client was told, hey, you have been alleged to have
6 raped Anna Mae Aquash. And you will hear what my
7 client's response was. I never raped Anna Mae Aquash.
8 I never had sex with Anna Mae Aquash. She was my
9 friend and my friend alone. And even if it requires
10 exhuming the body, I want there to be DNA tests
11 because I did not have sex with Anna Mae Aquash and I
12 want to prove that that is the case.

13 That statement was given in 2000 before he
14 was charged, before he had an attorney, when he was
15 presented with this evidence. He said, I want this
16 tested so it can be resolved.

17 And you are going to hear that later, once my
18 client was charged, and this allegation was brought up
19 again, he did two things. He asked the court system
20 to do two things. He said, first, I want the FBI and
21 the U.S. Attorney's Office to get the evidence: Her
22 under garments and her clothing and a Kotex pad that
23 was present when she was autopsied and would contain
24 evidence that would help alleviate or remove this
25 allegation of rape.

1 And I want -- once that information or that
2 evidence is obtained by the FBI or the U.S. Attorney's
3 Office, because they held the evidence, I want it sent
4 out for testing. And the court ordered those two
5 things.

6 Low and behold, the FBI could find the
7 underwear, but the Kotex mysteriously disappeared.
8 Nobody seems to know where that went. But the
9 underwear was sent. It was tested. No DNA. In fact,
10 you will learn 30 years before when Anna Mae Aquash's
11 body was found and her clothing -- all eight items of
12 her clothing were obtained by the FBI, the FBI sent
13 all that clothing out for testing to determine whether
14 semen was present on any one of the garments. And in
15 fact, nothing was recovered that linked my client to
16 any allegation of rape or sex or any misconduct in
17 regard to Ms. Aquash. So you are not going to hear
18 that evidence because the government doesn't have it.

19 So what I anticipate the remaining eight or
20 ten days of testimony is going to be about is -- it's
21 going to break down into basically three categories of
22 evidence. The first category is going to be evidence
23 about the American Indian Movement. The second
24 category of evidence is going to be about the days,
25 weeks, and months immediately prior to Ms. Aquash's

1 death. And the third evidence -- or category of
2 evidence is going to involve two witnesses: Arlo
3 Looking Cloud and Serle Chapman. So I am going to
4 address what those categories of evidence are likely
5 to show and to not show.

6 In regard to the American Indian Movement,
7 you are going to hear a wealth of information about
8 the American Indian Movement between 1973 and 1975.
9 You are going to hear how after the occupation at
10 Wounded Knee in 1973 a small group of upper echelon
11 AIM leaders became involved in a sequence of violent
12 activities. Militant activities. 1974, we had
13 courthouse riots. 1975 -- June 26, 1975, two FBI
14 agents and one AIM member were killed in a shoot-out
15 at Jumping Bull's.

16 Just a few months later, September 5, 1975,
17 in a response to that shoot-out -- because that
18 shoot-out caused a massive infusion of FBI presence
19 here in South Dakota. They were looking for the
20 killers of these two FBI agents. It was priority
21 number one. They did a raid at a place called
22 Al Runnings. And at that raid they arrested people, a
23 small group of AIM leader. And in the tent where they
24 were -- where one of them was found, there were
25 grenades, handguns, illegal sawed-off carbide rifles,

1 dynamite, and other explosives.

2 One month after that, October 12, 1975,
3 Columbus Day, that same group of people -- or that
4 same loose group of people -- some came, some went,
5 but there was core group that were involved in placing
6 bombs in Pine Ridge, bombing the power plant and
7 trying to blow up other places.

8 And from the bombing on October 12, 1975, the
9 same group of people got into a motor home, traveled
10 to the pacific northwest, hiding from law enforcement.
11 Because by now almost all of them are fugitives from
12 the law. And they are pulled over at one point by a
13 Highway Patrolman in Oregon. They had left Washington
14 State coming through Oregon. And what is the
15 response? They get into a shoot-out with the Highway
16 Patrolman. The Highway Patrolman could have been
17 killed. And at the end of that shoot-out, two of the
18 people in that group escaped, Leonard Peltier and
19 Dennis Banks.

20 Now, you will be listening to that evidence
21 and wondering what is the link between that evidence
22 and John Graham. And I will tell you that there is
23 almost no link at all. That group -- that core group
24 of people involved in these militant activities
25 involved Anna Mae Aquash, Kamook Banks now known as

1 Kamook Ecoffey, Dennis Banks her husband, and Leonard
2 Peltier. In each of those instances -- or almost
3 every one of those instances, that's the group of
4 people.

5 Who is John Graham at that time? What is he
6 doing?

7 He's a 20-year-old Canadian guy living down
8 in Denver with his girlfriend Angie traveling to Pow
9 Wows and sun dances, hanging out. And he happens to
10 have a relationship -- a friendly relationship with
11 one of those people, Anna Mae Aquash, because they are
12 both from Canada. She's older. She's taken him under
13 her wing at times, but that is his only connection to
14 this group of AIM militants.

15 In fact, one of the interesting you are going
16 to hear -- excuse me. I am going to grab some water.
17 As I told you during jury selection I will go through
18 a gallon a day.

19 What you are going to hear is the one
20 incident of that violent sequence that Anna Mae Aquash
21 was not involved in was the incident at Jumping Bulls'
22 place where the FBI agents were shot.

23 Why wasn't she involved in that incident?

24 Because on that date she, and my client John
25 Graham, and a couple other people were at a peaceful

1 assembly in Cedar Rapids, Iowa. They were supporting
2 a guy named Leonard Crow Dog during his trial. One
3 incident in that sequence of ever escalating events
4 that Anna Mae Aquash was not at was when she was with
5 my client at a peaceful assembly. All of those other
6 instances my client wasn't there. He had no
7 connection to any of these folks other than a friendly
8 relationship with Anna Mae Aquash built on their
9 common origins in Canada.

10 Now, the next category of evidence you are
11 going to hear about is day, weeks, and months before
12 Ms. Aquash's death. Denver, Rapid City, Pine Ridge,
13 Rosebud, maybe some other places. And you are going
14 to hear testimony from probably as many as ten
15 witnesses about what happened at these various
16 locations. Who did what, and what was seen, and what
17 wasn't seen.

18 And rather than summarize all of that
19 evidence, I am going to ask you to do one thing.
20 Listen closely. Because you are going to hear each of
21 the witnesses that the state presents that testify
22 about these events, in Denver and Rapid City and down
23 on the reservations, gives radically different stories
24 depending on when they are talking and who they are
25 talking to.

1 Not only do individual witnesses contradict
2 themselves over and over again, often times under
3 oath, because many of these witnesses have given sworn
4 statement and testimony before; but two of the
5 witnesses may claim to have been in the same room and
6 seen the same thing and they will contradict each
7 other on almost every material fact. Simply put, I
8 ask you to listen so that you can gauge how believable
9 any of these people are.

10 And I will suggest to you that though there
11 will be a suggestion that the failure of these
12 witnesses to stay straight on their stories or stay
13 straight with each other is due to the passage of
14 time; that that isn't the case because you are going
15 to hear they have given statements sometimes over a
16 period as long as 20 years.

17 Their statements all have started to change
18 in about the last ten years. And that's because a
19 virtual cottage industry has grown around this case.
20 And there is a group of people that want to be on the
21 right side of history and so now they are telling a
22 story that is consistent with what the government has
23 been saying about the case as opposed to what they
24 said for years and years as I said often times under
25 oath.

1 The last category of evidence you are going
2 to hear involves the two star witnesses: Arlo Looking
3 Cloud and Serle Chapman. Arlo Looking Cloud in 2004
4 was convicted of the murder of Anna Mae Aquash. He
5 was sentenced to life. Life in federal prison.

6 He appealed that conviction and lost. He
7 said there wasn't enough evidence and my attorney
8 dropped the ball and my sentence should not be imposed
9 and the Court of Appeals said no. The conviction is
10 upheld. Your sentence is upheld.

11 After he lost his appeal, he filed a petition
12 saying that he should get a new trial because of
13 problems with the way his case was handled and how his
14 attorney did and that his claims of innocence were not
15 presented. And that motion kind of floated around.
16 In fact, I think it may still be pending.

17 What you are going to learn, though, is that
18 when Arlo Looking Cloud got to that point where all
19 other options were out and he was doing a life
20 sentence in a hellish federal prison down in
21 Louisiana, he hired an attorney -- or his family hired
22 an attorney, a former AIM attorney. A guy who used to
23 represent Leonard Peltier, and he said, let's make a
24 deal. Do whatever is necessary to get me out of here.

25 And they came to the government. And they

1 started the process called a Rule 35 process. Rule
2 35, simply put, is where somebody asks the government
3 to file a motion, to go before the judge, and to say,
4 Judge, reconsider your life sentence. Cut me some
5 slack.

6 But the condition for a Rule 35 motion, as
7 you will hear, is the government has to say to the
8 judge, this guy provided us substantial assistance in
9 some prosecution. He cooperated with us. He provided
10 us material.

11 So Arlo Looking Cloud, when he starts that
12 negotiations for the Rule 35, suddenly changes his
13 story in every material way.

14 We're going to hear how in 2008, after he
15 started negotiating with the government, he suddenly
16 claimed to have heard my client and Anna Mae Aquash in
17 a bedroom having sex. Previously, sworn statements,
18 he said, yeah, they were in a room once together.
19 They were playing cards and talking. But, now, in
20 2008, he invents this rape allegation that they were
21 having sex and it was at a time when Anna Mae Aquash
22 was a captive.

23 Why is that important? Why is the 2008 date
24 important for that change?

25 Two things. One, he's at a point where he

1 needs to deal. But secondly, they coincides with the
2 time that my client's charges in federal court were
3 dismissed; and the state wanted to prosecute him here
4 in Rapid City. So they get Arlo Looking Cloud to say
5 John Graham raped Anna Mae Aquash in Rapid City.

6 Arlo Looking Cloud was willing to change his
7 story from a couple of old Canadian friends playing
8 cards in a room to a rape to fit their theory of
9 prosecution.

10 At the same time Arlo Looking Cloud showed
11 that he would be willing to do anything to help them
12 in any prosecution because in 2008 the government
13 became interested in Dick Marshall. You have heard
14 about Dick Marshall.

15 Arlo Looking Cloud had given statements,
16 recorded statements, sworn statements, for years.
17 Never ever mentioned Dick Marshall. Even when he was
18 on trial for his life and had an incentive to come to
19 the government with any other information to get a
20 good deal, he had never ever mentioned Dick Marshall.
21 In fact, he had said he had not gone to Dick
22 Marshall's house.

23 But because Dick Marshall became a suspect
24 2008, Arlo Looking Cloud suddenly says, you know what,
25 I just remembered myself and Theda and John and Anna

1 stopped at Dick Marshall's house and we went in a
2 bedroom and we had a private meeting and I saw a gun
3 and I -- it was all of this other discussion. And now
4 he'll tell you, well, you know, I never told you that
5 before because I was afraid of Dick Marshall.

6 Never once in the past had he ever indicated
7 any fear of Dick Marshall. Dick Marshall at this
8 point is a 60-something-year-old guy. And at that
9 point -- previous to that point, Arlo Looking Cloud
10 had every incentive to come forward with information
11 like that but he didn't come forward because it didn't
12 happen. He came forward with it, he invented it once
13 the prosecution said they wanted Dick Marshall.

14 You are also going to hear something about
15 Arlo Looking Cloud and his incentive to lie to get out
16 of his life sentence, to do anything necessary. And
17 that is, during the process of this case, he came
18 under the wing of an informant -- paid informant named
19 Kamook Banks now Kamook Ecoffey. The former AIM
20 militant. The former wife of Dennis Banks. Had left
21 AIM. Become involved in the movies. And then became
22 a paid informant. The government gave her about
23 \$40,000 for doing and interviews.

24 What you are going to hear is during the
25 course of an interview she had with Arlo -- the first

1 interview she had with him -- Arlo asks her one
2 question that rings above all other. Arlo says,
3 Kamook, who should I implicate. And Kamook Banks, who
4 has a very complicated history with this case, says,
5 only John Boy. She tells him the person Arlo is
6 supposed to implicate is my client.

7 Leaving Arlo, the next big witness for the
8 state is a guy named Serle Chapman. Serle Chapman is
9 a British guy. Him and his wife run a tour agency
10 called Go Native America Dot Com. They bring tourists
11 from Europe and around the United States out to
12 reservations and they expose them to Indian culture.
13 And Mr. Chapman writes books on Indians and gives
14 lectures on Indians, and he has basically made his
15 entire career on Indians. And you will learn that
16 he's even tried to pass himself off as being Indian
17 even though he has not a drop of Indian blood.

18 You are going to hear how Serle Chapman in
19 the year 2000 began researching and writing a book
20 called Blood Sweat and Tears. Inside the American
21 Indian Movement. And at the time he was researching
22 it, he goes to the FBI and he tells them that during
23 the process of researching it various AIM members had
24 given him information about Anna Mae Aquash.

25 And you will hear how he basically lied to

1 the FBI. He puffed up what information he had. He
2 said I've got these recorded interviews where people
3 talk about things like Farmington, New Mexico. You
4 just heard Mr. Jackley talk about how there was an
5 incident in Farmington where Leonard Peltier put a gun
6 to Annie Mae Aquash's head.

7 What you are going to learn in this case is
8 that the interview he did where he said -- told the
9 FBI that he had learned that Leonard Peltier had done
10 this. Actually, the guy he was talking to said
11 Leonard Peltier, him, and Anna Mae Aquash went outside
12 at Farmington to smoke a joint, to hang out. There
13 was some joking around about the informant accusation
14 and that was the end of it.

15 But Serle Chapman goes to the FBI wit them
16 and he starts selling his services and he baits them
17 and they say, you know what, we need your help and we
18 will pay you. We'll reimburse you. So between 2000
19 and 2003 Serle Chapman does a lot of recorded
20 interviews. And immediately upon starting that he
21 starts sending them the bill. In the beginning the
22 bills were small, \$600 here \$400 there, plane tickets
23 and hotel rooms. But very soon he starts asking for
24 big money.

25 And you are going to hear how Serle Chapman

1 is ultimately paid by the FBI \$100,000 by the FBI for
2 recording very few interviews from 2001 to 2003.
3 After 2003, he doesn't do a single interview. Not at
4 least one that's recorded. But the government pays
5 him \$70,000 from 2003 to 2009.

6 Not only do they pay him a hundred thousand
7 dollars, Serle Chapman and his wife are not citizens.
8 They came to this country to make money here, but they
9 only have a four year Visa. So you will hear the
10 letters he starts writing to the authorities, to
11 Mr. Mandel, to the FBI, saying you need to get us
12 Visas; and they do. They hand walk his Visa
13 applications through the Immigration and Customs
14 Enforcement Agency. They get him extensions on Visas.
15 They get him new Visas.

16 And low and behold, three weeks before Serle
17 Chapman is going to testify against Dick Marshall,
18 they give him and his wife green cards. Permanent
19 resident status.

20 So Serle Chapman is paid \$100,000, gets green
21 cards for himself and his wife, and what do we get in
22 return?

23 Well, he records one interview with my
24 client. One interview. And when the recorder is on
25 what does my client say? Anna Mae Aquash was my

1 friend. I did not have sex with her. I did not rape
2 her. I was asked by Anna Mae at a time when she was a
3 fugitive and was afraid of the FBI to help take her
4 from Denver which had been hot because there was so
5 many people that knew she was there up to a home in
6 Pine Ridge to leave her at a safe house.

7 Now Serle Chapman is going to come in and
8 say, you know, when he, Serle Chapman, decided to turn
9 off the tape recorder suddenly my client made
10 incriminating statements. And you will hear how
11 that's a pattern with Serle Chapman.

12 Even though the government had equipped him
13 and fitted him with a body wire, he had tape recording
14 devices, even had something where he could record
15 phone calls, everything he gathered that was suddenly
16 devastating and implicated people in this case was
17 when the recorder was miraculously off.

18 I will ask you to consider seriously whether
19 Arlo Looking Cloud and Serle Chapman respect the oath
20 or whether they are testifying based on other reasons.

21 In the end of this case, what it boils down
22 to is nothing forensic, nothing direct linking my
23 client to the case. A whole bunch of evidence about
24 AIM and some -- a few people in AIM. A few bad
25 apples, if you will, that have nothing to do with my

1 client. A bunch of people who have given wildly
2 inconsistent events about Denver and Rapid City and
3 down on the reservation. And two guys, Arlo and
4 Serle, who have bias and motives to lie, financial
5 incentives and all sorts of other reasons for slanting
6 their testimony.

7 Now when the case is done, I am not going to
8 come before you and tell you how I think you should
9 vote. That's not my role.

10 I am going to ask you really one question.
11 Based on what you have heard on the witness stand and
12 all of the inconsistencies and the lack of direct
13 evidence connecting my client in any way, shape, or
14 form to this crime, can you really say beyond a
15 reasonable doubt that the state's proven anything?

16 Have they proven the elements against my
17 client?

18 That's what I am going to ask you to ask
19 yourselves.

20 Thank you very much.

21 **THE COURT:** Thank you.

22 Ladies and gentlemen, not knowing exactly the
23 process in which we're going to go and the time frame,
24 the first witness is scheduled for one o'clock. I
25 would ask you to return here at 12:45 so we can

1 prepare to enter the courtroom and hear that witness
2 commencing at one o'clock.

3 You are again reminded to leave your
4 notebooks here and not to discuss this case nor allow
5 anyone to discuss it with you pending the final
6 resolution of the case. And for you not to inform --
7 not to form or begin to form any opinion on this case
8 until all the evidence has been presented.

9 The opening statements of counsel are not
10 evidence. They are simply their explanation of what
11 they believe the evidence will show or not show in
12 this case to help guide you through the process as
13 testimony is presented.

14 Thank you for your attention, and I will see
15 you at 12:45.

16 (Off the record.)

17 **THE COURT:** Okay.

18 Satisfied this is the jury, Mr. Jackley?

19 **MR. JACKLEY:** Yes, Your Honor.

20 **THE COURT:** Mr. Murphy?

21 **MR. MURPHY:** Yes, Your Honor.

22 **THE COURT:** I believe you are at bat,
23 Mr. Murphy -- I am sorry. Mr. Jackley. I will get it
24 right.

25 **MR. JACKLEY:** The state would call Roger

1 Amiotte, Your Honor.

2 **THE COURT:** If you would please come forward,
3 sir, and take a stop right here., I will get you sworn
4 in.

5 **ROGER AMIOTTE,**
6 called as a witness herein, having been duly sworn,
7 under oath testified as follows:

8 **THE COURT:** Please take a seat in that chair,
9 sir.

10 **DIRECT EXAMINATION**

11 **BY MR. JACKLEY:**

12 **Q.** Good morning.

13 Could you please state your name for the
14 record.

15 **A.** My name is Roger Amiotte.

16 **Q.** Mr. Amiotte, where do you live?

17 **A.** I live 18 miles south of Kadoka or 2 miles
18 north of Highway 44/173.

19 **Q.** Mr. Amiotte, what do you for a living?

20 **A.** I am a rancher.

21 **Q.** Have you done that for quite some time?

22 **A.** All my life.

23 **Q.** Mr. Amiotte, I want to take you back to
24 February of 1976.

25 Where did you live back there?

1 **A.** I lived at the same location.

2 **Q.** And you were a rancher at that time?

3 **A.** I was.

4 **Q.** Did you make a finding on your property?

5 Did you find something on February 24, 1976?

6 **A.** Yes, I did.

7 **Q.** Could you please describe that to this jury,
8 what you found, what you were doing.

9 **A.** All right.

10 I was building some fence. A
11 projection of -- extending the fence that was already
12 on location. And I was searching for a Badland bank,
13 a vertical bank, to run my fence against that would
14 effectively stop my livestock from getting out on the
15 road.

16 **Q.** When you were doing that, did you come upon
17 something?

18 **A.** Yes, I did. I found a person lying in --
19 near the bottom of this canyon, and I determined that
20 it was about 30 foot away. And the person was not
21 alive.

22 **Q.** Mr. Amiotte, I am handing you what's been
23 previously marked as State's Exhibit No. 1, an aerial
24 photo.

25 Do you generally recognize that photograph?

1 **A.** Yes, I do. That's -- would be about a mile
2 north of my house.

3 **Q.** Does it depict your ranch area and your house
4 area?

5 **A.** Yes, it does.

6 **MR. JACKLEY:** Your Honor, I would offer
7 State's Exhibit No. 1.

8 **MR. MURPHY:** No objection.

9 **THE COURT:** Thank you.

10 It will be received.

11 **MR. JACKLEY:** Can I show it to the jury, Your
12 Honor?

13 **THE COURT:** You may.

14 **Q.** **(BY MR. JACKLEY)** Mr. Amiotte, on Exhibit 1
15 there is a yellow dot.

16 Could you generally describe where that dot
17 is?

18 **A.** That would be the location about a mile north
19 of my home where I discovered the body lying.

20 **Q.** And there is a highway that runs next to
21 that.

22 What highway is that?

23 **A.** That's Highway 73.

24 **Q.** And if you were to head north on that, which
25 town would you eventually get to?

1 **A.** Kadoka. The nearest town.

2 **Q.** Mr. Amiotte, I am handing you State's
3 Exhibit 2.

4 Do you generally recognize that photograph?

5 **A.** Yes, I do.

6 **Q.** What is it?

7 **A.** It's a photo of the location of where I found
8 the person.

9 **MR. JACKLEY:** Your Honor, I would offer
10 State's Exhibit 2.

11 **MR. MURPHY:** No objection.

12 **THE COURT:** Received.

13 **Q.** **(BY MR. JACKLEY)** Mr. Amiotte, there is what
14 appears to be a white sheet there.

15 Could you describe where that location is?

16 **A.** Well, it's at the foot of about a 30-foot
17 cliff. And that's to mark the spot where the body was
18 laying.

19 **Q.** Is that sheet still there?

20 **A.** Yes, it is.

21 **Q.** Mr. Amiotte, I am handing you what's
22 previously been marked State's Exhibit 3.

23 Do you generally recognize what that
24 photograph depicts?

25 **A.** Yes, I do.

1 Q. What is that?

2 A. That's the person that I found.

3 Q. That you found February of 1976?

4 A. Right.

5 MR. JACKLEY: Your Honor, I would offer
6 State's Exhibit 3.

7 MR. MURPHY: No objection.

8 THE COURT: Received.

9 Q. (BY MR. JACKLEY) Mr. Amiotte, does that
10 generally depict the way she was laying when you saw
11 her first?

12 A. Yes, sir.

13 MR. MURPHY: Your Honor, may I ask for
14 clarification? I thought this was Exhibit 3.

15 MR. OSWALD: That's on the back side.

16 MR. MURPHY: Okay.

17 Thank you.

18 Q. (BY MR. JACKLEY) Mr. Amiotte, what was the
19 approximate distance from the top of the bluff to the
20 bottom of the bluff where the body was found?

21 A. About 30 foot, the cliff.

22 Q. I am handing you what's been previously
23 marked as State's Exhibit 4.

24 Do you generally recognize what that
25 photograph depicts?

1 **A.** Yes, I do. It's the location where I came
2 upon that body.

3 **Q.** Further identifying the bluff that the body
4 was below?

5 **A.** Yes, sir.

6 **THE COURT:** Mr. Jackley, as you take those in
7 would you pass them by me. I can't see that very
8 well.

9 **MR. JACKLEY:** Sorry.

10 **THE COURT:** That's all right. I would like
11 to see them so I have some idea of what's being shown
12 to the jury.

13 **MR. JACKLEY:** As Mr. Murphy looks at that for
14 clarification purposes, many of the exhibits will have
15 two different stickers on them. There is a yellow
16 sticker that would be used in prior proceedings and
17 the brown sticker would be for these proceedings here
18 today.

19 **THE COURT:** The one that says State's Exhibit
20 will be for these proceedings, correct?

21 **MR. JACKLEY:** Correct.

22 **THE COURT:** The yellow is not for these?

23 **MR. JACKLEY:** Correct.

24 Your Honor, I would offer State's Exhibit 4.

25 **MR. MURPHY:** No objection.

1 **THE COURT:** Will be received.

2 **Q.** **(BY MR. JACKLEY)** Mr. Amiotte, you had
3 indicated that essentially the distance from the top
4 of the cliff where this individual is standing to the
5 bottom where the body was found is how many foot?

6 **A.** Around 30 foot.

7 **Q.** Mr. Amiotte, when you came upon the body, did
8 you notice any distinctive jewelry?

9 **A.** Yes, I did. She did have jewelry. There was
10 a bracelet or -- her arm was extended from beneath her
11 and a turquoise bracelet that I noticed.

12 **Q.** Mr. Amiotte, I am handing you what's been
13 marked State's Exhibit 5.

14 Do you generally recognize what that
15 photograph depicts?

16 **A.** Yes, sir. That would be the jewelry that
17 caught my attention, anyway, from 30 foot away.

18 **MR. JACKLEY:** Your Honor, I would offer
19 State's Exhibit 5.

20 **MR. MURPHY:** May I see the exhibit?

21 No objection.

22 **THE COURT:** Will be received.

23 **Q.** **(BY MR. JACKLEY)** And Mr. Amiotte, what does
24 State's Exhibit 5 depict again?

25 **A.** A spider, butterfly, I wasn't sure.

1 **Q.** But that is the piece of jewelry that you
2 noticed that stuck in your mind when you had come upon
3 the body in February of 1976?

4 **A.** Yes. It was kind of a -- I didn't -- you
5 know, I didn't know whether it was a man or a woman.
6 And it was something that was kind of unisex jewelry
7 for the times.

8 **Q.** Did it appear that the body had been outdoors
9 or in the elements for a while?

10 **A.** Quite a long while.

11 **MR. JACKLEY:** No further questions at this
12 time, Your Honor.

13 **THE COURT:** Thank you.

14 Mr. Murphy?

15 **CROSS-EXAMINATION**

16 **BY MR. MURPHY:**

17 **Q.** Mr. Amiotte, my name is John Murphy.

18 We have never met before?

19 **A.** No.

20 **Q.** I am going to ask you some questions about
21 your testimony and I am going to refer to Exhibit 2.

22 Can you get a good view of Exhibit 2 or would
23 you like me to dim the lights?

24 **A.** I can see it.

25 **Q.** Okay.

1 The road we see there is Highway 73?

2 **A.** Yes, it is.

3 **Q.** And the white spot where the sheet is, that's
4 where Ms. Aquash's body was found?

5 **A.** Yes.

6 **Q.** It's about 150 feet if you went from
7 Highway 73 directly to the bluff above where
8 Ms. Aquash's body was found?

9 **A.** I would suppose. A hundred, hundred fifty.

10 **Q.** It's a good estimate based on your
11 familiarity with the land, a hundred to a hundred
12 fifty feet?

13 **A.** Yeah. At the present time the road was a lot
14 narrower then.

15 **Q.** Okay.

16 So even back then it would even be a little
17 farther?

18 **A.** Not necessarily.

19 **Q.** Okay.

20 Somewhere in the ballpark of a hundred to
21 150?

22 **A.** Right.

23 **Q.** Now, at the present time there a fence that
24 runs along the western border of Highway 73, correct?

25 **A.** That's correct.

1 Q. But at the time in 1976 there wasn't a fence
2 for half to three-quarters of a mile, correct?

3 A. That's true.

4 Q. And so --

5 THE COURT: Can we establish what is east and
6 west there?

7 MR. JACKLEY: Sure, Your Honor.

8 Q. (BY MR. MURPHY) Mr. Amiotte, that is west of
9 73, correct?

10 A. That's on the west side of the highway.

11 Q. So on the west side of the highway there
12 wasn't any fence line for half to three-quarters a
13 mile?

14 A. Not in that area, no. The cliff and the
15 draw, or canyon, you would call it, whatever, was a
16 natural barrier that I used. I just fenced it off at
17 both ends.

18 Q. Sure.

19 But at this time on February 24, 1976, you
20 were out there because you were going to join the
21 missing portion?

22 A. Right.

23 Q. Your cows were getting out on the road?

24 A. Right.

25 Q. And it was a nice day, the day that you went

1 out there to check the fence line?

2 **A.** Yes, I was.

3 **Q.** In fact, it had been a pretty warm February,
4 hadn't it?

5 **A.** I am guessing about 60 degrees. It was very
6 nice.

7 **Q.** When you approached, did you approach from
8 the roadside or were you down in the draw?

9 **A.** I was in the draw.

10 **Q.** You were on your horse?

11 **A.** No, I was afoot.

12 **Q.** Afoot.

13 When you got to that area where you saw the
14 body, saw the bracelet, did you see anything around
15 that area that stuck in your mind, any ropes, or
16 casings, or anything else?

17 **A.** There was nothing there.

18 **Q.** Okay.

19 And later that day, you brought law
20 enforcement back with you?

21 **A.** Yes.

22 **Q.** And did you walk all around that area at that
23 time?

24 **A.** No, I didn't. I stayed out of the -- it was
25 a law situation. I stayed up on the cliff.

1 Q. Okay.

2 And you stayed up on the cliff and you looked
3 down at where the body was?

4 A. Right.

5 Q. Did you see anything at all that drew your
6 attention or caused you concern up on the cliff?

7 A. Nothing there.

8 Q. All right?

9 MR. MURPHY: Nothing further.

10 Thank you.

11 **REDIRECT EXAMINATION**

12 **BY MR. JACKLEY:**

13 Q. Mr. Amiotte, you and Mr. Murphy talked about
14 a fence. And just -- I wanted to do a couple
15 follow-ups just so that I have it right.

16 This way would be headed south going that
17 way, correct?

18 A. That's right.

19 Q. And so north would be the way the pen is
20 facing, correct?

21 A. Correct.

22 Q. In 1994, would there have been a fence
23 running somewhat parallel to the highway?

24 A. No.

25 Q. Okay.

1 In 1976, if you were to go north a little
2 ways -- I believe now there is a type of a turn off so
3 to speak -- would there have been a fence?

4 **A.** Yes.

5 **Q.** Okay.

6 How far would the fence have been
7 approximately -- if we go directly across from the bed
8 sheet, how far north would you have to go to have hit
9 that fence, approximately?

10 **A.** Less than a quarter of a mile. It would
11 be -- I'm going to say probably 400 foot.

12 **Q.** Okay.

13 Just a couple of follow-up questions. How
14 far is the location where you found the body
15 approximately from your house?

16 **A.** A little over a mile.

17 **Q.** And your house would be to the south
18 direction, correct?

19 **A.** Yes.

20 **Q.** Is this location where -- where you found the
21 body visible from the road?

22 **A.** No, it isn't.

23 **MR. JACKLEY:** No further questions, Your
24 Honor.

25 **THE COURT:** Mr. Murphy?

1 **MR. MURPHY:** Thank you.

2 **REXCROSS-EXAMINATION**

3 **BY MR. MURPHY:**

4 **Q.** Sir, in regard to -- in regard to the fence
5 you indicated was about 400 foot up the road, that was
6 a fence where there was a little bit of a landing, a
7 turn off?

8 **A.** Yes. There is a -- an approach approximately
9 where it is today from the highway.

10 **Q.** Uh-huh.

11 **A.** And the fence extended from that point in and
12 to the base of that -- of that draw there.

13 **Q.** So that wasn't a section of fence of miles;
14 it's just a short section of fence?

15 **A.** It was a short section of fence.

16 However, on north the highway was fenced.

17 **Q.** All right.

18 So if somebody were to say they had to cross
19 a fence to get to the bluffs where you looked down at
20 this body, that would mean they crossed a short
21 section of fence some 400 feet north on the highway
22 and they would have then had to walk all along the
23 bluffs 400 feet south and then some feet in, maybe a
24 hundred feet in?

25 **A.** Well, from that location there is a fence

1 about, like I'm saying, that is in the Badlands.

2 Q. All right.

3 So -- and maybe I didn't ask the question
4 clear enough. There is a fence somewhere up this
5 direction?

6 A. Right.

7 Q. If somebody said they crossed a fence and
8 then walked to the bluff, they would have to walk that
9 whole 400 feet down the road -- or down along the
10 bluffs to get to where you could see down to the
11 bottom, correct?

12 A. Yes.

13 Q. All right.

14 MR. MURPHY: All right. Thank you.
15 Nothing further.

16 MR. JACKLEY: Nothing further, Your Honor.

17 THE COURT: Thank you, Mr. Amiotte. You are
18 excused.

19 And if you are here on subpoena, you are
20 released from that.

21 (Witness excused.)

22 MR. MANDEL: The state would call John Munis,
23 Your Honor.

24 THE COURT: Please come forward sir.

25 Stop right here and we'll get you sworn in.

1 JOHN MUNIS,
2 called as a witness herein, having been duly sworn,
3 under oath testified as follows:

4 **THE COURT:** Please take a seat, sir.

5 **DIRECT EXAMINATION**

6 **BY MR. MANDEL:**

7 Q. Good afternoon, sir.

8 A. Good afternoon.

9 Q. Could you state your name, please.

10 A. John Munis.

11 Q. What's your current occupation, sir?

12 A. I am retired.

13 Q. What are you retired from?

14 A. From the Federal Bureau of Investigation.

15 Q. Were you a special agent with the bureau?

16 A. I was.

17 Q. How long were you so employed?

18 A. From 1968 to 1996.

19 Q. During the time you were an agent were you
20 ever assigned to work in Rapid City?

21 A. I was, in 1975 to 1978.

22 Q. During the course of your duties here were
23 you ever assigned to work on an investigation of the
24 death of Annie Mae Pictou Aquash?

25 A. I was.

1 Q. Can you tell us how that came about, sir?

2 A. I was down on the Pine Ridge Reservation, I
3 believe it was the 25th of February of 1977. My
4 recollection. And we were advised by the Bureau of
5 Indian Affairs that an individual had been located in
6 a remote area. And there was no identification on the
7 body. And the body had been brought up to Pine Ridge
8 Hospital and an autopsy was currently being conducted
9 on the body.

10 Q. Did you ever go to the scene, sir?

11 A. To the --

12 Q. The scene where the crime took place.

13 A. I did not.

14 Q. You just went to the autopsy?

15 A. Correct.

16 Q. Can you tell me what the procedure was for
17 conducting autopsies down there at that time?

18 A. At that time, the pathologist that was being
19 used was out of -- I believe, it was Scottsbluff,
20 Nebraska, and his name was Dr. Brown.

21 And on that particular occasion I went to the
22 autopsy room where it was being performed. And the
23 primary reason was to see if there was any evidentiary
24 items or if there was any identification that had been
25 found on the body.

1 **Q.** Where was that autopsy room where the
2 autopsies were performed?

3 **A.** In the basement of the hospital at Pine
4 Ridge.

5 **Q.** When you went there, were you able to gather
6 any evidence that was of note regarding the body?

7 **A.** There wasn't any evidence concerning
8 identification for the body, no.

9 **Q.** What was the condition of the body based on
10 your observation?

11 **A.** It was somewhat decomposed.

12 One of the things that I thought I would
13 attempt to do at that time is to take fingerprints,
14 but it was obvious because of the condition of the
15 body that that was beyond my ability.

16 **Q.** What was the difficulty in that regard, if
17 you recall?

18 **A.** The hands were somewhat shelved. They were
19 in more or less a closed position. And in touching
20 the flesh, it was evident that it would come lose from
21 the body.

22 **Q.** What action -- first of all, I take it at
23 that point there was no other way to identify the
24 body?

25 **A.** That is correct.

1 **Q.** What action did you then take regarding
2 obtaining fingerprints?

3 **A.** Well, once I determined that I wasn't able to
4 get the prints, I made a telephone call back to our
5 lab in Washington DC and asked them for a
6 recommendation as to what should be done. The bureau
7 told me that I should ask the pathologist to remove
8 the hands and have them submitted back there so that
9 they could take fingerprints.

10 **Q.** So I understand, you felt that you were not
11 able to obtain fingerprints from the hands there at
12 the scene?

13 **A.** That is correct.

14 **Q.** So what action did -- who took the action
15 regarding --

16 **A.** I asked the pathologist if he would remove
17 the hands, which he did. And I -- my recollection is
18 that he turned the hands over to the criminal
19 investigator, Nate Merrick, and Nate Merrick in return
20 turned the hands over to me.

21 I took the hands from the reservation back to
22 Rapid City and I was directed in submitting them to
23 the bureau they should be in a formaldehyde solution.
24 I believe they recommended 10 percent formaldehyde
25 solution. And I believe I went to one of the

1 hospitals to get the solution and encompassed the
2 hands in that solution and submitted them to the
3 bureau along with the clothing that the deceased had.

4 Q. And just so I understand, the formaldehyde
5 solution, it was just a liquid solution that they were
6 suspended in?

7 A. Correct.

8 Q. That was so they wouldn't suffer any more
9 damage while they were transported?

10 A. That is correct.

11 Q. And I want to make sure I understand this,
12 the laboratory had some specific technique for
13 obtaining fingerprints that couldn't be done out in
14 the field?

15 A. They did. I am not familiar with what
16 technique they used but they did have the ability to
17 take prints from that type of a hand.

18 Q. But that was the reason they wanted the hands
19 transported?

20 A. That is correct.

21 Q. Beyond that, did you have any continued
22 involvement in this investment?

23 A. I did not.

24 Q. Was it assigned to another agent?

25 A. It was and I am not sure which agent it was

1 assigned to.

2 Q. Okay.

3 MR. MANDEL: I have nothing further, Your
4 Honor.

5 THE COURT: Mr. Murphy?

6 MR. MURPHY: Thank you.

7 CROSS-EXAMINATION

8 BY MR. MURPHY:

9 Q. Mr. Munis, my name is John Murphy. I am just
10 going to ask you a few questions.

11 At the time that you showed up at the
12 autopsy, you were made aware that the body had been
13 found the previous day?

14 A. It could have been either that day or the
15 previous day. I am not sure.

16 Q. But if prior testimony indicated the body was
17 found on the 24th of February, you're clear that the
18 autopsy that you attended was on the 25th of
19 February?

20 A. My recollection is it was the 25th, yes.

21 Q. And if you have any questions about that,
22 would it help to refresh your recollection if I showed
23 you the autopsy report?

24 A. It would or if you were to show me my what's
25 referred to as an FD302.

1 **MR. MURPHY:** Your Honor, may I approach?

2 **THE COURT:** You may.

3 **Q. (BY MR. MURPHY)** Mr. Munis, I am first going
4 to show you the autopsy report. If you might read
5 that first paragraph.

6 Does that help you in identifying the date?

7 **A.** Yes, it does. It does confirm February 25
8 was the correct date.

9 I believe I made a mistake of saying 1977.
10 This shows 1976.

11 **Q.** Okay.

12 Would you like to also see your 302?

13 **A.** Yes.

14 This confirms that I did receive them on the
15 25th.

16 **Q.** So you had no prior involvement with the body
17 until the day after it was found?

18 **A.** I did not.

19 **Q.** And part of the process that you were
20 involved in was to take what are called -- sometimes
21 called artifacts from the body; is that correct?

22 **A.** That is correct.

23 **Q.** And you took the clothing that was removed by
24 the pathologist, correct?

25 **A.** That is correct.

1 **Q.** And that included underwear and outer
2 garments, as well?

3 **A.** It did.

4 **Q.** In the autopsy it indicates that there was
5 also a Kotex pad that was recovered from the underwear
6 at the time the body was autopsied.

7 Do you recall taking possession of that Kotex
8 pad?

9 **A.** I have no recollection of that, no.

10 **Q.** Okay.

11 If it was in the underwear, it would have
12 gone with the underwear when you took the underwear?

13 **A.** I assume it would have. Yes.

14 **Q.** Do you recall from the autopsy report the
15 statement by the pathologist that a Kotex pad was in
16 the crotch of the panties at the time they were
17 removed from the body?

18 **A.** I don't have recollection of that.

19 **Q.** In any case, you have no idea what happened
20 to that Kotex pad?

21 **A.** I have no idea.

22 **Q.** All right.

23 And -- but the underwear and other items were
24 collected by you, you firmly recall that?

25 **A.** Yes, they were.

1 Q. And they were placed into evidence?

2 A. Correct.

3 Q. Okay.

4 MR. MURPHY: Nothing further.

5 Thank you.

6 THE COURT: Mr. Mandel?

7 REDIRECT EXAMINATION

8 BY MR. MANDEL:

9 Q. Sir, do you recognize that autopsy report?

10 A. I do.

11 Q. Is that the report from the autopsy that you
12 attended on that date?

13 A. Yes, it is.

14 Q. That indicates the autopsy was on the
15 25th of February, 1976?

16 A. That is correct.

17 MR. MANDEL: I'd offer State's Exhibit 11,
18 Your Honor.

19 MR. MURPHY: I object. It's a hearsay
20 document. We obtained the testimony.

21 THE COURT: Sustained at this point.

22 MR. OSWALD: May we approach?

23 (Whereupon, a discussion was held at the
24 bench.)

25 MR. OSWALD: Your Honor, the State's

1 Exhibit 11, the autopsy report, was previously
2 referred to at great length as to the Kotex. And to
3 the dates and it was shown to this witness. And if
4 the Court -- we're not arguing with the Court's
5 ruling. We ask for a motion to strike the hearsay of
6 the Kotex from the report that was used for this
7 witness by the defense.

8 **THE COURT:** Fundamentally, I don't see a
9 difficulty in getting the report into evidence. But
10 at this point it is hearsay -- it's just simply
11 without foundation. The use -- to whatever extent
12 Mr. Murphy objects to it, I can't imagine there is
13 difficulty in meeting those requirements to get it.

14 **MR. MURPHY:** It will come in through
15 Dr. Peterson. I used it to refresh his recollection.
16 He said it would help.

17 **THE COURT:** That's what I would assume.
18 Is he going to testify?

19 **MR. OSWALD:** He will.

20 **THE COURT:** We need it before then?

21 **MR. OSWALD:** Well, he referred to it, Judge.
22 He specifically referred to --

23 **THE COURT:** I understand that. That doesn't
24 necessarily make it admissible as far as I know. I
25 could be educated on that subject, but I don't think

1 it does.

2 **MR. OSWALD:** That's what our position is is
3 it doesn't make what he -- what Mr. Murphy said
4 admissible either if he referred to the document.

5 **THE COURT:** Number one, it's probably a
6 little late for that objection. But number two, I
7 think it's probably fair game to ask and it was a
8 refreshing recollection. You don't let the reports in
9 on refreshed recollection. At least I don't.

10 **MR. MURPHY:** In the future how many attorneys
11 do we need to do these bench conferences?

12 Mr. Mandel is asking the questions.

13 **THE COURT:** Six or seven, but the only one
14 talking is Mr. Oswald.

15 (Whereupon, the discussion at the bench was
16 then concluded.)

17 **MR. MANDEL:** Nothing further, Your Honor.

18 **THE COURT:** Thank you.

19 You may step down, sir.

20 You are excused from the subpoena if that's
21 how you are here.

22 (Witness excused.)

23 **MR. JACKLEY:** Your Honor, would it be
24 appropriate before the state calls its next witness --
25 we have a stipulation to be read to the jury by

1 counsel regarding the fingerprints.

2 **THE COURT:** It would be appropriate.

3 **MR. JACKLEY:** Thank you, Your Honor.

4 Stipulation. The parties to this action have
5 agreed and stipulated to certain matters. You may
6 accept this stipulation as if proven by the parties.

7 The parties agree that the fingerprints taken
8 from the hands of the body found by Roger Amiotte on
9 February 24, 1976, belonged to Annie Mae Aquash.
10 Thus, the body found by Roger Amiotte has been
11 positively identified as Anna Mae Aquash.

12 **THE COURT:** Thank you.

13 Ladies and gentlemen, as I indicated earlier,
14 evidence consists of and includes stipulations and
15 agreements by the parties as to evidence obtained.

16 Thank you.

17 **MR. MANDEL:** The state would call Bill Wood,
18 Your Honor.

19 **THE COURT:** Please raise your right hand.

20 BILL WOOD,
21 called as a witness herein, having been duly sworn,
22 under oath testified as follows:

23 **THE COURT:** Please take a seat.

24

25

DIRECT EXAMINATION

BY MR. MANDEL:

Q. Afternoon, sir.

Could you state your name, please.

A. William B. Wood.

Q. Sir, where do you reside?

A. Fredericksburg, Virginia.

Q. What is your occupation?

A. I am retired.

Q. What are you retired from?

A. The Federal Bureau of Investigation.

Q. What were your specific duties with the FBI?

A. I was assigned to Rapid City, South Dakota.

I was an investigator, special agent, working on the Pine Ridge Indian Reservation.

Q. So I don't lose track here, what years were you employed by the FBI?

A. From 1966 to 1997.

Q. And what years were you in Rapid City?

A. From 1975 to 1992.

Q. During the time you were here, you were at all times a special agent of the FBI?

A. Yes, sir.

Q. As part of your duties here, were you involved in the investigation of the death in 1976 of

1 Annie Mae Pictou Aquash?

2 **A.** Yes, sir.

3 **Q.** Can you tell us when and how you first became
4 involved in that, sir?

5 **A.** It was -- the case was originally assigned to
6 another agent. And -- for various reasons, I took the
7 case over just a couple of days after the initial
8 investigation was started and after the autopsy.

9 **Q.** At that time had any identification of the
10 body been made?

11 **A.** No, sir.

12 **Q.** What efforts were made by the FBI to identify
13 that individual?

14 **A.** At the time of the first autopsy, the hands
15 were removed by the pathologist and were sent to the
16 FBI identification division for -- for them to take
17 fingerprints from the hands.

18 **Q.** Did the identification division have some
19 ability to get fingerprints from these decomposed
20 hands that were not available from the field?

21 **A.** Yes, sir. The hands were what I would refer
22 to as mummified, but they were shriveled up and dried
23 out and they have special techniques that they use for
24 that purpose of getting the fingerprints if there are
25 any remaining.

1 **Q.** Was an identification made as to whose body
2 it was?

3 **A.** Yes, sir.

4 **Q.** Whose body was it?

5 **A.** It was the body of Anna Mae Aquash.

6 **Q.** Do you recall when that identification was
7 made?

8 **A.** I think it was around March the -- around
9 March the 2nd. I don't recall the exact date. It
10 was in March of 76. I would have to look.

11 **Q.** When you were informed as to who it was, did
12 that raise your interest level in the case?

13 **A.** Yes, it did.

14 **Q.** Why was that?

15 **A.** Because she was a known associate or member
16 of the American Indian Movement, and people that were
17 involved in the Pine Ridge Indian Reservation area
18 with Leonard Peltier and some others.

19 **Q.** During the course of the first autopsy, no
20 identification had been made, correct?

21 **A.** That is correct.

22 **Q.** Was it the intention of the FBI to have the
23 body buried before an attempt could be made at that
24 identification?

25 **A.** No, sir, it was not.

1 Q. Was the body buried?

2 A. Yes, sir, it was.

3 Q. And that was prior to when you got the
4 identification?

5 A. Yes, sir.

6 Q. Can you explain how or why that happened?

7 A. The Bureau of Indian Affairs on Pine Ridge
8 basically had custody -- or took custody of the body.
9 And they ordered the body to be interred in basically
10 what would be a pauper's grave at Red Cloud Indian
11 School near there.

12 Q. After the identification was made, did you
13 believe further action had to be taken regarding the
14 body?

15 A. Yes, sir.

16 Q. Why did you believe that?

17 A. Well, because I didn't believe the initial
18 report that was made in the autopsy. I just wanted to
19 check and see if that was exactly what another
20 pathologist would come up with. I wanted to see if
21 there were any injuries to the body that could be
22 determined. I didn't think that the first autopsy had
23 been complete enough.

24 Q. Do you recall what the cause of death had
25 been in the first autopsy?

1 **A.** I believe it was exposure.

2 **Q.** And you questioned that?

3 **A.** Yes, sir.

4 **Q.** What action did you then take in that regard?

5 **A.** I got a court order -- I submitted an
6 affidavit to the federal court in Rapid City to Judge
7 Bogue and requested that the body be exhumed.

8 **Q.** And what does exhume mean?

9 **A.** That her body be dug up and another -- I
10 wanted another autopsy done and that's what the
11 request was for.

12 **Q.** Were you present when the body was exhumed?

13 **A.** Yes, sir, I was.

14 **Q.** How did that take place?

15 **A.** It was done by the Bureau of Indian Affairs.
16 They used a backhoe. And when they got to the coffin,
17 then they used shovels, and they had some people that
18 were Bureau of Indian Affairs employees. Once they
19 got the casket out of the ground, then they put it on
20 a flatbed truck and it was transferred to the hospital
21 to the morgue at the Pine Ridge Hospital.

22 **Q.** Was there some sort of an arrangement made
23 for another pathologist to perform a second autopsy?

24 **A.** Yes, sir. Dr. Garry Peterson, he's the chief
25 medical examiner -- or at that time was for Hennepin

1 County in Minnesota and he was the person that was
2 requested to do the autopsy.

3 Q. Do you know how his presence there came
4 about?

5 A. Yes, sir.

6 Q. How was that?

7 A. Bruce Ellison who at one time had represented
8 Anna Mae Aquash in federal court had contacted -- I
9 don't recall if he contacted me or not. But anyway he
10 had requested that Garry Peterson be used to do the
11 second pathological examination of the remains.

12 Q. Do you recall, was the initial plan to use
13 Dr. Peterson or was he merely to be present?

14 A. No. As far as I was recall, he was to be the
15 person doing the autopsy.

16 Q. Okay.

17 What first took place regarding the autopsy?

18 A. You mean at the hospital?

19 Q. Yes.

20 What's the first action that took place?

21 Was there an x-ray performed?

22 A. I honestly don't recall if there was or not.

23 Q. Okay.

24 What do you recall taking place, sir?

25 A. I recall that Dr. Peterson -- he removed the

1 organs which had been originally removed by Dr. Brown
2 in the first autopsy. And there was -- then he was
3 examining -- reexamining the body and the head. And
4 in looking at the head, the skull cavity is where he
5 found a bullet.

6 Q. Do you recall if that was through the use of
7 x-ray or not?

8 A. I think it may have been, but -- it probably
9 was. That was the standard procedure.

10 Q. Then what was -- what was done with the
11 bullet that was found?

12 A. It was turned over to me.

13 Q. You have in front of you, sir, what I think
14 is marked State's Exhibit 8?

15 A. Yes, sir.

16 Q. What exactly is that?

17 A. This is basically the piece of metal that was
18 removed and later confirmed to be a bullet fragment
19 and it was -- I placed it in this box as evidence.

20 Q. That consists of a bullet in a small box?

21 A. Yes, sir.

22 Q. First of all, I assume you can't -- you
23 can't -- do you recall the bullet as looking like the
24 one you obtained at that time?

25 A. Yes, sir.

1 **Q.** Are there other ways that you can identify
2 that as being the one that you got?

3 **A.** Well, there are my initials on the box. This
4 is the box that I used. There is a date on there of
5 March the 11th of 1976. And, of course, my initials
6 appear on that. I don't recall if I was able to put
7 any marks on the bullet.

8 **Q.** Did you use that box to send the bullet in to
9 the FBI laboratory?

10 **A.** Yes, sir, I did.

11 **Q.** Could you explain to us procedurally how that
12 works in a case such as this.

13 **A.** I send a cover letter with it and give them a
14 little brief history of where the bullet came from.
15 And then ask them to see what they -- if they can
16 identify it. I merely tell them that it's a piece of
17 metal that was removed from a head during an autopsy.

18 **Q.** You don't even make the assumption that it
19 was a bullet, in other words?

20 **A.** No, sir.

21 **Q.** I assume, although you don't state that, you
22 probably reached that conclusion when you saw it?

23 **A.** Yes, sir.

24 **Q.** When you sent it into the laboratory, what
25 type of examination are you expecting them to perform

1 on it?

2 **A.** I expect them to try to determine the caliber
3 of the bullet and if there are any markings on the
4 bullet that could probably identify it from the weapon
5 that it was fired from.

6 **Q.** Okay.

7 After that -- the examination is performed at
8 the laboratory, what takes place with the bullet?

9 **A.** Then the bullet is placed back in the
10 original container and returned to the person that
11 sent it, to the agent that sent it. And a report is
12 submitted to that office.

13 **Q.** And what do you do so you can maintain the
14 ability to continue to identify that?

15 **A.** Well, this -- this is placed into what we
16 call evidence and it's placed in an evidence locker
17 and is kept under lock and key until it's used in
18 court.

19 **Q.** Now, during the autopsy, did Dr. Peterson
20 indicate anything as to what the cause of death was in
21 that case?

22 **A.** Dr. Peterson, as I recall, put down that the
23 cause of death had been gunshot wound to the head.

24 **Q.** Did you continue further investigation in
25 this matter, sir?

1 **A.** Yes, sir.

2 **Q.** What actions did you take after the autopsy?

3 **A.** Trying to interview as many people as we
4 could that we knew that were familiar with Anna Mae
5 Aquash and possibly her movement during that period of
6 time prior to the last time that she was known to have
7 been in the area.

8 **Q.** At that time, did you have any success with
9 that part of the investigation?

10 **A.** No, sir, we did not.

11 **Q.** Was Annie Mae Aquash an individual who was
12 known to you?

13 **A.** I have seen photographs of her.

14 **Q.** Were people uncooperative or were they just
15 not knowledgeable regarding this matter?

16 **MR. MURPHY:** Objection.

17 **THE COURT:** Sustained.

18 The cooperative stands, but knowledgeable
19 doesn't.

20 **Q.** **(BY MR. MANDEL)** Let me rephrase my question.

21 Were the people you dealt with in that regard
22 cooperative?

23 **A.** No, sir, they were not.

24 **Q.** Did you gain any useful information in that
25 regard?

1 **A.** No, sir.

2 **Q.** Was one of the individuals you interviewed an
3 individual by the name of Cleo Marshall?

4 **A.** Yes, sir.

5 **Q.** Did she provide any information regarding
6 this?

7 **MR. MURPHY:** Objection. Calls for hearsay
8 and it's leading.

9 **THE COURT:** The answer to the question
10 doesn't, but the next question might. It's a yes or
11 no question.

12 **A.** Would you repeat the question, please?

13 **MR. MANDEL:** I'd ask the reporter to read
14 that back.

15 (Whereupon, the question was then read back
16 by the Court Reporter.)

17 **A.** No, she did not.

18 **Q.** **(BY MR. MANDEL)** Essentially, did she indicate
19 she had no knowledge of the matter?

20 **MR. MURPHY:** Objection. It's leading and
21 it's putting hearsay into the record.

22 **THE COURT:** Sustained.

23 **Q.** **(BY MR. MANDEL)** Did you conduct further
24 investigation out at the scene where this took place?

25 **A.** Yes, sir, we did.

1 **Q.** Can you tell us what sort of investigation
2 you conducted out there, and with what objective?

3 **A.** We went out with a metal detector to -- the
4 objective was to see if we could find anything else of
5 value out there. The use of the metal detector would
6 have been to try to find any metal that might be in
7 the area.

8 **Q.** Do you recall what the scene looked like?

9 **A.** Vaguely.

10 **Q.** If I showed you a photograph, do you think
11 you might recognize it?

12 **A.** Yes, sir.

13 **Q.** Sir, I am showing you what's been marked
14 State's Exhibit No. 2. I think I am reading this
15 right.

16 Are you able to identify that area?

17 **A.** As I recall, this is the crime scene where
18 the body was found.

19 **Q.** Do you recall how wide an area you searched
20 in terms of looking for the location of metal or
21 things at the site?

22 **A.** Not specifically. I think we -- I think we
23 searched a number of yards out, but I don't recall the
24 exact amount -- the exact distance.

25 **Q.** Do you recall where the body was believed to

1 have been initially shot?

2 **A.** It was our belief that she was shot above an
3 embankment and the body was found at the base of the
4 embankment.

5 **Q.** Sir, I am showing you State's Exhibit No. 2
6 up on the -- being projected up on the wall there.

7 We've had previous testimony that this white
8 spot is where the body was located there.

9 Is that consistent with your recollection?

10 **A.** Yes, sir.

11 **Q.** Okay.

12 When you say you searched with a metal
13 detector, where did you do that searching?

14 **A.** We did on the top of the embankment and --

15 **Q.** Would that be up in this area?

16 **A.** Yes, sir.

17 And then down at the base where the body was
18 found. We did further examination in that area.

19 **Q.** Okay, sir, I will show you State's Exhibit
20 No. 4. That shows the body located at the bottom
21 there, again, of that Badlands wall. You did
22 searching down in the area where the body was located
23 as well as up at the top of that photograph?

24 **A.** Yes, sir.

25 **Q.** Do you recall how long you spent out there

1 doing it?

2 **A.** I guess it took a couple hours.

3 **Q.** Did you have any success?

4 **A.** No, sir, we did not.

5 **MR. MANDEL:** Your Honor, I would offer
6 Exhibit No. 8 at this time.

7 **MR. MURPHY:** No objection.

8 **THE COURT:** Will be received.

9 **MR. MANDEL:** I have no further questions at
10 this time, Your Honor.

11 **THE COURT:** Mr. Murphy?

12 **CROSS-EXAMINATION**

13 **BY MR. MURPHY:**

14 **Q.** My name is John Murphy. We have only spoken,
15 I believe, once on the phone; is that correct?

16 **A.** That's correct.

17 **Q.** And I am going to ask you some questions. If
18 I ask a question that doesn't make sense please just
19 let me know.

20 Now, it's my understanding you worked for the
21 FBI for a number of years, but what years were you
22 involved in the investigation of the death of Anna Mae
23 Aquash?

24 **A.** Oh, from -- as I testified earlier, from the
25 first part of March of 1976 until -- in that regard I

1 don't recall when the case was reassigned to another
2 agent. I honestly don't recall the date.

3 Q. Did you get the case from Agent Don Dealing?

4 A. Yes.

5 Q. And it went on to Agent Garber?

6 A. Correct.

7 Q. Okay.

8 Would it be accurate -- refresh your
9 recollection if Agent Garber took over about 1980, 81?

10 Was that more or less consistent with your
11 thoughts?

12 A. Somewhere in that time period, yes.

13 Q. All right.

14 And part of your duties as you just talked
15 about was to go to the crime scene and search the
16 area, correct?

17 A. Yes.

18 Q. And you had been trained before at the FBI
19 academy and whatnot in how to go about doing a search
20 for forensic evidence?

21 A. Yes.

22 Q. And when you went out, you didn't go out by
23 yourself, did you?

24 A. No.

25 Q. You brought a team with you?

1 **A.** I brought -- some other agents were with me,
2 yes.

3 **Q.** To the best of your knowledge, they were
4 similarly trained?

5 **A.** Yes, sir.

6 **Q.** And you brought a metal detector?

7 **A.** Yes.

8 **Q.** Anything else -- did you bring with you any
9 instruments or tools?

10 **A.** Not that I recall.

11 **Q.** Okay.

12 At the point you went out there, Ms. Aquash's
13 body had already been identified, correct?

14 **A.** That I don't know. I would have to look at
15 the date of when we went out there and I don't recall
16 what the date was.

17 **Q.** Let me see if I've got that. I don't have
18 that 302 with me, but it would it be fair to say if
19 you had -- if you hadn't known who Ms. Aquash was --

20 If you had just received information that a
21 body had been found in the area and the preliminary
22 diagnosis was death by exposure, would you and your
23 team of FBI agents have gone out there to do an
24 extensive search of the area?

25 **A.** Possibly.

1 **Q.** Would it be more likely that once you found
2 out that the decedent was Anna Mae Aquash that you
3 would have taken follow-up steps to thoroughly search
4 the area?

5 **A.** Yes.

6 **Q.** And in any regard, you did thoroughly search
7 the area?

8 **A.** Yes.

9 **Q.** All right.

10 You didn't cut corners or anything like that?

11 **A.** No.

12 **Q.** You found nothing of forensic value either on
13 the bluffs or down below; is that fair?

14 **A.** Not that I recall.

15 **Q.** All right.

16 If you had recalled it -- if you had gathered
17 some evidence, whether it be bullet casings or actual
18 spent bullets or other items, you would have put them
19 in evidence bags like Exhibit 8?

20 **A.** Yes.

21 **Q.** And you would have tested them or kept them,
22 right?

23 **A.** Correct.

24 **Q.** And you don't have any of those things?

25 **A.** No, sir.

1 **Q.** So it would be fair to say nothing of
2 evidentiary value was found?

3 **A.** Yes.

4 **Q.** Okay.

5 Now, I want to talk to you about the burial
6 of the body. The first burial. Your recollection
7 March 2, 1976?

8 **A.** That's when I received a call from the Bureau
9 of Indian Affairs investigator that was assigned to --

10 **Q.** And that Investigator was Nathan Merrick?

11 **A.** Correct.

12 **Q.** Would it help refresh your recollection as to
13 the date if I showed you your report on that?

14 **A.** I recall that it was March the 2nd.

15 **Q.** Okay.

16 At that point, were you aware that people on
17 the scene -- people who had come on February 24, 1976,
18 found the body, had already concluded that foul play
19 was present?

20 That they suspected this was a homicide or
21 some suspicious death?

22 **A.** Not -- no, because that was after the
23 autopsy.

24 **Q.** Okay.

25 So nobody told you when you came on the case

1 some time that first couple days in March that people
2 had already concluded before her -- this body was
3 identified, that there was foul play suspected?

4 **A.** Nobody had concluded that, no.

5 **Q.** Or nobody had told you that they had
6 concluded that?

7 **A.** Okay.

8 **Q.** Okay.

9 Would that be more fair to say?

10 **A.** Yes.

11 **Q.** Now, the autopsy was done on February 25, and
12 the body was buried March 2. That was only three
13 business days after the autopsy.

14 Is that a fair recollection or would you like
15 to look at a calendar?

16 I can show you a calendar if that would help.

17 **A.** I would have to look at a calendar.

18 **MR. MURPHY:** May I approach the witness, Your
19 Honor?

20 **THE COURT:** You may.

21 **Q. (BY MR. MURPHY)** I am going to show you just
22 for demonstrative purposes a calendar marked
23 February 1976.

24 What day of the week was February 24?

25 **A.** It was a Tuesday.

1 Q. Okay.

2 And that was the date the body was found?

3 A. Yes.

4 Q. And the autopsy was done on the 25th?

5 A. Yes.

6 Q. Okay. And that's the Wednesday.

7 What date is March 2?

8 A. March 2 is a Monday.

9 Q. All right.

10 So then after the autopsy, there was
11 Thursday, Friday, and by Monday the body had been
12 buried, correct?

13 A. Yes.

14 Q. Okay.

15 Do you know what the rush was?

16 A. I wasn't consulted.

17 Q. All right.

18 Well, let me ask you about that. This is a
19 person who had not been identified. There had been no
20 identification at the time she was buried, correct?

21 A. That's correct.

22 Q. And somebody had taken the effort of removing
23 her hands and sending them to the FBI lab, right?

24 A. Correct.

25 Q. And those results hadn't come back yet,

1 correct?

2 **A.** That's correct.

3 **Q.** And it normally takes several days,
4 especially during that period of time, prior to all
5 the computerization we have now, for the lab and FBI
6 to do their job, correct?

7 **A.** Yes.

8 **Q.** All right.

9 And there is processes involved or mechanisms
10 involved for preserving a body while you wait for
11 further identification, correct?

12 **A.** At that time on Pine Ridge I don't recall how
13 many lockers they had in the morgue which was
14 sometimes refrigerated and sometimes not.

15 **Q.** Well, do you recall that from your review of
16 the initial autopsy report and other documents that
17 after the initial autopsy, the body actually had been
18 wrapped in a powdered formaldehyde to preserve?

19 **A.** Do I recall?

20 **Q.** That in Pine Ridge, after Dr. Brown did his
21 autopsy, he took efforts to preserve the body with a
22 formaldehyde powder?

23 Do you -- do you recall that?

24 **A.** Well, when she was exhumed.

25 **Q.** When she was exhumed you saw the evidence of

1 that?

2 **A.** Yes.

3 I did not know that before.

4 **Q.** All right.

5 But you saw when her body was exhumed that
6 she actually had been coated in a powder that was
7 meant to preserve her?

8 **A.** Yes.

9 **Q.** Okay.

10 Now, it's my understanding you are saying it
11 was the BIA that ordered that she be buried
12 immediately, correct?

13 **A.** Yes.

14 **Q.** And specifically it was -- that was
15 communicated to you by Nate Merrick?

16 **A.** Correct.

17 **Q.** At that point from the initial finding of the
18 body, the FBI had been involved in the investigation,
19 had it not?

20 **A.** Yes.

21 **Q.** FBI agents were out at the scene with BIA
22 agents right away, correct?

23 **A.** They were called to the scene, yes.

24 **Q.** And they all reviewed the scene together,
25 correct?

1 **A.** Yes.

2 **Q.** And when the body was brought back to Pine
3 Ridge Hospital, the hands, the underwear, and all the
4 other garments were turned over from the BIA to the
5 FBI, correct?

6 **A.** They were -- as far as I recall -- and I
7 wasn't at the first autopsy -- there was an agent
8 present at the autopsy.

9 **Q.** An FBI agent?

10 **A.** Yes.

11 **Q.** And you know that that FBI agent took the
12 hands, correct?

13 **A.** Yes.

14 **Q.** And shipped them off to the FBI lab?

15 **A.** Yes.

16 **Q.** And you know the clothing was also put into
17 FBI evidence, correct?

18 **A.** Yes.

19 **Q.** As well as the bullet, correct?

20 **A.** No. The bullet wasn't from the first
21 autopsy.

22 **Q.** Right.

23 But, I mean, ultimately, the bullet was taken
24 into FBI custody, correct?

25 **A.** Yes.

1 **Q.** So how is it that -- if this was something
2 that the FBI didn't want, how is it that the FBI
3 couldn't control when Ms. Aquash's body was buried?

4 **A.** I can't answer that.

5 **Q.** In any regard, about six days later, March 8,
6 there begins to be a process where the body is going
7 to be exhumed, correct?

8 **A.** Yes.

9 **Q.** And it appears that both the FBI and
10 Mr. Ellison, who was an attorney for AIM, are working
11 at the same time to get the body exhumed; is that your
12 recollection?

13 **A.** I had no indication that anybody was seeking
14 exhumation of the body other than myself was seeking a
15 court order for that. As far as I knew I was the only
16 person trying to do that.

17 **Q.** You weren't aware of FBI reports that
18 Mr. Ellison showed up at your office on March 8 asking
19 that Anna Mae's body be exhumed so that they could
20 find out the cause of death?

21 **A.** That may have occurred. And I was probably
22 made aware of that at the time. But my --

23 I guess what I am saying is that my attempt
24 to do the court order was already in process. And
25 there was nobody else doing it up until the point when

1 Mr. Ellison made his comments.

2 Q. Okay.

3 Well, in any regard, Mr. Ellison was an AIM
4 lawyer, correct?

5 A. Yes.

6 Q. All right.

7 And he came to the FBI and said we don't buy
8 this diagnosis of death by exposure, correct?

9 A. I wasn't present.

10 Q. All right.

11 Were you made aware of those conversations
12 with other FBI agents?

13 A. I was made aware that there were
14 conversations, yes.

15 Q. Of that nature?

16 A. I think so.

17 Q. Would it help to refresh your recollection to
18 look at a 302 of one of your fellow agents?

19 A. Sure.

20 **MR. MURPHY:** May I approach, Your Honor?

21 **THE COURT:** You may.

22 Q. **(BY MR. MURPHY)** Would you identify what that
23 document is and the date of the document?

24 A. Yes. This is what's called an FD302 and it's
25 a form that's used to record an interview conducted by

1 a special agent of the FBI with another person.

2 Q. And what was the date of the interview in
3 this case?

4 A. March the 8th, 1976.

5 Q. And the interview was done with?

6 A. Bruce Ellison.

7 Q. All right.

8 If you need to take a minute to read through
9 that, if it refreshes your recollection.

10 A. Okay.

11 Q. Does that help refresh your recollection of
12 activities going on with your office?

13 MR. MANDEL: Your Honor, might I see what's
14 being shown to him?

15 MR. MURPHY: And maybe, for the record, I am
16 looking at Graham document 774.

17 Q. (BY MR. MURPHY) Sir, after having reviewed
18 that document, you are now refreshed as to some of the
19 conversations that were made known to you about
20 Mr. Ellison's activities?

21 MR. MANDEL: Objection. Hearsay.

22 Might I ask a couple questions?

23 THE COURT: Overruled.

24 The question is is his memory refreshed and
25 the answer is yes or no.

1 **Q.** **(BY MR. MURPHY)** Is your memory now refreshed
2 as to conversations that you were made aware of
3 regarding Mr. Ellison's activities pertinent to the
4 exhumation of Ms. Aquash's body?

5 **A.** Yes.

6 **Q.** So at the time that you were involved in this
7 investigation, and at the time you were preparing
8 materials for Judge Bogue, people at AIM were also
9 seeking the same kind of relief, correct?

10 **MR. MANDEL:** Objection. It's questioning the
11 witness's knowledge of hearsay that he received from
12 another agent.

13 **THE COURT:** I don't think that's hearsay the
14 way it's formed.

15 You may answer.

16 **A.** Can you have the question read back?

17 **Q.** **(BY MR. MURPHY)** Sure.

18 (Whereupon, the question was then read back
19 by the Court Reporter.)

20 **A.** That became my knowledge after that
21 conversation. I did not say they were doing that
22 prior to that date.

23 **Q.** **(BY MR. MURPHY)** That's fine.

24 You saw the report was dated March 8?

25 **A.** Yes.

1 **Q.** And that's actually the same date that you
2 got your court order from Judge Bogue; is that
3 correct.

4 **A.** Again, I would have to recollect -- I would
5 have to refresh my memory of that.

6 **MR. MURPHY:** Your Honor, may I approach the
7 witness again?

8 **THE COURT:** You may.

9 **MR. MURPHY:** May I have standing permission
10 to approach?

11 **THE COURT:** As far as I am concerned you may,
12 and that goes for both sides unless it's a hostile
13 witness. That is, more than an opposition witness.
14 Then we ask. Otherwise, go ahead.

15 **MR. MURPHY:** It's just less words for Tina to
16 write down.

17 **Q.** **(BY MR. MURPHY)** Agent, what I am going to
18 show you is something that appears to be an affidavit
19 you prepared to get the exhumation of the body.

20 If you wouldn't mind just page through. I
21 want to make sure that's an accurate representation of
22 your document.

23 **A.** Yes, sir.

24 **Q.** If you wouldn't mind turning to the last page
25 and noting the date that you filed that affidavit.

1 **A.** March the 8th.

2 **Q.** All right.

3 So the same date?

4 **A.** Yes.

5 **Q.** And you had to prepare this affidavit before
6 you even went into court to get that court order,
7 correct?

8 **A.** Yes.

9 **Q.** Do you even -- do you recall at this point
10 what date that court order was signed?

11 **A.** I assume it was signed on the 8th.

12 **Q.** Do you have a recollection of the judge
13 actually signing it on the day that you prepared your
14 affidavit or are you -- I am trying to get a sense --
15 are you sure the same day you drafted this affidavit
16 the judge signed order?

17 **A.** I can't say.

18 **Q.** All right.

19 So it was either the 8th or some date after
20 that, correct?

21 The order was granted some day either on the
22 8th of March or some day after?

23 **A.** You are asking when the order was granted?

24 **Q.** Yeah.

25 **A.** That was granted the same day.

1 Q. Okay.

2 So you recall that?

3 A. Yes.

4 Q. All right.

5 Now, at the time that you found out that Anna
6 Mae Aquash was the decedent, that raised some red
7 flags in your mind, did it not?

8 A. Yes.

9 Q. At this point you knew Ms. Aquash's name,
10 correct?

11 A. Yes.

12 Q. She was wanted as a fugitive on a number of
13 federal guns and weapons charges, correct?

14 A. Yes.

15 Q. And some of those charges were being
16 prosecuted in Pierre, South Dakota?

17 A. Yes.

18 Q. And others -- she was a fugitive on weapons
19 charges out of Oregon, correct?

20 A. Yes.

21 Q. And you also knew at this time that she was
22 affiliate of Leonard Peltier, correct?

23 A. An affiliate?

24 Q. Associated with.

25 Somebody who knew Mr. Peltier.

1 **A.** Yes.

2 **Q.** And Dennis Banks?

3 **A.** Yes.

4 **Q.** And other AIM leaders?

5 **A.** Yes.

6 **Q.** And you as an FBI agent in February of 76
7 were very interested in the whereabouts and activities
8 of Mr. Banks and Mr. Peltier, were you not?

9 **A.** Yes.

10 **Q.** Mr. Peltier at this point was the prime
11 suspect in the killing of two FBI agents?

12 **A.** Yes.

13 **Q.** There was a nationwide man hunt for him,
14 correct?

15 **A.** Yes.

16 **Q.** And Mr. Banks was also a fugitive from
17 justice on other charges, correct?

18 **A.** Yes.

19 **Q.** And there was a belief that he was also with
20 Mr. Peltier or involved or had knowledge of
21 Mr. Peltier's activities?

22 **A.** Yes.

23 **Q.** All right.

24 And you knew Ms. Aquash ran with these two
25 guys and she might have information of value to you,

1 correct?

2 **A.** Yes.

3 **Q.** You were interested in questioning her?

4 **A.** She had been questioned in the past.

5 **Q.** All right.

6 But you would have liked to have more
7 information from her?

8 **A.** Yes.

9 **Q.** Now, knowing in early March that Ms. Aquash
10 was the decedent and she was a person of substantial
11 interest to the FBI, why would the FBI allow AIM to
12 choose who was going to do the second autopsy?

13 **A.** When the name was proposed, we had no
14 objection to it because we knew of Mr. Peterson's --
15 Dr. Peterson's reputation. And he would have been a
16 person that we would have chosen ourselves.

17 **Q.** Are you aware that at the time Dr. Peterson
18 did this autopsy, the second autopsy, he was still in
19 his residency?

20 He was still, basically, in medical school.

21 **A.** I wasn't --

22 **Q.** You testified on direct that you thought he
23 was the chief pathologist for Hennepin County.

24 You are aware that that happened years later?

25 **A.** Okay.

1 **Q.** And are you aware or were you aware that when
2 mister -- or Dr. Peterson came out a resident in the
3 pathologist program, he didn't even bring his own
4 tools with him to do the autopsy?

5 Were you aware of that?

6 **A.** I didn't recall that, no.

7 **Q.** Do you recall him asking you and other FBI
8 agents to help him get the tools necessary to do the
9 autopsy?

10 **A.** I didn't -- I didn't recall that.

11 **Q.** Did the FBI not have it's own pathologist at
12 the time?

13 **A.** We were using W.O. Brown out of Scottsbluff,
14 Nebraska.

15 **Q.** I know the BIA was using W.O. Brown.

16 Was the FBI also using him?

17 **A.** Yes, from time to time yes.

18 **Q.** So you had some confidence in his abilities?

19 **A.** I can't say. I didn't have that much
20 experience with him.

21 **Q.** Okay.

22 Well, you said when you learned of his
23 autopsy diagnosis of exposure, you suspected the
24 legitimacy of that diagnosis; is that a fair
25 characterization?

1 **A.** Yes.

2 **Q.** When did you become aware of Dr. Brown's
3 autopsy report?

4 **A.** It would have been whenever we received it.

5 **Q.** Bear with me for just a moment. I am going
6 to show the autopsy report.

7 Can you state the date it was reported?

8 **MR. MANDEL:** Objection.

9 **THE COURT:** Why?

10 **MR. MANDEL:** It's not admitted into evidence.
11 In fact, counsel objected to its admission and now he
12 wants to read from the document.

13 **THE COURT:** All right.

14 The objection is it's not in evidence?

15 **MR. MANDEL:** Yes.

16 **MR. MURPHY:** Your Honor, the witness said
17 that he would be able to identify the date he got the
18 report from the date on the report. I am showing him
19 the date of the report.

20 **THE COURT:** Show him the date of the report.

21 **Q.** **(BY MR. MURPHY)** Does -- was this reported on
22 March 15, 1976?

23 **A.** Okay.

24 **Q.** All right.

25 **A.** That wouldn't necessarily be the date that I

1 received it.

2 Q. Well, if it wasn't prepared -- if the report
3 wasn't prepared until March 15, you couldn't have
4 received it before the exhumation and your request for
5 a court order which happened around March 8?

6 A. Well, as I recall, there was a statement made
7 at the time of the autopsy. Prior to the report being
8 submitted by Dr. Brown, there was a statement made
9 that his finding -- his preliminary finding was that
10 she had died of exposure.

11 Q. And when you say a statement, you mean he
12 said something? An oral statement?

13 A. Yes. Not to me.

14 Q. Not to you.

15 So you weren't there, but you heard from
16 somebody else that he had concluded exposure?

17 A. Yes.

18 Q. And without any other information, you
19 concluded that that was a dubious diagnoses?

20 A. I concluded that -- I don't recall at what
21 point I concluded that. But to me, a diagnosis of
22 exposure in the position that she was found at the
23 bottom of that bluff, it just -- and once I knew who
24 she was, it just didn't make sense.

25 Q. Okay.

1 It seemed on direct you said that something
2 to the effect immediately upon learning of the
3 diagnosis that you questioned the validity of W.O.
4 Brown's conclusion.

5 Do I --

6 **A.** I don't know that those were my words.

7 **Q.** Okay. And that's what I want to make sure I
8 understand.

9 It was now the diagnoses of death by exposure
10 that led you to question and seek exhumation?

11 **A.** Yes. Well, it was a combination.

12 **Q.** Well, you don't exhume many bodies, do you?

13 **A.** No, we don't.

14 **Q.** It's a radical procedure?

15 **A.** Yes.

16 That's why it has to be done by court order.

17 **Q.** Right.

18 And -- I will leave it at that.

19 Now, you continued to work on this case for
20 the next four years, correct?

21 **A.** Yes.

22 **Q.** And part of your investigation in this case
23 was to interview other people that may have
24 information about Ms. Aquash, correct?

25 **A.** Yes.

1 Q. And you received some information very early
2 on -- I'm talking about March 8, 1976, about
3 Ms. Aquash and a potential cause of death, correct?

4 A. Not necessarily. I don't know how you draw
5 that conclusion.

6 Q. Okay.

7 Well, I am looking at your affidavit that you
8 filed with the -- with Judge Bogue on March 8, and in
9 your affidavit you discuss a suspicious phone call
10 that came in to the Pine Ridge ambulance in the early
11 part of February.

12 A. Okay.

13 Q. About a possible hit-and-run victim being
14 found in the same location of where Ms. Aquash's body
15 was ultimately found?

16 A. Yes.

17 Q. Do you recall that?

18 A. Yes.

19 Q. And, in fact, it was so significant to you
20 that you included it in your affidavit to the Court,
21 correct?

22 A. Yes.

23 Q. And you had reason to doubt the veracity of
24 that phone call, correct?

25 A. Yes.

1 **Q.** All right.

2 You learned by your own interviews and
3 investigation that a man named Selo Black Crow and his
4 wife Irene had made a call to the ambulance some time
5 before the body was found, weeks before, and said that
6 there may be a body out there on the side of the road?

7 Something to that effect, correct?

8 **A.** I think it was -- as I recall it was Irene
9 Black Crow that made the phone call.

10 **Q.** Okay.

11 And -- but you went, then, and questioned
12 Selo and Irene about this call, correct?

13 **A.** Eventually.

14 **Q.** And when you questioned them, they gave
15 somewhat nonsensical answers to your questions?

16 **A.** Initially we didn't get much specific
17 information from Selo. And it took us a while before
18 we interviewed Irene.

19 **Q.** Well, you did do an interview of Selo and
20 Irene on March 12, 1976?

21 **A.** Okay.

22 **Q.** So that would have just been four days after
23 the body was exhumed, correct?

24 **A.** Yes.

25 **Q.** And I think that's actually the same day that

1 the body was autopsied. I may be off, but it was
2 close to the time of the autopsy, correct, the second
3 autopsy?

4 **A.** Yes, March the 11th.

5 **Q.** So just one day after?

6 **A.** Yes.

7 **Q.** And you confronted Selo and Irene about the
8 suspicious nature of their call, correct?

9 **A.** Yes.

10 **Q.** And Selo and Irene lived in close proximity
11 to Highway 73?

12 **A.** Correct.

13 **Q.** Down in Wambli?

14 **A.** It was near Wambli.

15 **Q.** And Highway 73 essentially runs between
16 Wambli and Kadoka?

17 **A.** Essentially.

18 **Q.** Okay.

19 And you learned that Selo and Irene were
20 folks affiliated with the American Indian Movement,
21 correct?

22 **A.** Selo was -- he was a Medicine Man and had sun
23 dances and other ceremonies conducted at his property
24 and a lot of Indian people went to those ceremonies.

25 **Q.** And a lot of people who were affiliated with

1 the American Indian Movement, correct?

2 A. Yes, as far as I recall.

3 Q. And in fact, you learned from a neighbor of
4 his that in the period of time preceding the finding
5 of Ms. Aquash's body that there had been suspicious
6 activity at Selo's house, correct?

7 A. Yes.

8 Q. In fact, he reported to you -- the
9 neighbor -- the next door neighbor reported to you an
10 Indian woman closely resembling or resembling
11 Ms. Aquash being left at that house, Selo's house,
12 correct?

13 A. I don't recall that it was -- that it was a
14 that woman closely resembled. That part of the
15 statement I don't believe is in my interview with
16 them.

17 Q. Okay.

18 An Indian female who appeared to be in here
19 late 20s or early 30s, medium to slender build.

20 Is that the information you were given?

21 A. If that's what's in my recording of the
22 interview, yes.

23 Q. Would you like to see your interview?

24 A. Yes.

25 MR. MURPHY: Graham document 3,494.

1 Q. (BY MR. MURPHY) Take all the time you need.

2 A. Okay.

3 Q. Does that refresh your recollection of the
4 conversation you had with --

5 A. Says another -- well, he describes two Indian
6 females. One in her late 30s, short, talky build
7 wearing dark clothing, and another Indian female who
8 appeared to be in late 20s or early 30s, medium to
9 slender build, wearing a black jacket, old blue jeans,
10 and had long hair worn in braids.

11 Q. Okay.

12 So the first woman would not match
13 Ms. Aquash's description, but the second would, at
14 least generally, approximate her build, age, and
15 whatnot?

16 A. I don't recall her exact description.

17 Q. Okay.

18 Would that be, then, in the autopsy reports?

19 A. It would be in a number of places, but yes.

20 Q. And you have seen her picture?

21 A. Yes.

22 Q. And didn't you see her in person on any
23 occasion?

24 A. Maybe one occasion.

25 Q. Well, and the information that came to you

1 was that the -- an Indian male, two Indian females
2 came to Mr. Black Crow's house. The slender
3 20-to-30-year-old Indian woman was left at the house.
4 The other two drove away, correct?

5 A. Yes.

6 Q. And that at some later date or some later
7 time, she was picked up from that house again in a
8 gold car and driven away, correct?

9 A. The person that was left there was, yes.

10 Q. And at certain times you discussed that
11 information with Selo and his wife, correct?

12 A. Yes.

13 Q. And rather than answer your question about
14 that, when you confronted him with the information,
15 Selo and Irene became visibly shaken, is that -- is
16 that a fair, accurate statement of what their reaction
17 was?

18 A. If that's what I put in the interview.
19 Again, I would have to see what the interview says.

20 MR. MURPHY: Graham document 113.

21 A. This is an interview that -- of Nate Merrick
22 where he did an interview with Irene -- let me see.

23 Q. (BY MR. MURPHY) Read it to yourself again --
24 I don't want to rush you -- and then I will ask you
25 questions about the report.

1 **A.** Okay.

2 He's --

3 **Q.** Like I said -- I ask you -- I got to ask you
4 questions other than it becomes narrative.

5 This is your report, correct?

6 **A.** It's my report of an interview with Nate
7 Merrick who had done an interview with somebody else.

8 **Q.** With Selo and Irene?

9 **A.** Yes.

10 **Q.** And then he confronted them with this
11 information and they became visibly shaken?

12 **MR. MANDEL:** Objection. Hearsay.

13 **MR. MURPHY:** It's not offered for the truth
14 of the matter asserted.

15 **THE COURT:** What's it offered for?

16 **MR. MURPHY:** It's nonverbal conduct so it's
17 outside the realm of hearsay under 801.

18 **THE COURT:** Overruled.

19 **Q.** **(BY MR. MURPHY)** That was the information you
20 had, they became visibly shaken when confronted with
21 this information?

22 **A.** That was what Mr. Merrick told me.

23 **Q.** Right.

24 And he told you that and you then did
25 follow-up interviews with Selo and Irene, did you not?

1 **A.** At some point, yes.

2 **Q.** Okay.

3 Would you again like -- I don't want to put
4 words in your mouth. Do you want to look at your
5 reports?

6 **A.** Yes.

7 **MR. MURPHY:** Graham document 114.

8 **Q.** **(BY MR. MURPHY)** Is that a report that you and
9 Agent David Price -- a report that you and Agent Price
10 did?

11 **A.** Yes.

12 **Q.** And the date of that report is?

13 **A.** The interview was conducted on March the
14 18th.

15 **Q.** And that was an interview done by you?

16 **A.** Yes -- well, myself and Price, and I recorded
17 the interview.

18 **Q.** All right.

19 And that was an interview with Selo and
20 Irene?

21 **A.** Irene, I believe, was present. I don't
22 recall exactly. It says that she was present at some
23 point. However, we were not able to interview her
24 specifically.

25 **Q.** And that was because Selo wouldn't let you

1 talk to her?

2 **A.** That is correct.

3 **Q.** And following up upon that, on March 31,
4 1976, you interviewed Herman Zimiga, Z-I-M-I-G-A?

5 **A.** Yes.

6 **Q.** And he was the gentleman who provided the
7 initial information about the suspicious activity at
8 Selo Black Crow's house, correct?

9 **A.** Yes.

10 **Q.** And you confirmed what Agent Merrick had
11 already told you that he had seen this pair of Indian
12 women and an Indian male at Selo Black Crow's house in
13 January or early February of 1976?

14 **A.** Yes. I believe he stated to us that there
15 was a lot of activity around there and he specifically
16 mentioned that particular incident, but he said there
17 had been a lot of activity.

18 **Q.** And mentioning the specific activity of a
19 gold car, two Indian women, one Indian man, a slender
20 Indian woman being dropped off at the house, and the
21 gold car returning some time later and taking her
22 away, correct?

23 **A.** Yes.

24 **MR. MURPHY:** No further questions.

25 Thank you.

REDIRECT EXAMINATION

1
2 **BY MR. MANDEL:**

3 Q. During your time in Rapid City, did you do a
4 lot of investigation on the Pine Ridge Indian
5 Reservation?

6 A. Yes, sir.

7 Q. There are a lot of Indian people living down
8 there?

9 A. Yes, sir.

10 Q. Tell me, do they fit all sizes and
11 descriptions?

12 A. Yes.

13 Q. Does the fact that two Indian females and one
14 Indian male were at Selo Black Crow's house shed any
15 light regarding this investigation based on what you
16 know of it?

17 **MR. MURPHY:** Objection. Calls for a
18 conclusion.

19 **THE COURT:** Overruled.

20 A. No.

21 Q. **(BY MR. MANDEL)** I am really asking, did that
22 add anything to this investigation?

23 A. No, it did not.

24 Q. Were you able ever determine anything as to
25 the identity of those people?

1 **A.** No.

2 **Q.** Were you able to determine any connection
3 with this case?

4 **MR. MURPHY:** Objection. Leading.

5 **THE COURT:** Sustained.

6 **Q.** **(BY MR. MANDEL)** What were you able to
7 determine from that information?

8 **A.** Nothing, really.

9 **Q.** Did you follow up regarding any information
10 you received from Selo and Irene Black Crow?

11 **A.** We did finally interview Irene.

12 **Q.** As a result of that arm of this
13 investigation, were you able to find out anything
14 useful regarding anything in this case?

15 **MR. MURPHY:** Objection. Calls for a
16 conclusion.

17 **THE COURT:** Overruled.

18 **A.** We were able to finally put to rest that
19 aspect of the investigation.

20 **Q.** **(BY MR. MANDEL)** With no productive leads
21 arising out of it?

22 **A.** That's correct.

23 **Q.** In terms of the exhumation that took place,
24 you said that Judge Bogue issued his order on March 8,
25 1976?

1 **A.** That's the date that the affidavit was
2 signed, yes.

3 **Q.** But did you -- do you believe the order for
4 exhumation was issued on the same date?

5 **A.** I believe that it was, but I don't know that
6 conclusively because that was the affidavit, I
7 believe, and I don't know where the order is.

8 **Q.** Okay.

9 How soon after the order was obtained did the
10 exhumation take place?

11 **A.** The exhumation took place on the 11th, the
12 same date as the second autopsy.

13 **Q.** So obviously the order was at least before
14 then?

15 **A.** Yes, sir.

16 **Q.** And the order was based on your affidavit?

17 **A.** Yes, sir.

18 **Q.** In terms of questioning Dr. Brown's results
19 in the initial autopsy, first of all, is there any
20 question but that he missed the bullet when he did the
21 autopsy?

22 **A.** He did miss it, yes.

23 **Q.** Okay.

24 **A.** There is no question in my mind that he
25 missed it.

1 **Q.** When you had a -- developed a question as to
2 his results, was that before or after you had
3 determined who the victim was -- before and after the
4 identification had been made.

5 **A.** I don't recall what was in my mind at that
6 time, but I know that once we determined the
7 identification, then my suspicions were heightened.

8 **Q.** Let me rephrase the question, then.

9 Did you seek the exhumation before the body
10 was identified?

11 **A.** No.

12 **Q.** Is that at least one of the reasons it was
13 sought?

14 **A.** Yes.

15 **MR. MANDEL:** Nothing further, Your Honor.

16 **MR. MURPHY:** If I may just briefly, Your
17 Honor?

18 **THE COURT:** Yes.

19 **REXCROSS-EXAMINATION**

20 **BY MR. MURPHY:**

21 **Q.** You were asked questions about the value of
22 the information you were given by Selo and Irene. You
23 prepared report after report about your investigation
24 of Selo and Irene in the months after the body was
25 found, correct?

1 **A.** I did -- I prepared whatever interviews that
2 I had with them, yes.

3 **Q.** And it was important enough for you to
4 include it in the affidavit that you sent over to
5 Judge Bogue, correct?

6 **A.** Yes.

7 **Q.** So you wouldn't put in completely frivolous
8 materials in an affidavit submitted to a United States
9 District Court Judge, would you?

10 **A.** No, I would not.

11 **Q.** In fact, in the years to follow, your agency
12 and activities involving you concentrated again and
13 again on Mr. Black Crow; isn't that accurate?

14 **A.** I don't know in what regard --

15 **Q.** Well, do you remember a man named Tom
16 Raymond?

17 **A.** No.

18 **Q.** A sheriff from Kadoka?

19 **A.** No.

20 **Q.** Not familiar with the use by the FBI of Tom
21 Raymond to work with Mr. Black Crow to try to figure
22 out what more he knew that he wasn't telling you?

23 **A.** I don't recall that specifically. You would
24 have to refresh my memory on that one.

25 **Q.** Well, let's go back to the dates of the

1 exhumation. I had showed you previously your
2 affidavit, which you dated March 8, correct?

3 A. Okay.

4 Q. Do you need to look at the date --

5 A. No, I saw the date of March the 8th on
6 there.

7 Q. Could you please tell me what date it was
8 filed with the Clerk of Courts?

9 A. March the 9th.

10 Q. All right.

11 And we talked that on March 8 Bruce Ellison,
12 the AIM lawyer, was already down at the FBI asking for
13 exhumation, correct?

14 A. He had mentioned that they were interested in
15 it to Agent Green, yes.

16 Q. So at least contemporaneous with your
17 efforts, AIM was trying to get the body exhumed,
18 right?

19 A. Yes.

20 Q. Okay.

21 And if your filing didn't get to the court
22 till March 9, the court order couldn't have been
23 granted before March 9, correct?

24 A. Okay.

25 MR. MURPHY: Nothing further.

1 Thank you.

2 **CONTINUED REDIRECT EXAMINATION**

3 **BY MR. MANDEL:**

4 Q. Did the investigation at the crime scene with
5 the metal detectors take place before or after the
6 exhumation?

7 **MR. MURPHY:** Goes beyond the scope of recross,
8 Your Honor.

9 **THE COURT:** Overruled.

10 A. I would have to see the date that we went out
11 and did that.

12 **MR. MANDEL:** Nothing further.

13 **THE COURT:** Thank you, sir.

14 You may be excused.

15 **MR. MURPHY:** Mr. Wood, you are released from
16 my subpoena as well.

17 (Witness excused.)

18 **THE COURT:** We're going to take a break,
19 folks. We'll be in recess until three o'clock.

20 (Off the record.)

21 **THE COURT:** Newcomers in the courtroom, no
22 electronic. No activity expressing approval or
23 disapproval of anything that is said or done.

24 Thank you.

25 Ready to proceed, Counsel?

1 **MR. MANDEL:** Yes, Your Honor.

2 The state calls Nate Merrick.

3 **THE COURT:** Please come forward, sir.

4 NATE MERRICK,

5 called as a witness herein, having been duly sworn,

6 under oath testified as follows:

7 **THE COURT:** Please take a seat.

8 **DIRECT EXAMINATION**

9 **BY MR. MANDEL:**

10 **Q.** Good afternoon, sir.

11 Would you state your name?

12 **A.** My name is Nathan Merrick.

13 **Q.** Sir, where do you live?

14 **A.** At the present time I live in Rosalie,
15 Nebraska.

16 **Q.** How long have you been living there?

17 **A.** Oh, for the past five years and in Nebraska
18 back home for the last 16 years.

19 **Q.** Are you originally from Nebraska?

20 **A.** Yes. I'm an Omaha Indian from the Omaha
21 Indian reservation.

22 **Q.** What's your current employment, sir?

23 **A.** Today I work as a Public Defender for our
24 Tribal Court.

25 **Q.** How long have you been doing that?

1 **A.** About nine years now.

2 **Q.** Sir, do you have a background in law
3 enforcement?

4 **A.** Yes, I do.

5 **Q.** Can you tell us what that consists of?

6 **A.** I became a police officer in 1969. I went to
7 the Indian Police Academy that same year and I worked
8 for the Omaha Tribe as a police officer. And then I
9 went to work in 1972 as a BIA police officer for the
10 Bureau of Indian Affairs first at Fort Thompson, South
11 Dakota. And then in 1973 during the Wounded Knee
12 siege I was assigned there and I remained at Pine
13 Ridge from 1973 until 1977.

14 And then I continued my law enforcement
15 career after that, for about 15 years I worked for BIA
16 law enforcement.

17 **Q.** On a number of different reservations?

18 **A.** Yes.

19 **Q.** Did you ultimately retire from that position?

20 **A.** Yes. I left the government service in 1994.

21 **Q.** And at that time you went back to Nebraska?

22 **A.** Yes. That's my home and that's where my
23 family is so I moved home.

24 **Q.** Now, what exactly was your position when you
25 worked down at Pine Ridge?

1 **A.** When I first arrived there I was a police
2 officer and in a short period of time I was a night
3 captain of police for the police department. And then
4 I became a criminal investigator in 1974 as a trainee.
5 And then I became a complete investigator in 1975.
6 And then from that point on I worked in criminal
7 investigations.

8 **Q.** What were your duties as a criminal
9 investigator?

10 **A.** We had many duties, but the most important
11 things in the work that I did involved 14 major
12 crimes. All felony investigations is what we did.
13 There was several BIA investigators at the Pine Ridge
14 agency. I was just one of them. I think there was
15 about five or six of us and we worked with the FBI in
16 investigating all sorts of felony crimes on the
17 reservation.

18 **Q.** Do you recall responding to a particular
19 crime on February 24, 1976?

20 **A.** Yes. It was about that time I was on duty
21 and the radio dispatch called me on the radio. I was
22 with another investigator. We were working on
23 something else. And they informed me that there was a
24 body found out near the Badlands. And I believe they
25 said it was north of Wambli off the highway. And

1 there was officers out there already. So we were --
2 we traveled from Pine Ridge all the way out there
3 which is about a two-and-a-half-hour drive.

4 Q. Had uniformed officers already responded to
5 that?

6 A. Yes.

7 The area was secured off and uniformed
8 officers had secured it and there was a couple of FBI
9 agents there when I got there. And then there was
10 other BIA investigators also present.

11 Q. Is that kind of typical as to how the
12 response worked back in those days?

13 A. Yes. That was typical, you know, because of
14 any time that there was a body found on the
15 reservation, we responded to investigate to find out
16 the cause. Find out any circumstances that we could.

17 Q. So do you remember what you observed when you
18 got to the scene?

19 A. I recall that day was -- it was a pretty nice
20 day and it was -- it wasn't cold. It was sort of not
21 real warm, but it was a pretty nice day. Right off
22 the highway from north of Wambli, the highway between
23 Wambli and Kadoka, I believe, and about maybe 75 to a
24 hundred yards west of the highway in a deep ravine --
25 at the bottom of that ravine was a body of a woman.

1 **Q.** I am going to ask you to first look at what's
2 been marked State's Exhibit 2 and ask you if you can
3 recognize that.

4 **A.** Appears to be similar or the same as the area
5 in which the body of this lady was found. And the
6 highway is located right up at the top. And then the
7 ravine is similar to what I saw that day.

8 **Q.** If Mr. Amiotte were to have testified that
9 the body was initially located where that white area
10 is on the photograph, is that at all consistent with
11 your recollection?

12 **A.** Yes, it is very consistent.

13 **Q.** I am showing you what's been marked State's
14 Exhibit 1.

15 Can you recognize the roads in that area?

16 **A.** Well, it's a picture of Highway 73 and the
17 intersecting Highway 44. It's an overview, looks
18 like, from an airplane, but without further
19 examination or being told more I would say that's the
20 highway between Kadoka and Wambli.

21 **Q.** Does that depict the area that you went to
22 that day?

23 **A.** Yes.

24 **Q.** Sir, let me display that.

25 Can you see it up there okay, sir?

1 **A.** Yes, I do.

2 **Q.** Does that yellow dot on the photograph relate
3 to anything that you are familiar with?

4 **A.** I never saw this picture before today but it
5 appears to be the highway and the location north of
6 Wambli where that body was found.

7 **Q.** At least based on your recollection, does
8 that approximate where you were that day?

9 **A.** Yes, it appears to be so.

10 **Q.** And sir, I will show you what's been marked
11 State's Exhibit 3.

12 Can you tell me if you can identify that?

13 **A.** Yes. This is a picture -- a Polaroid picture
14 that I believe that I took at the crime scene -- of
15 what I call the crime seen at the time of a female --
16 appeared to be an Indian person with blue jeans on and
17 a red type of sweater type thing and a blouse.

18 **Q.** That was from the scene on that day?

19 **A.** Yes.

20 **Q.** Sir, I will show you Exhibit No. 5 and --
21 excuse me -- yeah, number five, and ask if you can
22 recognize that?

23 **A.** Yes. This again is a Polaroid picture of
24 a -- of the -- appears to be the arm of the
25 unidentified female and it's a butterfly bracelet with

1 a turquoise stone in the middle of the bracelet. I
2 took that picture.

3 Q. Okay.

4 And Polaroid photographs -- I never thought I
5 would have to say this -- these were instant
6 photographs that appeared right at the time?

7 A. Yes. That's what I carried with me.

8 Q. Sir, I will show you what's been marked
9 State's Exhibit 6 and ask you if you can recognize the
10 item in there?

11 A. Yes. This is the bracelet that was on that
12 unidentified female's wrist. This is the one I took a
13 picture of.

14 MR. MANDEL: Offer Exhibit 6, Your Honor.

15 MR. MURPHY: No objection.

16 THE COURT: It will be received.

17 Q. (BY MR. MANDEL) And I will then show you
18 what's been marked State's Exhibit 7.

19 A. Yes. This is a picture of the same bracelet,
20 and I believe I might have taken this picture, too,
21 because I had both a 35 millimeter and a Polaroid
22 camera.

23 MR. MANDEL: Your Honor, if I could, could I
24 give the bracelet to the jury to look at?

25 THE COURT: That would be fine.

1 **Q.** **(BY MR. MANDEL)** Sir --

2 **MR. MURPHY:** Mr. Mandel, that hasn't been
3 received into evidence yet I don't believe, the blowup
4 of Exhibit 7.

5 **MR. MANDEL:** Your Honor, I thought I had
6 offered Exhibit 7.

7 I offer Exhibit 7 at this time.

8 **MR. MURPHY:** No objection.

9 **THE COURT:** Will be received.

10 **Q.** **(BY MR. MANDEL)** Mr. Merrick, does Exhibit 7
11 show the body in the condition it was at the time you
12 arrived there?

13 **A.** Yes, it does.

14 **Q.** That was a photograph taken before the body
15 had been moved in any way?

16 **A.** Right there, yes. At the scene.

17 **Q.** When you began the investigation, when you
18 located the body, what action did you begin to take at
19 that time?

20 **A.** Well, when I first arrived and the body was
21 down in the ravine, I believe there was some other
22 investigators that were with me. And we were all
23 working together. We did a complete grid search of
24 the entire area. We -- in other words, we walked in
25 the -- in circles and back and forth looking for any

1 kind of evidence that we could find connected to this
2 body.

3 But after we did all the search, looking for
4 weapons or anything on the top of the ravine, half way
5 down to the -- to where the body was laying, I think
6 it was about like maybe an 18-foot ravine, high, on
7 the side of the bank, there was stands of hair that
8 were on the bank. So, you know, we collected those
9 strands of hair and obviously they came from her --
10 the unidentified person.

11 Q. Obviously, why?

12 A. Because her hair was long and that was hair
13 that was right from that embankment so she must have
14 been thrown off that embankment or fell off it, one of
15 the two.

16 Q. Did you locate any other evidence at the
17 scene?

18 A. We didn't locate any other evidence because
19 there wasn't any to be found. Just pictures were what
20 I took and that was about all.

21 Q. Were you able to locate a weapon of some sort
22 at the scene?

23 A. No, sir. We looked but we couldn't locate
24 any weapons.

25 Q. What were the initial determinations that you

1 made when you were there?

2 **A.** When I got down to the body and made a closer
3 observation, the position she was laying, it was
4 really apparent to me that she had been pushed or
5 thrown off of that -- the embankment. The cliff.

6 And right around the base of her skull on the
7 back there was what appeared to be coagulated, dried
8 up old blood. It was dark in color. Discolored dirt
9 you might say. It was appear to be like old blood.

10 **Q.** Was the blood just on her or was it on the
11 ground?

12 **A.** It was on the ground.

13 **Q.** Did you make a determination as to what sort
14 of injury had been received or how?

15 **A.** Couldn't make any real determination except
16 that she had blood coming from her head so it was sort
17 of apparent to us that we were dealing with some sort
18 of foul play because of the blood that was behind her
19 head on the ground.

20 **Q.** Did you make any determination as to where
21 the injury took place?

22 **A.** We could not make any determination about
23 where the injury had actually taken place other than
24 where were body was laying.

25 **Q.** Did you seek anything such as footprints or

1 tire prints or things of that sort that would aid in
2 the investigation?

3 **A.** Yes. We looked. We looked very hard to see
4 if we could find tire prints or footprints. The
5 ground was sort of hard like not real soft ground.
6 It's winter time. So if there was any footprints
7 there, they weren't there to our -- we couldn't see
8 them. It's my recollection that there was no
9 footprints or tire prints.

10 **Q.** Was that consistent with the conditions at
11 that area at that time?

12 **A.** Yes.

13 **Q.** Did you make any efforts to identify the
14 victim?

15 **A.** Yes, we did. I recall distinctly calling
16 back on dispatch that day and asking them if there was
17 any missing persons out in the area.

18 And I think one of my fellow investigators
19 asked also to check the surrounding reservations like
20 Rosebud and that. But that's where it just began.
21 You know, we had an unidentified body so we naturally
22 tried to identify it.

23 **Q.** Did you search the body looking for any
24 possessions, identification, things like that?

25 **A.** No, we didn't. We didn't look for any kind

1 of identification at that time because the body was in
2 a position where we felt it was best that we just get
3 the body picked up and removed entirely, clothing and
4 all and everything, and then taken to the morgue and
5 then where we could make better examinations of the
6 clothing and what was in the pockets and everything
7 else. We didn't do it right at the crime scene.

8 Q. What was the condition of the body you -- as
9 you first observed it?

10 A. The body was badly deteriorated. It was like
11 blackened in color and it was, like, sort of like it
12 was drying up and being shriveled up. Sort of dry
13 shriveled if you can get my understanding. It was --
14 the body was badly deteriorated.

15 Q. Was the face identifiable?

16 A. The face was all black and unidentifiable.
17 You could obviously tell that it was a female and that
18 was about all that we could tell.

19 Q. What took place then?

20 What was done next regarding transporting the
21 body and stuff?

22 A. I believe Pine Ridge ambulance had arrived
23 and the police -- we helped get the body picked up and
24 taken to the Pine Ridge morgue where it was kept.

25 Q. In terms of the autopsy that took place, can

1 you tell us exactly what was arranged and how it
2 happened?

3 **A.** The next day when I arrived at work, I
4 believe my boss and others had already made
5 arrangements for Dr. Brown from Scottsbluff -- he's a
6 pathologist that we commonly used almost on
7 everything -- to come to Pine Ridge and do the
8 autopsy. And he arrived later that day. I don't
9 recall exact time or anything, but he arrived and I
10 was told to go up and work with the FBI and see if we
11 could collect evidence or -- and witness the autopsy.

12 And I went to the hospital and -- to the
13 Indian health hospital in the basement where the body
14 was being kept and Dr. Brown went in and started the
15 autopsy.

16 **Q.** Was any effort made to seek identification at
17 that point?

18 **A.** Yes. I believe the FBI was there and I was
19 there and I believe clothes were being collected and
20 looking for identification and also we -- the autopsy
21 itself -- I stayed in there for a while. And because
22 of the stench and the conditions and everything, I
23 stepped out in the hallway. And I didn't stay for the
24 entire autopsy.

25 And then after the autopsy was over,

1 Dr. Brown came out and we had a discussion together
2 and -- with the FBI and myself -- and I believe they
3 might have made phone calls as to what to do next for
4 identification and we had -- we were told that we
5 should get the hands of the unidentified person so
6 that we could get the fingerprints and they could have
7 them identified. And that was done.

8 Q. Was there a reason the fingerprints couldn't
9 have been taken at the scene?

10 A. Yes. The condition of the hands, the fingers
11 were like blackened and shriveled up so that it would
12 be impossible to take fingerprints like that. We
13 didn't have the equipment for that.

14 Q. Was there an x-ray machine that was normally
15 used in autopsy?

16 A. Well, there was an x-ray machine down there
17 that they used for autopsies. It was like a gurney.
18 It was a gurney where they could strap a body on and
19 they can put it up and they could take an x-ray. And
20 my closest recollection to that was that day I asked
21 the x-ray technician -- it was a white lady that
22 worked there for Indian Health Services, an x-ray
23 technician -- I asked her if we could put that body on
24 the gurney and they could take an x-ray and she told
25 me that the machine was broke down and they couldn't

1 do this case -- it.

2 Q. So no x-ray took place on that date?

3 A. No, sir.

4 Q. Going back to the hands, do you have a
5 recollection of what took place in terms of how they
6 were handled and what happened to them?

7 A. I believe that -- my best recollection is
8 that when it was decided to get the hands, I went in
9 and I talked to Dr. Brown with an FBI agent, and
10 Dr. Brown took the hands off at our request and put
11 them in a jar -- I don't know what solution it was --
12 and he gave the hands to me and then I immediately
13 handed them off to an FBI agent -- or a couple FBI
14 agents that were there present and they took
15 possession of them.

16 Q. Was that preliminary determination made as to
17 cause of death by the doctor at that time?

18 A. I don't recall him making a preliminary
19 determination of the cause of death. I don't recall
20 him telling us what the cause of death was. If he did
21 it wasn't to me.

22 Q. Did you continue to work on this
23 investigation after the autopsy?

24 A. I guess I was part of an investigation team
25 there, but I never really worked on it. I was around

1 the office working on a lot of other cases because we
2 constantly had felonies going on and I was working on
3 other things.

4 So immediately after the autopsy I got sort
5 of an emergency call from my family in Nebraska and I
6 left Pine Ridge and I didn't -- went back home to
7 Nebraska for about a week and a half or so. I didn't
8 come back for about a week and a half. A lot of
9 things had transpired during that time.

10 Q. Do you recall conducting any interviews of
11 Selo or Irene Black Crow?

12 A. No, I don't.

13 Q. Were you aware of any involvement they had in
14 this matter?

15 A. You know, I recall the name Selo Black Crow
16 being brought up and talked about, but I don't
17 remember the substance of it or what connections were
18 or -- I don't recall all of that. I don't know if it
19 was --

20 Q. After the autopsy took place were you
21 essentially through working on this matter?

22 A. Yes.

23 Q. As to Selo and Irene Black Crow, are you
24 aware of whether the investigation of any involvement
25 on their part went anywhere?

1 **A.** No, I don't believe it went anywhere. To the
2 best of my recollection it didn't go anywhere.

3 **MR. MANDEL:** Nothing further, Your Honor.

4 **THE COURT:** Thank you.

5 Mr. Murphy?

6 **MR. MURPHY:** Thank you.

7 **CROSS-EXAMINATION**

8 **BY MR. MURPHY:**

9 **Q.** Mr. Merrick, I am John Murphy. We just met
10 briefly in the hall?

11 **A.** Yes, John. I remember you.

12 **Q.** I am going to ask you some questions. And if
13 I ask you something that's not a good question just
14 let me know.

15 **A.** Okay, I will. I will do that.

16 **Q.** Thanks.

17 I want to get a sense of the very beginning
18 of the investigation, February 24, 1976. You are in
19 your office in Pine Ridge at the time?

20 **A.** I was actually out in my vehicle with another
21 BIA investigator. We were working on something. So I
22 got it through radio dispatch.

23 **Q.** All right.

24 But you went from wherever you were at out to
25 the scene?

1 **A.** Yes, that's correct.

2 **Q.** Do you recall going out to the scene with FBI
3 Agent Don Dealing?

4 **A.** 35 years ago -- there was several agents
5 there. And I know it could have been him that was
6 there but there was others. I just distinctly
7 remember being with my partner Doug Perisian. He was
8 a BIA investigator. Him and I road in the same car
9 out there.

10 **Q.** Okay.

11 If Agent Dealing indicated in a report that
12 he drove out with you and Doug Perisian and also a man
13 named Jim Stensgard, would that refresh your
14 recollection?

15 **A.** Stensgard I remember him distinctly. But I
16 can't recall if he was in my car or if he was in an
17 FBI car but there was several of us out there at the
18 crime scene.

19 **Q.** Sure.

20 At the crime scene when you get out there
21 there is BIA and there is FBI?

22 **A.** Yes, that's true.

23 **Q.** And you are working together?

24 **A.** Yes.

25 **Q.** Collecting information together?

1 **A.** Yes.

2 **Q.** Reviewing the crime scene both below and
3 above to see if you can find any forensic evidence?

4 **A.** Yes. That was what we were doing, yes.

5 **Q.** And at the crime scene, you determined that
6 foul play is at issue, correct?

7 **A.** Well, that's a good question because we had a
8 body that had blood underneath it's head. And my only
9 assumption was that we needed to do a thorough
10 examination and investigation because I suspected that
11 there was foul play.

12 **Q.** Okay.

13 I mean, if on a previous occasion you said,
14 well, it was pretty evident that this person had
15 expired due to foul play so we were looking for any
16 kind of weapon that might have been used would that be
17 accurate?

18 **A.** Yes, that's absolutely true.

19 **Q.** And that's right at the scene?

20 **A.** Yes.

21 **Q.** And you are there with other Tribal officers
22 as well as FBI agents, correct?

23 **A.** Yes.

24 **Q.** You are trying to get as much information
25 exchanged as possible?

1 **A.** Yes.

2 **Q.** So you can solve this case, correct?

3 **A.** Yes.

4 **Q.** So it would be natural then if you suspected
5 foul play and saw blood at the back of the head, you
6 would have communicated that to the FBI agents at the
7 scene?

8 **A.** I believe they all saw the same thing.

9 **Q.** Sure.

10 And you would have talked about it?

11 **A.** I believe we did.

12 **Q.** Do you have any idea why none of the FBI
13 reports produced at the scene mention anything about
14 foul play?

15 **A.** You know, that's a question for them.

16 **Q.** Fair enough. Fair enough.

17 In any regard, once you go out there and get
18 the evidence, or try to get the evidence, the only
19 thing you are able to get at the scene are these long
20 hairs that were on the face of the cliff?

21 **A.** Yes.

22 **Q.** And did you turn those over to the FBI?

23 **A.** Yes, I did.

24 **Q.** And was that pretty much standard procedure
25 when you -- when there was a suspicious death, and you

1 gathered forensic evidence, to turn everything over to
2 the FBI?

3 **A.** Yes.

4 **Q.** So back at the autopsy scene or the scene
5 where the autopsy was done, you similarly turned over
6 everything that was gathered to the FBI?

7 **A.** Yes.

8 **Q.** They took custody of the hands?

9 **A.** Yes.

10 **Q.** The clothes?

11 **A.** Yes.

12 **Q.** Everything basically that the pathologist
13 gave them, correct?

14 **A.** That's true.

15 **Q.** Okay.

16 Now, in your entire search, you talked today
17 about doing a grid search of the area.

18 Could you be a little more detailed, where
19 was the grid search done above on the bluffs, below,
20 or both?

21 **A.** My recollection is there were several
22 officers -- there some uniform officers -- and we
23 together decided that we needed to do sort of a grid
24 search. So we lined up the officers on the highway
25 and we took a section and then we walked all the way

1 to the ravine and we did that in a four-way pattern so
2 we could check the ground all over. I'd say maybe a
3 hundred yards in each direction. So there was lots of
4 officers involved. We just walked and looked, and if
5 one of us would see something we would let the other
6 ones know and take care of that. We did sort of a
7 grid search. That's what I am talking about but we
8 found nothing.

9 Q. And an extensive search revealed nothing?

10 A. That's right.

11 Q. No ropes, no casings, no shells?

12 A. Nothing.

13 Q. I want to ask you about the timing of the
14 burial of the body. Now, the body was found
15 February 24, correct?

16 A. Yes.

17 Q. And we've already heard some testimony that
18 the autopsy wasn't actually completed until the next
19 day which would be the 25th of February?

20 A. Yes.

21 Q. That fair with your recollection?

22 A. That's fair, yes.

23 Q. And the body was buried on March 7, 1976.

24 That would have been the following Monday.

25 A. Sir, by that time, I had this emergency to go

1 back to Nebraska so I had to -- my family wanted me
2 home so I went to Nebraska so those things that
3 happened after that autopsy, I don't know about.

4 Q. Okay. And that's why I am asking you the
5 question.

6 So from the date of the autopsy for a period
7 of a week and a half or so, you were gone?

8 A. Yes.

9 Q. Well, do you recall telling FBI Agent Wood on
10 March 2 that it was the BIA's decision to bury Anna
11 Mae Aquash immediately?

12 A. You know, 35 years ago, I might have said
13 that. I don't even recall because I wasn't there.
14 Somebody might have mentioned that to me and I might
15 have repeated it. But I don't know who ordered her to
16 be buried.

17 Q. Well, that's my question. And if you weren't
18 there, how would you have communicated to Agent Wood
19 that the body was being buried upon the authority of
20 the BIA.

21 A. If you would have asked me that question 35
22 years ago I could tell you.

23 Q. Right.

24 A. Kind of a long time ago.

25 Q. Well, that's where I am going with this.

1 We didn't have cell phones 35 years ago?

2 **A.** No. Barely had a Polaroid.

3 **Q.** Yeah. And you were back home with your
4 family in Nebraska?

5 **A.** Yes, I was there, yeah.

6 **Q.** And so -- I mean, do you have any
7 recollection at all of conducting any official
8 business regarding this case while you were back home
9 with your family?

10 **A.** While I was back home with my family?

11 **Q.** Yeah.

12 **A.** Well, no. But if that's March 2 you are
13 talking about, I might not have been gone for two
14 weeks or a week and a half. I might have only been
15 gone for four or five days. I just remember that I
16 had left right after the autopsy and I came back
17 later.

18 **Q.** This is only -- February only had 28 days in
19 that year so we're only talking about a five or
20 six-day period?

21 **A.** Yeah, it could have been that.

22 **Q.** Do you recall previously testifying that you
23 were gone seven to ten days?

24 **A.** I might have said that, too.

25 **Q.** Yeah?

1 **A.** But if I was gone three or four days, it's 35
2 years ago, so I just know that I went back to
3 Nebraska.

4 **Q.** All right.

5 Do you recall, though, that it was your
6 decision to have this body buried before it was
7 identified?

8 **A.** No. I didn't make no decision like that. I
9 wasn't there to do that.

10 **Q.** I guess that's what I am getting to.

11 You are clear in your mind even though it was
12 35 years ago, it was not your decision to have the
13 body buried prior to identification?

14 **A.** I wasn't really authorized to make a decision
15 like that because I had a boss at that time. And it
16 was clearly not my responsibility or my decision to
17 have a body buried.

18 **Q.** Okay.

19 **A.** I did not do that.

20 **Q.** So if Agent Wood's reports indicated that it
21 was you who ordered the body to be buried prior to
22 identification that would be inaccurate?

23 **A.** Yes.

24 **Q.** And frankly because you suspected foul play
25 and because you had gone through the effort of having

1 the hands removed so that identification could be
2 obtained, you wouldn't have wanted that body buried,
3 would you have?

4 **A.** Well, a reasonable person would want to keep
5 the body as long as you could until it's investigated
6 and not bury it. I mean, that's just a reasonable
7 thing to do. I don't think I would have ordered a
8 body buried or had a body buried, no.

9 **Q.** You would have waited more than three days?

10 **A.** Identify the body. If they could keep the
11 body refrigerated or whatever.

12 **Q.** Okay.

13 And you know from your involvement in this
14 case that, in fact, the coroner or the pathologist did
15 in fact try to preserve the body after the autopsy?
16 Dr. Brown I am talking about.

17 **A.** If he did I am not aware of that because
18 right after the autopsy, I was like pretty much done.

19 **Q.** All right.

20 Regarding the day that you found the body,
21 where the body was located was -- how many -- you
22 indicated about a hundred yards off the road?

23 **A.** Yes. It was about maybe 75 to a hundred.
24 Something like that I would say.

25 **Q.** All right.

1 And regarding the temperature, you said today
2 you weren't sure if it was a very warm day or --

3 **A.** I said I was sure it was a warm day.

4 **Q.** It was a warm day?

5 **A.** Yeah. I distinctly remember that I didn't
6 wear gloves. It was a pretty pleasant day.

7 **Q.** All right.

8 Now, the state asked you whether -- after the
9 autopsy whether your involvement in this case more or
10 less ended.

11 You indicated you weren't involved for too
12 much longer?

13 **A.** No.

14 **Q.** Do you recall, though, having interviews with
15 Selo and Irene Janis or Selo and Irene Black Crow
16 going into the middle of March of that year?

17 **A.** I don't recall having any interviews with
18 them or talking with them.

19 **Q.** Would it refresh your recollection if I
20 showed you a report?

21 **A.** It sure would. I would like to see it.

22 **Q.** Sure.

23 Take your time to review that.

24 **A.** Yes, I have looked at this report.

25 **Q.** All right.

1 Having looked at that report, does that
2 refresh your recollection of having gone out and
3 talking to Selo and Irene Black Crow some time on
4 March 12, 1976?

5 **A.** I don't recall, you know, any details like
6 that. But if -- if they did talk to me, and it was
7 concerning any kind of a death, regardless of what it
8 was, I probably would have made notation of it. And I
9 probably would have let the FBI know about what I had
10 heard or found. That was a common thing for me to
11 pass information on important issues.

12 **Q.** Especially in that case because you
13 immediately suspected foul play?

14 **A.** Well, any information that I would have
15 gotten regarding any kind of a death on the
16 reservation I would have passed on to the FBI, yes.

17 **Q.** And you went out and talked to Selo and Irene
18 about a call they had made that was deemed suspicious
19 to the ambulance?

20 **A.** You know, I don't really recall that. It's
21 not clear in my mind if I did. It's possible that I
22 did, but I don't think it went anywhere as far as the
23 investigation is concerned.

24 **Q.** Do you recall telling the FBI that they were
25 visibly shaken when you approached them about the --

1 **A.** I don't recall that, but it's possible I
2 could have said that.

3 **Q.** Okay.

4 **A.** It's 35 years ago, sir.

5 **Q.** All right.

6 Do you recall where Selo and Irene lived?

7 **A.** No, I don't.

8 **MR. MURPHY:** Nothing further.

9 **A.** And I didn't go to Wambli to talk to them.
10 If it happened at all it was in Pine Ridge because --
11 the reason is I went out to do that crime scene and I
12 never did go back to Wambli for a couple months after
13 that.

14 **Q.** (BY MR. MURPHY) So if you talked to them,
15 they came to you?

16 **A.** Must have been. Might have been in my office
17 or someplace if that happened at all.

18 **MR. MURPHY:** Okay.

19 Thank you.

20 **THE COURT:** Anything further from the state?

21 **MR. MANDEL:** No, Your Honor.

22 **THE COURT:** Thank you, sir.

23 You may be excused. You are released from
24 any subpoena that may be there.

25 **MR. MURPHY:** You are released from my

1 subpoena, sir.

2 (Witness excused.)

3 **MR. MANDEL:** The state calls Ray Hand Boy,
4 Your Honor.

5 **THE COURT:** Stop right up here, sir. We'll
6 get you sworn in. Please raise your right hand.

7 RAY HAND BOY,
8 called as a witness herein, having been duly sworn,
9 under oath testified as follows:

10 **THE COURT:** Please take a seat.

11 **DIRECT EXAMINATION**

12 **BY MR. MANDEL:**

13 **Q.** Good afternoon, sir.

14 Could you state your name, please.

15 **A.** Raymond Charles Hand Boy.

16 **Q.** Okay.

17 Last name two words or one word?

18 **A.** Pardon?

19 **Q.** Is your last name --

20 **A.** Hand Boy.

21 **Q.** Is your last name two words or one word?

22 **A.** I am sorry. I am hard of hearing.

23 **Q.** I will try and talk louder.

24 Is your last name spelled as two words or one
25 word?

1 **A.** Two words.

2 **Q.** Were you married to an individual named
3 Evelyn Bordeaux?

4 **A.** Yes.

5 **Q.** When were you married?

6 **A.** New Years 1977.

7 **Q.** How long were you married, sir?

8 **A.** Five years.

9 **Q.** What happened at that time?

10 **A.** Pardon.

11 **Q.** What happened at that time?

12 **A.** When we were married?

13 **Q.** No.

14 Did something happen to your wife?

15 **A.** Yes. She got killed in a car accident.

16 **Q.** Okay.

17 Did you know an individual by the name of
18 Annie Mae Aquash?

19 **A.** I knew who she was. I didn't know her
20 personally.

21 **Q.** To some extent were you involved in the
22 American Indian Movement back in 1975?

23 **A.** Pretty much, yeah.

24 **Q.** What was your involvement?

25 **A.** Just being around. Just being around, do

1 errands. Pretty much about it.

2 Q. Do you remember receiving a phone call
3 regarding Ms. Aquash back on November 24 of 1975?

4 A. Phone call wasn't for me, it was for my wife.

5 Q. Okay.

6 Do you know what the phone call was about?

7 A. No.

8 Q. Did you --

9 A. I found out later, but I didn't know then.

10 Q. As a result of the phone call, did you take a
11 trip?

12 A. Yes.

13 Q. What took place first?

14 A. What took place first?

15 Q. Yeah.

16 A. My wife just asked me if I -- if we could go
17 get one of her friends in Pierre at the time. And
18 that was pretty much what the phone call was about.
19 And they would get -- give her some fund for gas and
20 stuff to do it.

21 Q. Where were you living at the time?

22 A. 913 Blaine, Rapid City.

23 Q. Okay.

24 So you took off from Rapid City and went to
25 Pierre?

1 **A.** Yes.

2 **Q.** And Evelyn was with you?

3 **A.** Yes.

4 **THE COURT:** Let me -- I may be confused. I
5 thought they were married in 77 on New Years Day.

6 **THE WITNESS:** It wasn't New Years Day. I was
7 trying to remember the exact date.

8 **THE COURT:** Well, 77, and now we're talking
9 about 75.

10 **THE WITNESS:** Yeah.

11 **THE COURT:** Were you living together and not
12 married at that time?

13 **THE WITNESS:** Yeah.

14 **THE COURT:** I just want to get my dates
15 straight.

16 Thank you.

17 **THE WITNESS:** I am sorry. I should have
18 cleared that up myself.

19 **Q.** **(BY MR. MANDEL)** So the two of you left Rapid
20 City and headed over to Pierre?

21 **A.** Yes.

22 **Q.** Do you recall about what time of day that
23 was?

24 **A.** It was early evening. I couldn't tell exact
25 time. It was dark.

1 **Q.** Do you know why you were asked to do this?

2 **A.** No.

3 My wife indicated then that her friend, which
4 was Annie Mae, needed a ride, and I didn't know
5 exactly where we were going at the time. But we went
6 and did it. Took her.

7 **Q.** Do you know where you went when you got to
8 Pierre?

9 **A.** Went to Denver.

10 **Q.** No.

11 I am asking you where you went in Pierre to
12 pick her up?

13 **A.** It was -- I don't know exact streets or
14 anything, but I -- I can tell you -- I know my way
15 there as far as that goes. It was a motel.

16 **Q.** Do you recall how many -- how tall it was?
17 How many stories?

18 **A.** Yeah. Probably maybe six stories. Five or
19 six stories. Kind of a tall building for Pierre.

20 **Q.** Okay.

21 What happened when you got there?

22 **A.** We pulled in. There was a gas station right
23 across from the motel. We pulled in there. It was
24 closed. And my wife got out and went into the motel
25 and then her and Annie Mae came back to the car.

1 Q. You just waited in the car?

2 A. Yeah, I just waited for them.

3 Q. Do you recall what Annie Mae was wearing when
4 she came out?

5 A. A dark jacket.

6 Q. Anything else you recall?

7 A. Blue jeans, I think. That's about it. I
8 can't remember anything else.

9 Q. Do you remember what time of day it was when
10 you finally found her?

11 A. It was early evening. It was still -- it was
12 dark. I know we left Rapid City and it was daylight
13 when we left so when we got there it was just getting
14 dark and it was -- the sun was already down.

15 Q. When she came out to the car with Evelyn, did
16 Annie Mae have anything with her, any suitcase, or
17 anything like that?

18 A. No. Just -- just a bag.

19 Q. Like --

20 A. Yeah. A purse, I think.

21 Q. Okay.

22 What happened then?

23 A. They just told me that we were going to
24 Denver and they gave me directions to go. So before
25 we left town we stopped at a truck stop and I got gas

1 and we headed south.

2 Q. Do you remember how you headed down towards
3 Denver?

4 A. Went through Fort Pierre and I think we hit
5 the road, 81, 81 South coming out of Pierre going
6 through Fort Pierre and then going south onto the
7 interstate. Then we went to -- went to the interstate
8 for a little bit and then we got off on the road going
9 toward Mission. Then we went south and went down
10 toward Valentine -- just straight south to the
11 interstate down there, 90 -- or 80. I am sorry.

12 Q. In Nebraska?

13 A. Yeah.

14 Q. What did you do then?

15 A. We just took 80 west and drove until we came
16 to Denver.

17 Q. Where exactly were you heading to as far as
18 you knew at that point?

19 A. I didn't know. I didn't know where we were
20 going in Denver because I never been there.

21 Q. But you knew you were going to Denver?

22 A. Yes. That's what they indicated was where we
23 were heading.

24 Q. During the time Annie Mae and your wife were
25 in the car did you hear any conversations between

1 them?

2 **A.** Mostly -- well, all I heard was they talked
3 about their kids. And that's about it, really,
4 because I couldn't really pay attention to what they
5 were saying. It was bad weather and I had to pay
6 attention to the road mostly. But they were talking
7 about most -- mostly what I heard was about their
8 kids. About their children.

9 **Q.** Other than that do you remember anything?

10 **A.** No.

11 You know, I have tried to think since this
12 has been going on but I can't remember anything else
13 they said other than -- that sticks to my mind.

14 **Q.** Do you remember where they were seated in the
15 car?

16 **A.** My wife was in front with me when we started
17 out and then when I stopped and got gas she got in the
18 back seat with her and they were talking.

19 **Q.** Did you drive all night heading down towards
20 Denver?

21 **A.** Yeah.

22 **Q.** Do you recall about what time it was when you
23 got in the Denver area?

24 **A.** No. It was -- I don't know. Maybe
25 two o'clock. It had to be somewhere around there

1 because -- I didn't pay attention, but I know when
2 they got out it was still dark when we left.

3 Q. Do you recall -- did you actually go to the
4 city of Denver or in the area somewhere?

5 A. We went to where there were a bunch of
6 apartment buildings, like -- you know, kind of like
7 apartment buildings. And they just told me where to
8 go. I didn't know the street names or anything. They
9 just told me where to go, which way to turn, and I
10 just did what they said. They told me to stop and she
11 got out.

12 Q. Did they both know where they were going or
13 just your wife or what?

14 A. I think my wife knew, too. She's been down
15 to Denver, too, she told me.

16 Q. What were the buildings like there?

17 A. Like apartment buildings. Not real tall, but
18 like -- I don't know, projects, I guess you would call
19 them.

20 Q. Were they single-story buildings or taller
21 than that?

22 A. Two stories at the most, I think. Most of
23 them.

24 Q. What -- where did you go with her -- I mean,
25 I know you kind of followed directions in turning left

1 and turning right and so on but where did you finally
2 arrive at? Was it one --

3 A. I thought it was Denver --

4 Q. I mean, was it one of these buildings you
5 were describing?

6 A. Where did she go?

7 Q. Right.

8 Where did you take her?

9 A. I don't know. She just got out on the street
10 there and they said their goodbyes, they hugged each
11 other, and we just drove off.

12 Q. You don't know -- you didn't see what
13 building she went into or anything?

14 A. No, I didn't.

15 Q. And you just took off?

16 A. I was trying to concentrate on getting back
17 because it was still bad weather and I knew I had to
18 drive through that.

19 Q. In terms of whether you were right in Denver
20 or not, do you know for sure?

21 A. No.

22 Q. Is it safe to say at least you knew you were
23 in the area?

24 A. Yeah. Yeah. That's what they indicated. I
25 didn't know the area. I kind of do now but I probably

1 couldn't find that place if I tried.

2 Q. Did you ever see Annie Mae again after you
3 dropped her off in Denver?

4 A. No.

5 Q. Did you ever hear about her after that?

6 A. Yeah. After she was -- after she died.

7 Q. What did you hear in that regard?

8 MR. MURPHY: Objection. Calls for hearsay.

9 THE COURT: That depends. At the moment I am
10 going to sustain it unless you tell me what it's being
11 offered for.

12 Q. (BY MR. MANDEL) Did you ever discuss this
13 matter with your wife?

14 A. Pardon?

15 Q. Did you ever discuss Annie Mae's death with
16 your wife?

17 A. Afterwards, yeah.

18 Q. Did she indicate to you she knew anything
19 about what had happened to her?

20 A. No.

21 Q. Did anyone else?

22 A. No.

23 MR. MURPHY: Objection. Calls for --

24 THE COURT: It's overruled.

25 Q. (BY MR. MANDEL) Were you familiar with the

1 WKLDOC house in Rapid City?

2 A. Which house?

3 Q. WKLDOC, Wounded Knee Legal Defense Offense
4 Committee?

5 A. Yeah.

6 Q. Was that in the neighborhood you lived?

7 A. Probably about 10 blocks, 12 blocks from
8 where I lived then.

9 Q. Had you ever been there?

10 A. Yeah.

11 Q. Were you there at that time at all?

12 A. When?

13 Q. After you took Annie Mae down, were you ever
14 down there at that time do you remember?

15 A. No.

16 MR. MANDEL: I have nothing further, Your
17 Honor.

18 THE COURT: Mr. Murphy?

19 CROSS-EXAMINATION

20 BY MR. MURPHY:

21 Q. Mr. Hand Boy, my name is John Murphy.
22 Pleasure to meet you.

23 A. Same here.

24 Q. I will try to talk loudly, but if you miss
25 something, just let me know.

1 **A.** Okay. Sure.

2 **Q.** I want to talk to you about the trip you
3 took.

4 **A.** Yeah.

5 **Q.** You drive all the way from Rapid to Pierre.
6 That takes, what, about three hours?

7 **A.** Something like that. Maybe two and a half.
8 It was a little longer, the roads were pretty bad.

9 **Q.** Sure.

10 And then probably if the roads were bad
11 another six to eight hours down to Denver?

12 **A.** Yeah. It could -- 90 was pretty good -- I
13 mean, 80 before -- after we got on 80 it was snowy but
14 you could make the speed limit or faster.

15 **Q.** But from when you get to Pierre to when you
16 get to Denver or wherever you got, Annie Mae Aquash is
17 telling you where she needs to go?

18 **A.** Yeah.

19 **Q.** She knows where she wants to end up?

20 **A.** Uh-huh.

21 **Q.** I'm sorry. You have to answer yes or no.

22 **A.** Yes, sir.

23 **Q.** And it appears, at least obvious, that she's
24 already planned out where she's going to end up in
25 Denver?

1 **A.** They seemed to know, yeah.

2 **Q.** You didn't have to stop anywhere or ask for
3 directions or anything like that?

4 **A.** No.

5 **Q.** Okay.

6 At that point, you didn't ask her any
7 questions about where she was going, did you?

8 **A.** No, I didn't.

9 **Q.** And that wasn't your role, right?

10 **A.** No. I hardly knew her, but I knew of her
11 through my wife.

12 **Q.** Sure.

13 But even then if she said she was -- you were
14 told by your wife she's in some danger or she needs
15 some help, and she knows where she's going to go,
16 that's your job is just to give her a ride, correct?

17 **A.** Well, they never indicated they was in any
18 kind of danger.

19 **Q.** Okay.

20 Well, let me ask you about that. You said
21 today that you didn't really hear any of the
22 conversation that transpired between your wife and --

23 **A.** Well, I heard some but not nothing to do with
24 anything like -- what happened to her, you know.

25 **Q.** All right.

1 Well, I want to bring you back. I know it's
2 2010 now. You gave an interview with Robert Ecoffey
3 way back in 1996.

4 Do you recall talking to Mr. Ecoffey?

5 **A.** Yeah. Some of that.

6 **Q.** And do you recall telling him that in your
7 interview that Anna Mae wanted to come back to Rapid
8 City from Pierre, but Rapid City was too hot and so
9 therefore she decided she wanted to go down to Denver?

10 **A.** No. I don't remember that.

11 **Q.** If I show you a copy of the document, would
12 that help refresh your recollection?

13 **A.** Probably -- I mean, no, I don't think it
14 would because I don't remember every saying that to
15 Bob.

16 **Q.** Okay.

17 Do you remember telling him -- saying -- Hand
18 Boy said that Anna Mae was quiet and that she talked
19 to Evelyn saying that she was scared because while she
20 was in custody if Pierre, South Dakota, the FBI had
21 threatened her.

22 Do you recall that statement to Mr. Ecoffey?

23 **A.** You know, I don't.

24 **Q.** Would you like to review a cop --

25 **A.** Yeah, I would.

1 **MR. MURPHY:** Showing the witness document
2 1,323.

3 **Q.** **(BY MR. MURPHY)** Take your time. You can read
4 start to finish, if you like.

5 **A.** You know I remember --

6 **Q.** Having read this now, knowing that this was
7 conducted 14 years ago, closer to the events, does
8 that help refresh your recollection some of things --

9 **A.** I remember talking to him, but I don't
10 remember telling him that it was hot in Rapid City.

11 **Q.** Okay.

12 But in regard to the overhearing Anna Mae
13 tell your wife while you are in the car that she was
14 scared because while she was in custody in Pierre she
15 had been threatened by the FBI, does that refresh your
16 recollection as to that statement?

17 **A.** I think what was said then between them two
18 was that she indicated that the police were after her
19 and she didn't want to go to Rapid.

20 **Q.** Okay.

21 **A.** And that's what I indicated to Bob.

22 **Q.** Even though he put it down that --

23 **A.** Yeah --

24 **Q.** -- she felt --

25 **A.** She thought maybe she was in danger there by

1 someone other -- I thought she was just trying to
2 avoid the police.

3 Q. The police or the FBI?

4 A. Yeah. Whatever. Law enforcement. Yeah.

5 Q. Okay.

6 Thank you.

7 MR. MURPHY: Nothing further.

8 THE COURT: Anything further?

9 MR. MANDEL: No, Your Honor.

10 THE COURT: Thank you, Mr. Hand Boy.

11 You may be excused.

12 Is he here on subpoena?

13 MR. MURPHY: I don't have him subpoenaed.

14 MR. JACKLEY: We'd release him, Your Honor.

15 THE COURT: You are released from your
16 subpoena.

17 Thank you, sir.

18 (Witness excused.)

19 MR. JACKLEY: May we approach, Your Honor?

20 THE COURT: Yeah.

21 (Whereupon, a discussion was held at the
22 bench and off the record.)

23 THE COURT: Ladies and gentlemen, we had a
24 flight cancelation for a witness for the case that was
25 supposed to come in this afternoon. Welcome to court

1 time and troubles.

2 We're going to close down for the night.
3 We'll reconvene at 8:30 in the morning. Please leave
4 your notebooks here.

5 You are again reminded -- you are going to
6 get tired of this reminder, but I'm in trouble if I
7 don't give it to you -- you are reminded that you are
8 not to discuss this case with anybody under any
9 circumstances. Upon discussion you shut it down
10 immediately. You are not to form any opinions based
11 on the evidence you've heard until all the evidence is
12 presented to you.

13 You are to avoid watching the news, reading
14 newspapers, or anything of that ilk until this matter
15 is completed and you have reached a verdict.

16 Thank you. We are in recess.

17 (Whereupon, the proceedings in this matter
18 were then concluded.)
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25

1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
 2 COUNTY OF PENNINGTON)
 3

4 I, TINA RAE PRUSS, Official Court Reporter
 and Notary Public in and for the County of Pennington,
 5 State of South Dakota,

6 DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 7 questions asked, the testimony given, and of the
 proceedings had.
 8

9 I FURTHER CERTIFY that I am not of kin or in
 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 10 interested in the event thereof.
 11

12 IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.
 13

14 COPY

15 _____
 16 Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 17 Pennington County, South Dakota
 My Commission expires: 10-04-2012
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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
)
) Plaintiff,
)
) VS.
)
) JOHN GRAHAM,
)
) Defendant.

TRANSCRIPT OF
JURY TRIAL

VOLUME 4 OF 10

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
DECEMBER 2, 2010

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* * A P P E A R A N C E S * *

MR. MARTY JACKLEY
Attorney General
MR. ROD OSWALD
Assistant Attorney General
MR. ROBERT MANDEL
Assistant U.S. Attorney
Representing the State of South Dakota

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

* * I N D E X * *

WITNESS (ES) :	DIRECT	CROSS	REDIRECT	RECROSS
GARRY PETERSON	4	10	21	22
GARRY PETERSON	41	53	66	
ANGIE BEGAY JANIS	68	75	101	103
TROY LYNN YELLOW WOOD	105	138	187,195	192,195
EVAN HODGE	197			
ROBERT RITER	203	214	227	228
GEORGE PALFY	230	248	262	

1	EXHIBITS:	OFFERED/ADMITTED
2	9 - Peterson Vitae	
3	10 - Peterson Report	
4	11 - Brown Report	
5	11A- Orchid Cellmark Report	
6	11B- FBI Report	
7	12 - Photo	51/52
8	13 - X-ray	48/48
9	14 - X-ray	48/48
10	15 - Hodge Ballistics Report	201/201
11	18 - Photo	137/137
12	22 - Photo	131/131
13	48 - Letter	208/208
14	103- December Weather Chart	
15	104- January Weather Chart	
16	105- February Weather Chart	105/106
17	107- Chart	105/106
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* * P R O C E E D I N G S * *

(Whereupon, the following proceedings were then had in open court and out of the presence of the jury.)

THE COURT: We ready?

THE COURT REPORTER:

Mr. Jackley?

THE COURT: Wait a minute.

GARRY PETERSON,

called as a witness herein, having been duly sworn, under oath testified as follows:

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. JACKLEY:

Q. Could you please state your name for the record?

A. Garry, G-A-R-R-Y, Peterson, P-E-T-E-R-S-O-N.

Q. Dr. Peterson, what is your profession?

A. I'm a retired physician, but I'm a physician.

Q. Could you take just a moment and discuss with me your educational background?

A. I attended college at Hamline University in St. Paul and at the University of Minnesota. And then went to medical school at the University of Minnesota Medical School in Minneapolis.

1 Following that I had a year of rotating
2 internship at St. Paul Ramsey Hospital which was the
3 city/county hospital in St. Paul. And then undertook
4 a five-year training period in pathology. The first
5 three years were in clinical pathology and anatomic
6 pathology at St. Paul Ramsey Hospital in St. Paul. My
7 fourth year was in forensic pathology at the Hennepin
8 County Medical Examiner's Office. And my last year
9 was in clinical pathology and anatomic pathology at
10 Hennepin Medical Center in Minneapolis.

11 **THE COURT:** Mr. Jackley, I am not -- for the
12 purposes of this pretrial hearing I am not disputing
13 qualifications so if you want to get right to the
14 substance.

15 **MR. JACKLEY:** Including the sexual assault
16 review?

17 **THE COURT:** If you want to lay foundation
18 specific to that, but we don't need to go through the
19 whole educational background.

20 **Q. (BY MR. JACKLEY)** Okay.

21 Doctor, did you conduct the autopsy of an
22 Annie Mae Aquash March 11, 1976?

23 **A.** I conducted a second autopsy.

24 **Q.** Okay.

25 There had been a previous autopsy done by

1 Dr. Brown?

2 **A.** Yes.

3 **Q.** Have you had an opportunity to review

4 Dr. Brown's autopsy report?

5 **A.** I have. I haven't memorized it, but I have
6 looked at it.

7 **Q.** I am going to place in front of you to review
8 for purposes of this questioning what will be State's
9 Proposed Exhibit 11, which is Dr. Brown's report.

10 Please refer to it if you need to, Doctor.

11 **A.** Yes.

12 **Q.** On the last page of the report there is a
13 reference to acid phosphatase.

14 What is acid phosphatase?

15 **A.** Acid phosphatase is an enzyme that is found
16 in very high concentration in male secretions and male
17 seminal fluid. Seminal fluid being the fluid in which
18 the sperm cells, the reproductive cells, are
19 suspended.

20 And acid phosphatase at the time this testing
21 was done was used extensively --

22 **THE COURT:** Let's go question by question.

23 The question there was, what is it.

24 **THE WITNESS:** I'm sorry.

25 **Q. (BY MR. JACKLEY)** Back in 1975, in March of

1 1975, February/March of 1975, what was acid
2 phosphatase used to indicate?

3 **A.** Was it 1976?

4 **Q.** 1976.

5 **A.** It was a marker for seminal fluid, for male
6 secretions. It's produced in the prostate gland and
7 was used as a marker for recent sexual intercourse.

8 **Q.** With respect to Dr. Brown's reference to acid
9 phosphatase, the vaginal contents were strongly
10 positive for acid phosphatase.

11 During your examination, did you find
12 anything inconsistent with Dr. Brown's finding?

13 **A.** No.

14 **Q.** Doctor, I am going to ask you a yes or no
15 question.

16 Do you have an opinion to a reasonable degree
17 of medical certainty regarding Dr. Brown's acid
18 phosphatase finding?

19 **A.** Well, I guess I have an opinion, yes.

20 **THE COURT:** I don't understand the question.
21 You are asking him to give an opinion as to whether
22 the finding is well made or properly made or not made?

23 **MR. JACKLEY:** Let me -- I tried to short cut
24 it and I shouldn't have.

25 Let me go deeper.

1 **Q.** **(BY MR. JACKLEY)** Doctor, on the last
2 paragraph of Dr. Brown's report, Dr. Brown indicates
3 the strong acid phosphatase of the vaginal contents
4 would indicate recent sexual intercourse.

5 Do you see that?

6 **A.** I do.

7 **Q.** For purposes of this question I want you to
8 consider that to be Dr. Brown's finding.

9 Based on that finding with a yes or no
10 question, do you have an opinion to a reasonable
11 degree of medical certainty regarding Dr. Brown's acid
12 phosphatase finding?

13 **A.** I have an opinion.

14 **Q.** What is that opinion?

15 **A.** I disagree with it.

16 **Q.** Why do you disagree with it?

17 **A.** The way he's worded it, it indicates that it
18 indeed is indicative. I think it could be but it's
19 ambiguous. It may or may not be indicative of recent
20 sexual intercourse.

21 **Q.** Would it be consistent with intercourse?

22 **A.** It could be, yes.

23 **Q.** Would it be consistent, but not conclusive?

24 **A.** Yes.

25 **Q.** Doctor, have you had an opportunity to review

1 a report dated September 26, 2008, to attorney John
2 Murphy?

3 **A.** I have. I saw it for the first time this
4 morning.

5 **Q.** I will represent to you in the report there
6 is an indication, quote, presumptive testing for semen
7 was positive on the panties.

8 Do you see that?

9 **A.** Yes.

10 **Q.** Would that similarly be consistent with
11 intercourse?

12 **A.** Yes, it would.

13 **MR. JACKLEY:** No further questions.

14 **MR. MURPHY:** May I?

15 **THE COURT:** Yes.

16 **MR. MURPHY:** First, looking at the Orchid
17 Cellmark report that's before you, we haven't
18 identified that.

19 Do you have a proposed exhibit number? We
20 left off at 11.

21 **MR. JACKLEY:** I am going to get in trouble
22 with Tina.

23 **MR. MURPHY:** That's fine.

24 **MR. JACKLEY:** John, give me just a second.
25 Could we call it 11A since Brown is 11 just to keep

1 track of it.

2 MR. MURPHY: That's fine.

3 CROSS-EXAMINATION

4 BY MR. MURPHY:

5 Q. Looking at proposed Exhibit 11A, you were
6 just asked about the presumptive finding of semen.

7 Would you mind reading the line directly
8 below that?

9 A. Spermatozoa were not identified on the
10 panties.

11 Q. So they made a presumptive finding of semen
12 and then tested for the actual presence of spermatozoa
13 and could not find any; is that correct?

14 A. That's correct.

15 Q. So that would indicate that there was an
16 absence of sperm upon further testing?

17 A. That's what I would interpret, yes.

18 Q. Okay.

19 So whatever conclusion you might have drawn
20 from the sentence that Mr. Jackley pointed to you --
21 pointed out to you, the next sentence negates that,
22 correct?

23 A. It doesn't. It just further --

24 Q. It's a further finding?

25 A. It's a further finding.

1 Q. And in fact a finding of a negative?

2 A. The two are two independent things so not
3 finding one doesn't negate the other.

4 Q. Okay.

5 So -- all right. Let's talk about acid
6 phosphatase. Acid phosphatase is an enzyme that is
7 not unique to the prostate, correct?

8 A. That's correct.

9 Q. It is found in all living cells?

10 A. I am not sure of that, but it's found in many
11 of the body tissues. I'm not sure if it's absolutely
12 universal but it's found in many places.

13 Q. And it's found in greater concentrations as
14 cells start decomposing?

15 A. Yes, it is.

16 Q. And it is a -- an enzyme that is present in
17 vaginal fluids, correct?

18 A. It can be after decomposition has begun,
19 particularly. There can be traces of it in the
20 vagina, but the level will rise after death as
21 decomposition and deterioration and cell breakdown
22 take place.

23 Q. So in this case you have examined the body
24 connect?

25 A. I did, yes.

1 **Q.** You found it in an advanced stage of
2 decomposition?

3 **A.** Yes.

4 **Q.** So it would be natural for there to be
5 elevated levels of acid phosphatase in the vagina,
6 correct?

7 **A.** Yes.

8 **Q.** Would you agree or disagree with this
9 statement. It, acid phosphatase, is not unique to the
10 prostate and can be found in other biological fluids
11 including vaginal secretions?

12 **A.** I would agree with that.

13 **Q.** Agree or disagree with this sentence. It is
14 therefore considered a presumptive chemical test for
15 the presence of semen, and semen must be confirmed by
16 other means such as sperm detection or PSA?

17 **A.** I guess -- yeah, I'd agree with that.

18 **Q.** Agree or disagree with this. The use of acid
19 phosphatase as a marker for semen is compromised
20 because the vagina is also a source of vaginal acid
21 phosphatase?

22 **A.** I'd like to clarify whether it's in a living
23 patient or in a postmortem situation.

24 **Q.** Postmortem.

25 **A.** Then I would agree with the statement.

1 **Q.** You would agree with that?

2 **A.** Yes.

3 **Q.** Agree or disagree with this. Since seminal
4 and acid phosphatase cannot discriminate, the only
5 approach to differentiating semen in vaginal
6 secretions is by quantitative analysis such as PSA or
7 the microscopic inspection for sperm?

8 **MR. JACKLEY:** Objection. Compound and
9 confusing question.

10 **MR. MURPHY:** I would ask if the doctor found
11 that confusing.

12 **THE COURT:** Overruled.

13 **A.** I don't think those are the only exclusive
14 ways of confirming it, but I would agree basically
15 with that statement that they can be proven that way.

16 **Q. (BY MR. MURPHY)** You'd agree that before you
17 can render a conclusion to a reasonable degree of
18 medical certainty, you would need some type of
19 quantitative analysis or other microscopic
20 examination, correct?

21 **A.** Yes. I would -- finding sperm cells, for
22 instance, would settle the question.

23 **Q.** And in regard to Dr. Brown's autopsy, he
24 makes no quantification -- he does not render any
25 result as to how much acid phosphatase was found,

1 correct?

2 **A.** That's right. He just gives no numerical --

3 **Q.** He doesn't even state what methodology he
4 used to test it?

5 **A.** No.

6 **Q.** It doesn't give you an idea of what
7 laboratory instruments he used, whether they were
8 calibrated or any other information that would give us
9 an issue as to whether he performed the test
10 correctly?

11 **A.** If I can go a little further, there were a
12 number of different methodologies. Some had more
13 specificity. I don't know what method he used.

14 **Q.** Because he doesn't tell us?

15 **A.** Because he doesn't tell us.

16 **Q.** So we don't know if he used one of the more
17 accurate tests or the less accurate tests?

18 **A.** Specific -- specific for what was thought to
19 be male secretions. But again, that's a complicated
20 question, too, but we don't know what his methodology
21 was.

22 **Q.** So you have no way of going back and saying I
23 think his methodology at least was proper?

24 **A.** Well, I don't disagree that he did a test and
25 got that result, but I don't know what the test method

1 was.

2 Q. How do you know he did a test and got a
3 result other than what he said in here?

4 A. I don't.

5 Q. On prior occasions you've testified that you
6 were shocked at the fact that this pathologist missed
7 a bullet in Ms. Aquash's head, correct?

8 A. That's right.

9 Q. And that certainly gives you cause for
10 concern in the level of professionalism in his
11 autopsy, correct?

12 A. Yes.

13 Q. And you found that he had claimed to have
14 removed and weighed certain organs but you found that
15 not to be accurate when you did your autopsy?

16 A. Yes.

17 Q. So he essentially lied or misstated facts in
18 his autopsy report?

19 A. He did.

20 Q. So it's hard for you to sit here and say,
21 well, he missed a bullet, he misstated facts about
22 weighing organs, but I think he probably did a bang-up
23 job on that acid phosphatase test?

24 A. I am not saying that.

25 Q. Okay.

1 You can't say to a reasonable degree of
2 medical certainty that he did the test the right way
3 or that the test resulted -- or produced the results
4 he claims they did?

5 **A.** No.

6 **Q.** You can't say that?

7 **A.** No.

8 **Q.** Because you don't have any information?

9 **A.** Yes.

10 **Q.** And in regard to your own autopsy, you didn't
11 test for acid phosphatase?

12 **A.** I don't remember if I did or not.

13 **Q.** And it would --

14 **A.** Well, I sent all my reports to others and I
15 can't find original copies, and there may have been
16 supplementary material that I just don't have
17 available and I just don't remember if I did or not.

18 **Q.** Would it be fair to say that if you had done
19 acid phosphatase testing and it produced a result that
20 was significant, indicating recent sexual activity or
21 something like that that you would have put it in your
22 report?

23 **A.** Well, I don't know if I have the full report
24 and I think even when I did the report, I knew about
25 the ambiguity of the result in -- after decomposition

1 had taken place, so I might not have.

2 Q. You might not have even done the test?

3 A. No.

4 Q. At least we have no information today and the
5 jury is not going to be presented with information
6 from you that you did an acid phosphatase test and it
7 resulted in --

8 A. Right.

9 And I don't remember it.

10 Q. Okay.

11 So the jury is not going to hear that?

12 A. No.

13 Q. What did you find was the --

14 Ms. Aquash's vagina genitalia were normal?

15 A. Yes.

16 Q. And that is consistent with Dr. Brown's
17 finding that there wasn't any trauma or evidence of
18 injury to the vagina?

19 A. It is, yes.

20 Q. Okay.

21 MR. MURPHY: Marty, I am going to reach
22 across you. If you wouldn't mind handing this to
23 Dr. Peterson.

24 Q. (BY MR. MURPHY) I am going to show you
25 what's -- what I will refer to as 11B. It's an FBI

1 report.

2 Have you ever seen that before?

3 A. I don't know if I have or not. I don't
4 remember it.

5 Q. Okay.

6 If you wouldn't mind just briefly looking
7 through that.

8 Have you had enough time?

9 A. Yes.

10 Q. That's -- would you mind stating the date of
11 that report?

12 A. April 16, 1976.

13 Q. And it's a test from the FBI laboratory?

14 A. Yes.

15 Q. And there were eight items of clothing, Q1
16 through Q8, sent for semen testing?

17 A. Yes.

18 Q. Including the underwear?

19 A. Yes.

20 Q. And no semen was detected?

21 A. Yes. None was.

22 Q. None was detected?

23 A. None was detected.

24 Q. Okay.

25 So at this juncture you've got an FBI report

1 within close proximity by date to when the incident
2 occurred and you have no independent testing on acid
3 phosphatase of your own to testify to?

4 **A.** Right.

5 **Q.** And all we've got is W.O. Brown's statement
6 that there was strong acid phosphatase but no
7 quantification, no methodology, or any other
8 indications of how he arrived at that result.

9 You can't go before this jury and say to a
10 reasonable degree of medical certainty that you can
11 conclude that sexual activity occurred, can you?

12 **A.** No.

13 I think my earlier statement was it was
14 consistent with, but I can't say that it is
15 conclusive, that's correct.

16 **Q.** Consistent with, but, in fact, the lions
17 share of the evidence would seem to mitigate against
18 that finding?

19 **A.** It's just -- it's ambiguous. It doesn't
20 answer the question. The information doesn't answer
21 the question.

22 **Q.** The information doesn't answer the question.

23 **MR. MURPHY:** That's all I have.

24 Thank you.

25 We'll have to mark these exhibits and get

1 them --

2 **MR. JACKLEY:** Do you want to call it 11B?

3 **MR. MURPHY:** Let's do that one as 11B.

4 I don't know if it was announced, Your Honor,
5 we're outside the presence of the jury but we have the
6 press in the room.

7 Did you go through that at the beginning?

8 **THE COURT:** As to what?

9 **MR. MURPHY:** That we're outside the presence
10 of the jury.

11 **THE COURT:** I didn't but we clearly are
12 outside the presence of the jury and we're here to
13 resolve a question as to whether or not I'm going to
14 allow certain evidence and opinions related to that
15 evidence -- to that evidence to be presented to the
16 jury. That is a standard, ordinary, every day
17 procedural decision as to many items made in the
18 course of a trial.

19 Fundamentally, my decision has to be based on
20 whether evidence makes an event more or less likely to
21 have occurred. If it does neither, then it is not
22 relevant to the case because we are trying to decide
23 contested issues and only evidence that says, yay,
24 it's more likely or less likely to be, would be
25 relevant to the decision. An opinion that says could

1 be, could not be, is not relevant. And that's the
2 decision I have to make here.

3 Counsel agreed with that?

4 **MR. MURPHY:** That's a fair statement.

5 **MR. JACKLEY:** Yes.

6 **THE COURT:** That statement is offered for the
7 explanation of the press as to why we are here and
8 what I am doing, and I have to make a decision to that
9 end.

10 Mr. Jackley?

11 **MR. JACKLEY:** Thank you, Your Honor.

12 **REDIRECT EXAMINATION**

13 **BY MR. JACKLEY:**

14 **Q.** Doctor, is acid phosphatase used as a
15 presumptive test for sexual intercourse?

16 **A.** Yes.

17 **Q.** From your review of Dr. Brown's report, did
18 he make a finding with respect to the existence of
19 phosphatase?

20 **A.** He did.

21 **Q.** What was his finding?

22 **A.** He said that it was strongly positive for
23 acid phosphatase.

24 **Q.** Mr. Murphy asked you regarding the finding of
25 semen. And he provided you two documents -- or you

1 were provided two documents. One is 11A, which is the
2 report of Orchid Cellmark lab, dated September 26,
3 2008, along with an FBI report, 11B, which is April of
4 1976.

5 With respect to your review of the defense's
6 expert report, did presumptive testing demonstrate the
7 existence of semen?

8 **A.** Yes, it did.

9 **Q.** And I'll ask you a general question. Between
10 April of 1976 and September 26 of 2008, did technology
11 and testing improve with respect to semen -- detection
12 of semen?

13 **A.** I believe it did, yes.

14 **Q.** Just so that I have it -- understand it
15 correctly, is it your opinion today to a reasonable
16 degree of medical certainty that the existence of
17 strong acid phosphatase is consistent with
18 intercourse, but not conclusive?

19 **A.** Yes.

20 **MR. JACKLEY:** No further questions, Your
21 Honor.

22 **REXCROSS-EXAMINATION**

23 **BY MR. MURPHY:**

24 **Q.** Dr. Peterson, when we talk of a presumptive
25 test, that's a test that if the results are positive,

1 give us reason to conduct further testing; would that
2 be a fair statement?

3 A. Yes.

4 Q. And so in each of the cases since -- for
5 instance, the Orchid Cellmark test, they did a
6 presumptive test, correct?

7 A. Yes.

8 Q. And then they looked specifically for
9 spermatozoa, correct?

10 A. They did.

11 Q. And they found none?

12 A. They did.

13 Q. Similarly, with acid phosphatase, from
14 Dr. Brown's report, the indication that there is acid
15 phosphatase is a presumptive test, correct?

16 A. Yes.

17 Q. And it warrants further inquiry before you
18 can reach a conclusion, correct?

19 A. Or some hedging of your conclusion if you
20 can't do valid further testing.

21 Q. For instance, you would seek quantification
22 or microscopic examination?

23 A. Microscopic.

24 Q. Right.

25 So the fact that there may be a near

1 presumptive indication really just gets us to the
2 point of saying, well, now we're going to do further
3 testing or more detailed testing before we're going to
4 reach a conclusion?

5 **A.** Gets us there and it allows us to say that
6 it's consistent with, but not necessarily conclusive
7 of. It allows us to do that.

8 **Q.** Right.

9 And if we had more conclusive testing you
10 would be able to say to a reasonable degree of medical
11 certainty one way or the other?

12 **A.** With respect to recent sexual -- not really.
13 You can have penetration without any deposition of
14 male secretion so there is always ambiguity about it.
15 Positive testing at -- further levels of testing would
16 have settled the question better than what we have
17 here.

18 **Q.** Right.

19 It would, for instance, tell us whether the
20 levels of acid phosphatase were so high as to indicate
21 sexual activity as opposed to the kind of acid
22 phosphatase levels that might be found in decomposing
23 issue, correct?

24 **A.** In my experience, I don't think you can even
25 differentiate them if you have numerical values. If

1 they are very high -- the question -- there is still
2 ambiguity.

3 Q. So you would want microscopic testing?

4 A. Yes.

5 Q. To find out whether sperm were present?

6 A. Or even more sophisticated testing that
7 wasn't available that the time.

8 Q. So really at this point we got presumptive
9 testing?

10 A. Yes.

11 Q. All right.

12 And you can't render a conclusion one way or
13 another based on that?

14 A. Well, depends on the question asked. The
15 question I was asked is, is it consistent with and I
16 can answer that.

17 Q. You can answer that it's consistent with but
18 also could be inconsistent with?

19 A. Well, not inconsistent. It's consistent with
20 intercourse having taken place and it's consistent
21 with decomposition providing that positive test.

22 Q. Okay.

23 That's the best you can say?

24 A. Yes.

25 Q. And you can't say anything about the

1 reliability of Dr. Brown's tests?

2 **A.** No.

3 **MR. MURPHY:** Nothing further, Your Honor.

4 **THE COURT:** Well, everybody is ducking the
5 dollar question and I am not sure why.

6 Can you state within a reasonable degree of
7 medical certainty that sexual intercourse did take
8 place?

9 **THE WITNESS:** No.

10 **THE COURT:** So the finding is consistent with
11 it having taken place, but it's -- that could be true
12 at any time?

13 **THE WITNESS:** Yes.

14 **THE COURT:** And you are faced here with
15 decomposition which could account for other than
16 normal levels of acid phosphatase?

17 **THE WITNESS:** Yes.

18 **THE COURT:** So within the reasonable degree
19 of probability, you are unable, based upon the
20 relatively vague statements of Dr. Brown's autopsy, to
21 state that sexual intercourse was more likely than
22 not?

23 **THE WITNESS:** I can't answer the question yes
24 or no.

25 **THE COURT:** That seems to answer the

1 question. The finding, I suspect, goes in, but the
2 statement that that would indicate or could indicate
3 is consistent with, will not be made which means I
4 think the finding of acid phosphatase becomes
5 meaningless in terms of establishing whether or not
6 there was sexual intercourse. If it made it more
7 likely that there was, it would be admissible
8 evidence.

9 But where we stand here -- to enter it into
10 evidence is going to create or is very likely to
11 create an image in the minds of a jury that sexual
12 intercourse did occur and that the doctor thinks it
13 did occur, and the examination back and forth in front
14 of the jury will not be helpful in resolving that
15 issue.

16 So it is the decision of this court that any
17 comment or reference to the acid phosphatase being
18 indicative or establishing a probability or likelihood
19 of sexual intercourse will not be made nor will the
20 question be asked as to whether it is consistent with.

21 As that -- while it is understood in a legal
22 sense very clearly to say it does not mean anything
23 one way or the other, that might be misleading to the
24 jury and I am not going to let it go there.

25 **MR. JACKLEY:** Your Honor, based upon your

1 ruling, may I make a motion in limine that based upon
2 counsel's statements in opening statement, that he
3 cannot go in that direction, then. In other words,
4 it's not fair to the prosecution to have him comment
5 that we have no evidence regarding the acid
6 phosphatase or evidence regarding certain intercourse
7 when we, in fact, have got this ruling and our hands
8 are tied. I mean, it's not fair for him to --

9 **THE COURT:** Well --

10 **MR. MURPHY:** I can answer, which might help
11 you. Because this isn't going in, and I would ask
12 that Dr. Brown's autopsy not go in or it can be
13 discussed by Dr. Peterson -- unless we redact those
14 portions.

15 But I would not then on my examination of
16 Dr. Peterson be talking about the FBI lab reports or
17 anything else because it's no longer a topic.

18 I would merely comment at the end of the case
19 about the issues of Mr. Looking Cloud's credibility
20 or that particular issue, but I made clear in my
21 opening, I was talking about DNA and semen testing.
22 And that there wasn't that --

23 **MR. JACKLEY:** Well, there was, John. You got
24 a report.

25 **MR. MURPHY:** Well, there is no spermatozoa

1 found.

2 **MR. JACKLEY:** Well, can I go into this based
3 on opening statements? He said --

4 **THE COURT:** Well, I don't think Dr. Peterson
5 can go into it.

6 And I'm not -- presumptive testing to me
7 raises more questions than it answers. We don't let
8 breathalyzer results in. We do use them for a basis
9 for further blood tests and things of that nature.
10 They are presumptive indicators of too much alcohol in
11 the system and they establish a basis to look further.
12 But they -- I have never had one come into evidence
13 other than after a plea of guilty and a question asked
14 of the defendant, you were drinking and do you have an
15 objection to the breathalyzer results or the -- mostly
16 it's the blood test results being used for a factual
17 basis.

18 My real concern is, however -- at this stage
19 is somewhat consistent with yours. I am assuming that
20 the argument would be as to the unreliability of Arlo
21 Looking Cloud's recollections or statements. Somebody
22 has to convince me that a presumptive test for semen
23 made in 2008 is an indicator that -- I don't know what
24 it indicates. And that's a problem for me at this
25 stage when there is no further looking for PSA,

1 spermatozoa --

2 **MR. MURPHY:** And if I may add -- the
3 relevance of that was that it wouldn't match to my
4 client anyways. What I said during opening very
5 clearly is there was no DNA testing linking my client
6 to the rape or sexual assault of Anna Mae Aquash. So
7 even further than that when they attempted to find
8 some DNA that could link somebody to that, they were
9 unable to do so.

10 So it's you know, we got a presumptive
11 finding. We have then an inquiry into whether
12 spermatozoa were located. There was none. Then there
13 was an inquiry as to whether any DNA testing could be
14 obtained and there were none.

15 And so my opening was very narrow to that
16 issue. I'm obviously going to not open the door here
17 again on this ruling or anything else regarding that.
18 But I think -- we are where we're at on the testimony.

19 **MR. JACKLEY:** May I make a request with
20 respect to that?

21 **THE COURT:** Yeah.

22 **MR. JACKLEY:** This wouldn't be a very popular
23 request.

24 May I have a copy of the transcript of the
25 opening statement by Monday?

1 The reason I am asking for that is to revisit
2 this issue once Arlo Looking Cloud testifies and is
3 cross-examined because I believe what was said in
4 opening statement, combined with the cross-examination
5 of Arlo Looking Cloud, will further open the door to
6 the relevancy of this evidence for the prosecution to
7 get it in.

8 **THE COURT:** A, what would you intend or be
9 able to put in at that time, with the absence of
10 Dr. Peterson?

11 **MR. JACKLEY:** Through Dr. Habbe, who has been
12 noticed. It would be the intent to introduce
13 defense's report that indicates, quote, presumptive
14 testing for semen was positive on the panties, end
15 quote.

16 **THE COURT:** My problem is I still don't have
17 a clue what that means.

18 **MR. MURPHY:** Well, we could have hearing with
19 Dr. Habbe on this issue because we will go through the
20 next line and what the test found and the FBI stuff --

21 **THE COURT:** We get back to the same question.
22 I have to get back to where somebody will tell me that
23 there is evidence here that makes sexual intercourse
24 more likely than not. I think --

25 **MR. JACKLEY:** I think you've heard evidence

1 to a reasonable --

2 **MR. MURPHY:** Mr. Jackley, Mr. Mandel is
3 talking to the witness while we're in the middle of a
4 hearing.

5 **THE COURT:** Hold on. We got a witness here
6 that's sworn. And we're going to go from there and if
7 people want to ask further questions of him, that's
8 fine.

9 I want to kind of get headed back to the
10 trial.

11 **THE WITNESS:** Your Honor, could I just
12 clarify something that doesn't go to the issue you're
13 dealing with but it's a terminology issue, and that is
14 that semen is a two-part substance.

15 **THE COURT:** Seminal fluid --

16 **THE WITNESS:** It's -- seminal fluid is the
17 substance in which the sperm cells are suspended. The
18 sperm cells are the reproductive cells. I hear the
19 term semen being used. The two components together
20 make semen. The two are separate and distinct things.

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

22 I still don't know what a presumptive test
23 for semen means. That's my problem.

24 **MR. JACKLEY:** Isn't it just like a DUI, when
25 you have a blood test, there is a presumption when we

1 introduce the blood test in a DUI --

2 **THE COURT:** I don't think that the blood
3 test -- as to having -- you got a .2 and the question
4 is, is it a greater than .80. I don't think there is
5 anything presumptive about it.

6 **MR. MURPHY:** And it's a legal presumption.
7 That's a statutory legal presumption that says not
8 anything about the validity of the test or anything.
9 It says you are presumed to be intoxicated if you are
10 above a .08. This -- that's an apples and orange
11 issue. It has not doing do with the kind of
12 ambiguities that the doctor has indicated exist in
13 this case.

14 **MR. JACKLEY:** No, but it's very consistent
15 with I would not be able to Dr. Looyenga on the stand
16 as a prosecutor and say, do you have an opinion based
17 upon your blood test to a reasonable degree of medical
18 certainty that that defendant was drunk. That's an
19 inappropriate question. I mean, that's the
20 question --

21 **THE COURT:** I'm not going to go there.
22 That's also a misstatement of the question that would
23 go to Dr. Looyenga. And he would go through a whole
24 series of extractions and the likelihood of increases
25 and decreases of the blood alcohol content. And there

1 is two questions. One, are you impaired regardless of
2 how little you've had to drink. And number two, do
3 you have more than .08 in your system regardless of
4 whether you are impaired. Either of those will
5 constitute a DUI.

6 And if you have more than .08, you are not
7 only presumptively, you are flat out guilty of DUI.
8 And the only way you can combat that as I can see with
9 a .2 something blood alcohol test is show that the
10 test ain't worth -- that's it.

11 So I don't think that's a fair analogy of
12 what we have here. We have findings ten years
13 apart -- actually 25, 30 years apart. And I have a
14 presumptive test for semen. And that doesn't sound to
15 me like a positive test for semen. It says there is
16 indications of a possibility of semen, and I don't
17 know anything further than that.

18 If that's an accurate statement of what
19 presumptive means, it does not change my opinion. If
20 it says we need to look further to establish if semen
21 is in fact there, and we can't find evidence to
22 establish it's there, then I presume presumptive is
23 not an indication that sexual intercourse did or not
24 occur.

25 Doctor, answer that question. Is a

1 presumptive test -- and we don't know what the test
2 was I take it?

3 But is the indication that a test was done
4 for semen -- a presumptive test was positive for
5 semen -- does that in and of itself tell us that semen
6 was more likely there than not?

7 **THE WITNESS:** I would put it in the context
8 of this case and I'd say no.

9 **THE COURT:** Say again.

10 **THE WITNESS:** In the context of this case,
11 because of the decomposition, I would say no. Living
12 patients seen in an emergency room, the answer would
13 be different. But in this instance, I would say no.

14 **THE COURT:** That's where I am, folks.

15 **MR. JACKLEY:** Your Honor, before I go, I have
16 two requests. One is a request of a copy of the
17 transcript of the opening statement.

18 **THE COURT:** If it can be done. I don't have
19 a problem with it. You best look at her and either
20 she has to do it or someone else has to do it, and
21 we've got Friday, and I've got a pretty full schedule
22 Friday afternoon in addition to this, which requires
23 her to work on the weekend.

24 **MR. JACKLEY:** I will talk nice to her later
25 today.

1 **THE COURT:** I would, too.

2 **MR. JACKLEY:** And then the second request is
3 Mr. Murphy indicated a request to do redactions within
4 the Brown report. And I strenuously object to that
5 for the following reasons. Number one, the report is
6 the report.

7 Number two, based upon his opening
8 statements, but also based upon the fact he's already
9 used that report in the examination of witnesses.

10 **THE COURT:** He has not used that portion of
11 the report. And that portion of the report, including
12 his opinion, without any foundation that it could --
13 his is would -- indicate sexual activity, and the only
14 evidence of a valid medical opinion so far presented
15 to me is that it could indicate, but there is no way
16 to tell yes or no. That's my problem with it.

17 And so I don't have a problem with the
18 statement that there is an indication of -- because
19 that's consistent with decomposition as well. There
20 is a strong presence, whatever that means, of acid
21 phosphatase; but the statement of sexual intercourse
22 will not go to the jury.

23 **MR. JACKLEY:** So you want me to essentially
24 take out the last paragraph?

25 **THE COURT:** I didn't say that.

1 **MR. MURPHY:** It doesn't have to go before the
2 jury.

3 **THE COURT:** I didn't say that. I said I
4 wanted you to take out the last -- well, yeah, the
5 last thing in its entirety.

6 **MR. MURPHY:** For the record, we're looking at
7 page 19 of Dr. Brown's report. Graham document 4,450.

8 **MR. JACKLEY:** Well, I'm looking at 00307.

9 **MR. MURPHY:** Yeah, it's been renumbered.

10 **THE COURT:** Page 19. Yeah, the last sentence
11 comes out.

12 **MR. MURPHY:** Can I make a report on that,
13 Your Honor?

14 **THE COURT:** Yeah.

15 **MR. MURPHY:** Because we're not going to have
16 testimony about acid phosphatase, the mere indication
17 of acid phosphatase -- the report reads acid
18 phosphatase -- the vaginal contents, were strongly
19 positive for acid phosphatase. That would be without
20 foundation and would be misleading to the jury.
21 The last --

22 **THE COURT:** I don't think that's true. I
23 think that's consistent with -- I mean, we have no
24 reason to quibble with the fact that it was there
25 other than there are errors in the report.

1 But I don't see any reason to take that out
2 of the report.

3 **MR. MURPHY:** Okay.

4 So the last --

5 **THE COURT:** Just -- the last paragraph which
6 draws conclusions without scientific basis being set
7 forth in the report; and Dr. Peterson's testimony that
8 says from that report I cannot render an opinion
9 whether it is more likely that sexual intercourse
10 occurred than not.

11 **MR. MURPHY:** So we're going to be clear here,
12 there is not going to be any testimony through
13 Dr. Peterson about acid phosphatase?

14 **THE COURT:** That's true, and there is not
15 going to be any discussion about sexual intercourse.

16 **MR. JACKLEY:** Unless he opens the door.

17 **THE COURT:** Well, if he crosses -- you know,
18 if he does that --

19 **MR. JACKLEY:** I am just -- it's not going to
20 happen here, but it's going to happen at Arlo Looking
21 Cloud's examination is what I mean.

22 Can we revisit that after that?

23 **THE COURT:** We will deal with that. I
24 understand my ruling. I don't know if anybody else
25 does.

1 **MR. JACKLEY:** I do. I am not going there.

2 **THE COURT:** Nobody is going to go there.

3 Nobody is going to go there. Period.

4 **MR. JACKLEY:** Based upon redactions, can I
5 make a request, then?

6 **THE COURT:** Yes.

7 **MR. JACKLEY:** I would request that on page 17
8 of the Brown autopsy -- excuse me. It's page 16
9 marked C dash 17.

10 **THE COURT:** I understand the page.

11 **MR. JACKLEY:** I am requesting the redaction
12 of quote, a Kotex pad was in the crotch of the
13 panties, end quote.

14 The reason for that is there is no evidence
15 of Kotex pad. And I think similarly, then, to the
16 reference to the acid phosphatase, it should be
17 removed.

18 **MR. MURPHY:** No.

19 **THE COURT:** It has no relevance. I mean --
20 but -- there is no reason to remove it because it
21 doesn't say anything any way or the other. And I am
22 not going to --

23 **MR. JACKLEY:** Okay.

24 **THE COURT:** -- I am not going to do that with
25 a report that has ambiguities in it, but I suspect

1 even if he's wrong about weights and measurements,
2 it's pretty hard to be wrong about a Kotex pad in the
3 panties from my limited experience.

4 **MR. MURPHY:** Yeah.

5 **THE COURT:** So I see no reason to take that
6 out. I don't see that it has any indication to sexual
7 intercourse plus or minus. I don't think it means
8 anything beyond the jury would assume that she was
9 menstruating.

10 **MR. MURPHY:** Do you --

11 Do you need time to get the redaction.

12 **MR. JACKLEY:** Yeah. I want you to see it so
13 you are okay with it.

14 **THE COURT:** Okay.

15 (Whereupon, the following proceedings were
16 then had in open court in the presence of the jury.)

17 **THE COURT:** Satisfied this is the jury,
18 Mr. Jackley?

19 **MR. JACKLEY:** I am, Your Honor.

20 **THE COURT:** Mr. Murphy?

21 **MR. MURPHY:** Yes, Your Honor.

22 **THE COURT:** I think you are still batting,
23 Mr. Jackley.

24 **MR. JACKLEY:** The state would call Dr. Garry
25 Peterson, Your Honor.

1 **THE COURT:** Please come forward, Doctor.

2 GARRY PETERSON,

3 called as a witness herein, having been duly sworn,

4 under oath testified as follows:

5 **THE COURT:** Please take a seat.

6 **DIRECT EXAMINATION**

7 **BY MR. JACKLEY:**

8 **Q.** Could you please introduce yourself to the
9 jury, including where you live.

10 **A.** My name is Garry Peterson,
11 G-A-R-R-Y-P-E-T-E-R-S-O-N. I live in Minneapolis,
12 Minnesota.

13 **Q.** Dr. Peterson, what is your occupation?

14 **A.** I'm a physician. I'm a retired physician.
15 Doctor of medicine.

16 **Q.** Can you briefly describe your education and
17 work background for the jury?

18 **A.** It's fairly long, but I attended college in
19 the twin cities. I went to Hamline University and
20 then transferred to the University of Minnesota and
21 graduated in 1964. I worked for a year and then
22 attended medical school at the University of Minnesota
23 Medical School from 1965 through 1969.

24 Following that I had a one-year rotating
25 internship at St. Paul Ramsey Hospital which is the

1 city/county hospital in St. Paul.

2 And then undertook a five-year training
3 period in specialities of pathology, clinical
4 pathology, anatomic pathology, and forensic pathology.
5 The first three years were in clinical pathology and
6 anatomic pathology at St. Paul Ramsey Hospital in St.
7 Paul.

8 The fourth year was in forensic pathology at
9 the Hennepin County Medical Examiner's Office.

10 And the fifth year was in clinical pathology
11 and anatomic at the Hennepin County Medical Center
12 which is the city/county hospital in Minneapolis.

13 Q. Doctor, I am handing you what has previously
14 been marked State's Exhibit No. 9.

15 Do you generally recognize this document?

16 A. Yes, I do.

17 Q. What is that document?

18 A. It's titled my curriculum vitae. I am not
19 sure exactly how far it goes. I think it's correct.
20 I retired in 2004, but it shows my background.

21 MR. JACKLEY: Your Honor, I would offer
22 State's Exhibit No. 9.

23 MR. MURPHY: No objection.

24 THE COURT: Will be received.

25 A. Your question I think also asked for my work

1 experience.

2 Q. (BY MR. JACKLEY) Yes.

3 A. Following that completion of my residency
4 training I went into the practice of pathology in
5 St. Paul. And worked at St. Paul Ramsey Hospital as a
6 pathologist.

7 And while I was doing that, began law school
8 at William Mitchell College of Law in St. Paul, and I
9 attended there from 1975 to 1979 and finished law
10 school.

11 In 1976, I became the lead pathologist at
12 Fountain's Park Hospital. That was a private hospital
13 in St. Paul. And worked there until 1979 when I went
14 back to the Hennepin County Medical Center and was on
15 the pathology staff there and became an assistant
16 medical examiner in the Hennepin Medical Examiner's
17 Office.

18 I had been -- since the time of my training
19 at the Hennepin County Medical Examiner's Office, been
20 a deputy medical examiner and worked part-time in the
21 office. So there was continual work in the office.

22 And then went back on a full-time basis with
23 my position spanning those two positions at Hennepin
24 County Medical Center.

25 I became the Chief Medical Examiner of

1 Hennepin County. That's the county that Minneapolis
2 and the surrounding suburbs occupy. And held the
3 position of Chief Medical Examiner until 2004 when I
4 retired.

5 Q. Doctor, tell the jury what a forensic
6 pathologist does.

7 A. Forensic pathology is a subspecialty area of
8 general pathology. I mentioned those other two areas
9 and if you ask a question about that, I will answer
10 that separately.

11 Forensic pathologists generally work in a
12 coroner's or medical examiner's office. But the term
13 is broader than that. The term comes from the Latin
14 word forum which is in a courtroom. And so it's
15 applied because forensic pathologists are often asked
16 to address scientific questions in a legal setting.

17 But as I said, most forensic pathologists
18 will work in a medical examiner's or coroner's office
19 investigating sudden, unexpected death and unnatural
20 death. And that's what I devoted most of my career
21 to.

22 Q. Is one of your duties or responsibilities
23 conducting autopsies or supervising autopsies?

24 A. Yes.

25 Q. I want to take you back to 1976. Were you

1 involved in the autopsy of Annie Mae Aquash?

2 **A.** I was involved in a second autopsy.

3 **Q.** Do you remember where that occurred?

4 **A.** It took place at the Pine Ridge Public Health
5 Hospital.

6 **Q.** Doctor, after the completion of the autopsy,
7 did you issue an autopsy report identifying certain
8 findings?

9 **A.** I did.

10 **Q.** I am handing you what has previously been
11 marked State's Exhibit 10.

12 Can you take just a moment to familiarize
13 yourself with that exhibit. It's a copy of that
14 report.

15 **MR. JACKLEY:** Your Honor, I would offer
16 State's Exhibit 10.

17 **MR. MURPHY:** If I may just have a minute,
18 Your Honor?

19 No objection, Your Honor.

20 **THE COURT:** Will be received.

21 **Q. (BY MR. JACKLEY)** So Doctor, on or about
22 March 11, 1976, at Pine Ridge, South Dakota, you
23 conducted an autopsy?

24 **A.** Yes, I did.

25 **Q.** When you first walked into the autopsy room,

1 describe to the jury the general condition of the
2 body?

3 **A.** The body had recently been exhumed from a
4 nearby cemetery. It was in relatively poor condition.
5 There was a great deal of decomposition that had taken
6 place. There was preservative powder and fluid
7 associated with the body. So it was in relatively
8 poor condition.

9 **Q.** Would it have been consistent with being
10 outdoors for an extended period of time?

11 **A.** Yes.

12 **Q.** Upon your initial examination of the body,
13 tell the jury what you did and what you found.

14 **A.** If I could have a copy of the exhibit to
15 refer -- it's many, many years ago.

16 **Q.** Sure.

17 **A.** Thank you.

18 I examined the external aspects of the body.
19 I then opened the body to look at the internal organs
20 that were there. In the process -- and I'm not sure
21 exactly when it was -- I requested the x-rays be taken
22 so x-rays were taken, as well.

23 **Q.** Before you had ordered or requested the
24 x-rays, did you feel any irregularities?

25 **A.** In examining the head, I had -- it's my

1 recollection that I had begun the examination having
2 requested the x-rays. And by that time I had done an
3 external examination of the head. And in feeling the
4 head with my gloved fingers I could feel that there
5 had been removal of the top of the skull for autopsy
6 purposes, but I did feel a firmness in the left temple
7 area. I reserved judgment on that and then made a
8 final determination after the x-ray and after the
9 internal examination.

10 Q. Before I talk to you about the x-rays that
11 you had done, you had indicated that you had conducted
12 the second autopsy; is that fair?

13 A. Yes.

14 Q. Were you provided or were you aware of
15 whether any x-rays had been taken in the first
16 autopsy?

17 A. I was not provided any x-rays from that
18 autopsy.

19 Q. Doctor, I am handing you what has been marked
20 State's Exhibits 13 and 14.

21 Do you generally recognize those two
22 documents?

23 A. I do.

24 Q. What are they?

25 A. They are the x-rays of the head of Anna Mae

1 Aquash.

2 Q. The x-rays that you had requested be taken?

3 A. Yes.

4 MR. JACKLEY: Your Honor, I would offer
5 State's Exhibits 13 and 14.

6 MR. MURPHY: No objection.

7 THE COURT: They will be received.

8 Q. (BY MR. JACKLEY) Doctor, I am going to
9 display for you up on the screen Exhibit 13, the
10 autopsy -- or the x-ray.

11 Doctor, you made a reference to you had felt
12 something in the left temple area.

13 Upon examination of the x-ray, were you able
14 to identify an object?

15 A. Yes, I was.

16 Q. I am putting my finger on the x-ray.

17 Is that the object in the left temple area?

18 A. Yes, it is.

19 Q. What did that mean to you when you saw that?

20 A. It meant to me that there was a projectile, a
21 gunshot projectile, in the head.

22 Q. I am going to put up on the screen for you,
23 Doctor, Exhibit 14, which is a side photo --

24 Let me ask you, what does that appear to be
25 an x-ray of?

1 **A.** That's a side-view of the head.

2 **Q.** And again, were you able to identify a
3 projectile where my finger is pointed?

4 **A.** Yes, that's the projectile.

5 **Q.** Doctor, in examining the head area, were you
6 able to identify an entrance wound?

7 **A.** Yes, I was.

8 **Q.** Please describe that to the jury.

9 **A.** I'd like to refer to my notes because it is a
10 very long time ago.

11 It was in the posterior neck area. The back
12 of the neck. And it was a little over an inch and a
13 half above where the bottom of the skull meets the
14 neck. And it was about two inches to the right of the
15 center line. So I will turn and I will indicate as
16 best I can without a ruler on myself. It was in this
17 area of the head back here behind what would be my
18 right ear.

19 It was a perforation that was 4 millimeters
20 in size. Something in the range of about
21 three-sixteenth of an inch. And it had an abraded rim
22 around the edge and then surrounding it was an area of
23 blackish discoloration that was something in the range
24 of -- I will do a little calculating here.
25 Five-eighths of an inch by approximately

1 seven-eighths of an inch, a little less than an inch,
2 very, very black discoloration on the skin.

3 Q. What did that show you or tell you?

4 A. It indicated to me it was gunshot residue
5 surrounding that.

6 Q. Doctor, did you ultimately remove the
7 projectile from Ms. Aquash?

8 A. Yes, I did.

9 Q. Doctor, I am handing you what's previously
10 been introduced and admitted as State's Exhibit No. 8.

11 Do you generally recognize that exhibit?

12 A. I do, yes.

13 Q. What is that exhibit?

14 A. It comprises two things. One is a small
15 cardboard box with some evidence-type tape on it. It
16 has my writing on it. And then the projectile is
17 here. And after all these years, I don't know that I
18 can specifically identify this, but it's consistent
19 with what I remember the bullet looking like.

20 Q. And your writing does appear on the box?

21 A. That's my handwriting.

22 **MR. JACKLEY:** Your Honor, may I show this to
23 the jury?

24 **THE COURT:** Yes.

25 Q. **(BY MR. JACKLEY)** Would you take a minute and

1 describe to the jury how you removed the bullet. What
2 steps you took.

3 **A.** Well, I located it with my fingers. It was
4 in close to bone, but there was also soft muscle
5 tissue around it. And I was able to remove it just
6 using my fingers. I could work it out and get it to
7 come out. Kind of the way it had gone in so I was
8 able to take it out without having to use instruments
9 on it.

10 **Q.** Why did you use your fingers rather than
11 using instruments?

12 **A.** It's the preferred way to remove something
13 like that. Otherwise you may damage identifying
14 information that's on the bullet. So we're taught --
15 and when I was teaching the subject -- taught that if
16 at all possible you should use only fingers to remove
17 something without damaging it.

18 **Q.** Doctor, I am handing you what has been
19 previously marked as State's Exhibit 12.

20 Do you generally recognize that photograph?

21 **A.** Yes, I do.

22 **Q.** Did you take that photograph?

23 **A.** I believe I did, yes.

24 **MR. JACKLEY:** Your Honor, I would offer
25 State's Exhibit 12.

1 **MR. MURPHY:** No objection.

2 **THE COURT:** Will be received.

3 **Q. (BY MR. JACKLEY)** And Doctor, that was the
4 general condition of the bullet as it exists today and
5 as it existed when you removed it with your fingers
6 from the body?

7 **A.** I think today it looks a little darker. The
8 years have darkened it, but the same general
9 condition, yes.

10 **Q.** Doctor, we talked today about the entrance
11 wound, the powder by the entrance wound, the bullet
12 that was removed.

13 My question to you, would that information be
14 consistent with death by hit-and-run by a motor
15 vehicle?

16 **A.** It would not.

17 **Q.** Doctor, what was your finding as to the cause
18 of death of Annie Mae Aquash?

19 **A.** It was my opinion that she died as a result
20 of a gunshot wound to the head.

21 **Q.** Would that have been to the back of the head?

22 **A.** Yes.

23 **MR. JACKLEY:** No further questions, Your
24 Honor.

25 **THE COURT:** Mr. Murphy?

CROSS-EXAMINATION

1
2 **BY MR. MURPHY:**

3 Q. My name is John Murphy.

4 We just met a few minutes ago.

5 A. That's right.

6 Q. I'm going to ask you a series of questions.
7 Don't hesitate to let me know if my questions aren't
8 clean, okay?

9 A. All right.

10 Q. I talk a little too quickly sometime for Tina
11 so I am going to try to.

12 A. I think I do too so if you hear me, slow me
13 down, too.

14 Q. Either that or she will yell at both of us.
15 What I want to talk to you first about is how
16 you came to be doing this second autopsy.

17 You were contacted by a gentleman named Ken
18 Tilson?

19 A. That's right.

20 Q. And he was an attorney out in the twin cities
21 area?

22 A. He was, yes.

23 Q. And he was affiliated with representing
24 people in the American Indian Movement?

25 A. He had done that. He was known for that,

1 yes.

2 Q. Okay.

3 When you came out to South Dakota, you then
4 became in contact with an attorney called Bruce
5 Ellison?

6 A. I met him that day or that evening.

7 Q. In fact, Mr. Ellison had obtained the permit
8 for the autopsy?

9 A. I don't remember, but that seems correct.

10 Q. Do you still have your autopsy report if
11 front of you?

12 A. Yes.

13 Q. If you look under the first section, history
14 on page 1 --

15 A. It is mentioned there, yes. Thank you for
16 refreshing my recollection.

17 Q. All right.

18 So it was Mr. Tilson who contacted you
19 initially, and then Mr. Ellison is who arranged for
20 the autopsy to be done by you?

21 A. Well, I don't know what his role was in the
22 arrangement. He was the one that met me at the flight
23 I took out to Rapid City. And then I road with him
24 down to the Pine Ridge Hospital.

25 Q. Okay.

1 And at the time that this occurred, February
2 of 1976, you were not the Chief Medical Examiner for
3 Hennepin County?

4 **A.** No. I was a Deputy Medical Examiner.

5 **Q.** When did you become chief?

6 **A.** 1984.

7 **Q.** Okay.

8 So several -- a decade later or about eight
9 years later?

10 **A.** Eight years, yeah.

11 **Q.** At the time you did -- or you came to South
12 Dakota, you weren't anticipating doing an autopsy?

13 **A.** No, that is not what I had been requested to
14 do.

15 **Q.** In fact, you were told you were just going to
16 come out an as observer?

17 **A.** Yes.

18 **Q.** And you were surprised when you found out it
19 was you who was going to do the autopsy?

20 **A.** Yes.

21 **Q.** The FBI didn't have a pathologist lined up to
22 do the matter?

23 **A.** That's how it turned out.

24 **Q.** In fact, did you even have your tools with
25 you?

1 **A.** No.

2 **Q.** And at this point you had just finished your
3 training as a pathologist, had you not?

4 **A.** Yes.

5 **Q.** And you thought that perhaps this would be an
6 opportunity for you to learn by watching somebody else
7 do the autopsy?

8 **A.** I thought it would be a good experience and
9 would be professionally worth while for me to do, yes.

10 **Q.** Because you had just finished your training?

11 **A.** Yes.

12 **Q.** Now, I want to talk to you about your
13 statement that the body's condition was consistent
14 with the body being exposed or being out in the
15 elements for a substantial period of time.

16 Do you recall that question?

17 **A.** Yes.

18 **Q.** Have you identified a probable date of death?

19 **A.** No.

20 **Q.** Would it be fair to say that you cannot
21 establish a probable date of death?

22 **A.** Yes. A specific date, no, I could not.

23 **Q.** Okay.

24 And the best you can say, I mean for sure in
25 your field is that the person died some time between

1 when they were last seen alive and when the body was
2 found?

3 **A.** Yes.

4 **Q.** And the warmer the temperature, the more
5 rapidly a body would decompose?

6 **A.** That's generally true, but again, there can
7 be many factors. Sometimes individual to a particular
8 person.

9 **Q.** Sure.

10 Which further complicates establishing time
11 of death?

12 **A.** Yes.

13 **Q.** But as a general principle, the warmer the
14 temperature, the more rapidly the body would
15 decompose?

16 **A.** Yes.

17 **Q.** I want to discuss with you a couple letters
18 you were provided by the government. I am going to
19 show you a letter dated August 25, 1994.

20 Do you recall that letter?

21 Take your time in reviewing it.

22 **A.** Yes.

23 **Q.** And essentially that's a letter from
24 Mr. Ecoffey asking you to look at various pieces of
25 information?

1 **A.** Yes.

2 **Q.** One of the pieces of information he asked you
3 to look at were average weather or temperature
4 readings?

5 **A.** Yes.

6 **Q.** At the time in question?

7 **A.** Yes.

8 **Q.** And I'm going to show you another letter.

9 This letter dated March 21, 2003.

10 Could you review that for a moment.

11 **A.** Yes.

12 **Q.** Do you recognize that?

13 **A.** Yes.

14 **Q.** And that's a second letter from Mr. Ecoffey
15 to you?

16 **A.** Yes.

17 **Q.** And again he discussed temperature readings?

18 **A.** Yes.

19 **Q.** Provided you with some weather charts?

20 **A.** Yes.

21 **Q.** All right.

22 I am going to provide you now with three
23 documents previously marked as Defendant's Exhibits
24 103, 104 and 105.

25 Take a moment if you would like and review

1 those.

2 A. Yes.

3 Q. Are they familiar to you?

4 A. I have seen them, yes.

5 Q. All right.

6 Those are the weather charts Mr. Ecoffey gave
7 to you?

8 A. I believe they are, yes.

9 Q. All right.

10 Going back to the letter dated March 21,
11 2003, Mr. Ecoffey gave you some average temperatures
12 for December, January, and February, correct?

13 A. Yes.

14 Q. And for February of 1976, he told you the
15 average high temperature was 50.9 degrees?

16 A. Yes.

17 Q. And the average low temperature was
18 25.1 degrees.

19 A. Yes.

20 Q. Would you mind flipping to the last exhibit.
21 Does that appear to be the weather chart for
22 February of 1976?

23 A. Yes.

24 Q. All right.

25 It is, by all accounts, a horrible

1 reproduction. That's the best we have. So I have
2 actually brought a microscope or a magnifying glass
3 for your benefit. These documents were photocopied 35
4 years ago.

5 What I am going to ask you to do -- let's use
6 this as a ruler. We're going to go down to the
7 reading for Interior, South Dakota.

8 And if you can, can you determine whether
9 that reading, the average at the end, corresponds with
10 the average that Mr. Ecoffey gave you, 50.9 and 25.1?

11 **A.** Within the limits of a Xerox copy, I think
12 that's correct.

13 **Q.** Okay.

14 So it appears that he was using the numbers
15 from Interior, South Dakota?

16 **A.** Yes.

17 **Q.** If you wouldn't mind keeping that just like
18 that because we're going to talk more about this.

19 I am going to show you what's been marked as
20 Defendant's Exhibit 107. What I want you to do, if
21 you can, starting at February 24, check to make sure
22 that my numbers are right for the average high and
23 low.

24 **A.** Yeah, I have done that.

25 **Q.** Take your time. This is a poor copy.

1 Do you see the high being 63 and the low
2 being 41?

3 A. It's either a 63 or 53. I am not sure. I
4 got my finger on it. It's either a 63 or 53. I am
5 not sure.

6 Q. Let's go to the next day, February 23, which
7 would be going back one.

8 Does that appear to be a 65 high, 43 low?
9 Going back the other way.

10 A. I am sorry.

11 Q. That's all right?

12 A. I think so.

13 Q. You think so.

14 The next date, high of 59, low of 22?

15 A. Yes.

16 Q. The next date, which would be February 21,
17 high of 44, low of 12?

18 A. Yes.

19 Q. February 20, high of 42, low of 21?

20 A. They are hard to read. I think that's
21 correct.

22 Q. Could be a 21, could be a 31.

23 A. I have more trouble with the four.

24 Q. All right.

25 A. And then the two is not very good either.

1 Q. The next date, high of 46, low of 21?

2 A. That is clear. That's correct.

3 Q. And the next day is the high of 46 but there
4 is no reading for the low?

5 A. No. That's correct. What you say is
6 correct.

7 Q. High of 52, no data for a low?

8 A. Yes.

9 Q. February 16 there is no date at all, correct?

10 A. That's right.

11 Q. Going to February 15, high of 64, low of 34?

12 A. Yes.

13 Q. February 14, high of 64, low of 62?

14 A. There is no low.

15 Q. No low on February 14. Okay. I am sorry.

16 That was my mistake.

17 February 13, high of 56, low of 28?

18 A. What was the day again?

19 Q. February 13.

20 A. I think I see a 54 and maybe a 25 or 26.

21 Q. Okay.

22 February 12, 61 and 40?

23 A. Yes.

24 Q. Okay.

25 The date before that, February 11, 53 high,

1 36 low?

2 A. I think it's a 35.

3 Q. All right.

4 February 10, high of 54, low of 39?

5 A. Yes.

6 Q. And February 9, high of 59, low of 46?

7 A. Yes.

8 Q. All right. That's as far as I want to cover
9 with you.

10 I have made the corrections that you
11 indicated.

12 Now, looking at Exhibit 107, you can keep
13 that before you. I am going to grab my copy of it.

14 What that would indicate -- looking at that
15 chart, let's start with February 9, 10, and 11,
16 that's -- actually 9, 10, 11, and 12. That's four
17 consecutive days where the low never goes below
18 freezing?

19 A. Yes.

20 Q. We go to February 14 and February 15, we
21 don't have a low for February 14, but we know the
22 day -- or the day after February 15 the entire 24-hour
23 cycle is above freezing?

24 A. Yes.

25 Q. And on the previous day, February 14, we get

1 to a high of 64, correct?

2 **A.** Yes.

3 **Q.** Going down to February 24 and February 23,
4 there again we have a 48-hour period where the
5 temperature stays above freezing the entire duration,
6 correct?

7 **A.** Yes.

8 **Q.** Out of the 15 days listed here, not counting
9 the one day that there is no data at all, February 16,
10 every single day in that 15-day period preceding the
11 body being found on February 24, the temperature is
12 above freezing?

13 **A.** Yes.

14 **Q.** In fact, five of those days are above 60,
15 correct?

16 **A.** Well, I have to count again. Yes, five.

17 **Q.** Unseasonably warm February temperatures,
18 would you agree?

19 **A.** Well, I am from Minneapolis. I am not from
20 Rapid City or from the Interior, South Dakota area.

21 **Q.** In any regard, as we indicated or discussed
22 before, the warmer the temperature, the faster the
23 body would decompose other things being equal?

24 **A.** Yes. It can vary from person to person and
25 there is a great deal of variation possible but

1 generally that's true.

2 Q. So when you are presented with temperatures
3 this warm in the 15-day period before the body was
4 found, does that cause you to conclude that her body
5 could have decomposed rapidly, or at least it would
6 have speeded up the process of decompensation as
7 opposed to if the temperatures would have been below
8 freezing the entire time?

9 A. Yes.

10 And I think it was my conclusion that a great
11 degree of the decomposition had occurred in this time
12 period.

13 Q. Okay.

14 That was your conclusion at the time?

15 A. Yes.

16 MR. MURPHY: Okay. No further questions.

17 Actually, I should -- at this point, Your
18 Honor, I would move to admit Defendant's Exhibit 107
19 and 105.

20 MR. JACKLEY: Can I see them so I got them
21 straight?

22 MR. MURPHY: And for the record they are
23 Graham documents 4,406 --

24 MR. JACKLEY: Yeah.

25 MR. MURPHY: Any objection?

1 **MR. JACKLEY:** No objection, Your Honor.

2 **THE COURT:** They will be received.

3 I do think the change, though, reflects the
4 difference in the average than that reflected on the
5 exhibit.

6 **MR. MURPHY:** So noted, Your Honor.

7 **REDIRECT EXAMINATION**

8 **BY MR. JACKLEY:**

9 Q. Doctor, I just have a couple of brief areas
10 of inquiry.

11 My understanding of your discussion with
12 Mr. Murphy is that essentially you can't give a
13 specific date of death based on viewing the body; is
14 that fair?

15 A. That's correct.

16 Q. Explain to this jury why not.

17 A. It's one of the biggest, if not the biggest
18 problem, in forensic pathology. In detective fiction
19 they always have things cinched within a very small
20 type period. But it's very difficult because there is
21 so many factors. And the longer the interval between
22 the time of death and the time that a body is observed
23 becomes even in difficult. And so pinpointing a time
24 of death is a very difficult thing to do and we're
25 generally taught that it's not advisable to try to

1 give a specific date unless there is something that
2 very specifically would indicate that.

3 Q. Doctor, and kind of what you and I talked
4 about earlier, when you first saw that body, did it
5 appear to you to have been out in the elements for
6 quite some time?

7 A. It did, yes.

8 Q. Doctor, anything about what you and
9 Mr. Murphy talked about change your opinion as to the
10 cause of death?

11 A. No.

12 Q. And again, what was the cause of death?

13 A. It was a gunshot wound to the head.

14 Q. Was it a death by a motor vehicle?

15 A. No.

16 MR. JACKLEY: No further questions, Your
17 Honor.

18 MR. MURPHY: Nothing further, Your Honor.

19 THE COURT: Thank you, Doctor.

20 You may be excused.

21 (Witness excused.)

22 MR. JACKLEY: Judge, do you want me to call
23 my next witness or do you want to take a break.

24 THE COURT: I assume we had enough of a break
25 and we'll go for a while.

1 **MR. JACKLEY:** The state would call Angie
2 Begay, Your Honor.

3 **THE COURT:** Please raise your right hand.

4 ANGIE JANIS,
5 called as a witness herein, having been duly sworn,
6 under oath testified as follows:

7 **THE COURT:** Please take a seat.

8 **DIRECT EXAMINATION**

9 **BY MR. JACKLEY:**

10 **Q.** Angie, please introduce yourself to the jury
11 and let them know where you live.

12 **A.** My name is Angie Janis and I live in Pine
13 Ridge, South Dakota.

14 **Q.** Angie, did you go by a different name in
15 1975?

16 **A.** Yes, I did.

17 **Q.** What was that name?

18 **A.** Angie Begay.

19 **Q.** I want to take you back, Angie, to 1975.
20 Where did you work at?

21 **A.** Native American Rights Fund.

22 **Q.** And in what state would that have been?

23 **A.** Boulder, Colorado.

24 **Q.** Did you know John Graham?

25 **A.** Yes, I did.

1 **Q.** How did you know John Graham?

2 **A.** He was my boyfriend.

3 **Q.** Did you live together?

4 **A.** Yes.

5 **Q.** Were you generally a supporter of the
6 American Indian Movement?

7 **A.** Yes.

8 **Q.** Did you know Troy Lynn Yellow Wood?

9 **A.** Yes.

10 **Q.** How did you know Troy Lynn?

11 **A.** Just an acquaintance.

12 **Q.** Was it through some of the American Indian
13 Movement activities?

14 **A.** Yes.

15 **Q.** Have you ever been to her house?

16 **A.** Yes.

17 **Q.** Where was her house at back in 1975?

18 **A.** On Pecos.

19 **Q.** Did you know an individual by the name of
20 Thelma Rios?

21 **A.** Yes.

22 **Q.** How did you know Thelma?

23 **A.** Just an acquaintance.

24 **Q.** Did you know Thelma well enough where you
25 would recognize her voice?

1 **A.** Yes.

2 **Q.** Did you know Theda Clarke?

3 **A.** Yes.

4 **Q.** How do you know Theda Clarke?

5 **A.** Just an acquaintance.

6 **Q.** I want to take you back to the fall of 1975.

7 Do you remember having a phone conversation
8 regarding able?

9 **A.** Yes.

10 **Q.** Who did you talk to?

11 **A.** Thelma Rios.

12 **Q.** Did you recognize her voice?

13 **A.** Yes.

14 **Q.** What did Thelma and you discuss?

15 **A.** Something to the effect that Annie Mae needed
16 to be brought back to Rapid City. She was an
17 informant. I believe that's what it was.

18 **Q.** Okay.

19 Who do you recall passing this informant
20 information on to?

21 Who did you tell?

22 **A.** I think -- I don't recall.

23 **Q.** Okay.

24 Do you recall passing it on?

25 **A.** Yes.

1 **Q.** How long after the call did you pass it on?
2 Was this a deal where you passed it on fairly
3 immediately?

4 **A.** The same day.

5 **Q.** Okay.

6 At the time that you took that phone call in
7 the fall of 1975, do you know where Annie Mae Aquash
8 was staying?

9 **A.** No.

10 **Q.** The night of the phone call that you took and
11 after you relayed the information did you go to Troy
12 Lynn's?

13 **A.** Yes.

14 **Q.** Who was at Troy Lynn's that evening?

15 Who do you recall being at that house there
16 in Denver?

17 **A.** Troy Lynn, Theda, John Boy, Arlo.

18 **Q.** Was Annie Mae there?

19 **A.** Yes.

20 **Q.** Were there some individuals from the Crusade
21 for Justice there?

22 **A.** Yes.

23 **Q.** Do you remember was Corky Gonzalez there?

24 **MR. MURPHY:** Objection. Leading.

25 **THE COURT:** Overruled.

1 **A.** I don't remember.

2 **Q.** **(BY MR. JACKLEY)** Was there a meeting held at
3 Troy Lynn's that evening?

4 **A.** Yes.

5 **Q.** Generally, what of the meeting about?

6 **A.** I don't recall.

7 **Q.** Did it have to do with Annie Mae Aquash?

8 **MR. MURPHY:** Again, objection. Leading.

9 **THE COURT:** Overruled.

10 **A.** Yes.

11 **Q.** **(BY MR. JACKLEY)** Do you recall, when the
12 meeting was going on about Annie Mae, where Annie Mae
13 was at?

14 **A.** In the basement.

15 **Q.** Was there a discussion that you were involved
16 in or that you were privy to about her being an
17 informant?

18 **A.** I don't recall.

19 **Q.** Okay.

20 Did there come a time that somebody took
21 Annie Mae or that Annie Mae left Troy Lynn's that
22 evening?

23 **A.** Yes.

24 **Q.** Can you describe that generally to the jury,
25 please.

1 **A.** Just that the -- Arlo and John Boy and Theda
2 took her out the door.

3 **Q.** When you say John Boy, are you referring to
4 John Graham?

5 **A.** Yes.

6 **Q.** Was her movement in any way restricted when
7 she was taken out of the house?

8 Was she tied up?

9 **A.** Her hands were tied.

10 **Q.** Do you -- were you able to hear Annie Mae say
11 anything to you or to anybody?

12 **A.** No.

13 **Q.** When you say they took her, you indicated she
14 was tied up.

15 What did you see when you said they took her?

16 Where did they take her to?

17 **A.** Out the door.

18 **Q.** Okay.

19 Did you know where they were going?

20 **A.** I assumed where they were going.

21 **Q.** Did you assume that from the conversation,
22 the phone call, that you had had with Thelma Rios?

23 **A.** Yes.

24 **Q.** And was that the phone call where she was to
25 be brought back to Rapid City?

1 **A.** Yes.

2 **Q.** And just so that I have it straight, the
3 individuals in the vehicle when they left were Annie
4 Mae, John Boy, Arlo, and Theda?

5 **A.** Yes.

6 **Q.** And at that time you were living with John
7 Graham; is that correct?

8 **A.** Yes.

9 **Q.** Did John Graham come home that night that
10 they left?

11 **A.** No.

12 **Q.** When John Boy came back, was Annie Mae with
13 him?

14 **A.** No.

15 **Q.** When you were at Troy Lynn's, at any time
16 that evening that the meeting was held about Annie Mae
17 and she left, did you see a gun?

18 **A.** No.

19 **Q.** Did you ever see Annie Mae Aquash again after
20 that evening that John Boy took her from the house?

21 **A.** No.

22 **Q.** Angie, do you see John Graham in the
23 courtroom today?

24 **A.** Yes.

25 **Q.** Could you please point to him.

1 **A.** Right there.

2 **MR. JACKLEY:** Your Honor, may the record
3 please reflect that John Graham has been positively
4 identified?

5 **THE COURT:** Yes.

6 **MR. JACKLEY:** No further questions, Your
7 Honor.

8 **THE COURT:** Mr. Murphy?

9 **MR. MURPHY:** Your Honor, my cross might take
10 a while.

11 Could we take a break at this time?

12 **THE COURT:** Certainly.

13 We'll be in recess till 10:30.

14 (Off the record.)

15 **THE COURT:** We satisfied this is the jury,
16 gentlemen?

17 **MR. JACKLEY:** Yes, Your Honor.

18 **MR. MURPHY:** Yes, Your Honor.

19 **THE COURT:** I believe you are about to cross,
20 Mr. Murphy.

21 **MR. MURPHY:** Thank you, Your Honor.

22 **CROSS-EXAMINATION**

23 **BY MR. MURPHY:**

24 **Q.** Ms. Janis, my name is John Murphy.

25 We have never met, have we?

1 **A.** No.

2 **Q.** I am going to ask you some questions and I
3 want to you stop me any time you don't understand my
4 question?

5 **A.** Okay.

6 **Q.** I am going to start with a discussion about
7 your ability to recall events.

8 Would it be fair to say that statements you
9 might have made 10 or 15 years ago about these events
10 would have been fresher then than they are now?

11 **A.** Yes.

12 **Q.** Okay.

13 Your memory hasn't improved with age or date?

14 **A.** No.

15 **Q.** Okay.

16 And you would also agree with me that if you
17 experienced an event and remembered something clearly,
18 that would stay consistent over time, correct?

19 **A.** Yes.

20 **Q.** If it was something big or important, right?

21 **A.** Yes.

22 **Q.** Okay.

23 **A.** I believe so.

24 **Q.** I want to start by taking you back to 1993.
25 October 18, 1993.

1 Do you recall about, approximately that time,
2 giving an interview to Mr. Robert Ecoffey?

3 **A.** No.

4 **Q.** Do you recall talking to Bob Ecoffey a long
5 time ago about that case?

6 **A.** Yes.

7 **Q.** All right.

8 And Mr. Ecoffey is presently your boss; is
9 that true?

10 **A.** He's the superintendent.

11 **Q.** Of --

12 **A.** Of the BIA.

13 **Q.** How long has he been in that position?

14 **A.** About three years maybe.

15 **Q.** Okay.

16 And you're related to Mr. Ecoffey through
17 marriage?

18 **A.** Yes.

19 **Q.** Are you also related to him through blood?

20 **A.** No.

21 **Q.** Okay.

22 And you also have got some other connections
23 to this case and to some of the instances.

24 You had a child with Dennis Banks, correct?

25 **A.** Yes.

1 **Q.** And that was -- that child was back -- born
2 back in 1974 or 75?

3 **A.** Seventy-four.

4 **Q.** So it would have been conceived either early
5 74 or 73?

6 **A.** Yeah, 73.

7 **Q.** Okay.

8 And that was at a time period when Mr. Banks
9 was one of the leaders of the AIM?

10 **A.** Yes.

11 **Q.** It was before your relationship with John
12 Graham?

13 **A.** Yes.

14 **Q.** And it was at the same time though that he
15 was married at least common law to Kamook his wife?

16 **A.** Yes.

17 **Q.** And they had children together, too?

18 **A.** Yes.

19 **Q.** Discussing your relationship with my client,
20 Mr. Graham, John, that started in 1975; is that
21 accurate?

22 **A.** I don't recall.

23 **Q.** Do you recall when it ended?

24 **A.** No, I don't recall.

25 **Q.** Would it be fair to say it ended some time in

1 1976?

2 **A.** Yes.

3 **Q.** Okay.

4 And you guys were together for what,
5 approximately, a year?

6 **A.** Or less.

7 **Q.** Or less.

8 Nine months to a year?

9 **A.** Around that.

10 **Q.** Okay. Fair enough.

11 Let's start talking about your earlier
12 statements, and I want to go back to that interview on
13 October 18, 1993, with Mr. Ecoffey.

14 Were you working in the -- on Pine Ridge at
15 that time?

16 **A.** Yes.

17 **Q.** And what were you doing?

18 **A.** I worked at the BIA.

19 **Q.** Okay.

20 And you were -- and Mr. Ecoffey at that point
21 also worked at the BIA?

22 **A.** I don't recall if he did or not.

23 **Q.** He was a law enforcement officer?

24 **A.** I don't recall.

25 **Q.** Okay.

1 He came to speak to you about this case?

2 **A.** Yes.

3 **Q.** And he asked you to tell him what you knew
4 about the case, correct?

5 **A.** Yes.

6 **Q.** And at that point, you never told him
7 anything about Anna Mae Aquash being tied up, did you?

8 **A.** I don't recall.

9 **Q.** Would it help you to look at the interview
10 summary?

11 **A.** Yes, I can look.

12 **Q.** Take all the time you need.

13 You finished reading that?

14 **A.** Yes.

15 **Q.** Now, that you reviewed that, you realize or
16 you remember now that you never mentioned anything
17 about Anna Mae Aquash being tied up?

18 **A.** Yes.

19 **Q.** And in fact, at that point, you state that
20 someone went with Ms. Aquash to the car but you don't
21 know who, correct?

22 **A.** I don't recall.

23 **Q.** Okay.

24 Would you like to -- I will provide you the
25 document again. You can reread the whole document,

1 but I am going to point you to a particular section.

2 A. That Theda and John Boy left in Theda's
3 vehicle.

4 Q. Who took --

5 A. Angela stated someone had taken Anna Mae.

6 Q. Someone. You didn't have specifics then as
7 to who took Ms. Aquash out of the car -- or out to the
8 car, do you?

9 A. Huh-uh.

10 Q. In fact, in this entire interview you don't
11 mention Arlo Looking Cloud being present at all, do
12 you?

13 A. No.

14 Q. Okay.

15 You mentioned other people like George Palfy,
16 but not Arlo Looking Cloud?

17 A. Yes.

18 Q. Now I want to take you up to your next
19 interview. And this was June 27, 1994.

20 Do you recall that Mr. Ecoffey spoke to you
21 on a number of occasions?

22 A. A number, yes.

23 Q. Yeah.

24 And he spoke to you on this occasion, too, in
25 Pine Ridge at your office?

1 Do you recall that?

2 A. No.

3 Q. Okay.

4 In any regard, do you recall in your second
5 interview that this is the first time that you add
6 that Arlo Looking Cloud was present?

7 Do you recall that?

8 A. No, I don't.

9 Q. Would it help you to look at the
10 investigative report?

11 A. Yes.

12 Q. Okay.

13 Have you had time to read the document?

14 A. Yes.

15 Q. Would it be fair to say that this document or
16 this interview, I guess about nine months after the
17 first one, you now recalled that Arlo Looking Cloud
18 was present, correct?

19 A. Yes.

20 Q. And you also added -- one additional detail
21 was that you believed Ms. Aquash had been tied up at
22 that occasion?

23 A. Uh-huh.

24 Q. Is that correct?

25 A. Yes.

1 **Q.** Okay.

2 But you didn't recall whether it was in the
3 front or the back, correct?

4 **A.** Yes.

5 **Q.** You were supposedly in the house right there
6 on Pecos Street, correct?

7 **A.** Yes.

8 **Q.** It's not a huge house by any means, was it?

9 **A.** No.

10 **Q.** It was part of an apartment complex?

11 **A.** Yes.

12 **Q.** Was like one of three apartments joined
13 together?

14 **A.** Yes.

15 **Q.** All right.

16 I want to bring you up now to July 20, 1994.
17 This time you are interviewed by Mr. Ecoffey, who is
18 now the U.S. Marshal, and Mitch Pourier.

19 Do you recall talking to them together?

20 **A.** Yes.

21 **Q.** Okay.

22 This is the time -- during this interview
23 this is the first time that you indicated Thelma Rios
24 called you; is that fair?

25 **A.** Yes.

1 **Q.** You've talked to the -- Mr. Ecoffey twice
2 before, you never mentioned a phone call in either of
3 those interviews, did you?

4 **A.** No.

5 **Q.** So now we're into July of 94. You add that
6 there was a call from Thelma, but are you not sure who
7 you told about the call?

8 **A.** Yes.

9 **Q.** Okay.

10 And here on this occasion, as the time is
11 getting farther away from the event, you are clear in
12 your mind that Anna Mae Aquash was tied with her hands
13 behind her back.

14 Is that your recollection of what you told
15 them?

16 **A.** That her hands were tied.

17 **Q.** Would it help you to look at the interview
18 statement to see what you told them back then?

19 **MR. JACKLEY:** Objection. Asked and answered,
20 Your Honor.

21 **THE COURT:** No, it's not.

22 **Q.** **(BY MR. MURPHY)** Would it help you, ma'am, to
23 refresh your recollection with the report?

24 **A.** Yes.

25 **Q.** I am going to direct you here. You are more

1 than welcome to read the entire report.

2 **A.** Hands were tied behind her back.

3 **Q.** That's what you told them on the third
4 interview now; is that correct?

5 **A.** Yes.

6 **Q.** Okay.

7 You didn't mention anything about her being
8 tied to a board, did you?

9 **A.** No.

10 **Q.** And you didn't mention anything about her
11 being carried out by anybody, did you?

12 **A.** No.

13 **Q.** I want to bring your attention up to
14 September 7, 2001.

15 You were, again, interviewed by Mr. Ecoffey
16 in 2001, correct?

17 **A.** Yes.

18 **Q.** And at this time Mr. Ecoffey tells you that
19 Troy Lynn Yellow Wood accused you of trying to prevent
20 her from calling law enforcement on the night that
21 Anna Mae Aquash was down in Denver.

22 Do you recall that?

23 **A.** Yes.

24 **Q.** He told you that Ms. Yellow Wood prevented
25 you from making a call to the police; that you took

1 the phone out of her hand and you hung it up, correct?

2 A. Yes.

3 Q. You denied that?

4 A. Yes.

5 Q. You deny that today?

6 A. Yes.

7 Q. If that were true, you could have been
8 prosecuted in this case, correct?

9 MR. JACKLEY: Objection, Your Honor. Calls
10 for a legal conclusion.

11 THE COURT: I agree.

12 Sustained.

13 Q. (BY MR. MURPHY) Were you concerned that if
14 that accusation was believed you might be charged with
15 criminal activity?

16 A. No.

17 Q. You -- because you didn't have any reason to
18 believe Mr. Ecoffey was going to take any action?

19 A. No.

20 Q. You weren't worried about it?

21 A. No.

22 Q. Now, I am going to bring you up to your first
23 sworn statement, October 27, 1994.

24 Do you remember appearing before the Grand
25 Jury?

1 **A.** Yes.

2 **Q.** Do you remember being sworn under oath just
3 like I were today?

4 **A.** Yes.

5 **Q.** Do you recall telling the jury that Anna Mae
6 Aquash was down in Denver at Troy Lynn's house but she
7 was on her way to another house, another place?

8 **A.** No, I don't recall that.

9 **Q.** Do you recall that you told them that she
10 wasn't hiding, but she was on her way to somewhere
11 else at that time?

12 **A.** No, I don't recall that.

13 **Q.** Would it help if I showed you the transcript
14 where you told the Grand Jury that?

15 **A.** Yeah.

16 **Q.** Were you asked the question, why was she
17 staying there? Was she hiding from somebody? And was
18 your answer, she was. I don't know where. She was on
19 her way to somewhere. No, I don't remember why she
20 was staying there. I think just a place to stay.

21 Do you recall that?

22 **A.** No.

23 **Q.** You don't?

24 **A.** No.

25 **Q.** Okay.

1 Let me ask you this. Do you recall that when
2 you were asked questions about whether or not you saw
3 Anna Mae Aquash being put into a car you told them you
4 didn't see that?

5 **A.** Yeah.

6 **Q.** Because you didn't go outside, correct?

7 **A.** No.

8 **Q.** And you don't recall any discussion during
9 this alleged meeting about Anna Mae Aquash?

10 Do you remember telling the Grand Jury that?

11 **A.** No.

12 **Q.** Okay.

13 I am going to show you -- were you asked the
14 question, was there an argument or were people just
15 generally discussing what was to be done with the
16 informant. And your answer was, I don't remember. I
17 mean, that's what I told you was all I remember. I
18 don't know.

19 Was that your answer back then?

20 **A.** Yes.

21 **Q.** Under oath.

22 And you were also asked, under oath, and how
23 was she tied? And your answer was, I don't know. I
24 don't remember. And all I remember was tied up.

25 **A.** Because she was tied up.

1 **Q.** Yeah.

2 And at that time, you were asked whether it
3 was in front or back. This is back in 1994. You
4 didn't have any recollection of how she was tied up,
5 correct?

6 **A.** Yes.

7 **Q.** You also said that you didn't see them -- see
8 much of what happened on the night in question,
9 correct?

10 **A.** I don't recall.

11 **Q.** Okay.

12 Do you recall telling them there was no
13 discussions about Anna in your presence?

14 **A.** No, I don't recall.

15 **Q.** Okay.

16 Do you recall now any discussions about Anna
17 in your presence on that night?

18 **A.** No.

19 **Q.** Okay..

20 You also indicated that by 1994 you had heard
21 a lot of rumors about the case, correct?

22 **A.** Yes.

23 **Q.** In fact, by 1994, rumors were widespread
24 about who did what and what happened, correct?

25 **A.** Yes.

1 Q. This was a subject of great concern within
2 the Indian community and the community of former AIM
3 activists?

4 A. Yes.

5 Q. I need to take just one second.

6 The next time you gave a statement, you were
7 also under oath. That was at the trial of Arlo
8 Looking Cloud's case.

9 Do you remember that?

10 A. Yes.

11 Q. You testified on February 3, 2004?

12 A. Uh-huh.

13 Q. And that happened was a big base case, wasn't
14 it?

15 A. Yes.

16 Q. It was over in the federal building?

17 A. Yes.

18 Q. Lots of people from the media there?

19 A. Yes.

20 Q. And there were a lot of people in the
21 audience that were affiliated with various causes in
22 the Indian community?

23 **MR. JACKLEY:** Objection. Relevance, Your
24 Honor.

25 **MR. MURPHY:** I'll tie it up.

1 **THE COURT:** Please do.

2 **Q. (BY MR. MURPHY)** Do you recall there was a lot
3 of people in the audience, faces you recognized?

4 **A.** There was a lot of people.

5 **Q.** Okay.

6 And you testified under oath, correct?

7 **A.** Yes.

8 **Q.** And that was the first time you had been
9 involved in an event where there was real intense
10 coverage of the matter, correct?

11 **A.** Yes.

12 **Q.** Everything else had been private, correct?

13 **A.** Yes.

14 **Q.** Now, on that occasion, you told the jury that
15 Anna Mae Aquash was tied to a board and carried out of
16 Troy Lynn's apartment, correct?

17 **A.** I don't recall.

18 **Q.** Would you like to see your previous
19 testimony?

20 **A.** Yes.

21 **Q.** You were asked the question, how was she tied
22 up and was your answer, I think her wrists were tied
23 and they had her on like a board or something. Her
24 hands were tied to the board. Question, do you
25 recall? Your answer, they carried her out. Question,

1 they carried her out? Answer, yes.

2 Correct?

3 **A.** Yes.

4 **Q.** That's what you said in 2003?

5 **A.** Yes.

6 **Q.** Now you would agree that differs completely
7 from what you told -- what you told Mr. Ecoffey and
8 the Grand Jury on previous occasions, correct?

9 **A.** Uh-huh.

10 **Q.** And it's different from what you told the
11 jury today, correct?

12 **A.** Uh-huh.

13 **Q.** You also said on that occasion that you never
14 saw John or Arlo or Theda leave.

15 Do you remember that?

16 **A.** No.

17 **Q.** Okay.

18 I am going to show you, again, a transcript
19 of your testimony. If you would read lines 7 to 12 to
20 yourself or 7 to 11 to yourself.

21 Let me know when you are done.

22 **A.** Okay.

23 **Q.** On that occasion you say you didn't see them
24 leave, correct?

25 **A.** Uh-huh.

1 Q. You didn't see who went to the car?

2 A. Yes.

3 Q. And you said you could only guess -- you
4 thought maybe it was John and Arlo, correct?

5 A. Yes.

6 Q. You also told the jury on that occasion that
7 no one attempted to call law enforcement about this
8 situation, correct?

9 A. Yes.

10 Q. And that's because you didn't think anything
11 bad was going to happen to Ms. Aquash, correct?

12 A. No.

13 Q. I will bring you to your next statement which
14 is May 27, 2008.

15 Do you recall that was just two years ago,
16 Mr. Ecoffey coming to your office at the
17 superintendent's office?

18 A. Yes.

19 Q. That was your office and his office, correct?

20 A. I don't know which office it was at.

21 Q. Okay.

22 Would it help if I showed you?

23 A. Yeah.

24 Q. Does that refresh your recollection that it
25 happened at your office, the superintendent's office?

1 **A.** No. I don't remember where it happened.

2 **Q.** In any event, Mr. Ecoffey came to you and
3 essentially ask you, are you going to change your
4 story again, and you said, no; is that fair to say?

5 **A.** Yes.

6 **Q.** You then testified September 9, 2009, about a
7 year ago before a Grand Jury?

8 **A.** Yes.

9 **Q.** And again you were told about the oath and to
10 give the facts to the Grand Jury?

11 **A.** Yes.

12 **Q.** And you were asked whether or not you ever
13 told my client, Mr. Graham, about the phone call from
14 Thelma Rios.

15 Do you recall that?

16 **A.** No.

17 **Q.** Okay.

18 Well, sitting here today you are not sure you
19 ever told him about that call from Thelma Rios, are
20 you?

21 **A.** No, I don't recall.

22 **Q.** Okay.

23 You can't say that you ever relayed any
24 information from Thelma Rios to my client?

25 **A.** No, I don't recall.

1 Q. Okay.

2 And on that occasion, a couple years after
3 the trial in Arlo Looking Cloud's case, you told the
4 jury that Anna Mae Aquash walked out of Troy Lynn's
5 house on her own, correct?

6 A. I don't recall.

7 Q. Okay.

8 I will show you -- I am going to show you a
9 question asked to you. Okay. Very good. Was she
10 walking on her own power? Your answer, yes.

11 Is that what you told the Grand Jury at that
12 occasion?

13 A. Yes.

14 Q. All right.

15 And so she was no longer tied to a board and
16 carried out, now she's walking out voluntarily?

17 A. Yes.

18 Q. Yes?

19 A. Yes.

20 Q. All right.

21 And in fact, you told the Grand Jury at that
22 occasion you didn't see anybody push her, shove her,
23 or force her out of the house?

24 A. Yes.

25 Q. And the group of people that left the house,

1 just walked out together; is that correct?

2 A. I don't recall.

3 Q. Okay.

4 Well, what do you recall now?

5 A. I know she was tied up.

6 Q. Okay.

7 So now you know was tied up. But at least
8 back in 2009, you said on that occasion whether she
9 was tied up or not she walked out of the house on her
10 own, correct?

11 A. Uh-huh.

12 Q. Okay.

13 And then just about six months ago, you gave
14 testimony in the trial of Dick Marshall's case,
15 correct?

16 A. Yes.

17 Q. And during that period of time, you were
18 asked whether my client, John Graham, was a supporter
19 of the American Indian Movement, correct?

20 A. Yes.

21 Q. And you told them you weren't sure that he
22 even was really a supporter of AIM, correct?

23 A. Yes.

24 Q. Okay.

25 I mean, yes, in that you weren't even sure

1 whether my client was an AIM supporter, were you?

2 **A.** Uh-huh. Yes.

3 **Q.** Okay.

4 And you again reiterated that you are not
5 sure whether Thelma Rios -- that information from
6 Thelma Rios ever got to my client, correct?

7 **A.** Yes.

8 **Q.** You don't know if he knew anything about that
9 information, correct?

10 **A.** Yes.

11 **Q.** You told the jury on that occasion that you
12 weren't even sure that after leaving the house whether
13 anybody from this group got into a car?

14 Do you recall that?

15 **A.** No, I don't recall that.

16 **Q.** Okay.

17 Were you asked, did you see what they did
18 with Anna Mae Aquash when they got outside the house?
19 Your answer, no. Did you see what kind of automobile
20 they got into? No.

21 Do you recall those answers?

22 **A.** Yes.

23 **Q.** Okay.

24 So you weren't even looking outside so you
25 don't know what happened outside, do you?

1 **A.** No.

2 **Q.** And on the night in question, you were asked
3 by Mr. Jackley if there was a gun involved.

4 You didn't see my client ever with a gun, did
5 you?

6 **A.** No.

7 **Q.** Troy Lynn's house, that was kind of a hang
8 out for people from the American Indian Movement?

9 **A.** A lot of people hung out there.

10 **Q.** Okay.

11 A lot of people who had an interest in the
12 American Indian Movement?

13 **A.** That I don't know.

14 **Q.** Okay.

15 Well, did you tell the jury that about six
16 months ago?

17 Question, it was a place where a lot of
18 people who had an interest with or were involved in
19 the American Indian Movement would come to hang out
20 and be with each other, correct? Your answer, yes.

21 **A.** Yes.

22 **Q.** Okay.

23 And since we originally talked about this
24 case gaining a lot of interest in 1994 and the rumors
25 you heard then, since 94 to today, there has been a

1 tremendous amount of information circulated about this
2 case, correct?

3 A. Yes.

4 Q. And you've read and heard things about the
5 case over time, correct?

6 A. Yes.

7 Q. You heard what some people think did happen
8 and what other people think did happen, correct?

9 A. Yes.

10 Q. During the time period in question that you
11 were with my client, he was a quiet young man?

12 A. Yes.

13 Q. Twenty years old?

14 A. Yes.

15 Q. Interested in making chokers and other
16 objects, correct?

17 A. Yes.

18 Q. Sold them to people, correct?

19 A. Yes.

20 Q. Went to Pow Wows and sun dances and stuff
21 like that?

22 A. Yes.

23 Q. I want to ask you about when this event
24 allegedly happened.

25 Do you recall here sitting today when this

1 call happened?

2 **A.** In the latter part of the year.

3 **Q.** Do you recall telling the jury in the Arlo
4 Looking Cloud case that it was in November and that it
5 was not in December?

6 **A.** No, I don't recall that.

7 **Q.** Let me show you. Were you asked, and I don't
8 know if I asked you, but do you recall about what date
9 this all happened? Your answer, no. I think it was
10 November, but I don't know the date. And the
11 question, of 1975? Answer, yes. Question, is it
12 possible it was even into December? Your answer, no,
13 I don't think so.

14 **A.** Okay.

15 **Q.** Was that your testimony on that occasion?

16 **A.** Yes.

17 **Q.** And previously when you were asked by
18 Mr. Ecoffey back on July 20, 1994, he told you that he
19 thought Troy -- Anna Mae had been at Troy Lynn's a
20 full two weeks.

21 Do you remember that?

22 **A.** No.

23 **Q.** Do you remember telling him that you disputed
24 the time frame and that you think that this happened
25 around Thanksgiving?

1 Do you recall that now?

2 **A.** Yes.

3 **Q.** Okay.

4 **MR. MURPHY:** That's all.

5 Thank you very much, Ms. Janis.

6 **THE COURT:** Mr. Jackley?

7 **REDIRECT EXAMINATION**

8 **BY MR. JACKLEY:**

9 **Q.** Ms. Janis, you've had several meetings or
10 interviews with law enforcement officers regarding
11 what you can recall from the events that night at Troy
12 Lynn's; is that fair?

13 **A.** Yes.

14 **Q.** Is it a setting where investigators would
15 come to you and ask you some questions and then come
16 back and ask you some specific questions based on
17 information they wanted?

18 **A.** Yes.

19 **Q.** When you met with those investigators on
20 those repeated occasions did you try to be truthful to
21 the best you could?

22 **A.** Yes.

23 **Q.** And that hasn't been an easy process reliving
24 what happened at Troy Lynn's that evening and all
25 those meetings with law enforcement, has it?

1 **A.** No.

2 **Q.** Has it been an easy process testifying before
3 Grand Jurors and juries about what happened that
4 evening at Troy Lynn's?

5 **A.** No.

6 **Q.** Are you receiving any benefit from coming
7 here today and talking to this jury about what you can
8 best recall happened that evening?

9 **A.** No.

10 **Q.** Do you recall having a discussion with
11 Mr. Murphy how Annie Mae was tied up?

12 Do you recall that?

13 **A.** No.

14 **Q.** Do you recall having the discussion with
15 Mr. Murphy about how she was tied up, not that you
16 knew how she was tied up, but having that discussion?

17 **A.** Yes.

18 **Q.** Did you tie Annie Mae up?

19 **A.** No.

20 **Q.** But was she tied up that evening?

21 **A.** Yes.

22 **Q.** And you told that to investigators; is that
23 fair?

24 **A.** Yes.

25 **Q.** And you told that to juries; is that fair?

1 **A.** Yes.

2 **MR. JACKLEY:** No further questions, Your
3 Honor.

4 **MR. MURPHY:** Just briefly.

5 **RE-CROSS-EXAMINATION**

6 **BY MR. MURPHY:**

7 **Q.** When you were approached by Mr. Ecoffey, he
8 asked you to give him any information you had about
9 the case, correct?

10 **A.** I don't recall what he said.

11 **Q.** If I could approach you and show you the very
12 first of his interviews --

13 **A.** Yes.

14 **Q.** Wasn't that --

15 **A.** Yes.

16 **Q.** And consistently he asked you to provide any
17 information that you had, correct?

18 **A.** Yes.

19 **Q.** And though you were asked just a moment ago
20 by Mr. Jackley about saying that Annie Mae Aquash had
21 been tied up, you haven't always said that to law
22 enforcement, have you?

23 **A.** No.

24 **Q.** Sometimes she's tied up, sometimes she isn't,
25 correct?

1 **A.** Correct.

2 **Q.** Sometimes in front, sometimes in back,
3 sometimes to a board, correct?

4 **A.** Yes.

5 **Q.** Okay.

6 **MR. MURPHY:** Nothing further.

7 **MR. JACKLEY:** Nothing further, Your Honor.

8 **THE COURT:** Thank you, ma'am.

9 You are excused.

10 Released from her subpoena?

11 **MR. JACKLEY:** She can leave, but we don't
12 want to release her from her subpoena.

13 **THE COURT:** What that means is you can leave
14 now but you are still under subpoena to possibly be
15 called back.

16 Do you understand that?

17 **THE WITNESS:** Yes.

18 **THE COURT:** Thank you.

19 (Witness excused.)

20 **MR. OSWALD:** The state calls Troy Lynn Yellow
21 Wood.

22 **THE COURT:** Please stop here, ma'am.

23 Please raise your right hand.

24

25

1 TROY LYNN YELLOW WOOD,
2 called as a witness herein, having been duly sworn,
3 under oath testified as follows:

4 THE COURT: Please take a seat.

5 DIRECT EXAMINATION

6 BY MR. OSWALD:

7 Q. Would you introduce yourself, please.

8 A. My name is Troy Lynn Star Yellow Wood.

9 Q. Troy Lynn, do you live in Denver?

10 A. I do.

11 Q. During -- well, a little bit about yourself.

12 Mother? Grandmother?

13 A. I'm a great grandmother.

14 Q. Okay.

15 Are you currently employed?

16 A. I am. I work for Access Housing. It's a
17 homeless shelter and a place that provides subsidy
18 housing for people who are homeless.

19 Q. Okay.

20 Have you worked there very long?

21 A. Several years.

22 Q. Okay.

23 Troy Lynn, who is Theda Clarke?

24 A. Theda, she's my mother's oldest sister.

25 She's my aunt. But in the Lakota tradition she is my

1 mother as well.

2 Q. Did you have a lot of interaction with Theda
3 Clarke when you were younger?

4 A. I did.

5 Q. Was she instrumental in, I guess, raising
6 you?

7 A. She was around much of my upbringing.

8 Q. Do you know Arlo Looking Cloud?

9 A. I do.

10 Q. How do you know Arlo?

11 A. Arlo is a really good friend of mine, but my
12 mother took him as a son. So he became my Hookah
13 (phonetic) brother.

14 Q. Is that in the Lakota tradition?

15 A. It's a tradition amongst our people that
16 somebody who is well thought of can be adopted by your
17 family.

18 Q. Do you know John Graham?

19 A. I did.

20 Q. Do you see Mr. Graham here in the courtroom
21 today?

22 A. I believe it is this man right here.

23 Q. How long has it been since you've seen him?

24 A. I don't know. More than -- maybe 35 years or
25 30 plus. I don't know.

1 **Q.** Do you know Annie Mae Aquash?

2 **A.** I did.

3 **Q.** All right. I want to take you back to 1975.

4 Did you know Anna Mae Aquash back then?

5 **A.** I did.

6 **Q.** Did you see her in Denver at that time

7 period?

8 **A.** Yes. Theda brought her to my home and asked
9 that I keep her there and not let a lot of people know
10 that she was there.

11 **Q.** Can you just tell us if you remember the
12 address of that house?

13 **A.** It was 4494 Pecos, apartment one.

14 **Q.** Just as a side line, was your house kind of a
15 meeting place for supporters of the American Indian
16 Movement back then?

17 **A.** It was a gathering place, yeah. There were a
18 lot of AIM people in and out.

19 **Q.** Okay.

20 Did you have room to keep Anna Mae and let
21 her stay with you?

22 **A.** I did.

23 **Q.** When she came, did she have any clothing with
24 her?

25 **A.** She didn't have anything.

1 Q. And did you provide anything for her?

2 A. I gave her clothing, yes, a shirt, sweaters,
3 whatever.

4 Q. Did you provide any toiletries and hygiene
5 items, anything like that?

6 A. Whatever she needed.

7 Q. Did -- can you tell us a little bit about
8 Anna Mae as far as how she kept herself, things that
9 struck you?

10 A. She was very neat. Very industrious. Also
11 working or helping do something. She kept herself
12 busy. She was very neat in her appearance. Very --
13 just clean and neat. Always.

14 Q. Now, when Theda brought Anna Mae over and she
15 said those things to keep her, did she explain why?

16 A. Not really, no. There wasn't a big
17 explanation.

18 Q. Had you known Annie Mae before this?

19 A. I knew who she was. I had seen her at
20 various gatherings, but we were not close friends.

21 Q. Did you become closer?

22 A. After she stayed at my house I became very
23 close to her.

24 Q. Now, we're talking 1975.

25 Can you give me the best estimate or

1 reference point, like to holidays or something, that
2 you can when this happened?

3 **A.** It was in November. I don't know the exact
4 dates or anything. It was around Thanksgiving.
5 And --

6 **Q.** How do you know it was around Thanksgiving?

7 **A.** Because we went to Thanksgiving dinner at my
8 mother and father's home, and my mother puts a big
9 Thanksgiving dinner on and all of our family -- every
10 member of our family comes and attends. It's a big
11 formal sit-down dinner and Anna Mae attended with me.

12 **Q.** And you remember that?

13 **A.** Uh-huh.

14 **Q.** I am stopping to give you a chance to cough.

15 **A.** I am sorry.

16 **Q.** Troy Lynn, just if we can, about how long did
17 Anna Mae stay with you then?

18 **A.** I don't know. I don't really know the exact
19 time. I think it was possibly at least -- it was
20 longer than a week. I know that because I was going
21 to school at University of Colorado and it was right
22 before -- around -- it was getting close to the
23 semester break and I was working on some paperwork and
24 some papers that I was working on that I needed for my
25 class, and she helped me do the research for it.

1 **Q.** During the time Anna Mae was with you, did --
2 did she care for your children?

3 **A.** She did.

4 **Q.** Did you have any conversations with her about
5 her personal life?

6 **A.** Many. Many conversations.

7 **Q.** What did she care about?

8 **A.** Her daughters, her sister, her nieces, her
9 family.

10 **Q.** Did she express to you any fears that she had
11 at this time?

12 **A.** She did. She -- it was kind of a difficult
13 time to really understand, but there was a lot of
14 accusations and a lot of paranoia amongst, you know,
15 just people in general. And she was -- she felt that
16 people were accusing her of being an informant and
17 that they were pointing the finger at her and blaming
18 her for different arrests that had happened that she
19 was at and was released on a PR bond or however. I
20 don't really know exactly how, but she was released
21 and the others were incarcerated.

22 And she -- she was nervous about it. She was
23 a little apprehensive about it. And when I asked her
24 about -- I told her, why did they let you go? What's
25 that about. And she said, I don't know. I don't

1 really know, but I think they think that I will lead
2 them back to Dennis and the others. But --

3 Q. Okay.

4 But Troy Lynn, did she ever talk to you about
5 an incident at Farmington?

6 A. She did.

7 Q. Did that involve who?

8 A. She said that people were -- it seems like
9 there was some kind of -- a little -- a meeting of
10 certain people that were accusing her of being an
11 informant. And that -- and she had to defend herself.
12 And she told me that -- that Leonard Peltier was there
13 and that he said, you know, I want to hear it from the
14 horse's mouth, Anna Mae. I want to know if you are
15 doing what they are saying that you are doing. Are
16 you giving us up? Are you doing this?

17 And she said that she just -- she said she
18 was really afraid because he had a gun and she said he
19 held the gun to her head and she told him if you
20 believe that about me, then pull the trigger. But
21 either you defend me or you kill me because I am tired
22 of everybody doing this to me. I am tired of being
23 the target of your -- all this nonsense. I am not
24 guilty.

25 And then she said he just kind of laughed and

1 he -- he just said, I never believed what everybody
2 else said anyway. And he just laughed it off. And
3 she said but it was really frightful. It was really
4 frightening to her and it was frightful.

5 Q. Did Annie Mae call from your house at all?

6 A. She -- I had a phone but she never made any
7 phone calls from my home. She would go to -- across
8 the street to the 7-Eleven at the end of the block and
9 she would make phone calls all the time. I don't know
10 exactly who she was trying to reach. But she said she
11 was trying to call an attorney and she was trying to
12 reach John Trudell and Dino Butler.

13 Q. They were her friends?

14 A. She said they were the only people she could
15 trust. They were her Hookah brothers. She had
16 adopted them and she believed that they would -- if
17 she could get ahold of them, they would come and they
18 would help her.

19 Q. Now, when you heard these conversations from
20 Annie Mae, did you inquire as to Theda, your aunt,
21 about any of this stuff?

22 A. No.

23 Q. Now, back then, were you and Angie Begay
24 friends?

25 A. We were very good friends.

1 Q. And was Angie Begay involved in a
2 relationship with someone back then?

3 A. Yes. She lived with John Boy.

4 Q. They were cohabitating the whole time?

5 A. Well, they lived together.

6 Q. And did they -- did you see them together a
7 lot?

8 A. Uh-huh.

9 Q. Was there a time, Troy Lynn, that some people
10 showed up at your house regarding Anna Mae?

11 A. There was.

12 Q. Who was there?

13 A. I am not exactly certain of everybody, but
14 all of a sudden people just started showing up, and
15 you know, I didn't really know who they were showing
16 up for. But I assumed that -- I thought maybe Aunt
17 Theda called them. But they all went into the living
18 room and sat down. And I went in the kitchen and made
19 coffee for them.

20 Q. Did you ask what they were doing there?

21 A. No.

22 Q. Did you try and stay out of the business?

23 A. I wasn't asked to be or included in the
24 business that was going on.

25 Q. So they were in your --

1 **A.** But they were in my living room, and I was
2 part of the time in the kitchen and back and forth
3 between the back -- the bedrooms in the back of the
4 house.

5 **Q.** Do you know any people from the Crusade for
6 Justice back then?

7 **A.** Yes.

8 **Q.** Did they come to your house?

9 **A.** Yes.

10 **Q.** Do you know a couple of their names, if you
11 recall?

12 **A.** Corky Gonzalez was there and he was
13 accompanied buyer Ernesto Vigil. I don't know if
14 there were others, but those two, I knew, and I
15 remember them being there.

16 **Q.** And Vigil is spelled V-I-G-I-L?

17 **A.** Yes.

18 **Q.** Did Aunt Theda show up?

19 **A.** Yes. I don't know what the order of -- who
20 showed up, but I think she was there first and then
21 the others started coming.

22 **Q.** Did John Boy show up?

23 **A.** Yes.

24 **Q.** Do you know if -- did Arlo show up with any
25 of them?

1 **A.** No.

2 **Q.** Were they there before Arlo?

3 **A.** Yes.

4 **Q.** Was Anna Mae at your house at this time?

5 **A.** She was in the back bedroom, yes.

6 **Q.** Did you have any idea what was being
7 discussed in the living room in your house?

8 **A.** No, but I did go back to the book bedroom and
9 she could see out the window who had come in. And
10 I -- I don't know if she knew --

11 **MR. MURPHY:** Objection. Nonresponsive.

12 **A.** -- them or not.

13 **THE COURT:** Overruled. It is, but ask
14 another question, Mr. Oswald.

15 **MR. OSWALD:** Thank you.

16 **Q.** **(BY MR. OSWALD)** So you went back to the
17 bedroom and you talked to Annie Mae?

18 **A.** Uh-huh.

19 **Q.** What happened then?

20 **A.** She was really nervous and scared and
21 agitated just like really extremely nervous. Scared.
22 Frightened.

23 **Q.** Did you -- at some point when you were
24 providing coffee, did you see anything in that front
25 room?

1 **A.** I walked in, and the living room was situated
2 so there were three couches in the living room. And I
3 walked in there and there was a coffee table in the
4 middle and I took the coffee on a tray and set it on
5 the coffee table. And then I went back into the
6 kitchen.

7 But when I was going into the living room,
8 Ernesto Vigil was sitting closest to the door and I
9 saw him -- I don't know what the conversation was, but
10 he said, I don't know what you guys do about snitches,
11 but this is how we handle it, and he drew his finger
12 across his throat.

13 **Q.** You actually saw that?

14 **A.** Uh-huh. He did.

15 **Q.** Did you go tell Annie Mae that?

16 **A.** No.

17 **Q.** Was she still in that back bedroom?

18 **A.** She was.

19 **Q.** What happened next?

20 **A.** I don't know -- there was a progression of
21 things that happened. I don't remember exactly, but
22 at some point Aunt Theda went back and told her to
23 come out. That she was going with her. And so -- and
24 some time around that time, she began crying and she
25 told me, if they take me from here, you will never see

1 me alive again. And you know --

2 Q. What did you think about that?

3 A. I just thought she was really, you know, just
4 scared and paranoid. But because I knew -- I knew all
5 of these people and I had nothing to fear from any of
6 them.

7 Q. Did this goings on -- let's see -- affect you
8 emotionally at the time?

9 A. It did. I was really uncertain about things.
10 But I -- it felt wrong what was going on. It felt
11 like it was wrong. That nobody should be made to --
12 or be subjected to somebody else's demand or command
13 or whatever you want to say to go somewhere they
14 didn't want to go.

15 And I tried to intervene with Aunt Theda but
16 she just basically cursed me and told me to get out of
17 the way. That I was F'ing stupid and I didn't know
18 what was going on. And --

19 Q. About how old were you then?

20 A. I was in my 20s. Probably middle or early --
21 middle 20s, probably. I don't know exactly.

22 Q. And just -- just a quick side line. Was Aunt
23 Theda pretty strong willed?

24 A. There wasn't very many people that would have
25 went up against her, if any.

1 **Q.** So when you heard all of this going on, and
2 you saw Anna Mae crying, did you make any phone calls
3 to people?

4 **A.** I did.

5 **Q.** What for?

6 **A.** I tried to get -- find somebody that could
7 help. I didn't know what to do. For myself there was
8 nothing to fear, but for Anna Mae I could sense the --
9 I knew she was just frightened to death, you know.
10 And I just didn't think that she should have to go if
11 she didn't want to go.

12 And so I called the AIM house and whoever
13 answered the phone and I just told them something is
14 going on here and I need somebody to come. I need
15 somebody to come over here. I called several other
16 numbers. I think I called my mother, as well. I
17 don't remember exactly. I called several people. I
18 didn't have any luck finding anybody that I thought
19 could intervene or help with the situation. But --

20 **Q.** Do you know George Palfy?

21 **A.** I do.

22 **Q.** Did you try calling him?

23 **A.** I think he answered the phone. He was at the
24 AIM house and he answered the phone there.

25 **Q.** Did he come by?

1 **A.** He did.

2 **Q.** What about Arlo Looking Cloud?

3 Did he show up at some point?

4 **A.** He did. I can't really say again. But I --
5 I don't know exactly when, but I know he was there.

6 **Q.** Could you tell us the circumstances on how
7 Arlo showed up?

8 **A.** It wasn't unusual for him to show up at any
9 time. He came and went, you know, on a regular basis.
10 And I believe he came there looking for Joe Morgan who
11 was another friend of ours to drink with. And Joe
12 Morgan's sister lived just a couple blocks from me so
13 he came to my house first on the way to --

14 **MR. MURPHY:** Objection. Lack of personal
15 knowledge.

16 **THE COURT:** Overruled.

17 **Q.** **(BY MR. OSWALD)** Okay.

18 So did you let Arlo in your house?

19 **A.** I wouldn't have to let Arlo in. He would
20 just come in if he was there.

21 **Q.** Do you know when Arlo showed up where Anna
22 Mae was being kept?

23 **A.** She was in the bedroom until at some point
24 when Theda said for her to come, that they were going
25 to take her, or she was going to go with them or

1 whatever or however it was said. I don't know
2 exactly.

3 Q. Was there a time period when Annie Mae could
4 have gone to the basement?

5 A. I don't know. I don't remember that, but I
6 was in the bedroom making phone calls some of the
7 time. So I don't -- she could have.

8 Q. Did you make any phone calls for help other
9 than to friends?

10 A. I called the police. Back then they didn't
11 have 911. It was a just a zero. You just hit zero
12 and the operator would come on and ask what was the
13 call concerning or whatever. And I called the police
14 and somebody answered on the other end.

15 Q. What happened while you were calling the
16 police?

17 A. Angie came in and she pushed the phone down
18 on the hook and she said, don't do that. You are
19 going to bring a lot of trouble down on yourself.
20 Don't do that.

21 Q. Did you respond?

22 A. I did.

23 Q. What did you say?

24 A. I asked her -- I pleaded with her. I told
25 her, help me. You know, help me, Angie. Don't let

1 this happen. And Angie said, no, I am not going to.

2 Q. At some point did you see Annie Mae with
3 Theda and John Boy after this phone call?

4 A. I don't know what -- when it was. I just
5 know -- I don't know -- I don't know what exactly
6 happened at what time, but I just saw them -- they
7 flanked her down the hallway. And in the hallway.
8 And then out -- you have to go through the kitchen and
9 through the back door. That's what I can recollect.
10 I don't know -- I don't -- I don't know exactly when
11 or what.

12 Q. Was Arlo part of this flanking that you know
13 of?

14 A. No.

15 Q. You don't know or he wasn't?

16 A. He wasn't.

17 Q. Where was he?

18 A. I don't know where he was. I don't know -- I
19 don't remember seeing him again until they were
20 getting in the car.

21 Q. Well, so when they were flanking -- and you
22 said John Boy and Theda -- what -- what happened?
23 Where were they flanking her at and where were they
24 going?

25 A. They just walked her down the hallway and

1 through the house and --

2 Q. Where did they go from there?

3 A. I thought outside, but I am not exactly
4 certain about it.

5 Q. At some point did you see them leave your
6 house?

7 A. I did.

8 Q. And describe what you saw as best as you can
9 remember from 35 years ago.

10 A. Aunt Theda had a little red hatchback car and
11 I saw Anna Mae in the back of the hatch. She was
12 small and she could fit in the back of the hatchback
13 and she had knees pulled back and she had her head
14 down on her knees. And I think her arms were around
15 her knees and she was just -- she just had this
16 defeated look.

17 And I don't know -- I don't know where
18 exactly they were all positioned, but Aunt Theda, John
19 Boy, and Arlo were in the front part of the car.

20 Q. Before they left, did you protest again about
21 them taking Anna Mae?

22 A. At some point I asked Aunt Theda, why did you
23 bring her here if you were going to do this? Why did
24 you do this to us? You know, why did you bring her
25 here if you were going to -- you know -- because

1 she -- when she brought her, she was -- it was under
2 the guise of protection. She was protecting her. And
3 then everything changed somehow or somewhere and it
4 wasn't -- she wasn't doing that. You know, I knew
5 that.

6 Q. Did you see Anna Mae crying any more?

7 A. No. At one point when I -- when Aunt Theda
8 was cursing me and telling me to get out of the F'ing
9 way and whatever, then all of -- all of a sudden Anna
10 Mae just straightened up, she put her shoulders back,
11 and she shook off the tears, and just said, it's okay.
12 I'll go with them because I'm tired of this. I
13 just -- I want to get it straightened out. I am tired
14 of everybody believing this about me. I just want to
15 get it straightened out and I will go. You know, it's
16 all right.

17 But I still knew she didn't want to go.

18 MR. MURPHY: Objection. Narrative.

19 MR. OSWALD: Okay.

20 THE COURT: Overruled.

21 Q. (BY MR. OSWALD) Go ahead.

22 What did you say?

23 A. I knew she didn't want to go, but she said
24 she would go.

25 Q. Did you find it strange that they put her in

1 the hatchback?

2 **A.** I did. I thought that there was probably a
3 fourth person, but I don't know or I couldn't see who
4 it was. I thought there were probably four people in
5 there, but I didn't know. I didn't why they did that.

6 **Q.** As you sit here today, you have no idea if
7 there was a fourth person?

8 **A.** No. I can't remember.

9 **Q.** You do know specifically the four people in
10 that car that you remembered is what you already
11 testified to?

12 **A.** Yes.

13 **Q.** How did Arlo get going in this thing?

14 **MR. MURPHY:** Objection. Calls for
15 speculation.

16 **THE COURT:** I think your question needs
17 either more clarification or withdrawn.

18 **MR. OSWALD:** Okay.

19 **Q.** (BY MR. OSWALD) How is it that Arlo went
20 along in the Pinto?

21 **MR. MURPHY:** Same objection.

22 **THE COURT:** Sustained.

23 **Q.** (BY MR. OSWALD) Did you hear any
24 conversations of them talking to Arlo?

25 **A.** I didn't.

1 Q. Pardon me?

2 A. I didn't.

3 Q. Okay.

4 Do you know who drove?

5 A. I think it was -- I think it was one of the
6 men, but I don't know. I really can't say. I
7 don't -- I'm not certain. I can't remember.

8 Q. Did you ever see Anna Mae again?

9 A. No.

10 Q. Did you see Arlo again?

11 A. After some -- some time I did.

12 Q. Did you see John Graham again?

13 A. I did.

14 Q. Back in Denver?

15 A. Yes.

16 Q. Did you ask any of them what happened?

17 A. No.

18 Q. Why wouldn't you?

19 A. Because I just assumed that they took her
20 over there and left her over there. It was a really
21 short length of time, you know, that all of this
22 happened. It wasn't very long.

23 Q. Did you know Arlo then and kept in contact
24 with him throughout the years after this?

25 A. Yes. He was frequently around my home and my

1 family.

2 Q. Would he start talking about this incident?

3 A. He never talked about it.

4 Q. At some point did you take him anywhere to
5 talk about this incident?

6 A. What happened was Trudell came to Denver and
7 he said he was going to be the opening act at the
8 Paramount Theater. And he said that he would leave
9 some tickets for me at the window. And he was the
10 opening act for Midnight Oil and so he told me to go
11 ahead and come and bring whoever I wanted. But it was
12 short notice and so Arlo just happened to show up and
13 so he and I went there.

14 And prior to this, I had -- I had ran across
15 Trudell in California, in San Francisco, and he -- he
16 asked me about what I knew about whatever happened and
17 then he expressed an interest in wanting to know what
18 happened.

19 And so when Arlo went with me to the
20 performance, I told him, well, Arlo was one of the
21 people that was there. And I really -- I didn't
22 really know -- I didn't -- I didn't expect anything
23 except for, you know, what I thought had happened
24 until Arlo told Trudell everything that had really
25 taken place.

1 **Q.** And as far as a year, was this several years
2 later like late 80s?

3 **A.** I don't know how many years, but it was a
4 number of years later.

5 **Q.** Did you hear -- just yes or no -- did you
6 hear Arlo Looking Cloud telling Mr. Trudell what
7 happened to Annie Mae?

8 **A.** I did.

9 **Q.** Were you surprised?

10 **A.** I was shocked.

11 **Q.** Over the years, did you ever hear Arlo, then,
12 after this, speak of this incident to you?

13 **A.** He didn't really speak about it, but
14 sometimes when he would -- was drunk, he would, you
15 know, allude to different -- allude to that. But he
16 never really -- he never spoke, you know, like about
17 the details of whatever happened or anything like
18 that. He would just -- he was wounded over it. He
19 was hurt over it. Over everything. And when he was
20 drunk he would, you know, just allude to it. He never
21 would speak directly to it. He never really did that.

22 **Q.** Did you ever pump him for information?

23 **A.** No.

24 **Q.** Now, you know you were asked to testify at
25 Grand Juries in the federal system.

1 Do you remember that?

2 **A.** Yes.

3 **Q.** Did you try and minimize --

4 **MR. MURPHY:** Objection. Bolstering.

5 **THE COURT:** The question was, did you try --

6 **Q.** (BY MR. OSWALD) How --

7 **THE COURT:** I want to make sure that I am
8 reading the question.

9 **MR. OSWALD:** That is correct. I will
10 withdraw the question and start over.

11 **THE COURT:** That's fine.

12 **Q.** (BY MR. OSWALD) How would you characterize
13 your testimony prior to this?

14 **MR. MURPHY:** Objection. Vague.

15 **THE COURT:** Overruled.

16 **Q.** (BY MR. OSWALD) You may answer.

17 **A.** I gave as little information as I possibly
18 could.

19 **Q.** Why?

20 **A.** Because of Arlo -- because of my relationship
21 with Arlo and my friendship with Arlo.

22 **Q.** Was Theda still around you and in your life
23 also?

24 **A.** She was.

25 **Q.** Do you remember talking with Kamook Banks,

1 Kamook Ecoffey, now?

2 A. I do.

3 Q. Do you remember where?

4 A. She came to my house and she said that she
5 wanted to talk with Arlo, but she didn't think Arlo
6 would talk with her alone so she came and she --

7 MR. MURPHY: Objection, Your Honor.

8 Nonresponsive to the question.

9 THE COURT: Overruled.

10 Q. (BY MR. OSWALD) You may proceed.

11 A. She said that she needed to know the
12 answers --

13 MR. MURPHY: Objection. Hearsay.

14 THE COURT: Overruled.

15 Q. (BY MR. OSWALD) Okay.

16 Now, did you know at that time that she was
17 working with the FBI?

18 A. I didn't.

19 Q. She talked to you on two different occasions;
20 is that right?

21 A. Yes.

22 She came one night and she said that Arlo was
23 in jail in Denver and that he was being released the
24 following morning at, I don't know, eleven o'clock or
25 something. I don't remember the exact time, but it

1 was still morning. He was going to be released from
2 the Denver jail and would I go with her -- would I go
3 with her so that she could talk to Arlo.

4 **Q.** And did that happen?

5 **A.** It did.

6 **Q.** Was this a lengthy conversation between you,
7 Kamook, and Arlo?

8 **A.** I don't know what the length was, but at
9 first Arlo wouldn't say anything. He just wouldn't --

10 **MR. MURPHY:** Occurred. Nonresponsive.

11 **THE COURT:** I think the nonresponsive
12 objection generally belongs to the asker of the
13 question.

14 I am going to overrule that unless there
15 is some thing --

16 **MR. MURPHY:** Narrative.

17 **THE COURT:** -- objectionable in the question.

18 **MR. MURPHY:** Then I object as to narrative.

19 **THE COURT:** That's the same objection here
20 and I think it's not particularly narrative.

21 Overruled.

22 Nonetheless, the question is over so I guess
23 you will ask another one.

24 **MR. OSWALD:** Yes.

25 Thank you.

1 **Q.** **(BY MR. OSWALD)** I'd like to show you State's
2 Exhibit 22.

3 Do you recognize that?

4 **A.** It's the apartment on 4494 Pecos. It's a --
5 it was a triplex. There were three apartments and
6 mine was number one.

7 **Q.** Okay.

8 **A.** And that's the porch to the back -- the
9 kitchen.

10 **Q.** Is this a true and accurate picture of what
11 it looked like?

12 **A.** Uh-huh.

13 **MR. OSWALD:** I would offer Exhibit 22.

14 **MR. MURPHY:** No objection.

15 **THE COURT:** Can I see it, please?

16 Thank you.

17 **MR. OSWALD:** May I show and publish, Judge?

18 **THE COURT:** Yes.

19 **MR. OSWALD:** It's pretty dark. I am going to
20 pass it around, if I may, Judge?

21 **THE COURT:** Certainly.

22 **MR. OSWALD:** Judge, may I just have a couple
23 seconds?

24 **THE COURT:** You may.

25 **Q.** **(BY MR. OSWALD)** Troy Lynn, after you saw them

1 taking Anna Mae, did you have any interactions with
2 John Boy Graham and Angie after that?

3 **A.** That day?

4 **Q.** Not -- yeah, after that date. Through the
5 spring, summer.

6 **A.** I did.

7 **Q.** Can you describe that type -- the interaction
8 that you recall?

9 **A.** I really -- I -- what I can remember is that
10 Angie was working at NARF, Native American Rights Fund
11 in Boulder. And that initially my Aunt Faney took
12 care of Arrow Woman and then Angie got an apartment
13 and I believe John Boy took care of Arrow Woman after
14 that.

15 And I was going to school and so I wasn't --
16 I was -- I wasn't gone all the time. Occasionally we
17 were all around each other.

18 **Q.** Do you -- can you tell the jury what a sun
19 dance is?

20 **A.** It's a prayer and purification ceremony that
21 takes place during the summer months. It's a four-day
22 prayer offering -- self-offering that our people do
23 for health and help.

24 **Q.** Did you partake of a sun dance the summer
25 after you last saw Anna Mae?

1 **A.** We traveled all together to Cherry Creek and
2 I say we, it was Angie, John Boy, myself, and Trudell.
3 We traveled to Cherry Creek, South Dakota, where they
4 went up on the hill. They -- I am speaking of some of
5 them, I mean, went up on the hill. And we stayed down
6 below. Kept a fire going the four days. And we fed
7 the people that were around there.

8 **Q.** I want to talk to you just a little bit now
9 before I close up here about what clothing items did
10 you give Annie Mae while she was staying with you
11 after Thanksgiving?

12 **A.** I gave her an orange -- it was an orange
13 turtleneck neck sweater that was the Bronco orange.
14 At that time it was orange crush. It's what they
15 called the Bronco defense team. And the shirts -- or
16 the sweater was one of those Bronco sweaters. It was
17 a turtleneck long sleeved ribbed wool sweater.

18 **Q.** Did you -- do you recall what she was
19 wearing, then, when you saw her in the back hatchback
20 of that Pinto?

21 **A.** She had that sweater on. She had on a brown
22 maybe suede or -- a brown jacket and she had on jeans.

23 **Q.** Was the suede jacket yours also?

24 **A.** No. It was hers. She came with it.

25 **Q.** How about her pants?

1 Were those yours?

2 **A.** She had at various times worn my pants but my
3 pants were too big for her. So she would wear mine
4 and wash hers and she had her own on.

5 **Q.** So she -- if we're talking Thanksgiving then,
6 she had enough time to do laundry and you didn't
7 object to that?

8 **A.** No.

9 **Q.** Okay.

10 And you know she did laundry throughout the
11 days that she stayed with you?

12 **A.** Yes.

13 **Q.** Did you see any of her writings?

14 **A.** I didn't, like, see them to read them, but I
15 saw her -- she would sit at the table in the kitchen
16 and write. I asked her who she was writing to and she
17 said her sister. And her -- she was letting her
18 family know where she was or whatever. But she was
19 trying to be in contact with her daughters through her
20 sister or something of that nature.

21 **Q.** Just to be fair, Troy Lynn, do you know if
22 Annie Mae was hiding from the FBI at that point?

23 **A.** Initially I didn't, but towards the end I
24 did.

25 **Q.** When the police talked to you -- let me

1 rephrase this.

2 Did the police come to talk to you over the
3 years?

4 A. The FBI did.

5 Q. Would you cooperate with them at that time?

6 A. No, I didn't.

7 Q. Did you mail any of those letters for Anna
8 Mae?

9 A. She mailed them. There was a mailbox at the
10 end of our block and she would walk there and mail the
11 letters.

12 Q. By the way, when they took Anna Mae out of
13 your house, was there any luggage or baggage that Anna
14 Mae had with her?

15 A. No.

16 Q. Did you ever see any personal identification,
17 wallet, purse, anything like that that she may have
18 had?

19 A. I don't think she had any. I didn't see it.
20 Could she have had it in her pocket, I don't -- not
21 that I know of, though.

22 Q. If you can recall, did she have a lot of
23 jewelry on?

24 A. She wore a silver bracelet. I think it
25 had -- it may have had turquoise on it and she wore

1 rings. I can't be specific about what they looked
2 like but she had very beautiful slender hands and she
3 had well-cared-for nails and she had the rings and the
4 bracelet.

5 Q. You said, Troy Lynn, that you didn't think
6 she had anything with her.

7 Did she have postage available to her for
8 mailing the letters?

9 A. I don't remember. I don't think that it was
10 very much for letters. But I know she didn't have
11 very much cash. You know, I do remember we didn't
12 have coffee. We were out of coffee and she was a
13 coffee drinker. Big time coffee drinker. And a
14 friend of ours -- a male friend of ours came and he --
15 she told him we don't have any coffee or we would make
16 you some coffee. So he said, well, I can fix that and
17 he went to the 7-Eleven across the street and he
18 bought her a big can of coffee.

19 Q. I am going to show you what's marked as
20 State's Exhibit 18.

21 Do you see that?

22 A. Yes.

23 Q. Who is that?

24 A. It's Anna Mae.

25 Q. Okay.

1 **MR. OSWALD:** I would offer Exhibit 18.

2 **MR. MURPHY:** No objection.

3 **THE COURT:** Will be received.

4 **A.** Can I say, when she came, her hair wasn't
5 long.

6 **Q.** (BY MR. OSWALD) Okay.

7 Let me ask this. Was her hair a different
8 length?

9 **A.** It was.

10 **Q.** Okay.

11 **THE COURT:** May I see it, please.

12 **MR. OSWALD:** Yes. I am sorry, Judge. I
13 didn't mean to exclude you.

14 **THE COURT:** Okay.

15 Thank you.

16 **MR. OSWALD:** Can I pass this around to the
17 jury also, Judge?

18 **THE COURT:** Pretty close to 12:00 o'clock,
19 Mr. Oswald.

20 **MR. OSWALD:** Yes.

21 I have no further questions.

22 **THE COURT:** Okay.

23 We'll look at the photograph for a couple
24 minutes and then we will break for lunch, folks.

25 Please remember during the break you are not

1 to discuss the case with anyone or amongst yourselves
2 and you are not to form any opinions on this matter
3 until you have heard all of the evidence and you are
4 released for your deliberations.

5 Thank you.

6 (Off the record.)

7 **THE COURT:** Okay.

8 Satisfied this is the jury, gentlemen?

9 **MR. JACKLEY:** I am, Your Honor.

10 **THE COURT:** Mr. Murphy?

11 **MR. MURPHY:** I am, Your Honor.

12 **THE COURT:** I believe, Mr. Murphy, you are up
13 for cross-examination.

14 **MR. MURPHY:** Thank you, Your Honor.

15 **CROSS-EXAMINATION**

16 **BY MR. MURPHY:**

17 Q. Would you like to be referred to as
18 Ms. Yellow Wood?

19 A. That's fine.

20 Q. Or Star Yellow Wood?

21 A. That's fine.

22 Q. I want to start by clarifying some of the
23 phrases you used during your direct examination. You
24 mentioned twice somebody named Arrow Woman.

25 Arrow Woman is whom?

1 **A.** Arrow Woman is Angie Begay's daughter.

2 **Q.** Okay.

3 And you indicated that during a time or
4 during the time in question you recall my client being
5 Arrow Woman's caretaker?

6 **A.** Yes.

7 **Q.** Okay.

8 And you also were asked just a few questions
9 about sun dances. And during that discussion of the
10 sun dance you also discussed men going up on a hill.

11 Do you remember that?

12 **A.** Yes.

13 **Q.** Now, the sun dance itself is a traditional
14 ceremony, correct?

15 **A.** Yes.

16 **Q.** And involves both men and women?

17 **A.** Yes.

18 **Q.** And there is difference roles, for instance,
19 men pierce where as women typically do not?

20 **A.** That's right.

21 **Q.** Although women will offer flesh offerings?

22 **A.** Yes.

23 **Q.** The issue about going up on a hill, that's
24 actually a different ceremony from a sun dance?

25 **A.** It is.

1 Q. Sometimes referred to as a vision quest?

2 A. Himlache (phonetic).

3 Q. I just wanted to clarify those points.

4 I want to go into something Mr. Oswald asked
5 you about. He asked you if during previous contacts
6 with law enforcement you were willing to give full
7 information.

8 Do you remember that topic?

9 A. I do.

10 Q. And you indicated that when you had talked to
11 law enforcement on previous occasions you were
12 hesitant to give them all the information?

13 A. I was.

14 Q. And when you were asked about information you
15 had given over the course of this information for 23
16 years now that you gave as little information as
17 possible, correct?

18 A. Initially, I did.

19 Q. Okay.

20 And you did so because you wanted to protect
21 Arlo Looking Cloud?

22 A. Primarily, yes.

23 Q. He was your friend?

24 A. Yes.

25 Q. And so now I have got some of your

1 statements. I got 13 of your statements here. You
2 were asked to testify at Grand Juries, correct?

3 A. Yes.

4 Q. And you did so on a couple occasions?

5 A. I did.

6 Q. And you talked to law enforcement on a number
7 of occasions, correct?

8 A. Many.

9 Q. Many.

10 And you are saying that during those
11 instances where you were asked to give information
12 that you gave inaccurate information to protect
13 Mr. Looking Cloud?

14 A. I never gave inaccurate information. I just
15 left pieces out.

16 Q. You left pieces out.

17 So you were willing to give incomplete
18 answers in order to protect Mr. Looking Cloud?

19 A. Yes.

20 Q. Okay.

21 And so your feelings about some outside
22 consideration, in this case Mr. Looking Cloud, was
23 something that you allowed to affect how you presented
24 evidence or provided information to law enforcement or
25 the Grand Jury?

1 **A.** It affected it.

2 **Q.** It affected it.

3 Now, I want to get a sense of what you might
4 have left out and what you were holding back.

5 From what I have gathered, you have given at
6 least four voluntary interviews with the FBI.

7 Does that sound about fair?

8 **A.** I think it's much more than four.

9 **Q.** Okay.

10 In any regard, in none of those interviews
11 were you required to give them information, were you?

12 **A.** No.

13 **Q.** You were free to talk to them or not to talk
14 to them?

15 **A.** Yes.

16 **Q.** You were never read your Miranda rights or
17 anything like that?

18 **A.** No.

19 **Q.** You weren't a suspect in a crime?

20 **A.** No.

21 **Q.** And you began giving them information as
22 early as 1987?

23 **A.** I am not certain. If that's what you have,
24 yes.

25 **Q.** Do you recall giving information any time

1 prior to 1987?

2 **A.** I am not certain. I don't remember. I am
3 not certain. I could have or maybe not. I don't
4 know.

5 **Q.** Okay.

6 If the first report I have is from June 15,
7 87, do you think that might be an accurate assessment
8 of when you started talking?

9 **A.** Possibly.

10 **Q.** Okay.

11 But it even could have been earlier?

12 **A.** I don't know.

13 **Q.** In any regard, you gave many statements to
14 law enforcement and you also appeared before the Grand
15 Jury on several occasions?

16 **A.** I did.

17 **Q.** And gave lengthy testimony in front of the
18 Grand Jury?

19 **A.** I did.

20 **Q.** And you also testified at Arlo Looking
21 Cloud's trial?

22 **A.** I did.

23 **Q.** And you testified against Dick Marshall at
24 his trial?

25 **A.** I did.

1 **Q.** One of the interviews you gave back in
2 2000 was the interview Mr. Oswald discussed where you
3 and Arlo and Kamook Banks sat down to talk.

4 Do you remember that?

5 **A.** Yes.

6 **Q.** If I represent to you that the recording of
7 that interview is about six hours in duration, does
8 that fairly and accurately represent what you recall
9 as to the duration?

10 **A.** No, it wasn't that long.

11 **Q.** If it covered nine cassette tapes, is that
12 something that you would be disputing as well?

13 **A.** It wasn't that long.

14 **Q.** You are sure of that?

15 **A.** That I can remember.

16 **Q.** That you can remember?

17 **A.** Yeah.

18 **Q.** If the transcript is 257 pages --
19 You have seen portions of that interview,
20 correct?

21 **A.** Excerpts of it.

22 **Q.** Did they ever give you the whole chunk of it?

23 **A.** No.

24 **Q.** Happened a long time ago, correct?

25 **A.** In 1987?

1 Q. No. 2000, you, Troy Lynn, and Kamook?

2 A. Oh.

3 What is your question?

4 Q. My question is, it happened a while ago. You
5 are not sure exactly how long the interview took?

6 A. No.

7 Q. Well, what I'm interested in is that you said
8 you had left out portions of your story and conceded
9 that it's affected your story because you were
10 interested in protecting Arlo.

11 But in each of the statements you have given,
12 over the last -- since 1987, you have always mentioned
13 Arlo east involvement, true?

14 A. Yes.

15 Q. Okay.

16 In fact, you were one of the witnesses that
17 testified against him at his own trial, correct?

18 A. I testified at the trial. I wouldn't say
19 against him.

20 Q. Well, let me ask you this, if you were trying
21 to give as little information as possible, how is it
22 that you have actually been for the last decade or
23 more probably the most productive and talkative
24 witness the government has?

25 A. Initially, I was not.

1 I told you later, after Arlo had spoken with
2 Trudell and after the story had basically become
3 public, then I didn't feel that there was anything to
4 withhold.

5 Q. But the discussion with Trudell happened way
6 back in the 80s, did it not?

7 A. I don't know -- I don't remember what the
8 time period was. It was previous to that.

9 Q. It was previous to -- it was previous to
10 1987, was it not?

11 A. Probably.

12 Q. Because you talk about that meeting from the
13 very beginning, correct?

14 A. I don't know. I don't remember that. I
15 don't know what's in that, so I don't really remember.

16 Q. So --

17 A. If you say it does, it does.

18 Q. Well, if you were withholding information up
19 until the time Arlo spoke with Mr. Trudell, then every
20 statement after that, whether it happened in 87 or 88,
21 would have been a complete rendition of events, would
22 it not?

23 A. Probably for the most part.

24 Q. You weren't slanting your testimony after
25 that?

1 **A.** I don't think so.

2 **Q.** So it should be relatively consistent?

3 **A.** I believe that the facts that I can remember
4 have been consistent, yes.

5 **Q.** In any regard, for about a decade you have
6 been an epicenter of this case, true?

7 **MR. OSWALD:** I will object, Your Honor --
8 I will withdraw the objection.

9 **THE COURT:** Okay.

10 **Q.** **(BY MR. MURPHY)** I want to go to another issue
11 you discussed on direct which is you were asked by
12 Mr. Oswald, after Anna left your house, whether you
13 were concerned for her safety.

14 Do you recall basically that line of
15 questioning?

16 **A.** I do.

17 **Q.** You didn't do any follow-up after that, did
18 you?

19 **A.** I didn't because I got a call from another
20 person in South Dakota who said that Anna Mae was in
21 Oglala.

22 **Q.** And she was safe in Oglala, correct?

23 **A.** That's what this person said, yes.

24 **Q.** Okay.

25 And so you heard from somebody you knew in

1 South Dakota that after Ms. Aquash left your house,
2 whenever that was, some time at a later date, she was
3 still doing okay in Oglala?

4 **A.** That's what this person told me, yes.

5 **Q.** Do you remember how many weeks after Anna
6 left your house that that call happened?

7 **A.** I don't know. It was relatively soon after,
8 but I couldn't tell you the dates or anything.

9 **Q.** Okay.

10 It wasn't like the next day on the day after?

11 **A.** No. No. No.

12 **Q.** Okay.

13 Last thing I am going to touch base with
14 you -- well, take that back.

15 I want to talk about the term flanking. That
16 was used several times during your direct examination.

17 When Anna Mae left your house, Theda Clarke
18 was standing or walking in front of her, correct?

19 **A.** I think so, but -- or they -- I'm not sure.
20 I'm not sure of the order. I just know that John Boy,
21 Aunt Theda, and Anna Mae -- or they walked her out. I
22 don't know the exact order.

23 **Q.** Okay --

24 **MR. MURPHY:** Your Honor, may I approach?

25 **THE COURT:** Yes.

1 **MR. MURPHY:** Okay.

2 Thanks.

3 **Q. (BY MR. MURPHY)** I'm going to show you your
4 testimony from the trial of Richard Marshall.

5 If you could just maybe read that page.

6 **A.** In the yellow --

7 **Q.** To yourself. I just want to get you
8 familiar. And if that helps you --

9 Have you had time to read that now?

10 **A.** Uh-huh.

11 **Q.** At least on that occasion you recall Theda
12 walking first, Anna Mae walking second, and my client,
13 Mr. Graham, walking behind her?

14 **A.** That's what it says.

15 **Q.** Are you saying it was untrue when you said
16 that four months ago?

17 **A.** Well, that's what I remember. I can't tell
18 you the exact order, but I think that's probably what
19 it was. I don't know. I can't really tell you the
20 exact order.

21 **Q.** But you told that jury that that was the
22 exact order?

23 **A.** Well, that's what I remembered at that time.

24 **Q.** So -- and that was in April of this year?

25 **A.** Uh-huh.

1 Q. That's a yes?

2 A. Yes.

3 Q. So it was exact, then; it's not exact now.

4 That's fair enough. Fair enough.

5 What I want to get to is at the time that you
6 saw them walking down the hall, you were in the
7 hallway, too, correct?

8 A. I think I was at the end of the hallway or --
9 or yeah, I could have been in the hallway with them.
10 It was wide enough for all -- we could have all fit in
11 there.

12 Q. Well, you indicated that Theda brushed past
13 you as they walked out, correct?

14 A. She sort of pushed me, I guess you could say.

15 Q. Okay.

16 If you said on that occasion that she brushed
17 me aside, would that be a fair statement?

18 A. Yes.

19 Q. So you were very very close to these three
20 individuals at that time?

21 A. Yes.

22 Q. All right.

23 You got a good look at what was going on?

24 A. Yes.

25 Q. Okay.

1 Earlier today you were asked about phone
2 calls you made, and you said that you called the
3 police or attempted to call the police, and that Angie
4 Janis stopped you from doing so?

5 **A.** She.

6 **Q.** You recall that?

7 **A.** Yes.

8 **Q.** You also said today that during that time
9 period you went into the back bedroom and you tried
10 calling your mom, and you tried calling another -- a
11 number of other individuals, correct?

12 **A.** Yes.

13 **Q.** Now -- and you said that you were seeking
14 help for Anna because you felt that something wrong
15 was going on, correct?

16 **A.** Yes.

17 **Q.** You were making valiant efforts to stop this?

18 **A.** I really didn't know how to -- or what to do.
19 But I didn't think that I could -- I could stop it,
20 but I thought possibly others could.

21 **Q.** Okay.

22 And so that's why you made these efforts on
23 her behalf?

24 **A.** Yes.

25 **Q.** Well, during the lunch break I read the

1 entire transcripts of your testimony at both Dick
2 Marshall's trial and Arlo Looking Cloud's trial. In
3 neither of those trials even though you are asked
4 about phone calls do you mention anything about any of
5 these other calls.

6 Does that shock you?

7 **A.** No.

8 **Q.** So even though today you are saying to this
9 jury that you were making heroic efforts, essentially,
10 to stop this, that's something that just never came up
11 in six months ago or four years ago or five years ago?

12 **A.** I think it has come up in the past.

13 **Q.** You do.

14 Do you recall when?

15 **A.** No, but I know it's been a topic of
16 discussion before so I know that it's got to be in
17 there somewhere.

18 **Q.** Well, if you had brought that up at, say,
19 Dick Marshall's trial, that wouldn't have hurt Arlo,
20 would it?

21 **A.** I don't know.

22 **Q.** Well, he was already convicted and doing a
23 life sentence, right?

24 **A.** I don't know.

25 **Q.** But you know he's been convicted?

1 **A.** Yes, I know.

2 **Q.** You know he's lost his appeal?

3 **A.** Yes.

4 **Q.** You know he's been sentenced to life?

5 **A.** Yes.

6 **Q.** So you wouldn't have withheld that
7 information at Dick Marshall's trial because you were
8 afraid of hurting Arlo, would you?

9 **A.** Which information?

10 **Q.** The information you gave today about calling
11 your mom and calling other people to try to get them
12 to stop this?

13 **A.** No.

14 **Q.** Okay.

15 And at Arlo's trial, by that time it wasn't
16 going to hurt Arlo, was it?

17 **A.** I don't know. I don't think so. I don't
18 know.

19 **Q.** Well, you already made -- you already gave
20 the testimony about the call to the police, right?

21 **A.** Uh-huh.

22 **Q.** Yes?

23 **A.** Yes.

24 **Q.** Well, I am going to start back talking about
25 some of the things that you discussed, the sequence of

1 events, and I want to start with why Theda brought
2 Anna to your house.

3 Theda brought Anna to your house and she told
4 you that she brought Anna to your house so you could
5 help protect Anna, correct?

6 A. For safe keeping, basically, yeah.

7 Q. Well, to protect her?

8 A. Yes.

9 Q. To keep her safe?

10 A. Yes.

11 Q. To watch out for her and not let anything bad
12 happen to her?

13 A. Yes.

14 Q. And the plan at the time she was dropped off
15 at your house was for Anna to stay at your house
16 temporary before she moved to the next safe house,
17 correct?

18 A. Yes. I think so.

19 Q. That's what you were given reason to believe
20 by Theda, correct?

21 That's what she told you?

22 A. I don't know if she did or not, but that was
23 probably the assumption. I don't know.

24 Q. I want to ask you if you would read to
25 yourself lines 4 through 13 or actually 1 through 13.

1 **A.** Uh-huh.

2 **Q.** So the idea was -- the plan was that she
3 would stay at your house for a little while, then be
4 moved to some other place, correct?

5 **A.** I assume so, yes.

6 **Q.** And you weren't going to be privy to where
7 she was going to be moved to next?

8 **A.** That was never discussed. I don't know.

9 **Q.** Well, was the question asked to you, and you
10 were not privy to what those arrangements might be,
11 correct? And you answered, no.

12 **A.** You know, I really don't know. I don't know
13 if I would have been or not.

14 **Q.** Okay.

15 I asked you if that's what you said
16 previously. I will approach so in fairness you can
17 take a look at the transcript. Let me know if I'm
18 reading this incorrectly. Question, and you were not
19 privy to what those arrangements might be, correct,
20 and you answered no?

21 **A.** Uh-huh.

22 **Q.** You will have to answer yes or no for Tina.
23 She can't write down uh-huh.

24 **A.** Okay.

25 What is your question?

1 **Q.** That's what you said under oath six months
2 ago?

3 **A.** Yes.

4 **Q.** Okay.

5 And the reason you wouldn't be privy to the
6 details of where she might go next because that's how
7 fugitives operated when they were trying to stay under
8 ground, correct?

9 **A.** I suppose.

10 **Q.** Well, it's more than a supposition. You were
11 there.

12 A woman who you knew to be a fugitive was
13 staying at your house, correct?

14 **MR. OSWALD:** I will object, Judge, to the
15 comment of counsel. More than a supposition. It's
16 not a question.

17 **THE COURT:** Overruled.

18 **Q.** **(BY MR. MURPHY)** You may answer.

19 You knew this woman was a fugitive, right?

20 **A.** Yes.

21 **Q.** You knew she was supposed to move from house
22 to house, correct?

23 **A.** I assumed so, yes.

24 **Q.** You knew she was under ground at the time she
25 was at your house, correct?

1 **A.** She told me she was.

2 **Q.** And by under ground, it means that she was
3 fleeing from the feds, correct?

4 **A.** Yes.

5 **Q.** And she was attempting to evade capture by
6 the federal government?

7 **A.** Yes.

8 **Q.** And part of being under ground meant that she
9 was not going to carry any other ID or any other
10 identifying information, correct?

11 **A.** I think it would have to be.

12 **Q.** Well, when you testified previously, you
13 indicated that that's why she wasn't carrying ID, and
14 in fact, why she was even using a fake name.

15 Do you remember that?

16 **A.** No, but I -- when she initially came, she did
17 come by a different name.

18 **Q.** She used the name Joanna?

19 **A.** I think so.

20 **Q.** And you told the jury in that case that she
21 would not have carried any identification with her
22 because she didn't want to be known or recognized?

23 **A.** I would think so.

24 **Q.** And that's what you told them back then, at
25 least?

1 Now -- and part of the other attempts she was
2 using to evade detection by the feds -- and when I say
3 the feds, the federal government, the FBI, those are
4 the people she was trying to hide from, correct?

5 **A.** Yes.

6 **Q.** She had also cut her hair very short?

7 **A.** Yes.

8 **Q.** It was even shorter than your hair is today?

9 **A.** Yes.

10 **Q.** Though she was trying to avoid detection, she
11 opted to stay at your house, correct?

12 **A.** Yes.

13 **Q.** And your house was a house where people
14 affiliated with the American Indian Movement came and
15 went regularly?

16 **A.** Yes.

17 **Q.** At one point you even offered her the
18 opportunity to stay at an empty house somewhere else,
19 correct?

20 **A.** Yes. There is -- it's called the projects
21 right -- a field between my house and the projects.
22 And we had another friend who had an apartment there
23 but wasn't staying there. So she felt like there were
24 too many people coming and going and she wanted to go
25 somewhere else. So I gave her the key and she stayed

1 over there for a few days.

2 Q. Just a couple days?

3 A. Uh-huh.

4 Q. Again, so the court reporter can write down
5 actually what you are saying, you have to answer yes
6 or no.

7 A. Okay.

8 Q. So that was a yes?

9 A. Yes.

10 Q. And although she had that option, she came
11 back to your house after a couple days?

12 A. She was only gone for, yeah, two days
13 probably, and then she came back.

14 Q. And people affiliated with the American
15 Indian Movement knew she was at your house, correct?

16 A. I don't know. I guess they would.

17 Q. I don't want you to guess.

18 A. I think so. I am not sure. I don't know
19 what other people knew.

20 Q. Did you testify previously that other Indian
21 people came to your house and that they knew she was
22 there?

23 A. Yeah. But they -- not all the people that
24 came to my house were not American Indian Movement
25 members. They were just Indian people in general.

1 Q. Okay.

2 Let's -- let me ask it this way. Were you
3 asked the question, under oath, November 17, 1995,
4 question, were other people eventually aware of the
5 fact that Anna Mae was at your residence? And by
6 other people I mean other people in the American
7 Indian Movement. Your answer, I'm not certain, but a
8 lot of people came to my house all the time, a lot of
9 Indian people, and they knew she was there.

10 Do you remember giving that answer?

11 A. Yeah. Well, that is the truth. A lot of
12 people knew she was there. Whoever came there would
13 see her.

14 Q. All right.

15 So -- and in fact, during this period of
16 time, she even went over to your parents' house and
17 had a big Thanksgiving dinner with a lot of other
18 people?

19 A. She did.

20 Q. So if she was hiding from somebody, she
21 certainly wasn't hiding from the American Indian
22 Movement when she was at your house, was she?

23 A. I don't think so.

24 Q. She was hiding from the FBI and the feds,
25 correct?

1 **A.** I would think so, yes.

2 **Q.** In fact, you said at Dick Marshall's trial
3 that what Annie Mae Aquash was afraid of during the
4 time she was at your house was that she was very
5 paranoid of the government, of the feds, the FBI, the
6 feds.

7 Is that accurate?

8 **A.** She was. She was -- but they weren't the
9 only ones she was paranoid -- she was paranoid
10 about -- just about everybody.

11 **Q.** Well, I understand that's what you say today.
12 But yet, if she was paranoid of everybody, she
13 wouldn't have opted to return from an empty apartment
14 where she could stay anonymous, would she?

15 **A.** I don't know. She -- it was her choice to
16 come back and she came back. It was -- there was
17 nothing in that apartment, like, any -- really nothing
18 to do at that apartment. There wasn't a television.
19 There wasn't anything there, but I think it was just
20 out of loneliness she came back.

21 **Q.** Well, you testified today that she was
22 paranoid -- in an agitated state because of her fear
23 of people in AIM believing she was an informant.

24 Do you remember saying that earlier today?

25 **A.** She was -- I think that's not exactly the way

1 I meant it to sound. She was paranoid about, really,
2 basically everything.

3 Q. Okay.

4 If she was paranoid -- if among the things
5 she was paranoid about --

6 A. Yes.

7 Q. -- was, as you said earlier, AIM people who
8 believed she was an informant, would that be part of
9 the people you are saying she was afraid of?

10 A. I think so.

11 Q. Okay.

12 So what I am getting at, if that's true --
13 well, let me ask you this. That's something you are
14 assuming to be the case?

15 A. Yes.

16 Q. Okay.

17 It's an assumption on your part?

18 A. Yes.

19 Q. All right.

20 Well, let's look at her conduct. She opts
21 not to stay in an apartment where she could have
22 remained anonymous, correct?

23 A. Yes.

24 Q. She opted to go to a Thanksgiving dinner with
25 you and your family and other people?

1 **A.** There wasn't any other people except for my
2 immediate family, my brothers and sisters, my mother,
3 father, and children that's about it.

4 **Q.** She elects to stay in your house which is a
5 house where people from the American Indian Movement
6 come and go, correct?

7 **A.** I don't know if she would have chosen that
8 place but she was brought there, yes, she did stay
9 there.

10 **Q.** She was brought there to keep her safe?

11 **A.** Yes.

12 **Q.** And she stayed there, correct?

13 **A.** Yes.

14 **Q.** So if your assumption was right that she was
15 also paranoid about people in AIM, she wasn't doing a
16 good job of staying hidden from people in AIM, was
17 she?

18 **A.** I think she was. I think she did a fairly
19 good job of staying -- you know, the reason why she
20 went to the other place was because she -- you know,
21 she thought too many people came there and she didn't
22 feel comfortable around them. She didn't know what
23 they were. Different people came and went.

24 **Q.** You indicated earlier this is woman who was
25 afraid of -- for her life from AIM. And now it's --

1 well, she came back to your apartment where you have
2 already testified this was a gathering place for
3 people in the American Indian Movement because she --

4 **A.** Yes, she did.

5 **Q.** -- because she felt lonely and she didn't
6 have a TV over at the other place?

7 **A.** I can't tell you why she came back. I don't
8 know why except for, you know, she didn't want to be
9 over there anymore so she came back. I don't know if
10 she would have stayed long or not. But that same day
11 that she came back is when they took her to South
12 Dakota. So I don't know. Maybe she wouldn't have
13 stayed there. Maybe she just came for a little while.
14 I don't know.

15 **Q.** You don't know, and maybe that's what I am
16 getting at.

17 Maybe of the things you have today to this
18 jury are basically assumptions you've made over the
19 course of the last 35 years as to why she acted a
20 particular way at a particular be time, correct?

21 **A.** Well, yeah, they could be assumptions, but I
22 would base them on how she behaved and how she spoke
23 and what she said.

24 **Q.** All right.

25 Well, then we've just been talking about how

1 she behaved and some of the choices she made. She
2 went out, went to 7-Eleven, went to the mailbox, hung
3 out with people at your house, correct?

4 **A.** Yes.

5 **Q.** Now, you spent about a week together; is that
6 accurate?

7 **A.** I don't know the exact time frame. Had to --
8 the minimum it could have been was a week. It could
9 have been longer.

10 **Q.** And she came to your house some time before
11 Thanksgiving because you know she had Thanksgiving
12 dinner with you and your family?

13 **A.** Yes.

14 **Q.** During that week you did spend quite a bit of
15 time together?

16 **A.** Yes.

17 **Q.** You talked about personal subjects?

18 **A.** Yes.

19 **Q.** You got to know each other?

20 **A.** Yes.

21 **Q.** Some of the things she told you about were
22 personal things?

23 **A.** Yes.

24 **Q.** Such as that she told you about her love for
25 Dennis Banks?

1 **A.** Yes.

2 **Q.** In fact, she was very much in love with him,
3 correct?

4 **A.** Yes.

5 **Q.** And that the reason she told -- she told you
6 the reason why she traveled from Pine Ridge out to
7 Washington State and Oregon in November of 1975 was to
8 be with Dennis Banks, correct?

9 **A.** I believe so.

10 **Q.** During that time that you and her are
11 confiding with each other, she never mentioned to you
12 once that the reason she was on that trip in the motor
13 home was because she was being held captive or forced
14 to be along for the ride, did she?

15 **A.** No.

16 **Q.** So she was willing to talk about some pretty
17 personal things, but that wasn't something she brought
18 up?

19 **A.** No.

20 **Q.** I want to us discuss with you your statement
21 that during this period of time she told you that
22 Leonard Peltier held a gun to her head out at
23 Farmington.

24 Do you recall that?

25 **A.** Yes.

1 Q. And I don't know how much we discussed it
2 earlier, but Farmington is a town in New Mexico?

3 A. Yes.

4 Q. In early June of 1975 there was a conference
5 of AIM chapters there, correct?

6 A. Yes.

7 Q. Now, I understand that's your testimony
8 today, but at previous -- on previous occasions, you
9 claimed that Anna Mae told you that she and Leonard
10 Peltier were at a drunken party together and that's
11 when he put a gun to her head and accused her of being
12 an informant?

13 A. I don't remember that.

14 Q. I will show you two documents -- actually,
15 they are duplicates of each other.

16 And does this appear to be a summary of an
17 interview done between you and Mr. Ecoffey and
18 Mr. Pourier?

19 A. Uh-huh.

20 Q. Again, you have to say yes or no.

21 A. Do I have what?

22 Q. You have to say yes or no.

23 Does this appear to be a summary of an
24 interview between you and Mr. Ecoffey?

25 A. I have never seen it before, but if you say

1 it is, it is.

2 Q. Read the first paragraph. I am not trying to
3 put words into your mouth.

4 A. Yes.

5 Q. Okay.

6 Then I am going to turn to page 2,665 Graham
7 document. I am going to ask you to read the last
8 there to yourself.

9 Have you a chance to read that now?

10 A. Yes.

11 Q. So --

12 A. I don't recall making that statement, but --

13 Q. At least the statement that was made was that
14 when you went to the authorities and spoke with
15 them --

16 A. I didn't go to the authorities.

17 Q. When they came to you and spoke with you, in
18 1994, they say you told them that Anna Mae told you
19 that at a drunken party --

20 A. I don't recall that.

21 Q. You have to let me finish asking my question.

22 They said in their report that you said that
23 this whole incident about a threat was at a drunken
24 party with Leonard Peltier and Anna Mae, correct?

25 A. I don't recall that.

1 Q. You don't recall telling them that?

2 A. No.

3 Q. So if they wrote it down, you believe that
4 was either inaccurate on their part --

5 A. I don't know. I don't remember telling them
6 that.

7 Q. Could you have said that to them?

8 A. Possibly, but I don't remember it.

9 Q. But in any regard, today you are saying that
10 this threat that Ms. Aquash relayed to you happened at
11 Farmington, not at a drunken party?

12 A. Yes.

13 Q. Okay.

14 During the course of time that Ms. Aquash was
15 confiding to you about her love affair with Mr. Banks
16 and these alleged threats, she never told you about
17 any time Mr. Peltier confessed to executing any FBI
18 agents, did she?

19 A. No.

20 Q. Okay.

21 But you were at that point one of the closest
22 people in the world to her, were you not?

23 A. I was probably her last friend.

24 Q. Uh-huh.

25 And in fact, you have indicated in previous

1 testimony you considered her one of your best friends
2 at that time?

3 **A.** I did.

4 **Q.** Okay.

5 Now, on the night of this alleged meeting,
6 first off, the meeting itself, took about 15 minutes
7 is that not correct?

8 **A.** I don't know exactly, but probably. I
9 couldn't tell you the exact time.

10 **Q.** If you testified on previous occasions that
11 it was about 15 minutes, would that be inaccurate or
12 accurate?

13 **A.** It's probably close to that time. I just
14 can't tell you the exact time of things. I don't
15 remember, but possibly or probably.

16 **Q.** In any regard it was not a long protracted
17 meeting?

18 **A.** No.

19 **Q.** There was not any kind of mock trial?

20 **A.** No.

21 **Q.** And it was in your house so if there was you
22 would know about it?

23 **A.** I probably would.

24 **Q.** It was a small apartment, was it not?

25 **A.** About the living room was about from that

1 poll -- about -- about that big.

2 Q. All right.

3 And you were walking around your own
4 apartment during this time period?

5 A. I didn't go into the living room any time
6 except to set the coffee down, but I went from the
7 kitchen down the hall to the bedrooms.

8 Q. But the living room was not walled off or
9 sequestered off from the rest of the house by doors,
10 was it?

11 A. No. It had an open door way.

12 Q. Open door way into the kitchen?

13 A. Yes.

14 Q. And then into the hallway to where the
15 bedroom was?

16 A. Yes.

17 Q. During the meeting that you say happened,
18 neither Arlo Looking Cloud nor John Graham were
19 participants in that meeting, were they?

20 A. I don't know. I don't know where -- I -- you
21 know, I can't remember where John Boy was, but Arlo
22 hadn't come into the house yet that -- to my
23 recollection. I am not certain where John Boy was,
24 but I am pretty fairly certain that Arlo hadn't come
25 into the house yet.

1 **Q.** So at least --

2 **A.** Or -- in that regard, I don't think he ever
3 came all the way in the house. I think he just came
4 to the back door -- when you come to the back door
5 there was steps that come into the basement. He may
6 have gone down there, but I think he came to the back
7 door. That's what I can vaguely remember.

8 **Q.** Vaguely remember?

9 **A.** Vaguely, yeah.

10 **Q.** Did you have a conversation with him about
11 Joe Morgan, that he was looking for a drinking partner
12 and all of that?

13 **A.** At that particular time?

14 **Q.** Yeah.

15 **A.** I really -- I don't remember. I don't
16 remember when I knew of that. I don't know -- I don't
17 think -- I don't think that I talked to Arlo one on
18 one. I don't remember talking to him.

19 **Q.** If in previous sworn statements you said you
20 didn't have any conversation with Arlo on that night,
21 would that be consistent with what you recall now?

22 **A.** Yes.

23 **Q.** And so information you relayed to the jury
24 earlier about Arlo coming to your house, looking for
25 his drinking buddy Joe, and whatnot, would have been

1 information you learned afterwards, correct?

2 A. Yeah. I remember talking with him about it.

3 Q. Okay.

4 A. About him looking for Joe Morgan, yes.

5 Q. But that wasn't --

6 A. That he told me that night, no, I don't think
7 so.

8 Q. Okay.

9 Now, you said today that when you laid down
10 the coffee you heard somebody say or one of the
11 Crusade for Justice folks say about, this is what we
12 do to snitches and you drew your finger across your
13 throat?

14 A. Yes.

15 Q. You have been asked repeatedly over the years
16 about what happened during that meeting, right?

17 A. Yes.

18 Q. And you were in the house during that the
19 time when the meeting occurred?

20 A. Yes.

21 Q. And even though it wasn't a long meeting you
22 were at least in there long enough to put coffee down
23 and do some other stuff, correct?

24 A. I didn't do anything but put the coffee down
25 and turn around and walk back out.

1 Q. Well, you were in the kitchen making coffee,
2 correct?

3 A. Initially I made the coffee, then I took it
4 in the kitchen, and then I came back out.

5 Q. Well, the kitchen and living room are right
6 next to each other?

7 A. Yes.

8 Q. And it's an open door way?

9 A. Yes.

10 Q. Okay.

11 And so you are in there making the coffee,
12 getting the cups, and all that stuff ready, correct?

13 A. Yes.

14 Q. And then you bring it in, correct?

15 A. Yes.

16 Q. And then you come out?

17 A. Yes.

18 Q. All right.

19 You have repeatedly testified that you have
20 no idea what they were talking about in that room,
21 correct?

22 A. That's correct.

23 Q. You didn't hear any of the -- overhear any of
24 the conversation that was taking place in the living
25 room, correct?

1 **A.** I did not.

2 **Q.** You have told other forums, Grand Jurors, in
3 the past that you don't know how many people were in
4 the meeting, correct?

5 **A.** I don't, but I think -- the room was fairly
6 full. But you know, I really don't know. No, I don't
7 remember.

8 **Q.** You don't remember who all were participants
9 in the room?

10 **A.** The only people I can absolutely say were
11 there was Ernesto, Corky, and Theda absolutely.

12 **Q.** All right.

13 You had said in Arlo's trial you had no idea
14 what the meeting was about in your living room,
15 correct?

16 **A.** That's correct.

17 **Q.** Let's talk about Anna's departure after the
18 meeting. You were standing right there in the hall
19 when Theda and Anna and John allegedly left?

20 **A.** Yes.

21 **Q.** We talked about. They were close enough to
22 you that you -- they brushed aside you or at least
23 Theda brushed aside you?

24 **A.** Yes.

25 **Q.** And you had a chance to look at Anna and even

1 have a brief exchange of conversation with her,
2 correct?

3 **A.** I don't know so much that we had a
4 conversation; that she just made the statement that --
5 you know she wanted to go but --

6 **Q.** That's fine. That's what I am talking about.
7 You had that opportunity to talk or she at
8 least had an opportunity to say something to you?

9 **A.** Yes.

10 **Q.** And she was not tied up at that point was
11 she?

12 **A.** No.

13 **Q.** In fact, at no time when she was in your
14 house did you ever see her tied up, did you?

15 **A.** I never saw her tied up.

16 **Q.** And you testified earlier not only did you
17 see Theda and John and Anna walk out of the house but
18 you actually saw them get in the car, correct?

19 **A.** I didn't watch them walk all the way to the
20 car. I think I went back into the bedroom. I was
21 really, you know -- just raw energy and I -- you know,
22 I paced and then I went back and I looked out the
23 door. And that's when I saw that she was in the
24 hatchback. So that's why I really don't know who --
25 how people were seated in there. But --

1 **Q.** You indicated you saw her well enough to --
2 you saw her out there well enough to see how she was
3 seated and whatnot in the car?

4 **A.** Yes. From my back door to where the back of
5 that hatchback was -- the back of the car was backed
6 into my house, it's only from here to where the people
7 are over there.

8 **Q.** All right.

9 **A.** It's not very far.

10 **Q.** All right.

11 So you had a good opportunity to see her?

12 **A.** Yes.

13 **Q.** And you never saw her tied up or indications
14 of her being tied up in the car?

15 **A.** I don't think she was.

16 **Q.** And in fact, you testified previously that on
17 occasions that she walked out of the house on her own
18 voluntarily?

19 **A.** She did, but she didn't want to go.

20 **Q.** But she -- you at least characterized her
21 leaving the house voluntarily because she wanted to go
22 face her accusers, correct?

23 **A.** She didn't have a choice.

24 **Q.** Well, you testified previously at Arlo's
25 trial, you used the words, she went voluntarily?

1 **A.** Well, you know, it's just like making the
2 best of a bad situation. Okay. You can go or --

3 **Q.** Okay.

4 Ma'am, did you use the term voluntarily at
5 least in the past when describing --

6 **A.** Yes, she walked out on her own.

7 **Q.** Now, you talked today about your
8 confrontation with Theda where she allegedly swore at
9 you and told you you don't know what you are doing?

10 **A.** Yes.

11 **Q.** You gave statements to law enforcement in
12 1987, August of 94, going all the way through 94, 95,
13 multiple statements, and you never mentioned once that
14 confrontation with Theda?

15 **A.** I think that I did. Every time that we have
16 ever talked about it I did.

17 **Q.** I'm going to ask you to review -- first, take
18 a look at the first paragraph of that document, and
19 let me know when you are done with the first page.

20 **A.** In yellow?

21 **MR. OSWALD:** John, what document are you
22 showing her?

23 **MR. MURPHY:** Aquash box document 87-3.

24 **MR. OSWALD:** But what document is it?

25 **MR. MURPHY:** I am going to have her identify

1 it. It's the June 15, 1987 --

2 Q. (BY MR. MURPHY) Okay.

3 Was that a summary of an interview conducted
4 between yourself and FBI Agents Gunderson and Kerwin
5 on June 15, 1987?

6 A. Yes.

7 Q. Okay.

8 Would you please read the rest of the
9 document, then.

10 Have you finished reading it?

11 A. Yes.

12 Q. And you don't mention anything to the law
13 enforcement authorities about any confrontation with
14 Theda?

15 A. I never gave very much information to them.

16 Q. You gave them all sorts of information about
17 the alleged abduction?

18 A. That isn't very much information compared to
19 what has been said.

20 Q. If you would, showing you Graham document
21 2663, a five-page report of an interview you gave with
22 FBI Agent James Graf, August 4, 1994.

23 Would you skim through that and see if you
24 can find any indication whatsoever about the alleged
25 confrontation with Theda Clarke.

1 **A.** No, it doesn't, but it also doesn't -- it
2 also says that I didn't know how she got there.

3 **Q.** The question --

4 **A.** The information --

5 **Q.** Ma'am, I'm asking the questions right now.
6 The government will have a chance to respond.

7 This is -- 1994 is the time. You said early
8 on you weren't willing to give --

9 **A.** I was never willing to give --

10 **THE COURT:** Hold on, ma'am. You have to let
11 the question get finished. Then you get to answer.
12 And then we go on.

13 Thank you.

14 **Q.** **(BY MR. MURPHY)** At this time when you said
15 you weren't willing to give authorities information,
16 you voluntarily discussed this matter with
17 Mr. Ecoffey, Mr. Pourier, and FBI Agent Graf, correct?

18 You weren't forced to give this information?

19 **A.** Basically, Mr. Ecoffey came to my place of
20 employment. Continuously. He came to my home. He
21 kept coming until I finally did agree to talk with
22 them.

23 **Q.** And you gave them page after page of
24 information, correct?

25 **A.** Four pages.

1 Q. Four pages?

2 A. But it's not all of the information, no, it
3 isn't.

4 Q. You added stuff later on, right?

5 A. Yes.

6 Q. And you made assumption as to what happened
7 later on, correct?

8 A. Some.

9 Q. And you added details about your own efforts
10 to help Anna Mae Aquash as time went on, correct?

11 A. I don't know. From the initial -- from the
12 beginning, I told that, but I don't know. I don't
13 know when. I don't know where or when, but I did.

14 Q. At least in the beginning, before this case
15 was at the status it is now, you weren't talking about
16 making calls to stop the abduction?

17 A. No, not in that report.

18 Q. And you weren't talking about attempts you
19 made to stop Theda from taking Anna Mae out, correct?

20 A. If it's not in there, I guess not. I don't
21 know.

22 Q. So those details about your own efforts
23 didn't come until later, correct?

24 A. I don't -- I recall it from the beginning,
25 but I don't know. Whatever -- whatever is in there,

1 whatever you say --

2 Q. Those details wouldn't have implicated Arlo
3 or harmed Arlo, right?

4 A. I don't think so.

5 Q. So you weren't holding back those kind of
6 details at that point because of your concern for
7 Arlo, correct?

8 A. I don't think so.

9 Q. Let's talk about when you last saw Anna Mae
10 Aquash. You say you didn't see them actually get into
11 the car, correct?

12 A. No. I don't know who was sitting where.

13 Q. But you did see who -- somebody you thought
14 to be George Palfy in the car with them, correct?

15 A. I just -- I think I assumed that he -- he
16 left with them. I don't really know. But he was
17 there. And there were -- I -- I assumed there were
18 four people and that's why they put her in the
19 hatchback. So that's why I thought he was the fourth
20 person. I didn't know for certain. I can't really
21 tell.

22 Q. Well, would you have testified in the past
23 that there were two people in the front, two people in
24 the back and Anna in the hatchback area?

25 A. Yes.

1 **Q.** And that you thought it was George Palfy in
2 the car?

3 **A.** I thought it could have been George Palfy.

4 **Q.** All right.

5 You might have said that on repeated
6 occasions that you thought George --

7 **A.** Well, he was there and then I didn't know
8 where he went. And yes, I did think he was with them.

9 **Q.** Okay.

10 And that's -- you were just a short distance,
11 you said, from the window to the car or the door to
12 the car?

13 **A.** Uh-huh.

14 But -- the hatchback was parked so I could
15 see the -- what was in the back, but I couldn't see
16 exactly what was in the front.

17 **Q.** In any regard, at this time today when you
18 testified about them driving away, you indicated Anna
19 was -- had her arms around her knees and she was
20 slumped overruled.

21 Do you recall that?

22 **A.** Yes.

23 **Q.** Do you remember saying that Anna was sitting
24 up and -- sitting up erect in the back and that she
25 was back there because the car was full?

1 **A.** That was my assumption, yes.

2 **Q.** Well, it wasn't -- when you testified
3 previously that she was sitting up in the back, not
4 slumped over, that wasn't an assumption, that's
5 something you observed, correct?

6 **A.** Yes. I believe that she did both. She both
7 sat up and later at one time -- she did both.

8 **Q.** Okay.

9 You knew my client to some extent back in
10 1975?

11 **A.** I did.

12 **Q.** He was a young guy?

13 **A.** Yes.

14 **Q.** Had no significant involvement in the
15 American Indian Movement?

16 **A.** I don't know that. I don't know.

17 **Q.** Okay.

18 **A.** He was --

19 **Q.** That's fine.

20 **A.** -- with Angie Begay.

21 **Q.** I want to show you a transcript of sworn
22 testimony you gave November 17, 1995. If you might
23 read from, say, lines 12 to 19. My client didn't have
24 any significant involvement in the American Indian
25 Movement, did he?

1 **A.** I believe they were members. I don't know --
2 I couldn't say what their significance was. I don't
3 think it was any great significance but they were
4 members.

5 **Q.** When you say members, there was no membership
6 card?

7 **A.** No. If you wanted to be you could be.

8 **Q.** In other words, when we're talking about
9 being a member, somebody who supports the ideals of
10 the American Indian Movement?

11 **A.** Yes.

12 **Q.** And if somebody wanted to, they could say,
13 I'm a member?

14 **A.** Yes.

15 **Q.** And that's about as far as it went, right?

16 **A.** Yeah.

17 **Q.** John wasn't a dangerous person?

18 **A.** I didn't know him to be a dangerous person.

19 **Q.** And he wasn't a thug? Previous statements
20 you have made.

21 **A.** I didn't know him to be.

22 **Q.** And you didn't know him to be particularly
23 close to Theda?

24 **A.** I don't really know what their relationship
25 was. I believe that the first time I met him was

1 through her, but I don't know -- I can't say other
2 than that.

3 I believe that she initially said that he was
4 her nephew from California or something like that. I
5 don't remember. But I knew that he wasn't my first
6 cousin whom she was saying were the Pattons from
7 California.

8 Q. Do you recall testifying just six months ago
9 that Theda was -- and John weren't in the same
10 company; that you don't think Theda knew him before he
11 became partners with Angie Begay?

12 A. Probably, yeah. I don't really know when
13 they met. All I know is that for some reason she --
14 she named him Patton. I don't know why.

15 Q. All right.

16 But regardless -- I mean if Angie and John
17 had a relatively short-term relationship, it was your
18 understanding that John and Theda met once he started
19 dating Angie, right?

20 A. I would think so, yes.

21 Q. And Angie and Theda were related?

22 A. No.

23 Q. Angie and Theda were friends?

24 A. Yes.

25 MR. MURPHY: Nothing further.

1 Thank you.

2 **THE COURT:** Redirect?

3 **MR. OSWALD:** Thank you.

4 **REDIRECT EXAMINATION**

5 **BY MR. OSWALD:**

6 Q. Troy Lynn, when Mr. Murphy asked you this
7 question about many of the things you said today were
8 assumptions, do you remember that question?

9 A. Yes.

10 Q. There is facts, assumptions. I want to ask
11 you this.

12 It is your assumption or a fact that Anna Mae
13 did not want to go with John Boy and Theda?

14 **MR. MURPHY:** Objection. Form of the
15 question.

16 **THE COURT:** Overruled.

17 Q. **(BY MR. OSWALD)** You may answer.

18 A. She did not want to go.

19 Q. Is it a fact or an assumption that you saw
20 Ernesto Vigil slash his throat talking about snitches
21 or informants?

22 A. It is a fact.

23 Q. Is it a fact or an assumption that you saw
24 Anna Mae in the back of that hatchback?

25 **MR. MURPHY:** Your Honor, I am going to object

1 to the term fact as opposed to observation.

2 **THE COURT:** Well, let's move it this way. Is
3 it an observation or an assumption.

4 **MR. OSWALD:** Very good.

5 **Q. (BY MR. OSWALD)** Is it an observation or an
6 assumption?

7 **A.** It was an observation.

8 **Q.** Was it an observation or an assumption that
9 Anna Mae was crying?

10 **A.** She -- well, she was crying, initially. She
11 would -- she would regain her composure and -- so
12 yeah. She would cry and then she would regain her
13 composure and then she would just be, like, resigned
14 to whatever was going to happen. I don't know.

15 I can't -- it's hard for me to explain it,
16 but I know that she didn't want to go. I believed
17 that she went and that she just braved up to whatever
18 because she thought that was the best way to take
19 things away from me. I believe she did that for my
20 sake.

21 **MR. MURPHY:** Objection. Speculative
22 testimony.

23 **THE COURT:** All right.

24 At that point, the point where she said I
25 believe that she thought, is speculative and the jury

1 will disregard that.

2 Q. (BY MR. OSWALD) All right.

3 You know, Mr. Murphy talked to you about --
4 and he showed you some documents that maybe you said
5 this or something that about the flanking.

6 Do you remember that?

7 A. Yes.

8 Q. Did you ever deviate about who was present in
9 flanking her?

10 A. No.

11 Q. You just didn't know who was first and
12 maybe --

13 A. No.

14 Q. Okay.

15 Now, remember, he showed you the report from
16 Jim Graf? You read that.

17 A. I don't remember who Jim Graf is, but yes.

18 Q. FBI Agent Jim Graf.

19 A. I don't remember him.

20 Q. But you remember that report you just saw?

21 A. Yes.

22 Q. And you were trying to explain something.

23 Do you remember that?

24 A. Yes.

25 Q. And what did you want to explain to the jury?

1 **MR. MURPHY:** Vague. Improper form.

2 **THE COURT:** Well, I'd like to make sure that
3 you and she know what you're are talking about. And
4 then I will understand the incident, but I am not sure
5 this is where we want to be.

6 **A.** Can I look at the paper?

7 **Q.** (BY MR. OSWALD) Yes.

8 **MR. OSWALD:** May I approach, Judge?

9 **THE COURT:** Absolutely.

10 **A.** It was on the second page.

11 **Q.** (BY MR. OSWALD) Okay.

12 **A.** It just says here that I said I didn't know
13 how Anna Mae Aquash got to my home. And so the point
14 was just that, you know, I didn't give a lot of
15 information. I didn't -- basically that was answers
16 to questions that they asked me. And you know, most
17 certainly I knew how she got there, but I didn't
18 volunteer that information.

19 **Q.** Now, do you remember the conversation you and
20 Mr. Murphy had about the drunken party --

21 **A.** Uh-huh.

22 **Q.** -- and Anna Mae and Leonard Peltier.

23 Regardless of the drunken party or not, did
24 Anna Mae tell you a gun was held to her head?

25 **A.** Yes.

1 And -- can I add one thing to that? I didn't
2 know of Anna Mae to drink so that's -- I don't know
3 why that would be in there. I know that she was at
4 parties the same as I. But I don't -- I can't ever
5 say that -- I mean, I don't -- I never knew or heard
6 of her to drink. So I don't know. I don't know why I
7 would have said that because she may have been at a
8 party, yes, most certainly. But a drunken party or
9 drunk, if that alludes to the fact that she was
10 drinking or drunk, no, I don't think that was ever the
11 case.

12 **Q.** Do you remember the question Mr. Murphy asked
13 you about getting a call that Anna Mae was in Oglala
14 and doing fine?

15 **A.** Yes.

16 **Q.** Do you know who made that call to you?

17 **A.** Wilma Blacksmith said that -- she told me
18 that Anna Mae was in Oglala and I believe she said she
19 was with Candy Hamilton. I don't know. That's kind
20 of a vague memory, too. But she just said that she
21 was there and that she was okay.

22 **Q.** Do you know -- was that before you found out
23 Anna Mae was dead?

24 **A.** Yes.

25 **Q.** When do you first recall hearing about Anna

1 Mae dying and being dead?

2 **A.** There was -- it was at a Wounded Knee
3 memorial in Rapid City. There was this rumor just
4 everywhere that this -- a woman's body was found in
5 the Badlands and that was the first that I heard.
6 Nobody knew that it was Anna Mae. We just knew that
7 this woman's body was found.

8 And then some time following, after that, it
9 was -- the body was identified as Anna Mae's. It
10 wasn't a long period of time. So the Wounded Knee
11 memorial is around the end of February. And so it
12 would have been some time after that. Shorty after.
13 Maybe a week after. I don't know.

14 **MR. OSWALD:** Nothing further, Judge.

15 **THE COURT:** Mr. Murphy?

16 **MR. MURPHY:** Very briefly.

17 **RE-CROSS-EXAMINATION**

18 **BY MR. MURPHY:**

19 **Q.** You were redirected towards the flanking
20 comment that you made.

21 You didn't tell the authorities about that
22 for years in your initial interviews, did you?

23 **A.** I don't know. I don't remember.

24 **Q.** Well, I --

25 **A.** If it's not there, then I guess not.

1 **Q.** Well, I will show you -- Mr. Oswald asked,
2 you haven't you always been consistent about --

3 **A.** I have. I have always been consistent.

4 **Q.** Ma'am, let me ask you to let me finish my
5 question.

6 He asked you, haven't you always told the
7 same story, essentially, about flanking.

8 But for years when you were questioned on
9 that, on this instance, you never brought up that
10 issue at all, did you?

11 **A.** It's not there, but at other times I think it
12 was brought up.

13 **Q.** So it wasn't always brought up? You weren't
14 always consistent about the flanking, were you?

15 **A.** If it's not there, I guess not.

16 **Q.** And in regard to this use of this term
17 flanking, which I am not sure what that really means.

18 What you testified to is you saw Theda walk
19 out, Anna walk out, and John walk out, correct?

20 **A.** Yes.

21 **Q.** And you never saw my client push Anna Mae?

22 **A.** No.

23 **Q.** Never shoved her, never grabbed her, or
24 anything like that, did he?

25 **A.** No. I don't believe that he did that but --

1 Q. That's fine. You answered the question.

2 When you were asked about being honest with
3 law enforcement, you brought up the fact that you once
4 told law enforcement you had no idea how Anna Mae got
5 to your house, correct?

6 A. I once told law enforcement she was never
7 there.

8 Q. Okay.

9 So you were willing to lie to law
10 enforcement?

11 A. I did.

12 Q. Okay.

13 And you said in regard to this drunken party
14 allegation, I don't know why I would have said that.
15 Is that --

16 A. Yes.

17 Q. Sometimes you just don't know why you say
18 things to law enforcement, correct?

19 A. I don't think I said that. I told you I
20 don't think I said that. I don't know why I would say
21 that. I don't remember saying that.

22 Q. So either they are wrong or you are wrong?

23 A. Yes.

24 Q. But you -- you have discussed earlier how you
25 would slant your testimony to protect a friend like

1 Arlo?

2 A. I didn't slant. I left information out.

3 Q. Okay.

4 MR. MURPHY: Nothing further.

5 Thank you.

6 MR. OSWALD: I have -- may I?

7 THE COURT: Yes.

8 CONTINUED REDIRECT EXAMINATION

9 BY MR. OSWALD:

10 Q. Troy Lynn, you were talking about did John
11 Boy Graham every touch her or push her.

12 Do you remember that?

13 A. Yes.

14 Q. And you were cut off?

15 A. Yes.

16 Q. Do you remembering that happening?

17 A. I think there was something, but I can't -- I
18 can't say that it happened if I can't exactly remember
19 it. I don't know. But what I do know is that there
20 was the threat -- the threatening feeling. You know,
21 I never saw him do that. I mean, I can't remember.
22 But there was that threatening feeling. I don't know.
23 It's --

24 MR. OSWALD: Okay.

25 Nothing further.

CONTINUED RE-CROSS-EXAMINATION

1
2 **BY MR. MURPHY:**

3 Q. Ma'am, you have given at least -- you have
4 given sworn testimony in at least five prior
5 proceedings. In each of those you have been asked
6 about this event.

7 You've never indicated that my client
8 physically did anything adverse to Ms. Aquash, isn't
9 that true?

10 A. I never -- that -- of what I can remember, I
11 don't think that he laid hands upon her.

12 **MR. MURPHY:** Very well. Nothing further.

13 **THE COURT:** Ma'am, thank you very much.

14 You may step down.

15 She here on a subpoena?

16 **MR. OSWALD:** She is.

17 **THE COURT:** Released?

18 **MR. OSWALD:** No.

19 (Witness excused.)

20 **THE COURT:** Next?

21 **MR. JACKLEY:** Do you want to do one more
22 witness or take a break, Your Honor?

23 **THE COURT:** I am having trouble staying
24 awake. That's just because I am on cough syrup. I am
25 not bored, I am on medication. So let's take a little

1 break. About 15 minutes.

2 (Off the record.)

3 **THE COURT:** Satisfied this is the jury,
4 Mr. Jackley?

5 **MR. JACKLEY:** Yes, Your Honor.

6 **MR. MURPHY:** Yes, Your Honor.

7 **MR. JACKLEY:** The state would call Evan
8 Hodge, Your Honor.

9 **THE COURT:** Please raise your right hand.

10 EVAN HODGE,

11 called as a witness herein, having been duly sworn,
12 under oath testified as follows:

13 **THE COURT:** Please take a seat.

14 **DIRECT EXAMINATION**

15 **BY MR. JACKLEY:**

16 **Q.** Mr. Hodge, please introduce yourself to the
17 jury and where you live.

18 **A.** My name is Evan Hodge. And I am a retired
19 special agent of the Federal Bureau of Investigation,
20 and I now reside in Pennsylvania near Gettysburg.

21 **Q.** When you were with the FBI, what was your
22 specialty?

23 **A.** I trained to become a specialist or an
24 expert, if you will, in the forensic area of firearms
25 and tool marks examination.

1 **Q.** What was your general educational background?

2 **A.** Well, I studied engineering and business
3 administration in my undergraduate courses at Union
4 College and the University of Maryland. And I have a
5 master's degree -- master of science degree from the
6 George Washington University in Washington DC.

7 **Q.** I'd like to take a minute, Mr. Hodge, and
8 talk a little bit about your work background.

9 Please take a moment and tell the jury your
10 work history.

11 **A.** My work history, well, when I graduated from
12 high school I went into the military, United States
13 Army.

14 Upon concluding that, I went back and made up
15 some courses at the senior high school level that I
16 didn't do well in because I was too busy playing
17 around. That took a full year semester. And then I
18 got on the general ledger college level apprentice
19 course to study engineering at Union College and that
20 was a work study program where I would go in at 7:30,
21 get off at 4:00 and go right to the engineering
22 classroom and take other subjects and other general
23 subjects.

24 I abandoned the engineering program to become
25 an employee of the FBI in 1962. And I had to make up

1 enough credits to get a college degree so I went to
2 the University of Maryland. I couldn't continue my
3 engineering studies because there wasn't -- it was
4 wasn't offered at night time.

5 So I graduated in 1968 and went into special
6 agent training. And then did field investigative work
7 in the Mobile and Washington DC field offices.

8 In 19 -- late 1969, early 1970, I was called
9 back into the laboratory to formalize my training as a
10 firearms and tool marks identification specialist.

11 And since that has been formalized, I have
12 testified over 360 times in various courts, both
13 state, municipal, and federal all across the United
14 States. I retired --

15 Want me to go on?

16 **Q.** Yes.

17 **A.** I retired in 1988 and went to work for the
18 Vermont State Police as a forensic laboratory
19 supervisor in charge of firearms and fingerprints.

20 And I retired from that job in 1973 but got
21 called back -- or let's see -- pardon me. In 2000 --
22 2001. But then got called back when employees had to
23 leave the lab and go fulfill their National Guard
24 obligation after the September 11 bombing of the two
25 buildings. So I finally retired in 2003, fully

1 required, moved to Pennsylvania and have been their
2 since.

3 Q. Mr. Hodge, what was your position back in
4 1976 with the FBI?

5 A. I was a firearms and tool marks examiner.

6 Q. What does a firearms and tool mark examiner
7 do?

8 A. Well, basically through the microscopic study
9 of accidental marks that are created on bullets or on
10 a surface that has been worked on with a tool like a
11 screw driver or a pry bar, and then having a gun, you
12 can test fire it and see if those accidental marks are
13 the same. Much like you would take a known
14 fingerprint card with a person's fingerprints on it
15 and compare it to a latent fingerprint that was lifted
16 at some scene. It's basically the same idea. It's
17 the accidental random nature that you look at to
18 determine if there is a common source.

19 Q. Mr. Hodge, did there come a time that you
20 were asked to review a piece of evidence in the Annie
21 Mae Aquash death case?

22 A. Yes.

23 Q. I am handing you what has previously been
24 marked as State's Exhibit 8.

25 Could you take a moment and please see if you

1 recognize that.

2 **A.** My marking is on the box along with the case
3 number. And just a few moments ago I observed this
4 and saw that my marking is on the nose area of the
5 bullet. So these are two -- these two items did come
6 into my possession.

7 **Q.** And through your position with the lab, did
8 you examine and do any testing of the bullet?

9 **A.** I examined the bullet. There wasn't anything
10 to test. I made notes on the condition of the bullet.
11 And I made certain conclusions regarding the bullet.

12 **Q.** Did you -- I am going to hand you what's been
13 previously marked as State's Exhibit 15.

14 Do you recognize that document?

15 **A.** Yes, I do.

16 **Q.** Is that your report or your finding?

17 **A.** This is my report concerning that bullet
18 right there.

19 **MR. JACKLEY:** Your Honor, I would offer
20 State's Exhibit 15.

21 **MR. MURPHY:** No objection, Your Honor.

22 **THE COURT:** Will be received.

23 **Q. (BY MR. JACKLEY)** Mr. Hodge, what did your
24 examination of this bullet show?

25 What could you tell from the bullet?

1 **A.** Well, number one, that it is a 32-caliber
2 bullet with various characteristics of having been
3 manufactured by the Winchester Ammunition
4 Manufacturing Facility, which is a gilded brass
5 coating -- gilded copper coating. It's not copper
6 plated, but it's gilded with a -- tumbled in this fine
7 copper and adheres to the softer lead surface. It has
8 those characteristics. And it does appear to have
9 been fired from a revolver. And it is consistent with
10 being a revolver bullet in 32 caliber.

11 However, that's the only positive thing I
12 could say about it in that the bullet is so mutilated
13 that I could not ever identify that with a particular
14 firearm should I have one to compare it against.

15 **Q.** I want to take just a second and can you talk
16 to the jury about that concept, firearms
17 characteristics and comparisons.

18 **A.** Well, you have to have characteristics that
19 are individual to a particular gun on a bullet in
20 order to make a comparison.

21 Now, if you take a bullet and fire it out of
22 a gun and then you take a file or it goes into a brick
23 wall or -- and gets all mutilated, then those
24 characteristics are gone.

25 **Q.** Does bone have the ability to damage those

1 characteristics?

2 **A.** Oh, yes.

3 **Q.** So would it be fair to state -- people often
4 watch CI shows. If I were to bring a firearm to you
5 and ask for you to do a comparison and ask whether you
6 could tell me whether that bullet came out of that
7 firearm, due to the condition of the bullet, could you
8 tell me?

9 **A.** No.

10 **MR. JACKLEY:** I have nothing further, Your
11 Honor.

12 **MR. MURPHY:** No questions.

13 **THE COURT:** Thank you, sir.

14 You may step down.

15 (Witness excused.)

16 **MR. OSWALD:** The state will call Bob Riter.

17 **THE COURT:** Please come forward, sir.

18 Please raise your right hand.

19 ROBERT RITER,

20 called as a witness herein, having been duly sworn,

21 under oath testified as follows:

22 **THE COURT:** Please take a seat.

23 **DIRECT EXAMINATION**

24 **BY MR. OSWALD:**

25 **Q.** Would you state your name?

1 **A.** Certainly. Robert Riter.

2 **Q.** Mr. Riter, what do you do for a living?

3 **A.** I'm a lawyer.

4 **Q.** And your primary practice is in what town?

5 **A.** In Pierre.

6 **Q.** Were you a lawyer in October or November of
7 1975?

8 **A.** Yes, I was.

9 **Q.** And was that also in Pierre?

10 **A.** Yes.

11 **Q.** Did you know an individual by the name of
12 Anna Mae?

13 **A.** Yes.

14 **Q.** How did you come to know her?

15 **A.** I was appointed to represent her on some
16 charges pending against her in federal court in
17 Pierre.

18 **Q.** Did you have communications with her at
19 times -- in 1975?

20 **A.** Yes, I did.

21 **Q.** And can you briefly explain how you would
22 communicate mainly with Anna Mae?

23 Personal, telephone, letter?

24 **A.** I saw her when -- when I was initially
25 appointed she was -- I saw her in person. Met her in

1 person. She came up on another occasion as I recall
2 in Pierre so we had personal contact. She gave me a
3 way I could contact her by mail where I could write to
4 her. And I believe gave me a telephone number. So
5 those -- I had a methodology established how I could
6 make contact. I wasn't always successful in that
7 effort.

8 Q. At some point did there come a time when this
9 matter was set for trial?

10 A. Yes. I was -- I was appointed in September
11 and the matter was scheduled for trial in November.
12 My recollection was there was actually going to be a
13 hearing in advance of the trial which would have
14 required her attendance as well as at the trial.

15 I think I answered your question. Maybe
16 there is more.

17 Q. Okay.

18 And did -- did she -- was she present at that
19 motion hearing?

20 A. No, she was not. I was unable to make
21 contact with her.

22 Q. So did you write her a letter informing her
23 of the dates of the hearing and the trial?

24 A. Yes, I did. I wrote letters to the addresses
25 that she had provided to me to try to get that

1 information to her so she could appear when she was
2 required to appear because obviously the Court wants
3 all the litigants to be present when they are supposed
4 to be present.

5 Q. Was there a particular judge from Pierre
6 assigned to this case?

7 A. My recollection -- I remember Cliff Pay
8 (phonetic) was the United States Magistrate back then
9 so he would have handled the initial appearance. Then
10 generally Judge Bogue, who was a federal judge in
11 Rapid City, handled matters that were in Pierre, but
12 there were a lot of criminal matters pending at that
13 time.

14 So as it turned out, there was a visiting
15 judge from another district who came to South Dakota
16 to handle this matter and some others.

17 Q. Were you -- was Annie Mae in this case just
18 charged separately by herself or was there a group?

19 A. My recollection is there were a number of
20 defendants charged, and in fact in preparation for
21 coming to testify today I looked back at my file that
22 I have and I noticed in some of the pleadings that
23 there was a list of six or seven defendants. And I
24 know there were five or six other lawyers in Pierre
25 besides myself who had been appointed to represent

1 other of these defendants.

2 Q. Had you been offered from the United States
3 government a plea bargain for Anna Mae?

4 A. Yes, I had.

5 Q. And can you relate to the jury what that plea
6 bargain was for?

7 A. The terms you mean?

8 Q. Yes, sir.

9 A. Certainly. Back in 75 I was a young
10 attorney, and I was appointed, frankly, in quite a few
11 matters in federal court then because there were quite
12 a few matters pending.

13 The normal situation was to inquire of the
14 U.S. Attorney if there was an opportunity to resolve
15 this matter short of a trial. Initially I was advised
16 that Anna Mae Aquash had been charged with two counts.
17 And they said, initially, if she were to plead to one
18 count they would dismiss the other count and make no
19 recommendation at the time of sentencing.

20 Then later as the trial got nearer, they
21 contacted me and advised that that same offer was
22 still pending but then there was also a proposal that
23 if she were to testify as to what she knew as to
24 issues involving herself, that they would let her
25 plead guilty to a misdemeanor. And the charges she

1 had were felonies, subject to ten years. But they
2 would allow her to plead guilty to a misdemeanor and
3 they would recommend that -- as I recall that there
4 be -- if there was a sentence it be suspended.

5 Q. Did you write a letter to her conveying that
6 plea bargain?

7 A. I did.

8 Q. I'd like to show you what I marked as State's
9 Exhibit 48.

10 Do you recognize that letter, sir?

11 A. Yes, I do.

12 Q. And what is that, sir?

13 A. That's a copy of a letter that I wrote to
14 Anna Mae back on November 6, 1975. It's a copy that
15 was taken out of my file. It was a carbon copy.
16 That's what we used back in 1975.

17 And then on the top of it there are some
18 notes that I made that were not part of the letter,
19 but I made them on the letter or my copy of the
20 letter.

21 Q. Based on the letter, can you -- well, is this
22 a true and accurate carbon copy of the letter that you
23 sent?

24 A. Yes, it is. As I said subject to my
25 handwriting on the top and then it appears that I also

1 made a few notes within that letter, as well.

2 **MR. OSWALD:** I would offer 48, Judge.

3 **MR. MURPHY:** No objection.

4 **THE COURT:** Will be received.

5 Looks like a dandy typewriter, too.

6 **Q. (BY MR. OSWALD)** Referring to State's
7 Exhibit 48, sir, instead of putting it up on the
8 display, could you just read out loud the first
9 paragraph of what you wrote?

10 **A.** Certainly. Please be advised that I have had
11 further conversation with the Assistant United States
12 Attorney concerning a possible plea bargain in this
13 plat matter. He advised that if you would agree to
14 testify as a government witness and tell everything
15 you know about this matter, he would reduce the charge
16 against you to a misdemeanor and recommend probation.
17 You should certainly give this thorough consideration
18 and if you desire to confer with me concerning the
19 same, please feel free to contact me.

20 **Q.** Thank you.

21 Do you know if this letter ever reached her?

22 **A.** No, I don't know if it ever did reach her.

23 **Q.** So this was sent and dated November 6?

24 **A.** Correct.

25 **Q.** Did you see Anna Mae after November 6 of

1 1975?

2 **A.** Yes, I did.

3 **Q.** And what were the circumstances of that?

4 **A.** I was contacted in mid or late November and
5 advised that she had been -- picked up isn't the right
6 word -- but she had been found in Oregon. I had not
7 heard from her in several weeks or maybe even
8 months -- a month. So I was pleased that they had
9 made contact with her and I said they, I mean it was
10 the authorities, that she was in their custody. So
11 she was brought back to Pierre from Oregon and I met
12 with her in Pierre upon her return.

13 **Q.** When was the trial date set for, if you can
14 recall?

15 **A.** The trial was ultimately set for either
16 November 24 or November 25, 1975.

17 **Q.** Was this just prior to Thanksgiving?

18 **A.** Probably. I don't really remember.

19 **Q.** Did you have a motions hearing or suppression
20 hearing prior to this trial date?

21 **A.** Yes.

22 **Q.** And was Anna Mae at that?

23 **A.** I am almost certain she was because the
24 general rule if it's a felony charge, the defendant
25 needed to be present.

1 Q. Did you have to make any motion or request of
2 the judge regarding bond for Anna Mae during this time
3 period?

4 A. I did make a request of the Court during this
5 time period that she be released pending the trial on
6 bond.

7 Q. When you thought about it, did you think that
8 would be a futile motion?

9 A. I did not think that the Court would be
10 likely to allow her out on bond pending the trial
11 because she had been missing and then found in Oregon
12 and brought back. I realized it was easier for me to
13 prepare for trial if she and I could visit person to
14 person and frankly talk with others similarly situated
15 in preparing for the trial.

16 Q. Was it your idea to ask for her bond?

17 A. No, it was not my idea to ask for a bond. I
18 frankly thought it was a very unlikely condition that
19 the Court would allow her out on bond. I had been
20 practicing in federal court for several years in front
21 of the judges in South Dakota, and I didn't anticipate
22 that they would allow that.

23 Q. Was it the government, either an Assistant
24 U.S. Attorney, the United States Attorney, or an FBI
25 agent -- did they suggest you should ask for bond?

1 **A.** No.

2 **Q.** Do you remember who did?

3 **A.** No. I do not remember the specific person
4 who did to answer your question.

5 **Q.** Okay.

6 And then did you ask for bond?

7 **A.** Yes, I did.

8 **Q.** And what did the judge do?

9 **A.** The judge released her on bond or maybe even
10 personal recognizance. I don't know that she had any
11 money to put up pending the trial date, which was
12 within a day or two.

13 **Q.** Did you ever see Anna Mae again after that
14 time period?

15 **A.** My recollection -- and not only recollection.
16 I am confident I am right on this. There was up at
17 the St. Charles Hotel, which is an old hotel in
18 Pierre, there is kind of a war room, so to speak,
19 where there were a number of lawyers who were getting
20 ready for the trial or trials that were coming up,
21 making preparation, discussing strategies. And I
22 believe I may have seen her up at the St. Charles
23 Hotel when -- after she was released. I -- as I sit
24 here 35 years later, I don't remember that vividly,
25 but that's my general recollection.

1 **Q.** And so would that have been either
2 November 22nd or 23rd?

3 **A.** Yes. Part of the discussion with some of the
4 other lawyers in preparation was just trying to
5 consider strategies, as I indicated, and that there
6 was, from one of these other lawyers, a suggestion
7 that maybe we could get her out -- maybe she could get
8 out on bond and maybe have a better opportunity then
9 to work in preparation.

10 **Q.** Now, at this war room that you were talking
11 about, were some of these other lawyers representing
12 the American Indian Movement members?

13 **A.** You know, I don't know that I specifically
14 differentiated between defendants if they were an
15 American Indian Movement member or not, but I suspect
16 one might give them that term or identify them with
17 that terminology.

18 **Q.** All right.

19 **A.** Some of them.

20 **Q.** Mr. Riter, now that I am thinking about it,
21 St. Charles is that a four or five or six-story
22 building in Pierre?

23 **A.** It was the tallest building in Pierre. It
24 was four or five stories.

25 **Q.** Okay.

1 The day for trial comes around on
2 November 24?

3 **A.** Yes, it did.

4 **Q.** Did Anna Mae show up at that?

5 **A.** No, she didn't.

6 **Q.** Did you ever see her after that?

7 **A.** I never did.

8 **Q.** Did you hear about her demies at some point?

9 **A.** I did. I read about it. I know ultimately
10 the United States -- Assistant United States Attorney
11 dismissed the indictment because of her death -- or
12 the charge.

13 **MR. OSWALD:** I have no further questions.

14 **THE COURT:** Mr. Murphy.

15 **CROSS-EXAMINATION**

16 **BY MR. MURPHY:**

17 **Q.** Your daughter is Lindsey?

18 **A.** Yes.

19 **Q.** She used to practice here in town?

20 **A.** Yes, she did.

21 **Q.** And now she's practicing with you, I
22 understand?

23 **A.** Very proud dad, too.

24 **Q.** I want to take you back to when you were
25 first appointed to this case, the case that you were

1 representing Ms. Aquash on.

2 Was that around September 5, 1975?

3 **A.** Yes, it was.

4 **Q.** Okay.

5 Typically in federal practice, if somebody is
6 charged with a federal crime, they bring them into
7 court quite quickly after the incident; is that your
8 experience?

9 **A.** Yes. I mean, in this particular
10 circumstance -- and I looked back and maybe I am
11 telling you more than you are asking me -- but she was
12 arrested and brought in on a complaint initially. So
13 she had not been indicted by a Grand Jury at that
14 time.

15 **Q.** Okay.

16 If -- is it your recollection that the events
17 she was arrested on occurred on September 5, 1975?

18 **A.** Right in that time frame, yes. And she
19 was -- I am sure I was appointed within a day or so
20 after that, likely.

21 **Q.** Okay.

22 What she was charged with, you indicated she
23 was -- had -- facing two felonies, correct?

24 **A.** Correct.

25 **Q.** Both of them were punishable by up to ten

1 years in prison, correct?

2 A. That's my understanding.

3 Q. The first charge was for possession of
4 illegal firearms; is that your recollection?

5 A. Yes.

6 Q. Specifically firearms with obliterated serial
7 numbers?

8 A. Exactly.

9 Q. And the second count was for possession of
10 illegal explosives.

11 A. Yes. I think the count maybe said explosives
12 or A, B, or C something like that.

13 Q. Right.

14 It involved grenades, dynamite, and some
15 other explosive devices?

16 A. I recall dynamite.

17 Q. Yeah.

18 And one of the weapons involved was an M1
19 rifle.

20 Do you recall that?

21 A. I recall a rifle, but I don't remember M1.

22 Q. All right.

23 Just so we have a context, the arrest or the
24 charges stemmed out of a raid at a place called Al
25 Runnings, correct?

1 **A.** Yes.

2 **Q.** All right.

3 And in a nut shell, what happened in regard
4 to Ms. Aquash is that the FBI did a raid on Al
5 Runnings place; is that fair?

6 **A.** That's fair.

7 **Q.** And she was in a tent when they got to the
8 place?

9 **A.** Yes.

10 **Q.** And inside the tent it was just her?

11 **A.** Yes.

12 **Q.** And also these explosives and other weapons,
13 correct?

14 **A.** Yes.

15 **Q.** And that other people were also arrested
16 in -- on the property called Al Runnings, correct?

17 **A.** Correct.

18 **Q.** So that's would have been her codefendants?

19 **A.** Yes.

20 **Q.** Now, you indicated we had a visiting judge --
21 or you had a visiting judge at that time. This is
22 less than three months after the two FBI agents were
23 killed on June 26, 1975, correct?

24 **A.** I don't recall that date for sure,
25 Mr. Murphy.

1 **Q.** Okay.

2 Do you recall the incident where the two FBI
3 agents were killed?

4 **A.** Yes.

5 **Q.** After that, there were numerous arrests
6 throughout South Dakota, correct?

7 **A.** Yes. It was a very difficult time and a busy
8 time for lawyers who were being appointed on these
9 cases.

10 **Q.** Kind of a full employment policy for young
11 defense attorneys like yourself?

12 **A.** Yeah.

13 **Q.** And there was so many cases because of the
14 FBI search for the people responsible for the killing
15 the FBI agents that we had to bring in other judges,
16 essentially?

17 **A.** I suspect that was a major reason other
18 judges were brought in. I know from time to time
19 during a longer period even than just that immediate
20 time frame that they had visiting judges come in to
21 help relieve some of the burden that the federal court
22 judges had.

23 **Q.** Because at this time there was also the
24 courthouse real of an interview in Custer and in Sioux
25 Falls?

1 Do you recall those instances?

2 A. Yes.

3 Q. Lots of indictments coming out of those
4 particular matters, correct?

5 A. Probably. I was not involved in any of that.

6 Q. All right.

7 Moving ahead, so you -- we have you appointed
8 in September of September of 1975. You make the
9 initial appearance of Ms. Aquash, correct?

10 A. Correct.

11 Q. And she's released from custody?

12 A. Yes.

13 Q. Okay.

14 And things progress along. There is supposed
15 to be a motions hearing at some point prior to trial,
16 correct?

17 A. Correct.

18 Q. And if -- is the date November 10?

19 Does that ring a bell as the date?

20 A. Yes, it does.

21 Q. She doesn't show for that hearing so a
22 warrant is issued for her arrest, correct?

23 A. She did not show and I believe a warrant was
24 issued. I don't recall that clearly show.

25 Q. That would have been standard practice?

1 **A.** Correct.

2 **Q.** Especially when the attorney comes before the
3 Court and says I can't explain why my client is not
4 here?

5 **A.** Right.

6 **Q.** Right.

7 And so at that point it's likely she became a
8 federal fugitive, correct?

9 **A.** Likely, yes.

10 **Q.** Yeah.

11 In any regard, you learned shortly after that
12 missed court hearing that she has been apprehended in
13 Oregon, true?

14 **A.** True.

15 **Q.** And what you learn from your discussions with
16 the U.S. Attorney's Office is that she was involved in
17 a shoot-out with the Oregon Highway Patrol on
18 November 14, 1975?

19 **A.** You know, I don't think I learned that from
20 the U.S Attorney's Office. I was contacted by a
21 lawyer out there who she had visited with. And that
22 lawyer told me maybe a little bit of it. But then
23 there was, like, a newspaper article I remember
24 reading a newspaper article.

25 **Q.** You learned ultimately that she was in a

1 motor home and Dennis Banks and Leonard Peltier and
2 other AIM leaders were in that motor home with her?

3 **A.** Correct.

4 **Q.** And they -- an Oregon Highway Patrol tried to
5 pull them over. You heard about that?

6 **A.** I don't recall that.

7 **Q.** Did you hear at some point that shots were
8 fired; that there was a shoot-out between the motor
9 home and the Oregon Highway Patrol?

10 **A.** I may have. I don't -- as I sit here today,
11 I don't clearly recall that.

12 **Q.** Okay.

13 In any regard, you know she's taken into
14 custody in Oregon?

15 **A.** Correct.

16 **Q.** And you did get a call from an attorney in
17 Oregon so does that lead you to believe she's charged
18 with federal crimes also in Oregon?

19 **A.** Probably. But I -- I can't say that I recall
20 that she was specifically charged with anything out
21 there. I recall that I was contacted by an attorney
22 from Washington State, I think, who may have been down
23 in Oregon. I don't -- when I look back through my
24 file, I didn't see that she had been charged with
25 anything out there, but wouldn't be unexpected, I

1 guess.

2 Q. Wouldn't be unexpected if someone was
3 involved in a situation like that.

4 And in any regard she's then brought back to
5 Pierre?

6 A. Correct.

7 Q. You know, when she comes back to Pierre she's
8 now been alleged to have been involved in serious
9 felonious conduct out in Pierre, the weapons --

10 A. Down at Al Runnings, yes.

11 Q. And failed to show for a court hearing which
12 is also a serious matter, correct?

13 A. Yes.

14 Q. And then she's brought back from Oregon by
15 the authorities, correct?

16 A. That's correct.

17 Q. So you go before the Court some time
18 November 22, 23rd, and at some point you ask the
19 Court to release her on bond, correct?

20 A. Yes.

21 Q. And that's pretty much expected that you are
22 going to make that request on behalf of a client; is
23 it not?

24 A. It always is at the beginning when they are
25 first charged and first come before the Court.

1 Q. Right.

2 A. But not as likely, certainly, under
3 circumstances as were existing at that time.

4 Q. Let me put it this way. Your client
5 typically asks you to try to get them out of jail when
6 they are in custody?

7 A. That's true.

8 Q. All right.

9 So you wouldn't have made that request unless
10 Ms. Aquash wanted to get out of jail?

11 A. I'm sure that's true.

12 Q. Okay.

13 And she was released, correct?

14 A. Yes.

15 Q. And though it was unexpected or
16 unanticipated, it wasn't something that in your
17 recollection that the U.S. Attorney or the FBI
18 petitioned the Court to reconsider the bond decision?

19 A. I don't recall that they asked the Court to
20 reconsider. My recollection is that they certainly
21 didn't support my motion.

22 Q. Right.

23 But you made your motion and the Court
24 granted it?

25 A. Correct.

1 **Q.** All right.

2 Now, after that, we were -- you were talking
3 with Mr. Oswald about your -- or Mr. Jackley about
4 your -- who was it -- it's getting late in the day
5 here and they are blending together.

6 When you were discussing your communication
7 with Mr. Quash you said you sent her a plea letter,
8 correct?

9 That was the exhibit?

10 **A.** Yeah.

11 **Q.** You didn't send her any communication
12 indicating that she had already agreed to plead
13 guilty, did you?

14 **A.** No.

15 **Q.** In fact, she hadn't agreed to plead guilty?

16 **A.** That's correct.

17 I spoke with her -- I spoke with her up in
18 the federal building in Pierre when she was in what I
19 call the holding cell up there. Went over there again
20 with her again carefully because the opportunity to
21 get a misdemeanor and have probation recommended is a
22 pretty good circumstance for her -- a good result and
23 she would not agree.

24 **Q.** She wasn't interested in any way, shape, or
25 form with any plea bargain?

1 **A.** That's correct.

2 **Q.** All right.

3 Either initially when it was to one felony or
4 even when they sweetened the deal?

5 **A.** I didn't hear from her the first time.

6 **Q.** Okay.

7 So that first letter that you sent out that
8 of the exhibit, you never heard anything back from her
9 on that?

10 **A.** I believe that was the second letter.

11 **Q.** Okay. My mistake.

12 All right. So you sent out multiple letter,
13 one with the initial offer, and one with the better
14 offer?

15 **A.** I think so.

16 **Q.** In any regard, she wasn't interested if
17 taking the plea, correct?

18 **A.** That's correct.

19 **Q.** And if she had taken a plea, she would then
20 have become a government witness?

21 **A.** Under the second proposal -- under the first
22 proposal she would have plead guilty to one and they
23 would have made no recommendation at the time of
24 sentencing. There would have been no requirement for
25 her to cooperate as a witness. The second one with

1 the misdemeanor, yes, there was.

2 Q. So on the first plea bargain, had she plead
3 and not cooperated, she would have been exposed to up
4 to ten years?

5 A. Correct.

6 Q. But when they gave you the better offer, they
7 expected her to testify, correct?

8 A. Yes.

9 Q. And so she would have become a government
10 witness, correct?

11 A. She would have testified -- she probably
12 would have been called by the government to testify.

13 Q. Right.

14 And she would have been brought under their
15 protection at that point, correct?

16 A. Under their protection?

17 Q. She would be somebody who was working for the
18 prosecution?

19 Somebody that --

20 A. No. I don't -- that wasn't the way I -- that
21 wasn't the way I felt it was. I mean -- and I
22 represented quite a few individuals charged
23 criminally. And it was not a matter of necessarily
24 choosing sides. It was a matter of testifying and
25 being willing to testify honestly and that was the

1 opportunity given to her.

2 Q. Well, let me ask you this. When she was in
3 jail being held by the authorities, she was not
4 subject to any -- she was -- when she was in jail,
5 nobody from the outside could cause her harm, correct?

6 A. Correct.

7 Q. Okay.

8 She's there protected by law enforcement,
9 correct?

10 A. Correct.

11 Q. And throughout the whole time she's in the
12 federal court system and you are talking to
13 prosecutors and whatnot, she never relayed to you any
14 concerns for her own safety from the American Indian
15 Movement, did she?

16 A. I don't recall that she did.

17 Q. She never asked you to make as part of the
18 deal that the government give her any type of
19 protection, did she?

20 A. Not that I can recall at this time.

21 Q. Okay.

22 What you learned from her is that no matter
23 how much they sweetened the deal, she wasn't
24 interested in taking one?

25 A. That's correct.

1 **MR. MURPHY:** All right.

2 Thank you.

3 **REDIRECT EXAMINATION**

4 **BY MR. OSWALD:**

5 **Q.** Mr. Riter, if she turned down the plea
6 agreement, she wouldn't have asked for any help from
7 anybody would she have?

8 **A.** I wouldn't think so, other than her lawyer.

9 **Q.** Was there another young lawyer assisting you
10 and Anna Mae in this case?

11 **A.** There was a lawyer who did some legal
12 research early on in support of a motions hearing.
13 The motion that was being filed. So he hadn't been --
14 to my knowledge hadn't been appointed and I was her
15 lawyer. He assisted me in getting a brief put
16 together.

17 **Q.** What was that lawyer?

18 **A.** Bruce Ellison.

19 **Q.** Is he a lawyer?

20 **A.** Yes.

21 **Q.** Where?

22 **A.** Rapid City.

23 **MR. OSWALD:** Okay.

24 Nothing further.

25 **MR. MURPHY:** Briefly?

1 **THE COURT:** Thank you, sir.

2 **MR. MURPHY:** Your Honor, may I ask a couple
3 questions?

4 **THE COURT:** Sure.

5 **REXCROSS-EXAMINATION**

6 **BY MR. MURPHY:**

7 **Q.** Mr. Ellison merely was providing some
8 research to you?

9 **A.** Yes. I did call upon him to try to try to
10 help me find my client when I didn't hear from her.
11 So he helped with the research and I thought he was
12 helping with that effort too.

13 **Q.** Sure.

14 Appeared to you he was somebody who was
15 concerned about Ms. Aquash's situation and was willing
16 to lend a hand?

17 **A.** My recollection was a probably broader
18 concern from him that there were these six or seven
19 defendants, that his concern was of a broader scope
20 because I know at least one of the motions we filed
21 was filed by all six or seven defendants and I think
22 that may have been part of what the research that he
23 helped provide was utilized for.

24 **Q.** So he was not only willing to help with
25 Ms. Aquash, but willing to help all of these other

1 defendants with his research, correct?

2 **A.** Yes.

3 **Q.** And he wasn't getting paid by you guys for
4 that?

5 **A.** He asked to get paid and I said I didn't
6 think the judge would pay him for that other than
7 maybe the copies that he had to make.

8 **Q.** But he still went ahead and helped all the
9 defendants to the extent that he could?

10 **A.** Yes.

11 **MR. MURPHY:** All right.

12 Nothing further.

13 **THE COURT:** Thank, sir.

14 You may step down. You are excused.

15 (Witness excused.)

16 **MR. MANDEL:** The state calls George Palfy,
17 Your Honor.

18 **THE COURT:** Please raise your right hand.

19 GEORGE PALFY,

20 called as a witness herein, having been duly sworn,
21 under oath testified as follows:

22 **THE COURT:** Please take a seat.

23 **DIRECT EXAMINATION**

24 **BY MR. MANDEL:**

25 **Q.** Sir, would you state your name, please.

1 **A.** George Palfy.

2 **Q.** Mr. Palfy, where are you from?

3 **A.** Wheatridge, Colorado.

4 **Q.** Is that a suburb of Denver?

5 **A.** Yes, sir.

6 **Q.** How long have you lived there?

7 **A.** About 20 years.

8 **Q.** Are you originally from Denver?

9 **A.** Yes. I was born in Denver.

10 **Q.** Okay.

11 Where does your family come from?

12 **A.** Well, my mother IS Indian, my father is white
13 so my mom is from Oklahoma and my dad is from Brush,
14 Colorado.

15 **Q.** Are you an enrolled member of the Osage
16 Tribe?

17 **A.** Not enrolled.

18 **Q.** Do they have enrollment?

19 **A.** It's complicated.

20 **Q.** Okay. I won't go there, sir.

21 Prior to 20 years ago, were you still -- let
22 me ask you, have you spent your whole life living in
23 the Denver area?

24 **A.** Yes.

25 **Q.** What's your most recent employment?

1 **A.** Retired from the postal service last year.

2 **Q.** How long were you with the Postal Service?

3 **A.** Twenty-four years.

4 **Q.** Prior to that, you had other different jobs
5 down there?

6 **A.** Yes.

7 **Q.** Going back to the 1970s, did you have some
8 involvement with the American Indian Movement in
9 Denver?

10 **A.** Yes.

11 **Q.** Can you tell me what that was and how it came
12 about?

13 **A.** Well, we -- you know, basically was a
14 socializing group as it started.

15 **Q.** About what year are we talking?

16 **A.** Around about 74.

17 **Q.** Okay.

18 What kind of socializing?

19 **A.** Pow Wows, benefits, marches, you know,
20 protests, and then we got into -- involved with
21 starting an alternative school about 74.

22 **Q.** Were you directly involved in that?

23 **A.** Yes, sir.

24 **Q.** Let me ask you, how many people were
25 regularly involved in AIM down there?

1 **A.** It's hard to say. Maybe, you know, a hundred
2 to maybe 200.

3 **Q.** Okay.

4 Were a number of people involved with the
5 alternative school?

6 **A.** Yes. We had -- we had a lot of groups
7 helping us like NARF and ACIS and some of the public
8 school people were helping us. We were trying to, you
9 know, set up the alternative school.

10 **Q.** What was going to be the purpose of the
11 alternative school?

12 **A.** It was for all -- all kids, not just Indian
13 kids. It was for kids that were having a hard time
14 dealing with the public school system and they could
15 come to our school and we -- we worked more with our
16 ideas, you know, Indian spirituality and the way we do
17 things.

18 **Q.** Did the school have it's own building?

19 **A.** No. We didn't have the money to get our own
20 building. We were offered housing at the Denverane
21 House (phonetic).

22 **Q.** Where was that located?

23 **A.** About 12th and Gaylord. Somewhere about
24 there. Downtown Denver.

25 **Q.** Did you have any specific position in AIM at

1 that time?

2 **A.** No.

3 **Q.** So did the school get started back in 1974?

4 **A.** The concept was started in 74. We did a lot
5 of grant writing and about 74 or 75 it started to
6 develop.

7 **Q.** Did that pretty much end up being your
8 employment at that time?

9 **A.** Nobody got paid. Nobody got paid.

10 **Q.** We'll call it your occupation then?

11 **A.** My second job, yeah.

12 **Q.** Okay.

13 Did you spend a fair amount of time at the
14 American Indian Movement house there in Denver because
15 of that?

16 **A.** All the time I wasn't working, yes.

17 **Q.** Do you remember in the fall of -- fall or
18 early winter of 1975 receiving some contact from Troy
19 Lynn Yellow Wood or Troy Lynn Irving?

20 **A.** Yes.

21 **Q.** Do you recall getting a phone call from her
22 when you were at the AIM house?

23 **A.** I got a phone call. She wasn't looking for
24 me, but I was the only one there so, yeah, I took the
25 call.

1 Q. Did you previously to that know Troy Lynn?

2 A. Yeah.

3 Q. How do you know her?

4 A. Through Pow Wows and stuff. My wife and her
5 grew up together.

6 Q. Your wife is from Pine Ridge?

7 A. My wife is from Pine Ridge.

8 Q. So she had known Troy Lynn for a long time?

9 A. Uh-huh.

10 Q. That's how the two of you got together?

11 A. Yes.

12 Q. Was anyone else present there when you got
13 the call?

14 A. No, I was the only one there.

15 Q. Do you remember what date it was about?

16 A. I do not remember.

17 Q. Do you know what month it was?

18 A. November.

19 Q. Do you recall what was said to you?

20 A. She told me that -- well, first off, she was
21 asking for different people. And I told her there was
22 nobody around but me. So you can talk to me or
23 whatever. She said, well, she's having trouble at her
24 house and she asked me if I could come over and help
25 work things out.

1 So I knew where she lived. We were in the
2 same neighborhood so I said, well, when I got done
3 with my paperwork, then I would come over.

4 **Q.** Did she tell you what kind of trouble?

5 **A.** She mentioned that there was a lady at her
6 house that supposedly her aunt had got a call and said
7 it was from National AIM and they wanted to take this
8 lady back to South Dakota.

9 **Q.** Did she say why?

10 **A.** Not really, no.

11 **Q.** Where was her house located?

12 **A.** In north Denver about 44th and Pecos right
13 next to I-70.

14 **Q.** About how far was that from the AIM house?

15 **A.** Across town.

16 **Q.** Twenty minutes?

17 **A.** Twenty without traffic, yeah.

18 **Q.** Today 40 minutes?

19 **A.** Today, yeah.

20 **Q.** Okay.

21 When did you arrive there?

22 **A.** It was late afternoon.

23 **Q.** Getting dark yet or still light out?

24 **A.** It was still -- it was still fairly light
25 out, yes.

1 Q. What do you recall first happening when you
2 got there?

3 A. I went in and asked her what was going on and
4 her aunt was standing there, too.

5 Q. Who was her aunt?

6 A. Theda Nelson. Theda Clarke.

7 Q. Okay.

8 Go on.

9 A. She said, well, my aunt said she got a call
10 from National AIM to take this lady up to South
11 Dakota, Rapid City, because they wanted to confront
12 her about being a federal informant. And I asked her
13 who is the lady and she said it's Annie Mae Aquash and
14 I said where is she and she said down in the basement.

15 Q. Had you ever heard of Annie Mae Aquash
16 before?

17 A. Yes. What I had read in the papers.

18 Q. Had you ever met her?

19 A. No.

20 Q. What did you do next?

21 A. Well, I asked her if I could go talk to her
22 and they said okay. Went downstairs and I don't know
23 who introduced us to each other. But that's the first
24 time I had met her. First and last time.

25 Q. What was the basement of this place like?

1 Was it finished?

2 **A.** It was finished. Finished basement. Some
3 rooms down there. It was like a large living room.

4 **Q.** Who was present down there besides you and
5 Annie Mae?

6 **A.** Theda was down there, Troy Lynn -- I don't
7 know if Troy Lynn went down there or not. I can't
8 remember that. But I remember John Boy being there.
9 And that's about all I can remember being downstairs.

10 **Q.** When you say John Boy, who are you referring
11 to?

12 **A.** John Boy Patton.

13 **Q.** Did you know him by any other name at that
14 time?

15 **A.** No.

16 **Q.** If you were to see him today, do you believe
17 you would still be able to recognize him?

18 **A.** I don't know. It's been 35 years.

19 **Q.** I'll ask if you could look around and see if
20 you see him seated here in the courtroom?

21 **A.** Well, I guess that's John Boy. I don't know.
22 Looks like him.

23 **Q.** Okay.

24 **A.** Little different.

25 **Q.** As you said, 35 years ago, right?

1 **A.** Yeah.

2 **Q.** So what happened, then, down there in the
3 basement?

4 **A.** They left us down there and we started
5 talking. And she asked me who I was -- who I was with
6 or what I was doing. I told her, you know, about the
7 alternative school and what we were starting. And we
8 talked about her and her exploits.

9 **Q.** What kind of exploits, if you remember?

10 **A.** Just what -- the stuff I had read in the
11 paper, you know. I asked her what this was all about
12 and as I said what I said before, she thought it was
13 just somebody that was upset with her or jealous of
14 her. She told me that she had been through this
15 before. And I told her, well, you know you don't have
16 to stay here. I said you can -- you can go with me.
17 I can take you to the Indian center or wherever you
18 want to go. You don't -- you don't have to stay here.
19 And she said it wasn't a problem.

20 **Q.** Was the Indian center something different
21 from the AIM house?

22 **A.** Yeah.

23 **Q.** I'll just ask you, generally, was there a
24 fairly good sized Indian community down in Denver at
25 that time?

1 **A.** There has always been a pretty big community.

2 **Q.** That was just some social gathering-type
3 place or what?

4 **A.** Supposedly they had, you know, social
5 services and stuff like that. But sometimes it gets
6 pretty political.

7 **Q.** But there would have been a place for her to
8 stay there?

9 **A.** Yeah, or somebody she could stay with, but
10 she didn't seem concerned.

11 **Q.** Did you discuss with her the accusations that
12 had been made against her at all?

13 **A.** Yeah. She told me that they thought she was
14 an FBI informant. She said it wasn't the first time
15 and she said it probably wouldn't be the last time.
16 And you know, that's when I told her, well, she could
17 leave with me and I could take her where she wanted to
18 go. She was not concerned about it.

19 **Q.** What happened then?

20 **A.** Went back upstairs and that's when I seen
21 Corky and Ernesto talking to Theda.

22 **Q.** Corky Gonzalez?

23 **A.** Corky and Ernesto Vigil.

24 **Q.** Where were they seated?

25 **A.** They weren't seated. They were gathered in

1 the kitchen.

2 Q. Who was there?

3 A. And they were talking.

4 Theda was there, Troy Lynn was there, and a
5 few other people I cannot remember. I know Angie
6 Begay was in the house. She wasn't right there in the
7 kitchen. There was a bunch of kids, like little kids.

8 Q. Was John Boy there?

9 A. John Boy was around, but I don't remember him
10 being in the kitchen discussing things.

11 Q. Did you see Arlo Looking Cloud at all?

12 A. Arlo wasn't there.

13 Q. Go on.

14 What was going on then in the kitchen?

15 A. They were just talking about the situation
16 and I heard one of them say, well, what we do with
17 snitches is take them out to the country and get rid
18 of them. And that's when I said, you know --

19 Q. Who said that?

20 A. Either Corky or Ernesto. Probably Ernesto.
21 He was the younger one.

22 Q. Did he make any kind of gesture?

23 A. Yeah. He made the throat slit gesture.

24 Q. Tell you what you are talking about.

25 A. Like this (indicating) we get rid of them.

1 Q. And what did you say?

2 A. That's when I got mad and told them that's
3 not our way. We don't do that kind of stuff.

4 And then they decided it was time to leave,
5 so they left.

6 Q. After they left, who was in the house?

7 A. Just me, John Boy, Theda, Troy Lynn, Angie
8 Begay. There might have been a few other adults. I
9 cannot remember.

10 Q. And Anna Mae?

11 A. And Anna Mae, and all the kids.

12 Q. What do you remember taking place next?

13 A. Theda was in a hurry to get going. So she
14 kept telling everybody, you know, hurry up, hurry up.
15 We got to go. And I --

16 Q. About what time have we gotten to now?

17 Is it dark out yet.

18 A. Probably about 4:30 five o'clock in the
19 evening. And yeah, it's starting to get dark at that
20 hour in the evening.

21 Q. What do you recall took place at that time?

22 A. They went downstairs and got Anna Mae and
23 brought her upstairs.

24 Q. When you say they, who are you referring to?

25 A. I don't know for sure who it was, but I know

1 we all walked outside to the car to Theda's station
2 wagon.

3 Q. Do you remember what kind of station wagon
4 she had?

5 A. Yeah. It was a red Pinto station wagon with
6 wood siding like the old Woodys.

7 Q. Did this station wagon have a hatch that
8 opened in the back?

9 A. Yes.

10 Q. But it was definitely a station wagon?

11 A. Yes.

12 Q. And then what took place?

13 A. Then Theda pulled out some rope and I don't
14 know if she told John Boy to tie her or if she tied
15 her hands together. And I asked Anna Mae if she was
16 okay with that and she said, it's okay. Just get it
17 over with. Let's go.

18 Q. Anna Mae's hands were tied together?

19 A. Yes.

20 Q. In front or in back if you remember?

21 A. I remember in front.

22 Q. Okay.

23 Do you know which one of them did the tying?

24 A. I can't say for sure, but I think it was
25 Theda.

1 Q. Okay.

2 Then what happened after that?

3 A. Then I asked her if she was okay with that
4 and she said, yeah. Let's get it over with. And
5 Theda was hollering at everybody as usual. Get the
6 show on the road. So they put her in the back of the
7 Pinto and Theda got in the driver's seat and John got
8 in the front seat and Ida Mae got in the middle seat
9 and they took off.

10 Q. Now who is Ida Mae?

11 A. Theda's daughter.

12 Q. Now, at that point you never saw Arlo around
13 there?

14 A. No.

15 Q. And you didn't have any recollection of
16 seeing him that night?

17 A. No. If he would have been there he would
18 have come and talked to me. And I did not see him.

19 Q. And we're just up to about 5:00 or
20 six o'clock in the evening?

21 A. Uh-huh.

22 Q. Did it strike you odd that she was being tied
23 up?

24 A. Yeah, it did, but nobody seemed too worried
25 about it. So it was -- you know, it was like -- it

1 was surreal.

2 Q. She was a relatively small woman, right?

3 A. Yeah, she was a very small woman.

4 Q. What happened then?

5 A. Then they took off. They drove out of the
6 parking lot, north on Pecos, and caught I-70 east.

7 Q. What happened next?

8 Did you see them again?

9 A. No.

10 Q. What did you do after that?

11 A. Just -- I don't know if I talked to Troy Lynn
12 or not, but got in my car and went home -- in my truck
13 and went home. Told my wife what had gone on and she
14 said it was hard to believe.

15 Q. Shortly after that, did you head to South
16 Dakota?

17 A. I'm recollecting we left two or three days
18 after that.

19 Q. What did you go up to South Dakota for?

20 A. We had gone to one of the ladies that was
21 working on the alternative school with us, Mary
22 Johnson, and her father was a Medicine Man in Pine
23 Ridge.

24 Q. Was his name Charlie Mexican?

25 A. Charlie Mexican, yeah.

1 Q. Why in particular were you going up looking
2 for him?

3 A. We were going to bring him back down to do
4 ceremonies for the school, and you know, sweats and
5 that with the kids.

6 Q. When you were up in South Dakota, did you
7 look for Annie Mae at all?

8 A. No. We --

9 Q. Did you ask about her?

10 A. We came to Rapid City. That was the first
11 time I was in South Dakota. And Mary said she knew
12 where the AIM house was in South Dakota -- or in Rapid
13 City. So we drove over there. I couldn't tell you
14 where it is now. And she went -- she went in and I
15 had -- we had told her what had happened, too. And so
16 she stopped in at the AIM house and she said one --

17 **MR. MURPHY:** Objection, Your Honor. This is
18 going to go into hearsay.

19 **THE COURT:** It might go into hearsay, but I
20 think it's time to start with a question.

21 Q. **(BY MR. MANDEL)** What took place at the AIM
22 house, sir?

23 A. Mary said one of the boys told her --

24 **MR. MURPHY:** Objection, Your Honor.

25 **THE COURT:** Hold on. That is hearsay as far

1 as I can tell so we won't go there.

2 Q. (BY MR. MANDEL) Did you attempt to look for
3 her when you were at the AIM house?

4 A. No. There was no attempt made to look for
5 her.

6 Q. Did you ask as to whether or not she was
7 there?

8 MR. MURPHY: Objection. It's calling for
9 hearsay.

10 MR. MANDEL: No, it's not. I asked him --

11 THE COURT: At ease. I will respond.

12 It does not. The question is pretty simple.
13 Did you ask. And the answer to that is even simpler,
14 yes or no.

15 Q. (BY MR. MANDEL) Again, did you ask where she
16 was at the AIM house?

17 A. I didn't ask.

18 Q. Okay.

19 You weren't able to locate her up there?

20 A. No.

21 Q. Did you take any further action looking for
22 her?

23 A. No.

24 Q. Did you ultimately hear what had happened to
25 her?

1 **MR. MURPHY:** Objection. It calls for
2 hearsay.

3 **THE COURT:** My question is, what's the point
4 of the question? We stipulated that Anna Mae was
5 killed. We've had testimony for a day and a half
6 about her being killed and autopsies and all of that.

7 What is the point if this gentleman heard or
8 did not hear what happened to her?

9 And if it's to add other data, then it is
10 hearsay. Okay. So I'm just trying to figure out
11 where we're going. If it's helpful.

12 **MR. MANDEL:** I have nothing further, Your
13 Honor.

14 **THE COURT:** Thank you.

15 Mr. Murphy?

16 **CROSS-EXAMINATION**

17 **BY MR. MURPHY:**

18 **Q.** Mr. Palfy, I am John Murphy and we have never
19 met I don't believe?

20 **A.** No.

21 **Q.** I'm going to ask you some questions. The
22 first thing I want to do is get a sense of the time
23 line on the night in question.

24 You said you were at the AIM house doing
25 paperwork?

1 **A.** Uh-huh.

2 **Q.** And I apologize, but you are going to have to
3 answer yes or no so she can take it down.

4 **A.** Yes.

5 **Q.** All right.

6 And you get this call from Troy Lynn,
7 correct?

8 **A.** Yes.

9 **Q.** And you tell her at some point after you get
10 done with your paperwork you will head on over?

11 **A.** Yes.

12 **Q.** Do you recall about how long it took you to
13 finish up your paperwork?

14 **A.** Probably about half an hour, 45 minutes.

15 **Q.** Okay.

16 So 30 to 45 minutes later you start the drive
17 over to Troy Lynn's house, correct?

18 **A.** Yes.

19 **Q.** And that takes at least another 20 minutes?

20 **A.** Yes.

21 **Q.** All right.

22 So we're at least an hour after you get the
23 call before you arrive at Troy Lynn's house, correct?

24 **A.** Yes.

25 **Q.** But you arrive in time to hear Mr. Vigil or

1 Mr. Gonzalez make a comment about what the Crusade for
2 Justice does to snitches?

3 A. They weren't there when I got there.

4 Q. So they came even after you?

5 A. They came while I was downstairs with Anna
6 Mae.

7 Q. Okay.

8 So Troy Lynn calls you about some problems.
9 You arrive an hour later, give or take. You go down
10 in the basement and that's when the Crusade for
11 Justice folks come?

12 A. Yes.

13 Q. And then you, after talking to Anna Mae, come
14 back up and then you hear him make this comment?

15 A. Yes.

16 Q. So well before the Crusade for Justice people
17 even showed up, Troy Lynn called you about some
18 problems?

19 A. About the problem that turned out to be about
20 Anna Mae, yes.

21 Q. I wanted to get that straight.

22 Now, once you get there you recall clearly
23 that Anna Mae was in the basement, correct?

24 A. Yes.

25 Q. And she's not in a back bedroom or anything

1 like that, she's downstairs?

2 A. Yes.

3 Q. And she's not tied up at that point?

4 A. No.

5 Q. She's not being held captive?

6 A. No.

7 Q. There is nobody guarding her there, correct?

8 A. No.

9 Q. And at that point -- it appeared today you
10 said that you thought Mr. Graham was downstairs?

11 A. I think he was. I can't be sure.

12 Q. Well, do you recall testifying previously
13 under oath at the trial of Dick Marshall, question,
14 when you went down to the basement, who was present?
15 Answer, Anna Mae and there was a bunch of kids all
16 over. Question, referring to young kids? Answer,
17 yes. Just little kids. And maybe three or four other
18 people. I believe Theda and Troy Lynn were two of
19 them. I can't remember for sure who was the other
20 ones were. One may have been Richard Peters. I don't
21 remember.

22 Do you recall that?

23 A. Yeah.

24 Q. You never have indicated in any testimony
25 prior to today that John Graham was down in that

1 basement when you arrived; is that fair to say?

2 A. Yes.

3 Q. And what you have been consistent with,
4 though, through all your statements is that at no time
5 during this event, whenever it may have happened, Arlo
6 Looking Cloud was present, correct?

7 A. Yes.

8 Q. And when we talk about Arlo Looking Cloud, he
9 wasn't present in the house, correct?

10 A. No, I didn't see him in the house.

11 Q. And you were throughout the house, correct?

12 A. No. I was in the kitchen and the basement.

13 Q. Okay.

14 We're not talking about a large house?

15 We're talking about an apartment that's part
16 of a triplex, correct?

17 A. Yes.

18 Q. So there is the basement, there is a couple
19 bedrooms and kitchen and living room, right?

20 A. Yeah.

21 Q. As you go from the basement -- you come in
22 the house, you go down to the basement, you come out
23 of the basement, you go to the kitchen, you go to the
24 living room. You never see Arlo Looking Cloud there,
25 correct?

1 **A.** Never did.

2 **Q.** And you then walk with these folks -- these
3 folks meaning Theda and John and Ida Mae and Anna Mae
4 out to the car, correct?

5 **A.** Yes.

6 **Q.** And you stay with them the entire time period
7 as the car is being loaded up?

8 **A.** Yes.

9 **Q.** And Arlo Looking Cloud is not present?

10 **A.** No, he's not.

11 **Q.** Okay.

12 And in fact, you stand there and watch as
13 they drive away, correct?

14 **A.** Yes.

15 **Q.** All right.

16 Now, let me ask you, where was the car
17 located in relation to Troy Lynn's house?

18 **A.** Right in front. There is, you know, parking
19 spots. Marked parking spots.

20 **Q.** Okay.

21 And how far from the house was where the car
22 was parked from the front door?

23 **A.** Ten, 15 feet.

24 **Q.** Okay.

25 So there is no time period between when you

1 leave the house and when you are standing there near
2 the car for Arlo to insert himself in the crowd,
3 correct?

4 **A.** Correct.

5 **Q.** Okay.

6 Now -- by the way, you testified at Dick
7 Marshall's trial, correct?

8 **A.** Yes.

9 **Q.** But you weren't asked to testify at Arlo's
10 trial, were you?

11 **A.** No.

12 **Q.** Now, my client, John Graham, was present in
13 the house at times during the time you were there,
14 correct.

15 **A.** Yes.

16 **Q.** And at this time John is a young Canadian
17 kid?

18 **A.** He's a teen-age kid.

19 **Q.** And you were familiar with him because
20 sometimes he crashed at the AIM house?

21 **A.** Yes. Well, he was always with Theda.

22 **Q.** But he stayed at the AIM house from time to
23 time or you saw him there?

24 **A.** Yeah.

25 **Q.** And you never saw him in any leadership role

1 in the Denver AIM chapter?

2 A. No. He always called Theda Aunt Theda so I
3 assumed that was his aunt.

4 Q. Okay.

5 A. And she was good at giving orders.

6 Q. Well, my question was, he wasn't part of the
7 AIM upper echelon, correct?

8 A. No.

9 Q. He wasn't even part of the upper echelon of
10 the AIM house in Denver, was he?

11 A. No.

12 Q. And now, today, you said you thought it was
13 Theda who tied Anna Mae up outside, correct?

14 A. Yes.

15 Q. But you weren't sure?

16 A. Not sure.

17 Q. Well, on brief occasions you have said under
18 oath that you were sure it was not my client, correct?

19 A. I believe so, yes.

20 Q. In fact, on previous occasions you have said
21 I saw who tied Anna Mae up and it was Theda, correct?

22 A. Yes.

23 Q. Okay.

24 So at least closer to the time of events you
25 were sure that it wasn't my client who tied her up,

1 correct?

2 A. Yes.

3 Q. In fact, my client didn't have anything to do
4 with tying her up; isn't that true?

5 A. As far as I remember it's not true.

6 Q. This issue about statements you overheard by
7 the Crusade for Justice, either by -- you believe it
8 was Mr. Vigil who said that or was it Mr. Gonzalez?

9 A. I couldn't say for sure.

10 Q. Okay.

11 At the time it was said, though, you
12 understood that they were joking; isn't that true?

13 A. Well, you know, I thought it was just a joke
14 the way he said it, yeah. Because there had never
15 been anything -- bodies found all over Denver, you
16 know, with their throats slashed.

17 Q. Well, but the way he said it to you was in a
18 joking manner; isn't that true?

19 A. I don't know. I didn't take it as a joke.

20 Q. I understand that, but do you recall saying
21 under oath at a Grand Jury, to me, it was like they
22 were joking around, in regard to that comment?

23 A. Yeah. It could have been taken that way.

24 Uh-huh.

25 Q. I am talking about the way that it was said.

1 It was said in a joking manner, was it not, even
2 though you didn't like it, it was said in a joking
3 manner?

4 **A.** Yeah. It's possible.

5 **Q.** But your response is that's not what AIM
6 does?

7 **A.** Yeah. I didn't say that's not what AIM does.
8 I said Indian people don't do that.

9 **Q.** Okay.

10 In any regard, moving further after that,
11 Mr. Gonzalez and Mr. Vigil leave the -- leave Troy
12 Lynn's house?

13 **A.** Those two, yes.

14 **Q.** Okay.

15 So by the time -- well -- strike that.

16 Let's talk about what you said -- what you
17 discussed with Anna down in the basement.

18 You are down there by yourself with her more
19 or less?

20 **A.** Yes.

21 **Q.** Nobody stopped you from going on and talking,
22 correct?

23 **A.** No.

24 **Q.** And nobody said, as you decided to go down to
25 the basement to talk with her, stop interfering?

1 **A.** No.

2 **Q.** You were a pretty big guy then, correct?

3 **A.** Yes.

4 **Q.** You are a pretty big guy now still?

5 **A.** Old, but yeah.

6 **Q.** Yeah.

7 Bigger guy then?

8 **A.** All right.

9 **Q.** Would it be fair to say by the time -- by the
10 conclusion of this incident in the house, you were the
11 biggest guy in the house?

12 **A.** Probably, yes.

13 **Q.** Okay.

14 And you told Anna, you don't have to go if
15 you don't want to, correct?

16 **A.** Yes.

17 **Q.** And at this point, if you wanted to walk Anna
18 out of that house, nobody is going to stop you, are
19 they?

20 **A.** No.

21 **Q.** Not only are you a local AIM leader but you
22 are a big guy?

23 **A.** I am not an AIM leader. Never was.

24 **Q.** Weren't you pretty much head of the AIM house
25 down in Denver?

1 **A.** No. I was chairman of the alternative school
2 committee.

3 **Q.** Okay.

4 **A.** Not --

5 **Q.** You were -- you worked at the AIM house?

6 **A.** AIM member, yes. Not an AIM officer.

7 **Q.** All right.

8 In any regard, nobody was going to stop you
9 if you wanted to walk Anna out and take her to the
10 cultural center?

11 **A.** No.

12 **Q.** And today you said that what Anna told you is
13 that she was going to go back to South Dakota to face
14 the accusation that she was an AIM informant?

15 **A.** Government informant.

16 **Q.** A government informant?

17 **A.** Yes.

18 **Q.** Back -- you described this situation before.
19 You've said under oath that what Anna Mae Aquash told
20 you was that the accusations about her were made by
21 some jealous women, correct?

22 **A.** Yes.

23 **Q.** And that they were accusations because it was
24 alleged she had relations with their husbands,
25 correct?

1 **A.** Yes.

2 **Q.** And that was the accusation that she was
3 going back to face, correct?

4 **A.** Well, that and about being an informant.

5 **Q.** Well, let me read you what you said about
6 this matter just back in April of this year. She told
7 me she had gone through this two or three times before
8 and it's usually a jealous woman or a jealous wife.
9 Anna Mae was a very pretty woman and she said, let's
10 just get this over with.

11 Did she go into any detail or expand on that
12 theme about a jealous woman? It was just about a
13 jealous woman? Your answer, no.

14 Correct?

15 **A.** Uh-huh.

16 **Q.** And when you were asked by the government at
17 that time as to what Anna Mae told you, and what your
18 conversation was about, you said, and I said, well,
19 you don't have to stay here if you don't want to. You
20 can leave. I said you can walk out of here with me
21 because I will take you to the Indian center.
22 Wherever you want to go. She told me that she had
23 been through this all before and she was getting tired
24 of being accused all the time of what was going on.
25 And she told me it was probably just another jealous

1 woman.

2 Is that fair to say?

3 A. Yes.

4 Q. In your previous sworn testimony both at the
5 Dick Marshall trial and in the Grand Jury proceedings,
6 you never mentioned Anna Mae ever discussing with you
7 any concerns about being a government informant; isn't
8 that true?

9 A. I guess it is. Because that's what's down
10 there. It was always in the context of her being
11 labeled an informant and she told me that it always
12 ends up being a jealous female accusing her of being
13 an informant to get at her because the lady's husband
14 looked at her twice or whatever.

15 Q. Well, at least we can agree that prior to
16 this occasion, you never inserted any conversations
17 between yourself and Anna about being a government
18 informant as the reason she was going back to Rapid
19 City; is that fair to say?

20 A. Yes.

21 Q. All right.

22 Now I want to talk to you last about when
23 this event occurred.

24 You said it occurred in November?

25 A. Yes.

1 **Q.** Do you recall previously telling
2 investigators that you remembered this meeting, the
3 meeting that you are talking about, happening three
4 days before her body was found?

5 **A.** No.

6 **Q.** If that was put in FBI reports, you would say
7 that was inaccurate?

8 **A.** That's not accurate.

9 **Q.** All right.

10 So you are sure whatever happened on this
11 occasion, it was November?

12 **A.** Yes.

13 **Q.** All right.

14 **MR. MURPHY:** Let me just check my notes, if I
15 may, Your Honor.

16 Nothing further.

17 Thank you, sir.

18 **THE COURT:** Any follow up?

19 **MR. MANDEL:** Yes, Your Honor.

20 **REDIRECT EXAMINATION**

21 **BY MR. MANDEL:**

22 **Q.** Mr. Palfy, did you understand why Annie Mae
23 was going to be transported up to Rapid City?

24 **A.** From our conversation, yeah.

25 **Q.** What was your understanding as to why she was

1 being transported up there?

2 **A.** My understanding was that she was being
3 accused of being an informant.

4 **Q.** Is that based on what she told to you?

5 **A.** Basically, yeah, that's what I understood.

6 **Q.** Did Troy Lynn or Theda tell you anything
7 about that, as well?

8 **A.** Well, that's what they both told me, too,
9 that National AIM had called and she's being accused
10 of being an informant and they want her up in South
11 Dakota. And when me and Anna Mae talked about it, she
12 said, yeah, but it -- it's always somebody's mad at
13 her or jealous of her and they accuse her of being an
14 informant.

15 **Q.** She was a very attractive woman, right?

16 **A.** Yes, she was.

17 **Q.** When you saw her depart in that Pinto station
18 wagon she was tied up?

19 **A.** Yes.

20 **Q.** Why do you believe she was tied up?

21 **A.** Because she was tied up and put in the
22 station wagon right in front of all of us.

23 **Q.** What was your reaction to that at the time?

24 **A.** I asked her, do you -- is this okay with you
25 and she said don't worry about me. It's not a

1 problem. She was -- she wasn't concerned about it.

2 **MR. MANDEL:** I have nothing further.

3 **MR. MURPHY:** One follow up.

4 **RE-CROSS-EXAMINATION**

5 **BY MR. MURPHY:**

6 **Q.** When she drove away, Anna Mae Aquash was in
7 the back seat of the car with Theda's 12-year-old
8 daughter Ida Mae?

9 **A.** No. Ida was in the middle seat and Anna Mae
10 was in the back of the station wagon.

11 **Q.** On previous occasions have you told
12 authorities that --

13 **MR. MANDEL:** Your Honor, I object to this as
14 beyond the scope of redirect.

15 **THE COURT:** Yeah. Sustained.

16 **MR. MURPHY:** Your Honor, if may, he was asked
17 questions about the departure of the vehicle.

18 **THE COURT:** Do we have anything new is my
19 problem?

20 **MR. MURPHY:** What's that?

21 **THE COURT:** Ask the question.

22 **Q.** (BY MR. MURPHY) Sir, have you previously
23 stated that Theda and John were in the front seat, Ida
24 Mae and Anna Mae were in the back seat?

25 **A.** No. I always told them that Ida Mae was in

1 the middle seat and Anna Mae was in the back of the
2 station wagon. It wasn't a seat. You know, the
3 luggage area.

4 **MR. MURPHY:** Nothing further.

5 Thank you.

6 **MR. MANDEL:** Nothing further.

7 **THE COURT:** Thank you, sir. You may be
8 excused.

9 **MR. MANDEL:** Your Honor, he's released from
10 our subpoena.

11 **THE COURT:** I am sorry?

12 **MR. MANDEL:** I said he's released from our
13 subpoena.

14 **THE COURT:** Yes.

15 (Witness excused.)

16 **MR. MURPHY:** May we approach?

17 **THE COURT:** Uh-huh.

18 (A discussion was held at the bench and off
19 the record.)

20 **THE COURT:** Folks, the next witness is going
21 to take a spell. And my experience over 30 years is
22 that it is not helpful to break up over night that
23 kind of an examination.

24 Counsel tells me we are running very well in
25 terms of ending the trial before the end of the held

1 time. But I think it's helpful to you if you hear the
2 witness all at once rather than try and remember where
3 we started today. If we don't break now, we'll repeat
4 some of today's tomorrow which we probably don't need
5 to do.

6 So I am going to go into recess advising you
7 and cautioning you again, you may not discuss this
8 case with anybody, even yourselves. You are not to
9 form any opinions about the disputed facts in this
10 case until such time as the evidence is closed, you
11 have heard the final arguments, and go into the room
12 to decide the case.

13 Thank you again our your attendance. We
14 will -- I see no reason we won't start at 8:30 in the
15 morning.

16 (Whereupon, the proceedings in this matter
17 were then concluded.)

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1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
 2 COUNTY OF PENNINGTON)

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I, TINA RAE PRUSS, Official Court Reporter
 and Notary Public in and for the County of Pennington,
 State of South Dakota,

DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 questions asked, the testimony given, and of the
 proceedings had.

I FURTHER CERTIFY that I am not of kin or in
 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.

COPY

Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 Pennington County, South Dakota
 My Commission expires: 10-04-2012

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
) Plaintiff,)
))
) VS.)
))
) JOHN GRAHAM,)
))
))
) Defendant.)

TRANSCRIPT OF
JURY TRIAL

VOLUME 5 OF 10

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
DECEMBER 3, 2010

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* * A P P E A R A N C E S * *

MR. MARTY JACKLEY
Attorney General
MR. ROD OSWALD
Assistant Attorney General
MR. ROBERT MANDEL
Assistant U.S. Attorney
Representing the State of South Dakota

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

* * I N D E X * *

WITNESS (ES) :	DIRECT	CROSS	REDIRECT	RECROSS
CANDY HAMILTON	4	25	51, 66	61, 68
CLEO GATES	70	80	90	92
DARLENE KAMOOK ECOFFEY	93			

1	EXHIBITS:	OFFERED/ADMITTED
2	21 - Photo	98/98
3	21B - Photo	96/96
4	21C - Photo	96/96
5	26 - Photo	10/10
6	27 - Photo	10/10
7	30 - Photo	70/71
8	49 - Transcript	54/54
9	116 - Court Document	44/44
10	117 - Court Minutes	44/44
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* * P R O C E E D I N G S * *

(Whereupon, the following proceedings were had in open court with the jury present.)

THE COURT: Mr. Jackley, are you satisfied this is the jury?

MR. JACKLEY: The state is, Your Honor.

THE COURT: Mr. Murphy?

MR. MURPHY: Yes, Your Honor.

THE COURT: Thank you.

You may proceed.

MR. OSWALD: The state calls Candy Hamilton.

THE COURT: Please raise your right hand.

CANDY HAMILTON,

called as a witness herein, having been duly sworn, under oath testified as follows:

THE COURT: Please take a seat.

DIRECT EXAMINATION

BY MR. OSWALD:

Q. Tell us your name, please.

A. Candy Hamilton.

Q. What do you do for a living now?

A. I work for Lakota Circles of Hope.

Q. In 1975, were you living in this area?

A. Yes. I lived in Oglala.

Q. What were you doing in 1975?

1 **A.** I worked with the Oglala legal community.

2 **Q.** What did that consist of, ma'am?

3 **A.** It was helping anyone who was arrested from
4 the reservation, the people who got busted and
5 released and connected with the shooting of the two
6 FBI agents. Helping people in the community who
7 threatened and harassed by the goons and by the FBI
8 agents.

9 **Q.** At some point in 1975, I am talking about
10 around Thanksgiving time, November, December, did you
11 come to Rapid City?

12 **A.** I did.

13 **Q.** Do you remember why you came here?

14 **A.** I came to hook up with a ride to go to Sioux
15 Falls because I was a witness at Russell Means' trial
16 in connection with the Sioux Falls courthouse
17 disturbance.

18 **Q.** How did you get from Oglala to Rapid City,
19 then?

20 **A.** Jeanette Eagle Hawk and Charlie Long Shoulder
21 give me a ride.

22 **Q.** Do you remember when you got here?

23 **A.** Yes. Well, we got here the night before
24 because I was meeting a friend from when I worked with
25 the Wounded Knee Defense Committee who was here for

1 the Dick Wilson trial. And I met her at Thelma Rios'
2 house.

3 Q. Was her name Kathy?

4 A. Yes.

5 Q. Where did you stay that night?

6 A. We spent the night at Thelma's.

7 Q. Is that Thelma Rios?

8 A. Yes.

9 Q. Where was that at, do you?

10 A. It was in those apartments they call them the
11 ABC apartments. The mall wasn't here but they are
12 down there near the mall.

13 Q. Do you know them now as the Knollwood
14 Apartments?

15 A. Yes.

16 Q. The mall wasn't there then?

17 A. No.

18 Q. Just for foundational purposes, Ms. Hamilton,
19 what does WKLDOD stand for?

20 A. The Wounded Knee Legal Defense Offense
21 Committee.

22 Q. So if I say WKLDOD, you know what I mean?

23 A. Yeah.

24 Q. So when you were at Thelma Rios who was
25 there?

1 **A.** First it was just Kathy and me, and then
2 Thelma came home and then we were sitting in the
3 kitchen talking and Dave Hill walked in.

4 **Q.** And who is Dave Hill?

5 **A.** He is an Indian from Oklahoma who was around
6 the Wounded Knee committee some and around AIM.

7 **Q.** Okay.

8 Does he have any particular relationship with
9 Thelma?

10 **A.** They had been a couple for a while, but they
11 weren't at that point as far as I know.

12 **Q.** Did you attend any court appearances or
13 observations before you spent the night at Thelma's
14 that afternoon?

15 **A.** I can't remember whether it was the day I
16 came -- I guess it was the day I came up because the
17 next day I was at the committee house all day. Yeah,
18 that afternoon I had gone to the Wilson trial for a
19 while.

20 **Q.** Did -- when -- did you spend the whole night
21 then at Thelma's?

22 **A.** Yes.

23 **Q.** And it was you, Kathy, Thelma, and David?

24 **A.** Yeah, but shortly after Dave came in Kathy
25 and I went upstairs.

1 Q. Now, did you go to sleep?

2 A. Well, we visited a while and then went to

3 sleep.

4 Q. Nothing event full happened in the night?

5 A. Not that I know of.

6 Q. How go when you goat up in the morning did

7 you hear anything?

8 A. Before I got up I heard somebody come in the

9 downstairs door and --

10 Q. Let me ask you this. When that person came

11 in the downstairs door, did you then hear any voices?

12 A. Yes.

13 Q. Did you recognize the voice?

14 A. Yes.

15 Q. And who was the voice that you heard?

16 A. Bruce Ellison's.

17 Q. And did he talk to somebody, just yes or no?

18 A. Yes.

19 Q. And who was he talking to?

20 A. He called up the stairs to Thelma that they

21 had Annie Mae --

22 **MR. MURPHY:** Objection, Your Honor. Calls

23 for hearsay.

24 **THE COURT:** Who was he talking to does not.

25 Anything they talked about is hearsay.

1 **MR. MURPHY:** Move to strike the portion of
2 the response.

3 **THE COURT:** Yes. The portion of the response
4 directing to had Anna Mae is stricken. You are to
5 treat that statement as though it never occurred. You
6 may not use it or any inference whatsoever in your
7 deliberations unless it comes in through some other
8 course.

9 Thank you.

10 **Q. (BY MR. OSWALD)** So you heard a conversation
11 between Bruce and Thelma?

12 **A.** Yes.

13 **Q.** After that conversation, where did Bruce and
14 Thelma go?

15 **A.** I don't know, but I assume --

16 **MR. MURPHY:** Objection to anything after.

17 **THE COURT:** Sustained.

18 **Q. (BY MR. OSWALD)** At some point did you go to
19 WKLD0C?

20 **A.** Yes.

21 **Q.** And who was there?

22 **A.** I didn't see anybody when I first got there.
23 And then during the day I saw Lucky Hollander and -- I
24 can't remember his name. One of the legal workers.
25 Everybody else was closed up in one of the rooms.

1 Q. At that time did you know if Bruce and Thelma
2 were at WKLDLOC?

3 A. Not till later.

4 Q. Ms. Hamilton, I would like to show you
5 Exhibit 26 and Exhibit 27, if I may.

6 Do you recognize those?

7 A. Yes. That's the house we -- or they used for
8 the Wounded Knee committee.

9 Q. This is what we call WKLDLOC?

10 A. Yes.

11 Q. Is this a true and accurate depiction of what
12 it looked like?

13 A. Yes.

14 MR. OSWALD: Offer 26 and 27, Your Honor.

15 MR. MURPHY: No objection to either.

16 THE COURT: Will be received.

17 MR. OSWALD: If I could show them, Judge?

18 THE COURT: You may.

19 Q. (BY MR. OSWALD) Ms. Hamilton, we're looking
20 at State's Exhibit 27 here, and I'm going to have my
21 ink pen and I'm going to show you this area here.

22 Is that the back door?

23 A. Yes.

24 Q. Did you go in that back door?

25 A. Yes.

1 **Q.** And in this area here, was this parking
2 still?

3 **A.** It was parking but there used to be a big
4 garage back there, too. Maybe it's just not in the
5 picture but that's what it looked like.

6 **Q.** Okay.

7 Showing you Exhibit 26, and this area here is
8 the front door?

9 **A.** Yes.

10 **Q.** When you go in the front door, where do
11 you -- describe the rooms.

12 **A.** Okay. You can go straight ahead into the
13 kitchen back to the back door and then there are rooms
14 along the right-hand side. And at that time it was
15 just an open area. You went in and there was a little
16 sitting area or living room and then the kitchen and
17 then that back shed that you went in through the back
18 door. And rooms along the other side of the house.
19 And some stairs going up out of the kitchen.

20 **Q.** What was upstairs?

21 **A.** More office rooms and some bedrooms.

22 **Q.** Going back to the other exhibit, 27, was
23 there a kind of what you would call a crawl space?

24 **A.** I don't know.

25 **Q.** Okay.

1 Ms. Hamilton, did you later on then see Anna
2 Mae?

3 A. Yes, I did.

4 Q. How did you -- describe the events leading up
5 to how you saw her?

6 A. Well, I had been upstairs and I came
7 downstairs to the kitchen and just as I came down the
8 stairs, she came in from toward the front to get a cup
9 of coffee and we stood there and talked for a few
10 minutes.

11 Q. Describe her emotions and demeanor please?

12 A. Well, she had clearly been crying and looked
13 sad, serious.

14 Q. What did you tell her?

15 A. Well, I just asked how she was and I knew
16 that she -- I didn't know what was going on with her
17 there, but I knew that she had been very worried about
18 threats the FBI had made against her and that she also
19 didn't -- might not feel safe just anywhere and I told
20 her that strange as it may seem, that she might be
21 safe with me in Oglala and I would be glad to have her
22 come stay any time she could.

23 Q. So as far as you know, and if you know, there
24 were no FBI agents at that time interrogating her,
25 were there?

1 **A.** No, not there.

2 **Q.** Okay.

3 When you told her she might be safe at

4 Oglala, what was Anna Mae's response?

5 **A.** She said something about she didn't think so
6 or she didn't think she could come down there.

7 **Q.** Then what happened?

8 **A.** Then we chatted another few minutes about
9 stuff in general and then she said well I have to go
10 back in there and she went back toward the front of
11 the house and I got something to eat and went back
12 upstairs.

13 **Q.** Did you know who was in that room?

14 **A.** I could hear voices but I never ever went in
15 there.

16 **Q.** Well, did you know who was in that room,
17 Ms. Hamilton?

18 **A.** Well, when my ride got there later -- late
19 that afternoon early evening, I saw people who were in
20 the house then.

21 **Q.** Did you see people who were in that room?

22 **A.** I didn't see anybody in the room and I didn't
23 see anybody come out of the room.

24 **Q.** Did you hear and recognize any voices from
25 inside that room?

1 **A.** Yeah, I could hear the voices.

2 **Q.** Who were they?

3 **A.** It sounded like Thelma, Madonna -- Gilbert
4 then, Lorelei Means, and those were the main ones I
5 recognized.

6 **Q.** On May 10, did you -- of 1996 -- did you talk
7 to Robert Ecoffey?

8 **A.** I talked to him a few times and I don't know
9 the dates of any of them.

10 **MR. OSWALD:** Counsel, Graham document 996.

11 **Q.** **(BY MR. OSWALD)** Did you tell Marshal Ecoffey
12 on the 10th of 1996 in May that you know that
13 Lorelei Means, Madonna Gilbert, Thelma Rios, and Bruce
14 Ellison were in that room with Anna Mae?

15 **MR. MURPHY:** Objection. Improper
16 impeachment.

17 **THE COURT:** It's not impeachment at this
18 point. It's a simple, straight-forward question.

19 **A.** Well, I thought they were because I saw them
20 later in the house. That's who I thought was there
21 from the voices, but I never saw them in the room.

22 **Q.** **(BY MR. OSWALD)** Okay.

23 Did you tell Marshal Ecoffey that they took
24 Anna Mae in the room and that is the last time you
25 ever saw Anna Mae?

1 **A.** I don't think so because I didn't see them.
2 I just saw her go back in that room. And I didn't
3 ever see her again.

4 **Q.** Well, how long did you stay there?

5 **A.** I had to wait till my ride showed up and it
6 was after dark, but it was December so it was dark
7 early so I would say 4:30, 5:00. Around that time.

8 **Q.** After that coffee incident that you talked to
9 Anna Mae, did you ever see her again?

10 **A.** No.

11 **Q.** Never again?

12 **A.** Never again.

13 **Q.** Did you have an argument at some point about
14 Anna Mae with Madonna and Thelma and Bruce Ellison?

15 **A.** I had an argument with Thelma, Lorelei, and
16 Bruce about Annie Mae.

17 **Q.** Okay.

18 And without telling me or telling anyone what
19 they said, tell us what the argument was about.

20 **MR. MURPHY:** Objection. That's just an end
21 run around hearsay.

22 **THE COURT:** Calls her for knowledge.

23 You may answer.

24 **A.** I am sorry. You will have to tell me the
25 question again.

1 **Q.** **(BY MR. OSWALD)** Well, you made some comments
2 to them in the argument?

3 **A.** Uh-huh.

4 **Q.** And what was the subject matter that you were
5 arguing about with them?

6 **A.** That I would never believe that Annie Mae was
7 a snitch; that I had worked with her that summer and I
8 had seen how hard she worked, how much she cared about
9 the movement and about the people. How much concern
10 she had. And how -- and she lived in really difficult
11 conditions and snitches never put up with that kind of
12 stuff.

13 **Q.** When you had this argument, where were you
14 at?

15 **A.** At the WKLDOC house.

16 **Q.** And when was that?

17 **A.** It must have been sometime, maybe two months,
18 six weeks -- I just can't place that particular day,
19 but must have been a couple months before I saw Annie
20 Mae at the house.

21 **Q.** Before?

22 **A.** Uh-huh.

23 **Q.** When you saw Anna Mae at WKLDOC that last
24 time, did you think she was free to leave?

25 **A.** No.

1 **Q.** At some later point did you attend Anna Mae's
2 exhumation?

3 **A.** Yes.

4 **Q.** Describe that, please.

5 **A.** Well, I got there first. It was just me and
6 they had brought some guys from the jail and a backhoe
7 to dig. And then, I guess, maybe five or ten minutes
8 later, three FBI agents came and they kind of stood
9 off to the side. They were laughing and joking and
10 making fun of me and making fun of her. And just
11 being generally ugly.

12 And then when -- and I was -- I didn't have
13 any idea how they buried her. I was really worried
14 about what they were going to pull up. But she was in
15 a coffin. And then they put the coffin in a pickup
16 truck and took it over to the hospital.

17 **Q.** Did any FBI agents talk to you that day?

18 **A.** No. I could hear them jeer -- well, later
19 that day while they were waiting for the -- there were
20 a whole bunch of us by then. There were a lot of
21 women there who had known Anna Mae and we were just
22 waiting for the autopsy to start. And they asked me
23 to ask the agents about her personal property because
24 her family was coming for her funeral -- wake and
25 funeral and burial and it would be nice to have some

1 of her personal stuff for them. And they said, no, we
2 couldn't have it because it was all evidence.

3 And then a few minutes later -- well, then
4 Bill Wood went outside the area where we were
5 waiting -- outdoors and came back and had a box in his
6 hand and he said, you want something of Annie Mae's,
7 here, and he just threw the box and he said, there is
8 her hands.

9 Q. Now, did you talk to the FBI agents that day
10 about the investigation?

11 A. No.

12 Q. They wanted you to, didn't they?

13 A. They didn't ask me anything.

14 Q. And you haven't seen any FBI reports in
15 regard to your conversation with them, have you?

16 A. No. I've asked for my FBI file and they said
17 there wasn't one.

18 Q. Well --

19 A. Through the Freedom of Information Act.

20 Q. Well, if the -- so you don't know their
21 version of the events, do you?

22 A. No, but I wouldn't trust it.

23 Q. Okay.

24 You would think they would purposely lie?

25 A. I know they have.

1 **Q.** Now, Ms. Hamilton, you were with the FBI
2 agents there and they were jeering at you and they
3 threw hands at you at different times I understand.

4 **A.** Uh-huh.

5 **Q.** Did you tell them or volunteer when you last
6 saw Annie Mae?

7 **A.** No.

8 **Q.** Did you tell them you saw her crying at
9 WKLDOC?

10 **A.** No.

11 **Q.** Why?

12 **A.** The way they were behaving, the way they
13 treated all of us, I never had any reason to talk to
14 them.

15 **Q.** Did you notify Marshal Ecoffey -- or Officer
16 Ecoffey at that time?

17 **A.** I didn't even know him then.

18 **Q.** How about go to the Tribal police?

19 Did you trust them?

20 **A.** They were all goons.

21 **Q.** So there were no law enforcement people that
22 you can trust at that time?

23 **A.** Absolutely.

24 **Q.** Now, at that -- you were at that second
25 autopsy, weren't you?

1 **A.** Yes.

2 **Q.** And did you see, at some point later, Theda
3 Clarke?

4 **A.** Yes, I saw her later at my house in Oglala.

5 **Q.** Did you tell her what they found in that
6 second autopsy?

7 **A.** That she just came walking right into my
8 house and said, did you go to that autopsy, and I
9 said, yes, and she said --

10 **MR. MURPHY:** Objection, Your Honor. Hearsay.

11 **THE WITNESS:** She said it to me.

12 **THE COURT:** Be quiet.

13 I am going to overrule it.

14 **Q.** **(BY MR. OSWALD)** You may answer.

15 **A.** She said, did you go to that autopsy, and I
16 said, yes, and she said, what did they find, and I
17 said, they found a bullet right here. And she said,
18 oh. And then Allen Moose Camp was there and they
19 talked to each other in Lakota. I don't know what
20 they were saying. And then Theda said --

21 **MR. MURPHY:** Objection. Continuing hearsay.

22 **THE COURT:** Sustained.

23 **Q.** **(BY MR. OSWALD)** All right.

24 Were you surprised to see Theda at your
25 house?

1 **A.** I wasn't surprised to see her there. I was
2 surprised to see how fast she got out of there.

3 **Q.** That was after you told her they found a
4 bullet?

5 **A.** Yes.

6 **Q.** Okay.

7 **MR. OSWALD:** Judge, may I have a moment?

8 **THE COURT:** Yes.

9 **Q.** **(BY MR. OSWALD)** I'd like to take you back,
10 Candy Hamilton, to WKLDOC. And it was getting dark
11 and you had seen Anna Mae a couple hours earlier?

12 **A.** Yes.

13 **Q.** Okay.

14 Did you go anywhere from there?

15 **A.** When my ride got there we left to go to Sioux
16 Falls.

17 **Q.** What was happening in Sioux Falls?

18 **A.** Russell Means was on trial and I was a
19 witness the next morning.

20 **Q.** Who was your ride?

21 **A.** I think the car belonged to one of the
22 Bellecourt's because there was Vernon, Clyde -- and
23 one of them was driving. Ted Means was with us,
24 Web Poor Bear and another guy who I didn't know then
25 and I have never known who he was.

1 Q. Where did you go then?

2 A. We started out for Sioux Falls and then they
3 went down to Rosebud Reservation to Kills Means'
4 house.

5 Q. Is that a brother of Russell?

6 A. Yes.

7 Q. You all road in the same car?

8 A. Yes.

9 Q. It was dark when you were traveling?

10 A. Yes.

11 Q. What happened when you got to Mr. Means'
12 house on Rosebud?

13 A. They pulled in. They all got out and went in
14 the house.

15 Q. Where -- what did you do?

16 A. I just sat in the car.

17 Q. Why?

18 A. Well, nobody invited me to come in and so I
19 didn't.

20 Q. Do you know what went on inside that house?

21 A. Pardon me?

22 Q. Do you know what went on inside that house?

23 A. I have no idea.

24 Q. How long were they in there?

25 A. I would guess maybe 30, 45 minutes.

1 Q. Did they leave the car running for you?

2 A. I don't remember.

3 Q. Was it cold outside?

4 A. Yeah, it was cold, but I had on a coat and
5 hat.

6 Q. Now, do you know the relationship between
7 Mr. Means' house that you were there at and Ted Means
8 that you were traveling with?

9 A. You mean the relationship between Ted and
10 Kills -- they are twins.

11 Q. They are twins?

12 A. Yes.

13 Q. And they are both brothers of Russell?

14 A. Yes.

15 Q. Do you know what Madonna Gilbert -- we've
16 heard her as Madonna Thunder Hawk --

17 Who is she?

18 A. She's closely related to them. They are
19 cousins, but in the Lakota way they are brothers and
20 sisters. They were all raised together.

21 Q. And Lorelei, she's the one -- correct me if I
22 am wrong -- you had an argument with Lorelei and
23 Madonna?

24 A. Lorelei and Thelma.

25 Q. Lorelei and Thelma.

1 What relationship is Lorelei to this group?

2 **A.** Lorelei was married to Ted at that time.

3 **Q.** Ted Means?

4 **A.** Yes.

5 **Q.** Was Mr. Bellecourt active in the American
6 Indian Movement?

7 **A.** They both were.

8 **Q.** Vernon and Clyde?

9 **A.** Yes.

10 **Q.** And Vernon is now deceased?

11 **A.** Yes.

12 **Q.** Did they ever talk to you about Anna Mae
13 being an informant?

14 **MR. MURPHY:** Objection. Leading.

15 **THE COURT:** Overruled.

16 **MR. MURPHY:** Objection. Calls for hearsay.

17 **THE COURT:** Overruled.

18 **A.** You mean the Bellecourts?

19 **Q.** (BY MR. OSWALD) Yes.

20 **A.** No. I didn't know them very well.

21 **Q.** Now, this incident, was this the first part
22 of December that you saw Annie Mae?

23 **A.** Yes. Whatever the date -- I don't know what
24 the date of that trial was. I don't know what the
25 date was then, but it was near the early part of

1 December.

2 Q. Ms. Hamilton, did you talk to the FBI agents
3 or anybody about this case after 1975 to 1980?

4 A. I never talked to FBI agents.

5 Q. So you didn't talk to them in the 80s either?

6 A. No.

7 Q. Or the 90s?

8 A. No.

9 Q. When is the first time you talked about this
10 case to somebody, do you remember?

11 A. Well, I mean everybody that knew Anna Mae
12 talked about it whenever we got together because
13 nobody could figure out what had happened.

14 Q. Can I ask you, didn't you think it would be
15 important for law enforcement to know what you saw and
16 heard in the early part of December?

17 A. I didn't think they would -- that they would
18 care.

19 MR. OSWALD: No further questions.

20 THE COURT: Mr. Murphy?

21 CROSS-EXAMINATION

22 BY MR. MURPHY:

23 Q. Good morning, Mr. Hamilton. My name is John
24 Murphy. I represent Mr. Graham.

25 I am going to ask you some questions, but if

1 you don't understand a question or if I mess it up,
2 just let me know.

3 **A.** Yes.

4 **Q.** Don't hesitate to stop me -- I know you have
5 a dry throat -- if you need water.

6 **A.** Okay.

7 **Q.** First, just for clarification, you talked to
8 the jury about goons. You used that phrase. Some
9 people might not know what that means.

10 What do you mean by the term goons?

11 **A.** They were supporters of Dick Wilson who was
12 the Tribal a chairman then and they were all well
13 armed. They were violent. They were after anybody
14 who didn't support Dick Wilson.

15 **Q.** Okay.

16 Did goons stand for Guardians of the Oglala
17 Nation?

18 **A.** Well, somebody made that up at some point,
19 but I don't know that that was ever really it.

20 **Q.** Sure.

21 And Mr. Oswald just asked you a question, he
22 said, did you ever talk to anybody about this case.

23 Would it be fair to say this has been a
24 source of -- this case has been a source of constant
25 conversation over the last 30 years?

1 **A.** Yes.

2 **Q.** Okay.

3 Internet, in person, books, articles, et
4 cetera?

5 **A.** Uh-huh. Yes. Sorry.

6 **Q.** And then I want to start a bit with what you
7 were doing in 1975.

8 You indicated you were a legal worker for the
9 WKLDOC group?

10 **A.** Well, I did some legal-aid-type work. I did
11 fund raising. I did community support and community
12 organizing. Tried to get support for the people who
13 were getting arrested nationwide. I mean, I didn't go
14 anywhere. I was mostly on the reservation but being
15 in touch with people because I had worked for WKLDOC
16 for about two years before that and had a lot of
17 contacts and that sort of thing around the country.

18 **Q.** And before you came to South Dakota you had
19 been a journalist?

20 **A.** Yes. That was my career.

21 **Q.** All right.

22 And kind of confining yourself to the legal
23 work aspect. You were there to help defendants who
24 were charged, correct?

25 **A.** Yes.

1 Q. And you would go to trials?

2 A. Occasionally.

3 Q. You would work with the attorneys. Help
4 assist them?

5 A. Yes.

6 Q. Help review legal documents and other matters
7 that you had gathered during the course of a case?

8 A. Yes. And just the daily -- I mean, Oglala
9 was totally disrupted then and try to help people.

10 Q. And when you say totally disrupted, what do
11 you mean?

12 A. Large groups of FBI agents armed with M16s
13 and AR15s were there every day knocking down people's
14 doors, threatening people, hauling people off to jail.
15 Threatening to -- threatening people's children.

16 Q. Okay.

17 A. You know -- and I was -- I tried to help
18 people deal with that.

19 Q. This was in the wake of the killing of the
20 two FBI agents?

21 A. Yes.

22 Q. All right.

23 I want to talk to you about your familiarity
24 and contact with Anna Mae Aquash.

25 A. Yes.

1 Q. Mr. Oswald talked to you about your
2 conversation with her at WKLDOC?

3 A. Yes.

4 Q. But you knew her from going back at least six
5 months, didn't you?

6 A. Yes.

7 Q. Okay. Let's talk about that.

8 You and her lived in the village of Oglala
9 together, did you not?

10 A. Well, we lived in the Lakeside Community
11 which is a little bit outside the village, but it's in
12 that district.

13 Q. And would you mind before we go spelling
14 Lakesack?

15 A. Lakeside. Lake and side all written
16 together.

17 Q. All right.

18 A. You know what I really need is a cough drop
19 out of my purse.

20 **MR. MURPHY:** Your Honor, may the witness grab
21 one?

22 **THE COURT:** Yes.

23 **THE WITNESS:** Sorry. I think I can talk
24 around it.

25 Q. **(BY MR. MURPHY)** All right.

1 **A.** So what we did that summer before?

2 **Q.** Let me ask you, when do you recall first
3 meeting Ms. Aquash?

4 **A.** The first time I went down to the reservation
5 after the shooting at Jumping Bull's. I went to the
6 house where the first people who worked with the
7 Oglala legal committee were staying and she was there.

8 **Q.** Okay.

9 And would that have been June of 75, then?

10 **A.** I think it may have been July because that
11 was -- the shooting was July the 26th. Then I think
12 it was early in July before I went down to the
13 reservation.

14 **Q.** Let me just correct you. You said the
15 shooting was July?

16 **A.** June 26.

17 **Q.** So it would have been shortly after there?

18 **A.** Uh-huh.

19 **Q.** May have lapsed into July?

20 **A.** Uh-huh.

21 **Q.** Did there come a time when you and Ms. Aquash
22 lived in this small community called Lakeside?

23 **A.** Yes. We lived across Lakeside Road from each
24 other.

25 **Q.** Did you visit during that period of time?

1 **A.** Yes, we did.

2 **Q.** Got to know her?

3 **A.** Yes.

4 **Q.** And later, you actually got to conduct an
5 interview with Ms. Aquash, correct?

6 **A.** Yes.

7 **Q.** And is it your understanding that that's the
8 only interview she ever gave to the press?

9 **A.** No. I think she had talked to the press
10 other times. I think it was -- it was certainly the
11 last radio interview that was done with her -- last
12 recorded interview.

13 **Q.** And do you recall about when that interview
14 was done?

15 **A.** I don't know the date, but I know it was the
16 morning -- or the afternoon after Jim Little was
17 killed in Oglala and we found out about the people
18 being arrested in Kansas.

19 **Q.** Okay.

20 **A.** And that must have been early September.

21 **Q.** All right.

22 And during that interview you actually talk
23 about the incident at Al Runnings?

24 **A.** Yes.

25 **Q.** And that happened September 5, 1975?

1 **A.** Yes.

2 **Q.** So it would have had to have been some time
3 after that?

4 **A.** After that.

5 **Q.** Okay.

6 Now, September 24, 1975, was the protest at
7 the Wagner Pork Processing Plant.

8 Do you remember that?

9 **A.** Yes.

10 **Q.** And do you remember being or visiting with
11 Anna at that point, too?

12 **A.** Yes.

13 **Q.** You had time -- contact with her throughout
14 the June through December period intermittently?

15 **A.** Yes.

16 **Q.** Okay.

17 **A.** After she went back to California, she called
18 once and she -- as they had activities and did things
19 in California or things were going on there she would
20 send me stuff in the mail.

21 **Q.** Okay.

22 And in fact at one point she was in your
23 house or she was in the house of Luke and Rose's and
24 you were there, correct?

25 **A.** Yes. That was earlier.

1 **Q.** Okay.

2 Would you explain what happened at Luke and
3 Rose's house when you were there with Ms. Aquash?

4 **A.** Yes. There were a lot of us there.

5 **Q.** Uh-huh.

6 **A.** And all of a sudden like three or four cars
7 of the armed FBI agents came roaring in and we were
8 all outside and the minute she saw them she ran
9 inside. And I waited a few minutes but there were
10 other legal workers there then. So I went inside to
11 see if she was all right.

12 And she said I can't let them find me. I
13 don't want them to get ahold of me. And she was
14 worried they would just come charging in. And we
15 looked up and there was a little opening, crawl space,
16 up in the ceiling, and she climbed up on a chair,
17 pushed that little opening open.

18 **Q.** Like an attic panel?

19 **A.** Yeah, a panel.

20 She pushed that panel up and climbed up into
21 the crawl space which must have been roasting because
22 it was a really hot day. Then she called down to me,
23 get one of those guys to pull a car up right by the
24 door. So I went out and got somebody to do that. And
25 they pulled up right by the door and they went running

1 out and jumped in the car and they took out and she
2 went over to the housing and stayed in somebody's
3 basement.

4 Q. How long was she up in the attic?

5 A. Gee, I don't know, five, ten minutes.

6 Q. And this happened in June of 1975, correct?

7 A. It would have been July.

8 Q. July.

9 At that point, to your knowledge, she
10 wasn't -- she hadn't been charged yet for anything at
11 Al Runnings?

12 A. No.

13 Q. She wasn't a fugitive or anything like that?

14 A. No.

15 Q. It was just her fear of the FBI at that
16 point?

17 A. Exactly.

18 Q. All right.

19 Now, I want to talk to you about what you
20 learned from Ms. Aquash throughout the months that you
21 had contact with her.

22 She repeatedly told you she was afraid of the
23 FBI, correct?

24 A. Yes.

25 Q. She believed the FBI and the federal

1 government was following her?

2 **A.** She knew they were.

3 **Q.** Okay.

4 She also told you about specific threats made
5 on her life by FBI agents?

6 **A.** She did.

7 **Q.** What did she tell you in regard to that?

8 **A.** While she was in jail after the Al Runnings'
9 raid -- or the raid at Al Runnings' house, she said
10 that Agent David Price showed up. He had showed up --
11 he had interrogated her before or after Wounded Knee
12 and he had showed up there. And he was one of the
13 main agents on the reservation at that time. And that
14 he was trying to get her to talk about June the
15 26th and who was there and what happened although
16 she wasn't there that day.

17 **Q.** And she was actually in Cedar Rapids, Iowa on
18 that date?

19 **A.** That's right.

20 **Q.** That was for Leonard Crow Dog's trial?

21 **A.** That's right.

22 **Q.** Okay.

23 **A.** And she wouldn't talk about it, except
24 reminding that Joe Stunts was killed on the 26th,
25 too.

1 **Q.** And Joe Stunts was the AIM member that was
2 killed in the shoot-out?

3 **A.** Yes.

4 And finally he got really angry with her and
5 told her that if she didn't start cooperating that he
6 would see that she died.

7 **Q.** Okay.

8 And that's something she actually talked
9 about during your interviews?

10 **A.** She did.

11 **Q.** And she talked about her fear of people like
12 Doug Durham, correct?

13 **A.** Yes.

14 **Q.** And Doug Durham was an FBI operative?

15 **A.** Yes.

16 **Q.** When it came to talking about being accused
17 of being an informant, the person she identified as
18 making that accusation was John Stewart, correct?

19 **A.** She didn't tell me that. Somebody else told
20 me that the first time they ever heard anything about
21 Annie Mae being a snitch came from John Stewart.

22 **Q.** And John Stewart was somebody also who was an
23 FBI operative?

24 **A.** Yes. He worked with David Price and Bill
25 Wood.

1 **Q.** Okay.

2 Let's talk about, you know, you had these
3 conversations. You came to believe that she felt
4 comfortable talking to you, correct?

5 **A.** Yes.

6 **Q.** She never said anything to you at all about
7 Leonard Peltier putting a gun to her head at the
8 Farmington convention, did she?

9 **A.** No.

10 **Q.** In fact, when somebody presented you with
11 that accusation, you specifically said, I never heard
12 anything about that?

13 **A.** I never heard anything from her about it.

14 **Q.** Okay.

15 But that was kind of part of the gossip in
16 the community, correct?

17 **A.** It was gossip.

18 **Q.** Yeah.

19 She never told you that at any time -- and
20 I'm talking all the way up in your conversations all
21 the way up through 1975, that she had ever been held
22 captive by anybody in the American Indian Movement,
23 did she?

24 **A.** She didn't come out and say anything like
25 that, no.

1 Q. Right.

2 She didn't say anything about being forced to
3 travel with Leonard and Dennis in that motor home out
4 to the Pacific northwest?

5 A. No.

6 But I only -- after that period of time the
7 only time I saw her was the day at the WKLD OC house.

8 Q. Okay.

9 Regarding Leonard Peltier, though, you
10 understood that Anna Mae admired him, correct?

11 A. Evelyn Bordeaux told me -- or Ray, one or the
12 other -- told me that when they were taking her to
13 Denver that she said she admired Leonard. That you
14 could rely on him to do what -- to take care of people
15 and look after them.

16 Q. In fact, if I may, weren't you told she
17 expressed a lot of admiration for Leonard and said if
18 she were ever in trouble or if there was trouble, he
19 was the one she would want to be with because he had
20 the courage to do what needed to be done?

21 A. Yes.

22 Q. She never deviated or told you anything
23 differently?

24 A. No.

25 Q. Now, you knew Anna well enough to know that

1 if -- let me back track.

2 That conversation that you -- was relayed to
3 you by Evelyn and Ray Hand Boy --

4 **A.** Yes.

5 **Q.** -- that was on their trip from Pierre down to
6 Denver?

7 **A.** Right.

8 **Q.** November 24, give other take?

9 **A.** Yes.

10 **Q.** So that would have been after the motor home
11 trip?

12 **A.** Yes.

13 **Q.** If Anna had heard Leonard Peltier confess to
14 executing the FBI agents in cold blood while they
15 begged for help, do you think she would have ever said
16 anything like, I admire Leonard?

17 **MR. OSWALD:** Objection, your Honor. It's
18 speculation.

19 **THE COURT:** Sustained.

20 **Q.** **(BY MR. MURPHY)** I'd like to talk to you about
21 the date of this situation at WKLD.OC. And I want to
22 be very clear so we'll take some time here. You have
23 talked about this being -- this occurring at a time
24 when you were in Rapid City and the Dick Wilson Senior
25 trial was going on?

1 **A.** Yes.

2 **Q.** For those who don't know, who was Dick
3 Wilson?

4 **A.** He was then the Tribal Chairman at Pine
5 Ridge.

6 **Q.** All right.

7 And he was on trial for doing what?

8 **A.** He and some of his goons had attacked some of
9 the legal workers back in -- it must have been
10 probably 74 when they were on the reservation to do --
11 put some lawyers to do some investigation into one of
12 the Wounded Knee cases. And the goons attacked them
13 and beat them up.

14 **Q.** All right.

15 They were standing trial -- or Dick Wilson
16 was standing trial, and your friend Kathy James was a
17 witness, correct?

18 **A.** Right.

19 **Q.** Okay.

20 And in the past the state has -- or the
21 government has tried to get you to commit to a
22 particular date.

23 Do you recall that during prior questioning?

24 **A.** Yes.

25 **Q.** And you told them candidly, I can't tell you

1 the day?

2 A. Right. It's just whenever the trial was.

3 Q. Okay.

4 And so I want to make sure we're clear, it
5 was during the time of the Dick Wilson trial that you
6 were in Rapid City?

7 A. That's right.

8 Q. And Kathy was in town for that to become a
9 witness, correct?

10 A. Yes.

11 Q. And in fact, you, while you were in Rapid
12 City, went down to the federal court building to watch
13 part of the trial, correct?

14 A. Yes.

15 Q. Now I think you said today you did that the
16 first day?

17 A. I think -- it's hard to remember 35 years ago
18 and I'm old now. But I went either the day we got up
19 there or maybe I went the morning of the next day, but
20 I don't think so. I think it was the day before.

21 Q. If on a prior occasion some time ago when you
22 were giving Grand Jury -- well, first, do you remember
23 giving Grand Jury testimony on a number of occasions?

24 A. Just once.

25 Q. Just once.

1 And do you recall the year of that?

2 **A.** No.

3 **Q.** Okay.

4 It was a long time ago?

5 **A.** Yeah.

6 **Q.** Okay.

7 Do you recall back then telling -- the
8 prosecutor was asking you questions. I went back
9 upstairs -- and you are referring to WKLD0C -- and at
10 some point that day I went down to the federal court
11 building where the Wilson trial was going on and spent
12 a little time there?

13 **A.** Well, then, it must have been that day.
14 That's closer to the time.

15 **Q.** All right.

16 Now, pardon me. I am going to grab some
17 documents.

18 You indicated before -- you are familiar with
19 some legal documents?

20 **A.** Yes.

21 **Q.** I am going to show you what are marked
22 Defendant's Exhibit 116, 117, and 122. And I am going
23 to start with Exhibit 116.

24 First off, can you feel the certification?

25 **A.** Yes.

1 **Q.** And is this captioned the United States vs.
2 Richard Wilson Senior?

3 **A.** Yes.

4 **Q.** And that's Dick Wilson?

5 **A.** Yes.

6 **Q.** What are the dates of the trial listed on
7 that?

8 **A.** December 15, 16, 17, and 18.

9 **Q.** All right.

10 And then I am going to show you what's been
11 marked December -- excuse me, Exhibit 117.

12 Do you recognize this as the Court minutes?

13 **A.** I have never seen it before.

14 **Q.** But you have seen documents like this in
15 court files?

16 **A.** Yes.

17 **Q.** And again, this is the certified raised
18 document?

19 **A.** Yes.

20 **Q.** I am going to turn to page 9 and is the date
21 of that December 16, 1975?

22 **A.** Yes.

23 **Q.** And does that talk about your friend Kathy
24 James being sworn as a witness on that date?

25 **A.** Yes, but I didn't see her testify.

1 **Q.** Okay.

2 I just want to identify the date that she was
3 a witness.

4 **A.** Yes.

5 **MR. MURPHY:** All right.

6 I would move to admit Exhibits 117 and 116,
7 Your Honor.

8 **MR. OSWALD:** No objection.

9 **THE COURT:** Will be received.

10 **MR. MURPHY:** Actually, you know what, Your
11 Honor, may I confer with counsel for just a moment?

12 **THE COURT:** Certainly.

13 **MR. MURPHY:** Your Honor, rather than admit
14 the whole transcript, we'll admit Exhibit 117 in its
15 entirety and then just the first few pages of the
16 transcript.

17 **THE COURT:** Agreeable, counsel?

18 **MR. OSWALD:** Agreeable.

19 **THE COURT:** So be it.

20 **MR. MURPHY:** Thank you.

21 **Q.** **(BY MR. MURPHY)** Now, you were -- we were just
22 leaving off with your discussion about Ms. James being
23 up here for that trial?

24 **A.** Yes.

25 **Q.** And you visited her with -- with her the

1 night you got there?

2 **A.** Yes.

3 **Q.** And it was your understanding she was up
4 there to testify at that trial?

5 **A.** Yes.

6 **Q.** And was it your understanding that when you
7 talked to her, she had already testified?

8 **A.** I don't know.

9 **Q.** Okay.

10 Do you recall on a previous occasion that --
11 stating that you were waiting for her at Ms. Rios'
12 house? She came back after she got done testifying
13 and you visited into the evening?

14 **A.** Maybe so. I don't remember whether she was
15 coming in Minnesota or she came from the courthouse
16 there.

17 **Q.** Okay.

18 In any case --

19 **A.** But it related to that trial.

20 **Q.** She was there and she was a witness?

21 **A.** She was one of the victims.

22 **Q.** Oh, she was one of the victims --

23 **A.** Yes.

24 **Q.** And she was testifying?

25 **A.** Yes.

1 Q. Okay. Enough said.

2 Now, let's talk about WKLD,OC, the day that
3 you were there.

4 A. Yes.

5 Q. You came from Oglala?

6 A. Yes.

7 Q. With Jeanette Eagle Hawk?

8 A. Yes.

9 Q. And Charlie Long Shoulder?

10 A. Yes.

11 Q. When you arrived in Rapid City, where did you
12 first go?

13 A. I have no -- I just don't remember.

14 Q. Would you recall --

15 A. We probably ate and maybe went to the trial
16 and -- I don't know.

17 Q. Would you recall if you had gone to WKLD,OC
18 and had been told that you couldn't walk into the
19 WKLD,OC building?

20 A. Jeanette told I that --

21 Q. I know what Jeanette told you.

22 A. No, that didn't happen to me.

23 Q. Okay.

24 You weren't present when all of that --

25 A. No.

1 Q. All right.

2 When you got to WKLDOC the next day --

3 A. Yes.

4 Q. -- the day that you talked about earlier, you
5 were free to roam throughout the building?

6 A. Yes.

7 Q. You went upstairs and came down for coffee,
8 correct?

9 A. Yes.

10 Q. Left to go to the trial perhaps that day?

11 A. Yes. Maybe so.

12 Q. Okay.

13 You hear other people. You see Anna.

14 A. Yes.

15 Q. At no time during that day did you ever see
16 John Graham, correct?

17 A. No.

18 Q. And you knew my client by look at that point?

19 A. Yes.

20 Q. You would have recognized him if you saw him
21 there?

22 A. Yes.

23 Q. And you never saw Arlo Looking Cloud?

24 A. No.

25 Well, I had never seen him but -- after I did

1 see him I didn't remember seeing anybody like that
2 there.

3 Q. And let's talk about when you are meeting
4 with Ms. Aquash.

5 A. Yes.

6 Q. It's in the kitchen which is at the back of
7 the house?

8 A. Yes.

9 Q. And the back door is just three or four steps
10 away, correct?

11 A. Yes.

12 Q. You said earlier that you got the sense she
13 was not free to leave?

14 A. Yes.

15 Q. I want to talk about that more specifically.
16 She was not tied up?

17 A. No.

18 Q. Okay.

19 There was nobody else in the kitchen guarding
20 her, correct?

21 A. No.

22 Q. It was just you and her, correct?

23 A. Yes.

24 Q. And you and her are friends?

25 A. Yes.

1 **Q.** You would never have stopped her from walking
2 out the back door?

3 **A.** No.

4 But she didn't have a car. I didn't have a
5 car. Neither one of us had any money. I don't know
6 what we would have done if we left.

7 **Q.** You might know what you would have done, but
8 when you say somebody was not free to leave, that has
9 certain connotations that I want to explore with you.

10 **A.** Okay.

11 **Q.** You were in the kitchen. You were -- even
12 though you didn't have money and you didn't have a
13 car, you were free to walk out the door?

14 **A.** Yes.

15 **Q.** And she's there and she might not have a car
16 or money but she's free to walk out the door?

17 **A.** Yes.

18 **Q.** And at no time when she first entered the
19 kitchen did somebody else walk in there with her and
20 say, Candy, make sure she doesn't go anywhere?

21 **A.** No. Nobody said that.

22 **Q.** So she really was free to walk away from the
23 situation?

24 **A.** Yeah.

25 **Q.** Okay.

1 In fact, you talked to her about the
2 situation with the FBI and you said, hey, if you need
3 a place to go, come to my place?

4 **A.** Yes.

5 **Q.** And she declined your offer?

6 **A.** Yes.

7 **Q.** And she trusted you at this point?

8 **A.** I hope so.

9 **Q.** I mean, you had -- she trusted you enough to
10 give you an interview?

11 **A.** Yes.

12 **Q.** And you weren't affiliated with the American
13 Indian Movement leader ship, were you?

14 **A.** No.

15 **Q.** I mean --

16 **A.** I knew them but I wasn't -- certainly wasn't
17 part of any leadership.

18 **Q.** You are a Caucasian woman?

19 **A.** Yes.

20 **Q.** And that -- just by in and of itself was
21 going to make it so that you are not an AIM leader?

22 **A.** Right.

23 **Q.** So this isn't somebody -- you are not
24 somebody who Anna Mae would have associated as being
25 in tight with Russ Means or Dennis Banks or the

1 Bellecourt brothers?

2 A. No.

3 Q. In fact, you indicated you barely knew the
4 Bellecourt brothers?

5 A. Right.

6 Q. You indicated you heard voices in this other
7 room?

8 A. Right.

9 Q. You never heard anybody use the word snitch
10 or informant or anything like that coming through the
11 door?

12 A. I couldn't hear distinct words. It was just
13 voices.

14 Q. Just discussion?

15 A. Yes.

16 MR. MURPHY: Thank you.

17 I have nothing further.

18 THE COURT: Anything further, Mr. Oswald?

19 MR. OSWALD: Thank you.

20 **REDIRECT EXAMINATION**

21 **BY MR. OSWALD:**

22 Q. Ms. Hamilton, are you completely familiar
23 with that Dick Wilson trial?

24 A. No. I just went that one day, and read the
25 newspapers.

1 **Q.** Are you familiar with the pretrial
2 depositions and things that went on?

3 **A.** No.

4 **Q.** And there were a lot of legal proceedings on
5 December 10, 11 and 12?

6 **A.** I don't know.

7 **Q.** Well, those were open to the public and you
8 could view those?

9 **MR. MURPHY:** Objection. Facts not in
10 evidence.

11 **THE COURT:** Overruled.

12 **Q.** (BY MR. OSWALD) You --

13 **A.** I never did.

14 **Q.** Well, Ms. Hamilton, Mr. Murphy showed you
15 some documents about some court exhibits that were
16 offered and he asked you if you were familiar with
17 some of these legal documents.

18 So you have some legal knowledge as a
19 journalist?

20 **A.** Yes.

21 **Q.** Okay.

22 And you know if there were several lawyers
23 that showed up at a motions hearing and there were
24 court proceedings going on, on December 11 and 12, you
25 could have attended that, couldn't you?

1 **A.** Yes.

2 **Q.** Ms. Hamilton, I would like to show you what I
3 previously marked as State's Exhibit 49. Can you look
4 at that, please.

5 Now, in your experience as a journalist and
6 as you have noted earlier, familiarity with some legal
7 documents, what is the caption on that Exhibit 49?

8 **A.** United States of America, plaintiff, versus
9 Richard Wilson Senior, Duane Brewer, Richard Wilson
10 Junior, Fred Brewer, Everett Brewer, Shanfield Oakland
11 and Tony Russo.

12 **Q.** And what did that document say was the
13 proceeding?

14 **A.** Deposition of Mari Kingi.

15 **Q.** Do you know Mary Kingi?

16 **A.** I do. I didn't know him then, but I've know
17 him since.

18 **Q.** And are you familiar with date stamps and
19 certifications and filing stamps by the Clerk of
20 Courts offices?

21 **A.** Somewhat.

22 **Q.** Is that stamped at the top?

23 **A.** Yes.

24 **Q.** And what date was that filing stamped, that
25 proceeding?

1 **A.** December 12, 1975.

2 **MR. OSWALD:** I would offer Exhibit 49, Your
3 Honor.

4 **MR. MURPHY:** No objection.

5 **THE COURT:** Will be received.

6 **Q.** **(BY MR. OSWALD)** Now, you had mentioned
7 something about -- to Mr. Murphy about Anna Mae and
8 the Farmington incident?

9 **A.** Yes.

10 **Q.** And she had never related that to you?

11 **A.** No.

12 **Q.** But you had started to say that you had heard
13 about it?

14 **A.** Well, it was gossip. All of it, but, yeah,
15 through the movement. I'm not sure when I first heard
16 it but I think later after all of this happened.

17 **Q.** And you talked about that Leonard Peltier, I
18 believe it was, had the courage to do what needed to
19 be done?

20 **A.** That's what Annie Mae said.

21 **Q.** That's what Anna Mae said?

22 **A.** Yes.

23 **Q.** Did you know Leonard Peltier?

24 **A.** Yes.

25 **Q.** Did you feel the same way?

1 **A.** I didn't know him that well, but I would
2 assume so.

3 **Q.** And he -- your knowledge of Leonard Peltier,
4 he's serving time for the killing of the FBI agents?

5 **A.** Yes.

6 **Q.** You are not alleging at all, are you, that
7 agent -- FBI Agent Dave Price killed Anna Mae?

8 **A.** I don't think he pulled the trigger, but I
9 think he could make it happen.

10 **MR. OSWALD:** Your Honor, I'm going to
11 publish, if I could -- or show Exhibit 3 to the
12 witness and ask her to point out some things on
13 Exhibit 3.

14 **MR. MURPHY:** Your Honor, this is beyond the
15 scope of cross. I'd ask the Court review Exhibit 3.

16 **MR. OSWALD:** I can tell you what my inquiry
17 is if you want.

18 **THE COURT:** It is.

19 **MR. OSWALD:** All right.

20 I will do this.

21 **Q.** **(BY MR. OSWALD)** Do you remember Mr. Murphy
22 talking to you about the events at WKLD0C and Anna
23 Mae?

24 **A.** Yes.

25 **Q.** On that day?

1 **A.** Yes.

2 **Q.** And you saw Anna Mae that day?

3 **A.** Yes.

4 **Q.** What kind of clothing was she wearing that
5 day?

6 **A.** She had on a shirt and jeans. I don't
7 remember any more than that.

8 **Q.** And did she have a coat, do you know?

9 **A.** Not -- she didn't have it on in the house.

10 **Q.** All right.

11 If I show you State's Exhibit 3, would you be
12 able to recognize if this was the shirt she was
13 wearing or not?

14 **A.** I don't think so.

15 **MR. OSWALD:** May I try?

16 **THE COURT:** Yes.

17 **Q.** **(BY MR. OSWALD)** I'm showing you what's marked
18 as State's Exhibit 3.

19 Do you see that's the body of Anna Mae when
20 she was found?

21 **A.** Yes.

22 **Q.** Do you recognize any clothing items?

23 **A.** No.

24 **Q.** And now by that answer, do you mean she could
25 have been wearing these, she might not have, or you

1 specifically know that these weren't the clothing
2 items she was wearing?

3 A. I don't remember what the shirt looked like
4 that she had on. And I couldn't tell one pair of
5 jeans from another.

6 Q. Did you recognize any jewelry that she was
7 wearing at any point?

8 A. No.

9 It was later that I heard about her bracelet.

10 Q. Do you remember talking to Mr. Serle Chapman?

11 A. Yes.

12 Q. And he tape recorded you?

13 A. Yes.

14 Q. And you didn't know about it or did you know
15 he was tape recording?

16 A. I knew he was taping. He presented himself
17 as a journalist or writing a book.

18 Q. And you talked to -- about -- at great length
19 with him about this incident?

20 A. Well, we really didn't have that long. Maybe
21 an hour, hour and a half.

22 Q. Were you -- did you express to him that you
23 were -- that you didn't want to partake in
24 Indian-on-Indian discussions?

25 MR. MURPHY: Objection. Leading.

1 **THE COURT:** Overruled.

2 **A.** I don't know what I said to him, but that's
3 true.

4 **Q.** **(BY MR. OSWALD)** When you were talking to
5 Mr. Chapman, how did you refer to this -- this room
6 incident that Annie Mae was in at WKLDOC with these
7 other people?

8 How did you refer to that?

9 **A.** I don't know how I said it to him.

10 **MR. OSWALD:** Counsel, Graham document
11 page 1,069.

12 **Q.** **(BY MR. OSWALD)** Did you talk about it as an
13 interrogation?

14 **A.** I may have.

15 **Q.** That's the word you used, isn't it?

16 **MR. MURPHY:** Objection.

17 **A.** I don't remember because I don't remember the
18 details of my conversation with him.

19 **Q.** **(BY MR. OSWALD)** If I could show you a partial
20 transcript of one page, page 1,069, would you look at
21 that and you don't have to read the whole thing but
22 you are welcome to. If you would look right in this
23 area. Just read it to yourself.

24 **A.** Okay.

25 **Q.** Does that refresh your memory, Ms. Hamilton?

1 **A.** Well, not about --

2 **Q.** Did you use the word interrogated?

3 **A.** I didn't see it in there. You will have to
4 show me.

5 Yeah.

6 **Q.** You did?

7 **A.** Well, I don't know but whether he transcribed
8 exactly what I said or not, I have no way of knowing.

9 **Q.** Back then, Ms. Hamilton, was there a -- what
10 was the -- probably the biggest insult you could do to
11 somebody regarding their relationship with the federal
12 government?

13 **A.** To call them a snitch, and it happened to
14 almost everybody. Somebody would get mad at somebody
15 and the first thing they would say is that person is a
16 snitch. That's why I didn't think there was anything
17 so serious happening that day because it had
18 happened -- I think Tina Trudell is the only person I
19 know that it never happened to at all.

20 **Q.** Were you called a snitch?

21 **A.** Yeah.

22 **Q.** Did you want this case -- Anna Mae's case
23 investigated?

24 **A.** I thought it needed to be.

25 **Q.** Were there some people in the American Indian

1 Movement that suggested it not be?

2 **MR. MURPHY:** Objection. Vague. Foundation.

3 **MR. OSWALD:** All right --

4 **THE COURT:** You may answer.

5 **MR. MURPHY:** Well, I object on hearsay
6 grounds.

7 **THE COURT:** Not at this point.

8 **Q. (BY MR. OSWALD)** You may answer, ma'am.

9 **A.** I don't know of anybody in AIM that said
10 that.

11 **Q.** Was there somebody that represented the
12 American Indian Movement that told you that?

13 **MR. MURPHY:** Objection. Calls for hearsay.

14 **THE COURT:** No, it doesn't. Overruled.

15 **A.** Yes.

16 **Q. (BY MR. OSWALD)** Who was that person?

17 **A.** Ken Tilson.

18 **Q.** Can you just tell us who Ken Tilson is?

19 **A.** He was an attorney -- he is an attorney in
20 Minneapolis. He's retired now. He represented a lot
21 of AIM members in court.

22 **Q.** Do you know an investigator named Kevin?

23 **A.** He was a journalist, a reporter, and yes, I
24 know him.

25 **Q.** You told him what happened here, didn't you?

1 **A.** Yes. And it was in the newspaper published.
2 Anybody could see it.

3 **Q.** Did you ever see a letter --

4 **MR. MURPHY:** Objection. This is beyond the
5 scope, Your Honor.

6 **THE COURT:** It is. I think quite a ways.

7 **MR. OSWALD:** All right. I respect the Court.
8 No further questions.

9 **THE COURT:** Mr. Murphy?

10 **MR. MURPHY:** Thank you, Your Honor.

11 **RE-CROSS-EXAMINATION**

12 **BY MR. MURPHY:**

13 **Q.** Ms. Hamilton, I want to start where
14 Mr. Oswald was asking you about the deposition of Mari
15 Kingi?

16 **A.** Mari Kingi.

17 **Q.** You didn't know this person at the time?

18 **A.** No.

19 **Q.** You know the difference between a deposition
20 and a trial, do you not?

21 **A.** Yes.

22 **Q.** A deposition is where some attorneys sit in a
23 room with a court reporter and ask somebody questions?

24 **A.** Yes.

25 **Q.** This is a trial?

1 **A.** Yes.

2 **Q.** Mr. Oswald suggested that you might not know
3 whether you were at Dick Wilson's trial or a
4 deposition.

5 Do you recall talking to Mr. Ecoffey on
6 May 5, 1995?

7 **A.** Well, as I said, I have talked to him several
8 times, but I don't know what the dates were.

9 **Q.** Do you recall saying -- well, I will read
10 what he said you said. Ms. Hamilton stated that in
11 1975 during the trial for Dick Wilson in Rapid City,
12 South Dakota, Dick and others were on trial for
13 assaulting some WKLDOC workers at the Pine Ridge
14 Airport?

15 **A.** Yes.

16 I believe when I went, the prosecution was
17 testifying.

18 **Q.** Okay.

19 Do you remember testifying before the Grand
20 Jury, quote, I went back upstairs and at some point
21 that day, I went down to the federal court building
22 here where the Wilson trial was going on and spent a
23 little time there.

24 Do you remember saying that?

25 **A.** I guess I did if it's in the transcript.

1 **Q.** Well, in fact, you went there during the
2 trial?

3 **A.** Yes.

4 **Q.** You are not confused in your mind
5 whatsoever --

6 **A.** No.

7 **Q.** And again, you testified at the Arlo
8 looking -- excuse me -- yeah, the Arlo Looking Cloud
9 trial that, quote, it was during the trial for Dick
10 Wilson?

11 **A.** Yes, it was the trial.

12 **Q.** All right.

13 And as we previously discussed, that trial
14 began December 15 and ended the 18th?

15 **A.** Right.

16 **Q.** Okay.

17 Now, Mr. Oswald asked you about your
18 perceived unwillingness to cooperate in this
19 investigation.

20 You testified voluntarily at the Grand Jury,
21 right?

22 **A.** Right.

23 **Q.** You didn't invoke your right to remain
24 silent?

25 **A.** No.

1 Q. Didn't hire an attorney to quash a subpoena?

2 A. No.

3 Q. You went there and testified?

4 A. Right.

5 Q. And you were subpoenaed to testify at Arlo
6 Looking Cloud's trial?

7 A. Right.

8 Q. That was a subpoena coming from the state or
9 the government?

10 A. Right.

11 Q. And you showed up?

12 A. Yes.

13 Q. And you testified?

14 A. Yes.

15 Q. Under oath?

16 A. Yes.

17 Q. You did that again at Dick Marshall's trial
18 just last April?

19 A. Yes.

20 Q. Or actually this April?

21 A. Yes.

22 Q. Again, subpoenaed by the government, you
23 showed up you, you gave testimony?

24 A. Yes.

25 Q. And here today you are by subpoena?

1 **A.** Yes.

2 **Q.** From them?

3 **A.** Yes.

4 **Q.** You have never ever resisted providing sworn
5 testimony, have you?

6 **A.** No.

7 **Q.** The use of the term interrogation on
8 page 1,069, that was during an interview conducted in
9 June of 2000, the Serle Chapman interview?

10 **A.** That would have been about right because it
11 was when I was in Vermillion.

12 **Q.** More than 20 years after the incident?

13 **A.** Yes.

14 **Q.** And you relayed to him all sorts of
15 information that you had heard from other sources over
16 the past 25 years or so?

17 **A.** Yes.

18 **Q.** And you didn't say that you saw Anna Mae
19 Aquash being interrogated?

20 **A.** No.

21 **Q.** You did not see Anna Mae being interrogated,
22 did you?

23 **A.** No, I didn't.

24 **MR. MURPHY:** Nothing further.

25 Thank you.

1 **MR. OSWALD:** Thank you.

2 **CONTINUED REDIRECT EXAMINATION**

3 **BY MR. OSWALD:**

4 **Q.** Ms. Hamilton, isn't it true that you were
5 compelled by Federal District Judge Lawrence Piersol
6 to appear before the Grand Jury?

7 **A.** Well, I was subpoenaed.

8 **Q.** But you didn't want to appear on that
9 subpoena. They had to compel you to do that?

10 **A.** I didn't fight that subpoena at all. I
11 didn't want to but I complied with it.

12 **MR. MURPHY:** Your Honor, may we approach?

13 **THE COURT:** Uh-huh.

14 (Whereupon, a bench conference was then
15 held.)

16 **MR. MURPHY:** Your Honor, there is nothing --
17 they got a court order. There is nothing that they
18 are presenting that indicates anything that
19 contradicts the witness's testimony. There is no
20 motion to quash by her. They don't have any record
21 showing that she ever filed such a motion. They got
22 an order that says the judge finds in his satisfaction
23 that he's going to order her testimony but nothing
24 foundational to establish she ever resisted. Further,
25 that's not even a certified copy.

1 **THE COURT:** I don't find it's impeachment
2 material. It indicates a Fifth Amendment potential
3 and they wanted to ensure the order of immunity was
4 there. A realistic fear on the part of the government
5 that she might take that route and that's that.

6 (Whereupon, the bench conference was then
7 concluded.)

8 **Q. (BY MR. OSWALD)** Ms. Hamilton, do you remember
9 for the Dick Marshall trial?

10 **A.** Yes.

11 **Q.** And the FBI agent and DCI agent attempted to
12 serve you?

13 **A.** Yes.

14 **Q.** And you -- and did you throw that subpoena
15 out the window at them?

16 **A.** No. I just didn't open the door when they
17 came and they threw the subpoena in the window when it
18 fell out again.

19 **Q.** And they left it and you left it on the
20 ground at your house?

21 **A.** After they left I went out and picked it up.

22 **Q.** You didn't want to talk to them, did you?

23 **A.** No.

24 **Q.** You didn't want to be subpoenaed?

25 **A.** No.

1 **Q.** And didn't that happen for the Arlo Looking
2 Cloud case also that you were reluctant to be served?

3 **A.** Well, I don't like testifying and I don't
4 like being served with subpoenas, but I show up when I
5 am.

6 **Q.** And I've asked you to call me and you didn't
7 call, did you?

8 **MR. MURPHY:** Objection. This is beyond the
9 scope, as well.

10 **THE COURT:** I'm not sure where we're going.

11 **MR. OSWALD:** Okay.

12 I have no further questions.

13 **MR. MURPHY:** If I may just ask one final
14 question.

15 **THE COURT:** I hope.

16 **RE-CROSS-EXAMINATION**

17 **BY MR. MURPHY:**

18 **Q.** Ma'am, do you know anybody who enjoys being
19 subpoenaed and brought into a courtroom?

20 **A.** No.

21 **MR. MURPHY:** Nothing further.

22 **THE COURT:** Thank you, ma'am. You may step
23 down.

24 Is she released from her subpoena?

25 **MR. OSWALD:** Yes.

1 **THE COURT:** You are excused from the
2 proceedings, ma'am.

3 (Witness excused.)

4 **THE COURT:** I think it's time to take a break
5 unless you have a 15-minute witness.

6 **MR. JACKLEY:** I am not sure there is such a
7 thing.

8 **THE COURT:** Ladies and gentlemen, we'll be in
9 recess for approximately 15 minutes. You are reminded
10 you are not to talk to one another or anybody else
11 including yourselves about this case. You are not to
12 form or begin to perform any opinions hereon.

13 Thank you.

14 (Off the record.)

15 **THE COURT:** Satisfied this is the jury?

16 **MR. JACKLEY:** Yes, Your Honor.

17 **MR. MURPHY:** Yes, Your Honor.

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

19 **MR. JACKLEY:** Your Honor, the state would
20 call Cleo Gates.

21 **THE COURT:** Please raise your right hand.

22 CLEO GATES,

23 called as a witness herein, having been duly sworn,
24 under oath testified as follows:

25 **THE COURT:** Please take a seat.

DIRECT EXAMINATION

BY MR. JACKLEY:

Q. Ms. Gates, would you please introduce yourself to the jury, including where you live.

A. My name is Cleo Gates. Cleo Clifford Gates. I live in Manderson, South Dakota.

Q. Ms. Gates, are you employed?

A. No, I'm not employed. I'm retired.

Q. Before you retired, were you employed?

A. Yes, I was.

Q. Where was that at?

A. At Wounded Knee District School in Manderson.

Q. Ms. Gates, I want to take you back to 1975.

Were you married at that time?

A. Yes, I was.

Q. Who were you married to?

A. I was married to Dick Marshall.

Q. Where did you and Dick live back in 1975?

A. Allen, South Dakota.

Q. Ms. Gates, I am handing you what has previously been marked as State's Exhibit 30.

Do you generally recognize what that is?

A. It looks like the house that we lived in.

MR. JACKLEY: Your Honor, I would offer State's Exhibit 30.

1 **MR. MURPHY:** No objection.

2 **THE COURT:** It will be received.

3 **Q. (BY MR. JACKLEY)** Ms. Gates, do you generally
4 remember how many bedrooms were in your house?

5 **A.** It was a four-bedroom house.

6 **Q.** Fairly small house?

7 **A.** No, it was a big house.

8 **Q.** Okay.

9 I want to take you back to the fall/winter of
10 1975.

11 Did there come a time in the evening that you
12 were visited by several people including Anna Mae?

13 **A.** Yes, sir, there was.

14 **Q.** Do you remember what time of day that visit
15 occurred?

16 **A.** It was at night.

17 **Q.** How late at night?

18 **A.** Probably around -- it was after the news.

19 Probably ten -- about eleven o'clock, 10:30.

20 **Q.** Were you awake?

21 **A.** We had probably just gone to bed.

22 **Q.** Okay.

23 I want to walk through who arrived at your
24 house that evening.

25 Who do you remember being in your house

1 before those folks arrived?

2 **A.** Gee, we had nobody. Just our family was
3 home.

4 **Q.** When they arrived, who arrived?

5 **A.** Theda, John Boy, Arlo Looking Cloud, and Anna
6 Mae.

7 **Q.** I want to walk through prior to them
8 arriving, whether you knew each of them, okay?

9 **A.** I knew Theda, I knew Arlo, I hadn't -- I had
10 seen Graham, but I didn't know him personally. And I
11 did not know Anna Mae at all.

12 **Q.** That was the first time you had met Annie
13 Mae?

14 **A.** Yes, it was.

15 **Q.** What do you recall taking place when they
16 arrived at your house?

17 **A.** When they arrived, one of them walked Anna
18 Mae over to a chair in the living room and sat her
19 down. And they proceeded to go into the bedroom with
20 my husband.

21 **Q.** Okay.

22 And again, who was your husband at the time?

23 **A.** Dick Marshall.

24 **Q.** When you say they, who walked into the
25 bedroom?

1 **A.** Theda, Arlo, and John.

2 **Q.** And Dick, too?

3 **A.** And Dick.

4 **Q.** Was the door closed?

5 **A.** If I am not mistaken it was.

6 **Q.** In any event, could you see into the bedroom
7 from where you were at?

8 **A.** No, I couldn't.

9 **Q.** Did there come a point in time when somebody
10 emerged from the bedroom?

11 **A.** Dick came out of the bedroom.

12 **Q.** Let's talk about that.

13 How long was Dick, Theda, Arlo, and John Boy
14 in that bedroom before Dick emerged?

15 **A.** Probably less than ten minutes. Maybe five
16 minutes or more.

17 **Q.** When Dick Marshall leaves the bedroom, where
18 does he go?

19 **A.** I was in the kitchen. It's a small kitchen.
20 And the living room was really large. And I had
21 gotten Anna Mae some coffee. She said she wanted some
22 coffee so I got her a cup of coffee and she took a
23 doughnut. I was back in the kitchen. Then Dick comes
24 in the kitchen.

25 **Q.** What did you and Dick discuss?

1 **A.** I said what's going on and he goes, they
2 want --

3 **MR. MURPHY:** Objection. Calls for hearsay.
4 Confrontation.

5 **THE COURT:** I was under the impression that
6 Mr. Marshall was going to testify.

7 **MR. JACKLEY:** He is, Your Honor, on Monday.

8 **THE COURT:** Overruled.

9 **Q.** (BY MR. JACKLEY) Cleo, so Dick has now
10 emerged from the bedroom and you have a discussion
11 with him.

12 What is that discussion?

13 **A.** About keeping Anna Mae at our house.

14 **Q.** Okay.

15 **A.** And I told him no.

16 **Q.** Was there any discussion about tying her up?

17 **A.** Well, I said keep --

18 **MR. MURPHY:** Objection. Leading.

19 **THE COURT:** Overruled. It isn't.

20 **THE WITNESS:** Can I answer?

21 **Q.** (BY MR. JACKLEY) Yes, you can answer.

22 **A.** I said, what do you mean keep her here, and
23 he goes, maybe tie her up in the basement and keep her
24 down in the basement, and I told him, no.

25 **Q.** Why did you tell him no?

1 **A.** Because I didn't like what was going on.

2 **Q.** Did you and him at that point have any
3 discussion or was there reference to her being an
4 informant?

5 **A.** No.

6 **Q.** After you tell Dick Marshall no, what
7 happens?

8 What does he do?

9 **A.** He turned around and went back in the
10 bedroom.

11 **Q.** When he went back into the bedroom, could you
12 see into the bedroom?

13 **A.** No.

14 I didn't go in that far into the living room.
15 He walked back in there and I just kind of came back
16 into the living room because you couldn't see the
17 bedroom door the way the house is situated. I mean,
18 the way the rooms were. There was, like, two
19 bathrooms and then the bedroom was off to the side so
20 I really couldn't see.

21 **Q.** So it would be fair to state that the two
22 times that Mr. Marshall was in the bedroom, you don't
23 know exactly what was going on in the bedroom; is that
24 fair?

25 **A.** Right.

1 **Q.** So he had gone back into the bedroom. Then
2 does there come a point -- he's back in there and
3 second time, and you have just told him no that Annie
4 Mae is not staying at your house.

5 Does there come a point somebody emerges
6 again from the bedroom?

7 **A.** They all came out.

8 **Q.** They call, again, and that would be who?

9 **A.** Arlo, Theda, and John.

10 **Q.** I want to take a second and talk about the
11 bedroom.

12 Did -- how many beds were in the bedroom?

13 **A.** One.

14 **Q.** Were there any dressers or furniture that
15 would hold clothing in the bedroom?

16 **A.** I would -- there were two dressers in the
17 bedroom.

18 **Q.** Okay.

19 Describe generally the two dressers to this
20 jury.

21 **A.** There was a dresser, kind of a long narrow
22 that came about waist high. Then there was another
23 dresser that was so big and it was taller.

24 **Q.** Okay.

25 I want to now focus a little bit -- while

1 the -- Dick -- well, Dick and Theda and John Boy and
2 Arlo are in the bedroom, I want to focus on what you
3 and Annie Mae are doing.

4 Was Annie Mae talkative at that time?

5 **A.** She was not talkative.

6 **Q.** Did she appear to want to be there?

7 **A.** Well, she came in with them. They were
8 guiding her in. One of them had hold on the back of
9 her arm. And like I said they walked her to the chair
10 and sat her down and that's where she stayed.

11 **Q.** Okay.

12 Did you provide her anything to eat?

13 **A.** The coffee and I offered her -- it was -- we
14 still had some soup in the refrigerator that was still
15 warm and she didn't want any. She just wanted the
16 coffee and she took a doughnut.

17 **Q.** Did she arrive with any luggage with her?

18 **A.** No.

19 **Q.** Did she arrive with any baggage or anything
20 in a bag or anything?

21 **A.** No. All she had on -- it was cold out. She
22 had like a heavy jacket on.

23 **Q.** Did you provide her any clothing when she was
24 there?

25 **A.** Just before they left they asked me if I had

1 a pair of clothes for her. So I gave her a pair of
2 jeans and a T-shirt.

3 Q. After you gave her a T-shirt and the jeans,
4 what happens?

5 A. They leave.

6 Q. Okay.

7 I want to be very specific. They. Who is
8 they?

9 A. Theda, Arlo, John, and Anna Mae.

10 Q. Annie Mae walked out of your house alive that
11 night in 1975?

12 A. Yes, she did.

13 Q. Would you consider yours and Dick's house an
14 AIM safe house back in 1975?

15 A. No, sir, I wouldn't. This is the first I
16 heard of it.

17 Q. Ms. Gates, did you ever see Annie Mae again
18 after the night she left your house?

19 A. No, I didn't.

20 Q. How did you learn of Anna Mae Aquash's death?

21 A. On the news.

22 Q. When you first saw that, how did you feel
23 after the events that you testified to the jury?

24 How did you feel?

25 A. Oh, my God it was terrible. I thought, oh my

1 God. This -- this is -- you know, this is when that
2 happened to her. You know I had no idea but I was
3 like -- I was afraid to express my feelings. I didn't
4 know who to trust. I didn't know who to talk to. I
5 could talk to my sister or my brother, but they
6 weren't always around.

7 Q. Speaking of that trust, you have been visited
8 through the years by several law enforcement officers
9 and prosecutors; is that fair?

10 A. Yes, sir.

11 Q. To talk to you about the events of that
12 evening?

13 A. Yes.

14 Q. Initially, were you very cooperative?

15 A. No, I wasn't.

16 Q. Were there times that perhaps you didn't
17 necessarily volunteer information?

18 A. Yes, sir, I didn't. I didn't know who I
19 could trust.

20 Q. Why are you coming forward and testifying to
21 the jury about what happened at your house?

22 MR. MURPHY: Objection, Your honor. It's
23 self-serving.

24 THE COURT: Sustained.

25 MR. JACKLEY: No further questions at this

1 time, Your Honor.

2 **THE COURT:** Mr. Murphy?

3 **CROSS-EXAMINATION**

4 **BY MR. MURPHY:**

5 **Q.** I am going to ask you some questions. My
6 name is John Murphy and I will try to speak clearly,
7 but if you need me to stop and rephrase something,
8 will you let me know?

9 **A.** Yes, I will.

10 **Q.** Okay.

11 First thing I want to talk to you about is
12 your testimony today where you say that somebody sat
13 Ms. Aquash in a chair.

14 Do you recall just talking about that?

15 **A.** Yes.

16 **Q.** Okay.

17 Let's back up a little bit. These people
18 come to your house in the evening, correct?

19 **A.** In the night.

20 **Q.** In the night.

21 About eleven o'clock?

22 **A.** Yeah.

23 **Q.** I believe in prior testimony you have said
24 the coffee pot was still warm?

25 **A.** Yeah.

1 **Q.** You and Dick had just settled down?

2 **A.** Went to bed.

3 **Q.** I don't want to get Tina to yell at me. I
4 got to finish my question before you start answering.

5 **A.** Okay.

6 **Q.** She has a hard time writing two at once.

7 And when they came into the house, somebody
8 introduced you to Annie Mae, correctly?

9 **A.** No, they didn't introduce her. Nobody
10 introduced her to me.

11 **Q.** Well, I am going to show you your testimony
12 on April 15 of this year at the Dick Marshall trial.

13 Do you remember testifying at Dick Marshall's
14 trial?

15 **A.** Yeah. Uh-huh.

16 **Q.** I'm going to read something to you and this
17 is a question. What took place next? Your answer,
18 Theda -- I'm not sure if it was Theda. I need to talk
19 to you. I think we went to the bedroom. I think it
20 was. And then I went up -- in the meantime someone
21 had said to me, this is Annie Mae. I didn't know who
22 she was.

23 Is that what you said back in April of this
24 year?

25 **A.** That's -- because that's what one of them

1 said that was Annie Mae.

2 Q. Okay.

3 And Anna Mae is right there?

4 A. Uh-huh.

5 Q. So they essentially introduced you? Gave you
6 her name?

7 A. I thought you went mean, Cleo, this is Anna
8 Mae.

9 Q. Okay.

10 And you said today that somebody sat her in
11 the chair. You even said somebody maybe had her arm.

12 A. Like guided her over to the chair.

13 Q. I am going to go to the same page of your
14 testimony back at Dick Marshall's trial. You were
15 asked the question, where did she go to sit? Your
16 answer, she went to a chair that we had right off the
17 dining room. There was a chair. There is a couch and
18 TV. She went to that chair at that time.

19 Correct?

20 A. Uh-huh.

21 Q. That's what you said when you testified
22 against Dick Marshall?

23 A. Yes.

24 Q. And back at Arlo Looking Cloud's trial, you
25 were asked about the same issue by Mr. Mandel. When

1 they came over, what took place? They came in and
2 they brought the girl in and she sat on the chair in
3 the living room and they went into the bedroom with my
4 husband.

5 Isn't that what you told the jury at Arlo
6 Looking Cloud's trial?

7 **A.** Yes, it is.

8 **Q.** Okay.

9 And Anna Mae stayed outside with you?

10 **A.** Yes.

11 **Q.** And you had coffee and she a doughnut?

12 **A.** No. She had coffee -- I didn't -- I didn't
13 drink no more coffee.

14 **Q.** Oh, you didn't. All right.

15 While they were in having this meeting in the
16 bedroom, she was there alone with you, correct?

17 **A.** Uh-huh.

18 **Q.** And nobody was standing guard?

19 **A.** No.

20 **Q.** She was not tied up?

21 **A.** No.

22 **Q.** As people left the room to go back to the
23 bedroom nobody said to you, watch her?

24 **A.** No.

25 **Q.** You had a back door, correct?

1 **A.** A kitchen door and the door that came in with
2 the living room. Two doors.

3 **Q.** And she was in close proximity to both doors?

4 **A.** Yeah.

5 **Q.** A few steps away from the kitchen door,
6 correct?

7 **A.** Yes.

8 **Q.** And you weren't preventing her from leaving
9 at any time?

10 **A.** No.

11 **Q.** Now, during the time that you and Ms. Aquash
12 are alone, she never indicated to you that she needed
13 help?

14 **A.** No, she didn't.

15 **Q.** Never asked you to use your phone?

16 **A.** No, she didn't.

17 **Q.** And you had a phone there?

18 **A.** Yes, sir.

19 **Q.** And she didn't try to leave the house?

20 **A.** No, she didn't.

21 **Q.** And in fairness, you don't know whether the
22 bedroom door was open or closed, do you?

23 **A.** No, I don't.

24 **Q.** Okay.

25 **A.** I didn't bother to look.

1 **Q.** Sure.

2 But just so we're clear you didn't -- you
3 couldn't even see down the hall from where you were
4 sitting, could you?

5 **A.** Right.

6 **Q.** All right.

7 At this time, in the fall of 1975, you didn't
8 have any guns in your house, did you?

9 **A.** No, we didn't.

10 **Q.** And you know that you didn't have any?

11 **A.** I know that.

12 **Q.** All right.

13 And you didn't have guns in any of the
14 dressers in the bedroom?

15 **A.** No, sir.

16 **Q.** And this was something you were vigilant
17 about?

18 **A.** Oh, you bet.

19 **Q.** Okay.

20 In fact, Dick had given his guns to his
21 parents, correct?

22 **A.** Yes, he did.

23 **Q.** You didn't have cases of bullets?

24 **A.** No.

25 **Q.** And your night stand, that was next to the

1 bed, didn't have any drawers in it, did it?

2 **A.** No, it didn't.

3 **Q.** All right.

4 Now, the last thing I want to touch base with
5 you about is your statement today that Dick said
6 something to you about tying her up. Okay.

7 Do you recall when you answered the question
8 that was put to you?

9 **A.** Yes.

10 **Q.** You've given three sworn statements in this
11 case.

12 Do you recall testifying at the Grand Jury
13 back in 2003?

14 **A.** Yes, I do, sir.

15 **Q.** And then you testified at Arlo's trial?

16 **A.** Yes.

17 **Q.** And that was in 2004?

18 **A.** Yes.

19 **Q.** And you testified at Dick's trial?

20 **A.** Yes.

21 **Q.** I am going to bring your attention, first, to
22 your Grand Jury testimony. And that was at a time you
23 were under oath, correct?

24 **A.** Yes, sir.

25 **Q.** And you were trying to provide complete

1 information to the Grand Jury?

2 **A.** Yes.

3 **Q.** Okay.

4 I am going to read to you what you said in
5 response to a question about your conversation with
6 Dick. And they -- I guess they wanted us to keep her
7 there and I just said I didn't feel good. I didn't
8 have a good feeling, you know, about everything. So I
9 told him no.

10 Is that correct?

11 **A.** Yes, sir, that's correct.

12 **Q.** You didn't mention on that occasion anything
13 about a request to tie Anna Mae Aquash up?

14 **A.** No, I didn't.

15 **Q.** Okay.

16 And then back at Arlo Looking Cloud's trial,
17 you were asked about the same conversation when Dick
18 comes out of the room. And you were asked, who said
19 that -- well, let me back track. You said, well they
20 came in and they went -- they came out of the bedroom
21 and called me in the kitchen and he said they want us
22 to keep her here. Question, Who said that? Dick --
23 answer, Dick. I said what for. I don't know. Just
24 keep her here. And I said no.

25 Was that your testimony then?

1 **A.** Yes, it was.

2 **Q.** Okay.

3 Again, you never mentioned anything in 2003
4 or 2004 about tying up or requests being made to tie
5 up Ms. Aquash, correct?

6 **A.** Correct.

7 **Q.** The last thing I want to ask you about the
8 final departure.

9 Somebody asked you for some clothes?

10 **A.** Right.

11 **Q.** Okay.

12 And you said yes?

13 **A.** I got a change of clothes for her.

14 **Q.** And then you were asked for directions by
15 somebody?

16 **A.** Yes.

17 **Q.** And the directions were to Rosebud, correct?

18 **A.** I'm not sure who asked the question but they
19 wanted to know the back road to Rosebud.

20 **Q.** And I want to get a sense -- and get a sense
21 for the jury, your house was in Allen, South Dakota?

22 **A.** Yes, sir.

23 **Q.** And that's on the Pine Ridge Reservation?

24 **A.** Yes.

25 **Q.** How far is it to Rosebud?

1 **A.** Probably 50 miles or so from there. Maybe a
2 little more.

3 **Q.** Okay.

4 An hour, hour-and-15-minute drive?

5 **A.** About an hour or so.

6 **Q.** An hour or so?

7 **A.** Uh-huh.

8 **Q.** How long does it take to drive from your
9 house to Wambli?

10 **A.** You mean the house in Allen?

11 **Q.** Yes.

12 **A.** Going the back road?

13 **Q.** Going whatever way is quickest.

14 **A.** Okay.

15 Well, there were some dirt roads and gravel
16 back road. Then there was a highway. And if we went
17 to Wambli we just went on the highway towards Kyle and
18 then took that road on up to Wambli.

19 **Q.** How long would it take?

20 **A.** Probably about 40 minutes. Half hour maybe.

21 **Q.** And how long would it take if you went to
22 Wambli and then all the way up to Kadoka?

23 **A.** Probably about 45 minutes longer depending on
24 how fast you were going.

25 **Q.** So do you know where Roger Amiotte lives?

1 **A.** No, I don't.

2 **Q.** So 45 minutes to Wambli, another 40
3 minutes -- 45 minutes all the way up to Kadoka?

4 **A.** Right.

5 **Q.** Okay.

6 And the people who left your house, they left
7 before midnight in any regard?

8 **A.** Oh, yes, sir.

9 **MR. MURPHY:** Nothing further.

10 Thank you.

11 **MR. JACKLEY:** Briefly, Your Honor.

12 **REDIRECT EXAMINATION**

13 **BY MR. JACKLEY:**

14 **Q.** Ms. Gates, I want to go back to the bedroom
15 and you and Mr. Murphy talked about the bedroom.

16 I just want to make sure it's clear, there
17 was the small dresser that you described, do you
18 remember that?

19 **A.** Yeah.

20 **Q.** Were there drawers in that small dresser?

21 **A.** Yes, there were.

22 **Q.** Do you remember what you were doing earlier
23 that day before they came?

24 Were you working that day?

25 **A.** I worked that day.

1 **Q.** So in other words you didn't stand guard in
2 the bedroom to see whether Dick Marshall was bringing
3 guns in or out, did you?

4 **A.** No.

5 **Q.** In fact, you weren't in the bedroom that
6 night that John Graham, Theda Clarke, Arlo Looking
7 Cloud and Dick went in the bedroom?

8 **A.** No, I didn't go in there.

9 **Q.** Mr. Murphy was talking to you about
10 directions. Do you recall that? Just before he sat
11 down about them requesting directions.

12 Do you recall that?

13 **A.** Right.

14 **Q.** And you indicated that there is a highway, do
15 you remember that?

16 **A.** Yes.

17 **Q.** And I believe you indicated that they had
18 requested directions in the back roads.

19 Do you recall that?

20 **A.** Yes.

21 **Q.** So there is a highway there, but they are
22 asking about back roads, correct?

23 **A.** Yes.

24 **Q.** Why do you suppose they wanted to know the
25 back roads to Rosebud?

1 **MR. MURPHY:** Objection. Calls for
2 speculation.

3 **THE COURT:** Sustained.

4 **Q. (BY MR. JACKLEY)** Do you know why they wanted
5 to know where the back roads were?

6 **A.** No, I don't, sir.

7 **Q.** When they left that evening, do you know
8 where they went?

9 **A.** No.

10 **MR. JACKLEY:** No further questions, Your
11 Honor.

12 **RE-CROSS-EXAMINATION**

13 **BY MR. MURPHY:**

14 **Q.** Ma'am, at this time in 1975, there was a lot
15 of activity on the Pine Ridge Reservation, correct?

16 **A.** Yes.

17 **Q.** A lot of law enforcement, a lot of conduct by
18 what had been called the goons, correct?

19 **A.** Yes.

20 **Q.** And from time to time, there was acts of
21 violence on the highway?

22 **A.** Yes.

23 **Q.** People were actually shot at as they were
24 driving down the highway, correct?

25 **A.** Right.

1 **MR. MURPHY:** Nothing further.

2 Thank you.

3 **MR. JACKLEY:** Nothing further, Your Honor.

4 **THE COURT:** Thank you, ma'am you. You may be
5 excused --

6 Is she on subpoena here?

7 **MR. JACKLEY:** She is. I would ask she not be
8 released, but she is certainly welcome to go home.

9 **THE COURT:** Certainly.

10 Thank you.

11 We have -- I think Ms. Hamilton is in the
12 courtroom and she's still under subpoena.

13 Is there a problem with that?

14 **MR. JACKLEY:** She was released from her
15 subpoena.

16 The state would call Darlene Nichols.

17 **THE COURT:** Please raise your right hand.

18 DARLENE KAMOOK ECOFFEY,
19 called as a witness herein, having been duly sworn,
20 under oath testified as follows:

21 **THE COURT:** Please take a seat.

22 **DIRECT EXAMINATION**

23 **BY MR. JACKLEY:**

24 **Q.** Ma'am, would you please introduce yourself to
25 the jury.

1 **A.** My name is Darlene Nichols Ecoffey.

2 **Q.** Do you go by a nickname sometimes?

3 **A.** Most people call me Kamook.

4 **Q.** Is it okay if I call you Kamook today?

5 **A.** Yes.

6 **Q.** Kamook are you married?

7 **A.** Yes, I am.

8 **Q.** Who are you married to?

9 **A.** Robert Ecoffey.

10 **Q.** Kamook, in the 1970s, were you involved with
11 the American Indian Movement?

12 **A.** Yes, I was.

13 **Q.** Who, generally, was considered to be the
14 leadership of the American Indian Movement during
15 those days?

16 **A.** Well, there were at any given time probably
17 ten to 12 people.

18 **Q.** Who were some of the names -- some of the
19 bigger names?

20 **A.** The bigger names, probably, I would say
21 Dennis Banks, Russell Means, Clyde Bellecourt, Vernon
22 Bellecourt, Ted Means, Bill Means, John Trudell,
23 Madonna Gilbert, Herb Hollows.

24 **Q.** Okay.

25 Did you have a relationship back then with

1 Dennis Banks?

2 A. Yes, I did.

3 Q. Please describe that relationship to the
4 jury.

5 A. I lived with Dennis Banks for 17 years from
6 1972 until April of 1989.

7 Q. And did you have children with Dennis Banks?

8 A. We have four children.

9 Q. Did you know Anna Mae Aquash?

10 A. Yes, I did know Annie Mae.

11 Q. How did you know Annie Mae?

12 When did you meet her?

13 A. I met Annie Mae when she came to Wounded Knee
14 in 1973.

15 Q. Kamook, I am going to have you look up the at
16 screen there.

17 Do you recognize the individual into the
18 photo?

19 A. Yes.

20 Q. Who is that?

21 A. That is Annie Mae.

22 MR. JACKLEY: For purposes of the record I am
23 referring to State's Exhibit 18.

24 Q. (BY MR. JACKLEY) Kamook, did you know Theda
25 Clarke sometimes going by Theda Nelson?

1 **A.** Yes, I do know Theda.

2 **Q.** How did you know Theda?

3 **A.** Because Theda was just always there like
4 everybody else.

5 **Q.** How would you describe Theda Clarke's
6 personality?

7 **MR. MURPHY:** Objection. Relevance.

8 **THE COURT:** Overruled.

9 **A.** Theda was very bossy. She was older so
10 people pretty much listened to her whenever she told
11 individuals what to do.

12 **MR. MURPHY:** Marty, may I see the exhibits?

13 **Q.** **(BY MR. JACKLEY)** Kamook, I am handing you
14 what has been marked as State's Exhibit -- proposed
15 Exhibits 21B and 21C.

16 Do you generally recognize what those photos
17 depict?

18 **A.** Yes.

19 **Q.** What do they depict?

20 Who is that?

21 **A.** That's Theda Clarke.

22 **MR. JACKLEY:** Your Honor, I would offer
23 State's Exhibits 21B and 21C.

24 **MR. MURPHY:** No objection.

25 **THE COURT:** They will be received.

1 **Q.** **(BY MR. JACKLEY)** Do you remember when you
2 would have first met Theda Clarke generally?

3 **A.** In the early 70s. She -- I also kind of knew
4 Theda a little bit because her brother and my dad were
5 really close friends.

6 **Q.** Back then did you know John Boy Patton or
7 John Graham?

8 **A.** In the early 70s.

9 **Q.** How did you know John Graham?

10 **A.** Because he was always with Theda.

11 **Q.** Was he generally considered to be related to
12 Theda in any way?

13 **A.** Well, Theda used to say that he was her
14 nephew.

15 **Q.** Okay.

16 Kamook, I am handing you what has been
17 previously marked as State's Exhibit 21.

18 Do you generally recognize the individual
19 appearing in that photograph?

20 **A.** Yes.

21 **Q.** Who is the individual?

22 **A.** That's John Graham.

23 **Q.** Is that generally how he would have looked
24 back in the 1970?

25 **A.** Well, he had long hair. I don't know if it's

1 just tied back in that picture but he had longer hair.

2 Q. Would it be fair that the picture generally
3 depicts what he looked like back then?

4 A. Yes.

5 MR. JACKLEY: Your Honor, I would offer
6 State's Exhibit 21.

7 MR. MURPHY: Let me see the exhibit, please.
8 No objection, Your Honor.

9 THE COURT: Will be received.

10 Q. (BY MR. JACKLEY) Kamook, did you know Arlo
11 Looking Cloud back in that time frame?

12 A. I knew who Arlo was but I didn't know him
13 personally.

14 Q. Did you know Troy Lynn Yellow Wood?

15 A. Yes, I knew Troy Lynn.

16 Q. How did you know Troy Lynn?

17 A. Well, because Troy Lynn was always just
18 around.

19 Q. Around various AIM activities?

20 A. Yes.

21 Q. Back in 1975, did there come a time where you
22 are aware that there existed a concern of Anna Mae
23 Aquash being an informant for the government?

24 A. Yes.

25 Q. I want to take you back to June of 1975.

1 Did you attend the National AIM convention?

2 A. Yes, I did.

3 Q. Where was that convention held at if you
4 recall?

5 A. In Farmington, New Mexico.

6 Q. Do you remember who you were there with in
7 Farmington, New Mexico?

8 A. I was with my sister, Dennis, Leonard
9 Peltier, Dino Butler, Neelock (phonetic) Butler, Gene
10 Day, Bob Rubideaux.

11 Q. Were there general discussions of Annie Mae
12 Aquash being an informant down at the convention?

13 MR. MURPHY: Objection. Calls for hearsay.

14 THE COURT: Overruled.

15 A. Yes, there were.

16 Q. (BY MR. JACKLEY) Did you become aware when
17 you were in New Mexico of a confrontation involving
18 Anna Mae Aquash and Leonard Peltier?

19 MR. MURPHY: Objection. Foundation.

20 THE COURT: Overruled.

21 Q. (BY MR. JACKLEY) What was your understanding
22 of that confrontation?

23 MR. MURPHY: Your Honor, calls for hearsay.
24 It's speculation. Confrontation issues.

25 THE COURT: It certainly may. And it is

1 likely an end run around both *Crawford* issues and
2 hearsay rules.

3 **MR. JACKLEY:** May we approach, Your Honor?

4 **THE COURT:** You may.

5 (Whereupon, a discussion was held at the
6 bench.)

7 **MR. JACKLEY:** Your Honor, this is the subject
8 of the pretrial motion on the Leonard Peltier evidence
9 for which the Court denied -- in which the Court
10 denied the defendant's motion on the basis that it is
11 being elicited not for the truth of the matter
12 asserted, but in relation to the informant evidence.
13 And I have to look at the order, but I also believe
14 the state of mind. It is consistent evidence with the
15 Arlo Looking Cloud trial that was affirmed by the
16 Eighth Circuit Court.

17 **THE COURT:** You can whisper.

18 **MR. JACKLEY:** That was confirmed with the
19 Eighth Circuit Court of appeals. The evidence is
20 admissible in relation to that informant evidence.
21 The actions of Leonard Peltier and the affect that
22 had --

23 **MR. MURPHY:** Your Honor, nothing in any of
24 the prior rulings indicate it could come in through a
25 witness who has no personal knowledge of the events in

1 question. It is incompetent evidence. She is about
2 to testify as to rumors or gossip. Nothing that she
3 has personal knowledge of.

4 The state knows who allegedly was in the car:
5 Leonard Peltier, Dino Butler, Anna Mae Aquash. They
6 have not attempted to subpoena Dino Butler. I have
7 confirmed that with him. He is the only person, or
8 Leonard Peltier, who could provide competent evidence
9 on this information.

10 Therefore, it violates my client's
11 confrontation rights. It's also lack of personal
12 knowledge. There is no foundation. It's just gossip.

13 **THE COURT:** I believe it's offered to prove
14 the truth of the matter asserted without any knowledge
15 from whence it came but general rumors. But it has to
16 be offered for the proof of the contents or it
17 wouldn't be offered at all. You would have no
18 interest in it.

19 You are trying to establish that Peltier held
20 a gun to her head or she was afraid of him as a result
21 of that?

22 **MR. JACKLEY:** That's fair.

23 **THE COURT:** But then that goes to prove that
24 happened -- that did in fact happen. And there is no
25 other reason to put it in. We're repeating rumors

1 from unnamed persons to establish the truth of the
2 rumors and I have a little trouble with that.

3 **MR. JACKLEY:** This is the same witness --

4 **THE COURT:** You may make an offer of proof
5 after this, but at the moment, I am not going to allow
6 it to be addressed.

7 **MR. JACKLEY:** Can I ask her whether she's had
8 discussions with Annie Mae Aquash regarding that
9 incident?

10 **THE COURT:** I think you can ask that.

11 **MR. MURPHY:** I think the same issues are
12 implicated because that is not going to Anna Mae's
13 state of mind but it is going to prove that the
14 incident occurred.

15 **THE COURT:** I think we're going -- I think
16 you may ask her whether Anna Mae had conversations
17 with her regarding an incident with Leonard Peltier.
18 No more definitive than that.

19 **MR. JACKLEY:** Okay.

20 **MR. MURPHY:** And then it ends at yes or no?

21 **MR. JACKLEY:** If she says yes, I get to go
22 further. If she says no then I am done.

23 **MR. MURPHY:** No, because then you are going
24 into the substance that this -- I am not able to
25 confront Ms. Aquash. It is not proven for state of

1 mind.

2 If they were to ask, did you have the
3 conversation with her about an incident, she says yes,
4 and then they ask, well, what was her reaction and if
5 she were to express that I was nervous or something,
6 that would be the state of mind evidence.

7 But relaying the substance of the incident is
8 to prove that the incident in fact occurred. And
9 that's not what they have competent evidence to
10 present.

11 **THE COURT:** Well, that's first of -- first of
12 all, let's see what she has to say and then I am
13 thinking she can describe Anna Mae's reactions or
14 nature of her appearance to that discussion without
15 getting into the discussion, you know, and her
16 appearances to your client are admissible or -- not
17 your client -- this witness are admissible so let's go
18 down that line before we go further.

19 (Whereupon, the discussion at the bench was
20 then concluded.)

21 **Q. (BY MR. JACKLEY)** Kamook, I am going to ask
22 you -- I am looking for a yes or no response to this
23 question, okay?

24 In your discussions with Annie Mae Aquash,
25 did you ever have an opportunity to discuss an

1 incident involving Annie Mae Aquash and Leonard
2 Peltier in Farmington, New Mexico?

3 **A.** Yes.

4 **Q.** Based upon those discussions, what was your
5 understanding of the confrontation between Leonard
6 Peltier and Annie Mae Aquash?

7 **A.** That Leonard had --

8 **MR. MURPHY:** Objection, Your Honor.

9 **THE COURT:** I mean, that's not where we're
10 going to go at this stage.

11 **Q.** (BY MR. JACKLEY) Where did the discussions
12 with Annie Mae Aquash occur that you talked about an
13 incident involving Leonard Peltier and Annie Mae
14 Aquash?

15 **A.** When we were in jail in Oregon.

16 **Q.** When she was relating to you an incident
17 involving her and Leonard Peltier, how did she appear
18 to you?

19 What were her reactions?

20 **A.** Nervous. Upset.

21 **Q.** Did she describe to you or did you glean from
22 that conversation why she was appearing upset?

23 **MR. MURPHY:** Your Honor --

24 **THE COURT:** I think that's a fair question.

25 He's not asking you to describe. He's -- you

1 are not being asked to repeat the substance of the
2 conversation, but whether from the conversation you
3 understood why she was upset.

4 **THE WITNESS:** Yes.

5 **Q. (BY MR. JACKLEY)** Okay.

6 When she was describing the incident between
7 her and Leonard Peltier, did she appear genuine to
8 you?

9 **A.** Yes, she did.

10 **Q.** When you left that conversation, at least
11 from what you heard and what you saw, did you believe
12 her?

13 **A.** Yes, I did.

14 **Q.** Kamook, I want to take you now to June 26,
15 1975?

16 **A.** Okay.

17 **Q.** Where were you staying at that time?

18 **A.** In Oglala, South Dakota.

19 **Q.** Were you saying at a specific place?

20 **A.** Yes.

21 **Q.** Where would that be?

22 **A.** It would be at the Jumping Bull residence.

23 **Q.** On June 26, 1975, did something happen at the
24 at the Jumping Bull residence?

25 **A.** Yes.

1 **Q.** What happened?

2 **A.** There was a shoot-out between two FBI agents
3 and some other individuals that had been also living
4 down there.

5 **Q.** With respect to that shoot-out, were you
6 there later that day on June 26, 1975?

7 **A.** Yes, I was.

8 **Q.** When you arrived at Jumping Bull's on
9 June 26, 1975, describe to the jury what you saw.

10 **A.** I had driven -- this had been during the
11 shoot-out. I didn't know it was happening. I drove
12 into the road. We lived maybe a quarter of a mile or
13 something off the road. I turned to go toward our
14 house. I looked over here to the right. There were
15 some BIA cop cars with individuals that had rifles.
16 They were leaning behind the door.

17 I had my daughter in the car. She had been
18 sick so I had taken her to the doctor and I was on my
19 way home. So then I knew something was wrong when I
20 saw these cars lined up over here. And I was -- I was
21 driving toward our house and the grass was maybe
22 three, four feet high. And all I could see was some
23 hands that came out of the grass motioning for me to
24 turn around. I was in my pick up and I made a turn
25 and I just went back toward the highway.

1 Q. Are you generally aware that two FBI agents
2 had been killed that day at that place?

3 A. Yes.

4 Q. I now want to take you to later in the fall
5 of 1975 to Columbus day, October 12, 1975.

6 Do you recall that general time frame?

7 A. Yes, I do.

8 Q. Do you recall a particular motor home?

9 A. Yes.

10 Q. Who owned the motor home?

11 A. Marlin Brando.

12 Q. Did there and a time that you, around
13 Columbus day, were riding in the motor home?

14 A. Yes, I was.

15 Q. Who were you riding with?

16 A. I was with Dennis Banks, Leonard Peltier,
17 Annie Mae, my sister, and Kenny Loud Hawk and Dave
18 Hill.

19 Q. Who is your sister?

20 A. Bernadine Nichols.

21 Q. Did there come a time while in the motor home
22 that Leonard Peltier began to talk about some
23 incriminating matters?

24 A. Yes.

25 Q. Who was present during those discussions?

1 **A.** The same individuals I had just named. All
2 of us.

3 **Q.** Okay.

4 **A.** Except I don't believe that Dave was in the
5 motor home at the time.

6 **Q.** So those individuals would have been, of
7 course, Leonard Peltier, yourself, Annie Mae Aquash
8 your sister Bernie, and Dennis Banks?

9 **A.** And Kenny Loud Hawk.

10 **Q.** And Kenny Loud Hawk.

11 Is Kenny Loud Hawk still with us?

12 **A.** No, he is not.

13 **Q.** Were part of the discussion that was going on
14 the talk about the two FBI agents that had been killed
15 on June 26, 1975 at Jumping Bull's?

16 **A.** Yes.

17 **Q.** What do you recall -- what did you take from
18 that event from those discussions?

19 **A.** That Leonard Peltier --

20 **MR. MURPHY:** Objection. Calls for hearsay.
21 Also confrontation.

22 **THE COURT:** Sustained.

23 **MR. JACKLEY:** May we approach, Your Honor?

24 **THE COURT:** Yes.

25 (Whereupon, a discussion was held at the

1 bench.)

2 **MR. JACKLEY:** Your Honor, as with the Looking
3 Cloud case, as affirmed by the Eighth Circuit Court of
4 appeals, and consistent with the order that this court
5 has issued in the pretrial rulings, this evidence is
6 being elicited from the witness not for the truth of
7 the matter asserted. We don't care whether or not
8 Leonard Peltier shot the two FBI agents.

9 What it's being introduced to show is that
10 Annie Mae Aquash had obtained the incriminating
11 evidence which is the motive upon which she was
12 ultimately killed for. That is the purpose of this
13 testimony, and it is not hearsay.

14 **MR. MURPHY:** Your Honor, the state of mind
15 exception applies to the state of mind of the
16 declarant. The declarant in this case would be
17 Leonard Peltier. The rule is unequivocal on that.

18 So what they are trying to do is bring in the
19 statement that Leonard Peltier supposedly said, I shot
20 the motherfucker or something to that effect. That's
21 how it's been relayed before.

22 So first off, they are trying to prove that
23 that event did occur because their later theory is --
24 and they've argued this consistently -- is that Anna
25 Mae Aquash was shot in part because she had overheard

1 Leonard Peltier confess.

2 So, first, they are doing it for the truth of
3 the matter asserted. That is the motive for the
4 killing that's been alleged.

5 Secondly, they are not introducing this for
6 Anna Mae's state of mind because she is not the
7 declarant. They have not tried to subpoena Leonard
8 Peltier. I have talked to his attorney, a woman named
9 Jane Tigar (phonetic). There has been no attempt to
10 try to subpoena him. She indicated to me that he
11 would have responded to a subpoena. And so they are
12 using the wrong exception.

13 The fact that this evidence came in in the
14 Looking Cloud trial is largely irrelevant because as I
15 indicated in my previous submissions and motion in
16 limine, which has not been ruled on directly, the
17 objection was not made in this form at the Looking
18 Cloud trial. Mr. Rensch never argued that they didn't
19 have it or they weren't asserting it for the state of
20 mind of the actual declarant.

21 Furthermore, when this court ruled it's --
22 issued it's prior order, it said that the topics may
23 come in; that they were not excludable on their face.
24 But it never ruled that incompetent evidence, hearsay
25 evidence, or evidence that violates a defendant's

1 right to confrontation could come in.

2 You merely said the topics are not forbidden
3 if in fact the state can lay the proper foundation and
4 admit it in the proper format. That's why we're here
5 today. Leonard Peltier's state of mind is not at
6 issue.

7 **THE COURT:** Fundamentally, I agree with the
8 hearsay because you can't show his state of mind until
9 he actually believes he did it and that poses a
10 threat -- that creates the problem with the statement.
11 It's offered to prove that and then use it as proof to
12 establish a motive for her being afraid and perhaps
13 for her being killed.

14 I am reluctant to do that at the status of
15 this testimony at this point. That ruling is
16 sustained.

17 I am going to make a brief statement to the
18 jury of what hearsay constitutes and to explain
19 various rulings which may be inconsistent but will
20 certainly appear to be inconsistent to the jury.

21 And at that point this objection is
22 sustained.

23 **MR. JACKLEY:** Your Honor, because there has
24 been apparent disagreement with Mr. Murphy on maybe
25 what the Court's previous order said and because I

1 believe the Court's previous order would shed light on
2 the further rational of why this is admissible
3 evidence, may I refer back to that order? It will
4 just take a moment.

5 **THE COURT:** Sure.

6 (Whereupon, the bench conference was then
7 concluded.)

8 **THE COURT:** I will make a note of explanation
9 to the jury. You have heard multiple times an
10 objection to something called hearsay or being
11 described as hearsay. And you may have seen what
12 appear to be rulings which seem to be inconsistent and
13 hard to understand why I made those rulings.

14 Hearsay in its technical terms, and for legal
15 purposes, involves a statement made by somebody other
16 than the person who is testifying and it was made
17 outside the courtroom. And it becomes hearsay if it's
18 being offered to prove the truth of the things stated.

19 For instance, if I were to ask somebody what
20 the weather was in Spearfish last week and that person
21 said my grandmother told me it was snowing, then that
22 statement would be offered to prove the weather at
23 that time. The question then is whether grandma was
24 right or wrong and we have no opportunity to address
25 grandma's statement with grandma, who would be the

1 person who would have known. The person answering the
2 question has no idea whether it's true or not except
3 they tend to believe grandma.

4 But other than that -- so statements of that
5 nature are not admissible absent certain exceptions
6 recognized in the law. And these objections will come
7 up and I have to figure out why it's being offered and
8 whether it can come in and I do my best to do that.

9 Mr. Jackley is going to show me some previous
10 documents.

11 My ruling today stands.

12 Sustained.

13 **Q. (BY MR. JACKLEY)** Kamook, we were talking
14 about -- and I want to be careful not to elicit
15 directly what Leonard Peltier said -- but we were
16 talking about a discussion that you were a witness to
17 in Marlin Brando's motor home.

18 Do you recall that?

19 **A.** Yes.

20 **Q.** And you were present for that discussion?

21 **A.** Yes.

22 **Q.** And Annie Mae Aquash was present for that
23 discussion?

24 **A.** Yes.

25 **Q.** At the time of that discussion did Leonard

1 Peltier -- did you witness Leonard Peltier make any
2 hand gestures?

3 **MR. MURPHY:** Your Honor, I am going to
4 object. I know the next question is yes or no, but
5 the answer to follow may just slide in. We're talking
6 about verbal conduct now.

7 **THE COURT:** Well, we're not -- she can
8 testify as to what she observed. Not what she heard,
9 but what she observed.

10 **Q. (BY MR. JACKLEY)** Understanding the Court's
11 ruling to not have you talk about what you heard, but
12 I want to ask you about what you observed Leonard
13 Peltier gesture or do during his discussion in front
14 of an Annie Mae Aquash?

15 **A.** He used his hand to (indicating).

16 **Q.** Just show the jury what he did with his hand.

17 **A.** He -- he -- (indicating) like a gun.

18 **Q.** Okay.

19 And where did he -- where did he put -- where
20 did he put his hand that he was gesturing with?

21 **A.** To his head.

22 **Q.** I don't want to ask you what he said, but I
23 want to ask you, did you hear what he said?

24 **A.** Yes, I did.

25 **Q.** What was your reaction when you heard what he

1 said and when he made that gesture?

2 **A.** Shocked.

3 **Q.** What was the other people standing around
4 listening to him's reaction?

5 Not what they said but what was their
6 reaction?

7 **MR. MURPHY:** Vague, over broad, and
8 foundation.

9 **THE COURT:** She may testify as to what she
10 observed their reaction to be. Not what she thought
11 it was but what she observed.

12 **A.** The same. I would say that they were
13 shocked.

14 **Q.** **(BY MR. JACKLEY)** Was the motor home and the
15 people in it ultimately involved in contact with law
16 enforcement?

17 **A.** Yes.

18 **Q.** When that occurred, did Leonard Peltier and
19 Dennis Banks escape?

20 **A.** Yes, they did.

21 **Q.** And you and Annie Mae were there?

22 **A.** Yes, we were.

23 **Q.** Were you pregnant at the time?

24 **A.** I was.

25 **Q.** Was there any shooting that you either heard

1 or observed at that time?

2 **A.** Yes, there was.

3 **Q.** Describe that to the jury.

4 **A.** Well, when the officer stopped us, he knocked
5 on the back of the motor home. Told us to step out.
6 Annie Mae got out first. And Leonard got out in front
7 of me. And then I got out with my daughter. And
8 there was a small ditch right here so he asked us to
9 lay down. I couldn't lay down. I was seven months
10 pregnant. So I sat by Annie Mae. Then Leonard was to
11 my right. And he kept knocking on the back of the
12 motor home. He said if anybody else is in there to
13 please come out. At that time Dennis started driving
14 down the road and then there were gunshots between him
15 and the police officer.

16 **Q.** And Leonard Peltier and Dennis Banks were not
17 arrested that night?

18 **A.** No.

19 **Q.** Okay.

20 After that event, and I guess as a result of
21 that event, were you placed in jail?

22 **A.** Yes.

23 **Q.** Did you share a cell with somebody?

24 **A.** With Annie Mae.

25 **Q.** What did you and Annie Mae talk about in that

1 cell?

2 **A.** Well, we talked about what had just happened.
3 We talked about different events we had been to. She
4 talked a lot about her kids. Talked about my
5 daughter. We talked about family. We talked about
6 everything.

7 **Q.** Did you talk at all about the discussion that
8 you had earlier both witnessed in the motor home with
9 Leonard Peltier of an incriminating nature with his
10 hand?

11 Did you discuss that at all?

12 **A.** Yes.

13 **Q.** And that was a discussion between you and
14 Annie Mae Aquash?

15 **A.** Yes.

16 **MR. JACKLEY:** Your Honor, may we approach?

17 **THE COURT:** Yes.

18 (whereupon, a discussion was held at the
19 bench.)

20 **MR. JACKLEY:** Am I speaking too loud or too
21 soft or about right?

22 **THE COURT:** She can pick up anything.

23 **MR. JACKLEY:** Okay.

24 Your Honor, I believe this witness can
25 testify to discussions she had with the victim in this

1 case in a jail cell. She was privy to the
2 conversations. They were all present when the things
3 and events had happened and obviously Annie Mae Aquash
4 is no longer with us. She's the murder victim in this
5 case. And I believe it's appropriate for me to go
6 into what was discussed and what reactions were had.

7 **MR. MURPHY:** Your Honor, in your order one of
8 the things you said as a condition was that if the
9 Peltier confession as to the murder of the agents was
10 true, then the stuff might be admissible.

11 It's the second to the last line on page 10.
12 You said as to the confession by Peltier, to quash,
13 the disclosure of this information to quash if true
14 could provide a motive for members.

15 So what they are trying to do here without
16 actually calling the witnesses that they should have
17 called is to prove that allegation. If -- they can do
18 the same thing they did with Ms. Ecoffey in regard to
19 Ms. Aquash. Did you have a conversation about the
20 subject matter that we previously discussed. What
21 were Ms. Aquash's reactions to it.

22 But they are trying to get into the substance
23 of an allegation that has not proven to be true. And
24 so that's where they are trying to cross the line.
25 Just like we just saw, they can say, you know, what

1 was Ms. Aquash's demeanor when you talked about this
2 subject matter. Was she shocked or whatever. You
3 know, words she's going to try to say.

4 But to try to prove up the allegation through
5 Anna Mae Aquash who was not present at Jumping Bull
6 and has no information of a probative or reliable
7 nature as to what actually happened, that would be
8 damaging. Incredibly damaging.

9 **THE COURT:** I agree with Mr. Murphy.

10 (Whereupon, the discussion at the bench was
11 then concluded.)

12 **Q. (BY MR. JACKLEY)** Kamook, again, I do not want
13 to elicit from you the specifics of a conversation,
14 okay?

15 I am going back to the conversation that you
16 and Annie Mae were a witness to in the motor home with
17 Leonard Peltier that you then later discussed with
18 Annie Mae in the jail cell.

19 Would that information that we're talking
20 about be potentially incriminating to Leonard Peltier?

21 **MR. MURPHY:** Objection. Calls for
22 speculation. It's a legal conclusion.

23 **THE COURT:** Overruled.

24 **A.** Yes.

25 **THE COURT:** It's already been answered in any

1 event.

2 Q. (BY MR. JACKLEY) If that information were to
3 get out, would that be a concern to those involved?

4 MR. MURPHY: Objection. Calls for
5 speculation.

6 THE COURT: Agreed.

7 Sustained.

8 Q. (BY MR. JACKLEY) Kamook, we talked about
9 sharing the cell with Annie Mae and the discussion
10 about her kids.

11 With respect to, you know, your case, what
12 was the resolution?

13 What became of you with respect to that
14 particular case or charge?

15 A. The charges were dismissed.

16 Q. Kamook, did there come a time when you
17 separated from Dennis Banks?

18 A. In April of 1989.

19 Q. Did there come a time when you began looking
20 further into what may have happened to Annie Mae
21 Aquash?

22 A. Yes.

23 Q. Describe about when that was.

24 A. In the year 2000.

25 Q. Were you recruited by the United States

1 government to do this?

2 **A.** No.

3 **Q.** Were you recruited by the State of South
4 Dakota to do this?

5 **A.** No.

6 **Q.** Did you do it on your own?

7 **A.** Yes.

8 **Q.** Were you paid for what you were doing?

9 **A.** No.

10 **Q.** Were you provided any reimbursements?

11 **A.** Yes, I was.

12 **Q.** Describe for a moment to the jury what those
13 reimbursements were for?

14 **A.** Travel expenses, hotel expenses, if I rented
15 a car, for moving.

16 **Q.** You said for moving.

17 Did there come a time when you had to move
18 after you began assisting with the government?

19 **A.** There were two times.

20 **Q.** Let's walk through that a little bit. Let's
21 walk through the first time.

22 What happened or what events happened that
23 required you to move?

24 **MR. MURPHY:** Objection. Relevance.

25 **THE COURT:** You may answer the question.

1 **A.** Well, I had been told to move to a secure
2 area the first time. And then Dennis Banks showed up
3 at my door. So when I contacted the FBI, then they
4 told me that I needed to move a second time.

5 **Q.** **(BY MR. JACKLEY)** Did you want to move?

6 **A.** No.

7 **Q.** Beginning in 2000 as you began to look into
8 this case, did you have meetings with people that knew
9 about the case that had information about the case?

10 **A.** Yes, I did.

11 **Q.** Were some of those individuals -- or did you
12 ever meet with Theda Clarke regarding the case?

13 **A.** I did.

14 **Q.** Did you ever meet -- let me ask you this.
15 Do you remember approximately when you met
16 with Theda Clarke?

17 **A.** You mean the first time?

18 **Q.** Did you meet with Theda more than once?

19 **A.** Yes.

20 **Q.** Do you remember a meeting with Theda Clarke
21 in July of 2000?

22 **A.** Yes.

23 **Q.** I don't want to ask you what Theda said, I
24 just want to ask you what you discussed, what you
25 said, okay?

1 **A.** Okay.

2 **Q.** In that meeting, did you discuss or did you
3 talk about the death of Annie Mae Aquash?

4 **A.** Yes, I did.

5 **Q.** Did you discuss concerns about Annie Mae
6 being an informant?

7 **A.** Yes.

8 **MR. MURPHY:** Your Honor, I am going to
9 object. These are out-of-court statements offered for
10 the truth of the matter asserted.

11 **THE COURT:** He's asking, I believe, if this
12 witness said that or words to that effect.

13 **MR. MURPHY:** I understand.

14 **THE COURT:** Responses of other people I am
15 not interested in.

16 Do you understand?

17 **THE WITNESS:** Yes.

18 **THE COURT:** Thank you.

19 **MR. MURPHY:** Your Honor, my objection would
20 be her statements -- this witness's out-of-court
21 statements are still hearsay if offered for the truth
22 of the matter asserted.

23 **MR. JACKLEY:** Your Honor, the witness is
24 here.

25 **THE COURT:** You may answer the question.

1 **A.** Yes.

2 **Q.** **(BY MR. JACKLEY)** Okay.

3 Did you also discuss -- let me ask you this.

4 As part of your looking into the death of
5 Annie Mae Aquash, did you have a or some discussions
6 with Arlo Looking Cloud?

7 **A.** Yes, I did.

8 **Q.** Do you recall having a discussion with Arlo
9 Looking Cloud in Denver?

10 **A.** Yes.

11 **Q.** Would that have been in about December of
12 2000?

13 **A.** Yes, it was.

14 **Q.** I don't want to go into what Arlo said. I
15 want to talk about who was present for that
16 discussion.

17 **A.** Troy Lynn Yellow Wood, Arlo, and myself.

18 **Q.** In December of 2000 had Arlo Looking Cloud --
19 was he under any indictment or charges for the death
20 of Annie Mae Aquash, if you know?

21 **A.** No.

22 **Q.** Again, without eliciting from you what Arlo
23 may have said, did you talk to him and Troy Lynn about
24 Annie Mae Aquash?

25 **A.** Yes.

1 **Q.** At points in the discussion did Arlo Looking
2 Cloud have any physical reaction?

3 **A.** Yes, he did.

4 **Q.** Describe that to the jury.

5 **A.** When I visited with Arlo, I was sitting in
6 the driver's seat. Arlo was sitting in the back seat
7 in the middle. And when I asked him certain
8 questions, he became very emotional. He would turn to
9 the left and look out the window. He became choked up
10 at times and at some points he would nod his head. He
11 wouldn't answer clearly. He would just kind of grunt,
12 but he was very emotional during the discussion.

13 **Q.** Kamook, when did you ultimately learn of
14 Annie Mae's death?

15 **A.** In 2000 or -- do you mean the first time?

16 **Q.** Yeah. When you first learned she had been
17 killed.

18 **A.** It was in February of 1976.

19 **Q.** Do you remember when in February of 1976?

20 **A.** I do remember exactly when.

21 **Q.** When?

22 **A.** It was -- I lived in Portland, Oregon. It
23 was February 24 of 1976.

24 **Q.** How are you so sure of that date?

25 **A.** Well, because I had been sitting at my desk.

1 Dennis Banks had been living in California and he
2 called me. And during the discussion when he had
3 called me, hanging on the wall was a calendar, which
4 was my nephew's birthday, February 24. And during
5 that conversation is when he told me that they had
6 found Annie Mae.

7 Q. And you took from that conversation that he
8 said that they had found, specifically, Annie Mae; not
9 that they had just found a body?

10 A. No, he said that they had found Annie Mae.

11 Q. Kamook, after you received the word -- the
12 phone call of February 24, 1976, are you generally
13 aware of what events took place with respect to the
14 identification of Annie Mae Aquash?

15 A. Yes, I am.

16 Q. What is your understanding of what those
17 events are?

18 A. That they didn't know it was Annie Mae when
19 she had been found. She had been buried as Jane Doe.
20 And that they had not discovered that it was Annie Mae
21 for approximately two weeks after that.

22 Q. Two weeks after you had received the phone
23 call identifying that it was Annie Mae?

24 A. Yes.

25 MR. JACKLEY: No further questions, Your

1 Honor.

2 **THE COURT:** Mr. Murphy?

3 **MR. MURPHY:** Your Honor, in light of the fact
4 that my cross-examination will be lengthy -- it's ten
5 to 12:00.

6 Would you like me to start now or could we
7 start on Monday?

8 **THE COURT:** I think we're best doing it all
9 at once, do you not?

10 **MR. MURPHY:** I would prefer that.

11 Thank you.

12 **THE COURT:** We're going to reconvene Monday
13 morning at 8:30, folks. You are reminded, and it's
14 particularly difficult and important over the weekend,
15 that you are not to cause this case with anybody. You
16 may not form opinions on it. You must be specifically
17 and especially alert to avoiding news, newspapers, and
18 anything that may contain it. Even avoiding if it's
19 front page, and get back on page 6, there may be an
20 article. So continued stories. So forget newspapers
21 at home. They are history until this matter is
22 finished.

23 Any questions about that?

24 Please don't -- please try very hard not to
25 form or begin to form any opinions on this matter.

1 We will be in recess and see you Monday
2 morning at 8:30.

3 (Whereupon, the proceedings in this matter
4 were then concluded.)

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1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
 2 COUNTY OF PENNINGTON)
 3

4 I, TINA RAE PRUSS, Official Court Reporter
 and Notary Public in and for the County of Pennington,
 5 State of South Dakota,

6 DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 7 questions asked, the testimony given, and of the
 proceedings had.

8 I FURTHER CERTIFY that I am not of kin or in
 9 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 10 interested in the event thereof.

11
 12 IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.
 13

14
 15 **COPY**

16 Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 17 Pennington County, South Dakota
 My Commission expires: 10-04-2012
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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
) Plaintiff,)
))
) VS.)
))
) JOHN GRAHAM,)
))
))
) Defendant.)

TRANSCRIPT OF
JURY TRIAL

VOLUME 6 OF 10

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
DECEMBER 6, 2010

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* * A P P E A R A N C E S * *

MR. MARTY JACKLEY
Attorney General
MR. ROD OSWALD
Assistant Attorney General
MR. ROBERT MANDEL
Assistant U.S. Attorney
Representing the State of South Dakota

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

* * I N D E X * *

WITNESS (ES) :	DIRECT	CROSS	REDIRECT	RECROSS
DARLENE KAMOOK ECOFFEY	7	8	89,115	102
RICHARD MARSHALL	117	129	135	
THEDA CLARKE	152			
JENNIFER GERING	162			
ARLO LOOKING CLOUD	186	231		

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EXHIBITS:

OFFERED/ADMITTED

35 - Photo

225/225

1 * * P R O C E E D I N G S * *

2 (Whereupon, the following proceedings were
3 had in open court with the jury not present.)

4 **THE COURT:** Okay.

5 I think over the weekend I made some reviews
6 of some of the decisions I have made and I have come
7 to a conclusion that one of them was wrong. And that
8 pertains to the testimony of what was said by Leonard
9 Peltier in the camper. I reversed my decision on that
10 and the state will reopen to address that issue.

11 Mr. Murphy has made any number of objections
12 to that which I previously sustained in large and we
13 need to reassert those objections at this time.

14 Mr. Murphy?

15 **MR. MURPHY:** That's correct, Your Honor. I
16 would reassert the objections I made both in court and
17 also incorporate my motion in limine on this specific
18 issue which set forth a number of authorities
19 including the *Shepard* decision wherein the U.S.
20 Supreme Court said specific instances of past conduct
21 cannot be admitted for the purpose of proving state of
22 mind. And I cited a number of other authorities on
23 the issue.

24 There is also the issue of the confrontation
25 clause. The unavailability issue has not been

1 resolved. And so, for all of those reasons previously
2 asserted, I would reassert those at this point.

3 **THE COURT:** And I realize this is a Supreme
4 Court issue, but I have given it multiple thoughts on
5 several occasions and that's the best result I can
6 give at this time.

7 Before we get something going, I want to
8 advise the audience once again, if there is a cell
9 phone in here, get it gone. If there are any
10 electronics in here, get it out of here.

11 My staff attorney will be on a Blackberry.
12 He's doing some research for me on the internet. But
13 he's entitled to do that because he works for me. The
14 rest of you are out of luck.

15 In terms of -- again, I want to clarify that
16 we will not have reactions in the audience pro or con
17 to the testimony or proceedings in any way, shape, or
18 form. The reason for that is it simply amounts to
19 unsworn testimony easily visible by the jury. And
20 that makes it difficult for me to retain a jury
21 hearing and deciding the case only from the evidence
22 that comes from the witness stand and exhibits. That
23 may be difficult. Things are said with which you
24 disagree. But nonetheless, I am going to assume we
25 are going to carry forward and we should.

1 And having said that, we would call the jury
2 in and get the morning under way.

3 (Off the record.)

4 **THE COURT:** Satisfied this is the jury,
5 Mr. Jackley?

6 **MR. JACKLEY:** The state is, Your Honor.

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

8 **MR. MURPHY:** Yes, Your Honor.

9 **THE COURT:** Ladies and gentlemen, I changed a
10 ruling I had made before regarding some testimony
11 pursuant to some statements by Mr. Peltier. I have
12 changed that ruling and am allowing the state to
13 reopen to go to that area.

14 Thank you.

15 **MR. JACKLEY:** Thank you, Your Honor.

16 The state calls Kamook Banks.

17 **THE COURT:** Please come forward, ma'am.

18 I believe you are still sworn, but we'll do
19 it again anyway.

20 KAMOOK ECOFFEY,
21 called as a witness herein, having been duly sworn,
22 under oath testified as follows:

23 **THE COURT:** Please take a seat.

24

25

DIRECT EXAMINATION

BY MR. JACKLEY:

Q. Good morning.

A. Good morning.

Q. Kamook, I want to take you back to the time frame after October 12, 1975, when you were riding in the motor home and there was a discussion about Leonard Peltier.

Do you recall that time period?

A. Yes, I do.

Q. Who, again, was present for the discussion involving Leonard Peltier?

A. It would be myself, Dennis Banks, Kenny Loud Hawk, my sister Bernie Nichols, and Annie Mae, and Leonard.

Q. Did you witness or did you see -- did you witness and see Leonard Peltier make what appears to be incriminating statements?

A. Yes, I did.

Q. Would you please look to the jury and to the best that you can describe what he said and any hand movements he said when he made it?

A. He held his hand like this (indicating). He was standing -- there was a little table. We were sitting at the table. He was standing by the table in

1 the motor home. He held his hand like this
2 (indicating) and he said, that motherfucker was
3 begging for his life but I shot him anyway.

4 Q. Kamook, who was he referring to?

5 A. He was talking about the FBI agents.

6 MR. JACKLEY: No further questions, Your
7 Honor.

8 THE COURT: Thank you.

9 I think, Mr. Murphy, you are up on cross.

10 MR. MURPHY: Thank you, Your Honor.

11 **CROSS-EXAMINATION**

12 **BY MR. MURPHY:**

13 Q. Mrs. Ecoffey, my name is John Murphy and I
14 represent John Graham. I am going to ask you a series
15 of questions.

16 Let me know if I ask a question that's
17 convoluted or anything like that, okay?

18 A. Okay.

19 Q. I want to bring you back to the general time
20 frame. You have been testifying about 73 through 75
21 in South Dakota.

22 At this point, you were living on Pine Ridge
23 more or less?

24 A. Pretty much.

25 Q. Okay.

1 And during that time period, it was pretty
2 scary to live in Pine Ridge on occasion, wasn't it?

3 **A.** For a lot of people it was.

4 **Q.** Yeah.

5 There were a lot of shootings, correct?

6 **A.** Yes.

7 **Q.** There was the goon squad?

8 **A.** Yes.

9 **Q.** And the goon squad often shot at AIM members
10 or their families?

11 **A.** Yes.

12 **Q.** A number of AIM supporters were killed in
13 that time period, correct?

14 **A.** Yes.

15 **Q.** And the FBI at this point was also regularly
16 appearing on Pine Ridge, correct?

17 **A.** I read that but I didn't know that myself.

18 **Q.** After June of 1975, when the FBI agents were
19 killed, you -- at that point you saw a lot more of the
20 FBI, did you not?

21 **A.** Personally, no, I did not.

22 **Q.** Okay.

23 But you did see the goon squads and the
24 supporters of Dick Wilson, correct?

25 **A.** Yes.

1 Q. All right.

2 Let's talk about -- you mentioned Dennis
3 Banks -- would you call him your common-law husband?
4 Would that be a fair way of describing him?

5 A. Yeah, that would be.

6 Q. When did you meet Mr. Banks?

7 A. In February of 1972.

8 Q. How old would you have been then?

9 A. Seventeen.

10 Q. And he would have been how old about?

11 A. Thirty-four.

12 Q. Did you begin a romantic relationship at that
13 time or did it develop later?

14 A. It developed later.

15 Q. How much later?

16 A. Six months, maybe.

17 Q. Okay.

18 So by the time you were at Wounded Knee
19 together you were a couple?

20 A. In 73, a year later, yes.

21 Q. When did you have your first child with
22 Mr. Banks?

23 A. In August of 1974.

24 Q. All right.

25 And then at the time of like the motor home

1 incident, you were pregnant with your second child by
2 him?

3 **A.** Yes, I was.

4 **Q.** Okay.

5 And at this time period, Mr. Banks was a
6 leader in the American Indian Movement?

7 **A.** He was.

8 **Q.** Very charismatic person?

9 **A.** I guess.

10 **Q.** Okay.

11 He had rose to a leadership role within the
12 American Indian Movement at that time, correct?

13 **A.** Well, he had originally been one of the
14 original cofounders of the American Indian Movement.

15 **Q.** Okay.

16 And when we talk about the American Indian
17 Movement, we're not talking about -- especially, like,
18 by 1975 -- we're not talking about one well-organized
19 movement, are we?

20 **A.** By 1975 they are -- I would say that he was
21 still kind of together.

22 **Q.** Well, there was factions from Minnesota, from
23 Denver, from South Dakota, from California, correct?

24 **A.** There were many states that had different
25 chapters of the American Indian Movement.

1 Q. Okay.

2 And the whole initial premise behind the
3 movement was Indian self-determination, correct?

4 A. Yes, I would say.

5 Q. And -- so not being told what to do by
6 somebody else, correct, basically?

7 A. Well, I think the American Indian Movement --
8 back then I think it was started not just for
9 self-determination, but also it brought light to a lot
10 of Native American issues, treaty right, land rights.

11 Q. Education issues?

12 A. Yes.

13 Q. And there was a lot of good people working in
14 the movement, weren't there?

15 A. Yes.

16 Q. A lot of people that had nothing to do with
17 violence but were there for the people?

18 A. Yes.

19 Q. Let's bring you up to Wounded Knee. That's
20 1975.

21 Do you recall being there?

22 A. Yes, I do.

23 Q. And for those who don't know what Wounded
24 Knee was, that was a time when the American Indian
25 Movement occupied a village called wounded knee,

1 correct?

2 **A.** It was a time when the American Indian
3 Movement was in the area and there were members of the
4 tribe, including some elders, that had asked the
5 American Indian Movement for some help on the
6 reservation. So it was the American Indian Movement
7 but it was also just a lot of people. Some didn't
8 belong to the American Indian Movement.

9 **Q.** Sure.

10 And when we talk about belonging to the
11 American Indian Movement, would you have called
12 yourself a member back then?

13 **A.** Yes.

14 **Q.** But you didn't have, like, a membership card?

15 **A.** No.

16 **Q.** You just supported it and became --

17 **A.** Yeah. What you believed in, yeah, at the
18 time.

19 **Q.** So at Wounded Knee there came to be a point
20 when there was a standoff with federal and Tribal
21 authorities, correct?

22 There was shooting back and forth?

23 **A.** It was a standoff between Tribal and federal
24 authorities and the people that were at Wounded Knee.

25 **Q.** Right. Okay.

1 And there was lots of gun fire back and forth
2 between the two?

3 **A.** Over 71 days, yes.

4 **Q.** Seventy-one days.

5 Some people got killed?

6 **A.** Yes.

7 **Q.** Okay.

8 And you were there and Dennis was there?

9 **A.** Yes.

10 **Q.** Anna Mae Aquash was there?

11 **A.** Yes.

12 **Q.** And in fact, Anna Mae Aquash got married at
13 Wounded Knee?

14 **A.** She.

15 **Q.** Do you remember that ceremony?

16 **A.** Yes, I do.

17 **Q.** Now, after Wounded Knee, after the occupation
18 or the standoff ended, many, many people were
19 prosecuted for their role in that, were they not?

20 **A.** Yes, they were.

21 **Q.** In fact, the Wounded Knee Legal Defense
22 Offense Committee was created to help represent some
23 of the hundreds of people that were charged as a
24 result of the so-called occupation; is that fair?

25 **A.** Yes.

1 **Q.** John Graham was not there, was he?

2 **A.** At?

3 **Q.** At Wounded Knee?

4 **A.** There were hundreds and hundreds of people
5 there. I don't know.

6 **Q.** You never saw him?

7 **A.** At Wounded Knee?

8 **Q.** Yes.

9 **A.** No.

10 **Q.** Okay.

11 And you didn't get charged and Dennis didn't
12 get charged with actions as a result of Wounded Knee,
13 did you?

14 **A.** He did get charged. I didn't get charged.

15 **Q.** Let me -- I should have put that differently.

16 The day before the occupation ended, you and
17 Dennis left Wounded Knee?

18 **A.** Actually, I left on April 27 and it wasn't
19 over until May 5.

20 **Q.** Okay.

21 So about eight days before the end of the
22 occupation?

23 **A.** Yes.

24 **Q.** And Dennis also got out before the end?

25 **A.** He left the night before it ended.

1 Q. Okay.

2 So he was charged, though, as a result?

3 A. Yes, he was charged.

4 Q. Okay.

5 Do you remember what he was charged with?

6 A. Now I don't, but he did have a trial in
7 St. Paul, Minnesota.

8 Q. Okay.

9 Now, that ended in -- you said April of 19 --

10 A. No. No. It ended in May of 1973. The first
11 week of May.

12 Q. I want to bring you up to, now, the early
13 parts of 1975. You talked on direct about some of the
14 leaders and insiders in AIM.

15 Do you recall a man named Doug Durham?

16 A. Yes, I do.

17 Q. And Doug Durham was somebody that Dennis
18 knew?

19 A. Yes.

20 Q. And Leonard knew?

21 A. Probably.

22 Q. Okay.

23 You knew him?

24 A. Yes.

25 Q. In fact, Doug Durham was pretty close to you

1 and Dennis at one point, wasn't he?

2 **A.** He was.

3 **Q.** He flew Dennis around the country in his
4 plane?

5 **A.** Yes.

6 **Q.** He was kind of like Dennis's right-hand man
7 in some regards, wasn't he?

8 **A.** He was.

9 **Q.** And it came to be a point when Mr. Durham
10 admitted to being an FBI informant, correct?

11 **A.** Yes.

12 **Q.** And he acknowledged that he had been working
13 with the FBI to secretly gather information about AIM
14 for some time?

15 **A.** Yes.

16 **Q.** And he had information about Dennis's
17 criminal activities, true?

18 **A.** I believe that when Doug Durham had a press
19 conference he said that he had never seen any kind of
20 illegal activities.

21 **Q.** Well, Mr. Banks, Dennis, was a fugitive
22 during a time period when Mr. Durham was flying him
23 around in his airplane?

24 **A.** There was one time that I recall that Dennis
25 was a fugitive when he did fly him. But a couple of

1 years before time period, he wasn't wanted on any
2 charges.

3 Q. During this time period Mr. Banks had been in
4 possession of a large number of weapons, correct?

5 A. You mean with Doug?

6 Q. During the time period in question Dennis
7 often had guns and explosives with him?

8 A. In 1975?

9 Q. 75, 74, 73?

10 A. Seventy-five.

11 Q. He did?

12 A. Yes.

13 Q. Okay.

14 Now, the response when Doug Durham was outed
15 as an informant was for AIM to hold a press
16 conference, correct?

17 A. I am sorry. I don't understand.

18 Q. When it was discovered that Mr. Durham was an
19 informant for the FBI --

20 A. The press conference that I mentioned?

21 Q. Yes.

22 -- Dennis and other AIM leaders held a press
23 conference and Doug Durham was there, correct?

24 A. No. Doug held his own press conference and
25 that's how he announced that he had been working for

1 the FBI.

2 Q. And you are saying that Dennis Banks wasn't
3 at that press conference?

4 A. I wasn't at the press conference, so I don't
5 know. But I -- my understanding is that he had a
6 press conference. I don't know who was there.

7 Q. In any regard, that was the avenue at which
8 point -- or by --

9 Do you need a glass of water?

10 A. Sure.

11 Q. So let me put it this way. In March of 1975,
12 Doug Durham is exposed as an informant, there is no
13 question that he's an informant because he's admitted
14 it, and a press conference is held; is that a fair
15 statement?

16 A. Yes.

17 Q. Okay.

18 I want to move you forward another couple
19 months to June of 1975. And I am going to ask you
20 these questions and they are not designed to humiliate
21 or embarrass you, but I need to talk to you about your
22 discovery of the affair between your husband and Anna
23 Mae Aquash.

24 You discovered that in about June of 1975?

25 A. I didn't discover it in -- I didn't go out

1 looking for the information.

2 Q. Right.

3 A. It was just told to me and that's how I found
4 out. So I didn't discover it.

5 Q. Okay.

6 You learned about it in June of 1975?

7 A. Right.

8 Q. In fact, you learned about it at the
9 Farmington convention we talked about?

10 A. I did.

11 Q. At that point you had one child with Dennis?

12 A. Yes.

13 Q. And one on the way?

14 A. At that time, I didn't know I had one on the
15 way.

16 Q. June of 75 -- in November you were how many
17 months pregnant during the motor home incident?

18 A. Seven.

19 Q. Seven months. Okay.

20 So you would have been about four months
21 pregnant, I guess, if my math is right?

22 A. Maybe. I don't --

23 Q. Okay.

24 Anyway, Anna Mae knew you knew about the
25 affair?

1 **A.** She knew when the conference was over.

2 **Q.** All right.

3 And at this point we're going forward from
4 this point over the next five months up until like the
5 motor home incident.

6 Dennis and Anna Mae are together on a number
7 of occasions, correct?

8 **A.** You mean from June to --

9 **Q.** To the motor home incident.

10 **A.** To my knowledge, she only came when -- in
11 November -- I am sorry. October.

12 **Q.** Columbus day?

13 **A.** Yes. A few days before that.

14 **Q.** And then she was on the motor home trip with
15 you?

16 **A.** Yes.

17 **Q.** And just to be fair, you weren't happy about
18 the fact that Anna Mae Aquash was having an affair
19 with your common-law husband?

20 **A.** No.

21 **Q.** Okay.

22 I want to bring you back to the Farmington
23 convention in June of 1975. You were asked some
24 questions on direct about conversations you had with
25 Anna Mae about what transpired.

1 Do you remember that?

2 A. You mean when her and I were in jail
3 together?

4 Q. Yes.

5 And we didn't get into the specifics but you
6 said Anna Mae was upset about the incident in
7 Farmington, correct?

8 A. Yes.

9 Q. All right.

10 Now, as part of your work in this case, when
11 you were working for the FBI, you interviewed people
12 like Dino Butler, correct?

13 A. I wasn't working for the FBI.

14 Q. Okay.

15 When you were doing interviews that
16 ultimately were turned over to the FBI?

17 A. Yes.

18 Q. Okay.

19 And Mr. Butler was alleged to have been
20 present at the event in question, correct?

21 A. He was.

22 Q. And he told you the event happened nothing
23 like it had been retold over time; is that fair to
24 say?

25 A. When I visited with Dino?

1 **Q.** Yes. On the tape recorded conversation you
2 had with him.

3 **A.** I am sorry --

4 **Q.** The version of events he gave you isn't quite
5 like the events that people are talking about today;
6 is that fair to say?

7 **MR. JACKLEY:** Objection, Your Honor, as to
8 what people are talking about today.

9 **MR. MURPHY:** I will move on. That's fine.

10 **Q.** (BY MR. MURPHY) Anyway, in regard to the
11 Farmington incident that Anna Mae talked to you about
12 in November in the jail cell, John Graham wasn't part
13 of that incident, was he?

14 **A.** No.

15 **Q.** And in fact, going to and from Farmington,
16 Mr. Graham and Ms. Aquash rode in the caravan
17 together; is that your recollection?

18 **A.** I'm not sure how they got there.

19 **Q.** Okay.

20 But anyways, you saw Mr. Graham there at
21 Farmington and you saw Ms. Aquash there at Farmington?

22 **A.** Right.

23 **Q.** You never heard my client at Farmington ever
24 mention anything about Anna Mae Aquash being an
25 informant, did you?

1 **A.** No.

2 **Q.** Okay.

3 And whatever happened in Farmington, that's
4 in June. Over the next five months, six months, till
5 December, Ms. Aquash remains involved in AIM and
6 AIM-related activities, does she not?

7 **A.** Yes, she did.

8 **Q.** And we'll talk about some of those, but she
9 was on a day-to-day basis involved with AIM activities
10 in Pine Ridge and in other states, correct?

11 **A.** She was.

12 **Q.** Okay.

13 She didn't leave the area -- nothing that
14 happened in Farmington caused her to decide to move
15 back home to Canada, right?

16 **A.** I didn't see Annie Mae everyday, but I just
17 had heard, because people talk, that I knew she was in
18 the area somewhere.

19 **Q.** Well, this happened in June and you know she
20 was busted at Al Runnings' in September?

21 **A.** Uh-huh.

22 **Q.** Yes?

23 **A.** Yes. I am sorry.

24 **Q.** You saw her on Columbus day which is
25 October 12?

1 **A.** Right.

2 **Q.** And then you are in a motor home with her all
3 the way up to November 14?

4 **A.** Right.

5 **Q.** So whatever happened in Farmington, she
6 decided not to relocate to Canada and not come back to
7 the U.S.?

8 **A.** No.

9 **Q.** Okay.

10 Now, let's bring you up to June of 1976, or
11 later in June, June -- 1975, the shoot-out at Jumping
12 Bull's. You lived at Jumping Bull's at this time
13 period?

14 **A.** There were several houses there. We lived in
15 one of the houses on the property.

16 **Q.** Okay.

17 Is that part of what's called tent city or
18 was called tent city?

19 **A.** No. That was down the road a ways, down
20 behind where we lived.

21 **Q.** All right.

22 **A.** It was within walking distance.

23 **Q.** Sure.

24 So the same general vicinity?

25 **A.** Right.

1 Q. And the shoot-out occurs and two FBI agents
2 are killed?

3 A. Yes.

4 Q. And one AIM member is killed?

5 A. Yes.

6 Q. Mr. Peltier, Mr. Rubideaux, Mr. Butler are
7 all implicated in that crime?

8 A. Yes.

9 Q. John Graham was not there during the
10 shoot-out, was he?

11 A. I don't know who was there during the
12 shoot-out. I wasn't there.

13 Q. Weren't you told by Ms. Aquash that
14 Mr. Graham and he were -- or Mr. Graham and she were
15 out at Cedar Rapids at Leonard Crow Dog's trial?

16 A. I knew that trial was going on. I was only
17 in Oglala. So who was down at the tent city, I don't
18 know who was there and who wasn't.

19 Q. You've studied this case more or less by
20 living it for the last 35 years.

21 Have you ever heard anybody put John Graham
22 at Jumping Bull's during the shoot-out?

23 A. Not during the shoot-out.

24 Q. Okay.

25 And would it be a surprise to you that

1 Ms. Aquash would have gone to Leonard Crow Dog's trial
2 to lend support to Mr. Crow Dog?

3 **A.** Would it be a surprising to me?

4 **Q.** Yeah.

5 **A.** No.

6 **Q.** Because during that time period one way that
7 AIM members peacefully showed their support of the
8 movement was to go to the trials of people standing
9 trial for activities related to Wounded Knee or other
10 matters?

11 **A.** Yes.

12 **Q.** Was that pretty common back there?

13 **A.** Yes.

14 **Q.** So it wouldn't surprise you that Ms. Aquash
15 and Mr. Graham went to Cedar Rapids for Crow Dog's
16 trial.

17 **A.** No.

18 **Q.** Crow Dog's trial was kind of a big deal,
19 wasn't it?

20 **A.** I think so.

21 **Q.** He was a Medicine Man?

22 **A.** Yes.

23 **Q.** Okay.

24 Now, after the shoot-out, immediately after,
25 like in the days after, you became aware that

1 Ms. Aquash had come back to Pine Ridge, correct?

2 A. Yes.

3 Q. And she came back to help Mr. Peltier,
4 Mr. Rubideaux, Mr. Butler and others escape, correct?

5 A. Well, there were a lot of people there
6 because they were also having services for Joe Stunts
7 who was the other person that had been killed at the
8 shoot-out.

9 Q. Right.

10 But there was an effort to get Leonard and
11 Dino and other people off the reservation to safe
12 hiding, correct?

13 A. I -- I don't know because I wasn't part of
14 that.

15 My understanding is that they had already
16 left.

17 Q. Okay. All right.

18 So you don't recall what Ms. Aquash was doing
19 back in Pine Ridge at that time?

20 A. Well, she had just been staying in Oglala so
21 she was there.

22 Q. Okay.

23 And Oglala is the same community where the
24 shoot-out happened?

25 A. Correct.

1 Q. All right.

2 August of 75. We're up to the month before
3 Al Runnings'. There has been a sun dance at Crow
4 Dog's paradise.

5 Do you recall that?

6 A. Yes.

7 Q. That was late July, early August?

8 A. Usually in August.

9 Q. Yeah.

10 Ms. Aquash is present there, correct?

11 A. Yes.

12 Q. Mr. Graham is present at the sun dance,
13 correct?

14 A. Probably. There were hundreds of people at a
15 sun dance and everybody camps separately.

16 Q. You were there at times?

17 A. Yes.

18 Q. No violent activities occurred?

19 A. No.

20 Q. And during this whole period of time,
21 Mr. Peltier, Mr. Banks, and others had gone under
22 ground more or less, correct?

23 A. After this the sun dance was over, yes.

24 Q. And at the -- well, I will bring you up to
25 September now. September of 1975 is the raid at Al

1 Runnings'. Al Runnings' property is right next to
2 Crow Dog's Paradise; is that a fair statement?

3 **A.** Yes, it sits adjacent to it.

4 **Q.** Crow Dog's Paradise is where the sun dance
5 was and adjacent to that is Al Runnings' land?

6 **A.** Yes. Al Runnings was married to Leonard Crow
7 Dog's sister. Basically it's just one big property.

8 **Q.** Okay.

9 And you recall that on September 5, 1975, the
10 FBI came into Al Runnings' place and also into Crow
11 Dog's place looking for people that had been involved
12 in the shoot-out, correct?

13 **A.** I know they were there. What they were
14 looking for I don't know.

15 **Q.** All right.

16 They executed search warrants, they arrested
17 people, and other things like that?

18 **A.** Yes.

19 **Q.** And of the people they arrested was Anna Mae
20 Aquash, correct?

21 **A.** Yes.

22 **Q.** She was there in a tent with explosives and
23 illegal weapons, correct?

24 **A.** I read that.

25 **Q.** Yeah.

1 And Dino Butler was in the vicinity where she
2 was at, correct?

3 **A.** Dino Butler?

4 **Q.** Uh-huh.

5 Do you recall Dino and --

6 **A.** Nilak.

7 **Q.** Nilak being arrested along with Anna Mae
8 Aquash?

9 **A.** Maybe. I wasn't there.

10 **Q.** All right.

11 Let me ask you this. You've discussed on
12 your direct examination that from Farmington on, Anna
13 Mae Aquash was suspected of being an informant for
14 the -- for the federal government, correct?

15 **A.** I would say there were a lot of people that
16 didn't trust her at the time.

17 **Q.** Okay.

18 And you have indicated before that some of
19 those people were the American Indian Movement
20 leadership, correct?

21 **A.** That's correct.

22 **Q.** Yet, between Farmington and June and December
23 of 75, right smack dab in the middle, September of
24 1975, she's entrusted with a catch of illegal weapons
25 in close proximity to other AIM leaders and other AIM

1 activists on Pine Ridge, correct?

2 **A.** She traveled with us in October.

3 **Q.** I am talking about September, though.

4 In September, she's entrusted with being in a
5 tent full of weapons, illegal weapons, right?

6 **A.** I guess. I wasn't there. So I don't know
7 what she was charged with or what she had or what
8 other people had there.

9 **Q.** But you have speculated as to what AIM
10 leaders thought about her?

11 **A.** Right.

12 **Q.** And yet, presumably, those AIM leaders are
13 allowing her to hang out with them and their illegal
14 weapons, correct?

15 **A.** Well, I spoke for Dennis and Leonard because
16 I was around them. I knew they didn't trust her.
17 They weren't at Crow Dog's.

18 **Q.** Okay.

19 They were on the run, correct?

20 **A.** Right.

21 **Q.** Dino Butler was charged with Leonard and the
22 Jumping Bull shoot-out, correct?

23 **A.** Yes.

24 **Q.** And so he was affiliated with Leonard,
25 correct?

1 **A.** He was.

2 **Q.** There was no great fission or separation
3 between Dino and Leonard, was there?

4 **A.** No.

5 **Q.** Okay.

6 Nor was there in 1975 between Dino and
7 Dennis, was there?

8 **A.** No, but I wouldn't call Dino Butler one of
9 the leaders of the American Indian Movement.

10 **Q.** He was actively involved in AIM throughout
11 this period of time?

12 **A.** He was.

13 **Q.** He was charged with shooting one of the FBI
14 agents?

15 **A.** He was.

16 **Q.** So he was involved in high level AIM
17 activity, right?

18 **A.** Right.

19 **Q.** Now, just a few days after the Al Runnings'
20 incident you were in a vehicle down in Kansas,
21 correct?

22 **A.** Yes.

23 **Q.** And you were there -- it was your sister
24 Bernie. Each of you had one of your children with?

25 **A.** She didn't have any children with you.

1 Q. You had one --

2 A. My oldest daughter.

3 Q. And there was several other people in the
4 vehicle, correct?

5 A. Right.

6 Q. And there was dynamite and grenades in that
7 vehicle, wasn't there?

8 A. There was.

9 Q. And the car caught on fire in Kansas?

10 A. It did.

11 Q. You escaped but the car exploded, correct?

12 A. Well, the car started to smoke so as -- when
13 we pulled over to the side of the road, we all got out
14 and then the car exploded.

15 Q. Already.

16 In any regard, you are then charged with a
17 host of weapons charges or explosives charges down in
18 Kansas, correct?

19 A. Yes.

20 Q. These are federal charges?

21 A. Yes.

22 Q. And you were also threatened with child
23 endangerment charges?

24 A. No, I was not.

25 Q. You weren't threatened at all with anything

1 to do with your child being present with you?

2 A. No.

3 Q. Was that ever brought up as an issue with
4 you?

5 A. No.

6 Q. Okay.

7 At this point Dennis is not with you,
8 correct?

9 A. No.

10 Q. You don't know where he is?

11 A. No. I don't know where he.

12 Q. What's that?

13 A. I didn't know where he is.

14 Q. You did not know where he is?

15 A. No.

16 Q. And I apologize, one of my ears is clogged up
17 with a head cold so I am having trouble hearing some
18 of this.

19 A. Okay.

20 Q. Anna is not with you, correct?

21 A. No.

22 Q. So on those charges -- and we'll get to --
23 we'll go ahead a little bit but ultimately those
24 charges are reduced down to misdemeanors of some sort,
25 the explosive charges against you?

1 **A.** They -- I believe they were. I plead guilty
2 and was on probation for three years.

3 **Q.** You got a probationary sentence?

4 **A.** Yes.

5 **Q.** Okay.

6 But that didn't come for a while, yet, did
7 it?

8 You -- that didn't come until later in the
9 year or actually into 1976 that you got your
10 three-year probationary sentence?

11 **A.** No, because by 197 -- maybe. It happened in
12 75, so, yeah, it would have been the next year.

13 **Q.** In the next year. Okay.

14 Were you at the Wagner pork plant protest?

15 **A.** No.

16 **Q.** From the time that you had the car explosion,
17 I believe that was 197 -- September 6, 1976.

18 Does that ring a bell?

19 **A.** I think so.

20 **Q.** Okay.

21 **A.** It was in September. I don't remember the
22 exact day.

23 **Q.** Close enough.

24 But between that time and Columbus day,
25 October 12, 1975, you are stuck down in Kansas or

1 Oklahoma; is that true?

2 A. Both.

3 Q. Okay.

4 Because you got the charges pending down
5 there?

6 A. Yes.

7 Q. And during this whole period of time you
8 don't know where Dennis is, right?

9 A. No.

10 Q. And you don't know where Anna Mae is?

11 A. No.

12 Q. But you are allowed to come back to South
13 Dakota on Columbus day for a memorial dinner?

14 A. Yeah. My mother -- I mean, my grandma was
15 having a memorial dinner for my Uncle Buddy. He had
16 been killed at Wounded Knee.

17 Q. Okay.

18 He was shot by either a goon or an FBI during
19 that --

20 A. In court testimony, it was a Marshal, I
21 believe.

22 Q. Okay.

23 That's kind of -- gives you an idea of how
24 dangerous it was at Wounded Knee, correct?

25 A. Right.

1 Q. Somebody close to you was shot and killed?

2 A. Yes.

3 Q. So you go to this memorial dinner on Columbus
4 days and at some point somebody comes to you and tells
5 you to go to Oglala?

6 A. She came to me and said when this is over you
7 need to come with me.

8 Q. And who was that person?

9 A. It was Dela Mae Star.

10 Q. And you go to Kenny Loud Hawk's house?

11 A. We did.

12 Q. Okay.

13 And you don't know initially why you are
14 going to Kenny Loud Hawk's house, do you?

15 A. I assumed Dennis was there. She didn't say
16 that. But -- that was it.

17 Q. That's the kind of way things worked is
18 somebody told you you need to come with me and you
19 didn't ask questions?

20 A. Because she wouldn't have asked me just to go
21 with her otherwise.

22 Q. Unless it was something important?

23 A. Yes.

24 Q. You get to Loud Hawk's house, you walk in,
25 and you look into a room in the back or one of the

1 rooms, correct?

2 **A.** Well, we had been there all evening.

3 **Q.** At Loud Hawk's house?

4 **A.** Yes.

5 **Q.** Okay.

6 Let me ask you, when you go into Loud Hawk's
7 house, you see Leonard Peltier, Dennis Banks, and Anna
8 Mae Aquash in a room, correct?

9 **A.** Right.

10 **Q.** And they are making bombs, correct?

11 **A.** Right.

12 **Q.** All right.

13 And you haven't seen your common-law husband
14 in about six weeks by this point have you?

15 **A.** Maybe six weeks or longer.

16 **Q.** Or longer.

17 And one of your first reactions was you said
18 you wondered why was she there meaning Anna, correct?

19 **A.** I wondered why she was there because she
20 never came around when I was around before.

21 **Q.** Okay.

22 **A.** She didn't -- because she knew that I knew of
23 her relationship with him and so she did not come
24 around basically just to rub it in my face or
25 whatever. She didn't do that. So I was surprised

1 when I walked in because she was there. So I was
2 there wondering why she was there because she wouldn't
3 have done that otherwise.

4 Q. But she was there first, right?

5 She got there first?

6 A. She was -- yeah, she was -- when we came to
7 the house they were there.

8 Q. They were already there and they were making
9 bombs?

10 A. Right.

11 Q. And bomb making is a dangerous activity,
12 isn't it?

13 A. It is.

14 Q. In fact, didn't Dennis get his arm hurt
15 pretty substantially making a bomb or with something
16 to do with a bomb at one point?

17 A. No.

18 Q. Didn't he hurt his arm?

19 A. No.

20 Q. Okay.

21 In any regard, you see her there, you see
22 them there, they are together making bombs.

23 And that's kind of unusual for a woman to be
24 involved in making bombs, isn't it, with an AIM?

25 A. Not back then.

1 **Q.** Not back then.

2 So that was kind of what was going on at the
3 time?

4 **A.** Right.

5 **Q.** And you don't just trust anybody to make
6 bombs, do you?

7 **A.** I don't think so.

8 **Q.** No. Because things could go wrong, right?

9 **A.** Right.

10 **Q.** And you know Anna had previous explosive
11 experience because she was caught with dynamite and
12 other explosives at Al Runnings, right?

13 **A.** Well, I knew that there were guns at Al
14 Runnings'. Was there dynamite, I have no idea about
15 that.

16 **Q.** Okay.

17 If we hear about that later or something you
18 are not going to dispute whether there was explosives?

19 **A.** I don't know exactly what was found at Al
20 Runnings'.

21 **Q.** Okay.

22 And you don't know what Dennis had been doing
23 the previous six or seven weeks or what Anna had been
24 doing the previous six or seven weeks?

25 **A.** No.

1 Q. Okay.

2 Now you've testified before that you thought
3 the reason Anna Mae was in there making bombs was
4 because they wanted to get her fingerprints on the
5 bombs, correct?

6 A. That's right.

7 Q. Your theory has been that she was suspected
8 of being an AIM informant so these AIM leaders brought
9 her into the bomb making process and put her
10 fingerprints on things, correct?

11 A. I believe so.

12 Q. At this point Leonard Peltier is wanted for
13 the murder of two FBI agents, correct?

14 A. Yes.

15 Q. And at this point, Dennis has become a
16 fugitive because he refused to go to his sentencing
17 for one of the courthouse riot cases, correct?

18 A. Right.

19 Q. So these are two highly wanted guys. I mean
20 the FBI is looking for these guys everywhere?

21 A. Yes.

22 Q. And you don't see them wearing latex gloves
23 or anything to prevent their fingerprints from being
24 on the bombs, do you?

25 A. I don't remember any gloves.

1 Q. Okay.

2 Well, you have testified about this a number
3 of times before. You would have mentioned gloves if
4 you recalled them, right?

5 A. Right.

6 Q. And your theory is that they wanted her
7 fingerprints on the bomb or on the bombs so if the
8 bombs were discovered, she would be implicated?

9 A. Yes.

10 Q. But if she's an FBI informant, then she's
11 going to already be acknowledging that she was present
12 when the bombs were made, right?

13 A. But she wasn't an FBI informant.

14 Q. But you said that the reason why she were
15 having her make the bombs was because they suspected
16 her of being an informant?

17 A. They didn't trust her.

18 Q. They didn't trust her so they invited her
19 over to Kenny Loud Hawk's house while they are highly
20 wanted fugitives to make bombs with them?

21 A. Right.

22 Q. Okay.

23 So they basically have invited the fox into
24 the hen house, right?

25 A. I guess that's a close analogy.

1 **Q.** You don't see anybody guarding her at this
2 point?

3 **A.** Well, no there was nobody standing there.

4 **Q.** Okay.

5 Let me ask you if she was an FBI informant
6 like you say they suspected, and she were to tell the
7 FBI they were making bombs, her fingerprints on the
8 bombs would be the best proof possible that she
9 actually saw what she said she saw, wouldn't it?

10 **A.** Probably.

11 **Q.** So the whole fingerprints on the bombs
12 theory, that's something you just created and
13 testified about at previous hearings?

14 **A.** Well, they asked why I thought that she had
15 done it.

16 **Q.** Leonard never told you that, Dennis never
17 told you that, Anna never told you, did they?

18 **A.** No.

19 **Q.** In fact, nobody said anything while you are
20 there at Loud Hawk's house about making sure her
21 fingerprints are on the bombs?

22 **A.** No.

23 **Q.** The next day is the day of the bombings, do
24 you recall that day?

25 **A.** Yes.

1 **Q.** You and Anna, Dennis, Leonard and some other
2 people go out and plant these bombs around various
3 places, correct?

4 **A.** Dennis and Leonard -- I am sorry. Dennis and
5 Leonard and Annie Mae, they got out of the car.

6 **Q.** You stayed in the car?

7 **A.** Yes.

8 **Q.** They went out and planted the bombs like at
9 the power plant, do you remember that?

10 **A.** Yes.

11 **Q.** Where else did they plant the bombs?

12 **A.** I remember that one. I don't remember where
13 else.

14 **Q.** So in any regard, now we're a day after the
15 bomb making, and this woman that you say they
16 suspected of being an informant is invited to get into
17 a car with them while they are fugitives, while they
18 are the subject of a massive man hunt, and drive
19 around in various locations and plant bombs together,
20 correct?

21 **A.** Yes.

22 **Q.** They don't shun her and leave her at some
23 location to be far away from them. They actually have
24 her in the car with them at this point?

25 **A.** That's correct.

1 Q. And she is not tied up during this point?

2 A. No.

3 Q. You don't hear anybody say guard her?

4 A. No.

5 Q. Essentially, free to come and go with these
6 guys as she wants?

7 A. Um --

8 Q. Nobody is forcing her and nobody is forcing a
9 gun on her saying get out and plant these bombs?

10 She was a willing participant?

11 A. She was with us.

12 Q. Yes.

13 And she wasn't being forced to do it?

14 A. No.

15 Q. Again, going back to this theory that
16 starting in June in Farmington and continuing forward,
17 Anna Mae Aquash is suspected by these AIM leaders as
18 being an informant, and there is grave concern about
19 that. She's at Al Runnings' house with explosives,
20 she's making bombs at Kenny Loud Hawk's house, she's
21 now planting bombs and driving around with the guys,
22 correct?

23 A. That's right.

24 Q. Okay.

25 Now, the motor home trip. The motor home

1 trips starts basically right after the bombs are
2 planted, correct?

3 A. Yes.

4 Q. You guys have this motor home that Marlin
5 Brando had donated to you.

6 A. I just know it belonged to him. I wasn't
7 there when they had acquired the motor home. I am not
8 sure how that came about.

9 Q. You had met Marlin Brando before, hadn't you?

10 A. I did.

11 Q. Was that part of being affiliated with
12 Dennis. You went out to California and stayed at his
13 house, correct?

14 A. When the trial -- we had stayed at his house
15 when all of that had already happened.

16 Q. You stayed at his house in 1974, correct?

17 A. My daughter was maybe eight months old when I
18 stayed at his house, and she was born in 1974.

19 Q. Okay.

20 A. So it was actually -- it was after Dennis's
21 trial, I believe --

22 Q. Okay.

23 A. -- was over in St. Paul that I had stayed at
24 his house. We visited. We didn't live there and stay
25 there for any length of time.

1 Q. Okay.

2 So whether it's 1974 or 75, you had met
3 Marlin Brando?

4 You were out in California, correct?

5 A. Yes.

6 Q. And somehow somebody gets a motor home from
7 him and you and -- would you please rename all the
8 people that were in the motor home?

9 A. Dennis Banks, Kenny Loud Hawk, my sister
10 Bernadine Nichols, Leonard Peltier, Annie Mae, Dave
11 Hill, and myself.

12 Q. Okay.

13 A pretty select group of AIM people at this
14 point, fair?

15 And you got some of the leaders of AIM, the
16 founding leader of AIM, correct?

17 A. Yes.

18 Q. We have Kenny Loud Hawk who had gone
19 through -- ultimately went through a massive trial
20 regarding his involvement in AIM activities, correct?

21 A. No. The charges were dropped against Kenny
22 also. He never went to trial.

23 Q. After years, though, right?

24 A. Yes.

25 Q. He was litigating his case for many, many,

1 many years?

2 A. Yes.

3 Q. A book was written by Loud Hawk ultimately?

4 A. Yes.

5 Q. And then you are the common-law wife of one
6 of the founders?

7 A. Yes.

8 Q. Anna Mae is somebody who has been involved in
9 high level AIM activity since at least 73, correct?

10 A. Right.

11 Q. Not anybody was invited to be on this motor
12 home trip, were they?

13 A. I don't think there was -- we just happened
14 to be together. There was no occasion to invite other
15 people along. It wasn't a vacation where we were
16 taking people, inviting other people along.

17 Q. Sure.

18 Well, Anna Mae or Annie Mae -- she's listed
19 on the indictment as Anna Mae but you call her Annie
20 Mae was that the --

21 A. Yes, I have always called her Annie Mae.

22 Q. Okay.

23 And Annie Mae had been invited somehow to get
24 to Loud Hawk's house?

25 A. Right.

1 Q. And she was invited along on the bombings?

2 A. Yes.

3 Q. As were you?

4 A. Yes.

5 Q. And you guys all end up in the vehicle and
6 you said this wasn't a vacation. That's a pretty --
7 that's an understatement, I guess, I would say.

8 A. That's right.

9 Q. At this point, the pressure to find Leonard
10 Peltier is enormous, is it not?

11 A. I assume so.

12 Q. But he's --

13 A. He was being looked for.

14 Q. He was probably the most wanted man in the
15 United States from the FBI's perspective, correct?

16 A. Probably.

17 Q. Yeah.

18 And Dennis is a federal fugitive who was
19 closely affiliated with Leonard Peltier?

20 A. Yes.

21 Q. And Anna Mae is somebody who is an AIM
22 activist who is now a fugitive from her charges in
23 Pierre, correct?

24 A. Right.

25 Q. So it's pretty important that you guys don't

1 get caught, right?

2 **A.** Right.

3 **Q.** That could mean ruin for Anna Mae, Dennis,
4 and Leonard, correct?

5 **A.** Right.

6 **Q.** Could also mean problems for you because you
7 would have been harboring or assisting fugitives,
8 correct?

9 **A.** Probably.

10 **Q.** And you've got charged still pending in
11 Kansas, right?

12 **A.** In November I did.

13 **Q.** Yeah.

14 In November you still had your federal
15 charges down there for the explosives?

16 **A.** From September when our car blew up, yes.

17 **Q.** Same with Bernie?

18 **A.** Right. Bernie wasn't with us in the motor
19 home when it got stopped.

20 **Q.** I'll get to that. I am just talking about as
21 you leave.

22 Bernie was in the motor home?

23 **A.** When we left South Dakota.

24 **Q.** When you started your trip out west?

25 **A.** Yes.

1 **Q.** And you had your daughter and she was
2 pregnant?

3 **A.** Was by herself.

4 **Q.** Bernie was by herself?

5 **A.** Yes.

6 **Q.** All right.

7 Now, in the motor home, it's not just you --
8 this group of AIM leaders and fugitives, there is also
9 dynamite, grenades, and weapons, correct?

10 **A.** Yes.

11 **Q.** There is timers, hollowed out watches, light
12 bulbs that are set up as timers and other devices,
13 correct?

14 **A.** Correct.

15 **Q.** There is also one of the guns that had been
16 taken off of one of the murdered FBI agents, correct?

17 **A.** I learned that some years later.

18 **Q.** Okay.

19 So this motor home is filled with highly
20 wanted federal fugitives and evidence of a host of new
21 potential federal crimes, correct?

22 **A.** Yes.

23 **Q.** Yes. You just can't drive around with
24 dynamite, grenades, and timing devices, can you?

25 **A.** No.

1 **Q.** Okay.

2 During the trip you go from -- where do you
3 start your trip, Nebraska?

4 **A.** Chadron, Nebraska.

5 **Q.** And you end up going to a place in Washington
6 State called Chiquiti's.

7 Am I pronouncing it right?

8 **A.** John Chiquiti.

9 It was his residence where we had stayed.

10 **Q.** And do you happen to know, just for Tina's
11 purposes, how to spell his name?

12 **A.** I think it's C-H-I-Q-U-I-T-I.

13 **Q.** And Mr. Chiquiti lives out on a --

14 **A.** Chiquiti.

15 **Q.** -- lives out on a reservation somewhere in
16 Washington State, correct?

17 **A.** Right.

18 **Q.** It's a remote area?

19 **A.** Yes.

20 **Q.** And you guys are heading out there to hide
21 out, correct?

22 **A.** Yes.

23 **Q.** Because you were under the understanding that
24 that would be a safe place for -- at least for a while
25 for Leonard and Dennis and Anna to stay?

1 **A.** Well, we went -- I didn't know where we were
2 going. That's where we ended up. So why we are there
3 I am assuming it was because it was a remote area.

4 **Q.** All right.

5 You get -- on the trip out there, takes a
6 number of days to get out there, correct?

7 **A.** It took us a couple days.

8 **Q.** Because there was some bad weather and some
9 other things?

10 **A.** Right.

11 **Q.** During the time period that you are driving
12 out, you stop at gas stations, correct?

13 **A.** Yeah.

14 **Q.** And you stop along the way and you do some
15 shopping at a thrift store like a Salvation Army?

16 **A.** No.

17 **Q.** You don't remember your sister Bernie telling
18 you about getting some clothing and --

19 **A.** That happened when we were already in
20 Washington State.

21 **Q.** Okay. I stand corrected.

22 So in Washington state, you went to stores,
23 correct?

24 **A.** Her and Annie Mae did with Leonard.

25 **Q.** All right.

1 At no time from when you left Chadron to when
2 you got to Mr. Chiquiti's, did you ever see Anna Mae
3 tied up?

4 **A.** No.

5 **Q.** She was not being guarded?

6 **A.** No.

7 **Q.** You never heard anybody say keep an eye out
8 on her?

9 **A.** No.

10 **Q.** You were never given instructions as to what
11 to do if she was to start talking to a gas station
12 attendant or a clerk at a store?

13 **A.** No.

14 **Q.** She was let into stores and gas stations?

15 **A.** I am assuming so. I don't remember stopping
16 at gas stations and getting out.

17 **Q.** Do you remember that she went shopping with
18 Bernie and Leonard at some point in Washington state?

19 **A.** Yes.

20 **Q.** And nobody was told what to do if she starts
21 talking to the authorities or anything like that,
22 correct?

23 **A.** No.

24 **Q.** All right.

25 But you've told a number of juries and Grand

1 Jurors that your theory is that the reason Anna Mae
2 Aquash was brought on this trip is because they wanted
3 to keep an eye on her, right?

4 A. I never testified at a Grand Jury.

5 Q. Okay. I am sorry.

6 An actual jury trial. You have testified at
7 two of those before?

8 A. Yes.

9 Q. And you told those juries the reason Anna Mae
10 was brought along is she was a suspected informant and
11 they wanted to keep an eye on her?

12 A. Yes, I believe that.

13 Q. Okay.

14 But you didn't hear anybody say anything like
15 that?

16 A. When we were in the motor home --

17 Q. Well, I asked you the questions before.

18 Nobody ever said we're bringing her here --

19 A. No.

20 Q. -- because she's an informant?

21 A. No.

22 Q. And nobody ever said anything about guarding
23 her?

24 A. No.

25 Q. Nobody ever said anything about not letting

1 her talk to other people, right?

2 **A.** No, they never said that.

3 **Q.** All right.

4 So again, kind of like your fingerprints on
5 the bomb theory, you got two highly wanted fugitives,
6 Leonard and Dennis, in a motor home full of illegal
7 explosives, and what you learn later, the weapon of
8 one of the dead FBI agents, and you would agree that's
9 probably about one of the most incriminating evidence
10 that somebody could get caught with?

11 **A.** Right.

12 **Q.** And rather than leave Anna Mae in Pine Ridge
13 or Chadron or wherever she was beforehand, they
14 decided to bring her along to keep an eye on her?

15 That's your theory?

16 **A.** That's what I believe, yes.

17 **Q.** Okay.

18 And this makes sense to you because she would
19 be less -- scratch that. I will withdraw that.

20 These guys, Dennis and Leonard, have evaded
21 capture now for five months, correct?

22 **A.** Well, Leonard because they were looking for
23 him since June; and Dennis since August.

24 **Q.** August --

25 **A.** Or September. Sorry.

1 **Q.** So three to five months they have evaded the
2 authorities, right?

3 **A.** Yes.

4 **Q.** And they have done this despite a massive
5 infusion of FBI resources trying to find out where
6 they are at, right?

7 **A.** Right.

8 **Q.** And yet these are the same guys that decide
9 to bring along with them a suspected informant as they
10 go from one place to presumably a safe place to hide
11 further?

12 That's what your theory is?

13 **A.** Yes.

14 **Q.** Okay.

15 In fact, you learned that during the time
16 period that y'all are in Washington, Bernie and Annie
17 and Leonard also go actually into the town of Seattle,
18 correct?

19 **A.** Yes.

20 **Q.** And Leonard goes off with another woman at
21 that point in time and Bernie and Annie are left
22 alone?

23 **A.** They were actually all in the same house.
24 They never went separately.

25 **Q.** Mr. Peltier went into a bedroom with the

1 other woman, correct?

2 **A.** That's what my sister said.

3 **Q.** Yeah. And your sister wasn't somebody who
4 was guarding Annie Mae, was she?

5 **A.** No.

6 **Q.** So now Leonard Peltier, one of the most
7 wanted men in the country, leaves Annie Mae and your
8 sister in a separate bedroom in a town of a million
9 people or so, right?

10 **A.** Right.

11 **Q.** Even though he suspects she's the informant
12 that's working for the federal government?

13 **A.** Right.

14 **Q.** Okay.

15 Nothing in the world to prevent her from
16 walking out that apartment, knocking on a door, going
17 to the police, saying I got your man, was there?

18 **A.** No.

19 **Q.** Okay.

20 And it's on this trip where Leonard Peltier,
21 who believes according to you that Anna Mae is an
22 informant, deciding to spontaneously get up in front
23 of her and confess to executing in cold blood the FBI
24 agent, correct?

25 **A.** Right.

1 **Q.** Yet, from the point of that confession
2 forward he does not say, well, now she knows what I
3 did, lock her up, does he?

4 **A.** No.

5 **Q.** And he doesn't have somebody standing guard
6 on her 24/7?

7 **A.** No.

8 **Q.** And you get out to Chiquiti's out there in
9 the middle of nowhere in Washington and he doesn't
10 himself or through somebody else take her out into the
11 woods and kill her now that he knows that she know he
12 was the guy who killed the FBI agents, does he?

13 **A.** No.

14 **Q.** Absolutely nothing like that -- no discussion
15 like that that now she knows I killed the FBI agents
16 so we must do something with her?

17 **A.** No.

18 **Q.** This whole issue about this grand confession
19 by Peltier --

20 You began your first discussions with the FBI
21 in the summer of 2000, correct?

22 **A.** Yes.

23 **Q.** And you broke up with Dennis Banks in 1989?

24 **A.** Yes.

25 **Q.** And you testified earlier that you began to

1 suspect he had some inside knowledge of her death way
2 back in 1976, correct?

3 A. Because he's the one who called me and told
4 me about her dying.

5 Q. Right. Okay.

6 So 76 you have -- a red flag is raised.
7 Would that be -- a concern is raised in your mind?

8 A. Right.

9 Q. And in 1989 you break it off with him,
10 correct?

11 A. Right.

12 Q. You don't tell the authorities about
13 Peltier's confession in 1989, 90, or in any year up
14 until the end of 2000, correct?

15 A. No. He was already doing life.

16 Q. Dennis?

17 A. No.

18 Q. Or Peltier?

19 A. Peltier had already been convicted.

20 Q. Well, whether he had been convicted or not,
21 this information had never gone to a trial or anything
22 else like that?

23 A. No.

24 Q. You were one of the only people in the world
25 who supposedly knows this, right?

1 **A.** Yes.

2 **Q.** Peltier has gone up for parole on a number of
3 occasions between his life conviction and 2000 when
4 you met the FBI, right?

5 **A.** Right.

6 **Q.** You have no allegiance to Dennis Banks from
7 1989 forward, do you?

8 **A.** No.

9 **Q.** You meet with the FBI in July and August of
10 2000, correct?

11 **A.** Right.

12 **Q.** You don't tell them this tidbit of
13 information until December of 2000, correct?

14 **A.** I don't remember exactly when I told him.

15 **Q.** Okay.

16 You didn't tell it to them at your first
17 meeting?

18 **A.** No.

19 **Q.** Your second meeting?

20 **A.** No.

21 **Q.** Same thing with the issue about knowing or
22 believing that Dennis Banks had prior knowledge, you
23 don't tell the FBI that at your first several
24 meetings, do you?

25 **A.** I don't remember when I told them.

1 Q. Okay.

2 And between 1989 and 2000, you didn't tell
3 the authorities that, did you?

4 A. No.

5 Q. During that all of this period of time you
6 are aware through the grapevine that Anna Mae Aquash's
7 death is being investigated by federal authorities,
8 right?

9 A. Right.

10 Q. You heard when Grand Jurors were being
11 convened and witnesses were being called and whatnot,
12 right?

13 A. No.

14 Q. You didn't hear any talk in the community?

15 A. I did not -- I did not live around here. I
16 didn't -- years and years later I heard that there had
17 been a couple of Grand Juries. I didn't visit people
18 around here. I didn't know what was going on.

19 Q. You knew it was actively being investigated
20 by the FBI from the time of her death on?

21 A. Honestly, I didn't know what was going on.

22 Q. You didn't have any contact with anybody who
23 talked about the investigative efforts?

24 A. No. I don't remember ever having a personal
25 conversation with anybody saying that they went to a

1 Grand Jury --

2 Q. I am not talking just about Grand Juries.

3 I mean, you knew that was a case of an
4 unsolved murder that somebody was investigating?

5 A. Yes.

6 Q. And you didn't tell them about the Peltier
7 confession or your suspicions about Dennis, did you?

8 A. No.

9 Q. Not until 2000 when you start working with
10 the FBI or when you start talking to the FBI?

11 A. Right.

12 Q. All right.

13 Now, I want to talk to you about something
14 you mentioned earlier that at a period of time when
15 you are out in Washington state, you and Bernie
16 actually left, correct?

17 A. Right.

18 Q. You flew back to Kansas or Oklahoma?

19 A. Well, we had a court hearing in Kansas.

20 Q. Okay.

21 A. I don't remember if we flew to Kansas or
22 Oklahoma.

23 Q. Okay.

24 You go back for your court appearance and
25 that's regarding the car explosion, right?

1 **A.** Right.

2 **Q.** And how long are you gone, two or three days?

3 **A.** A short time.

4 **Q.** Do you recall how many nights you might have
5 spent there?

6 **A.** I would say it wasn't more than a week,
7 maybe.

8 **Q.** Okay.

9 **A.** Member a few days.

10 **Q.** Okay.

11 You end up flying back to Washington?

12 **A.** Yes.

13 **Q.** And you rejoin Dennis, Leonard, Annie, all
14 those people?

15 **A.** Yes.

16 **Q.** Bernie doesn't decide to come back?

17 **A.** Huh-uh. She stayed.

18 **Q.** Now, after you leave Washington State, you
19 guys get into the motor home and you start driving.
20 You end up in Oregon.

21 You remember that?

22 **A.** Yes. We were driving south.

23 **Q.** Do you know where you were supposed to go?

24 **A.** Honestly, no. We were -- they didn't tell me
25 where we were going. We were just going.

1 **Q.** That was kind of the way things worked is
2 pretty much everybody was on a need-to-know basis?

3 **A.** I didn't need to know. I mean, I was just
4 there.

5 **Q.** You were just there, and these guys were
6 wanted felons?

7 **A.** Right.

8 **Q.** Or wanted fugitives, I should say.

9 So they are not going to communicate a lot of
10 information?

11 **A.** No. They didn't say we were going to a
12 certain spot for a certain reason.

13 **Q.** Okay.

14 Because that might put them in peril down the
15 line?

16 **A.** I don't know.

17 **Q.** Isn't that what you suspect that if everybody
18 has a lot of information as to the destination, that
19 information could get out to the authorities?

20 **A.** It's possible.

21 **Q.** All right.

22 But yet Leonard Peltier in front of a
23 suspected informant confesses to killing an FBI agent?

24 **A.** He did.

25 **Q.** Okay.

1 Because he suspected she was an informant?

2 **A.** He did think that she was an informant.

3 **Q.** And that's -- that explains why he would
4 confess --

5 **A.** I don't know why he did it in front of her.

6 **Q.** In any regard, you get to Oregon, you are
7 heading south. The Oregon Highway Patrol pulls you
8 over or pulls the motor home over?

9 **A.** Yes.

10 **Q.** A shoot-out occurs, correct?

11 **A.** Yes.

12 **Q.** And you are arrested? Anna Mae is arrested?

13 **A.** Yes.

14 **Q.** Leonard and Dennis both escape?

15 **A.** Yes.

16 **Q.** You are now charged with a slew of new
17 federal charges in Oregon, correct?

18 **A.** Right.

19 **Q.** Possession of explosives, including grenades
20 and dynamite, correct?

21 **A.** Right.

22 **Q.** Possession of a weapons with obliterated
23 serial numbers?

24 **A.** Yes.

25 **Q.** In total you are facing 80 years of federal

1 charges in Oregon, correct?

2 A. I don't remember.

3 Q. Does that sound about right from what you
4 previously markedly testified to?

5 A. Probably.

6 Q. Annie Mae is facing the same charges,
7 correct?

8 A. Yes. We were arrested together, yes.

9 Q. And who else was arrested?

10 Was it Mr. Redner?

11 A. Russ Redner and Kenny Loud Hawk.

12 Q. So the four of you are charged with,
13 basically, all the stuff that's found in the motor
14 home?

15 A. Right.

16 Q. All right.

17 And when you are in jail, at some point, you
18 are taken into jail, into Oregon, and then are you
19 transferred back to Kansas or Oklahoma?

20 A. To Kansas.

21 Q. To Kansas. Okay.

22 And during that time period you and
23 Mr. Loudner and -- or Mr. Redner and Mr. Loud Hawk and
24 Ms. Aquash are given some discovery. That's legal
25 documents, correct?

1 You are given information about your case
2 from your attorneys?

3 **A.** Well, that was the very initial stages of
4 being charged. We hadn't really began any court
5 proceedings as far as going to trial or anything at
6 that time.

7 **Q.** Okay. Let me be more specific. That was
8 probably too broad.

9 You are told that the reason the motor home
10 is pulled over, the reason that motor home was
11 targeted, was there were two informants listed as
12 informant A and B who had given the authorities
13 detailed information about the motor home and who was
14 inside it, correct?

15 **A.** Correct.

16 **Q.** You find that out while you are in jail,
17 correct?

18 **A.** Yes.

19 **Q.** And this immediately raises all sorts of
20 concern as to who informant A and B are, correct?

21 **A.** I -- we were -- I don't know. I mean --

22 **Q.** Would it help to refresh your recollection
23 with what you testified to previously?

24 **A.** Sure.

25 **Q.** Okay.

1 At the time the disclosures are made about
2 informants A or B it's clear that it couldn't have
3 been Annie Mae?

4 **A.** That's correct.

5 **Q.** She had been in the motor home throughout the
6 entire course of events.?

7 **A.** Yes.

8 **Q.** The only two people that were arrested who
9 had flown out of the motor home group was you and
10 Bernie, correct?

11 **A.** That's right.

12 **Q.** And immediately suspicions started to gather
13 that it was you and Bernie who were informants A and
14 B, correct?

15 **A.** Never to my knowledge. I never heard that
16 before.

17 **Q.** Nobody has ever told you that suspicions
18 started going on you?

19 **A.** No.

20 **Q.** And you weren't told or didn't hear through
21 the rumor mill that because of your anger at Dennis
22 because of his affair with Annie Mae, and whatnot,
23 that you had talked to authorities back when you went
24 to your court hearing in Kansas?

25 **MR. JACKLEY:** Your Honor, I am going to

1 object to the and whatnot.

2 **THE COURT:** I think she can answer.

3 **A.** I never heard that before today.

4 **Q.** **(BY MR. MURPHY)** Well, you didn't have an
5 alibi, Annie Mae did, right?

6 **A.** An alibi to what?

7 **Q.** She was in the motor home throughout. You
8 were gone, right?

9 **A.** Yeah.

10 **Q.** Bernie was gone?

11 **A.** Right.

12 **Q.** You were in the federal system down in Kansas
13 on serious charges, right?

14 **A.** Yes.

15 **Q.** You're a young mother with one on the way,
16 right?

17 **A.** Right.

18 **Q.** You have all right of reasons to make a deal,
19 don't you?

20 **A.** No. I had no reason to make a deal.

21 **Q.** Well, you were facing huge time down there in
22 Kansas and you are facing now huge time in Oregon,
23 correct?

24 **A.** Yes.

25 **Q.** And there is all sorts of things that you

1 could have been charged with, but you weren't, like,
2 hiding fugitives such as Dennis and Leonard, right?

3 **A.** I had a lot of charges, but that wasn't one
4 of them.

5 **Q.** So ultimately the charges in Oregon are
6 dismissed against you?

7 **A.** Yes.

8 **Q.** You get three years of probation for the
9 Kansas City explosive case?

10 **A.** Yes.

11 **Q.** You are never charged at Wounded Knee?

12 **A.** No.

13 **Q.** You are not arrested at Jumping Bull because
14 you had been gone that morning?

15 **A.** Yes. I wasn't there.

16 **Q.** Okay.

17 And you had been at Al Runnings' and Crow
18 Dog's, but you weren't there the day the raid was
19 conducted, correct?

20 **A.** I wasn't staying there.

21 **Q.** Okay.

22 **A.** So I wasn't --

23 **Q.** You were in and out during that period of
24 time?

25 **A.** Right.

1 Q. And now, today -- and it's in recent years --
2 you've testified that Leonard Peltier confessed to the
3 execution of the FBI agents and that your husband had
4 prior knowledge of Anna Mae's death, correct?

5 A. Right.

6 Q. That's what's come out since 2000, right?

7 A. Right.

8 Q. I want to talk to you about the assistance
9 you have given the government in the prosecution of
10 this case and other cases.

11 You did some interviews with various people
12 associated with the case, correct?

13 A. That's correct.

14 Q. How many people in total do you think you
15 interviewed?

16 A. Ten, maybe. I'm not absolutely sure.

17 Q. It's a number close there to.

18 A. Okay.

19 Q. I mean -- let me ask you this.

20 The years that you were involved in regarding
21 interviews was between 2001 or late 2000 about 2003;
22 is that correct?

23 A. Yes. I think so.

24 Q. Okay.

25 And on December 16, 2000, you did an

1 interview with Arlo Looking Cloud, correct?

2 A. That's right.

3 Q. You picked him up at the jail in Denver?

4 A. Yes.

5 Q. And you interviewed him with Troy Lynn Yellow
6 Wood?

7 A. Yes.

8 Q. And I guess I want to ask you first before we
9 get into that about that interview with Troy Lynn and
10 Arlo, do you recall about how many hours it took?

11 A. When they were together?

12 Q. When you and Arlo and Troy Lynn were
13 together.

14 A. Three.

15 Q. Okay.

16 Would it be a surprise to you if it filled up
17 nine cassette tapes, the duration of that interview?

18 A. Would it surprise me?

19 Q. Yeah.

20 A. No.

21 Q. Okay.

22 Two hundred fifty-seven page single-spaced
23 transcript.

24 Would that surprise you?

25 A. No.

1 Q. And at another occasion you interviewed just
2 Troy Lynn by herself, correct?

3 A. That's right.

4 Q. And that filled ten cassettes?

5 A. I don't know how many it made. It was a long
6 conversation.

7 Q. Sure.

8 Do these appear to be the ten cassettes of
9 Troy Lynn's interview with you?

10 A. I have never seen them before.

11 Q. Oh, you haven't?

12 A. No.

13 Q. Who kept the cassettes for you, the FBI or --

14 A. I never had those cassettes.

15 Q. Because you were wearing a wire at that
16 point?

17 A. That's right.

18 Q. Same thing with Arlo?

19 A. Right.

20 Q. In any regard, you had a lengthy conversation
21 with Ms. Yellow Wood?

22 A. Yes.

23 Q. She wasn't reluctant to share information
24 with you?

25 A. She wasn't reluctant?

1 Q. Yeah.

2 A. She was not reluctant.

3 Q. And that was in 2000, correct?

4 A. Right.

5 Q. When you interviewed her, she never told you
6 that Anna said to her, if you let them take me out of
7 this place, you'll never see me alive, did she?

8 A. I don't remember if that was -- I talked to
9 her for about eight hours.

10 Q. Right.

11 A. I don't remember -- she told me a lot of
12 stuff.

13 Q. Okay. That's fair enough.

14 Let's go back to the interview you had with
15 Mr. Looking Cloud. December 16, 2000. You pick him
16 up at the jail. He tells you right off the bat that
17 his head is foggy based on pills they gave him in
18 jail?

19 A. He said something to that effect.

20 Q. Okay.

21 And you know at this point Mr. Looking Cloud
22 is more or less an intoxicated -- a street person, a
23 drunk, a drug addict, at that point?

24 A. That was the first time I saw Arlo.

25 Q. But you had a gathered information about him?

1 A. Right.

2 Q. You knew he had substance abuse problems?

3 A. Right.

4 Q. During the course of that interview isn't it
5 true that he asks you, quote, how many people should I
6 implicate, and you answer him, only John Boy.

7 Do you recall that exchange?

8 A. I recall that exchange after hours of
9 conversation with him.

10 Q. Okay.

11 You told Mr. Looking Cloud, a man whose brain
12 has been affected by alcohol and drug usage, when he
13 asks you the direct question, how many people should I
14 implicate, you tell him directly, only John Boy?

15 A. Up to that point my knowledge was it was John
16 Boy so he had already -- Arlo had already said at that
17 point that he was afraid of all the other leaders.

18 Q. Ma'am, I am asking you what your direct
19 information was to Arlo Looking Cloud on December 16?

20 **MR. JACKLEY:** Your Honor, I am going to
21 object. I think the witness should be able to answer
22 the question as opposed to without interruption.

23 **THE COURT:** Overruled. It's
24 cross-examination. Mr. Murphy is entitled to an
25 answer to his questions.

1 **Q.** **(BY MR. MURPHY)** After you tell him, only John
2 Boy, he asks you again, only John Boy. And at that
3 point Troy Lynn Yellow Wood says, back at John Boy?

4 **A.** Yes.

5 **Q.** You then tell Mr. Looking Cloud, cuz it's
6 come down pretty much to, a, like your word against
7 his, you know.

8 You told him that?

9 **A.** Yes.

10 **Q.** So you tell Mr. Looking Cloud, essentially,
11 how to start preparing a defense?

12 **A.** No.

13 **Q.** At a later point in the interview, after
14 Mr. Looking Cloud leaves the car, Serle Chapman gets
15 in, does he not?

16 **A.** Yes.

17 **Q.** And he tells you that the police officers who
18 are listening in on the wire didn't get to hear or he
19 thought they might not have been able to hear what was
20 being said.

21 Do you recall that?

22 **A.** I think so.

23 **Q.** He told you how to relay your story. How to
24 puff up your story to the police if they couldn't have
25 heard the recording; isn't that true?

1 **A.** I don't know.

2 Is that what that says?

3 **Q.** Do you recall Mr. Chapman saying, quote,
4 because I think these guys are having trouble hearing
5 him, him being Arlo, so here is my advice. You need
6 to be very very positive when you go in and say he
7 went through it. He put himself there. Said he was,
8 you know, he, John Boy, shot her.

9 Do you recall that?

10 **A.** Yes.

11 **Q.** Okay.

12 So you tell Mr. Looking Cloud to implicate
13 John Boy, meaning my client, John Graham, and
14 Mr. Chapman tells you how to very very positively put
15 forth the story when you relay it to law enforcement,
16 correct?

17 **A.** Right.

18 **Q.** In fact, you know Mr. Chapman has later
19 claimed that he delivered you to the FBI; isn't that
20 fair?

21 **A.** No.

22 **Q.** You weren't aware of that?

23 **A.** No. I never heard that before.

24 **Q.** Okay.

25 Would you doubt it if it was in reports or

1 letters from Mr. Chapman?

2 **A.** I went to the FBI. Nobody took me. I -- it
3 was my choice.

4 **Q.** Okay.

5 So if Mr. Chapman is to claim at a later
6 point that he delivered you to the FBI, he would be
7 overstating his role?

8 **A.** It was my choice to go to the FBI.

9 **Q.** Okay.

10 I want to talk to you now about the issue
11 that's come up a couple times in our discussion. I've
12 used the term that you worked for the FBI and you said
13 you didn't work for them?

14 **A.** Right.

15 **Q.** But you got paid \$49,083.44 for your
16 cooperation with them?

17 **A.** I got reimbursed.

18 **Q.** Okay. Let's talk about that.

19 **A.** Okay.

20 **Q.** Now, you are not disputing that they gave
21 you -- the money paid to you was \$49,083.44?

22 **A.** No.

23 **Q.** And you indicated you did interviews starting
24 late 2000. They ended up about 2003, correct?

25 **A.** I think so.

1 Q. And you did ten interviews plus or minus
2 during that time period?

3 A. That's correct.

4 Q. And because you claimed it as reimbursement,
5 you didn't pay -- have to pay taxes on any of this,
6 did you?

7 A. I don't know. I mean, I filed taxes and if
8 that came into my salary before you used it then my
9 salary at some point was considered taxable. So --

10 Q. So if you are getting --

11 A. That was original money that came to me. The
12 reimbursements. So that came out of my pocket. So I
13 am assuming I paid taxes on those.

14 Q. Well, let me show you. When you would
15 provide receipts to the government, or where you would
16 ask for money, you filled out a form each time,
17 correct?

18 Do you recall these forms?

19 A. Okay. Yes.

20 Q. And they are signed Maverick because that was
21 your code name?

22 A. Right.

23 Q. They would put in the amount they were paying
24 you. So for instance, in this case, they gave you a
25 check for \$17,000?

1 **A.** That wasn't a reimbursement.

2 **Q.** Well --

3 **A.** The small amounts were for reimbursements.

4 **Q.** Let me just take a look at this. I want to
5 make sure that I am showing you the report and that
6 we're stating this accurate.

7 It says that you received from Jeffrey
8 Campbell the total amount zero dollars for services
9 rendered, correct?

10 **A.** Yes.

11 **Q.** And \$17,000 in a cashier's check for
12 expenses, correct?

13 **A.** Right.

14 **Q.** And so -- and then -- pardon me.

15 It gives you a little note down below saying
16 that if you get -- you get money for services, that's
17 taxable, right?

18 **A.** Right.

19 **Q.** Obviously, then, the expenses aren't taxable,
20 right?

21 They are reimbursed expenses in your view,
22 correct?

23 **A.** I guess.

24 **Q.** And when you got a \$25,000 check, from Agent
25 Graf, in 2005, again, that's listed as zero dollars

1 for services. All \$25,000 were for expenses, correct?

2 **A.** Right.

3 **Q.** And again, you are told that you only have to
4 report it as income if it's a service, not an expense,
5 right?

6 **A.** Right. That's what it says.

7 **Q.** You have no recollection now whether you paid
8 any taxes on any of the \$49,000 that they gave you?

9 **A.** I paid taxes and if I paid -- not on the
10 large amounts.

11 But like I said, the smaller amounts were out
12 of my pocket. So that was considered whatever my
13 income had been before that. So that part I would
14 have paid taxes on.

15 **Q.** That's not what I am asking you.

16 I understand you said -- you are saying that,
17 well, you had already paid taxes on the money. And so
18 when you get a hotel room or something like that, they
19 reimburse you, you have already paid taxes on the
20 money?

21 **A.** Right.

22 **Q.** What I am asking you is, the \$49,083.44 that
23 they gave to you, you didn't report this on any of
24 your income tax returns as income, did you?

25 **A.** No.

1 **Q.** So you didn't pay a penny of tax on this
2 \$49,000, correct?

3 **A.** Not on the 25 or whatever the other amount
4 was.

5 **Q.** Well, you didn't pay it on the \$500 checks?
6 You might have already paid taxes on your
7 income, but when you get this \$500 check or an 800 or
8 a 1,200 or a \$1,300 check, you didn't then submit that
9 to the tax man?

10 **A.** No.

11 **Q.** All right.

12 And you said it's reimbursements.

13 Now, we have looked through all of your
14 receipts. We got those. And you provided the FBI a
15 total of \$5,457.07 for receipts for all of this
16 \$49,000?

17 **A.** If that's what it says. I don't remember
18 exactly.

19 **Q.** Okay.

20 So you are not claiming that you provided
21 proof to the government that you were due and owing
22 \$49,000 in reimbursed expenses?

23 **A.** No.

24 **Q.** Okay.

25 Even though when you got that \$17,000 check

1 and when you got that \$25,000 check, you listed them
2 as reimbursable expenses?

3 **A.** Right.

4 **Q.** And so you didn't have to pay taxes on it,
5 right?

6 **A.** Right.

7 **THE COURT:** Pick a convenient point,
8 Mr. Murphy, where to break. It need not be
9 immediately.

10 **MR. MURPHY:** If we could go another ten
11 minutes I think I could wrap it up.

12 **THE COURT:** Okay.

13 **Q. (BY MR. MURPHY)** You claimed on direct that
14 one of the reasons why you needed so much money from
15 the FBI was because Dennis Banks showed up on your
16 door step, right?

17 That was what was you said on direct?

18 **A.** What I said was that they had asked me to
19 move to a secure location.

20 **Q.** Uh-huh.

21 **A.** My daughter came home one night because she
22 was unaware of what was going on at the time. She
23 lived with me. And she -- he was helping her. He was
24 carrying the diaper bag and she was carrying the baby
25 and I opened the door and they were there.

1 **Q.** So because Dennis Banks knew where you lived,
2 now you needed another \$25,000 to relocate?

3 **A.** I didn't ask for it. I called Mark Vocolich
4 (phonetic) and told him that Dennis Banks showed up at
5 my door and he said, then you need to move again.

6 **Q.** So they paid you 17 grand for the first move,
7 25 grand for the second?

8 **A.** He also told he at the time -- he said does
9 he know what kind of car you drive and I said yes. He
10 said you need to get rid of your car.

11 **Q.** Let me ask you, Dennis Banks showing up on
12 your door step, of the ten or so interviews you did,
13 one of them was with Dennis Banks?

14 **A.** Right.

15 We didn't talk about Annie Mae.

16 **Q.** You talked about matters related to this
17 case?

18 **A.** It was a whole different case.

19 **Q.** That was during the time period when you are
20 cooperating with the FBI?

21 **A.** Right.

22 **Q.** And during this entire period of time,
23 including up to weeks ago, your children and Dennis
24 Banks have regular contact?

25 **A.** They do.

1 Q. I mean, they -- your daughter's Facebook
2 pages are --

3 A. They have very close to their father.

4 Q. They are not keeping secrets of their
5 whereabouts because they are showing up at film
6 festivals and marches with him, correct?

7 A. Are you talking about -- well, they are not
8 afraid of their father. My daughter works for her
9 father's organization.

10 Q. Sure.

11 November 13, your daughter Tashina, she's the
12 oldest?

13 A. Right.

14 Q. She's the one who was in the motor home and
15 whatnot?

16 A. Right.

17 Q. She attended the American Indian film
18 festival with Dennis?

19 A. Right.

20 Q. May 8, Dennis suffers a heart attack. Your
21 children collectively release press releases on his
22 behalf, right?

23 A. Yes. Like I said, she's very close to her
24 father.

25 Q. Same with the other children, too?

1 I mean, they have contact with him?

2 A. They do.

3 Q. So you are saying that just because Dennis
4 Banks learned your location, that the FBI just sent
5 you another check for 25 grand and said move?

6 A. No. He learned my location previous to the
7 last ten years whenever all of this had happened.

8 I actually -- my daughter actually asked if I
9 could update and install a security system in our home
10 when we lived in Albuquerque, and that would be
11 Tashina. So that was part of my expense also.

12 It's not her father she was afraid of.

13 Q. You are doing interviews with Dennis Banks in
14 01. The check for 25 grand was January 13, 2004?

15 A. That was after Arlo got indicted, yes.

16 Q. Actually, that was right after Arlo went to
17 trial?

18 A. It is.

19 Q. He was indicted in 2003?

20 A. Yes. In December, I believe.

21 Q. And went to trial 2004?

22 A. Yeah.

23 Q. Just a short time before his trial where you
24 testified about the fingerprint theory and some of the
25 theories you have today, you got that check for 25

1 grand?

2 **A.** Right.

3 **MR. MURPHY:** I have nothing further.

4 Thank you.

5 **THE COURT:** Thank you.

6 We'll be in recess for 15 minutes, folks.

7 Remember, once again, you talk to nobody, you
8 form no opinions.

9 Thank you.

10 (Off the record.)

11 **THE COURT:** I presume we're comfortable with
12 the jury, Mr. Jackley?

13 **MR. JACKLEY:** Yes, Your Honor.

14 **MR. MURPHY:** Yes, Your Honor.

15 **THE COURT:** I think we're ready for your
16 redirect, Mr. Jackley.

17 You are still under oath, ma'am.

18 Please stake take a seat.

19 **REDIRECT EXAMINATION**

20 **BY MR. JACKLEY:**

21 **Q.** Kamook, I want to take you back -- do you
22 recall when you corrected Mr. Murphy about whether or
23 not you were working for the FBI.

24 Do you remember that?

25 **A.** Yes.

1 Q. Were you working for the FBI?

2 A. No.

3 Q. Who were you working for back at that time
4 frame, back in 2000?

5 What were you doing for a living?

6 A. I was a casting director. I worked in the
7 entertainment business.

8 Q. Was that your profession after you had left
9 the days of AIM that we discussed?

10 A. Yes. I did that for 16 years.

11 Q. You and Mr. Murphy spent some time talking
12 about reimbursed expenses.

13 How many times were you required to move
14 because of this case?

15 A. Two time.

16 Q. What was going on -- what was the event going
17 on that caused your first move?

18 A. You mean before I moved?

19 Q. The first move. Right.

20 What caused that?

21 A. Well, it was -- I believe that it was
22 whenever Arlo was -- had been indicted.

23 Q. Do you know, was Arlo Looking Cloud indicted
24 with John Graham?

25 A. Yes.

1 Q. Okay. So that was the first move.

2 When was the second move or what precipitated
3 the second move?

4 A. Because that was when Dennis Banks had come
5 to my door.

6 Q. Did you also have a security system installed
7 in your house?

8 A. Yes, I did.

9 Q. Did you want to -- did you want to move two
10 times?

11 A. No.

12 Q. Was it an easy thing to pick up and move two
13 times?

14 A. No.

15 Q. Did you make a profit or an income off of
16 these two moves?

17 A. No, I did not.

18 Q. I want to now take you back to your and
19 Mr. Murphy's discussion about Farmington. And I
20 believe that would have been in June of 1975.

21 Do you recall that?

22 A. Yes.

23 Q. At Farmington in June of 1975, were there
24 concerns about Anna Mae being an informant raised?

25 A. Yes.

1 **Q.** Did it appear to you that AIM, through AIM
2 leadership, began watching Annie Mae during that
3 general time frame?

4 **MR. MURPHY:** Object. Leading.

5 **THE COURT:** Sustained.

6 **Q. (BY MR. JACKLEY)** In relation to those
7 informant concerns, did you notice whether AIM was
8 doing anything or took any action?

9 **A.** You mean in June?

10 **Q.** Yes.

11 **A.** Yes.

12 **Q.** What were they doing with respect to Annie
13 Mae Aquash?

14 **A.** Well, people were paying more attention to
15 her.

16 **Q.** Okay. Paying more attention to her.

17 Would an example of that be -- I believe you
18 discussed with Mr. Murphy in Washington the setting of
19 where Leonard Peltier had gone shopping for women's
20 clothing with Bernie and Annie Mae?

21 **A.** Yes.

22 **Q.** Do you recall Mr. Murphy discussing with you
23 in that time frame with Jumping Bull's, Cedar Rapids?

24 Do you recall that general discussion?

25 **A.** Yes.

1 **Q.** And the inquiry about whether -- or the
2 discussion about Annie Mae going with John Graham to
3 Cedar Rapids?

4 Do you recall that?

5 **A.** Yes.

6 **Q.** Would Cedar Rapids have been after the
7 June 1975 Farmington incident?

8 **A.** Yes, it was.

9 **Q.** You had a long discussion with Mr. Murphy
10 about Kenny Loud Hawk's place and the making of bombs.

11 Do you recall that?

12 **A.** Yes.

13 **Q.** What was your observation as to why Annie Mae
14 was brought into it?

15 Why she was being a part of that. What was
16 occurring at Kenny Loud Hawk's?

17 **A.** Well, as I had said before, I honestly think
18 that they did not trust her. And I think that to keep
19 her closer they could keep a better eye on her.

20 **Q.** Was she also close after that event when she
21 rode in the motor home -- in Marlin Brando's motor
22 home after Columbus Day of 1975?

23 **A.** Yes.

24 **Q.** I want to now put it in a time frame so
25 everybody is clear.

1 So we have Kenny Loud Hawk's occurred about
2 when?

3 What time frame?

4 **A.** In October of 1975.

5 **Q.** And that -- would that have been prior to a
6 federal judge releasing Annie Mae in November of 1975?

7 **A.** Yes.

8 **Q.** Do you recall discussing with Mr. Murphy
9 about Wounded Knee and people being killed?

10 Do you recall that discussion?

11 **A.** Yes.

12 **Q.** Do you know who Ray Robinson is?

13 **A.** Yes, I do.

14 **Q.** Tell the jury who Ray Robinson is.

15 **A.** Ray Robinson -- Ray Robinson was a person who
16 had come to Wounded Knee and he was very active where
17 he came from. He -- he fought for civil rights. He
18 came to Wounded Knee. He never left.

19 **Q.** With respect to Jumping Bull's, the location
20 I believe you testified that you were living at where
21 the two agents were shot, did you ever see John Graham
22 at Jumping Bulls?

23 **A.** Yes, I did.

24 **Q.** Okay.

25 But in fairness, not the day of the FBI

1 shooting; is that fair?

2 **A.** Yes.

3 **Q.** But you had seen him there on other
4 occasions?

5 **A.** Yes.

6 **Q.** Do you recall your discussion with Mr. Murphy
7 about after the motor home was pulled over and Leonard
8 Peltier and Dennis Banks fled, the discussion that
9 Leonard Peltier was off the reservation for safe
10 keeping.

11 Do you generally recall that discussion?

12 **A.** I am sorry. Can you say that again?

13 **Q.** After the motor home incident, was Leonard
14 Peltier arrested at that incident?

15 **A.** No.

16 **Q.** If you know, where did Leonard Peltier
17 ultimately head to?

18 **A.** Canada.

19 **Q.** If you know, was Leonard Peltier extradited
20 from Canada?

21 **A.** He was.

22 **Q.** Kamook, were you informant A or informant B?

23 **A.** No, I was not.

24 **Q.** Kamook, do you recall discussing with
25 Mr. Murphy your interview with Arlo Looking Cloud and

1 Troy Lynn on or about December 16, 2000?

2 A. Yes.

3 Q. Do you recall Mr. Murphy's discussion of that
4 interview and what Arlo had said generally?

5 A. Yes.

6 Q. And part of your discussion with Mr. Murphy
7 was about the implication of John Graham, do you
8 recall that?

9 A. Yes.

10 Q. And it was a fairly lengthy discussion that
11 you had with Arlo and Troy Lynn?

12 A. Yes, it was.

13 Q. What -- what was some of the information that
14 you discussed with Arlo and Troy Lynn prior to the
15 discussion about John Graham being implicated in the
16 offense?

17 Do you recall any of that discussion?

18 MR. MURPHY: Your Honor, objection. And ask
19 to approach.

20 THE COURT: Very well.

21 (Whereupon, a discussion was held at the
22 bench.)

23 MR. MURPHY: I asked about Kamook's
24 statements to Arlo which was only --

25 THE COURT: Quiet.

1 **MR. MURPHY:** I asked only -- I asked Kamook
2 to talk about what she said which was, only implicate
3 John Boy. Arlo states Troy Lynn's statements are not
4 relevant of scope of the inquiry. It's her
5 statements. Arlo is going to be on the stand. He can
6 be examined about what he told her. But the question
7 and the issue was what she told Arlo to deflect
8 attention away from others.

9 **MR. JACKLEY:** Your Honor, he specifically
10 cross-examined regarding this statement. He
11 specifically -- he elicited testimony --

12 **THE COURT:** Shut it down.

13 **MR. JACKLEY:** He -- Mr. Murphy specifically
14 cross-examined this witness about that interview --
15 about what Troy Lynn said, about what Arlo said. And
16 about what Kamook said.

17 I would cite the Court to *State vs. Salalla*,
18 S-A-L-A-L-L-A, Westlaw 58968, 2000, South Dakota case,
19 where the Supreme Court stated the trial court acted
20 within its discretion in ruling that defendant's
21 introduction of exculpatory portions of declarant's
22 hearsay statement to police officer resulted in waiver
23 of confrontation right and ability of state to, quote,
24 complete the picture, end quote. By eliciting other
25 inculpatory portions of the statement.

1 And that's precisely what occurred here where
2 I examined regarding the implication of John Graham
3 and the state should be entitled to, quote, complete
4 the picture, end quote.

5 **THE COURT:** Arlo is going to be here, right?

6 **MR. JACKLEY:** That's correct.

7 **THE COURT:** Arlo is going to be here, right?

8 **MR. JACKLEY:** Yes.

9 **THE COURT:** Can't you ask Arlo?

10 **MR. JACKLEY:** He's just cross-examined this
11 witness with what would be perceived as --

12 **THE COURT:** Just answer my question.

13 **MR. MURPHY:** Our position would be under
14 that -- under that case, if this witness during the
15 interview made other statements that were
16 inculpatory -- and this really isn't an issue of
17 inculpatory or exculpatory; it's about bias.

18 But if he made statements during that
19 interview, they would be subject to be presented. I
20 impeached her on her statement that she told Arlo
21 only, implicate John Boy. Now they want to bring in
22 Arlo's statements and Troy Lynn's statements, not
23 hers. That's the problem with their examination.
24 They ultimately could go back through everything Arlo
25 told this witness over a six-hour interview under

1 their theory.

2 **MR. JACKLEY:** Your Honor --

3 **THE COURT:** He's going to be here. You can
4 ask Arlo. She's subject to being recalled if
5 necessary. Arlo's statements are here. I mean -- the
6 question was whether she directed him to -- the
7 question of what he asked her at that point --

8 **MR. JACKLEY:** Right. He elicited testimony
9 of what Arlo's testimony was and I believe he elicited
10 testimony of what Yellow Wood said and I shouldn't be
11 foreclosed from going into that.

12 **THE COURT:** I mean, I don't understand the
13 problem with calling the people and having them here
14 to testify. You are going to call them both.

15 **MR. JACKLEY:** I know -- the problem is he
16 examines on these matters that he believes are
17 exculpatory and then I can't go into the inculpatory
18 matters.

19 **THE COURT:** You can have Arlo here. And you
20 can go over every statement he made. You got complete
21 transcripts. Other than the question he asked that's
22 the only place you are going to go.

23 **MR. JACKLEY:** So I won't cross the boundary,
24 can I ask her about the implication of John Graham and
25 why she said what she said? Can I put it back into

1 that context?

2 **MR. MURPHY:** I would argue no because she's
3 going to say, well, the reason I did that is because
4 Arlo told me A, B, C, D, and E. That exchange -- the
5 only reason for that question --

6 **THE COURT:** I think he can ask her why she
7 said that. I don't know how he cannot.

8 **MR. MURPHY:** Well, then if she starts talking
9 about Arlo's --

10 **THE COURT:** We're not going into Arlo's
11 statement other than that. If it gets into Arlo's
12 statements, we'll shut down. He's not going to -- all
13 the things Arlo said to her, at this point, that's
14 hearsay. You can bring it in through Arlo and then
15 you have the ability to bring her back and confront
16 her if he says something different. I think you can
17 always bring her back. I don't think we're going to
18 go through Arlo's statements here.

19 And Mr. Murphy was very limited. So that's
20 that. I think you are entitled to ask her why but
21 we're not going to go back through a litany of Arlo's
22 statements to her. We're not going to go there.
23 Later, if he says different things, there may be a
24 basis for doing that.

25 **MR. JACKLEY:** I respect the Court's ruling.

1 (Whereupon, the discussion at the bench was
2 then concluded.)

3 **Q. (BY MR. JACKLEY)** Kamook, I want to be very
4 careful with these questions. I don't want to elicit
5 from you what Arlo told you, okay, during that
6 interview. Okay?

7 **A.** Okay.

8 **Q.** And I don't want to elicit what Troy Lynn
9 Yellow Wood told you.

10 **A.** Okay.

11 **Q.** Which means my questions are really being
12 directed at what generally you were discussing. Okay.

13 **A.** Okay.

14 **Q.** Mr. Murphy had inquired about your statement
15 regarding the implication of John Graham in this case.

16 Do you recall that?

17 **A.** Yes.

18 **Q.** Prior to that part of the interview, had you
19 discussed several individuals?

20 **A.** Yes.

21 **Q.** Had you discussed their involvement in the
22 murder of Annie Mae Aquash?

23 **A.** Yes.

24 **Q.** Not asking you what Arlo said, but I want to
25 ask you what his reaction or emotions were when you

1 were discussing the murder of Annie Mae Aquash of in
2 December of 2000.

3 What were his reactions and emotions at
4 times?

5 **A.** Arlo was very emotional when I would ask him
6 certain questions. There were times where he became
7 choked up. Where he couldn't answer. There were a
8 few times where his eyes got very watery. He looked
9 out the window because he couldn't answer. He was
10 very emotional.

11 **Q.** Mr. Murphy's reference to the implication of
12 John Graham is on page 168 a transcript.

13 Prior to that discussion, and the reference
14 to the implication of John Graham, had you discussed
15 John Graham?

16 **A.** Yes.

17 **MR. JACKLEY:** No further questions, Your
18 Honor.

19 **THE COURT:** Thank you.

20 Mr. Murphy?

21 **MR. MURPHY:** Thank you.

22 **RE-CROSS-EXAMINATION**

23 **BY MR. MURPHY:**

24 **Q.** Ma'am, I saw you during the break talking
25 with Mr. Jackley.

1 Do you recall that?

2 A. Yes.

3 Q. You were a witness on the stand at that
4 point, correct?

5 A. Yes.

6 Q. But you decided to have a conversation with
7 an attorney during the course of your examination?

8 A. Is that not allowed?

9 Q. Well, let me ask you, I mean, you are now
10 married to the lead investigator, correct?

11 A. Right.

12 Q. So your intent and desire is to help the
13 prosecution in this case, is it not?

14 A. Yes.

15 Q. And that's why at various times when you have
16 been asked to propound upon theories like the
17 fingerprint theory and the motor home captive theory
18 you have been willing to go before juries and
19 speculate as to what you think?

20 A. Well, I have always been asked my opinion and
21 that was my opinion.

22 Q. And you used words like I think and I guess?

23 A. Yes.

24 Q. Even though the evidence that you observed
25 didn't necessarily support what you thought or you

1 guessed, right?

2 **A.** It is what I thought.

3 **Q.** Okay.

4 Well, now Mr. Jackley asked you about working
5 for the FBI. You said, no, at the time you got
6 involved in this case, you were working in the movie
7 industry, correct?

8 **A.** That's right.

9 **Q.** 2000 -- well, let me ask you, you weren't
10 working for the FBI, but they had fitted you for a
11 body wire, right?

12 **A.** Actually, it was not a body wire. It was
13 just a --

14 **Q.** Secret recording device?

15 **A.** Yes.

16 **Q.** And you went out and did interviews of people
17 that they were interested in, correct?

18 **A.** No. It's people that I was interested in and
19 I told them that's who I would like to talk to.

20 **Q.** Let me ask you, you said you had hadn't even
21 seen the tapes. We've got 19 tapes of conversations
22 with Troy Lynn.

23 They must have been pretty interested in Troy
24 Lynn if they are going to take 19 tapes full of her
25 talking, right?

1 **A.** When I first visited with Troy Lynn, I told
2 Jim Graf that I wanted to visit with Troy Lynn because
3 at that point I had already heard a lot of things that
4 Troy Lynn had been saying. So I said to him that I am
5 leaving this area. I am driving back to New Mexico.
6 And I want to stop and visit Troy Lynn.

7 **Q.** And you recorded that conversation?

8 **A.** Yes, but that wasn't the original -- I
9 originally just wanted to go visit her. And over
10 time, he came to me and asked me if I would do that.

11 **Q.** But you don't consider that working for the
12 FBI?

13 **A.** No.

14 **Q.** Okay.

15 Working in cooperation with the FBI?

16 Would you give us that much?

17 **A.** Yes.

18 **Q.** All right.

19 Well, if you are not working for the FBI, I
20 want to talk to you about the money they gave you.

21 In 2003, your income apart from what the FBI
22 gave you was about \$20,000, correct?

23 **A.** I -- in 2003?

24 **Q.** Yeah. That's what you said under oath --

25 **A.** I did. I worked on a movie for about eight

1 weeks.

2 Q. Okay.

3 And you made \$20,000?

4 A. On that movie.

5 And I had another job.

6 Q. In the five years prior to that, so we're
7 going basically 98 through 2003, the most you ever
8 made in one year was \$35,000, correct?

9 A. Maybe.

10 Q. Well, in July -- in -- excuse me.

11 February 3, 2004, you testified at Arlo Looking
12 Cloud's case?

13 A. Yes.

14 Q. You were asked the question in the five years
15 prior to that time, what is the most you made in any
16 one year? Your answer, maybe 35.

17 Do you recall that?

18 A. Yes.

19 Q. And then you were asked preceding to that,
20 just the whole year, 2003, all the money that you
21 made? Answer, probably not very much this year.
22 Question, well, are we talking -- can you give us a
23 ballpark on an amount? Answer, okay. We are talking
24 about last year.

25 That would have been 2003, right?

1 **A.** Yes.

2 **Q.** Question, yes. Answer, probably only about
3 \$20,000.

4 Is that what you said under oath at that
5 point?

6 **A.** Yes. That was for one movie.

7 **Q.** Okay.

8 Well, but the prior five years, the most you
9 made in about a year was about 35,000?

10 **A.** Yes, and a movie takes anywhere from three to
11 four months.

12 **Q.** I am just asking you how much you made
13 because Mr. Jackley asked you if you ever profited
14 from your involvement in that case and you said no.

15 2003, taxpayers gave you \$17,000 in one
16 check, right?

17 **A.** Right.

18 **Q.** That's almost 100 percent more than the
19 entire rest of the money you earned doing movies,
20 correct?

21 **A.** Okay.

22 **Q.** So you made \$17,000 from the taxpayers and
23 only \$20,000 from working.

24 That's a profit, isn't it?

25 **A.** You mean because --

1 **Q.** Well, if you are your working career only
2 amounted to 20,000 and the FBI gives you an additional
3 17,000, you have almost double the amount of money
4 coming in your house that year alone, correct?

5 **A.** \$20,000 is what I made on a movie. I also
6 had another job besides that one.

7 **Q.** Well, when you were asked how much you made
8 last year, 2003, at that time under oath at least you
9 said you only made 20,000 for the whole year?

10 **A.** The conversation, I believe, up to that point
11 had been about movies. Nobody asked me about another
12 job.

13 **Q.** Question, how much money do you make in a
14 year, ma'am? Answer, it depends on the movie and the
15 budget of the movie. It differs. Well, let's talk
16 about the year 2003. How much did you make in 2003?

17 **A.** Right.

18 **Q.** It was not a question limited to movies. And
19 on that -- to that question, you said, 2003, you made
20 20 grand?

21 **A.** Yes.

22 **Q.** Now you are saying you made a little more
23 than that?

24 **A.** I worked for Lagoon Industries at the time
25 and I was a supervisor and we were doing digital

1 analyzing for the state of New Mexico for the land
2 office.

3 Q. All right.

4 But you are not denying that that \$17,000
5 check came in pretty handy, are you?

6 A. It came in handy when it was time to move.

7 Q. And the \$25,000 check you got almost a year
8 exactly afterwards, that was -- that came in handy,
9 too, didn't it?

10 A. In moving it did.

11 Q. Okay.

12 Well, we're going to talk about the moving.
13 I just want to compare it to your income.

14 Since you said you averaged about \$35,000 a
15 year; a \$25,000 check basically doubles your income
16 for that year, too, doesn't it?

17 A. Yes.

18 Q. All right.

19 Now, you -- you referenced repeatedly that
20 these checks were for moving. I am showing you the
21 sheet -- the voucher for your \$17,000 check. It says,
22 does it not, that it's \$17,000 for expenses for a
23 period of February 1, 2003, to February 1, 2004?

24 That's what it says?

25 A. Yes.

1 **Q.** So they gave you a \$17,000 check for expenses
2 covering a one-year period?

3 **A.** Right.

4 **Q.** The next check, \$25,000. It's for \$25,000
5 for expenses for the period from February 1, 2004, to
6 February 1, 2005, correct?

7 **A.** Yes.

8 **Q.** So there is nothing on any of these vouchers
9 about it being moving expenses. They are basically
10 paying a year's salary in advance at a time?

11 **A.** That also -- not only was it to cover moving
12 expenses, that also was to cover of the expense of the
13 rent, which is where -- to pay for the place where I
14 was eventually located.

15 **Q.** Ma'am, you didn't do any interviews in 2004,
16 2005?

17 **A.** No, I did not.

18 **Q.** They paid you --

19 **A.** That was after Arlo's trial happened in 2004
20 and I believe I testified at that trial that I was not
21 able at that point because I -- because of testifying,
22 I did not feel safe to go back into the movie industry
23 and begin working in public and being around a lot of
24 people.

25 **Q.** Ma'am, you got that \$17,000 check one month

1 before you testified in Arlo's trial?

2 **A.** Right.

3 **Q.** And you just said after Arlo's trial you
4 didn't feel safe going back into the movies.

5 July 27, 2003, one month before you testified
6 in Arlo's trial, they paid you one year in advance
7 expenses. February 1, 03, to February 1, 04, they
8 paid you that in January.

9 It was before you could have known anything
10 about the outcome of Arlo's trial; isn't that true?

11 **A.** No. At that point I had already visited
12 several people.

13 **Q.** You had been visiting people for three years?

14 **A.** Right, but during that time -- by the first
15 check, I had already spent a lot of time talking to
16 people.

17 **Q.** Ma'am, it's undeniable what the document
18 says?

19 **A.** Right.

20 **Q.** And that is that one month before Arlo
21 Looking Cloud's trial, they paid you a check that
22 almost equaled your annual income for advanced
23 expenses for the upcoming year.

24 That's what it says?

25 **A.** Okay.

1 **Q.** And then one year almost exactly later, they
2 give you another check, \$25,000, for expenses to be
3 paid in advance, correct?

4 **A.** Right.

5 **Q.** You didn't provide a single receipt for
6 either of those checks?

7 **A.** No, I did not.

8 **Q.** \$50,000 tax free -- what's that equal, about
9 \$65,000 in real money? 70,000?

10 **A.** I don't know what you mean by real money.

11 **Q.** Okay.

12 And you indicated that the AIM leaders were
13 paying more attention to Annie Mae after Farmington?

14 That was your testimony just now?

15 **A.** Yes.

16 **Q.** Like paying more attention by inviting her to
17 participate at Al Runnings' house, correct, to be
18 there?

19 **A.** She was there. I don't know if she had been
20 invited.

21 **Q.** She was there in a tent full of explosives by
22 herself, correct?

23 **A.** That's what I heard.

24 **Q.** Okay.

25 And they invited her -- by paying more

1 attention to her they invited her to come to Loud
2 Hawk's house and help make bombs with them?

3 A. She was there when I got there.

4 Q. And you saw her making bombs?

5 A. Yes.

6 Q. And they invited her along on the motor home
7 trip?

8 A. Yes he.

9 Q. So by paying more attention to her, they
10 allowed her to participate with them in more criminal
11 activity, correct?

12 A. Yes.

13 Q. More criminal activity that she could have
14 been a witness to if she really was an informant,
15 right?

16 A. Yes.

17 Q. Mr. Jackley asked you about Ms. Aquash going
18 into stores to buy women's clothing with Mr. Peltier.

19 They went to a Good Will store, did they not?

20 A. Yes.

21 Q. Good Will stores sell everything from men's
22 clothing, women's clothing, kitchen stuff, everything
23 you can imagine pretty much, right?

24 A. My sister told me they when to get clothes.

25 Q. They got clothes. All right.

1 And you didn't hear her say Leonard Peltier
2 was guarding Anna Mae Aquash at that time?

3 **A.** No.

4 **Q.** In fact, you never saw Leonard Peltier
5 guarding Annie Mae, did you?

6 **A.** No.

7 **Q.** Same thing at Loud Hawk's house, the bomb
8 making you were asked about, never saw them guarding?

9 **A.** No.

10 **Q.** Never were told keep an eye on her?

11 **A.** No.

12 **Q.** Mr. Jackley asked you about the time being at
13 Loud Hawk's house. That was before she was released
14 from federal custody in November, right?

15 **A.** Yes, because that was in October.

16 **Q.** Okay.

17 But --

18 **A.** We were at Loud Hawk's in October.

19 **Q.** But that was after she had already flown the
20 coupe regarding the Al Runnings' charges, correct?

21 **A.** I know they had been arrested in September
22 and he were at Loud Hawk's in October. And then in
23 November when I was taken back to Kansas after we were
24 arrested, and Annie Mae was taken to South Dakota.

25 **Q.** You said today you are not informant A or B?

1 **A.** No, I am not.

2 **Q.** The issue is, at the time, you were one of
3 the only -- you and Bernie were the only people that
4 left the motor home and flew back to Kansas during the
5 time of the trip, correct?

6 **A.** Yes.

7 **Q.** And you knew that that was something that
8 might cause people to be suspicious once they saw
9 those A and B informant affidavits, correct?

10 That they might suspect you and Bernie?

11 **A.** I never thought that.

12 **Q.** Even though you had outstanding charges and
13 you had left for a couple days?

14 **A.** I never thought that. I was not the
15 informant. I would have been informing on myself.

16 **MR. MURPHY:** Okay.

17 Nothing further.

18 **CONTINUED REDIRECT EXAMINATION**

19 **BY MR. JACKLEY:**

20 **Q.** Kamook, are you involved in this case so you
21 could be required to move twice?

22 **A.** Pardon me?

23 **Q.** Are you involved in this case so that you
24 could be able to move twice?

25 **A.** You mean back then?

1 **Q.** Let me ask this.

2 Why are you involved in this case?

3 What is your motive in this case?

4 **MR. MURPHY:** Objection. Self-servicing.

5 **THE COURT:** Sustained.

6 **Q. (BY MR. JACKLEY)** Let me ask this.

7 Did you ask the FBI to move on either of your
8 two moves?

9 **A.** No.

10 **Q.** Did the FBI require you to move?

11 **A.** Yes, they told me that I should move.

12 **Q.** Was the FBI appeared to be concerned about
13 something?

14 **A.** My safety.

15 **Q.** Did you make any money based upon your
16 involvement in this case?

17 **A.** No, I did not.

18 **MR. JACKLEY:** No further questions, Your
19 Honor.

20 **MR. MURPHY:** Just a moment, Your Honor.

21 Thank you. Nothing further.

22 **THE COURT:** Thank you, ma'am.

23 You may be excused.

24 (Witness excused.)

25 **MR. JACKLEY:** The state would call Dick

1 Marshall, Your Honor.

2 **THE COURT:** Please come forward, sir.

3 RICHARD MARSHALL,

4 called as a witness herein, having been duly sworn,

5 under oath testified as follows:

6 **THE COURT:** Please take a seat.

7 **DIRECT EXAMINATION**

8 **BY MR. JACKLEY:**

9 Q. Good morning, Mr. Marshall.

10 A. Good morning.

11 Q. Do you please state your name.

12 A. Richard Marshall.

13 Q. Mr. Marshall, where do you live?

14 A. I presently live in Porcupine, South Dakota.

15 Q. Mr. Marshall, I want to take you back to

16 December of 1975.

17 Where did you live then?

18 A. I lived in Allen, South Dakota.

19 Q. Mr. Marshall, I am handing you what has

20 previously been marked State's Exhibit 30.

21 Do you recognize that house?

22 A. Yes, I do.

23 Q. Is that the house that you lived in in 1975?

24 A. Correct.

25 **MR. JACKLEY:** May I show the jury on the

1 screen, Your Honor?

2 **THE COURT:** You may.

3 **Q. (BY MR. JACKLEY)** Mr. Marshall, in December of
4 1975, were you married?

5 **A.** Yes, I was.

6 **Q.** Who were you married to?

7 **A.** I was married to Cleo Clifford.

8 **Q.** Were you a supporter of the American Indian
9 Movement?

10 **A.** Yes, I was.

11 **Q.** One evening in December of 1975 were you
12 visited by a group that included Annie Mae Aquash?

13 **A.** That I can't remember clear right away. That
14 was over 30 some years ago.

15 **Q.** Let me ask you this, Mr. Marshall.

16 Do you recall a time when you had a group of
17 people come visit you late one evening in December of
18 1975?

19 **A.** We always had company all the time and I
20 can't say how many people showed up when but we always
21 had company all the time.

22 **Q.** Do you know Theda Clarke? Sometimes goes by
23 Theda Nelson.

24 **A.** Well, I have heard of her name recently
25 when -- the first time that I was handed a subpoena

1 saying I was going to be subpoenaed to Grand Jury
2 from -- I think he was a U.S. Marshal then by the name
3 of Robert Ecoffey.

4 Q. Mr. Marshall, do you recall ever meeting with
5 an individual by the name of Serle Chapman?

6 A. Serle Chapman, yes, I recall that.

7 Q. Do you recall meeting with him on July 27,
8 2001?

9 Do you recall that, generally?

10 A. Vaguely, I remember, yeah.

11 Q. And do you recall it was being taped?

12 A. I think it was, yeah. Yeah, I think it was
13 taped yeah.

14 Q. In fact, at one point you asked him for a
15 opportunity to proofread the transcript, didn't you?

16 A. I can't recall that.

17 Q. Mr. Marshall, are you here voluntarily today?

18 A. I was subpoenaed.

19 Q. You don't want to be here today, do you?

20 A. I was subpoenaed so I am here.

21 Q. Are you concerned that your testimony that
22 you give today could be used against you in some form
23 or manner?

24 A. Oh, yeah. I always have that concern.

25 Q. Mr. Marshall, do you recall telling Serle

1 Chapman in the taped interview that you remember being
2 visited and that Annie Mae was with them?

3 **MR. MURPHY:** Objection. Leading.

4 **A.** I --

5 **THE COURT:** Hold on.

6 **A.** I can't recall saying that.

7 **THE COURT:** Overruled.

8 Go ahead, Mr. Marshall.

9 **A.** I can't recall saying that.

10 **Q. (BY MR. JACKLEY)** Do you recall telling Serle
11 Chapman that that night Cleo Marshall gave Anna Mae
12 Aquash clothing?

13 **A.** No, I don't remember saying that.

14 **Q.** Do you deny saying it or you just can't
15 remember?

16 **A.** I can't remember.

17 **Q.** If I showed it to you, would that help you
18 any?

19 **A.** It may.

20 **MR. JACKLEY:** May I approach, Your Honor?

21 **THE COURT:** You may.

22 **Q. (BY MR. JACKLEY)** Do you recall stating,
23 Mr. Marshall --

24 **MR. MURPHY:** Your Honor, I am going to
25 object. This is an proper way to refresh

1 recollection.

2 **THE COURT:** Ask him to read it first.

3 **Q. (BY MR. JACKLEY)** Mr. Marshall, can you please
4 read the paragraph that I am indicating to you on page
5 ten of the transcript.

6 **A.** We were married and we --

7 **Q.** Not out loud, sir.

8 **A.** Okay.

9 **Q.** Mr. Marshall, does that refresh your
10 recollection of when Anna Mae was brought to your
11 house in December of 1975?

12 **A.** Not really, but you know, it's been so long
13 ago.

14 **Q.** Mr. Marshall, do you recall talking to
15 Marshal Bob Ecoffey on December 26, 2003?

16 Do you recall meeting with Mr. Ecoffey about
17 that time frame?

18 **A.** I remember he said I was going to be
19 subpoenaed.

20 **Q.** Do you remember talking to him about when
21 Theda, Arlo -- excuse me. Theda, Anna Mae, and two
22 young guys appeared at your house one December evening
23 in 75?

24 **A.** Yeah, he mentioned that, yeah.

25 **Q.** Well, what did you mention?

1 **A.** What did I mention? I told him I couldn't
2 clearly remember that date and time and I asked him to
3 talk to my wife Cleo because we had a lot of people
4 coming over all the time.

5 **Q.** And Cleo would be a better person to maybe
6 answer some of those questions?

7 **A.** Yes. That's what I told him, yeah.

8 **Q.** Mr. Marshall, is it -- would it be fair to
9 state that you remember nothing about Annie Mae Aquash
10 coming to your house in December of 1975?

11 **A.** Well, it happened so long ago and since that
12 time with all the news and I have been in jail for
13 almost two years and reading discovery, I start to
14 remember certain parts of way back then. That
15 happened a long time ago.

16 **Q.** Mr. Marshall, what parts do you remember,
17 then?

18 **A.** Well, Mr. Bob Ecoffey mentioned when he told
19 me that these people came to my house. And like I
20 mentioned, we always had a lot of company coming over.
21 And that -- that I remember one time this lady came --
22 her name was Theda. And she knew my wife. And my
23 wife knew her. And I didn't know her.

24 **Q.** That night or that time that Theda came, is
25 there something she wanted?

1 **A.** She asked us to keep a woman there.

2 **Q.** Okay.

3 Did she have any written documentation with
4 her when she asked you to keep a woman there?

5 **A.** I did not see any written document --
6 anything written.

7 **Q.** Were you aware of a written document?

8 **A.** No, I'm not.

9 **Q.** When she asked you to keep this woman there,
10 did it appear that this woman was free to leave?

11 **A.** Well, there was others there and they were
12 all in the living room. And we was all standing
13 around.

14 **Q.** What do you remember about this woman that
15 appeared at your house that Ms. Clarke wanted to keep
16 there?

17 What do you recall about her?

18 **A.** To me she was just a different person.
19 That's the first time I ever laid eyes on them people.

20 **Q.** First time you had ever met this young woman?

21 **A.** First time I met these people that came to my
22 house.

23 **Q.** Was the lady that -- that you were going to
24 keep there, was she a young woman?

25 **A.** I don't know.

1 Q. Did -- do you recall her saying anything to
2 you or was she quiet?

3 A. She didn't say nothing.

4 Q. What was she wearing?

5 A. I can't remember.

6 Q. Mr. Marshall, in your house, do you have a
7 bedroom?

8 A. Oh, yeah. It's a four-bedroom house.

9 Q. And in your bedroom, did you have a dresser
10 that you recall?

11 A. A dresser?

12 Q. Yes.

13 A. Yeah, each bedroom had a dresser in it.

14 Q. Do you remember how many drawers that dresser
15 had?

16 A. Not right off hand.

17 Q. Mr. Marshall, back to the interview that you
18 had with Bob Ecoffey of December 26, 2003, I'd like
19 you to read the last two paragraphs --

20 **MR. MURPHY:** Objection. This is improper.

21 **THE COURT:** Overruled.

22 Q. **(BY MR. JACKLEY)** And read it to yourself,
23 please.

24 Mr. Marshall, does that in any way help
25 refresh your recollection as to what occurred at your

1 house or what may have occurred at your house in
2 December of 1975?

3 **A.** Not really.

4 **Q.** Did you ultimately keep this young lady at
5 your house that evening?

6 **A.** Nope.

7 **Q.** What do you remember about that?

8 **A.** That elderly lady asked if we could keep that
9 lady there. I said no. And I immediately went and
10 told Cleo what she had asked.

11 **Q.** But I thought Cleo was standing there?

12 **A.** Yeah. She was standing right there.

13 **Q.** Why would you need to go ask Cleo something?

14 **A.** Because in the Lakota tradition, the lady
15 runs the house. So I asked her and Cleo said nope.
16 And we had children also. Young children there. And
17 it was late.

18 **Q.** Do you know why Cleo said no?

19 **MR. MURPHY:** Objection. Calls for
20 speculation.

21 **THE COURT:** Sustained.

22 **Q.** **(BY MR. JACKLEY)** Were these discussions about
23 keeping this young lady there, were they had in front
24 of the young lady?

25 **A.** I believe they were.

1 **Q.** Did she say anything during those
2 conversations?

3 **A.** Nope.

4 **Q.** Did you -- were you the one that informed
5 Theda Clarke that the young lady wasn't going to stay
6 at your house?

7 **A.** I told them that nobody was going to stay
8 there.

9 **Q.** How did Theda Clarke take that?

10 **A.** She acted mad.

11 **Q.** Wasn't happy, was she?

12 **A.** She wasn't happy. Looked upset.

13 **Q.** Do you remember what type of clothing Cleo
14 gave this young lady that evening?

15 **A.** No, I can't remember that.

16 **Q.** Do you remember when they came to your house
17 were you woke up or -- were you sleeping?

18 **A.** We were sleeping, correct.

19 **Q.** Okay.

20 Did both you and Cleo get up when they came?

21 **A.** We both got up.

22 **Q.** The bedroom that we talked about with the
23 dresser in it, the room that you slept in, did it have
24 a door?

25 **A.** Oh, yeah. All four doors -- all bedrooms had

1 doors on them.

2 Q. Mr. Marshall, is your house considered an AIM
3 safe house?

4 A. No.

5 Q. Did this young lady that evening in December
6 of 1975 leave your house alive?

7 A. They all left.

8 Q. Everybody that came there that evening with
9 this young lady including Theda Clarke, left, is that
10 what you are saying?

11 A. They all left.

12 Q. They didn't stay at your house?

13 A. Nope. We locked the doors when they left.

14 Q. Why did you lock the doors as soon as they
15 left?

16 A. Because we had children there and we always
17 lock our door every night.

18 Q. Did you ever see this young lady again after
19 she left your house that night?

20 A. I didn't see any of them.

21 Q. And this would have been the first time that
22 you had ever met this young lady?

23 A. First time I ever laid eyes on all of them.

24 Q. Did you attend the wake of Annie Mae Aquash?

25 A. I believe we did.

1 **Q.** Can you -- Mr. Marshall, can you explain to
2 me why when you never knew Annie Mae Aquash, this was
3 the first night the young lady had come to your house,
4 why you would then attend her wake of somebody that
5 you didn't know?

6 **A.** Well, in Lakota tradition, the lady of the
7 house always cooks all the time. And Cleo wanted to
8 take some food over there. That's what we did. We
9 took some food over there.

10 **Q.** As you sit here today, Mr. Marshall, are you
11 sure that Cleo Marshall went to Anna Mae's wake?

12 **A.** We stopped there.

13 **Q.** You stopped there?

14 **A.** Both of us. We dropped the food off and we
15 left.

16 **Q.** Mr. Marshall, as you sit here in court today,
17 do you see the gentleman in the blue shirt seated at
18 counsel's table?

19 **A.** I see him.

20 **Q.** Have you ever seen him before?

21 **A.** Nope.

22 **Q.** Who was it, then, that showed up at your
23 house that night with Theda Clarke and this young
24 lady, if you know?

25 **A.** They were young boys.

1 Q. There was two of them, weren't there?

2 A. They were young boys.

3 Q. There was two of them, weren't there?

4 A. Yeah.

5 Q. And they both left that evening, didn't they?

6 A. They all left.

7 MR. JACKLEY: No further questions, Your
8 Honor.

9 THE COURT: Mr. Murphy?

10 MR. MURPHY: Thank you.

11 CROSS-EXAMINATION

12 BY MR. MURPHY:

13 Q. Now, Mr. Jackley has told you that this event
14 happened in December of 1975.

15 You don't recall exactly when this event
16 happened, do you?

17 A. No, I can't recall exactly the date.

18 Q. Fall or winter of 1975?

19 Some time in the fall or winter?

20 A. Some time there, yeah.

21 Q. And as to what time of night they came to
22 your house, you don't recall?

23 A. I don't recall that either, sir.

24 Q. You think Cleo might have a better
25 recollection?

1 **A.** She might have, yes.

2 **Q.** If she testified some time between 10:30 and
3 midnight would that sound about right to you?

4 **A.** I couldn't say because I didn't see the
5 clock.

6 **Q.** Sure. Okay.

7 Well, let's talk about November, December,
8 1975.

9 At that time you were working, right?

10 **A.** Correct. We were both employed.

11 **Q.** Yeah.

12 Where were you working?

13 **A.** I was a construction worker for the Oglala
14 Sioux Housing.

15 **Q.** Okay.

16 Where was Cleo working?

17 **A.** And she was -- she was a technician with one
18 of the programs at the hospital.

19 **Q.** Okay.

20 **A.** Mental health. She had a mental health tag.

21 **Q.** How many kids did you have?

22 **A.** We had two.

23 **Q.** How old?

24 **A.** Them little guys were probably about three.

25 **Q.** Okay.

1 **A.** Both about the same age.

2 **Q.** All right.

3 And at this point we're not going to --

4 **MR. MURPHY:** Your Honor, may we approach on
5 one issue?

6 It will be brief.

7 (Whereupon, a bench conference was then
8 held.)

9 **MR. MURPHY:** I'm going to ask him if he was
10 on bond. I am not going to ask him anything about the
11 Montileaux incident or the crime he committed. I want
12 to make sure that's understood that's the only scope
13 and that this didn't get a relitigation of the motion
14 in limine about the criminal history of Mr. Marshall.

15 **MR. JACKLEY:** Well, it's the state's
16 position, Your Honor, if he's going to ask about bond,
17 the state should be entitled to ask him more about
18 that situation.

19 **MR. MURPHY:** My position is that one of his
20 conditions of bond was that he did not have a weapon
21 in the house. That's the only relevant -- whether we
22 get into the whole issue of him being involved in a
23 shooting at a bar in scenic is completely irrelevant
24 to his bond conditions.

25 **THE COURT:** Can we not duck the whole issue

1 by asking him if he was allowed to have guns in the
2 house?

3 **MR. MURPHY:** Well --

4 **THE COURT:** Then we kind of avoid the whole
5 issue.

6 **MR. MURPHY:** Yes, I can ask that.

7 The question is, why isn't he allowed to have
8 guns, well, because he's on bond. I mean, that would
9 be fine for them to redirect, but not to get into the
10 whole Monteleaux shooting.

11 **THE COURT:** Yeah. I don't think we're going
12 to go into the shooting. That is irrelevant, but he
13 can ask about bond.

14 **MR. MURPHY:** Yeah, that's all I want to get
15 into.

16 **THE COURT:** That he's on bond from a court
17 proceeding. I think we can go there. That's prior to
18 anything on this. Okay. We can go that far. It's a
19 bond on a court proceeding. A criminal proceeding
20 even, but what it's for is irrelevant.

21 **MR. MURPHY:** Thank you.

22 (Whereupon, the bench conference was then
23 concluded.)

24 **Q. (BY MR. MURPHY)** Sorry for the interruption,
25 Mr. Marshall.

1 So you and Cleo -- it's at night, you both
2 have to work the next day, is that your recollection?

3 **A.** Yes, sir.

4 **Q.** You got two young kids. And I'm not going to
5 ask you -- and I want to make sure you understand --
6 anything about any particular crime.

7 But at this time, when these folks came to
8 your house, you were on bond, correct?

9 **A.** Yes, I was.

10 **Q.** And a condition of your bond was that you
11 were not allowed to have any weapons in your house,
12 correct?

13 **A.** Correct.

14 **Q.** And when you were put on bond, what did you
15 do with the weapons you had?

16 **A.** My parents came over and my stepfather took
17 them with him.

18 **Q.** Okay.

19 And at this time period, November or
20 December, 1975, on Pine Ridge, there was a strong law
21 enforcement presence, correct?

22 **A.** Uh-huh. Right.

23 **Q.** And at any time the authorities could come
24 into your house and check to make sure you were
25 complying about your bond conditions?

1 **A.** Oh, yeah, they could do that.

2 **Q.** And during the course of time you were on
3 bond, did you ever violate your bond?

4 **A.** Nope.

5 **Q.** When these folks came to your house, did you
6 have any guns or bullets in your house?

7 **A.** Nope.

8 **Q.** Let's talk about your house. You were asked
9 some questions by Mr. Jackley about being a safe house
10 and whatnot.

11 Your house was well known as an AIM house,
12 correct?

13 **A.** Well, I don't think so. Just had a lot of
14 friends.

15 **Q.** Well --

16 **A.** And my wife and I, we always try to help
17 people out.

18 **Q.** Do you recall previously stating, and we were
19 about, like, a, one of the strongest AIM families
20 there in Allen at the time.

21 **A.** I would say there was a lot of AIM families
22 in that community then.

23 **Q.** But do you recall telling Mr. Chapman you
24 were one of the strongest?

25 **A.** No, I can't recall saying that.

1 Q. Okay.

2 Do you recall telling him that people came to
3 your house regularly for help?

4 A. Yeah -- not regularly, but whenever somebody
5 needed help. Whether it was -- I had a pickup then so
6 if an elderly couple wanted wood hauled, I would go
7 help haul wood. And then if we had extra groceries we
8 would help somebody out, particularly the elderly and
9 the grandmothers that were taking care of a lot of
10 grandchildren.

11 Q. And if people came to your house, and you
12 knew them, you would let them spend the night at your
13 house from time to time?

14 A. Yeah, if they were relatives and we knew
15 them.

16 Q. Relatives or people you knew?

17 A. Uh-huh.

18 Q. Now, your wife, Cleo, is related to Joe
19 Morgan, correct?

20 A. That's her stepbrother.

21 Q. Stepbrother.

22 And so that's -- if Arlo Looking Cloud -- or
23 there has been testimony about Arlo Looking Cloud
24 being a friend of Joe Morgan, that would be the Joe
25 Morgan that is Cleo's stepbrother?

1 **A.** Yeah. That's the only Joe Morgan that I know
2 of.

3 **Q.** So what you know about the night in question,
4 whatever date this was, was that you think about four
5 people showed up at your house?

6 **A.** About that, yeah.

7 **Q.** And you hadn't seen any of them before?

8 **A.** Nope.

9 **Q.** Two of them were youngsters and two of them
10 were women, correct?

11 **A.** Correct.

12 **Q.** All right.

13 They asked you -- or Theda asked you or the
14 woman you believe might have been Theda --

15 **A.** The elderly one, yeah.

16 **Q.** The elderly one asked you if they could leave
17 the other lady there, correct?

18 **A.** That's what she asked.

19 **Q.** She asked if they could leave her.

20 She did not ask you if you would help harm
21 this woman, correct?

22 **A.** Nope.

23 **Q.** She did not ask you to tie this woman up?

24 **A.** Nope.

25 **Q.** In fact, had somebody asked you to tie the

1 woman up, you wouldn't have had to consult with Cleo
2 about the issue?

3 A. I would have told them to get the hell out.

4 Q. Yeah. That would have been your reaction?

5 A. Yeah.

6 Q. There would have been no reason to go over
7 and kind of respect the traditional way of advising
8 the woman of the house?

9 A. Right.

10 Q. That's clear in your head?

11 A. Right.

12 Q. There was no discussion whatsoever with any
13 of these people about any intent to harm the other
14 lady?

15 A. No discussion.

16 Q. And you are clear no guns, no bullets, in the
17 house?

18 A. Nope.

19 Q. You had a night stand in your bedroom?

20 A. We had a little small table by the bed. It
21 was not a night stand.

22 Q. Did it have any drawers in it?

23 A. No drawers. It was just a little stand to
24 hold up the lamp.

25 Q. You said that when they left, the older lady

1 seemed a lit bit upset, correct?

2 **A.** Yeah, she seemed upset.

3 **Q.** Because she wasn't able to leave the other
4 lady with you?

5 **A.** I believe that's why she was upset.

6 **MR. MURPHY:** Nothing further.

7 Thank you.

8 **MR. JACKLEY:** May I have a just a moment,
9 Your Honor?

10 **THE COURT:** Yes.

11 **MR. JACKLEY:** Your Honor, with respect to
12 Mr. Murphy's inquiry regarding the gun, I am going to
13 make a motion to declare this witness adverse and to
14 proceed.

15 **THE COURT:** I am kind of treating it that way
16 to begin with.

17 Go ahead.

18 **REDIRECT EXAMINATION**

19 **BY MR. JACKLEY:**

20 **Q.** Mr. Marshall, one evening in December of
21 1975, you gave the people that showed up at your house
22 a gun, didn't you?

23 **A.** No, I did not.

24 **Q.** Explain to me why in August of 2001 --

25 **MR. MURPHY:** Objection, Your Honor. Move to

1 approach.

2 **THE COURT:** I'm not sure what it is, but
3 somebody better come up and talk to me.

4 (Whereupon, a discussion was held at the
5 bench.)

6 **MR. MURPHY:** What they are trying to do is to
7 get into this conversation where Mr. Marshall
8 allegedly said something to the effect of, back in the
9 day when you were asked to do something you did it, or
10 some variation of that.

11 That causes all sorts of issues for
12 Mr. Graham because it is a statement he made of a
13 general inculpatory nature that is going to be
14 attributed to my client. It was an unrecorded
15 statement. He has previously denied making that
16 statement. And therefore, it should not be allowed to
17 be admitted.

18 Nothing we said opened that door because
19 when -- this bears out at the Dick Marshall
20 transcripts in the prior litigation what was asked of
21 him back in this interview was something to the
22 effect, there has been rumors about you giving a gun
23 and there has been rumors about it being a 32. And
24 some time during that conversation Mr. Marshall
25 allegedly something to the effect, well, back in the

1 day, you didn't ask too many questions.

2 That has no bearing here and should not be
3 used to -- this is about John Graham. It's not about
4 Dick Marshall. And Dick Marshall's statements should
5 not be used to inculcate John Graham when Mr. Graham
6 was not present during that conversation in 2001 or
7 whenever it was. He did not adopt that admission or
8 otherwise endorse it in any way.

9 **MR. JACKLEY:** Your Honor, it's the state's
10 position that we should be entitled to ask
11 Mr. Marshall whether or not he said it. And if he
12 said it, in what context he said it in.

13 **MR. MURPHY:** They know he's going to deny
14 making the statement.

15 **THE COURT:** What do you have to show me he
16 actually made it?

17 **MR. JACKLEY:** Nothing.

18 **MR. MURPHY:** Nothing. It was not recorded.

19 **MR. JACKLEY:** I have the notes -- I have the
20 notes from an interview. I have highlighted the
21 reference.

22 **THE COURT:** Whose interview?

23 **MR. JACKLEY:** Serle Chapman.

24 **MR. MURPHY:** Those notes were not
25 contemporaneous. They were made after the interview

1 allegedly.

2 **THE COURT:** It simply is not responsive to
3 the question asked by Mr. Jackley. I mean, it's a
4 completely nonresponsive answer. Doesn't add anything
5 so it's out.

6 (Whereupon, the discussion at the bench was
7 then concluded.)

8 **Q. (BY MR. JACKLEY)** Mr. Marshall, is it a fair
9 observation that you are having trouble remembering at
10 times certain things that happened at your house in
11 December of 1975?

12 **A.** Yeah. That's because -- it's been so long
13 ago and I have had a couple head injuries since then
14 so my memory isn't that clear -- that good.

15 **Q.** Is part of it, too, that you just simply put
16 some of these things behind you that happened back in
17 1975?

18 Is that fair?

19 **A.** Well, there is a lot of things that I put
20 behind me and moved on with my life.

21 **Q.** In fact, do you recall telling Marshal
22 Ecoffey when he gave you a subpoena, that quote, it
23 happened a long while ago. Those things I put behind
24 me and moved on, end quote.

25 Do you recall that?

1 **A.** I can't recall saying that.

2 **Q.** Mr. Marshall, do you recall testifying before
3 a Federal Grand Jury on February 15, 2003?

4 **A.** That I remember, yeah.

5 **Q.** Do you recall advising the Federal Grand
6 Jury, quote, so I tell Mr. Ecoffey it happened a long
7 while ago. It's hard for me to recollect. I can't
8 recall a lot of events, dates, or times. I said those
9 things I put behind me and moved on.

10 Do you recall that now?

11 **A.** Not right away. I can't remember saying that
12 right away.

13 **Q.** But you don't dispute that you told the
14 Federal Grand Jury that, do you?

15 **A.** If that's what it says I probably said that.

16 **Q.** And you went on to -- do you recall going on
17 to state, but whatever Cleo would remember, I said,
18 that I can't remember.

19 Do you recall that?

20 **A.** No, I can't recall saying that.

21 **Q.** But you believe that's true that Cleo -- that
22 Cleo would have some more information about what
23 happened at your house that night?

24 **A.** Yeah, she may have. Yeah.

25 **Q.** Mr. Marshall, is there any reason that you

1 would have a conversation with your visitors outside
2 of the presence of Cleo that evening?

3 **A.** No, there would be no reason to do that.

4 **Q.** Would there be any reason that you would need
5 to go into your bedroom with some of your visitors
6 that evening?

7 **A.** No.

8 **Q.** Mr. Marshall, we talked about you going to
9 the wake of Annie Mae Aquash; do you recall that?

10 **A.** Yes, I do, sir.

11 **Q.** Did you have great respect for Annie Mae
12 Aquash?

13 **A.** Well, after the news of her death and then
14 her being involved in the American Indian Movement,
15 and we had heard that she was down in Wounded Knee,
16 and we had heard where she had come from. And to my
17 wife and I, we were, you know, respectful of that.
18 The distance she had come to participate in the
19 occupation.

20 **Q.** Would it bother you if some harm would have
21 come to her?

22 Does that bother you?

23 **A.** Oh, yeah.

24 **Q.** Do you recall having a taped conversation
25 with Serle Chapman on July 27, 2001, and talking about

1 John Boy, John Graham?

2 Do you recall that?

3 A. Not right off hand.

4 MR. MURPHY: Page number, counsel?

5 MR. JACKLEY: Page 12.

6 Q. (BY MR. JACKLEY) With respect to the taped
7 interview, do you recall being asked the question, now
8 this --

9 MR. MURPHY: Objection. There hasn't been a
10 question posed to the witness where he's claimed a
11 lack of recollection.

12 Your Honor, I'd ask to approach so you can
13 see the nature of the question.

14 THE COURT: I believe there has.

15 You may continue the question.

16 Q. (BY MR. JACKLEY) Do you recall the question
17 being asked, now this guy --

18 MR. MURPHY: Your Honor, I am going to object
19 on the nature of the character evidence that is about
20 to come in before the Court. I'd ask that you look at
21 the question before it is read.

22 MR. JACKLEY: May I approach?

23 THE COURT: Uh-huh.

24 (Whereupon, a discussion was then had at the
25 bench.)

1 **MR. JACKLEY:** Your Honor, this witness has
2 testified that he doesn't even know John Graham. I
3 have a taped interview statement where, after the
4 question is posed -- and I don't object to redacting
5 part of the character part -- but the gist of the
6 question is, now this guy, John Boy -- and I don't
7 mind taking the rest out -- is just a supporter. He
8 did it. And he tells me at one point -- he says, I am
9 not going to say I am not -- and he's cut off,
10 apparently by Dick Marshall, who states, John Boy's
11 like that. I think that's important because it shows,
12 number one, that he knew John Boy. And in the context
13 of the question I should be entitled to know what he
14 is referring to.

15 **THE COURT:** The problem is, I think he's
16 entitled to show that he knows John Boy. I don't like
17 the preceding question.

18 **MR. JACKLEY:** I don't mind redacting, those
19 aren't the words I chose and the question. I don't
20 mind taking out, quote, he's just a total F'ing prick,
21 end quote. I think that should be removed. If he
22 doesn't object, I won't read that.

23 **MR. MURPHY:** Well, the issue is --

24 **THE COURT:** Leave it in -- I would leave
25 that.

1 **MR. MURPHY:** The other issue is, that the
2 remainder that he wants to get in -- at one point he
3 says I'm not going to say I'm not. That is part of a
4 disputed statement because that is the statement that
5 Chapman says my client made when Chapman turned the
6 recorder off. So he could ask him, didn't you mention
7 that you knew that Graham was from up in Canada. I
8 mean that's the next part.

9 **THE COURT:** The first part he's just a total
10 fucking prick. And then, answer, John Boy is like
11 that.

12 **MR. MURPHY:** That's the problem. That's the
13 character. And so that's what he's --

14 **MR. JACKLEY:** That's what he's objecting to
15 and I don't mind taking that out. When he says John
16 Boy is like that, that is a --

17 **MR. MURPHY:** That is a character statement.
18 Just two lines down from that he says -- you know, he
19 claims that he doesn't know John Boy. But -- I just
20 think it's character evidence that should not come in.

21 **THE COURT:** You can stop at that period. You
22 may address that answer if he recalls -- acknowledges
23 he knows him. Mr. Chapman from here. And you can
24 beat him up all you want.

25 **MR. MURPHY:** You are going to allow him to

1 ask this guy whether Chapman says he was a fucking
2 prick. That's character assassination in front of the
3 jury.

4 **THE COURT:** He's just -- I don't know what
5 that has to --

6 **MR. MURPHY:** Right. Let's get that out of
7 there.

8 **MR. JACKLEY:** Yeah --

9 Judge, one of the reasons I want to ask him
10 is because --

11 **THE COURT:** What do you want to ask?

12 **MR. JACKLEY:** I want to -- I don't care about
13 the, now this guy. Mr. Murphy wants it in there. I
14 am fine with it.

15 But I want to ask, you know, because he did
16 it and he tells me at one point he says -- he says I'm
17 not going to say I'm not and then Marshall says John
18 Boy is like that.

19 **MR. MURPHY:** That is completely improper that
20 they've tried to admit an unrecorded alleged
21 confession.

22 **MR. JACKLEY:** This is recorded.

23 **MR. MURPHY:** Well, but the statement he's
24 relaying that my client said is not recorded. That's
25 when Chapman said the recorder was turned off. So

1 they want to elicit an unrecorded --

2 **THE COURT:** Well, you may ask him to read
3 that to himself. And you may ask him -- you may not
4 read that out loud at all. You may ask him, did he
5 say there that he acknowledged knowing John Boy.

6 **MR. MURPHY:** Fair enough.

7 **THE COURT:** That's it.

8 (Whereupon, the bench conference was then
9 concluded.)

10 **MR. JACKLEY:** May I approach, Your Honor?

11 **THE COURT:** Uh-huh.

12 **Q. (BY MR. JACKLEY)** Mr. Marshall, I am going to
13 ask you to read something to yourself, not to the
14 jury, this highlighted part on page 12 of the
15 transcript that I am placing in front of you.

16 Please read what Serle Chapman indicated to
17 you to yourself.

18 Have you read it to yourself, Mr. Marshall?

19 **A.** I have read it.

20 **Q.** The transcript further indicates your
21 response was, John Boy's like that.

22 Do you see that?

23 **A.** I see that.

24 **Q.** I thought you earlier testified that you
25 didn't know John Graham?

1 **A.** Yeah, I don't know him.

2 **Q.** How would you know that he's like that?

3 **A.** That's a question. John Boy's like that? A
4 question back to that man there.

5 **Q.** Mr. Marshall, Mr. Murphy and you had a
6 discussion about bond requirements and possession of
7 guns.

8 Do you recall that?

9 **A.** Yes, I do, sir.

10 **Q.** Have you ever owned or possessed a 32-caliber
11 revolver?

12 **A.** No, I never have, sir.

13 **Q.** Have you ever been in contact with law
14 enforcement specifically on or about March 2, 1975,
15 when you were in possession of a 32-caliber revolver?

16 **A.** I can't recall that.

17 **Q.** Can you recall being in possession of one in
18 the trunk of a vehicle you were driving?

19 **A.** No, I can't recall ever driving a vehicle on
20 that day.

21 **Q.** Do you recall it being in the trunk of a
22 vehicle you were in on or about March 2, 1975?

23 **A.** No, I can't recall that either, sir.

24 **MR. MURPHY:** Your Honor, I am going to object
25 to this line of questioning. We were -- he was

1 questioned about in November or December of 1975
2 whether he had any guns in his house at that time.
3 This is now months preceding.

4 **THE COURT:** We're beyond the cross quite a
5 ways.

6 **MR. JACKLEY:** No further questions, Your
7 Honor.

8 **THE COURT:** Thank you.

9 Ladies and gentlemen, it is noon time. We're
10 going to break from now until about 1:30 because I
11 have to have a hearing before we go in. So we'll see
12 you then.

13 You are reminded not to talk to anybody.
14 Don't form any opinions on this until it is submitted
15 to you for your decision.

16 Thank you.

17 **MR. JACKLEY:** Your Honor, I am not releasing
18 him from his subpoena.

19 **THE COURT:** You are not free to go.

20 We are in recess.

21 (Off the record.)

22 (Whereupon, the following proceedings were
23 had in open court and out of the presence of the
24 jury.)

25 **THE COURT:** Ready to go, folks?

1 Please close the door -- Jeff, would you
2 close the door, please.

3 Thank you.

4 Do you have anything or wish to proceed with
5 anything before we go a little further, Mr. Urlandson?

6 **MR. ERLANDSON:** I assume that we're
7 proceeding with our motion to quash the subpoena, Your
8 Honor.

9 **THE COURT:** That's correct.

10 **MR. ERLANDSON:** I do have, if the Court
11 pleases at some point here, some additional medical
12 information updated medical information. To the
13 extent it might be relevant to any of the Court's
14 consideration.

15 **THE COURT:** Is it such that you would
16 consider it private?

17 I was going to -- we're going to go into some
18 discussions, but I'd like to see the medical
19 information and I don't think that that's open for
20 anybody else to hear.

21 **MR. ERLANDSON:** I would appreciate that, Your
22 Honor.

23 **THE COURT:** Do we have medical records here?

24 **MR. ERLANDSON:** No. Just in the form of
25 witness testimony, Your Honor.

1 **THE COURT:** Okay.

2 So let us begin the testimony if we can.

3 Ma'am?

4 Ms. Clarke, how are you?

5 Can you speak? Apparently not.

6 Are you going to speak with us?

7 Is your client able to communicate,

8 Mr. Erlandson?

9 **MR. ERLANDSON:** She is, Your Honor, on a
10 limited basis.

11 **THE COURT:** Okay.

12 I need to put you under oath. If you would
13 please raise your right hand as best you can.

14 THEDA CLARKE,
15 called as a witness herein, having been duly sworn,
16 under oath testified as follows.

17 **THE COURT:** You have to answer.

18 **THE WITNESS:** I do.

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

20 You have been called as a witness.

21 Do you understand that?

22 You have to answer me, ma'am.

23 Do you understand what a witness is?

24 **THE WITNESS:** Yes.

25 **THE COURT:** Okay. You are obviously ill; is

1 that correct?

2 Are you sick? Are you sick?

3 **THE WITNESS:** Yes.

4 **THE COURT:** All right.

5 **MR. ERLANDSON:** She has a hard time hearing,
6 Your Honor.

7 **THE COURT:** Me too.

8 Would it help if I am louder?

9 Where are you living now?

10 **THE WITNESS:** Ponderosa Villa.

11 **THE COURT:** Okay.

12 How far is that from here? How long a drive?

13 How long did it take you to get here?

14 **THE WITNESS:** Three hours.

15 **THE COURT:** Three hours.

16 Take you that long to get home?

17 **THE WITNESS:** Yes.

18 **THE COURT:** What was the weather like?

19 **THE WITNESS:** Clear.

20 **THE COURT:** Clear.

21 Temperature?

22 **THE WITNESS:** Warm.

23 **THE COURT:** Warm.

24 How warm? Warm for winter?

25 You got a sweat -- sweatshirt on. Would you

1 go outside without a sweatshirt?

2 **THE WITNESS:** Yes.

3 **THE COURT:** You would.

4 Where did you go to school? High school.

5 **THE WITNESS:** Saint Francis Mission, Saint
6 Francis, South Dakota.

7 **THE COURT:** What years?

8 When did you graduate?

9 **THE WITNESS:** 1942.

10 **THE COURT:** You went there in 1942.

11 Is that when you were born?

12 **THE WITNESS:** That's when I graduated.

13 **THE COURT:** You graduated in -- how old are
14 you now?

15 **THE WITNESS:** Twenty-four.

16 **THE COURT:** Right. Let's try a little better
17 than that.

18 How old are you now?

19 **THE WITNESS:** I don't really know. I can't
20 figure it out according to that new system.

21 **THE COURT:** Okay.

22 How would you try and figure it out?

23 Forty-two -- you were 18 when you graduated?

24 You were born in 1924?

25 **THE WITNESS:** Twenty-two.

1 **THE COURT:** Twenty-two. Okay.

2 So that would make you about 78 plus ten

3 about 88 -- no --

4 **THE WITNESS:** Eighty-six.

5 **THE COURT:** Eighty-six. Close enough.

6 How many people in your high school class?

7 **THE WITNESS:** I don't recall.

8 **THE COURT:** Your basketball team beat ours up
9 real bad. I remember that. Saint Francis used to
10 have a pretty good basketball team.

11 Do you remember that?

12 **THE WITNESS:** Yes.

13 **THE COURT:** Yeah, I thought so. I'd like to
14 remember the name of the kid. He beat us all by
15 himself.

16 Did you go to college at all?

17 **THE WITNESS:** No.

18 **THE COURT:** No?

19 You did not go to college?

20 **THE WITNESS:** No, I didn't.

21 **THE COURT:** Okay.

22 What was your first job?

23 **THE WITNESS:** Saint Mary's Hospital in Saint
24 Mary -- Kansas City, Missouri.

25 **THE COURT:** How did you get to Kansas City

1 from Saint Francis?

2 **THE WITNESS:** I went to nurse's training in
3 Kansas City.

4 **THE COURT:** Okay.

5 Are you a practicing nurse?

6 **THE WITNESS:** Yeah, registered.

7 **THE COURT:** You were a registered nurse.

8 Where did you get your training there?

9 **THE WITNESS:** Saint Mary's Hospital.

10 **THE COURT:** Okay.

11 Did you work in any other hospitals after
12 that?

13 **THE WITNESS:** Oh, yes?

14 **THE COURT:** Whereabouts?

15 **THE WITNESS:** All over the country.

16 **THE COURT:** You traveled around, then, quite
17 a bit?

18 **THE WITNESS:** Yes.

19 **THE COURT:** Did you work in South Dakota in
20 any of them?

21 **THE WITNESS:** Yes, in Pine Ridge.

22 **THE COURT:** Okay.

23 The Indian Health Service?

24 **THE WITNESS:** Yes.

25 **THE COURT:** Okay.

1 Did you work on other reservations?

2 **THE WITNESS:** No.

3 **THE COURT:** Okay.

4 You were -- did you work in private
5 hospitals?

6 **THE WITNESS:** Yes.

7 **THE COURT:** All right.

8 How many different ones, any idea?

9 **THE WITNESS:** No, I don't have any idea. It
10 was several.

11 **THE COURT:** Okay.

12 Do you have children?

13 **THE WITNESS:** Three.

14 **THE COURT:** How old are they?

15 **THE WITNESS:** Nineteen --

16 **THE COURT:** I don't believe that. Nineteen.

17 No.

18 **MR. OSWALD:** My daughter is 19.

19 **THE COURT:** I don't think so. Unless --

20 Did you have a child when you were 70? I
21 don't think so.

22 **THE WITNESS:** No.

23 **THE COURT:** All right.

24 When was your oldest child born?

25 **THE WITNESS:** I don't recall.

1 **THE COURT:** Okay.

2 And you had three children?

3 **THE WITNESS:** Yes.

4 **THE COURT:** Girls? Boys?

5 **THE WITNESS:** Two boys and a girl.

6 **THE COURT:** Who of the oldest?

7 **THE WITNESS:** The boy.

8 **THE COURT:** Both boys or boy, girl, boy?

9 **THE WITNESS:** Two boys and a girl.

10 **THE COURT:** Okay.

11 The girl was the youngest?

12 **THE WITNESS:** Yes.

13 **THE COURT:** Okay.

14 Who was their father?

15 **THE WITNESS:** Edward Clarke.

16 **THE COURT:** How long were you married?

17 **THE WITNESS:** Seventeen years.

18 **THE COURT:** Okay.

19 Now, what kind of a facility or place are you

20 living now?

21 **THE WITNESS:** It's a nursing home.

22 **THE COURT:** A nursing home.

23 And where is it? Where? Chadron?

24 **THE WITNESS:** No. Crawford.

25 **THE COURT:** Crawford. I always get speeding

1 tickets there.

2 How long have you been there?

3 **THE WITNESS:** Four years.

4 **THE COURT:** Four years.

5 Where were you before that? Where before
6 Crawford?

7 **THE WITNESS:** I don't remember.

8 **THE COURT:** Okay.

9 How long have you been ill or sick?

10 **THE WITNESS:** About six years.

11 **THE COURT:** Okay.

12 Is that when you started being in a nursing
13 home?

14 **THE WITNESS:** Yes.

15 **THE COURT:** About six years ago?

16 **THE WITNESS:** Four years ago..

17 **THE COURT:** Four years ago.

18 You know, where were you living 25, 35 years
19 ago?

20 **THE WITNESS:** I don't remember.

21 **THE COURT:** You don't remember.

22 Were you living at Pine Ridge?

23 **THE WITNESS:** Yes.

24 **THE COURT:** Okay.

25 Were you at Wounded Knee?

1 **THE WITNESS:** Yes.

2 **THE COURT:** Okay.

3 Were you around when some Native American
4 groups all over the country began to form a movement
5 to assert their rights?

6 **THE WITNESS:** Yes.

7 **THE COURT:** Okay.

8 Were you part of that movement?

9 **MR. ERLANDSON:** Objection, Your Honor.

10 **THE COURT:** I guess I shouldn't go there.

11 **MR. ERLANDSON:** On behalf of Mr. Clarke, I
12 assert her Fifth Amendment rights against
13 self-incrimination.

14 **THE COURT:** I am sorry.

15 **MR. ERLANDSON:** I renew our position --

16 **THE COURT:** I am sorry. I had no need to go
17 there.

18 However, I am satisfied she's competent to
19 testify. Having said that, then we need to get to the
20 next point.

21 Do you have medical records to give me? I
22 can look at them, but unless they change my mind, it's
23 not going to do anything.

24 **MR. ERLANDSON:** I don't have any additional
25 medical records, Your Honor.

1 I do have testimony from one, if not two,
2 additional witnesses that might shed some additional
3 light on the answers that you heard --

4 **THE COURT:** Okay.

5 **MR. ERLANDSON:** -- and the accuracy of those
6 answers, Your Honor.

7 **THE COURT:** I'm not buying the 19 year old.
8 Okay. We can start with that.

9 Okay. If you do, bring them in.

10 **MR. ERLANDSON:** Some of it is private medical
11 information, Your Honor.

12 **THE COURT:** Okay.

13 Can we save that for last?

14 **MR. ERLANDSON:** Sure.

15 **THE COURT:** Then I don't have to play
16 revolving doors.

17 **MR. ERLANDSON:** Sure.

18 Can I have just one minute?

19 **THE COURT:** Sure.

20 **MR. ERLANDSON:** Your Honor, we'll just have
21 one witness, and that will be Jennifer Gering. She
22 would like to -- I'd like to present some information
23 about the medications, medical conditions, and
24 Ms. Clarke's current condition.

25 **THE COURT:** Okay.

1 Folks, I am going to ask folks to leave
2 because we're going to get into the private and
3 personal medical records of this witness. You have
4 heard the statements and examinations so far. We will
5 let you know as soon as this is over. I expect it
6 will not take more than five minutes to ten minutes at
7 the most.

8 Thank you.

9 (Whereupon, the courtroom was then cleared of
10 any spectators.)

11 **THE COURT:** Please raise your right hand.

12 JENNIFER GERING,

13 called as a witness herein, having been duly sworn,
14 under oath testified as follows:

15 **THE COURT:** Please take a seat.

16 Mr. Erlandson?

17 **MR. ERLANDSON:** Thank you, Your Honor.

18 **DIRECT EXAMINATION**

19 **BY MR. ERLANDSON:**

20 **Q.** Would you state your name for the record,
21 please.

22 **A.** Jennifer Gering.

23 **Q.** And what do you do for a living?

24 **A.** I am a medication aide going to nursing
25 school.

1 Q. Okay.

2 And where do you work?

3 A. I work as Ponderosa Villa in Crawford.

4 Q. And do you know Theda Clarke?

5 A. Uh-huh.

6 Q. How do you know her?

7 A. She's a resident there.

8 Q. And are you familiar with her medical
9 condition?

10 A. I am. Her -- the medications she's currently
11 taking, yes.

12 Q. If you wouldn't mind, would you please
13 summarize the medications that Theda is on presently
14 and the associated medical conditions?

15 A. She is on --

16 Do you want me to say the name of the
17 medication?

18 Q. Please.

19 A. Glyburide and Adamet for her diabetes. She
20 is on Prilosec and Tums for gird. She is on an iron
21 supplement for anemia. Klonopin for anxiety. She's
22 on Celexa for aggravated depression. Risperidone it's
23 for -- it's an anti-psychotic medication. She's on
24 Diabion for hypertension. Remeron for depression.
25 Plavix for an injection fraction. Dilantin for CVA.

1 **Q.** Okay.

2 Do any of these medications affect her
3 ability to recall past events?

4 **A.** They are supposed to kind of help. You know,
5 at her age, whether they do or not --

6 **Q.** Are you familiar with -- strike that.

7 **MR. ERLANDSON:** I have nothing further, Your
8 Honor.

9 **THE COURT:** Do you deal with her commonly?

10 **THE WITNESS:** Yeah.

11 **THE COURT:** Is she coherent?

12 **THE WITNESS:** Yes.

13 **THE COURT:** Got a pretty good idea of who,
14 what, where, and why?

15 **THE WITNESS:** Yes.

16 **THE COURT:** She knows who you are?

17 **THE WITNESS:** Uh-huh.

18 **THE COURT:** Okay.

19 **THE WITNESS:** She has troubles with numbers.

20 **THE COURT:** Me, too.

21 Given the statement of the meds, though, and
22 time to think and consider the questions, she should
23 be able to answer them?

24 **THE WITNESS:** I would think so. Uh-huh.

25 **THE COURT:** Okay.

1 I don't have any anything further.

2 Anybody else?

3 **MR. JACKLEY:** Not from the state, Your Honor.

4 **THE COURT:** Okay.

5 How do you spell Gering?

6 **THE WITNESS:** G-E-R-I-N-G.

7 **THE COURT:** Okay.

8 You are from Gering, Nebraska then?

9 **THE WITNESS:** My husband's great grandfather
10 founded Gering.

11 **THE COURT:** Oh, okay.

12 Thank you.

13 (Witness excused.)

14 **THE COURT:** Okay. I think I have to let the
15 folks in for the motion hearing or I will get scabbed
16 out of town. Allow them back in --

17 Do we need to -- I need to get to the magic
18 question before we have a crowd in, right -- folks, I
19 am sorry. I am dancing the wrong direction. It will
20 be another three or four minutes before you can come
21 in.

22 **MR. JACKLEY:** I think they can hear that.

23 **THE COURT:** I am sorry again. Come on back
24 in.

25 (Whereupon, the courtroom was then reopened

1 to the public.)

2 **THE COURT:** Okay.

3 How do we wish to proceed at this point?

4 We are at the point where Ms. Clarke has been
5 sworn. Is under oath. I have made a ruling that
6 she's competent to testify.

7 And, at which point, does anybody prefer who
8 makes the inquiry?

9 I think she's your witness, Mr. Jackley.

10 **MR. JACKLEY:** Thank you, Your Honor.

11 Ms. Clarke, can you hear me?

12 **THE WITNESS:** Yes.

13 **MR. JACKLEY:** Ms. Clarke, if you are called
14 to testify today, and you are given an oath to testify
15 about the truth, what do you intend to do?

16 Are you going to testify or are you going
17 to -- Ms. Clarke?

18 Are you going to testify or are you going to
19 exercise --

20 **THE WITNESS:** What do I say to that?

21 **MR. ERLANDSON:** Let him finish his question.

22 **MR. JACKLEY:** Are you going to testify or are
23 you going to exercise your Fifth Amendment right to
24 not incriminate against yourself?

25 **MR. ERLANDSON:** She'll exercise her Fifth

1 Amendment right.

2 **MR. MURPHY:** Your Honor, I believe the
3 response needs to come from the witness, not the
4 attorney.

5 **THE COURT:** Will you testify today, ma'am?
6 Break it down. Will you take the stand and
7 answer questions.

8 **MR. JACKLEY:** Ma'am, if I call you as a
9 witness today, will you agree to raise your right
10 hand? Will you do that for me?

11 **THE WITNESS:** (Indicating.)

12 **MR. JACKLEY:** If you testify, will you agree
13 to raise your right hand and tell the truth?
14 Will you agree to do that for me?

15 I am sorry, ma'am, what did you say?

16 **THE WITNESS:** Yes.

17 **MR. JACKLEY:** Okay.

18 Do you wish to testify or do you wish to
19 exercise your right to not testify?

20 **THE WITNESS:** Not testify.

21 **MR. JACKLEY:** Okay.

22 So you will exercise your Fifth Amendment
23 right per your advise of counsel?

24 **THE WITNESS:** Yes.

25 **MR. JACKLEY:** Can I keep going?

1 **THE COURT:** I accept that. That's been the
2 representation as to what would occur and it's been
3 affirmed by the witness.

4 Next step.

5 Do you have anything further to ask?

6 **MR. MURPHY:** No, I don't.

7 **MR. JACKLEY:** Ma'am, if you exercise your
8 Fifth Amendment right, I, as a prosecutor, have the
9 ability to do what we call compel testimony. I have
10 the ability to have you testify and I have to agree to
11 not use your testimony against you.

12 Do you understand me?

13 Maybe let me go at it this way. If I go to
14 the judge and I ask the judge to have you testify
15 here, and I agree to not use that against you -- we
16 call that use or derivative use immunity -- will
17 you -- will you do that?

18 **THE WITNESS:** What do I say?

19 **MR. ERLANDSON:** It would be my recommendation
20 and advice to my client not to cooperate with regard
21 to that testimony.

22 **THE COURT:** Mr. Jackley?

23 **MR. JACKLEY:** I am satisfied, Your Honor.

24 **THE COURT:** At this point we will excuse the
25 witness and go from there.

1 Mr. Murphy, do you have any questions?

2 I mean, I don't see much point in going to
3 jail.

4 **MR. MURPHY:** I -- we would not be seeking
5 that as any form of relief.

6 **THE COURT:** It seems a little unduly harsh.

7 **MR. JACKLEY:** Your Honor, the only thing I
8 ask is that you not release her from her subpoena
9 unless -- until you declare her unavailable. I should
10 say, unless you declare her unavailable.

11 **THE COURT:** I don't perceive she's
12 unavailable.

13 Mr. Murphy?

14 I mean, she's available but we're going to go
15 nowhere.

16 **MR. MURPHY:** Right. That's a finding the
17 Court will make. I don't have anything on that.

18 **THE COURT:** It would appear to me she's
19 unavailable for all particular purposes in this
20 hearing.

21 You -- let me describe just -- because we
22 don't have a video. Ms. Clarke is elderly. And I am
23 not sure of the dates and the accuracy of it, but she
24 indicates that she graduated from high school
25 somewhere around 1942. And that she's 80 some years

1 of age. She appears very limited in mobility. I
2 believe she's capable of understanding, but she is
3 clearly not in good health.

4 I think she is competent to testify. She has
5 legal counsel. She has exercised her right to
6 silence. And despite an offer of immunity by
7 Mr. Jackley, she has stated that she will not testify
8 and that is concurrent with the advice of counsel.

9 At that point and under those facts and
10 observations, I would declare her to be unavailable.
11 And at that point she is released from her subpoena.
12 And you may -- you may exit if you wish,
13 Mr. Erlandson, together with your client.

14 Thank you, ma'am.

15 **MR. MURPHY:** Your Honor, then we would
16 request to proceed with our discussion on my motion in
17 limine.

18 **THE COURT:** That's correct.

19 You may begin.

20 **MR. MURPHY:** Thank you, Your Honor.

21 On April 23 of this year, I filed a motion in
22 limine. It is my understanding the state intends to
23 call Ms. Clarke or now to have her declared
24 unavailable so they can put one statement by her
25 before the jury, presumably through Kamook Ecoffey.

1 That statement is an isolated statement. It
2 was an unrecorded statement. And it happened,
3 supposedly, in the year 2000, some 25 years after the
4 incident.

5 I want to go through the issues that I see as
6 making that statement inadmissible either through
7 Ms. Ecoffey or any other third-party source. First is
8 the issue of confrontation. Theda Clarke is not on
9 trial, but the state is seeking to inculcate my client
10 through her statement. That statement essentially
11 boils down to her saying that's why we did it. We
12 didn't want to -- we didn't want to have this happen
13 to us again. That's essentially the statement that
14 they want to put through -- put in before the jury
15 through Ms. Ecoffey.

16 The statement uses the term we twice, which
17 is broadly inculpatory, but in the context of this
18 case clearly is inculpatory towards my client.

19 An out-of-court statement by a third-party
20 declarant that implicates the accused violates my
21 client's right to confrontation.

22 I would read one short quote from *United*
23 *States vs. One Star*, a 1992, Eighth Circuit Court out
24 of the District of South Dakota. That case says,
25 quote, the admission of out-of-court statements by an

1 unavailable declarant to inculcate a third party
2 requires careful thought. Because the defendant has
3 no opportunity to cross-examine the witness, the Court
4 must be thoroughly satisfied the statements are
5 accompanied by significant indicia of reliability.
6 Absent factors that clearly indicate the
7 trustworthiness of the statements, a confrontation
8 clause problem arises, unquote. It cites to *Brutten* a
9 U.S. Supreme Court case, and *Riley*, an Eighth Circuit
10 case.

11 In this case, let's be very clear, the
12 statement the state intends to offer is being offered
13 for the truth of the matter asserted. They want to
14 establish that Anna Mae Aquash was killed because she
15 was perceived to be an informant. It is hearsay and
16 John can't confront the declarant because Ms. Clarke
17 has just been ruled unavailable.

18 It does not fall outside of hearsay because
19 it is not a co-conspirator statement. It is a
20 statement made 25 years after the alleged events. And
21 it was not made in furtherance of the conspiracy.

22 The state has argued or asserted that this is
23 a statement against interest. And it appears it is a
24 statement against Ms. Clarke's interest.

25 However, a statement against interest is not

1 a firmly rooted exception to the rule against hearsay.
2 That's the *Lilly* decision, United States Supreme
3 Court. Restated recently in *Linder, L-I-N-D-E-R*, 2007
4 South Dakota 68.

5 Because it is a -- because it is not a firmly
6 rooted hearsay exception, to be admissible it must be
7 corroborated by facts clearly indicating the
8 trustworthiness of the statement in addition to the
9 matters I mentioned previously in regard to the
10 confrontation issue.

11 We have a line of cases that talk about what
12 the Court can and should look at when deciding whether
13 or not the statement was corroborated by circumstances
14 or facts clearly indicating trustworthiness.

15 First, the Court may consider whether the
16 statement was made under oath. That's the *Engesser*
17 2003 decision and the *Cottier* 2008 decision. In this
18 case we know Ms. Clarke's out-of-court statement was
19 not made under oath.

20 The *Davi* decision, *D-A-V-I*, 1993 South
21 Dakota, said the Court can consider whether the
22 statement was oral or recorded. The statement the
23 state intends to offer was oral. It was not recorded.

24 We have previously heard the testimony of
25 Kamook Ecoffey where she talked about how she had a

1 recording device. She had a secretly concealable
2 recording device. You saw how we presented that she
3 had recorded in one -- for one witness alone, Troy
4 Lynn Yellow Wood, 19 cassettes full of information.
5 She recorded interviews with at least ten people. Yet
6 this statement is not recorded.

7 Of import is that Ms. Ecoffey did record
8 secretly other statements made by Theda Clarke. The
9 one in question was not recorded, but others were. In
10 the recorded statements, she makes no incriminating
11 statements and she does not say anything close to what
12 the statement wants to admit.

13 *Engesser* also says the Court may consider
14 whether the out-of-court statement was subject to
15 cross-examination. That was not the case here.

16 Last, *Engesser* says the Court can consider
17 the declarant's character. Here, we got a statement
18 allegedly made by Clarke to Ecoffey that was not under
19 oath, not recorded, not subject to cross. An oral
20 statement.

21 And I am going to present the Court what we
22 previously submitted, which is Exhibit N. That is a
23 selection of prior statements that were recorded --
24 other than the very first page -- that were recorded
25 secretly or openly with Ms. Clarke. In each of those

1 statements, when Ms. Clarke was questioned by
2 Ms. Ecoffey about the incidents at issue here, she
3 denied being involved. When she was told that she had
4 supposedly done one thing or another, she would laugh
5 or say, boy, people on the internet seem to know more
6 about this than I do.

7 She -- at every juncture where the statements
8 were recorded, she denied being involved. Yet, the
9 state wants to introduce that one statement when the
10 recorder wasn't on. And it wasn't because Ms. Clarke
11 asked the recorder to be off. It was just that
12 Ms. Ecoffey decided not to record it. That's the
13 statement they want in.

14 I submit to the Court that there is nothing
15 indicating the kind of corroboration, reliability,
16 circumstantial guarantees of trustworthiness that are
17 required. And I submit to the Court that this is
18 probably one of the most damning pieces of information
19 that the state is trying to admit.

20 And that should heighten the Court's scrutiny
21 because this out-of-court, unrecorded statement that
22 is inconsistent to all of her recorded statements has
23 the potential to damage my client's case irreparably.

24 The other thing I want to reference is the
25 very first document on the top of Exhibit N is

1 document 607 which was taken in 2001 shortly after the
2 statement that is at issue right now.

3 At that time, Ms. Clarke was not living in a
4 nursing home. She was not receiving medical
5 attention, but yet she openly discusses with
6 Ms. Ecoffey the fact that she has Alzheimers. Further
7 raising the specter that the statement she made, if
8 she made it, is certainly subject to dispute. But
9 where that statement is reliable or corroborated by
10 other circumstances showing particularized
11 trustworthiness.

12 I would ask the Court to rule that this
13 statement does not come in. It should not come in.
14 And that the -- any probative value is so outweighed
15 by the prejudice to my client, that it shouldn't come
16 in on those grounds as well.

17 But certainly the kind of trustworthiness
18 circumstances and guarantees that are required under
19 the confrontation clause as well as the state of mind
20 exception are not present.

21 **THE COURT:** Mr. Jackley?

22 **MR. JACKLEY:** Your Honor, the state has
23 provided the Court with a detailed brief on *Crawford*
24 and unavailability so I will get to the point.

25 It is the state's position that *Crawford*

1 would not preclude the use of this statement because
2 Kamook Ecoffey is not a law enforcement officer and we
3 have provided the Court with that case law.

4 I believe that today the Court has found
5 Theda Clarke unavailable. Rule 804(b)(3) specifically
6 allows for the use of a statement such as this. It
7 provides a statement which was, at the time of its
8 making, so far contrary to the declarant's pecuniary
9 or proprietary interest -- and I emphasize
10 declarant's. The declarant in this case being Theda
11 Clarke -- or so far tended to subject her to criminal
12 liability. It's permissible.

13 Your Honor, we have a transcript of the notes
14 directly taken after the interview. Mr. Murphy
15 indicated that the witness, Kamook Banks, that would
16 testify about this, chose not to record it. And I
17 believe that that is inaccurate. I believe that
18 Kamook Banks --

19 **THE COURT:** We can't argue with the fact that
20 it was not recorded?

21 **MR. JACKLEY:** Right. But it wasn't by her
22 choosing.

23 She will be subject to cross-examination on
24 the issues that would essentially go to weight, not
25 admissible. That is the existence or nonexistence of

1 a transcript.

2 But I think the important part for the
3 indicia of reliability is, directly after the
4 interview, Kamook Banks sat down with an FBI agent and
5 they did a transcript of the interview.

6 Moreover, Kamook Banks is here subject to
7 cross-examination regarding the statement. And when
8 we talk about the statement, in the context of Kamook
9 Banks and Theda Clarke talking about Annie Mae being
10 an informant, and the murder of Annie Mae Aquash,
11 Theda Clarke states, quote, yeah, that's why we did it
12 and it wasn't ever gonna happen again, end quote.
13 That's clearly against her interest to have said that.
14 And I believe that there is an indicia of reliability
15 based upon the existence of this transcript and I
16 believe that the state is entitled to introduce this
17 statement and the fact that the defendant is entitled
18 to cross-examine the witness regarding the
19 circumstances surrounding the statement.

20 **MR. MURPHY:** May I respond, Your Honor?

21 **THE COURT:** Uh-huh.

22 **MR. MURPHY:** First, *Crawford* has not been an
23 issue in this case. *Brutten* and the confrontation
24 clause, which are alive and well outside of *Crawford*,
25 are. There has not been any case law that says just

1 because *Crawford* only applied to testimonial
2 statements, that the confrontation clause does not
3 apply when a third party's out-of-court declarations
4 are going to be used against a defendant who did not
5 make the statement, did not adopt the statement, and
6 where they were not a co-conspirator statements.

7 What the state hasn't addressed is the *Lilly*
8 issues and the issues that we talked about regarding
9 the pre-admissibility issue. This is not a weight of
10 the evidence issue. The particularized guarantees of
11 trustworthiness, the requirements that the statement
12 be so corroborated by facts and circumstances showing
13 that it is trustworthy and has indicia of such are not
14 about weight, they are about admissibility.

15 The fact than Ms. Ecoffey is subject to
16 cross-examination is irrelevant. The issue is that
17 Ms. Clarke is not subject to cross-examination. The
18 state keeps referencing a transcript. That's an
19 inaccurate statement. What it is is this woman's --
20 after -- whether she decided not to use the recorder
21 or whether the recorder wasn't working or she didn't
22 have one is irrelevant.

23 The fact of the matter is this is a woman who
24 went to a witness's house, she has recorded multitudes
25 of statements. She did not use her recorder at this

1 time. So it was her choice. And she did not do so.
2 And so she took some notes afterwards and they are
3 saying that is indicia of reliability. It is not.

4 We don't know anything about the reliability
5 of Ms. Clarke's statement to her. As I indicated, she
6 said it was at a time near when Ms. Clarke was already
7 suffering from Alzheimers.

8 She also says in her statements that she --
9 that Ms. Clarke made the statement at the end of the
10 day after a long interview. That raises issues about
11 fatigue and competency at the time of the making of
12 the statement.

13 But we got an uncross-examined, unsworn,
14 unrecorded statement that is inconsistent with every
15 other recorded statement she made and it is damaging
16 to my client and he has no ability to cross-examine
17 the declarant.

18 **THE COURT:** You addressed issues also earlier
19 in terms of accomplice testimony and conspiracy
20 testimony, did we not?

21 **MR. MURPHY:** I don't believe directly. We
22 talked about it not being a co-conspirator statement
23 because it was made 25 years after the fact.

24 **THE COURT:** I don't believe it's a
25 co-conspirator statement, period.

1 **MR. MURPHY:** Right.

2 **MR. JACKLEY:** May I briefly respond to that,
3 Your Honor?

4 **THE COURT:** Uh-huh.

5 **MR. JACKLEY:** If you examine the actual
6 statement, there is no *Brutten* issue. In other words,
7 she doesn't say John Graham did this. What she --

8 **THE COURT:** Then why do you want it in?

9 **MR. JACKLEY:** Because it ties her into it and
10 it says we. In other words, she didn't do it alone.

11 **MR. MURPHY:** There are two Supreme Court
12 cases that address this. There is *Grey vs. Maryland*
13 and I believe the other one is called *Marsh*. There is
14 a great dialogue about how the statement in those
15 cases making the same kind of argument. And the
16 Supreme Court says, well, it wouldn't take very
17 intelligent jurors to look up and see the defendant at
18 the defense table and realize that the we implicated
19 him.

20 That's just -- they have established or tried
21 to establish that the we means John Graham, Arlo
22 Looking Cloud, and Theda Clarke. So to allow in a
23 statement that says twice, we did this because we
24 didn't want this to happen again, clearly is
25 inculpatory and clearly is a *Brutten* confrontation

1 issue.

2 **MR. JACKLEY:** Your Honor, I believe that most
3 of the *Brutten* problems are typically salvaged or
4 addressed by redactions in which you take out the name
5 of a co-conspirator for a defendant and you put in we
6 or you put in some other --

7 **THE COURT:** Come on. Get serious.

8 **MR. JACKLEY:** I am, Judge. I mean, she does
9 not say John Graham in this statement.

10 **MR. MURPHY:** I would cite the Court to *Iron*
11 *Shell vs. Leaply* that says that's a fiction.

12 **THE COURT:** I mean, the only possible reason
13 you want the statement in is because you want we to
14 include Mr. Graham. I understand that.

15 But to tell me that we can't draw a rational
16 conclusion or that 14 people aren't going to
17 immediately know that we includes John Graham is --
18 you know --

19 **MR. JACKLEY:** But, Judge, my reading of
20 *Brutten* is this, that the statement itself cannot do
21 that. But a jury is allowed to draw inferences from
22 other evidence in a trial; and then therefore, there
23 is not a *Brutten* problem. That's precisely what is
24 occurring here. It will take the jury to draw
25 inferences from other evidence in this courtroom which

1 is permissible and which does not create a *Brutten*
2 issue. That's the basis behind all the *Brutten* case
3 redactions. That is permissible.

4 **MR. MURPHY:** That, Your Honor, is in cases
5 where the statement is so attenuated that there are
6 multiple steps to link.

7 *Iron Shell* and numerous other cases in this
8 state as well as federally say that if the clear
9 implication -- the obvious inference is that the we
10 applies to the defendant, the redaction isn't
11 permissible, that the statement should not come in.

12 **THE COURT:** Well, I make the requisite
13 findings. First of all, the short note is, I don't
14 think it's admissible. Rule out conspiracy and
15 accomplices. But it's truly an out-of-court statement
16 that implicates Mr. Graham beyond cavel. There is --
17 might as well put John Boy or JG on it instead of we.
18 And I don't see that it's humanly possible to mistake
19 that connection.

20 There is no opportunity to confront or
21 cross-examine Ms. Clarke based upon that. That's a
22 fundamental right. A Fifth Amendment -- sixth?

23 **MR. MURPHY:** Sixth.

24 **THE COURT:** -- to confront our accusers. And
25 that guarantee from Colonial days. The right got so

1 far out of whack that *Crawford* came in, but it's a
2 still a straight-forward confrontation issue and it's
3 trying to cross-examine someone on what was said with
4 all of the other available information that is
5 presented to us in dozens of different statements and
6 that like. It would be -- it would be fair
7 confrontation, and to deprive the defendant of that
8 opportunity, I think is constitutionally invalid.

9 And then if you go down the list of, under
10 oath, it's not recorded, it's a concealed recorder
11 that -- is apparently it's non operable, but
12 regardless it didn't operate. The other statements
13 are contrary. There is no opportunity to
14 cross-examine.

15 For whatever it's worth, the person taking
16 the statement is very clearly, no matter how it's
17 characterized, working for the FBI or very closely
18 with. Her husband is a part of that accommodation.
19 So there is a connection to law enforcement one way or
20 the other.

21 The extent to which she's working for or
22 cooperating with I am not sure that there is a
23 distinction with a difference there.

24 Doesn't mean that the statement is
25 inaccurate. It doesn't mean that it was not precisely

1 remembered and put down. I am not saying that at all.
2 I am just saying it runs afoul of the South Dakota and
3 the United States Constitutions.

4 And at that point, lacking any other
5 significant indicia of reliability -- it doesn't even
6 come down to he said/she said. She's not here to say
7 and so that's out.

8 **MR. JACKLEY:** For purposes of the record,
9 Your Honor, I would request that if it is, in fact,
10 being excluded under *Brutten*, that proper limiting
11 instruction be given to correct any concerns that the
12 Court has alluded to.

13 **THE COURT:** I think a limiting instruction
14 would be an exercise in futility. I don't think the
15 we can be cured. I don't think there is any way I can
16 cure that defect. I can give an instruction on
17 reliability which I think would be prejudicial to the
18 state's case. I don't see that going there is helpful
19 at all.

20 **MR. JACKLEY:** Would the Court consider a
21 redaction of the statement to remove the we?

22 **THE COURT:** No.
23 What am I going to replace it with?

24 **MR. JACKLEY:** I.

25 **THE COURT:** Then how is it admissible?

1 Then it's irrelevant.

2 **MR. JACKLEY:** It's a statement against
3 interest. If she was involved in the criminal venture
4 it's further evidence that the jury can consider.

5 **THE COURT:** Well, it says I did it and I
6 didn't want it to happen again.

7 How does that relate to Mr. Graham?

8 If it doesn't make it more or less likely
9 that Mr. Graham did or did not do something, then it's
10 irrelevant by definition. So, no.

11 I'll take your offer of proof as to what's
12 there and we'll go from there.

13 Please call your next witness.

14 **MR. JACKLEY:** Your Honor, for purposes of the
15 record, can I mark for purposes of the appellate
16 record Exhibit 23 which is the statement that's been
17 excluded?

18 **THE COURT:** Yes. Absolutely.

19 (Whereupon, the following proceedings were
20 had in open court with the jury present.)

21 **THE COURT:** Satisfied this is the jury?

22 **MR. JACKLEY:** The state is, Your Honor.

23 **MR. MURPHY:** Yes, Your Honor.

24 **THE COURT:** You may proceed, Mr. Oswald.

25 **MR. OSWALD:** The state calls Arlo Looking

1 Cloud.

2 **THE COURT:** Please raise your right hand.

3 ARLO LOOKING CLOUD,

4 called as a witness herein, having been duly sworn,
5 under oath testified as follows:

6 **THE COURT:** Please take a seat in the witness
7 chair, sir.

8 **DIRECT EXAMINATION**

9 **BY MR. OSWALD:**

10 Q. Would you introduce yourself, please.

11 A. My name is Arlo Looking Cloud.

12 Q. Arlo, were you convicted of a particular
13 crime regarding Anna Mae Aquash?

14 A. Yes, sir.

15 Q. Could you tell the jury what crime you were
16 convicted of?

17 A. Aiding and abetting.

18 Q. In what, murder?

19 A. Yes, sir.

20 Q. Was that in federal court?

21 A. Yes, sir.

22 Q. Did you at some point agree to testify in
23 this case?

24 A. Yes, sir.

25 Q. Did you want something from the government in

1 regard to that testimony?

2 **A.** No, sir.

3 **Q.** Did the government offer to give you or give
4 a recommendation to the -- or not a recommendation but
5 a letter to the judge that you cooperated for a
6 sentence reduction?

7 **MR. MURPHY:** Objection. Leading.

8 **THE COURT:** Overruled.

9 **A.** Sir, can you explain the question?

10 **Q.** (BY MR. OSWALD) Are you -- is there a -- you
11 would like a sentence reduction, wouldn't you?

12 **A.** Yes, sir.

13 **Q.** And your understanding is that if you
14 cooperated that the government will inform the judge
15 as to your level of cooperation?

16 **MR. MURPHY:** Again, leading, Your Honor.

17 **THE COURT:** Overruled.

18 **A.** Yes.

19 **Q.** (BY MR. OSWALD) How old are you, Arlo?

20 **A.** Fifty-seven.

21 **Q.** In -- what year were you born?

22 **A.** Fifty-three.

23 **Q.** 1953?

24 **A.** Yes.

25 **Q.** So in 1975, did you know John Boy Graham or

1 John Boy Patton?

2 A. I was -- it was the first time I met him.

3 Q. Okay. We'll talk about that.

4 Did you know Theda Clarke?

5 A. Yes, sir.

6 Q. How did you know Theda Clarke, sir?

7 A. I did some driving for her in the past.

8 Q. Now, Arlo, just after Thanksgiving in 1975 --

9 I want to take you there. Okay.

10 You got it in your mind?

11 A. Yes, sir.

12 Q. At some point were you north of Wambli and

13 south of Kodaka?

14 A. Yes, sir.

15 Q. That's where I want to take you.

16 Where were you in the motor vehicle, sir?

17 A. In the back seat.

18 Q. Describe the car.

19 A. It was a red Pinto station wagon.

20 Q. Who was in the car?

21 A. Theda Clarke, John Graham, Annie Mae Aquash,

22 and I.

23 Q. Where was Annie Mae in the car at that time?

24 A. In the back hatchback in the back.

25 Q. Where was John Graham?

1 **A.** In the front passenger's side.

2 **Q.** So how long had Theda been driving in that
3 area prior to this?

4 **A.** A few hours, I think.

5 **Q.** Which way were you headed?

6 If we're talking you had already passed
7 Wambli, let's start there.

8 Which way were you headed?

9 **A.** North.

10 **Q.** Is that on the way to Kodaka?

11 **A.** Yes, sir.

12 **Q.** Describe what happened as you were headed
13 north?

14 **A.** When I woke we stopped and we turned around
15 and we went left, south, on the same highway, on the
16 same road.

17 **Q.** Theda still driving?

18 **A.** Yes, sir.

19 **Q.** Then what happened after she went south?

20 **A.** She drove for a while and then she turned
21 south and then she went north and then she stopped and
22 she went south again and then she stopped.

23 **Q.** Everybody still in the same car?

24 **A.** Yes, sir.

25 **Q.** Nobody left off?

1 **A.** No, sir.

2 **Q.** When she stopped, what took place?

3 **A.** John Boy got out and he went in the back.

4 **Q.** And what did he do in the back?

5 **A.** He got Annie Mae Anna Mae and he walked
6 towards the side.

7 **Q.** To the side, you said?

8 **A.** Yes. Toward the area there.

9 **Q.** What did you do?

10 **A.** I sat in the car and Theda told me go with
11 him.

12 **Q.** Did you do that?

13 **A.** Yes, sir.

14 **Q.** Where did you guys go?

15 **A.** I proceeded to follow him.

16 **Q.** What did you see when you were right behind
17 them?

18 **A.** I see him standing with Anna Mae and then I
19 seen him shoot her.

20 **Q.** Did you see what kind of gun he shot her
21 with?

22 **A.** No.

23 **Q.** Not at that time?

24 **A.** Not at the time.

25 **Q.** Did you hear Anna Mae saying anything before

1 you heard the shot?

2 **A.** She was saying something but I couldn't -- I
3 couldn't identify -- I couldn't -- sounded like she
4 was praying, but in her language.

5 **Q.** Okay.

6 It was in her native language you think?

7 **A.** I think.

8 **Q.** You are fluent in Lakota, aren't you?

9 **A.** Yes, sir.

10 **Q.** And did it sound like Lakota language?

11 **A.** No, sir.

12 **Q.** Well, where was John Boy in relation to Anna
13 Mae when you here the shot?

14 **A.** He was beside her.

15 **Q.** Did you see the flash of the gun?

16 **A.** No.

17 **Q.** How close was Mr. Graham to Anna Mae when you
18 here the shot?

19 **A.** He was beside her.

20 **Q.** What did you see Anna Mae do when you heard
21 the shot?

22 **A.** She went over the bank there.

23 **Q.** Did you hear one shot?

24 **A.** Yes, sir.

25 **Q.** Did you go down the bottom of the cliff and

1 check her out at all?

2 A. No, sir.

3 Q. What did you guys do then when -- after you
4 saw her go over the cliff?

5 A. I asked for the gun and I emptied the rounds.

6 Q. Why did you ask for the gun?

7 A. I figured I'd be next. I thought I would be
8 next.

9 Q. Did you empty some rounds, then?

10 A. Yes, sir.

11 Q. Where at?

12 A. I don't recall, but I know I fired them
13 toward the west. Anywhere.

14 Q. Was Anna Mae crying before she was shot?

15 A. No, sir.

16 Q. Now the pan that you say shot her, do you see
17 him here in the courtroom today?

18 A. Yes, sir.

19 Q. Where is he seated?

20 A. Seated right there.

21 Q. Who color shirt is he wearing?

22 A. Dark blue.

23 MR. OSWALD: Your Honor, may the record
24 reflect this identification?

25 THE COURT: Yes.

1 **Q.** **(BY MR. OSWALD)** After you emptied the rounds,
2 what did you folks do?

3 **A.** We left.

4 **Q.** Was there anything said between the three of
5 you when you got back in the car?

6 **A.** No, sir.

7 **Q.** When you left, which direction did you go?

8 **A.** South.

9 **Q.** What happened then?

10 **A.** Then we stopped at a bridge and we buried the
11 gun.

12 **Q.** Did you have anything to bury it in?

13 **A.** A pillow case.

14 **Q.** Later on, much later, did you go back to that
15 bridge?

16 **A.** Yes.

17 **Q.** Why?

18 **A.** To see if it was still there.

19 **Q.** Was it?

20 **A.** No, sir.

21 **Q.** Was the pillow case still there?

22 **A.** No, sir.

23 **Q.** Who actually buried it?

24 **A.** We both did.

25 **Q.** Now, when you went back to look for that gun

1 again, how much later was it from the time that you
2 looked for it to when you buried it?

3 **A.** A few years.

4 **Q.** After you folks buried the gun, what
5 happened?

6 **A.** We left and we got on to 18 and was headed
7 back towards again Denver.

8 **Q.** Mr. Looking Cloud, in Denver, were you a
9 resident of Denver at this time?

10 **A.** Yes, sir.

11 **Q.** Who was Troy Lynn Yellow Wood?

12 **A.** Troy Lynn Yellow Wood is the niece of Theda
13 Clarke.

14 **Q.** Now, we were talking about the incident on
15 the cliff, right? I want to take you back a few days.
16 Are you with me there?

17 **A.** Yes, sir.

18 **Q.** You are in Denver?

19 **A.** Yes, sir.

20 **Q.** Whose house did you go over to?

21 **A.** Troy Lynn.

22 **Q.** Why did you go to Troy Lynn's house?

23 **A.** I went to look for a friend of mine.

24 **Q.** And that was who?

25 **A.** Joe Morgan.

1 Q. Why did you do that?

2 A. So I do go party around.

3 Q. Where and you go to look for Troy Morgan?

4 A. Troy Lynn's.

5 Q. When you got to Troy Lynn's, what happened?

6 A. I knocked on the door. The back door. And
7 Troy Lynn answered the door. And she told me to wait,
8 so I waited, and Theda came out.

9 Q. Then what happened?

10 A. And Theda asked me what I was doing. If I
11 was doing anything or if I was sober and if I could
12 help her drive to Rapid City. And then she told me
13 we'll be right back.

14 Q. What did you say?

15 A. I thought about it and I said yeah. Since
16 they was going to be for maybe a day.

17 Q. Did she ever mention to you why?

18 **MR. MURPHY:** Objection. Calls for hearsay.

19 Q. **(BY MR. OSWALD)** Just answer yes or no.

20 A. Yes.

21 **THE COURT:** Sustained. That question
22 doesn't, but the next one will.

23 Q. **(BY MR. OSWALD)** She told you why, then --
24 just answer yes or no.

25 Did she tell you why?

1 **A.** Yes.

2 **Q.** Did you go in the house, then?

3 **A.** Yes.

4 **Q.** What did you see in the house?

5 **A.** I went down to the basement. She told me to
6 go down to the basement.

7 **Q.** What did you see there?

8 **A.** I go down to the basement and I see
9 Mr. Graham and I see a lady sitting on a couch.

10 **Q.** Have you ever met this lady before?

11 **A.** I have never met either of them.

12 **Q.** You mean Graham and this lady?

13 **A.** Yes.

14 **Q.** Did you get introduced to Mr. Graham?

15 **A.** Yes, sir.

16 **Q.** Did you eventually find out who this lady was
17 that was downstairs?

18 **A.** Yes, sir.

19 **Q.** Who was that?

20 **A.** Anna Mae Aquash.

21 **Q.** What happened downstairs then?

22 **A.** She told me to wait, and a few minutes later
23 she came downstairs and asked us -- she told us if we
24 was ready to go.

25 **MR. MURPHY:** Objection. Calls for hearsay.

1 **THE COURT:** Sustained.

2 **MR. MURPHY:** Move to strike.

3 **THE COURT:** I'm going to change the ruling.
4 Overruled.

5 **Q. (BY MR. OSWALD)** What did she say, then, to
6 you?

7 **A.** She asked if we was ready to go.

8 **Q.** And then?

9 **A.** And then she asked --

10 **THE COURT:** Hold on. That's one answer.

11 **Q. (BY MR. OSWALD)** And did you answer to that?

12 **A.** Yes, sir.

13 **Q.** Did she add anything to that?

14 **MR. MURPHY:** Objection. Calls for hearsay.

15 **THE COURT:** I want to know where we're going.
16 We're getting into hearsay other than introductory
17 comments.

18 **Q. (BY MR. OSWALD)** Mr. Looking Cloud, when you
19 say she, are we talking about Theda?

20 **A.** Yes, sir.

21 **Q.** So we're not talking about Anna Mae Aquash
22 saying these things to you?

23 **A.** Yes. It's not Anna Mae.

24 **Q.** After the conversation, what did you see
25 happening?

1 **A.** Theda asked for a rope.

2 **Q.** Did a rope show up?

3 **A.** Yes.

4 **Q.** What -- who had the rope at that point, you?

5 **A.** No, sir. Theda -- Troy Lynn. She asked Troy
6 Lynn to get the rope.

7 **Q.** Then what happened?

8 **A.** She brought down a rope.

9 **Q.** What happen then?

10 **A.** And John Boy tied her up.

11 **Q.** Were you present and you saw that?

12 **A.** Yes, sir.

13 **Q.** How did he tie her up?

14 **A.** He tied her hands.

15 **Q.** In the front or the back?

16 **A.** Front.

17 **Q.** What happened then, Arlo?

18 **A.** And then we leave.

19 **Q.** When you left, did you go out the door of the
20 back or the front?

21 **A.** The back door.

22 **Q.** Then where did you go once you got out the
23 back door?

24 **A.** We went to Theda's car, to the Pinto.

25 **Q.** Can you describe the seating arrangement?

1 **A.** I was driving and Theda was in the
2 passenger's side and John Boy was in the back seat and
3 Anna Mae was in the back compartment there, the trunk
4 area.

5 **Q.** That hatchback area?

6 **A.** Yes, sir.

7 **Q.** Is it the same Pinto as we talked about
8 earlier?

9 **A.** Yes, sir.

10 **Q.** Did you ever hear Anna Mae saying anything?

11 **A.** No.

12 **Q.** Right then?

13 **A.** No, sir.

14 **Q.** What did you think when you saw the rope and
15 saw her hands being tied?

16 **MR. MURPHY:** Objection. Relevance.

17 **THE COURT:** Overruled.

18 **Q.** **(BY MR. OSWALD)** You may answer.

19 You can answer, sir.

20 **A.** That it might be serious.

21 **Q.** I am sorry?

22 **A.** It could be serious.

23 **Q.** It could be serious, you said?

24 **MR. OSWALD:** Is that what he said?

25 **THE COURT:** Yes.

1 **Q.** **(BY MR. OSWALD)** Answer this yes or no if you
2 would, Mr. Looking Cloud.

3 Did you know why you were going to Rapid City
4 with Anna Mae?

5 **A.** I was told --

6 **Q.** Yes or no, sir.

7 **A.** No.

8 **Q.** Well, what were you told?

9 **MR. MURPHY:** Objection. Calls for hearsay.

10 **THE COURT:** Sustained.

11 **Q.** **(BY MR. OSWALD)** So you got in this car and
12 that's where we're at and she's tied up in the
13 hatchback.

14 From there, what happened next?

15 **A.** I drove north.

16 **Q.** Where did you go?

17 **A.** I went through Cheyenne and somewhere on the
18 other side of Cheyenne Theda drove.

19 **Q.** Did you have any conversations on the trip
20 inside the car?

21 **A.** No.

22 **Q.** Do you recall if you stopped for bathroom
23 breaks or gas or anything?

24 **A.** No, sir.

25 **Q.** No you didn't or no you don't recall?

1 **A.** I don't recall.

2 **Q.** Did you do any sleeping on the way up, if you
3 recall?

4 **A.** Yes, sir, I did.

5 **Q.** Was Anna Mae always in the hatchback all the
6 way on the trip?

7 **A.** Yes, sir.

8 **Q.** Did you know where you were headed for? What
9 town?

10 **A.** Yes, sir.

11 **Q.** What town was that?

12 **A.** Rapid City.

13 **Q.** Eventually did you get to Rapid City?

14 **A.** Yes, sir.

15 **Q.** Then what happened?

16 **A.** Then we go to an apartment.

17 **Q.** Do you know whose apartment?

18 **A.** At the time I did not.

19 **Q.** Did you find out later?

20 **A.** Yes, sir.

21 **Q.** Whose apartment?

22 **A.** Thelma Rios.

23 **Q.** Describe this apartment.

24 **A.** It was empty.

25 **Q.** Like empty like no people or no furniture?

- 1 **A.** No people and no furniture.
- 2 **Q.** Was it an old one or new apartment?
- 3 **A.** A new apartment.
- 4 **Q.** Was Anna Mae with you at this time?
- 5 **A.** I don't recall.
- 6 **Q.** Was John Graham with you at this time?
- 7 **A.** We were all together.
- 8 **Q.** So let me reask you, then, was Anna Mae still
9 with you?
- 10 **A.** We were all together.
- 11 **Q.** What didn't you recall in the first question
12 I just asked you?
- 13 **A.** She was not with me.
- 14 **Q.** Where was she?
- 15 **A.** She was probably inside the apartment in a
16 room.
- 17 **Q.** Well, you were all -- were you all three
18 together or four of you together from Denver to Rapid
19 City?
- 20 **MR. MURPHY:** Objection. Leading the witness.
- 21 **A.** Yes.
- 22 **THE COURT:** Overruled.
- 23 **Q.** **(BY MR. OSWALD)** And you said you were all
24 together at the apartment, right?
- 25 **A.** Yes, sir.

1 Q. All four of you?

2 MR. MURPHY: Asked and answered.

3 THE COURT: Overruled.

4 A. Yes.

5 Q. (BY MR. OSWALD) What happened in this
6 apartment, Arlo?

7 A. Theda asked me if I was hanging over and I
8 said yes so she gave me a couple pills and I took the
9 pills and I went to sleep.

10 Q. Was Theda a nurse?

11 A. Yes, sir.

12 Q. Do you know what kind of pills she gave you?

13 A. I assumed they were aspirin.

14 Q. You had been drinking?

15 A. The night before, yes.

16 Q. Okay.

17 What do you recall happening next, sir?

18 A. I go use the restroom.

19 Q. Are you still in the apartment are we talking
20 about?

21 A. Yes, sir.

22 Q. Then what happened?

23 A. Then I passed the top --

24 MR. MURPHY: Your Honor, I am going to object
25 at this point and ask that we briefly approach the

1 bench.

2 **THE COURT:** Very good.

3 (Whereupon, a bench conference was then
4 held.)

5 **MR. MURPHY:** I just wanted to renew my motion
6 in limine regarding the rape allegation at this point.

7 **THE COURT:** I don't think the rape allegation
8 can fly a kite, but they can proceed with this matter.
9 There may or may not be matters of sexual play.
10 Whether or not there is or not I don't know but I
11 think they are entitled to go there. But I ain't
12 going to call it a rape unless there is some evidence
13 of that.

14 **MR. MURPHY:** I just wanted my record
15 preserved.

16 Thank you.

17 **THE COURT:**

18 (Whereupon, the discussion at the bench was
19 then concluded.)

20 **Q. (BY MR. OSWALD)** All right.

21 We're at the point where you went to the
22 bathroom?

23 **A.** Yes, sir.

24 **Q.** Then what happened?

25 What did you observe?

1 **A.** I heard two people having sex.

2 **Q.** You heard those noises?

3 **A.** Yes, sir.

4 **Q.** Where were they coming from?

5 **A.** From the room where John Boy and Anna Mae
6 were at.

7 **Q.** What did you do then?

8 **A.** I used the bathroom and I went back to my
9 room.

10 **Q.** Did you ever see Anna Mae untied from when
11 you left Denver?

12 **A.** I don't recall.

13 **Q.** What happened next?

14 **A.** Well, Theda wanted me to go with her across
15 the street to another apartment.

16 **Q.** Did you do that.

17 **A.** Yes, sir.

18 **Q.** What did you do across the street there?

19 **A.** Went across the street. We got some
20 breakfast.

21 **Q.** Did you eat there or did you have to haul the
22 food somewhere?

23 **A.** I believe we hauled it back. We hauled it
24 back to the apartment.

25 **Q.** You testified that you thought you heard --

1 that you heard noises of two people having sex.

2 Where was Theda at this time?

3 A. I don't recall.

4 Q. Now, the two people that you talked about,
5 which two are we talking about?

6 A. John Boy and Anna Mae.

7 Q. What happened next, Mr. Looking Cloud?

8 A. We -- we get the food from the ladies there
9 at the house and we go back. And I go back to sleep
10 again.

11 Q. Then what happened?

12 A. Then in the afternoon Theda wakes me and she
13 wants me to go get some gas.

14 Q. Did you do that?

15 A. Yes, sir.

16 Q. What did you do?

17 A. I went down to the gas station and not far
18 from there I have a friend. His name is Tony Red
19 Cloud. So I go visit him.

20 Q. Then what happened?

21 A. And then I have dinner with him and then I go
22 back to the apartment.

23 Q. Were you late getting back there?

24 A. Yes.

25 Q. What happened when you got back there?

1 **A.** She was pretty upset. She wanted to know
2 where I went. Where I was.

3 **Q.** And who is she?

4 **A.** Theda.

5 **Q.** Did you tell her?

6 **A.** Yes, I did.

7 **Q.** Did she curse you out?

8 **A.** Yes.

9 **Q.** What happened next?

10 **A.** And then we leave and I drive to Sharp's
11 Corner.

12 **Q.** Then what happened?

13 **A.** And then she drives.

14 **Q.** Anna Mae?

15 **A.** Theda drives from an -- Sharp's Corner.

16 **Q.** Where was Anna Mae at this time?

17 **A.** In the back area.

18 **Q.** Who was all in the car?

19 **A.** There was John Boy, Theda, I, and Anna Mae.

20 **Q.** John Boy, the same man you pointed out
21 earlier here?

22 **A.** Yes, sir.

23 **Q.** Where did you go?

24 **A.** Theda drives from Sharp's Corner and when I
25 woke, later I find out we're in Rosebud.

1 **Q.** Were you and Tony Red Cloud drinking, by the
2 way, in Rapid City?

3 **A.** No, sir.

4 **Q.** You went to Rosebud, you said?

5 **A.** Yes.

6 **Q.** Where at in Rosebud?

7 **A.** We went to a house.

8 **Q.** Do you know whose house?

9 **A.** Later I find out. It's --

10 **MR. MURPHY:** Objection. Lack of personal
11 knowledge.

12 **THE COURT:** Ask the next question.

13 **Q.** **(BY MR. OSWALD)** At the house that you went
14 to, did you -- you were all still four together?

15 **A.** Yes, sir.

16 **Q.** What happened when you got to this house?

17 **A.** Theda goes inside.

18 **Q.** Okay.

19 And then what happened when Theda went
20 inside?

21 **A.** She went inside and then she comes out. She
22 gets John Boy and they both go back in. And --

23 **Q.** Why didn't you go in at this time?

24 **A.** She tells me to stand --

25 **MR. MURPHY:** Objection. Hearsay.

1 **THE COURT:** Sustained.

2 **Q. (BY MR. OSWALD)** Were you ordered to do
3 something?

4 Just answer this yes or no.

5 **A.** Yes.

6 **MR. MURPHY:** Your Honor, it's an end run
7 around the hearsay.

8 **THE COURT:** I understand that, but it's --
9 it's overruled.

10 **MR. OSWALD:** May the answer stand?

11 **THE COURT:** The answer stands.

12 **Q. (BY MR. OSWALD)** What did you do, then,
13 outside when those two, John Boy and Theda, went in?

14 **A.** She tells me --

15 **MR. MURPHY:** Objection. Hearsay.

16 **THE COURT:** Yeah.

17 Mr. Looking Cloud, you need to quit answering
18 every question or almost every question with what
19 somebody else said. The question was what did you do.
20 That's the answer I expect to come with the question.

21 **THE WITNESS:** Yes, sir.

22 **THE COURT:** Thank you.

23 **Q. (BY MR. OSWALD)** What did you do outside,
24 then?

25 **A.** I stand.

1 Q. Where was Anna Mae?

2 A. In the same area. The same trunk area.

3 Q. Did you walk away from the car?

4 A. No, sir.

5 Q. Did Anna Mae walk away from the car?

6 A. No, sir.

7 Q. Just answer this yes or no also.

8 Would you do that for me?

9 A. Yes, sir.

10 Q. Did you do what you were supposed to do?

11 MR. MURPHY: Objection. It's going through
12 the hearsay again.

13 THE COURT: I think we asked him what he did.
14 He said stand. I think he can answer that question.

15 Q. (BY MR. OSWALD) You may answer.

16 A. Can I have the question, please?

17 Q. Did you do what you were supposed to do?

18 A. Yes, sir.

19 Q. Did Anna Mae talk to you out there?

20 A. No, sir.

21 Q. Did you see her moving around at all?

22 A. No, sir.

23 Q. What was she doing in the trunk -- or excuse
24 me, hatchback?

25 A. I don't know.

1 Q. Were you watching her at all?

2 A. No, sir.

3 Q. Where were you standing?

4 A. I was standing in the back.

5 Q. The back of what?

6 A. The Pinto.

7 Q. The car?

8 A. Yes.

9 Q. Did you ever leave that car area where you
10 were standing when John Boy and Theda were in the
11 house?

12 A. No, sir.

13 Q. Do you know how long they were in the house?

14 A. Not long.

15 Q. At some point did they come out?

16 A. Yes, sir.

17 Q. Then what did you do?

18 A. Then I asked Theda if I -- if I can use the
19 restroom, the bathroom.

20 Q. Just answer this yes or no. Did you go in
21 the house?

22 A. Yes, sir.

23 Q. Did you use the restroom?

24 A. Yes, sir.

25 Q. Did you leave this Rosebud area eventually?

1 **A.** Yes, sir.

2 **Q.** In the same car?

3 **A.** Yes, sir.

4 **Q.** Was Anna Mae in still the same spot?

5 **A.** Yes, sir.

6 **Q.** Who drove, do you know?

7 **A.** I drove for a little while till we got to the
8 highway and Theda drove.

9 **Q.** Where did you go?

10 **A.** We go to Allen.

11 **Q.** Do you know whose house you went to?

12 **A.** Yes, sir.

13 **Q.** And who is that?

14 **A.** Dick Marshall.

15 **Q.** What happened at Dick Marshall's when you
16 first got there?

17 **A.** We go inside.

18 **Q.** You say we, who do you mean, sir?

19 **A.** The same four.

20 **Q.** What happened inside of Dick Marshall's house
21 when you first went in?

22 **A.** Theda goes into the bedroom with Dick
23 Marshall. He was already in there.

24 **Q.** Just Theda alone?

25 **A.** Yes, sir.

1 **Q.** Who was then left, any children around or
2 what are we talking about?

3 **A.** No, sir.

4 **Q.** Okay.

5 So who was out there outside of the bedroom?

6 **A.** There was Cleo, Anna Mae, John Boy, and I.

7 **Q.** How long was Theda and Mr. Marshall in that
8 bedroom?

9 **A.** Not very long.

10 **Q.** Can you give me like hours or minutes?

11 **A.** Minutes.

12 **Q.** What happened, then, when they came out?

13 **A.** She asked us to go into the bedroom.

14 **Q.** Theda did?

15 **A.** Yes. Yes, sir.

16 **Q.** So when you say us, who went in there?

17 **A.** John Boy and I.

18 **Q.** And you?

19 **A.** Yes, sir.

20 **Q.** The two of you went in also?

21 **A.** Yes, sir.

22 **Q.** So who was in the bedroom now?

23 **A.** It was Dick Marshall, Theda, John Boy, and I.

24 **Q.** What did you see when you went in there?

25 **A.** Dick Marshall was passing a note back to

1 Theda.

2 Q. Did you see what was on the note?

3 A. No, sir.

4 Q. Do you have any idea where that note came
5 from?

6 MR. MURPHY: Objection. Calls for
7 speculation.

8 THE COURT: The answer is yes or no.

9 A. No, sir.

10 Q. (BY MR. OSWALD) What did you see Theda do
11 with this note?

12 A. She puts it in her pocket.

13 Q. Did you look at the note?

14 A. No, sir.

15 Q. Did you -- had you touched it?

16 A. No, sir.

17 Q. Nobody handed it to you?

18 A. I don't recall.

19 Q. Did you see anybody reading the note?

20 A. No, sir.

21 Q. After she stuck that note in her pocket, what
22 happened?

23 A. Dick Marshall reaches in the bottom drawer
24 and he pulls out a box, opens the box, and there is a
25 pistol in there and he hands it to Theda.

1 Q. And he hands it to who?

2 A. Theda.

3 Q. Did she take it?

4 A. Yes, sir.

5 Q. What did she do it with, do you know?

6 A. She pockets it.

7 Q. Anything else that she was handed?

8 A. Yes, a box. A box of shells.

9 Q. Did you see what she did with the shells?

10 A. Yes.

11 Q. What?

12 A. She pockets them.

13 Q. Did you hear the conversation that occurred
14 inside that bedroom? Just yes or no.

15 A. No, sir.

16 Q. You didn't?

17 A. No, sir.

18 Q. Was there any talk inside that bedroom when
19 you were there?

20 A. No, sir.

21 Q. So when you and John Boy went in the second
22 time, there was no conversation?

23 **MR. MURPHY:** Asked and answered.

24 A. No, sir.

25 **THE COURT:** Sustained.

1 **Q.** **(BY MR. OSWALD)** What happened then, sir,
2 after the shells and the gun got handed?

3 **A.** Then we leave.

4 **Q.** In the same car?

5 **A.** Yes, sir.

6 **Q.** With Annie Mae?

7 **A.** Yes, sir.

8 **Q.** Do you remember who was driving then?

9 **A.** I was, sir.

10 **Q.** Where was Annie Mae?

11 **A.** In the same area in the back.

12 **Q.** Then where did you go?

13 **A.** Then we took the road from Allen and I don't
14 know what the number is, but we go through Red Water.
15 On the Red Water bridge going towards Wambli this big
16 old owl comes out of nowhere and goes in front of the
17 windshield where Theda is sitting. And then we
18 proceed --

19 **Q.** Okay.

20 Let me ask this, that sticks in your mind,
21 that owl?

22 **A.** Yes.

23 **Q.** In Lakota tradition, does that have any
24 meaning to you?

25 **MR. MURPHY:** Objection. Relevance.

1 **THE COURT:** Sustained.

2 **Q. (BY MR. OSWALD)** Where did you go, then, from
3 Allen?

4 Whose place?

5 **A.** My grandmother's.

6 **Q.** Where was that?

7 **A.** In Potato Creek.

8 **Q.** Why did you go there?

9 **A.** To get some gas.

10 **Q.** And how did you get gas at Potato Creek?

11 **A.** I siphoned it from her car.

12 **Q.** Did you talk to grandma at that time?

13 **A.** A little.

14 **Q.** Was this your boyhood home?

15 **A.** No.

16 **Q.** Was this the grandma that raised you?

17 **A.** No, sir.

18 **Q.** Where did you go from Potato Creek?

19 **A.** We go towards Wambli.

20 **Q.** Who is in the car?

21 **A.** The same four.

22 **Q.** What happened when you went towards Wambli?

23 **A.** There was a junction going towards Interior
24 and just before you get to the junction we see a red
25 light in the back. Theda points out that there is a

1 red light behind us.

2 Q. A red light, like, are you talking like a
3 stoplight or something else?

4 A. Like a flashing red light. A police car.

5 Q. Okay.

6 So did you see it, then?

7 A. Yes, sir.

8 Q. What happened then when you saw that?

9 A. Theda hands me the gun.

10 Q. Then what happened?

11 A. I put it underneath the seat and we continue.

12 Q. And then you continued to -- till what
13 happened?

14 A. Till the red light goes towards -- when he
15 hits the junction, he goes north towards Interior and
16 Theda asks for the gun back.

17 Q. Did you give it to her?

18 A. Yes, sir.

19 Q. Did you know at this time whether that gun
20 was loaded or unloaded?

21 A. No, sir.

22 Q. You didn't know?

23 A. Yes, sir.

24 Q. Can you describe this gun, sir?

25 A. It was a silver -- silver with a red handle,

1 I think. Yeah. Silver with a red handle.

2 Q. Do you know the difference between an
3 automatic, semiautomatic and a revolver?

4 A. Yes, sir.

5 Q. Was this a revolver or semi-automatic?

6 A. Revolver.

7 Q. Okay.

8 After she -- after you hand this gun back to
9 her, what happened?

10 Where did you go?

11 A. We go to Wambli.

12 Q. Where at in Wambli?

13 A. We go to a house.

14 Q. Do you know whose house?

15 A. No, sir.

16 Q. What happen at this house?

17 A. We switch drivers. I get in the back seat.

18 Theda drives, and John Boy gets on the passenger's
19 side.

20 Q. Did you go into this house?

21 A. No, sir.

22 Q. So was this house just a stopping-off point?

23 A. No, sir.

24 Q. Explain that, please.

25 A. She goes to the house but there was no one

1 home so she comes back into the car and she drives to
2 another house.

3 Q. Anna Mae still in the hatchback?

4 A. Yes, sir.

5 Q. Then what happened at this other house?

6 A. No one was home or no one answered the door.

7 Q. Was this daylight or dark?

8 A. I believe it was still -- it was still dark.

9 Q. Then what happened after the second house?

10 A. The third house -- that would be the third
11 house and we rested. I think we rested. Went to
12 sleep maybe for a little while.

13 Q. All of you?

14 A. I know I did.

15 Q. What did the others do?

16 A. I don't know.

17 Q. Where did you go then?

18 A. We go north headed towards Kodaka.

19 Q. And then what happened?

20 A. And then we stop.

21 Q. Is that where we started this story?

22 A. Yes, sir.

23 It's not a story, it's the truth.

24 Q. Do you -- do you have any remorse about what
25 happened to Annie Mae?

1 **MR. MURPHY:** Objection. Relevance.

2 **THE COURT:** Sustained.

3 **Q. (BY MR. OSWALD)** Okay. Don't answer that.

4 After -- let me take you back after you

5 buried the gun.

6 You said you headed to Denver?

7 **A.** Yes, sir.

8 **Q.** All four of you?

9 **A.** Yes, sir.

10 **Q.** Excuse me.

11 **A.** Three.

12 **Q.** Three of you?

13 **A.** Yes, sir.

14 **Q.** And it was Theda, you, and who else?

15 **A.** It was Theda, John Boy, and I.

16 **Q.** Do you know John Trudell?

17 **A.** Yes, sir.

18 **Q.** Did you ever tell him this or parts of it?

19 **A.** Yes, sir.

20 **Q.** Was Troy Lynn along at the time?

21 **A.** Yes, sir.

22 **Q.** Did you ever call Anna Mae's daughter?

23 **A.** Yes, sir.

24 **Q.** When was that, sir?

25 **A.** 2003, maybe. 2003, maybe.

1 Q. Where did you call to?

2 Do you know the country?

3 A. No.

4 Q. Did you talk to the person who identified
5 herself as Anna Mae's daughter?

6 A. Yes, sir.

7 Q. What was her first name?

8 A. Denise.

9 Q. What did you tell Denise?

10 MR. MURPHY: Your Honor, objection. He's
11 being asked about prior statements before he's been
12 impeached.

13 THE COURT: I am going to sustain it.
14 Where are we in terms of your examination?

15 MR. OSWALD: We could take a recess.

16 THE COURT: We should.

17 MR. OSWALD: Okay.

18 THE COURT: I promise 15 minutes, folks.
19 Remember the admonition not to talk to
20 anybody about the case and not to form any opinions.

21 Thank you.

22 (Whereupon, the following proceedings were
23 had out of the presence of the jury.)

24 THE COURT: Counsel, I want to think about
25 that last ruling. I am not sure where I want to go

1 with that.

2 (Off the record.)

3 **THE COURT:** Okay.

4 Satisfied this is the jury, Mr. Jackley?

5 **MR. JACKLEY:** Yes, Your Honor.

6 **MR. MURPHY:** Yes, sir.

7 **THE COURT:** Mr. Oswald, you may pick up -- I
8 changed the last ruling I made. You may pursue that
9 line of questioning.

10 **MR. OSWALD:** Thank you.

11 **Q. (BY MR. OSWALD)** Mr. Looking Cloud, we were
12 talking about what you told Denise.

13 Do you remember that?

14 **A.** Yes, sir.

15 **Q.** Okay.

16 What was it you told her?

17 **MR. MURPHY:** Your Honor, I renew my objection
18 because the statement doesn't predate the motive to
19 fabricate.

20 **THE COURT:** Overruled.

21 The objection is noted.

22 **Q. (BY MR. OSWALD)** You may answer that.

23 **A.** I told her that John Boy shot her and there
24 was Theda and I, and I was sorry.

25 **Q.** And what?

1 **A.** I -- if I had known that something like that
2 was going to happen.

3 **MR. MURPHY:** Objection, Your Honor. This is
4 self-serving and it doesn't respond to the question.

5 **THE COURT:** That's true. That -- the
6 objection is sustained.

7 That answer is stricken. Folks will
8 disregard it.

9 **Q.** **(BY MR. OSWALD)** Mr. Looking Cloud, do you
10 know Robert Ecoffey?

11 **A.** Yes, sir.

12 **Q.** At some point in 1994 did you meet Robert
13 Ecoffey at that crime scene?

14 **A.** Yes, sir.

15 **Q.** Excuse me, was this 1995?

16 **A.** Yes, sir.

17 **Q.** Okay.

18 I'd like to show you what's been marked
19 State's Exhibit 35.

20 Do you see that picture?

21 **A.** Yes, sir.

22 **Q.** Do you recognize whose in there?

23 **A.** Yes, sir, I you do.

24 **Q.** Does this depict what occurred and what you
25 observed on that day?

1 **A.** Yes, sir.

2 **Q.** Whose in that picture, sir?

3 **A.** There is Mr. Ecoffey, Mr. Ianuchi, and
4 myself.

5 **Q.** Is that how you looked back then?

6 **A.** Yes, sir.

7 **Q.** You just -- had you just gotten out of jail,
8 then?

9 **A.** Yes, sir.

10 **MR. OSWALD:** I would offer Exhibit 35.

11 **MR. MURPHY:** No objection.

12 **THE COURT:** Will be received.

13 **MR. OSWALD:** I would like to put this on the
14 wall, if you may?

15 **THE COURT:** Uh-huh.

16 **Q.** **(BY MR. OSWALD)** Mr. Looking Cloud, where are
17 we at right here referring to State's Exhibit 35?

18 **A.** We are on the edge.

19 **Q.** Is that where Anna Mae went over?

20 **A.** Yes.

21 **Q.** Are you telling your story to Mr. Ecoffey
22 right there?

23 **A.** Yes, sir.

24 **Q.** Mr. Looking Cloud, on the way back to Denver,
25 the three of you now, did Theda make any comments

1 about what took place?

2 Just yes or no.

3 **A.** Yes, sir.

4 **MR. OSWALD:** I am offering the next question
5 as a co-conspirator exception to the hearsay.

6 **MR. MURPHY:** Object, your Honor. Doesn't
7 meet the requirements.

8 **THE COURT:** Come on up.

9 (Whereupon, a discussion was then held at the
10 bench.)

11 **THE COURT:** First of all, whisper.

12 **MR. OSWALD:** If anybody asks or talks about
13 it, just tell them that I did it. Theda is saying
14 this.

15 **MR. MURPHY:** Statement is exculpatory another
16 defendant requiring corroboration before they are
17 admissible. The other thing as co-conspirator
18 statements, it has to do more than merely describe or
19 discredit an event. It has to somehow further the
20 event. The event was over at that time.

21 **MR. OSWALD:** May I, Judge?

22 May I reply?

23 **THE COURT:** Your response to the
24 corroboration? I think that that's a correct
25 statement of the law.

1 **MR. OSWALD:** I don't believe it is, Judge.

2 **THE COURT:** You got authority for me? Either
3 side.

4 **MR. OSWALD:** The authority is that I don't
5 believe there is authority on the other side for
6 corroboration. People -- *State vs. Tiegen* didn't
7 require corroboration.

8 **MR. MURPHY:** This isn't co-conspirator
9 statements. I would not be able to admit this
10 statement and -- if I was trying to prove that Theda
11 did it, because I don't have corroboration for a
12 statement that exculpates a codefendant. I believe
13 804(b)(3), statements against interest, is the rule.
14 This is a statement against Theda's interest and I can
15 grab the rule -- Marty has it here.

16 **MR. OSWALD:** Actually, Judge --

17 **THE COURT:** Read the last sentence.

18 **MR. OSWALD:** Okay.

19 Judge, I'm not talking that statute.

20 **THE COURT:** Is not admissible unless
21 corroborating circumstances clearly indicate the
22 trustworthiness of the declarant. It's not met.

23 **MR. OSWALD:** This is a co-conspirator
24 statement by somebody in furtherance of the
25 conspiracy. It had just happened, Judge. It's

1 clearly under *State vs. Tiegen* admissible. This
2 statute is the wrong one that's cited for applying --

3 **THE COURT:** I am not awed by the conspiracy
4 but I am struck by the corroboration and I don't think
5 you got it. In fact, there is no indicia -- there is
6 no indication that it is reliable for crying out loud.
7 I mean all your evidence is directly contrary.

8 So how are you trying to tell me there is
9 some evidence that this is reliable?

10 **MR. OSWALD:** I just -- I just think that
11 reliability of corroboration is not the standard you
12 use for a co-conspirator statement.

13 **MR. MURPHY:** If the evidence is all --
14 whether it's a co-conspirator or any other basis you
15 are now trying to put in testimony that you know to be
16 untrue or at least believed to be untrue.

17 **THE COURT:** I think the last statement in the
18 rule controls. It's not in.

19 **MR. OSWALD:** Judge, for my record, I would
20 like to cite S.D.C.L. 19-16-3 subsection five. And I
21 know the Court's ruling, but I would like the Court to
22 look at this. *State vs. Tiegen*.

23 **THE COURT:** Call me wishy washy but that
24 seems to change my mind. When I read the
25 co-conspirator analysis and the cases cited.

1 **MR. MURPHY:** Okay.

2 **THE COURT:** Overruled.

3 (Whereupon, the discussion at the bench was
4 then concluded.)

5 **Q. (BY MR. OSWALD)** Mr. Looking Cloud, we were
6 talking about what Theda said on the way back to
7 Denver there?

8 **A.** Yes, sir.

9 **Q.** What was it she said about what just
10 happened?

11 **A.** She said if anyone questions or says anything
12 that she done it.

13 **Q.** Mr. Looking Cloud, you have in your life a
14 lot of criminal convictions, don't you?

15 **A.** Yes, sir, I do.

16 **Q.** Spent a lot of time in jail?

17 **A.** Yes, sir.

18 **Q.** You had an alcohol problem?

19 **A.** Yes, sir.

20 **Q.** Have you done some drugs?

21 **A.** Yes, sir.

22 **Q.** Somebody said you have been homeless. Is
23 that true?

24 Do you understand the question, sir?

25 **A.** I might need to explain that.

1 Q. Okay. Go ahead and explain, sir.

2 A. I was not homeless, but sometimes I would go
3 out on binges.

4 Q. How has this affected your life, sir?

5 MR. MURPHY: Objection. Relevance.

6 THE COURT: Sustained.

7 MR. OSWALD: If I may have a minute, Judge?

8 THE COURT: You may.

9 MR. OSWALD: Thank you.

10 I pass this witness, Judge.

11 THE COURT: Thank you.

12 Mr. Murphy?

13 MR. MURPHY: Thank you.

14 **CROSS-EXAMINATION**

15 **BY MR. MURPHY:**

16 Q. Mr. Looking Cloud, my name is John Murphy. I
17 am going to ask you a bunch of questions.

18 You stop me if you don't understand a
19 question, okay?

20 A. Yes, sir.

21 Q. I want to start more or less where you
22 started at the scene where you say my client shot
23 Ms. Aquash.

24 Now, when that event allegedly occurred it
25 was getting light out, correct?

1 **A.** Yes, sir.

2 **Q.** Going back a bit, you were at Cleo Gates'
3 house?

4 **A.** Yes.

5 **Q.** And would you dispute her estimate that that
6 happened between 10:30 and midnight?

7 **A.** I don't recall.

8 **Q.** All right.

9 So you are not saying she's wrong when she
10 testified that it happened between 10:30 and midnight?

11 **A.** Yes.

12 **Q.** Okay.

13 And from there you go to Potato Creek which
14 is a pretty short distance, correct?

15 **A.** Yes.

16 **Q.** And you siph -- you have your brief words
17 with your grandma?

18 **A.** Yes.

19 **Q.** You siphon some gas?

20 **A.** Yes.

21 **Q.** And I believe that then only took a few
22 minutes, correct?

23 **A.** Yes, sir.

24 **Q.** And you go to one house in Wambli, right?

25 **A.** Yes, sir.

1 **Q.** Theda knocks on the door, nobody answers?

2 **A.** Yes, sir.

3 **Q.** You drive to the next house in Wambli, same
4 thing?

5 **A.** Yes, sir.

6 **Q.** Both of those events, knocking on the door,
7 take just a few minutes, correct?

8 **A.** Yes.

9 **Q.** Now, today, for the first time, in all the
10 prior statements you have given, you said that between
11 that second house and arriving out on the Badlands,
12 you guys may have rested.

13 Do you remember you saying that?

14 **A.** Yes.

15 **Q.** And you have never said that before in any of
16 your sworn or unsworn statements, have you?

17 **A.** I did mention that before.

18 **Q.** Can you identify any time in any of the
19 multitude of statements you have given when you ever
20 mentioned the group resting at any point in this
21 venture?

22 **A.** At the lost house maybe.

23 **Q.** And that's what you are saying today.

24 And the reason you are saying that is because
25 you just testified about six months ago at Dick

1 Marshall's trial, right?

2 A. Right.

3 Q. And after you testified, you know an issue
4 came up about you not being able to explain what you
5 did between midnight when you left Cleo's and six or
6 so in the morning when it got light out, right?

7 You didn't have an explanation for that?

8 A. No, sir.

9 Q. Six hours missing, essentially.

10 So today for the first time in front of this
11 jury you say you guys were resting?

12 A. I was. I know I was.

13 Q. But you don't about anybody else?

14 A. Yes.

15 Q. So it's a little different than what you
16 testified to on direct?

17 A. Yes, sir.

18 Q. All right.

19 Well, let's talk about the deals you have
20 made in this case and let's start at the very
21 beginning because you were asked by Mr. Oswald about
22 your hopes for a benefit from this case, do you recall
23 that?

24 You hoped to get a good deal out of this?

25 A. Yes, sir.

1 Q. All right.

2 You started brokering deals in this case all
3 the way back in 1994, didn't you?

4 A. Yes, sir.

5 Q. In fact 1994, Abe Alonzo and Robert Ecoffey
6 came to you while you were in jail, right?

7 A. Yes, sir.

8 Q. You were facing some serious charges there
9 weren't you?

10 A. No, sir.

11 Q. You were facing felony assault on a police
12 officer?

13 A. Yes, sir.

14 Q. That's a pretty serious charge isn't it?

15 A. Yes, sir.

16 Q. Especially for a guy who at that point had
17 four prior felonies.

18 MR. OSWALD: Is that a question?

19 Objection.

20 THE COURT: What's the question?

21 MR. MURPHY: It's a question.

22 Q. (BY MR. MURPHY) It's a real serious matter to
23 be charged with a felony crime of violence to have
24 four prior felonies, isn't it?

25 A. I would need to explain that.

1 **Q.** Well, were you convicted in 1979 in Florida
2 of aggravated assault?

3 **A.** No, sir.

4 **Q.** You weren't.

5 So if your rap sheet says differently it's
6 wrong?

7 **A.** Yes, sir.

8 **Q.** And in 1987, convicted in one county in
9 Colorado with robbery with a knife?

10 **A.** No, sir, I was never convicted of that.

11 **Q.** So your rap sheet is wrong there, too?

12 **A.** I was never convicted of robbery.

13 **Q.** And 1987 in another county in Colorado
14 aggravated robbery?

15 **A.** That's one.

16 **Q.** And 1988, somewhere else in Colorado, felony
17 trespass.

18 You were convicted of that too, weren't you?

19 **A.** Yes.

20 **Q.** Okay.

21 So by your statement, by your count, you only
22 had two prior felonies before the felony charge for
23 assaulting a police officer, right?

24 **A.** You would have to explain that two felonies.

25 **Q.** Well, you didn't dispute the aggravated

1 robbery in 87?

2 A. Yes.

3 Q. You got that conviction, right?

4 A. It was not -- I was never convicted of
5 robbery.

6 Q. Okay.

7 So your rap sheet is wrong there, too?

8 What about the ag assault in Florida?

9 A. There was nothing. There was nothing there.

10 Q. All right.

11 Well, let me put -- let me ask it this way.

12 You've been convicted of more than 40 offenses

13 throughout your life, correct?

14 A. Correct.

15 Q. And in fact, your rap sheet reveals that you
16 got 12 separate convictions for providing false
17 information, true?

18 A. True.

19 Q. And now you are disputing some of the prior
20 felonies but at the time these two officers came to
21 you in 1994, while you sat there in the jail, you were
22 facing one serious felony and you had a track record
23 with the court system, didn't you?

24 A. Yes, sir.

25 Q. And you were looking at some time?

1 **A.** Yes, sir.

2 **Q.** And by that time in 1994, you already knew
3 how to work the system, didn't you?

4 **MR. OSWALD:** Objection. Vague. Speculative.

5 **THE COURT:** Overruled.

6 **Q.** **(BY MR. MURPHY)** You may answer.

7 **A.** The question, please?

8 **Q.** You knew how to work the system by 1994,
9 didn't you?

10 **A.** Work the system how?

11 **Q.** Well, you had done a lot of plea bargains,
12 right?

13 You had done over 40 plea bargains, hadn't
14 you?

15 **A.** Actually, they were guilty pleas.

16 **Q.** You plead guilty to a lot of charges, but you
17 had lots more charges thrown out, didn't you?

18 **A.** Yes, sir.

19 **Q.** Sometimes you would have six or seven charges
20 on a day but they would give you a deal for one
21 charge, right?

22 **A.** Yes, sir.

23 **Q.** And so Ecoffey comes to you and he tells you
24 that the District Attorney would consider dropping the
25 assault on a police officer charge if you cooperated

1 with their investigation?

2 That's what he told you, didn't he?

3 A. Yes.

4 Q. And you said you would consider that, right?

5 A. Yes, sir.

6 Q. And Detective Alonzo told you the same thing,
7 should you decide to cooperate with that, he would
8 have a special word with the District Attorney, right?

9 A. Yes.

10 Q. And so shortly thereafter you hired an
11 attorney, or you had an attorney, and he worked out an
12 immunity agreement, didn't he?

13 A. Yes, sir.

14 Q. And that immunity agreement basically said
15 you wouldn't get into trouble if you told them what
16 they wanted to hear, right?

17 A. Yes, sir.

18 Q. Now, pursuant to the immunity agreement,
19 signed November 3, 1994, the charges disappear about
20 assaulting the law enforcement officer, don't they?

21 They got dismissed?

22 A. Yes, sir.

23 Q. And you go in and you decide to talk to them
24 pursuant to this agreement, tell them your side of the
25 story, right?

1 **A.** Yes.

2 **Q.** And you tell them that Aquash was never tied
3 up; isn't that true?

4 **A.** I don't recall.

5 **Q.** Okay.

6 Well, let me see if I can find it for you.
7 Were you asked by Robert Ecoffey, okay, do you -- a-
8 somebody untie her then. Not that you can remember.
9 Okay.

10 You couldn't remember then, could you?

11 **A.** Okay.

12 **Q.** Okay.

13 And when asked if she was ever tied up, you
14 couldn't recall that either, could you?

15 **A.** Yes.

16 **Q.** Robert Ecoffey asked you, okay, did you guys
17 tie her up. Your answer, no.

18 **A.** Yes, sir.

19 **Q.** Okay.

20 Little different story today, right?

21 **A.** Well, there was three interrogations, I
22 think. Three or four interrogations.

23 **Q.** Sometimes maybe more like 14, weren't there?

24 **A.** Maybe.

25 **Q.** When you were asked to give a complete story

1 back in 1994, which was much closer to the time in
2 events, they asked you if there was anything sexual
3 that happened and you said no, correct?

4 A. I don't recall.

5 Q. Okay.

6 If you had said something like that it would
7 probably be here in the transcript, wouldn't it?

8 A. There is several transcripts.

9 Q. Of that one interview?

10 A. Several interviews.

11 Q. All right.

12 I am talking about the first one you gave
13 when you -- when you assaulted the law enforcement
14 officer and they dumped the charge --

15 MR. OSWALD: Object as to when you assaulted
16 the officer.

17 THE COURT: He was charged with it. The
18 charge went away.

19 Proceed.

20 Q. (BY MR. MURPHY) In fact, at that point you
21 told Mr. Ecoffey and Mr. Alonzo, that John and Anna,
22 Anna Mae were always together. You described them as
23 if they were friends, correct?

24 A. Yes, sir.

25 Q. And you never mentioned anything about rape

1 or hearing sex noises or anything like that, did you,
2 back in 1994?

3 A. Yes, sir.

4 Q. You didn't. That's something you added, oh,
5 about 30 years later or 20 years later, right?

6 A. No, sir.

7 Q. That's something you started talking about in
8 2008, right?

9 A. No, sir.

10 Q. Okay. Well, we'll get to that.

11 Same time, 1994, you get this deal, you give
12 about a 25-page single-spaced statement. You never
13 mention Dick Marshall whatsoever, do you?

14 A. Yes, sir.

15 Q. You do -- you think you did mention Dick
16 Marshall or you didn't?

17 A. I didn't.

18 Q. And you didn't mention going to a house on
19 Rosebud, did you?

20 A. No, sir.

21 Q. And you didn't know anything about Thelma
22 Means' house at that time or Thelma Rios' house at
23 that time?

24 You didn't have any information as to where
25 you were in Rapid City, right?

1 **A.** Right.

2 **Q.** You also said on that occasion you never saw
3 the gun; isn't that true?

4 **A.** That's true.

5 **Q.** But what you did say is at the scene of the
6 alleged crime, after the shooting, you took the gun
7 away from my client and shot it into the ground,
8 emptied the entire cylinder.

9 Do you remember that?

10 **A.** Yes.

11 **Q.** The problem was, you found out later they did
12 a complete metal detector search of that whole area,
13 right?

14 **A.** Yes, sir.

15 **Q.** And so after you found that out, around 2008,
16 you started giving this story about how you shot the
17 gun into the west -- out into the air in the west to
18 explain why nobody found any bullets in the ground,
19 right?

20 **A.** Right.

21 **Q.** I want to talk to you about your next
22 interview, July 25, 1995. The next year after that
23 first one, right?

24 Do you remember that?

25 **A.** Yes.

1 Q. And you are taken to the Badlands -- that was
2 the picture they put up on the wall, right?

3 A. Right.

4 Q. And you are taken there by Mr. Alonzo and
5 Mr. Ianuchi and Mr. Ecoffey?

6 A. Right.

7 Q. But you are driven up there from Denver by
8 Mr. Ianuchi and Mr. Alonzo.

9 Do you recall that?

10 A. Yes.

11 Q. And your attorney is not with you, is he?

12 A. No, sir.

13 Q. And you are alone in the car with these two
14 officers, right?

15 A. Yes.

16 Q. And they start telling you about how
17 Mr. Ianuchi was part of a murder squad in
18 Philadelphia?

19 A. Correct.

20 Q. And that he needed nine certified murders in
21 order to get on that police murder squad?

22 A. Correct..

23 Q. And he told you how they didn't like to have
24 defendants go to trial so back in Pennsylvania where
25 he was at, they had this murder squad to take

1 defendants out and kill them rather than have to go
2 through trial, right?

3 A. Right.

4 Q. And Mr. Alonzo said he wanted to be part of
5 that, right?

6 A. Right.

7 Q. And he told you if you didn't cooperate, he
8 would make it look like you had a -- did a run for it,
9 so he could shoot you, too, didn't he?

10 A. Right.

11 Q. He was messing with your head, wasn't he?

12 A. Yes, sir.

13 Q. And you were scared, weren't you?

14 A. Yes.

15 Q. You were a young guy in a car with these two
16 cops that you don't trust, right?

17 A. Yes.

18 Q. And they want you to come out and cooperate
19 in this investigation, right?

20 A. Yes, sir.

21 Q. And they start telling you, basically, if you
22 don't things their way they are going to kill you,
23 right?

24 A. Yes.

25 Q. And they take you out to the Badlands where

1 that picture was taken, but you don't even recall that
2 as being the place where the events you supposedly
3 witnessed happened, correct?

4 A. Correct.

5 Q. You can't tell them whether this was it or
6 not?

7 A. Correct.

8 Q. But they ask you to go through the story
9 again.

10 Do you recall that?

11 A. Yes.

12 Q. And there scared for your life, you are asked
13 to give all the details you can and at that point you
14 are not worried about anybody else but yourself is
15 that fair to say?

16 A. Yes.

17 Q. And you go through the story. You never
18 mention anything about hearing any sex noises,
19 anything like that, do you?

20 A. Yes.

21 Q. It's true you didn't say that, right?

22 A. Right.

23 Q. You never brought that up? You never brought
24 up Dick Marshall's house, right?

25 A. Right.

1 Q. You said that Anna Mae was not tied up, do
2 you remember that?

3 A. Yes.

4 Q. Okay.

5 After that rather than getting to go back
6 home, getting released on your own recognizance, you
7 are taking to a federal maximum security prison down
8 in Elreno?

9 A. Yes.

10 Q. You are not charged with anything?

11 A. Yes, sir.

12 Q. And you don't have an attorney that's
13 representing you in regard to that, correct?

14 A. Correct.

15 Q. These officers somehow orange straighted that
16 you would be locked up in a federal maximum security
17 prison without charges or anything else?

18 That's your understanding of how it worked?

19 A. I don't know how anything worked but --

20 Q. You ended up there?

21 A. Yes, sir.

22 Q. And you had no explanation of why you were in
23 there federal maximum security lockdown situation?

24 A. Yes, sir.

25 Q. And you spent quite a bit of time there,

1 didn't you?

2 A. Yes, sir.

3 Q. Months?

4 A. Yes, sir.

5 Q. And again, not convicted of anything to get
6 you there, just the police messing with your mind,
7 weren't they?

8 A. Yes, sir.

9 Q. They were breaking you down. That's what you
10 knew at the time. They were breaking you down, right?

11 A. Yes, sir.

12 Q. And you were a pretty easy guy to break down,
13 weren't you?

14 A. I'd been in prison before.

15 Q. Well, but let's talk about your mental
16 health. You know your drug usage -- what was your
17 drug of choice back then?

18 A. There was no particular.

19 Q. Did you testify about six months ago that
20 mescaline was your drug of choice?

21 A. Yes.

22 Q. That's a hallucinogenic?

23 A. Yes.

24 Q. And you liked heroine?

25 A. No.

1 Q. You testified that you used to used heroine,
2 right?

3 A. Yes, sir.

4 Q. In fact, you've claimed in an interview that
5 Abe Alonzo used to give you money so you could buy
6 Cheeba, which is the street slang for heroine, right?

7 A. Yes, sir.

8 Q. And you liked methamphetamine and marijuana,
9 too, right?

10 A. Yes, sir.

11 Q. And you had a history of drinking to the
12 point of blacking out, didn't you?

13 A. Yes, sir.

14 Q. In fact -- let's see. Where is the rap
15 sheet?

16 In your presentence report in federal court,
17 you acknowledged that many years of heavy alcohol --

18 **MR. OSWALD:** Objection, Your Honor. It's
19 improper impeachment at this time. There is no
20 question. Nothing to refresh.

21 **THE COURT:** Lay a foundational question.

22 Q. **(BY MR. MURPHY)** The years of heavy alcohol
23 and drug use, it started to affect the way you -- your
24 ability to think clearly, hadn't it?

25 A. No, sir.

1 Q. Okay.

2 Didn't you tell the United States Probation
3 Office that many years of heavy alcohol and drug use
4 have affected your thought process and mental
5 condition?

6 A. What I witnessed impacted my --

7 Q. Did you tell the presentence -- the U.S.
8 Probation Officer who came and did an interview with
9 you back in 2004 that drugs and alcohol had affected
10 your mental health and your ability to remember
11 things?

12 A. I don't recall.

13 Q. You are not -- did you object to that
14 statement when it was in your presentence?

15 A. I have no -- I have -- I had no counsel with
16 me at the time and the PSI needed to be gone over.

17 Q. Right.

18 A. Exactly.

19 Q. And you and your attorney went over it?

20 A. No, we never did.

21 Q. Sir, at your sentencing hearing, the judge
22 went through the presentence with you.

23 Do you remember that?

24 A. No, sir.

25 Q. You don't remember there when the judge asked

1 if there was any objections to any of the things put
2 in the presentence?

3 A. No, sir.

4 Q. Okay.

5 You don't recall it or you are saying it just
6 didn't happen?

7 A. I don't recall.

8 Q. Because the years of heavy drug and alcohol
9 abuse have affected your ability to keep things
10 straight, right?

11 That's a fair statement?

12 A. Yes.

13 Q. Okay.

14 So even things that happened in 2004 when you
15 were locked up are hard to keep straight?

16 It's hard to recall those things, right?

17 A. No, sir.

18 Q. Well, you were in jail at the time you did
19 that presentence interview in 2004, right?

20 A. Yes.

21 Q. And you have been in jail or prison every day
22 since then, correct?

23 A. Correct.

24 Q. You haven't had access to illegal drugs or
25 alcohol, right?

1 **A.** Right.

2 **Q.** But here today even having six years of
3 sobriety, you can't say whether you went through that
4 presentence or whether the judge went through it with
5 you, can you?

6 **A.** No, sir.

7 **Q.** Okay.

8 In any regard, after you did that time in
9 Elreno, you came out of it knowing these guys were
10 playing for keeps, right?

11 These guys --

12 **A.** Yes.

13 **Q.** They wanted -- if you didn't give them the
14 story they wanted, you were going to have a pretty
15 miserable life, right?

16 **A.** Yes.

17 **Q.** And you knew the answers you had given them
18 so far weren't the answers they wanted, right?

19 **A.** Yes.

20 **Q.** You had told your story a couple times and
21 yet they are still sending you off to federal prisons
22 beg it be consistently just to be held and toyed with,
23 right?

24 **A.** Yes.

25 **Q.** So let's bring it up to 2,000. You are in

1 jail in December of 2000.

2 Do you recall that?

3 **A.** No, sir.

4 **Q.** Okay.

5 Do you recall Troy Lynn Yellow Wood and
6 Kamook coming to the jail to pick you up one day?

7 **A.** Yes, sir I do.

8 **Q.** And do you recall that being in the winter?

9 **A.** Yes, sir.

10 **Q.** Troy Lynn was a friend of yours, right?

11 **A.** Yes.

12 **Q.** And Kamook was a relative of yours? Kind of
13 attenuated relative?

14 **A.** No, sir.

15 **Q.** Don't you remember Kamook telling you that
16 you were half brothers with Richard Lee Lamont, right?

17 **A.** Right.

18 **Q.** And that she -- her mother was a Lamont,
19 right?

20 **A.** I guess.

21 **Q.** Okay.

22 And that -- that actually is right in the
23 beginning of the interview. She establishes she has a
24 family connection with you through the Lamonts.

25 Do you recall that now?

1 **A.** Yes, sir.

2 **Q.** So you are talking with friends and relatives
3 and you talk to them for hours, don't you?

4 **A.** Yes.

5 **Q.** They get you cigarettes, do you recall that?

6 **A.** Yes, sir.

7 **Q.** And got you breakfast? Although, actually,
8 it was about lunch. It was your first meal of the
9 day.

10 Do you remember that?

11 **A.** Yes, sir.

12 **Q.** Do you remember how your mind was really
13 foggy because of the pills they gave you in the jail?

14 **A.** Yes, sir.

15 **Q.** The jail gave you some kind of medication to
16 sedate you?

17 **A.** Yes, sir.

18 **Q.** They talked to you for 257 pages.

19 You have seen this transcript before, haven't
20 you?

21 **A.** Yes, sir.

22 **Q.** In fact, you have been able to read a lot of
23 the discovery if your case over the last six or seven
24 years?

25 **A.** No, sir.

1 **Q.** Well, you went through a federal prosecution
2 for murder, right?

3 **A.** I did not go through the files.

4 **Q.** You didn't read your own files?

5 **A.** Some.

6 **Q.** Some. Okay.

7 Well, you are talking now, not to cops, but
8 to friends and relatives and you are asked about
9 whether there was any sexual activity between my
10 client, John Graham, and Anna Mae Aquash.

11 Do you recall them bringing that topic up?

12 **A.** Yes, sir.

13 **Q.** And actually they bring it up twice, and on
14 both occasions, you say, didn't happen.

15 Do you remember that?

16 **A.** Yes.

17 **Q.** In fact, you said they were hanging out in a
18 room and it sounded like they were playing cards and
19 talking.

20 Do you remember that?

21 **A.** Yes, sir.

22 **Q.** You also don't bring up Dick Marshall, do
23 you?

24 **A.** Yes, sir.

25 **Q.** And you don't bring up a note, do you?

1 **A.** No, sir.

2 **Q.** You don't bring up anything about seeing a
3 gun being passed from to Theda?

4 **A.** Yes, sir.

5 **Q.** And that's because you don't even acknowledge
6 ever being in Dick Marshall's house at that the point,
7 do you?

8 **A.** Yes.

9 **Q.** That's because it hadn't become part of the
10 story line, right?

11 **MR. OSWALD:** I will object as argumentative,
12 Judge.

13 **THE COURT:** Sustained.

14 **Q.** **(BY MR. MURPHY)** Okay. I will rephrase that.
15 At the time that you ultimately got
16 prosecuted in 2003, the prosecution was painting a
17 different story of this whole case.

18 Do you remember that?

19 **A.** No, sir.

20 **Q.** Well, they didn't have a component about
21 going out to Rosebud, did they?

22 That wasn't even part of the picture, was it?

23 **A.** No, sir.

24 **Q.** You hadn't learned what their theory of the
25 case was at that point nor had you in 2000, had you?

1 **A.** Yes, sir.

2 **Q.** You didn't know Dick Marshall was going to be
3 a suspect, did you?

4 **A.** No, sir.

5 **Q.** You didn't know he was going to get charged
6 in 2008, did you?

7 **A.** No, sir.

8 **Q.** And so at that point, even though you talked
9 for nine cassettes, 257 pages, details like sexual
10 conduct between my client and Dick Marshall don't even
11 come up, do they?

12 **A.** No, sir.

13 **Q.** And the issue about sex does come up twice
14 but both times you deny it, right?

15 **A.** Yes, sir.

16 **Q.** And at that time my client hadn't been
17 charged, had he?

18 **A.** I don't recall.

19 **Q.** Well, he was charged with you, originally
20 wasn't he?

21 **A.** Yes, sir.

22 **Q.** And you weren't charged till 2003, right?

23 **A.** Yes.

24 **Q.** And he wasn't charged in state court until
25 2008, was he?

1 **A.** Yes, sir.

2 **Q.** And that's when they made the sex allegation
3 for the first time, isn't it?

4 **A.** Yes, sir.

5 **Q.** And that's the first time you ever testified
6 about hearing any noises consistent with sexual
7 activity, isn't it?

8 **A.** Yes, sir.

9 **Q.** Okay.

10 So that detail got added in 2008 when they
11 started saying my client raped Anna Mae Aquash, do you
12 recall that now?

13 **A.** Yes, sir.

14 **Q.** Okay.

15 That was pretty helpful to them, wasn't it,
16 when you started saying, after 20 years of giving
17 statements, that he did that?

18 That was pretty helpful to those guys?

19 **A.** It was the truth, sir.

20 **Q.** Awe.

21 Just wasn't the truth when you talked to
22 friends and relatives for six hours, right?

23 **A.** That's questionable, sir.

24 **Q.** It's questionable --

25 **A.** That they are my friends other relatives.

1 Never knew them before.

2 Q. Troy Lynn Yellow Wood?

3 A. Yes.

4 Q. Troy Lynn Yellow Wood was a woman who let you
5 stay at her house?

6 A. I never stayed at her place.

7 Q. Oh.

8 So if she said you were free to come and go
9 at her house and crash at her house, she was lying?

10 A. She wasn't lying, but I never stayed at her
11 place.

12 Q. You weren't allowed to just walk in the front
13 door without knocking?

14 A. I knocked.

15 Q. You always knocked?

16 A. Yes, sir.

17 Q. So you weren't going to tell Troy Lynn and
18 Kamook the truth because you didn't like them?

19 A. I really didn't know them, sir.

20 Q. Well, you spent six hours talking to them.

21 A. They talked to me.

22 Q. They talked to you, you talked to them. They
23 asked you questions about what did it sound like when
24 John and Anna were together. I don't know. Some card
25 games or something like that.

1 That's the kind of thing you told them,
2 right?

3 **A.** Yes.

4 **Q.** And if you were interested if the truth then,
5 certainly the truth at that point didn't involve sex,
6 did it?

7 **A.** Yes.

8 **Q.** All right.

9 And back then when you are talking you said
10 you never saw the gun. You didn't even know one
11 existed, did you, didn't you?

12 **A.** Yes, sir.

13 **Q.** Today you tell a story this gun is being
14 handed back and forth to you. You see it in Dick
15 Marshall's house. You know it's a revolver. It's got
16 a red handle. But back then when you are talking to
17 somebody who at least thinks she's your friend and
18 let's you say at her house, and somebody who is
19 related to you through your families, you say I didn't
20 see a gun, right?

21 **A.** Right.

22 **Q.** During this long discussion with Kamook and
23 Troy Lynn, they start telling you that my client is
24 blaming you for the killing of Anna Mae Aquash, don't
25 they?

1 **A.** Yes.

2 **Q.** You didn't know that they were lying to you,
3 did they?

4 **A.** No.

5 **Q.** My client was up in Canada. He hadn't said a
6 word about you being involved in this.

7 You know that now, don't you?

8 **A.** Yes.

9 **Q.** But back then, the year 2000, they tell you
10 it's going to be your word against his and he's saying
11 you committed the crime.

12 That gets you mad, doesn't it?

13 **A.** Yes, sir.

14 **Q.** And you ask Kamook, how many people should I
15 implicate, huh? And she tells you only John Boy,
16 right.

17 **A.** Yes.

18 **Q.** And she further tells you she's the FBI
19 informant. She's working with law enforcement. But
20 she tells you, because it's going to come down to
21 pretty much your word against his, right?

22 **A.** Yes, sir.

23 **Q.** She's setting you up to tell you to keep
24 pointing the finger at my client, right?

25 Isn't that the case?

1 **A.** Yes, sir.

2 **Q.** And the only person she wants you to
3 implicate is John Graham, right?

4 That's what she tells you, only John Boy?

5 **A.** I would like to be explain.

6 **Q.** No. I am asking you what she said -- you
7 said --

8 **A.** Okay, yes.

9 **Q.** She gave you one name?

10 **A.** Yes.

11 **Q.** Did it seem odd to you that at that point
12 she's telling you who to implicate?

13 **A.** I would like to explain.

14 **Q.** Well -- did it seem --

15 **A.** Yes.

16 **Q.** All right.

17 Because you knew at this point or you
18 believed at this point that Kamook and Anna -- or
19 Kamook didn't like Anna Mae?

20 **A.** I don't know.

21 **Q.** You made that statement in recorded jail
22 calls that you knew Kamook didn't like Anna.

23 Do you recall making those statements?

24 **A.** Yes.

25 **Q.** Because Anna Mae was having an affair with

1 her husband, right?

2 **A.** Right.

3 **Q.** And then you are talking to this woman who
4 doesn't like Annie Mae, according to what you
5 believed. Was the wife who was betrayed by Annie Mae.
6 And she's telling you to point the finger at somebody
7 else.

8 Did you think you were getting played at that
9 point?

10 **A.** Yeah. I thought the whole thing was just
11 like a gest.

12 **Q.** Like a gest?

13 **A.** Yes.

14 **Q.** You didn't know you were being recorded?

15 **A.** I thought they were just kind of like fooling
16 around.

17 **Q.** When you talked to them for all this time?

18 They were fooling around when they asked you
19 if you ever heard sex or all these other detailed
20 questions they asked you, that was just joking around?

21 **A.** I didn't know who these people were.

22 **Q.** Well, you knew Troy Lynn from way back in the
23 1970s?

24 **A.** Exactly.

25 **Q.** And you had contact with her all through from

1 1970s, 1980s, 1990s. This is all the way in 2000.

2 A. Right.

3 Q. You knew her pretty darn well?

4 A. Yes, sir.

5 Q. Okay.

6 Another thing you left out in this is any
7 discussion of any alleged meeting or any other
8 activity up at the Wounded Knee Legal Defense Offense
9 Committee, right?

10 A. Yes, sir.

11 Q. You said you guys, meaning you, Anna, and
12 John, stayed in an apartment for the entire time you
13 were up in Rapid City.

14 Do you remember telling them that?

15 A. Yes.

16 Q. Nobody left other than Theda to get some
17 food, right?

18 A. Yes, sir.

19 Q. All right.

20 But things started changing pretty quickly
21 after the 2000 interview. Specifically in 2003 you
22 were charged with one count of murder, right?

23 Do you remember that?

24 A. Yes.

25 Q. And you said you were convicted of aiding and

1 abetting.

2 Do you remember that?

3 A. Yes, sir.

4 Q. But you were charged with committing the
5 murder or aiding and abetting, right?

6 A. Yes.

7 Q. Charged either way?

8 A. Yes, sir.

9 Q. And the jury didn't have to find you guilty
10 of one or the other, they could have found you guilty
11 of both, right?

12 A. Yes.

13 Q. So you don't know if they found you guilty of
14 aiding and abetting or being the shooter, do you?

15 MR. OSWALD: Objection, Your Honor.

16 THE COURT: It's a fair question.

17 Q. (BY MR. MURPHY) You might answer the
18 question.

19 A. Yes, I don't know.

20 Q. You don't know. Okay.

21 Well, you are charged with murder. You are
22 facing life, right?

23 You know that?

24 A. Yes, sir.

25 Q. And you decide to go back one more time and

1 talk with Mr. Ecoffey.

2 Do you remember that?

3 Do you remember that.

4 A. Yes.

5 Q. He reads you your Miranda rights and all of
6 that. Gives you all the warnings required under the
7 law, right?

8 A. Right.

9 Q. And at this point, you are fighting for your
10 life, fair statement?

11 A. Yes.

12 Q. I mean, you don't want to go to prison. You
13 don't want to go down for this murder rap, do you?

14 A. Yes, sir.

15 Q. You have every incentive to tell them what
16 they want to hear, don't you?

17 A. Just the truth, sir.

18 Q. Well, okay.

19 You are asked if you hear my client having
20 any sexual activity with Anna Mae.

21 Do you remember that?

22 A. Yes, sir.

23 Q. And what you told them is, I don't think she
24 was tied up in a room. I don't know. I think she was
25 talking to John -- John Boy. They asked, okay. You

1 answer, they must have known each other.

2 Is that accurate?

3 A. Yes.

4 Q. And you also tell Mr. Ecoffey, while you are
5 trying to make the deal of your life, that the three
6 of you, John, Anna, and you, yourself, you three,
7 stayed in the apartment, that empty apartment, the
8 entire time. None of you left.

9 Do you remember that?

10 A. Yes, sir.

11 Q. And nobody went down to the WKLDQC office.
12 Do you remember telling them that?

13 A. No, sir.

14 Q. Okay.

15 You were asked the question, okay, Arlo, you
16 didn't take her down to the Wounded Knee defense house
17 that day. I don't think so. No. We just stayed in
18 that house all day.

19 That's what you told them?

20 A. Yes.

21 Q. And you told them that John was -- or that --
22 excuse me. That Anna Mae was not tied up during this
23 event, right?

24 A. Right.

25 Q. And you never mentioned Dick Marshall or

1 going to his house, right?

2 A. Right.

3 Q. And you say that you shot the gun into the
4 ground, right?

5 A. Yes.

6 Q. Because you hadn't gotten your discovery yet
7 so you hadn't figured out that the metal detector had
8 searched the ground, right?

9 A. Yes.

10 Q. So at this point you are still telling the
11 shooting the ground story; you hadn't quite moved to
12 the shooting into the air story?

13 A. Fair.

14 Q. That didn't come until later once you got the
15 police reports?

16 A. Right.

17 Q. In fact, they repeated asked you about Dick
18 Marshall. You don't mention anything about him, fair?

19 A. Fair.

20 Q. You don't mention anything about the red
21 lights that you say you saw today. You don't mention
22 seeing a gun passed from Dick Marshall to Theda,
23 right?

24 A. True.

25 Q. No bullets? None of that stuff?

1 **A.** True.

2 **Q.** At that point, sir, you have the biggest
3 incentive in the world to give them the complete
4 story, don't you?

5 **A.** Yes.

6 **Q.** But you don't know what story they want to
7 hear yet, do you?

8 **A.** No, sir.

9 **Q.** Okay.

10 So you can't give them all the details they
11 want. You give those details, later, once you figure
12 out what they want to hear?

13 **A.** No, sir.

14 **Q.** Well, 2008 your story gets a lot different,
15 doesn't it?

16 **A.** Yes, sir.

17 **Q.** All right.

18 Well, things don't work out for you in 2003.
19 You get convicted at trial in 2004.

20 Do you remember that?

21 **A.** Yes.

22 **Q.** You get sentenced to life, right?

23 **A.** Yes, sir.

24 **Q.** And right after you get sentenced to life --
25 well, let's talk about your trial first. Let me back

1 up.

2 You go to trial. You call one witness,
3 right?

4 A. Yes.

5 Q. That guy testifies for about five minutes,
6 right?

7 A. Yes, sir.

8 Q. You come to the conclusion your trial was a
9 complete farce, right?

10 It was a joke?

11 A. Yes, sir.

12 Q. You didn't get a fair trial?

13 A. Yes, sir.

14 Q. You claim your attorney dropped the ball?

15 A. Yes, sir.

16 Q. You also claim that nobody would listen to
17 you when you tried to tell them about dropping Anna
18 Mae off at a safe house.

19 Remember that?

20 A. No, sir.

21 Q. Didn't you tell David Seals that in an
22 interview in February of 2004?

23 A. No, sir.

24 Q. He came to the jail and interviewed you, do
25 you remember that?

1 **A.** Yeah. He was some kind of a writer.

2 **Q.** Yeah. A writer.

3 And you told him that you visited your
4 friend, Tony Red Cloud, in Rapid City and wasn't even
5 with Annie Mae after they dropped off her off at a
6 safe house on Pine Ridge 100 miles from Rapid City.
7 You told him, I never saw her again or even John Boy I
8 don't think.

9 That's what you told him, right?

10 **A.** Yes, sir.

11 I can't explain, though, right?

12 **Q.** Well, you can explain at some point, but I'm
13 asking you, that's what you told this guy, right?

14 **A.** Yes.

15 **Q.** That you and John dropped Annie Mae at a safe
16 house in Pine Ridge, right?

17 **A.** Well, that's what he said.

18 **Q.** Okay.

19 But you just said that's what you said.

20 You remember saying that now, don't you?

21 **A.** I didn't say it, but he said it.

22 **Q.** So he got it wrong?

23 **A.** Yes.

24 **Q.** In fact, up until the jail records showed
25 that he had come over and visited you, you denied that

1 he even did that interview, didn't you?

2 A. Yes, sir.

3 Q. Okay.

4 But then when they showed you, hey, we got
5 jail cards proving this guy gave the interview, then
6 you said, yeah, maybe he did interview me, but now he
7 wrote it down wrong.

8 That's how things have changed?

9 A. Yes, sir.

10 Q. Shortly after you were convicted, about six
11 months after you got that life sentence, you were
12 asked by Mr. Mandel to go before a Grand Jury.

13 Do you remember that?

14 A. Yes, sir.

15 Q. And what you told the Grand Jury is is that
16 you were innocent of the charges?

17 A. Yes, sir.

18 Q. But nobody would listen to you, right?

19 A. Yes, sir.

20 Q. So you appealed your sentence trying to get
21 your conviction and your life sentence overturned,
22 right?

23 A. Yes.

24 Q. And again, you made the same arguments. You
25 said, hey, I'm innocent, and my attorney didn't

1 present the defense I wanted him to.

2 Remember that?

3 A. I didn't go through the appeal.

4 Q. Well, you testified before that you read the
5 appeal.

6 A. Well, after it was done.

7 Q. And that was --

8 A. After it was affirmed.

9 Q. After it was affirmed.

10 So you know what your attorney said on your
11 behalf?

12 A. After it was affirmed.

13 Q. Right.

14 And that attorney was Terry Gilbert?

15 A. Yes.

16 Q. A really well-known attorney from out in
17 Ohio, right?

18 A. I don't know.

19 Q. Well, he wasn't the attorney who took your
20 case to trial, right?

21 A. Right.

22 Q. But the Eighth Circuit didn't agree with you
23 and they affirmed your life sentence?

24 A. Yes.

25 Q. And that came down in 2005, and so at that

1 point you had run the course of appeals, hadn't you?

2 A. Yes.

3 Q. Things were starting to look pretty grim?

4 A. Well, I had two more appeals, I think.

5 Q. Okay.

6 We'll talk about those in a second. In the

7 meantime you are sent down to a --

8 Who do you keep looking at over there?

9 A. I am looking at the clock.

10 Q. Okay.

11 You are looking somewhere over there aren't
12 you, though?

13 A. I was looking at the time.

14 Q. When I ask you a question you keep looking
15 over there?

16 A. I am just looking at the time.

17 Q. Really? Each question?

18 A. Yes.

19 Q. All right.

20 You get sent down to a prison down in
21 Louisiana in the meantime, don't you?

22 A. Yes, sir.

23 Q. And it's a hell hole?

24 A. Yes.

25 Q. People are getting stabbed every week?

1 **A.** Yes.

2 **Q.** People are dying, get murdered regularly?

3 **A.** Yes.

4 **Q.** There is the Arian Brotherhood, the Mexican
5 Mafia, the Bloods, Crips, assorted other gangs?

6 **A.** Yes.

7 **Q.** You are not part of a gang?

8 **A.** No.

9 **Q.** And you are all alone there, aren't you?

10 **A.** Yes.

11 **Q.** And it's a dangerous place to be alone, isn't
12 it?

13 **A.** Yes.

14 **Q.** So at that point you have lost your appeals,
15 you start doing some other appeals, some petitions, to
16 get your conviction thrown out, a habeas corpus
17 action, right?

18 **A.** Yes.

19 **Q.** You are hoping that will get you out, right?

20 **A.** Yes, sir.

21 **Q.** Bring the same causes of action. You say
22 that your attorney dropped the ball and nobody
23 listened to your defense?

24 **A.** Yes, sir.

25 **Q.** But that's denied as well, right?

1 **A.** I don't recall.

2 **Q.** Do you recall testifying that it was denied?

3 I didn't hear your answer.

4 **A.** Yes.

5 **Q.** You testified before that it was denied?

6 **A.** One of them was.

7 **Q.** Do you have another one going out there?

8 **A.** Yes.

9 **Q.** Is that your Rule 35 motion?

10 **A.** No, sir.

11 **Q.** You have two habeases going?

12 **A.** Yes.

13 **Q.** That other one is just kind of floundering
14 out there, right?

15 **A.** Yes.

16 **Q.** You don't know what is happening with it?

17 **A.** Yes, sir.

18 **Q.** You are certainly not banking on that to get
19 you out of prison, are you?

20 You are not counting on that to get you out
21 of prison?

22 **A.** Yes, sir.

23 **Q.** What you are counting on getting you out of
24 prison is your cooperation in this case, right?

25 **A.** Yes, sir.

1 Q. All right.

2 A. If I speak the truth.

3 Q. Well --

4 A. -- they will.

5 Q. And we have already talked about your various
6 versions of the truth and we'll get back to that.

7 Things changed in 2007. You had run your
8 appeals. You will lost your first habeas. But in
9 2007, my client, John Graham, was brought back to the
10 United States.

11 Do you recall that?

12 A. Yes, sir.

13 Q. And he was charged over in federal court,
14 right?

15 A. Yes, sir.

16 Q. And he was charged with Dick Marshall, right?

17 A. Yes, sir.

18 Q. And the government came to you again with
19 another immunity agreement.

20 Do you remember that?

21 A. No, sir.

22 Q. Handing you August -- a letter dated
23 August 8, to your then attorney, John Schlingin,
24 correct?

25 Let me break it up. Is the letter dated

1 August 8, 2008?

2 A. Yes.

3 Q. And is John Schlingin the person who it's
4 addressed to?

5 A. Yes, sir.

6 Q. And was he your attorney at the time?

7 A. Yes, sir.

8 Q. And he -- and is it captioned *United States*
9 *vs John Graham*?

10 A. Yes, sir.

11 Q. All right.

12 And does it start by saying this confirms
13 conversations in which you, Mr. Schlingin, indicated
14 that you, Mr. Looking Cloud, would be willing to
15 provide information and testimony against Mr. Graham?

16 A. Yes, sir.

17 Q. All right.

18 So when I talk about the immunity agreement
19 that they gave you in 2008, you agree this is
20 basically that agreement?

21 A. Yes, sir.

22 Q. All right.

23 You actually, by this point, 2008, have
24 multiple attorneys working on your behalf, don't you?

25 A. Yes, sir, I do.

1 Q. You have a guy from Boston, a guy named Barry
2 Bachrach?

3 A. Yes, sir.

4 Q. He used to be Leonard Peltier's attorney?

5 A. Yes, sir.

6 Q. In fact, he ran Leonard Peltier's
7 presidential campaign at one point.

8 Were you aware of that?

9 MR. OSWALD: Objection. Relevancy.

10 MR. MURPHY: I will tie it in.

11 THE COURT: Continue.

12 Q. (BY MR. MURPHY) Do you recall that?

13 A. No, sir.

14 Q. Okay.

15 Do you recall knowing that he was Peltier's
16 attorney for a while, right?

17 A. Right.

18 Q. And that he was fired by Peltier?

19 A. I wouldn't know.

20 Q. Okay.

21 And anyways, he agreed to work for you for
22 free, right?

23 A. Yes, sir.

24 Q. And essentially, your case, you knew, was
25 about trying to get back at Leonard Peltier, right?

1 **A.** I am sorry. The question?

2 **Q.** You knew part of your case, part of the
3 interest in your case, was to prevent Leonard Peltier
4 from getting paroled, didn't you?

5 **A.** No, sir.

6 **Q.** You never heard that?

7 **A.** No, sir.

8 **Q.** You never testified about that before?

9 **A.** No, sir.

10 **Q.** Well, August 8, they come to you. They say,
11 let's make a deal. We now got Dick Marshall and John
12 Graham indicted in federal court, right?

13 **A.** Yes, sir.

14 **Q.** And so for the first time now, in -- well,
15 let me put it this way. Fourteen days after you enter
16 that immunity agreement, you go before a Federal Grand
17 Jury.

18 Do you recall that?

19 **A.** Yes, sir.

20 **Q.** August 20, 2008?

21 **A.** Yes, sir.

22 **Q.** For the first time in 14 years, through all
23 the repeated times you told this story, suddenly you
24 add major new details.

25 Do you remember that?

1 **A.** Yes, sir.

2 **Q.** The first time in 14 years you indicated that
3 Anna Mae was tied up.

4 Do you remember that?

5 **A.** Yes, sir.

6 **Q.** Because they told you they needed her to be
7 tied up, didn't they?

8 **A.** No, sir.

9 **Q.** They told you that kidnapping was going to be
10 part of the equation.

11 Do you remember that?

12 **A.** No, sir.

13 **Q.** You were staying fully aware of what this
14 case was all about. This was a great interest to you,
15 right?

16 **A.** Yes, sir.

17 **Q.** In fact, it was of great interest to you
18 because when you got those other attorneys and you
19 entered that immunity agreement, you started working
20 on what's called a Rule 35 motion.

21 Do you remember that?

22 Do you remember that?

23 **A.** No, sir.

24 **Q.** You don't remember testifying about your
25 Rule 35 motion?

1 Well, let me put it to you this way. Do you
2 remember that your attorneys were going to ask the
3 government not for some letter like Mr. Oswald was
4 talking about, but your attorneys were asking the
5 government to go into federal court, to go back in
6 front of Judge Piersol and to ask on your behalf for
7 Judge Piersol to reduce your sentence.

8 Do you remember that?

9 A. Yes, sir.

10 Q. That's the Rule 35 motion that I'm talking
11 about.

12 Do you remember now that that's what that's
13 called, that Rule 35 motion?

14 A. Yes, sir.

15 Q. In fact, you just testified about it in Dick
16 Marshall's trial six months ago, right?

17 A. I was told that if I spoke the truth that
18 they would agree that they would speak to the Court.

19 Q. They would speak to the Court to get you out
20 of your life sentence, right?

21 A. Yes.

22 Q. And in fact, you have said on a number of
23 occasions, since you started working that deal, that
24 that's what this is all about, getting you out of
25 prison, right?

1 **A.** The truth.

2 **Q.** No. That's not what you said when you were
3 giving recorded jail conversations.

4 In those conversations somebody asked you
5 what's this all about and you said it's about getting
6 out.

7 Do you remember that?

8 **A.** No, sir.

9 **Q.** Do you remember telling people in those
10 conversations that you expected to be out soon?

11 **A.** No, sir.

12 **Q.** You expected -- in fact, one of your friends
13 told you that once you got out he would be over so you
14 guys could hang out and party a bit together?

15 **A.** No, sir.

16 **Q.** Do you remember talking to your friends in
17 Lakota because you didn't think other people could
18 hear you when you were talking about working this deal
19 to get out?

20 **A.** No, sir.

21 **Q.** So if the recorded jail conversations show
22 that, they are somebody else's conversations?

23 **A.** No, sir.

24 **Q.** They would be your conversations?

25 **A.** Yes.

1 Q. All right.

2 This Rule 35, you know what information they
3 want to hear, don't you?

4 A. Just the truth.

5 Q. You have been asked to tell the truth a
6 number of times before, right?

7 A. Yes.

8 Q. And in fact, you have acknowledged you don't
9 have any problem lying to law enforcement to cut a
10 deal, do you?

11 A. No, sir.

12 Q. You said you don't feel bad using the
13 government to get out of prison, correct?

14 A. No, sir.

15 Q. You didn't say that?

16 A. Yes --

17 Q. Did you say it or not?

18 A. The question, please.

19 Q. The question is, you have said before under
20 oath that you don't feel bad about using the
21 government to get out of prison?

22 A. No, sir.

23 Q. Dick Marshall's trial just six months ago,
24 you were asked, and so you didn't feel bad if you
25 could use the government to get out of prison, right?

1 Your answer, yes. Question, and they had lied to you.
2 You didn't feel bad if you lied to them to get out of
3 prison, right? Answer, no.

4 Remember that?

5 A. I didn't understand the question.

6 Q. You didn't understand those questions?

7 A. Yes.

8 Q. What was ambiguous about them?

9 What was confusing?

10 A. I am sorry. I'm not too aware of the English
11 language.

12 Q. You have been speaking the English language
13 in this room perfectly well for two hours, sir.

14 A. I am sorry. I don't understand ambiguous.

15 Q. Okay.

16 What was hard to understand about those
17 questions that you were asked just six months ago?

18 A. I just didn't understand it.

19 Q. You didn't understand --

20 A. Yeah.

21 Q. The question, and so you didn't feel bad if
22 you could use the government to get out of prison,
23 right? Your answer, yes.

24 Let me ask you, do you recall the question,
25 and in fact, in the course of your experience in the

1 criminal justice system, you have frequently lied to
2 law enforcement officers, haven't you? Your answer,
3 yes.

4 A. Yes.

5 Q. And we talked previously about your 12 prior
6 convictions for giving false statements, right?

7 Correct?

8 A. Yes.

9 Q. Okay.

10 No question about those. Those aren't part
11 of the rap sheet that you dispute?

12 A. I don't know what you mean.

13 I have two felony conviction --

14 Q. There is no question before you.

15 Let me just look through my notes.

16 One of the other issues that came up after
17 you started working this cooperation agreement in 2008
18 was the gun. Because that was the first time after
19 all these years of telling your story, the first time
20 you ever admitted or acknowledged or even thought
21 about being at Dick Marshall's house, right?

22 A. Yes.

23 Q. And you went into court at Dick Marshall's
24 trial, and you didn't really know exactly what you
25 were supposed to say, did you?

1 **A.** Just the truth.

2 **Q.** You didn't know the questions you were going
3 to be asked, did you?

4 **A.** No. No, sir.

5 **Q.** And so you were asked, where did you get this
6 gun -- or excuse me. You were asked, where did Dick
7 Marshall pull this gun out of? And you said, from the
8 night stand next to the bed.

9 Do you remember that?

10 **A.** Yes, sir.

11 **Q.** You said that under oath. That was supposed
12 to be the truth at that point, right?

13 **A.** It is the true, yes, sir.

14 **Q.** And he reached in one of the drawers from the
15 night stand.

16 Do you remember telling them that?

17 **A.** Yes.

18 **Q.** But, what came out during your testimony at
19 Dick Marshall's trial is that there was no drawers in
20 the night stand.

21 Remember that?

22 **A.** I didn't hear other testimony.

23 **Q.** Well, you have said before that you've read
24 through Cleo Gates' testimony.

25 Do you remember that?

1 A. Yes.

2 Q. And Cleo Gates was the witness who said there
3 were no drawers in that night stand?

4 A. I didn't hear her testimony at that trial.

5 Q. You heard it since then?

6 A. Since then I have heard.

7 Q. Yeah.

8 A. But she's mistaken.

9 Q. You heard it since then and so today, rather
10 than repeat the night stand truth, you say the gun and
11 the bullets came from the bottom drawer of the
12 dresser, right?

13 A. Night stand, dresser, still the same.

14 Q. Well, you were pretty specific before. You
15 were asked point blank questions and you described a
16 night stand next to the bed.

17 A. Well, I -- same thing.

18 Q. But once --

19 A. The point is --

20 Q. -- once you read Cleo Gates' testimony and
21 you find out that a government witness says there was
22 no drawers in that night stand, now you are very clear
23 today that you saw Dick Marshall get down there and
24 pull that bottom drawer out?

25 A. Still means the same thing.

1 Q. That's the same thing?

2 A. Yeah.

3 Q. Same thing but it's a pretty important thing?

4 A. The point is he got the gun from the dresser
5 or whatever. The drawer.

6 Q. You needed to do some damage control to
7 change your statement so that you wouldn't get caught
8 up in that same lie again, right?

9 A. No, sir.

10 Q. That's why today it's the drawer and the
11 dresser, last time it was the night stand. Doesn't
12 have a drawer.

13 The only thing that changed is in between you
14 found out about what Cleo's testimony is, right?

15 A. No, sir.

16 Q. That's how you worked the system over and
17 over again during these 14 years of giving statements,
18 right?

19 A. No, sir.

20 Q. Well, up until they offered you the Rule 35
21 to get you out of that life sentence, you have given
22 hundreds of pages of statements, recorded and
23 otherwise, right?

24 A. Yes, sir.

25 Q. And every one of those up until 2008, John

1 and Anna Mae got together -- got along together like
2 friend, right?

3 That's what you always said?

4 **A.** Yes, sir.

5 **Q.** And that when you saw them together they were
6 talking or they were playing cards, right?

7 **A.** Yes, sir.

8 **Q.** And when you were asked point blank about
9 rape or sex between them, you said all I heard was
10 them talking and playing cards, right?

11 **MR. OSWALD:** Objection. Asked and answered,
12 Judge. Three times.

13 **MR. MURPHY:** I will move on.

14 **THE COURT:** Overruled.

15 **Q.** **(BY MR. MURPHY)** Fourteen years, given this
16 statement over and over again, talking with friends,
17 talking with family, trying to work deals, you never
18 mentioned going into Dick Marshall's house, you never
19 mentioned seeing a gun being taken out of a drawer,
20 you never mention a note, anything like that, right?

21 **A.** Right.

22 **Q.** Today you talked about standing outside at
23 this house in Rosebud and that you went into the house
24 at one point to go to the bathroom, right?

25 **A.** Yes, sir.

1 Q. And you were asked about that one previous
2 time and you said that you had to go in and urinate,
3 right?

4 A. Yes.

5 Q. And the government asked you to add that
6 detail in because they were trying to make a case that
7 there was some contact out in Rosebud.

8 Do you remember that?

9 A. The question, please?

10 Q. There came a point after 14 years of giving
11 this statement that the government changed its theory
12 about what happened and they said that the group of
13 you went to Rosebud.

14 Do you remember that?

15 Let me put it to you this way. Fourteen
16 years of statements, you never once mentioned going to
17 Rosebud, right?

18 A. Yes, sir.

19 Q. And then in 2008 you are in Rosebud, right?

20 A. Yes, sir.

21 Q. And to kind of drive the point home, they
22 asked you to put yourself actually inside a house on
23 Rosebud, right?

24 A. No, sir.

25 Q. Well, that's the first time you ever

1 indicated that you had to go pee so you went into the
2 house, right?

3 A. Yes, sir. I had to piss.

4 Q. Sir, starting well before 1975 and continuing
5 well after, you have had conviction after conviction
6 for public urination, right?

7 A. Yes, sir.

8 Q. And so -- but out there in the middle of the
9 reservation, after 14 years of omitting that detail,
10 suddenly you decide you have to go inside this
11 person's house, whom you don't know, to use the
12 bathroom to urinate, right?

13 A. Yes, sir.

14 Q. Okay.

15 But that became a pretty important detail for
16 the government, right, in Dick Marshall's trial?

17 A. Yes, sir.

18 Q. Okay.

19 You were asked questions about your
20 conversation in 2003, 2002 with Denise Maloney.

21 Do you remember that?

22 A. Yes.

23 Q. You call up the daughter of a woman who has
24 been killed, right?

25 A. Yes, sir.

1 Q. And you are -- you were asked whether you
2 told her the story about what happened, right?

3 A. Yes, sir.

4 Q. That would be a pretty important person to
5 tell the truth to, wouldn't it be?

6 A. Yes, sir.

7 Q. And you told her that you never even got out
8 of the car on the night in question, but that John and
9 Theda went out and shot Anna Mae, right?

10 A. I don't recall.

11 Q. You don't recall telling her that, huh?

12 Well, let me ask you this, if you had told
13 her that, that's at different truth than the truth you
14 are giving today, right?

15 A. Yes, sir.

16 Q. Okay.

17 And it's a different truth that -- than you
18 gave on and off over the last 14 years, right?

19 A. Yes.

20 Q. The truth kind of moves around a bit here,
21 doesn't it?

22 A. Yes.

23 Q. One of the things that changed is the
24 discussion about a fence --

25 **THE COURT:** Mr. Murphy, it's 5:00.

1 **MR. MURPHY:** Can we go another five minutes
2 and I may be able to finish.

3 **THE COURT:** That's a question.

4 **MR. MURPHY:** Yeah. I think so.

5 **THE COURT:** By 5:15.

6 **MR. MURPHY:** Okay. Great.

7 **THE COURT:** I promised them five o'clock.

8 **MR. MURPHY:** If anybody has scheduling issues
9 I am willing to cut off now.

10 **THE COURT:** Let's do that and we'll come in
11 tomorrow.

12 **MR. MURPHY:** Okay. Very well.

13 Thanks.

14 **THE COURT:** Ladies and gentlemen, we're in
15 recess once again for the evening. You are reminded
16 you may not talk to anybody about this case. You may
17 not read news, watch news, or form any opinions on it
18 until we give it to you for final determination.

19 Thank you.

20 (Whereupon, the following proceedings were
21 then had in open court and out of the presence of the
22 jury.)

23 **MR. MURPHY:** Your Honor, I'd ask that the
24 witness not be allowed to communicate with any
25 attorneys or any of the parties while he's still on

1 the stand.

2 **THE COURT:** That's good. You may not talk to
3 any of the attorneys while you are still on the stand.

4 **MR. MURPHY:** We'd ask that be including
5 investigators and other personnel of the prosecution.

6 **THE COURT:** Say again.

7 **MR. MURPHY:** I'd like that to include
8 investigators and other personnel.

9 **THE COURT:** Yeah, nobody, about this case.
10 We'll see you tomorrow.

11 (Whereupon, the proceedings in this matter
12 were then concluded.)

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1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
 2 COUNTY OF PENNINGTON)
 3

4 I, TINA RAE PRUSS, Official Court Reporter
 and Notary Public in and for the County of Pennington,
 5 State of South Dakota,

6 DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 7 questions asked, the testimony given, and of the
 proceedings had.

8 I FURTHER CERTIFY that I am not of kin or in
 9 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 10 interested in the event thereof.

11

12 IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.

13

14

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16 Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 17 Pennington County, South Dakota
 My Commission expires: 10-04-2012

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
) TRANSCRIPT OF
) JURY TRIAL
)
) VS.
)
) JOHN GRAHAM,
) VOLUME 7 OF 10
) Defendant.)

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
DECEMBER 7, 2010

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* * A P P E A R A N C E S * *

MR. MARTY JACKLEY
Attorney General
MR. ROD OSWALD
Assistant Attorney General
MR. ROBERT MANDEL
Assistant U.S. Attorney
Representing the State of South Dakota

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

* * I N D E X * *

WITNESS (ES) :	DIRECT	CROSS	REDIRECT	RECROSS
ARLO LOOKING CLOUD		4	25, 68	51, 70
DENISE MALONEY	71	83	87	89
ROBERT ECOFFEY	90	142	183, 197	189
MITCHELL POURIER	198	221	234	236

1	EXHIBITS:	OFFERED/ADMITTED
2	34 - Photo	141/141
3	37 - Photo	140/140
4	42 - My Space video	188/188
5	50 - Immunity Agreement	44/44
6	51 - Video	47/
7	128- 1994 Immunity Agreement	52/52
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1 * * P R O C E E D I N G S * *

2 **THE COURT:** Satisfied this is the jury?

3 **MR. JACKLEY:** Yes, Your Honor.

4 **MR. MURPHY:** Yes, Your Honor.

5 **THE COURT:** I assume Mr. Looking Cloud is
6 still on the stand.

7 **MR. MURPHY:** Yes, Your Honor.

8 **CONTINUED CROSS-EXAMINATION**

9 **BY MR. MURPHY:**

10 **Q.** Are you ready, Mr. Looking Cloud?

11 **A.** Yes, sir.

12 **Q.** All right.

13 I want to start by going back to the very
14 first immunity agreement that you entered into. We
15 talked about it briefly, but I wanted to make sure --
16 I am showing you a letter to your attorney, Henry
17 Mullhill dated November 3, 1994, correct?

18 **A.** Yes.

19 **Q.** And that's your signature on the bottom of
20 the page?

21 **A.** Yes, sir.

22 **Q.** And that is dated as having been received by
23 the U.S. Marshal Service on November 4, correct?

24 **A.** Yes, sir.

25 **Q.** And that would have been in 1994?

1 **A.** Yes, sir.

2 **Q.** And then just 13 days later, you went and
3 talked to Mr. Ecoffey, FBI Agent Graf, Mr. Ianuchi,
4 and Mr. Pourier, correct?

5 **A.** Yes, sir.

6 **Q.** And you were with your attorney, correct?

7 **A.** Yes, sir.

8 **Q.** And you were advised you were a suspect in
9 this case, correct?

10 **A.** Yes, sir.

11 **Q.** And you gave information based on that
12 immunity agreement?

13 **A.** Yes, sir.

14 **Q.** Okay.

15 Let's -- following up on something we left
16 off at yesterday, we talked about how you had been
17 told by Kamook and Troy Lynn that my client had blamed
18 you for Annie Mae's death.

19 Do you remember that?

20 **A.** Yes, sir.

21 **Q.** And they told you that it was going to end up
22 being your word against his, true?

23 **A.** Yes, sir.

24 **Q.** All right.

25 The same thing happened to you regarding Dick

1 Marshall, do you recall that?

2 **A.** Yes, sir.

3 **Q.** You were told in 2008 that Dick Marshall had
4 implicated you in this crime. Do you recall being
5 told that?

6 **A.** No, sir.

7 **Q.** I am going to show you your sworn testimony
8 on April 16, 2010 in the trial of Dick Marshall. You
9 were asked, you didn't like it when you thought about
10 Richard Marshall telling federal authorities that you
11 had stopped off at his house with Anna Mae Aquash in
12 1975 and that you had asked them to keep her there.
13 You didn't like knowing that, did you? And your
14 answer was no, correct?

15 **A.** Yes. I didn't understand the question.

16 **Q.** You didn't understand the question.

17 Well, when you found out or you had been told
18 that Dick Marshall had implicated you, that made you
19 mad, didn't it?

20 **A.** No, sir.

21 **Q.** And you were happy that you thought he was
22 blaming you?

23 **A.** No, sir.

24 **Q.** All right.

25 In fact, you learned later that Dick Marshall

1 had never implicated you in this crime, isn't that
2 true?

3 **A.** Yes, sir.

4 **Q.** It's true that you found out after that
5 conversation that Dick Marshall had always said I
6 don't know who stopped at my house?

7 You learned that, didn't you?

8 **A.** Yes.

9 **Q.** But at the time in 2008 when you were talking
10 with authorities, they told you Dick Marshall ratted
11 you out?

12 **A.** Is that a question?

13 **Q.** Yes.

14 **A.** Yes, sir.

15 **Q.** And so in 2008 for the first time in 14 or
16 more years of telling various versions of this story,
17 you suddenly included the detail that Dick Marshall
18 gave you the gun, right?

19 **A.** Yes, sir.

20 **Q.** All right.

21 Because by that time you are doing a life
22 sentence down in Louisiana, right?

23 **A.** Yes, sir.

24 **Q.** And you are going to bring Dick Marshall down
25 with you, right?

1 **A.** It's the truth, yes.

2 **Q.** Truth, as we talked yesterday, has kind of
3 moved around in this case, right?

4 **A.** Yes, sir.

5 **Q.** All right.

6 So the truth in 2008 was you were going to
7 bring Dick Marshall down with you because somebody
8 told you he had ratted you out?

9 **A.** Yes, sir.

10 **Q.** All right.

11 I want to go to the issue of Annie Mae
12 praying at the time that she was supposedly shot by my
13 client.

14 Do you remember on direct examination you
15 were asked about that?

16 **A.** Yes, sir.

17 **Q.** That became a pretty important detail for the
18 prosecutors here once you started talking to them in
19 2008, didn't it?

20 **A.** Yes, sir.

21 **Q.** They kept asking you about it, right?

22 **A.** Yes, sir.

23 **Q.** And you were sworn to testify to tell the
24 truth just like you were yesterday back before a Grand
25 Jury on September 9, 2009.

1 Do you remember that?

2 A. Yes, sir.

3 Q. And you were asked a very straight forward
4 question on this praying allegation. Arlo, right
5 before John Boy shot Annie Mae, did she appear to you
6 to be praying or making motions that would look like
7 she was trying to pray? And your answer was, no. She
8 was just standing.

9 Do you remember that?

10 A. Yes, sir.

11 Q. But that didn't satisfy Mr. Oswald and
12 Mr. Jackley. They were doing the questioning.

13 Do you remember that?

14 A. Yes, sir.

15 Q. And so Mr. Oswald asked for a break in the
16 proceedings.

17 Do you recall that?

18 A. No, sir.

19 Q. Well, do you recall taking a break and having
20 Mr. Jackley talk to you about this praying incident?

21 Do you remember that?

22 A. Yes, sir.

23 Q. In fact, Mr. Oswald started the examination
24 again after the break was taken. Arlo, during the
25 break, or -- now, Arlo, during the break you talked to

1 Marty Jackley about the prayer issue and we asked you
2 then if you wanted to come back and discuss it a
3 little more. Can we discuss it some more.

4 Do you remember that?

5 **A.** Yes.

6 **Q.** They weren't happy with your original
7 statement that she wasn't praying, right?

8 **A.** Yes, sir.

9 **Q.** So they took a little break and they came
10 back and they asked you the question again and then
11 you answered, she seemed like she was praying.

12 Do you remember that?

13 **A.** Yes, sir.

14 **Q.** So they clearly indicated to you they wanted
15 some drama to this story and so you take a little
16 break, and you come back, and you give them the drama
17 they ask for, right?

18 **A.** Yes, sir.

19 **Q.** Because that's how it works, you are going to
20 sing the song they want you to sing so you can get out
21 of prison?

22 **A.** Is that a yes or no?

23 **Q.** Tha's my question, yes or no? Truth or
24 false?

25 **A.** Yes.

1 Q. I mean, there during the middle of sworn
2 testimony you give an answer they don't seem to like.
3 Mr. Jackley takes you aside, talks to you about some
4 things, and you give a new answer under oath?

5 A. Yes, sir.

6 Q. Two answers that can't both be true?

7 A. Yes, sir.

8 Q. And that process of people telling you what
9 you are supposed to say started long before 1994 with
10 your first meeting with Mr. Ecoffey, didn't it?

11 A. Yes.

12 Q. In fact, as I indicated before, my first
13 report of any interrogation was that November 17, 1994
14 report, but he indicated on direct you had gone
15 through many interrogations do you remember that?

16 A. Yes, sir.

17 Q. Those were with a detective named Abe Alonzo
18 down in Denver?

19 A. Yes, sir.

20 Q. He was investigating this case.

21 A. Yes, sir.

22 Q. And he started talking to you years before
23 Mr. Ecoffey got involved, didn't he?

24 You don't need to look over there, sir. Just
25 look at me.

1 **MR. OSWALD:** I object, Your Honor.

2 Mr. Looking Cloud can look wherever he wants.

3 **MR. MURPHY:** I don't think he can, Your
4 Honor.

5 **THE COURT:** That all depends on where he's
6 looking, but it solves the question if he doesn't --
7 if he looks at the jury or Mr. Murphy, and I care not
8 which. He can look at the ceiling. He's not going to
9 look in the direction of people that may or may not
10 have an interest in this case.

11 **Q. (BY MR. MURPHY)** You understand when I ask you
12 a question you don't need to look over to Mr. Mandel
13 or any of these people?

14 **A.** I was looking at the door to see who was
15 coming in.

16 **Q.** All right.

17 Sir, Mr. Alonzo started communicating with
18 you about this case years before you met Mr. Ecoffey,
19 correct?

20 **A.** No, sir.

21 **Q.** All right.

22 Sir, if Mr. Alonzo's name is on various parts
23 of your rap sheet and your criminal history as having
24 talked to you and been involved in arrests of you
25 before 1994, would that be inconsistent or consistent

1 with what you remember?

2 **A.** Inconsistent.

3 **Q.** Okay.

4 You never met him before 94?

5 **A.** Yes, I never met him.

6 **Q.** You've never met him?

7 **A.** Before 94.

8 **Q.** Do you remember telling people that you --
9 that he used to give you money back in the day?

10 **A.** Yes, sir.

11 **Q.** And he gave you money so you could go out and
12 buy heroine?

13 **A.** No, sir.

14 **Q.** Well, when you got money, your -- when you
15 got money you went and bought heroine, didn't you?

16 **A.** I bought alcohol, sir.

17 **Q.** Well, when you area talking to the United
18 States probation office you told them that in addition
19 to crack, meth, acid, and marijuana, heroine was your
20 drug of choice and you bought it when you could get
21 money.

22 Do you remember telling them that?

23 **A.** Yes.

24 **Q.** Okay.

25 So you are saying now you never met Abe

1 Alonzo before the time that he and Mr. Ecoffey met you
2 in 94?

3 A. Yes, sir.

4 Q. Okay.

5 But you did meet with him a number of times
6 after 1994, correct?

7 A. Yes, sir.

8 Q. And some of those meetings were alone with
9 Mr. Alonzo, correct?

10 A. Yes, sir.

11 Q. And they weren't recorded to your knowledge,
12 were they?

13 A. No, sir.

14 Q. And those are some of those meetings where
15 afterwards he would give you some money?

16 A. Yes, sir.

17 Q. Okay.

18 We talked a bit about the statements you made
19 during jail calls where you told people that you were
20 getting out as a result of the -- as a result of your
21 cooperation against Dick Marshall.

22 Do you remember that topic?

23 A. Yes.

24 Q. And you said it didn't happen, remember?

25 Do you remember saying you never said

1 anything like that?

2 **A.** Yes.

3 **Q.** And I asked you even if you had used Lakota
4 to try to speak in code on those jail calls when you
5 were telling people that you were getting out.

6 Do you remember that?

7 **A.** Yes, sir.

8 **Q.** And you said it didn't happen?

9 **A.** Yes, sir.

10 **Q.** Okay.

11 And I am going to show you your sworn
12 testimony from April 16, 2010, just about six months
13 ago. You were asked, didn't you say to that person --
14 and I'm going to slaughter the pronunciation -- would
15 you say that word -- that Lakota word.

16 **A.** Wableen apenokte (phonetic).

17 **Q.** Okay. It was phonetic. Wableen apenokte.

18 And you answered, sorry, I don't answer. You
19 were asked, does the word wableen apenokte mean I am
20 getting out in Lakota? Your answer, I may have, yes.
21 You may have told somebody you were getting out in
22 Lakota, right? Answer, under oath, yes, I may have.
23 Question, in fact, didn't you say to one of your
24 friends, it looks like I'm getting out pretty soon. I
25 may show up at your door. And he said to you, we can

1 get drunk and smoke some pijs. Answer, is that a yes
2 or no? Question, that's what I'm asking you. Answer.
3 Yes.

4 Do you remember that?

5 **A.** Yes.

6 **Q.** That was just before Dick Marshall's trial
7 that you are on the phone from the jail telling people
8 that you are about ready to get out. You are going to
9 be able to go party with some of your friends, right?

10 **A.** Yes.

11 **Q.** But yesterday under oath you never made those
12 calls?

13 **A.** Yes.

14 **Q.** But today now you remember making those
15 calls?

16 **A.** Yes.

17 **Q.** Okay.

18 So the truth again changes from day to day
19 regardless of whether you are under oath or not?

20 **A.** Sometimes my understand -- yes.

21 **Q.** Okay.

22 Things didn't quite work out how you planned
23 though because here six months later you are still in
24 custody, aren't you?

25 **A.** Yes, sir.

1 Q. And Dick Marshall got acquitted. The jury
2 acquitted him of murder, didn't they?

3 A. Yes, sir.

4 Q. Thelma Rios, my client's other codefendant,
5 got a probationary plea bargain, right?

6 Are you aware of that?

7 A. No, sir.

8 Q. You weren't aware anything about that?

9 A. Yes, sir.

10 Q. But at least you know my client is the last
11 man standing, right?

12 MR. OSWALD: Objection, Your Honor. That's
13 calling for speculation as to the investigation.

14 THE COURT: Well, that question is -- if he
15 knows or believes one way, he can answer.

16 Q. (BY MR. MURPHY) You know my client is the
17 only guy on trial right now for this crime, right?

18 A. Yes, sir.

19 Q. And in a way that makes him your meal ticket
20 out of federal prison, doesn't it?

21 A. Yes, sir.

22 Q. And that Rule 35 motion, that motion to
23 reduce your sentence, is dependent now on what you say
24 against my client, right?

25 A. Yes, sir.

1 Q. And because of that, you want to make sure
2 he's convicted, don't you?

3 A. It's the truth.

4 Q. One of the things that's happened in this
5 case since you started working your deal in 2008 is
6 you never had to go back to Louisiana, did you?

7 A. No, sir.

8 Q. You spent a few months at the South Dakota
9 state penitentiary, right?

10 A. Yes, sir.

11 Q. And that's a heck of a lot better place than
12 the Louisiana prison, isn't it?

13 A. No, sir.

14 Q. Oh, yeah. Not stabbings on a weekly basis at
15 the South Dakota state pen, right?

16 A. Right.

17 Q. And people aren't getting killed on a monthly
18 basis down at the South Dakota state pen?

19 A. No, sir.

20 Q. That's true, they are not getting killed, are
21 they?

22 A. No.

23 Q. Are you saying they are getting killed or
24 they are not getting killed?

25 A. I have no idea.

1 **Q.** Well, while you were there in the three or
2 four months, did you hear about anybody getting
3 killed?

4 **A.** There was one that died but I have no idea.

5 **Q.** Well, in any regard, other than those few
6 months at the South Dakota State Penitentiary, you
7 have been in local county jails for the last two
8 years, haven't you?

9 **A.** Yes, sir.

10 **Q.** And at the jails you get to watch TV all day,
11 right?

12 **A.** No, sir.

13 **Q.** Six months ago, question, that's a whole lot
14 better than being stranded down in Louisiana without
15 any relatives or friends to visit you, isn't it? Your
16 answer, yes. You get to watch TV all day or whenever
17 you want to up here in South Dakota, don't you? Your
18 answer, yes.

19 **A.** Yes.

20 **Q.** Okay.

21 So under oath six months ago it's a yes. Two
22 minutes ago it's a no. Now it's a yes again, right?

23 **A.** Yes.

24 **Q.** Okay.

25 Being in these South Dakota county jails

1 where you get to watch TV all day, it's a constant
2 reminder to you every single day of why you don't want
3 to go back to Louisiana, isn't it?

4 A. No, sir.

5 Q. You want to go back to Louisiana?

6 A. No, sir.

7 Q. Nobody would want to go back there, right?

8 A. Yes, sir.

9 Q. You were asked questions about what happened
10 in Rapid City back in November of 1975. Do you
11 remember that discussion with Mr. Oswald?

12 A. Yes, sir.

13 Q. And you said you stayed in the apartment that
14 whole day except for when you went to your friend Tony
15 Red Cloud's house, right?

16 A. Yes.

17 Q. And you were at Tony Red Cloud's house for
18 what, 30 minutes, 45 minutes.

19 A. Yes, sir.

20 Q. During that entire day and the night before,
21 you never saw John Graham guarding Annie Mae's
22 bedroom, did you?

23 A. Yes, sir.

24 Q. You did not see him, true?

25 A. True.

1 **Q.** In fact, you said in prior statements, that
2 during that time period, my client, John Graham, was
3 guarding the front door to make sure nobody came in.

4 Do you remember that?

5 **A.** No, I don't recall that.

6 **Q.** You don't remember that. Okay.

7 Let me show you a transcript of your
8 2000 interview -- that long interview you did with
9 Troy Lynn and Kamook.

10 Do you remember we talked about this
11 interview?

12 **A.** Yes.

13 **Q.** Okay.

14 I am going to ask you to read to yourself the
15 bottom half of the page. You let me know when you are
16 done.

17 Done?

18 **A.** Yes.

19 **Q.** Annie Mae was a fugitive at this time?

20 **A.** Yes.

21 **Q.** John Boy was helping protect make sure nobody
22 kicked the door in to get her, wasn't he?

23 **A.** Yes.

24 **Q.** This is the same John, my client John Graham,
25 that you saw playing cards with Annie Mae and talking

1 with Annie Mae and hanging out with Annie Mae?

2 **A.** Right.

3 **Q.** You assumed you had never met them before but
4 they were friends because they were always hanging out
5 together?

6 **A.** Yes.

7 **Q.** I want to talk to you about how you
8 incorporate new things into your ever changing story.
9 I want to talk to you about the fence issue. You told
10 people originally or at one point that when you guys
11 got out to the Badlands you parked on the side of the
12 road.

13 Do you remember that?

14 **A.** Yes, sir.

15 **Q.** You were in fact asked the specific question,
16 did you park at the approach or on the side of the
17 road and you said on the side of the road.

18 Do you remember that?

19 **A.** Yes, sir.

20 **Q.** And during that period of time when you were
21 asked what happened next, you gave various versions of
22 events of how John or Theda or Anna or you walked out
23 towards the bluffs.

24 Do you remember that?

25 **A.** Yes, sir.

1 **Q.** But then in 1995 you are taken out there by
2 Ianuchi and Alonzo, right?

3 **A.** Yes.

4 **Q.** And they park their police vehicles at that
5 approach.

6 Do you remember that?

7 **A.** Yes.

8 **Q.** Because they don't want their cars on the
9 side of the highway, right?

10 **A.** Yes.

11 **Q.** And there is a fence at that approach, right?

12 **A.** Yes.

13 **Q.** And so from that point forward, when you
14 started telling the story, you talked about seeing
15 John and Annie Mae climb over that fence.

16 Do you remember that?

17 **A.** Yes, sir.

18 **Q.** Okay.

19 Even though we know now that approach is
20 400 feet up the road from where you supposedly parked
21 the car?

22 **A.** Yes, sir.

23 **Q.** Okay.

24 So you don't go to the crime scene for a long
25 time. In fact, you don't even know -- recall where it

1 is, right?

2 **A.** Yes.

3 **Q.** And then they take you to a place and park in
4 front of a fence and ask you to tell your story, and
5 then suddenly now that fence becomes part of your
6 story?

7 **A.** Yes.

8 **Q.** The trip that you took with John, I want to
9 talk about that trip and that trip alone.

10 That trip took two days, correct?

11 **A.** Yes, sir.

12 **Q.** And that trip happened November 27 or
13 November 28 of 1975, correct?

14 **A.** Yes, sir.

15 **Q.** And you can remember that with certainty and
16 you have testified to it on a number of occasions
17 because it correlated to your son's birthday, right?

18 **A.** Yes, sir.

19 **Q.** Your son and had left to go to Scottsbluff
20 for his birthday.

21 Do you remember that?

22 **A.** Yes, sir.

23 **Q.** And because they had left town that day you
24 decided to go over to Troy Lynn's and find Joe Morgan
25 to go out drinking, right?

1 **A.** Yes, sir.

2 **MR. MURPHY:** Nothing further.

3 Thank you.

4 **THE COURT:** Mr. Oswald?

5 **MR. OSWALD:** Thank you.

6 **REDIRECT EXAMINATION**

7 **BY MR. OSWALD:**

8 **Q.** Mr. Looking Cloud, do you remember yesterday
9 Mr. Murphy showed you an article by David Seales about
10 what you supposedly said?

11 **A.** Yes, sir.

12 **Q.** Have you had -- seen that article before
13 today or yesterday? Excuse me.

14 **A.** I don't recall.

15 **Q.** Do you know anything about David Seales?

16 **A.** He wrote a book.

17 **Q.** He wrote about him being abducted by aliens,
18 didn't he?

19 **A.** Yes, sir.

20 **Q.** And he believes that, doesn't he?

21 **MR. MURPHY:** Objection. Calls for
22 speculation.

23 **THE COURT:** Sustained.

24 **MR. OSWALD:** Judge, he met Mr. Seals in the
25 jail.

1 **THE COURT:** I understand.

2 What Mr. Seales believes is another question.
3 That's what someone else believes. That's always
4 speculative.

5 **Q. (BY MR. OSWALD)** Now, Mr. Looking Cloud, the
6 very last question Mr. Murphy talked to you about is
7 that trip you took with John Graham and Theda.

8 Do you remember that?

9 **A.** Yes, sir.

10 **Q.** He talked about your version -- that you say
11 it was a little different dates and you remember it
12 because of your son's birthday?

13 **A.** Yes, sir.

14 **Q.** One thing you are certain about though is
15 that trip did take place, didn't it?

16 **A.** Yes, sir.

17 **Q.** No matter if it was then, a week later, that
18 trip took place?

19 **A.** Yes.

20 **MR. MURPHY:** Objection. Leading, Your Honor.
21 This is redirect.

22 **THE COURT:** I understand. It is. Rephrasing
23 takes care of the problem.

24 Try not to do that further, counsel.

25 The answer stands.

1 Q. (BY MR. OSWALD) All right.

2 Mr. Looking Cloud, do you remember talking to
3 Mr. Ecoffey on that bluff? You know, I showed you the
4 picture yesterday.

5 A. Yes, sir.

6 Q. That was in 1995?

7 A. Yes, sir.

8 Q. Arlo, did you tell him at that time who got
9 Annie Mae out of the car?

10 MR. MURPHY: Your Honor, objection. May I
11 approach?

12 THE COURT: Yes.

13 (Whereupon, a discussion was held at the
14 bench.)

15 MR. MURPHY: Your Honor, they are going to
16 try to start introducing prior incident statements.
17 We have established that the date of the motive to
18 fabricate was on November 3, 1994. That was the date
19 he formally entered an immunity agreement with the
20 United States through his attorney. An agreement
21 which he signed and then was interviewed after that.

22 The rule requires that for the admissibility
23 of prior consistent statements to rebut an implied or
24 recent fabrication it must antedate the motive to
25 fabricate. The motive to fabricate is not based on an

1 arrest. It's not based on a conviction or a charge.
2 It's -- it can be based on the date in which a
3 particular person is advised that they have been
4 accused of a crime. When they have official contact.

5 My first questions this morning established
6 he was advised that he was a suspect. He got an
7 immunity agreement through an attorney and that his
8 conversations from that point on were -- should be
9 prohibited from being introduced as prior consistent
10 statements.

11 **THE COURT:** Mr. Oswald?

12 **MR. OSWALD:** Your Honor, I wrote down --
13 Mr. Murphy, in cross-examining, talked about your
14 story has changed 20 to 30 years. He's also said your
15 story changed over 14 years. He has brought up the
16 Troy Lynn Yellow Wood and the Kamook transcript. He
17 has personally brought up all of these issues. If the
18 state is handcuffed in coming back, it's not improper
19 for us. We have a right to rehabilitate on those
20 consistent statements.

21 **THE COURT:** Well, I think you can go into any
22 statement that he brought up.

23 **MR. MURPHY:** Specific statement?

24 Okay. What --

25 **THE COURT:** Any specific statements from the

1 same time. I mean -- from whatever document or
2 records you produced the statement, I think he can go
3 into that record.

4 **MR. MURPHY:** Just so my record is clear, I am
5 going to cite Tome, T-O-M-E, United States Supreme
6 Court, 1995. We would also then ask for a limiting
7 instruction so that the jury is advised not to
8 consider the statements he made that they are going to
9 try to introduce for the truth of the matter asserted
10 because these statements aren't sworn, but instead
11 just for the purpose of rebuttal.

12 **THE COURT:** Mr. Oswald?

13 **MR. OSWALD:** Then I would like the same -- if
14 the Court goes there I would like the same limiting
15 instruction on his impeachment or his attempted
16 impeachment.

17 **THE COURT:** I am going to rule this way. I
18 have no idea what that Supreme Court decision says.

19 **MR. MURPHY:** I got the digest here.

20 **THE COURT:** I don't have a clue what it says.

21 All right. Where are you going?

22 **MR. OSWALD:** I am just --

23 **THE COURT:** Give me time frame.

24 **MR. OSWALD:** I am going to every consistent
25 statement he made that he was impeached on. He --

1 there was a charge of fabrication in 94. There was a
2 charge of improper influence in 95 and in 2008.

3 Mr. Murphy referenced a letter that I have here and --

4 **THE COURT:** I think he can make further
5 inquiry on the record from any statement that was used
6 to impeach him.

7 I think other statements in the same record
8 can be used by the state in response to your
9 examination. They cannot go back within this line for
10 a consistent statement made prior according to this
11 law and rulings prior to a motive to fabricate. And
12 frankly there is another decision that says a prior
13 consistent statement need not rebut all motives to
14 fabricate but only the specific motive alleged at
15 trial. Whatever that means. But that's fairly clear
16 English but that's the ruling.

17 (Whereupon, the discussion at the bench was
18 then concluded.)

19 **MR. OSWALD:** Your Honor, for the record, did
20 you wish to overrule or sustain that objection?

21 **THE COURT:** Overruled with the limitations
22 discussed at the bench.

23 **MR. OSWALD:** May I proceed?

24 **THE COURT:** Yes.

25 **MR. OSWALD:** Thank you.

1 **Q.** **(BY MR. OSWALD)** The same question I asked
2 you, Mr. Looking cloud, did you tell Ecoffey on that
3 bluff in 1995 who got Annie Mae out of that car?

4 Just yes or no.

5 **A.** Yes.

6 **Q.** And who did you say got her out of that car?

7 **A.** John Graham. John Boy.

8 **Q.** Did you tell Robert Ecoffey in 2003 in Denver
9 who got Annie Mae out of that car?

10 **A.** Yes, sir.

11 **Q.** And who did you say?

12 **A.** John Boy.

13 **Q.** Is that that man sitting there that you
14 pointed out earlier?

15 **A.** Yes, sir.

16 **Q.** In the year 2000, with your interview -- or
17 with your discussion with Troy Lynn and Kamook --

18 Do you remember that?

19 **A.** Yes.

20 **Q.** Did you tell them who got Anna Mae out of
21 that car in 1975?

22 **A.** Yes, sir.

23 **Q.** And who did you say?

24 **A.** John Boy.

25 **Q.** Did you tell a Grand Jury in October 2008,

1 who got Anna Mae out of that car in 1975?

2 A. Yes, sir.

3 Q. And who did you say?

4 A. John Boy.

5 Q. When you were on that bluff with Mr. Ecoffey
6 in 1995, did you tell Mr. Ecoffey who shot Anna Mae?

7 A. Yes, sir.

8 Q. And who did you say shot Anna Mae?

9 A. John Boy.

10 Q. When you were interviewed in 2003, in Denver,
11 you were videotaped, right?

12 A. Yes, sir.

13 Q. Abe Alonzo and Mr. Ecoffey interviewed you;
14 is that right?

15 A. Yes, sir.

16 Q. Did you tell those gentleman who shot Anna
17 Mae?

18 A. Yes, sir.

19 Q. Who did you say?

20 A. John Boy.

21 Q. With Kamook and Troy Lynn in December, you
22 had just gotten out of jail, do you remember that?

23 A. Yes.

24 Q. You were in the back seat of Kamook's car?

25 A. Yes, sir.

1 Q. What parking lot were you in?

2 A. Denny's parking lot.

3 Q. Did you know you were being recorded, sir?

4 A. No, sir.

5 Q. Did you tell Kamook and Troy Lynn who shot
6 and ended Anna Mae's life?

7 A. Yes, sir.

8 Q. And who did you say did that?

9 A. John Boy.

10 Q. In the Grand Jury in 2008 who did you tell
11 that Grand Jury shot Anna Mae?

12 A. John Boy.

13 Q. At the Dick Marshall trial, in 2010, April,
14 did you tell that jury who shot Anna Mae?

15 A. Yes, sir.

16 Q. And who did you say?

17 A. John Boy.

18 Q. When you talked to Mr. Ecoffey, did you tell
19 Mr. Ecoffey who was hauled in the back of that
20 hatchback?

21 A. Yes, sir.

22 Q. And who did you say was hauled in the back of
23 that hatchback?

24 A. Anna Mae.

25 Q. Did you tell Mr. Alonzo and Mr. Ecoffey in

1 2003, who was hauled in the back of that hatchback?

2 A. Yes, sir.

3 Q. Who was that?

4 A. Anna Mae.

5 Q. Did you tell Kamook and Troy Lynn in the year
6 2000 who was hauled in the back of that hatchback?

7 A. Yes, sir.

8 Q. And who was that?

9 A. Anna Mae.

10 Q. In 1995 on that bluff with Mr. Ecoffey, did
11 you tell him when you got out of that car on the night
12 Anna Mae was killed?

13 A. The question, please.

14 Q. The night Anna Mae was killed, or the
15 morning -- excuse me -- are you there with me?

16 A. Yes, sir.

17 Q. In previous testimony what you said was that
18 John Boy and Anna Mae got out of the car, then you
19 did.

20 Do you remember that?

21 A. Yes, sir.

22 Q. That's what you testified today?

23 A. Yes, sir.

24 Q. Is that what you told Mr. Ecoffey in 1995?

25 A. Yes, sir.

1 Q. Did you tell Mr. Ecoffey that you walked
2 towards those two?

3 A. Yes, sir.

4 Q. You implicated yourself in the murder, then,
5 didn't you?

6 A. Yes, sir.

7 Q. What two people were present at Troy Lynn's
8 before you got there?

9 A. John Boy and Anna Mae.

10 Q. Was Theda there, too?

11 A. Yes, sir.

12 Q. Had you been called to come over to drive or
13 anything like that?

14 A. No, sir.

15 **MR. OSWALD:** The Kamook/Troy Lynn transcript
16 page 108, sir.

17 Q. **(BY MR. OSWALD)** Mr. Looking Cloud, showing
18 you the transcript from Kamook, Troy Lynn, and you,
19 okay.

20 Do you see that question by Kamook?

21 A. Yes.

22 Q. So what did she say to you while you were
23 there?

24 Does that refresh your memory?

25 A. Yes.

1 Q. What did she say to you?

2 A. Theda --

3 Q. Pardon me?

4 A. Theda told me to go with him.

5 Q. And what did you say?

6 A. I just went with him.

7 Q. To Theda, you said -- you just went with
8 Theda?

9 Is that what you are talking about?

10 A. No.

11 I need the question again.

12 Q. If you would look at this from here to here.

13 Take a second to read that, Arlo.

14 Have you looked at that document?

15 A. Yes, sir.

16 Q. Does that refresh your memory as to the
17 conversation?

18 A. Yes, sir.

19 Q. Did Kamook say to you, then, so, whenever
20 Arlo, whenever John Boy shot her, did she just fall
21 right off of that cliff or did you -- or did she just
22 fall on the ground, and there was a pause.

23 Do you remember that?

24 A. Yes, sir.

25 Q. Then Kamook, do you remember her saying to

1 you, I mean you didn't in my mind give her the,
2 unintelligible, faith and let it go and go away from
3 it.

4 Do you remember that?

5 **A.** Yes, sir.

6 **Q.** Later in that same colloquy, do you remember
7 Kamook saying --

8 **MR. MURPHY:** Your Honor, I am going to
9 object. This isn't a prior consistent statement.

10 **THE COURT:** Sustained.

11 **MR. OSWALD:** Page 109.

12 **Q. (BY MR. OSWALD)** Do you remember Mr. Murphy
13 talked to you about the prayer issue?

14 **A.** Yes, sir.

15 **Q.** Did Kamook ask you, did she say anything to
16 him? I mean, cuz I know her so well.

17 And do you know what you responded?

18 Can I show that to you?

19 **A.** Yes, sir.

20 Yes, sir.

21 **Q.** And what did you say?

22 **A.** She prayed.

23 **Q.** Kamook asked you, did she actually kneel down
24 or did she just stand there and start praying?

25 **A.** She was standing.

1 Q. That's what you said, isn't it?

2 A. Yes, sir.

3 Q. Your exact words were what?

4 A. She stood.

5 Q. Did Mr. Jackley or Mr. Mandel cook up this
6 story to have you tell?

7 A. No, sir.

8 Q. Did Abe Alonzo or Robert Ecoffey tell you
9 have to say something and cook this story up?

10 A. No, sir.

11 Q. Did I?

12 A. No, sir.

13 Q. You held back, it's true, about Dick
14 Marshall, didn't you?

15 A. Yes, sir.

16 Q. Were you aware that Dick Marshall and Cleo,
17 though, came in and corroborated what you said?

18 **MR. MURPHY:** Objection.

19 **THE COURT:** Sustained.

20 Q. **(BY MR. OSWALD)** Are you aware that Dick
21 Marshall and Cleo admitted that you were there?

22 A. Yes.

23 Q. Answer this, just yes or no, Arlo, would you
24 please?

25 A. Yes.

1 **Q.** Is there a reason why you did not want to
2 talk about Dick Marshall?

3 **A.** Yes, sir.

4 **MR. OSWALD:** Your Honor, can we approach?

5 **THE COURT:** Yes.

6 (Whereupon, a discussion was held at the
7 bench.)

8 **MR. OSWALD:** Your Honor, my next question is,
9 why, and I anticipate he's going to say because he
10 knew Dick Marshall committed a killing and that he had
11 family on the reservation and he was scared. And I
12 believe the door was opened on this line of inquiry.
13 He was challenged as to whether -- as to motive, as to
14 fabrication, and we think it's just fair for the state
15 to come back and let the jury know and complete this
16 story about what really happened and why he did this.

17 **MR. MURPHY:** Your Honor, we've previously
18 discussed the unattenuated nature of that whole
19 inquiry. Dick Marshall was convicted of shooting a
20 man in a bar in scenic. Wasn't present. The issue is
21 that Mr. Looking Cloud in his past testimony has not
22 been willing to confront or confine his testimony to
23 what was asked but to go on rants about Russell Means
24 and Dick Marshall being an enforcer and a bag man and
25 all sorts of other speculative and inflammatory

1 materials. I should say even instructed by the
2 federal court to limit his responses he was unwilling
3 to confine his answers.

4 **THE COURT:** I don't think we're going there.
5 That's the answer. We're not going there.

6 (Whereupon, the bench conference was then
7 concluded.)

8 **Q. (BY MR. OSWALD)** Arlo, do you remember when
9 you testified that you folks went to Rosebud to Kills
10 Means' house?

11 **A.** Yes, sir.

12 **Q.** Did you tell Robert Ecoffey in 1995 either on
13 that bluff or around that time period, that the four
14 of you went to Rosebud with Anna Mae in that car?

15 **A.** Yes, sir.

16 **Q.** Did you tell Abe Alonzo and Robert Ecoffey
17 that you went to Rosebud with Anna Mae in that car?

18 **A.** Yes, sir.

19 **Q.** Has your story every changed about that?

20 **A.** No, sir.

21 **Q.** Did you tell the Grand Jury in 2008 that you
22 went to Rosebud with Anna Mae, John Graham, and Theda
23 Clarke?

24 **A.** Yes, sir.

25 **Q.** Now, Mr. Murphy talked to you about Thelma

1 Rios getting probation on her conviction.

2 Do you remember that?

3 A. Yes, sir.

4 Q. And do you know what Thelma Rios plead guilty
5 to, sir?

6 A. No, sir.

7 Q. Did she plead guilty to things surrounding
8 this incident?

9 MR. MURPHY: Your Honor, lack of personal
10 knowledge.

11 THE COURT: Sustained.

12 Q. (BY MR. OSWALD) Do you know if she plead
13 guilty to incidents surrounding this incident?

14 A. Yes, sir.

15 Q. Mr. Looking Cloud, I am not sure if you are
16 familiar with this, but according to the 1975 federal
17 law, are you eligible for parole in ten years?

18 MR. MURPHY: Your Honor, objection. Calls
19 for speculation and legal conclusions.

20 (Whereupon, a discussion was held at the
21 bench.)

22 THE COURT: You know, my biggest objection to
23 that is that it's a very leading question when you
24 simply could have asked him if he was eligible for
25 parole or if he was eligible in ten years. We have

1 now loaded the gun. And it frankly suggests an answer
2 even though it's prefaced with, I don't know if you
3 know this, but under the law were you eligible. I
4 don't like the form of the question. I don't have a
5 problem with the answer to the question. But I have
6 no way of knowing at this point whether it's an
7 independent knowledge.

8 **MR. OSWALD:** Can I ask him if he's been
9 informed by his lawyer when he's eligible for parole?

10 **THE COURT:** That's going to be hearsay.

11 **MR. OSWALD:** Yeah. But he -- but it's his
12 knowledge of when he's eligible.

13 **THE COURT:** I have no idea whether he's
14 eligible for parole or not. His answer is not going
15 to help me.

16 **MR. MURPHY:** There is a dispute about that
17 because the last comments by counsel when this matter
18 came up was that he wasn't eligible for 15 years. He
19 believes that he's eligible in ten years, but that's
20 been a subject of dispute. I think from day one as to
21 what the old parole rules are under the federal
22 system. And I don't think anybody has got a gotten a
23 definitive answer, or not.

24 **MR. MANDEL:** Not to push my way into this,
25 but I worked under the parole rules when I started --

1 **THE COURT:** Let's --

2 **MR. MANDEL:** -- clearly, he would be eligible
3 for parole in ten years. Whether he would obtain
4 parole is another story.

5 **THE COURT:** Now we're asking him to draw
6 legal conclusions and what he knows. I don't see
7 we're going anywhere with it that's helpful in the way
8 the question was asked. I know what the answer is.
9 What I just don't know is whether it has a grain of
10 truth in it or not that he knows or even if it's
11 correct. And you telling me that it's correct is not
12 all that helpful either.

13 **MR. OSWALD:** Mr. Murphy went into at great
14 length his legal conclusions about what immunity
15 agreement -- what that suggested -- what all that
16 suggested and he had to speculate as to his legal
17 conclusions there. And I thought that if he wants to
18 talk about his knowledge of legal conclusions --

19 **THE COURT:** Well, I am sorry. Mr. Murphy had
20 a letter.

21 **MR. MURPHY:** I didn't go into speculation.

22 **THE COURT:** I don't know where that went and
23 I don't recall that. But I don't think this line of
24 question has -- you know I don't know if it's -- okay.

25 (Whereupon, the discussion at the bench was

1 then concluded.)

2 **THE COURT:** The objection is sustained.

3 **Q. (BY MR. OSWALD)** Arlo, I am going to show you
4 what's just been marked as State's Exhibit 50.

5 Remember, Mr. Murphy showed you that letter?

6 **A.** Yes, sir.

7 **Q.** And he referred to a couple of paragraphs in
8 this letter, didn't he?

9 **A.** Yes, sir.

10 **Q.** Is this a true and accurate copy, the two
11 pages of that letter that Mr. Murphy showed you?

12 **A.** Yes, sir.

13 **Q.** Have you seen this letter yourself before
14 Mr. Murphy even showed it to you?

15 **A.** I don't recall.

16 **MR. OSWALD:** I would offer Exhibit 50, Judge.

17 **MR. MURPHY:** No objection.

18 **THE COURT:** Received.

19 **Q. (BY MR. OSWALD)** Arlo, do you -- do you read
20 well out loud?

21 **A.** No, sir.

22 **MR. OSWALD:** May I show it, Judge?

23 **THE COURT:** Yes.

24 **Q. (BY MR. OSWALD)** Mr. Looking Cloud, do you see
25 paragraph one of that letter to your attorney,

1 Mr. Schlimgin?

2 A. Yes, sir.

3 Q. I'm talking right there.

4 A. Yes, sir.

5 Q. Do you see paragraph 2, sir?

6 A. Yes, sir.

7 Q. Do you see paragraph 3, sir?

8 A. Yes, sir.

9 Q. Can you read that from there, Arlo?

10 A. No, sir.

11 **THE COURT:** If he needs to see it you can
12 either hand it to him or he can move to a place where
13 he can read it.

14 Q. **(BY MR. OSWALD)** Arlo, there has been quite a
15 bit of talk about your criminal history.

16 Do you recall those questions you and
17 Mr. Murphy had?

18 A. Yes, sir.

19 Q. Now, he talked about some convictions of
20 false statements.

21 Do you understand those?

22 A. Yes, sir.

23 Q. Can you explain what the circumstances were
24 on some of those?

25 A. I was afraid that people would know where I

1 reside, where I live, where I'm at.

2 Q. So is that -- did that come from an
3 interaction with a police officer?

4 A. It came from all over.

5 Q. You didn't want people to know where you
6 lived is that what the false statement was?

7 A. Yes, sir.

8 MR. MURPHY: Your Honor, I am going to assume
9 this opens the door now to every prior conviction of
10 Mr. Looking Cloud's and the facts and circumstances?

11 MR. OSWALD: I thought it was open anyway,
12 Judge.

13 THE COURT: Okay.

14 Q. (BY MR. OSWALD) When did you first learn
15 English, Arlo?

16 A. In 08 -- I mean in -- when I was eight years
17 old.

18 Q. You hadn't spoken English before that?

19 A. Yes, sir. I never spoke English.

20 Q. Did you have a job, sir?

21 A. Yes, sir.

22 Q. Where have you worked in the past?

23 MR. MURPHY: Objection. Relevance.

24 THE COURT: Overruled at this point.

25 Q. (BY MR. OSWALD) Go ahead, sir.

1 **A.** I worked with J Images, Era Mark, Graphics.

2 **Q.** Do you -- do you have a special talent or
3 gift?

4 **A.** Yes, sir.

5 **Q.** What is that?

6 **A.** I draw. I paint. I sculpture.

7 **Q.** Are you comfortable talking about sex in
8 front of women?

9 **A.** No, sir.

10 **Q.** Did you ever mention sex to Troy Lynn or
11 Kamook between John Graham and Anna Mae?

12 **A.** No, sir.

13 **Q.** Mr. Looking Cloud, I'm going to show you
14 what's been marked as State's Exhibit 51.

15 Do you see that?

16 **A.** Yes, sir.

17 **Q.** Did you interview with Mr. Alonzo and
18 Mr. Ecoffey in March of 2003 like we've talked about?

19 **A.** Yes, sir.

20 **Q.** Did you know you were videotaped?

21 **A.** Yes, sir.

22 **Q.** And have you in your case scene that video
23 before?

24 **A.** Yes, sir.

25 **Q.** And are the statements in that video the same

1 as you and I talked about regarding who you claim and
2 say shot Anna Mae and things like that?

3 **A.** Yes, sir.

4 **MR. OSWALD:** I would offer Exhibit 51.

5 **MR. MURPHY:** Object, Your Honor.

6 If we might approach?

7 **THE COURT:** Yeah. Why not.

8 (Whereupon, a discussion was held at the
9 bench.)

10 **MR. MURPHY:** They are trying to admit a 45
11 minute or an hour long interview to rebut what we
12 don't know what because he talks about a hundred
13 topics in that interview. You allowed them to get
14 into prior consistent statements on specific issues I
15 brought up. We are so far afield --

16 **THE COURT:** Are we going to put all of the
17 other statements into evidence?

18 **MR. MURPHY:** No. None of them have been
19 admitted into evidence.

20 **MR. OSWALD:** It has been challenged that he
21 is a liar and he's making all of this up. And those
22 are consistent statements and a consistent interview
23 and it shows --

24 **THE COURT:** And you have asked him about the
25 consistent statements. You have gone on freely about

1 that without objection, but pursuant to my ruling.
2 And it comes as no prize to you that he was -- his
3 credibility was attacked for inconsistent statements.
4 I assume. From past history. Nobody raises this
5 issue on the video tape before the trial that I am
6 aware of. And so now I sit here with reversible error
7 question number 37 arising during the course of the
8 trial. And I frankly don't think it's admissible.

9 But that's a flip of the coin gut reaction
10 from me. I have no -- but it seems to me unless we
11 let in all the other statements, they are all as
12 admissible as that is and it doesn't address specific
13 questions and answers. It does in part but it
14 requires the jury to sort out what's been addressed
15 and what hasn't been addressed and you are capable of
16 doing that as you have been doing quite nicely
17 throughout your rebuttal exam and I don't think it's
18 appropriate to do that at this point.

19 **MR. OSWALD:** Thank you.

20 (Whereupon, the discussion at the bench was
21 then concluded.)

22 **MR. OSWALD:** Your Honor, may I have a minute
23 to look at my notes, please?

24 **THE COURT:** Certainty.

25 **THE BAILIFF:** Mr. Looking Cloud needs a

1 restroom break before too long. He said he can wait a
2 few minutes.

3 **THE COURT:** We're going to take the break
4 early. You can look at that as a for necessity,
5 folks. We will take a break for about 15 minutes.

6 Ladies and gentlemen, you are again reminded
7 you are not to talk amongst yourselves or anybody else
8 about the case or form any opinions on it until it
9 comes to you for trial.

10 Thank you.

11 (Off the record.)

12 **THE COURT:** Satisfied, Mr. Jackley?

13 **MR. JACKLEY:** Yes, Your Honor.

14 **MR. MURPHY:** Yes, Your Honor.

15 **THE COURT:** Thank you.

16 You may proceed.

17 **Q. (BY MR. OSWALD)** Arlo, your testimony is that
18 after Anna Mae was murdered and left in that ravine,
19 three of you went back to Denver.

20 Do you remember that?

21 **A.** Yes, sir.

22 **Q.** Did the three of you arrive back to Denver in
23 that same car?

24 **A.** Yes, sir.

25 **Q.** Were the three of you always together after

1 Anna Mae was shot until Denver?

2 A. Yes, sir.

3 Q. Did you tell Robert Ecoffey in 1995 that same
4 thing?

5 A. Yes, sir.

6 MR. OSWALD: No further questions, Your
7 Honor.

8 THE COURT: Mr. Murphy?

9 RE-CROSS-EXAMINATION

10 BY MR. MURPHY:

11 Q. Mr. Looking Cloud, I want to start with the
12 immunity agreement you were shown and was admitted
13 into evidence, Exhibit 50, which was the immunity
14 agreement in 2008.

15 Do you recall that?

16 A. Yes, sir.

17 Q. And that immunity agreement as was projected
18 up onto the wall there said that you had to give
19 truthful information in order to get the deal, right?

20 A. Yes.

21 Q. I am going to show you what's been previously
22 marked Exhibit 128.

23 This is the 1994 immunity agreement, is it
24 not?

25 A. Yes, sir.

1 Q. This is the one that you signed, correct?

2 A. Yes, sir.

3 Q. And like the 2008 one, this one states that
4 you have to provide truthful and complete summary of
5 the facts, correct?

6 A. Yes, sir.

7 Q. And I want you to read that paragraph because
8 I want to make sure that you have no questions about
9 what your obligations were under that immunity
10 agreement.

11 A. Okay.

12 Q. Are you done reading that paragraph, sir?

13 A. Yes.

14 Q. And no question in your mind, you were
15 required to be truthful and complete in 1994, right?

16 A. Yes, sir.

17 **MR. MURPHY:** Move to admit Exhibit 128.

18 **MR. OSWALD:** No objection.

19 **THE COURT:** Received.

20 Q. **(BY MR. MURPHY)** And yet, in 1994, and in the
21 years afterwards, all those other statements, you gave
22 20 different versions of events, didn't you?

23 A. Yes, sir.

24 Q. And even though you were told to get immunity
25 you had to be truthful, you weren't truthful in 1994,

1 were you?

2 A. Yes, sir.

3 Q. Well, you left out all sorts of details that
4 now you say you remember, right?

5 A. Yes, sir.

6 Q. And all sorts of things about Dick Marshall
7 and the gun and the fence and the sex and all those
8 things weren't part of that were they?

9 A. Yes, sir.

10 Q. They were not that's correct, right?

11 A. Yes.

12 Q. All right.

13 But yet within a matter of weeks after making
14 that deal, the felony charge of assaulting a police
15 officer was dismissed, correct?

16 A. Yes.

17 Q. That's how the deal worked?

18 A. Yes.

19 Q. You go in and you talk and you give them
20 truthful information and as long as it says what they
21 want it to say, charges go away?

22 A. Yes.

23 Q. Because they had the power to do that, right?

24 A. Yes.

25 Q. Now, Mr. Oswald talked to you about a number

1 of things you supposedly said on prior occasions that
2 were consistent with your testimony today. And one of
3 the things he asked you was, do you remember telling
4 Mr. Ecoffey and Mr. Ianuchi or Mr. Alonzo up on that
5 bluff that you went to Rosebud?

6 Do you remember that question?

7 **A.** Yes.

8 **Q.** And you answered yes, right?

9 **A.** Yes.

10 **Q.** Because you knew that was the answer he
11 wanted, right?

12 **A.** Yes.

13 **Q.** In fact, and I want you to take all the time
14 you need, this is the investigative report prepared by
15 Mr. Ecoffey when you folks traveled from Rapid City,
16 South Dakota, to the Pine Ridge Indian Reservation.
17 That the trip when you were up on the bluffs.

18 **A.** Yes.

19 **Q.** I want you to show me anywhere in that
20 summary there is any indication that you ever told any
21 of them that you ever went to Rosebud.

22 Are my stickies in your way?

23 **A.** No.

24 **Q.** You have had time now to read that?

25 **A.** Yes.

1 Q. You don't mention Rosebud, do you?

2 A. No, sir.

3 Q. And you don't mention sex, do you?

4 A. No, sir.

5 Q. You just in other words bounced from
6 statement to statement by Mr. Oswald and he told you
7 on a prior occasion you were consistent with your
8 testimony today and you just agreed with him, right?

9 A. The truth, yes, sir.

10 Q. Well, as we talked about several times now
11 the truth seems to bounce around over the last 15
12 years, hasn't it?

13 A. Yes, sir.

14 Q. Yeah.

15 And when we're trying to find how that truth
16 bounces around, we go back to what you said on prior
17 occasions, right?

18 A. Yes, sir.

19 Q. And just moments ago, you were asked a bunch
20 of questions under oath about what you had said on
21 prior occasions. And in fairness to you, you don't
22 remember what you said on prior occasions, do you?

23 A. No, sir.

24 Q. Yeah.

25 You didn't even know really what you were

1 saying at the time you were saying it, did you?

2 A. I don't know the question, sir.

3 Q. Well, let's talk about, he also directed your
4 attention to the statement that you gave with Troy
5 Lynn and Mack.

6 Do you recall that?

7 A. Yes, sir.

8 Q. And have you ever had an opportunity to go
9 back through and read the 257 pages of the transcript?

10 A. No, sir.

11 Q. Would it be a fair recollection of events
12 that during this interview Troy Lynn Yellow Wood and
13 Kamook, then Banks, now Ecoffey, did a lot more
14 talking than you did, didn't they?

15 A. Yes.

16 Q. They told you all sorts of things that they
17 had heard about your case, didn't they?

18 A. Yes, sir.

19 Q. And I just grabbed during the break a couple
20 pages. Start at page 119. CW, that is Kamook, and
21 Troy Lynn is Yellow Wood.

22 Do you see any input by you on that page at
23 all?

24 A. No, sir.

25 Q. And again, on the next page, Troy Lynn and

1 Kamook talking all about the facts of the case,
2 correct?

3 A. Yes, sir.

4 Q. Things that they have read if newspapers and
5 whatnot?

6 A. Yes, sir.

7 Q. And they are telling you about -- going to
8 the next page -- still a whole another page where you
9 don't say a word, do you?

10 A. Yes, sir.

11 Q. I mean, your name is not anywhere here?

12 A. Yes, sir.

13 Q. And Troy Lynn is talking paragraph after
14 paragraph about what John Trudell said about
15 Mr. Graham, correct?

16 A. Yes, sir.

17 Q. And other information. Okay. We're now,
18 what, four pages in? You still don't have a single
19 word on that page, do you?

20 A. No, sir.

21 Q. Troy Lynn Yellow Wood is just continuing on
22 narrating to you all about the facts that she believes
23 are true, doesn't she?

24 A. Yes, sir.

25 Q. And then we finally get to the fifth page and

1 you finally come in with something that they say is
2 unintelligible, like, a grunt or something, right?

3 A. Uh-huh.

4 Q. Yeah.

5 And then a laugh, right?

6 A. Yes.

7 Q. And then an uh-huh, right?

8 A. Uh-huh.

9 Q. So those are your only contributions. We're
10 going into the sixth page of narrative and again
11 Ms. Yellow wood just talks and talks and talks about
12 the facts of the case?

13 So you see all that information Mrs. Yellow
14 Wood is giving?

15 A. Yes.

16 Q. And your name doesn't appear as speaking at
17 all?

18 A. No, sir.

19 Q. And we go to the next page where Ms.
20 Yellow Wood and Ms. Ecoffey are doing all the talking,
21 right?

22 A. Yes.

23 Q. And almost ten pages in now you still don't
24 have anything to say, do you?

25 A. No, sir.

1 **Q.** All right.

2 That's kind of how this interview went,
3 didn't it?

4 **A.** Yes, sir.

5 **Q.** They just talked and talked and talked, told
6 you what they had heard, what they believed, what
7 somebody might have told them, and occasionally you
8 are asked whether you agree or disagree, right?

9 **A.** Yes, sir.

10 **Q.** Sort of like what just happened with
11 Mr. Ecoffey -- I mean Mr. Oswald when he asked you
12 about the bluffs and whether you had mentioned
13 Rosebud, right?

14 You just agree?

15 **A.** They were the truth.

16 **Q.** You believed it was the truth when Ms. Yellow
17 Wood and Ms. Ecoffey were telling you what they heard
18 in the newspapers and the internet about the case?

19 **A.** Yes, sir.

20 **Q.** All right.

21 Now, you were asked about some of the details
22 that the state alleges you have kept consistent, that
23 you got -- that my client got Anna Mae out of the car
24 and that he shoot her.

25 Do you remember that?

1 **A.** Yes, sir.

2 **Q.** That you went with him?

3 **A.** Yes, sir.

4 **Q.** Well, you haven't even been consistent on
5 those facts and those are the big easy ones. I mean
6 over the years, you told Denise Maloney in 2002 that
7 it was Theda and John that took Anna Mae out, didn't
8 you?

9 **A.** Yes, sir.

10 **Q.** And what you did on those big details, is you
11 always made sure that you were pointing the finger at
12 somebody else whether it was Theda or whether it was
13 John, right?

14 **A.** It was the truth.

15 **Q.** Well, that's -- I understand what today's
16 version of the truth is but in every statement on
17 those big details, you always made sure that the
18 attention was pointed somewhere else, didn't you?

19 **A.** Yes.

20 **Q.** And even then, when you are trying to ever
21 point the finger at somebody else, you had trouble
22 with some of those big details as to who got out of
23 the car, who did the shooting, those things, right?

24 **A.** No, sir.

25 **Q.** Well, you did tell Denise Maloney in 2004

1 that it was Theda and John that got out and did it,
2 right?

3 **A.** I don't recall, sir.

4 **Q.** Okay.

5 The problem with retelling your story over
6 the years is when people have tried to corroborate
7 particular facts about it and you have gone through
8 the process of being questioned a number of times,
9 haven't you?

10 **A.** Yes, sir.

11 **Q.** And there over and over again when you get
12 off script, when you get off those two details that
13 Mr. Oswald talked about, that's where you can't keep
14 things straight, right?

15 **A.** Yes, sir.

16 **Q.** I mean, if you had lived and experienced this
17 the way you claimed to have, you could remember the
18 details when you retold it over time, couldn't you?

19 **A.** No, sir.

20 **Q.** You couldn't?

21 Because you heard so many different stories
22 from other people about what happened?

23 **A.** No, sir.

24 **Q.** You have been affected by the fact that you
25 have read testimony by other witnesses, true?

1 **A.** Yes, sir.

2 **Q.** And you have been told what the newspapers
3 and the internets say about the case, right?

4 **A.** Yes, sir.

5 **Q.** And you have been told what Kamook's theory
6 is and what Troy Lynn's theory is and what other
7 people's theories about the case are haven't you?

8 **A.** Yes.

9 **Q.** So significant details like whether my client
10 had sex or was playing cards with Anna that hasn't
11 been able to be kept straight over the years, has it?

12 **A.** Yes, sir.

13 **Q.** I mean, the first time you ever mentioned
14 that to anybody is in 2008 once my client is charged
15 here in state court, right?

16 **A.** I don't recall.

17 **Q.** Well, we went through that before, with Troy
18 Lynn and Kamook. They asked you that question
19 directly and you said no. And you have been
20 interviewed in 2003, 1994, and 1995, and you gave
21 Grand Jury testimony of your own in 2004 and you never
22 mentioned anything about sex.

23 Do you recall that?

24 **A.** Okay.

25 **Q.** Now, today Mr. Oswald suggested, well, you

1 might not have felt comfortable talking about sex in
2 front of Troy Lynn and Kamook, right?

3 **A.** Yes.

4 **Q.** You have given dozens of interviews with
5 Mr. Ecoffey, a male, Mr. Alonzo, a male, Mr. Ianuchi,
6 a male, Mr. Pourier, a male.

7 Never mentioned to them before 2008, did you?

8 **A.** Yes, sir.

9 **Q.** That's true, you never mentioned it to them?

10 **A.** Yes, sir.

11 **Q.** You weren't bashful about that in front of
12 these guys, were you?

13 **A.** Yes, sir.

14 **Q.** Well, I mean you are not a bashful kind of
15 guy. We talked about how many public urinations you
16 have and public indecency convictions?

17 **A.** Yes.

18 **Q.** Same thing with the fence and how far the
19 road was, whether you went to Dick Marshall's, whether
20 you saw a gun in the drawer of the night stand,
21 whether Anna Mae was tied up, she wasn't tied up,
22 whether you shot bullets in the air or in the ground;
23 what you were doing during these six hours.

24 Those are all pretty significant details that
25 you haven't been able to keep straight from one -- one

1 story telling session to the next, have you?

2 **A.** Yes, sir.

3 **Q.** Okay.

4 Mr. Oswald went into your criminal record.

5 Yesterday I asked you about whether you had a felony
6 out of Florida for aggravated assault and you claimed
7 that you didn't have that conviction?

8 **A.** No conviction, sir.

9 **Q.** I want to bring you to your sworn testimony
10 in 2010.

11 Did you do some time in Florida, too? Your
12 answer, yes, I did?

13 **A.** Yes.

14 **Q.** How long were you in prison in Florida? Six
15 months.

16 **A.** Yes.

17 It was no prison though. It was county jail.

18 **Q.** Wasn't that an aggravated assault charge?
19 Yes.

20 **A.** Yes.

21 **Q.** Possession of a firearm?

22 **A.** Yes.

23 **Q.** Yes.

24 **A.** Yes, sir.

25 **Q.** Those are felony charges?

1 **A.** Yes, sir.

2 **Q.** I asked you yesterday if you had been
3 convicted of that charge and you said no?

4 **A.** I was never convicted.

5 **Q.** How do you do six months in prison if you are
6 not convicted?

7 **A.** I was waiting for trial -- waiting for the
8 trial, the Court.

9 **Q.** That's not what you said just six months ago?

10 **A.** I was in jail yes, sir.

11 **Q.** There is a big difference between jail and
12 prison. Prison is after you get convicted and jail --

13 **A.** Right.

14 **Q.** You said back then you were in prison, right?

15 **A.** My bad.

16 **Q.** Your bad.

17 Now today, going through your rap sheet, you
18 said those 12 convictions for giving false statements
19 or making false reports, it's because you didn't want
20 the police to know where you lived, right?

21 **A.** That was included every one.

22 **Q.** Sometimes during those false reports you just
23 made up stories to the police and they charged you
24 with it, didn't they?

25 **A.** Yes, sir.

1 Q. And that's why they charged you are making a
2 false report, right?

3 A. Yes, sir.

4 Q. And you had conviction after conviction of
5 those over the years, right?

6 A. Yes, sir.

7 Q. And they started actually even before 1975,
8 didn't they?

9 A. Yes, sir.

10 Q. One of the reasons why you didn't want them
11 to know where you lived because you had fugitive
12 warrants out for you and failures to appear for court
13 hearings, didn't you?

14 A. Yes, sir.

15 Q. You gave them about 20 different aliases over
16 the years?

17 A. Yes, sir.

18 Q. And, essentially, from the late 60s through
19 2000, 2003, I guess, you just got convicted about
20 every couple months for one crime or another, didn't
21 you?

22 A. Yes, sir.

23 Q. And some of those crimes involved lying, some
24 of them were felonies, were they not?

25 Right?

1 **A.** I don't know about the felonies.

2 **Q.** Well, here is a list of felony convictions.

3 That's the robbery of a business with a knife.

4 Do you recall that?

5 **A.** Yes. That was in 80, I think.

6 **Q.** That was in 1987.

7 **A.** Right.

8 **Q.** And just a few days later you got an
9 aggravated robbery charge in a different county.

10 **A.** That's the same one.

11 **Q.** This is Aurora County and that is one
12 Arapahoe County?

13 **A.** Yes. That's the same charge.

14 **Q.** They charged you in two different counties
15 with --

16 **A.** No. It's the same one.

17 **Q.** Menacing. That was a felony.

18 **A.** That's the same one.

19 **Q.** That's seven months later, sir.

20 **A.** Exactly. They reduced the charge.

21 **Q.** First degree felony trespassing 1988?

22 **A.** Yes.

23 **Q.** Got convicted of that?

24 **A.** Yes, sir.

25 **Q.** All right.

1 False reporting.

2 You had given them a lot of different
3 addresses over time. You said you didn't want them to
4 know where you were living, but they had dozens of
5 addresses over the years, didn't they?

6 A. Yes.

7 Q. So they knew where you lived?

8 A. Yes.

9 Q. So your false reporting convictions and
10 making false statement convictions are more about you
11 lying to the police about different things than about
12 not wanting them to know where you lived, right?

13 A. Yes.

14 MR. MURPHY: Nothing further.

15 Thanks, Your Honor.

16 THE COURT: Mr. Oswald?

17 MR. OSWALD: Thank you.

18 REDIRECT EXAMINATION

19 BY MR. OSWALD:

20 Q. Were you ever convicted in Florida?

21 A. No, sir. I was never convicted.

22 Q. Was it a plea bargain or what happened?

23 A. I bonded out, sir.

24 Q. Okay.

25 So you weren't sentenced to prison?

1 **A.** No, sir.

2 **Q.** When you said prison versus jail, is there
3 one word in Lakota for that?

4 **A.** Yes, sir.

5 **Q.** Okay.

6 Mr. Murphy talked to you about these ten
7 pages of transcripts where Troy Lynn and Kamook went
8 on and on and he started with page 119.

9 Do you remember that just now?

10 **A.** Yes, sir.

11 **Q.** They weren't talking consistently about this
12 case, were they?

13 **A.** No, sir.

14 **Q.** In fact, were they talking about friendships
15 and Jerry Cooney and Angie Begay?

16 **A.** Yes, sir.

17 **Q.** And there was some talk about this case in
18 there?

19 **A.** Yes, sir.

20 **Q.** But not ten pages worth?

21 **MR. MURPHY:** Leading the witness, Your Honor.

22 **A.** Yes.

23 **THE COURT:** Sustained.

24 **Q.** **(BY MR. OSWALD)** Arlo, Mr. Murphy asked you
25 about the one question on recross about shooting in

1 the air or in the ground.

2 Do you remember that?

3 **A.** Yes, sir.

4 **MR. OSWALD:** Page 118, Counsel.

5 **Q.** **(BY MR. OSWALD)** Do you remember during that
6 interview Kamook asking you when you seen him shoot
7 her, did you say anything to him. And you said, I
8 don't know him that well. And I'm thinking maybe
9 he'll shoot me next.

10 Do you remember that?

11 **A.** Yes, sir.

12 **Q.** So did he -- excuse me. Did you get that gun
13 from him and then shoot in the air?

14 **A.** Yes, sir.

15 **Q.** Did you empty the rounds?

16 **A.** Yes, sir.

17 **Q.** I am wondering, did it go through your mind
18 or were you troubled that somebody might have heard
19 the gunshots?

20 **MR. MURPHY:** Beyond the scope of recross.

21 **THE COURT:** It is.

22 Sustained.

23 **MR. OSWALD:** I have no further questions.

24 Thank you.

25 **MR. MURPHY:** Very briefly.

RE-CROSS-EXAMINATION

1
2 **BY MR. MURPHY:**

3 Q. Sir, there may be a word in Lakota that
4 covers prison and jail, right?

5 A. Yes.

6 Q. But over the last 40 years, you are someone
7 what has been in the criminal justice system almost on
8 a monthly basis, correct?

9 A. Yes.

10 Q. I mean, South Dakota, Florida, Colorado, you
11 know the difference as well as anybody between prison
12 and jail, don't you?

13 A. Yes, sir, I do.

14 **MR. MURPHY:** Nothing further.

15 **THE COURT:** Thank you, sir. You are excused.
16 We're on subpoena. Are we held on the
17 subpoena?

18 **MR. OSWALD:** He's not completely released
19 from his subpoena, but he's free to go back.

20 **THE COURT:** All right.

21 (Witness excused.)

22 **MR. JACKLEY:** The state calls Denise Maloney,
23 Your Honor.

24 **THE COURT:** Please stop here, ma'am.

25 Please raise your right hand.

1 DENISE MALONEY,
2 called as a witness herein, having been duly sworn,
3 under oath testified as follows:

4 THE COURT: Please take a seat.

5 DIRECT EXAMINATION

6 BY MR. JACKLEY:

7 Q. Good morning.

8 A. Good morning.

9 Q. Ms. Maloney, please introduce yourself to the
10 jury.

11 A. My name is Denise Pictou Maloney.

12 Q. Ms. Maloney, what is your profession?
13 What do you do?

14 A. I'm a stay-at-home mom.

15 Q. Are you related to Anna Mae Aquash?

16 A. Yes. She was my mother.

17 Q. Do you have any -- do you have a sister?

18 A. I do.

19 Q. What is her name?

20 A. Her name is Debbie.

21 Q. Ms. Maloney, I want to ask you a yes or no
22 question.

23 Have you ever had a conversation with Arlo
24 Looking Cloud regarding the death of your mother?

25 A. Yes, I have.

1 **Q.** Do you recall when that conversation
2 occurred?

3 **A.** Early April, 2002.

4 **Q.** How did that conversation come about?

5 **A.** I had gotten a call from Paul Denay, the
6 editor of News from Indian Country, indicating that a
7 man by the name of Richard Two Elk had called him and
8 that Arlo Looking Cloud had been in contact with him
9 and was asking to speak to us.

10 **Q.** Who is Richard Two Elk?

11 **A.** I was told that he's Arlo Looking Cloud's
12 brother.

13 **Q.** Was the -- was a telephone conversation --
14 did a telephone conversation ultimately occur?

15 **A.** Yes.

16 **Q.** Who was on the call?

17 **A.** Myself, Arlo Looking Cloud, and my sister
18 Debbie.

19 **Q.** Was the call recorded?

20 **A.** No, it wasn't. We actually asked if we could
21 record it and he said no. And we respected that.

22 **Q.** Please generally describe to the jury what
23 you observed Mr. Arlo Looking Cloud's emotions to be
24 during the phone call.

25 **A.** Well, he was pretty quiet when we first

1 started the conversation. I don't think any of us
2 really knew what to say. His voice broke when we
3 asked him if this was something that he wanted to do.
4 He seemed -- we specifically asked him why he was
5 doing this and he said that it was something that he
6 had wanted to do for a long time and thought that we
7 deserved to know what had happened to our mother.

8 Q. Did you talk to Mr. Looking Cloud about any
9 of the details surrounding your mother's death?

10 A. We asked him -- we specifically told him that
11 we hoped that he could speak to us from his heart and
12 that we had considered the fact that he was speaking
13 to us now to be important and that we wanted to know
14 how my mother died, but it wasn't fess that he give is
15 forcing all the details. That we needed to hear from
16 somebody that was there when she died.

17 Q. Relate to the jury the best you can some of
18 the details that were relayed during that
19 conversation?

20 A. Well, he started out the conversation by
21 saying that there was a phone call and that he was
22 instructed with Theda and John Boy to take my mother
23 from Troy Lynn Yellow Wood's house in Denver up to
24 Rapid City. His voice broke and at that point I
25 actually asked him if he had been drinking that day

1 because he was so emotional and he replied no.

2 And then he went on to say that the three of
3 them had taken her from Troy Lynn Yellow Wood's house
4 the first day to a house in Rapid City and the second
5 day to a house in Rosebud.

6 Q. Did there come a point in the conversation
7 that Arlo discussed with you the last few moments of
8 your mother's life?

9 A. Yes. He had said that when they had stopped
10 at the house in Rosebud that he was asked to stay at
11 the car with my mother. For my sister and I it was
12 important for us to know her demeanor and we asked if
13 he had had a conversation with her, which he said he
14 didn't.

15 And then he said he was really sorry. His
16 voice broke again and he didn't know they were going
17 to do this to her. That people had been discussing
18 and talking about her being an informant and that
19 Angie and Theda and John Boy --

20 MR. MURPHY: Objection. Calls for hearsay,
21 Your Honor.

22 MR. JACKLEY: Prior consistent statements,
23 Your Honor.

24 MR. MURPHY: I'd argue not on this issue.

25 THE COURT: It's hearsay within hearsay is

1 the problem I have with it. Her statement might be
2 okay but I think it goes a step far.

3 **Q. (BY MR. JACKLEY)** Ms. Maloney, did there come
4 a time where you and Mr. Looking Cloud discussed the
5 vehicle pulling over that your mother was in?

6 **A.** Yes. He said that they had left the house in
7 Rosebud, had gone to a location that he didn't
8 designate specifically, and that he was told to stay
9 at the car. And that John Boy and Theda and my mother
10 went up over a hill. He heard a gunshot. And John
11 Boy and Theda came back without my mother. And they
12 got in the car and drove away.

13 **Q.** When he said that -- and maybe the question
14 is maybe more appropriate -- during the conversation,
15 did you ever feel that Mr. Looking Cloud was maybe
16 holding anything back?

17 **MR. MURPHY:** Objection. Relevance.

18 **THE COURT:** Sustained. It's speculative as
19 well.

20 **Q. (BY MR. JACKLEY)** Based upon the conversation
21 that you had with Mr. Looking Cloud, did you gain an
22 understanding of who was with your mother when she
23 died?

24 **A.** Yes.

25 **Q.** Who would have those individuals have been?

1 **A.** Theda, Arlo and John Boy.

2 **Q.** And this was in April of 2002?

3 **A.** That's correct.

4 **Q.** And this would have been prior to any charges
5 filed against Mr. Graham or Mr. Looking Cloud?

6 **A.** That's correct, yes.

7 **Q.** Ms. Maloney, what of the length of your
8 conversation with Mr. Looking Cloud?

9 **A.** It's hard to determine because time stood
10 still for us so I would guess probably anywhere from
11 20 to 30 minutes.

12 **Q.** Ms. Maloney, how old were you at the time of
13 your mother's death in December of 1975?

14 **A.** In 75 I turned 11. It would have been just
15 shortly before my 11th birthday.

16 **Q.** When did you recall seeing your mother last
17 alive?

18 **A.** In the fall of that year before she was
19 killed.

20 **Q.** Do you remember about what month that was?

21 **A.** I would say late fall, probably early
22 September or -- early fall. Early September. I just
23 know that the leaves were starting to turn. I was
24 basing it on what produce was coming out of the
25 backyard in the garden.

1 **Q.** What do you recall from the last time that
2 you saw your mother?

3 **A.** There were lots of conversations amongst the
4 adults. It was very secretive. She came in in the
5 middle of the night and left in the middle of the
6 night. There were conversations that we overheard as
7 children that we didn't necessarily think were
8 serious. But that there were -- there were requests
9 for her not to leave. Indications that --

10 **MR. MURPHY:** Objection. Calling for hearsay.

11 **THE COURT:** Sustained.

12 **Q.** **(BY MR. JACKLEY)** Ms. Maloney, I want to take
13 you to Christmastime, 1975.

14 Did you receive a phone call from your mother
15 during that time frame?

16 **A.** No.

17 **Q.** Did you perceive that as unusual?

18 **A.** Yes.

19 **Q.** Why?

20 **A.** Because she had promised to call in the fall.

21 **Q.** When did you first learn that your mother had
22 been found?

23 **A.** Probably April that following year after she
24 disappeared.

25 **Q.** How did you find that out?

1 **A.** My dad had sat us down. We were actually --
2 sorry March or April. We were actually making plans
3 for Easter to go down to see some relatives in the
4 United States. And he sat down and said that he had
5 some bad news. That they had found a body. And that
6 they weren't quite sure at that time what the identity
7 of that body was. He didn't tell us specifically that
8 at that point that he knew who it was. And then he
9 said that they were pretty sure that it was my mother.
10 And that she had died fighting for her people.

11 **Q.** This December 11 will mark 35 years or
12 approximately 35 years since the death of your mother?

13 **MR. MURPHY:** Objection. Facts not in
14 evidence.

15 **THE COURT:** Folks, come up, please.

16 (Whereupon, a discussion was held at the
17 bench.)

18 **THE COURT:** Where are we going?

19 **MR. JACKLEY:** I have one last line of
20 questioning. That questioning is simply, other than
21 Arlo Looking Cloud, has anybody from AIM been in
22 contact with her or the family. The reason for that
23 is based upon Mr. Murphy's cross-examination
24 previously.

25 **THE COURT:** I don't mind the question, but

1 let's get to it.

2 **MR. JACKLEY:** Can I just say 35 years.

3 **MR. MURPHY:** I want to first renew my motion
4 in limine. This line of questioning over the 35 years
5 and all this stuff is purely an attempt to elicit
6 emotional response. It doesn't go to anything
7 probative. Whether she's been contacted --

8 **THE COURT:** Essentially, I agree with that.
9 When she last talked to her mother, near as I can
10 tell, is not relevant to anything or what her mother
11 said at that time is not relevant to anything. You
12 may ask her since her death who talked to you. And
13 you know have -- anybody spoken to you.

14 **MR. JACKLEY:** From AIM? Can I ask from AIM?

15 **MR. MURPHY:** First off, lack of personal
16 knowledge as to who was in AIM and who was not. The
17 general relevance issue. What she's --

18 **THE COURT:** Yeah. How do you establish what
19 she knew? I think you have to do that to ask the
20 question. And where are we going? I still don't know
21 where we're going with it. What we're trying to
22 prove.

23 **MR. MURPHY:** What he's trying to prove is
24 that nobody from AIM had any remorse because nobody
25 from AIM called her. That's completely irrelevant to

1 any issue as to whether my client is guilty or not.

2 **MR. JACKLEY:** Your Honor, I specifically
3 recall Mr. Murphy going into Bruce Ellison and his
4 desire to get the order to exhume. If it didn't have
5 any relevance why was he going into it and why was I
6 allowed to go into it.

7 **MR. MURPHY:** Well, that was on March 8 of
8 1976. It was not -- that was at the time the FBI was
9 investigating this case. And two different bodies
10 were both claiming responsibility. It goes to the
11 boggled nature of the investigation which was what I
12 was drawing out of Agent Wood. They missed a bullet.
13 They planted the body far too quickly. They are both
14 rushing to get the exhumation. That has nothing to do
15 with the emotional -- does AIM care. I mean AIM as we
16 know over the last 35 years, nobody would even be able
17 to define what AIM is.

18 **MR. JACKLEY:** May I ask her the question over
19 the last --

20 **THE COURT:** You can ask her if anybody else
21 has talked to her about this event if you can
22 establish that she knows who was in AIM, and who
23 wasn't. I don't think she can be asked the
24 question -- you can ask her if anybody called her.
25 Then make whatever argument you want to make over the

1 response.

2 **MR. JACKLEY:** Can I ask her if anybody that
3 identified themselves from AIM ever contacted her? Is
4 that a fair question?

5 **THE COURT:** First of all, you asked her if
6 anybody talked to her -- anybody called her about the
7 case and what's the answer to that going to be?

8 **MR. JACKLEY:** Other than probably prosecutors
9 and victims witness people, I think the answer is
10 going to be no, none other than that.

11 **MR. MURPHY:** Then I think it ends there.

12 **THE COURT:** Well, then do you know for sure
13 what the answer is going to be? You ever asked her
14 that at all before?

15 **MR. JACKLEY:** I know what the answer is as to
16 whether or not anyone identifying themself as being
17 from AIM ever contacted her. No other than Arlo
18 Looking Cloud.

19 **THE COURT:** Well, I think your question is,
20 again, as I said, if you want to phrase it as has
21 anybody other than investigators or victims talked to
22 you about this before or given -- called you since
23 your mother died.

24 **MR. JACKLEY:** Okay.

25 **THE COURT:** That's it.

1 (Whereupon, the discussion at the bench was
2 then concluded.)

3 **Q.** **(BY MR. JACKLEY)** Ms. Maloney, over the last
4 35 years has anybody other than Arlo Looking Cloud or
5 investigators contacted you regarding the death of
6 your mother?

7 **A.** Arlo Looking Cloud was the only person that I
8 know of that was there when my mother died that
9 contacted us.

10 **MR. JACKLEY:** No further questions, Your
11 Honor.

12 **THE COURT:** Thank you.

13 Mr. Murphy?

14 **MR. MURPHY:** Thank you.

15 **CROSS-EXAMINATION**

16 **BY MR. MURPHY:**

17 **Q.** Ms. Maloney, my name is John Murphy. I am
18 going to ask you some questions.

19 You indicated the last time you saw your
20 mother in person was in September of 1975?

21 **A.** That's correct.

22 **Q.** Okay.

23 Do you recall was that before or after the
24 arrest at Al Runnings' place?

25 **A.** What date was that?

1 Q. That was September 5.

2 A. I don't recall, no.

3 Q. Okay.

4 In any regard your mother came down to the
5 states some time in 72 or 73, is that your best
6 recollection of events?

7 A. We were living in the states. I was with
8 her -- I was born in Massachusetts.

9 Q. Okay.

10 In Boston?

11 A. That's correct.

12 Q. But when she came out to Wounded Knee in 73,
13 you --

14 A. We were living in Boston.

15 Q. You were living in Boston?

16 A. Yes.

17 Q. But when she moved out to Wounded Knee in 73,
18 you didn't come with her at that point?

19 A. No.

20 Q. Okay.

21 So let me -- when did you go back to Canada,
22 then, do you know?

23 A. I believe it was the summer of 74.

24 Q. Back to Nova Scotia?

25 A. That's correct, with our father.

1 **Q.** Between 74 and September of 75, how many
2 times did your mom come up to Canada?

3 **A.** I believe there was one other time that we
4 got to see her.

5 **Q.** Okay.

6 That she --

7 **A.** Yes, it was shortly after we had come back to
8 Nova Scotia.

9 **Q.** Okay.

10 So between 74 and June -- September of 75 at
11 least twice she made her way up to Canada?

12 **A.** Yes.

13 **Q.** Okay. All right.

14 I want to talk to you about just Arlo's
15 story.

16 And you didn't try to call him; he tried
17 calling you, correct?

18 **A.** That's correct.

19 **Q.** And he knew at the time you spoke with him
20 that you were Anna Mae's daughters, right?

21 **A.** That's what we told him on the phone, yes.

22 **Q.** Sure.

23 And even before you got him on the phone, it
24 was your understanding that this had been coordinated
25 through a couple other people, Mr. Denay and

1 Mr. Two Elk?

2 A. That's correct.

3 Q. From that you gathered he knew who he was
4 going to talk to, right?

5 A. Yes.

6 Q. And really, what you wanted from him was some
7 honest communication, right?

8 A. That's correct. Yes.

9 Q. An incredibly heart-felt moment? An
10 emotional moment?

11 A. Of course.

12 Q. And yet he told you at that occasion that
13 Theda and John Boy were the people responsible for
14 shooting your mom, right?

15 A. That's correct, why he.

16 Q. In fact, he claimed in that conversation or
17 during that conversation that he stayed in the car and
18 Theda and John Boy took your mother out over a hill
19 and he heard a gunshot?

20 A. Well, he didn't say he stayed in the car. He
21 was at the car. He was instructed to stay at the car.

22 Q. He said he was told to stay with the car?

23 A. With the car. He didn't say he was inside
24 the car.

25 Q. In any regard, he was clearly trying to

1 distance himself from whatever happened over that
2 hill?

3 **A.** I don't know what he was trying to do.
4 That's what he told me.

5 **Q.** He told you he didn't see the shooting
6 happen, right?

7 **A.** That's correct, yes.

8 **Q.** That he heard a gunshot, right?

9 **A.** Yes.

10 **Q.** And that it was John and Theda who did it?

11 **A.** Yes. That they went up over the hill.

12 **Q.** At that point, that was in 2003, you know
13 that he had been investigated already in this case for
14 eight years at least by that time?

15 **A.** I didn't know how long he had been
16 investigated. But, yes, I had heard his name.

17 **Q.** And you heard that as you've been in the
18 courtroom that from 1994 on he was working immunity
19 agreements?

20 **A.** I wasn't in the courtroom, no. I had never
21 been in the courtroom until 2004.

22 **Q.** I am talking today and yesterday?

23 **A.** Yes. Yes. That's correct.

24 **Q.** And then so you heard that he has been
25 working immunity agreements eight years prior to your

1 conversation with him?

2 **A.** I heard that, yes.

3 **MR. MURPHY:** Nothing further.

4 Thank you.

5 **REDIRECT EXAMINATION**

6 **BY MR. JACKLEY:**

7 **Q.** Ms. Maloney, the discussion that you had with
8 Arlo Looking Cloud, in 2002, did Arlo implicate
9 himself?

10 **MR. MURPHY:** Objection. Calls for a
11 conclusion.

12 **THE COURT:** Sustained. We have what the
13 conversation was.

14 **Q. (BY MR. JACKLEY)** Did you testify about the
15 conversation you had with Arlo at Arlo Looking Cloud's
16 jury trial?

17 **A.** Yes, I did.

18 **Q.** I want to go back one year, Christmastime, so
19 we're talking Christmastime of 1974.

20 Do you recall whether or not you talked to
21 your mother during that time frame, Christmastime of
22 1974?

23 **A.** I did not speak to her.

24 **Q.** Okay.

25 In 74 or 75?

1 **A.** Sorry. In 74 we would have spoken to her --
2 no. Seventy-four we didn't.

3 **Q.** Maybe my question wasn't very good.

4 She came to see you in September of 1975. Do
5 you recall that?

6 **A.** Yes. Yes.

7 **Q.** And then she left and you didn't see her
8 again; is that right?

9 **A.** That's correct, yes.

10 **Q.** So in the Christmas of 1975, did you talk to
11 her?

12 **A.** No.

13 **Q.** Okay.

14 Now I want to go one year back earlier,
15 Christmas of 1974.

16 Do you generally recall that time frame?

17 **A.** Yes. Yes.

18 **Q.** Do you recall either being with your mother
19 or talking to your mother at Christmastime, 1974?

20 **A.** On Christmastime, 74, I don't think we saw
21 her then but there would have been some communication.

22 **MR. JACKLEY:** No further questions.

23 **MR. MURPHY:** One very briefly, if I may, Your
24 Honor.

25

RE-CROSS-EXAMINATION

1
2 **BY MR. MURPHY:**

3 Q. Mr. Jackley asked you about your testimony at
4 Arlo Looking Cloud's trial?

5 A. Yes.

6 Q. You testified at that point that when Arlo
7 called you in 2002, he told you that he was the one
8 who had received the phone call and was instructed to
9 go with Theda and John to Denver, right?

10 A. That is -- there was a phone call, yes.

11 Q. May I approach and show you --

12 A. Yeah -- yes, that's correct.

13 Q. That he had told you that he had gotten a
14 phone call, right?

15 A. Yes. Yeah.

16 **MR. MURPHY:** Nothing further.

17 Thank you.

18 **MR. JACKLEY:** Nothing further, Your Honor.

19 **THE COURT:** Thank you. Thank you, ma'am.

20 You may be excused.

21 (Witness excused.)

22 **MR. OSWALD:** The state calls Robert Ecoffey.

23 **THE COURT:** Please come forward, sir.

24 ROBERT ECOFFEY,

25 called as a witness herein, having been duly sworn,

1 under oath testified as follows:

2 **THE COURT:** Please take a seat.

3 **DIRECT EXAMINATION**

4 **BY MR. OSWALD:**

5 **Q.** Would you tell us who you are, sir?

6 **A.** My name is Robert D. Ecoffey.

7 **Q.** And currently what is your employment?

8 **A.** I am the superintendent with the Bureau of
9 Indian affairs, Pine Ridge, South Dakota.

10 **Q.** Were you in law enforcement in the past?

11 **A.** Yes, I was.

12 **Q.** Can you explain some of your background in
13 law enforcement, sir?

14 **A.** I have 35 years of service with the federal
15 government. Of the 35 years, 25 years of that was
16 with law enforcement.

17 I have a college degree in criminal justice.
18 I am a graduate of the FBI National Academy. I have
19 had hundreds of hours of formal investigative training
20 both in homicide investigations, forensics,
21 firearms -- certified firearms structure. I am a
22 certified hostage negotiator.

23 **Q.** Did you get involved in the Anna Mae Aquash
24 investigation?

25 **A.** Yes, I did.

1 Q. And how did that come about, sir?

2 A. I was originally approached, I think
3 probably, back in the mid 80s by the FBI asking if I
4 could assist them with the investigation. At the time
5 I was a criminal investigator with the Bureau of
6 Indian Affairs stationed in Fort Totten, North Dakota.

7 Q. Are you an enrolled member of Pine Ridge
8 tribe?

9 A. Yes, I am. A member of the Oglala Sioux
10 Tribe.

11 Q. Bob, is it all right if I call you Bob?

12 A. Yes.

13 Q. Bob, did you work in law enforcement in 1975
14 at the time of this incident?

15 A. In 1975, I started with my law enforcement
16 career. I was going to college at Chadron State
17 College and I started my internship in law
18 enforcement.

19 So during the summer of 75, I was assigned to
20 the criminal investigative division on the Pine Ridge
21 Reservation. And at that point in time I began my law
22 enforcement career.

23 Q. Okay.

24 So you weren't actually a police officer that
25 went to the scene or anything in 1975?

1 **A.** Oh, no. I was actually -- because of my
2 schooling and my interest in law enforcement I was
3 assigned as an investigator. I was actually started
4 involvement in direct investigations of homicide cases
5 during the summer of 75.

6 **Q.** Now, are you generally familiar with the
7 Rapid City area and -- regarding this investigation?

8 **A.** Yes, I am.

9 **Q.** Okay.

10 It may seem a little out of place but I got
11 to do it before I forget.

12 Did you happen to take Arlo Looking Cloud and
13 at a separate occasion Thelma Rios around the area?

14 **A.** Yes, I did.

15 **Q.** And did you take them to where?

16 **A.** As far as Arlo Looking Cloud --

17 **Q.** Just in the Rapid City area.

18 **A.** In the Rapid City area, Arlo Looking Cloud
19 took us to the Norwood Apartments (sic) and then
20 showed us a residence that -- where Thelma Rios had
21 been living and told us that that's where --

22 **Q.** It's okay.

23 That will get into hearsay, Bob.

24 Do you know what WKLD0C stands for?

25 **A.** Yes.

1 Q. And did they take you there at all?

2 A. Yes.

3 Q. Okay.

4 Now, here is my basic question, are those all
5 in Pennington County?

6 A. Yes, they are.

7 Q. All right.

8 Now, do you know John Graham?

9 A. Yes, I do.

10 Q. Do you see him here in the courtroom today?

11 A. Yes, I do.

12 Q. Point him out for the jury, please.

13 A. He's sitting right here next to be his
14 attorney. Glasses.

15 Q. And what color shirt?

16 A. Kind of a grayish color.

17 **MR. OSWALD:** May the record reflect this
18 identification, Your Honor?

19 **THE COURT:** Yes.

20 A. I would like to maybe go back a little bit as
21 far as my law enforcement expertise. I guess I left
22 something out.

23 Q. **(BY MR. OSWALD)** Okay.

24 Is it about your training and experience?

25 A. Yes, it is.

1 **Q.** Go ahead, then.

2 **A.** In 1994 I became the United States Marshal
3 for the Federal District of South Dakota. I was
4 appointed by President Clinton in 94. I was the first
5 Indian marshal in a 200-year history of a Marshal
6 Service.

7 And then after leaving the position of the
8 Marshal Service, I went on to become the director of
9 law enforcement services for the Bureau of Indian
10 Affairs in Washington DC so I was the direct of all
11 law enforcement throughout Indian country throughout
12 the United States.

13 **Q.** Were you a marshal and had you been appointed
14 by President Clinton on April 20 of 1994?

15 **A.** Yes, I was.

16 **Q.** And were you actually sworn in at that time?

17 **A.** Yes. It was actually in March of 1994.

18 **Q.** Did you happen to go to Canada April 20,
19 1994?

20 **A.** Yes. On April 20, 1994 myself and Special
21 Agent Mitch Pourier, who was a criminal investigator
22 with the Bureau of Indian Affairs -- we left Rapid
23 City here and went to white house in the Yukon
24 Territory.

25 **Q.** What -- why -- why did you make that trip,

1 sir?

2 **A.** The purpose of the trip was to try to attempt
3 to contact Mr. Graham and to interview him pertaining
4 o to some information that had come up concerning the
5 murder of Anna Mae Aquash.

6 **Q.** Then did you arrive in the Yukon Territory
7 April 20?

8 **A.** Yes, we did.

9 **Q.** How did you get there?

10 **A.** We flew into -- we flew actually from here
11 went to Seattle, on to Vancouver, and then from
12 Vancouver up to Whitehorse. We arrived in Whitehorse
13 approximately 3:30 p.m. on April 20.

14 **Q.** What did you do?

15 **A.** At the airport a Constable with the Royal
16 Canadian Police, RC Miller, met us at the airport. He
17 picked us up. He then took us to a motel that we were
18 staying at the Gold Rush Motel located in Whitehorse.

19 **Q.** Then what happened?

20 **A.** At that time, then, Constable Miller gave us
21 a tour of the Whitehorse community. We first went up
22 by a residence located in Whitehorse. At that time
23 Constable Miller said that this residence -- he
24 identified it as the residence belonging to John
25 Graham and that John Graham had lived there. We drove

1 by there. He just showed us the place and then we
2 returned back to the motel.

3 Q. Was there anyone else with you folks or that
4 had met you there?

5 A. No. It was just us three at that time.

6 Q. Then what happened, sir?

7 A. It was getting late in the day so at that
8 time we decided not to attempt to contact Mr. Graham.
9 That we decided to wait till the following day, the
10 21st of April. Special Agent Jim Graf with the FBI
11 was scheduled to fly in at 3:30 in the afternoon to
12 assist us with the investigation.

13 Q. Then did you spend the night in the motel in
14 Whitehorse?

15 A. Yes, we did. We spent the night at the
16 motel. The next afternoon, was approximately
17 12:15 p.m., we decided that we were going to attempt
18 to contact Mr. Graham to see if we could set up an
19 interview.

20 Q. Okay.

21 So did you know where to go when you tried to
22 contact him?

23 A. Yes, we did.

24 Q. Where did you go?

25 A. Constable Miller -- actually went with him,

1 he drove the car, and he took us to the residence that
2 he described the before as the residence that belonged
3 to Mr. Graham.

4 Q. Did you find Mr. Graham at that residence?

5 A. No, we didn't.

6 Q. Were you directed elsewhere then?

7 A. Yes. Myself and Special Agent Pourier went
8 to the door. Constable Miller stayed in the vehicle.
9 I knocked on the door. At that point in time a young
10 child said come in. So I said is John Graham here.
11 And he said no. He said he's working on the roof of
12 the West Mark Motel downtown. And said that he would
13 be back about 6:30 p.m.

14 At that point in time another child that was
15 in the back room, he said, no, he'll be back about
16 4:30 p.m. So I said okay, thank you. And then we
17 left.

18 Q. Then where did you go?

19 A. After -- after that it had to be about
20 12:30 p.m. He went directly down to the West Mark
21 Motel to see if we could observe Mr. Graham working on
22 the roof of the motel. We went down there. Both
23 myself and Investigator Pourier got out. We walked
24 around the back of the motel, the side of the
25 building. We looked up and at that point in time we

1 could see Mr. Graham working on the roof.

2 Q. What happened then?

3 A. We decided at that point in time we wasn't
4 going to attempt to interview him. We wanted to wait
5 until Special Agent Graf arrived. He wasn't due to
6 arrive until 3:30 in the afternoon. We went to the
7 airport at 3:30 and we picked him up.

8 Q. And did you go back to the roof?

9 A. Yes.

10 At that point in time we decided that myself
11 and Special Agent Pourier would be the ones that would
12 approach Mr. Graham.

13 Q. Why is that, sir?

14 A. Since from the case, that in prior history
15 that he refused to cooperate with the FBI --

16 **MR. MURPHY:** Objection, Your Honor. Hearsay.

17 **THE COURT:** Sustained. Stricken.

18 You are not to consider that remark at all in
19 your deliberations.

20 Q. **(BY MR. OSWALD)** Bob, did you talk to John
21 Graham, then, at the job site?

22 A. Oh, yes, we did.

23 Q. Explain how that happened.

24 A. It was right about 4:30 p.m. both me and
25 Mr. Pourier we were -- we got off -- we walked into

1 the back of the motel. There was a large ladder
2 running up the back of the building. Going up to the
3 roof. We were just standing on the corner of the
4 building waiting for Mr. Graham to get off of work.

5 It was right about 4:30 p.m. that Mr. Graham
6 climbed down the ladder and as soon as he got to the
7 ground, and started walking, both myself and criminal
8 investigator Pourier approached him.

9 Q. And what did you do?

10 A. I walked up to January. I reached out. I
11 shook his hand, and I said, John, my name is Bob
12 Ecoffey. This is Mitch Pourier and we're law
13 enforcement officers from South Dakota. And we would
14 like to talk to you about some new information
15 concerning the investigation and death of Anna Mae
16 Aquash. And then I told John, I said, I want to let
17 you know that I have no legal authority; that we're
18 not going to arrest you. That I have no legal
19 authority to arrest you here in Canada.

20 Q. What did you observe then?

21 A. At that point John looked at me and he said,
22 well, how do you know about me? How did you find out
23 about me?

24 Q. Did you tell him then?

25 A. Yes.

1 Q. What did you say?

2 A. I said --

3 MR. MURPHY: I am going to object. Calls for
4 a hearsay source, Your Honor.

5 THE COURT: Overruled.

6 A. I said that information had come about
7 that --

8 Q. (BY MR. OSWALD) Don't tell me what the
9 information was, just from who.

10 A. I basically told John that an elderly
11 gentlemen by the name of Al Gates came forward with
12 information --

13 MR. MURPHY: Objection, Your Honor. This is
14 the hearsay.

15 MR. OSWALD: That's all. That's fine.

16 Q. (BY MR. OSWALD) You told him that?

17 A. Yes.

18 Q. What was his response when you said that?

19 A. Well, I also told him some more.

20 Q. Okay.

21 Was it about the Al Gates' information, you
22 mean?

23 A. I told him that Al Gates --

24 MR. MURPHY: Objection.

25 THE COURT: Hold on.

1 You are going to answer the question that's
2 asked or we're going to go sideways pretty fast.

3 **THE WITNESS:** Okay.

4 **Q. (BY MR. OSWALD)** Did you tell him some things
5 other than Al Gates' information?

6 **A.** Yes.

7 **Q.** Okay.

8 What else did you tell him?

9 **A.** I told him that information had been
10 received --

11 **MR. MURPHY:** Objection, your Honor. This is
12 outside information. It's hearsay.

13 **MR. OSWALD:** Can I do it in generalities,
14 Your Honor?

15 **THE COURT:** It's offered for the truth
16 asserted.

17 Ladies and gentlemen, this -- to be hearsay,
18 it has to be offered to prove the contents of the
19 statement -- as evidence of the truth of the content
20 of the statement. You may not consider what
21 Mr. Ecoffey was told as being true or accurate or
22 anything else. It's simply to explain what
23 Mr. Ecoffey's base of knowledge that he was acting
24 upon. It is not evidence that that knowledge is
25 accurate or true. It simply explains his behavior and

1 you may not consider it as evidence to any other
2 affect than that.

3 **MR. OSWALD:** Thank you.

4 **Q. (BY MR. OSWALD)** Now, you heard the judge's
5 explanation to the jury just now?

6 **A.** Yes.

7 **Q.** All right.

8 So just narrow and just following the judge's
9 explanation, what did you tell Mr. Graham other than
10 what Mr. Gates had said?

11 Mr. Gates isn't part of that.

12 Just tell him what else you said.

13 **A.** Well, I told him that information had come
14 about a meeting that was held in Denver, Colorado.
15 And that during this meeting there was discussion that
16 went on involving Anna Mae Aquash. And that during
17 the meeting it was -- there was members of the Chicano
18 movement and that Corky Gonzalez and others were
19 there. And that a statement was -- in the meeting --
20 the purpose of the meeting --

21 **MR. MURPHY:** I am going to object. This
22 goes --

23 **THE COURT:** We're getting narrative and I
24 think we're stretching admissible evidence or
25 statements quite a ways.

1 **MR. OSWALD:** Okay. All right.

2 We'll proceed.

3 **Q. (BY MR. OSWALD)** So after you told him this
4 story about what you know of, what was his reaction?

5 **A.** He got real nervous. His lips started
6 quivering. He had a cigarette in his hand and he
7 started shaking this like and he was trying to smoke.
8 And then I said, you don't have to say anything. We'd
9 like to meet with you. We'd like for you to sit down
10 with us and meet with us -- sit down and listen to
11 what we have to say.

12 So at that point in time, he said -- he
13 looked at me and said, yeah. He said, I will meet
14 with you guys. He said, where are you saying. So I
15 said, we're staying at the Gold Rush Motel. He said,
16 well, I am -- I want to go home and clean up first.
17 And he said I will meet you guys down there about
18 7:30 p.m. And I said, okay. That's fine. And he got
19 in the car and he left.

20 **MR. OSWALD:** All right, Judge, are we clear
21 of the admonition regarding hearsay when I go into now
22 Mr. Graham's statements to Mr. Ecoffey?

23 **THE COURT:** Unless something is objected to
24 by Mr. Murphy that I sustain, yes.

25 **MR. OSWALD:** Okay. Very well.

1 **Q.** **(BY MR. OSWALD)** So Mr. Ecoffey, did he meet
2 you later?

3 **A.** Yes, he did.

4 **Q.** Explain the circumstances on how you set up
5 that meeting.

6 **A.** Well, at about 7:15 p.m. myself and Special
7 Agent Pourier went down into the lobby of the motel to
8 wait for Mr. Graham because he said he would be there
9 at 7:30. We were just sitting in the lobby waiting
10 for him. He didn't show up.

11 And then approximately 8:00 o'clock a lady by
12 the name of Viola Papiquash entered the lobby. She
13 walked over to where we were sitting and she said that
14 John said that he can't talk to you guys. That he
15 will have to wait till tomorrow to talk to you.

16 And I said, you know, we're scheduled to
17 leave tomorrow. It's very important that we talk to
18 him tonight. And I said, you know -- I said we
19 traveled a couple thousand miles to get here. All we
20 want him do is sit down and listen to what we have to
21 say. And so she said, wait a minute, I will go give
22 him a call and see what he says. So I said okay.

23 So at that point in time she walked down the
24 hallway and she made a telephone call from the
25 hallway. A couple minutes later she came back to me

1 and she said, well, John wants to talk to you on the
2 telephone. And so I said, okay. So I went over and
3 picked up the telephone. And I said hello. This is
4 Bob Ecoffey. And he said this is John Graham. He
5 said, you know -- he said, I don't even really want to
6 talk to you guys because he said I didn't have a
7 chance to get ahold of my attorney.

8 So at that point in time I said, well, John,
9 as I said, you have the right to remain silent and I
10 said you don't have to say anything to us, I said, but
11 we traveled, you know, a couple thousand miles and I
12 said it would be good to at least have you sit down
13 and listen to what we have to say.

14 Q. Okay. Very good.

15 So then eventually did he agree to come to
16 the motel?

17 A. Well -- you know -- well, he said -- he
18 said -- during the conversation he said, well, I hate
19 to talk to you guys he said because an FBI agent had
20 threatened him before. And so I said, well, John when
21 we approach you this afternoon, did I approach you in
22 a threatening manner? Did I threaten you in any way
23 and he said no.

24 And I said, once again, I want to tell you
25 that I have no legal authority to arrest you. I am

1 not here to o arrest you. I have no legal authority
2 in Canada so he said okay. He said, I will come talk
3 to you guys.

4 So then I told him, I said, well, come down
5 to the motel. I said I got a room here with a coffee
6 table. I said I got some coffee and I said we can sit
7 down and visit. He said, no, I want to visit at a
8 neutral location. And he said I will meet you guys at
9 the Rotary Park in Whitehorse at 9:30 p.m.

10 Q. Is that close to the motel?

11 A. Yes. It's not far from the motel.

12 Q. Did you go to the park then?

13 A. Yes.

14 Q. So you are at the park.

15 What happened?

16 A. Well, Constable Miller took us over to the
17 park. At that point in time myself, Special Agent
18 Mitch Pourier and Constable Miller were standing by a
19 picnic table in the center of the park. We saw a
20 brown-colored station wagon go by and didn't see
21 anybody at first. And a short time later an
22 individual came walking up from the river bottom on
23 the park and as he got closer I could identify him as
24 John Boy -- or John Graham.

25 Q. Okay.

1 Did you talk to Mr. Graham, then, in the
2 park?

3 **A.** Yes, I did.

4 **Q.** Before you got into any particular
5 conversation, did you preface your remarks by any
6 comments from you?

7 **A.** Well, when he first came up to us, he --
8 Constable Miller approached him and showed him his
9 credentials and said, I am from the RCMP. And at that
10 time I told Mr. Graham, I said, you know, John, I
11 said, the RCMP has nothing to do with this case. I
12 said Constable Miller is just here because we had to
13 go through him in order to have an opportunity to talk
14 to you. So that he will be standing in the area. So
15 John said okay.

16 At that point in time there was a picnic
17 bench sitting there. So I asked Mr. Jam, I said we
18 can sit down here on the picnic bench. So he set down
19 on the bench and I sit next to him. At that point no
20 is special poor Part Two Part Two sit down across from
21 us on the picnic table.

22 **Q.** Did you talk to him about whether he had to
23 say anything to you or threaten him in any manner at
24 that time?

25 **A.** Yes. At that point in time I still reminded

1 him, I said, John, you know, you have the right to
2 remain silent. You don't have to say anything to us.
3 I just want you to sit down and give us an opportunity
4 to give out some information that has been developed
5 in Anna Mae Aquash murder case.

6 Q. Then what happened?

7 A. Then I told him -- I said, well, I would like
8 to start from the beginning of the case. Just kind of
9 give you from the beginning as I know it, John. And I
10 started from the beginning of the case. I told him
11 Anna Mae Aquash --

12 MR. MURPHY: Objection, Your Honor.

13 THE COURT: Point of the objection.

14 MR. MURPHY: The point of the objection is
15 lack of personal knowledge as well as it's derived
16 from multiple hearsay sources and it isn't relevant or
17 necessary to get to the statement or the conversation
18 between my client and Mr. Ecoffey.

19 THE COURT: Well, it's not necessary to get
20 to the statement between Mr. Graham and Mr. Ecoffey, I
21 agree.

22 I frankly don't have any idea whether it's
23 necessary, but you do; and if it's not necessary,
24 let's go to the statements. If it's necessary, I will
25 hear it.

1 **MR. OSWALD:** Thank you.

2 I am thinking.

3 **MR. MURPHY:** Your Honor, may we approach and
4 I will show you an exhibit that will help.

5 **THE COURT:** Please.

6 (Whereupon, a discussion was held at the
7 bench.)

8 **MR. MURPHY:** Your Honor, what I am going to
9 show you is Graham document 953, which is the summary
10 of what we're at. If you look here, we're about the
11 middle of the page. And you are going to see that
12 what he's going to start summarizing is about 12
13 paragraphs of material where he relays basically
14 everything that he learned about the investigation in
15 the preceding decade or whatever it was. And he goes
16 through point by point by point as --

17 **THE COURT:** Tell me why you need to go beyond
18 the top paragraph of page 6.

19 **MR. MURPHY:** And that's -- on the exhibit
20 that you just reviewed, paragraph after paragraph to
21 which Mr. Ecoffey is testifying to, almost verbatim,
22 starts out Ecoffey told -- and then he listed a litany
23 of accusations and then the next paragraph, Ecoffey
24 told and then he lists a litany of accusations and
25 finally after all of that you get to the page that you

1 just referenced and then he starts talking about what
2 my client actually said.

3 **MR. OSWALD:** Judge, if I may be heard, it's
4 the context of everything that he's talking about and
5 the bare statements are limited or have no meaning
6 unless it's within that context. Plus, all -- I think
7 all of this information -- the Court's ruling if it
8 has already been approached and subject to
9 cross-examination.

10 **THE COURT:** The difficulty is that it
11 interposes, first of all, stuff that in large part is
12 hearsay to Mr. Ecoffey.

13 Number two, is it gets confusing as to the
14 scope of the questions asked of him. You start with
15 the picture -- showed him the pictures of the scene.
16 I don't know why you have to go into anything beyond
17 that.

18 And then the following points on the
19 questions asked will address most of the things that
20 are going to go in the interim.

21 **MR. OSWALD:** But, he has to know what he --
22 if the jury speculates what did Mr. Graham -- or
23 Ecoffey tell him, and his response is -- it wasn't
24 about making a birthday cake for crying out loud.
25 We're talking about accusing --

1 **THE COURT:** You are showing him the
2 photograph of Anna Mae at the scene. Nobody is going
3 to confuse that with a cake.

4 **MR. OSWALD:** Yes. But the statements have to
5 come in for the context of it. This is what they
6 confronted this man with. They confronted with this
7 information.

8 **THE COURT:** I don't know that the context is
9 an exception to hearsay.

10 **MR. MURPHY:** Our position would be that when
11 you get two pages of single spaced allegations that
12 maybe he starts -- well he starts with the autopsy and
13 then in Denver and then in Rapid City. Then he talks
14 about the Crusade for Justice and he gets all the way
15 up there, and then he finally says, okay --

16 **THE COURT:** You are not going to get very far
17 before lunch.

18 So what are we talking about?

19 We have heard all of the stuff that's in his
20 statement before.

21 **MR. OSWALD:** And it's been subject to
22 cross-examination.

23 **THE COURT:** What are you showing me?

24 **MR. JACKLEY:** I don't want to interject
25 myself unless I have permission.

1 **THE COURT:** Well, I mean you are. I mean who
2 is showing me -- what am I trying to be shown?

3 **MR. JACKLEY:** Hearsay is one -- other than
4 one made by the declarant. The declarant is here
5 testifying about what he told John. He's here. He's
6 subject to cross-examination.

7 **THE COURT:** I understand what hearsay is, I
8 think. Probably better than most lawyers.

9 **MR. MURPHY:** This is actually double hearsay
10 because this is all stuff that Mr. Ecoffey did not
11 observe. But he's been told from sources unnamed, and
12 then he regurgitates it to my client for pages. And
13 then it all comes down to a picture and gets a
14 response to the picture. All that stuff in between is
15 just fluff.

16 But what they are trying to do is just to get
17 it before the jury through this witness to
18 independently establish those allegations as having
19 been true. And so those are out-of-court statements
20 that Mr. Ecoffey learned from another source that now
21 are being admitted for the truth of the matter
22 asserted. They are not just context for the question
23 because there is two pages of them.

24 **MR. OSWALD:** This isn't an attempt to get in
25 inadmissible hearsay. Besides all of this information

1 has already been subject to cross-examination. This
2 is what he told him and his knowledge.

3 **THE COURT:** We never want hearsay in for the
4 wrong purpose but we just want it in. I mean I
5 understand that.

6 **MR. OSWALD:** The police officers constantly
7 accuse somebody of the crime. And they bluff, they
8 rouse, and it's --

9 **THE COURT:** They bluff and lie and they do
10 all kinds of things.

11 **MR. OSWALD:** Yes. That's admissible. There
12 is a witness here that saw this. There is a witness
13 that saw that.

14 **THE COURT:** First of all, you can ask him if
15 he has any personal knowledge of any of that
16 information that he relates. You are going to ask him
17 that. Then I will at least tell the jury.

18 **MR. OSWALD:** As a limiting instruction?

19 **THE COURT:** At that point if Mr. Murphy wants
20 to examine him briefly on that extent of knowledge I
21 will allow that and then I will probably allow them to
22 go into that information about the understanding that
23 I don't have a clue whether it's true or not.

24 **MR. MURPHY:** I would ask to voir dire the
25 witness.

1 (Whereupon, the discussion at the bench was
2 then concluded.)

3 **MR. OSWALD:** Do you want me to proceed?

4 **THE COURT:** You may.

5 **Q. (BY MR. OSWALD)** Mr. Ecoffey, you made some
6 statements to Mr. Graham about the investigation?

7 **A.** Yes, I did.

8 **Q.** And was this -- these statements are based
9 upon your review of the file and reports?

10 **A.** Review of the file, and actually interviews
11 of different individuals.

12 **Q.** So you had some personal knowledge yourself?

13 **A.** Oh, yes.

14 **MR. MURPHY:** Your Honor, at this point may I
15 voir dire the witness for the purpose of the
16 objection?

17 **THE COURT:** You may.

18 **MR. MURPHY:** Of course, Mr. Ecoffey, you
19 weren't present in Denver in 1975, December of 1975 or
20 November of 1975, were you.

21 **THE WITNESS:** No, I wasn't.

22 **MR. OSWALD:** And you weren't present at the
23 autopsy, were you?

24 **THE WITNESS:** No, I wasn't.

25 **MR. MURPHY:** And you weren't present at Troy

1 Lynn Yellow Wood's house in the fall of 75, were you?

2 **THE WITNESS:** No, I wasn't.

3 **MR. MURPHY:** Nor were you present at WKLD
4 or Thelma Rios' house in 1975, were you?

5 **THE WITNESS:** No, I wasn't.

6 **MR. MURPHY:** When you talked about having
7 personal knowledge, what you had personal knowledge of
8 is what certain people that claim to have been at
9 those places told you years later, correct?

10 **THE WITNESS:** That's correct.

11 **MR. MURPHY:** In some cases decades later,
12 correct?

13 **THE WITNESS:** Correct.

14 **MR. MURPHY:** I would renew my objection, Your
15 Honor, to this witness testifying as to any of these
16 events for lack of personal knowledge, lack of
17 foundation, and double hearsay.

18 **THE COURT:** I am going to overrule the
19 objection with this cautionary instruction to the
20 jury.

21 One, I think you have heard to date likely
22 variations of the narrative that Mr. Ecoffey gave to
23 Mr. Graham. The narrative and the purpose of the
24 narrative is simply to set the parameters of the
25 interview with Mr. Graham.

1 And once again, you are specifically
2 prohibited from using any of the information given to
3 Mr. Graham by Mr. Ecoffey as evidence in the trial.
4 You may consider the responses specifically made to
5 specific items by Mr. Graham as part of the normal
6 ordinary testimony that comes into trial. The
7 narrative of what Mr. Ecoffey has been told by other
8 people is not evidence of the truth of anything he was
9 told. You will have to make that decision from other
10 testimony and evidence presented to you.

11 Do you understand that?

12 Anybody not understand it?

13 You may proceed, Mr. Oswald.

14 **Q. (BY MR. OSWALD)** What did you tell Mr. Graham,
15 sir?

16 **A.** I told him that -- I said I would like to --
17 again told him that I wasn't there to arrest him.
18 That I would like to start from the beginning of the
19 case as I knew it. And I told him that in February of
20 1976 Anna Mae Aquash's body was found in the Badlands
21 on the Pine Ridge Indian Reservation. That an
22 investigation was conducted and that it was determined
23 at first that she died of exposure. That at that
24 point in time, the FBI or the BIA was unable to
25 identify her. So that the FBI amputated her hands,

1 sent them in to get fingerprinted and determine her
2 identity.

3 I told him that upon receiving the hand
4 hands, the FBI was able to determine that the
5 individual of Anna Mae Aquash. I then told him that
6 after she was identified as Anna Mae Aquash, that a
7 second autopsy was conducted. The body was exhumed.
8 A second autopsy was conducted. And at the second
9 autopsy, determined that she died from a gun shoot --
10 gunshot in the back of the head.

11 Q. Okay.

12 And was Mitch Pourier and Mr. Graham and you
13 still at this table?

14 A. Yes, we were.

15 Q. Did he do anything in response, then, to
16 those comments?

17 A. I went on to tell him more information --

18 Q. Okay.

19 What information did you continue with
20 telling him?

21 A. I then told him that the investigation had
22 then moved on to Denver, Colorado. And that
23 information was developed that during the late fall or
24 early winter of 1975, that it was -- that information
25 was that he was at the Troy Lynn Irving residence on

1 Pecos Street.

2 Q. Is that Troy Lynn Yellow Wood also?

3 A. Yes. Troy Lynn Yellow Wood.

4 Q. Okay. Go ahead.

5 A. He was in attendance of a meeting that was
6 being held there at Troy Lynn's residence; that
7 during the meeting there was several people there
8 which included two leaders of the Chicano movement
9 Corky Gonzalez and Ernesto Vigil and that there was
10 some discussion going on with all of these people
11 concerning whether or not Anna Mae Aquash was an
12 informant.

13 Q. Okay.

14 A. And during this discussion --

15 MR. MURPHY: Your Honor, I am going to
16 specifically object to the next portion of testimony
17 as being highly prejudicial and not a fact or
18 presented to this jury through any witness.

19 MR. OSWALD: I will proceed then.

20 THE COURT: Sustained.

21 MR. OSWALD: Thank you.

22 Q. (BY MR. OSWALD) Let's just get it straight.
23 I don't want the information, but you had told him
24 information that you had heard about this meeting?

25 A. That's correct.

1 Q. Okay.

2 Gets to -- skip that one portion and let's go
3 to the part where you told him about the basement.

4 A. Okay.

5 Q. What did you tell him about the basement?

6 A. I said -- at this meeting then it was --

7 Q. Nope. You talked about --

8 A. That it was reported that he then -- that
9 Anna Mae was tied up in the basement of Troy Lynn's
10 house and it was reported that John Boy and others
11 went down there, John Boy tied her up. And they
12 removed her from the basement. They took her outside
13 and they placed her in the back of a red station wagon
14 that belonged to -- at that point in time it belonged
15 I believe to Troy Lynn. That they put her in the back
16 they tied her up -- as they tied her up. They tied
17 her up and when they were placing her in the back of
18 the station wagon, that Anna Mae was crying and that
19 she said --

20 MR. MURPHY: I am going to object. This is
21 also a fact not alleged in evidence and highly
22 prejudicial.

23 THE COURT: I don't think we need do that.

24 MR. OSWALD: Okay.

25 Q. (BY MR. OSWALD) All right.

1 So you talked about the tying up.

2 Did you tell him what your information showed
3 where she was taken from the basement?

4 **A.** Yeah. That they took her -- they put her in
5 the car and they took her supposedly back to the Pine
6 Ridge Indian Reservation.

7 **Q.** Okay.

8 Then --

9 **MR. OSWALD:** May I have a minute?

10 **THE COURT:** Uh-huh.

11 **Q.** **(BY MR. OSWALD)** Bob, I'd like to show you a
12 report that you made.

13 Do you recognize that?

14 **A.** Yes, I do.

15 **Q.** Okay.

16 If you would start from there your narrative,
17 read that and that's where I am going to start with my
18 next questions, okay.

19 **A.** Okay.

20 **Q.** Hold on now.

21 Okay.

22 Starting from that point, what did you tell
23 him?

24 **A.** I told Graham that a few days later that
25 they -- that he and Theda returned from South Dakota

1 and that Anna Mae Aquash wasn't with them.

2 Q. What else did you tell him?

3 A. Then I told him that information was given
4 that he was bragging around. He was saying that we
5 had to move --

6 MR. MURPHY: Objection. Another fact not in
7 evidence. Highly prejudicial.

8 THE COURT: Sustained.

9 Q. (BY MR. OSWALD) All right.

10 Based upon what you had told him, did John
11 Graham respond to you?

12 A. Yes, he did.

13 Q. What did he do and what did he say?

14 A. He was sitting there at the picnic table next
15 to me --

16 THE COURT: Let me interject a minute. I'm
17 assuming this is the best place to break for lunch
18 before we get into that.

19 MR. OSWALD: I think that's good.

20 THE COURT: I -- so let's do that. And we
21 will be in recess for the noon hour till about 1:15.

22 Ladies and gentlemen, the same cautionary
23 instructions about not talking amongst yourselves or
24 with others or forming any opinions.

25 Thank you.

1 (Whereupon, the following proceedings were
2 then had in open court out of the presence of the
3 jury.)

4 **MR. MURPHY:** We would ask for the
5 sequestration of the witness.

6 **MR. OSWALD:** Judge, I was --

7 **THE COURT:** I don't want Mr. Murphy talking
8 to his witnesses during breaks either. I think it
9 gives a bad impression to the jury and everything else
10 because it's subject to, didn't you talk to Mr. Oswald
11 during the break and the hearing. Okay. I mean, I
12 think it's got a smell to it that I don't want going
13 to the jury.

14 **MR. OSWALD:** Well, I was just going to try
15 and inform Mr. Ecoffey on what to eliminate so we
16 don't get into another objection. I am getting
17 objected to.

18 **THE COURT:** If you and Mr. Murphy agree to
19 it, that's fine with me. If you are going to tell him
20 what to stay out of, I assume that John needs to know
21 that in order to --

22 **MR. OSWALD:** I will just make it easy --

23 **THE COURT:** I don't have any problem with
24 that, but I think it needs to be mutual so that
25 Mr. Murphy understands what you are doing.

1 **MR. OSWALD:** I just won't do it. I won't go
2 there.

3 **THE COURT:** Yeah. I think it smells. Even
4 if it is absolutely proper, it's going to raise a
5 smell.

6 (Off the record.)

7 **THE COURT:** Satisfied this is the jury,
8 Mr. Jackley?

9 **MR. JACKLEY:** Yes, Your Honor.

10 **MR. MURPHY:** Yes, Your Honor.

11 **THE COURT:** You may proceed.

12 **Q. (BY MR. OSWALD)** All right, Bob. I'd like to
13 ask you these series of questions about the
14 investigation. I know where we left off, but I want
15 to back track a little bit.

16 **A.** Okay.

17 **Q.** When you became Marshal for the District of
18 South Dakota, you kind of took this case on as an
19 investigation on your part?

20 **A.** Yes, I did.

21 **Q.** Did you review the file about things that
22 happened in the past?

23 **A.** Yes, I did.

24 **Q.** And about statements that people had made?

25 **A.** Yes, I did.

1 **Q.** Had you done any interviews yourself prior to
2 going to the Yukon in 1994?

3 **A.** Yes, I did.

4 **Q.** Without saying what was said, tell me who did
5 you interview?

6 **A.** George Palfy, Al Gates, Frank Dillon, Troy
7 Lynn Irving, Angie Begay, Theda Clarke Nelson, John
8 Graham, Arlo Looking Cloud.

9 **Q.** Before John Graham? This is the first
10 interview, right?

11 **A.** Yes.

12 **Q.** Okay.

13 So did you interview Arlo before this?

14 **A.** No.

15 **Q.** Okay.

16 So you had all of that information at your
17 disposal either mentally or through notes?

18 **A.** Yes, I did.

19 **Q.** Based upon that information that you had, did
20 you relay to Mr. Graham your theory of the case?

21 **A.** Yes, I did.

22 **Q.** Okay.

23 Now we're at that question where we left off
24 at noon. After you had talked to him about some of
25 that information, did he turn to you and say

1 something?

2 A. Yes, he did.

3 Q. And you are still on the park bench?

4 A. Yes, we are.

5 Q. Tell these folks what he said.

6 A. After I laid out the information or at least
7 my understanding of what his involvement was in the
8 kidnapping and murder of Anna Mae Aquash, he turned to
9 me at the table and he said, well, he said, looks like
10 you guys have my future planned out for me. You have
11 your case.

12 Q. What did you ask him then?

13 A. I said, well, John, I want to give you this
14 opportunity -- I want to give you an opportunity to
15 fill in some details. I want you to give your side of
16 the story.

17 Q. What did you do then?

18 A. I then said, well, not too long ago, I had
19 obtained access of crime scene photographs of Anna Mae
20 at the scene.

21 Q. So did you have those photos with you at the
22 time?

23 A. Yes, I did.

24 Q. What did you do with them?

25 A. I reached down at the table and John was

1 sitting here. I reached down at the table. I had
2 them in a folder. I started taking the photographs
3 out. I laid them down in front of him. And it
4 depicted her laying on the bottom of the draw in a
5 curled up position and I told him -- I said -- he
6 looked down at the photographs and as I laid them
7 down, I said it was quite clear from the evidence --

8 **MR. MURPHY:** Objection, Your Honor. This is
9 going to be a conclusion.

10 **THE COURT:** Is what -- yeah. First of all, I
11 don't -- Mr. Ecoffey goes on after a question to
12 address matters other than the question that was
13 asked. And that leads us to trying to unring a bell
14 if he gets into bad areas or if any witness does. And
15 I just as soon avoid telling the jury not to consider
16 something that they just heard. Okay.

17 Mr. Ecoffey, please answer the question
18 that's asked and if Mr. Oswald wants to get you into
19 other areas he will ask the questions.

20 **THE WITNESS:** Yes, sir, I understand.

21 **THE COURT:** Thank you.

22 **Q. (BY MR. OSWALD)** Now, as you laid out the
23 photos, did you make any observations of Mr. Graham?

24 **A.** Yes, I did.

25 **Q.** What did you see?

1 **A.** He glanced down at the photos real quick. He
2 took a look and then he turned away, he looked up in
3 the air, and he turned back. His eyes were all filled
4 with tears as if he was going to cry.

5 **Q.** Answer this yes or no. Did he or -- or did
6 you tell him, then, any further things about your
7 theory of the case?

8 **A.** Yes, I did.

9 **Q.** Okay.

10 About your theory of the crime scene?

11 **A.** Yes, I did.

12 **Q.** After that, what did he say?

13 **A.** He said, be Anna Mae was my friend. He said
14 the only fear that she had was from FBI agent Dave
15 Price.

16 **Q.** And then did he say anything else?

17 **A.** He said that's all I'm going to say.

18 **Q.** Did you ask him something then?

19 **A.** Yes, I did.

20 **Q.** What did you ask him?

21 **A.** I asked him -- let's see -- let me back up
22 here.

23 **Q.** Would it help to refresh your memory?

24 **A.** Sure.

25 **MR. OSWALD:** Showing page six.

1 Q. (BY MR. OSWALD) Does that help refresh your
2 memory?

3 A. Yes, it does.

4 Q. And you made this report near the time during
5 the interview?

6 A. Yes.

7 Q. Okay.

8 What did you ask him?

9 A. I turned to John and I said -- I said, did
10 anybody ever threaten you. I said did anybody ever
11 tell you that the same thing would happen to you that
12 happened to Anna Mae if you talked.

13 Q. What did he say?

14 A. He said, no, nobody threatened me.

15 Q. Did you hear Investigator Pourier ask him
16 anything?

17 A. Yes.

18 Q. And Mr. Pourier is going to be a witness here
19 next.

20 What did Mr. Pourier ask him?

21 A. Mr. Pourier said, well, John do you think
22 that something would happen to you if you talked to
23 us.

24 Q. And what is said next?

25 A. He said --

1 Q. Would it help to refresh your memory, sir?

2 A. Yes.

3 MR. OSWALD: Same page six.

4 A. It was after Investigator Pourier said, well
5 would anybody -- if you talked to us, do you think
6 that anybody would do anything to you. And he said --
7 he kind of looked up and he looked into the horizon.
8 You could see the Whitehorse community in the river
9 going by. He said, well, I'm ready to leave this
10 place anyway. He said, I will probably spend the rest
11 of my life in jail.

12 Q. (BY MR. OSWALD) Did you hear, then,
13 Investigator Pourier ask him another question?

14 A. He said --
15 Can I look at the report again?

16 Q. Okay.
17 Just yes or no.

18 A. No, I didn't.

19 Q. Okay.
20 Would it help to refresh your memory?

21 A. Yes.

22 MR. MURPHY: Your Honor, that's improper
23 refreshment. He said he didn't hear the next
24 question.

25 THE COURT: If he didn't hear the next

1 question he shouldn't be looking at the report.

2 **A.** I misunderstood your question.

3 I did hear it.

4 **Q.** (BY MR. OSWALD) You did hear it?

5 **A.** Yes.

6 **Q.** Would it help to refresh your memory with the
7 report?

8 **A.** Yes.

9 **MR. OSWALD:** May I?

10 **THE COURT:** Yes.

11 **Q.** (BY MR. OSWALD) Does that refresh your
12 memory, sir?

13 **A.** Yes.

14 **Q.** What did Investigator Pourier ask him?

15 **A.** He asked him -- he said, John, why would all
16 of these people that Ecoffey mentioned to you -- why
17 would they tell him the things that they told him.

18 **Q.** And what happened then?

19 **A.** John kind of sat there for a second and then
20 he turned and he said, okay, okay. I was there. I
21 drove the car. I helped take her back to Rapid City.

22 **Q.** Okay.

23 Now, I'd like to -- did you make notes of
24 what he said exactly at that time?

25 **A.** The mental notes are what -- that are in

1 the -- that are in the report.

2 Q. And when did you make those notes, sir?

3 A. That evening as soon as the interview was
4 done.

5 Q. And did you make those notes and transcribe
6 them into a formal report?

7 A. Yes.

8 Q. And would this report that I have reflect as
9 close as you can come to the quote from Mr. Graham?

10 A. Yes.

11 Q. Would it help to refresh your memory to look
12 at that report to see exactly the words that you took,
13 sir?

14 A. Yes.

15 Q. Okay.

16 Does that refresh your memory?

17 A. Yes.

18 Q. What did John Graham say at that point?

19 A. He said okay. Okay. I was there. I helped
20 drive the car to take her back to the reservation.

21 Q. What did he then say?

22 A. I asked him, I said, well, who went back --
23 who did -- who went in the car with you. I said, was
24 it Theda, Ida, and yourself that took Anna Mae back to
25 the reservation? And he said, I drove, but he said, I

1 am not going to give any other names.

2 Q. Did he say where they went?

3 A. He said that they went to a safe house.

4 Q. Did you ask where that safe house --

5 A. Excuse me.

6 He said that they went to a safe house and so
7 I said was that safe house in Rapid City, South
8 Dakota, and he said he didn't know.

9 So then Mitch --

10 Q. Okay.

11 So then did Mitch ask him something?

12 A. Yeah.

13 Q. What did Mitch ask him?

14 A. He said was the safe house in South Dakota
15 and he said yes.

16 Q. What happened next?

17 A. Then I asked him was the safe house in South
18 Dakota and he said yes and then he said that they
19 stopped a couple times on the way back and that but he
20 wasn't quite sure where they had stopped. And then he
21 said that they took the back roads to get back to the
22 reservation -- or to get back to South Dakota they
23 took the back roads.

24 Q. Do you know, did John Graham make any
25 statements about whether he knew the people at this

1 safe house or not?

2 **A.** Well, at first he said that he didn't get out
3 of the car. And then later then he said -- later on
4 he said, well, he didn't know any of the people at the
5 safe house.

6 **Q.** Did you ask him where this safe house was?
7 Try to pin him down?

8 **A.** Yes. I said, well, where was the safe house
9 and he said that it was in a village.

10 **Q.** Were you able to get any closer information
11 other than village?

12 **A.** No.

13 **Q.** Did you talk about the time of the day?

14 **A.** Yes.

15 **Q.** What did you say -- what did you hear Pourier
16 ask him?

17 **A.** Special Agent Pourier asked him -- said,
18 well, what time was it when you left Denver and John
19 Boy said it was dark. He said that we drove all night
20 to get back.

21 **Q.** And at that time you had mentioned there was
22 talk about back roads.

23 Is that when he said that?

24 **A.** Yes.

25 **Q.** Was he asked about the back roads?

1 **A.** Yes.

2 **Q.** What did he say?

3 **A.** Well, he was asked, how come you took the
4 back roads to get back, and he said, well, it was Anna
5 Mae's idea that she was scared of Special Agent Price.

6 **Q.** Did he then -- did you then ask him what
7 happened after they dropped Anna Mae off?

8 **A.** Yes.

9 **Q.** What did he say?

10 **A.** He said after they dropped her off, they
11 immediately turned around and drove back to Denver.

12 **Q.** Then did you ask him if he killed Anna Mae?

13 **A.** Yes, I did.

14 **Q.** And what did he say?

15 **A.** Well, at the time when I said --

16 **MR. MURPHY:** Objection. He's not answering
17 the question.

18 **THE COURT:** What did he say?

19 **A.** He said no.

20 **Q.** **(BY MR. OSWALD)** Well, at the time he said
21 that, did you make any observations?

22 **A.** Yes, I did.

23 **Q.** And what observations did you make?

24 **A.** He was very nervous. He began to tremble.
25 He was shaking. Almost to the point where the picnic

1 table was rocking.

2 Q. Did Pourier then ask him anything?

3 A. Yes. He asked him if he knew who killed Anna
4 Mae.

5 Q. How did he respond?

6 A. He said no.

7 Q. At some point did you concluded this
8 interview, then?

9 A. Yes.

10 Q. How did it end, sir?

11 A. Just basically after -- he said that he did
12 not kill her. He didn't know who killed her. Then
13 basically stood up and at that point in time his wife
14 came over and that was the end of the interview.

15 MR. OSWALD: May we approach, Judge?

16 THE COURT: Yes.

17 (Whereupon, a discussion was held at the
18 bench.)

19 MR. MURPHY: Judge, they have just informed
20 me that they are going to try to introduce a video of
21 an interview of my client on a My Space which is one
22 of these social networking sites through Mr. Ecoffey.
23 It's my understanding Mr. Ecoffey had no part in the
24 making of this interview. The production -- from what
25 I understand it was made by some group. I am not sure

1 exactly who. But there is no way in the world he can.
2 authenticate or lay the foundation for some video
3 produced and made by somebody else at some other time.
4 And that's my objection to the admissibility.

5 **MR. OSWALD:** Okay.

6 **THE COURT:** Has it been disclosed, the
7 existence of this video?

8 **MR. OSWALD:** Yes, and you have ruled on it.
9 It was advised at the pretrial hearing.

10 **THE COURT:** I mean is it of the interview?

11 **MR. OSWALD:** It's an interview.

12 **THE COURT:** With whom?

13 **MR. OSWALD:** It's with the --

14 **MR. MURPHY:** On My Space.

15 **MR. OSWALD:** -- the Native Youth Movement.

16 It's been disclosed. It's 36 seconds long. And --

17 **THE COURT:** What is it? What's it of?

18 **MR. OSWALD:** He talks about Anna Mae and
19 dropping her off at a safe house. And then he didn't
20 know what happened.

21 **THE COURT:** Talks -- who talks about it?

22 **MR. OSWALD:** John Graham does. It's him on
23 the video and his voice. Marshal Ecoffey saying I see
24 that man, I listened to his voice, this is him, I have
25 known the inflexion. I know his voice. I know what

1 he looks like. And that's how I am intending to
2 authenticate this.

3 **THE COURT:** Why are we telling me this at ten
4 to 2:00 where I have zip time to think about it? I
5 have zip time to make a decision about it.

6 **MR. JACKLEY:** I raised this in a pretrial
7 hearing, the legal authority that was presented to the
8 Court. There was no objection by defense counsel.
9 This has been since the federal case. Defense counsel
10 knew about it.

11 The authorities that been presented -- if I
12 could dig it out. This was all discussed at the
13 pretrial hearing.

14 **THE COURT:** Has it been presented to me?

15 **MR. JACKLEY:** Yes, it absolutely has.

16 **MR. MURPHY:** Absolutely not.

17 We presented that we wanted redactions made
18 but we specifically said we were not conceding to any
19 admissibility issues.

20 In fact, at prior times they have asked to
21 stipulate like, for instance, they had an interview
22 with a woman named Antoinette Claypool. They said
23 would you stipulate to her foundation or
24 authentication and I said absolutely not.

25 We have talked about what we deemed

1 inadmissible, the prejudicial portions. But we never
2 have discussed --

3 **THE COURT:** How are you going to lay the
4 foundation? I don't know what the foundation has to
5 be.

6 **MR. JACKLEY:** The foundation is this, Your
7 Honor. This video is a 30-second video of John Graham
8 talking about his involvement in this case. The
9 foundation will be laid by Marshal Bob Ecoffey that
10 has just spent the last hour testifying.

11 **THE COURT:** What did he have to do with it?

12 **MR. JACKLEY:** He can authenticate that he has
13 interviewed John Graham so he knows what he looks
14 like. He can authenticate that he knows his voice.
15 He ask authenticate that he has watched the video.

16 **THE COURT:** Is the only foundation
17 requirement, that he be able to identify Mr. Graham?

18 **MR. JACKLEY:** Yes, and I presented these
19 things to the court before and I can certainly dig
20 them back out. But this was addressed at a pretrial
21 hearing.

22 **MR. MURPHY:** And I may have been mistaken on
23 this but I recall no such presentation of authority
24 and I stand to be corrected and I will eat that crow.
25 But I have never seen any authority about the

1 foundations for authentication of a video produced by
2 somebody we don't even know who produced it I don't
3 think. There was a third party. Mr. Jackley can dig
4 up --

5 **THE COURT:** We'll talk about this after the
6 break when I have time to look at it. I am not going
7 to make a decision now.

8 **MR. JACKLEY:** During the break I am going to
9 have to dig out the authority or else we got to find
10 the transcript of the hearing.

11 **THE COURT:** Somebody has to.

12 **MR. JACKLEY:** It would be easy for me to try
13 to find the stuff.

14 **THE COURT:** Yeah.

15 (Whereupon, the discussion at the bench was
16 then concluded.)

17 **Q. (BY MR. OSWALD)** Mr. Ecoffey, Bob, I am going
18 to show you what's been marked as State's Exhibit 37.
19 Would you look at this, please.

20 Do you recognize that?

21 **A.** Yes, I do.

22 **Q.** What is this?

23 **A.** This is a picture of Arlo Looking Cloud
24 walking in the front, myself, walking in the middle,
25 and United States Deputy Marshal Rich Ianuchi walking

1 in the back.

2 Q. Do you know when this was taken?

3 A. This was in July of 1995.

4 Q. And where was this taken at?

5 A. This was taken out near the crime scene where
6 the body was found.

7 Q. Is this a true and accurate picture?

8 A. Yes, it is.

9 MR. OSWALD: I would offer Exhibit 37.

10 MR. MURPHY: No objection.

11 THE COURT: Will be received.

12 MR. OSWALD: Judge, I am going to ask to pass
13 this to the jury.

14 THE COURT: Yes.

15 MR. OSWALD: Thank you.

16 Q. (BY MR. OSWALD) Mr. Ecoffey, I'd like to show
17 you what's marked State's Exhibit 34.

18 Do you recognize that?

19 A. Yes, I do.

20 Q. And what is this a picture of?

21 A. This is a picture of -- the individual with
22 the white shirt on is Arlo Looking Cloud. The
23 individual in the middle is Rick Ianuchi, Deputy
24 United States Marshal. And I was standing on the
25 other side of Deputy Ianuchi. And this photo depicts

1 a standing at the crime seen over the embankment where
2 Anna Mae was found below.

3 **MR. OSWALD:** I would offer Exhibit 34.

4 **MR. MURPHY:** No objection.

5 **THE COURT:** Will be received.

6 **MR. OSWALD:** I am going to show this to the
7 jury, again, Judge.

8 **THE COURT:** Yes.

9 **MR. OSWALD:** No further questions, Your
10 Honor.

11 **THE COURT:** Thank you.

12 Mr. Murphy?

13 **MR. MURPHY:** Thank you.

14 **CROSS-EXAMINATION**

15 **BY MR. MURPHY:**

16 **Q.** Mr. Ecoffey, do you need another throat
17 lozenge or anything?

18 **A.** I am okay now.

19 **Q.** Okay.

20 I want to start where you finished up with
21 these exhibits.

22 Exhibits 37, do you recall that?

23 **A.** Yes, I do.

24 **Q.** Okay.

25 And that was that time in the summer of 75

1 where you took Arlo Looking Cloud back to the scene?

2 **A.** It was the summer of July of 1995.

3 **Q.** I apologize. I am sorry.

4 July of 1995.

5 **A.** That's correct.

6 **Q.** And when you got, Mr. Looking Cloud didn't
7 recall that as being the place, did he?

8 **A.** Yes, he did.

9 **Q.** If he testified earlier that when you took
10 him out -- when you took him out there he didn't
11 recall that as being where this incident happened, are
12 you saying he was --

13 **MR. OSWALD:** Judge, I will object. Improper
14 impeachment.

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

16 **A.** What was the question again, sir?

17 **Q. (BY MR. MURPHY)** If Mr. Looking cloud
18 testified just a few hours ago that when you brought
19 him out there to the Badlands in 95, he didn't recall
20 that being the place where these incidents happened,
21 are you saying he's wrong now? That he was testifying
22 untruthfully today?

23 **A.** I'm just saying that he indicated to us that
24 that was the place where the crime had occurred.

25 **Q.** Well, let me ask you this. Prior to getting

1 out to the scene in July of 95, Mr. Looking Cloud
2 traveled with Mr. Alonzo and Ianuchi, correct?

3 **A.** That's correct.

4 **Q.** And did you meet them at the scene or did you
5 meet them some other place?

6 **A.** No, we met them at the federal building in
7 Rapid City, South Dakota.

8 **Q.** And then you all traveled down there
9 together?

10 **A.** Yes.

11 **Q.** Mr. Looking Cloud testified earlier that at
12 some point during this ride with Mr. Alonzo and
13 Mr. Ianuchi, that Mr. Ianuchi said that he was part --

14 **MR. OSWALD:** Objection, Your Honor. This is
15 inadmissible hearsay. It's not relevant to the
16 colloquy between counsel and Mr. Ecoffey.

17 **MR. MURPHY:** I would like to ask whether he
18 has knowledge of these conversations.

19 **THE COURT:** You may.

20 **Q. (BY MR. MURPHY)** Mr. Looking Cloud testified
21 that during this trip at some point Mr. Ianuchi told
22 him he was part of a police death squad where you
23 needed nine confirmed kills of defendants in order to
24 be part of that death squad.

25 Did you hear anything like that?

1 **A.** No, I didn't.

2 **Q.** And he also said that during this trip prior
3 to you getting out to the Badlands, that he was told
4 by Mr. Alonzo that if he should try to make a run for
5 it or he should try to make it run for it so Alonzo
6 could also get a confirmed kill.

7 Did you hear anything like that?

8 **A.** No, I didn't.

9 **Q.** He also testified that after this meeting you
10 guys had, out in the Badlands -- or this visit, that
11 he was shipped off to a maximum security federal
12 penitentiary called Elreno where he wasn't charged
13 with anything but he was held for a period of months
14 by you guys or as a result of his meeting with you
15 guys to break him down.

16 Is there any truth at all to that assertion?

17 **A.** No.

18 **Q.** So Mr. Looking Cloud just makes stuff up,
19 right?

20 **A.** No, I don't believe so.

21 **Q.** Okay.

22 Well, if he just testified to the jury about
23 these death squad and all this other stuff and Elreno
24 maximum security prison, you have no knowledge of that
25 ever happening, do you?

1 **A.** Well, I have no knowledge of it, no.

2 **Q.** Okay.

3 Well let's go start at the beginning. You
4 said you started working in law enforcement in 1976,
5 correct?

6 **A.** That's correct.

7 **Q.** And --

8 **A.** Actually in 1975.

9 **Q.** Seventy-five. Okay.

10 And that's when you worked that summer down
11 an Pine Ridge?

12 **A.** That's correct.

13 **Q.** Even back in 75, you were working murder
14 investigations, right?

15 **A.** That's correct.

16 **Q.** And basically since then for a period of
17 decades you were in the law enforcement community?

18 **A.** That's correct.

19 **Q.** And you began investigating this case in the
20 mid or early 80, correct?

21 **A.** Mid 80.

22 **Q.** If I have a report that you of interview you
23 did in 1981, would that suggest that you were involved
24 in this case earlier than the mid 80s?

25 **A.** I guess I'd have to see the report.

1 Q. Sure.

2 I'm going to show you an FBI 302.

3 What's the date on the top?

4 A. 9/9/81.

5 Q. And in the first paragraph does it indicate
6 it summarizes an interview by you, Mr. Vandyke and a
7 gentleman named Selo Black Crow?

8 A. Yes.

9 Q. And if you take a moment to peruse it, does
10 it refer generally to an investigation that was
11 related to this case?

12 A. Yes that's true.

13 Q. So you actually started working the case in
14 81?

15 A. That's correct.

16 Q. All right.

17 And part of your job when you investigate a
18 case like this, a murder case, is to first gather all
19 the information available to you, right?

20 You want to get all the information that's
21 been gathered prior to your involvement?

22 A. That's correct.

23 Q. And I believe you talked about that earlier
24 that you looked at what had been accumulated in the
25 years preceding your involvement.

1 **A.** That's correct.

2 **Q.** And you also want to do your own interviews?

3 **A.** Yes.

4 **Q.** And you want to establish a time line of
5 relevant events, correct?

6 **A.** Yes.

7 **Q.** And in a case like this where timing is
8 important, you want to identify an approximate time of
9 death, correct?

10 **A.** That's correct.

11 **Q.** Because what we know about this case is that
12 Ms. Aquash was last seen by members of the law
13 enforcement community on November 24, 1975, when she
14 was released from jail in Pierre, correct?

15 **A.** That's correct.

16 **Q.** And then were body was found three months to
17 the day later, right on February 24, 1975?

18 **A.** Yes.

19 **Q.** So, of course, part of your investigation
20 then is narrowing down the time frame to find out
21 approximately when she died, correct?

22 **A.** That's correct.

23 **Q.** All right.

24 And you are looking for leads and all sorts
25 of other information about the case to help build the

1 prosecution, right?

2 A. That's correct.

3 Q. Part of that involved in this case
4 identifying various events related to the American
5 Indian Movement, did it not?

6 A. Yes.

7 Q. And you having been on Pine Ridge for the
8 past 30, 40 years, were certainly familiar with some
9 of those activities, correct?

10 A. Yes.

11 Q. And you know that there were some people
12 involved with AIM that were good law abiding peaceful
13 people, right?

14 A. That's correct.

15 Q. In fact, your own sister was a member of AIM?

16 A. That's true.

17 Q. And then there was some people that were
18 involved in militant activities, correct?

19 A. That's correct.

20 Q. Okay.

21 And you are not by any means suggesting or of
22 the opinion that everybody who was associated with the
23 American Indian Movement was somebody who was involved
24 in militant or violent activities, are you?

25 A. No, sir.

1 Q. Okay.

2 And I think we have gone through the time
3 line of events with prior witnesses. But just let me
4 ask you briefly, as part of your investigation, you
5 looked at events starting say in 73, Wounded Knee,
6 some of the big events and then got in the 1975
7 period, correct?

8 A. Actually, I didn't go back into anything
9 in -- like in 73.

10 Q. Okay.

11 A. It was more 75 and beyond.

12 Q. All right.

13 Things like the Farmington convention, the
14 Jumping Bull shoot-out where the FBI agents were
15 killed, Al Runnings, and all those events that led up
16 to the fall of 75?

17 A. I was familiar with Jumping Bull's. I wasn't
18 familiar with Al Runnings.

19 Q. If you made passing reference to those events
20 in other reports would that have just been to help you
21 create a chronology?

22 A. Yes.

23 Q. And you knew that during the time frame in
24 question, Ms. Aquash was a fugitive times two,
25 correct?

1 She was a fugitive out of Pierre and she was
2 also a fugitive from Oregon?

3 **A.** I knew she was a fugitive out of Pierre, yes.

4 **Q.** Uh-huh.

5 But you were aware also of the incidents in
6 Oregon that led to federal charges being brought,
7 correct?

8 **A.** Yes. I read about them.

9 **Q.** Okay.

10 Now, I want to bring you up to that 1981.
11 You had received prior information -- and I am not
12 going to go into what somebody else told you on a
13 prior occasion or past information, but it brought you
14 to a point where you had information that directed you
15 towards a person named Selo Black Crow, correct?

16 **A.** Yes.

17 **Q.** And based on the information that you got
18 previously, you decided to go out and interview
19 Mr. Black Crow, correct?

20 **A.** Yes. I was asked by the FBI to assist in his
21 interview.

22 **Q.** All right.

23 And you went out there with a guy named
24 Dr. Edward Vandyke?

25 **A.** Yes.

1 **Q.** He's a specialist in interviewing Native
2 Americans or Indians; is that your understanding?

3 **A.** I believe he was an anthropologist from
4 Canada.

5 **Q.** And he was brought in -- he was brought into
6 this because he -- is there something going on with my
7 questions?

8 Do you have a question?

9 **A.** No.

10 **Q.** He was brought into this because he was
11 supposed to help in the investigation of this case,
12 right?

13 **A.** He was brought in to assist to interview some
14 people that might have some knowledge about it.

15 **Q.** Okay.

16 And so the FBI asked you to get involved and
17 also brought this guy down from Canada to go out and
18 interview Mr. Black Crow, right?

19 **A.** That's correct.

20 **Q.** And you confronted Mr. Black Crow with
21 information about two Indian females, an Indian male,
22 and a gold car showing up at his house?

23 **A.** Yes, I believe that there was some
24 information at that time.

25 **Q.** Uh-huh.

1 And some -- and this was something that
2 happened in either late January or early February of
3 1976?

4 **A.** I would have to look at the report.

5 **Q.** Okay. You can read those. Take all the time
6 you need.

7 Does that help?

8 **A.** Yeah, that assists me.

9 **Q.** That assists you?

10 **A.** Uh-huh.

11 **Q.** Mr. Black Crow lived near Wambli, correct?

12 **A.** That's correct.

13 **Q.** In relative close proximity to where
14 Ms. Aquash's body was found?

15 **A.** Probably about 6 or 7 miles.

16 **Q.** Sure. Six or 7 miles up -- down Highway 73?

17 **A.** Yes.

18 **Q.** And Highway 73 is the road closest to where
19 her body was found, right?

20 **A.** Yes.

21 **Q.** And you confronted him with the information
22 and when you did so your observation of him was that
23 it looked as if he had been kicked in the stomach.

24 Is that a fair statement?

25 **A.** Yes.

1 **Q.** And after he looked like he had been kicked
2 in the stomach, he remained silent for four to five
3 minutes, correct?

4 **A.** I don't remember seeing that in there.

5 **Q.** Okay.

6 **A.** Yes. This is in reference to Dr. Vandyke.
7 This wasn't in reference to anything that I said.

8 **Q.** Well, sir, you were sitting there right next
9 to Dr. Vandyke when this interview happened?

10 **A.** Yes.

11 **Q.** And Dr. Vandyke said in this report -- or
12 actually Agent Garber said --

13 **MR. OSWALD:** Objection, your Honor. Hearsay.

14 **MR. MURPHY:** I can rephrase.

15 **THE COURT:** Yeah, please do.

16 **Q.** **(BY MR. MURPHY)** You just said this refreshed
17 your recollection?

18 **A.** Yes.

19 **Q.** Your recollection is that when Mr. Black Crow
20 was confronted with the information, looked like he
21 had been kicked in the stomach; that then he remained
22 silent for four to five minutes, correct?

23 **A.** No, I didn't say.

24 **Q.** Well, is that -- I am asking you now, is that
25 your recollection?

1 **A.** No, it isn't.

2 **Q.** So the report is wrong?

3 **MR. OSWALD:** Objection, Your Honor.

4 **THE COURT:** Got to have more than that. I
5 like short objections, but I need a couple more words.

6 **MR. OSWALD:** Relevancy, and argumentative
7 whether the report is wrong or not. It's not for this
8 witness to determine that.

9 **MR. MURPHY:** Your Honor --

10 **THE COURT:** Overruled.

11 **THE WITNESS:** It wasn't my report.

12 **THE COURT:** Excuse me. As I understand it he
13 was an observer at that time.

14 **MR. MURPHY:** That's correct.

15 **THE COURT:** You may answer.

16 **A.** I guess I didn't remember observing things
17 that way.

18 **Q.** **(BY MR. MURPHY)** What about then Mr. Black
19 Crow started -- his foot started to tap, his hands
20 shook, he put his head down, so the cap covered his
21 face and he gulped several times.

22 Did you observe that?

23 **A.** I don't recall.

24 **Q.** But you are not disputing that he looked like
25 he had been kicked in the stomach?

1 **A.** I don't recall that either.

2 **Q.** I just asked you that a couple minutes ago
3 and you had a recollection then.

4 **A.** I just said it wasn't my report. It's what's
5 reflected in Dr. Vandyke's report.

6 **Q.** But you were sitting next to him, right?
7 You were sitting next to Vandyke when he did
8 this interview?

9 **A.** I think we were -- I can't even remember
10 where were we sitting at that time.

11 **Q.** Sir, this isn't the first time you have seen
12 this report?

13 **A.** I believe it is.

14 **Q.** Sir, if this was received in information that
15 was both in the Aquash box that was collected and from
16 the United States Attorney's office, and you have been
17 involved in this investigation for close to 30 years,
18 you are saying this is the first time you have seen a
19 report with your name on it?

20 **A.** It's the first time that I have seen this
21 report. There is thousands of reports.

22 **Q.** Well, you know, one of the things that was
23 said during that interview with Mr. Black Crow that
24 you were observing was that Mr. Black Crow claimed he
25 didn't even know Theresa Kimball.

1 Do you remember that?

2 A. No.

3 Q. You don't recall that?

4 A. No.

5 Q. Would the report refresh your recollection or
6 no?

7 A. If I could look at it.

8 Q. My apologies. I will have to find that
9 report.

10 All right.

11 In any regard, during the course of your
12 investigation, you learned from several witnesses that
13 Ms. Aquash had been seen alive in Rapid City some time
14 around December 15, correct?

15 A. It was actually around December 11.

16 Q. Well, let me talk to you about that. You
17 received information from a woman named Candy Hamilton
18 who has already testified that she was at the WKLD
19 house and spoke to Anna Mae Aquash and it was during
20 the Dick Wilson Senior trial.

21 Do you remember that?

22 A. Yes.

23 Q. Okay.

24 You also received some other information that
25 it might have been closer or during the Russ Means'

1 trial?

2 **A.** No. It was on December 11.

3 **Q.** Well, let me ask you about what you; learned
4 about the Russ Means's trial. That was a trial that
5 went from December 12 through December 15.

6 Is that a fair statement?

7 **A.** I know that it was going on in Sioux Falls,
8 yes.

9 **Q.** Right.

10 And various witnesses put Anna Mae Aquash in
11 Rapid City either during the Dick Wilson trial that
12 went from December 15 through December 18 or the Russ
13 Means's trial that went from December 12 to
14 December 15; is that not correct?

15 **A.** That's correct.

16 **Q.** All right.

17 And you know that the Russ Means' trial ended
18 December 15, correct?

19 **A.** Yes.

20 **Q.** And so the only point of overlap between the
21 two trials would have been the date of December 15,
22 correct?

23 **A.** Yes.

24 **Q.** All right.

25 Let's talk a bit about Mr. Graham's

1 interviews with you. I want to go through in a little
2 more detail what he said, what you said.

3 So your two interviews, April 21, 1994, and
4 you did a follow-up March 21, 1995?

5 **A.** Yes, that's correct.

6 **Q.** You had previously been contacted by the
7 FBI -- by the FBI about their interviews with
8 Mr. Graham?

9 You had been out there and talked to him?

10 **A.** All I had was a general idea that Special
11 Agent Garber had attempted to interview back him in
12 the 80s. I didn't see the report.

13 **Q.** Okay.

14 So you knew that the FBI had been up to
15 Canada to talk to John, right?

16 **A.** That's correct.

17 **Q.** And when you talked to John, he told you that
18 he perceived the way they you approached him as being
19 threatening?

20 **A.** That's correct.

21 **Q.** And you come to John's house, April 21, and
22 he's not there, right?

23 **A.** That's correct.

24 **Q.** His two sons are there?

25 **A.** Yes.

1 **Q.** And they tell you that he's working doing
2 construction on a motel, right?

3 **A.** At the West Mark Motel.

4 **Q.** Right.

5 And you go out there later in the day and you
6 have contact with him, right, as he's coming down the
7 ladder, right?

8 **A.** That's correct.

9 **Q.** And it's you and Pourier at that time?

10 **A.** Yes.

11 **Q.** Miller and Graf are in the car?

12 **A.** Yes.

13 **Q.** And you tell him right away when you
14 introduce yourself that you are there to talk to him
15 about a murder investigation, right?

16 **A.** Yes.

17 **Q.** And right then at the bottom of the ladder
18 you start to relay some of the information you
19 believed you had gathered about that murder
20 investigation, correct?

21 **A.** That's correct.

22 **Q.** And because that was information you gathered
23 prior -- from prior sources, you don't know if that
24 information you relayed to Mr. Graham was true or not?

25 It was just information you had been told

1 about, right?

2 A. Yes.

3 Q. Because you weren't there as we previously
4 discussed back in 1975, right?

5 A. That's correct.

6 Q. But you tell it to my client, and then you
7 note that his hands shook while he was smoking his
8 cigarette, right?

9 A. Yes.

10 Q. You'd agree that that isn't quite the same
11 kind of reaction as Mr. Selo Big Crow gave you when he
12 looked like he had been kicked in the stomach, right?

13 A. What I said earlier is I didn't know that
14 Mr. Big -- Selo Black Crow had got kicked in the
15 stomach. I didn't recall that happening.

16 Q. Even though -- and we discussed this
17 before -- Mr. Vandyke put it in a report and you are
18 named in the report as being an observer.

19 If Mr. Big Crow looked like he had been
20 kicked in the stomach, remained silent for four to
21 five minutes, gulped, tapped his feet, pulled his gap
22 down, those would be more expressive client than my
23 client trembling with a cigarette, right?

24 A. Yes.

25 Q. And you would acknowledge it's probably

1 common for people to get nervous when they are
2 approached by law enforcement officers they don't know
3 and are told within the first couple seconds of
4 meeting them that they are there to talk about a
5 murder investigation, right?

6 A. That's correct.

7 Q. People get pretty nervous when they are
8 pulled over for speeding time sometimes, don't they?

9 A. Yes.

10 Q. They are tremble when trying to get the
11 driver's license out?

12 A. I don't know.

13 Q. You haven't had to do patrol too much?

14 A. Oh, yeah, I have.

15 Q. All right.

16 Even then, even though you approach my client
17 and tell him this is about a murder investigation and
18 you start relaying some investigation, even then he
19 says, hey, I will listen to what you guy have to say,
20 right?

21 A. Yes.

22 Q. And you repeatedly told him throughout the
23 course of this that all he had to do was listen?

24 A. That's correct.

25 Q. He didn't have to talk?

1 **A.** That's correct.

2 **Q.** And he didn't even have to meet with you?

3 **A.** That's correct.

4 **Q.** But he agreed he would do that?

5 **A.** That's correct.

6 **Q.** And the next contact you have is a phone call
7 or a phone conversation with him at -- when you are in
8 the lobby of the motel at about 8:00 o'clock?

9 **A.** Yes.

10 **Q.** And he said to you at that point that he
11 hadn't had the opportunity to speak to an attorney,
12 right?

13 **A.** That's correct.

14 **Q.** I believe previously you said it was his
15 attorney, but he was looking for an attorney, right?

16 **A.** That's correct.

17 **Q.** All right.

18 But you told him, hey, I have driven
19 thousands of miles or flown thousand of miles, won't
20 you talk to us, right?

21 **A.** I told him that he had the right to remain
22 silent; that he didn't have to talk to us. That, yes,
23 we did drive a thousand miles. It would be good for
24 him to sit down and listen to us to hear what we had
25 to say.

1 Q. And he obliged you?

2 A. Yes, he did.

3 Q. He extended that courtesy you?

4 A. Yes.

5 Q. Throughout all of these interviews he
6 remained courteous to you?

7 A. Yes.

8 Q. Okay.

9 And he agreed, okay, even though I am not too
10 thrilled about this, I will listen, right?

11 A. That's correct.

12 Q. And that was the point at which he told you
13 again that he had been threatened by the FBI the last
14 time they were up in the Yukon.

15 Do you remember that?

16 A. He said that on the telephone when I was
17 talking to him.

18 Q. Right. That's what we're talking about.

19 A. Yes.

20 Q. Okay.

21 A. And then I told him, I said, well, John, I
22 said when we approached you this afternoon did I
23 approach you in a threatening manner, did I threaten
24 you in any way, and he said no.

25 Q. And he was being straight forward with you?

1 **A.** Yes.

2 **Q.** You weren't present during those FBI
3 interviews up in the Yukon so you have no idea what
4 happened, do you?

5 **A.** No, I don't.

6 **Q.** So you don't know what was said to him?

7 **A.** No, I don't.

8 **Q.** And you don't know how it was said?

9 **A.** No, I don't.

10 **Q.** The meeting occurs out at Rotary Park. At
11 about 9:30 at night it starts?

12 **A.** Yes.

13 **Q.** And just so the jury has an understanding of
14 Whitehorse and Rotary Park, Whitehorse is a community
15 in the Yukon territory?

16 **A.** That's correct.

17 **Q.** Right below the Artic Circle, correct?

18 **A.** Yes.

19 **Q.** Rotary Park is a park that runs right along
20 the Yukon River, correct?

21 **A.** That's correct.

22 **Q.** And that's one of those glacial melt streams
23 or rivers, right?

24 **A.** Yes.

25 **Q.** And this is in April and it's at night?

1 **A.** Well, it's 9:30 at night but it's still
2 daylight out. The sun is still up in the sky. It was
3 quite something for me.

4 **Q.** All right.

5 And it's the spring in the Artic Circle more
6 or less?

7 **A.** Yes.

8 **Q.** John shows up as he promised he would?

9 **A.** Yes.

10 **Q.** And you tell him, again, that you would like
11 him to listen, right?

12 **A.** Yes.

13 **Q.** And then you go into a long litany of
14 accusations or information that you relay to him,
15 right?

16 **A.** It was facts as I knew them.

17 **Q.** Facts as you knew them you relay them to him?

18 **A.** Yes.

19 **Q.** Facts that you had gathered from other
20 sources or from previous investigations?

21 **A.** That's correct.

22 **Q.** And without getting into the accusations, you
23 certainly don't know that all of them were true, do
24 you?

25 **A.** No.

1 Q. No.

2 In fact, one of the accusations or
3 allegations of that it was John, Theda, and a
4 12-year-old girl on this trip, right?

5 A. Yes.

6 Q. All right.

7 But you relayed these accusations to him,
8 basically outlined your entire case, your entire
9 theory of the prosecution?

10 A. Yes.

11 Q. And it takes a while to get through all of
12 this material, doesn't it?

13 A. Yes, it does.

14 Q. And at the conclusion of your laying out all
15 of these supposed facts and your theory, his response
16 is -- and his only response at this time is, well,
17 looks like you guys have my future planned out for me.
18 You have your case, right?

19 A. That's correct.

20 Q. He didn't say I did it, did he?

21 A. No.

22 Q. He didn't say you got me?

23 A. No.

24 Q. It's almost set out as a sarcastic comment,
25 wasn't it?

1 **A.** No.

2 **Q.** He was basically mirroring back to you what
3 you told him which is we got this entire case built
4 against you?

5 **A.** The way that I took it is that after he heard
6 the information, that he looked at us and said, looks
7 like you got my life planned out for me. You have
8 your case. It wasn't in a sarcastic manner. It was
9 in a manner, at least as I perceived, that he realized
10 that we had information that was pretty good.

11 **Q.** Well, information such as this alleged
12 kidnapping involving a 12-year-old girl as one of the
13 participants, right?

14 **A.** Yes.

15 **Q.** All right.

16 And what you've discussed with the jury about
17 this interview is your recollections of the interview,
18 right?

19 **A.** That's correct.

20 **Q.** And I want to get into that because it's --
21 you and Agent Pourier travel from Rapid City, South
22 Dakota, all the way up to the Yukon?

23 **A.** That's correct.

24 **Q.** Drive or fly?

25 **A.** We flew.

1 Q. Agent Graf from the FBI also flies all the
2 way from South Dakota to the Yukon, right?

3 A. Yes.

4 Q. Thousands of miles trip?

5 A. Yes.

6 Q. And you got three professional investigators
7 handling the case, right?

8 A. Yes.

9 Q. And you go up there to speak to one person
10 which is John Graham, right?

11 A. That's correct.

12 Q. And none of you bring a tape recorder, right?

13 A. That's right.

14 Q. Nobody is wearing a body wire?

15 A. Nobody is wearing a body wire.

16 Q. Nobody is wearing one of the recording --
17 secret recording devices we have heard about so far in
18 this trial, right?

19 A. That's correct.

20 Q. You don't even set a 15-dollar Casio or Sony
21 tape recorder on the table, do you?

22 A. It was decided not to try to record him
23 because we felt if we laid a recorder on the table
24 that he wouldn't cooperate.

25 Q. That doesn't explain why no secret recording

1 devices were used, does it?

2 A. No.

3 Q. You at that point are with the United States
4 Marshal Service, right?

5 A. That's correct.

6 Q. A nationwide law enforcement office, right?

7 A. That's correct.

8 Q. Thousands of officers, budget of millions of
9 dollars, right?

10 A. That's correct.

11 Q. You certainly had recording devices available
12 to you in the U.S. Marshal Service?

13 A. Yes.

14 Q. And Mr. Pourier at that point is a criminal
15 investigator with the BIA?

16 A. Yes.

17 Q. And though the budget might not be quite as
18 big -- I am not sure where it goes -- but they
19 certainly have recording devices available to them,
20 right?

21 A. Yes.

22 Q. And the FBI, they are a nationwide
23 investigative outfit, right?

24 A. Yes.

25 Q. Millions and millions of dollars in their

1 budget, right?

2 A. That's correct.

3 Q. Lots of money to buy recording devices?

4 A. Yes.

5 Q. And every day, nationwide, these agencies use
6 recorders to surreptitiously record conversations,
7 right?

8 A. Yes.

9 Q. But you -- you three decide to fly all the
10 way up there for one interview and one interview only
11 and nobody has got a recorder on them?

12 A. We didn't -- just like I said, we decided not
13 to use the recorder because we didn't think that
14 Mr. Graham would cooperate.

15 Q. A surreptitious recording device, he would
16 never have known about that, would he have?

17 A. Yes.

18 Q. He would have known?

19 A. No, he wouldn't have.

20 Q. Yeah.

21 That would have provided the jury with the
22 best evidence of exactly what was said and how it was
23 said, wouldn't it have?

24 A. Yes.

25 Q. After John makes that comment about you guys

1 having his future planned out for him, you ask him for
2 his side of the story, right?

3 **A.** Yes.

4 **Q.** And at the time you are asking him for his
5 side of the story, that's when you pull out these
6 photographs of Anna Mae?

7 **A.** Yes.

8 **Q.** And these were pretty graphic pictures were
9 they not?

10 **A.** Yes, they were.

11 **Q.** They showed the blood on the sand or on the
12 dirt under her head at the crime scene?

13 **A.** That's correct.

14 **Q.** And in reaction to that, you described my
15 client's response as being turning away, his eyes
16 filling with tears, and him claiming or saying to you,
17 she was my friend?

18 **A.** That's correct.

19 **Q.** He wasn't shaking at that point, right?

20 **A.** Yes.

21 **Q.** And he wasn't looking like he was kicked in
22 the stomach or anything else, was he?

23 **A.** No. Just looked like he felt bad about what
24 had happened to her.

25 **Q.** Yeah.

1 And anybody who saw those pictures would feel
2 bad this a young woman was killed like that, wouldn't
3 they?

4 **A.** Yes.

5 **Q.** Would have been a pretty heartless response
6 not to react, correct?

7 **A.** That's correct.

8 **Q.** And this comment he made afterwards about FBI
9 Agent Price, I am not going to suggest to you that
10 Agent Price actually intended to kill Anna Mae Aquash.

11 What I want to ask you about is the frequency
12 with which that statement has been repeated over the
13 last 30 years.

14 You've heard about that alleged threat by
15 Agent Price towards Anna Mae Aquash on a number of
16 occasions, have you not?

17 **A.** Yes.

18 **Q.** Okay.

19 In fact, it's one of those, for lack of a
20 better statement, an urban myth that has gone around
21 the internet for the last 30 years?

22 **A.** I don't know.

23 **Q.** Okay.

24 You have heard it from a number of sources in
25 a number of -- on a number of occasions that Mr. Price

1 allegedly threatened to kill Anna Mae Aquash?

2 **A.** Just what Mr. Graham told me that she was
3 scared of Agent Price.

4 **Q.** Right. Okay.

5 But you have heard that from many other
6 people over time?

7 **A.** I had heard that there was an allegation
8 made.

9 **Q.** Okay. All right.

10 So it didn't surprise you at that point that
11 hear that Agent Price's name was brought up?

12 **A.** I mean, I -- you know, when he had said that
13 I knew Agent Price. I worked with his closely on Pine
14 Ridge and that that statement would be, you know,
15 totally untrue.

16 **Q.** And again, I am not disputing with you the
17 truth of the statement, but the fact that it had been
18 repeated many times, within people interested in this
19 case, that did not surprise that happened Agent
20 Price's name came up?

21 **A.** It surprised me that when he said that the
22 only when she was scared of was Agent Price.

23 **Q.** You have heard that subsequently, have you
24 not, in this investigation?

25 **A.** Just -- might have been in a report or

1 something.

2 Q. Right.

3 Witnesses you have interviewed have said that
4 Annie Mae Aquash was afraid of Agent Price?

5 A. Yes.

6 Q. All right.

7 And you ask him about whether he wants to
8 give his side of the story, which is essentially your
9 way of saying he has a story to tell?

10 A. That's correct.

11 Q. Basically an accusation?

12 A. Wanted him had to fill in some details.

13 Q. And again we don't have a recording so we
14 can't know exactly what Mr. Graham said, but you say
15 at that point he said, I will probably spend the rest
16 of my life in jail any way, correct?

17 A. It was when we asked him -- when I asked him
18 if anybody had ever threatened him. If anybody said
19 that he would -- the same thing would happen to him
20 that happened to Anna Mae if he talked and then Mitch
21 asked him -- said, well, John, do you think anything
22 would happen to you if you talked and he said --
23 that's when he paused for a minute and he looked up
24 and he said -- and that's what he said.

25 Q. Well, when -- in the preceding conversation

1 when you are listing out this litany of accusations,
2 you are setting out those accusations as facts that
3 you believe are true, right?

4 **A.** That's correct.

5 **Q.** All right.

6 You are not expressing any doubt about the
7 validity of the accusations that you are relaying?

8 **A.** Right.

9 **Q.** You are basically telling him we're going to
10 nail you, right?

11 **A.** No.

12 **Q.** Well, you weren't saying that you were --
13 that you doubted anything you had been told, right?

14 **A.** Right.

15 **Q.** Okay.

16 And after that, John gives you some
17 information even though he didn't need to give you
18 that information?

19 **A.** That's correct.

20 **Q.** And he tells you that he gave Anna Mae a ride
21 from Denver to the reservation?

22 **A.** Yes.

23 **Q.** They went to a safe house?

24 **A.** Yes.

25 **Q.** It's South Dakota?

1 **A.** Yes.

2 **Q.** He isn't exactly sure where the safe house
3 is?

4 **A.** That's correct.

5 **Q.** But it's in a village?

6 **A.** Yes.

7 **Q.** And there is lots of villages on Pine Ridge?

8 **A.** Yes.

9 **Q.** And when you drive around Pine Ridge not all
10 of the villages are well marked by big signs saying
11 welcome to this village, correct?

12 **A.** That's correct.

13 **Q.** There is many housing clusters on roads that
14 aren't even marked, correct?

15 **A.** Correct.

16 **Q.** And he said to you that Annie Mae knew where
17 she wanted to get out, right?

18 **A.** No, I don't remember him saying that Anna Mae
19 knew where she wanted to get out.

20 **Q.** Okay.

21 Did she not -- did you not put in your report
22 Graham said because she wanted to get off there?

23 **A.** Yes.

24 **Q.** Okay.

25 That he didn't know the people at the safe

1 house, only that it was a safe house in a village?

2 **A.** Yes.

3 **Q.** So he did tell you that she knew where she
4 was going, he didn't?

5 **A.** That she wanted to get off there.

6 **Q.** Yeah.

7 And you, of course, know that Ray Hand Boy
8 basically gave the same description of events about
9 his trip from Pierre down to Denver, right?

10 **A.** That Ray gave his what?

11 **Q.** The similar description of how things went
12 that Annie Mae told them to take her down to a place
13 in Denver and she knew where she wanted to get out and
14 they got to an intersection and she got out, right?

15 **A.** Yes.

16 **Q.** Told you that they took the back roads
17 because Annie Mae was scared of getting pulled over?

18 **A.** No. She said that she was scared of Jim
19 Price.

20 **Q.** All right.

21 Well, Agent Price was an FBI agent working on
22 the Pine Ridge Reservation?

23 **A.** That's correct.

24 **Q.** And Anna Mae Aquash was a fugitive at the
25 time?

1 **A.** Yes.

2 **Q.** You then asked him the big -- the two big
3 questions or Mr. Pourier did who was sitting next to
4 you.

5 Did kill her and do you know who killed her,
6 right?

7 **A.** That's correct.

8 **Q.** And you are sitting next to him as those
9 questions are put to him?

10 **A.** Yes.

11 **Q.** And he says, unequivocally no to both?

12 **A.** That's right.

13 **Q.** And you indicate that his legs were shaking
14 at this point, right?

15 **A.** Heavily shaking, yes.

16 **Q.** Yeah.

17 Now, it was the 9:30 at night when you began
18 this interview.

19 What time do you conclude the interview?

20 **A.** I suppose it was about an hour later.

21 **Q.** And it's at night, you are in a park, and you
22 just accused this man of killing a woman, correct?

23 **A.** That's correct.

24 **Q.** And you have shown him some bloody
25 photographs?

1 **A.** Yes.

2 **Q.** Pretty natural somebody might be shaking in
3 that situation?

4 **A.** Yeah, if he was accused of shooting her.

5 **Q.** Or if he was just implicated by you, right?

6 **A.** That's correct.

7 **Q.** And you said on your direct that it was
8 Mr. Graham that stood up.

9 Isn't it true that the interview concluded
10 when you stood --

11 **A.** No. I said when I stood up.

12 **Q.** I wanted to make sure.

13 So you stood up at that point?

14 **A.** Yes.

15 **Q.** And then the interview concluded?

16 **A.** Yes.

17 **Q.** You interviewed basically about a year later
18 didn't you?

19 **A.** Yes.

20 **Q.** And you went back up to the Yukon?

21 **A.** Yes.

22 **Q.** And Pourier came with you?

23 **A.** That's correct.

24 **Q.** And again the only purpose to go up there was
25 to interview Mr. Graham?

1 **A.** That's correct.

2 **Q.** And despite the budgets and the availability,
3 neither of you brought a recorder again, right?

4 **A.** That's right.

5 **Q.** What Mr. Graham told you in a nut shell --
6 well, according to you in quote, he said to you twice,
7 I didn't kill her, I didn't kill her; isn't that true?

8 **A.** That's true.

9 **Q.** And that basically concluded that interview
10 didn't it?

11 **A.** Yes.

12 **MR. MURPHY:** Nothing further.

13 **THE COURT:** Counsel, come here, please.

14 (Whereupon, a discussion was held at the
15 bench.)

16 **THE COURT:** This is a 2010 *State vs. Harris*
17 decision that talks about the identification and use
18 of a recording. And it says the foundation necessary
19 is for someone who knows or can recognize the voice.
20 It says only voice here, because it's not a video, is
21 sufficient regardless of whether the voice was known
22 before or after -- that -- I am sorry -- that comes
23 from the restatement. And I don't know if it was in
24 Harris.

25 But it would seem to me on that criteria,

1 Mr. Ecoffey can identify the video of Mr. Graham and
2 the voice that it's admissible.

3 **MR. MURPHY:** Okay.

4 **THE COURT:** That's on *State vs. Harris*.

5 **MR. MURPHY:** Okay.

6 **MR. OSWALD:** I don't think the WOLFY works.
7 The lamp is out. So to do this, and play it, he's
8 going to have to switch and get the other WOLFY.

9 **MR. MURPHY:** Are we coming up on a break or
10 no because I don't mind --

11 **THE COURT:** Do you know what's wrong with it?

12 **MR. JACKLEY:** The lamp. It's the lamp.

13 **THE COURT:** Okay.

14 You want to take a break and do that now or
15 get it later through the course of your cross -- or
16 redirect?

17 **MR. MURPHY:** Let's do it now because the
18 redirect is not going to be that long and I am not
19 going to have much recross.

20 **THE COURT:** Okay.

21 (Whereupon, the discussion at the bench was
22 then concluded.)

23 **THE COURT:** Ladies and gentlemen, we have to
24 do some equipment repair on modern technological stuff
25 so we're going to take about a 15 minute break to do

1 that.

2 The standard warnings about opinions and
3 discussions hold true for now.

4 Thank you.

5 (Whereupon, the following proceedings were
6 then had in open court and outside the presence of the
7 jury.)

8 **THE COURT:** Okay.

9 We're here for a hearing outside the presence
10 of the jury. I think that probably should include
11 Mr. Ecoffey as outside of here as well.

12 **MR. MURPHY:** That's fine, Your Honor. I am
13 not sure we need the hearing any more. The issue has
14 been taken care letter.

15 **MR. OSWALD:** Yes, Your Honor.

16 **THE COURT:** Bring in the jury.

17 Have we had the appropriate come to Jesus
18 sessions?

19 **MR. MURPHY:** I believe so.

20 **MR. JACKLEY:** I believe so.

21 (Whereupon, the following proceedings were
22 had in open court with the jury present.)

23 **THE COURT:** Counsel?

24 **MR. JACKLEY:** Yes, Your Honor.

25 **MR. MURPHY:** Yes, Your Honor.

1 **THE COURT:** All right.
2 I think you are up, Mr. Oswald.
3 Mr. Ecoffey can return to the stand.

4 **REDIRECT EXAMINATION**

5 **BY MS. OSWALD:**

6 **Q.** Bob, just where we left -- last left off,
7 Mr. Murphy asked you in kind of a couple questions
8 that Price worked on the reservation.

9 Do you remember that?

10 **A.** Yes.

11 **Q.** And that Anna Mae was scared of Price or
12 words to that effect?

13 **A.** Yes.

14 **Q.** Does it make sense to you that she would run
15 to the reservation where Agent Price worked?

16 **A.** No.

17 **Q.** Selo Black Crow information. Okay. I want
18 to talk about that.

19 In all of your witness interviews, have you
20 ever heard of anyone placing Selo Black Crow if
21 Denver?

22 **A.** No.

23 **Q.** Have you had any witnesses or reports of any
24 kind that place Selo Black Crow tying her up in
25 Denver?

1 **MR. MURPHY:** Leading, Your Honor.

2 **THE COURT:** True.

3 Sustained.

4 **Q. (BY MR. OSWALD)** Regarding any -- do you have
5 any witness that talks about Selo Black Crow in a red
6 Pinto?

7 **A.** No.

8 **Q.** Do you have any information regarding
9 Mr. Black Crow ever having been at WKLD0C here in
10 Rapid City?

11 **MR. MURPHY:** Leading, again.

12 **THE WITNESS:** No.

13 **THE COURT:** I really don't think it is.
14 Overruled.

15 **A.** No.

16 **Q. (BY MR. OSWALD)** Do you have any information
17 through witnesses or reports that this Selo Black Crow
18 was ever at Dick Marshall's?

19 **A.** No.

20 **Q.** Finally, do have you any information that
21 Anna Mae was killed as a result of a hit-and-run?

22 **A.** No.

23 **Q.** Now, Mr. Murphy asked you this question,
24 throughout all of those interviews, he was courteous
25 and obliged you.

1 Do you remember that?

2 A. Yes.

3 Q. Did Mr. Graham oblige you all the time in
4 1995?

5 A. No.

6 Q. Did you go up to the Yukon to try and
7 interview Mr. Graham again in 1995?

8 A. Yes.

9 Q. That's when you and Mr. Murphy were talking
10 about, I didn't kill her, I didn't kill her he said?

11 A. Yes.

12 Q. But before that, what did you want from him?
13 What did you want to do before he made those
14 statements?

15 A. I told him that I wanted him to listen to a
16 tape of Arlo Looking Cloud concerning new information
17 in the Anna Mae Aquash murder.

18 Q. What did he say in response to that, sir?

19 A. He said that -- I believe he said we -- that
20 we don't trust you at that point in time.

21 Q. Did you make note of his response in your
22 report from 1995?

23 A. Yes.

24 Q. And was that report based upon the notes at
25 or near the time when you had the interview?

1 **A.** Yes.

2 **Q.** Would it help to refresh your memory?

3 **A.** Yes.

4 **Q.** Okay.

5 Now does looking at this report refresh your
6 memory, sir?

7 **A.** Yes.

8 **Q.** What did Mr. Graham say?

9 **A.** He said, what about all the other murderers.
10 What about Leonard Peltier.

11 **Q.** Did you want to meet with Mr. Graham again,
12 then?

13 **A.** Yes.

14 **Q.** And did he?

15 **A.** No.

16 **Q.** When you and Mr. Murphy were talking about
17 the response Mr. Graham gave when it looks like you
18 have your case, explain, was it sarcastic as he's --
19 as he questioned you?

20 **A.** No, it wasn't.

21 **Q.** Explain what it was.

22 **A.** I thought that it was from him realizing that
23 we did have our case. That we had his life planned
24 out for him.

25 **Q.** I'd like to show you what's been marked as

1 42, sir?

2 Do you see that.

3 A. Yes, I do.

4 Q. Did you review that before coming to court
5 last night?

6 A. Yes, I did.

7 Q. And did you recognize the video of the person
8 in that just yes or no?

9 A. Yes.

10 Q. Did you recognize the voice belonging to that
11 person at the same time?

12 A. Yes.

13 Q. Is there any doubt in your mind of who is
14 depicted on that video and audio?

15 A. No, there isn't.

16 Q. And then did I have you initial that DVD?

17 A. Yes, you did.

18 Q. And does this DVD after reviewing it bear
19 your initials?

20 A. Yes, it does.

21 Q. Who is depicted on that 36-second clip, sir?

22 A. John Graham.

23 MR. OSWALD: I would offer 42.

24 MR. MURPHY: May I see the disk?

25 MR. OSWALD: Sure.

1 **MR. MURPHY:** No objection.

2 **THE COURT:** Will be received.

3 **MR. OSWALD:** May I show it now?

4 **THE COURT:** You may.

5 (Whereupon, Exhibit 42 was then played for
6 the jury.)

7 **MR. OSWALD:** I have no further redirect,
8 Judge.

9 **THE COURT:** Mr. Murphy?

10 **MR. MURPHY:** Just a moment, if I may, Your
11 Honor.

12 **REXCROSS-EXAMINATION**

13 **BY MR. MURPHY:**

14 **Q.** You were asked by Mr. Oswald about whether it
15 made sense for Anna Mae Aquash to want to go back to
16 Pine Ridge, right?

17 **A.** Yes.

18 **Q.** Because Agent Price worked down there?

19 **A.** That's correct.

20 **Q.** In 1975 where were the FBI headquarters?

21 **A.** Rapid City.

22 **Q.** Agent Price's office was in Rapid City,
23 correct?

24 **A.** That's correct.

25 **Q.** The FBI presence was strong in Rapid City,

1 correct?

2 **A.** It was also strong on Pine Ridge.

3 **Q.** Well, let me ask you about this. Where was
4 AIM's presence stronger, Rapid City or Pine Ridge?

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

6 **Q.** Sir, the activities we talked about, Wounded
7 Knee, Jumping Bull, Crow Dog's, Al Runnings, all
8 occurred on Pine Ridge, didn't they?

9 **A.** Al Runnings' is on Rosebud.

10 **Q.** Okay.

11 Down on the reservation -- one of the
12 reservations?

13 **A.** Yes.

14 **Q.** AIM safe houses, there were many located
15 around the Pine Ridge Reservation in the 1970s, were
16 there not?

17 **A.** I don't know.

18 **Q.** People like Mr. Peltier, Mr. Butler,
19 Mr. Banks, were able to hide down in Pine Ridge after
20 the killing of the FBI agents, were they not?

21 **A.** Yes.

22 **Q.** There were a lot of people in Pine Ridge that
23 weren't willing to cooperate with the FBI and other
24 law enforcement officers when they were investigating
25 activities related to AIM, correct?

1 **A.** Correct.

2 **Q.** Anna Mae Aquash was well known in Pine Ridge,
3 was she not?

4 **A.** Yes.

5 **Q.** And lived in Oglala?

6 **A.** Yes.

7 **Q.** Worked throughout the reservation, correct?

8 **A.** I don't know that.

9 **Q.** Okay.

10 She knew a lot of people down there, didn't
11 she?

12 **A.** Yes.

13 **Q.** Mr. Oswald asked you about this hit-and-run
14 issue, about whether Anna Mae Aquash was killed as a
15 result of hit-and-run. I want to talk to you about
16 that.

17 Hit-and-run became an issue because Selo
18 Black Crow's wife made a call to the ambulance, do you
19 remember that?

20 Do you remember reading about that?

21 **A.** Yes.

22 **Q.** And turned out it was a nonsensical call, do
23 you remember that?

24 **A.** Yes.

25 **Q.** She couldn't explain why she had reported a

1 body up there on Highway 73 but made a number of
2 claims that it might have been because there was a
3 hit-and-run, right?

4 A. What I recall is there might have been an
5 accident.

6 Q. All right.

7 And anyway, her case, once that was
8 investigated, her explanations held no water
9 whatsoever, did they?

10 A. That's correct.

11 Q. In fact, she reported things that happened
12 weeks afterwards as having happened before her call,
13 right?

14 A. I'm not sure.

15 Q. All right.

16 And anyway, in -- in any case, she wasn't
17 allowed to talk to you?

18 A. I didn't talk to her.

19 Q. Selo wouldn't let her be interviewed by
20 anybody, would he?

21 A. I don't know.

22 Q. Okay.

23 Well, why that hit-and-run was an issue is
24 because it brought Selo on to the radar screen, right?

25 That's how his name first came up?

1 **A.** Well, I believe that the reason that the
2 hit-and-run came up was that they just thought that
3 there might have been an accident there and somebody
4 called it in.

5 **Q.** Right. That was the call Selo's wife made,
6 right?

7 **A.** Yes.

8 **Q.** And that was reported on the logs of the
9 ambulance company, right?

10 **A.** Yes.

11 **Q.** And so somebody back in 1976 looked through
12 those logs and that brought Selo and Irene's names to
13 their attention; is that a fair statement?

14 **A.** Yes.

15 **Q.** And then when they started investigating Selo
16 and Irene, they talked to the next-door neighbor,
17 Herman Zimiga, right?

18 **A.** I don't know.

19 **Q.** How is it you seem to be aware of all of the
20 reports but just not the ones that involve Mr. Zimiga
21 and his accusations against Selo?

22 **A.** Like I said, I didn't review all of the
23 thousands of reports that are associated with this
24 investigation.

25 **Q.** So in the course of your investigation you

1 never reviewed Agent Wood and Agent Prices' report of
2 their investigation of Herman Zimiga?

3 **A.** No, I didn't.

4 **Q.** So you were never made aware in the course of
5 your investigation of this case over the last 35 years
6 that Mr. Zimiga was the next door neighbor of Selo
7 Black Crow?

8 **A.** No, I wasn't.

9 **Q.** And you were never made aware at any time
10 even though it's in reports going back from February
11 of 1976 on that Mr. Zimiga said --

12 **MR. OSWALD:** Objection, Your Honor. Hearsay.

13 **THE COURT:** Overruled.

14 **Q. (BY MR. MURPHY)** That Mr. Zimiga had reported
15 that two Indian women, one thin short in her 20s or
16 30s and an Indian male had come to Mr. Black Crow's
17 house in a gold car at night?

18 Never heard about that?

19 **A.** No.

20 **Q.** And you never heard that they dropped the one
21 thin younger woman off at the house -- at Mr. Black
22 Crow's house?

23 **A.** No.

24 **Q.** And how that some time later that woman was
25 picked up from the house?

1 Never heard that?

2 **A.** No.

3 **Q.** And through all of your investigation of this
4 case, you never -- even during the interview, that you
5 sat in on with Selo Black Crow, you can't remember
6 today that when he was confronted with this
7 information that he looked like he had been kicked in
8 the stomach and he remained silent for four to five
9 minutes and he put his head down and he gulped?

10 That just -- you don't remember that either?

11 **A.** No.

12 **Q.** Even though you were right in the room?

13 **A.** No.

14 **Q.** All right.

15 When you were asked whether my client's
16 comment was sarcastic or not about, well, it sounds
17 like you got your case, that was after you had relayed
18 to him a bunch of information, a bunch of accusations,
19 right?

20 **A.** That's correct.

21 **Q.** And including in one of those accusations was
22 that a 12-year-old girl participated in the
23 kidnapping?

24 **A.** Yes.

25 **Q.** So he might not have taken you completely

1 seriously?

2 **A.** Well, when somebody accuses you of killing
3 someone you should take them seriously.

4 **Q.** And he obliged you with interviews and
5 obliged you with meetings and he sat down and talked
6 to you even though he didn't have to, right?

7 **A.** Yes.

8 **Q.** Regarding -- the last point is this 1995
9 interview. You were asked about my client's comment
10 when he said twice to you, I didn't kill her. I
11 didn't kill her.

12 Do you remember that?

13 **A.** Yes.

14 **Q.** And you said that was in response to him
15 being asked -- or him saying that he didn't trust you.

16 Do you remember that?

17 **A.** Yes.

18 **Q.** And your report shows that my client's
19 comments when he said to you twice, I didn't kill her,
20 I didn't kill her, came when you were trying to get
21 him to watch Arlo's tape, right?

22 **A.** Yes.

23 **Q.** All right.

24 Didn't happen when he was saying, I don't
25 trust you guys. You wanted him to watch a video and

1 he said, I don't need to watch this video. I didn't
2 kill her. I didn't kill her?

3 A. He didn't say I don't need to watch the
4 video. He just said, I didn't kill her.

5 Q. That was the implication, though, he didn't
6 watch the watch the video?

7 A. Apparently not. He didn't show up.

8 MR. MURPHY: All right. Nothing further.

9 Thank you.

10 **REDIRECT EXAMINATION**

11 **BY MR. OSWALD:**

12 Q. Mr. Ecoffey, were there -- you talked
13 about -- he talked about safe houses just now with
14 you?

15 A. Yes.

16 Q. Was Kills Means' house on Rosebud Reservation
17 a known AIM safe house that you know of?

18 A. I don't know.

19 Q. Was Dick Marshall's a known safe house?

20 A. I don't know.

21 Q. How about Arlo's grandmother at Potato Creek,
22 was that a known safe house?

23 A. I don't know.

24 MR. OSWALD: No further questions.

25 MR. MURPHY: Nothing further.

1 Thank you.

2 **THE COURT:** Thank you, sir.

3 You may step down.

4 (Witness excused.)

5 **MR. JACKLEY:** The state would call Mitch
6 Pourier, Your Honor.

7 MITCH POURIER,
8 called as a witness herein, having been duly sworn,
9 under oath testified as follows:

10 **THE COURT:** Please take a seat.

11 **DIRECT EXAMINATION**

12 **BY MR. JACKLEY:**

13 **Q.** Good afternoon.

14 Please introduce yourself to the jury.

15 **A.** My name is Mitchell Pourier. I am a special
16 agent with the BIA.

17 **Q.** Mr. Pourier, are you an enrolled Tribal
18 member?

19 **A.** Yes, I am enrolled with the Oglala Sioux
20 Tribe.

21 **Q.** Do you have a college education?

22 **A.** Yes. I have a Bachelor's degree from Huron
23 College.

24 **Q.** Mr. Pourier, could we take just a moment and
25 walk through your law enforcement work history. Where

1 you started to where you are at now.

2 **A.** Okay.

3 Well, I started part time at Pine Ridge in
4 1975. I went on to get my Bachelor's degree. I
5 started full-time with the Oglala Sioux Tribe
6 Department of Public Safety. I was a police officer
7 there for a number of years till 1984. I became a
8 criminal investigator with the Oglala Sioux Tribe. In
9 1988 I was hired on by the Bureau of Indian Affairs as
10 a crime investigator. I worked in that capacity on
11 several reservations in South Dakota up until 1990.

12 And I was hired as the child abuse
13 investigator for the Aberdeen area office. From there
14 I -- in 1994 I was selected at one of five district
15 commanders. My duty station was up in Billings,
16 Montana. I oversaw the law enforcement programs, BIA
17 and Tribal in five states in that particular position.
18 I stayed there until 2000.

19 In 2000 I transferred down to Rapid City here
20 where we had opened up a new internal affairs office.
21 I was the supervisory special agent there and I worked
22 in that capacity until 2006 when the BIA closed that
23 office down. I then transferred back to Pine Ridge
24 and basically just waiting to finish up where I
25 started, I guess.

1 **Q.** Mr. Pourier, did you ever meet Anna Mae
2 Aquash?

3 **A.** No, sir.

4 **Q.** In April of 1994, what position did you hold?

5 **A.** In April of 94 I was the child abuse
6 investigator up in Aberdeen.

7 **Q.** Did there come a time in relation to the
8 Annie Mae Aquash case where you went to Canada?

9 **A.** Yes.

10 **Q.** When was that?

11 **A.** It was on April 20, 1994.

12 **Q.** Generally, why were you going to Canada?

13 **A.** I was accompanying Marshal Ecoffey to Canada
14 so -- to see if we could locate and possibly interview
15 John Graham.

16 **Q.** Who else was generally involved with
17 assisting with the interview?

18 **A.** FBI Special Agent Jim Graf, one of the
19 Canadian police, Constable Miller. He had assisted us
20 up there. So it was kind of a joint investigation
21 type.

22 **Q.** When you say joint investigation, my
23 understanding from testimony is there were four
24 agencies involved, you, with the BIA; Bob Ecoffey,
25 United States Marshal; somebody from the Canadian

1 authorities; and Agent Graf from the FBI; is that
2 fair?

3 **A.** Yes, sir.

4 **Q.** Did there come a time when you had an
5 opportunity to interview John Graham?

6 **A.** Yes, sir.

7 **Q.** What date was that, the actual interview?

8 **A.** The actual interview was on the 21st of
9 April, 1994.

10 **Q.** Please set the stage for the jury about where
11 the players were at and how the interview began.

12 **A.** Well, we had scheduled an interview down at
13 our motel which was to Gold Rush Motel in Whitehorse,
14 Montana -- I mean, excuse me, Canada. We scheduled it
15 for 7:30 that evening of the 21st. However, John
16 Graham never showed up. About 8:00 o'clock his
17 significant other showed up and told Marshal Ecoffey
18 that John Graham --

19 **MR. MURPHY:** Objection. Hearsay.

20 **THE COURT:** Sustained.

21 **Q.** (BY MR. JACKLEY) Mr. Pourier, let me back up
22 just a moment. I want to take you back earlier in the
23 day.

24 Did there come a time where prior to setting
25 up the 7:30 meeting that you and Marshal Ecoffey had

1 an opportunity to meet with John Graham?

2 **A.** Yes.

3 **Q.** Describe approximately what time of day it
4 was?

5 **A.** It was approximately 4:30 p.m.

6 **Q.** Where did that meeting occur at?

7 **A.** That meeting was at the place of employment
8 of John Graham at the West Mark.

9 **Q.** Who was present for this interview?

10 **A.** Marshal Ecoffey and myself had approached
11 John Graham.

12 **Q.** When you approached John Graham, please
13 describe how that happened.

14 **A.** We were waiting near the building there,
15 parked. We observed John Graham come down the ladder
16 that was next to the building. Marshal Ecoffey and I
17 got out of the vehicle. We walked over to -- John
18 Graham came down. He started walking down the alley
19 way. We approached him and introduced ourselves that
20 we were law enforcement officers from Pine Ridge,
21 South Dakota.

22 **Q.** What was Mr. Graham's response?

23 **A.** Once Marshal Ecoffey told John Graham that we
24 were there because new information had been found on
25 the murder of Annie Mae Aquash, he seemed surprised.

1 Asked us how do you know about me.

2 Q. Mr. Pourier, I now want to ask you a couple
3 yes or no questions, okay?

4 A. Okay.

5 Q. At that point was there an inquiry about a
6 ceremony made to John Graham?

7 A. Yes, sir.

8 Q. Again, yes or no, did John Graham provide a
9 response about that inquiry?

10 A. Yes, sir.

11 Q. What was John Graham asked about that
12 ceremony?

13 MR. MURPHY: Objection, Your Honor.

14 THE COURT: Approach.

15 (Whereupon, a discussion was held at the
16 bench.)

17 THE COURT: What ceremony are we talking
18 about?

19 MR. JACKLEY: The Medicine Man ceremony that
20 we litigated, Your Honor. What I am eliciting, number
21 one, was an inquiry made and he said yes. Number two
22 did John Graham make a response and he said yes.
23 Basically John Graham has admitted to going to a
24 spiritual leader and requesting a ceremony and I think
25 I am entitled to ask this witness that. I can show

1 the Court specifically in the report where it's at if
2 you want to see further detail.

3 **THE COURT:** Well, I can believe that. My
4 question is whether it's admissible.

5 **MR. MURPHY:** Right, and we're arguing it's
6 not admissible. The meeting is clearly offered to
7 prove the truth of the matter asserted. It is hearsay
8 because what he is going to do is present my --
9 Mr. Pourier is going to relay hearsay from Mr. Gates
10 and then he is going to --

11 **THE COURT:** No, he's not.

12 **MR. JACKLEY:** Because John Graham says that's
13 what he's going to say.

14 **MR. MURPHY:** Well, all John Graham's response
15 was yeh, Y-E-H. That's what it says in the report.

16 **MR. JACKLEY:** And he nodded affirmatively.
17 There is two things I am trying to elicit.

18 **MR. MURPHY:** The elements -- then it can't go
19 near the contents of what Gates relayed to him. I
20 mean --

21 **MR. JACKLEY:** Your Honor, this goes to the
22 subject that we litigated on the Medicine Man theory.
23 What we are seeking --

24 **THE COURT:** Just a minute.

25 Who?

1 **MR. JACKLEY:** John Graham's -- we're not
2 asking what Al Gates said; we're asking what John --

3 **THE COURT:** Going to an Indian ceremony, what
4 does that mean? They have them for all kinds of
5 things.

6 **MR. JACKLEY:** Can I grab the report?

7 Basically the gist of it is John Graham was
8 asked a question, the inquiry was made regarding the
9 ceremony of a -- that he felt in a bad way about Annie
10 Mae Aquash so --

11 **THE COURT:** That's not going to come in. We
12 already had that discussion. It's a Gates problem --
13 I mean that's a distinct *Crawford* problem if we deal
14 with it.

15 **MR. JACKLEY:** This is what John Graham said
16 about it. This is John Graham's statement.

17 **MR. MURPHY:** It's not John Graham's
18 statement. The only thing that John Graham said is
19 Y-E-H. That's an ambiguous response to a long
20 accusation that was relayed by Gates or supposedly
21 from Gates through a law enforcement officer.

22 **THE COURT:** Let me see the report.

23 First of all, I am not excited about anything
24 from the ceremony.

25 **MR. JACKLEY:** I am seeking to admit it under

1 801, Your Honor. It's this right here.

2 **THE COURT:** What question are you going to
3 ask?

4 **MR. JACKLEY:** What was John Graham asked and
5 what was his response.

6 **MR. MURPHY:** So that would allow in all that
7 garbage which is -- it is not an --

8 **THE COURT:** It would go no further than that
9 at all.

10 **MR. MURPHY:** Well, but see then he -- if he's
11 asked what was John Graham asked, that would allow --

12 **THE COURT:** He's not going to ask that.

13 **MR. MURPHY:** Okay.

14 **THE COURT:** The only thing I think you can
15 ask him -- and I don't know the relevance of it
16 because there is no context -- but did he have a
17 cultural ceremony. But that's about it. He says,
18 yeh, then you are not going anywhere beyond that.

19 **MR. JACKLEY:** A cultural ceremony pertaining
20 to the death of Anna Mae Aquash? Can I do that?

21 **THE COURT:** No. That is hearsay from
22 Mr. Gates. And is a *Crawford* problem with Mr. Gates.
23 That's -- I thought that was a much more solid
24 response than the Medicine Man theory which has some
25 merit but it's never been reached in our courts. I

1 think -- there is a distinct *Crawford* problem here.
2 And I mean that's -- while all you are doing is
3 putting in from Gates with no ability to cross-examine
4 him. We're not going to mention Gates in any way,
5 shape, or form.

6 **MR. JACKLEY:** I am not putting in what
7 Gates -- I am putting in what John Graham
8 affirmatively admitted. It's a statement by the
9 defendant under 802(d).

10 **THE COURT:** That's based on what Gates said.

11 **MR. JACKLEY:** But John Graham confirmed what
12 Gates said.

13 **THE COURT:** You can ask him if he had a
14 ceremony and his answer is yeah and that's the end of
15 it.

16 **MR. JACKLEY:** But a ceremony to what about
17 Anna Mae. Can I at least say about Anna Mae.

18 **THE COURT:** Well -- we're not going to ask
19 him that because that comes from Gates. We're not
20 going to address that issue at all. You are not going
21 to put in what Gates said one way or the other.
22 Period.

23 Now if I am wrong on that I am wrong on it.
24 But I think it's a huge *Crawford* problem to which I
25 have had no -- I can find no way around it. Neither

1 can my clerk who is a hell of lot smarter than I am.
2 I can't find a way around it and you can't get around
3 it this way. You are not going to start something
4 that's based o what Gates told anybody.

5 **MR. JACKLEY:** I have supplied the case law to
6 the Court on *Crawford* -- that *Crawford* only applies to
7 hearsay statements. This is not hearsay under 801(d).
8 This is a defendant's admission.

9 **THE COURT:** Well, it's investigatory amongst
10 other things from the get go.

11 **MR. MURPHY:** Clearly doesn't meet the
12 standard for an adoptive admission because an adoptive
13 admission has to an unequivocal response.

14 **MR. JACKLEY:** *Crawford* doesn't apply to
15 801(d). The case law is clear on this. This is not
16 hearsay. This is defendant's admissions.

17 **MR. MURPHY:** Well, when you say defendant's
18 admission, the only -- because his response is an
19 ambiguous Y-E-H. You have to be going -- an adoptive
20 admission and doesn't meet the standards for that and
21 that's the 801 issue.

22 **THE COURT:** I don't think it can come in.

23 **MR. JACKLEY:** My record -- 801(d) makes it
24 not hearsay. If that's all I can --

25 **THE COURT:** That's fine.

1 (Whereupon, the discussion at the bench was
2 then concluded.)

3 **Q. (BY MR. JACKLEY)** Mr. Pourier, I want to take
4 you back to -- I believe you indicated to the jury
5 Mr. Graham had indicated, quote, how do you know about
6 me, end quote.

7 Do you recall that?

8 **A.** Yes, sir.

9 **Q.** At that point in time, did you and
10 Mr. Ecoffey have a general discussion with Mr. Graham
11 about information that you had obtained through
12 response is -- view of the Aquash investigation file?

13 **A.** Yes, sir.

14 **Q.** Did some of that information that you were
15 discussing with Mr. Graham include occurrences in
16 Denver?

17 **A.** Yes, sir.

18 **Q.** Generally describe to the jury what that
19 discussion was about Denver.

20 **MR. MURPHY:** Your Honor, objection. Calls
21 for hearsay. It's also cumulative.

22 **THE COURT:** I'm not sure I understand the
23 question.

24 Say again what you are asking this gentleman.

25 **Q. (BY MR. JACKLEY)** Let me maybe approach it

1 this way.

2 Mr. Pourier, before you went to Canada, did
3 you take an opportunity to review information from the
4 Annie Mae Aquash investigation file?

5 A. Yes, sir.

6 Q. Did you have an opportunity to review,
7 including photos, some of which you took with you for
8 the interview?

9 A. Yes, sir.

10 Q. Did you have an opportunity to review witness
11 statements and information contained in the file of
12 that nature?

13 A. Yes, sir.

14 Q. Based upon the information, the witness
15 information, the photographs, did you develop a
16 general theory of the case to inquire of John Graham
17 about?

18 A. Yes, sir.

19 Q. Was part of that general theory involving
20 Mr. Graham's activities or alleged activities in
21 Denver?

22 A. Yes, sir.

23 Q. Please describe what was discussed with
24 Mr. Graham at that point in the interview in relation
25 to Denver.

1 **MR. MURPHY:** Objection, Your Honor. This
2 calls for the same hearsay that came up with
3 Mr. Ecoffey.

4 **THE COURT:** Depending on where it goes and
5 how much it goes, I think it's fair within a context
6 of an interview with Mr. Graham.

7 Again, the statements made or descriptions
8 made by Mr. Pourier are not evidence that anything
9 occurred. They are just simply a recitation of things
10 he is telling Mr. Graham and they cannot be considered
11 by you in resolving any of the questions in this case.

12 Understood?

13 **MR. MURPHY:** Your Honor, I'd also object on
14 relevance. How they got to Canada, why they got to
15 Canada is irrelevant.

16 **THE COURT:** Well, it may be. But I don't --
17 I think that takes 30 seconds and it doesn't have much
18 to do with anything.

19 Go ahead.

20 **Q. (BY MR. JACKLEY)** Mr. Pourier, again, then, in
21 the context of your discussions with Mr. Graham, about
22 the information you obtained from the file, generally
23 speaking, what was Mr. Graham being told about the
24 case as it relates to Denver?

25 What information did you have about his

1 activities in Denver?

2 **A.** It was mentioned to him about a meeting being
3 held in Denver at Troy Lynn Irving's residence where a
4 meeting went on and there was an individual by the
5 name of Corky Gonzalez from the Chicano movement or --
6 that he --

7 **MR. MURPHY:** Your Honor, this is getting into
8 double hearsay now.

9 **THE COURT:** Yeah.

10 **Q.** (BY MR. JACKLEY) Did -- during the discussion
11 with Mr. Graham, about the information that law
12 enforcement had on its file about Denver, did he show
13 any emotions or did you observe him do anything?

14 **A.** Once during the discussion he responded, yeh.
15 He drew his cigarette toward his mouth. I observed
16 his lips trembling and his hand was shaking.

17 **Q.** Did that initial interview come to an end?

18 **A.** Yes.

19 **Q.** Generally describe that to the jury.

20 **A.** While we were there talking with him, a
21 brown-colored station wagon pulled into the area. At
22 that point they had come to pick up John Graham and so
23 that's when we asked if we could meet later. He
24 wanted to go -- John Graham wanted to go home, clean
25 up. So we had a meeting scheduled for our motel at

1 7:30 that evening.

2 Q. Okay.

3 Did you prepare to have a meeting at the
4 hotel at 7:30 that evening?

5 A. Yes. We had an area to talk with John Graham
6 and we were waiting for his arrival.

7 Q. Did he ever show up?

8 A. John Graham never showed up at the motel
9 there.

10 Q. Did somebody show up at the hotel there?

11 A. His significant other, I guess, Viola
12 Papiquash, she showed up around 8:00 o'clock.

13 Q. When she showed up, was contact attempted to
14 be made with Mr. Graham?

15 A. Yes. Once she arrived -- and then at that
16 point she had went and placed a telephone call to John
17 Graham.

18 Q. Was she the only one that talked to John
19 Graham on the telephone call or did somebody else talk
20 to him?

21 A. Marshal Ecoffey also talked with John. Viola
22 Papiquash came back and advised Marshal Ecoffey that
23 John Graham would like to talk with him on the
24 telephone.

25 Q. Were you present -- could you hear at least

1 the conversation that Bob Ecoffey was having at that
2 time?

3 **A.** No, sir.

4 **Q.** Okay.

5 Did it ultimately turn out that there was a
6 second meeting that day with John Graham?

7 **A.** Yes, sir.

8 **Q.** And again what date are we talking about?

9 **A.** April 21st.

10 **Q.** Of what year?

11 **A.** 1994.

12 **Q.** Where did what I will call the second meeting
13 occur at?

14 **A.** At Rotary Park in Whitehorse.

15 **Q.** Do you remember about what time the meeting
16 began?

17 **A.** It was about 9:15 p.m. in the evening.

18 **Q.** Who was present for the meeting?

19 **A.** Marshal Ecoffey, myself, and Constable Miller
20 was waiting at a -- at one of the tables -- picnic
21 tables there and John Graham walked up to us. At that
22 point Constable Miller introduced himself.

23 **Q.** Did Mr. Graham ask to see anything at that
24 point in time?

25 **A.** At that point in time, we provided our --

1 identified ourselves and provided our credentials.

2 Q. Do you know at the time that interview
3 began -- you had mentioned a Ms. Papiquash his
4 significant other.

5 Do you remember was she anywhere nearby the
6 interview?

7 A. She was a distance away. Just Marshal
8 Ecoffey and myself and John Graham were at the picnic
9 table.

10 Q. So you were sitting at a picnic table?

11 A. Yes, sir.

12 Q. Generally describe to the jury where the
13 folks were seated at the picnic table. Where you were
14 at, where Marshal Ecoffey was at, and where John
15 Graham was at?

16 A. The table is there. John Graham was on
17 the -- my left side across the table. And Marshal
18 Ecoffey was on my right side on each end of the table.
19 I was on the opposite side seated in the middle.

20 Q. Mr. Pourier, we again talked about, prior to
21 you and Marshal Ecoffey coming to the interview, you
22 had reviewed the file, and that you had developed some
23 information and a case theory.

24 Do you remember that discussion that we had?

25 A. Yes, sir.

1 **Q.** At this time did Marshal Ecoffey and you
2 begin going into more detail with Mr. Graham about the
3 information that law enforcement had obtained in the
4 file?

5 **A.** Yes, sir.

6 **Q.** Without going into a he said/she said or
7 specific witnesses, I'd just like to inquire as to
8 general areas that you discussed with Mr. Graham.

9 For instance, at all did you talk about the
10 body being identified?

11 **A.** Yes. We talked about that.

12 **Q.** Was there further information talked about,
13 the evidence, or information as it related to Denver?

14 **A.** Yes, sir.

15 **Q.** Was there a discussion about information
16 pertaining to Annie Mae being tied up in Denver?

17 **A.** Yes, sir.

18 **Q.** At the end of, essentially, you and Marshal
19 Ecoffey outlining the information that was obtained
20 through the file and through witnesses, did Mr. Graham
21 have any type of a response?

22 **A.** Yes, sir. He told us, looks like you guys
23 have my future planned out for me. You have your
24 case.

25 **Q.** How did you take that when he said it?

1 **A.** That he was admitting to his involvement.

2 **Q.** Mr. Pourier, at some point in time did you
3 show photographs to Graham?

4 **A.** Yes, sir.

5 **Q.** Mr. Pourier, I'm handing you what has been --
6 placed into evidence as State's Exhibits 3, 4, and 5.

7 Do you recognize those photographs?

8 **A.** Yes, sir.

9 **Q.** Are those the photographs that were shown to
10 John Graham on April 21, 1994?

11 **A.** Yes, sir.

12 **Q.** Who had taken those photographs out of the
13 investigation file?

14 **A.** Marshal Ecoffey.

15 **Q.** Okay.

16 **MR. JACKLEY:** Your Honor, may I briefly show
17 the jury on the projector?

18 **THE COURT:** Yes.

19 **Q. (BY MR. JACKLEY)** And again, Mr. Pourier,
20 those were the photographs that were shown to John
21 Graham during that interview?

22 **A.** Yes, sir.

23 **Q.** Did John Graham have any reaction that you
24 observed when he saw those photographs?

25 **A.** Yes. He glanced at the photographs and

1 immediately turned away. At that point in time I saw
2 his eyes fill with tears.

3 Q. Did there come a point where you and Marshal
4 Ecoffey talked to Mr. Graham about any threats being
5 made to him or that if he cooperated any threats, can
6 you recall that?

7 A. Yes, sir.

8 Q. Can you brief that he describe that
9 discussion to this jury.

10 A. Well, initially Marshal Ecoffey asked if he
11 had -- John Graham had been threatened by anyone or if
12 he thought that -- thought that the same thing would
13 happen to him if he talked. And I then asked him, did
14 he think anything would happen to him if he talked.
15 At that point John Graham said -- looked around,
16 looked over toward the Whitehorse community, and said
17 I'm ready to leave this place. I'll probably spend
18 the rest of my life in jail.

19 Q. When he said that, what did you take from
20 that?

21 What was your observation?

22 A. I -- my observation was that he was
23 admitting --

24 MR. MURPHY: Objection, Your Honor. That's
25 speculation.

1 **THE COURT:** Sustained.

2 **Q.** (BY MR. JACKLEY) Did you take him serious?

3 **A.** Yes, sir.

4 **Q.** Did you take him serious enough that you
5 placed that quote in your report?

6 **A.** Yes, sir.

7 **Q.** Did there come a point in the interview that
8 John Graham began discussing his involvement in
9 Denver?

10 **A.** Yes, sir.

11 **Q.** Describe that to the best that you can recall
12 to the jury.

13 **A.** Well, we asked -- I asked John Graham why all
14 the people that had information would bring up his
15 name as mentioning his involvement in this particular
16 matter. At that point Graham mentioned -- he said,
17 okay, okay. I drove the car. I drove the car that
18 night all the way back to the reservation.

19 **Q.** Was he willing to or did he offer any further
20 names of people that he went with?

21 **A.** No. He would only say that he drove the
22 vehicle and wouldn't provide any other names.

23 **Q.** Did there come a point then that there was a
24 discussion about a safe house?

25 **A.** Yes.

1 **Q.** Please to the best of your recollection tell
2 the jury what was talked about about the safe house.

3 **A.** John Graham mentioned that he had driven the
4 vehicle back with Annie Mae Aquash to -- to a village.
5 Marshal Ecoffey asked him if that was in Rapid City,
6 South Dakota. He said he didn't know. I asked him
7 was it in South Dakota, he said yes.

8 **Q.** Did he ever indicate that this safe house was
9 at Kills Means'?

10 **A.** No.

11 **Q.** Did he ever indicate that this safe house was
12 at Cleo or Dick Marshall's?

13 **A.** No.

14 **Q.** Did you ask him further questions about this
15 safe house?

16 **A.** I asked him why he and Theda Clarke Nelson
17 would tie up Annie Mae in Denver.

18 **MR. MURPHY:** Objection. Hearsay.

19 **THE COURT:** Overruled.

20 **Q.** **(BY MR. JACKLEY)** You may continue.

21 **A.** I asked him why they would tie Annie Mae up
22 in Denver and transport her back to South Dakota and
23 allow her to get off at a safe house there.

24 **Q.** What was his response?

25 **A.** His response was, because she wanted to.

1 Q. Was John Graham asked a direct question
2 whether or not he had killed Annie Mae Aquash?

3 A. Yes, sir.

4 Q. When he was asked that question, what did he
5 say?

6 A. Marshal Ecoffey asked the question to John
7 Graham, did you kill Annie Mae Aquash. He said no.
8 Immediately the table that we were seated at started
9 shaking.

10 Q. Describe that to the best that you can
11 recall. I mean, you are sitting there and that table
12 starts shaking. I mean, describe that to the jury.

13 A. It was actually moving. At first I -- I
14 checked to see and it was because he was shaking. I
15 then asked him if he knew who killed Annie Mae Aquash.
16 The table continued to shake. It was moving.

17 Q. Did the interview then essentially end?

18 A. Yes, sir.

19 **MR. JACKLEY:** Pass this witness, Your Honor.

20 **THE COURT:** Mr. Murphy?

21 **CROSS-EXAMINATION**

22 **BY MR. MURPHY:**

23 Q. I am going to start, Mr. Pourier, with your
24 assertion that you asked my client something to the
25 effect of why would you tie Anna Mae up and take her

1 from Denver to South Dakota.

2 Do you remember that?

3 **A.** Yes, sir.

4 **Q.** And you said my client responded because
5 Annie Mae wanted to?

6 **A.** Yes.

7 **Q.** Now, we've got Marshal Ecoffey's seven-page
8 report of that conversation, that interview, correct?

9 **A.** Yes, sir.

10 **Q.** And that statement isn't contained anywhere
11 in Marshal Ecoffey's report is it?

12 **A.** I'd have to check.

13 Can I see the report?

14 **Q.** Sure.

15 And I am going to point you to one point in
16 the report where my client allegedly said something
17 that it was Anna Mae who wanted to.

18 That was in response to a question, why did
19 you take the back roads, right?

20 **A.** Yes.

21 **Q.** And I want you to read this report -- I want
22 you to take all the time you need -- and show me any
23 place where my client allegedly said that Annie Mae
24 Aquash wanted to be tied up.

25 Okay. Point it out to me.

1 **A.** What part because --

2 **Q.** Well, you said that she said she wanted to
3 get tied up. That's where she said she wanted to get
4 off at the safe house.

5 **MR. JACKLEY:** Your Honor, I am going to
6 object. Misstatement of the record.

7 **MR. MURPHY:** I beg to differ.

8 **MR. JACKLEY:** He was referring to a safe
9 house.

10 **THE COURT:** Let me read the record.

11 My recollection of the officer's statement is
12 the same as Mr. Murphy's. And that the question was
13 asked why would Anna Mae want to be tied up and --
14 or -- tied up and driven to Rapid City or wherever.
15 And so Mr. Murphy's question of where such a statement
16 exists in the report is fair cross-examination.

17 **Q. (BY MR. MURPHY)** Do you want to continue
18 reading the report?

19 **A.** No.

20 **Q.** You would agree, then, in this seven-page
21 single-spaced statement that Mr. Ecoffey put
22 together -- which he says he put together shortly
23 after the interview -- there is no reference at all
24 whatsoever to my client saying that Annie Mae Aquash
25 wanted to be tied up?

1 **A.** No, sir.

2 **Q.** That's true, correct, it's not in this
3 report?

4 **A.** Just in our initial conversation with
5 Mr. Graham.

6 **Q.** Sir, it wasn't in your initial -- this report
7 covers the interview start to finish.

8 Do you want to read this report?

9 I am not trying to trick you. You said
10 minutes ago that when you were out there at that table
11 in the park that you asked Mr. Graham, why would Annie
12 Mae Aquash want to be tied up and then taken up to a
13 safe house.

14 And I am asking you where in this report it
15 ever indicates that my client said that Annie Mae said
16 she was okay with being tied up?

17 **A.** There is no place in there.

18 **Q.** There is no place in this report -- there is
19 no place in this report about my client saying that he
20 tied her is there?

21 **A.** No, sir.

22 **Q.** There is no place in this report that he says
23 she was tied up, is there?

24 **A.** No, sir.

25 **Q.** And this is the same interview you and

1 Ecoffey and Graf travel thousands of miles to do?

2 This one interview, right?

3 A. Yes, sir.

4 Q. And you guys represent three powerful law
5 enforcement agencies, right?

6 A. Yes, sir.

7 Q. And you got thousands of people at your
8 disposal, you got equipment, you got money, and not
9 one of you brings a recorder, right?

10 A. No, sir.

11 Q. It's true, nobody brought a recorder?

12 A. No.

13 Q. Nobody wore a wire?

14 A. No.

15 Q. So had you guys done that, we might actually
16 know what John Graham said, wouldn't we?

17 A. It's contained in the report.

18 Q. Well, but you just said when Mr. Jackley was
19 asking you questions that my client said Anna Mae was
20 okay about being tied up or that she had asked to be
21 tied up. That's what you said just minutes ago.

22 That's not in here so that one comment is the
23 only one that didn't make it into the report?

24 A. Well, initially when Marshal Ecoffey brought
25 up -- when we met with -- at the West Mark, and it

1 was -- there was information -- information earlier
2 that Annie Mae had been tied up in the basement by
3 John Graham.

4 Q. Well, I understand that's what Mr. Ecoffey
5 told Mr. Graham. Mr. Graham in this -- according to
6 this report never said, well, we did that because
7 Annie Mae wanted to.

8 A. Well, he never denied it either.

9 Q. Okay. Let's get into that.

10 In this report, you -- or during these two
11 interviews both at the West Mark when you surprise him
12 at his place of work and then at the park, you guys
13 tell him over and over again, he doesn't need to talk
14 to you, right?

15 A. Yes, sir.

16 Q. You want him to listen to you. That's what
17 you say?

18 A. Yes, sir.

19 Q. And he says I will agree to listen to you,
20 right?

21 A. Right.

22 Q. So now you are saying because Ecoffey throws
23 a bunch of information at him, says we heard this that
24 and the other thing from all of these people that
25 because my client didn't say I didn't that, that he's

1 admitting to it?

2 That's your position?

3 **A.** Well, he made statements there.

4 **Q.** Well, he -- Ecoffey, recited ten paragraphs
5 of accusations to him.

6 You've read this report?

7 **A.** Yes.

8 **Q.** And he doesn't respond statement by
9 statement, does he?

10 **A.** No.

11 **Q.** In fact, at the very end, he doesn't say
12 anything at all, does he?

13 **A.** No, sir.

14 **Q.** He starts talking to you once you show him
15 the picture of his friend with her blood coming out
16 from the back of her said, right?

17 **A.** Yes.

18 **Q.** And that's at the park?

19 **A.** Yes, sir.

20 **Q.** He didn't make any statements at all to you
21 out at the West Mark when you surprised him on the job
22 site?

23 **A.** All he said was yeh when we told him the
24 information.

25 **Q.** He said yeh, Y-E-H?

1 **A.** Yeah.

2 **Q.** And so after ten paragraphs of recitation,
3 you basically took that that he was admitting
4 everything that had just been said to him?

5 **A.** He wasn't denying nothing.

6 **Q.** All right.

7 These paragraphs over and over again of
8 accusations, Ecoffey said, Ecoffey told, Ecoffey
9 stated --

10 Mr. Ecoffey wasn't engaging Mr. Graham in a
11 question and answer session, was he?

12 **A.** No, sir.

13 **Q.** He wasn't asking him, we heard this is, is
14 that true, was he?

15 **A.** No, sir.

16 **Q.** He just set out accusation after accusation
17 and John Graham said he was willing to listen?

18 **A.** Yes, sir.

19 **Q.** All right.

20 Well, what we know my client did respond is
21 that when you showed him the pictures of Anna Mae
22 Aquash dead at the bottom of the gulch, he looked
23 away, his eyes filled with tears, and he said she was
24 my friend, right?

25 **A.** Yes.

1 **Q.** Now, regarding this comment about I'm ready
2 to leave this place, I will probably spend the rest of
3 my life in jail any way, do you remember that comment?

4 **A.** Yes, sir.

5 **Q.** That's after a couple law enforcement
6 officers come up to his house, come to his place of
7 work, then meet him at a park and tell him without a
8 doubt in their mind they have a case against him,
9 right?

10 **A.** We told him that the information that we had.

11 **Q.** Well, you guys weren't putting this to him
12 as, well, we're not really sure what happened.
13 Ecoffey told him ten paragraphs of things that he said
14 were facts, right?

15 **A.** He advised him of the information that he had
16 received.

17 **Q.** And he said that all these other people were
18 implicating John Graham, right?

19 **A.** Yes.

20 **Q.** So at that point somebody listening to that
21 might obviously believe that, boy, if these guys are
22 saying this is true, I might actually spend some time
23 in jail, right?

24 **A.** A normal innocent man would have responded to
25 a lot of those questions.

1 Q. Awe.

2 Even though you guys told him in advance you
3 don't have to talk to us, we just want you to listen?

4 A. It would have been his response as to
5 denying.

6 Q. Well, what was his initial response -- after
7 all of that recitation of accusations, what was his
8 response? His eyes filled up with fears and he said
9 she was my friend, right?

10 A. Yes, sir.

11 Q. And then you guys asked him, did you do this
12 and he said no, right?

13 A. Yes.

14 Q. And you said do you know who did this and he
15 said no, right?

16 A. He verbally said no, but his body language
17 was different.

18 Q. His body language because he was shaking?

19 A. Yes, sir.

20 Q. Pretty scary to have these kinds of
21 accusations thrown at you, wouldn't it be?

22 A. Yes, sir.

23 Q. You got no explanation for why none of you
24 guys, not the FBI, the BIA, the U.S. Marshal Service
25 all went all the way to Canada without bringing a

1 simple hidden microphone or a tape recorder, do you?

2 **A.** It's a pretty common practice that we usually
3 took notes and compared our interviews off that.

4 **Q.** You weren't taking notes as he spoke?

5 **A.** Marshal Ecoffey was.

6 **Q.** He said he took the notes afterwards.

7 **A.** Yes. He took them and we prepared --
8 prepared the interview on our memory and what was
9 discussed at the time.

10 **Q.** Based on your memory, a memory that
11 apparently didn't include anything about my client
12 saying that Annie Mae said she wanted to be tied up,
13 right?

14 **A.** Yes, sir.

15 **Q.** Because that didn't make it into the report?

16 **A.** Yes, sir.

17 **Q.** What made it into the report was that my
18 client said I dropped her off at a place safe house,
19 right?

20 **A.** Yes.

21 **Q.** In a village?

22 **A.** Yes.

23 **Q.** In South Dakota?

24 **A.** Yes.

25 **Q.** That Anna Mae knew where she wanted to get

1 off, right?

2 A. I guess.

3 Q. Well, I don't want you to guess.

4 Would the report help refresh your
5 recollection, sir?

6 A. Sure.

7 Q. I will ask you to review the bottom
8 paragraph.

9 A. Yes.

10 Q. Because she wanted to get off there. She
11 told them which place to drop her off at, right?

12 A. According to him.

13 Q. That's that he told you?

14 A. Yes.

15 Q. So that's the stuff that made it into your
16 report which was unreported?

17 A. Yes.

18 Q. And it was your common practice not to report
19 thing because then of course it's your word against a
20 defendant's, right?

21 A. No, sir.

22 Q. Well, if we had a recording there wouldn't be
23 a question as to what was said, would there?

24 A. There was no question what was said. It's
25 contained in the interview.

1 **Q.** Well, there is a question because you already
2 added something into the report that wasn't there,
3 right?

4 **A.** No, sir.

5 **Q.** Well, let's go back. When Mr. Jackley asked
6 questions, you said my client was asked why would
7 Annie Mae want to be tied up if she was going to go be
8 taken to a safe house. And you said his answer was,
9 she wanted it that way, right?

10 That's a fair summary of what you said with
11 Mr. Jackley?

12 **A.** It was base --

13 **Q.** I'm just asking you, is that a fair summary
14 of what you said 15 minutes ago with Mr. Jackley?

15 **A.** Not that she wanted to be tied up.

16 **Q.** What did you say?

17 You were asked the question very directly by
18 Mr. Jackley, did it make sense or did you ask
19 Mr. Graham about his story as to why she would want to
20 be tied up in Denver if she was going to be taken to a
21 safe house or something like that. Some question
22 close to that. And you said his response was, because
23 Annie Mae wanted it, right?

24 Do you remember that?

25 **A.** Yes.

1 Q. But that's -- we just agreed that that's
2 nowhere in this seven-page report, right?

3 A. Yes, sir.

4 Q. So there is a dispute as to what was said
5 back in 1995, right?

6 A. Ninety-four.

7 Q. Ninety-four?

8 A. Yes, sir.

9 Q. So we're 16 years after the fact, right?

10 A. Yes, sir.

11 Q. So if any of you guys had decided to bring a
12 recorder, a secret microphone, a body wire, we
13 wouldn't have -- be having this dispute, right?

14 A. Yes, sir.

15 Q. That's true because the jury could decide for
16 themselves what was really said, right?

17 A. It's contained in the interview.

18 Q. All right.

19 **MR. MURPHY:** No further questions.

20 Thank you.

21 **THE COURT:** Thank you.

22 **REDIRECT EXAMINATION**

23 **BY MR. JACKLEY:**

24 Q. Mr. Pourier, you and Mr. Murphy went round
25 and round about what John Graham had indicated Annie

1 Mae wanted. Let me just ask you the question.

2 From the best of your recollection, what did
3 John Graham indicate to you that Annie Mae Aquash
4 wanted?

5 **A.** Off at the safe house.

6 **Q.** Right.

7 Not referring to wanting to be tied up, did
8 Graham mention that?

9 **A.** No.

10 **Q.** You and Murphy did have -- Mr. Murphy did
11 have a discussion about tying up and whether or not it
12 existed in your report.

13 Do you recall that discussion?

14 **A.** Yes, sir.

15 **Q.** Do you recall whether or not there is a
16 reference in your report to John Graham tying Annie
17 Mae up?

18 **A.** Yes, sir.

19 **Q.** And do you recall what your report indicated
20 John Graham tied her up with?

21 **A.** A rope.

22 **Q.** Okay.

23 You and Mr. Murphy had a long discussion
24 about tape recording.

25 Do you recall that?

1 A. Yes, sir.

2 Q. You have been an officer for about 25 years?

3 A. Close to that. Thirty-four.

4 Q. I am cheating you then, huh.

5 Do you record all of your conversations?

6 A. No, sir.

7 Q. Were there two witnesses to the conversation
8 that was had with John Graham?

9 A. Yes, sir.

10 Q. Who were those two witnesses?

11 A. Marshal Ecoffey and myself.

12 Q. Would a tape recorder have shown what John
13 Graham's body language was during certain times of the
14 interview?

15 A. No, sir.

16 Q. Would a tape recorder have shown the
17 cigarette shaking to the mouth?

18 A. No, sir.

19 Q. Would a tape recorder have shown tears to the
20 eyes when photographs were shown?

21 A. No, sir.

22 Q. Would a tape recorder have shown a picnic
23 table shaking?

24 A. No, sir.

25 **MR. JACKLEY:** Pass the witness, Your Honor.

1 opinions on it until you've heard all of the evidence
2 and go to deliberate.

3 Thank you.

4 (Whereupon, the following proceedings were
5 had in open court and out of the presence of the
6 jury.)

7 **MR. MURPHY:** Are we back on the record, Tina?

8 **THE COURT REPORTER:** Yes.

9 **MR. MURPHY:** The state having rested at this
10 point we would move for a judgment of acquittal
11 Particularly in regard to the premeditated murder
12 count. As this court knows, Mr. Looking Cloud is an
13 accomplice as a matter of law. That requires that the
14 Court or fact finder disregard his testimony and
15 consider other evidence independent of that to
16 determine whether anything corroborates his version of
17 events.

18 As this court has heard over the last several
19 days, the only evidence presented in this case about
20 what happened at the Badlands is the testimony of Arlo
21 Looking Cloud. There have not been admissions by my
22 client of such conduct. There have not been any other
23 witnesses attesting to it. Nor have there been any
24 forensic evidence linking my client to a weapon or to
25 the decedent or the bullet. Anything like that.

1 At this point, as a matter of law, the Court
2 must disregard Mr. Looking cloud's testimony and
3 consider what else is out there. And I submit to the
4 Court that on the count of premeditated murder, there
5 is no evidence from which a rational fact finder could
6 find beyond a reasonable doubt that the crime of
7 premeditated murder has occurred.

8 I would also make the same motion in regard
9 to the other count, the felony murder count, but I
10 specifically wanted to address the premeditated
11 murder.

12 Thank you.

13 **THE COURT:** Mr. Jackley?

14 **MR. JACKLEY:** Your Honor, of course the Court
15 is well aware that in a Rule 29 motion, all facts must
16 be taken in the light most favorable to the
17 government. There is sufficient corroboration. That
18 corroboration, amongst other things, is a bullet, a
19 dead body, two witnesses that just testified as to
20 Mr. Graham's statements, as to his reactions,
21 including, among others, the picnic table shaking.

22 The state has shown through witnesses that
23 this began in Denver. This began with a phone call to
24 Mr. Graham's girlfriend. This began with Mr. Graham
25 tying up Annie Mae Aquash. This court has heard from

1 three witnesses regarding that: Arlo Looking Cloud,
2 George Palfy, and Angie Begay.

3 This court has further heard from Troy Lynn
4 about the flanking and taking her away.

5 This court has heard from Candy Hamilton and
6 what her observations were with respect to what
7 occurred in Rapid City.

8 There is -- this court has heard from Cleo
9 Marshall regarding Mr. Graham's activities in Pine
10 Ridge.

11 There is certainly ample evidence to
12 demonstrate that Mr. Graham has done this, and
13 certainly sufficient corroboration to withstand the
14 Rule 29 motion. And I ask that it be denied, Your
15 Honor.

16 **MR. MURPHY:** If I may briefly respond, Your
17 Honor. The state has to provide evidence on each and
18 every element of the charged offense. Not general
19 corroboration that a crime occurred. The existence of
20 a bullet proves nothing.

21 In regard to the specific element that for
22 premeditated murder the state has the burden of
23 proving beyond a reasonable doubt that my client
24 specifically intended to effectuate the death of Anna
25 Mae Aquash at the time she was killed.

1 Mr. Looking Cloud -- disregard his testimony.
2 What Cleo Gates said, what people in Denver said, what
3 people in Rapid City said, what a mutilated bullet
4 said do not go to that element. They have failed as a
5 matter of law to corroborate Mr. Looking Cloud's
6 testimony on the intent element. And therefore, the
7 premeditated murder should be dismissed.

8 **MR. JACKLEY:** Do you want further response?

9 **THE COURT:** Well, I think the -- I think the
10 point that has to be addressed is getting down to the
11 point Mr. Murphy just raised is what evidence is there
12 to corroborate that Mr. Graham killed her and intended
13 to kill her other than Arlo Looking Cloud's
14 statements?

15 **MR. JACKLEY:** Again, viewing the evidence in
16 a light most favorable to the government as the Court
17 must, that evidence begins with the tying up in
18 Denver. It begins with the evidence that several
19 witnesses have testified as what do we do with
20 informants. We kill them. They did just that and we
21 presented that evidence, Your Honor. In a light most
22 favorable to the government that's precisely what
23 happened.

24 **THE COURT:** Well, I don't think anybody is
25 quibbling with the fact that Anna Mae Aquash was

1 killed and was shot; that Anna Mae Aquash was
2 murdered. There has not been a suggestion of anything
3 else. I think that was stipulated at the start of the
4 trial. And that part of the *corpus delicti* is not
5 even an issue. She died and she was killed and she
6 was murdered.

7 The question is, was it by Mr. Graham and was
8 it premeditated. I suspect that, you know, however we
9 deal with that, but there has to be -- does there not
10 have to be evidence directly addressing the point of
11 premeditated murder; that he intended to and did kill
12 her as opposed to all other players in the universe?

13 **MR. JACKLEY:** That evidence has been shown at
14 a minimum that he aided and abetted in that
15 premeditation and killing, Your Honor. At a minimum.
16 I am going to suggest it demonstrates a lot more than
17 that.

18 But at a minimum, to survive the Rule 29, it
19 demonstrates that he aided and abetted in the
20 premeditated murder of Annie Mae Aquash.

21 **MR. MURPHY:** I would submit to the Court that
22 Mr. Looking Cloud is the only person that could
23 corroborate or provide testimony on that point.
24 Because of all the people that supposedly were
25 involved in this venture -- we don't have Theda

1 Clarke's testimony. We don't have anybody else's
2 testimony. It is a situation that rises and falls on
3 Arlo Looking Cloud.

4 In regard to the premeditated murder. That's
5 talking about stuff in Denver that may go to the
6 felony murder; may go to the kidnapping. But we got a
7 period of time when Ms. Aquash has last contact with
8 any of the state's witnesses, which as far as we can
9 guess, is in at Rapid City and would involve
10 Ms. Hamilton.

11 And then we got a series of events afterwards
12 that the only person who attested to them, especially
13 at the crime scene, is Mr. Looking Cloud. And so what
14 happened there is based on his testimony and there is
15 nothing that corroborates his testimony.

16 **MR. JACKLEY:** Your Honor, standing alone, the
17 corroboration here is a bullet in the back of the head
18 so close that it left powder burns.

19 **THE COURT:** I don't have any problem. I
20 understand the facts of the case.

21 Maybe I misheard. I thought we allegedly
22 went to Mr. Marshall's house and then directly to the
23 scene. Maybe I misheard that.

24 **MR. MURPHY:** There were two intervening
25 houses alleged and whatnot.

1 **THE COURT:** But there wasn't Rapid City?

2 **MR. MURPHY:** Rapid City was beforehand.

3 **THE COURT:** That was my understanding. I
4 just wanted to check my memory there.

5 All right. On the basis of aiding and
6 abetting, which would be sufficient in Count One,
7 and/or Count Two for that matter, I am going to deny
8 the motion because I think there is evidence produced
9 that would allow a jury to reach that conclusion.

10 There does not appear to be, in contest, the
11 fact that she was murdered by a gun, probably a pistol
12 of one sort or another. That doesn't happen without
13 premeditation and circumstances described.

14 The question remaining is can they reach to
15 Mr. Graham directly as the one who pulled the trigger
16 or as one who aided and abetted. And at this point, I
17 cannot say as a matter of law that a jury could not
18 reach that conclusion. I am not saying that they will
19 or that they would have to reach that conclusion. I
20 am simply saying there is sufficient evidence to get
21 by a motion for directed verdict at this time as.

22 **MR. MURPHY:** Thank you, Your Honor.

23 8:30?

24 **THE COURT:** Yeah.

25 (Whereupon, the proceedings in this matter
were then concluded.)

1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
 2 COUNTY OF PENNINGTON)

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I, TINA RAE PRUSS, Official Court Reporter
 and Notary Public in and for the County of Pennington,
 State of South Dakota,

DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 questions asked, the testimony given, and of the
 proceedings had.

I FURTHER CERTIFY that I am not of kin or in
 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.

COPY

Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 Pennington County, South Dakota
 My Commission expires: 10-04-2012

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
)
Plaintiff,)
)
VS.)
)
JOHN GRAHAM,)
)
)
Defendant.)

TRANSCRIPT OF
JURY TRIAL

VOLUME 8 OF 10

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
DECEMBER 8, 2010

COPY

1 * * P R O C E E D I N G S * *

2 **THE COURT:** Okay.

3 Gentlemen?

4 **MR. JACKLEY:** The state is, Your Honor.

5 **MR. MURPHY:** Yes, Your Honor.

6 **THE COURT:** All right.

7 Unless I am mistaken, where we were is the
8 state has closed its case in chief.

9 And Mr. Murphy, have you made a decision as
10 to how you are going to proceed?

11 **MR. MURPHY:** Yes, Your Honor. The defense
12 rests.

13 **THE COURT:** All right.

14 That should set us up for closing the case
15 out; is that correct?

16 Do you have anything further, Mr. Jackley?

17 **MR. JACKLEY:** The state does not, Your Honor.

18 **THE COURT:** All right.

19 Ladies and gentlemen, what that means is you
20 are here for about three minutes this morning. And at
21 this point I am going to have you leave because we
22 have functions amongst the counsel and the Court to
23 settle jury instructions for a complicated case. And
24 it will likely take us the bulk of a day. And you
25 will be called back at 8:30 tomorrow morning and I

1 would expect at that time we would present the jury
2 instructions to you. I have to read them. So you
3 will also get copies in the -- to take with you during
4 deliberations.

5 And following that, counsel will make their
6 closing arguments. That will be Mr. Jackley, or one
7 of the State's Attorneys, will make their closing
8 argument, followed by Mr. Murphy, and the state will
9 have a rebuttal. That is normally the procedure.

10 At that point, you will go to the
11 deliberation room. You will have the exhibits with
12 you and my instructions. I will read them -- you will
13 get them in more detail tomorrow morning.

14 In the meantime, once again, I need to tell
15 you that, particularly now, that you should not form
16 any opinions whatsoever in this case until you have
17 heard the closing arguments. Those arguments are not
18 evidence. But they are efforts on the part of the
19 respective parties to -- on how they believe the
20 evidence should be construed and what the verdict
21 should be. So that will be their presentation and you
22 bear that in mind when you go through your
23 deliberations.

24 If you form opinions tonight you've kind of
25 made up your mind no matter what the arguments say and

1 that's inappropriate.

2 You are not to talk to anybody or allow
3 anybody to talk to you about this case until after we
4 have had your verdict.

5 Please refrain during the day from news
6 broadcasts, newspaper accounts, or internet accounts
7 or any other media that may address this trial.

8 You are here to decide the case solely and
9 exclusively on the evidence you have heard from the
10 witness stand and the exhibits that have been
11 admitted. And viewing those things or getting outside
12 input after days of hearing evidence may lead you to
13 not be able to be certain of where your recollection
14 of certain information or evidence comes from.

15 You will have your notes and your
16 recollections of what transpired. And we will go from
17 there.

18 So I thank you again for coming in this
19 morning and for your attention throughout the
20 evidentiary phase. I trust this will leave you alert
21 and refreshed tomorrow morning.

22 Thank you very much.

23 (Whereupon, the following proceedings were
24 had in open court and outside the presence of the
25 jury.)

1 **THE COURT:** Do we have further proceedings
2 outside the presence of the jury, Mr. Jackley?

3 **MR. JACKLEY:** Nothing further, Your Honor.

4 **THE COURT:** Mr. Murphy?

5 **MR. MURPHY:** Your Honor, I would renew the
6 motion I made yesterday for judgment of acquittal on
7 both counts incorporating the same arguments I made
8 yesterday, asking the Court to reconsider its
9 decision.

10 **THE COURT:** And I recall those. I frankly
11 thought about them at some length over the evening
12 time. I am going to keep the same ruling that I made
13 yesterday.

14 **MR. JACKLEY:** Thank you, Your Honor.

15 **THE COURT:** Okay.

16 So ladies and gentlemen, we are in recess.
17 Please leave our jurors the opportunity to get the
18 rest of the food out of the jury room and out of the
19 building. I can't keep you here but I would ask your
20 cooperation.

21 Thank you.

22 **MR. MURPHY:** Judge, what -- when do we need
23 to meet?

24 **THE COURT:** Why don't you give me until
25 ten o'clock and then we'll try and hassle out jury

1 instructions and go from there.

2 Thank you.

3 (Whereupon, the proceedings in this matter
4 were then concluded.)

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1 STATE OF SOUTH DAKOTA)
 2 COUNTY OF PENNINGTON) SS. CERTIFICATE

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I, TINA RAE PRUSS, Official Court Reporter and Notary Public in and for the County of Pennington, State of South Dakota,

DO HEREBY CERTIFY that the foregoing transcript is a true and accurate transcript of the questions asked, the testimony given, and of the proceedings had.

I FURTHER CERTIFY that I am not of kin or in any way associated with any of the parties to said cause of action, or their counsel; and that I am not interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this 3rd day of May, 2011.

COPY

Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 Pennington County, South Dakota
 My Commission expires: 10-04-2012

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
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Plaintiff,)
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VS.)
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JOHN GRAHAM,)
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)
Defendant.)

TRANSCRIPT OF
JURY TRIAL

VOLUME 9 OF 10

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
DECEMBER 9, 2010

COPY

1 * * A P P E A R A N C E S * *

2 MR. MARTY JACKLEY
3 Attorney General
4 MR. ROD OSWALD
5 Assistant Attorney General
6 MR. ROBERT MANDEL
7 Assistant U.S. Attorney
8 Representing the State of South Dakota
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* * I N D E X * *

14 WITNESS (ES) : DIRECT CROSS REDIRECT RECROSS

15 (None.)

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21 EXHIBITS: OFFERED/ADMITTED

22 (None.)

23

24

25

1 * * P R O C E E D I N G S * *

2 (Whereupon, the following proceedings were
3 had in open court and outside the presence of the
4 jury.)

5 **THE COURT:** Folks, at this time is a very
6 brief hearing outside the presence of the jury while
7 we put on the record the settling of jury
8 instructions.

9 Counsel, you have both been provided with
10 copies of the instructions that I prepared as a final
11 set of instructions for the jury. This is the time to
12 make such objections as you find to those
13 instructions.

14 Mr. Jackley?

15 **MR. JACKLEY:** The state has no objection,
16 Your Honor.

17 **THE COURT:** Mr. Murphy?

18 **MR. MURPHY:** The state has no -- I mean, the
19 defense has no objections, Your Honor.

20 **THE COURT:** All right.

21 Let's -- we're settled with these. We'll
22 call the jury in and we will proceed with the closing
23 arguments.

24 (Off the record.)

25 **THE COURT:** Ladies and gentlemen, we're in

1 the final stages of the trial.

2 Counsel, are you both satisfied this is the
3 jury?

4 **MR. MURPHY:** Yes, Your Honor.

5 **MR. JACKLEY:** Yes, Your Honor.

6 **THE COURT:** The first part of this is for me
7 to read the instructions of the court governing the
8 law and the definitions which will control this case
9 as you determine the facts.

10 I read them to you now though I will send
11 copies to the jury room for you, to give you an
12 outline of those principles, definitions, et cetera,
13 to prepare you to listen more appropriately to the
14 closing arguments of both the state, Mr. Jackley
15 Mr. Oswald, and the defense through Mr. Murphy.

16 When I am finished with this the state will
17 make its closing argument in chief; Mr. Murphy will
18 then present his; and then Mr. Jackley will make a
19 final rebuttal on the part of the state.

20 At that point, you will be given the case for
21 deliberation. I will at that point remove the two
22 jurors who sit as alternates from the case and they
23 will be excused. The remaining 12 will then consider
24 the evidence under these instructions and resolve the
25 issues in this case.

1 (Whereupon, the jury instructions were read
2 aloud in open court.)

3 **THE COURT:** I would advise you, if you send
4 questions for purposes of the Court, or when you have
5 reached a verdict, it may take a spell to gather
6 counsel and to consider the question or to be prepared
7 to receive your verdict.

8 Having said that, Mr. Jackley -- Mr. Oswald,
9 are you prepared to give your closing argument?

10 **MR. JACKLEY:** Your Honor, may Mr. Murphy and
11 I approach for just one second, please?

12 **THE COURT:** Yes.

13 (A discussion was held at the bench.)

14 **MR. JACKLEY:** On instruction number three
15 with kidnapping, I think this needs to be or instead
16 of and. I am requesting that the Court make that
17 change. I am not asking it to be read again but in
18 the instructions that go to the jury that -- I believe
19 we don't have -- the state does not have to show all
20 of these items of kidnapping. We just have to show
21 one per the statute.

22 **THE COURT:** Yeah.

23 **MR. MURPHY:** No objection.

24 **THE COURT:** I agree with that.

25 **MR. JACKLEY:** It's here, Judge --

1 **THE COURT:** I will make a statement to the
2 jury now. I found a couple typos in the instructions
3 while I was reading and I suggest we make corrections
4 before we send the copies back to the jurors. I
5 was -- will say that I read them and it said an and
6 when, in fact, it should be or.

7 **MR. MURPHY:** Tina wasn't keeping a record of
8 it so we don't need to worry about the record because
9 the ones they get will be the right ones.

10 **THE COURT:** Yeah.

11 (Whereupon, the discussion held at the bench
12 was then concluded.)

13 **THE COURT:** Ladies and gentlemen, counsel
14 have asked me to make something clear in an
15 instruction, and it pertains to the elements of
16 kidnapping where I talked about seizing, confining,
17 kidnapping, abducting, and carrying away. Between
18 abduct and carry away, the and should be replaced by
19 an or. Making them one or the other being sufficient.
20 And I will make that correction in the copies that I
21 give you before I send them out to you.

22 Thank you, counsel.

23 At this stage, Mr. Oswald, if you are ready
24 to give the argument, you may proceed.

25 **MR. OSWALD:** Thank you.

1 Counsel, ladies and gentlemen of the jury,
2 John Graham and Theda Clarke and others, Arlo Looking
3 Cloud, are responsible for what happened to Anna Mae.
4 I can't tell you who did the order -- who made that
5 order. Can't tell you that.

6 But I can tell you Anna Mae was suspected of
7 being an informant, and a call was made to Denver from
8 Rapid City ordering her from there back to Rapid City
9 to stand -- to answer to charges of being an
10 informant.

11 Picture this woman in your mind, if you
12 would. Standing on a hilltop being marched to a
13 cliff, a petite young woman, only seconds to live.
14 Her knees probably weak with fear. Her surroundings
15 probably blinded by fright. And what does she do?
16 She begins to pray because she knows her existence is
17 about over. What words she used in her Native tongue
18 we will never know.

19 Now see in slow motion this man, grabbing
20 that pistol. Circling the grip on that gun. Holding
21 it up to a head. Boom. And it's over. She tumbles
22 down the cliff.

23 John Graham was in it from the start and he
24 was in it to the end. He was, at the very least,
25 folks, an aider and abettor on both counts of murder.

1 Let's just look at this case from the scene
2 of the crime. Just -- take in your mind and eliminate
3 testimony right now of Rapid City, WKLD.OC. Eliminate
4 testimony of anything. Consider the scene of the
5 crime.

6 If you were responsible for solving this
7 crime in 1976 when she was found, how would you begin
8 to analyze it?

9 We have a young woman whose clothing is
10 intact; so that probably suggests not a sexual motive
11 in this crime. We probably -- we have from the
12 autopsy -- we know it was a bullet to the back of the
13 head. She was decomposing and we know that it was a
14 32-caliber handgun and she was shot from behind. In
15 close contact. It's likely from this fact alone that
16 it wasn't a fight or some type of a struggle or combat
17 from that fact alone.

18 The killer had to consciously think about
19 pointing the gun at her head and pulling the trigger.
20 So immediately, logically, you have an element of
21 premeditation.

22 Now, the killer was behind or beside her.
23 And the bullet wound was from the right side and to
24 the left. As you can see, from the right side and to
25 the left.

1 There is a high probability the shooter was
2 right handed. You cannot tell much from the angle of
3 the bullet, of course, except later on in testimony,
4 she was speaking in her Native tongue and she probably
5 had her head bowed.

6 But because of the blood evidence that seeped
7 from her head, we can figure that she was shot at the
8 scene and not --

9 **MR. MURPHY:** Objection, Your Honor. This is
10 facts not in evidence.

11 **THE COURT:** That's true.

12 **MR. OSWALD:** Logical inferences, Your Honor,
13 from the scene.

14 **THE COURT:** We had evidence to that?

15 **MR. OSWALD:** It's logical inferences from the
16 scene of the crime and photos.

17 **THE COURT:** I think you are entitled to make
18 your argument.

19 The objection is overruled.

20 **MR. OSWALD:** Because of the blood evidence,
21 folks, she was probably not carried there, so she
22 probably walked to the cliff.

23 Also, no evidence of any quantity of blood
24 around except around her head where the blood drained
25 from her lifeless body on the frozen hardpan.

1 Now, Anna Mae was left to decompose there
2 without regard for any dignity. This suggests the
3 killers were in a hurry, but clever enough to pick
4 up -- and pick a ravine-type of burial site for her.

5 This also suggests that the killers had
6 little regard for this human being. The manner of
7 death, the location, the mechanism of death strongly
8 suggests hostile, contemptuous-like feelings towards
9 this woman.

10 This also suggests that it was planned out,
11 premeditated because if this killing was done in the
12 heat of passion, it's an unusual spot to march someone
13 to a cliff over some kind of a jealousy argument of
14 some sort.

15 So one could guess from the scene of the
16 crime that it could have been someone or a group that
17 would feel no sympathy or respect towards this human
18 being.

19 Anna Mae was wrongly accused of being an
20 informant and was sent to eternity because of it.

21 Now, if you just took this crime scene
22 analysis, folks, and held it up to the light, and if
23 you meshed Looking Cloud's testimony about how it
24 happened, it's pretty close. There were no missing
25 person reports on Anna Mae. There was a warrant, but

1 no missing person reports. Only one person tried
2 calling the police in Denver.

3 If Candy Hamilton would have told her story,
4 folks, the FBI could have been on the trail of these
5 WKLDOC people like Thelma Rios and the others. Had
6 Angie told immediately what she knew to the FBI it --
7 they would have been led to Denver, probably to John
8 Graham, Arlo Looking Cloud, Theda Clarke years ago.
9 Justice would have been served years ago.

10 Silence, though, from these people occurred
11 because of some blind loyalty to an organization whose
12 corruption masked itself in principle ideology.
13 Perhaps more painful to Anna Mae than the bullet was
14 the betrayal of the people that she embraced.

15 I'm going to talk about certain concepts,
16 folks, if I can now, and then I will talk about
17 individual witnesses. The first concept I want to
18 talk about is the informant status. Angie Begay heard
19 that she was an informant because of that phone call.
20 Leonard Peltier felt she knew too much and put a gun
21 to her head in Farmington, New Mexico a few months
22 earlier.

23 Anna Mae also heard in that motor home, that
24 agent begged for his life and I shot him anyway. Such
25 callousness, folks, about human life would play out,

1 again, six months later with Anna Mae. After all, if
2 you really think about it, Peltier's statement in the
3 wrong hands would have sunk him.

4 Kamook knew of the accusations also, folks,
5 of her being an informant. Being a perceived
6 informant against an organization that has secrets to
7 hide would probably get someone killed.

8 Informant status, folks, equals motive. The
9 killing was committed by a group of persons, whether
10 actually present or not. Motivated to keep their
11 secrets hidden. Anna Mae could have exposed bomb
12 making, unsolved killings of FBI agents, and the
13 whereabouts of fugitives. She just knew too much.

14 Two independent witnesses, folks, saw this is
15 what we do to informants (indicating). The throat
16 slashing in that Denver house as to how they are going
17 to deal with informants.

18 Finally, a judge in Pierre who let her out on
19 bail helped sink Anna Mae as a perceived informant.

20 Kidnapping, folks. Anna Mae was taken
21 against her will to Rapid City. If I leave here, you
22 will never see me alive again. Remember those words?
23 Tied up and hauled in the back of a Pinto hatchback.
24 Arlo Looking Cloud offered this information years ago.
25 It's a factor that implicates himself as much as the

1 others.

2 If you ignore Looking Cloud, and let's --
3 let's ignore that for a minute. Let's assume he plead
4 the fifth. Didn't testify for a minute. This
5 evidence is still overwhelming that Anna Mae was
6 kidnapped from Denver.

7 Angie Begay Janis's phone call, George Palfy,
8 Troy Lynn -- we can take all of their testimony, twist
9 it, turn it upside down. Do what you want, but
10 scrutinize it, and there is one piece of Troy Lynn's
11 testimony that stands out as probably the biggest
12 circumstantial, logical inference of a kidnapping.
13 And that is Troy Lynn tried to call the police. One
14 doesn't call the police because you think you are
15 going on vacation for a ride in a car. Troy Lynn
16 knew. George Palfy knew. Angie Janis knew. She was
17 tied up. My goodness sakes.

18 Now, not only the call, but John Graham
19 showed a consciousness of guilt when he denied
20 everything to Ecoffey and Pourier in 1994. He told
21 them, finally, okay, okay, I drove her from Denver to
22 the reservation. At the time he said this Anna Mae
23 had been dead for about 19 years. And if he actually
24 thought it was an innocent trip, don't you come with
25 it to Ecoffey and Pourier?

1 How about Anna Mae crying at WKLDLOC. And
2 Candy Hamilton saying to a distraught Anna Mae, come
3 to Oglala. You will be safe there. People care for
4 you. Finally, though, Candy said, it appeared that
5 Anna Mae was not free to leave WKLDLOC.

6 Cleo Marshall Gates seeing a quiet Anna Mae
7 being escorted and led to a chair in her house. No
8 one has said Anna Mae jumped in the car in Denver and
9 wanted to go except this guy here. He's the only one
10 to have implied that in 1994.

11 Sure, she told Troy Lynn and Palfy -- I am
12 talking about Anna Mae -- she told those two to back
13 off, the same as any of us would do to protect or save
14 some of our children or our friends or loved ones.
15 You know that story. You know how Troy Lynn testified
16 to that.

17 Troy Lynn testified as to the flanking as
18 Anna Mae was led away. Theda, Anna Mae, and John
19 Graham in the hallway. Theda said, get out of the
20 F'ing way. Folks, this is an abduction, a seizing,
21 and a carrying away of a human being. Carrying away
22 doesn't mean lifting up and hauling like a
23 wheelbarrow. Carrying away means she was kidnapped,
24 folks.

25 I will remind you, the burden of proof is on

1 the state, but in order for you to find reasonable
2 doubt of a kidnapping -- if you are going to find a
3 reasonable doubt that that took place, you will have
4 to find Troy Lynn is lying, Angie Begay Janis is
5 lying, George Palfy is lying; plus you then have to
6 completely ignore the evidence of motive.

7 And then you have to ignore our crime scene
8 analysis that we just walked through.

9 And then if you want, now, throw Looking
10 Cloud into this mix. Even though others -- others saw
11 the tying, besides just Arlo, that evidence is
12 corroborated, folks. Not just him.

13 Finally, to find reasonable doubt to a
14 kidnapping, folks, you will also have to ignore John
15 Graham's statement. I'm ready to leave this place and
16 I'll probably spend the rest of my life in jail.

17 I want to talk about the death. There is an
18 instruction called the *corpus delicti*. You can find
19 beyond a reasonable doubt that Anna Mae is dead,
20 folks, by a bullet wound to her head. That's clear.

21 So even if one of you thinks that maybe Theda
22 did the shooting, or Arlo did the shooting, you can
23 still find John Graham guilty of murder while in the
24 commission of a felony. John Graham and Theda were
25 the active participants in the captivity of Anna Mae

1 and she died during the continued kidnapping across
2 state and county lines.

3 Now, there is no doubt that the actual
4 gunshot was in Jackson County. But let me read that
5 venue statute again to you. Venue is the county or
6 counties in which a criminal case must be charged and
7 tried. When a crime, or any element essential to that
8 crime, is committed in more than one county, or the
9 acts or effects of the acts essential to the crime are
10 committed in more than one county, venue is properly
11 placed in any of those counties. Any of those
12 counties. The acts or effects started from Denver and
13 led all the way through, folks.

14 This instruction is important to note because
15 no one should be able to get away with their crimes
16 because of county lines, folks. The indictment
17 charges murder while in the commission of a felony in
18 Pennington County, but Anna Mae was kidnapped in
19 Denver, brought to Rapid City, and her captivity
20 continued.

21 So the same goes for premeditated murder.
22 Although the actual shot, folks, came in Jackson
23 County on this horrific act, it all began in Denver
24 and it carried through each county Anna Mae was hauled
25 through.

1 Regarding the dates of the capture and
2 execution, the jury instruction talks about on or
3 about. And I'd like to read that to you, folks. The
4 indictment alleges the offenses were committed on or
5 about certain dates. The proof need not establish
6 with certainty the exact date of the offenses charged.
7 It is sufficient if the evidence establishes beyond a
8 reasonable doubt the offenses were committed on a date
9 reasonably near the date alleged.

10 The law factors in, folks, human memory.
11 Especially over 35 years. And it does not intend for
12 a jury to find a technicality so that Anna Mae's final
13 death -- her final breath goes without justice.

14 The note. Arlo Looking Cloud saw a note
15 passed. There is corroborative evidence from Cleo
16 about that. This wasn't any kind of note, folks. It
17 was the death warrant.

18 I can't tell you who wrote that note, but
19 from the analysis we can narrow it down. It did not
20 come from Denver because Anna Mae had not yet been
21 found, as I call it, guilty by the WKLDOC people of
22 being an informant. And it did not come from the
23 Marshall house because it was already in existence.

24 That leaves two places, folks. It came from
25 either WKLDOC or Bill Means' residence in Rosebud.

1 Understand that the call was made to have Anna Mae
2 brought to Rapid City, not to Bill Means' house.

3 Theda and John Graham were in it from the
4 start. Arlo was the undisputed outsider so it is
5 logical and commonsensical for Arlo to be told to wait
6 outside at Kills Means' house just like he said.

7 Dick Marshall took three people into his
8 bedroom. Two young men who he didn't know. They show
9 up and go into his bedroom with the door closed, and a
10 note was being passed around. Think about this on
11 your own, folks. Just think about that. Any time
12 someone brings a woman into your house and the three
13 go into the bedroom, it's not certainly a plan for a
14 Christmas party. Not under these circumstances.

15 The gun. The second Anna Mae's life was
16 stolen from her, it is common sense that if you were
17 the outsider, perhaps others would want -- would not
18 want any witnesses. Let's analyze that gun thing at
19 the cliff. Arlo asks for the gun immediately and
20 fires off some rounds emptying it.

21 How would he know there were more rounds in
22 there? Because he knew where the ammunition came
23 from. Plus in his mind, folks, this was the only gun.
24 Otherwise, why stop at Dick Marshall's? That one
25 incident of emptying the gun tells you everything that

1 you need to know about the ammo, the gun, and the
2 killers.

3 Remarkably eerie are John Graham's words to
4 Robert Ecoffey and Mitchell Pourier in 1994, I'm ready
5 to leave this place. I will spend the rest of my life
6 in jail.

7 Wouldn't normal human beings say to Ecoffey
8 and Pourier, hey, what are you trying to say here? I
9 gave her an innocent ride to Rapid City. And then to
10 the reservation. That's it.

11 This man claims he was just along for the
12 ride and he dropped her off at a safe house. If
13 that's true, how is it that Arlo Looking Cloud, Theda
14 and this man, John Graham, got back to Denver in the
15 same car at the same time?

16 Who are the two people that are in this thick
17 and thin?

18 When Arlo showed up at Troy Lynn's, which two
19 persons were watching Anna Mae already?

20 Who ordered her tied up and then who tied her
21 up?

22 Whose girlfriend had connections enough to
23 get the call to bring Anna Mae back to Rapid City?

24 John Graham suggested that he was helping her
25 get away from the FBI in Denver and in Rapid City, and

1 Anna Mae was directing this trip. It's a stupid
2 notion. Just plain stupid. It's not based upon
3 anything other than him wanting to get away with
4 murder.

5 At Troy Lynn's, with all the people present
6 and the throat slashing, who was not present at that
7 time? Arlo Looking Cloud.

8 Theda Clarke and John Graham were there. I'm
9 not trying to say this to defend Arlo's honor, folks.
10 Rather, just illustrates just one more example of who
11 was in this from the beginning. You can find this man
12 guilty without Arlo's testimony.

13 Let me talk about Arlo Looking Cloud's
14 evidence. Of course, the defense is, once a person
15 has lied then they are a liar for life. Let me get
16 this straight, folks. The defense claims Arlo is
17 telling lies about this whole incident. But it's the
18 same telling that put Arlo himself behind bars. He
19 did not make up John Graham's involvement years and
20 years and years ago for a get-out-of-jail-free card.

21 Do you think Arlo's so quick that he has to
22 think, you know what, I am going to need a gimmick.
23 Some kind of gimmick. So I am going to have to kind
24 of cook up some story so if I go down for this, if I
25 get convicted, then I am going to have to -- maybe the

1 government will give me some kind of deal, and I can
2 rat somebody else off. Who shall I pick? Oh, let's
3 just pick this man? No. That was a gimmick -- that's
4 not a gimmick he thought of. He has been talking
5 about this, who was in that car, who shot who, all the
6 time.

7 How many people that participates in the
8 murder of a mother call the daughter and tell her
9 about the mother's death?

10 How many people that participated in the
11 murder of a mother tell the friends about the crime?

12 Remember, this is a man who turned his head
13 and looked out the window and had tears in his eyes
14 when recalling the incident to Kamook.

15 Folks, the wagon of justice is loaded with
16 lies, it's half truths and deceit, and it's being
17 pulled hard from the shadows into the light to expose
18 a senseless killing of a mother.

19 Robert Ecoffey. I would like to talk about
20 that. He devoted many years to solving this case. No
21 one dare say this verdict is a rush to judgment. Your
22 verdict encompasses years of uncovering reluctance,
23 fear, and pure lies.

24 Robert Ecoffey and others exposed this murder
25 by unmasking many people whose selfishness presided

1 over truth; by people whose self-interest overrode
2 sensibility for a young lady whose body was left to
3 rot. Such dehumanization.

4 Robert Ecoffey talked with John Graham and
5 was able to get one of the closest statements to
6 criminal culpability in this case, I'm ready to leave
7 this place. I will probably spend the rest of my life
8 in jail. John Graham told Robert and Mitch after much
9 discussion that he took Anna Mae to the reservation.

10 Did John Graham at that time forget about
11 Rapid City? The WKLDOD area? Dick Marshall's place
12 when talking with Bob and when he talked to the press
13 that we showed you?

14 Or was it not offered to Ecoffey and Pourier
15 to conceal his guilt?

16 His guilt has been proven beyond a reasonable
17 doubt as to aiding and abetting, folks, in a
18 premeditated murder. His guilt has also been proven
19 and established beyond any doubt to felony murder.

20 John Graham, with legs trembling and watery
21 eyes, with his admissions and obvious omissions, told
22 Bob and Mitch everything they needed to know.

23 This is a man who committed a heinous act and
24 has gotten away with it for many years. Now he wants
25 the 12 of you to reward him once and for all for his

1 slide past the alter of truth.

2 We've talked about the dates and the county
3 lines.

4 I would like to discuss the elements, folks.
5 The elements of kidnapping are that John Graham had
6 the specific intent to seize, abduct, or carry away
7 Anna Mae. This does not mean he ordered it or that he
8 was in charge. Doesn't mean that. This means he got
9 involved in a criminal venture of kidnapping Anna Mae
10 purposefully. He not only was an aider and abettor,
11 but he was one of the principals to kidnapping her
12 from Denver until she dropped to her death on that
13 cliff alone and forever.

14 Look at this paragraph. While Mr. Graham
15 must be shown to specifically intend to kidnap Anna
16 Mae, he may be found guilty of murder while in the
17 commission of a felony such as kidnapping even if the
18 killing was unintentional, accidental, or negligent.
19 If any of you struggle with John Graham as the actual
20 shooter, he is still an aider and abettor, folks.
21 That's the bottom line, too.

22 The state does not have to prove John Graham
23 personally killed Anna Mae while in the commission of
24 a felony. We only have to prove the kidnapping and
25 her death regardless by whose hand it was caused by.

1 Now, the jury instruction for premeditated
2 murder. Understand, folks, there is no time element
3 to establish premeditation. It can happen in a flash
4 or be months in planning. Grabbing a gun, consciously
5 pointing a gun at a person, not just at a body part,
6 an arm or a leg, but at the back of the head. The
7 vital spot that will ensure her silence forever. And
8 then pulling the trigger while somebody is praying is
9 premeditated murder.

10 The state does not have to prove who gave
11 that order, folks, who gave that gun, or who had sex
12 with whom. Who was -- or who was in this conspiracy
13 complete top to bottom. We don't have to prove that
14 today.

15 The independent evidence from the crime scene
16 should be overwhelming, but it's also corroborated and
17 has corroborated that with what others said.

18 Let's assume that one of you may think that
19 Theda or Arlo did the actual shot. He can still be
20 guilty of premeditated murder as an aider and abettor.
21 The captain of the ship, folks, and the navigator will
22 both sink in the storm.

23 Find him guilty on both counts, and trust
24 this judge to do his job; not to consider the subject
25 of penalty of punishment.

1 I would like to talk about corroboration.
2 The accomplice jury instruction requires you to have
3 independent corroborative evidence of the killing of
4 Anna Mae other than just Arlo. We already talked
5 about the crime scene and how it lines up to this
6 testimony. But here are some points I wanted to bring
7 out for you. The forensics of the 32-caliber bullet,
8 the head wound, x-rays, Dr. Peterson's testimony of a
9 contact wound. John Graham being at Marshall's just
10 prior to the killing. John Graham being an active
11 participant the whole time. His statements to Bob and
12 Mitch in Canada. His one statement alone should be
13 sufficient for corroboration and I have already
14 repeated that twice.

15 Lastly, the man who conveniently just
16 happened to store his guns at his parents' house, Dick
17 Marshall. You just judge that man's credibility. You
18 heard him and you saw him on that witness chair. For
19 35 years, folks, the coils of justice have been wound
20 very tight. Now is the time. This is not a difficult
21 case, folks. The threshold of evidence has been met,
22 and then some. Arlo Looking Cloud has been
23 corroborated, but still, this case has been shown
24 beyond a reasonable doubt with or without him.

25 Only you folks can establish accountability.

1 You have to shine the light of truth on the darkness
2 that is now Anna Mae's. You have to get this right,
3 folks.

4 This is the man who years ago -- and, again,
5 I am not defending his honor, folks. Don't mistake
6 that. But he gives it up. He gives it up. And he
7 stands and he tells them what took place many years
8 ago. Yes, criminal convictions, yes, he does. Look
9 at that proffer letter, folks, from the federal
10 government to him. It's not a get-out-of-jail-free
11 card, folks.

12 And there is no motive -- no motive to -- for
13 Arlo Looking Cloud against this man. Arlo Looking
14 Cloud threw Theda in there, too, and that's
15 exceptionally clear. There is no motive. Think about
16 that. This is the same story that put himself behind
17 bars. His is a crime that has escaped justice for
18 many, many, many years and it's not going to happen
19 any more.

20 Thank you.

21 Thank you, Judge.

22 **THE COURT:** Mr. Murphy?

23 **MR. MURPHY:** Thank you, Your Honor.

24 Good morning, ladies and gentlemen. I want
25 to start from both my perspective and my client's

1 perspective by saying thank you. You folks, whether
2 voluntarily or not, inherited the most difficult job
3 assigned to civilians in this democracy. And whether
4 you volunteered or not, it's a job that requires
5 incredible courage because you have accepted the
6 responsibility of sitting in judgment of another
7 person. And some people say, well, if you don't
8 volunteer, it's not a courageous effort.

9 But when our men and women go across the gulf
10 and go fight in battles overseas on behalf of our
11 country, the assessment of their courage isn't based
12 on whether they were drafted or enlisted, it's
13 assessed based on the acceptance of responsibility
14 they made; what things they accepted to do; what
15 responsibilities they agreed to take upon themselves.

16 November 30, Tuesday of last week, about
17 four o'clock, each of you stood up, raised your right
18 hand and you took the juror's oath. And when you did
19 that, that was the beginning of this adventure and it
20 was the beginning of your acceptance of the
21 responsibility the jurors have in this system.

22 The responsibilities you have are not easy.
23 I would never make light of the responsibilities you
24 have. You are being asked to sit in judgment of a man
25 who has been accused of murder. The judge's

1 instructions outline for you some of your
2 responsibilities.

3 First and foremost to put aside sympathy and
4 bias. You heard Mr. Oswald just a few moments ago
5 repeatedly use the phrase mother, and we talked about
6 that in jury selection. How they would try to get you
7 sympathetic to look through the evidence through that
8 window, through those glasses, so that you would rush
9 to judgment against my client, John. He repeatedly
10 used that phrase, mother. Why? Of course, to appeal
11 to your sense of sympathy which the judge has told you
12 is not proper.

13 The other responsibility the judge outlined
14 for you in the instructions is to critically examine
15 the facts, and that is going to be so important
16 through this case because as you are going to hear
17 later on, there is a huge difference between a theory
18 and a fact.

19 So I am going to start with one of the jury
20 instructions that goes to the issue of how you
21 critically examine the facts. I apologize, folks. I
22 am new to this technology. I am going to read
23 instruction number five. Page 16 of your packet. The
24 highlighted section. If any member of the jury has a
25 reasonable doubt that Mr. Graham committed the offense

1 charged or a reasonable doubt as to any single fact or
2 element necessary to constitute the offense charged in
3 a particular count, then it is that juror's duty to
4 give him the benefit of the doubt and vote for a
5 verdict of not guilty on that count.

6 It's what I mean when I say you have accepted
7 the responsibility of engaging in a critical
8 examination of each and every fact. Because as I want
9 to talk to you in a bit, what you heard from the
10 witness stand is not -- does not make it a fact. You
11 have to decide what is a fact. There is fluff, there
12 is facts, there is speculation, there is all sorts of
13 stuff. And you have to make that decision. What do I
14 really believe. What has the state really proven to
15 me, and that's what I am talking about in regard to
16 the critical examination.

17 The other assignment or responsibility you
18 accepted was to apply the beyond a reasonable doubt
19 standard. And as we talked about in jury selection,
20 that's not how we conduct our day-to-day lives. We
21 don't make assessments on a day-to-day basis by
22 demanding proof beyond a reasonable doubt. We operate
23 on hunches and bias and speculation.

24 But we're not in day-to-day life here. We're
25 in a trial. And this man, John Graham, is accused of

1 murder. We have to up the ante. Elevate our
2 analysis. Require at every juncture that the state
3 proves its case beyond a reasonable doubt. That
4 applies to elements, and it applies to facts.

5 One of the toughest responsibilities you have
6 is being told that it is your duty to vote not guilty
7 if the state hasn't met its burden. You may feel
8 and -- Mr. Oswald clearly wanted you to feel -- that
9 you would be letting down the system or the memory of
10 Annie Mae if you didn't vote guilty.

11 Look at the judge's instructions on
12 reasonable doubt. Right up there. The word duty. It
13 is your duty and you honor the duty and you honor the
14 oath you took when you force the state to prove its
15 case beyond a reasonable doubt. You are not letting
16 down the system. You are not letting down anybody.
17 You are following your oath and adopting the duty that
18 you agreed to take on.

19 I mention the emphasis on facts, not on
20 theories. There are or there is a huge difference
21 between facts and theories. Theories can be
22 interesting, they can be intriguing, they can be
23 compelling. But unless -- in a criminal trial, unless
24 a theory is supported every step of the way by facts
25 that you believe have been proven beyond a reasonable

1 doubt, a theory means nothing.

2 The theory that the state supports or puts
3 forward in the case -- or the many theories that you
4 heard about over the last six or seven days of
5 testimony, were not supported by facts that were
6 proven beyond a reasonable doubt.

7 Now, one of the things that you have to
8 consider in this case -- part of your job as a juror
9 is to consider the elements of the offense or the
10 offenses. But I want to say or suggest to you that
11 you have to take a step back from the elements. And
12 this goes to what we heard from the witness stand.

13 Before you can consider whether the state has
14 proven each and every element of the crimes beyond a
15 reasonable doubt, you have to make that critical
16 assessment of what really was proven from the witness
17 stand.

18 What did they prove out that was true that
19 you can say you wouldn't pause or hesitate to act upon
20 it?

21 What came from that witness stand that was so
22 rock solid I don't need to check on it?

23 I submit to you very little over the last six
24 days of testimony that came from that witness stand is
25 actually a fact. You have heard from witness after

1 witness after witness. Witnesses who lied, witnesses
2 who could not keep their stories straight when
3 retelling it over the years, and not on little
4 details, on major details. Witnesses that claim to be
5 in the same little apartment observing the same event
6 at the same time and cannot keep their stories
7 straight. They contradicted each other over and over
8 again.

9 Witnesses that had financial bias, who were
10 interested in becoming celebrities or heroes. That is
11 what you heard from the witness stand. That was the
12 quality of evidence that you heard over and over
13 again.

14 I ask you to ask yourself, if the state's
15 witnesses really observed these events, were really
16 there perceiving the events as they happened, then why
17 can't any one of them keep their story straight from
18 month to month. Because as we heard, many of these
19 witnesses have given the statements 13, 14 times.
20 Some of it going back 20 years, much closer to the
21 events. On major details they could not keep it
22 straight. And they claim to be two or three of them
23 in the same room and they are contradicting each other
24 on huge matters such as who was present and when
25 things happened. If they had really perceived the

1 events they claimed to have perceived, they wouldn't
2 have had so much trouble retelling the stories over
3 and over again.

4 As a juror being asked to convict my client
5 of murder, I would -- I would hope that you would have
6 been presented with better quality evidence. Before
7 you are asked to call somebody a murderer, you deserve
8 better quality evidence than what was presented here.
9 My client, somebody who has been accused of murder and
10 of rape, he deserves better quality evidence.

11 This case is 35 years old. And in 35 years,
12 they have tried this case twice before and that's
13 still the quality of evidence that they can produce.
14 Poor quality, inconsistent, biased, contradictory
15 evidence.

16 I want to talk to you about the rape
17 allegation. Mr. Jackley, in his opening statement,
18 said he was going to prove to you beyond a reasonable
19 doubt that my client raped Anna Mae Aquash.

20 **MR. JACKLEY:** Objection, Your Honor.
21 Misstatement of the record.

22 **THE COURT:** I am not in a position to address
23 that as to -- I have no recollection of what was
24 addressed in the opening statement. The jury will
25 have to recall that on their own.

1 **MR. MURPHY:** I will tell you it is my
2 recollection that such an accusation was leveled
3 against my client. That is the vilest accusation one
4 can make against a man. An accusation that has been
5 haunting my client since 2008 when Arlo Looking Cloud
6 first made it.

7 You sat through six days of testimony and
8 what did you hear about that accusation? What quality
9 of evidence was presented on that point, which was
10 clearly a point that was brought in for one reason and
11 one reason only, and that reason was to assassinate
12 his character; to get you people to hate him.

13 What was the evidence you heard? You heard
14 Arlo admit that since 1994 he has been telling and
15 retelling this story and even when he was point blank
16 asked by Kamook and Troy Lynn, did you ever see
17 anything funny going on between Annie Mae and John he
18 said no. They played cards, they talked, they looked
19 like friends.

20 But then in 2008, when my client is
21 brought -- when his charges are dismissed in federal
22 court and he's brought over to state court, he's
23 willing to tell the Grand Jury under oath, oh, yeah, I
24 walked by the bedroom where they were inside. The
25 bedroom where he said previously they had been playing

1 cards and I heard sex noises.

2 That is the sum total of the evidence that
3 was presented to you over about 18 witnesses to
4 substantiate an accusation against a man that he raped
5 a woman who he considered his friend. You deserve
6 more and he deserves a hell of a lot more.

7 It was an irresponsible, reckless claim and
8 you should care because it's indicative of how far
9 they will go on just pathetic evidence to try to ruin
10 somebody and to try to assassinate their character so
11 you will have a sense of umbrage and forget your
12 responsibilities to apply the law and demand proof
13 beyond a reasonable doubt. That's one statement by
14 Arlo they say was proof of a rape.

15 Arlo, a man, who as pathetic as he, is
16 somebody who I don't think any of us would ever even
17 have walk their dog much less rest a rape accusation
18 on his words.

19 That's why we have the beyond a reasonable
20 doubt standard. To protect people like John from weak
21 allegations based on horrible quality evidence.

22 That incident, the rape allegation, is not
23 the only instance of unfair play that you heard during
24 the course of this trial. The prayer allegation.

25 Do you recall when Arlo was on the stand and

1 we talked about a time when he was before a Grand
2 Jury? During that time before the Grand Jury, he was
3 asked by Mr. Oswald, was she praying. And Arlo said,
4 no. Point blank. And then I read the highlighted
5 section of this sworn statement. And it's important
6 that it's a sworn statement because one of the
7 instructions that the judge gave you is that prior
8 inconsistent statements break into two groups.
9 Unsworn statements, you can only consider those to
10 show that somebody changed their stories. But if
11 somebody is presented with a sworn statement by them,
12 during a trial, that statement is evidence.

13 So what happened during the trial? I read to
14 Arlo this statement, where, during his Grand Jury
15 testimony, after --

16 Can you see that, folks? Is it focused
17 enough? Thanks.

18 It was after he said, no, she wasn't praying,
19 Mr. Oswald said, now, Arlo, during the break you
20 talked to Marty Jackley about the prayer issue and we
21 asked you then if you wanted to come back and discuss
22 it a little more. Can we discuss it some more? Yes.

23 And then we get to the next page, you
24 discussed a little bit more about you saw or heard
25 some prayer from Anna Mae. Now, does that ring a bell

1 to you now? Answer. She seemed like she was praying.

2 They basically told Arlo what to say. And
3 you saw him on the stand. He is the most pliable guy
4 in the world. He is putty that can be molded. You
5 just wind him up, tell him what you want him to say.
6 And what did Arlo say when I confronted him with that?
7 I said, they told you they wanted the drama and you
8 were willing to give it to them, and he said, yeah.

9 I submit to you that if I engaged in that
10 kind of conduct I'd probably lose my license to
11 practice law. Coaching, putting words in a witness's
12 mouth. They do it during a Grand Jury proceeding.

13 It would be nice if that was the only type of
14 misconduct that we saw in the way they have
15 manipulated witnesses and manipulated evidence. The
16 only John Boy statement. Recall with Kamook and Troy
17 Lynn. Arlo, this drug-addicted, strung-out career
18 criminal, pathological liar, is there in the car and
19 they are interviewing him and Arlo asks one question
20 of Kamook. How many people should I implicate and
21 Kamook's statement, only John Boy. And he asks, only
22 John Boy? And Troy Lynn says, back at John Boy.

23 Kamook, a person at that point who is working
24 for the FBI -- she didn't want to admit that. Let's
25 face it. This is 2000. Between 2000 and 2003, this

1 woman gets paid 50 grand tax free to do ten
2 interviews. Her husband is the U.S. Marshal. The
3 lead investigator. The FBI is listening in on the
4 recording device. She is an FBI employee at this
5 point. They get to throw her 50 grand tax free to do
6 some interviews.

7 And what does she follow up after she tells
8 Arlo, only implicate John Boy, because it's come down
9 pretty much to, uh, like your word against his, you
10 know. And Arlo admitted they had told him that my
11 client, way back then, was making stuff up against
12 him, which wasn't true. My client had never
13 implicated him. We heard the same thing about Dick
14 Marshall. Arlo had been told Dick Marshall is ratting
15 you out. Give us information about him.

16 Arlo had been telling a story from the early
17 90s on and only in 2008 when Dick Marshall became a
18 suspect did suddenly Dick Marshal and the gun appear.
19 They spoonfed him from the get go.

20 I submit to you if I conducted myself with a
21 witness, like Kamook did with Arlo, I would be charged
22 with witness tampering. Telling a witness who to
23 implicate. It's criminal. But that's the quality of
24 the evidence they want you to convict my client for
25 murder on. You should be outraged.

1 This is a 35-year investigation and they want
2 you to find him guilty of two counts of murder when
3 they have FBI employees telling witnesses who to
4 finger.

5 I said before, you can't get to the elements
6 until you find out what is fact, what is fiction.
7 What is fact, what is fluff, because a lot of what we
8 heard is just plain fluff.

9 Let's start in Denver. What happened in
10 Denver? The sources are Troy Lynn, Angie, George
11 Palfy, and Arlo. As I indicated before, and you heard
12 it, they could not keep their stories straight about
13 anything. Whether Annie Mae was in the basement or a
14 bedroom; whether Annie Mae was tied up, whether she
15 wasn't; whether Arlo was there or whether he wasn't;
16 how many people were in the room, what they were
17 doing, et cetera. They couldn't keep that straight at
18 all.

19 And they gave this incredibly inconsistent
20 time line which is relevant because it goes to the
21 celebrity issue or the cottage industry issue. I want
22 you to recall back to George Palfy's testimony and
23 Troy Lynn's testimony. Troy Lynn said a bunch of
24 people showed up all of a sudden and there was a short
25 meeting, 15 to 30 minutes at most. They left. Theda

1 started saying we've got to go now. And that's when
2 she goes -- she, Troy Lynn, goes back and makes some
3 calls. Tries to call the police and makes some other
4 calls. And that's right before they are leaving.

5 And as a side note, that's also when she said
6 she made that dramatic statement, if I leave here
7 you'll never see me alive again.

8 And I don't want to digress too much, but
9 when we were talking with Kamook, she gave -- Troy
10 Lynn gave that huge interview, nine cassettes with
11 Arlo and then ten more cassettes by herself. When she
12 was being interviewed ten years ago, that traumatic
13 statement never made it into the record. That only
14 got added on later as this case has become the cause
15 celeb.

16 But let's go back to Troy Lynn's testimony.
17 Pretty concise short meeting. Calls. They go.

18 George Palfy gets up on the stand. He says,
19 yeah, I got a call. I was at the AIM house. I don't
20 know if she was looking for me, but she said, can you
21 come over. And he said, I did my paperwork. I had to
22 finish up my paperwork which took another half hour,
23 45 minutes. And then I drove across town, which took
24 another 45 minutes. So at the earliest, he got there
25 an hour, more likely an hour and a half, after the

1 call.

2 Why does this timeline mean anything? The
3 reason it means something is because both Troy Lynn
4 and George Palfy claimed to have been in the room when
5 one of the Crusade for Justice guys made this gesture.
6 George Palfy would have arrived an hour after that
7 gesture would have been made. But it's part of the
8 internet gossip mill that we heard about and the
9 fanatical obsession with this case. People --
10 somewhere along the line, that gesture became part of
11 the case and now everybody wants to be part of it.

12 And what do you remember about Troy Lynn?
13 Troy Lynn said over and over again in past statements,
14 she didn't know anything about what the meeting was
15 about. Didn't know what they were talking about.
16 But, then, in more recent statements, she said, oh, my
17 only responsibility, my only contact with this meeting
18 was when I went in, put the coffee tray down, turned
19 around and left, and that's when I saw this gesture.

20 These people all want to get in on the action
21 and they are willing to say things that are not true,
22 could not be true, in order to be part of the case.

23 Troy Lynn indicated -- she was this main
24 witness from Denver -- that the explanation for her
25 inconsistencies and omissions was because she only

1 wanted to give minimal information. This is the same
2 gal who spoke for 19 cassettes to Kamook alone. You
3 probably saw when I was examining her, I had a stack
4 of her prior statements that was about that high. She
5 had talked to investigators. She had talked to
6 anybody who would listen. And her statements make
7 her -- especially her recent statements make her to be
8 quite the hero.

9 That's the kind of testimony you got. It is
10 not unbiased or impartial. It's testimony by people
11 who want to claim to be part of this, and they
12 certainly want to be the heroes in it.

13 I would like you to think of three things we
14 can take away from the Denver testimony. And there is
15 three things that I think come out as consistent.
16 First, the time line, and this is critical. George,
17 Angie, Troy Lynn, and Arlo all put this event
18 happening at the end of November. George was positive
19 about it. Angie was positive about it. And Arlo said
20 the one thing he could say that he could tie to some
21 outside fact was he said, I know it happened during my
22 son's birthday. His mother had taken his son up to
23 Scottsbluff and that's why I was going out to find a
24 drinking buddy and his son was born November 27.

25 The only wiggle room on that was Troy Lynn.

1 She said Annie Mae came on November 24 and she stayed
2 a week, plus or minus a day. At best that brings us
3 up to December 1st or 2nd.

4 Why is this pivotal? It's pivotal because
5 that establishes the trip that my client took with
6 Annie Mae. It happened at the end of November. And
7 what's going to become really crucial in a few moments
8 when we talk about the WKLDLOC meeting. Because as you
9 know, the WKLDLOC meeting was clearly established --
10 whatever that meeting was, I should say, because we
11 didn't hear much about that -- it happened on
12 December 15, plus or minus a day.

13 You have the court documents as exhibits.
14 Candy Hamilton said it happened during Dick Wilson
15 Senior's trial. They have a two-week gap that they
16 have never provided you any evidence on. Two weeks
17 they cannot explain between the end of November and
18 December 15, they have no explanation for events. Why
19 is this pivotal? Because it goes to the safe house
20 issue.

21 I want you to go back to Denver. How did
22 Annie Mae get to Denver? Annie Mae called Evelyn
23 Bordeaux and Ray Handboy and said, I need to get out
24 of here. Take me to -- take me somewhere. She didn't
25 tell them where she was going. She didn't tell them

1 any of the details. She said, pick me up and take me
2 to Denver, and Annie Mae directed it, day by day or
3 mile by mile where they go. They get down to Denver.
4 She says, drop me off at this street corner and she
5 gets out. Ray and Evelyn know nothing about where
6 she's going.

7 What do we know next? Troy Lynn says Theda
8 brought Annie Mae over and left her at my house. So
9 we know Annie Mae went to Denver, made contact with
10 Theda and said, arrange a safe house for me.

11 And what did Troy Lynn say about the plans
12 and the comments Theda made when they dropped Annie
13 Mae off? Keep her safe. Protect her. And Troy Lynn
14 said the plan was Annie Mae would stay at her place
15 for a little while and then move on to the next safe
16 house.

17 As we see winding through the rest of the
18 story later on, that safe house issue comes back over
19 and over again, but what I want you to bring from that
20 is that we have that two-week period missing from when
21 John Graham takes Annie Mae up to Rapid City, and
22 when -- or wherever he took her, Pine Ridge -- and
23 when -- or the village of Oglala -- and when Annie Mae
24 is seen without anybody else and -- without John,
25 without Theda, without Arlo, 15 days later at the

1 WKLDOC hearing. Annie Mae was at a safe house during
2 that period of time.

3 Let's go up to the WKLDOC house in Rapid
4 City. And I'd ask you to keep those two things
5 separate, Rapid City and WKLDOC. Rapid City. Arlo is
6 really the only witness who testified about Rapid
7 City. And what did Arlo say over and over again? He,
8 Annie Mae, and John stayed in an empty apartment all
9 day together. They got there late at night. They
10 next day they stayed in the apartment together. That
11 was when he saw John and Annie Mae playing cards and
12 talking.

13 It's also when he said John was guarding the
14 front door. He was specifically asked by Troy Lynn
15 and Kamook, was John guarding the bedroom? No. He
16 was guarding the front door. I asked him about his
17 prior statement. Why was he guarding the front door?
18 To keep anybody from coming in.

19 At that point, at the end of November, Annie
20 Mae is a fugitive and she's afraid of the FBI or the
21 Marshal service kicking down the door, so her friend
22 John Graham is guarding the front door.

23 They also -- or Arlo also says, and Angie
24 Janis confirmed this. That trip in November that John
25 Graham was on happened in the end of November and they

1 were back in Denver in two days. John Graham took
2 Annie Mae to a safe house. Dropped her off. They
3 were back in Denver in two days. And we don't know
4 what happened between the end of November and
5 December 15, but it clearly did not implicate John
6 Graham.

7 That's where we get to the WKLDLOC house.
8 Candle Hamilton, the only witness who testified,
9 December 15, clear as a bell, she had testified about
10 that under oath multiple times before. She said, I
11 was there. I spent the night with my friend Kathy
12 James, who was a witness at the trial. You will see
13 in the exhibit, December 16, Kathy James was a witness
14 at the Dick Wilson trial.

15 Now, the state tried to get her confused or
16 tried to get her to change her story and say, well,
17 couldn't it have been this deposition? Couldn't you
18 have been at a deposition earlier in December? She
19 said, I am a legal worker. I know the difference
20 between a trial. I asked her, this is a trial, right?
21 Yeah, this is a trial. That's what I went to.

22 She was at the Dick Wilson trial on
23 December 15. And that date is probably established
24 beyond dispute because when Mr. Ecoffey was up on the
25 stand, he admitted that he had tried to cross

1 reference the Dick Wilson Senior trial and the Russell
2 Means trial. The only date those two trials had in
3 common of December 15. It was the last day of the
4 Russ Means trial and the first day of the Dick Wilson
5 trial.

6 What do we know about WKLDOC? What we know
7 about WKLDOC is at that point Annie Mae Aquash was
8 clearly not in anybody's custody. There was clearly
9 no kidnapping there. She meets Candy for coffee in
10 the kitchen three steps from the back door. She is
11 not tied, she is not restrained, she is not -- Candy
12 says, hey, do you want to come back down to Oglala.
13 You know, I know you are running from the feds. You
14 might be safe there. Annie Mae says no. Clearly not
15 kidnapped.

16 Also, Candy Hamilton travels throughout the
17 WKLDOC house that day. Upstairs, downstairs, in the
18 kitchen, et cetera. Says she know -- she knew what
19 John Boy looked like. He wasn't there, Theda wasn't
20 there, Arlo wasn't there.

21 One of the instructions on the elements of
22 felony murder is that if you are to find Mr. Graham
23 guilty of felony murder, you must find that Ms. Aquash
24 died as a result of or while committing kidnapping, or
25 aiding and abetting kidnapping. As a result of or

1 while the kidnapping was going on.

2 This is sometimes called the causal break
3 instruction. The kidnapping has to be the cause of
4 the murder. There has to be a continuous connection
5 between those two events. If there is a break between
6 those two events, felony murder has not occurred; or
7 at least it has not occurred in regard to my client.

8 That is why that two-week break becomes such
9 a huge issue because they haven't proven to you one
10 bit by any evidence where the heck Annie Mae was and
11 what she was doing between the end of November and
12 December 15.

13 My client cannot be guilty of the crime of
14 felony murder. They have to show a continuous
15 transaction; that she was continuously kidnapped and
16 that he was involved in that and they don't have him
17 at WKLD.OC. They don't have him in the State of South
18 Dakota. They don't have an explanation for two weeks
19 that evaporated.

20 The other thing I want to talk about WKLD.OC
21 is this is one of the first good examples or the
22 theory versus fact issue; speculation versus what's
23 reality. What was the -- the only witness about
24 WKLD.OC was Candy Hamilton.

25 The state has tried to allege and

1 speculate -- put forward this theory that some
2 Tribunal occurred at WKLDOC where Annie Mae was found
3 guilty of being an informant or guilty of treason. It
4 would make a great law and order episode, but what
5 facts do they have to support it? Not one fact.

6 Candy Hamilton said she was in the house all
7 day. There were some people having a meeting in the
8 other room. She never heard Annie Mae's name
9 mentioned. She never heard the word informant
10 mentioned. It was -- there was no screaming or
11 anything like that. It was just a meeting in another
12 room.

13 She also said something interesting. She
14 said I was a lady from the south. I was not upper
15 echelon in AIM. I was not somebody who was a leader
16 allowed to be in a decision-making role. Yet they
17 allowed her to have free access to the house and roam
18 around all day when they are supposedly conducting a
19 Tribunal to convict Annie Mae? It was pure
20 speculation. We know nothing about what that meeting
21 was about.

22 Consider all the other options. There are
23 500 criminal trials going on at this point. Annie Mae
24 is up to her ass -- pardon me -- up to her neck in
25 alligators. She's got explosive charges and

1 kidnapping -- or grenade charges and obliterated
2 serial numbers charges out of Pierre at this time.
3 She's on the run. She's a fugitive. That meeting
4 could have been about her legal chances, about her
5 likelihood of going to prison, it could have been
6 about anything. It might not even have been about
7 her. They have speculated and they have concocted
8 this theory, but they have no support for it.

9 So we've got the reasonable doubt established
10 in Rapid City about what the two-week period means.
11 We established that. We go to this issue about
12 whether there was a meeting or not.

13 We also go back to the safe house issue. And
14 the safe house issue is important and it comes up
15 again because we talked about this two weeks that they
16 can't explain, but there was a question put to Troy
17 Lynn Yellow Wood by the state. Why didn't you follow
18 up? If Annie Mae had been taken out of your house and
19 if you were concerned about how safe she was, why
20 didn't you follow up on it? And she said, well, a
21 couple weeks after she left, I got a call from my
22 friend Wilma Blacksmith who lives in Oglala. And she
23 said Annie Mae was fine. She was safe in Oglala.

24 What is Oglala? Oglala is a village on the
25 reservation. That two-week -- that call two weeks

1 later from Wilma to Troy Lynn would have been during
2 this period of time when the state can't explain where
3 Annie Mae was.

4 What did John Graham tell Ecoffey and
5 Pourier? I dropped Annie Mae off at a village on the
6 reservation.

7 Dick and Cleo's house. Let's move it up to
8 the next step. Timing, again, comes into play. What
9 did Cleo say and what did she admit to saying
10 previously under oath? The folks that came to her
11 house came there right after Thanksgiving. Again,
12 helping to establish the two-week gap that the state
13 can't explain between when John was with Annie Mae and
14 when Annie Mae was seen alive at WKLD0C two weeks
15 later.

16 What do we know about what happened at Dick
17 and Cleo's house? What is uncontroverted, not
18 disputed, by either of those witnesses? There was no
19 gun. There were no bullets in that house. The
20 meeting was about -- or the discussion was about,
21 could they leave Annie Mae at Dick and Cleo's house.

22 Why would they have picked Dick and Cleo's
23 house. Well, Dick talked quite a bit about this.
24 Everybody knew their house, Cleo entertained
25 everybody; and they were the kind of people that were

1 AIM supporters that if people needed help, that's
2 where they came.

3 What did Dick and Cleo say was the reason for
4 them to come to the house? It was to leave Annie Mae.
5 It wasn't to kill her. It wasn't to harm her. It
6 wasn't to do anything bad. It was to leave her.

7 And one of the things that I want to go back
8 to is what Cleo actually said at the trial in prior
9 sworn statements she gave. The implication by the
10 state has been that when they went to Dick and Cleo's
11 house they were asking Dick and Cleo to participate in
12 the kidnapping of Annie Mae.

13 I showed Cleo two of her prior sworn
14 statements on this issue. What did he say to you at
15 that time? He being Dick Marshall. He said, they
16 want us to keep her here. What did you understand
17 that to mean? To hide her. This is substantive
18 evidence. This is evidence you can consider because
19 it was under oath.

20 On a previous time, sworn statement, was
21 there some request made of you and Dick that evening
22 by these people? Well, they came in, they went --
23 they came out of the bedroom and called me in the
24 kitchen and he said they want us to keep her here.
25 Who said that? Dick. I said, what for? I don't

1 know. Just keep her here. And I said, no.

2 When John was with Annie Mae in late
3 November, he was helping or trying to help her find a
4 safe house. It didn't work out at Dick and Cleo's but
5 it worked out somewhere else in Oglala, and that's
6 what Wilma Blacksmith's call was all about.

7 Oglala is important because what did Troy
8 Lynn -- or I am sorry -- Candy Hamilton say when she
9 was testifying? Her and Annie Mae used to live right
10 outside of Oglala. Annie Mae had friends in Oglala.
11 That's where the incident at Jumping Bull's happened.
12 That was an AIM stronghold. If Annie Mae was going to
13 go to a house or to a place to find a safe house to
14 hide while she was a fugitive, Oglala would have been
15 it.

16 Now, there is one thing that I have to
17 acknowledge. During this trial, Cleo said something,
18 and it was very vague, about possibly a discussion of
19 tying up Annie Mae. It was very vague. And I brought
20 up that the first time after 20 some years of giving
21 statements about this case that she had ever made that
22 reference was last April when her ex-husband was on
23 trial. That was the first time. Her prior sworn
24 testimony was unequivocal. There was nothing about
25 tying her up.

1 I think the lesson to be learned from that is
2 you never want to have your ex-wife being a witness
3 against you. That is the sum total because it was so
4 out of character with everything she had ever said
5 before under oath.

6 The only evidence that conflicts --

7 **THE COURT:** Mr. Murphy, a juror has requested
8 a break.

9 **MR. MURPHY:** Oh.

10 **THE COURT:** Can we take five minute?

11 **MR. MURPHY:** Certainly.

12 **THE COURT:** I am sorry to interrupt a closing
13 argument, ladies and gentlemen. But we have had a
14 request for a break and we will take one for five
15 minutes or so. The bailiffs will let us know when we
16 come back.

17 Folks, it's still too early to talk about
18 this case or think about it or form opinions until
19 Mr. Murphy and Mr. Jackley have finished their closing
20 arguments. So we will see you in a few moments.

21 Thank you.

22 (Off the record.)

23 **THE COURT:** I am satisfied.

24 Counsel?

25 **MR. JACKLEY:** Yes, Your Honor.

1 **MR. MURPHY:** Yes.

2 Folks, we left off at Dick and Cleo's house.
3 How Dick and Cleo had both said, absolutely no gun, no
4 bullets. No nefarious meeting about killing or
5 harming Annie Mae. The only evidence on that point
6 was Arlo Looking Cloud.

7 And I want to take you over to the accomplice
8 instruction the judge read to you. Particularly, the
9 bracketed section up there. I am going to read that
10 to you. "In determining when an accomplice has been
11 corroborated you must first assume the testimony of
12 the accomplice is removed from the case and then
13 determine whether there is any evidence remaining
14 which tends to connect the defendant with the crime
15 charged."

16 What does that mean? It means you got an
17 accomplice. And the judge has said Arlo is an
18 accomplice. Take it out of the case. Pretend like it
19 doesn't exist and see what's left over. Dick and Cleo
20 are what is left over, and they said no gun, no
21 bullets, no kidnapping. That's the evidence you have
22 to consider.

23 Pretend like Arlo's testimony doesn't even
24 exist. Nothing corroborates Arlo. What, in fact, we
25 know about Arlo's testimony on this point is that it

1 was a complete fabrication, part of his ongoing
2 manipulation. You got an opportunity to see that
3 before your very eyes.

4 The night stand issue. Arlo admitted between
5 when he testified at Dick Marshall's trial and when he
6 testified here he read Cleo Gate's testimony.

7 Why is that important? At Dick Marshall's
8 trial he said, yeah, I saw Dick Marshall get the gun
9 and the bullets from the night stand beside the bed.
10 But Cleo at that trial was asked, was there a night
11 stand next to the bed? No. There was a table. Did
12 it have any drawers? No.

13 So what did Arlo do, because he is an expert
14 at milking deals and changes his story to make sure he
15 get a deal. He changed it right before your eyes in
16 this trial. He said, no, Dick went down to the bottom
17 drawer of a dresser and pulled out the gun and the
18 bullets there. He is willing to change his testimony
19 over and over again when it fits the new theory or to
20 explain a past lie.

21 The state proposed a theory at Dick
22 Marshall's house and this note and this gun that has
23 not been supported by any evidence that you can
24 consider -- that you can consider reliable or that
25 does not come from an accomplice. It's yet another

1 unsupported theory. It's interesting. It makes good
2 drama, but you have the duty to separate fact from
3 fiction. You have the duty to separate what's a
4 theory and what's a theory supported by believable
5 facts.

6 The next event, it brings us up to the
7 Badlands where supposedly my client killed Annie Mae.

8 Who testified about what happened at the
9 Badlands? One witness. Arlo Looking Cloud.

10 We go back to that jury instruction. How are
11 you supposed to consider the testimony of Arlo? You
12 are supposed to pretend it doesn't exist and then see
13 what else is there. Arlo is the only witness who can
14 testify on this point. He's the only witness who did
15 testify on that point. Remove him, their case is
16 gone. That's just the reality.

17 They have charged my client with aiding and
18 abetting premedicated murder or committing
19 premeditated murder. Their theory has been my client
20 was the gunman. The only source of that evidence is
21 Arlo Looking Cloud. And you are told it's your duty
22 as jurors to, first, pretend like that testimony
23 doesn't exist.

24 Well, what else corroborates the statement
25 that my client held his -- a gun up and killed Annie

1 Mae? There simply is not -- no forensics, no other
2 eyewitness, no confession, nothing.

3 When you look at the elements of the offense
4 of premeditated murder, you know, you will realize
5 that they have to have evidence that my client killed
6 or aided and abetted the killing of Annie Mae; and
7 they have nothing on that point other than Arlo
8 Looking Cloud's accomplice, bogus testimony.

9 Even if there wasn't an accomplice rule --
10 and that's a rule meant to protect people when
11 somebody like Arlo tries to finger others.

12 Even if they didn't have that rule, could you
13 base a finding of guilt beyond a reasonable doubt on
14 anything Arlo said?

15 I mean, to prove their case, both for felony
16 murder or for premeditated murder, they have to prove
17 my client specifically intended to do acts; that he
18 participated directly in this killing, he aided and
19 abetted the killing, he caused her death during the
20 course of a kidnapping.

21 What testimony did you hear about any of
22 that? It all came from Arlo. And Arlo was perhaps
23 one of the least believable people every to grace a
24 courtroom. His testimony was sad. Yet their case
25 rises and falls on his testimony. Everything at the

1 Badlands come in through Arlo.

2 And they are going to say the crime scene
3 analysis corroborates Arlo. Statements of counsel are
4 not evidence. I ask you, where was the crime scene
5 analysis during this trial? They had cop after cop up
6 there. Did they ever have any of these trained
7 professionals try to conduct an analysis of the crime
8 scene that somehow magically linked my client to these
9 crimes? Absolutely not.

10 They didn't put a -- produce a shred of
11 forensic or crime scene analysis or other analysis
12 that established any link between my client and the
13 killing of Annie Mae Aquash up on that bluff west of
14 Highway 73.

15 I want to take a moment to talk about Arlo.
16 And I just want to put it to you bluntly. How dare
17 they base these charges on his testimony. They know
18 him. He's testified over and over again since he got
19 convicted. He was a guy -- I mean, notwithstanding
20 the 12 convictions for making false reports to law
21 enforcement, the 40 other convictions he has, the
22 felonies, all of that. He's a guy who gets up on the
23 stand and says, I have no problem lying to the
24 government to get a deal. I will provide them
25 whatever deals -- or details they want if it helps me

1 get out of jail. He was somebody who by his own
2 admissions was willing to do or say anything to make
3 them happy.

4 Arlo in many ways is like the perfect
5 prosecution witness. His brain has been ravaged by
6 drug abuse and alcohol issues. He's been manipulated.
7 He learned how to use the system over 40 years ago.
8 We talked about all of the charges he's been able to
9 get thrown out. All the convictions.

10 He was spoonfed information in this case by
11 key people even when they were working for the FBI.
12 He's been privy to other witness's testimony. His 40
13 years of making deals has given him a pretty good
14 touch at figuring out how he needs to change his story
15 when they need a new story to be told. We saw that
16 over and over again. Dick Marshall becomes a suspect.
17 Arlo suddenly sees a gun. John Graham gets moved over
18 to state court, suddenly there is a rape.

19 The other things about Arlo, and it probably
20 was apparent, this is a guy who desperately wants to
21 be special. And he's become more special since 2008
22 when he started changing his story to fit their needs
23 than he's ever been in his life. And that's a huge
24 motivator. Probably not nearly as much as a motivator
25 for him to lie or to say or do anything they want as

1 the idea of going back to that hell hole prison in
2 Louisiana for the rest of his life.

3 Imagine what that prospect would do to
4 anyone. Not just somebody who is a drug-addicted
5 career criminal. Anybody facing the idea of going
6 back to that Louisiana prison where he's all alone, he
7 has no gangs to protect him, and people are getting
8 stabbed and killed daily. He would say anything.

9 Now, the state tried with Arlo to point to
10 two consistencies. Said, well, you know, you have
11 changed your story on every other detail umpteen
12 times, but, Arlo, haven't you always said that it was
13 John, you, and Annie Mae that got out of the car? And
14 it -- wasn't it always you that said John was the one
15 who was the trigger man? And Arlo said yes.

16 So we pointed out to him or we asked him
17 questions about his statement to Denise Maloney. And
18 he denied that, but then Denise Maloney got up on the
19 stand and what did she say? Arlo -- when he's talking
20 to the daughter of a woman who has been killed says
21 Theda and John went up over a hill. I don't know who
22 shot her. He couldn't even keep the big details
23 straight from story to story. And that would have
24 been the easy part because anybody could have gone and
25 kept those straight if they wanted to finger him. It

1 was always the case, that whatever Arlo said, somebody
2 else did it.

3 And they like to say his statements caused
4 him to be incarcerated. I take you back to Arlo's
5 testimony and his 2004 interview with David Seales
6 (phonetic). What did he say? I'm innocent. I took
7 her to a safe house but nobody would listen to me.
8 Okay.

9 Arlo has given multiple versions of events.
10 He could not keep his story straight on anything and
11 that's the purpose of cross-examination. That's why
12 we have it. It's considered the great truth finder.
13 If Arlo saw what he said he saw before you guys, he
14 would be able to keep that same story straight over
15 the years, and he hasn't kept it straight.

16 We talked -- we had some great examples of
17 that where he created new stories before your eyes. I
18 mentioned the night stand issue just a moment ago.
19 That was new for you. Different from 20 other
20 versions of events, but new for you.

21 The other one was the six hour gap. The last
22 trial he testified at he said, went to Dick
23 Marshall's, spent a few minutes siphoning gas, two
24 short visits to houses where nobody answered the door,
25 and then out to the Badlands.

1 What did we find out from Cleo? At most that
2 trip would take an hour and a half. At most. And
3 that was all the way to Kadoka. We're not even nearly
4 that far.

5 He also says over and over again in the past
6 that he was out on the bluffs with my client and Annie
7 Mae when the sun was coming up. It's December.
8 6:00 a.m. He's got about six hours between when they
9 left Dick Marshall's house and when they got out to
10 the Badlands to account for and he doesn't have an
11 explanation at Dick Marshall's trial. He's presented
12 with that and he read Cleo's testimony.

13 So what did he invent for you today -- or
14 when he testified a couple days ago? We stopped at
15 one of the houses and we rested. That was new for
16 you. A problem with one of his stories comes up, he's
17 going to fill the gap.

18 Other examples of how he changed -- I mean,
19 umpteen years of telling the story. No mention of
20 Dick Marshall and the gun. No mention of John having
21 any sexual relation with Annie. The fence issue that
22 came up. When he was supposedly out at the Badlands,
23 they pulled off to the side of the road. You heard
24 from Mr. Amiotte, there was no fence there. But when
25 he went with the authorities there in 95, they pulled

1 onto a landing. The cops are going to want to have
2 their cars on the side of the road. They pulled onto
3 a landing 400 feet up the road where there was a
4 fence. What happened magically? Every story Arlo
5 told after that point, after he was out on those
6 bluffs in 95, involved John and Annie Mae climbing
7 over the fence. That's how malleable his mind is.
8 And it's why I said to you, how dare they base a
9 prosecution for murder on that guy. He's been used,
10 he's been played, he's unworthy of belief.

11 The last element I want to discuss with you,
12 the elements of the crime charged, is the time of
13 death. And I beg you, do not treat that as a
14 technicality like Mr. Oswald would like you to. There
15 are no technicalities here. Each of those elements
16 must be proven to you by evidence beyond a reasonable
17 doubt. That is your duty. This are no lesser or
18 greater elements.

19 Do we know when Annie Mae died? No. We have
20 no idea. Arlo, John, Annie Mae, Theda are in Rapid
21 City the end of November. We hit that two-week gap
22 where nobody knows where she is, but we got good
23 evidence to believe she's in Oglala or at a safe
24 house. Shows up at WKLD0C December 15. She's alive
25 then, but John is not anywhere in the vicinity.

1 Nobody places him there. Nobody even places him in
2 the same state. 12/15 she leaves WKLD.OC. We have no
3 accounting for her movements, her whereabouts, until
4 her body is found on February 24, 1976.

5 The pathologist said most of the
6 decomposition happened in February. And I went
7 through the weather charts for February in that
8 location with him. And you have the exhibit. The
9 last 15 days before Annie Mae's body was found were
10 incredibly warm. Day after day where the highs are
11 above 60s and the lows are above freezing. Periods of
12 48 hours contiguous staying above freezing. He said,
13 I believe most of the decomposition happened during
14 that time period. So we don't know -- there was no
15 time of death. He was honest. We don't know when she
16 died. We can't say that.

17 But we have some other evidence that you can
18 use your common sense to apply to this. The hair.
19 Annie Mae's hair. When she was at Troy Lynn's house
20 November 24, Troy Lynn said she had very short hair.
21 As -- shorter than yours? Yes, shorter than mine.

22 If she was killed two or three days later,
23 like their theory was, her hair wouldn't have grown
24 out. If she was killed December 15, her hair could
25 not have grown out by that time.

1 What did Nate Merrick tell you about the
2 crime scene? What evidence was recovered from the
3 crime scene? His words, long dark hair on the face of
4 the bluff.

5 The picture of Annie Mae dead at the scene
6 that has been admitted is not good. It's hard to
7 view. Clearly, though, not short hair. How long
8 would it take her hair to grow out? It would take a
9 lot longer than December 15. It would take a lot
10 longer than the end of November. Could it have been
11 late January? Early February?

12 We heard testimony from multiple witnesses
13 about the suspicious activity at Ceelo Black Crow's
14 house late January, early February where a young 20 to
15 30-year-old petite Indian woman was dropped off at his
16 house and he's an AIM person. He lives near the crime
17 scene. And then that woman is seen being picked up
18 later.

19 That is reasonable doubt, and it's reasonable
20 doubt as to who killed Annie Mae and it's certainly
21 reasonable as to time of death. They have to prove
22 time of death --

23 **THE COURT:** Five minutes.

24 **MR. MURPHY:** I want to talk to you about some
25 of the unsupported theories that were proposed -- put

1 before you. Theories about Annie Mae being forced to
2 engage in bombing -- bomb making so that her
3 fingerprints would be found on the bombs.

4 Theories such as that Annie Mae was killed
5 because Leonard Peltier confessed to killing the FBI
6 agents in front of her.

7 Theories about Annie Mae being dragged along
8 on the motor home trip because she was suspected of
9 being an informant.

10 All of those theories came from one person,
11 Kamook Ecoffey. Perhaps the most complicated witness
12 in this case. A form AIM militant. Married to Dennis
13 Banks. Gets paid \$50,000 for doing ten interviews.
14 Is the woman whose husband was having an affair with
15 Annie Mae. Who is now married to the lead
16 investigator. Very complicated web of bias and
17 reasons to fabricate, reasons to deflect attention.

18 A woman, who through all of her activities
19 with AIM, ended up getting three years of probation
20 and never worried about having her kids taken away
21 even though her kids were riding along with her -- or
22 one kid was riding along with her when she's in a car
23 full of explosives that blows up. And she's later in
24 a motor home chalked full of explosives and weapons.

25 There is a lot that goes on behind the scenes

1 of Kamook, but let's talk about her theories. Does it
2 make any sense at all that if Annie Mae was suspected
3 of being an informant by Peltier and Banks as early as
4 June of 75 at Farmington that they would have her at
5 Al Runnings' house in September in a tent full of
6 explosives and guns; that they would have her there on
7 October 12, 75, making bombs with them; that they
8 would have her with them the next day while they
9 placed these bombs; and then most ridiculously, that
10 Leonard Peltier, a guy who is wanted nationwide for
11 killing two FBI agents, who is on the run for his
12 life, would invite Annie Mae into the motor home with
13 the rest of them to travel around the country but
14 allow her to get out at gas stations and thrift stores
15 and to go to Seattle with him and Bernie when he goes
16 and hooks up with some other woman and leaves Bernie
17 and Annie Mae alone?

18 Does that make any sense? I mean, it doesn't
19 even pass a blush test.

20 Would Leonard Peltier, a guy who supposedly
21 put a gun to her head six months or five months
22 earlier, and believed she was an FBI informant, then
23 confess right in front of her to executing FBI agents?

24 Those theories are pure speculation and at
25 least Kamook admitted when she testified she had

1 nothing to support them. Nothing that indicated any
2 of those were true.

3 The general prosecution theory is that Annie
4 Mae was killed because she was an AIM leader -- or she
5 was suspected of being an informant by AIM leaders. I
6 ask you, what connection does any of that have to
7 John? He was never, during the course of this trial,
8 even placed in the same room as an AIM leader.

9 Nobody showed him to be a AIM devotee. He
10 had no motive. What is his motive for killing Annie
11 Mae? Nothing has been established.

12 Theda. What's the worse they could say about
13 Theda? Bossy, older woman. Yeah, so what. Takes a
14 lot to go from a bossy, older woman to being a killer
15 or somebody who orchestrates a killing.

16 John. He's the killer? What have you seen
17 during that trial that indicates anything about this
18 guy being violent? Having a propensity towards
19 killing people? Having anything to do with AIM
20 militant activities? Everything you heard about him
21 was he was a quiet, nice, unassuming guy who had no
22 connection with any of the AIM military activities.

23 Arlo. If you were going to orchestrate the
24 assassination of a high level AIM operative, you would
25 have Arlo along on the trip? It makes no sense. Arlo

1 had no motive and he was the least reliable person in
2 the world. Theda had no motive. John had no motive.

3 John's oral responses. Much has been made
4 about John's statements. Those statements are not
5 incriminating. Consider the context. John, at that
6 point, is a roofer. A Canadian Indian living up in
7 the Yukon with his kids and his girlfriend. FBI has
8 come up beforehand and threatened him. Pourier,
9 Ecoffey, Graf from the FBI, and a guy from the Royal
10 Canadian Mounted Police wait for him at his work
11 place. They map out what they say is a bullet-proof
12 case against him and that they are going to get him.

13 Even though we know that some of the
14 statements were ridiculous like that a 12-year-old
15 girl participated in the kidnapping. But they are not
16 asking him whether these things are true. They're
17 telling him, we've got you. Pretty natural for him to
18 be pretty fatalistic and say things like, yeah, sounds
19 like you guys have my life planned out for me. Yeah,
20 looks like I will be spending the rest of my life in
21 jail.

22 They weren't there to talk nice to him. They
23 were there to tell him your goose is cooked. That was
24 his response. He didn't say I did. In fact, over and
25 over again he said I did not.

1 I want you to consider, what is the truest
2 statement John made about what was in his heart. The
3 truest statement he made was when Ecoffey showed him
4 those pictures of Annie Mae dead -- and Ecoffey
5 testified to this -- he looked off in the distance, he
6 looked up, his eyes filled with tears, and he said,
7 she was my friend. Hardly the statements of a
8 cold-blooded killer that would march her out to the
9 end of a cliff and put a gun to the back of her head.

10 I said in the opening, I'm not going to tell
11 you how to vote. It's not my role. You are jurors.
12 You have accepted the responsibility. You took the
13 oath.

14 I want you to ask yourself on each and every
15 element on each and every fact, can I really say,
16 really say, that the evidence they provided was so
17 strong that I don't pause or hesitate to act on it;
18 that the state has proven its case beyond a reasonable
19 doubt. Each and every fact, each and every element,
20 ask yourself that. That's your job. That's your
21 duty.

22 The evidence doesn't support that. This
23 evidence wasn't of that quality. You would pause and
24 hesitate to act on just about everything that was
25 presented to you.

1 I don't get to speak again; Mr. Jackley does.
2 I ask you just to ask yourself as he makes
3 statements -- to think for a moment how I might
4 respond if I had the opportunity.

5 I said in the beginning, thank you from both
6 of us. I sincerely mean that. You have a tough job
7 ahead of you. And I know you will conduct yourselves
8 pursuant to your oath and I thank you for that.

9 **THE COURT:** Mr. Jackley?

10 **MR. JACKLEY:** May it please the Court,
11 Counsel.

12 After listening to evidence for approximately
13 five days, it comes as no surprise that the majority
14 of what defense counsel has just talked about can be
15 boiled down to reading jury instructions to you that
16 the judge has already read to you; claiming misconduct
17 by a witness, including Kamook Ecoffey; attacking the
18 prosecution team in words defense counsel used, quote,
19 loss of a license, end quote, and attacking Arlo
20 Looking Cloud. In a nut shell that's what you heard
21 for the last hour.

22 I want to take care of the first three items
23 quickly. The judge has read to you the jury
24 instructions already. Please consider them carefully
25 in making a determination in this case.

1 As to Kamook Ecoffey's testimony, you may
2 recall part of her testimony, she talked about an
3 interview she did with Troy Lynn and Arlo on tape. In
4 fact, remember, defense counsel, to make a big show,
5 went and grabbed the nine tapes. Remember him doing
6 that?

7 And remember, she testified about how it was
8 about a six-hour conversation wherein Arlo, basically,
9 throughout the conversation, relayed his story that
10 you heard from the witness stand.

11 And recall when I got up after the allegation
12 come about the, implicate John Graham, and I pointed
13 that out; and I further pointed out that the reference
14 to the implication of John Graham was on page 168 of
15 that transcript. Page 168. And I talked to her about
16 what had happened prior to page 168, including things
17 on page 109.

18 Think about it. Kamook Ecoffey just heard
19 several hours of Arlo Looking Cloud talking about what
20 occurred, including what had occurred on the bluff.
21 She's talking to Arlo Looking Cloud. Who else is he
22 -- is she going to ask to implicate when she's talking
23 to Arlo Looking Cloud who is out on the bluff with one
24 person, John Graham. Use your common sense. That's
25 not witness misconduct, and it's disingenuous to

1 suggest that.

2 With respect to prosecution misconduct, you
3 sat here and listened to my opening statement. Look
4 at your notes. Do you recall me standing here during
5 opening statement and telling you that the State of
6 South Dakota would prove beyond a reasonable doubt
7 that John Graham raped Annie Mae Aquash?

8 Frankly, the first one to talk about rape
9 throughout this case, including voir dire, is defense
10 counsel. He's now trying to slip it in as an
11 essential element to the offense, which it is not.
12 The state does not need to prove there was a rape.

13 The only evidence that has been discussed
14 about any sexual relations is with respect to Arlo
15 Looking Cloud indicating that on occasion when they
16 were staying at Thelma Rios', he went by the bedroom
17 and he heard sex going on. That's what was discussed
18 in opening statement, that was discussed on the
19 witness stand.

20 Then Mr. Murphy shows you a transcript, one
21 page, of Arlo Looking Cloud's September of 2009 Grand
22 Jury testimony regarding the prayer. And the
23 testimony that you heard throughout Arlo's discussion,
24 you know, and much of it came through defense counsel,
25 that he gave testimony under oath in August of 2008 to

1 a Federal Grand Jury, not a State Grand Jury.

2 As well as discussed with law enforcement
3 officers at the scene of the crime what Annie Mae was
4 doing in the moments before her death. And what Arlo
5 said prior to September of 09 Grand Jury testimony in
6 both 08 and in 1995 was she was praying. And, of
7 course, when she finished praying, she stood up and he
8 shot her.

9 To suggest that the prosecution team in 2009
10 planted this praying thing in her mind after you heard
11 about the August of 2008 under-oath testimony of Arlo
12 Looking Cloud about praying and you heard about what
13 he told law enforcement in 1995 is nothing short of
14 disingenuous.

15 Now, let's talk about the attack on Arlo
16 Looking Cloud. As Mr. Murphy has told you, his
17 position is that there is no corroborating evidence.
18 And I want to take an opportunity to walk through that
19 corroborating evidence. What Arlo Looking Cloud did
20 was reprehensible. What he described to you should
21 not have happened. Arlo Looking Cloud -- and it came
22 out in Mr. Murphy's opening statement -- has been held
23 responsible for his actions. He's been convicted of
24 committing -- or aiding and abetting in the commission
25 of the murder of Annie Mae Aquash.

1 The problem Mr. Graham has is that Mr. Graham
2 was with Arlo Looking Cloud every step of the way
3 beginning in Denver. In fact, the evidence you heard
4 places him about two or three steps ahead of Arlo
5 Looking Cloud when he put that gun to Annie Mae's
6 head.

7 Let's talk about that corroborating evidence
8 beginning in Denver. You heard Arlo Looking Cloud
9 take the stand and testify that John Graham, with the
10 help of Theda Clarke, tied up Annie Mae Aquash. The
11 kidnapping has started.

12 The additional corroborating evidence is what
13 you heard from Angie Janis Begay. John Graham's
14 girlfriend of all other people -- or former girlfriend
15 that he lived with -- told you that Annie Mae was tied
16 up.

17 George Palfy -- no reason to come in here and
18 lie about John Graham -- told you that Annie Mae
19 Aquash was tied up.

20 Troy Lynn came in here and testified and told
21 you that on the way out Anna Mae was flanked by none
22 other than Arlo Looking Cloud and John Graham.

23 Annie Mae was downstairs in the basement when
24 Troy Lynn and Palfy heard about or saw the reference
25 by Corky Gonzalez that this is what we do to

1 informants, we kill them.

2 But through the testimony of Troy Lynn, we
3 know that Annie Mae didn't need to hear that. She
4 already knew because on her way out she told Troy Lynn
5 what? If I leave her, Annie Mae said, you will never
6 see me alive again. She knew. She was kidnapped and
7 she was on her death March.

8 So what do they do? Arlo tells you, they put
9 her in the trunk hatchback area of a red Ford Pinto.

10 Who else told you that? George Palfy. And
11 Troy Lynn. She's tied up. She's in the back of the
12 hatchback.

13 Now, if you want to disregard the words of
14 all those people, consider them all to be liars, take
15 the words of John Graham. Remember, on April 21,
16 1994, John Graham was interviewed by United States
17 Marshal Bob Ecoffey and BIA CI Mitch Pourier. And
18 what does he finally tell them, okay, okay. I drove
19 from Denver. Those are his words.

20 And when they explain to him all the evidence
21 about the tying up, including the evidence that John
22 Graham tied her up, what does John Graham say? He
23 says, it looks like you have your future planned for
24 me -- or my future planned for me. You have your
25 case. That's his admission.

1 And if you want to then go a step further and
2 say, well, geez, the U.S. Marshal came up here and was
3 untruthful, along with Mitch Pourier, although they
4 have no reason to be. It's not shown to you.

5 Remember that 36-second clip that was played
6 for you that will go back to the jury room as evidence
7 where John Graham was giving a media interview? You
8 see, John Graham liked to talk to the media. What did
9 he tell you? What did he say? I drove her from
10 Denver to Pine Ridge.

11 He was careful when he interviewed with the
12 law enforcement. He said he drove her from Denver but
13 he wasn't real specific as to where. But his problem
14 is he got arrogant. He did a media interview and he
15 slipped. He said, I drove her from Denver to Pine
16 Ridge.

17 We know from the additional evidence that you
18 heard that they went to Rapid City. We know they went
19 to two places. Arlo Looking Cloud has told you about
20 Thelma Rios' place. Told you what they did at Thelma
21 Rios' place.

22 We know, too, from the testimony and the
23 examination that Thelma Rios has been held responsible
24 for her actions in this case, much like Arlo Looking
25 Cloud.

1 They did another stop in Rapid City and that
2 was at WKLD, the Wounded Knee Legal Defense Offense
3 Committee. And you heard from Candy Hamilton about
4 that, remember? Remember Candy Hamilton described
5 Annie Mae's crying. And eventually gave it up that
6 Annie Mae wasn't free to leave. The kidnapping
7 continuing.

8 And remember the word that Candy Hamilton
9 described of what was going on at WKLD?
10 Interrogation. This wasn't a friendly meeting, this
11 was an interrogation. Exactly what they did. That's
12 exactly what the evidence showed.

13 Now, defense counsel wants to talk about
14 dates, and of course you heard the judge read the jury
15 instructions, and what the jury instructions say is
16 that the state has to prove on or about. In other
17 words, near to that time. All the witnesses that
18 testified have testified that it occurred after
19 Thanksgiving, which is November 27, 1975, a couple of
20 weeks after that.

21 Defense counsel wants to hang his hat on
22 Candy Hamilton. He had a disagreement with Mr. Oswald
23 about whether or not this was December 15 or
24 December 14, whether or not she was attending a trial
25 or a pretrial hearing or a deposition. I am not sure

1 whether it was December 15 or December 14, but the
2 evidence showed it happened in mid December and that's
3 what the witnesses testified to you about.

4 When they get done with WKLDLOC, they head for
5 the Rosebud Indian Reservation to Kills Means'. Arlo
6 testified to you about that.

7 Additional corroborating evidence to what
8 Arlo testified comes from Candy Hamilton. Recall that
9 Candy Hamilton testified that after she left WKLDLOC,
10 she was headed to Russell Means' trial in Sioux Falls
11 and she stopped with several others at Kills Means'
12 house. Bill Kills Means' house. And she stayed in
13 the car. She didn't testify that there was a red
14 Pinto there. She didn't testify that Arlo Looking
15 Cloud was there standing over Annie Mae or that Annie
16 Mae was still in the trunk. In other words, Annie Mae
17 Aquash wasn't left at Kills Means' house.

18 And Graham -- Mr. Graham could no longer
19 claim that because remember that video clip when he
20 said I drove her from Denver to Pine Ridge. He took
21 out his ability to say that he left her at Kills
22 Means' because of his own words. He slipped up.

23 Remember the two significant stops you heard
24 evidence on are Kills Means' and Marshall's, the two
25 potential safe houses. There has been not a scintilla

1 bit of evidence that Kills Means' was a safe house.
2 And his problem is, Candy Hamilton -- and the
3 testimony I just talked to you about -- his problem is
4 his own words that he took her to Pine Ridge.

5 And remember where the body was found? It
6 was found on Rosebud. It was found by Roger Amiotte
7 on Pine Ridge. Kills Means' wasn't a safe house.

8 They then traveled from Kills Means' to Dick
9 Marshall's. Arlo told you in detail what he recalled
10 about happening at Dick Marshall's. That is they
11 arrive; that initially Theda went in the bedroom with
12 Dick Marshall. She came out. They brought in John
13 Boy and Arlo. The door was shut. Remember, Cleo said
14 that. The door was shut. They then came out. Cleo
15 backs that up. Talks about the two trips into the
16 bedroom. She can't testify as to what happened in the
17 bedroom, but backs that up. And Arlo says Dick
18 Marshall -- I don't know whether it was a drawer out
19 of a dresser or night stand -- but he testified out of
20 a drawer came a red box. Out of the red box came a
21 pistol with a brown handle and silver. Dick Marshall
22 then handed Theda Clarke the shells. And according to
23 Arlo and Cleo, then Annie Mae was given -- or the
24 group was given some clothes for Annie Mae and they
25 left.

1 Arlo is corroborated by Cleo by the fact that
2 they arrived, that Annie Mae left alive, so it's not a
3 safe house and they went in the bedroom twice.

4 Now, Dick Marshall -- remember when he
5 testified? He had a hard time remembering that
6 anybody even showed up. And then some prompting from
7 me and showing him some documents, oh, yeah, I do, I
8 guess, think that -- I do remember that in the middle
9 of December, mid December -- remember what he
10 testified, mid December --

11 **MR. MURPHY:** Objection, Your Honor.
12 Misstatement of the facts.

13 **THE COURT:** I think that's the jury's
14 decision to make as to whether the statement is an
15 accurate recollection of the fact. They have their
16 notes and they have their recollections independent of
17 mine.

18 **MR. JACKLEY:** Mid December they arrive at his
19 house. And it was Thelma, Annie Mae, and two young
20 guys. Arlo -- or excuse me. Dick Marshall had a hard
21 time with the bedroom. Frankly, for the same reasons
22 that Arlo Looking Cloud for many years had a problem
23 talking about what happened in that bedroom.

24 What happened in that bedroom was the first
25 time that a gun has been produced. It's the first

1 evidence of a gun. It goes directly to intent to
2 first degree murder. Remember, I asked Dick Marshall
3 the question about, he didn't want to be here
4 voluntarily and he's concerned about what could happen
5 to him based upon his testimony.

6 But the real reason that Dick Marshall is so
7 important is because he backs up Arlo and Cleo about
8 one important fact. And that is, in mid December,
9 Anna Mae Aquash walked out of his house alive. He
10 didn't kill her.

11 Dick Marshall's house is not a safe house.
12 Cleo told you that. Dick Marshall told you that. And
13 Arlo, Dick, and Cleo all back up the fact that she
14 wasn't left there. John Graham is now out of safe
15 houses. Those are the two major stops.

16 I have talked a little bit about Denver to
17 Rapid City and then what went on. I want to back up
18 for a minute. If you just take from Rapid -- or from
19 Denver to Rapid, I submit to you the state has proven
20 beyond a reasonable doubt that John Graham
21 committed -- or aided and abetted in the commission of
22 felony murder kidnapping.

23 The state has shown that important acts
24 occurred in Pennington County. That's WKLD0C, that's
25 Thelma Rios.

1 The state has proved that on or about
2 December 10th through the 12th -- it just has to be
3 near that -- that the kidnapping occurred.

4 The state has proven that John Graham either
5 committed the kidnapping or certainly aided and
6 abetted in the kidnapping; and the further evidence,
7 that Annie Mae Aquash was in fact killed.

8 But continuing on, the additional evidence
9 further supports a conviction for felony murder
10 kidnapping along with premeditated murder. They have
11 now left Cleo and Dick Marshall's. They have made
12 some non relevant stops. Not of any consequence. And
13 they are at the bluff. And they are at the bluff in a
14 red Pinto. They are not at Ceelo Black Crow's in a
15 gold car. Annie Mae Aquash wasn't killed by a motor
16 vehicle accident. She was killed with a 32-caliber
17 bullet put in the back of her head. This isn't a
18 motor vehicle accident case.

19 So what happened when they get there? Arlo
20 says John Graham takes Annie Mae Aquash out of that
21 red Ford Pinto. Theda Clarke says, go with him. So
22 what does he do? He listens to Theda. And John
23 Graham steps ahead of him.

24 What does John Graham do? He puts a
25 32-caliber pistol with a brown handle and silver to

1 the head of Annie Mae Aquash and he pulls the trigger.

2 What is the corroborating evidence of that?

3 The 32-caliber bullet just happens to be the same
4 caliber that Arlo testified was obtained at Dick
5 Marshall's house.

6 Dr. Peterson took the stand. It just so
7 happens that there were powder burns because the
8 pistol was so close to the back of Annie Mae's head.

9 Been a lot of talk about Arlo concocting this
10 story, but you heard about the different statements
11 that he has given. Remember in 1995 when he talked to
12 Ianuchi and Marshal Bob Ecoffey and he went to the
13 scene, and there are pictures of that in evidence.
14 John Graham is with him every step of the way. In
15 1995 he hasn't fabricated or made some deal with the
16 government. He hasn't been charged till 2003 and
17 convicted in 2004.

18 Then in 2000, remember when he met with
19 Kamook and Troy Lynn, Arlo Looking Cloud, before he's
20 again charged or convicted. Remember where defense
21 counsel wants to say there is witness misconduct.
22 What does Arlo do? Tells the same and fairly
23 consistent story. The most consistent part of it is
24 every step of the way is John Graham.

25 Then in 2002, again, prior to Arlo Looking

1 Cloud being charged, guilt has set in. He wants to
2 talk to the daughter of Annie Mae Aquash. That can't
3 be an easy discussion to call the daughter of somebody
4 you were just involved in -- years back -- in her
5 murder.

6 He makes that phone call though. And you
7 heard Denise Maloney take the stand. You heard how
8 she described Arlo's emotions. It's not an easy phone
9 call, and I'm sure he minimized some of what his
10 conduct was.

11 But remember, again, another consistent
12 statement that was given in 2002, that none other than
13 John Graham was out on the bluff with Annie Mae
14 Aquash.

15 **THE COURT:** Four minutes, Mr. Jackley.

16 **MR. JACKLEY:** But perhaps the additional
17 corroborating evidence with respect to what happened
18 on that bluff comes from John Graham. Remember when
19 Marshall Ecoffey and Mitch Pourier interviewed him and
20 were talking to him about his involvement? And after
21 they outlined the case and talk about that, what does
22 he say? He says, I'm ready to leave this place. I
23 will probably spend the rest of my life in jail.

24 And if that doesn't speak for itself, the
25 picnic table does. What does he do when asked the

1 direct question? That picnic table is shaking so bad
2 that both investigators took huge note of it.

3 Ladies and gentlemen, I talked to you about
4 the felony murder kidnapping. With respect to the
5 premeditated murder in Count Two, the state, again,
6 has to prove that a material act occurred in
7 Pennington County. That's WKLD0C, that's Thelma Rios;
8 that this happened on or about or near the time frame
9 of December 12th through December 14th. The state has
10 proven that beyond a reasonable doubt.

11 The state has to prove that John Graham
12 committed or aided and abetted in the commission -- or
13 aided and abetted in the killing of Annie Mae Aquash.

14 Folks, when Theda Clarke and John Graham and
15 Arlo Looking Cloud pulled up to that bluff, they both
16 put themselves -- or they all three put themselves as
17 an aider and abettor in the murder of Annie Mae Aquash
18 no matter who pulled the trigger. The evidence showed
19 beyond a reasonable doubt that John Graham pulled that
20 trigger, but the state doesn't have to prove that.

21 The state has to prove that John Graham aided
22 and abetted in the murder of Annie Mae Aquash. He
23 knew that the murder was going to happen, and he
24 participated in a material way. And that was dragging
25 her all the way from Denver to Rapid City, to Kills

1 Means', to Marshall's, and onto a bluff, and that that
2 murder was premeditated murder.

3 This wasn't a shooting by accident. This
4 wasn't a motor vehicle accident. That gun was put to
5 the back of her head and it was premeditated when that
6 trigger was pulled.

7 Almost 35 years to the day, John Graham
8 pulled Annie Mae Aquash from a red Ford Pinto. He
9 walked a young lady that had lost a lot of her spirit
10 out to a bluff. On her way out, she was praying in
11 her Lakota language. She stopped praying, she stood
12 up, and John Graham took a 32-caliber pistol, silver
13 with a brown handle, and he put it so close to her
14 head it left powder burns.

15 It's time to hold John Graham accountable and
16 enter a guilty verdict for felony murder kidnapping
17 and premeditated murder.

18 On behalf of the State of South Dakota, I
19 thank you for your attentiveness.

20 Thank you, Your Honor.

21 **THE COURT:** Bailiffs approach, please.

22 (Whereupon, the bailiffs were then sworn.)

23 **THE COURT:** Ladies and gentlemen, we now have
24 to remove the two alternates from the jury panel. I
25 am going to ask the clerk to draw one number out --

1 one piece of paper out. Juror 3, Tony Randolph. And
2 will you pull one more paper out. That would be Jacob
3 Solano. The two of you are excused. Your call back
4 is six o'clock Friday night -- they are done. You are
5 all finished. Thank you for your service.

6 I don't know how you feel about being
7 removed, but it's the only way we can try the case.
8 Thank you very much for your close attention during
9 the trial, and at this point you are excused.

10 Ladies and gentlemen, you are the remaining
11 12. This case is now turned over to you for your --
12 to you for your deliberations and to decide the issues
13 in front of you.

14 We await your word.

15 (Whereupon, the jury was then recessed to
16 begin their deliberation.)

17 **THE COURT:** Anything further, counsel?

18 **MR. JACKLEY:** Not from the state, Your Honor.

19 **MR. MURPHY:** Nor from the defense.

20 **THE COURT:** And we have to discuss the matter
21 about if the jury goes into tomorrow, overnight, and
22 the rules pertaining thereto.

23 So let us take a moment or two before we
24 break for lunch.

25 (Off the record.)

1 (Whereupon, the following proceedings were
2 had out of the presence of the jury.)

3 **THE COURT:** Okay.

4 We're present in court with Mr. Murphy here,
5 Mr. Jackley, Mr. Oswald, and Mr. Mandel about the
6 question raised by the jury wanting to have a
7 definition of the term preponderance.

8 The Court is entitled to give a response or a
9 definition to them. Frankly, the Court is entitled to
10 give them a dictionary and it ain't going to do that.
11 Okay.

12 But whether or not the word was used in the
13 instructions -- and it was not -- it was raised in
14 voir dire.

15 **MR. MURPHY:** Your Honor, if I may, I found
16 it. It's actually in the legal principles section.
17 It's not in the definition of reasonable doubt.

18 **THE COURT:** So it's in there. It's part of a
19 pattern jury instruction and I hate it because it
20 raises question where people address preponderance
21 when preponderance has nothing to do with a criminal
22 case.

23 It would be my intension to respond by
24 saying, first of all, that preponderance is the burden
25 of proof that applies only in civil cases. It has no

1 function or place whatsoever in a criminal matter. It
2 is a much lower burden of proof and simply does not
3 apply. And that's where I would keep it.

4 **MR. MURPHY:** The only addition I would ask,
5 since it didn't appear in the reasonable doubt
6 section, which sometimes it does in some of the
7 patterns, it is then referring them at the conclusion
8 of that to the applicable standard which is set out in
9 instruction number whatever that is. Because they are
10 about three pages shy of the reasonable doubt
11 definition or the legal principles section.

12 So giving the definition that you just
13 suggested and then referring them to the definition of
14 the applicable standard that you have already set
15 forth would be my request.

16 **THE COURT:** Mr. Jackley?

17 **MR. JACKLEY:** Your Honor, because this is a
18 criminal case, it is the state's request that at most
19 the jury be instructed preponderance is the burden
20 most commonly applied in civil cases.

21 **THE COURT:** Is there any place it's applied
22 in other than civil cases?

23 **MR. JACKLEY:** Sometimes by clear and
24 convincing evidence is used --

25 **THE COURT:** Well, but it apply --

1 preponderance applies only in civil cases.

2 **MR. JACKLEY:** That's fair.

3 And then just refer them -- please consult
4 the instructions you have been provided in this case.

5 I think it's dangerous to start quibbling
6 over which instructions to send them to. I think it's
7 better and more appropriate --

8 **THE COURT:** My concern, Mr. Jackley, is I
9 don't want them playing with preponderance at all.
10 And I don't want -- if that's a factor in their
11 deliberation it needs to be shut down quickly.

12 **MR. JACKLEY:** Then don't we accomplish that
13 by just simply stating please consult your
14 instructions.

15 **THE COURT:** No.

16 If we solved that, it would already be
17 solved. There is 12 people there. Most of whom can
18 read and they each have a copy of the instructions.
19 And I would imagine if they are looking at it,
20 that's -- it came up from looking at the instructions.
21 And I don't think it solves the question at all.
22 That's the problem.

23 Even if it does, you and I will not know
24 that. And I want to make sure that the answer -- that
25 the question is taken care of with as clear and simple

1 a statement as I can give them.

2 If I would -- I think I should refer them to
3 the reasonable doubt instruction.

4 **MR. MURPHY:** Because somewhere they have
5 gotten off track with those legal principles. They
6 haven't been looking at the right instruction. And to
7 shut down any discussion of preponderance because I
8 know in voir dire we both brought it up and I remember
9 Marty making the statement about law professors hating
10 51/49 and all of that stuff. So they heard it and now
11 they are obviously considering it and that has no
12 function here.

13 **THE COURT:** Yeah.

14 You know, I envision, with or without
15 accuracy, a discussion going on about X -- you know,
16 well, there is more evidence of this than that and
17 that's not even approaching the burden. And if
18 that -- that should not be guiding the discussion.
19 And I am afraid of that because it's wrong and if
20 that's not occurring, an instruction that it should
21 not occur, is harmless. If it is going on, failing to
22 shut it down in disastrous.

23 **MR. JACKLEY:** In light of the Court's
24 position, would the Court consider instructing,
25 preponderance is the burden applied in civil cases.

1 Please consult the reasonable doubt instruction at
2 whatever number it is.

3 **MR. MURPHY:** That doesn't do anything to
4 foreclose the discussion they are already having which
5 is --

6 **THE COURT:** I am going to say it applies only
7 in civil cases and it has no place -- I will even be
8 redundant -- or use whatsoever in a criminal. Please
9 see the instruction on beyond a reasonable doubt
10 definition.

11 **MR. MURPHY:** Set forth in whatever?

12 **THE COURT:** Yeah.

13 **MR. JACKLEY:** Okay.

14 **THE COURT:** That's what I'm going to do. And
15 of course I have moved my computer, but let me get it
16 typed up and I will give it to you.

17 (Off the record.)

18 **THE COURT:** The jury has indicated they wish
19 to go home for the night. I told the bailiff to
20 inquire if they felt there was any likelihood of being
21 able to reach a verdict by 8:00 o'clock or so, having
22 dinner and staying and deliberating until then.

23 If the answer is no, I'm going to send them
24 home because I -- I think to do otherwise would not
25 help their state of minds and I will bring them in for

1 a cautionary instruction, again, a very specific one.
2 I don't want to send them to a hotel. I don't think
3 that's going to improve their minds either.

4 **MR. MURPHY:** You are going to bring them back
5 in?

6 **THE COURT:** Yeah.

7 **MR. MURPHY:** Then I better get the jail to
8 get my client over here.

9 (Off the record.)

10 (Whereupon, the following proceedings were
11 had in open court with the jury present.)

12 **THE COURT:** Looks like the right jurors to
13 me.

14 Counsel?

15 **MR. MURPHY:** Yes, Your Honor.

16 **MR. JACKLEY:** Yes, Your Honor.

17 **THE COURT:** Ladies and gentlemen, as you
18 begin to figure out any time you leave or come back,
19 you have to come through here so we can count to 12
20 and make sure you are the 12 we started with.

21 It's my understanding that a significant
22 percentage of you wish to call it for the evening. My
23 options in those cases are two. One is to place you
24 in a hotel. The other is to send you home.

25 I am assuming you would prefer to go home.

1 But in doing that, you need be extra, extra specially
2 careful to avoid contact -- better avoiding contact
3 with anybody other than your immediate family.
4 Responding to no questions with anything other than I
5 can't talk about that.

6 And I know I can't keep you from thinking
7 about the case at night, but you cannot resolve the
8 case without considering it with all the opinions and
9 considerations of the other 11 jurors.

10 To that end, you're probably better off not,
11 you know, spending your wake -- your sleeping hours
12 awake.

13 We appreciate the difficult work it is to do
14 what you are doing and we will honor your request to
15 go home. I'd like you to come back at 8:30 in the
16 morning if you can. And you'll -- once you are here
17 we'll come into the room just to make sure you are
18 you, and then we will return you to your
19 deliberations.

20 I have provided the explanation requested --
21 the definition to some extent that was requested. I
22 will entertain all questions that you have. There are
23 a lot of them I will not be able to answer according
24 to the rules of jury trials. If that happens, I will
25 just simply say I cannot provide further answer on

1 that. You must read the instructions, rely on them,
2 and your recollection of the testimony and exhibits in
3 the case.

4 So thank you for today and we'll see in the
5 morning. Have a good night, good meals, and sleep
6 well.

7 (Whereupon, the proceedings in this matter
8 were then concluded.)

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STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF PENNINGTON)

I, TINA RAE PRUSS, Official Court Reporter
and Notary Public in and for the County of Pennington,
State of South Dakota,

DO HEREBY CERTIFY that the foregoing
transcript is a true and accurate transcript of the
questions asked, the testimony given, and of the
proceedings had.

I FURTHER CERTIFY that I am not of kin or in
any way associated with any of the parties to said
cause of action, or their counsel; and that I am not
interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my
hand this 3rd day of May, 2011.

COPY

Tina Rae Pruss
Official Court Reporter and
Notary Public
Pennington County, South Dakota
My Commission expires: 10-04-2012

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
)
Plaintiff,)
)
VS.)
)
JOHN GRAHAM,)
)
)
Defendant.)

TRANSCRIPT OF
VERDICT

VOLUME 10 OF 10

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
DECEMBER 10, 2010

COPY

1 * * A P P E A R A N C E S * *

2 MR. MARTY JACKLEY
 Attorney General
3 MR. ROD OSWALD
 Assistant Attorney General
4 MR. ROBERT MANDEL
 Assistant U.S. Attorney
5 Representing the State of South Dakota

6 MR. JOHN MURPHY
 Attorney at Law
7 Representing John Graham

8

9

10

11

12

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* * I N D E X * *

14 WITNESS (ES) : DIRECT CROSS REDIRECT RECROSS

15 (None.)

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19

20 EXHIBITS: OFFERED/ADMITTED

21 (None.)

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23

24

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1 * * P R O C E E D I N G S * *

2 (Whereupon, the following proceedings were
3 had in open court outside the presence of the jury.)

4 **THE COURT:** Okay.

5 I've been advised by the bailiff that the
6 foreman has contacted him and indicated to him that
7 the jury is hung and that he would like to speak with
8 me.

9 At this stage of the game, I am certainly not
10 permitted to do that in the absence of consent of
11 counsel. I certainly, under any circumstances, could
12 not ask him how the jury stands.

13 Allen charges are not approved of in state
14 court as I recall.

15 Is that the current law, Mr. Murphy?

16 **MR. MURPHY:** I don't know what the state of
17 the law is, but certainly we would be opposing an
18 Allen charge.

19 **THE COURT:** Mr. Jackley?

20 **MR. JACKLEY:** Are you asking the state's
21 position on whether you should go talk to the juror or
22 are you asking our position on the Allen charge?

23 **THE COURT:** The Allen charge first.

24 **MR. JACKLEY:** Can I consult with Mr. Oswald
25 for just a moment?

1 **THE COURT:** Yeah.

2 I have a 93 case in *State vs. Kaiser* that
3 held it reversible error in supplemental instructions.
4 Response to an inquiry by jury to instruct the jurors
5 that they must reach a unanimous verdict.

6 We have earlier decisions, 78 and 82 that
7 said the charge could be read. We have the federal
8 charge -- we have our own *Boykin*. State of South
9 Dakota.

10 Is that the big one?

11 **MR. MURPHY:** No. That was *Boykin v. Alabama*.

12 **THE COURT:** *State vs. Kaiser* held it was
13 reversible error. I haven't read it. I don't think
14 it's as solid as that. Based upon the facts in *Kaiser*
15 and a quick read, leaves about that much discretion, I
16 read, in the Court, which ain't a lot.

17 **MR. JACKLEY:** Can I call the AG's office --

18 **THE COURT:** I am sorry?

19 **MR. JACKLEY:** Can I have two minutes to call
20 the AG's office to find out if an appellate lawyer
21 can --

22 **THE COURT:** Yeah.

23 **MR. MURPHY:** Can I ask, is there some
24 security issue that we have a show of force at the
25 door?

1 **THE COURT:** Say again.

2 **MR. MURPHY:** What's the issue with the show
3 of force?

4 **SHERIFF'S DEPUTY:** There is always two
5 deputies with him. I was not told whether this was a
6 verdict or not. I wasn't --

7 **THE COURT:** I can't understand. I don't have
8 my realtime up.

9 **MR. MURPHY:** Okay.

10 (Off the record.)

11 **MR. JACKLEY:** Judge, I have a case and I
12 don't have it on me. The case is *State v. Fool Bull*.
13 It's 766 N.W.2d 159, South Dakota 2009. My
14 understanding of its proposition is the Court cannot
15 give an Allen charge. The Court cannot take steps
16 that would be deemed coercive. And the case gives
17 some general facts giving guidance to a trial court
18 judge on what the judge can do.

19 **THE COURT:** I am assuming -- and I will pull
20 that case and will read it.

21 Allison, did you get the cite?

22 **THE LAW CLERK:** Uh-huh.

23 **THE COURT:** Pull it up and have copies
24 printed for us.

25 I am assuming that something along the lines

1 are, continue to deliberate until you are convinced
2 that it is virtually impossible to reach a unanimous
3 verdict.

4 **MR. MURPHY:** But that's what an Allen charge
5 is.

6 **THE COURT:** Well, no.

7 **MR. MURPHY:** Essentially, that's what it is.

8 **THE COURT:** Somebody has to tell me that they
9 can't reach a verdict. And I can talk -- I can talk
10 to the foreman without finding out how they stand and
11 see what he says. But I am not going to do that
12 without the consent of you folks.

13 **MR. MURPHY:** And we wouldn't be consenting.

14 I mean, towards what end? If they -- I mean,
15 it appears they have sent a note to the bailiff or is
16 there a note that they have sent out saying they are
17 hung?

18 **THE BAILIFF:** No, sir. He asked if I wanted
19 it in writing and I said I would go talk to the judge
20 and then go from there.

21 **THE COURT:** Let's get it in writing.

22 **MR. JACKLEY:** I think we need to look at this
23 case just so --

24 **THE COURT:** Say again.

25 **MR. JACKLEY:** I think it would help for at

1 least the state to look at this case.

2 **THE COURT:** Well, we're going to get it.

3 Yeah. It's coming.

4 (Off the record.)

5 **THE COURT:** My point, Mr. Murphy, was if you
6 can't -- if you believe you truly can't get a verdict,
7 I want to know that.

8 **MR. MURPHY:** Right.

9 **THE COURT:** I mean, I consider that's a hung
10 jury. That's what they are telling me, they are hung.

11 But, you know, I am not sure how really solid
12 it is. Rollie indicated that the foreman said that we
13 simply will not be able to reach a verdict.

14 **MR. MURPHY:** Do you typically require that
15 note to be signed by all jurors or just the foreman?

16 **THE COURT:** Typically, I haven't had it.
17 This is new to me. So I don't know what typical is.

18 I would suspect that that's a good idea. I
19 mean, I think that would be a good idea for the record
20 if we're going to have a hung jury. And then we get
21 to go back and try it again.

22 Okay.

23 (Off the record.)

24 **MR. MURPHY:** Did you get the note?

25 **THE COURT:** Yes.

1 I have a note from the jury. It says, we the
2 jury are decided on Count One. We are undecided on
3 Count Two. Unable to resolve either within or with no
4 time frame. It's two words. It's written so it could
5 be within. But I think it's with no time frame.

6 **MR. MURPHY:** Could you say that last part
7 again?

8 **THE COURT:** It says we are undecided Count
9 Two. Unable to resolve with -- and then a space and
10 then the word I perceive to be no time frame.

11 **MR. JACKLEY:** Would you let the defendant --
12 can we see the note?

13 **THE COURT:** Yeah. Take a look.

14 **MR. JACKLEY:** Can we have just two minutes?

15 **THE COURT:** Yeah.

16 I am going to go get some water while you are
17 doing that.

18 (Off the record.)

19 **MR. MURPHY:** Do you have the verdict form?

20 **THE COURT:** With my computer out of
21 business -- it's got a number on the bottom because it
22 came from the set of instructions and then I just
23 modified it.

24 Sit down, folks.

25 Wisdom of counsel?

1 **MR. MURPHY:** We move for a mistrial.

2 **MR. JACKLEY:** Your Honor, the state's request
3 is that we receive the verdict on Count One; and that
4 you hang it on Count Two.

5 **THE COURT:** And what?

6 **MR. JACKLEY:** And that it be a hung jury on
7 Count Two.

8 **THE COURT:** Anybody have any authority --

9 **MR. JACKLEY:** It's coming.

10 **THE COURT:** -- for either the mistrial or the
11 other?

12 **MR. MURPHY:** I think the authority for the
13 mistrial is probably well established that if the jury
14 says they are unable to reach a verdict, the Court has
15 the authority to --

16 **THE COURT:** Yeah, but how about if they have
17 reached a verdict on Count One; do we have a mistrial
18 as to Count Two?

19 **MR. MURPHY:** We would be opposing any partial
20 verdict.

21 **MR. JACKLEY:** We're pretty comfortable in
22 your position, but I asked my office to email me the
23 case. I am waiting for that.

24 **THE COURT:** Kersten, you and Allison see what
25 you can find about guilty on one and hung on the

1 other.

2 **MR. JACKLEY:** And the analysis that we used
3 is with respect to the issue of double jeopardy.

4 **THE COURT:** I understand the analysis. And I
5 understand I think -- I think you are more likely
6 right than Mr. Murphy at this stage, but I will see.
7 The truth is, I don't know. So we will have a recess
8 until I figure it out.

9 (Off the record.)

10 **THE COURT:** Initially, what has happened was
11 I was walking down the hall and the bailiff came up to
12 me and said the jury said they would continue to
13 deliberate while we were dealing with the question.

14 On another trip up or down the hall, I
15 directed the bailiff to tell the jury that we were
16 working on their question and we would hope to resolve
17 it in 20 minutes.

18 I went out to the hallway and got a soft
19 drink and the bailiff informed me that they have a
20 verdict on both counts.

21 At this stage of the game, unless there is
22 something outside the presence of the jury, I would
23 call them back into the courtroom.

24 State?

25 **MR. JACKLEY:** Yes. We're ready for the jury,

1 Your Honor.

2 **MR. MURPHY:** We have nothing.

3 **THE COURT:** Bring the jury, please.

4 (Whereupon, the following proceedings were
5 had in open court with the jury present.)

6 **THE COURT:** Okay.

7 Would the foreman please stand.

8 It's my understanding that you have reached a
9 verdict; is that correct?

10 **THE FOREPERSON:** We have, Your Honor.

11 **THE COURT:** Satisfied this is the jury,
12 Mr. Jackley?

13 **MR. JACKLEY:** I am, Your Honor.

14 **THE COURT:** Mr. Murphy?

15 **MR. MURPHY:** Yes, Your Honor.

16 **THE COURT:** Would you please hand the verdict
17 to the bailiff.

18 After I read the verdict, I will ask each of
19 you if this is your verdict as to Count One, and then
20 as to Count Two. You will each answer me in the
21 affirmative or negative. Yes or no clearly stated.

22 Any questions about that?

23 With the formal captions of the verdict form
24 omitted, the verdict reads as follows: We the jury
25 find that Mr. Graham is, Count Number One, guilty of

1 murder while in the commission of a felony.

2 Count Two, not guilty of premeditated murder.

3 Gilbert Martinez, is this your verdict as to

4 Count One?

5 **JUROR:** Yes.

6 **THE COURT:** Is this your verdict as to Count

7 Two?

8 **JUROR:** Yes.

9 **THE COURT:** Nancy Hanson, is this your
10 verdict as to Count One?

11 **JUROR:** Yes.

12 **THE COURT:** Is this your verdict as to Count

13 Two?

14 **JUROR:** Yes.

15 **THE COURT:** Mildred Fisher, is that your
16 verdict as to Count One?

17 **JUROR:** Yes.

18 **THE COURT:** Is this your verdict as to Count

19 Two?

20 **JUROR:** Yes.

21 **THE COURT:** Scott Denotter, is this your
22 verdict as to Count One?

23 **JUROR:** Yes.

24 **THE COURT:** Is this your verdict as to Count

25 Two?

1 **JUROR:** Yes.

2 **THE COURT:** Cynthia Christensen, is this your
3 verdict as -- I missed Sheila Garrigan. I will get
4 back to you.

5 Cynthia Christensen, is this your verdict as
6 to Count One.

7 **JUROR:** Yes.

8 **THE COURT:** Is this your verdict as to Count
9 Two?

10 **JUROR:** Yes.

11 **THE COURT:** And Sheila Garrigan, is this your
12 verdict as to Count One?

13 **JUROR:** Yes.

14 **THE COURT:** Is this your verdict as to Count
15 Two?

16 **JUROR:** Yes.

17 **THE COURT:** Hildur French, is this your
18 verdict as to Count One?

19 **JUROR:** Yes.

20 **THE COURT:** And your verdict as to Count Two?

21 **JUROR:** Yes.

22 **THE COURT:** Thank you.

23 Michelle Shelton, is this your verdict as to
24 Count One?

25 **JUROR:** Yes.

1 **THE COURT:** As to Count Two?

2 **JUROR:** Yes.

3 **THE COURT:** Barry Winter, is this your
4 verdict as to Count One?

5 **JUROR:** Yes.

6 **THE COURT:** As to Count Two?

7 **JUROR:** Yes.

8 **THE COURT:** James Eppard, is this your
9 verdict as to Count One?

10 **JUROR:** Yes.

11 **THE COURT:** As to Count Two?

12 **JUROR:** Yes.

13 **THE COURT:** Jo Ann Lemke, is this your
14 verdict as to Count One?

15 **JUROR:** Yes.

16 **THE COURT:** As to Count Two?

17 Is this your verdict as to Count Two which is
18 the not guilty of premeditated murder?

19 **JUROR:** Yes.

20 **THE COURT:** Thank you, ma'am.

21 James Whitman, is this your verdict as to
22 Count One?

23 **JUROR:** Yes.

24 **THE COURT:** And is this your verdict as to
25 Count Two?

1 **JUROR:** Yes.

2 **THE COURT:** Thank you.

3 Any questions further, counsel, at this time?

4 **MR. JACKLEY:** No, Your Honor.

5 **MR. MURPHY:** No, Your Honor.

6 **THE COURT:** At this point in time, ladies and
7 gentlemen, I would say this to thee, thank you. It's
8 a very difficult thing to sit in judgment in these
9 cases. You have done Yeomen's duty and we appreciate
10 it.

11 After a trial, you are excused from jury
12 duty. Obviously you came on in the last days of
13 November. Often times after a trial -- and I suspect
14 certainly after this one -- you will have people
15 inquire of you. It is your absolute privilege to say
16 yes or no.

17 I am going to ask those in the gallery to
18 allow you to leave tonight. They may inquire of you.
19 You do not have to respond. Attorneys and their staff
20 may call you. The primary purpose, at least when I
21 did it, was to see if there were -- you know, looking
22 for critique on my performance, but not anything else.
23 They may contact you, and I repeat, you are free to do
24 so.

25 Again, on behalf of Pennington County, the

1 State of South Dakota, thank you. You are excused.

2 (Whereupon, the jury was then excused from
3 their service.)

4 **THE COURT:** Please be seated.

5 Mr. Graham, you are remanded to the custody
6 of the Pennington County Sheriff.

7 And we will need to set a sentencing date. I
8 do not have my calendar. I will confer with counsel
9 and set that date.

10 It will be -- I believe, I have to by law
11 have a presentence investigation, unless it's waived
12 by everybody. In which case we can do the sentencing
13 at your convenience.

14 Other than that, I will advise counsel of the
15 time and date for sentencing. That be it.

16 We are in recess.

17 **MR. JACKLEY:** Thank you, Your Honor.

18 **THE COURT:** Anything else I need do?

19 Then we are in recess.

20 (Whereupon, the proceedings in this matter
21 were then concluded.)

22

23

24

25

1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
 2 COUNTY OF PENNINGTON)
 3

4 I, TINA RAE PRUSS, Official Court Reporter
 and Notary Public in and for the County of Pennington,
 5 State of South Dakota,

6 DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 7 questions asked, the testimony given, and of the
 proceedings had.

8 I FURTHER CERTIFY that I am not of kin or in
 9 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 10 interested in the event thereof.

11
 12 IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.

13
 14 **COPY**

15
 16 Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 17 Pennington County, South Dakota
 My Commission expires: 10-04-2012
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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA)
)
)
Plaintiff,)
)
VS.)
)
JOHN GRAHAM,)
)
)
Defendant.)

TRANSCRIPT OF
SENTENCING HEARING

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
JANUARY 24, 2011

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* * A P P E A R A N C E S * *

MR. MARTY JACKLEY
Attorney General
MR. ROD OSWALD
Assistant Attorney General
MR. ROBERT MANDEL
Assistant U.S. Attorney
Representing the State of South Dakota

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

* * I N D E X * *

WITNESS (ES) : DIRECT CROSS REDIRECT RECROSS

 (None.)

1 * * P R O C E E D I N G S * *

2 **THE COURT:** Okay.

3 We're here in the matter of the State of
4 South Dakota versus John Graham, file number 09-3953.
5 This is the time and place set for sentencing in this
6 matter.

7 There has been a bunch of attachments to the
8 presentence report, but it's my understanding there
9 has been no input from Mr. Graham.

10 Have you gone over whatever there is here
11 with your client, Mr. Murphy?

12 **MR. MURPHY:** I have, Your Honor.

13 **THE COURT:** Any additions or corrections?

14 **MR. MURPHY:** We do have a number of
15 objections, Your Honor, and one addition. In addition
16 to the time served that's indicated -- I wasn't able
17 to get this information to Ms. Horner in time. But it
18 appears my client was in Canada -- in custody in
19 Canada. Not house arrest, but actual custody for 220
20 days additional.

21 The objections we have with the PSR aren't
22 actually to the PSR but to the attachments so I will
23 go through those one by one if I could?

24 **THE COURT:** If you would.

25 **MR. MURPHY:** The first is, attached to the

1 presentence was the interview between Serle Chapman
2 and John Graham. That transcript is not even the
3 official transcript that the Court finally endorsed.
4 It's a previous version. There were a number of
5 versions of various redactions.

6 If the Court looks at page 4 and 6 of that
7 transcript, you can see right away there is the
8 parentheticals interpreting. Not only is it not the
9 official version that was ultimately adopted by the
10 Court, or approved by the Court, but the transcript
11 itself was never admitted into evidence; and neither
12 Mr. Chapman nor Mr. Graham testified authenticating
13 the transcript or the recording thereof.

14 And so I believe that it's not only
15 inadmissible here, but it's also completely irrelevant
16 to any issue before the Court.

17 **THE COURT:** I agree with that.

18 **MR. MURPHY:** The next is the transcript of
19 Denise Maloney's testimony during the Arlo Looking
20 Cloud trial. That wasn't even part of the record in
21 this case. Both Denise Maloney and Arlo Looking Cloud
22 provided sworn testimony in this case. So how a
23 transcript from Arlo Looking Cloud's trial is relevant
24 at this proceeding is beside me. I can't figure that
25 out.

1 But frankly for, that to be part of this
2 sentencing record appears to be completely
3 inappropriate. And I don't know to -- who offered it
4 or how it got into the record.

5 The third item is -- attached to the
6 presentence is the state's motion and notice to
7 clarify Theda Clarke's statement. Now, the Court
8 ruled against the state on that motion; found that it
9 wasn't co-conspirator testimony and it wasn't reliable
10 enough to be admitted. And how a pleading by the
11 state that wasn't granted is relevant to sentencing
12 here is against something I don't see the significance
13 of.

14 I can't see how that's relevant or why it was
15 submitted in support of any recommendation to the
16 Court. We ask that that, like the others, be
17 excluded. We don't want it part of the record that
18 goes up to the Supreme Court or follows my client to
19 the penitentiary.

20 Similarly, attached to the presentence is FBI
21 Agent McRoden's August 28, 2008 FBI 302, which was a
22 summary of his interview with Arlo Looking Cloud.
23 Mr. Looking Cloud testified, provided sworn testimony.
24 Mr. McRoden did not. So Mr. McRoden's unsworn
25 statement as to Arlo Looking Cloud's unsworn statement

1 in August of 2008, again, is not relevant. It's
2 certainly not the best evidence on any point that
3 could be gleaned from it because we had Arlo Looking
4 Cloud on the stand for hours, so the Court knows what
5 he has to say and his level of credibility. So we ask
6 that that be stricken from the record as well.

7 The last issue is an objection to the
8 assertion in the presentence that my client is facing
9 life without parole. We discussed this with the
10 Court. If I could, I will just summarize my arguments
11 so we have an appellate record on that issue.

12 Essentially, our position is this: In 1975,
13 South Dakota Codified Law 22-16-12 provided the Court
14 with two options for sentencing, death or life at hard
15 labor. Death is not an issue in this case because
16 this happened post Furman vs. Georgia. So the only
17 sentence provided by statute was life with hard labor.

18 In 1975, at the time this crime allegedly
19 occurred, the legislature had not defined what life
20 meant and whether that was a parolable or non
21 parolable offense.

22 But what we do know is in 1975, South Dakota
23 Codified Law 24-15-3 said that all inmates -- it did
24 not make an exception -- all inmates upon their entry
25 at the penitentiary should be given a parole date.

1 So it appears there that the legislature or
2 the legislation in effect in 75 anticipated for all
3 inmates a parole date being set.

4 We also know that in the case of Bush vs.
5 Canary, that, although it doesn't address this issue,
6 we know that the defendant in that case, who was
7 serving a life sentence, was granted parole. So there
8 were instances of lifers, prior to 1978, being granted
9 parole.

10 The fair inference from that structure is
11 that life sentences prior to 1978 were parolable.

12 In 1978 -- and this is the distinction -- the
13 legislature enacted 22-15-4 and at that point the
14 legislature specifically said life sentences are not
15 parolable.

16 The ex post facto law would prohibit the
17 Court from going backwards retroactively and imposing
18 a harsher sentence for crimes pre enactment of that
19 legislation.

20 It wouldn't make sense for the legislature in
21 78 to say life sentences are non parolable if that was
22 the previous state of the law. They wouldn't enact a
23 statute to reiterate the status quo.

24 The only inference that can be drawn from the
25 1978 legislation is that the legislature knew that

1 prior to 78 life sentences anticipated parole
2 eligibility. So statutorily, I believe Mr. Graham is
3 eligible for parole.

4 Constitutionally, under the Eighth amendment,
5 I believe he should be considered eligible for parole.

6 What we know is at the time of the events
7 alleged he was 19 years old. He was not convicted of
8 first degree murder by premeditation. And so the
9 cruel and unusual clause of the constitution -- both
10 of the state and the federal constitution in my view
11 should be read to prohibit the imposition of a non
12 parolable life offense.

13 Now, I would cite as further authority, the
14 dissent by Sabers and Amundson in Brim vs. South
15 Dakota Board of Pardons and Paroles. The citation is
16 1997 South Dakota 48. I understand, and I have
17 acknowledged before, that that is not the majority
18 decision. That the majority decision in that case
19 found after 1913 life sentences were not parolable,
20 but I believe that was not a well-reasoned decision
21 and it was certainly -- but the arguments made in the
22 dissent are better supported by the legislation than
23 that of the majority.

24 So those are the objections I would have to
25 the attachments and the finding.

1 **THE COURT:** All right.

2 I would listen to the state.

3 **MR. JACKLEY:** With the exception of the last
4 objection dealing with parole, Your Honor, we don't
5 object to excluding those matters from the presentence
6 report. They were included to provide background
7 information. And I agree with counsel that this
8 record is sufficient without those items. The Court,
9 having gone through the trial, having viewed the
10 evidence, I don't believe they are necessary. So we
11 would not object to those first items.

12 However, with respect to the life without
13 parole, it is the state's position that the law is
14 well settled in South Dakota with the Brim decision at
15 563 N.W.2d 812. It's a 1997 case, Your Honor, which
16 makes it clear, Your Honor, that life sentences after
17 July of 1913 do not have parole eligibility.

18 Furthermore, with respect to the
19 constitutional arguments set forth, the United States
20 Supreme Court has made it crystal clear that parole is
21 a privilege and not a right; and therefore, there are
22 no constitutional concerns. So we simply ask this
23 court follow the binding precedence of Brim.

24 **THE COURT:** Pursuant to the statements of
25 counsel, the objections to the addendums to the

1 presentence report will be stricken and removed from
2 the record as it goes up.

3 As to the question of parole --

4 **COURT REPORTER:** Is your mic on?

5 **THE COURT:** Appears not to be.

6 Addressing the issue of parole, in terms of
7 statutory construction, I think Mr. Murphy's analysis
8 is what statutory construction has routinely been.

9 However, I also have to state that I am
10 assuming the majority decision was aware of those
11 rules and have declared -- and I believe I am bound by
12 that decision that I have -- even were I to do so --
13 and this is not to say I would adopt that -- I think I
14 am prohibited from doing so by what appears to me to
15 be controlling law in the State of South Dakota.

16 On the basis of the statutory construction
17 and the usual premise that if the legislature makes a
18 change or passes a -- amends a law or passes a law, it
19 suggests that the preceding law was different. And I
20 acknowledge that as well, but the Supreme Court
21 decision takes that away.

22 I am not sure of the interpretation of the
23 parole being a right versus a privilege, but in the
24 absence of frankly having looked at the decision,
25 would I be correct in assuming that means that, for

1 instance, in South Dakota someone eligible for parole
2 under our routine rules is not entitled to parole
3 simply because he or she has served the requisite
4 time?

5 I think the argument addressed by Mr. Murphy
6 is basically a cruel and unusual punishment argument
7 under the Eighth Amendment, which would suggest a
8 conviction for felony murder is different than a
9 conviction for premeditated murder.

10 And given the circumstances of Mr. Graham's
11 life and the events occurring at that time, the
12 mandatory life imprisonment without parole sentence,
13 which is required, given my previous ruling on parole
14 eligibility, to be imposed in this case, might violate
15 the Eighth Amendment of the United States Constitution
16 and it would appear -- and perhaps of the South Dakota
17 Constitution as well.

18 Given some decisions of the U.S. Supreme
19 Court in recent time pertaining to life and life
20 without parole, Sullivan -- Sullivan -- Florida vs.
21 Sullivan, and the like, I am not -- I am not -- I
22 think the argument has some merit.

23 I am going to deny the motion. And I think
24 it's in the record for the Supreme Court to address.
25 Circumstances giving rise to the crime have made life

1 imprisonment sentences held unconstitutional in a
2 number of circumstances. I am not prepared to make
3 that ruling at this time, and deny the motion. I
4 think that is left for higher courts than I to decide.

5 At that point does the state have additions
6 or corrections to the presentence report?

7 **MR. JACKLEY:** Your Honor, we would simply
8 have two additional victim impact statements. One
9 from the grandchild of Annie Mae Aquash and the other
10 from Dr. Mark Aquash. They have been provided to
11 counsel.

12 May I provide them to the Court?

13 **MR. MURPHY:** And Your Honor, similarly, I
14 have reviewed them. We have some additional letters
15 that we attached to the 16 that we previously
16 provided. And copies of those have been provided to
17 counsel, as well.

18 **THE COURT:** Okay.

19 These matters will be amended to the
20 presentence report.

21 Does the state have anything to say?

22 **MR. JACKLEY:** Your Honor, if it would be
23 appropriate, the state would like to call two
24 witnesses, the daughters of Annie Mae Aquash.

25 **THE COURT:** Please.

1 **MR. JACKLEY:** The state would call Denise
2 Maloney.

3 Denise, for purposes of the record, can you
4 please state your name.

5 **DENISE MALONEY:** My name is Denise Maloney
6 Pictou.

7 **MR. JACKLEY:** How are you related to the
8 victim in this case, Annie Mae Aquash?

9 **DENISE MALONEY:** She was my mother.

10 **MR. JACKLEY:** Now is the time for you to
11 address the Court of anything you would like to say
12 regarding an appropriate sentence.

13 **DENISE MALONEY:** Thank you.

14 Your Honor, there is not a day in the past 35
15 years that I have not thought about my mother, Annie
16 Mae Pictou Aquash. Every morning when I wake and
17 every evening before I drift off to sleep, I think of
18 my mother. My mother of the center of my universe and
19 we were almost always with her.

20 The last time I saw my mother alive she got
21 down on her knees, rested her hands on my shoulders,
22 and looked straight into my eyes and said three things
23 to me: Don't ever let anyone tell you they are better
24 than you are. We are all equals, each and every one
25 of us. Then she said, don't lie. Not matter what

1 always tell the truth. And the most telling and
2 haunting, look after your sister, you are the oldest,
3 and I am counting on you to look out for her.

4 To my ten-year-old ears those words, though
5 curious to some, was how my mother always spoke to me.
6 So I did not think it strange or understand the impact
7 of those words until I realized they would be the last
8 words I would hear her speak.

9 Nor did I know that I would spend 35 years
10 defending those words and desperately clinging to them
11 to give me strength during this nightmare that has
12 become my life.

13 It was always so important to my mother to
14 impress upon our rights as human beings and instill in
15 us pride in embracing our heritage as first nation's
16 people. As a parent I struggled daily to impress
17 those same values upon my own children explaining the
18 rules and consequences of not knowing the rules of our
19 society and that by telling the truth, justice will
20 prevail.

21 That the truth is always unconditional and
22 that the taking of a human life is never to be
23 outweighed by anything including loyalty to social
24 groups or causes.

25 This was not something that was always easy

1 for me to have faith in during these last 35 years.
2 Thirty-five years is an incomprehensible amount of
3 time to wait for justice.

4 I questioned many times if my mother's ideals
5 and mine in retrospect were a little too utopian and
6 unrealistic for our world; and I still question if I
7 am setting my children up for a lifetime of
8 disappointment.

9 I would like to tell you a little bit about
10 my mother, not as an activist or a martyr as she was
11 often portrayed, but who she was as a human being.

12 My mother loved children and she could always
13 be found entertaining some little people as she called
14 them; treating them with the same dignity and respect
15 as any adult. She could be found teaching any of them
16 to bead or sew ribbon shirts or moccasins at any given
17 time.

18 People still talk about how my mother spoke
19 about us and interacted with us and I am filled with
20 regret when I hear these stories knowing she had so
21 many plans with us upon her return.

22 There was never any finality in her life.
23 Everything was always changing and evolving and we
24 believed her when she said we would see big changes in
25 our time with native rights and the poor lifestyles

1 and living conditions she had to endure as a child.

2 She had so much promise and was decades ahead
3 of her time in knowing the solutions that would bring
4 our nation's healing through education and the revival
5 of our culture and traditions.

6 This is something that we still to this day
7 are reminded of and mourn when we witness the levels
8 of poverty and violence that plague our communities.

9 I remember my mother being as protective as a
10 momma bear, and she loved us so fiercely and with so
11 much emotion I often cry when I think about it. If
12 there was one thing I knew for sure about my mother it
13 was how important we were to her and how much she
14 cared for us.

15 She explained to us the state of affairs in
16 our world at a very young age and as an avid supporter
17 of not just women's rights, but human rights as well.
18 It was not difficult for us to understand her passion
19 and why her leaving us for a short time would mean
20 that she would make a better future for us.

21 She was torn between leaving us and a chance
22 to help make a difference. Never in a million years
23 did she imagine that would mean she would never see us
24 again or she would have never left.

25 It is hard enough to try to accept the

1 senseless death of my mother, let alone the immense
2 feeling of betrayal I was left struggling with and
3 leaning that it was the lies and actions of her own
4 people and certain members of the American Indian
5 Movement, people my other trusted that participated
6 and delivered this death sentence upon her, delaying
7 her justice for 35 years with their oath of silence.

8 Thankfully I was able to cling to my mothers
9 perseverance in keeping the faith that the truth would
10 prevail, as difficult and hopeless as it seemed
11 sometimes. If not for any other reason, but for the
12 sake of her grandchildren. How was I to give them
13 hope for a future? In my mother's words, if the basic
14 fundamental lessons we base our humanity on could not
15 be adhered to above and beyond all justices even if it
16 included people closer to home than most wanted to
17 admit.

18 While writing this impact statement it
19 occurred to me that my children have not known their
20 grandmother as anything else but a murder victim. And
21 my heart aches with this realization and I will spend
22 the rest of my life trying to erase that from their
23 memories.

24 It tortures me that they had to live this
25 horror most of their lives, and it should come as no

1 surprise that for years I questioned my own quest for
2 justice for my mother. Worrying about how my
3 children's lives are being impacted and scarred to
4 know that a horrible event had touched their mother's
5 and Auntie's lives. My worst fear is that they will
6 carry that scar with them for the rest of their lives.

7 It is one of the last things I can do for my
8 mother and my children in helping them to learn the
9 wonderful humanitarian and human being she was and
10 that she had a rich and full life before it was stolen
11 from her.

12 My daughter fears living through what I had
13 to endure as a child. Having your mother ripped from
14 your life so unceremoniously. She often worries when
15 I have to travel and that weighs heavily on my because
16 I know she should be living her life as any
17 well-balanced 13 year old; not worrying about the
18 actions of a handful of immoral individuals from 35
19 years ago. I pray daily that she is able to move past
20 that.

21 The senseless act of having my mother stolen
22 from me left me confused and full of pain. Often over
23 the years, in attempts to try to push down some of my
24 own pain, I try to imagine what my mother's pain was.
25 More often than I would like to admit, while making

1 snow angles with her grandchildren, I was compelled to
2 lay down in the snow for a little while longer staring
3 up at the ski imaging the life slipping away from me
4 as I froze to death thinking of my children.

5 It still breaks my heart to think how along
6 she must have felt in those last few moments of her
7 life. I was left for 35 years imaging what happened
8 to my mother, dying in the snow, beaten and batter,
9 shot in the head, thinking of her pain and fear and
10 betrayal, and knowing who she was as a woman,
11 understanding how difficult and horrible that must
12 have been to be violated by people she trusted.
13 Especially after she had sacrificed her time with her
14 children for a short while to dedicate her life to an
15 organization that clearly viewed her as having no
16 value or importance.

17 The task of putting into words one of the
18 most painful events in my life and having to live that
19 day over and over again for the last 35 years with
20 little consequence to those who took her life has been
21 almost unbearable. To try and deny and explain what
22 my personal loss was has been difficult and has
23 brought to the surface many painful feelings and anger
24 that I had thought I had overcome.

25 It occurred to me how twisted my perception

1 of my own existence had become over the years
2 remembering as a young adult thinking that because I
3 hadn't been taken out to a bluff and shot in the head
4 that I was doing pretty good. Things could always be
5 worse and that left me with little incentive to think
6 that I could demand justice and exercise my right to
7 live my life the way it should have been had this
8 horrible event not have occurred.

9 Three of the most important events in my
10 life, should have been euphoric and were shadowed with
11 sadness and regret. The first being when I walked
12 down the aisle on my wedding day and turned to look
13 back at the back of the church hoping to see my mother
14 standing there.

15 And the second and third were the birth of my
16 two children, knowing and mourning the relationship my
17 children would denied by not having her in their
18 lives.

19 For me the most difficult thing to overcome
20 was being robbed of remembering my mother when I saw
21 her last. Being forced to live my mother's last few
22 day repeatedly, publicly through the media and the
23 internet for 35 years, at times threated the existence
24 and retention of my childhood memories of how a child
25 should remember their parent.

1 For 35 years the lies and conspiracies spun
2 by her murders prevented me from mourning her and
3 memorializing her in a way that would have allowed me
4 to begin to heal. Instead, I was denied that and left
5 for all these years with a gaping wound in my heart
6 knowing her murderers still walked free. I was forced
7 to live my mother's nightmare over and over again
8 while defending her right to live.

9 I wanted to be able to remember my mother the
10 way I saw her last, smiling, laughing, and smelling
11 the sweet grass. I still replay that image in my head
12 over and over again trying to etch it into my memory,
13 for fear of forgetting how she walked, talked,
14 laughed, and smelled. A child never forgets the
15 warmth and security of their parent's embrace and the
16 look of pride and admiration as they gaze upon them.
17 My mother made me feel safe and secure and that was
18 stolen from me.

19 Another result of losing my mother was the
20 inability to embrace my own culture for many years.
21 In our culture it is your mother who teaches you your
22 language and traditions. With her gone that journey
23 was made all that difficult. It was just too painful
24 to embrace it knowing that she would have been right
25 next to me learning and teaching had she been given

1 that opportunity to live.

2 After hearing whispers and rumors that her
3 own group had a hand in her murder, it prevented me
4 from feeling comfortable in exploring my heritage
5 through social events.

6 I still remember at the age of 25 stopping
7 dead in my tracks frozen with fear when I saw someone
8 walk by with an AIM patch on the jacket at a local Pow
9 Wow wondering if they knew about my mother's death.

10 I became resentful after listening to reports
11 that those who had knowledge and involvement in my
12 mother's death claimed traditional status. As a
13 result, I refused any traditional teachings, thinking
14 that if those who murdered my mother could be part of
15 that world, that was not something I wanted to be part
16 of. I remained spiritually scared and still recoil in
17 disgust from the hypocrisy of their claims to this
18 day.

19 It is difficult knowing that one of the most
20 important things to my mother was the learning
21 embracing of our traditional ways and this weighs
22 heavily on my heart as I feel I have let her down.

23 It is my hope one day with all of this behind
24 me that I will find the strength in outwardly
25 expressing my spirituality and confidence and pride so

1 that I may teach and share her legacy with her
2 grandchildren. For now I keep my spirituality locked
3 safe in my heart with my mother to protect and hold.

4 I now live my life battling bouts of
5 cynicism, paranoia and over-protectiveness trying to
6 cherish each and every moment I have with my children.
7 Most times stung with regret that I will never get to
8 experience those moments with my mother.

9 Sometimes moments of fear overcome me as I
10 think of the individuals who had knowledge and
11 involvement in my mother's murder but still walk free
12 and point fingers accusing others in this horrific
13 act. They continue to be feel justified because they
14 cannot hear the silent protests emanating from members
15 within their own community. Too gripped in fear of
16 retaliation to vocalize their truth and feelings on
17 this unconscionable act brought upon not just not
18 another human being, but one of their own women.

19 Woman are sacred in our culture and are to be
20 protected as life givers, not treated like trash and
21 dumped on the side of the road. No human being
22 deserves to be treated like. I have lived most of my
23 life not expressing my true anguish and pain over the
24 loss of my mother because I have had to be the strong
25 one for all these years. After all, my mother put me

1 in charge of looking after my sister. I have denied
2 myself that emotional cleansing, and I fear now after
3 35 years that I will not be able to have that because
4 I have lived this way most of my life.

5 There are days when I am exhausted from
6 having to put up a front when what I really want to do
7 is fall to the floor and stay there for a very long
8 time. But I go forward for my mother for her
9 grandchildren and for all who suffered during this
10 35-year ordeal.

11 I have spent the last ten years actively
12 campaigning for justice, not just through the courts,
13 but within our own community. And became subject to
14 public ridicule and name calling by supporters by my
15 mother's murderers who called me informant, FBI pawn,
16 vindictive, grief stricken because I dared to demand
17 justice to go through the white man's court for my
18 mother's justice.

19 I was thrust into living a life. I never
20 imagined feeling like an outcaste amongst my own
21 people because I dared to question the sanctity of the
22 brotherhood. I was always left feeling like I had to
23 justice my mother's basic rights as a human being to
24 my own people, an absorb thought, but something I know
25 my mother ended up having to do. And I only have to

1 remember what she had to endure to give me the
2 strength to continue to stand my ground.

3 For her family, grandchildren, nieces,
4 nephews and nation her murder will forever be a scar
5 on their memories. So much silence surrounded their
6 lives for so long that they have a hard time
7 discussing with me the details of my mother's murder
8 in fear of bringing me more pain.

9 So we continue suffer in silence and accept
10 that an injustice has been delivered to us and hope
11 for the ability to be free of this pain brought on by
12 our own people.

13 I have often left to marvel at the irony that
14 has now become my mother's legacy and that the
15 injustice she fought so hard against in our
16 communities would be the very injustices adopted and
17 delivered by her own people, not to mention the
18 addition of the ultimate insult of blaming the
19 government for their actions. This is a slap in the
20 face to all those who strive to make our world a
21 better place and a mockery to what my mother stood and
22 ultimately died for. Her right to exist in this
23 universe undisturbed.

24 The senseless murder of a family member means
25 more than just devastating grief. It leaves the

1 family reliving the horror and tears at your
2 anonymity. I would like to think one today that I
3 will be known over than the victim's daughter or the
4 daughter of Annie Mae who was murdered by her own
5 people 35 years ago.

6 To live through three trials has been one of
7 the most stressful events in our lives. For almost
8 ten years now this has consumed a quarter of my life,
9 the entire lives of my grandchildren, and for 35 years
10 half of her sister's lives.

11 I am especially concerned and pained by the
12 suffering of certain individuals who suffered along
13 with us during this whole process. Individuals
14 involved behind the scenes who had the courage to step
15 forward and speak the truth. The pain and guilt I
16 feel for those who dedicated so much of their lives
17 over the last 15 years to help my mother, and suffered
18 irreparable damages to their personal and financial
19 lives will be carried with me for the rest of my life
20 and they will never be forgotten. It is their undying
21 efforts and commitment that gave me hope and the
22 courage over the years to keep looking forward to
23 ensuring those that murdered my mother will never harm
24 another human being.

25 I get angry when I am forced daily to deal

1 with not only the betrayal my mother must have felt
2 and the realization her captures and murderers were
3 her own people, but who now claim they were her
4 friends. Not one of those so-called friends ever
5 contacted us in 35 years. And I unequivocally state
6 for the record that they were no friends of my mother.

7 Forgiveness is something that I still have
8 difficulty entertaining because her murderers and
9 their supporters show little remorse and still think
10 that the historical injustices and the importance of a
11 man sitting in prison outweighs the value of a woman's
12 life and that was stolen from her to protect the
13 sanctity of the brotherhood. A brotherhood that still
14 continues to bring injustices upon a sister who was
15 held hostage in their own community. This makes it
16 difficult for me to dream of a day when I can find
17 peace and remember my mother for the beautiful person
18 she was and not the horrible indignity she suffered in
19 the last few days of her life.

20 It is my hope through these proceedings that
21 others who are suffering from injustices delivered
22 upon them by family and members of their own community
23 will have faith in the justice system and know that
24 the truth will prevail, no matter how much silence or
25 how many years pass by that someone with courage one

1 day will step forward and speak the truth. My mother
2 did not have that opportunity to use her voice and
3 bring to light the injustices she witnessed condemned
4 and then suffered within her own community and our
5 nations and family will mourn that what could have
6 been for a very long time knowing that members of her
7 own group supposedly created to fight injustices such
8 as these made a judgment they did not have the right
9 to make, and sealed their fate when they decided she
10 did not have the right to live.

11 If my mother had lived, John Graham, I would
12 have spoken this to you in my Native American language
13 so that your spirit will hear and our grandmothers and
14 grandfathers will know what you have done. Until you
15 tell the truth, you deserve what you get. Forgiveness
16 will only come with remorse and ownership of your
17 actions.

18 This, John Graham, is what you stole from me.

19 I have one more from my 13-year-old daughter.
20 She states, I know a victim impact statement is
21 supposed to be about what you lost, but mine is about
22 what I never had. I never met my grandmother. I
23 still don't know what she looks like or even smells
24 like. I never even felt comfortable even saying her
25 name until this last peer.

1 I also never met anyone who had a family
2 member murdered. My grandmother is what a lot of
3 people lost, but my grandmother is what I never had.
4 Christine. Annie Mae's granddaughter.

5 Thank you, Your Honor.

6 **THE COURT:** I have read those letters.

7 **MR. JACKLEY:** The state would call it's last
8 witness, Debbie Maloney.

9 **DEBBIE MALONEY:** My name is Debra Jean
10 Maloney. I am Annie Mae's youngest daughter.

11 Your Honor, on behalf of the Mi'k Maq First
12 Nation, I want to give thanks for allowing us to come
13 here today and speak. Today I am going to be speaking
14 to you from my heart. In Mi'k Maq tradition, when we
15 speak from the heart it means we speak the truth.

16 I also want to give thanks, before I read my
17 letter, for the Lakota people that did support my mom,
18 and did love my mom, and did treat her respectfully.
19 Thank you for allowing us to be in your territory once
20 again today.

21 As I wrote out my statement, my 13-year-old
22 daughter sat next to me and asked what I was doing.
23 She could see the pain in my eyes. A familiar look
24 for me since I started this trial process seven years
25 ago. I told her that I was writing an important

1 report telling the judge about the pain that was
2 caused by John Graham when he killed my mom. My
3 daughter bowed her said and said softly, momma, can
4 you tell them about the pain that I have knowing I
5 will never meet my grandmother, and she began to cry.

6 You see, I'd often talked so proudly of my
7 mother that my children actually feel that they know
8 her. We celebrate her birthday. On her birthday
9 every year I make a cake. And we sing happy birthday
10 to my mother. And they do know her in their hearts.

11 I often wonder how much heartache we must
12 endure, my family and I. I didn't think it was
13 possible that my heart could break so many times or
14 that the pain within me would continue as long as it
15 has.

16 I was hesitant in telling the Court today how
17 vulnerable I have felt over the years as I know Graham
18 will receive a life sentence, regardless. And I
19 refuse to allow anyone's actions to victimize me.

20 However, today, with the hopes of creating a
21 sense of healing and on behalf of my children, my
22 family, friends, and nation, I humbly submit the
23 following.

24 In a previous statement given at Arlo Looking
25 Cloud's trial, I spoke about the loss through the eyes

1 of a child. I spoke about the loss of childhood my
2 sister had in having to fill a void for me as her
3 younger sister. I spoke about the cultural,
4 traditional, and language loss the Mi'k Maq Nation and
5 my sister and I experienced in not having my mother as
6 one of our leaders. All of that is still true due to
7 the actions of John Graham, as well.

8 However, today I will be talking about what
9 has happened since the onset of these trials seven
10 years ago. Less than two months ago I had the
11 opportunity to look at John Graham in the eyes for the
12 first time. I have to admit I was terribly anxious
13 because of the commitment I bestowed on myself at a
14 very young age. I vowed that some day, somehow, I
15 would look into the eyes of the person who killed my
16 mother.

17 I was nervous because I didn't know how I
18 would react when I saw you for the first time. In my
19 mind, I envisioned rage, due to the emptiness of not
20 having my mother there for all the times that I needed
21 her the most. And if it were not rage, it was the
22 deepest sadness that you can't possibly imagine. I
23 can't even find the words to describe it.

24 I entered the courtroom on December 1, 2010,
25 fearful of the reaction I would have after waiting 35

1 years to look at you. Shockingly, I found myself
2 looking at a shell of a man. Someone who has never
3 taken responsibility for their actions. Surprisingly,
4 I wasn't filled with rage or fear or feel vulnerable.
5 Instead, I looked at you and I pitied you -- I pitied
6 you -- because you appear empty to me; and you will
7 never know forgiveness. Because of your lack of
8 accountability, your family will never have peace.

9 Your Honor, I don't want my pity and
10 compassion for others to be mistaken for forgiveness.
11 I cannot forgive this man because he does not deserve
12 it nor does he want it. I have suffered greatly at
13 the hands of this man since my childhood, right
14 through into the court processes that started in 2003.

15 Thirty-five years ago this man silenced my
16 mother. And in 2004, I was silenced because of this
17 man as well. Prior to the trial two months ago I have
18 never spoken publicly about my mother's death because
19 early on in the investigation in 2004, Graham's legal
20 team in BC publically announced they had concerns that
21 one of Annie Mae's daughters was a police officer and
22 may be capable of influencing the case.

23 So for nearly seven years I have kept all my
24 thoughts, all my feelings and opinions, to myself with
25 only my spiritually as comfort. In turn, my sister,

1 Denise, has had to face the public on her own and deal
2 with the daily barrage of insults, lies, half truths,
3 and misinformed supporters.

4 For nearly 35 years I, myself, have been part
5 of the justice system in Canada. My experience in law
6 enforcement had prepared me for the crime scene
7 photographs and horrific detail of the last few hours
8 of my mother's life. I didn't flinch when I saw my
9 mother's decomposing body laying on the ground with
10 her blackened skin when they showed those pictures on
11 the wall. I was even able to get through hearing how
12 she was bound and interrogated. And even when I heard
13 of how you were allegedly having sex with my mom, I
14 knew she was doing everything possible to stay alive.
15 I knew she was fighting hard every step of the way to
16 try and convince her murderers that she deserved to
17 live; that she wasn't an informant.

18 What I wasn't prepared to hear was how, in
19 those last few minutes, she suddenly stopped crying,
20 stood defiantly, and began to pray in Mi'k Maq. On
21 one hand it broke my heart to know that she had
22 finally conceded. Yet in my mind, I knew in those
23 last few moments she became a warrior.

24 Bringing my mother home was another difficult
25 event for me. I was happy to return her to our

1 community to rest. But the images of her remains will
2 stay with me forever.

3 While my mother was buried 35 years ago here
4 in South Dakota, without a coffin the second time, the
5 soil here preserved her very well. I arranged for
6 another examination of her remains when we returned
7 back to Nova Scotia and I was present when this took
8 place.

9 Because of you I have held my mother's skull
10 in my hands. I have seen that bullet hole in her
11 skull because of your actions.

12 Financially, the costs of this has also had
13 an impact on me. Travel costs, lawyer fees, with
14 limited victim services' funds on both sides of the
15 border. Often types I paid for tickets and meals and
16 accommodations or us or family friends.

17 On April 22, 2004, I obtained a loan to have
18 my mother's body returned back to Nova Scotia. And
19 despite the attempt to stop us with an injunction, we
20 were granted permission to return home with her. In
21 the next eight weeks I incurred financial costs to
22 conduct DNA analysis and plan a funeral. This was
23 followed by having to hire a lawyer to deal with a
24 second injunction. This time in Canada. Prohibiting
25 us from burying my mother, once again led by your

1 legal team.

2 I have to say this last event was like one of
3 the most devastating events for me. Eight weeks after
4 I exhumed my mother's body from South Dakota, and
5 planned, extensively, a traditional funeral, which
6 would bring in family and friends from across North
7 America, we received an injunction prohibiting us from
8 carrying on with the barrier on the day that we began
9 our waking ceremony. Four days before the funeral.

10 If there was ever a time I felt most violated
11 it was this time. I could not understand why your
12 defense team would wait until the day we started our
13 sacred ceremonies to place an injunction on us when
14 they clearly had eight weeks. They had eight weeks
15 prior, and knew the funeral date to be Canada's
16 National Aboriginal day.

17 Through hiring a lawyer and working
18 throughout the weekend, the injunction was rescinded
19 two hours prior to the funeral start time. What
20 should have been four days of sacred ceremonies and
21 celebration turned out to be four days of desperation.

22 Years of silence around this case initially
23 lead my family to believe we didn't own the right to
24 learn the truth or circumstances surrounding our
25 mother's death. This case began 35 years ago with my

1 mother's sister, Mary Laffert and Becky Julian,
2 attempting to find justice. My sister and I began our
3 journey pushing for justice in 1997 when a distant
4 relative named Robert Branscomb brought to our
5 attention the three individuals responsible for our
6 mother's death.

7 Branscomb was our catalyst which started a
8 journey where many friends of our mothers would be
9 found along the way. And while we recently lost
10 Robert Branscomb, I am comforted to know he knew of
11 your conviction prior to his passing.

12 Bob Mandel, Rod Oswald, Marty Jackley are all
13 great prosecutors and have done a great job based on
14 the dynamics of this case. They continually pushed
15 through delays and obstacles and brought us to a place
16 that shown a light of truth to who was responsible for
17 my mother's death.

18 I feel like I have lost seven years of my
19 life like they were stolen from me. I know now I will
20 never be the same person prior to this long drawn-out
21 process.

22 My two children have been impacted by this
23 and it has taken away years from them that I'll never
24 get back. The strain both physically and emotionally
25 has been hard to bear at times.

1 Whether the people involved in my mother's
2 death walk outside the walls of prison or within the
3 confines of it, they will never be free.

4 What you have done will follow you the rest
5 of your life. Through accountability comes
6 forgiveness, but not freedom. You spending the rest
7 of your life in prison will not change the loss that
8 my family or community feel. But if you miss your
9 children and your grandchildren growing up, their
10 birthdays, their holidays, celebrations, then maybe
11 you will know and you will better understand what you
12 took from us. At the end of the day, you will still
13 be able to celebrate from your cell. And you will
14 still be able to have your memories. That we will
15 never have because you have stolen our memories.

16 When all of this started I wrote a poem. I
17 wrote a poem to you. Have you ever thought of me.
18 Take a moment to reflect. Think of someone you really
19 love and need in your life. Someone who was there for
20 you to share all your triumphs, hold your hand when
21 you have fallen, was there for all the important
22 events smiling proudly by your side. You really love
23 this person, don't you? But suddenly this person is
24 gone. What would your life be like without them? Can
25 you go on living? What kind of life would it be? It

1 would never be the same. At least you would have your
2 memories, memories to cherish. You murdered my mother
3 before we could make our memories. Have you ever
4 thought of me? Do you ever think of how you changed
5 my life, let alone yours? Do you ever think of how my
6 children's life has changed? You may have taken my
7 mother's body, but in turn you set her spirit free and
8 it lives on in many people including me. The truth
9 shall set your own spirit free. Come forth and be
10 forgiven.

11 Today, Your Honor, you will hear today how
12 this man has been a good father, a good friend, a good
13 partner or husband. For that, I'm glad your family
14 hasn't suffered. I'm glad they haven't experienced
15 the same pain that we have had for 35 years. But
16 those good things that others recognize in you, and
17 they cherish in you, does not change the fact that you
18 were responsible for my mother's death.

19 I have had a life sentence. My sister and I
20 and our family has had more than a life sentence.

21 And I want to tell you one last thing, Your
22 Honor. Despite all the pain and suffering we have
23 endured through three-and-a-half decades, I am
24 confident now more than ever that my mother did not
25 die in vain. Because of who she was as a Mi'k Maq

1 woman, the strength she carried in her body, mind, and
2 sole, the convictions she had in exposing the truth on
3 injustices done to Native American people, and the
4 foresight she spoke of in bringing back our language,
5 our culture, and spirituality. For all of that, we
6 are all better people.

7 My mother's blood runs through my sister and
8 I, and because of that, we are strong Mi'k Maq woman.
9 The loss of our mother makes us love our children
10 fiercely and has made us formidable mothers, sisters,
11 and friends to one another and those around us.

12 Annie Mae Pictou Aquash stood for
13 preservation, preservation of a nation of people. She
14 stood for all North American Indians, for equality,
15 for education, for the right of women, and for the
16 truth.

17 Signoqua (phonetic).

18 **THE COURT:** Thank you.

19 I have read that letter, too, as before.

20 **MR. JACKLEY:** Your Honor, I only have yet a
21 brief argument with respect to sentencing. I don't
22 know if the Court wants to hear it now or wants to
23 hear the other witnesses?

24 **THE COURT:** Argument -- say again -- in
25 support of what?

1 **MR. JACKLEY:** I just have a brief statement
2 to make based primarily upon the statements earlier
3 made regarding the Eighth Amendment. I don't --

4 **THE COURT:** Well, I have already ruled on
5 that.

6 **MR. JACKLEY:** I just want -- would like to
7 have a record in reference to the Eighth Amendment.

8 **THE COURT:** I see no point in it, but all
9 right.

10 The Supreme Court will decide the issue, not
11 I, other than what I have said.

12 **MR. JACKLEY:** Okay.

13 **THE COURT:** Feel free.

14 **MR. JACKLEY:** In the Brim decision, there is
15 a reference to the United States Supreme Court case of
16 Board of Pardons v. Allen 482 US 369, wherein it
17 states, quote, an inmate has no constitutional right
18 to parole, end quote. And indeed when you look at a
19 case of this nature, while I, as a prosecutor, cannot
20 express as well as the victim impact statements that
21 we have heard, would indicate that this case is one of
22 the most severe cases of callous disregard for human
23 life that I have seen. It began with the tying up of
24 a victim, placing her in the trunk area of a Ford
25 Pinto, bringing her to Rapid City, South Dakota, to be

1 further held to be interrogated, and then ultimately
2 to be shot execution style.

3 It is based upon those reasons that the State
4 of South Dakota respectfully requests that John Graham
5 be sentenced to mandatory life without parole.

6 **THE COURT:** Do I have any option other than
7 that?

8 **MR. JACKLEY:** It's the state's position that
9 you do not.

10 **THE COURT:** Mr. Murphy?

11 **MR. MURPHY:** Your Honor, the state has argued
12 now twice that parole is a privilege, not a right.
13 That may be unless the legislature speaks to the
14 issue.

15 We've cited 24-15-3, which was in effect in
16 1975 which uses the language shall; that inmates shall
17 be given a parole date. So we believe that in regard
18 to the Eighth Amendment claim as well as the statutory
19 claim, our legislature spoke. And in 1975 they said
20 that parole in each instance was a right, not a
21 privilege. Whether you are actually paroled may be a
22 privilege, but whether you are given a parole date or
23 made parole eligible was a right.

24 **THE COURT:** I thought we were addressing the
25 Eighth Amendment.

1 The Supreme Court -- the U.S Supreme Court
2 has ruled on a number of occasions that life sentences
3 in and of themselves without a possibility of parole
4 in some cases or categories of people are
5 unconstitutional. The cases cited aren't particularly
6 on point of that, but I have read those decisions.
7 And in classes I have taught, I have discussed them
8 with students. I am well aware of those decisions.

9 I believe the issue -- none of them have
10 addressed this posture squarely on and I leave that to
11 the Supreme Court, the State of South Dakota, and the
12 United States Supreme Court should it go that far.

13 But I don't believe that it is my position
14 nor prerogative under the circumstances to design
15 circumstances not yet addressed; and the result of
16 those addressing those by higher courts is beyond me.

17 And at this point the motion is, again, in
18 case there was doubt about it, denied.

19 Mr. Murphy, anything further?

20 **MR. MURPHY:** I have one witness, my client's
21 brother, Harold Johnson, would like to address the
22 Court and then my client's statement.

23 **THE COURT:** Please come forward, sir.

24 If you would take the witness stand, as well,
25 sir.

1 Thank you.

2 **MR. MURPHY:** Mr. Johnson, you can go ahead
3 and address the Court as to your thoughts about your
4 brother and the sentence that should be imposed.

5 **MR. JOHNSON:** Okay.

6 John has a huge family in the Yukon. And we
7 all know you are innocent, John. Like all the
8 grandchildren, we tell them what kind of injustice is
9 going on here all the time.

10 Mom -- our mother died knowing this injustice
11 and this was -- she carried to the grave, you know,
12 the fight for truth that we've been going through
13 since the 80s. Like there is only about 30,000 people
14 in the Yukon. So everybody knows each other
15 indirectly or directly. And everybody that's been --
16 that I have been in contact with and has been in
17 contact with me over the few years, you know, no one
18 can believe this is really going on. You know, how
19 could this be happening.

20 Because like -- you know, wherever you've
21 lived throughout your life, your home has always
22 been -- has become like a friendship center, a drop-in
23 center for all walks of life that have come through
24 your doors, and you are like a counselor. People,
25 like, look up to you.

1 And we never -- no one is ever going to stop
2 praying for God's truth. That's all we have ever
3 asked for is God's truth. And I don't really have too
4 much to say other than, you know, we're not going to
5 stop going after God's truth.

6 And like the old people are phoning me today,
7 and you know, they are saying, you know, maybe towards
8 the end, the righteous will be prosecuted. Maybe this
9 is what's going on. But we're not going to give up
10 and we're not going to ever stop believing in the
11 truth. And that's really about all I have.

12 **MR. MURPHY:** All right.

13 Thank you.

14 **THE COURT:** Thank you, sir.

15 **MR. MURPHY:** We have no other witnesses to
16 present, Your Honor.

17 You've gotten the 20 some letters?

18 **THE COURT:** I have. I have read them.

19 **MR. MURPHY:** All right.

20 **THE COURT:** Anything further?

21 **MR. MURPHY:** Your Honor, I don't know if you
22 want to take comments from counsel at this point. My
23 client will make a statement as well.

24 What order would you like to go in?

25 **THE COURT:** If comments are to be made,

1 Mr. Graham's would be of interest.

2 Counsel can speak, but I don't see that I
3 have any options. The sentence is preordained at this
4 point, but you are welcome. I don't want to cut
5 anybody off.

6 **MR. MURPHY:** I understand the sentence is
7 preordained, but you have received 20 letters from
8 people who have known him since he was born through
9 the present. And you heard the testimony of the
10 witnesses who knew John back in the 1970s. Without
11 exception everybody who has had contact with this man
12 over the last 55 years has pointed him out to be a
13 gentle, kind, and decent man.

14 He has no criminal record to speak of,
15 certainly nothing involving violence. So we just
16 wanted the Court and the people present to recognize
17 that this is a man who has been widely regarded in his
18 community as a leader and advocate of his people.

19 **THE COURT:** I believe that I have a pretty
20 good grasp on the loss suffered by Anna Mae's family
21 and friends over time.

22 I think I also have a pretty good feeling for
23 the life that Mr. Graham has led for a long number of
24 years. And he has made friends and supported people
25 and done, through the course of time, many good

1 things.

2 None of that changes what happened 35 years
3 ago. Understanding the circumstances of those times
4 and events puts a context to what happened for
5 everybody involved, but it doesn't change what
6 happened for anybody.

7 There is no way to erase the pain of Anna
8 Mae's family and friends. There is no way that Anna
9 Mae comes back to life. And there is nothing -- I
10 think at this point there is nothing that can be done
11 about any of that.

12 I would hear from Mr. Graham if you wish to
13 speak, sir.

14 **THE DEFENDANT:** I would just like to say
15 that -- to the people here in this court and to the
16 family, that the truth hasn't come out here. You
17 know, I'd like to tell your family that Anna Mae was
18 never kidnapped; she was never ever tied up, never in
19 my presence. She was not murdered in my presence.
20 And that's what I know for sure. That just did not
21 happen.

22 And when we got people that can come in here
23 and take the stand and every one of them just about
24 admitted that they are lying. They are holding back
25 truths, telling half truths, they are not saying the

1 whole story, and you haven't heard the whole story. I
2 didn't mean years of being silent. I stayed silent
3 because it seemed like everything I say and everything
4 I do, I am just lying. Nothing I say is the truth.

5 I knew Anna Mae. I never ever denied riding
6 with her from Denver to here to Pine Ridge where we
7 dropped her at a safe house where she was safe and
8 well. And she came out and told me she was safe
9 there. I was free to go. That was the last time I
10 seen her.

11 At no time ever was she kidnapped, tied up in
12 any way, shape, or form. And what's been going on,
13 like 35 years of rumors, innuendoes, speculation,
14 that's about all it was and all it is. And people
15 taking the stand one after the other, like I said,
16 admitting that they were lying, didn't ever tell the
17 truth, and then they could sit here and watch this
18 carry on.

19 You are going to do what you are going to do.
20 You are going to believe what you are going to
21 believe. I did not kill Anna Mae and I did not ever
22 kidnap her, and that's just the way it is. And I've
23 never ever been given orders from anybody or taken
24 orders from anybody to ever do this to her. I would
25 never do that.

1 **THE COURT:** Having been said, I have a
2 verdict entered by a jury after a fairly lengthy,
3 complex trial. And it is my duty at this point to
4 impose a sentence unless there is some reason I should
5 not do so at this time.

6 **MR. MURPHY:** There is not.

7 **THE COURT:** Mr. Graham, as you are well
8 aware, I have no option whatsoever under the law and
9 the ruling that I have made but to sentence you to
10 life in the South Dakota Penitentiary without parole.

11 You have 30 days in which you may appeal this
12 sentence from and after my signing and filing of the
13 judgment.

14 Need I do anything else, gentlemen?

15 **MR. JACKLEY:** Your Honor, none other than we
16 would request the Grand Jury costs and the costs that
17 have been submitted to be part of the judgment.

18 **MR. MURPHY:** We ask that those be hardshipped
19 in light of the fact my client has been in custody for
20 three years and will remain so there is no realistic
21 way those will ever be paid. So we ask that they be
22 hardshipped or liened.

23 **THE COURT:** I don't know how I can run a
24 lien. I will include them in the judgment. They
25 certainly are hardship costs. Although they are

1 hardship costs, I don't think you can lien them. I
2 think they have been incurred. The judgment should
3 reflect that.

4 Thank you.

5 **MR. JACKLEY:** Has the Court ruled just for
6 purposes of the judgment on the time served aspect
7 that came up initially on the extradition?

8 It would be the state's position on the 220
9 days that he's not entitled to that because it's on
10 the premise of an extradition.

11 **THE COURT:** This becomes relevant if and when
12 the parole issue is addressed and overturned.

13 It has been my practice over the years to
14 allow credit for all time served except that in
15 resisting extradition. But once extradition is
16 granted, the time served from that point forward is
17 credited. Once the decision on extradition has been
18 made.

19 Any further questions or issues?

20 **MR. MURPHY:** No, Your Honor.

21 **MR. JACKLEY:** No, Your Honor.

22 **THE COURT:** If not, we are in recess.

23 Thank you.

24 (Whereupon, the proceedings in this matter
25 were then concluded.)

1 STATE OF SOUTH DAKOTA)
 2 COUNTY OF PENNINGTON) SS. CERTIFICATE

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I, TINA RAE PRUSS, Official Court Reporter and Notary Public in and for the County of Pennington, State of South Dakota,

DO HEREBY CERTIFY that the foregoing transcript is a true and accurate transcript of the questions asked, the testimony given, and of the proceedings had.

I FURTHER CERTIFY that I am not of kin or in any way associated with any of the parties to said cause of action, or their counsel; and that I am not interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this 3rd day of May, 2011.

COPY

Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 Pennington County, South Dakota
 My Commission expires: 10-04-2012