

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)
)
 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
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MR. ROD OSWALD
MR. ROBERT MANDEL
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MR. JOHN MURPHY
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MR. MATT KINNEY
MR. RANDY CONNELLY
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Representing Thelma Rios

MR. DANA HANNA
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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 WKLDCC 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 WKLDLOC 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 WKLDLOC 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 Pellitier'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