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

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Attorney General  
MR. ROD OSWALD  
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MR. ROBERT MANDEL  
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Representing the State of South Dakota  
  
MR. JOHN MURPHY  
Attorney at Law  
Representing John Graham  
  
MR. MATT KINNEY  
MR. RANDY CONNELLY  
Attorneys at Law  
Representing Thelma Rios

\* \* I N D E X \* \*

WITNESS (ES) :	DIRECT	CROSS	REDIRECT	RECROSS
DONOVIN SPRAGUE	41	62	75, 95	94

1	EXHIBITS:	OFFERED/ADMITTED
2	1 - Grand Jury Transcript, Al Gates	93/93
3	A - Book Cover	42/42
4	B - Sprague Resume	42/42
5	C - 2010 Letter	43/43
6	D - 1936 Letter	44/44
7	E - Historical Document	45/45
8	F - 1940 License	45/45
9	G - License	46/46
10	H - Resolution	46/46

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

1  
2           **THE COURT:** Are you ready to proceed,  
3 counsel, for the state?

4           **MR. OSWALD:** Yes.

5           **THE COURT:** And for Mr. Graham?

6           **MR. MURPHY:** Yes, Your Honor.

7           **THE COURT:** And for Ms. Rios?

8           **MR. KINNEY:** Yes, Your Honor.

9           **THE COURT:** All right.

10           I want to take care of probably a nickel/dime  
11 matter first. Audio visual during the course of the  
12 trial. State has advised ELMO and ancillary  
13 equipment.

14           Is that sufficient for counsel?

15           **MR. MURPHY:** ELMO and we'll also need a video  
16 reproduction unit for the DVDs.

17           **THE COURT:** Yeah. Understand. Okay.

18           Now, I have been given to understand that  
19 Ms. Rios has reached a plea agreement with the State  
20 of South Dakota involving a plea to a charge of  
21 attempted kidnapping, which is a Class 5 felony.

22           **MR. OSWALD:** Accessory.

23           **THE COURT:** I'm sorry. Accessory to  
24 kidnapping, which is a Class 5 felony carrying a  
25 maximum possible prison sentence of five years in the

1 penitentiary, and a \$10,000 fine, or both such fine  
2 and imprisonment.

3 Is that the understanding of the state?

4 **MR. OSWALD:** Yes.

5 **THE COURT:** I have a plea agreement in front  
6 of me.

7 Does that plea agreement as executed by the  
8 state set forth all the requirements, all the terms  
9 and conditions?

10 **MR. OSWALD:** Except for certain terms of  
11 probationary --

12 **THE COURT:** Left in the discretion of the  
13 Court?

14 **MR. OSWALD:** Correct.

15 **THE COURT:** And Mr. Kinney, is your client  
16 aware of the details of that?

17 **MR. KINNEY:** She is, Your Honor.

18 **THE COURT:** Ms. Rios, have you had the  
19 opportunity to read and review the plea agreement  
20 which is signed by your attorney?

21 **THE DEFENDANT:** Yes, sir.

22 **THE COURT:** I understand it's an agreed  
23 disposition which would allow the Court to impose a  
24 five-year penitentiary sentence, suspended for a  
25 period of five years, subject to a period of

1 incarceration of approximately 90 days with credit for  
2 time served. And the terms and conditions of the  
3 probation to be set in the mind of the Court.

4 Is that a fair statement, counsel?

5 **MR. KINNEY:** Yes, Your Honor.

6 **MR. OSWALD:** Yes.

7 **THE COURT:** Is that your understanding,  
8 Ms. Rios?

9 **THE DEFENDANT:** Yes, sir.

10 **THE COURT:** All right.

11 This is a new charge, Ms. Rios, so to dot the  
12 Is and cross the Ts, I must treat it as though this is  
13 your first appearance in the court on this charge and  
14 advise you of all your rights that attend a criminal  
15 proceeding. If you should have any questions about  
16 these rights, you must inform me when I ask you about  
17 them.

18 Because this is brought by other than an  
19 indictment, that is it's brought about simply by the  
20 issuance of a complaint, which requires a first  
21 appearance and a preliminary hearing to decide if  
22 there is enough evidence to establish there is  
23 probable cause to believe a crime was committed, and  
24 probable cause to believe that you are the person  
25 committing the crime, that would precede a formal

1 arraignment here.

2 I am expecting that you have discussed with  
3 counsel the waiving of that, but I will get to the  
4 question of that after we discuss your rights in their  
5 entirety.

6 In this charge, as with any other charge, you  
7 begin with the presumption of innocence. That is,  
8 specifically, you have done nothing wrong and at this  
9 point of the game there is no evidence whatsoever to  
10 suggest you have done anything wrong.

11 You have an absolute right to silence and a  
12 right against self-incrimination. And those rights  
13 stay with you unless this matter is resolved or you  
14 waive them.

15 You have a right to have copies of the papers  
16 that spell out the charges against you, specify  
17 exactly what the state must prove in order to obtain a  
18 conviction. In this case, there are two sets of  
19 papers. One is the initiating complaint; and the  
20 second is the information which is the document upon  
21 which this formal arraignment will be made.

22 You have a right to be represented by  
23 counsel. That right includes, as you know, the right  
24 to represent yourself, the right to hire attorneys of  
25 your own choosing, or the right to ask the Court if

1 you cannot afford a lawyer, to appoint counsel for you  
2 at county expense. The county will, of course, expect  
3 its money back at a later date.

4 That is the option you have exercised so far  
5 in these proceedings and Mr. Kinney and Mr. Connelly  
6 are the counsel appointed for you.

7 Are you satisfied with their services to  
8 date, ma'am?

9 **THE DEFENDANT:** Yes, sir.

10 **THE COURT:** Do you wish to continue with  
11 their representation in this matter?

12 **THE DEFENDANT:** Yes, sir.

13 **THE COURT:** Now, the state, as in all  
14 criminal charges, has the burden of proving every act,  
15 fact, or omission alleged in a crime and necessary to  
16 complete the crime beyond a reasonable doubt. They  
17 must prove that to the unanimous satisfaction of a  
18 jury.

19 In that regard, you are entitled to a speedy  
20 and public trial before a jury of your peers here in  
21 Pennington County, South Dakota. And a jury of your  
22 peers means a jury composed of ordinary, everyday  
23 citizens of Pennington County.

24 At that trial, not only does the state have a  
25 burden of proving its case, but you have a couple of

1 serious constitutional rights. The first one is what  
2 we call the right of confrontation. And that,  
3 essentially, means the right to see and hear the  
4 testimony of the witnesses called by the state when  
5 they are placed under oath, and for you to have the  
6 opportunity to question or cross-examine them.

7           That is the confrontation our -- the U.S.  
8 Constitution talks about and the meet the witnesses  
9 face to face that our state constitution addresses.

10           You have a second right. The state issues  
11 subpoenas to make people come to court and testify.  
12 You have a right to do the same thing. It's called a  
13 right to compulsory process. What it means is you  
14 have the power and the right to my assistance in the  
15 issuance of order courts or subpoenas to make people  
16 come to court and testify on your behalf.

17           With any charge you have a -- eventually you  
18 are called upon, as you will be today, to answer the  
19 charge and that is to respond by making a plea of the  
20 guilty or not guilty varieties. You are aware of  
21 those pleas from your previous arraignment, but I will  
22 go over them again.

23           The not guilty pleas are essentially two: A  
24 not guilty plea; and a not guilty by reason of  
25 insanity. Both of those pleas are usually made

1 simultaneously if the insanity plea is used.

2           The guilty pleas are commonly three: A  
3 straight forward guilty; a guilty but mentally ill  
4 whose major impact affects the sentencing options  
5 available to the Court; and a no-contest plea,  
6 officially known as nolo contendere. But the no  
7 contest plea essentially has you admitting to the  
8 judge that -- or saying to the judge, Judge, I won't  
9 admit I committed the crime or every act necessary for  
10 that crime, but on the other hand, I won't deny it.

11           And I understand that if I plead no contest,  
12 you can sentence me just as though I plead guilty or  
13 if a jury convicted me of the crime. In other words,  
14 I am exposed to the same maximum possible sentence  
15 that I could get if I plead guilty. It takes special  
16 permission of the Court to use that plea and it  
17 doesn't come very often -- I think twice in the ten  
18 years I have been here -- so that plea is hard to get.

19           The critical factor when one enters a guilty  
20 plea is making sure that you do so voluntarily; that  
21 is, after considering all the facts, you have had  
22 enough time and -- to discuss it with counsel, think  
23 about it, and weigh your options, and decide for your  
24 own personal view and benefit this is the best way to  
25 resolve the case against you.

1           And if you enter a plea of guilty, most of  
2 the rights I just discussed will go away. Obviously  
3 the presumption of innocence disappears.

4           You get to keep two essential rights: Your  
5 right to have copies of the papers and know what you  
6 are supposed to have done wrong; and your right to the  
7 assistance of attorneys.

8           But you have to give up part of your right to  
9 silence and the right against self-incrimination.  
10 Obviously, if you enter a plea of guilty, you are  
11 speaking and you are incriminating yourself.

12           Secondly, you have to give me enough  
13 information so that I believe you actually committed  
14 the crime. If I don't think you committed the crime,  
15 I will not accept a plea of guilty.

16           You give up -- the state upon a plea  
17 agreement has nothing left to prove so its right or  
18 its obligation to prove its case beyond a reasonable  
19 doubt disappears.

20           If you enter a plea of guilty, there is no  
21 need for a trial so you are giving up your right to  
22 the speedy and public trial before a jury of your  
23 peers here in Pennington County.

24           And again, if there is no trial, your rights  
25 that are part of that trial, your rights to see, hear,

1 and question the witnesses of the state, and your  
2 right to use my court orders to make people come to  
3 court go away as well. There is simply no place in  
4 the remaining proceedings to do this.

5           Once you enter a plea of guilty, and I am  
6 satisfied that you committed that crime, the only  
7 thing left to occur is the sentencing as a result of  
8 that plea.

9           Do you have any questions about the rights  
10 that I just explained?

11           **THE DEFENDANT:** No, sir.

12           **THE COURT:** Do you understand them?

13           **THE DEFENDANT:** Yes, sir.

14           **THE COURT:** Need any further explanation of  
15 them?

16           **THE DEFENDANT:** No, sir.

17           **THE COURT:** All right.

18           Do you know what the maximum possible  
19 sentence for this charge is?

20           **THE DEFENDANT:** Yes, sir.

21           **THE COURT:** What is it?

22           **THE DEFENDANT:** Five years.

23           **THE COURT:** Five years in the penitentiary  
24 and/or a \$10,000 fine.

25           Any questions about that?

1           **THE DEFENDANT:** No, sir.

2           **THE COURT:** This is presented to the Court as  
3 an agreed disposition, meaning the Court will accept  
4 the agreement of the parties as to the disposition or  
5 sentence it will impose at least insofar as those  
6 terms go. It's a very rare thing for the Court to do.

7           Upon consideration of the matters here for me  
8 to accept the plea agreement and let you plead to it,  
9 I have to accept the agreed disposition. I have  
10 looked at the papers and I am willing to do so in this  
11 case, which means that if you accept the plea  
12 agreement and enter the plea of guilty, as is  
13 indicated, you will be sentenced to a five-year  
14 penitentiary sentence suspended except for a period of  
15 approximately 90 days and credit for the time served,  
16 which would make you eligible for release,  
17 essentially, immediately.

18           There would be a probationary period of five  
19 years; and the terms would be very simple: Number  
20 one, you would follow the recommendations of your  
21 Court Service's Officer.

22           Number two, you would obey all laws and  
23 commit no crimes. I am obviously not talking about  
24 speeding tickets, but I wouldn't get very careless  
25 after that.

1 Do you understand me?

2 **THE DEFENDANT:** Yes, sir.

3 **THE COURT:** There would be a requirement that  
4 you make regular payments within your means to  
5 reimburse the county for the expenses it has incurred  
6 on your behalf.

7 Do you have any questions about that?

8 **THE DEFENDANT:** No, sir.

9 **THE COURT:** Now, as I indicated earlier,  
10 since this is a new charge resulting from the plea  
11 agreement, and it's brought by way of a complaint  
12 signed by the state, you have a right to a preliminary  
13 hearing. They are commonly held in Magistrate Court  
14 though they can be held in front of a Circuit Court  
15 Judge. The real purpose of that is to see if there is  
16 enough evidence to make any sense to go forward with  
17 the crime or the prosecution. The Grand Jury serves  
18 that function in an indictment, but without an  
19 indictment, an intervening judge makes a judicial  
20 decision in that regard.

21 To come before me and enter the plea, you  
22 either have to have the preliminary hearing or waive,  
23 give up, your right to the preliminary hearing.

24 It is my understanding that you are going to  
25 give that up and enter the plea today; is that

1 correct?

2 **THE DEFENDANT:** Yes, sir.

3 **THE COURT:** The state needs to read the  
4 charge.

5 If you would be so kind.

6 (Whereupon, the Information was then read  
7 aloud in open court.)

8 **THE COURT:** Is that -- do you have any  
9 questions about the charge, Ms. Rios?

10 **THE DEFENDANT:** No, sir.

11 **THE COURT:** Do you need any further  
12 explanation of any elements or things contained in  
13 that charge?

14 **THE DEFENDANT:** No, sir.

15 **THE COURT:** Do you have any questions at all  
16 about your rights, the consequences, or the nature of  
17 the charge?

18 **THE DEFENDANT:** No, sir.

19 **THE COURT:** Are you ready to proceed?

20 **THE DEFENDANT:** Yes, sir.

21 **THE COURT:** Have you had enough time to think  
22 about this?

23 **THE DEFENDANT:** Yes, sir.

24 **THE COURT:** Have you had sufficient time to  
25 talk with your attorneys and weigh the pluses and

1 minuses, pros and cons, of entering this agreement?

2 **THE DEFENDANT:** Yes, sir.

3 **THE COURT:** Now, lastly, it must be your own  
4 specific and voluntary decision. After all the input  
5 from whoever you discussed it with and however much  
6 thought you gave it, you must come to the decision  
7 that says I, myself, Thelma Rios think this is the  
8 best way to go and I do so willingly. Okay.

9 Is that -- can you say that to me openly and  
10 honestly that you thought about it, you seriously  
11 considered it, and you wish to do this?

12 **THE DEFENDANT:** Yes, sir.

13 **THE COURT:** Anybody make any threats or  
14 promises to you except for the plea bargain as a  
15 promise and the implied possible consequences of  
16 former charges?

17 If you understand what I am saying, obviously  
18 being charged with a serious crime has an implied  
19 threat, and a plea bargain has some promises. If you  
20 do this they will give you this.

21 Other than those things, anybody made any  
22 threats or promises to you?

23 **THE DEFENDANT:** No, sir.

24 **THE COURT:** Are you under the influence of  
25 drugs or alcohol today?

1           **THE DEFENDANT:** No, sir.

2           **THE COURT:** All right.

3           Would you please come forward, ma'am.

4           Okay. Ma'am, you are charged here today with  
5 an accessory to kidnapping. The formal charge was  
6 read aloud, but specifically, it alleges, again, that  
7 between December 1975 and September of 2009, in  
8 Pennington County, South Dakota, you committed a  
9 public offense known as accessory to kidnapping.  
10 That's the Class 5 felony carrying the five years  
11 potential sentence to the penitentiary and a \$10,000  
12 fine. And in committing that offense, you did, with  
13 the intent to hinder, to delay, or prevent, basically,  
14 the discovery, detection, apprehension, prosecution,  
15 conviction, or punishment, all or any one of those, of  
16 John Graham, Theda Clarke, and other known or unknown  
17 principles and accessories to the crime for the  
18 commission of a felony or render assistance to them in  
19 violation of 22-3-5. That, in the State of South  
20 Dakota, if you did those things, is a Class 5 felony.

21           Do you understand the charge?

22           **THE DEFENDANT:** Yes, sir.

23           **THE COURT:** Now, in the charge -- to that  
24 charge, what is your plea?

25           **THE DEFENDANT:** Guilty, Your Honor.

1           **THE COURT:** All right.

2           In here it says -- did you with some intent  
3 to hinder, delay, or prevent the discovery in any way,  
4 shape, or form, detention, apprehension, prosecution,  
5 conviction, or punishment, of John Graham, Theda  
6 Clarke, or any other principles and accessories  
7 involved in this felony which here, I believe, is the  
8 murder of Anna Aquash. All right.

9           Did you do those things?

10          **THE DEFENDANT:** Yes, sir.

11          **THE COURT:** All right.

12          In particular, were you aware of relaying a  
13 message to have Anna Mae brought to Rapid City?

14          **THE DEFENDANT:** Yes, sir.

15          **THE COURT:** And did you hear others  
16 discussing Anna Mae?

17          **THE DEFENDANT:** Yes, sir.

18          **THE COURT:** And the bringing of her to Rapid  
19 City?

20          **THE DEFENDANT:** Yes, sir.

21          **THE COURT:** Did you provide your apartment to  
22 others?

23          **THE DEFENDANT:** Yes, sir.

24          **THE COURT:** Regarding Anna Mae, for purposes  
25 related to Anna Mae?

1           **THE DEFENDANT:** Yes, sir.

2           **THE COURT:** Okay.

3           Did you hear or -- hear any discussions among  
4 others about the possibility or the thought that Anna  
5 Mae should be killed or offed?

6           **THE DEFENDANT:** Yes, sir.

7           **THE COURT:** Okay.

8           Now, if those statements are true, that you  
9 just made to me, there is a factual basis for my  
10 finding you guilty and accepting your plea of guilty  
11 to the charge of accessory to kidnapping.

12           So I am going to ask you once again, are the  
13 statements and admissions you just made to me true?

14           **THE DEFENDANT:** Yes, sir.

15           **THE COURT:** Based upon those statements, the  
16 plea agreement, other matters of evidentiary value  
17 that are contained within the file, I will find that  
18 there is a factual basis to find you guilty and will  
19 hereby find you guilty of the crime of accessory to  
20 kidnapping.

21           Now, there has been a question of sentencing  
22 and when it would occur. You have an automatic right  
23 to 48 hours between now and the sentencing to be done.  
24 You can waive that right if it is your desire, but to  
25 do that, you would also have to waive the right to a

1 presentence investigation. The state would have to  
2 waive its right for a presentence investigation, which  
3 is normally an accumulation of facts, evidence,  
4 opinions, and other matters that the judge might want  
5 to consider both in aggravation and mitigation; that  
6 is, making the crime worse or less blame worthy than  
7 it otherwise would. That can be a compilation taking  
8 a number of weeks and provide information to the  
9 Court.

10           If you are -- if you wish to be sentenced  
11 today -- and I have no idea how fast you wish to  
12 proceed -- you would have to waive that as would the  
13 state. With an agreed disposition, as indicated, I am  
14 not so concerned about it. But it may be necessary if  
15 at some point and another if there is to be what we  
16 call an interstate transfer of probationary terms  
17 because another state will have to decide whether they  
18 are willing to accept you for supervision within their  
19 system. And to do that they may want to know more  
20 about this than appears on a relatively cold record.

21           Do you understand that?

22           **THE DEFENDANT:** Yes, sir.

23           **THE COURT:** So defense counsel, Mr. Kinney,  
24 how does your client wish to proceed at this time?

25           **MR. KINNEY:** Your Honor, she intends to waive

1 the 48-hour time period and proceed with sentencing  
2 today.

3 **THE COURT:** And is that true, ma'am, you wish  
4 to be sentenced in about the next three minutes?

5 **THE DEFENDANT:** Yes, sir.

6 **THE COURT:** How does the state feel about the  
7 presentence investigation?

8 **MR. OSWALD:** We're fine with the waiver,  
9 Judge. We feel it's knowingly, voluntarily, and  
10 intelligently entered.

11 Can I speak with Mr. Kinney for one minute,  
12 Judge?

13 **THE COURT:** Yes.

14 **MR. KINNEY:** Your Honor, at this time, I  
15 would make a motion to seal the unredacted plea  
16 agreement that is before the Court. As we discussed  
17 in chambers there are two versions, and we make that  
18 motion at this time.

19 **THE COURT:** There is, for diverse interest  
20 discussed with me by both the state and the defense  
21 concerning the plea agreement, there will be a  
22 redacted version of the plea agreement placed in the  
23 public record. And a complete and full plea agreement  
24 will be placed within the court file in a sealed  
25 version which is openable only by my order or some

1 court higher than I.

2 And that's the motion by both the state and  
3 the defense?

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

5 **THE COURT:** So be it.

6 Is there any reason -- do you have anything  
7 anybody wishes to say?

8 **MR. KINNEY:** No, Your Honor. We ask the  
9 Court adopt the agreed upon disposition.

10 **THE COURT:** Well, I think I am bound to that  
11 or we can go back to --

12 **MR. KINNEY:** Square one.

13 **THE COURT:** I am content to do that.

14 Is there any reason why I should not impose  
15 sentence upon you today?

16 **THE DEFENDANT:** No, sir.

17 **THE COURT:** All right.

18 That having been said, and with the Class 5  
19 felony, the parameters of this sentence are not beyond  
20 or particularly unusual in sentences given for Class 5  
21 felonies. That is, some of them are harsher than the  
22 one agreed to and some of them are markedly less  
23 harsh.

24 But there is a five-year penitentiary  
25 sentence imposed. I am going to suspend the execution

1 of that sentence on the following terms and  
2 conditions: Number one, you serve a period of 90 days  
3 in jail with credit for time served.

4 You will obey all laws and follow all of the  
5 recommendations of your Court Service's Officer.

6 Those are relatively simple probationary terms; but  
7 because they are that simple, I will expect absolute  
8 and complete compliance with those terms.

9 Do you have any questions about that?

10 **THE DEFENDANT:** No, sir.

11 **THE COURT:** You will be required to reimburse  
12 the county for all expenses incurred on your behalf  
13 and to set up a stream of payments to that end.

14 Understood?

15 **THE DEFENDANT:** Yes, sir.

16 **THE COURT:** I believe the attorney's fees  
17 will be substantial. My guess somewhere between ten  
18 and \$20,000 at this stage and could exceed that. I  
19 don't know where they are, but they are up there. I  
20 have been signing vouchers that have a lot of numbers  
21 on them.

22 There is filing fees of \$104. There will be  
23 some transcript costs from the Grand Jury. The  
24 amounts are not specific but as a rule those are not  
25 horrendous, particularly compared to any other costs.

1           Any other costs other than filing fees and  
2 transcript costs from the state?

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

4           **THE COURT:** Number one, you may appeal this  
5 judgment and sentence within 30 days of when it is  
6 signed and filed. I will sign and file it, in all  
7 likelihood, the first part of next week. And so your  
8 30 days would run from some time the first part of  
9 next week.

10           The parole eligibility, should you go to the  
11 penitentiary, is -- I don't have a clue. I am  
12 assuming 25 percent, but I don't know that. Parole  
13 eligibility depends upon the number of prior felonies  
14 one has had -- prior convictions for felonies. I  
15 don't know where we sit on that. I don't believe  
16 there are any.

17           And secondly, sometimes the nature of the  
18 underlying crime, crimes of violence and the like, can  
19 carry an enhanced one of 30, 35, 40 percent. Things  
20 of that nature. What I am telling you at this stage  
21 is I don't have a clue. But it's a minimum of  
22 25 percent of your time and 40 percent of your time, I  
23 believe.

24           **MR. KINNEY:** Your Honor, because the  
25 information alleges that the time period was all the

1 way up to September of 2009, the new system of parole  
2 would apply as opposed to the old system. And if  
3 accessory to kidnapping is considered a violent crime  
4 we're under the understanding of 50 percent.

5 **THE COURT:** All right.

6 So there is a chance if you go to the pen you  
7 got to serve two-and-a-half years before you are  
8 eligible for parole less credit for time served.

9 If you don't go to the penitentiary, it  
10 doesn't matter. But if you do go to the penitentiary,  
11 the time you actually sit in the big house until you  
12 are set out would be two-and-a-half years.

13 Understood?

14 **THE DEFENDANT:** Yes, sir.

15 **THE COURT:** Questions about that?

16 **MR. KINNEY:** Your Honor, as far as the costs  
17 go, she will have to make payments.

18 **THE COURT:** Understood.

19 **MR. KINNEY:** As well as the court-appointed  
20 attorney's fees and that is what she was asking about  
21 to me.

22 **THE COURT:** Yeah. You are going to set up a  
23 payment schedule.

24 Frankly, I don't know what your means are,  
25 but I would be surprised if you will get them all paid

1 before your probation runs out. I do expect a  
2 significant and serious effort to pay those fees.  
3 Regardless, whatever is remaining unpaid, if and when  
4 your probation is terminated, it will become a lien or  
5 judgment against you for collection from any assets  
6 you may thereafter incur.

7 I mean, those things are not going to go  
8 away. And simply because they won't go away, and you  
9 won't be able to pay them in their entirety, I do  
10 expect a meaningful attempt to pay them. I mean, ten  
11 dollars a month ain't going to fly.

12 So there is also, of course, with this a new  
13 charge that requires, I believe, additional processing  
14 with the Sheriff's Department. So what I am going to  
15 do is issue a warrant of arrest with a PR bond which  
16 will allow you to go over and be processed and  
17 released on that bond, all right.

18 I think that is sufficient, is it not,  
19 counsel?

20 **MR. OSWALD:** It is.

21 **THE COURT:** And that's consistent with the  
22 plea agreement; is that correct?

23 **MR. OSWALD:** Yes.

24 **MR. KINNEY:** Your Honor, upon entry of the  
25 written judgment, will the bond posted by a third

1 party be exonerated?

2 **THE COURT:** Yes. I think that was  
3 substantial as I recall it, after numerous discussions  
4 on that issue.

5 **THE DEFENDANT:** Thank you, sir.

6 **THE COURT:** Yeah.

7 We will turn now to the State versus John  
8 Graham. We have a number of motions pending, but the  
9 first thing I want to clarify is, I am assuming that  
10 this process, to date, has reduced the question about  
11 the number of peremptory challenges to what I am  
12 assuming are going to be somewhere in the vicinity of  
13 25 a side, plus or minus a couple, to account for the  
14 base 20, plus the additional challenges that are  
15 associated with alternate jurors?

16 **MR. MURPHY:** That would be my understanding,  
17 Your Honor, although, of course, during voir dire if  
18 it appears that we're having a substantial difficulty  
19 finding unbiased jurors or those who have not been  
20 affected by pretrial publicity, we would certainly  
21 revisit the issue at that point.

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

23 The state have any questions about that?

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

25 **THE COURT:** Considering the age of the case,

1 and the fact that a good share of the potential jurors  
2 will not have been either born or old enough at the  
3 time of the alleged event to have recollections from  
4 that point in time, realizing there has been publicity  
5 in the current time, I am thinking an original call of  
6 100 jurors would be sufficient.

7 Does anybody disagree with that?

8 To go larger than that, I have to do the  
9 jurors in relays or go down to the Civic Center.

10 **MR. MURPHY:** Well, Your Honor, my main  
11 concern about going with a 100 jurors is that the case  
12 in and of itself has some sensational components, but  
13 as the Court is aware, the state is alleging that my  
14 client has committed a sexual assault against  
15 Ms. Aquash. And my past experience is that that  
16 allegation alone will affect a number of jurors. I  
17 picked a jury out in Kadoka on a rape case and we had  
18 82 jurors and I recall probably 15, 18 for cause just  
19 on that issue alone.

20 **THE COURT:** Yeah.

21 **MR. MURPHY:** And so when you get into the  
22 pretrial publicity, the feelings about the American  
23 Indian Movement and the sexual assault you kind of got  
24 a perfect storm of potential cause challenges.

25 **THE COURT:** And my experience in the sexual

1 offenses runs the same way. The percentage of jurors  
2 that are acquainted with either relatives, themselves,  
3 family members, or claims, whether justified or  
4 unjustified, is always a very surprising number to me  
5 and I think that creates a bit of a problem for us.

6 Mr. Jackley? Mr. Oswald?

7 **MR. JACKLEY:** Your Honor, were you talking 25  
8 perempts or 20 each?

9 **THE COURT:** Well, you have a base 20, but  
10 once we start adding alternate jurors and we're  
11 sitting here looking at Thanksgiving to Christmas,  
12 although I expect we won't be going that long at this  
13 stage, could be in error, but I think were -- we're  
14 still going to look at several days of jury selection.  
15 We're going to take half a day or better to take care  
16 of the peremptory challenges once we have a panel  
17 seated.

18 So we're talking about Christmastime looming  
19 over the horizon and having jurors who thought that  
20 Monday was about their last day of -- Tuesday would be  
21 their last day of jury service be called in to sit for  
22 two or three weeks on a trial.

23 I am concerned about where we go.

24 **MR. JACKLEY:** We would request at least a  
25 hundred then, Your Honor.

1           **THE COURT:** Well, I don't think we get by  
2 with less than a hundred.

3           My concern is do we need a hundred and a  
4 half. And as I think about it -- I am thinking I do,  
5 but I think we could start with a panel of a hundred  
6 and have a panel of 50 on standby if we need to come  
7 in and start over with the voir dire.

8           Mr. Krattenmaker, how do you prefer to do  
9 that? If we say we need -- we want at least a standby  
10 of 150.

11           Do you prefer we do them here in relays?

12           **MR. KRATTENMAKER:** That would be my  
13 suggestion. I will leave it to counsel.

14           **THE COURT:** Mr. Krattenmaker is our court  
15 administrator responsible for arranging the facilities  
16 necessary to handle this matter.

17           And is that agreeable to counsel?

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

19           I was going to add, too, my understanding --  
20 again, anticipating from the Marshall trial, but in  
21 the last two federal trials they were able to do it --  
22 and I know voir dire is different in the federal  
23 system -- but for less than a hundred, so I think that  
24 makes sense.

25           **THE COURT:** Well, it's -- I hope it does.

1 And I remain somewhat optimistic that we can get that  
2 done. But absent the sexual allegations I would be  
3 extremely comfortable with a hundred, but you never  
4 know whether you are going to get two or 40 of those.  
5 And that's the -- going to be the big unknown, coupled  
6 with the time frame from basically black Friday to  
7 Christmas Eve. So that's going to create some  
8 problems as well.

9 So we'll start with a panel of 100, Jeff.  
10 And however we call up the second one to have them  
11 available. I suspect we should at least have them  
12 come in and be videoed or -- they already will have  
13 been.

14 Anything else?

15 **THE CLERK:** When do you want to release the  
16 jurors' names to counsel, Your Honor?

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

18 **MR. MURPHY:** Tomorrow.

19 That was one of the things on my list. If we  
20 can get the preselect going, we're going to have --

21 **THE COURT:** I doubt we're going to do  
22 preselects because we're not -- you know, no matter  
23 what we call, we don't have a clue how many are going  
24 to show up here. And we're going to have to shift  
25 them around.

1           We can give you the names of the potential  
2 jurors. I can give those to you well in advance, but  
3 preselect just makes no efficiency for us here at all.

4           **MR. MURPHY:** Well, if we could get the names  
5 and the questionnaires, copies of the questionnaires  
6 and all that as soon as possible, because the  
7 logistics of managing between 100 and 150 individual  
8 jurors is something that's pretty burdensome.

9           **THE COURT:** Monday, folks?

10          **MR. JACKLEY:** That would be good for the  
11 state, Your Honor.

12          **THE COURT:** Okay.  
13 You can do that, Stan?

14          **THE CLERK:** We should be able to, Your Honor.

15          **THE COURT:** Say again.

16          **THE CLERK:** We should be able to, Your Honor.  
17 That's not a problem.

18                 And then have we decided on the alternates  
19 yet or to be determined?

20          **THE COURT:** It will be determined, but there  
21 will be within that number -- I have to go back and  
22 read the statute, but you get quite a number of extra  
23 peremptorys for alternates. It surprised me that the  
24 number was that high, but it is. So I am guessing  
25 they'll be another five a side.

1 Two alternates?

2 **MR. MURPHY:** That would be fine by me, Your  
3 Honor. If we had two alternates, randomly dismissed  
4 at the end of the case as opposed to being the last  
5 picked. And I think the statute would require five  
6 additional peremptories or four. I am not sure.

7 **THE COURT:** That's my thought.

8 And I prefer the random extraction, pull a  
9 number out of the hat, and those two go home.

10 Anything else logistically we need do?

11 **MR. MURPHY:** Your Honor, the only other  
12 thing -- and Mr. Oswald and I briefly talked about  
13 it -- he emailed you quite some time ago saying the  
14 state anticipated starting their witnesses on  
15 December 2.

16 In light of Ms. Rios' situation, I questioned  
17 whether that had changed. It appears their witnesses  
18 are going to be ready on the 2<sup>nd</sup>. So even if we  
19 finish jury selection early, it's my understanding now  
20 that we aren't going to start taking testimony until  
21 the morning of December 2.

22 **THE COURT:** Okay.

23 Are we --

24 **MR. OSWALD:** Yes. Originally, Judge, I  
25 thought, from leave of the Court, I asked permission

1 to have it start at one o'clock. And just to be on  
2 the safe side, I have them coming in at 8:30 on  
3 December 2.

4 **THE COURT:** They also are aware they may not  
5 go until the next day as well?

6 **MR. OSWALD:** Yes.

7 **THE COURT:** I have no idea how fast or slow  
8 jury selection is going to go. All counsel here are  
9 experienced at what they are doing and I suspect we  
10 will get it done in workman-like manner. All right.  
11 That takes care of the logistics.

12 Now, we have some motions pending.

13 Mr. Murphy?

14 **MR. MURPHY:** Your Honor, I have my -- the one  
15 that requires evidence is my motion in limine  
16 regarding the Medicine Man issue. I do have Donovan  
17 Sprague, the expert that we noticed up, here and ready  
18 to testify and so if you want to take him, that would  
19 be great my us.

20 Otherwise, I know Mr. Hanna has his motion to  
21 quash the Dick Marshall subpoena also pending, and I  
22 don't know if he has evidence on that.

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

24 **MR. HANNA:** Judge, that depends on whether or  
25 not the prosecutor will stipulate to certain facts. I

1 do have witnesses who are available to testify if that  
2 becomes necessary.

3           Otherwise, I had anticipated primarily just  
4 argument today.

5           **THE COURT:** State?

6           **MR. JACKLEY:** I don't know what facts he  
7 wanted to stipulate to so it's hard for me -- we don't  
8 have any witnesses. We don't know what's all being  
9 alleged at this point.

10           It is our intent to request that Dick  
11 Marshall be subpoenaed and testify at trial. If he  
12 takes the fifth, which is my understanding that he's  
13 indicated he's going to do now, it would be our desire  
14 to request the Court for an order to compel under a  
15 grant of immunity.

16           **THE COURT:** I understand there is potential  
17 immunity to what? Prosecution for?

18           **MR. JACKLEY:** My understanding is it would be  
19 a grant of immunity for prosecution with the exception  
20 of perjury.

21           **THE COURT:** Okay.

22           Including -- is there a probationary factor  
23 in here?

24           **MR. JACKLEY:** The status of the probation --

25           **THE COURT:** Or of parole?

1 I don't know about y'all, but I consider the  
2 possibility of going back to jail to be -- in the  
3 course of testimony to be incriminating. I may be  
4 wrong, but --

5 **MR. JACKLEY:** Your Honor, our request would  
6 be for derivative use -- an order to compel for  
7 derivative use immunity.

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

9 **MR. HANNA:** I am not certain what they mean  
10 by derivative use immunity.

11 **THE COURT:** I think I understand. It's kind  
12 of the fruit of the poison tree doctrine; that it  
13 cannot be used for prosecution for anything coming out  
14 of -- arising out of his testimony.

15 **MR. HANNA:** I am --

16 **THE COURT:** Is that a fair statement?

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

18 **MR. HANNA:** Judge, I would like to see  
19 whatever their motion is in terms of immunity. What  
20 exactly they are going to be offering.

21 My argument would be -- first of all, he is  
22 taking the Fifth Amendment.

23 Secondly, if they try to seek an order to  
24 immunize his testimony, such an order would not be  
25 sufficient to protect him from criminal liability in

1 at least two other states. Crimes were committed here  
2 in the state of Colorado, in the state of Wyoming, and  
3 in the state of South Dakota. The government's theory  
4 is that a woman was kidnapped in Colorado, driven  
5 against her will while being kidnapped through Wyoming  
6 and into South Dakota.

7 So regardless of what the boundaries they are  
8 talking about in terms of derivative use immunity, the  
9 South Dakota Attorney General does not have the  
10 authority to bind Colorado or Wyoming to refrain from  
11 using any testimony that Mr. Marshall had in a  
12 prosecution that could bring in either of those  
13 states.

14 **THE COURT:** That would be my understanding  
15 without any effort at research.

16 Mr. Jackley?

17 I mean, my view is -- as to the underlying  
18 motion to quash is your client, if subpoenaed, has to  
19 come to court and has to exercise his right.

20 **MR. HANNA:** Uh-huh.

21 **THE COURT:** He's always subject to changing  
22 his mind no matter how many affidavits are signed  
23 before hand. And I think he has to stand up to the  
24 plate and the pitch gets thrown and then he decides to  
25 swing or step out of the box.

1           **MR. HANNA:** Well, I think the proper  
2 procedure is he is called into the box outside of the  
3 presence of the jury. He is then asked a question.  
4 He then asserts his Fifth Amendment because he is not  
5 supposed to be taking his Fifth Amendment privilege in  
6 front of the jury. Which is why the preferred process  
7 is to --

8           **THE COURT:** If that's the procedure,  
9 Mr. Hanna, that's what will happen. I frankly don't  
10 know at this stage. But if that's the procedure -- I  
11 have not even looked at that. If that's the  
12 procedure, I am more than content with doing that.

13           **MR. HANNA:** So with regard to this motion --  
14 this request they are making for an order to give  
15 Mr. Marshall derivative use immunity, which I frankly  
16 don't know what it means. I know there is such a  
17 thing as transactional which means we're not going to  
18 charge him with anything. And I know there is such a  
19 thing as use immunity which is we promise not to use  
20 his testimony in a future prosecution.

21           The idea of derivative use immunity is  
22 frankly something I have never heard of.

23           **THE COURT:** Well, as I described it to  
24 Mr. Jackley, it's either included in normal use  
25 immunity or it's an extension of it. They won't use

1 that to go find additional evidence of any way, shape  
2 or form. That's what I perceive it to be, but  
3 Mr. Jackley can spell it out.

4 But in any event, that issue will come up if  
5 and when we get to the crux of the problem and I will  
6 certainly be prepared to address it at that point in  
7 time.

8 **MR. HANNA:** Thank you.

9 What I would ask the Court to do is I would  
10 like to address an issue today that has nothing to do  
11 with the Fifth Amendment or an order to immunize with  
12 the issue of immunity. And that is the issue of the  
13 government's improper purpose for seeking to compel  
14 the testimony of Richard Marshall. And it is on that  
15 issue that I would ask to be heard and ask leave to  
16 call witnesses should it be necessary to do so.

17 And that issue has nothing to do with  
18 immunity or an order to immunize if, in fact, the  
19 government's purpose here is to seek testimony that  
20 they intend to use in a prosecution to revoke parole  
21 for a perjury charge, then that is an illegitimate  
22 purpose, it is unconstitutional, and the Court can  
23 make a ruling on that that has nothing to do with  
24 immunity or use immunity or the Fifth Amendment.

25 If that is their purpose then the Court

1 should quash the subpoena on those grounds. And I am  
2 prepared to address that today.

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

4 **MR. JACKLEY:** Your Honor, that is not the  
5 state's purpose. We stated in our response what the  
6 state's purpose is.

7 With respect to the parole issue, I  
8 identified in our filing that the Attorney General  
9 doesn't bring a parole violation proceeding, the  
10 Attorney General doesn't adjudicate a parole  
11 revocation hearing.

12 The issue with respect to parole really  
13 doesn't have anything to do with perjury. Although, I  
14 don't bring it. The issue with respect to parole came  
15 up at Dick Marshall's detention hearing. The issue  
16 and the problem that he has with the parole board, and  
17 where all the discussions have been, he's already been  
18 adjudicated a first strike --

19 **MR. MURPHY:** Your Honor --

20 **THE COURT:** Just a minute.

21 **MR. MURPHY:** I apologize for interrupting  
22 you, Mr. Jackley. Can I call my witness? He's been  
23 here since 2:45. He teaches a college class at 4:00.  
24 I will do an expedited direct.

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

1           **MR. MURPHY:** Thank you.

2           And then Mr. Hanna and Mr. Jackley can argue  
3 this out.

4           **MR. HANNA:** Fifteen minutes or so, Judge?

5           **THE COURT:** Yes.

6           **MR. MURPHY:** Your Honor, at this time the  
7 defense, Mr. Graham, would call Donovan Sprague as a  
8 witness.

9           **THE COURT:** Please come here and raise your  
10 right hand, sir.

11                               DONOVIN SPRAGUE,  
12 called as a witness herein, having been duly sworn,  
13 under oath testified as follows:

14           **THE COURT:** Please take a seat over there.  
15 The microphone should be sufficient.

16                               **DIRECT EXAMINATION**

17 **BY MR. MURPHY:**

18           **Q.** Mr. Sprague, I have just put in front of you  
19 a series of exhibits --

20           **MR. MURPHY:** And Your Honor, I am going to  
21 provide you a copy. The originals are with  
22 Mr. Sprague.

23           **Q. (BY MR. MURPHY)** In order to expedite matters,  
24 because I understand you have to teach a class at  
25 4:00 o'clock today, I am going to go through the

1 exhibits and the government will let me know if they  
2 object.

3 Before you is Exhibit A. That's the front  
4 cover of a book you wrote?

5 **A.** Yes, it is.

6 **MR. MURPHY:** Okay.

7 The defense would move to admit Exhibit A.

8 I will elicit further testimony in a minute  
9 on the actual objects and the relevance.

10 **MR. JACKLEY:** No objection other than this is  
11 the first time we have been provided this information.

12 **MR. MURPHY:** I understand that. It's listed  
13 in the --

14 **Q. (BY MR. MURPHY)** Turning your attention to  
15 Exhibit B, that's the resume that we previously  
16 provided to all the parties, correct?

17 **A.** Yes.

18 **Q.** And that lists numerous publications, the  
19 fact that you are an author of a number of books?

20 **A.** Right.

21 **MR. MURPHY:** Move to admit Exhibit B?

22 **MR. JACKLEY:** No objection, Your Honor.

23 **THE COURT:** Will be received.

24 **Q. (BY MR. MURPHY)** Exhibit C is a letter that  
25 you received just in October of 2010 as a contributor

1 to this book that is yet to be published. It's just  
2 being put out now by the Smithsonian Institute?

3 **A.** That's correct.

4 **Q.** And this is The Infinity of Nations, which is  
5 going to be or is being put out by the National Museum  
6 of the American Indian?

7 **A.** That is correct.

8 **Q.** And you have contributed a number of articles  
9 about Indian culture for this book?

10 **A.** Yes.

11 **Q.** This is your only copy of the book?

12 **A.** Yes, it is.

13 **MR. MURPHY:** So I am not going to admit the  
14 book, but I would ask that Exhibit C be introduced or  
15 admitted.

16 **MR. JACKLEY:** No objection, Your Honor.

17 **THE COURT:** Will be received.

18 **Q. (BY MR. MURPHY)** Exhibit D, could you explain  
19 to the judge what Exhibit D is?

20 **A.** What Exhibit D is, it's a letter from 1936  
21 regarding Chips, the Medicine Man. And if -- it's  
22 concerning desire to have restoration or permission to  
23 use old Indian remedies in the form of roots and  
24 herbs. So this is presented to the -- it's a U.S.  
25 Department of the Interior.

1           **Q.** We'll talk a little bit about the  
2 significance of this later, but part of your job as a  
3 historian and a scholar is to collect antique  
4 documents, ancient documents, regarding Indian  
5 culture?

6           **A.** Yes. I have a variety of documents like  
7 this.

8           **Q.** Okay.  
9           And this is a copy from your collection?

10          **A.** Yes, it is.

11          **MR. MURPHY:** Move to admit Exhibit D.

12          **MR. JACKLEY:** No objection, Your Honor.

13          **THE COURT:** Will be received.

14          **Q.** **(BY MR. MURPHY)** Exhibit E, is this also a  
15 document from your collection of historical Indian  
16 Documents?

17          **A.** Yes, it is. This is excusing the student  
18 so-called of the Chips family based on a study in  
19 medicine.

20          **Q.** Okay.  
21                When you talk about medicine, you mean  
22 spiritual practice --

23          **A.** Traditional, yeah, Indian medicine.

24          **Q.** And he was exempted from attending regular  
25 school because he was essentially an apprentice to a

1 Medicine Man?

2 **A.** That's correct.

3 **MR. MURPHY:** Move to admit Exhibit E.

4 **MR. JACKLEY:** No objection, Your Honor.

5 **THE COURT:** Received.

6 **Q.** (BY MR. MURPHY) Exhibit F is a license from  
7 1940 authorizing a particular individual to be a  
8 Medicine Man on the Pine Ridge Reservation?

9 **A.** Yes. That being Charles Horn Chips of Pine  
10 Ridge Reservation.

11 **MR. MURPHY:** Move to admit Exhibit F.

12 **MR. JACKLEY:** May I have just a minute with  
13 counsel?

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

15 **MR. MURPHY:** I misspoke. It was Rosebud.  
16 This it is on Rosebud.

17 **MR. JACKLEY:** No objection, then, Your Honor.

18 **THE COURT:** Will be received.

19 **Q.** (BY MR. MURPHY) Is that correct?

20 **A.** Yes. Charles Horn Chips was from the Pine  
21 Ridge Indian Reservation.

22 **Q.** Okay.

23 The regulation or the license --

24 **A.** To practice is on Rosebud.

25 **Q.** Okay.

1           And Exhibit G is, in fact, that license?

2           **A.**    Yes.

3           **MR. MURPHY:** All right.

4           Move to admit Exhibit G.

5           **MR. JACKLEY:** No objection, Your Honor.

6           **THE COURT:** Received.

7           **Q.**    **(BY MR. MURPHY)** If you could explain the  
8           significance or what Exhibit H is.

9           **A.**    Exhibit H is a resolution of the Oglala Sioux  
10          Tribe basically recognizing the Horn Chips, Ellis  
11          Chips, the third generation direct descendant of Chips  
12          Medicine Man and Crazy Horse's friend; and  
13          acknowledging the practice and -- of traditional  
14          Indian medicine and recognizing him on this particular  
15          day, and it was proclaimed in April of 1990.

16          **MR. MURPHY:** Move to admit Exhibit H.

17          **MR. JACKLEY:** No objection.

18          **THE COURT:** G and H will both be received.

19          **MR. MURPHY:** Thank you.

20          **Q.**    **(BY MR. MURPHY)** All right.

21          We just kind of railroaded through those  
22          exhibits because of time. I want to start now with  
23          your examination.

24                 Your name is Donovin Sprague, that's

25          D-O-N-O-V-I-N?

1           **A.**    That's correct.

2           **Q.**    And would you spell your last name?

3           **A.**    S-P-R-A-G-U-E.

4           **Q.**    Could you summarize your family and ethnic  
5 background along with your family lineage?

6           **A.**    Yes.  I'm Minnecojou Lakota.  My great,  
7 great, great grandfathers are high back bone or hump.  
8 And we're from the Crazy Horse family.  And Fred  
9 Dupree, from the French man, is also part of our  
10 family.  All grandfathers.

11          **Q.**    All right.

12                   And which reservation are you formally or  
13 officially recognized by?

14          **A.**    I'm from the Cheyenne River Sioux  
15 Reservation.

16          **Q.**    And could you explain to the Court the  
17 similarities between folks who live on the Cheyenne  
18 River Sioux Reservation and those who live on Pine  
19 Ridge and Rosebud and how they are different?

20          **A.**    Well, one thing that's -- that has a common  
21 theme among all of that is that the people have a  
22 respect for the confidentiality of medicine men and  
23 counselors; and among my -- five of my other six  
24 books, they all pertain to Rosebud and Pine Ridge and  
25 Standing Rock, Cheyenne River.  So I've traveled out,

1 you know, to traditional communities to gather this  
2 information.

3 Q. Okay.

4 And I don't want to put words in your mouth,  
5 but the Cheyenne River Sioux Tribe is not ethnically  
6 or culturally distinct from the Lakota, Nakota, or  
7 Dakota, is it?

8 A. They are all together.

9 Q. It was -- was it the reservation system or  
10 U.S. Government that more or less fractured these  
11 populations?

12 A. Yes, it was. It split them up and divided  
13 them.

14 Q. How long back do we have to go before these  
15 were all one people?

16 A. Well, prior to the -- mid 1880s, you had a  
17 group that traveled and lived together, you know, as a  
18 large group. And then the mid 1880s a reservation  
19 system that then split those into -- in this case in  
20 western South Dakota five Lakota reservations.

21 Q. The cultural traditions, the religious  
22 traditions, are similar, if not the same, among these  
23 groups?

24 A. Yes. All the same.

25 Q. Would you briefly summarize for the Court

1 your formal education?

2 **A.** I have a Master of Arts degree from the  
3 University of South Dakota plus 15 hours, and I teach  
4 undergraduate and graduate studies as Black Hills  
5 State. I also have a Bachelor's from Black Hills  
6 State University.

7 **Q.** Okay.

8 Could you summarize your employment history  
9 paying particular attention to those matters that  
10 relate to the study or relate to Indian culture and  
11 Indian religion?

12 **A.** I spent my whole life pretty much except for  
13 maybe a couple years working in American Indian  
14 organizations or studies. Most recently Black Hills  
15 State University for a number of years as an adjunct  
16 instructor in graduate studies, undergraduate studies.  
17 A consultant for American Indian organizations  
18 presently in the area of health.

19 And also as an author of books. I am a  
20 writer, an author, and I present at a lot of tribes  
21 and universities. Crazy Horse Memorial, I worked  
22 there since -- from 1996 to 2010.

23 Prior to that, I was general manager of KILO  
24 Radio on Pine Ridge Reservation from 94 to 95.

25 And then prior to that I was with the Iowa

1 Regents Universities where I was the head of American  
2 Indian education for the three Iowa universities.

3 Q. What did you do at Crazy Horse or what do you  
4 do at Crazy Horse?

5 A. When I worked there, I worked with bringing a  
6 lot of speakers in, which included elders and people  
7 that talked about traditional culture.

8 Q. And you mentioned that you are an author.  
9 How many books have you written?

10 A. The one that you have over there would --  
11 that's a contributing author, but I have six of my  
12 own, plus that one, plus 20 other major publications  
13 that I have written for.

14 Q. Okay.

15 Would it be fair to say the majority of those  
16 relate to Indian culture and Indian traditions?

17 A. They all do.

18 Q. All right.

19 You have worked with school systems and other  
20 institutions to develop curriculum or curricula for  
21 Indian cultural issues?

22 A. Yes. I have developed some Bachelor of  
23 Science degree programs for universities as well as  
24 working on some Master of Arts programs, specifically,  
25 in American Indian studies. I formed several American

1 Indian student organizations at major universities  
2 including Iowa.

3 Q. All right.

4 You have also acted as a lecturer around the  
5 country on Indian issues?

6 A. Yes. I traveled throughout the United States  
7 and Canada and I have spoke at a lot of major  
8 universities and I have visited just about every  
9 American Indian Reservation in the U.S. and a lot of  
10 the first nations in Canada.

11 Q. I want to ask you about your preparation for  
12 your testimony today.

13 Do you recall what books or articles or other  
14 reference materials you've relied upon other than  
15 those you have written yourself when formulating the  
16 opinions that I have asked you to testify to?

17 A. Yes. I looked at Lakota Belief and Ritual by  
18 James Walker; Black Elk Speaks, writings by John  
19 Neihardt; and I also consulted with some, what you  
20 would call, traditional medicine men.

21 Q. Okay.

22 And we'll get to those folks in a minute.

23 What materials of your own have you relied  
24 upon or referred to when forming the opinions that  
25 I'll discussing?

1           **A.**   Probably, a lot of it just would be born and  
2           raised on the Cheyenne River Reservation. I have a  
3           lot of traditional family and that from communities of  
4           Cherry Creek and Thunder Butte, Red Scaffold, Iron  
5           Lightning, and other suburbs there. But you know, a  
6           lot of -- I was around traditional people all my life.

7           **Q.**   Okay.

8                     And some of the documents we've looked at as  
9           exhibits, particularly Exhibits D through H, did you  
10          rely or did you refer to documents such as these?

11          **A.**   Yes, I did.

12                     In fact, as a part of this, that's of a  
13          confidential nature, I have a huge document of Horn  
14          Chips who was the Medicine Man for Crazy Horse. And  
15          that's where some of this comes from. It's an  
16          incredibly thick document of his personal diary of his  
17          travels and actually doctoring people including many  
18          of my own family. It's all written in Lakota and --  
19          except the last names appear.

20                     So the other part of that is a winter count,  
21          which is a calendar. It's a Lakota calendar. And  
22          that calendar starts in the late 1700s and comes up  
23          the early 1900s. And it's Lakota -- it's all written  
24          in Lakota. It's the most important event of the year  
25          that took place.

1           **Q.**   And the documents that you collect such as  
2 these, and the diary you just referred to, you're  
3 asked to be an archivist and a contributor to the  
4 Smithsonian Institution and other museums in Europe  
5 because of your collection of documents related to  
6 Indian culture and religion?

7           **A.**   That's correct.

8                   And I have several other documents with the  
9 Smithsonian, but that's the first kind of hard cover  
10 big book. And then that coincides with a large  
11 exhibit that's on display at the Smithsonian called  
12 Infinity of Nations by the same title.

13          **Q.**   All right.

14                   And essentially, the import of the documents  
15 that we've talked about, Exhibits D through H, are --  
16 even the United States Department of the Interior and  
17 the Tribal governments have a long history going back  
18 to the 30s of recognizing in an official way the  
19 practices of Indian medicine men in the Dakotas?

20          **A.**   That's correct.

21          **Q.**   Okay.

22                   Let me ask you about the people you've  
23 individually consulted with pursuant to my request  
24 that you act as an expert witness in this case.

25                   Who have you talked to?

1           **A.**    The people that I talked to -- and I didn't  
2 specifically say I was going to a courtroom. I didn't  
3 know for sure what all was going to transpire there.  
4 But the people that I consulted with were, just last  
5 week I was with Orville Looking Horse, who is the  
6 keeper of our sacred white buffalo calf bundle. I  
7 have talked to Rick Two Dogs. I have talked to Wilmer  
8 Mesteth. And that being the key people right there.

9           **Q.**    Would you explain who Rick Two Dogs is?

10          **A.**    He's a Medicine Man and leads a lot of  
11 ceremonies and sweats.

12          **Q.**    What reservation is he from?

13          **A.**    He's from Pine Ridge Reservation.

14          **Q.**    And Mr. Mesteth?

15          **A.**    Mr. Mesteth is -- he's a Lakota studies  
16 instructor, language instructor, and also he runs a  
17 lot of sweats and that at -- he's also from Pine  
18 Ridge.

19          **Q.**    All right.

20                    And --

21          **A.**    Excuse me.

22                    And Mr. Looking Horse is from Green Grass,  
23 South Dakota, at Cheyenne River where pipe is held.

24          **Q.**    And he is the pipe keeper?

25          **A.**    Yes.

1           **Q.** Let us talk about the subject matter. We're  
2 talking about the confidentiality of communications.

3                   Before we get specifically into  
4 confidentiality between medicine men and those who are  
5 seeking spiritual guidance, could you explain to the  
6 Court whether confidentiality as a concept exists in  
7 the Lakota, Dakota, Nakota population group?

8           **A.** All of those they require confidential and  
9 they respect the privacy and -- within the culture.

10          **Q.** Okay.

11                   And what examples outside of the Medicine Man  
12 penitent relationship -- what other examples do you  
13 know of where confidentiality is a concept that is  
14 recognized and --

15                   **MR. JACKLEY:** Objection. Relevance, Your  
16 Honor.

17                   **MR. MURPHY:** Your Honor --

18                   **THE COURT:** At ease.

19           **A.** We --

20                   **THE COURT:** Hold on. I am still figuring out  
21 how I am going to answer the objection.

22                   When you speak about peoples, what are you  
23 talking about?

24                   **MR. MURPHY:** Your Honor, at the last  
25 hearing --

1           **THE COURT:** I am not interested in  
2 Norwegians.

3           **MR. MURPHY:** No. I said the Lakota, Dakota,  
4 Nakota group, which is what we're talking about.

5           At the last hearing you said, at one point, I  
6 don't even know if confidentiality is a concept among  
7 Indian people as a concept. So I wanted to start  
8 there and just get that the notion of confidentiality  
9 exists as a concept because we know not all cultural  
10 concepts are universal. One that, you know, obviously  
11 comes to mind are things like personal space.

12           **THE COURT:** Yeah. And I am much more  
13 interested with that point in -- you know, there is a  
14 lot of books here, whether any of them mention that  
15 and in what context they mention it. And I assume  
16 we're going to get to that and I am going to get to  
17 read the books.

18           But the concept of confidentiality I think is  
19 key in a number of respects, and we'll go. But I  
20 don't want to spend -- we can go medicine men as I  
21 understand it have probably different roles in  
22 different Tribal groups, and I am saying Sioux, and  
23 Cherokee, and Comanche and that kind of a thing.

24           **MR. MURPHY:** Let me back up then.

25           **Q. (BY MR. MURPHY)** The population we're talking

1 about is the Lakota, Dakota, Nakota?

2 **A.** Yes.

3 **Q.** Could you explain to the Court what  
4 population that is geographically and culturally?

5 **A.** Geographically it includes all of South  
6 Dakota today, and it also includes a little bit of  
7 northeastern Nebraska and southeastern North Dakota,  
8 and a large portion of Minnesota. But prior to that,  
9 a much larger area.

10 **Q.** And you've studied cultural practices among  
11 Indian or indigenous people nationwide and into  
12 Canada?

13 **A.** Yes.

14 **Q.** But I ask you, because the Medicine Man at  
15 issue in this case was from this area, to focus on the  
16 cultural concepts for the LDN, Lakota, Dakota, Nakota  
17 group?

18 **MR. JACKLEY:** Your Honor, I am going to renew  
19 my objection because I believe that Mr. Graham is a  
20 Canadian Indian, Southern Tutchone, and he's not one  
21 of the above-classified categories that he is being  
22 asked about.

23 **MR. MURPHY:** Well, Your Honor, the response  
24 is that Mr. Gates, the Medicine Man at issue, was  
25 identified in the exhibits we have previously provided

1 the Court by Robert Ecoffey as a Lakota Medicine Man.  
2 And so it's his traditions that we're talking about.  
3 I am going to get to the issue about Mr. Graham being  
4 from Canada.

5 But this would be -- if we were talking about  
6 the traditional practices of Roman Catholic Priests,  
7 we would have to talk about Roman Catholic Priests as  
8 apart from their penitence. And that's what I am  
9 talking about here --

10 **THE COURT:** Well, I am not sure how tight  
11 that is. I am not sure -- I am not sure anybody  
12 talking to a Catholic Priest is entitled to the seal  
13 of the confessional.

14 **MR. MURPHY:** Well, we're going to get to  
15 that.

16 **THE COURT:** Okay.

17 **Q. (BY MR. MURPHY)** So let's talk about Medicine  
18 Man from the LDN group. First off, though, we are  
19 talking about confidentiality.

20 In the Lakota, Dakota, Nakota traditional  
21 group is confidentiality a concept that is understood?

22 **A.** Yes, it is very understood.

23 **Q.** All right.

24 And give me an example of where  
25 confidentiality is a well understood concept?

1           **A.** Well, we talk about things as simple as a  
2 talking circle or we discuss things among our own  
3 people and we say, you know, what stays inside here  
4 stays inside versus, you know, this could be told  
5 outside.

6                   But a Medicine Man and spiritual leader like  
7 that, that's his role. It's just a protocol that they  
8 honor, the confidentiality of the person they're  
9 advising.

10           **Q.** And you've -- so basically what you are  
11 saying is if somebody comes to a Medicine Man and  
12 seeks spiritual guidance, it is understood that the  
13 communication is confidential?

14                   **MR. JACKLEY:** Objection. Leading, Your  
15 Honor.

16                   **THE COURT:** It is indeed that.

17                   I am much more interested in the explanation  
18 and the proof of that rather than statements.

19           **Q. (BY MR. MURPHY)** Where do you derive that  
20 opinion from?

21                   What resources, references, conversations, et  
22 cetera, have you relied upon to form that opinion?

23           **A.** It's widespread in all the writings of Lakota  
24 belief and ritual, of the James Walker, of Black Elk  
25 Speaks, of the medicine men that I talked about, as

1 well as it crosses over into ceremony.

2 Q. And how does it cross over into ceremony?

3 A. It crosses over into ceremony like when a  
4 person does a sweat lodge or vision quest, and as they  
5 are practicing those, and that's all of a  
6 confidentiality nature. You don't go and tell people,  
7 you know, these matters of what happened. That's  
8 between the Medicine Man and the -- you might say the  
9 client.

10 Q. Okay.

11 Now, let's get to the client aspect  
12 Mr. Jackley has brought up that my client, Mr. Graham,  
13 is from an indigenous group out of Canada. One of the  
14 first bands of Canada or First Nations of Canada.

15 Have you had experience with Canadian  
16 indigenous groups?

17 A. Yes, I have.

18 Q. Now, apart from United States recognition and  
19 whether Canadian Indians are recognized as Indians by  
20 the U.S. Department of Interior, among Indian people  
21 in the Lakota, Dakota, Nakota group, are people from  
22 First Nations recognized or accepted as being Indian?

23 A. Yes, they are. They are all like brothers  
24 and sisters of ours.

25 And I do have even a Choctah Nation book

1 which is totally outside of this area and they have  
2 the same commonality.

3 Q. So from what you've gleaned from the research  
4 you've done, and you've talked about if somebody like  
5 Mr. Graham came -- or say somebody who was  
6 Caucasian -- say if I came to a traditional, spiritual  
7 leader or practitioner, a Medicine Man, on Pine Ridge,  
8 and sought spiritual guidance from him, and if he was  
9 willing to meet with me about that, the fact that I'm  
10 Caucasian or he's Canadian, would that affect the  
11 confidentiality of the communications?

12 A. No, it would not, and they would honor their  
13 confidentiality.

14 Q. All right.

15 Do you have any doubt in your mind about  
16 that?

17 A. No, not at all.

18 Q. And let me ask you -- I mean in years, how  
19 many years have you been studying Indian culture and  
20 religion?

21 A. About 40 years.

22 Q. All right.

23 I understand your class has already started  
24 over at BH so I am going to finish my direct  
25 examination at this point.

1           You will have to answer questions --

2           **THE COURT:** Whoever is pitching.

3                           **CROSS-EXAMINATION**

4           **BY MR. JACKLEY:**

5           **Q.** Mr. Sprague, it's my understanding you are  
6 not an enrolled Oglala Sioux Tribal member?

7           **A.** I am enrolled Minnecojou Lakota. It's one of  
8 the seven bands of the Lakota. We were, like I said,  
9 all together as one, but we were separated by  
10 reservation creation.

11          **Q.** So you are not an enrolled member of the  
12 Oglala Sioux Tribe, correct?

13          **A.** No.

14          **Q.** And you are not a certified or enrolled  
15 member of the First Nations of Canada, correct?

16          **A.** No, I am not.

17          **Q.** And that would include the Southern Tutchone,  
18 correct?

19          **A.** That's correct.

20          **Q.** You discussed your formal training to include  
21 a Master in Arts, but you have no formal training to  
22 be a Medicine Man, correct?

23          **A.** That's correct.

24          **Q.** You have no certification to be a Medicine  
25 Man, correct?

1           **A.**    That's correct.

2           **THE COURT:**  Is there such a thing as  
3 certification of medicine men?

4           **THE WITNESS:**  No.  Only in the world of new  
5 age.

6           **Q.**    **(BY MR. JACKLEY)**  What do you mean by in the  
7 world of new age?

8           **A.**    It's the non-Indian people.  We call them  
9 wannabes who want to be Indian and they are charging  
10 for our ceremonies in cities and trying to imitate our  
11 culture in a negative manner.

12          **Q.**    Describe to me what a traditional Medicine  
13 Man ceremony is and what it looks like?

14          **A.**    Well, a traditional ceremony, there were  
15 seven originally talked about from -- like you could  
16 find those in the seven rights of the Lakota.  And one  
17 of the central and most important was described as a  
18 sun dance which would take place at least once a year  
19 where they actually sacrificed a flesh offering or  
20 blood.

21                   And another real common one is inipi or sweat  
22 ledge, a purification, and that's very commonly done.  
23 And that's done before you do any of the other  
24 ceremonies.

25                   So there were several others which I could

1 also name but they all have to do with, like, making  
2 relatives or restoring the earth or making a  
3 brother -- or a girl becomes a woman. There is  
4 ceremony for that.

5 Q. What would -- let me give you an example.  
6 The example that Mr. Murphy talked about where he --  
7 let's say him or I came to you for spiritual help;  
8 that we had done something that troubled us. And what  
9 would -- would there be a ceremony that would come  
10 about from some type of a communication if there was  
11 some type of a spiritual exchange from a Medicine Man  
12 and somebody?

13 A. Yeah. It would be at the discretion of the  
14 counselor or Medicine Man, but typically you would do  
15 a sweat first and everything that took place would be  
16 of a confidential manner.

17 Q. And then isn't it true that -- depending upon  
18 the size of the problem or the size of the concern, it  
19 may include more people involved in either the  
20 ceremony or the dance; isn't that fair?

21 A. Yes.

22 Q. In fact, you may have many people that are  
23 singing as part of the ceremony, correct?

24 A. Yes.

25 Q. So it just simply isn't a ceremony between,

1 in that example, Mr. Murphy and you. It could broaden  
2 to include more individuals, correct?

3 **A.** As spectators, but only the one with actual  
4 piercings, say like of sun dance. That's from the  
5 Medicine Man, you know, to the individual.

6 **Q.** Well, they would involve the dancers,  
7 correct?

8 **A.** Yeah, but first it's a one on one with each  
9 one.

10 **Q.** And then it expands out, doesn't it?

11 **A.** Yes, just as they dance together.

12 **Q.** The ceremony can expand out to dancers,  
13 correct?

14 **A.** Yes.

15 **Q.** It can expand out to singers, correct?

16 **A.** Yes.

17 **Q.** And it really depends upon the size of the  
18 concern or the problem, the spiritual problem,  
19 correct?

20 **A.** Yes.

21 **Q.** Have you ever conducted a spiritual ceremony  
22 of that nature where there have been singers and  
23 dancers involved in trying to cleanse the spirit?

24 **A.** Not really, other than just, you know,  
25 praying to my God, you know. And my brother -- I

1 punch the time clock, but he's -- he doesn't work in  
2 the so-called white man's way and he does ceremony,  
3 you know. All day long he's doing ceremonies. When  
4 his daughter became a woman, he had a ceremony for  
5 her. They made a teepee and -- out of buffalo robes  
6 and made everything in there and then on her day they  
7 gave her the name -- her Indian name, and that's also  
8 one of the seven rights.

9 Q. Now, you would agree that as a Medicine Man,  
10 the main purpose of this communication, this  
11 confidential communication, is to assist in spiritual  
12 help; is that fair?

13 A. That's right.

14 Q. Would it be fair to state that an improper  
15 spiritual communication would be one that would  
16 involve avoidance of the law?

17 A. I don't understand that.

18 Q. Why do -- why do traditional Lakota religious  
19 individuals come to a Medicine Man? For what purpose?

20 A. It could be for anything, any kind of a  
21 regular -- like church, you know. It doesn't have to  
22 be Sunday. You can just go in and have a ceremony at  
23 any time.

24 And I don't proclaim at all to be a Medicine  
25 Man. I am not a Medicine Man.

1           **Q.**    But you -- let me back track.

2                    Understanding you are not a Medicine Man.

3    But would be the purpose that somebody would come to a  
4    Medicine Man for spiritual help?

5           **A.**    Yes.

6           **Q.**    They wouldn't come to a Medicine Man for  
7    avoidance of the law?

8                    **MR. MURPHY:**  Objection.  Calls for  
9    speculation.

10                   **THE COURT:**  Overruled.  I'd like a little  
11   more clarification, however, for avoidance of the law.  
12   I think that would be helpful to Mr. Sprague as well  
13   as myself.

14           **A.**    Well, in a confidential manner, you wouldn't  
15   even know that.  Somebody could be in the sweat lodge  
16   or whatever and you don't know that because it's a  
17   confidential matter.

18           **Q.**    **(BY MR. JACKLEY)**  Let me give you an example.  
19   We were talking about why an individual would come to  
20   a Medicine Man and we were talking about confidential  
21   communications.

22                    Would it be appropriate or part of that  
23   confidential communication to come to a Medicine Man  
24   to talk about when you were present when somebody was  
25   killed?

1           Is there any spiritual value for that?

2           **A.**    There would be no spiritual value, but the  
3 person could say what he wants in confidentiality.

4           **Q.**    So you are saying that the confidentiality  
5 would pertain to matters of trying to avoid the law  
6 or --

7           **A.**    No.    Just the relationship between the  
8 Medicine Man and, like, the client.

9           **Q.**    Here is why I ask.  I am Catholic.  So if I  
10 were to go and confess my sins, there is forgiveness.  
11 But if I talk about a particular crime and avoidance  
12 of the crime, or steps that would maybe further the  
13 crime, I lose that confidence.

14           **MR. MURPHY:**  Objection.  That's a  
15 misstatement of the canons and it's a misstatement of  
16 the covenants of the privilege --

17           **THE COURT:**  Excuse me.

18           All of us Catholics can sit here, but it  
19 seems to me that the steps furtherance would probably  
20 not fall within the seal of the confessional.  The  
21 past events, my understanding would.  The intent to  
22 commit future crimes, I don't think are.  That's my  
23 understanding of the rule.

24           But past events, I murdered or I raped or I  
25 did -- I robbed a bank, I think that is sealed.  I am

1 going to rob one tomorrow I think is not. I could be  
2 in error on my theology, but I think that's the rule.

3 **Q. (BY MR. JACKLEY)** Have you ever, as a Medicine  
4 Man, not to ask names, but in a situation where -- I  
5 understand you are not a Medicine Man?

6 **A.** I am not a Medicine Man.

7 **Q.** Are you ever aware of any of the teachings  
8 and the discussions of confidential communications of  
9 a situation where an individual came that admitted to  
10 a crime and asked the Medicine Man what to do about  
11 it?

12 **A.** No, I'm not.

13 My mother was a medicine woman, which was  
14 rare.

15 **Q.** But you are never aware -- she had never  
16 communicated to you any instances where somebody had  
17 came and said that they had killed somebody and asked  
18 furtherance of what to do?

19 **A.** No.

20 **Q.** Do you know who Al Gates is?

21 **A.** From the computer world?

22 **Q.** No.

23 Are you aware of an Al Gates that lived in --  
24 on the Pine Ridge/Rosebud area?

25 **A.** No, I'm not.

1 Q. So you have never met an Al Gates?

2 A. Not that I know of.

3 Q. So you are not opining today whether or not  
4 he was an Medicine Man?

5 A. What was that?

6 Q. You have no opinion of whether or not he was  
7 actually a Medicine Man?

8 A. He was.

9 Q. Why do you say he was?

10 A. I believe that I have read that he was.

11 Q. Would it surprise you that in his Grand Jury  
12 transcript he testified, quote, I'm different than  
13 these what-you-call medicine men, end quote.

14 Would that surprise you?

15 A. I don't know him so I couldn't really say.

16 Q. So you really have no opinion as to whether  
17 or not he was a Medicine Man, correct?

18 A. Right.

19 Q. In the Medicine Man tradition that you  
20 studied, would it be fair that there is often times an  
21 exchange of a spiritual symbol such as tobacco?

22 A. Yes.

23 Q. Do you know who John Graham is?

24 A. Never met him.

25 Q. You would agree that if there is a symbolic

1 exchange, such as tobacco, that that would give  
2 credence to that it was spiritual in nature; is that  
3 fair?

4 **A.** Tobacco is a protocol -- we give tobacco all  
5 the time for assistance.

6 **Q.** Mr. Sprague, you talked about some of the  
7 writings and confidentiality, and they are contained  
8 in your books, when Mr. Murray was questioning you.

9 Do you recall that?

10 **A.** Yes.

11 **MR. JACKLEY:** May I approach the witness,  
12 Your Honor?

13 **THE COURT:** You may.

14 **Q.** **(BY MR. JACKLEY)** I am handing you The  
15 Infinity of Nations. Could you please direct me to  
16 where it talks about communications of non-tribal  
17 members to a Medicine Man is considered confidential.

18 **A.** Non-tribal --

19 What was that again?

20 **Q.** A non-tribal member communication to a  
21 Medicine Man is considered confidential.

22 **A.** I do know that the main author here had  
23 contact with a lot of people in the making of the book  
24 and found that there were areas that they just  
25 couldn't go there because it was a confidential

1 nature. And she's not Indian and they were from  
2 various tribes in North America and South America.

3 **Q.** Can you point to me in the book that I have  
4 just provided to you where it talks even so much as  
5 it's considered a confidential communication  
6 irrespective of who was involved?

7 **A.** Well, I haven't read the book yet. It just  
8 came out last week. But I do have -- it's mainly in  
9 the area of art and history.

10 **Q.** I misunderstood your testimony. I thought  
11 when there was a questioning occurring that there was  
12 a confidential communication that you referred to  
13 several books.

14 Did I misunderstand you?

15 **A.** There were -- there is lots of references to  
16 it even in the area that -- the areas that I wrote in  
17 here.

18 **Q.** Can you point to me a single instance of  
19 those references?

20 **A.** One area was this drum here was of a sacred  
21 manner and there were things that were not told about  
22 this out of respect for the individual who may have  
23 made this drum or the tribe that was involved.

24 Maybe another example here -- anyway, I don't  
25 see it in here, but there is a shirt in here that was

1 attributed to Crazy Horse. And the non-Indian author  
2 knew that we didn't say that was Crazy Horse's shirt  
3 although it's written on there. We said it has scalp  
4 locks on it and we were always -- learned that he left  
5 his -- those scalp locks for other people, other men  
6 of his tribe to pick up. And so he would not wear  
7 those. So out of, you know, respect and  
8 confidentiality, that was not told. So you don't read  
9 about that whole story in there. It's still listed as  
10 Crazy Horse's shirt.

11 That drum is listed as Sitting Bull's drum.  
12 It's not his drum. I found a man from Fort Peck that  
13 made drums just like that. Almost identical. That's  
14 about the best example.

15 **Q.** Let me ask you this. Assuming that I were to  
16 go to a Medicine Man, and I were to talk about  
17 something I had done; and then I were to go talk to  
18 Mr. Oswald later on about that same thing that I had  
19 done, would that demonstrate to you confidentiality or  
20 secrecy of nature?

21 **A.** Well, I think there is no boundaries with the  
22 confidentiality. I mean, I think it's present all the  
23 time in every manner or situation. And I think -- you  
24 have to think of more traditional times, probably when  
25 there -- before there was a -- or an IRA government

1 and all of that that made laws and rules. But I think  
2 they would want to counsel that -- the person and help  
3 them in some manner, but it wouldn't be a matter of  
4 going and reporting this or make an announcement in  
5 the camp. That would be the last thing.

6 **Q.** But Mr. Sprague, in that example that I had  
7 gave, if I had communicated to a true Medicine Man of  
8 something that I had done, I am still free to  
9 communicate to anybody else what I have done; is that  
10 fair?

11 **A.** Yeah, you could. There are various medicine  
12 men of different personalities just like there are of  
13 all of people.

14 **Q.** In other words, just because I go talk to a  
15 Medicine Man, that doesn't preclude from me talking to  
16 other people about whatever I talked to the Medicine  
17 Man about, correct?

18 **A.** Right.

19 **MR. JACKLEY:** No further questions, Your  
20 Honor.

21 **THE WITNESS:** I have one comment, if I could.

22 **THE COURT:** Hold on. No, you don't.

23 Mr. Murphy?  
24  
25

**REDIRECT EXAMINATION**

1  
2 **BY MR. MURPHY:**

3 Q. I want to bring your attention to a quote  
4 Mr. Jackley presented to you. And I am looking at  
5 Exhibit A to my motion in limine regarding statements  
6 to medicine men, Exhibit A, page 3669.

7 He said -- he was asking you questions about  
8 Mr. Al Gates and he said -- the quote was, quote, well  
9 I'm different than these what-you-call medicine men,  
10 and he said the quote ended there.

11 I want to read you the whole quote and I want  
12 you to keep in mind what you were talking about  
13 wannabes. Quote, while I'm different than these  
14 what-you-call medicine men. These medicine men --  
15 there is no -- just a very few that pretty near lost  
16 all their power. So now they do that with money.  
17 They charge money. Big money. And they are all  
18 pretty well off, but I don't do that, unquote.

19 Is that what you were talking about the  
20 new-age medicine men and whatnot?

21 **A.** Yes.

22 Q. So taken in its entirety, not the snippet  
23 that Mr. Jackley quoted to you, that would indicate  
24 Mr. Gates was saying, I'm the real deal. I am not one  
25 of these new-age guys that charges money for his

1 medicine man services, would it not?

2 **A.** Yes.

3 **Q.** So if you were to learn that Mr. Al Gates  
4 told various law enforcement officers that he had been  
5 practicing the Indian religion since 1944 through  
6 2003, that would indicate to you he had a long history  
7 of practicing traditional practices, correct?

8 **A.** Yes.

9 **Q.** All right.

10 Now, Mr. Jackley asked you about the public  
11 nature of some ceremonies where dancers may be  
12 involved, drum circles, and whatnot. But you said  
13 something before that. You said, it would be at the  
14 discretion of the Medicine Man.

15 Could you explain what you mean about the  
16 discretion of the Medicine Man and how they shape or  
17 form a ceremony?

18 **A.** Well, they have their own personalities in  
19 the way that they run their ceremonies and it's  
20 usually just out of respect that you go with the way  
21 they run their ceremony, and recognizing that this is  
22 of a confidential manner, somebody that you can trust.  
23 And sometimes they will put colors up for -- you know,  
24 the four directional colors maybe at different  
25 directions than somebody else. But it doesn't mean

1 that it's wrong or anything. It's just that they have  
2 another way of doing that.

3 Q. So not every ceremony is going to involve  
4 drum circles or dancers?

5 A. Right.

6 Q. Could be a private, intimate conversation?

7 A. Right.

8 Q. Or what you were talking about like at the  
9 sun dance, the Medicine Man might have a private  
10 communication with somebody and that's part of a much  
11 larger ceremony but it doesn't reveal the disclosure  
12 of the materials to everybody?

13 A. Yes.

14 Q. So at a sun dance or an inipi, there might be  
15 a dozen or 15 people in the sweat lodge and none of  
16 them might know what the communication was between  
17 each of them and the Medicine Man?

18 A. Exactly.

19 Q. And then Mr. Jackley asked you a series of  
20 questions about are you aware of anybody ever going to  
21 a Medicine Man who committed a crime and was trying to  
22 avoid detection or similar-type questions.

23 If it's confidential, how would you know why  
24 a particular person went to a Medicine Man?

25 A. That's right, you wouldn't know.

1           **Q.**    Okay.

2                    Do you consider that somebody who might feel  
3 remorse over their involvement or their knowledge in a  
4 particular act, whether it's criminal or not, might go  
5 to a Medicine Man for their feelings?

6           **A.**    Yes, they would.

7           **Q.**    Okay.

8                    **THE COURT:** Let me ask you a question. Most  
9 of the traditional groups that I am aware of at least  
10 in the western Caucasian cultures have an abundance of  
11 literature on the meaning and circumstances in which  
12 what the Catholics call the seal of the confessional;  
13 that is, the confidentiality of things told. When it  
14 exists, to what extent it exists.

15                   Now, it's my understanding if we go back a  
16 couple hundred years that most of the Tribal  
17 encampment were relatively small, a hundred people.  
18 How many teepees, how many families, but relatively  
19 small?

20                   **THE WITNESS:** Yes.

21                   **THE COURT:** And I am going to ask you this  
22 question. Let us assume for the sake of the question  
23 that there is an encampment of 15, 20 families. That  
24 would be a fair-sized camp, right?

25                   **THE WITNESS:** In some way, but I have my

1 great, great grandfather's surrender list and he has  
2 714 in his band.

3 **THE COURT:** All right.

4 So let's deal with 714 and how many it is.  
5 How many medicine men would there be in that  
6 group?

7 **THE WITNESS:** There could be many.

8 **THE COURT:** And let us suppose that in that  
9 group on some morning people get up and find a raped  
10 and brutally killed five year old. And let us suppose  
11 that nobody knows who did it. Let us suppose further  
12 that, number one, a non-tribal member comes to the  
13 camp and talks to one of your medicine men and says I  
14 raped and butchered that child.

15 You are telling me that that person is going  
16 to walk out of the camp unscathed, and that everybody  
17 is going to say, that's fine, go forth and sin no  
18 more?

19 **THE WITNESS:** There would be some kind of,  
20 you know, repercussions.

21 **THE COURT:** Well, what kind of repercussions?

22 **THE WITNESS:** Well, there is such a variety  
23 amongst different tribes to --

24 **THE COURT:** Hold on. Hold on.

25 You are telling me that if the

1 confidentiality, as I understand it exists, there can  
2 be no repercussions because the Medicine Man cannot  
3 say anything to anybody and cannot in any way disclose  
4 what he or she, as the medicine woman may be, was told  
5 by the Tutchone or Choctaw that came in and talked to  
6 a Lakota Medicine Man in that camp.

7           And so you have a dead girl there. And I use  
8 the example because it's awful. Please understand me.  
9 Because that's the real test of confidentiality if,  
10 despite the gruesomeness, awfulness of it, the  
11 Medicine Man or woman says, my spiritual obligations  
12 are such that I cannot reveal what you told me to  
13 anybody and it remains a secret between you and I.

14           **MR. MURPHY:** Your Honor, I'm --

15           **THE COURT:** Now, I encourage you to go forth  
16 and confess or tell other people what you did, but I  
17 can't do that for you and I can't make you do that.

18           **MR. MURPHY:** Your Honor, can I level an  
19 objection to the question?

20           **THE COURT:** Sure.

21           **MR. MURPHY:** Because it's so compound. You  
22 mixed so many things in there. I mean, the question  
23 is, you said -- asked if there was consequences. The  
24 first question is, is the communication between the  
25 non-tribal member and the Medicine Man confidential.

1           **THE COURT:** What that means is that under no  
2 circumstances can he reveal the contents of that  
3 conversation.

4           **MR. MURPHY:** Right, but that's not the way  
5 you started the question. You said, are there going  
6 to be consequences which assumes that the secret has  
7 been revealed.

8           **THE COURT:** No.

9           I am saying that under those circumstances,  
10 unless the gentleman who raped and butchered that  
11 five-year-old girl tells somebody else, or somehow he  
12 or she is linked -- I guess it would be a he -- linked  
13 to that murder by something other than communication  
14 to you, and to somebody else, he will not be caught  
15 and -- I mean, you can't reveal it.

16           **THE WITNESS:** Well, again, I know there is  
17 different variations among different tribes, but I  
18 know usually that would be settled in a way but it  
19 wouldn't have to be announced or anything.

20           **THE COURT:** If it's going to be settled,  
21 somebody has to let some cat out of the bag somewhere.

22           **MR. MURPHY:** Well, that's assuming so many  
23 facts that aren't part of your hypothetical.

24           I mean, the question is fairly, if the person  
25 comes after this rape and murder of a five year old

1 and talks to a Medicine Man, is the Medicine Man  
2 allowed to reveal that publicly. That's the issue.

3 **THE COURT:** No, is he allowed to reveal it to  
4 anybody.

5 **MR. MURPHY:** Well, okay, is he allowed to  
6 reveal it to anybody.

7 You keep talking about consequences which  
8 assume the cat is out of the bag and that could come  
9 from 150 sources.

10 **THE COURT:** Well, I am saying it can come  
11 from no other source than the Medicine Man. All  
12 right.

13 So, if that's the case, and the information  
14 comes from no other source, and unless the Medicine  
15 Man says something, this person who committed a very  
16 nasty crime is going to be able to walk -- and I mean  
17 nobody can tell anybody that he committed a crime.

18 **THE WITNESS:** I don't think the non-Indian  
19 would have a relationship there with him in the first  
20 place.

21 **THE COURT:** Well, how about a Tribal member?  
22 Suppose --

23 **THE WITNESS:** I think it would be  
24 confidential.

25 **THE COURT:** So if another member of the tribe

1 came to a Medicine Man and said I raped and tortured  
2 the child of so and so who is a member of this band,  
3 again, you would not -- the Medicine Man would not be  
4 able -- would be absolutely prohibited from taking any  
5 action on that or telling anybody about it or doing  
6 anything that would reveal, directly or indirectly,  
7 that such a statement or admission had been given to  
8 him?

9 **THE WITNESS:** Traditionally I don't really  
10 think they would. I don't think it would be revealed,  
11 but I -- people would find out in other manner  
12 somehow.

13 **THE COURT:** That's a different problem.  
14 But if they don't find out in another manner,  
15 then that person will not ever be charged or found or  
16 whatever the Tribal method of dealing with such crimes  
17 and atrocities is?

18 **THE WITNESS:** I think it would remain  
19 confidential.

20 **THE COURT:** Okay.

21 Now, is there in any of the books you  
22 referenced any discussion of the nature of the  
23 confidentiality dealing with what we would call  
24 criminal behavior that specifically addresses in the  
25 role of the Medicine Man prior conversations?

1           And as far as I am concerned, sir -- and my  
2 ruling will be this, if there is any third party  
3 involved be they dancers, singers, otherwise, there is  
4 no confidentiality. Okay. So we're down to the  
5 Medicine Man and the person seeking the assistance.

6           Is there anything in any of the writings and  
7 books you have read that specifically addresses the  
8 restrictions on the Medicine Man's ability to disclose  
9 that kind of information?

10           I am serious. I am not saying I have  
11 searched all this and looked for it, but I have  
12 searched quite a bit of it and I am looking for some  
13 discussion on medicine men that says, in plain simple  
14 terms, in our society, whatever society it might be,  
15 that any wrongdoings disclosed to a Medicine Man could  
16 never, under any circumstances, be revealed to any  
17 other person without the permission of the person  
18 involved.

19           That is, if I came to you as a member of the  
20 tribe and you were a Medicine Man, and I told you that  
21 I had done something wrong, not immoral, just flat  
22 criminally what we would call a crime, robbed  
23 somebody, killed somebody, raped somebody, of that  
24 nature, is there any discussion in any of the books  
25 and literature that you have which describes the roles

1 of medicine men in any of our tribes and in particular  
2 any of our -- the Sioux Nation as I understand it that  
3 specifically discusses that?

4 **THE WITNESS:** I would have to research that.

5 I know there is a lot written on Akicita,  
6 which is a policing society, and they'll throw up an  
7 example of something that happens.

8 But on the whole, there is no written thing.  
9 There is no -- you have to imagine in traditional  
10 times, there is no written this is the rule and this  
11 isn't or whatever. It's just -- it's based on the  
12 families, you know. And the knowledge of medicine men  
13 was handed down from father to son.

14 Another Medicine Man might operate in a  
15 totally different manner, but there wasn't, like, a  
16 written, you know, set of rules governing, you know,  
17 what we're talking about here, really. All that comes  
18 into play with the modern government after the Indian  
19 Reorganization Act, say, of 1934 and government.

20 **THE COURT:** I understand that this decision  
21 is made pursuant to the rules of evidence, law, and  
22 procedure within the State of South Dakota; and to  
23 meet that criteria, the medicine men are going to have  
24 to qualify under our Clergymen statute or it's not  
25 going to fly. And that's what I am looking for and I

1 am looking for any similarities between the cases and  
2 the decisions that have described the Clergymen  
3 privilege or the Clergy penitent, whatever it is,  
4 privilege of confidentiality and something that will  
5 tell me that that same concept -- which is not broad.  
6 It's a very tight concept. And it doesn't cover all  
7 kinds of things that would sound to me like you would  
8 consider covered.

9           So I'm looking for anything that will tell me  
10 from the studies, we have things -- all kinds of books  
11 telling us things medicine men did, the ceremonies  
12 ran. We are here on a request to use herbs and other  
13 things as medicines and healers and that kind of  
14 stuff.

15           I am not making light of it at all. I want  
16 something that addresses this within the scope of the  
17 Clergyman issue that I have to address.

18           **THE WITNESS:** I think what it boils down to  
19 with all of that usage is a traditional world and a  
20 contemporary world. And I even see our whole history  
21 like that, too. There is a whole traditional story  
22 telling and ways -- confidential things we have in our  
23 history. And then we get non-Indian people who write  
24 books and they change it all. They write their own  
25 history.

1           And we still have -- have to write those  
2 things. I see the medicine men struggling in that  
3 manner. They are operating in a traditional world.  
4 And they are bombarded by -- well, right now, you  
5 know, how do you become a Medicine Man. Well, that  
6 doesn't exist in the rules. And so it's really two  
7 worlds.

8           **THE COURT:** Question. Who decides who is a  
9 Medicine Man?

10           My impression is it's the medicine men.

11           **THE WITNESS:** Nobody really.

12           They -- it used to be in families, handed  
13 down all the knowledge they could and you trained  
14 throughout your life just like --

15           **THE COURT:** Okay. Mr. Sprague, I understand  
16 that.

17           But who, and at what point, decides somebody  
18 is a Medicine Man? Has gone beyond training and is  
19 now sufficiently skilled and in touch with the spirits  
20 as required for a Medicine Man to function as one in  
21 the service of the Tribal group and community.

22           How is that decision made?

23           **THE WITNESS:** The elders based on their  
24 ability like to be healing or medicine or counselor  
25 and how effective they were. It would be recognized.

1           **THE COURT:** So if I understand you, and I am  
2 taking a leap here, it's because other people begin to  
3 rely -- begin to rely on that person, and the  
4 perception they have of the spiritual contacts,  
5 powers, and healings?

6           **THE WITNESS:** Yes.

7           **THE COURT:** So it's the acceptance of that  
8 person by the community rather than anybody saying I  
9 declare you a priest?

10          **THE WITNESS:** Right.

11          **THE COURT:** All right. Fair enough.

12          Mr. Murphy?

13          **Q. (BY MR. MURPHY)** We have talked about the  
14 traditional leaders and medicine men that you have  
15 talked to, correct?

16          **A.** Yes.

17          **Q.** And those are all people that are widely  
18 regarded in the Lakota, Nakota, or Dakota communities  
19 as medicine men, correct?

20          **A.** Yes.

21          **Q.** What has their consistent message been to you  
22 about the confidentiality of communications between  
23 them and people receiving spiritual guidance?

24          **MR. JACKLEY:** Objection. Hearsay, Your  
25 Honor.

1           **MR. MURPHY:** It's -- an expert witness can  
2 rely upon --

3           **THE COURT:** One, I am going to allow it. I  
4 am not yet sure that Mr. Sprague qualifies as an  
5 expert witness on medicine men as he is not a Medicine  
6 Man. But nonetheless I will allow the question.

7           **Q. (BY MR. MURPHY)** Why don't you answer that  
8 question, then, about the people you have talked to.

9           **A.** They would all hold with the confidentiality.

10          **Q.** All right.

11          **THE COURT:** And who are those people?

12          **MR. MURPHY:** We have previously put them in  
13 the record.

14          **A.** Orville Looking Horse, Wilmer Mesteth, Rick  
15 Two Dog.

16          **THE COURT:** Have they ever written anything?

17          **THE WITNESS:** Orville Looking Horse is in a  
18 lot of books.

19                 As far as his own writings, I am not sure if  
20 he has anything written. Again, it's -- they're  
21 recognized.

22          **THE COURT:** Okay.

23          **THE WITNESS:** An example might be, I teach at  
24 Oglala Lakota college. Like people with lots of  
25 knowledge of herbs and medicine and they don't even

1 have, like, a Bachelor degree or Master's degree but  
2 they will say known expertise in Lakota studies and  
3 they are equally side by side with degrees.

4 Q. (BY MR. MURPHY) Why is it -- why wouldn't a  
5 true Medicine Man come into this hearing and testify?

6 A. Because it would -- it would go against  
7 everything that they stand for.

8 Q. Could you please explain more to the Court so  
9 that the Court understands what they stand for.

10 A. Well, they stand for bravery, generosity,  
11 respect, and wisdom, but they are -- they are there to  
12 help people in ceremony and consultation. And we're  
13 touching on a modern contemporary like a -- like I  
14 said, the IRA, you know, with government and all that  
15 structure. And it's just -- I see the whole thing as  
16 a traditional versus a contemporary world.

17 Q. And when you say IRA, you are talking about  
18 the Indian Reorganization Act?

19 A. Yes.

20 Q. So this is part of the white world?

21 A. Yes.

22 Q. And one of the values of medicine men is  
23 humility?

24 A. Yes.

25 Q. And to hold themselves out here as an expert

1 in what medicine men do would be antithetical to what  
2 medicine men do?

3 **A.** Yes.

4 **THE COURT:** You are telling me that a  
5 Medicine Man wouldn't describe for us by way of  
6 teaching or otherwise what he or she, Medicine Man or  
7 Woman -- what he or she does in the scope of helping  
8 their society and community members within the role  
9 and goal of a Medicine Man?

10 **THE WITNESS:** From what I am aware of, they  
11 do not want to come forward in these sittings.

12 **THE COURT:** I don't -- I understand that.

13 But you are telling me that they wouldn't.  
14 No, I can't imagine they would want to come here, but  
15 I would also think -- it would surprise me that,  
16 particularly when we talk about mutual cultural  
17 understandings of the white community and the Native  
18 American communities and the Hispanic, that that sort  
19 of an education would be beneficial to all parties --

20 **THE WITNESS:** It would be --

21 **THE COURT:** -- it's hard for me to imagine  
22 that they would not come in and explain that.

23 **THE WITNESS:** It would be beneficial probably  
24 but they just wouldn't come in in a formal setting.

25 They would -- you could take them some

1 tobacco and they would take you out to Green Grass and  
2 put you in a sweat or put you on a hill or something  
3 and start that way.

4           **MR. MURPHY:** And Your Honor, I will make as  
5 an offer of proof, I had two lengthy discussions in  
6 Pine Ridge with two recognized medicine men who gave  
7 the exact same answer that, though they understood the  
8 value, they understood the bridge-building capacity,  
9 and they resented the notion that this court might  
10 treat their religion as secondary to Catholicism or  
11 something like that, they would not come into a  
12 structured white court system and be subject to  
13 cross-examination about the sanctity of their  
14 ceremonies or the inner workings or hold themselves  
15 out as experts in the area.

16           **THE COURT:** That's interesting. I don't see  
17 any of those things would be at issue here.

18           **MR. MURPHY:** They may very well be. We have  
19 had questions about ceremonies from Mr. Jackley.

20           **THE COURT:** Sure, but we haven't had anything  
21 about the sanctity of them. Nobody is challenging  
22 that. Nobody is challenging that they are an integral  
23 part of the various Tribal communities. I think they  
24 are.

25           **MR. MURPHY:** Well, notwithstanding that, that

1 was not something that was part of the tradition. I  
2 spoke to two at length down on the reservation and  
3 it's just not part of their tradition to come into a  
4 public court forum.

5 So any way, that's the end of my questioning  
6 of Mr. Sprague. I don't know if that elicits more  
7 from Mr. Jackley.

8 **MR. JACKLEY:** Briefly, Your Honor.

9 I would like to introduce as Exhibit 1 the  
10 Grand Jury transcript of Al Gates. I think it was  
11 referred to by both counsel, and specific reference to  
12 page 55.

13 And the other thing, just in light of that,  
14 Your Honor, with respect to Mr. Murphy's statements,  
15 the state has not challenged anything about the Lakota  
16 religion or anything.

17 The issue in this case is whether or not John  
18 Graham had a confidential communication with a  
19 recognized medicine person and didn't waive that  
20 communication.

21 **MR. MURPHY:** I have no objection to the Grand  
22 Jury transcript. It's already been admitted as  
23 Exhibit A in its entirety, but if it needs to  
24 readmitted for the purposes this hearing, that's fine.

25 **THE COURT:** It will be admitted, but a

1 cautionary word to counsel, in addition to traditional  
2 foundational requirements, a multi-page document to be  
3 admitted into evidence requires a staple or some other  
4 fastening. Otherwise, I promise you, I will lose it,  
5 misplace it, or scatter it amongst a half a dozen  
6 different files.

7 I have a stapler.

8 That's going to be State's Exhibit 1?

9 **MR. JACKLEY:** Yes.

10 **RECROSS-EXAMINATION**

11 **BY MR. JACKLEY:**

12 Q. Mr. Sprague, you and the Court were having a  
13 discussion about a non Indian coming into an  
14 encampment and committed a horrible butchery or crime.

15 And I want to expand that discussion to be an  
16 instance not of a non Indian or not of a Tribal  
17 member, but of a cross Tribal member. For instance,  
18 assume in this example that a Tribal member from  
19 Rosebud came to Cheyenne River and committed a  
20 butchery, an assault upon a two-year-old child.

21 And then the next day came to a recognized  
22 Medicine Man on Cheyenne River and discussed about the  
23 butchery, discussed about what they had done, and then  
24 left.

25 Would it be fair to state that under that

1 scenario, the true Medicine Man would have the ability  
2 to talk to the Tribal elders or the dancers or the  
3 singers about what he had learned -- he or she had  
4 learned; is that fair?

5 **A.** He would use his discretion in what he wanted  
6 to do.

7 **MR. JACKLEY:** I have no further questions,  
8 Your Honor.

9 **THE COURT:** Thank you.

10 Mr. Murphy?

11 **CONTINUED REDIRECT EXAMINATION**

12 **BY MR. MURPHY:**

13 **Q.** But would that -- if he were to disclose that  
14 information publicly or to other people, would that  
15 violate the confidentiality?

16 **A.** Yeah, it would.

17 **Q.** And that confidentiality you said is a  
18 recognized concept?

19 **A.** It is recognized.

20 **MR. MURPHY:** Nothing further.

21 Does the Court have anything further for  
22 Mr. Sprague?

23 I think he's missed half of his class.

24 **THE COURT:** He can blame me. I am missing  
25 half of mine, too.

1 Anything further, Mr. Jackley?

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

3 **THE COURT:** Thank you, sir.

4 You may be excused.

5 (Witness excused.)

6 **MR. MURPHY:** Your Honor, that's all I have on  
7 the Medicine Man motion.

8 I don't know if Mr. Hanna -- yeah, he's still  
9 here.

10 Are we ready to continue?

11 **THE COURT:** I thought we had pretty much  
12 resolved where we're going with Mr. Hanna.

13 We have the question of the immunity for the  
14 state of Colorado, and likewise, which would be -- I  
15 assume his statements on that are correct, and then we  
16 have the unlawful purpose. I don't know where I am  
17 going to decide that at this date or how I am going to  
18 do that.

19 **MR. HANNA:** May I make this request and  
20 suggestion, Your Honor?

21 Since we only have ten minutes or so left, I  
22 would ask that this hearing be continued until after  
23 the government submits its motion to request an order  
24 for immunity. And I would ask that the -- because at  
25 that hearing I would like to produce witnesses who

1 will testify as to statements made by Mr. Jackley,  
2 which I submit prove an intent to bring an accusation  
3 against Mr. Richard Marshall for perjury if he is  
4 compelled to testify in this trial.

5 And I would ask the Court to direct mister --  
6 because our -- I don't have enough time to make that  
7 argument in ten minutes, Judge. But I am asking the  
8 Court to direct Mr. Jackley to make a specific factual  
9 offer of proof as to what questions and what facts he  
10 intends to elicit from Mr. Marshall. Why these facts  
11 are necessary. Especially in view of the fact that 90  
12 percent of them are coming in through other witnesses.

13 But I will want to call witnesses at an  
14 evidentiary hearing and I would ask that this matter  
15 be adjourned until after Mr. Jackley has made a  
16 written motion for an order and that I can respond to.

17 **THE COURT:** How does Monday grab you?

18 **MR. JACKLEY:** Well, Your Honor, I don't mind  
19 making a written motion for an order to compel, but I  
20 object to a couple things. I object to, number one,  
21 having to tell Mr. Hanna exactly what I am going to  
22 ask Mr. Marshall at trial because I am going to be  
23 straight with the Court, I don't know exactly what  
24 those questions will be at this point. I have a  
25 feeling they will pertain to what occurred at his

1 house the evening in question, mainly. But I don't  
2 know exactly -- I mean, I have never been in a  
3 situation as a prosecutor, or frankly even as a  
4 defense lawyer, where I have asked for or been  
5 required as a prosecutor to submit questions as to  
6 what I am going to ask of somebody.

7           The continued allegation and reference by  
8 Mr. Hanna regarding perjury is baseless. Number one,  
9 with respect to the 2003 Grand Jury testimony, that's  
10 beyond the statute of limitations, and it's not an  
11 offense.

12           With respect to his future testimony, I will  
13 restate -- and it's true what Dana Hanna has in his  
14 motion, and I think I told the Court this, as long as  
15 he tells the truth, he won't have any problem.

16           **THE COURT:** Who is to decide what's the  
17 truth?

18           **MR. JACKLEY:** Just like any case, Your Honor,  
19 at the end of the day if the state believes he  
20 committed perjury, the state would proceed to bring  
21 the matter to a Grand Jury; present whatever evidence  
22 there would be of perjury. The Grand Jury would then  
23 make a decision whether or not there was a reason to  
24 believe the crime was committed and he committed it.  
25 It would then have all the other protections of a

1 perjury case. That's a premature decision because we  
2 don't know what he's going to testify to or what he's  
3 not going to testify to.

4 **THE COURT:** Well, are we satisfied that if we  
5 don't -- if there is no immunity from Colorado and  
6 Wyoming that he's probably not going to testify?

7 **MR. JACKLEY:** Well, I can't --

8 **THE COURT:** I assume, you don't have the  
9 authority to grant that?

10 In fact, I am sure you don't.

11 **MR. JACKLEY:** I guess if the Court is telling  
12 me that if I'm going to make a motion for an order to  
13 compel that I need to go talk to an Attorney General  
14 in Wyoming and an Attorney General in Colorado, I can  
15 do that. But I don't have the authority to grant him  
16 immunity in those states.

17 **THE COURT:** Yeah, I understand that.

18 But I think a grant of immunity for the State  
19 of South Dakota would be insufficient because of the  
20 nature of what we're talking here which is really  
21 involvement in criminal activity alleged to run over  
22 several states. I mean, we do have a kidnapping from  
23 Colorado, and we do have transport from Colorado  
24 through Wyoming to South Dakota, as I understand it,  
25 but I don't know that.

1           And certainly there is -- obviously, federal,  
2 state, and multi-state charges that could arise out of  
3 that. So based on what I know, I perceive that to be  
4 a problem.

5           **MR. JACKLEY:** My position is the federal is  
6 taken care of based upon the federal trial so that  
7 would be double jeopardy. So the issue would be --  
8 obviously, I could give it in South Dakota and my  
9 understanding is -- what I am -- what I am hearing  
10 from the Court is I better talk to Wyoming and  
11 Colorado, and I would ask more time than Monday for  
12 that.

13           **THE COURT:** Well, I mean, I think that point  
14 in time comes -- I mean, I think Mr. Hanna's client is  
15 going to have to come to court to exercise the right.  
16 Assuming that assertion is correct -- I have no reason  
17 to believe it isn't -- that discussion takes place out  
18 of the presence of the jury. We make a determination  
19 at that point, and his client decides whether to  
20 testify or not.

21           Motion to compel, then, to me, in my view, is  
22 pointless if it does not grant the immunity necessary  
23 to protect the person for prosecution based, you know,  
24 on his testimony or it incriminates him in crimes in  
25 all jurisdictions.

1           You know, we used to play that game which is  
2 why the Fourth and Fifth Amendments were finally made  
3 applicable to the states through the  
4 Fourteenth because search and seizure and  
5 incriminating statements taken under state law  
6 enforcement were not precluded by such. And then the  
7 information was transferred to the federal authorities  
8 and ultimately the U.S. Supreme Court began to apply  
9 the principles of the various Bill of Rights to the  
10 states, and that's one of them. And I think the same  
11 principle applies here. That to give immunity here it  
12 must be an effective immunity or we're all just  
13 pretending it's something it's not. And that's where  
14 I see that to be.

15           **MR. JACKLEY:** I will discuss the matters with  
16 Colorado and Wyoming and I guess I just would ask time  
17 until the trial to sort that out.

18           **THE COURT:** I don't have a clue, Mr. Hanna,  
19 how to address the other issue you are raising.  
20 Absolutely we will have further opportunity to address  
21 that. And I am not quite -- I mean, in all candor, I  
22 don't have a clue where to go with it at this time or  
23 how to even resolve the questions. I fully understand  
24 your point. And I am just -- I am not quite sure  
25 where it goes.

1 I think there is some issue of the extent to  
2 which -- the inquiry, I assume, has to be relevant to  
3 the matters at issue and that kind of stuff. But I  
4 can't go beyond that at this point.

5 We will have further hearing on it, and I  
6 expect we're going to need to do that reasonably  
7 quickly.

8 **MR. HANNA:** I would hope so, Judge.

9 I don't think it can wait until the trial.  
10 The prosecutor has known that this problem was going  
11 to arise for some time. They have spoken months ago  
12 to people saying that they intend to --

13 **THE COURT:** Well, Mr. Jackley has to decide  
14 if he's going to be in a position to make a motion to  
15 compel.

16 We have given him the outlines of that and if  
17 he's in a position to do that, then the question you  
18 raise becomes important. Other than that, it's a Part  
19 Two Information that hits the trash can.

20 **MR. HANNA:** I see.

21 And I would ask that we be given a week to do  
22 that, Judge.

23 **THE COURT:** We go to trial the 29<sup>th</sup> of this  
24 month so it be now the 8<sup>th</sup>. We got 21 days.

25 So can you handle it ten days from today, a

1 week from Friday?

2 I am just asking for Mr. Jackley's input at  
3 this point.

4 **MR. JACKLEY:** I venture a guess that neither  
5 Colorado or Wyoming wants to prosecute Mr. Marshall so  
6 I think I can probably get that taken care of within a  
7 week.

8 **THE COURT:** My guess is they don't either,  
9 but my guess isn't good enough.

10 **MR. JACKLEY:** I will -- can I have ten days?

11 **THE COURT:** Yeah. You have a week to Friday.  
12 That should be ten, a little more than that. Five and  
13 four plus weekend.

14 **MR. HANNA:** Since this is a matter of law, I  
15 would also point out that according to the trial  
16 testimony, the statements of Arlo Looking Cloud, after  
17 the murder of Anna Mae Aquash, the perpetrators drove  
18 through Nebraska. So it may very well be that  
19 Nebraska might have a criminal liability, may be able  
20 to impose criminal liability on anybody who fled the  
21 scene through that state.

22 **THE COURT:** I am not going to run this  
23 through the 50 states, all right.

24 **MR. JACKLEY:** Thank you.

25 **THE COURT:** Somebody is going to have to

1 establish there is some realistic basis upon which  
2 Nebraska could bring a charge. And the fact that he  
3 drove through the state of Nebraska after committing a  
4 crime, I am not sure that's anything but a potential  
5 federal offense.

6 I don't think if I kill somebody in South  
7 Dakota and wander off through Montana that I have  
8 committed a crime in Montana. I may be wrong.

9 **MR. HANNA:** All right, Judge.

10 If I can just make one more point which is  
11 the reason I am asking Mr. Jackley to present some  
12 kind of specificity is he is seeking an order to  
13 compel testimony from a witness who has taken the  
14 Fifth Amendment. It is disingenuous for him to tell  
15 the Court I have no idea what Richard Marshall is  
16 going to testify to. We have had two trials.  
17 Mr. Marshall has testified in the Grand Jury.

18 Mr. Marshall has made statements to law enforcement  
19 officers. And the essence of those statements was  
20 that four people came to his house and he has very  
21 little memory of anything that happened after that.

22 So Mr. Jackley is going to have to show  
23 why -- what facts he intends to prove. Because --

24 **THE COURT:** Give me authority for that and  
25 then we'll have a discussion on it. But I understand

1 your point. I also understand -- I understand  
2 witnesses say different things all the time. And it's  
3 one of the reasons why everybody likes to have  
4 depositions and Grand Jury testimony and preliminary  
5 hearings because almost nobody can say the same thing  
6 twice.

7 So you have to show me authority for that  
8 proposition. I am not opposed to it. I just simply  
9 need to see some authority that that kind of  
10 disclosure is required. I don't know. Show me. I  
11 will play the Missouri role.

12 **MR. HANNA:** What I am asking the Court to do  
13 is to direct Mr. Jackley -- for him to show the Court  
14 why this order is necessary.

15 **THE COURT:** Show me the authority that I can  
16 make him do that.

17 **MR. HANNA:** All right, Judge.

18 **THE COURT:** That's my point. Show me  
19 authority for what you want. The two rules of  
20 presentation as I perceive them to a court or a jury  
21 is the Court must understand two things: What you  
22 want, which I do; and why I should give it to you,  
23 which I don't.

24 **MR. HANNA:** All right.

25 **THE COURT:** I understand what you want. Now

1 show me why I should or have to give it to you.

2 **MR. HANNA:** So do I understand that in ten  
3 days from now Mr. Jackley is ordered to make his  
4 written motion setting --

5 **THE COURT:** I think ten days from now he's to  
6 establish that he can make a motion to compel or that  
7 he will provide the requisite immunity from the states  
8 of Colorado and Wyoming. Okay. And then if he can do  
9 that from -- has their authority or they grant that  
10 immunity, and his, he may be in a position to issue a  
11 motion to compel.

12 **MR. HANNA:** All right.

13 **THE COURT:** But until we know that, I am of  
14 the position that he cannot do that until and unless  
15 he can.

16 **MR. HANNA:** Thank you.

17 **MR. JACKLEY:** Your Honor, may I just speak to  
18 a couple of things?

19 **THE COURT:** Yes.

20 **MR. JACKLEY:** The inquiry is why I need to  
21 call him.

22 **THE COURT:** Well, I didn't.

23 **MR. JACKLEY:** I have submitted Mr. Marshall's  
24 different statements to the Court and I think I will  
25 stand behind that basis as to why I need to call him.

1 They are not all consistent.

2 The other thing that I would point out, there  
3 has been a lot of discussions about parole. The  
4 Attorney General -- I've cited the authority -- does  
5 not control parole.

6 Where Mr. Marshall has a problem with parole  
7 and -- we litigated this at the federal level at Dick  
8 Marshall's detention hearing, is the fact not about  
9 Annie Mae Aquash, but the fact that he's on his third  
10 strike. And so that's why that's relevant. If I  
11 could, I would just like to submit that to the Court  
12 so the Court has that because Mr. Hanna had made a lot  
13 of allegations regarding that. And I think that the  
14 parole record, the same exhibit that was submitted at  
15 the federal trial, demonstrates that the state is not  
16 calling Dick Marshall for purposes of some parole  
17 revocation trap.

18 His parole revocation problems stem from a  
19 2007 DUI and admission; not from anything related to  
20 Annie Mae Aquash. So if I could submit that, Your  
21 Honor.

22 **MR. HANNA:** I object to that.

23 **THE COURT:** Just a minute. At ease. I need  
24 a gavel.

25 The point is, is at least what it seems to

1 me, if that's the case, and this is the problem, then  
2 somebody should be in a position to tell me that the  
3 derivative use immunity you are talking about will  
4 include the use of that data or doctrine to -- in any  
5 parole revocation matter. And I assume --

6 **MR. JACKLEY:** I think I can tell you that. I  
7 mean, I think if I, as Attorney General, grant him  
8 derivative use immunity, I mean, that can't be used in  
9 any State of South Dakota proceedings. That would be  
10 a parole proceeding, that would be prosecuting him for  
11 accessory to kidnapping. I can't -- I can't use it  
12 for that and neither can any --

13 **THE COURT:** If that's the case, are you  
14 satisfied with that?

15 **MR. HANNA:** Judge, we will present  
16 evidence --

17 What I am saying is that Mr. Jackley wants to  
18 put Richard Marshall on the stand. And when Richard  
19 Marshall says, I did not give a gun to anybody,  
20 Mr. Jackley is going to determine that's not the  
21 truth. And then he's going to charge Richard  
22 Marshall -- or have the state charge Richard Marshall  
23 with perjury in a parole violation, and I base that  
24 conclusion on statements Mr. Jackley has made to me  
25 and two other attorneys.

1           That -- it has nothing to do with anything  
2 that happened in 2007. The reason --

3           **THE COURT:** Then I will hear that evidence  
4 and we will go from there, but we will address that at  
5 the time when it becomes more of an issue and I  
6 understand your concern with it. And somehow I need  
7 to know a whole lot more about the law of that than I  
8 know now.

9           **MR. HANNA:** Thank you.

10          **MR. MURPHY:** We got some other outstanding  
11 motions.

12           Do you have some time on your calendar in the  
13 near future?

14          **THE COURT:** I have Monday.

15          **MR. MURPHY:** Works for me.

16           What time?

17          **THE COURT:** I have any time Monday you like.

18          **MR. MURPHY:** I'd be ready to go at nine in  
19 the morning if the state is ready to go or one of the  
20 prosecutors is ready to go.

21          **THE COURT:** I can tell you phosphatase isn't  
22 coming in through law enforcement in any way, shape,  
23 or form.

24           Next question?

25          **MR. JACKLEY:** We didn't object to that.

1           **MR. MURPHY:** We got the motion in limine  
2 regarding Denise Maloney and we got the notice of  
3 recorded testimony that involves Lorelei Decora Means.

4           I have already advised the Court and counsel  
5 that I am having some trouble getting Mr. Leach in.  
6 He's already indicated -- I have submitted a letter --  
7 but he's going to have his client invoke the Fifth  
8 Amendment. So we need to at least get the Denise  
9 Maloney motion in limine and the Lorelei Decora Means  
10 matter --

11           **THE COURT:** I have to confess. I am -- I am  
12 swimming around and trying to understand the structure  
13 of Denise's testimony, the purpose of it.

14           I understand that there is two statements by  
15 Arlo Looking Cloud, both of which involve Arlo Looking  
16 Cloud as a direct participant in the murder of Anna  
17 Mae. One statement says he and -- no. Wait a minute.  
18 Strike that. Graham and Theda Clarke went out and the  
19 next statement says he and Graham went out. Is that  
20 correct?

21           Both of those statements -- both of those  
22 statements say that Graham went out. In one case it  
23 says Graham actually shot, and the other one just says  
24 Graham was one of two people that went out and Anna  
25 Mae was dead.

1 I am trying to figure out, for the life of  
2 me, of what significance the distinction is.

3 **MR. MURPHY:** Well, Your Honor, I think what  
4 the distinction is, is they would like to put on an  
5 inherently sympathetic witness to prejudice the jury  
6 against my client.

7 **THE COURT:** Well, I understand.

8 My question is directed to Mr. Jackley --

9 **MR. MURPHY:** I know.

10 **THE COURT:** -- as to where you are going with  
11 that.

12 **MR. JACKLEY:** From experience, the defense  
13 will likely challenge Arlo Looking Cloud's  
14 credibility. I think that's fair. And --

15 **THE COURT:** Yeah. I would guess that that's  
16 fair.

17 **MR. JACKLEY:** Part of that challenge will be  
18 that he has been convicted of murder and he has swung  
19 a deal with the state and he's made up this story.

20 Well, witnesses that he talked to about what  
21 had occurred prior to his conviction basically takes  
22 care of the challenge of recent fabrication, so to  
23 speak. So it evidentiarily has value. And it shows  
24 that he didn't just make up a story the day after we  
25 convicted him. Rather, this has been consistent with

1 what he has indicated, not only --

2 **THE COURT:** Well, can't that be set up -- if  
3 it can be set up at all -- in the course of rebuttal?

4 Could it not fit more appropriately in  
5 rebuttal than in your case in chief?

6 Mr. Murphy?

7 **MR. MURPHY:** Exactly.

8 What they are talking about is calling her on  
9 direct to testify as to Arlo's statements which they  
10 believe are perjurious.

11 **MR. JACKLEY:** Well, we wouldn't call her  
12 until -- assuming he attacks Arlo, and depending on  
13 what that attack is, I think that gives us the  
14 evidentiary basis to call her in case in chief.

15 **THE COURT:** Well, I agree that may. Okay.  
16 But I don't think that that's a decision I can make  
17 now.

18 I understand the point that Denise's  
19 statement -- Arlo made the statement to Denise, what,  
20 three decades later or something?

21 **MR. MURPHY:** 2002.

22 And so it's after the motive to fabricate  
23 because --

24 **MR. JACKLEY:** He's not convicted yet.

25 **MR. MURPHY:** That's not --

1           **THE COURT:** We'll come back on Monday.

2           Call your time.

3           **MR. MURPHY:** Nine o'clock.

4           **THE COURT:** Sounds good.

5           (Whereupon, the proceedings in this matter  
6 were then concluded.)

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1 STATE OF SOUTH DAKOTA )  
 ) SS. CERTIFICATE  
 2 COUNTY OF PENNINGTON )  
 3

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

6 DO HEREBY CERTIFY that the foregoing  
 transcript is a true and accurate transcript of the  
 7 questions asked, the testimony given, and of the  
 proceedings had.  
 8

9 I FURTHER CERTIFY that I am not of kin or in  
 any way associated with any of the parties to said  
 cause of action, or their counsel; and that I am not  
 10 interested in the event thereof.  
 11

12 IN WITNESS WHEREOF, I have hereunto set my  
 hand this 3rd day of May, 2011.  
 13

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