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

FILE NO. CRI 09-3953

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

TRANSCRIPT OF
MOTIONS HEARING

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
NOVEMBER 15, 2010

COPY

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

2 **THE COURT:** Mr. Oswald, you are under
3 staffed?

4 **MR. OSWALD:** Yes, sir.

5 If we could dial up my other one.

6 (Whereupon, Mr. Jackley was then called to
7 participate by telephone.)

8 **THE COURT:** I think we're all here. Let me
9 close down my existing realtime and bring up another
10 one so I can keep it for this case. Give me a second.
11 Should be up.

12 **MR. MURPHY:** Your Honor, if we can, to begin
13 with, just finish where we left off last week. We had
14 to shut down pretty quickly.

15 I am handing you what's marked as Exhibit I.
16 Mr. Oswald already has got a copy of that and we
17 agreed that you could review that prior to the
18 beginning of this hearing. This was not an exhibit
19 intended for Mr. Sprague because it's not something
20 that he generated.

21 This is a report from FBI Agent -- Special
22 Agent Allen Garber documenting an a interview with --
23 between Bob Ecoffey, at that time Bureau of Indian
24 Affairs head, and Al Gates, the now deceased Medicine
25 Man who is at issue in the Medicine Man privilege

1 motion.

2 In my -- the document speaks for itself in
3 many ways, but I think there is three points I wanted
4 to highlight, as I know the Court has got this matter
5 under its consideration. This is probably the most
6 relevant of all the documents.

7 The first is in the second paragraph.
8 Mr. Gates talks about that he is a Medicine Man in a
9 private way. He does practice Indian medicine
10 ceremonies, but only upon special request. That goes
11 to, immediately, his understanding of the
12 confidentiality of the services he provides.

13 It also addresses some of the suggestions
14 that there may have been dancers present or drummers
15 or anything like that. None of that -- you know, we
16 had at the last hearing discussions about, well, if
17 there was drummers or dancers would that remove
18 confidentiality through a third-party waiver.

19 The Court has already got in its possession
20 the Grand Jury transcripts in the other matters, none
21 of which intimate in any way, shape, or form that
22 there was any third persons present, but this goes to
23 that point that he is a private Medicine Man; he only
24 does ceremonies upon special request. Does not
25 advertise.

1 The next point is the second paragraph from
2 the bottom where it says Gates said that he advised
3 Patton -- that being my client -- to keep this
4 information to himself and if he was questioned by
5 authorities then to seek further advice from Gates.

6 This I think goes to the point, he has --
7 Gates, the Medicine Man, has established a
8 confidential relationship with my client. He is
9 telling my client, according to his own statement,
10 that my client is only to talk to him about these
11 matters. And that they have a relationship that is
12 premised upon the idea that there not be dissemination
13 or communication to third parties.

14 The last important point in this multi-page
15 document comes on the second page and it's in the
16 fourth paragraph. The quote is, Gates said that he
17 strongly believes this because in a spiritual way
18 Patton trusts Gates and sought his aid, unquote.

19 Again, this reinforces the idea that my
20 client had a spiritual relationship with Gates; that
21 Gates understood this to be a spiritual relationship;
22 and that they had essentially had a trust based on
23 that confidentiality and spirituality.

24 I am asking the Court to accept Exhibit I.
25 If we need to, at trial we could always, outside the

1 presence of the jury, have Mr. Ecoffey come in and
2 verify that this is in fact a description of his
3 conversations with Mr. Gates, but I don't really think
4 that is subject to much debate.

5 And I think this closes the record, at least
6 from our perspective, on the confidential nature of
7 the relationship between my client and Al Gates, the
8 now deceased Medicine Man.

9 **MR. OSWALD:** May I, Judge?

10 **THE COURT:** Yes.

11 **MR. OSWALD:** Judge, the document, first of
12 all, talks about Mr. Gates being a Medicine Man in a
13 private way. As pointed out, he's qualifying that.
14 Anybody -- anybody can say that they are clergy or a
15 Medicine Man. It's if they really are.

16 And Mr. Gates testified under oath that he
17 was a helper and he was not a true Medicine Man. That
18 testimony stands as the only one that has been under
19 oath by this -- by Mr. Gates.

20 Nevertheless, there is -- if Mr. Gates felt
21 that he was a true Medicine Man and the
22 confidentiality existed, he is telling Ecoffey and
23 he's telling FBI Agent Garber and he's rattling off
24 what he knows. Nothing in here suggests that even
25 Mr. Patton believed there was a confidential

1 relationship that exists.

2 So therefore, I'd like to stand on the
3 previous record that's made, and the previous
4 exhibits.

5 And furthermore, just to remind the Court,
6 the clergy penitent privilege is statutory; it is not
7 constitutional. And there is the difference, then,
8 when the Court makes that decision on whether we are
9 allowed to use Mr. Gates' testimony or not.

10 I don't know if Mr. Jackley has any comments
11 on that or not, Judge. If he could be heard.

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

13 **MR. JACKLEY:** Judge, kind of in tow with what
14 Mr. Oswald indicated that, you know, I think it's
15 important we look at the three statements at issue.
16 There are the two statements that John Graham gave
17 that tie in with Al Gates and the Medicine Man
18 information. And I think that clearly goes -- that's
19 an evidentiary privilege.

20 So even if the Court would determine that Al
21 Gates was a Medicine Man, even if the Court determined
22 that there was a communication privilege that didn't
23 exist, a proper waiver, it still fails and it becomes
24 of evidentiary value because the case law that we
25 provided to the Court is clear that it's an

1 evidentiary privilege and not a constitutionally-based
2 privilege; and therefore, the case law says that the
3 fruit of the poisonous tree does not apply.

4 So with respect to Graham's two statements of
5 confessions or admissions, or whatever you want to
6 call them, in relation to this, the law clearly allows
7 its admissibility.

8 With respect --

9 **THE COURT:** Wait a minute. The poisonous
10 tree is things that come from the statement, not the
11 statement itself; wouldn't that be correct?

12 **MR. JACKLEY:** Correct.

13 But if you look at the analysis -- I mean,
14 the statement we're talking about is John Graham is
15 speaking to law enforcement, or other individuals,
16 about him going to this ceremony and talking about in
17 relation to what happened or in the questioning that
18 comes up that, you know, the law enforcement officer
19 says, you know, our information is you have admitted
20 this and then Graham himself -- this isn't coming from
21 Al Gates -- Graham himself talks about the presence in
22 the instance, et cetera, and our position is that that
23 would be admissible because it's Graham speaking.
24 That's his admissions.

25 And irrespective of what is determined on

1 this Medicine Man theory, it doesn't affect that
2 because the Medicine Man theory is wholly evidentiary
3 based it is not constitutionally based; and the case
4 law that we presented to the Court indicates that when
5 it's not constitutionally based, the fruit of the
6 poisonous tree does not apply. And so with respect to
7 Graham's statements about the Medicine Man theory or
8 in relation to what he told Al Gates is not
9 foreclosed.

10 **MR. MURPHY:** May I be heard on those points,
11 Your Honor?

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

13 **MR. MURPHY:** First, in response to Mr. Oswald
14 saying that Gates, under oath, said that he was not a
15 true Medicine Man, you have the exhibits. What's
16 clear is he was deriding new-age practitioners and he
17 said, I am not one of those guys that takes money for
18 ceremonies. And so this document corroborates that he
19 sees himself as a Medicine Man who is actually the
20 real deal. He practices in a private way. He does
21 not advertise.

22 And in the Grand Jury transcript --

23 **THE COURT:** You know, it also seems to me
24 that even if I assume that to be true, he does not
25 accept the proposition that a Medicine Man is bound or

1 that things said to him are confidential. His
2 statement here is, don't tell anybody, which I am not
3 sure has anything to do with any bond of
4 confidentiality between the two of them.

5 But I -- here I have somebody supposedly
6 standing in a Clergyman's stead that talks very freely
7 about what people said to him.

8 So in terms of this, and evidence -- I mean,
9 I don't know that I have any evidence that Mr. Graham
10 considered it confidential. So what I have here on
11 display is no evidence or feeling on the part of
12 anybody involved considering this a confidential
13 communication.

14 It's clear Gates did not, fair?

15 **MR. MURPHY:** No, I don't think that is fair.

16 And if you look to the second page, that
17 fourth paragraph, he's talking to Ecoffey and he says,
18 if anybody can get Graham to talk, it's me. And he
19 says because of our spiritual relationship he thinks
20 he can bring Graham to the table. And so, clearly,
21 he's indicating there that he and Graham identify this
22 as a confidential, private communication. And Gates
23 acknowledges that and says that if he gives Graham the
24 word, that Graham may, in fact, talk to authorities.

25 So there is clearly a recognition that this

1 was something that Graham felt was confidential
2 because Gates is saying he -- I could get him to talk
3 if I was so asked to do so.

4 But the other thing is is that this case
5 would be no different -- you talked about Gates not
6 recognizing the confidentiality. Well, he's got
7 statements like in this exhibit where he clearly talks
8 about this as being a private communication, but then
9 he blabs to the authorities. That's the
10 contradiction.

11 **THE COURT:** I don't see where he talks about
12 it being a private communication. And he also has --
13 I mean, that's -- one can put that interpretation on
14 it, but I certainly don't see it express.

15 And then he talks about Sue Casper coming to
16 him, him performing a ceremony, and he -- that she had
17 been threatened by Theda Nelson because Casper had
18 been present when Aquash was murdered, and he
19 performed a ceremony. She's no longer afraid, but he,
20 again, has no qualms about discussing that.

21 **MR. MURPHY:** Well, so that's why I said.
22 This would be no different than any of the cases that
23 have come before courts on this issue where a priest
24 or minister or a Rabbi blabbed to the authorities
25 notwithstanding their understanding of the -- that it

1 was supposed to be confidential. And that's how these
2 cases are litigated is when a priest or some
3 recognized member of the clergy doesn't live up to the
4 expectation.

5 If they always kept everything sacracent,
6 then we would never have any litigation on the
7 parameters of the privilege. I mean, it's obvious
8 that's how these things get before the courts is when
9 an individual member of the clergy who should have
10 kept things private for whatever reasons, because they
11 think it's the right thing to do or because they get
12 drunk at a cocktail party or whatever, they don't keep
13 things privileged.

14 So we got Gates saying that he had advised
15 Patton to keep this information to himself and only
16 communication with him about it. That's what he
17 said --

18 **THE COURT:** No. That's before he talked to
19 somebody to talk to him about it.

20 **MR. MURPHY:** Right.

21 But, I mean -- he's saying, keep this between
22 you and I and before you talk to somebody else talk to
23 me first. So that's something that clearly indicates
24 confidentiality or privacy. He talks about that he's
25 a Medicine Man in a private way. Private is --

1 **THE COURT:** I have no clue what that means,
2 by the way.

3 **MR. MURPHY:** Well, nor does any of us because
4 the guy died in 2003.

5 But we have to, I think, presume or give my
6 client the benefit of the doubt on these matters
7 because it's his privilege that's being asserted, he's
8 the one who has asserted it, and we don't have Gates
9 subject to cross-examination. We can never confront
10 him. We can never put him on the stand and ask him
11 any of this stuff.

12 So what we're left with are these documents
13 and so he says I am a private Medicine Man. I do this
14 on special request. I had communication with Patton.
15 I told him not to talk to anybody else but me and then
16 he tells the FBI that because of the -- because Patton
17 trusts him in a spiritual way, that --

18 **THE COURT:** My problem, Mr. Murphy, goes back
19 to, I don't have a clue what in a spiritual way means.
20 Okay. At least the Lakota people, the local Sioux
21 Tribes that I have talked to and we deal with in
22 A and Ns all the time use the term spirt or spiritual
23 or sacred in a context that is completely foreign.

24 And when you get down to children are sacred,
25 and I ask what that means, it says you are supposed to

1 take care of them and not harm them. Well, that's
2 exactly what exists as far as I know in every society
3 in the world. It's not a special standard for Native
4 American children.

5 But the use of the term is almost universal
6 to describe ordinary, for the most part, social
7 values. We take care of our children. We take care
8 of our family. We don't pray or we're not predators.
9 We live a wholesome life. We stay in good spiritual
10 contact with the creators. I mean, all of these terms
11 seem to me to be much like if I use German to describe
12 sacred and it encompasses the same thing that we're
13 talking about for everybody.

14 **MR. MURPHY:** But you're assuming that you
15 need to understand what the word spiritual means. And
16 I don't believe that's the days because what we're
17 establishing by saying that it was a spiritual
18 communication is if somebody goes to a priest and is
19 talking about the weather and just blurts out, I
20 killed Mr. Jones, the case law says, well, there
21 wasn't dissemblance of the spiritual communication
22 going on. They were talking about the weather and the
23 guy blurted it out, so it's not protected by
24 privilege.

25 What we have over and over again in the

1 exhibits we provided you from Gates is --

2 **THE COURT:** My problem here is establishing,
3 first of all, that Gates stands in a position where
4 that is a recognize -- I mean, I can't come up to you
5 and say, John, you have been my adviser all my life on
6 things and conscience and how to behave. I know
7 something about a crime or another. I don't want you
8 to tell anybody about it. I don't think that creates
9 it, and yet I am looking at you as some sort of a
10 spiritual mentor or guidance.

11 **MR. MURPHY:** That's not a fair reading of
12 this record, though. Everything we put before you,
13 all of the exhibits that involve Gates' statements --
14 and there has been a number of them -- have all said
15 that he was involved with members of AIM as a
16 spiritual leader; he was an -- any conversations he
17 had with Mr. Graham were of a spiritual context. This
18 is not something where you can create a record that
19 doesn't exist.

20 You've got a record in front of you, multiple
21 exhibits. Every single one of them --

22 **THE COURT:** But I don't have -- at least what
23 I am not sure that I have is a record that the
24 Medicine Man within the standards of practice of a
25 Medicine Man is a person that stands in a Clergyman's

1 posture.

2 We have discussions and a statement from your
3 expert that says it was discretionary. He
4 specifically used that term. That doesn't strike me
5 as a standard. I have no statements in books or
6 anything on the Lakota culture that indicates there is
7 a confidentiality that accompanies spiritual
8 ceremonies.

9 **MR. MURPHY:** Well, we met our burden, Your
10 Honor. We -- they haven't put up any evidence.

11 I understand you seem to be doing your own
12 independent investigation. But we're talking about --

13 **THE COURT:** It's a question of law for me. I
14 have to do that. I don't have any authority that I
15 know of that says medicine men qualify.

16 **MR. MURPHY:** Well, we had a witness on the
17 stand --

18 **THE COURT:** I don't have any case authority.

19 **MR. MURPHY:** Well, I understand that.

20 If we had some case authority, we would all
21 be --

22 **THE COURT:** It would be an easy question.

23 **MR. MURPHY:** Yeah.

24 And I assume the government is in the same
25 position. I -- having done a nationwide search, and I

1 believe this is a first impression issue nationwide,
2 which is stunning.

3 **THE COURT:** Oh, good.

4 **MR. MURPHY:** But we had a witness on the
5 stand who is an expert. He has written books, he
6 testified, he talked to medicine men, he's grown up in
7 the culture; and he told you repeatedly one thing and
8 one thing only: That communications by a person to a
9 Medicine Man are presumed to be confidential.

10 Now, the state hasn't rebutted that.

11 **THE COURT:** I don't think he's -- he was
12 anywhere near that positive, Mr. Murphy.

13 But regardless, that's the question I have in
14 front of me is whether there is a standard as a
15 Medicine Man to that standard. If that is, that's
16 probably outcome determinative of the questions here.

17 **MR. MURPHY:** Okay.

18 **THE COURT:** Because I agree with you that if
19 it is so, Gates has no privilege to waive the
20 statement. I don't know where we go from there with
21 the poisonous tree doctrine, but I haven't gotten that
22 far in the analysis because the fundamental question
23 to me is, first of all, Gates' standing and status.
24 That's where I see the -- that's the problem for me.

25 **MR. MURPHY:** Okay.

1 And just so my record is complete, the last
2 issue, Mr. Jackley and Mr. Oswald both referenced the
3 statutory nature and the evidentiary privilege. I do
4 want to address one thing. Mr. Jackley said that my
5 client, when confronted, admitted to being in a
6 ceremony and talking about the -- what his
7 communications with Mr. Gates were. We've provided
8 you previously as exhibits the sum total of the
9 statements. There was a statement to Mr. Ecoffey and
10 a statement to Mr. Chapman. To, one, after the person
11 recited all the allegations that Al Gates supposedly
12 made, my client said, yeh, Y-E-H. And that was
13 after -- that was to Ecoffey after he had told Ecoffey
14 he was just there to listen.

15 To Chapman I think the sum total of the
16 response was uh-huh, and I may be wrong, or huh. So
17 for any -- either of the State's Attorneys in this
18 case to reference that my client make some grand
19 adoption of what was put in front of him is just not a
20 statement that's accurate, and the record that we
21 provided also addresses that.

22 **THE COURT:** Understand.

23 **MR. MURPHY:** Okay.

24 I -- I was under the understanding that today
25 we were going to have Mr. Hanna here, but perhaps I am

1 wrong. I think the only things that we have left, we
2 filed late, but -- well, it wasn't necessarily late --

3 **THE COURT:** The motion on impeachment and
4 convictions?

5 **MR. MURPHY:** Yeah, Mr. Dillon.

6 And I emailed that to everybody, I believe,
7 on Thursday of last week. And I will have another one
8 on Arlo Looking Cloud. I reviewed his rap sheet at
9 the Attorney General's Office on Friday. He's got, I
10 believe, three prior felonies and a number of prior
11 misdemeanors for false statements or making false
12 reports. He's already been impeached at the other
13 trial thoroughly on his criminal record so --

14 **THE COURT:** I am assuming the state has no
15 objections to the granting of that motion?

16 **MR. OSWALD:** Judge, we have no objection as
17 long as it's in to the general question that we have
18 to use when we impeach defense witnesses, have you
19 been convicted of a crime of dishonesty or felony in
20 the past.

21 **MR. MURPHY:** Well -- and with Mr. Dillon I
22 may agree with that.

23 Mr. Looking Cloud is going to be a different
24 story if he testifies anything like he did at the
25 Marshall trial.

1 **THE COURT:** Well, my understanding, first of
2 all, is that the statement as to the general nature of
3 the inquiry is, generally, correct. Years ago there
4 was a trial involving a sexual molestation of a child
5 in which the existence of the prior conviction was
6 raised but not as to the specific -- it was for the
7 same thing, and the parameters being virtually exact.
8 And the only question asked was -- which surprised
9 me -- was have you had a prior conviction for a
10 felony.

11 And my understanding of review of the law is,
12 depending on the specific nature of the event, that
13 the specifics may be necessary and indeed require a
14 burden of proof. My thought was, I am thinking, at
15 least a burden of a preponderance of the evidence or
16 something of bad acts as opposed to prior convictions.

17 **MR. MURPHY:** Well, in Mr. Dillon's case, his
18 misdemeanors are relevant to the actual fact that he's
19 going to be testifying under oath and that he's been
20 convicted on a number of occasions of making false
21 statements to law enforcement or false police reports.
22 So that bears on his ability to uphold the oath.

23 As to the felonies, I would agree that,
24 generally speaking, the prior nature of the felonies
25 is -- it's just a general question unless they were to

1 involve something like -- you are talking about where
2 it related to the particular case where it would touch
3 on 404(b) or if it was a crime of dishonesty.

4 In Mr. Looking Cloud's case, his prior
5 misdemeanors, he has 40 or 50 of them. There are a
6 number of them that are crimes of dishonesty, false
7 statements, false reports, and those kind of things.

8 But where I see his going beyond the typical
9 606(a) impeachment is at the Marshall trial he feigned
10 a complete absence of knowledge of how the criminal
11 justice system works. He pretended as if this was all
12 some new mystery and he didn't understand things like
13 plea agreements and beneficial agreements,
14 recommendations by the government to help him.

15 So he was impeached very thoroughly on his
16 35-year history through the criminal justice system
17 with convictions about every six to eight months,
18 multiple plea bargains, and whatnot; and I would fully
19 intend that if he does anything close to what he did
20 at the Marshall trial in pretending to be some
21 neophyte to the criminal justice system, that we would
22 be allowed to impeach him on that basis.

23 **THE COURT:** Oh, I don't have any doubt you
24 would. It would probably -- never mind.

25 **MR. MURPHY:** So that's what we had.

1 We had the Denise Maloney motion in limine.
2 We barely touched upon that. I would say, first off,
3 there is no admissible grounds. It's not just the
4 prejudicial nature. There is no admissible grounds in
5 John Graham's trial for Arlo Looking Cloud's
6 self-serving, moderately exculpatory statements to her
7 in 2002 to be admitted in his trial. I mean, they are
8 not co-conspirator statements because they are not in
9 furtherance; they are self-serving; they are
10 perjurious in the sense that they go contrary to what
11 he said on other occasions of what the state's theory
12 of the case is. And they are certainly not statements
13 against interest because Looking Cloud is available as
14 a witness.

15 And so I don't, you know, understand in any
16 way, shape, or form evidentiarily or on the probative
17 versus prejudicial balancing how they can do this and
18 I do stand behind my statement they want to put the
19 daughter of the victim on the stand and they are going
20 to construct any way of trying to get that in front of
21 the jury. And I think that -- it should go under the
22 consideration of why this is inadmissible.

23 **THE COURT:** Any comments, Mr. Oswald?

24 I want to deal with those items separately.
25 One is, I am assuming the impeachment testimony will

1 be fairly standard. And I haven't gone into Arlo
2 Looking Cloud's things. If the novice event is coming
3 through, I don't see any way to keep that out.

4 **MR. OSWALD:** Well, speaking to the Denise
5 Maloney issue, I just think it's premature for the
6 Court to make a definitive ruling on keeping it out
7 until the Court has seen and heard all of the
8 testimony.

9 **THE COURT:** Well, that may be.

10 My inclination at this point is to suggest,
11 however, that somebody is going to have to convince me
12 to let it in because I am inclined to keep it out.
13 And somebody is going to have to convince me that
14 there is a basis to let it in.

15 **MR. JACKLEY:** Judge, can I do that right now?

16 **THE COURT:** No. If it's premature for me to
17 make a decision, then, I think -- I think it's wasted
18 time, Mr. Jackley. I will consider it when the time
19 is appropriate.

20 But somebody at this point is going to have
21 to overcome what I consider to be Mr. Murphy's,
22 basically, well-founded objections to letting it in.

23 I am not saying that it can't come in. I am
24 not saying that there is not going to be a basis to
25 let it in. But I am going to have to have something

1 set up through Mr. Looking Cloud before we're going to
2 look at that. And we would have any discussion in
3 camera or out of the presence of the jury to deal with
4 that before the daughter is called. Period. So
5 that's where that will go.

6 I am assuming the same impeachment standards
7 on stuff applies to the state as it does to the
8 defense, and we are going to follow those rules as far
9 as they go.

10 I will make a decision on the -- and put it
11 out in writing on the Medicine Man.

12 And I thought -- on Mr. Hanna's, I thought we
13 were, for all practical purposes, virtually finished.
14 That is, that issue comes up before the jury because
15 his client can change his mind before it -- and I
16 don't think we can let him take the Fifth in *absentia*.

17 **MR. MURPHY:** All right.

18 I was mistaken. I thought there was
19 discussion about witnesses being called today and
20 that's why --

21 **THE COURT:** There is the allegations that
22 he's been called for an improper purpose and somebody,
23 again, is going to have to raise the bar quite a ways
24 to convince me that he could not testify on that
25 ground. I think he -- if the materials presented are

1 as what -- I mean, he's going to take the Fifth
2 Amendment and he's out of here.

3 But if he doesn't, and he chooses to testify
4 upon the subpoena, that's a different ball game. But
5 I am thinking that's more than likely an appeal issue
6 for somebody beyond me.

7 Questions?

8 **MR. MURPHY:** I just had a question.

9 Mr. Jackley, in a letter, indicated he was going to
10 give further update to the Court on the Wyoming and
11 Colorado issue at this hearing. I don't know if
12 that's relevant at this point.

13 **THE COURT:** Well, are we anywhere near there,
14 Mr. Jackley?

15 **MR. JACKLEY:** We are. In fact, I just
16 received an email from the Colorado Attorney General.
17 I will file a supplement this morning. The gist of
18 the supplement is this, so everybody knows. In South
19 Dakota the Attorney General has concurrent
20 jurisdiction everywhere. That is not the case in
21 Colorado nor in Wyoming. So if, in fact, we were to
22 gain use and derivative use immunity in those two
23 states, it would have to be in every county involved.

24 I am filing a supplemental response telling
25 the Court that and also citing the federal and state

1 authority that indicates any immunized testimony is
2 tainted in every other jurisdiction.

3 In other words, if Dick Marshall were to
4 testify under oath truthfully -- because if you don't
5 testify truthfully you will lose your immunity. But
6 if he's to testify truthfully, then that evidence or
7 that testimony cannot be used by a prosecutor in
8 Colorado, cannot be used by a prosecutor in Wyoming,
9 because it's tainted; and I have that authority and I
10 will provide it to the Court this morning.

11 **THE COURT:** What about transactional immunity
12 which I think has largely ceased to exist?

13 **MR. JACKLEY:** Short of me being ordered to do
14 that by the Court, I am not going to give him that
15 immunity.

16 **THE COURT:** Okay.
17 Anything further I need do today?

18 **MR. MURPHY:** Not from Mr. Graham's
19 perspective.

20 **MR. OSWALD:** I don't believe from us unless,
21 Marty, you have anything?

22 **MR. JACKLEY:** I don't.

23 **THE COURT:** I have been advised, at least
24 tentatively at this stage, that the matter may be
25 tried in one of the upper courtrooms -- one of the

1 larger, upper courtrooms, Judge Davis's probably.

2 Whether that's final or not, I do not know.

3 In any event, it -- somebody else has said
4 that decision is above my pay grade. And I will do
5 whatever is decided to do, but I want people on alert
6 to that.

7 **MR. OSWALD:** Judge, I understand that we're
8 summoning, on hand, about 200 jurors.

9 **THE COURT:** I am not sure we need that many
10 at this stage.

11 Stan?

12 **THE CLERK:** Your Honor, we're -- we are going
13 to pool that many jurors for a potential of a hundred
14 the first day, a hundred for the second day, because
15 once we get through the 30th, these November jurors
16 are done. So that's why we have drawn that many
17 initially.

18 **THE COURT:** All right.

19 **THE CLERK:** What we would also like to
20 address for an administrative-type issue is the final
21 list of any jurors mutually agreed upon by counsel and
22 the Court to be excused. When we could get that.

23 If we could have that by Friday?

24 **THE COURT:** Yeah.

25 **MR. MURPHY:** We can probably email between

1 the group of us as to which ones we think.

2 **THE COURT:** Yeah. That will work.

3 And include the Clerk of Courts on the email,
4 if you would.

5 Okay, folks, anything else?

6 If not, thank you and have a nice day.

7 (Whereupon, the proceedings in this matter
8 were then concluded.)

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1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
 2 COUNTY OF PENNINGTON)
 3

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

6 DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 7 questions asked, the testimony given, and of the
 proceedings had.
 8

9 I FURTHER CERTIFY that I am not of kin or in
 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 10 interested in the event thereof.
 11

12 IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.
 13

14 COPY

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