

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

2 **THE COURT:** Okay.

3 Folks, we're here in the continuing matter of
4 State versus John Graham, 09-3953 file.

5 I want to take care of some administrative
6 matters before we get anything else done, primarily
7 directed towards jury selection and the like.

8 Does anybody here have the distinct
9 impression we're going to have our jury picked by the
10 end of Tuesday?

11 **MR. MURPHY:** I think it's possible.

12 **MR. JACKLEY:** I thought it was possible.

13 **THE COURT:** Okay.

14 Because one of our thoughts is how far are we
15 going to push November jurors without an uprising of
16 the masses because they think they are done.

17 Because one of the concepts is, if we're not
18 done by Tuesday, pulling in the subsequent panels from
19 December's list. I don't know of any impediment to
20 that in the legal system.

21 Anybody here?

22 I can't think of any reason why that poses a
23 problem.

24 **MR. MURPHY:** I haven't reviewed that subset
25 of statutes.

1 **THE COURT:** Understand.

2 Well, I haven't either, but I don't know that
3 it requires --

4 Kersten, you know anything about it?

5 Came up in my conversation not many minutes
6 ago.

7 **MR. MURPHY:** What I would anticipate, if we
8 pick Monday, because we got one set of jurors then,
9 and we get some jurors and some jurors Tuesday, we
10 would probably have to swear them then as a group on
11 Wednesday because that would be the first time the
12 jurors from the first day and the jurors from the
13 second day are put together.

14 **THE COURT:** Yeah.

15 **MR. MURPHY:** We may be doing voir dire the
16 first two days and exercising our peremptories on
17 Wednesday when we've got the whole combined group.

18 **THE COURT:** Yeah. And I think that may be a
19 reasonably good plan, too, because it's going to take
20 a whale of a long time to do 45, 50 peremptories?

21 **MR. MURPHY:** Exactly.

22 **THE COURT:** So it's -- that's a fair chunk.
23 I think it's 50, 25 a piece is my thought, but we'll
24 check that, but it certainly is in that vicinity.

25 My understanding is that the state has no

1 objections to any of the jury panels to suggest a
2 mutual exclusion; is that fair?

3 **MR. OSWALD:** That is correct.

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

5 **MR. MURPHY:** Your Honor, I emailed you over
6 my concerns, and without putting the name on the
7 record, because of the confidential nature of the case
8 that that one juror was in, I don't know how fairly,
9 without invading her privacy, we could voir dire on
10 that particular juror. And so that's something in the
11 past I have never had any problems having somebody
12 like that excused just like if you represented a kid
13 in the juvenile case who has then become an adult.
14 They are going to get asked the question, well, do you
15 know any of the attorneys and how so and how does that
16 affect your relationship.

17 **THE COURT:** Understand.

18 The state have any objection to that
19 particular request to excuse the juror?

20 It seems a very rational request to me.

21 **MR. OSWALD:** Yes, it does.

22 **THE COURT:** So that's taken care of.

23 **MR. MURPHY:** That would be the only one,
24 then, I believe, that was identified specifically.

25 **THE COURT:** Okay.

1 So other administrative matters we need to --
2 We'll probably be trying this in Judge Kern's
3 courtroom. Every time I think about the logistics
4 down here I just say it can't be done. We'll pick it
5 in Davis's court and try the case in Judge Kern's.
6 There is just too many problems down here that can
7 lead to difficulties. I just as soon not have to deal
8 with those.

9 **MR. MURPHY:** I think we have covered this
10 sufficiently in emails, but what my understanding is,
11 December 3rd we're going to go 8:30 to noon?

12 **THE COURT:** Yes, and December 10 we aren't
13 going at all.

14 **MR. MURPHY:** We aren't going at all. All
15 right, that's fine.

16 **THE COURT:** Any other administrative --
17 Stan?

18 **THE CLERK:** Yes, Your Honor, if I may. Do
19 you want -- we're going to use -- put the cards in
20 the --

21 **THE COURT:** We are pretty much going to have
22 to depending on who shows up and all of that.

23 **THE CLERK:** Did you want to ask the question
24 of if they can be here for the duration right from the
25 onset and then before we put the cards in the bingo

1 bin remove those jurors?

2 **THE COURT:** Unless there is objection from
3 counsel I do. I just as soon remove that group with
4 bona fides. I tend to shut it down pretty quickly of
5 those that can't be here. You know, with questions
6 like, if you were in the hospital, you know, you would
7 have the same problem you have here. And I tend to
8 shut it down as quickly as I can.

9 But if we're going to lose five, ten, or
10 fifteen jurors with all kinds of travel plans and
11 things before the holidays, I just as soon do it
12 before we start calling the individual jurors. But I
13 believe that to counsel's objection if you understand
14 the manner in which I am posing the question.

15 **MR. MURPHY:** I am wondering how you would do
16 that. I mean --

17 **THE COURT:** We swear them in -- we would call
18 roll and swear them in. And then I would -- then I
19 would pose that question to them. And certainly allow
20 counsel to ask anybody that indicates there is a
21 problem, as you wish; and at that point, whichever
22 ones we determine to be excused from duty would leave
23 and then we wouldn't spend time calling them up and
24 going through an individual voir dire again with them
25 and then have to call another one and all of that

1 stuff.

2 **MR. MURPHY:** Yeah. I have no problem with
3 that if both counsel are present and have the
4 opportunity to follow up.

5 **THE COURT:** Yeah. I think counsel would have
6 the opportunity to step in; and I will inquire first
7 and then if there is -- if you have questions about
8 the explanation, then I will make whatever ruling
9 strikes me is appropriate.

10 **MR. OSWALD:** That is acceptable to us.

11 **MR. MURPHY:** And I should have pointed out,
12 when talking about the other juror issue, Stan, I went
13 through all of the questionnaires and there were three
14 or four -- and I can give you their names -- that said
15 on the questionnaire they had served within the past
16 two years. I don't know what kind of double checking
17 you do on that, but -- to see whether or not it's
18 true.

19 **THE COURT:** They usually turn out to be
20 federal.

21 Can we get the blinds turned so Mr. Murphy
22 can look in that direction and see to whom he is
23 talking.

24 **MR. MURPHY:** Thank you.

25 And I can email those over to you. One of

1 them did say in parentheses federal.

2 **THE CLERK:** We usually verify, and then if
3 they have --

4 **CLERK TWO:** Sometimes it's the case of where
5 they may have been on for another month and never
6 reported.

7 **THE COURT:** All right.

8 Other administrative matters?

9 **THE CLERK:** I am just going to advise the
10 Court and counsel that we're going to have three
11 bailiffs working during the voir dire, and then break
12 down to two.

13 We'll also have two clerks working. Once we
14 get into the trial, the clerks will alternate half
15 days in order to keep some continuity with the Court.

16 I wanted to confirm that -- it was discussed
17 at one of the meetings that we're not going to allow
18 people to come in and out?

19 **THE COURT:** We're going to try, once you are
20 in, short of bona fide serious problems, you are in
21 until recess. There will be absolutely, under no
22 circumstances, any electronics other than plain,
23 ordinary, everyday watches in the courtroom and that
24 is the flat limit of it. If your watches take
25 pictures, they are out of here. That will apply to

1 the jury, and their cell phones can be kept by the
2 bailiffs.

3 **MR. MURPHY:** For counsel, are we exempted
4 from that, Your Honor, because we'll have witnesses
5 who are trying to get ahold of us, and we won't take
6 calls, obviously.

7 **THE COURT:** Have them on vibrate and deal
8 with them on the breaks, but that's it.

9 I had a request from the Associated Press to
10 allow laptops into the courtroom and I decline to do
11 that.

12 **MR. MURPHY:** While Stan is here, do we know
13 which panels are you going to call day one and which
14 you are going to call day two.

15 **THE CLERK:** That is correct. I have panel
16 one, three, four, seven will be day one. Bring them
17 in for orientation at 7:45. That would keep us going
18 up to 8:30, and then getting ready and seated starting
19 at 8:45 or nine o'clock. Whatever the Court deems
20 appropriate.

21 **THE COURT:** We'll see where it is. I think
22 we're optimistic if we get rolling before 9:00. I
23 think 9:00 is a very reasonable time to be rolling.

24 **THE CLERK:** Tuesday brings us a potential
25 problem. I wasn't sure what your thoughts were. If

1 we were bringing all of that group in and going
2 through that group of 93, or were we still going to
3 have the group of 58 sitting. How that was going to
4 transition. Were we going to have --

5 **THE COURT:** Let me make sure I understand the
6 problem.

7 How many jurors, approximately, are we
8 calling for Monday?

9 **THE CLERK:** One hundred twelve if everybody
10 shows.

11 **THE COURT:** And you are suggesting at the end
12 of the day we have 40 or 50 left sitting, do we call
13 in the next panel?

14 **THE CLERK:** That's what I was trying to
15 ascertain.

16 **THE COURT:** I would say -- my guess would be
17 we inform them on the call-in that night that they
18 need to report in by noon. And I assume we can -- I
19 don't know that we can get anything out. They can
20 check at noon and report in by one o'clock.

21 Will they have been computered?

22 **THE CLERK:** No. The next group will have to
23 receive orientation as well.

24 **THE COURT:** Then you need to require that
25 they come in some time like at ten o'clock the next

1 morning and get it done. By noon we should know
2 whether we need them in the afternoon.

3 **THE CLERK:** So you would like the whole group
4 of 93 to come in and then do orientation and then work
5 through them?

6 **THE COURT:** Yeah. Unless we tell you
7 otherwise during the trial, yes -- or during the voir
8 dire. Then they are available. If we have enough
9 that realistically that we go through the morning on
10 Tuesday with the remaining jurors we have, and then if
11 we need more, they will be oriented and we'll -- they
12 will be here right after lunch and we can go that way.
13 At least we will inconvenience them somewhat less.

14 **THE CLERK:** We're going to still use
15 courtroom C2 for this?

16 **THE COURT:** Yeah.

17 **THE CLERK:** And then we'll hold that group of
18 93 in C2 where?

19 **THE COURT:** Yeah. We'll figure out what
20 we're going to do after that. I mean, I think I got
21 to play a little bit by ear as do counsel at this
22 stage.

23 **THE CLERK:** Just to make sure I understand,
24 have them report around ten o'clock, and do the
25 orientation?

1 **THE COURT:** Yeah.

2 And then somewhere around that time we should
3 have an idea of where we are and what we need and
4 we'll get the word to you, and then you can either let
5 them go or keep them, or we'll say keep one or two
6 panels, three panels, whatever it is.

7 **THE CLERK:** Another alternative, Your Honor,
8 if you so choose, would be staggered. Bring two
9 panels in at 7:45, do orientation. They would be
10 available to you by 9:00 --

11 **THE COURT:** Well, you know, we can do that,
12 too, but let's see where we are close of business on
13 Monday.

14 And other than that, have them call in Monday
15 night and we'll give them the best we can. You know,
16 I want to inconvenience them as little as possible,
17 but there is frankly going to be some inconvenience
18 and there is not much I can do about it.

19 **THE CLERK:** So the group of panels coming in
20 on Tuesday that are projected are panel two, nine,
21 twelve, and panel fourteen.

22 **THE COURT:** Okay.

23 Other administrative details?

24 **MR. OSWALD:** I have one, Judge.

25 Does the Court have any prohibition against

1 the case agent being here the whole time?

2 I know in federal court, Agent McRoden was
3 allowed in during the whole trial.

4 **THE COURT:** My point would be, having been on
5 the federal court where I was caught by surprise by
6 that, my answer is, I have no objection if he's not
7 going to testify. But if he's going to testify, I
8 think he's subject to the same sequestration as
9 anybody else.

10 **MR. OSWALD:** He will testify.

11 **THE COURT:** Because he's going to come in
12 after sitting there and he'll be able to cherry pick
13 data. Unless he qualifies as some sort of an expert,
14 the rule is no.

15 **MR. OSWALD:** Okay.

16 **THE COURT:** Next question?

17 **MR. MURPHY:** I am going to have my paralegal
18 be sitting with me at counsel table.

19 **THE COURT:** That's fine. I have no problem
20 with paralegals. I like them, and I think you are
21 welcome to use them in any way that you feel is --
22 helps your case.

23 **MR. OSWALD:** Judge, also, in response to
24 not -- people not coming and going, I am going to have
25 my administrative assistant watching, but she'll --

1 since the state has the burden --

2 **THE COURT:** Sure. No. I understand that.

3 I am talking about the gallery and spectators
4 and news people and all of that. I just don't -- I
5 don't want the trial interrupted. I don't want an OJ
6 trial. I want it calm, cool, and collected. It's a
7 small enough courtroom upstairs in Judge Kern's. It
8 has the big advantage of separate counsel tables where
9 you are not staring at one another from both sides.

10 I find conceptually disturbing -- I don't
11 know how counsel do, but I do -- after the fifth grade
12 everybody I know can read upside down. I don't think
13 that's particularly helpful. That's why we're in
14 Judge Kern's courtroom.

15 Were you satisfied with Mr. Jackley's
16 response to your question in terms of disclosures?

17 **MR. MURPHY:** Not sure.

18 **THE COURT:** You asked for disclosures of
19 contributors.

20 **MR. MURPHY:** Oh, yes.

21 **THE COURT:** That's taken care of?

22 **MR. MURPHY:** That's taken care of.

23 **THE COURT:** Other questions of the
24 administrative nature?

25 Then we have to deal with a number of things.

1 Anybody have a particular order you would like to
2 address them?

3 **MR. MURPHY:** Well, Your Honor, I thought the
4 primary motion we were here today on was the large
5 motion I filed after getting the state's final
6 transcript they delivered to me -- well, they sent it
7 to me on November 15. I think I got it on the
8 17th or the 16th -- the transcript they plan to
9 allow the jury to view while listening to the
10 interview between my client and Mr. Chapman.

11 When I got the transcript, I emailed over to
12 Mr. Oswald and sought information as to whether he
13 planned to play the entire recording. I was not aware
14 that that was their intention. He indicated that that
15 was their plan.

16 So then I immediately drafted this motion and
17 I provided the Court with the color-identified
18 portions, which I believe for a number of reasons
19 which are set forth in my motion, need to be redacted.

20 Here today I got two other sections that I
21 didn't make part of that motion that I believe need to
22 be redacted and also a number of spots. I spent the
23 morning with my ear up next to the speaker. It's a
24 very poor quality audio -- and I got my copy here for
25 the Court -- where there is things in the transcript

1 that are attributed to my client that I believe are
2 just not on the tape. And so I want to get those
3 things before the Court and make a record on that as
4 well today.

5 **THE COURT:** Who did the transcription?

6 **MR. MURPHY:** It appears somebody at the
7 Attorney General's Office. I don't know whom. There
8 is no indication.

9 **MR. OSWALD:** My legal assistant.

10 **THE COURT:** Okay.

11 **MR. OSWALD:** It was based upon -- it was a
12 transcript originally done by the cooperating witness
13 Mr. Serle Chapman. But instead of using his, I had my
14 administrative assistant redo it, look at it, and then
15 I checked it for as accurate as I can.

16 Mr. Murphy is correct in part that there is
17 some difficulty in some words to hear. He's
18 absolutely right on that. But this -- in interviews
19 with Mr. Chapman, this is what was said, he was there,
20 and that's what we go with.

21 **THE COURT:** How about the suggested
22 redactions?

23 **MR. OSWALD:** We oppose.

24 **THE COURT:** All of them?

25 **MR. OSWALD:** Yes.

1 **THE COURT:** Okay.

2 Do you have any further explanation -- when
3 do you plan to call Mr. Chapman?

4 **MR. OSWALD:** It would probably be the
5 following week. I suspect December 6 is Monday or the
6 7th.

7 **THE COURT:** Okay.

8 How long will it take you to redact your
9 recording assuming that I grant some of Mr. Murphy's
10 requested redactions?

11 **MR. OSWALD:** We're using the computer
12 technician for the federal government and I don't know
13 his schedule. So he's pretty good at it.

14 **THE COURT:** I would assume he is.

15 **MR. MURPHY:** I guess on that point I would
16 note that during the federal trial, this came up, and
17 they were able to redact out individual words within a
18 half hour. You know, there was some disputes. As I
19 put in my motion the redaction issue had come up the
20 Monday night, or Monday, and Mr. Chapman was on the
21 stand a couple days later. There was some discussion
22 that morning that the redactions weren't up to par or
23 whatever the case was. And so Mr. Chapman was on the
24 stand. They took a break and Mr. Oswald and the
25 technician were able to do further redactions per

1 Judge Piersol's order in about 40 minutes. So they
2 got some technology that allows them to do it quickly
3 and precisely.

4 **THE COURT:** Okay.

5 Now when did this interview take place?

6 **MR. MURPHY:** 2001. February 11, 2001.

7 **THE COURT:** Now, why, when the word is -- we
8 have to guess at what it says, why should that not be
9 taken out?

10 **MR. OSWALD:** Because the witness will say
11 that's what he heard.

12 **THE COURT:** Yeah, but it's nine years later.

13 **MR. OSWALD:** Right.

14 **THE COURT:** He's a cooperating witness.

15 **MR. OSWALD:** Correct. That's subject to his
16 credibility and his cross-examination, but he has a
17 very good memory.

18 **THE COURT:** Well.

19 **MR. OSWALD:** He says this is good.

20 And the transcript -- there are jury
21 instructions that say the transcript is not to be --
22 for the jury to consider the truth of that
23 conversation. It is the recorded conversation that
24 they hear.

25 **THE COURT:** Then why don't we let them here

1 it as opposed to read it while it's being said.

2 **MR. OSWALD:** They will.

3 **THE COURT:** You are not going -- come on.
4 You don't read and hear at the same time. What you do
5 is you listen and then you -- you are either reading
6 the transcript -- and usually if I am reading one, I
7 am pages ahead of where the tape is.

8 But the only thing you would use it for is to
9 tell you what the tape said when you either didn't
10 hear it or understand it. In other words, it's giving
11 them the benefit of testimony they get from no other
12 witness.

13 And I don't know if Mr. Murphy has objection
14 to that or not, but --

15 **MR. MURPHY:** Well, that's our point is that
16 if it's not audible, to put it in the transcript, you
17 are actually creating evidence that doesn't exist. If
18 it can't be heard or if it's so indecipherable -- they
19 have their witness who can say on their direct, well,
20 yeah, there is things on here that I heard that you
21 might not be able to hear on the tape.

22 But for them to actually insert things
23 that -- like I said, I got a copy of the tape -- that
24 are either not audible or as I pointed out in the
25 motion he puts in things in the transcript -- it's

1 only an audio. There was never a video -- of my
2 client nodding affirmatively or shrugging his
3 shoulders or doing things like that which he can
4 testify to but they should not be part of an
5 uncertified transcript. This is different in --

6 **THE COURT:** Makes sense to me in terms of the
7 characterization of physical conduct, would you not
8 agree?

9 **MR. OSWALD:** I thought about that when I was
10 doing this. Honestly, Judge, I did. And I thought
11 maybe it's interjecting testimony when it shouldn't
12 be.

13 **THE COURT:** Yeah, it sure is interjecting
14 testimony. There is no question about that.

15 **MR. OSWALD:** But then I thought, it would
16 make it run much smoother by putting that in there at
17 that particular time then stopping it, starting it --
18 what did he do here, what did he do there.

19 **THE COURT:** Yeah. But -- and I assume he's
20 not going to have a transcript, right? The witness.

21 **MR. OSWALD:** You mean while testifying?

22 **THE COURT:** Yeah.

23 **MR. OSWALD:** I don't know.

24 **THE COURT:** Well, I mean so he's got a
25 transcript as it sits right now and you stop and say

1 now what did he do at this time? Oh, he shrugged. I
2 have no idea whether he has a memory or not. If he's
3 sitting there -- we do it with anybody else, which is
4 a recollection and is a number of things. You either
5 have a present recollection or you refresh your memory
6 as to a -- to give you a present recollection or you
7 have -- you cannot recover a present recollection. In
8 which case you put in whatever record it is. In that
9 case it would be the audio.

10 Here we're doing kind of all three things.
11 We're providing him with a record to which he would --
12 otherwise nobody else would be able to refer to one
13 without consent of opposing counsel. I will grant you
14 traditionally -- or I don't know traditionally, but a
15 great many cases where a police officer is testifying.
16 He's sitting there reading the notes and I don't hear
17 an objection, but if I heard one it would be
18 sustained, because he's not testifying from a present
19 recollection. He's reading something that was written
20 days, week, months, years ago.

21 And what he's supposed to do in theory is
22 look at that and then be able to put it aside and say
23 that has refreshed my recollection. I recall that
24 incident in particular, and this is what I
25 specifically recall. Or he does that and says I don't

1 have a clue if that's what happened. That's my notes
2 so I assume it did. So then you put the note in and
3 he doesn't get to testify on it.

4 Now, which of these am I doing here?

5 Unless I am mistaken, that's the rule.

6 **MR. MURPHY:** I can make it clear we would not
7 be consenting in any way, shape, or form to him
8 reading off this transcript. He's going to have to
9 play by the rules of evidence as any other witness.

10 And I think one of the things that's brought
11 up -- I know you had a chance to read the
12 transcripts -- he talks in the transcript about being
13 so tired -- he uses some language that he's having a
14 hard time keeping things straight as he's doing the
15 interview.

16 So now ten years later he's going to get up
17 and say, yeah, I distinctly remember a head shrug or a
18 nod or something like that. It's all subject to
19 cross-examination, but he shouldn't be afforded the
20 transcript to make it seem as if it's a real thing.

21 **THE COURT:** And you know, when was his --
22 what's the time frame in which the report he's giving
23 as to relate to the transcript that was made in 2001?

24 What's the time lapse in that?

25 You said he had one version of what was said

1 and we had a transcript made from the audio. How
2 contemporaneous is the interview with Mr. Chapman's
3 written report of what transpired?

4 **MR. OSWALD:** I don't know the certain date,
5 but when he transcribed the tape after listening to
6 it, I couldn't begin to tell the Court. I think it's
7 in a couple of months.

8 **THE COURT:** Of when the --

9 **MR. OSWALD:** Of his interview.

10 **THE COURT:** After the interview?

11 **MR. OSWALD:** Yeah. I don't want to be
12 quoted. I mean, it could be longer, it could be less,
13 Judge.

14 The fact is --

15 **THE COURT:** Has his version been provided to
16 Mr. Murphy?

17 **MR. OSWALD:** Oh, yes.

18 **MR. MURPHY:** Yeah. His version which has, I
19 mean, all sorts of problems with it that I don't think
20 we need to get too far into. He puts in lengthy
21 sections about what supposedly happened at lunch and
22 while the tape recorder was off and large dramatic
23 passages of gut-wrenching experiences he had as a
24 child.

25 I mean, his transcript I would consider as

1 much a fictional piece of work as a transcript, and I
2 have no idea when -- in relation to when the interview
3 was that he transcribed it or claimed to have
4 transcribed it.

5 **MR. OSWALD:** I did a lot of redaction of
6 those things already, Judge.

7 **THE COURT:** I am not quibbling with that at
8 all, Mr. Oswald.

9 What I am concerned about is a witness
10 supposedly testifying from memory that's reading a
11 transcript. I know of no place that that's
12 technically allowed.

13 **MR. OSWALD:** I can tell the Court this
14 particular man has an excellent memory and he won't
15 need the transcript. We'll just end it right there.

16 **THE COURT:** Okay. Sounds good.

17 **MR. OSWALD:** If there is such a thing, rules
18 of evidence will apply, and I know how to deal with
19 past recollection recorded, refreshing, and all of
20 those things. Understood. So we can cut the
21 conversation here short.

22 **THE COURT:** Sounds good.

23 I will have to make a ruling on the
24 individual sections, I think, that you have indicated.
25 I will attempt to have that done some time during the

1 voir dire process so counsel have an opportunity. I
2 don't -- you are making a general objection.

3 Do you have any specific comments?

4 Mr. Murphy has provided a number of reasons.

5 Do you need to give me more information as to
6 individual segments?

7 **MR. MURPHY:** I do, and they are sections that
8 actually weren't in the original motion.

9 Do you have the transcript in front of you?

10 **THE COURT:** Kersten does.

11 **MR. MURPHY:** Okay.

12 If the Court can turn to page 19, the very
13 bottom paragraph starts with Serle Chapman. So when
14 this had occurred. That paragraph is subject to
15 redaction for all the same reasons as the others. As
16 you can see in there, Dennis Banks told me this. And
17 Madonna hadn't denied this. Lorelei, Thelma, Bruce,
18 Candy, this is another one of these collections of
19 hearsay, many of which are not true hearsay statements
20 but statements where he's attributing comments to
21 other witnesses that weren't in fact made.

22 Violates all the same provisions of hearsay,
23 confrontation, reliability that I previously
24 referenced. I apologize for not getting that to you
25 in the original list. As I indicated, I was trying to

1 get the motion to you before the weekend.

2 The other thing that would be subject to
3 exclusion, if we could turn to page 30, going to the
4 third from the -- third paragraph from the bottom,
5 starting with, so from that period. It's my position
6 that, essentially, everything from that point to the
7 end of the transcript should be omitted.

8 What's happening there is that at that point
9 Mr. Chapman begins asking my client questions about
10 activities, his life, et cetera, in Canada once he
11 returned to Canada some time in the summer or fall of
12 1976. He starts by talking about an incident that I
13 believe happened in 1978 when some AIM members, Dino
14 Butler particularly, was involved in an alleged murder
15 in the pacific northwest over some artifacts and a
16 grave robber. That stuff -- it's other acts by AIM
17 members in Washington State or Seattle that have
18 nothing to do with this case. There is no relevance.
19 My client is asked questions about that.

20 And so, really, there is nothing that appears
21 probative to any of the issues before the jury from
22 that point forward. And so we would say, after my
23 client says no, which is the fourth paragraph from the
24 bottom on page 30, that the entire remainder be
25 excluded as not relevant and highly prejudicial, and

1 should have to go through kind of a 404(b) weighing
2 because of the inflammatory nature of activities of
3 other AIM members years after this event.

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

5 **MR. OSWALD:** Yes. Thank you.

6 As far as that particular segment from
7 page 30 on, I do note -- and if you look on page 33,
8 fourth paragraph, where it starts, up yonder, then we
9 are talking about this whole business surrounding Anna
10 Mae. There are some relevant conversations in there.
11 Relevant conversations as the Court, I assume -- and
12 the Court's clerk will look at it and find that there
13 are some issues in there that need to be addressed by
14 the state that can be given to the jury.

15 The other matters, I would like to ask the
16 Court or inform the Court that what Mr. Murphy is
17 seeking goes more towards manifesting a belief in the
18 statement itself. And it's not going to the truth of
19 the matter asserted. And the confrontation clause
20 doesn't have a hill of beans to do with that.

21 Police --

22 As the Court knows police interrogators do
23 this all the time. Witness so and so saw you at the
24 scene. Whether witness so and so did or did not isn't
25 the point. The point is whether that suspect then

1 admits whether witness so and so saw them at the
2 scene. Those aren't necessarily subject to redaction.

3 **THE COURT:** No, it doesn't admit whether so
4 and so saw him at the scene. Admits whether he's at
5 the scene, I am assuming.

6 **MR. OSWALD:** So if he uh-huh, acknowledges,
7 or huh-uh, disavows, either way, that's what is
8 relevant, and the Court can fashion either a
9 limiting --

10 **THE COURT:** Wait a minute. So you are taking
11 the defendant's statement of yes or no and offering it
12 for what purpose?

13 **MR. OSWALD:** To acknowledge the statement
14 that was originally posed to him. Whether witness so
15 and so heard this or saw this, and whether -- if he
16 acknowledges it, I think it's fair game then.

17 It's -- this came up in the federal trial and
18 Judge Piersol was faced with kind of the same issue,
19 and he commented that if someone acknowledges or
20 agrees that the statement is correct it doesn't
21 matter --

22 **THE COURT:** Well, the statement would be I
23 saw you and if he says no, let me say that answer
24 requires some interpretation. That means I didn't see
25 you or it may be a denial that I was there.

1 **MR. OSWALD:** Okay.

2 **THE COURT:** And so am I supposed to allow a
3 jury to take their guess from that?

4 **MR. OSWALD:** Yes.

5 **THE COURT:** We have a lot of questions that
6 the answers to which are not helpful. That answer, in
7 particular -- I saw you at the station, and the answer
8 is no, you don't have a clue what that means. I don't
9 either. It means you didn't see me at the station; it
10 could mean I wasn't at the station; it could mean I
11 didn't see you.

12 I mean, where -- that's pure speculation as
13 to what it means, is it not?

14 It's another thing if he says yes, perhaps;
15 but if he says no --

16 **MR. OSWALD:** But that's why we have the 12
17 finders of fact. It's not a --

18 **THE COURT:** Objection. Speculation.
19 Sustained.

20 **MR. OSWALD:** It's not a matter of law, Judge.
21 It's a matter of fact. And that's what closing
22 arguments are for.

23 **THE COURT:** No. Speculation as to what
24 another person -- you know, deputy, what did your
25 partner think? Speculation. Sustained.

1 Fair?

2 **MR. MURPHY:** If I could chime in here, I
3 don't think this is even the kind of adoption or
4 acknowledgment. I think that is frankly a red herring
5 being thrown out.

6 In the federal trial what Judge Piersol was
7 confronted with was Dick Marshall was asked a question
8 by Serle Chapman, something to the effect of, did you
9 give these guys a gun. And his response was, well,
10 back in the day you did what you were told. And the
11 judge said, well, that's close enough of a response to
12 adopt the statement that he may have given the gun.

13 What I have identified here are statements
14 where Serle Chapman sets forth a slew of facts and he
15 says I verified this, I have corroborated them, I have
16 reason to disbelieve this. And then at the very end
17 he will say something like, and Theda was driving a
18 red car wasn't she. And my client will say yeah.

19 They want to admit an entire paragraph of
20 facts, speculation, invasion of the province of the
21 jury to get in the last question or to get in where my
22 client will say yeah when he's answering the very last
23 section of that. And that's why I have done the
24 selective reactions that I have done.

25 Look at page 71. I mean, he goes --

1 **THE COURT:** The standard objection to that is
2 compound question.

3 **MR. MURPHY:** Well, exactly, but it shouldn't
4 go before the jury when Mr. Chapman is not allowed to
5 testify as to stuff that goes outside his personal
6 knowledge. So he's setting forth -- if you look at
7 this transcript, he probably does about 80 percent of
8 the talking.

9 **THE COURT:** Seems to be.

10 **MR. MURPHY:** And he's talking about stuff
11 that's not true -- and I understand what Mr. Oswald is
12 saying. A cop can say, you know, we got your
13 fingerprints and a person says, okay, you got me.

14 That's not what is going on here. He's
15 saying, talked to Dino and Dino told me this and Theda
16 verified this and Arlo said this and blah, blah, blah,
17 blah, blah which are all presented as assertions of
18 fact which are not fact, and they want that to go in
19 front of the jury merely because at the end of the
20 statement like that, my client says something like
21 uh-huh. Which is completely unresponsive to this
22 litany of facts and there really isn't even a question
23 put to him. He's just being told over and over again
24 that these are these things that have supposedly
25 happened or he's supposedly been told or other

1 witnesses have said.

2 So I think the redactions I did -- I could
3 have asked for a lot more redactions based on just
4 straight hearsay, things like Arlo has said. Arlo is
5 going to be on the stand. So I will note there is
6 many places where I did not move to redact those
7 because Arlo is going to be subject to
8 cross-examination.

9 Leonard Peltier, Dino Butler, Dennis Banks,
10 all of these -- Lorelei, Madonna, all of these people
11 are not going to be on the stand. They are not going
12 to be subject to examination. We shouldn't allow
13 Mr. Chapman to essentially lie to the jury and say he
14 was told these things by these people; he verified the
15 information backwards and forwards; they are true, and
16 by the way, Mr. Graham, wasn't her car red. They want
17 to get in the red car part. I left that out of the
18 paragraph. I said they could bring that in. But all
19 of these other nonsensical things that Mr. Chapman is
20 presenting should not go before the jury.

21 **THE COURT:** I will look at those matters. If
22 you have initial things to say, send them. And
23 Mr. Oswald, if you have things to say in reply, get
24 them to me.

25 **MR. MURPHY:** Your Honor, would you like a

1 copy of the tape because what I will do is email
2 over --

3 **THE COURT:** Yep.

4 **MR. MURPHY:** This is my only copy of the
5 tape, but I am going to hand it to you. And I will
6 just ask that by trial at some point we get it back.

7 I will email to you and counsel a list of
8 about 15 things that are included in the transcript on
9 particular pages that I believe are not said at all on
10 the tape and would ask those to be redacted, as well.

11 **THE COURT:** Okay. I will look forward to
12 that.

13 All right. People need to know what I am
14 going to do with the Medicine Man thing. And I've
15 made up my mind on that, and it creates another
16 problem. But for a number of reasons I don't believe
17 that Mr. Gates qualifies. I can go into those in some
18 detail, and I haven't written the decision in its
19 entirety, but I am comfortable with where I am going
20 with it.

21 There is a whole lot of reasons but I can
22 start with the basics. I appreciate Mr. Murphy's
23 expert who was not a Medicine Man, and I am still
24 waiting for a citation from any authority in a written
25 piece of work that sets that out, and I don't have

1 any.

2 He also at one point said it would be
3 discretionary near the end of the testimony.
4 Mr. Murphy redirected on that, but you can't take the
5 discretionary language away from the witness.

6 In doing some looking at various cases,
7 people to whom folks obviously go to spiritual
8 guidance, deacons, nuns, are frequently held not to
9 qualify. Admittedly there are cases that qualify a
10 nun, but they are relatively routinely held not to
11 count. You go to the priest, and you don't go to the
12 deacon.

13 And I have no nothing that -- I have no
14 comfortable information available to me that Mr. Gates
15 declares himself to be a Medicine Man. There is
16 nothing that indicates he was generally accepted as a
17 Medicine Man by the particular community in which he
18 claims to hold such status. I don't probably quibble
19 with the fairly common interpretation of a Medicine
20 Man or Medicine Woman's roles within the society. But
21 I have nothing that suggests that either party had a
22 look at it as a truly absolute confidential thing
23 where the Medicine Man should go to his death rather
24 than even acknowledge talking to Mr. Graham.

25 I don't -- I mean, I realize others under

1 that privilege have spoken, but the rule is you are
2 supposed to go to your death rather than give up that
3 information. I don't have any understanding -- I have
4 nothing in front of me that convinces me that's the
5 degree of privacy in which it was held. And in some
6 more detail that will come out.

7 But I also think it creates a significant
8 *Crawford* issue. That has to be addressed because I
9 think *Crawford* poses a huge impediment to that coming
10 into evidence.

11 **MR. MURPHY:** And we made that point in our
12 motion. You know, he's been dead since 2003. This
13 was statements made at a Grand Jury proceeding so they
14 are sworn statements and clearly fall under the
15 testimonial context. And so that's --

16 I want to make sure in your ruling you
17 incorporate or at least reference all of the exhibits
18 that we provided because you mentioned just now not
19 having anything before you that he was recognized as a
20 Medicine Man. We do have the transcript where
21 Mr. Ecoffey says that he was a spiritual leader for
22 AIM and we did submit the exhibit where he said he was
23 a Medicine Man and practitioner since the 40s. So I
24 want to make sure those are --

25 **THE COURT:** Well, I am a little bit -- by

1 the, I am a private practitioner. And I realize
2 people are construing that to say he's not -- in the
3 private way that he's not in the modern whatever we
4 call it. To some extent perhaps huckster scope of
5 some of the practices that truly deviate from the
6 cultural basis for medicine men and women.

7 But I'm just not comfortable I get to the
8 degree that that relationship in virtually any way,
9 shape, or form imposes the degree of confidentiality
10 that's required to establish that evidentiary
11 privilege.

12 **MR. MURPHY:** But are you excluding his
13 1994 -- I believe was the year -- Grand Jury
14 transcript?

15 **THE COURT:** Yes.

16 **MR. MURPHY:** Okay.

17 **THE COURT:** Well, I mean, I'm -- I don't
18 think he's a Medicine Man.

19 So -- but his problem is *Crawford*. And with
20 *Crawford*, the state has to either reply to me or
21 that's gone. And I'm not sure what the exception to
22 it is. There are some. Whether they will apply or
23 not -- but I need that specifically addressed by the
24 state.

25 **MR. MURPHY:** The only other issue I have -- I

1 actually have two. One is -- and I just want to keep
2 the Court abreast of things. We got a second witness
3 list late last week which included the name Russell
4 Means on it. Over the weekend I emailed the state
5 asking them for both his rap sheet, because that
6 wasn't included in the rap sheets that I was allowed
7 to review at Mr. Oswald's office, as well as all
8 statements he's made.

9 Mr. Jackley emailed back and advised me that
10 there was Grand Jury testimony out there. The state
11 has said they will get that to us by close of business
12 today. I have no idea since I have been working this
13 case for three years and have not seen anything
14 regarding Russell Means in this case what new issues
15 that may bring up. But I want -- I don't want you to
16 think if we come in on the 29th and I say, wholly
17 cow, Judge, there is all sorts of stuff and I am
18 bringing all of these issues forward, that it's
19 something I have sandbagged.

20 I have yet to see -- I will hopefully see by
21 the end of today what Mr. Means' relationship in any
22 way, shape, or form is to this case. That's where
23 we're at on that.

24 **THE COURT:** Okay.

25 **MR. OSWALD:** Understood.

1 **MR. MURPHY:** The only other issue is the Dick
2 Marshall subpoena issue. I haven't heard of any new
3 court hearing being scheduled on Mr. Hanna's motions.
4 Mr. Jackley referenced in an email this weekend that
5 he thought it was going to be handled on the 29th.

6 **THE COURT:** It will be handled during the
7 voir dire process. Exactly where in that process, I
8 do not yet have a clue, but it will be handled at a
9 time convenient there that does not impact on the jury
10 or the potential jurors.

11 **MR. MURPHY:** So about seven p.m. at night?

12 **THE COURT:** Well, no. Y'all may get paid by
13 the hour. I don't. And I am going to have jurors
14 that are going to be throwing things at us as
15 five o'clock approaches, so I suspect we will close at
16 five o'clock.

17 We will routinely have an hour and fifteen
18 minutes for a lunch break. We will break once in the
19 afternoon and once in the morning.

20 Bench conferences will be held to an absolute
21 minimum. Objections should consist of one word if at
22 all possible. Speaking objections will not be had.
23 If I need more than the objection itself to figure out
24 what I am going to do, I will ask counsel either in
25 open court or under a whisper mic.

1 The whisper mic is exceedingly sensitive and
2 you may intrude. Pick it up and I will read it on my
3 screen so we don't even need to talk in a very low
4 voice. You will whisper. Otherwise, I can't
5 understand you. With whispers I don't have a clue
6 what's being whispered. So that mic will work well,
7 and you will be faced away from the jury and will be
8 easy enough for me to handle. Tina will have a
9 headset to use and we'll get a good transcript of it
10 and go from there.

11 If we're going to have to take breaks other
12 than those I have specified, I want to know about them
13 in advance so perhaps we can either adjust a trial
14 schedule to provide less inconvenience for the jury.
15 They are going to be sitting here with their lives
16 severely disrupted with wholly inadequate
17 remuneration, and I wish to make it as easy as
18 possible for them.

19 **MR. MURPHY:** And you will be advising them
20 that they -- for instance, if we have some jurors that
21 are diabetic and need to use the restroom more
22 regularly, they can call for breaks themselves?

23 **THE COURT:** Absolutely.

24 **MR. MURPHY:** All right.

25 **THE COURT:** So anything else we need to do

1 today?

2 **MR. MURPHY:** Not from the defense.

3 **MR. OSWALD:** I don't think so, Judge.

4 **THE COURT:** Thank you.

5 Unless we have something further, we shall
6 see you Monday morning.

7 There is a possibility that you can reach me
8 over the holiday. Bear in mind I am not the world's
9 sharpest tool and I have only used wireless once. But
10 I will have a computer at my farm and I would suggest
11 you use my two email addresses. One is the official
12 one here and the other one would be Jack and Diane,
13 like the diddy, spelled out, at hotmail dot com. And
14 with any luck I will have one of these two computers
15 up and on the air and able to retrieve those messages,
16 okay, because I will be at the farm from Wednesday and
17 back Sunday.

18 So if you need me, the farm number is
19 869-2560. You will need -- let it ring. Some of us
20 take a dozen rings to realize it's the telephone.
21 It's a 605 in front of that.

22 I think that's all the information I can give
23 you about that. Call and I will try and do it by
24 conference -- I am sure I can arrange something
25 somewhere.

1 We'll go from there. Thank you, folks.

2 (Whereupon, the proceedings in this matter
3 were then concluded.)

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

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

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

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

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

14 COPY

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