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

FILE NO. CRI 09-3953

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

TRANSCRIPT OF
JURY TRIAL

VOLUME 1 OF 10

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
NOVEMBER 29, 2010

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

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

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

* * I N D E X * *

WITNESS (ES) : DIRECT CROSS REDIRECT RECROSS
(None.)

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EXHIBITS:

OFFERED/ADMITTED

(None.)

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

2 **THE COURT:** Okay.

3 We have a number of things to discuss. We'll
4 deal with Marshall's motion in a moment. What I want
5 to talk about, first of all, is to make counsel aware
6 of some things that are going to go on.

7 Number one, other than counsel and their
8 assistants, there ain't going to be any cell phones or
9 anything capable of carrying any device. Those who
10 came in with them today will shut them off; and if we
11 hear one they will be out of here for the duration,
12 except for jurors, but we're short of those the way it
13 stands.

14 You get one alternate -- you get one
15 additional peremptory challenge because of the two
16 extras as I read the statute.

17 **MR. MURPHY:** Say that again.

18 **THE COURT:** One -- two alternates, one
19 additional challenge.

20 You can check that against me, but that's
21 what I pulled out of the code this morning. For one
22 or two alternate jurors, there is an additional
23 peremptory challenge. It comes out of the civil code,
24 but --

25 **MR. MURPHY:** So we get 21 peremptories?

1 **THE COURT:** You get 21 apiece.

2 So we'll have to seat 56. We got 75, I
3 think, moving up towards 80 in there this morning.

4 I realize people from time to time will have
5 to leave the courtroom, but it's going to be limited.

6 We're going to try the case in Judge Kern's
7 courtroom. The acoustics are better for me. I will
8 have access to her chambers and things of that ilk.
9 It's a smaller audience than we have here.

10 In terms of the audience, I am going to try
11 and get the media in more or less a front row seat.
12 Gives me a barrier. And I don't mind them taking some
13 hits.

14 One of the things I am very concerned with is
15 audience reactions to testimony. Noddings of head or
16 oh no kind of horse shit. I am not supposed to say
17 that on the record. But I will throw them out of the
18 courtroom because, it gets going, that's going to be a
19 mistrial. That's testimonial in nature and the jury
20 is going to be able to see it. And if you have any
21 people here from either side, Mr. Murphy's side or
22 victim's here, they best be forewarned.

23 **MR. MURPHY:** We got nobody.

24 **THE COURT:** Okay.

25 But I don't -- I mean, I will make that

1 statement to the jury -- or to the audience, as well.
2 But I simply won't tolerate it and -- because it
3 impacts the jurors' thought processes, those that see
4 it; and for all practical purposes, it's unsworn
5 neither affirmative or contrary visual testimony. And
6 ain't going to fly.

7 I am going to make opening comments somewhat
8 longer than I normally make because this is a somewhat
9 longer trial than I ordinarily have. The only thing I
10 want to be clear on -- and I will need some help -- is
11 a brief, incomplete but accurate, statement of the
12 charges and advising the jury that the charges will be
13 read if full by the state just prior to opening
14 argument.

15 I want to give them obviously a heads up. I
16 suspect most of them know at this stage of the game
17 that this is the trial dealing with murder charges.

18 **MR. JACKLEY:** Judge, on that point -- and
19 Mr. Murphy and I have talked -- obviously in the
20 indictment Thelma Rios is listed. Is there a problem
21 with me redacting her out or do you want it read in
22 full.

23 **THE COURT:** No. No.

24 Mr. Murphy?

25 **MR. MURPHY:** Well, she's listed by both the

1 state and the defense as a witness.

2 **THE COURT:** I am assuming she will testify.
3 I don't know that. But if she is, I am assuming it's
4 fair grounds to say you were indicted on these charges
5 and -- by virtue of the plea signed --

6 **MR. MURPHY:** As long as we got that covered.

7 **THE COURT:** I am assuming that's a fair
8 inquiry.

9 Other than it, I haven't yet figured out how
10 I am going to describe the charges and I will need to
11 do that. I will get your prior approval before I do
12 that.

13 I am going to explain the number of jurors
14 and the peremptory challenges. I am going to give
15 them the warnings on discussions of the case because
16 we're going to be here through a number of breaks and
17 things of that ilk, and I am going to give a brief
18 explanation of that.

19 If there is electronic devices, trial jurors
20 can bring theirs in, but they will be given to the
21 bailiffs at the start of the day and they will be
22 returned at the close of the day.

23 **MR. MURPHY:** Are you going to go through
24 personal hardships?

25 **THE COURT:** Yeah, I'm gonna.

1 What I have there is -- there are obviously
2 some people -- I'm going to lay a guilt trip on them.
3 Who cannot possibly serve because of serious and
4 unchangeable obligations. I am going to ask you to
5 identify yourselves if you cannot possibly serve. In
6 doing so, please take a look at your obligations to
7 public service and its priorities over other matters.

8 Perhaps give some thought to our National
9 Guards and Reservists who have been repeatedly
10 deployed into hazardous zones, and place the duty of
11 public service before all things, including life.
12 Within that parameter, I expect most of us can find
13 the time to sit as jurors in this case.

14 Then I will ask for a show of hands that
15 after consideration of the fact those that cannot --
16 just simply cannot handle the time frame for the
17 trial.

18 I am telling them it's scheduled for three
19 weeks. We're anticipating that we'll end by mid week
20 the last one and perhaps a day or so earlier, but it
21 might not. I am advising them of Friday afternoon off
22 and Friday the 10th off.

23 **MR. MURPHY:** I would plan during my voir dire
24 to go back into the personal hardships to talk about
25 ability for people to remain attentive for this period

1 of time.

2 **THE COURT:** Yeah.

3 **MR. MURPHY:** You got kind of a heavy-handed
4 approach there and I know people are going to back
5 off, but I just want to make sure we're able to go
6 into that as well.

7 **THE COURT:** Yeah.

8 And we can talk physically as well.

9 **MR. MURPHY:** Yeah. We got hardships,
10 disability, hearing, diabetes, but also a lot of
11 students.

12 **THE COURT:** I don't have any problem with
13 that at all, either side for that matter.

14 Anything before we bring Mr. Marshall in?

15 **MR. JACKLEY:** Not from the state.

16 **THE COURT:** I had two things from you, John.
17 I'm trying to remember.

18 **MR. MURPHY:** The redactions and --

19 **THE COURT:** Alternate charges is one.

20 **MR. MURPHY:** The alternate charges is one and
21 the redactions.

22 **THE COURT:** Yeah.

23 I am about done with the redactions. I am
24 sorry, I have not been up to speed over the weekend,
25 but I got good input from Kersten.

1 And the fundamental problem with a lot of the
2 questions is as Mr. Murphy says, fact A, B, C, D, E,
3 as in a compound question routinely objected to and
4 sustained, any time the answers can be inconsistent to
5 the matters. And then we have statements of fact and
6 then a question and I don't think the question is
7 commonly, are these things true. Okay.

8 So it's possible that we are talking about
9 the sun rose yesterday at 7:15 and you had lunch at
10 Romeo's Cafe; that the same answer doesn't apply to
11 both, and I think that's a problem. Because the
12 implication is an answer that -- however vague, can be
13 interpreted as an affirmative response, by its nature
14 then adopts all the stated facts.

15 **MR. JACKLEY:** Does that go to weight and not
16 admissibility, though?

17 **THE COURT:** Compound question. Sustained.

18 **MR. JACKLEY:** But we're talking about the
19 witness interview, correct?

20 **THE COURT:** Yeah.

21 **MR. JACKLEY:** Not a lawyer's question to a
22 witness.

23 **THE COURT:** That's true. I understand that.
24 But nobody here in the room can even make a guess as
25 to what the response means and whether it applies to

1 all of them or not.

2 In any event, I will give you whatever it is
3 as rulings on it; particularly if we acknowledge --
4 and I thought Mr. Oswald -- I thought there was a
5 point that some of the things are just flat not true.

6 And we acknowledge an interesting thing that
7 law enforcement frequently can make some statements
8 that are not true and are not held to the same level
9 of responsibility as others in the system. And
10 particularly when we're doing that and asking somebody
11 by an answer which -- whether clear or ambiguous, at
12 best, to adopt things that we know to be false. I
13 think that's -- violates our duty as officers of the
14 Court not to misrepresent something by act or omission
15 to the Court. So that's kind of where I sit on that,
16 buy I'll give you details on that.

17 I have Mr. Murphy's motion for alternate
18 charges and I kind of poked Rod this morning and said,
19 can you explain to me how I can look at a man on the
20 street and say somebody can intentionally and
21 unintentionally kill the same person. And I am hard
22 pressed to think that anybody walking down the street
23 would say, well, that's easy. I understand that.

24 And I am somewhat leary of things that --
25 legalisms that defy reason. And so somebody -- and

1 somebody has got to give me the law on that and
2 explain to me how that can be done because I really
3 have a problem with that concept that we can charge
4 somebody in Count One -- you know, we do DUIs in the
5 alternative all the time.

6 And how we can intentionally kill someone as
7 an essential element of the crime and have the same
8 jury find that there was an unintentional thing in a
9 separate count. To me it's inherently impossible.
10 And it's just -- it's asking a jury to say it's
11 raining and it's not raining. It rained at noon
12 yesterday and it didn't rain at noon yesterday, both
13 of them beyond a reasonable doubt.

14 Now, I also understand there is some rulings
15 and circumstances, like, I don't understand and I
16 never will why simple assault is not a lesser included
17 of aggravated assault. I never will understand that
18 ruling until the day I die. I think that's the
19 statement of law. At least some simple assaults are
20 not lesser included and it's -- how can you walk down
21 the street and say that to people.

22 But -- so anyway, I want to know what's going
23 on there and how we get around what seems to be just
24 an absolute impossible statement.

25 Mr. Murphy?

1 **MR. MURPHY:** The only other thing I wanted to
2 bring up now is we had a lot of motions in limine; and
3 you know, to preserve the issues for appeal, they have
4 to be reobjected to. You said the other day you want
5 one word objections and so --

6 **THE COURT:** Well, there can be two or three
7 words. What I don't want is a lecture to the jury as
8 to how dumb the other side is --

9 **MR. MURPHY:** Right.

10 **THE COURT:** -- or the Court itself.

11 **MR. MURPHY:** So in the motions in limine, my
12 plan would be to say something to the effect where
13 it's going into one of those areas where you may have
14 to reassess a prior ruling just, objection based on
15 the prior motion and leave it at that. You'll know
16 then and the state will know that it's based on
17 whether we're talking the rape allegation, the Peltier
18 threat --

19 **THE COURT:** I am assuming we're not even
20 going to try the phosphatase thing. That word is
21 probably not even going to come up, right?

22 **MR. JACKLEY:** I respectfully respect the
23 opportunity to have it come up.

24 **THE COURT:** In what respect?

25 **MR. JACKLEY:** The phosphatase was found in an

1 autopsy. We have noticed the expert testimony --

2 **THE COURT:** Of who?

3 **MR. JACKLEY:** -- of what acid phosphatase it.

4 **THE COURT:** Of who?

5 **MR. JACKLEY:** Dr. Peterson.

6 **THE COURT:** How much acid phosphatase was

7 found.

8 **MR. JACKLEY:** The words of the autopsy report
9 are strong. Doesn't have an exact amount but it says
10 strong contents of acid phosphatase.

11 **THE COURT:** And how -- is there semen found
12 with it?

13 **MR. JACKLEY:** No.

14 **THE COURT:** And acid phosphatase is vaginal
15 secretion as well, and there is a threshold, as I read
16 the studies on it, that indicates sexual activity and
17 we don't know the levels.

18 How do we get there?

19 We're to assume the word strong establishes a
20 certain level or we're going to have testimony as to
21 how much and how we distinguish between vaginal
22 secretions; and I am assuming however the term is
23 pronounced, seminal components or semen components?

24 **MR. JACKLEY:** Your Honor, what I would
25 anticipate coming in is really -- and again, all I can

1 do is anticipate because I don't know what the
2 witnesses will say. But three areas of inquiry
3 regarding the sexual relations: We have the Arlo
4 Looking Cloud statements regarding what he heard in
5 the room.

6 We have the Frank Dillon statements as to
7 what he heard John Graham tell him.

8 And then we have Dr. Peterson that can
9 indicate that -- define to the jury generally what
10 acid phosphatase is; and define basically that it's an
11 indicator of sexual relations. He's not going to go
12 so far as to say with whom us because there is no
13 semen.

14 **THE COURT:** Well, what level of certainty
15 does he have to say that this amount, unknown to him,
16 is an indication -- would indicate scientific
17 probability of sexual intercourse?

18 **MR. JACKLEY:** I think he's limited to saying
19 it's an indicator of sexual relations.

20 **THE COURT:** But it's not, in and of itself.
21 It exists without sexual intercourse in the vagina.

22 **MR. MURPHY:** Actually in all living cells.

23 **THE COURT:** What?

24 **MR. MURPHY:** In all living cells it exists.
25 It also exists in all decomposing cells.

1 **THE COURT:** I mean, its presence is
2 absolutely normal.

3 **MR. JACKLEY:** But not at the levels
4 indicated --

5 **THE COURT:** We don't know what the levels
6 are, you are telling me, other than the word strong.

7 **MR. JACKLEY:** That's correct.

8 **MR. MURPHY:** And that was by the autopsy from
9 the guy who missed by bullet. That wasn't
10 Peterson's autopsy.

11 **MR. JACKLEY:** I all fairness, the x-ray
12 machine wasn't working. I'm not going to beat up on a
13 dead guy.

14 **MR. MURPHY:** So our position would be this
15 doesn't pass any threshold level of probativeness or
16 reliability. You know --

17 **THE COURT:** Yeah. I'm going to have to hear
18 what his testimony is going to be because I really --
19 I mean, it's normal -- it's normal. It's not abnormal
20 to have it found vaginally. And -- at least that's
21 what my readings indicate. And, of course, I'm not a
22 doctor.

23 **MR. JACKLEY:** So do you want -- does the
24 Court want a pro offer of evidence from counsel or are
25 we going to have a hearing outside of the presence of

1 the jury?

2 What is the preferred method?

3 **THE COURT:** Well, I want to know what he's
4 going to say, so I am assuming the appropriate method
5 will be to have him here.

6 You know, near as I can tell, it requires his
7 interpretation of what strong means. And that is --

8 **MR. JACKLEY:** That and defining to the jury
9 what acid phosphatase is because I don't think that's
10 a common term.

11 **THE COURT:** Depending on -- what we get to is
12 it may or may not indicate sexual intercourse. Okay.
13 And if that's the statement, it may or may not, then
14 it -- I mean, I always have trouble when we bring in
15 the forensic examiner for child sexual abuse that has
16 no findings that support or deny it and is only called
17 if they are raised in question that it means it didn't
18 happen. But the state routinely calls one and the end
19 result is within the reasonable degree of medical
20 probability I can't tell whether there was or was not
21 a sexual penetration. Objection. Irrelevant.
22 Sustained. I mean, it has to be of assistance in
23 proving or disproving some fact in issue. And if he
24 can't tell, how is that a fact in issue?

25 **MR. JACKLEY:** Because it's circumstantial

1 evidence from which appropriate inferences may be
2 drawn that is consistent with what Arlo Looking
3 Cloud will -- is anticipated to testify to, and what
4 Frank Dillon is anticipated to testify to. It's
5 corroborating circumstantial evidence of that fact.

6 **MR. MURPHY:** But if it has no threshold of
7 reliability --

8 **THE COURT:** That's where I am stuck with it.
9 If he can tell me how he gets there, that there is a
10 reasonable probability -- within a reasonable
11 scientific probability --

12 **MR. MURPHY:** And that would be the
13 quantification issue, which you've read the studies
14 and I've read the studies where as a threshold matter
15 they are not supposed to indicate that it's an
16 abnormally high level until they have done the
17 quantitative analysis that tells them there is more
18 than 3 milligrams per whatever -- quantitative
19 numbers.

20 **THE COURT:** Of course we don't have any DNA
21 samples. That's probably understandable given the
22 time frame.

23 **MR. MURPHY:** Well, DNA tests were done --
24 semen tests were done way back then with the FBI and
25 came back negative, as well.

1 **MR. JACKLEY:** Well, they came back unable to
2 find a testable sample. They didn't come back
3 negative towards your client. They came back with
4 unable to find a testable sample. There is a
5 difference.

6 **MR. MURPHY:** Well, the report I got said
7 items Q1 through QA were studies and --

8 **THE COURT:** I am not sure in reality there is
9 a significant difference if I can't find a sample I
10 realize like not guilty doesn't mean innocent but the
11 end result is the same.

12 But in any event, I am somewhat concerned
13 about this. I still have some questions about
14 relevancy and -- of testimony of sexual intercourse
15 and an indication of rape. I find it highly
16 prejudicial and have some concerns about that as I
17 don't know how it makes it more or less likely that
18 Mr. Graham had a part in the killing of Ms. Aquash.

19 **MR. JACKLEY:** It provides both a motive
20 and --

21 **THE COURT:** So we're suggesting that it had
22 nothing to do with being an informer. He just killed
23 her to keep her from saying he raped her?

24 **MR. JACKLEY:** We're allowed to have more than
25 one motive, Your Honor. He had compound motives.

1 **THE COURT:** What evidence do you have of that
2 other than I am going to suggest to you that he
3 wouldn't have killed her but for that?

4 **MR. JACKLEY:** Well, the evidence -- of
5 course, as to the informant, there is a considerable
6 amount of evidence when it comes to that.

7 When it comes to the sexual relations, I
8 mean, he kidnapped -- as part of the integral act, the
9 criminal venture, he kidnapped, raped. That evidence
10 goes to both his motive to kill her along with an
11 explanation of her state of mind why she didn't run.

12 **THE COURT:** Did that go into the Grand Jury?
13 Was the charge even proposed to the Grand
14 Jury on that?

15 **MR. JACKLEY:** The Grand Jury has made a
16 probable cause finding of felony murder rape.
17 However, Canada doesn't have felony murder rape and
18 has not allowed us to proceed.

19 So I can tell the Court that a Grand Jury has
20 made a probable cause finding, but I can't move
21 forward on that count because of Canada.

22 **THE COURT:** You can't?

23 **MR. JACKLEY:** I don't want to create an
24 international incident, so no, I can't because of the
25 extradition agreement. My understanding is we can

1 neither move forward on the felony murder rape nor --

2 **THE COURT:** Aren't you doing the same thing
3 indirectly?

4 **MR. JACKLEY:** No. It's evidence that goes
5 directly to the kidnapping and the murder which are
6 existing counts.

7 **THE COURT:** You are suggesting to me that the
8 kidnapping was to enable Mr. Graham to have sexual
9 intercourse with Anna Mae?

10 **MR. JACKLEY:** It's an integral part of the
11 events.

12 **THE COURT:** You are telling me that that was
13 the reason for the kidnapping?

14 **MR. JACKLEY:** No, I'm not telling you it was
15 the reason for the kidnapping, but that became a part
16 of -- an integral part of the kidnapping and the
17 murder.

18 So I don't get confused -- so we are moving
19 forward on the first degree premeditated murder and
20 we're moving forward on the felony murder kidnapping;
21 but because of the extradition agreements, we are
22 unable to move forward on the felony murder rape. But
23 there has been a probable cause finding by a Grand
24 Jury as to the existence of the felony murder rape.

25 **THE COURT:** I will address that further, but

1 I -- I don't like it.

2 John?

3 **MR. MURPHY:** I think that's one of those
4 things we need to get addressed before voir dire.
5 It's just one of those things that -- because if it's
6 coming in in any way, shape, or form, I'm going to
7 voir dire on that extensively because it's always --
8 one of those atomic bombs in jury selection is past
9 sexual violence, victims of violence, friends, family,
10 children.

11 **MR. JACKLEY:** Your Honor, I understand that
12 when issues come up the ability to relitigate, but
13 this is a matter that has been extensively litigated
14 that the Court has issued an order directly addressing
15 this issue on, I believe, August 10, 2010, indicating
16 in the order at paragraph 10, denying the defendant's
17 motion with conditions, explaining it's probative
18 value as to motive, as to the felony murder
19 kidnapping, and the charge of premeditated murder.
20 Finding that it is -- arose out of the same
21 transaction or series of transactions as charged in
22 the offense citing the *Owen* case, 729 N.W.2d 363. It
23 has probative value. *It's res gestae* evidence along
24 with 404(b) evidence.

25 **THE COURT:** I don't think it has diddley to

1 do with murder, frankly. I don't think rational minds
2 can conclude that. I don't think -- if we assume for
3 the sake of discussion that Mr. Graham or someone
4 associated with Mr. Graham murdered Anna Mae, I don't
5 think that had anything to do with it and I don't
6 think anybody else thinks that.

7 I think they think that she would have been
8 murdered in any event by whoever did it whether or not
9 Mr. Graham had sexual relationships with her or not.
10 That's the problem I have with it.

11 But I do agree that it is a course of events
12 that there may have been sexual relationships between
13 the two. I think that -- whether I am going to let
14 the phosphatase in or not, I don't know. I think we
15 have to let Arlo Looking Cloud's discussion come in as
16 well as what's his name.

17 **MR. JACKLEY:** Frank Dillon?

18 **THE COURT:** Yeah.

19 But I think that has to come in.

20 **MR. JACKLEY:** I need to advise the Court,
21 too, just in lines with what the Court is saying as
22 far as witness scheduling, Dr. Peterson has an event
23 he has to attend to Thursday so our plan is to call
24 him this Friday morning. That's the only time we can
25 get him here is what I am advising the Court.

1 **THE COURT:** Well, we will -- we will have to
2 have the gist of his testimony presented at
3 eight o'clock in the morning.

4 **MR. MURPHY:** So my record is complete, I am
5 just renewing -- we've had this relitigation on the
6 rape issue, renewing my previous objections. I
7 believe it is not *res gestae* or 404(b) --

8 **THE COURT:** Understand.

9 We will not discuss phosphatase in the course
10 of the voir dire. Period.

11 **MR. JACKLEY:** Am I permitted, Your Honor, to
12 discuss what I anticipate Arlo Looking Cloud will
13 testify to regarding sexual relations in opening
14 statements? In the context of what --

15 **THE COURT:** My thought is he said it sounded
16 like people were having fun.

17 **MR. JACKLEY:** No, having sex.

18 **THE COURT:** Well --

19 **MR. JACKLEY:** After she was bound and tied.

20 **MR. MURPHY:** I think that's an overstatement
21 of the record. He said making love on one occasion,
22 heard sounds of sex on another. Nothing about bound
23 and tied.

24 **MR. JACKLEY:** Well, Your Honor, we anticipate
25 bringing in three to four witnesses that will testify

1 she was bound and tied in Denver.

2 **THE COURT:** Do you have any as to say she was
3 unbound and tied at any point in time?

4 **MR. JACKLEY:** She was bound and tied
5 throughout the incident at times. I mean, in Denver
6 she was bound and tied and then throughout the trip
7 there was times she was and there was times she
8 wasn't.

9 **THE COURT:** And how about -- do we have any
10 evidence at the time of the alleged rape that she was
11 bound and tied?

12 **MR. JACKLEY:** Not during that time.

13 **THE COURT:** Then we're not going to go there.

14 **MR. JACKLEY:** I didn't say while it was going
15 on, but there is evidence from three to four witnesses
16 that just prior to that in time, during the kidnapping
17 process, she was bound and tied.

18 **THE COURT:** And unbound and tied, as well.

19 **MR. JACKLEY:** Correct.

20 **THE COURT:** So we have no evidence which
21 tells us she was bound and tied at the time there was
22 a sexual relationship alleged. So we're not going to
23 make that statement in conjunction with it.

24 You may discuss that she was bound and tied
25 in Denver. You can suggest that on the trip she was

1 bound and tied --

2 **MR. JACKLEY:** And that's all I am asking,
3 Your Honor.

4 **THE COURT:** -- at various times.

5 But we're not going to make any statement
6 that she was bound and tied during the alleged sexual
7 congress.

8 **MR. JACKLEY:** I didn't intend to indicate
9 that to you, Judge.

10 **THE COURT:** Okay.

11 **MR. JACKLEY:** But during this entirety --

12 **THE COURT:** She spent times tied and times
13 untied.

14 **MR. JACKLEY:** That's fair.

15 **THE COURT:** I think that's probably
16 permissible testimony.

17 Questions?

18 **MR. OSWALD:** Judge, as far as Dr. Peterson,
19 he's being flown in with the state airplane and he's
20 not scheduled to be here until about nine o'clock in
21 the morning. And then we get him from the airport and
22 get him here. So I asked him to be here by ten.

23 **THE COURT:** I suggest we try and get him here
24 earlier. I don't know what else I am going to do.
25 But if he's going to testify at ten o'clock, he's apt

1 to be the last witness before we break for noon and I
2 want an opportunity to hear what he's going to say
3 before I allow him to address the question of acid
4 phosphatase. And I want to hear his authorities for
5 it and the like.

6 **MR. MURPHY:** I guess while we're on the
7 phosphatase --

8 **THE COURT:** Sounds like a minimal -- a minor
9 *Daubert* to me. I mean, he has to be making a
10 statement that would be accepted within the scientific
11 community which he is part. And that would be that
12 phosphatase is present in vaginal secretions as well
13 as the semen and any number of other anatomical parts.
14 And that it's indicative of sexual intercourse at what
15 level? I mean, I know the studies show one level that
16 I have read but I don't know what other studies may
17 show.

18 **MR. MURPHY:** On the phosphatase issue, I
19 guess it would be presumed that none of the other
20 witnesses -- we have a number of FBI agents --

21 **THE COURT:** They aren't talking about it.

22 **MR. MURPHY:** Okay. We took care of it with
23 McRoden.

24 **THE COURT:** I want to hear what the doctor
25 has to say.

1 **MR. JACKLEY:** So the Court is aware, I
2 believe there are three witnesses that touch upon the
3 rape issue.

4 I also need to alert counsel that there is a
5 proposed exhibit which is Dr. Brown's autopsy report
6 that also makes mention of the acid phosphatase. I
7 mention that to the extent there are limiting rulings
8 that will need to be addressed before this exhibit is
9 introduced.

10 **MR. MURPHY:** We would be objecting to the
11 admission of Dr. Brown's autopsy anyway. It's a
12 hearsay document. He's not here.

13 And in light of what the Court is talking
14 about, we would certainly say that as a preliminary
15 matters, it doesn't go in front of the jury until such
16 time as Peterson's foundation is laid. And then if
17 that goes against the state then there would be a
18 redaction of that portion, the phosphatase finding.

19 **THE COURT:** Fair enough.

20 I am -- if we don't have testimony as to what
21 it means, then I don't think we're going to talk about
22 it, even if the report comes in. At least without
23 explaining to the jury that -- somewhere that acid
24 phosphatase is a common finding in human beings both
25 male and female. I don't know to what extent it's

1 always traceable in males or females. I need to know
2 that.

3 Let's bring Mr. Marshall in.

4 **MR. MANDEL:** Judge, can I ask you one
5 question?

6 What's the Court's rules on attorney's having
7 laptops in the courtroom?

8 **THE COURT:** No.

9 **MR. MURPHY:** We're going to plan to play our
10 CDs through the computer. Is that going --

11 **THE COURT:** Yeah. Counsel can have a laptop.

12 **MR. MURPHY:** Okay.

13 **THE COURT:** Yeah. I don't mind counsel
14 having laptops. I do mind the media having laptops.
15 I think you are trying the case and we have laptops
16 and zingy wingies in all of our trials nowadays. And
17 things that I haven't a clue how they work and don't
18 really care. So, no, counsel can have access to their
19 laptops. Good God, for just maintaining track of
20 exhibits and statements and things of that nature, I
21 think they are essential.

22 All right. Can we have Mr. Hanna and
23 Mr. Marshall come in.

24 **MR. OSWALD:** Judge, there is several members
25 of the press that want in here, too.

1 **MR. JACKLEY:** For the record the state did
2 not call them.

3 **THE COURT:** I'm sure that's true.

4 **MR. OSWALD:** They said that Mr. Hanna
5 contacted them. Hazel Bonner and somebody from the
6 Associated Press.

7 **THE COURT:** I don't know that I can keep them
8 out.

9 I understand the press has been invited?

10 **MR. HANNA:** Not by me.

11 **THE COURT:** Yeah. I can't keep them out so
12 let them in.

13 Just a statement, folks. We're looking at a
14 potential change of venue based simply on the article
15 appearing in the newspaper a day or two ago. I don't
16 know that that will happen, but there certainly may be
17 a question about it come about. And I suspect if we
18 get significant coverage of this, we may well be
19 there.

20 Mr. Hanna?

21 **MR. HANNA:** Your Honor, Mr. Marshall is here
22 in response to the subpoena that was served upon him.
23 We have filed a motion to quash the subpoena on two
24 grounds. The issue we are discussing now is whether
25 or not the prosecutor's offer of state immunity for

1 his testimony would be sufficient to supplant the
2 Fifth Amendment.

3 Mr. Marshall is here to advise the Court that
4 he intends to assert his right under the Fifth
5 Amendment to refuse to give evidence that the
6 government can use against him.

7 There are two issues which the Court has to
8 decide. And the first issue is whether Mr. Marshall
9 has a legitimate fear that his testimony could be used
10 against him as evidence; that is whether he has a
11 right to invoke the Fifth Amendment.

12 And the second issue is whether or not the
13 state's immunity statute would give Richard Marshall
14 the same protection that the Fifth Amendment would
15 give him.

16 First question, he certainly has a legitimate
17 fear that evidence that he would give is -- the
18 testimony he would give could be used against him as a
19 link in an evidentiary chain in a criminal proceeding.

20 I presume that the Court got my response --
21 my written response last week to Mr. Jackley's letter
22 brief informing the Court that Colorado and Wyoming
23 would not give immunity to Mr. Marshall.

24 Mr. Marshall has a legitimate fear that
25 testimony he would give could be used as a link in an

1 evidentiary chain in a criminal proceeding for these
2 reasons. First of all, most obviously, he has been
3 indicted, prosecuted, for what the government said was
4 his involvement in the death of Anna Mae Aquash. And
5 he was acquitted on that charge. Nevertheless, double
6 jeopardy would not bar further prosecution in federal
7 or state courts or Tribal courts. He has not been
8 charged with felony murder. So the federal government
9 could charge him with that.

10 Moreover, the government's evidence -- the
11 prosecution's evidence is that Anna Mae Aquash was
12 kidnapped in Colorado, driven through Wyoming, and
13 into South Dakota. She was driven through the Pine
14 Ridge Reservation and the Rosebud Reservation.

15 That being the case, there are five other
16 jurisdictions that could conceivably bring
17 prosecutions against Richard Marshall.

18 In addition to the federal government there
19 is the state of South Dakota, state of Colorado, state
20 of Wyoming, Oglala Sioux Tribe, and the Rosebud Sioux
21 tribe. The crime was committed -- the murder was
22 committed on the Oglala Sioux Tribe's lands, Pine
23 Ridge Reservation.

24 And the evidence is that Anna Mae Aquash and
25 three other people stopped at Richard Marshall's house

1 on the Pine Ridge Reservation. So the Oglala Sioux
2 Tribe could most definitely bring a prosecution here.

3 Now, according to the prosecution's theory,
4 crimes were committed in Colorado, Wyoming, South
5 Dakota, on the Pine Ridge Reservation, and the Rosebud
6 Reservation.

7 Therefore, this Court has recognized that
8 Mr. Marshall faces exposure -- potential criminal
9 exposure in Colorado and Wyoming which is why you
10 directed the Attorney General to determine whether
11 those states would give immunity and they have said
12 they will not.

13 More over, this Court has ruled already that
14 certain out-of-court statements by Mr. Marshall are
15 admissions against penal interest; and therefore, they
16 are admissible.

17 That being the case, this court has
18 essentially already ruled that statements made by
19 Mr. Marshall can be used as evidence against him in a
20 potential prosecution. That's why they were
21 admissible.

22 So his fear of potential use at his testimony
23 against him is legitimate and he does have a right to
24 exercise the Fifth Amendment and to ask this court to
25 respect and protect that right.

1 In response to this we have advised the Court
2 that he's going to take the Fifth Amendment. The
3 Attorney General comes to the Court and says, in spite
4 of his Fifth Amendment right to remain silent, we want
5 you, Your Honor, to order him to testify on pain of
6 contempt because the State of South Dakota has
7 promised not to use his testimony or evidence against
8 him in any criminal proceeding or investigation in
9 South Dakota. The Attorney General relies on the
10 state's immunity statute for that.

11 Now, under the *Kastegard* test, a state
12 immunity statute cannot override a constitutional
13 right unless that state immunity statute gives him the
14 same exact protection that the Fifth Amendment would
15 give him, and would leave him in the same position
16 after he were to testify as if he had never given
17 testimony at all.

18 So the question for Your Honor in this case
19 is, does the South Dakota Attorney General's promise
20 not to use Richard Marshall's testimony against him in
21 any criminal proceeding or investigation in South
22 Dakota automatically bind any other prosecutors or
23 investigators in any other jurisdiction, specifically,
24 in Colorado or Wyoming or on the Pine Ridge Indian
25 Reservation. The answer is, obviously, no.

1 Pursuant to the *Murphy* case, United States --
2 Murphy against Waterfront Commission case -- if the
3 Attorney General of South Dakota were to give use
4 immunity to a witness, that would be automatically
5 binding on -- then prohibits federal prosecutors from
6 using his testimony in a prosecution. That was a
7 judge-made rule the federal courts authorized or came
8 up with as part of their supervisory authority over
9 federal courts.

10 Absolutely no case has ever held that one
11 state's immunity order binds the prosecutors or
12 investigators in any other state. And what the
13 prosecutor here is presenting to you that somehow
14 your -- the Attorney General's immunity would
15 automatically bind every other state has no basis in
16 law. No case has ever held that.

17 Moreover, the Pine Ridge Indian Reservation
18 is Indian country. It is another government whom
19 crimes have been committed against, the Oglala Sioux
20 Tribe. They could bring a prosecution for kidnapping,
21 they could bring a prosecution for homicide; and it is
22 a legal no brainer that the Attorney General's
23 authority in South Dakota has absolutely no binding
24 authority on the Pine Ridge or Rosebud Sioux Indian
25 Reservation.

1 So unless the immunity that is being offered
2 here by the prosecutor would automatically prevent a
3 county attorney in Denver or in Wyoming or a Tribal
4 prosecutor in Oglala Sioux Tribe's court from taking
5 Richard Marshall's testimony and using it against him
6 in a prosecution -- unless the immunity went that far,
7 then you must allow Richard Marshall to assert his
8 Fifth Amendment privilege, Your Honor.

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

10 **MR. JACKLEY:** Your Honor, it is my
11 understanding -- and that understanding is based upon
12 the case law that was presented to the Court in the
13 state's reply brief or supplemental brief, is that
14 under the state statute, once the Attorney General or
15 other prosecutor grants the use and derivative use
16 immunity as set forth in that statute, any of the
17 witness's testimony regarding that becomes tainted.

18 In other words, a prosecutor whether it be a
19 federal prosecutor, another South Dakota prosecutor,
20 or any prosecutor from another state --

21 **THE COURT:** How about from another country
22 like a sovereign nation?

23 **MR. JACKLEY:** Your Honor --

24 **THE COURT:** How binding is it -- first of
25 all, forgetting questions of immunity, and forgetting

1 questions of a prior trial, could the Oglala Sioux
2 Tribe prosecute Mr. Marshall for kidnapping and
3 murder?

4 **MR. JACKLEY:** In fairness, this is the first
5 time I believe that Mr. Marshall has raised that
6 issue. I am not aware of any case law on point. I am
7 not aware of what the statute of limitations is on the
8 offenses that he has talked about so I am not prepared
9 to look the Court in the eye and answer that question.
10 I don't know the answer to it.

11 It would seem to me that federal law would
12 protect against that. I cite the *Kastegard* case
13 because it's tainted evidence, and I don't believe --

14 **THE COURT:** Well, it is, but we go back a
15 long time ago where the states used to do the work for
16 the federal government, and the evidence obtained by
17 the state, which would not have been attainable by the
18 federal government absent following procedures under
19 the United States Constitution as opposed to the
20 State's Constitution eventually led to the Fourteenth
21 Amendment being applied to apply all of the
22 consequences or all of the rights attained under the
23 Fourth and Fifth Amendments to the states. And to
24 present -- to prevent the golden platter presentation
25 of evidence that could not otherwise be obtained or

1 used.

2 And I have a problem here to the extent --
3 you know, we talk about sovereign nations and the
4 reservations and I find that a very vague term because
5 they are not completely sovereign in many respects.

6 But if they would have the ability to try --
7 accuse and try Mr. Marshall for the kidnapping and/or
8 the murder -- and we're well aware that different
9 jurisdictions can try people for the same events. You
10 can be tried for murder in the military system and the
11 civil system or the federal criminal system or the
12 state system is my understanding. Each king has his
13 own realm, and if a crime is committed within that
14 realm, they can be prosecuted by that king.

15 And I really have some concerns -- I mean, I
16 have a concern about one practicality. I don't
17 believe for a minute that Wyoming or Colorado is going
18 to charge Mr. Marshall, but that doesn't answer the
19 questions.

20 I think the question is, can they. And the
21 question is, can the Oglala Tribe -- to some extent
22 the Rosebud Tribe -- do they have sufficient
23 sovereignty to charge and try Mr. Marshall in their
24 court system?

25 It's been -- you know, it's only been 30

1 years since I delved into that at all. And my memory
2 is somewhat foggy to be kind. As to what level of
3 crimes the tribe has jurisdiction to try. And I am
4 assuming it doesn't come under the Major Crimes Act
5 because that would -- but I don't have a clue as to
6 whether the tribe can try the case; and if they can,
7 that would seem to pose a significant problem if your
8 grant of immunity would not extend that far.

9 And we're talking about, again, whatever
10 federal rulings are, in many respects don't have any
11 impact on the state at all. And we go back to the
12 golden platter although perhaps reversing it. But in
13 terms of binding another nation -- and we are to treat
14 for these purposes the respective tribes as sovereign
15 nations, then do we not have a problem?

16 **MR. JACKLEY:** Let me approach it this way,
17 Your Honor. Yes, the initial question is, do these
18 different sovereigns have the ability to charge
19 Mr. Marshall and bring an offense to trigger a Fifth
20 Amendment. And I think the answer is probably yes.

21 The real question is, do any of these
22 separate sovereigns have the ability to use tainted
23 testimony. Tainted in a sense that it's under a use
24 or derivative use immunity in that prosecution.

25 And I think the answer from the case law that

1 I have provided to the Court is no. They do not have
2 the ability to prosecute Mr. Marshall with tainted
3 evidence. The reason being is the United States
4 Constitution protects Mr. Marshall in all of the
5 jurisdictions that is talked about. And so when he is
6 provided use and derivative use immunity, both the
7 federal and the state case law makes it very clear --

8 **THE COURT:** All right.

9 So let's assume that's the case. It's my
10 understanding that the United States Constitution does
11 not apply to the reservation. Now that's an old
12 perception of mine, but it's pretty bloody old, and I
13 could be in error on that. But that's -- I think we
14 have a number of cases that directly say the United
15 States Constitution does not apply to reservations.

16 **MR. HANNA:** That is absolutely correct and
17 that is why Congress had to pass the Indian Civil
18 Rights Act.

19 **THE COURT:** So, you know, where do I go?

20 I mean, I think we have a real serious
21 problem if the immunity -- I am -- I tend to be along
22 with you in terms of the states. But I am not along
23 with you in terms of the sovereignty of the Indian
24 tribes.

25 And there is probably a sub question to that,

1 and that is, if it doesn't technically, so what?

2 That is, could Germany try and would that be
3 sufficient to preclude the testimony here? I mean,
4 because, again, Germany -- if we're treating the
5 reservations as sufficiently sovereign to raise that
6 issue, would it be different for any other country?
7 And I don't know the answer to that question either.

8 **MR. JACKLEY:** But isn't it incumbent upon
9 Mr. Marshall that carries that burden as I've outlined
10 in my brief to demonstrate that he does, in fact, have
11 a legitimate Fifth Amendment right. And he has not
12 done that with respect to his new argument regarding
13 the Oglala Sioux Tribe. He hasn't identified which
14 charge it would be.

15 **THE COURT:** I assume it could be any charges
16 that are -- that could arise from this case and his
17 testimony.

18 **MR. JACKLEY:** What about statute of
19 limitations?

20 **THE COURT:** Well, I don't know what the
21 statute of limitations is -- I am just checking
22 grammar -- we're talking about both reservations and I
23 don't know what the statutes of limitation are.

24 **MR. HANNA:** May I?

25 **THE COURT:** Yes.

1 **MR. HANA:** We're talking about a
2 constitutional right here that the State of South
3 Dakota is saying Mr. Marshall has to give up against
4 his will. Therefore, if any party has the burden of
5 proof or the burden of persuasion it is obviously the
6 state. The state has to show that the Oglala Sioux
7 Tribe or Colorado or Wyoming could not take his
8 testimony and use it.

9 What he's saying about *Kastegard* has
10 absolutely no basis in *Kastegard*. There is no Supreme
11 Court case that says immunized testimony is tainted
12 for all purposes in any court. That's what he's
13 telling you, but that's not -- there is no case law to
14 support that. He quotes *Kastegard* to support that.
15 All *Kastegard* says is that in order for a state
16 immunity statute to overcome the Fifth Amendment, that
17 immunity given by the state has to be -- in that
18 case --

19 **THE COURT:** I understand that. We have been
20 down that road a couple times.

21 **MR. HANA:** -- has to be co-extensive.

22 **THE COURT:** I understand the statement.

23 **MR. HANA:** I am just saying *Kastegard* does
24 not stand for what he's saying it stands for.

25 **THE COURT:** I heard that the first time, too.

1 And again, to me that's a relatively easy
2 question to resolve compared to the questions about
3 the sovereignty of the tribes. And that's the issue
4 that is right now. I can resolve the other on the
5 basis of authorities given me and go there.

6 But I do really wish to know, and I have no
7 authority, as to what effect a United States
8 immunity -- immunity granted by a state or the United
9 States and/or both of them impacts the ability of a
10 foreign country -- of a distinct sovereign entity to
11 use that information. I don't have a clue what the
12 law is --

13 **MR. HANA:** Judge, let me address that. First
14 of all there is a United States court case *Balys*,
15 B-A-L-Y-S, which says that the fact that a person
16 might be prosecuted in a foreign country, in the
17 middle east or someplace, the Fifth Amendment doesn't
18 apply there.

19 We're not talking about a foreign country.
20 We're talking about a government within the United
21 States of America that is recognized by the United
22 States of America. It's part of the United States of
23 America. And it is absolute basic number one rule in
24 Indian law which the Attorney General should
25 acknowledge is the state court has no authority on an

1 Indian reservation in South Dakota. Attorney
2 General's promise of immunity doesn't bind any Tribal
3 prosecutor on any state -- on any Tribal Court in
4 South Dakota. That is basic, that is undebatable,
5 that is not even something we should be discussing
6 here.

7 **THE COURT:** Well, I want to know if the
8 Courts are capable of trying that charge. I don't
9 know that. And -- of those charges.

10 And I want to know if there are statutes of
11 limitation that apply. And I think I need the
12 information. I expect you will have it to me by close
13 of the day.

14 **MR. HANA:** Would we be able to have a ruling
15 on this by the close of the day?

16 **THE COURT:** If I have it by the close of the
17 day you will have a ruling tomorrow.

18 Mr. Marshall, please raise your right hand.

19 RICHARD MARSHALL,
20 called as a witness herein, having been duly sworn,
21 under oath testified as follows:

22 **THE COURT:** Is it your intention if you are
23 called as a witness to refuse to testify on the
24 grounds of the protections offered you and the rights
25 offered you under the Fifth Amendment of the United

1 States and the South Dakota Constitution?

2 **MR. MARSHALL:** Yeah.

3 **THE COURT:** Questions on that line?

4 Establishing that he will not respond. And
5 if we need to raise that again after I make rulings
6 tomorrow, we could do for that. But for the moment, I
7 am satisfied the issues are fairly joined and we will
8 get me the information before the close of the day.

9 **MR. JACKLEY:** The state is satisfied that he
10 has exercised his Fifth Amendment, Your Honor.

11 **MR. MURPHY:** No discussions of his testimony
12 during opening until this matter is resolved?

13 **THE COURT:** No. You may -- you may -- if I
14 rule the other way on opening statements, you may
15 address that. But I don't see any particular need to
16 address it in voir dire. Other than if we're talking
17 about names of witnesses or potential witnesses.

18 **MR. MURPHY:** Well, names of witnesses, that's
19 not the issue.

20 The Court has already ruled on the baggage
21 note issue and that that was not coming in. So I
22 don't want that part of the opening absent some
23 determination by this court, reversing the prior
24 ruling that the baggage note does not come in. And I
25 didn't want the Attorney General's Office to argue

1 that Dick Marshall was going to somehow now validate
2 the note or authenticate it.

3 **MR. JACKLEY:** It's not my intent, Your Honor,
4 because of the Court's ruling to go into the baggage
5 note. I mean, my understanding of the Court's ruling
6 is that the baggage note is about double hearsay and
7 it's not coming in unless I can get Mr. Marshall on
8 the stand and ask him the question. And we're sorting
9 that out right now.

10 **MR. MURPHY:** Right.

11 **THE COURT:** For the time being -- at least
12 for the time being we have. Now that we demonstrated
13 to the jury what court time means --

14 **MR. HANA:** Judge, do you want us back here
15 tomorrow morning or are you just going to advise us of
16 your ruling?

17 **THE COURT:** I suggest you should show up in
18 the morning. I will give you either an oral or a
19 written response by then.

20 **MR. HANA:** Nine o'clock?

21 **THE COURT:** No. About eight o'clock.

22 (Off the record.)

23 **THE COURT:** Ladies and gentlemen, you have
24 been selected as potential jurors for a trial of the
25 State of South Dakota versus John Graham. I am going

1 to ask the clerk to call the roll of the jurors. You
2 need answer allowed as to whether you are here, and
3 then I will address some further matters after we have
4 sworn you as prospective jurors.

5 **THE CLERK:** As I call your name, please
6 respond by saying here.

7 (Whereupon, the roll call of the prospective
8 jurors was then taken.)

9 **THE CLERK:** Is there any name that I missed?

10 **THE COURT:** I believe the case is ready for
11 trial.

12 Mr. Jackley?

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

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

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

16 **THE COURT:** At this time I am going to ask
17 counsel for the respective parties to introduce them
18 testifies and their staff.

19 Mr. Jackley, for the State of South Dakota?

20 **MR. JACKLEY:** Marty Jackley, Rod Oswald, Bob
21 Mandel.

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

23 **MR. MURPHY:** My name is John Murphy, my
24 client John Graham, and paralegal Erin Duchaneaux.

25 **THE COURT:** At this time, we go through one

1 more step. And that is you will all stand and raise
2 your right hand as you may be sworn as prospective
3 jurors.

4 (Whereupon, the prospective jury panel was
5 then sworn.)

6 **THE COURT:** Ladies and gentlemen, please
7 excuse my voice. It's not what it should be, and I
8 trust it will be better by tomorrow.

9 To start with, I wish you all to know that to
10 say I am hard of hearing, as you are, sir, may be an
11 understatement. I have transcription on the computer
12 screen that tells me what is being said as it is being
13 said. And so if I am watching the screen, I am not
14 ignoring either you or a witness or counsel.

15 As I indicated you have been selected as
16 potential jurors in this trial. And I am going to
17 tell you that Mr. Graham is accused, in very brief
18 form, of number one, murder; and number two, murder in
19 the course of a felony that is kidnapping. A more
20 detailed recitation of those charges will be given to
21 you as the indictment is read by the State's Attorney
22 immediately prior to the opening statements to those
23 jurors selected.

24 This trial is going to take a considerable
25 period of time. It's tentatively scheduled for three

1 weeks. Our anticipation or hoped-for result would be
2 slightly less than that, although it's unlikely it
3 would end any earlier than the end of next week.

4 It's -- all of us are concerned, realizing
5 the imposition this will put on you, your lives, and
6 your families during the time this trial will take.

7 The jury selection process itself will likely
8 take a full day, day and a half, and maybe a tad more.
9 We must first select 56 potential jurors that have
10 been passed for cause by counsel. Then from those
11 jurors which will account for a jury of 12 plus two
12 alternate jurors, the counsel for the respective sides
13 are required by law to remove 21 apiece. That will
14 reduce us to the 14 jurors that will try the case.
15 Two of those jurors will be alternate jurors unknown
16 to them or anybody else, including me. In the event
17 we lose a juror or two during the course of the trial.
18 It's designed to ensure that when we're all said and
19 done we still have 12 jurors to decide the case.

20 The two alternates, or remaining alternates,
21 as the case may be, will simply be chosen by lot, or
22 chance, from a drawing of appropriate numbers.

23 The numbers of the peremptories and the
24 required jurors -- and we do have another set of jury
25 panels on call by the way -- is set bylaw. And

1 neither I nor counsel can change that law and we will
2 go by it.

3 Our trial days will begin at 8:30 and they
4 will end by 5:00. I promise you those two things.
5 The start can be delayed on pretrial motions and
6 things that I must decide out of the presence of the
7 jury. I will do my dead level best to start at 8:30
8 in the morning, and we will schedule any hearings
9 outside of the jury's presence before that time. Noon
10 hour will be from 12:00 to 1:15. And there will be a
11 morning break and an afternoon break, and I hope no
12 others.

13 From time to time, I hope seldom, it will be
14 necessary for me to resolve questions, again, outside
15 the presence of the jury as they will be questions of
16 law to determine some events during the course of the
17 trial.

18 The -- I am going to give you some warnings
19 that will apply now and that is a solemn obligation of
20 all jurors whether during the jury selection process
21 or the actual trial jurors to refrain or not discuss
22 anything about this trial. Period. Until after you
23 are released from the jury selection process as not
24 having been chosen as a trial jury, or if you are on
25 the trial jury, until all the evidence and final

1 arguments have been made. I will briefly explain why.

2 In any discussion of a case you begin to
3 order your thoughts so that you can describe it. In
4 doing that, you will begin, as human nature requires,
5 to form or process an opinion just in the sequence of
6 the discussion you make. And I think we would all
7 agree that once we have formed an opinion or a
8 tentative opinion, we tend to filter any new
9 information. That is, we will emphasize and cheer for
10 information that supports our opinion, and we will
11 downplay or make fun of information which would tend
12 to be in opposition to our opinion.

13 And consequently, any effort you make to
14 discuss or otherwise form an opinion is harmful to one
15 side, the other, or both.

16 The second reason is we can only have one
17 side talk at a time. And if you are making decisions
18 and forming opinions before the other side has had its
19 opportunity to present evidence, then again, it will
20 already fit into your opinion and either be emphasized
21 or disregarded, at least to some degree, because of
22 that opinion. I am asking you to do that. It's a
23 very difficult thing.

24 I think we need to swear the jurors at this
25 time.

1 **THE CLERK:** We did that already.

2 **THE COURT:** I blew that, then.

3 There will be no electronic devices in the
4 courtroom. I realize some folks may have brought cell
5 phones with them. You will right now turn them off.
6 Those that are finally selected for jurors will give
7 them to the bailiffs during the times the court is in
8 session.

9 Anybody outside the jury that's found with
10 such an item will be removed from the courtroom for
11 the duration of the trial.

12 Any questions about that?

13 There are obviously some of you who cannot
14 possibly serve because of serious and unchangeable
15 obligations. There may be physical effects or
16 limitations that will not allow you to sit for two
17 weeks or two-and-a-half weeks or three weeks. I am
18 shortly going to ask you to identify yourselves if you
19 cannot possibly serve.

20 But I ask you in making that decision to give
21 some serious considerations to your obligations for
22 public service. Give some thought, perhaps, to our
23 National Guard and Reservists who are called,
24 repeatedly I might add in recent years, to serve in
25 Afghanistan or other places of danger. And that

1 public serve for them takes precedence over all other
2 matters, sometimes including life.

3 Within that parameter, I believe most of us
4 could sit for this trial, and I am asking you to put
5 that same classification of the importance of your
6 being a juror in this matter. Mr. Graham and the
7 State of South Dakota are both entitled to have a jury
8 representative of this community.

9 Now, having said that, and before we begin
10 the jury selection process by counsel, which is a
11 process by which they will inquire of you as a group,
12 or individually, concerning your abilities or possible
13 knowledge that may make it difficult or impossible for
14 you to sit as -- without any preconceived opinions.

15 But before I get to that, I want to ask those
16 to raise your hands and identify yourselves who truly
17 believe you cannot be a juror in this case. All
18 right.

19 We're going to start, I believe --

20 Ma'am, what's the problem?

21 **PROSPECTIVE JUROR:** I was almost kidnapped in
22 2006 and it bring --

23 **THE COURT:** We will -- at the moment I just
24 want to talk about time. And then I will let counsel
25 go into things other than time.

1 Thank you.

2 On a time basis, ma'am?

3 **PROSPECTIVE JUROR:** I am scheduled to leave
4 the country for ten days on the 4th. And
5 rescheduling that isn't an option. I am going to a
6 graduation ceremony of a niece and I have been holding
7 the tickets for six months.

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

9 Mr. Murphy fee.

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

11 **MR. MURPHY:** No objection, Your Honor.

12 **THE COURT:** You have a call back time to
13 address.

14 **THE CLERK:** Your service would be complete
15 after today. I just need to know your name.

16 **PROSPECTIVE JUROR:** Boyer.

17 **THE COURT:** God, I hate to let that news out.
18 You may be excused.

19 **THE CLERK:** Is it Mary?

20 **PROSPECTIVE JUROR:** Yes.

21 **THE COURT:** May I have the next person over
22 here.

23 Yes, ma'am? Please stand. It will help us
24 hear you, particularly me.

25 Why could you not serve?

1 **PROSPECTIVE JUROR:** On the 22nd I was struck
2 with a severe case of arthritis in my wrist and hands
3 and I am on two types of medication. I also have a
4 splint on my wrist.

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

6 **MR. MURPHY:** No objection.

7 **MR. JACKLEY:** No objection.

8 **THE COURT:** Thank you, ma'am. You may be
9 excused. I believe that's a satisfactory reason.

10 **THE CLERK:** Can we get your full name,
11 please?

12 **PROSPECTIVE JUROR:** Joan Gustafson.

13 **THE COURT:** There were other hands raised on
14 this side of the room.

15 Yes, ma'am?

16 **PROSPECTIVE JUROR:** My only objection is that
17 I am a nurse at a local clinic and about two to three
18 days a week I am the only nurse available so they
19 would not be able to see patients.

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

21 **MR. MURPHY:** I have no objection.

22 The clinic won't be able to operate or see
23 patients without you?

24 **PROSPECTIVE JUROR:** Right.

25 **MR. MURPHY:** No objection.

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

2 **THE COURT:** Thank you, ma'am.

3 **THE CLERK:** Your full name?

4 **PROSPECTIVE JUROR:** Sarah Mauer.

5 **THE COURT:** Is there someone directly behind
6 you? How come all of these are ladies?

7 **PROSPECTIVE JUROR:** I am a research nurse for
8 Rapid City Regional Hospital and I am scheduled to
9 travel to San Diego on the 4th for work. I would be
10 gone for a week.

11 **THE COURT:** What happens if you don't go?
12 What happens if you broke your leg today?

13 **PROSPECTIVE JUROR:** I don't know.

14 **THE COURT:** I mean, that's a pretty good
15 question.

16 What happens if you go to the hospital today?
17 I realize she wouldn't have gone to Europe either, or
18 wherever she's going. But --

19 Mr. Murphy?

20 **MR. MURPHY:** No objection.

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

22 **THE COURT:** Thank you, ma'am.

23 **PROSPECTIVE JUROR:** Michele Sargent.

24 **THE COURT:** Anybody else in this section?
25 Yes, ma'am?

1 **PROSPECTIVE JUROR:** I work graves every night
2 and I don't feel like I can do the jury because I will
3 be tired. And I am going to have three kids under the
4 able of five and I don't have a baby-sitter to watch
5 them.

6 **MR. MURPHY:** No objection.

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

8 **THE COURT:** They are kinder than I.

9 You may be excused.

10 **THE CLERK:** Your name, please?

11 **PROSPECTIVE JUROR:** Jilian Jankord.

12 **THE COURT:** Anyone else in that section?

13 Thank you very much.

14 Over here?

15 Ma'am?

16 **PROSPECTIVE JUROR:** I am not asking you to
17 excuse me, but I wanted to know whether I am qualified
18 because yesterday in the paper all the three pages
19 involved this case, so it's up to you.

20 **THE COURT:** We will address that issue a
21 little later. But thank you, ma'am.

22 Other folks -- yes, sir?

23 **PROSPECTIVE JUROR:** I have finals at the
24 School of Mines the next two weeks. So --

25 **MR. MURPHY:** No objection.

1 **THE COURT:** In my class?

2 I would excuse you.

3 Mr. Murphy has no objection.

4 Mr. Jackley?

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

6 **PROSPECTIVE JUROR:** Mike Hodge.

7 **THE COURT:** Ma'am?

8 Front row?

9 **PROSPECTIVE JUROR:** I have a sister who is in
10 the hospital with end-stage lymphoma and I am a PA and
11 I am her spokesperson for medical reasons.

12 **MR. MURPHY:** No objection.

13 **MR. JACKLEY:** No objection.

14 **THE COURT:** Thank you, ma'am.

15 **THE CLERK:** Ma'am, can I get your full name,
16 please.

17 **PROSPECTIVE JUROR:** Grace Scholl,
18 S-C-H-O-L-L.

19 **THE COURT:** Other folks here?

20 Yes, sir?

21 **PROSPECTIVE JUROR:** I have the most frivolous
22 reason but I have tickets to the National Finals Rodeo
23 starting next week.

24 **MR. MURPHY:** In Las Vegas?

25 **PROSPECTIVE JUROR:** Yeah.

1 **THE COURT:** How many more do I have?

2 It's looking pretty good.

3 Mr. Murphy?

4 **MR. MURPHY:** No objection.

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

6 **THE COURT:** As the saying goes, is this your
7 first rodeo?

8 **PROSPECTIVE JUROR:** Darrell Wenzel.

9 **THE COURT:** Anybody else?

10 Yes, ma'am.

11 **PROSPECTIVE JUROR:** I am sorry. I am here
12 taking care of my grandmother three days a week. She
13 has dialysis. She cannot drive. As well as, I don't
14 know if this is related, but I have a mandatory hockey
15 game I need to be at. But the main reason is my
16 grandmother.

17 **THE COURT:** Well, the hockey game doesn't --
18 that's not going to get you out of here.

19 **MR. MURPHY:** No objection.

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

21 **THE COURT:** Thank you, ma'am. You may be
22 excused.

23 **PROSPECTIVE JUROR:** Emily Hirschman.

24 **THE COURT:** I want to thank you, folks. I
25 frankly expected more difficulty because of the length

1 of the trial and I am appreciative of your effort.

2 At this point we're going to go through the
3 process where -- where are we going to sit these
4 jurors?

5 **THE BAILIFF:** We'll start in the first row
6 there, the first seven. We'll have to move them as we
7 go.

8 **THE COURT:** All right.

9 We're going to be calling the 56 jurors that
10 we will start the questioning with. The remainder of
11 you not chosen will not be sitting on this side, but I
12 want you listening to the questions although not
13 answering at that point in time unless counsel so
14 indicate.

15 If you are called up, you will be addressed
16 as to those questions and we'll save a lot of time if
17 you remember your objections.

18 I am going to ask you just to call by name.
19 I think we cleared that with counsel.

20 **THE CLERK:** Jacqueline Dittman, Zachary
21 Pelofske, Cadey Reisner, Cody Weiland, Mark West,
22 Gilbert Martinez, Russell Anderberg, Nancy Hanson,
23 Robert Bennett, Matthew Almeida, James Harbert,
24 Mildred Fisher, Elaine Kocher, Jacqueline Anderson,
25 Robert Christensen, Britt Brown, Scott Denotter,

1 Sheila Garrigan, Bonnie Lang, Wayne Rosby, Robert
2 Rasch, Greg Nepstad, Jennifer Plasencio, Shelly
3 Broderick, Robert Tindall, Jacob Solano, Justin
4 Amundson, Cynthia Christensen, Danny Kemp, David
5 Rietveld, Valerie Begeman, Jo Ann Paulson, Hildur
6 French, Kyle Huling, Calvin England, Tania Little,
7 Cassandra Heying, Brett Bassham, Jan Parker, Lindsey
8 Hildebrand, Stephanie Bond, Cara Boehler, Twyla
9 Israel, Kenneth Heiser, Nathaniel Spencer, Michelle
10 Shelton, Jake Spreizer, Barry Winter, James Eppard,
11 Jeffrey Adkins, Neal Pierce, Melanie Stephens, Barbara
12 Fisher, Thomas Jimboreez, Laura Hill, Amy Schmidt.

13 **THE COURT:** Unless somebody needs a break
14 right now, we will begin the questioning by counsel
15 and that will take us certainly into the noon hour and
16 thereafter.

17 And please raise your right hand, sir.

18 Would you administer the oath.

19 (Whereupon, a prospective juror was then
20 sworn.)

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

22 **MR. MURPHY:** Thank you.

23 **THE BAILIFF:** Muriel Anderson has not been
24 sworn.

25 **THE CLERK:** Muriel, would you please raise

1 your right hand. I am going to give you the oath.

2 (Whereupon, a prospective juror was then
3 sworn.)

4 **MR. MURPHY:** Good morning, folks. You made
5 it so close to end of the month, and you know, I feel
6 like right away I am starting out like the bearer of
7 bad news. You were almost over the wall. It's only a
8 30-day month and you made it to day 29, and now we're
9 on the cusp of picking a jury that will likely be here
10 for two and a half to three weeks.

11 Initially, I want to start and say none of
12 us, nobody here, intended to have you guys picked as a
13 jury for this duration at this time of year. It's a
14 miserable time of year with, you know, kids' school
15 programs and finals and all of that. Everybody here
16 is going to be missing some activity with our kids or
17 our family, and we know you guys are. But when a case
18 is called to the docket, the Judge only has so many
19 trial days. He has all of these other things going on
20 and if your case comes to call, then you got to be
21 ready to try it whether it's winter, summer, holidays,
22 or not.

23 So, I guess, on behalf of all of us I
24 apologize for calling you out in the middle of the
25 winter especially on cyber Monday. I heard on the

1 radio on the way in, this is the least productive day
2 of the year. It just beat out the first day of the
3 Final Four or the NCAA tournament. So we're going to
4 try to be very productive.

5 As I said earlier in the introductions, my
6 name is John Murphy. I represent John Graham. My
7 paralegal is going to be here throughout the trial
8 unless she has to run and grab witnesses or something
9 like that.

10 And to start with, I am going to be talking
11 to you 56. If somebody has to be removed -- if one of
12 the people for whatever reason isn't going to be able
13 to sit on this jury, then one of the other people is
14 going to be called to fill in their seat. And rather
15 than start from scratch again, which if I did that I
16 am sure people would start picking up shoes and
17 throwing them at me. I am just going to ask you, did
18 you hear any question previously that you had an
19 answer to and then we'll start from there as opposed
20 to starting all the way in the beginning.

21 This is the most unique part of the trial
22 because it's the only time that we get to speak to
23 each other. Once you are sworn as a juror, then it's
24 pretty much one-way communication. You sit and
25 listen, we do the talking, or the witnesses do the

1 talking. And so I want to encourage you during this
2 time period to feel free to talk. There are no wrong
3 answers. There is no judgments.

4 One thing that I will tell you, if, for any
5 question, it brings up anything that is of a personal
6 nature or even of a professional nature that you don't
7 want to discuss in this forum, we have the ability to
8 go in the back and have a private meeting. And for
9 those of you who have been through this process before
10 you may know that happens all the time. I picked a
11 jury out in Kadoka where 12 jurors had answers to
12 questions that they said, Judge, we don't want to talk
13 about it in public. So what we did, we took down
14 their names, and at a recess one by one went in and
15 talked about their issues. We want to make this a
16 process that you feel comfortable answering and giving
17 us full information.

18 And the reason why that interchange -- that
19 exchange of information is so important is we're
20 trying to pick the right jury for this case. And
21 that's an important concept. Sometimes people think
22 that we're trying to weed out good versus bad jurors.
23 Well, that doesn't make sense. That's not a concept
24 that really applies.

25 Every case is different. There is a case

1 that you are right for and there is a case that you
2 are wrong for because of your personal experience,
3 your background, whatever. We need to know whether
4 this is the case for you and you need to let us know
5 if it's not the case for you.

6 My client is going to be on trial for weeks
7 and he's going to be reviewed -- the case is going to
8 be reviewed by 12 or 14 people, and he needs to know
9 from the beginning, that the people that are sitting
10 in judgment of him are people that aren't coming into
11 the process with some personal experience that's going
12 to make them biased or unable to listen to his side of
13 the case, and the state has the same interest.

14 So I always think back to my father who died
15 in June, but he was 89 when he died. He was one of
16 those guys I would think would be great on most
17 juries. He served in World War II; he raised five
18 boys; he had his own business; had a wealth of
19 experience. Really a fair guy. But he had some
20 feelings about the Internal Revenue Service that he
21 just couldn't have been fair to a case where the IRS
22 was one of the parties, and he would be the first to
23 admit it. He would just say, you know, with my
24 feelings about taxation, I just don't think I'm the
25 right juror for the case.

1 So that's where we're starting. I know
2 nobody volunteered to be here. I am going to say in
3 fairness to you guys, I won't ask anything that I
4 don't think is necessary in some way, shape, or form.
5 I don't want to keep you here for days. And you know
6 because I am going to be asking questions about you I
7 will give you a little more detailed introduction of
8 myself and who I am here with today.

9 My name is John Murphy. My wife, Denise, is
10 a social worker in town. I have a law firm that's way
11 above the ice rink in that big old historic building.
12 I've got three kids. My youngest is a fifth grader
13 and she has her school program coming up in about a
14 week so I am going to miss that. I have been here for
15 about 20 years, so I am not related to like Jeremiah
16 Murphy and some of the Murphy attorneys on the east
17 side of the state. All of my family is from Chicago.

18 My client, John Graham, is from the Yukon
19 Territory up in Canada and he's got two daughters
20 Chusia and Naneeek. Naneeek will be down here later in
21 the trial. Chusia is pregnant so she can't come down
22 for the trial.

23 And next to John is my paralegal, Erin. Erin
24 is Erin Duchaneaux. Her husband Cam is a local police
25 officer and they have three kids. And she grew up in

1 this area. But her family all hales from Harding
2 County, the Bennett family and the Jensen family.

3 And I will drink at least a gallon of water a
4 day because I am a bit nervous. This is a huge group
5 to talk to. Normally we have maybe 40 jurors in the
6 typical case, but because of the nature of this case,
7 we have a lot more.

8 What I am going to do is I am going to break
9 the voir dire, the jury selection -- and by the way,
10 the word voir dire, which is what this process is
11 actually called, it's a French phrase and it means to
12 speak the truth. That was -- really the principle of
13 that and why we use that is the only standard was that
14 you speak the truth.

15 And with that in mind, I am going to start
16 with nuts and bolt issues like knowledge of witnesses
17 and participants. Then we're going to get into some
18 legal principles that are going to be applied. And
19 the reason we're going to get into those is because
20 the judge is going to be giving you the law. You as
21 the jury will be the judges of the facts. That's what
22 the phrase is called. And you will have to know
23 whether you can be a judge of the facts and apply the
24 law. You will have to know something about the law.
25 We can't tell you all about the law because the jury

1 instructions that the judge will give at the end of
2 the case are 30 to 40 pages long. So we're not going
3 to do that. But we're going to talk about some key
4 principles.

5 Then we're going to go into some specific
6 issues that relate to this case. When we're talking
7 about specific issues, though, one of the things that
8 I always come across when talking to jurors is you
9 guys justifiably, understandably want to know more
10 about the case. You want to say, how can I tell you
11 if I can be fair until I know the facts of the case.

12 Unfortunately, the rules of jury selection
13 say we can't talk about the facts in any detail. We
14 will talk about some of the facts and some of the
15 allegations to ferret out whether that causes any bias
16 or concern. But we really can't go into the full
17 blown explanation of what the case is about.

18 So let's talk first -- I just want to revisit
19 for a second what the judge went over about personal
20 hardships or other things that may make this --
21 anybody in this group of 56 unable to sit and pay
22 attention morning to night for three weeks.

23 Is there anything that we didn't cover or
24 that you didn't raise your hand beforehand about?

25 Were you raising your hand, sir?

1 **PROSPECTIVE JUROR:** Kind of.

2 **MR. MURPHY:** And I'm am going to ask -- one
3 of the things I will ask this for everybody, when I
4 call on you, I will ask your name so Tina, our court
5 reporter, can identify you.

6 **PROSPECTIVE JUROR:** Jeff Adkins.

7 **MR. MURPHY:** Okay.

8 **PROSPECTIVE JUROR:** I should have raised my
9 hand earlier. I work two jobs. I work security and
10 clean two bars at 8:00 o'clock in the morning and
11 3:00 o'clock in the afternoon till close. At least
12 five days a week.

13 **MR. MURPHY:** All right.

14 And you believe that your work commitments
15 can't be filled in by somebody else?

16 **PROSPECTIVE JUROR:** Yeah.

17 **MR. MURPHY:** Okay.

18 And if you were to close, what do you work,
19 till 2:00?

20 **PROSPECTIVE JUROR:** 2:30, 3:00 o'clock,
21 sometimes 3:30.

22 **MR. MURPHY:** In light of that, Your Honor, I
23 have no objection to Mr. Adkins being excused.

24 **MR. JACKLEY:** No objection.

25 **THE COURT:** Thank you, sir. You may be

1 excused.

2 **MR. MURPHY:** Before we get to you, ma'am,
3 we'll fill in his seat. Then I will get back to you.

4 **THE CLERK:** Joseph Gion.

5 **MR. MURPHY:** All right.

6 I believe was that -- ma'am, your name?

7 **PROSPECTIVE JUROR:** Lindsey Hildebrand.

8 **MR. MURPHY:** Okay.

9 Ms. Hildebrand, what's your situation?

10 **PROSPECTIVE JUROR:** I feel I should have
11 raised my hand earlier, too. I also feel it's my duty
12 to be here. But I have finals next week also. Next
13 two weeks. And I am the only employee where I work.
14 And things would fall drastically behind if I was
15 chosen.

16 **MR. MURPHY:** Where are you a student?

17 **PROSPECTIVE JUROR:** On line through USD
18 working on my MBA.

19 **MR. MURPHY:** Okay.

20 And you got --

21 **PROSPECTIVE JUROR:** Graduate level class.

22 **MR. MURPHY:** And you've got to take the
23 finals in this two-week period.

24 **PROSPECTIVE JUROR:** In the next two or three
25 weeks.

1 **MR. MURPHY:** In light of that, I have no
2 objection.

3 **MR. JACKLEY:** No objection.

4 **THE COURT:** Thank you, ma'am.

5 **THE CLERK:** Kathleen Repstein.

6 **MR. MURPHY:** Sir, are you Mr. Rietveld?

7 **PROSPECTIVE JUROR:** Yes, sir.

8 **PROSPECTIVE JUROR:** I have a contracting
9 business, my son and myself together. And we have
10 signed contracts that need to be fulfilled by the end
11 of this coming month due to the window is going to be
12 closed down for their tax.

13 **MR. MURPHY:** So you have to fulfill those
14 obligations?

15 **PROSPECTIVE JUROR:** Yes.

16 **MR. MURPHY:** If you were here till the
17 17th of December, the remaining time wouldn't give
18 you enough time to finish those?

19 **PROSPECTIVE JUROR:** No.

20 **MR. MURPHY:** No objection, Your Honor.

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

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

23 **THE CLERK:** Larry Gruba.

24 **PROSPECTIVE JUROR:** My employer again. I am
25 self-employed and I am the only income of the family.

1 And I think I would be worrying about where my next
2 house payment is coming from.

3 **MR. MURPHY:** If you are not at work no money
4 is coming in, Mr. Gruba?

5 **PROSPECTIVE JUROR:** Right. Exactly.

6 **MR. MURPHY:** No objection, Your Honor.

7 **MR. JACKLEY:** No objection.

8 **THE COURT:** You may be excused.

9 **MR. MURPHY:** That was Mr. Gruba.

10 **THE CLERK:** I know I am going to mispronounce
11 this, Vijaya Ramakrishnan.

12 **MR. MURPHY:** You are Ms. Bond?

13 **PROSPECTIVE JUROR:** Yes. I am a nursing
14 mother. My daughter is ten months old and I have a
15 two-year-old son and three older kids and my husband
16 works full-time, and I am not quite sure that I will
17 be able to hand all the responsibilities off to my
18 husband with picking kids up from school. And if
19 there will be allotted amounts of times that I could
20 go and pump because I am a nursing mom.

21 **MR. MURPHY:** Sure. I don't know whether
22 there would be times when we would be able to recess
23 for that. My wife went through the same thing.

24 And so in light of that, Judge, unless the
25 Court had some provisions where recesses would be

1 allowed for her to return home, I would say that I
2 would have no objections to her being removed.

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

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

5 **THE COURT:** I think that would be difficult
6 for us to accomplish and maintain a schedule for the
7 trial.

8 Thank you.

9 **THE BAILIFF:** We have six left, Your Honor.

10 **THE COURT:** I understand. We're down to six.

11 **THE CLERK:** Scott Schaible.

12 **MR. MURPHY:** Is it Ms. Hill?

13 **PROSPECTIVE JUROR:** Yes.

14 **MR. MURPHY:** What's your situation?

15 **PROSPECTIVE JUROR:** I am a single mother of
16 two who are in grade school and I work two jobs.

17 **MR. MURPHY:** What hours do you typically
18 work?

19 **PROSPECTIVE JUROR:** Usually nine in the
20 morning depending on which job I am at until
21 nine o'clock at night.

22 **MR. MURPHY:** If you were asked to be here
23 there wouldn't be anybody to care for your children
24 and fill in for you at work?

25 **PROSPECTIVE JUROR:** At certain times, no.

1 **MR. MURPHY:** At certain times, no.

2 Would it be fair to say you would be thinking
3 about your kids more than what's going on here in
4 court?

5 **PROSPECTIVE JUROR:** Yes.

6 **MR. MURPHY:** All right.

7 I have no objection, Your Honor.

8 **MR. JACKLEY:** No objection.

9 **THE COURT:** Thank you.

10 You may be excused.

11 **THE CLERK:** Muriel Anderson.

12 **MR. MURPHY:** I am still working on that side,
13 but I see Ms. Begeman.

14 **PROSPECTIVE JUROR:** Yes. I have severe
15 osteoarthritis in my hips and I have never had to sit
16 for three weeks solid before. I am willing to give it
17 a shot, but I don't know.

18 **MR. MURPHY:** What will probably happen is
19 we'll be sitting for an hour-and-a-half-long periods.
20 I estimate we'll go from like 8:30 to 10:00 or 10:30
21 and 10:30 to noon take another break, probably 2:30
22 take another break.

23 **PROSPECTIVE JUROR:** I don't know.

24 **MR. MURPHY:** One thing because this happens
25 also especially with people with bad backs, typically

1 any time you need to stand up, move around, you know,
2 there is actually one of our Justices of the U.S.
3 Supreme Court that has to get up and walk around
4 during oral arguments and it would distract the
5 attorney, but his back would seize up.

6 **PROSPECTIVE JUROR:** Sure, I mean I am game,
7 but if you are sitting in a frozen position, I may be
8 not be able to get up.

9 **MR. MURPHY:** We'll make all accommodations
10 for anything physical like that.

11 Okay. I saw some hands -- did I catch
12 everybody over here?

13 Okay. There was a hand -- are you -- what's
14 your name?

15 **PROSPECTIVE JUROR:** Bonnie Lang.

16 **MR. MURPHY:** Okay.

17 Ms. Lang, what's the situation?

18 **PROSPECTIVE JUROR:** There wouldn't be --

19 **MR. MURPHY:** Could you please stand up so
20 Tina can hear you.

21 **PROSPECTIVE JUROR:** There wouldn't be anybody
22 at work to fill in for me if I was gone and I would
23 fall drastically behind.

24 **MR. MURPHY:** May I ask what you do for a
25 living?

1 **PROSPECTIVE JUROR:** I work at Behavior
2 Management Systems and I help people get medication
3 that can't afford them.

4 **MR. MURPHY:** Okay.

5 **PROSPECTIVE JUROR:** There is nobody else
6 trained to do that?

7 **MR. MURPHY:** All right.

8 I have no objection, Your Honor.

9 **THE COURT:** Behavior Management doesn't have
10 somebody to sit in for you, ma'am?

11 **PROSPECTIVE JUROR:** Do they?

12 **THE COURT:** Yeah.

13 I mean, do they not?

14 **PROSPECTIVE JUROR:** They don't right now.

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

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

17 **THE COURT:** Thank you.

18 You may be excused.

19 **THE CLERK:** Michael Leiby.

20 **MR. MURPHY:** Anybody over here on this side?
21 Okay. Good.

22 All right. Well, let's talk first -- one of
23 the first nuts and bolts things is whether anybody
24 here has a personal or professional relationship with
25 any the participants; and I will start with myself,

1 Mr. Graham, and Erin.

2 Does anybody here have a relationship, past
3 business dealings, personal relationship that might
4 affect your ability to set fairly?

5 You are?

6 **PROSPECTIVE JUROR:** Jan Parker.

7 **MR. MURPHY:** Mr. Parker?

8 **PROSPECTIVE JUROR:** I don't think it would
9 have too much -- wouldn't be a problem, but I don't
10 know if the judge remembers that we were in a play
11 together.

12 **MR. MURPHY:** Did he steal your lines or
13 impinge on your scene.

14 **PROSPECTIVE JUROR:** He had to make sure he
15 knew his own lines.

16 **MR. MURPHY:** Well, I don't think that's the
17 kind of thing that would cause you to be excused for
18 cause, but I appreciate it and I will get into some of
19 the other participants in a bit.

20 Sticking with my office, myself, my wife,
21 Jennifer Plasencio. I recognize you.

22 You are good friends are Erin's sister?

23 **PROSPECTIVE JUROR:** Yes.

24 **MR. MURPHY:** In fact, you guys used to be
25 roommates?

1 **PROSPECTIVE JUROR:** Yes.

2 **MR. MURPHY:** Okay.

3 Do you think any part of that relationship
4 would affect your ability to be fair to both sides in
5 this case and listen to all the evidence?

6 **PROSPECTIVE JUROR:** I don't think it would.

7 **MR. MURPHY:** You don't think so. Okay.

8 Anybody else?

9 Let's look at the prosecution. We have
10 Mr. Jackley, Mr. Oswald, and Mr. Mandel. Mr. Mandel
11 is from the U.S. Attorney's Office; Mr. Oswald is from
12 the Attorney General's Office; and Mr. Jackley is the
13 Attorney General for the State of South Dakota.

14 Any personal or professional relationships
15 with any of those individuals?

16 **PROSPECTIVE JUROR:** Does being a state
17 employee have any bearing on that?

18 **MR. MURPHY:** Do you work --

19 **PROSPECTIVE JUROR:** I work in corrections.

20 **MR. MURPHY:** In corrections.

21 Have you had any contact with Mr. Jackley or
22 Mr. Oswald?

23 **PROSPECTIVE JUROR:** No, not directly.

24 **MR. MURPHY:** Sir, you are -- and I should
25 have said the last person who spoke is Mr. West.

1 And you are Mr. Kemp?

2 **PROSPECTIVE JUROR:** Yeah.

3 I don't have any personal contact with
4 Mr. Jackley, but I believe my boss does at my place of
5 employment.

6 **MR. MURPHY:** What is that?

7 **PROSPECTIVE JUROR:** RPM Solutions.

8 **MR. MURPHY:** Do you have any contact or any
9 knowledge or anything --

10 **PROSPECTIVE JUROR:** No.

11 **MR. MURPHY:** Anybody else?

12 Sir, you are Mr. Christensen?

13 **PROSPECTIVE JUROR:** Yes.

14 Mr. Jackley and I went to college together.

15 **MR. MURPHY:** Oh, okay.

16 So you could tell us some stories?

17 **MR. JACKLEY:** Objection.

18 **MR. MURPHY:** Were you roommates or were you
19 close friends during college?

20 **PROSPECTIVE JUROR:** No. Just knew each
21 other.

22 **MR. MURPHY:** Anything about that that thinks
23 you might sway towards one side or the other?

24 **PROSPECTIVE JUROR:** No.

25 **MR. MURPHY:** Okay.

1 Anybody else?

2 All right. As most of you probably know,
3 just on November 2, there was the election.
4 Mr. Jackley was elected to be the State's Attorney
5 General.

6 Were any of you involved in his election
7 campaign either by contributing to his campaign or
8 doing get-out-the-vote activities or working for the
9 republican party on his behalf.

10 Anybody involved any of those things?

11 **THE COURT:** Mr. Parker?

12 **PROSPECTIVE JUROR:** I was supporting him.

13 **MR. MURPHY:** Were you doing so in more of a
14 capacity -- more than just as a voter by contributing
15 to his campaign financially?

16 **PROSPECTIVE JUROR:** No. I worked for the
17 republican party.

18 **MR. MURPHY:** Did you do any specific
19 activities regarding Mr. Jackley's reelection?

20 **PROSPECTIVE JUROR:** Phone calling.

21 **MR. MURPHY:** Phone calls.

22 Do you think knowing that you had that
23 investment of time and energy on his behalf to get him
24 elected, would that affect you in this case?

25 **PROSPECTIVE JUROR:** No.

1 **MR. MURPHY:** Okay.

2 Anybody else? Okay.

3 All right. Now, we already briefly touched
4 upon Judge Delaney. There is Judge Delaney and Tina
5 Pruss. Tina is the court reporter and she's going to
6 remind me throughout the trial to talk slower. She's
7 already whispered over me to breathe once.

8 But anybody have a relationship with either
9 his honor or Tina that might affect how you view this
10 case or have anything to do with it?

11 We're going to have a rotation of clerks and
12 bailiffs and so I am not going to get into that unless
13 somebody has a strong connection to one of the clerks
14 of court or one of the bailiffs. On any given day
15 there will be one or two clerks and one or two
16 bailiffs but we don't always know who is going to be
17 here on a day-to-day basis.

18 The next nuts and bolts thing is witnesses
19 and there is a long list. There is about 50 potential
20 witnesses and so I am going to go through name by
21 name. If you would, raise your hand if you have a
22 recognition, relationship, anything about that
23 particular name that causes you to have any reaction.
24 And I am going to do it name by name rather than go
25 through the whole list of 50, because it would be

1 hard at the end for you to recall who I had said.

2 I am going to do them in alphabetical order.
3 There is no significance. First is Charlie Abourezk.
4 He's an attorney here in Rapid City.

5 Abe Alonzo. He is a former Denver Police
6 Department Detective.

7 Roger Amiotte. He's a rancher from down --
8 Ma'am, you are?

9 **PROSPECTIVE JUROR:** Cadey Reisner.

10 **MR. MURPHY:** Yes?

11 **PROSPECTIVE JUROR:** My parents ranch with
12 him. I live down in the same area as him.

13 **MR. MURPHY:** Okay.

14 Known him for years?

15 **PROSPECTIVE JUROR:** My parents have, yes.

16 **MR. MURPHY:** Do you have a -- he is going to
17 be a key prosecution witness in this case.

18 Does that relationship -- do you think that
19 you are going to factor that in or that might
20 influence your ability to sit fairly and just listen
21 to the testimony?

22 **PROSPECTIVE JUROR:** I couldn't say. Just my
23 parents they were -- they knew him well with ranching
24 and stuff; knew the case a little bit because of that.

25 **MR. MURPHY:** Have you learned about the case

1 through your parents?

2 **PROSPECTIVE JUROR:** Yes.

3 **MR. MURPHY:** Okay.

4 That's another issue, but why don't we
5 explore that while we're talking.

6 You have learned information about this case
7 outside the witness chair?

8 **PROSPECTIVE JUROR:** Uh-huh.

9 **MR. MURPHY:** Okay.

10 Would it be fair to say it's going to be hard
11 to put out of your mind what you heard in the past
12 from people that were involved in the case and just
13 focus on what's in the -- what comes from the witness
14 chair?

15 **PROSPECTIVE JUROR:** I would say yes with my
16 dad growing up down there and stuff.

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

18 Your Honor, based on the past experience and
19 knowledge, I would ask her to be excused.

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

21 **MR. JACKLEY:** May I voir dire the witness for
22 just a moment, Your Honor?

23 **THE COURT:** You may.

24

25

1 **MR. MURPHY:** You had indicated that you know
2 Mr. Amiotte; is that fair?

3 **PROSPECTIVE JUROR:** Uh-huh.

4 **MR. JACKLEY:** And he is going to take the
5 stand and he is going to provide some -- is
6 anticipated to provide some information as a witness.

7 Would you be able to separate your knowledge
8 from him and be able to listen to him as to what he
9 says and to fairly evaluate his testimony or do you
10 have concerns with that?

11 **PROSPECTIVE JUROR:** I think I would be fairly
12 go over his testimony. Just with me growing up down
13 there and with my parents growing up there, I think
14 other factors would contribute to being hard to be
15 unbiased.

16 **MR. JACKLEY:** You would not be able to
17 separate your background, the information, you know,
18 from the evidence you would hear at trial?

19 **PROSPECTIVE JUROR:** No.

20 **MR. JACKLEY:** If you were seated in my chair,
21 knowing what you know, would you have concerns of
22 having somebody like you be a juror?

23 **PROSPECTIVE JUROR:** I would be like pre -- I
24 don't know what the exact word.

25 **MR. JACKLEY:** Predisposed.

1 **PROSPECTIVE JUROR:** Predisposed thoughts,
2 yes.

3 **MR. JACKLEY:** No objection from the state.

4 **THE COURT:** Thank you, ma'am. You will be
5 excused.

6 **THE CLERK:** Heather Bendowski.

7 I believe you need to be sworn in; is that
8 correct.

9 **PROSPECTIVE JUROR:** Yes.

10 (Whereupon, a prospective juror was then
11 sworn.)

12 **THE CLERK:** Thank you.

13 Take a seat where she left from.

14 **MR. MURPHY:** Ms. Bendowski, before we go
15 further, were there any issues that were raised when
16 you weren't in the panel of 56 that bear on this
17 process.

18 **PROSPECTIVE JUROR:** Just that I am the only
19 provider for my family.

20 **MR. MURPHY:** Can you explain that?

21 **PROSPECTIVE JUROR:** My husband is a
22 stay-at-home dad. He goes to school and I am the one
23 that goes to work and does all that.

24 **MR. MURPHY:** Is your employer going to pay
25 you while you are here or no?

1 **PROSPECTIVE JUROR:** I think they do, but I am
2 not a hundred percent sure of that.

3 **MR. MURPHY:** So financially, you will still
4 be receiving the same income?

5 **PROSPECTIVE JUROR:** Like I said, I am not a
6 hundred percent sure. I have never been on a jury
7 before. So I don't know how it works with my work.

8 **MR. MURPHY:** All right.

9 I left off at Mr. Amiotte. Anybody else know
10 Mr. Amiotte?

11 Next one is Barry Bachrach. He's an attorney
12 from Massachusetts.

13 Clyde Bellecourt. A man from Minnesota,
14 former activist or leader in the American Indian
15 Movement.

16 What's your name?

17 **PROSPECTIVE JUROR:** Tania Little.

18 **MR. MURPHY:** Could you say your name again?

19 **PROSPECTIVE JUROR:** Tania Little.

20 **MR. MURPHY:** Okay.

21 **PROSPECTIVE JUROR:** He's a relative of mine.

22 **MR. MURPHY:** What degree of relative?

23 **PROSPECTIVE JUROR:** Probably second cousin.

24 **MR. MURPHY:** Do you know him well?

25 **PROSPECTIVE JUROR:** No.

1 **MR. MURPHY:** Anything about your knowledge,
2 the family relationship, that would cause you to
3 believe you couldn't be fair to both sides?

4 **PROSPECTIVE JUROR:** No.

5 **MR. MURPHY:** Okay. Anybody else with
6 Mr. Bellecourt?

7 Serle Chapman is a man from Great Britain,
8 from England, but he's a writer. He runs a tour
9 company in this part of the world in the hills.

10 Theda Clarke. She's a woman from Pine Ridge,
11 originally. Lived in Denver and Pine Ridge. Now
12 lives in Nebraska.

13 Jean Ann day from Minnesota -- from
14 Wisconsin, excuse me.

15 Don Dealing, a retired FBI agent that used to
16 live and work in the Rapid City area.

17 Frank Dillon, a gentleman originally from
18 Denver. I believe he lives in Yankton or over on the
19 eastern side of the state.

20 Jeannette Eagle Hawk. From Denver.

21 Kamook Darlene -- Darlene or Kamook, first
22 name, Nichols. Also known as Kamook Banks or Kamook
23 Ecoffey. She runs the Subway restaurant down on Pine
24 Ridge. Lives in Rapid City. Her husband is Robert
25 Ecoffey.

1 Next one is Robert Ecoffey. Robert Ecoffey
2 is the president/superintendent of the Pine Ridge
3 Indian Reservation. He was a United States Marshal
4 and a law enforcement officer.

5 Kim Edwards.

6 Is Kim Edwards still a witness?

7 **MR. JACKLEY:** Not per the stipulation.

8 **MR. MURPHY:** Allen Garber. A retired FBI
9 agent. Also worked in Rapid City and South Dakota for
10 many years.

11 Cleo Marshall Gates. Cleo Marshall or Cleo
12 Gates. A woman who, I believe, works down in a school
13 on Rosebud. Is from the Rosebud Indian Reservation.

14 James Graf. Another retired FBI agent. I
15 believe he still lives in Rapid City.

16 Naneek Graham, my client's daughter from the
17 Yukon Territory in Canada.

18 Dr. Don Habbe. Dr. Habbe works at Clin Lab.
19 He's a pathologist here in Rapid City. Been here
20 forever.

21 Candy Hamilton. She's a journalist that
22 lives in Pine Ridge. Has lived in Rapid City. Been
23 here for about 35 years, forty years.

24 Ray Hand Boy. Mr. Hand Boy, I think,
25 presently lives in Rapid City. Used to work at Sioux

1 San.

2 Sir, you are?

3 **PROSPECTIVE JUROR:** Joe Gion.

4 **MR. MURPHY:** Mr. Gion. Yeah.

5 **PROSPECTIVE JUROR:** I actually used to play
6 in a band with Ray Hand Boy.

7 **MR. MURPHY:** Did you?

8 **PROSPECTIVE JUROR:** Yeah.

9 **MR. MURPHY:** Close personal friend?

10 **PROSPECTIVE JUROR:** You could call him that.

11 **MR. MURPHY:** During the course of your band
12 playing together, did you guys ever talk about
13 anything about this case or anything like that?

14 **PROSPECTIVE JUROR:** No.

15 **MR. MURPHY:** Do you believe you can set aside
16 your personal friendship and just listen to what's
17 presented on the witness stand?

18 **PROSPECTIVE JUROR:** Yeah.

19 **MR. MURPHY:** Okay.

20 Ma'am, I am sorry.

21 **PROSPECTIVE JUROR:** So it's Ray Hand Boy
22 that's like 20 some years old?

23 **MR. MURPHY:** No. He's probably in his 50s.

24 **PROSPECTIVE JUROR:** Okay.

25 **PROSPECTIVE JUROR:** I know who he is.

1 **PROSPECTIVE JUROR:** That's a different Hand
2 Boy, then. The other one would probably be younger.

3 **MR. MURPHY:** And your name.

4 **PROSPECTIVE JUROR:** Hildur French.

5 **MR. MURPHY:** And how do you know the older
6 Mr. Hand Boy?

7 **PROSPECTIVE JUROR:** I just know him because I
8 know his son.

9 **MR. MURPHY:** Okay.

10 Anything about that relationship that would
11 cause you --

12 **PROSPECTIVE JUROR:** No.

13 **MR. MURPHY:** Okay.

14 Anybody else?

15 Evan Hodge. Anybody know Mr. Hodge?

16 Angie Begay also known as Angie Janis.

17 Mary Johnson.

18 Fritz Arlo Looking Cloud. Also known as Arlo

19 Looking Cloud. Anybody familiar with Mr. Looking
20 Cloud?

21 How about Denise Maloney?

22 Vine Richard, also known as Dick, Marshall.

23 Mike McRoden. He's a local FBI agent. Still
24 works at the FBI here in Rapid City.

25 Russell Means. AIM activist, spokesperson.

1 Actor.

2 Anybody have any personal or professional
3 connection with Russell Means?

4 David Melmer. He's a journalist. I believe
5 he comes from the twin cities but he writes in the
6 nationwide publications.

7 Nathan Merrick. Former BIA law enforcement
8 officer.

9 George Palfy. A gentleman from Denver.

10 Dr. Garry Peterson. He's a retired
11 pathologist, forensic pathologist, from the twin city
12 area.

13 Mitch or Mitchell Pourier. He was, I
14 believe, with the U.S. Marshals as well as with the
15 BIA.

16 David Price. Former FBI agent that lived in
17 the Rapid City area for many years.

18 Thelma Rios. Ms. Rios is a resident of Rapid
19 City. Has been a spokesperson for various causes in
20 the community.

21 Bob Riter. He's an attorney from Pierre.

22 Madonna Gilbert, also known as Madonna
23 Thunderhawk. Used to live here in Rapid City. May
24 still.

25 Gene Roach from Rapid City.

1 William, also known as Bill Wood. Long term
2 FBI agent that lived in Rapid City for many years.

3 Troy Lynn Irving, also known as Troy Lynn
4 Yellow Wood.

5 Okay. We got through the long list of
6 witnesses.

7 Do you want to take a break?

8 **THE COURT:** I could use a break because it's
9 been a spell since I've had one.

10 You got a question.

11 **MR. MURPHY:** Ms. French?

12 **PROSPECTIVE JUROR:** Well, I am just
13 wondering. I don't even know if that is the same Ray
14 Hand Boy that I would know since he said this is
15 another one. I don't --

16 **MR. MURPHY:** But in any case it wasn't
17 somebody that --

18 **PROSPECTIVE JUROR:** No.

19 **MR. MURPHY:** All right.

20 **THE COURT:** All right, ladies and gentlemen,
21 we're going to take a brief break. No more than 15
22 minutes. With this size of a crowd we're going to
23 need at least that.

24 When you come back, please come back and sit
25 in the same seats you are. That is, the 56 still

1 being examined retain your places until we end up with
2 a final jury.

3 You are reminded of my instruction on
4 discussion of the case with nobody. Mothers, fathers,
5 aunts, brothers, sisters, friends, enemies. Nobody.
6 Including counsel or the lawyers. You may see us pass
7 you in the hall and feel offended because nobody says
8 high. If they say hi, then they are in trouble with
9 me and with the whole judicial system. So don't
10 expect you to greet them and I don't expect them to
11 greet you.

12 Thank you. We are in recess.

13 (Off the record.)

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

15 **MR. MURPHY:** Thank you.

16 I am going to go a little bit out of order.
17 Ms. Schmidt, I understand it was brought to my
18 attention that you are feeling a bit antsy just being
19 in this courtroom?

20 **PROSPECTIVE JUROR:** Uh-huh.

21 **MR. MURPHY:** Is that something -- would you
22 like to address it in private or is it fair to say
23 that based on your past experience, the process of
24 sitting through a trial like this would be traumatic
25 to you?

1 **PROSPECTIVE JUROR:** Yes.

2 **MR. MURPHY:** You have to talk loud.

3 **PROSPECTIVE JUROR:** It would be traumatic to
4 me.

5 **MR. MURPHY:** All right.

6 In light of that, Your Honor, I have no
7 objection to Ms. Schmidt being excused for cause.

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

9 **THE COURT:** Thank you, ma'am.

10 **THE CLERK:** Craig Greenwalt.

11 **MR. MURPHY:** While Mr. Greenwalt is getting
12 seated, are there more jurors that need to be sworn.

13 **THE CLERK:** There are a few more.

14 **MR. MURPHY:** Why don't we make sure we take
15 care of that.

16 **THE CLERK:** Any jurors that have not been
17 sworn in, would you please stand and raise your right
18 hand.

19 (Whereupon, the prospective jurors were then
20 sworn.)

21 **MR. MURPHY:** All right. Going back for the
22 five jurors that just were sworn, I wasn't aware of
23 what time or how far into the process it was before
24 you guys came. You are not part of the 56 that have
25 already been selected as our talk-to panel.

1 What I am going to ask you folks to do is
2 listen to the questions so that in case like you just
3 saw somebody got removed, somebody from the spare
4 jurors gets put in their position. So we don't have
5 to go back through all of the questions, although I
6 will have to run through some of those because people
7 have come in late.

8 At least from this point forward, whenever
9 you come forward, listen to the questions and then I
10 can just say, was there anything that causes you
11 concern and you can just address that at that point.

12 Now, I want to start this part talking about
13 familiarity with the case. This is the State of South
14 Dakota versus John Graham. But during the trial, you
15 are going to hear about three other cases, I believe.
16 You are going to hear about a case called *United*
17 *States vs. Fritz Arlo Looking Cloud* or Arlo Looking
18 Cloud. That was a federal prosecution involving the
19 same allegations that are here. At one point my
20 client was charged in federal court with Mr. Looking
21 Cloud. Mr. Looking Cloud went to a jury trial and was
22 convicted. And that will all be presented.

23 And I wanted to ask first if anybody recalls
24 the media coverage about that case or hearing about
25 that case in any way, shape, or form?

1 Sir, you are?

2 **PROSPECTIVE JUROR:** Greg Nepstad.

3 **MR. MURPHY:** What do you know about that case
4 and how does it affect you?

5 **PROSPECTIVE JUROR:** Just whatever I read in
6 the paper.

7 **MR. MURPHY:** Okay.

8 **PROSPECTIVE JUROR:** Also this whole AIM
9 affairs in the 80s. Read in *The spirit of Crazy*
10 *Horse*.

11 **MR. MURPHY:** And I am going to get into the
12 books and media coverage in a bit.

13 While we're talking about you, is there
14 anything about your historical interest or the
15 interest in the subject matter of case that is going
16 to make it hard for you to listen to the evidence as
17 it comes in from the witness stand and just focus on
18 that as opposed to what you might have read in a book
19 or heard outside?

20 **PROSPECTIVE JUROR:** Just judging by what I
21 know about the cases --

22 **MR. MURPHY:** Would you mind standing?

23 **PROSPECTIVE JUROR:** Sure.

24 There was government misconduct at times. It
25 makes it hard to do it without a reasonable doubt.

1 **MR. MURPHY:** Okay.

2 Do you think if the judge tells you that it's
3 your duty as a juror to put that aside and base your
4 decisions solely on what was presented through the
5 witnesses and the documents and exhibits, can you do
6 that or do you think that the outside influences are
7 going to make it hard for you?

8 **PROSPECTIVE JUROR:** It would be difficult.

9 **MR. MURPHY:** Impossible or just --

10 **PROSPECTIVE JUROR:** Not impossible.

11 **MR. MURPHY:** Not impossible.

12 Do you feel comfortable sitting as a juror?

13 **PROSPECTIVE JUROR:** Like I say, I have a hard
14 time convicting just because of the reasonable doubt.

15 **MR. MURPHY:** Okay.

16 That you have already formed outside the
17 course --

18 **PROSPECTIVE JUROR:** That's correct.

19 **MR. MURPHY:** You know most books are fiction?

20 **PROSPECTIVE JUROR:** Absolutely.

21 **MR. MURPHY:** Okay.

22 Even if they say they are nonfiction, there
23 is probably a good portion of the book that is
24 fiction?

25 **PROSPECTIVE JUROR:** Yeah.

1 **MR. MURPHY:** In light of that, would you be
2 able to put aside what you read and focus on just what
3 you hear here in this courtroom?

4 **PROSPECTIVE JUROR:** I would attempt to.

5 **MR. MURPHY:** You would attempt to. Okay.

6 I don't mean to put you on the spot, but
7 we're getting dangerously short of jurors and I want
8 the communication to be free and open and honest. All
9 I guess I want from you is to know whether you think
10 if -- if the judge says that your verdict has to be
11 based on the evidence presented here and not what you
12 read somewhere else, could you do that or could you
13 not do that?

14 **PROSPECTIVE JUROR:** I don't know. I mean,
15 it's hard because, like I say, I followed this case
16 just because I had an interest in it since the 70s,
17 basically.

18 **MR. MURPHY:** Okay.

19 Well, I don't have a basis for cause on this
20 in light of his response so I will just proceed unless
21 the state wants to voir dire.

22 **THE COURT:** I think we leave him sit.

23 **MR. MURPHY:** You are fine. Thank you, sir.

24 Anybody else regarding Mr. Looking Cloud?

25 Maybe I will just announce the other trials.

1 There was also a trial and it was just in April of
2 this year. The trial of *United States vs. Dick*
3 *Marshall or Richard Marshall*, his real legal name is
4 Vine Richard Marshall. It was front page of the Rapid
5 City Journal. He was acquitted. He was charged in
6 the same crime, same case essentially. In fact, he
7 and Mr. Graham were once codefendants also in the
8 federal system. Mr. Graham's charges were dismissed
9 and he was brought over to state court. Mr. Marshall
10 went ahead in the federal system and was acquitted.

11 Anybody here have any recollection of that
12 case since it was just six or seven months ago?

13 We got a couple. We have -- I am going to
14 slaughter your name, so I --

15 Ma'am, would you state your name and if you
16 wouldn't mind standing up so Tina can here.

17 **PROSPECTIVE JUROR:** Vijaya, my first name.
18 Ramakrishnan my last name.

19 **MR. MURPHY:** All right.

20 And you indicated you have knowledge of
21 Mr. Marshall's case?

22 **PROSPECTIVE JUROR:** Yeah, since I read that
23 before yesterday also.

24 **MR. MURPHY:** And you indicated before you
25 read yesterday's newspaper article, and we're going to

1 get to that in a second.

2 But talking about Mr. Marshall's case,
3 anything you read or heard about that case, will that
4 affect your ability to be fair here and base your
5 opinions just on what's in the witness stand?

6 **PROSPECTIVE JUROR:** It would convince more --

7 **MR. MURPHY:** It would convince more?

8 **PROSPECTIVE JUROR:** Yeah. I mean, then I
9 can -- which one is more convince me.

10 **MR. MURPHY:** Okay.

11 **PROSPECTIVE JUROR:** Do you understand?

12 **MR. MURPHY:** Yeah, I do understand.

13 So you are saying basically what evidence you
14 hear is going to help you decide which way you go?

15 **PROSPECTIVE JUROR:** Which way I go.

16 **MR. MURPHY:** Would it be fair to say what you
17 heard about Mr. Marshall's case isn't going to affect
18 that?

19 **PROSPECTIVE JUROR:** I don't really know about
20 that.

21 **MR. MURPHY:** Okay.

22 Ma'am, you also raised your hand?

23 **PROSPECTIVE JUROR:** Yeah.

24 **MR. MURPHY:** And your name?

25 **PROSPECTIVE JUROR:** Jo Ann Paulson.

1 **MR. MURPHY:** Okay.

2 **PROSPECTIVE JUROR:** You know, like anybody
3 who has been in the area, I have read and heard lots.
4 As a teacher I spent over 30 years teaching kids how
5 to tell the difference fact and opinion when we read
6 or we wrote something. I don't see that I would have
7 a problem.

8 **MR. MURPHY:** All right.

9 Nothing that you have read about in the paper
10 or heard is going to have you firmly convinced?

11 **PROSPECTIVE JUROR:** One way or the other I
12 have read things. I can tell when it's Dateline-type
13 stuff and I can tell when there is fact. I don't see
14 a problem.

15 **MR. MURPHY:** All right.

16 Well, let me -- maybe so we can broaden the
17 discussion rather than going through each individual
18 case, there was also recently in the paper *State vs.*
19 *Thelma Rios*. Ms. Rios was also charged in this case
20 and she reached a plea bargain just a few weeks ago
21 and that was covered by the press. She got a
22 probationary sentence and that was something covered.

23 But we've also talked, and a couple of you
24 have hit upon, there has been books, The Spirit of
25 Crazy Horse, a widely read book. There was a book not

1 long ago, 2007, called American Indian Mafia. The
2 Unquiet Grave, which was written by a guyed named
3 Steve Hendricks. Who Will Unbraid Her Hair is a book
4 by Jo Ann Brand. And then there has been movies and
5 documentaries. There was the docudrama Incident At
6 Oglala. It involved AIM and the activities at Wounded
7 Knee and the activities involved in this case in the
8 70s. This case is involving something that's alleged
9 to have happened in 1975 or 1976.

10 Anybody here have a historical background or
11 exposure to the media?

12 We saw -- if you got the Sunday paper
13 yesterday, it was the front page and a full insert.

14 Who has read articles about this case? Okay.
15 Let's start for a change in the back.

16 Sir, what's your name?

17 **PROSPECTIVE JUROR:** Dale Pierce.

18 **MR. MURPHY:** Mr. Pierce?

19 **PROSPECTIVE JUROR:** Yes, sir.

20 **MR. MURPHY:** Okay.

21 What have you read and how has it influenced
22 you if at all?

23 **PROSPECTIVE JUROR:** It has allowed me to make
24 a conclusion of what I think of guilt and innocence.

25 **MR. MURPHY:** It has?

1 **PROSPECTIVE JUROR:** Yes, sir, it has.

2 **MR. MURPHY:** And without getting into what
3 your conclusion is --

4 **PROSPECTIVE JUROR:** Yes, sir.

5 **MR. MURPHY:** -- is it fair to say -- you have
6 spoke pretty directly -- that that's going to
7 influence how you hear the evidence and you are going
8 to go into this prejudging the case?

9 **PROSPECTIVE JUROR:** Yes, sir, that is
10 correct.

11 **MR. MURPHY:** Even if the judge tells you,
12 come into it with a clear mind, that's not going to be
13 able to be possible.

14 **PROSPECTIVE JUROR:** No, sir. I already know
15 what I decided.

16 **MR. MURPHY:** All right.

17 Your Honor, in light of that, I'd ask
18 Mr. Piece to be allowed to be excused.

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

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

21 **THE COURT:** Thank you, sir. You may be
22 excused.

23 **THE CLERK:** Debra Rosser.

24 I believe you need to be sworn in. Please
25 raise your right hand.

1 (Whereupon, a prospective juror was then
2 sworn.)

3 **THE CLERK:** Please be seated where that lady
4 just left.

5 **MR. MURPHY:** Ms. Rosser, you just arrived?

6 **PROSPECTIVE JUROR:** Yes.

7 **MR. MURPHY:** Okay.

8 The rest of the people bear with me a bit.
9 We have been going at this for over an hour now. And
10 we covered a number of topics so I have to kind of go
11 back through and discuss some of those things.

12 I will do it a little more briefly than I did
13 the first time. And -- but I want you to stop me at
14 any time if I say something that you don't understand
15 because I don't want to hurry through things.

16 First, of my name is John Murphy and I am the
17 defense attorney for Mr. Graham. That's my client
18 Mr. Graham and my paralegal Erin Duchaneaux. We've
19 got on the prosecution team Mr. Jackley, who is the
20 Attorney General, and Mr. Oswald and Mr. Mandel.

21 Do you know any of us professionally or
22 personally to any extent?

23 **PROSPECTIVE JUROR:** No.

24 **MR. MURPHY:** Okay.

25 And Mr. Jackley was just elected to the

1 Attorney General's position. Were you involved in his
2 campaign efforts either as a campaign contributor or
3 somebody who helped get out the vote or made phone
4 calls or anything like that?

5 **PROSPECTIVE JUROR:** No.

6 **MR. MURPHY:** What we're going to do here --
7 Have you been through jury selection before?

8 **PROSPECTIVE JUROR:** No.

9 **MR. MURPHY:** All right.

10 What we're doing is called voir dire and it's
11 the process by which both sides ask all of the jurors
12 potential questions to determine whether you can be a
13 juror on this case. It's not whether you are a good
14 person or a bad person or anything like that.

15 If at any time there is an issue that I bring
16 up that is for whatever reason sensitive, that you
17 don't want to share with 60 other people, all you need
18 to do is let us know and we have the ability to go in
19 the back -- there is rooms in the back and the court
20 reporter sets up her equipment -- and we can handle it
21 that way.

22 We'll try not to ask you anything that is
23 going to embarrass you, but there are issues that are
24 sensitive. What we're looking at here -- one of the
25 things is this is a case involving allegations of

1 murder. My client is charged with committing a murder
2 that is alleged to have happened back in 1975 or 76.

3 The trial is likely to go through
4 December 17. That's our best estimate. Basically
5 three full weeks of trial.

6 And first off, are there any physical
7 limitations, work situation, child situations,
8 anything else like that that is going to make it
9 reasonably difficult for you to be here from 8:30 to
10 5:00 for the next three weeks?

11 Would you mind standing up so Tina with hear
12 you.

13 **PROSPECTIVE JUROR:** I have some surgery
14 coming up to be scheduled on December 1 and I am not
15 exactly sure if they are going to keep me that day or
16 going to reschedule me. So I have been kind of in
17 limbo waiting for that.

18 **MR. MURPHY:** And I am not going to dive into
19 the medical history or anything like that. But if
20 they have surgeries available for you on the first, is
21 it your intention have them?

22 **PROSPECTIVE JUROR:** Absolutely.

23 **MR. MURPHY:** Okay.

24 In light of that, Your Honor, I would excuse
25 Ms. Rosser.

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

2 **MR. JACKLEY:** No objection.

3 **THE COURT:** Thank you, ma'am. You may be
4 excused.

5 **THE CLERK:** Karen Malenius. If you will
6 please take a seat where Ms. Rosser left.

7 **MR. MURPHY:** Good morning, Ms. Malenius.
8 Am I pronouncing your name right?

9 **PROSPECTIVE JUROR:** Malenius.

10 **MR. MURPHY:** Thank you.

11 I didn't notice when you came in. I know you
12 were one of the latter jurors who came in. Where were
13 we at, if you recall, when we came?

14 **PROSPECTIVE JUROR:** You were reading the
15 names off.

16 **MR. MURPHY:** Reading the names off. Okay. I
17 was in the midst of reading the names off. Okay.
18 I --

19 You may have a seat.

20 I will try to cover what we brought up to
21 then. First off, we're in the process of jury
22 selection. I am trying to orient my voice so Tina can
23 hear me, too. If I turn my back it's hard for her to
24 hear.

25 I am going to ask you questions like you just

1 heard. If you need a private meeting that's fine.
2 Just trying to get to the truth. And there is no
3 judgments or anything like that.

4 The first biggest issue is we are here
5 planning to be here potentially through December 17.
6 And that's three weeks. 8:30 to 5:00. Conceivably,
7 if you were out in deliberations, it could go beyond
8 the 17th because jurors deliberate for however long
9 it takes, hours, days, sometimes longer.

10 Is there anything about that schedule that is
11 going to cause you a particular hardship?

12 **PROSPECTIVE JUROR:** No.

13 **MR. MURPHY:** All right. Thank you.

14 Anything about your relationship or knowledge
15 of Mr. Jackley, Mr. Oswald, Mr. Mandel, myself, my
16 paralegal, my client, that would cause you any concern
17 that you might have any bias?

18 **PROSPECTIVE JUROR:** No.

19 **MR. MURPHY:** Do you happen to recall about
20 witness I was on when you came in?

21 **PROSPECTIVE JUROR:** No, I'm afraid not.

22 **MR. MURPHY:** Well, I am just going to start:
23 Charlie Abourezk, Abe Alonzo, Roger Amiotte, Barry
24 Bachrach, Clyde Bellecourt -- I am sorry, Tina --
25 Serle Chapman, Theda Clarke, Jean Ann Day, Don

1 Dealing, Frank Dillon, Jeanette Eagle Hawk, Kamook
2 Banks or Kamook Ecoffey, Robert Ecoffey, Allen Garber,
3 Cleo Marshall Gates, James Graf, Naneek Graham,
4 Dr. Don Habbe, Candy Hamilton, Ray Hand Boy, Evan
5 Hodge, Angie Begay Janis, Arlo Looking Cloud, Denise
6 Maloney, vine Richard also known as Dick Marshall,
7 mike McRoden, Russell Means, David Melmer, Nathan
8 Merrick, George Palfy, Dr. Garry Peterson, Mitchell
9 Pourier, David Price Thelma Rios, Bob Riter, Madonna
10 Gilbert Thunderhawk, Gene Roach, William or Bill Wood,
11 Troy Lynn Irving Yellow Wood.

12 Any of those names familiar?

13 **PROSPECTIVE JUROR:** No.

14 **MR. MURPHY:** What about connections with
15 Judge Delaney or Tina Pruss?

16 **PROSPECTIVE JUROR:** No.

17 **MR. MURPHY:** Okay.

18 We were just getting up to the media, books,
19 movies, press coverage. I know there was other hands
20 and I just started with Mr. Piece in the back row.
21 Let's start this back row here.

22 Anybody with media -- that has read anything
23 about the case or read books or has formed an opinion
24 about the case?

25 In the third row?

1 Okay. Second row?

2 Ma'am, your name again?

3 **PROSPECTIVE JUROR:** Cara Boehler.

4 **MR. MURPHY:** What's the --

5 **PROSPECTIVE JUROR:** You know, Googling has a
6 lot to do with it. You read an article and go to
7 another, so I've done quite a bit of that.

8 **MR. MURPHY:** And that's -- you Googled the
9 Anna Mae Aquash case?

10 **PROSPECTIVE JUROR:** Yes.

11 **MR. MURPHY:** All right.

12 For historical reasons or just general
13 information?

14 **PROSPECTIVE JUROR:** Something would come up
15 in the news and you kind of look something up and it
16 leads to something else and then I was into it.

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

18 When you say you were into it, did it become
19 kind of a subject matter of interest or fascination
20 for you?

21 **PROSPECTIVE JUROR:** Yeah. Well, yeah.

22 **MR. MURPHY:** Okay.

23 In light of that -- I mean, there is tons of
24 stuff out there on the internet, do you feel that you
25 have already come to some conclusions about how she

1 died, and who is responsible, or any of those other
2 things?

3 And I don't want to you get into the
4 conclusions, but have you formed some opinions?

5 **PROSPECTIVE JUROR:** I have.

6 **MR. MURPHY:** All right.

7 And what the opinions are doesn't matter.
8 That's why I don't go into that.

9 Is it fair to say that you would have a hard
10 time putting those opinions aside or can you
11 completely put those aside and just listen to what
12 comes in on the witness stand and disregard everything
13 else you have read about the case?

14 **PROSPECTIVE JUROR:** I think it would be hard
15 to do. I don't know about impossible.

16 **MR. MURPHY:** Okay.

17 Well, let's talk about how hard. You know,
18 it's impossible -- why I say it that way is we don't
19 want to find out -- and it happens from time to time
20 that a juror sitting on a case, one of the 12 or 14
21 picked, suddenly says, boy, I didn't realize I had
22 these feels, but I'm filtering everything through what
23 I read or heard from somebody else, and then we start
24 the whole process over. We don't want to do that.
25 Nobody wants to try the case twice.

1 That's why I ask you to kind of search your
2 sole for a second and answer candidly, do you think
3 you can completely put that aside or do you have
4 doubts about your ability to do so?

5 **PROSPECTIVE JUROR:** I have doubts. I think
6 I'm pretty open-minded but --

7 **MR. MURPHY:** Sure. And we all try.

8 **PROSPECTIVE JUROR:** A lot of people want to
9 think that of themselves. It would be --

10 **MR. MURPHY:** If you were in my client's
11 shoes, would you want to have a jury of people -- or
12 if you were in the state's shoes. It could go either
13 way -- would you want to have a jury of 12 or 14
14 people with your preconceptions deciding the case?

15 **PROSPECTIVE JUROR:** Probably not.

16 **MR. MURPHY:** Sometimes a way for us to look
17 at it.

18 All right. I would then ask this juror be
19 allowed to be removed for cause, Your Honor.

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

21 **MR. JACKLEY:** May I voir dire?

22 **THE COURT:** You may.

23 **MR. JACKLEY:** Morning, ma'am.

24 **PROSPECTIVE JUROR:** Morning.

25 **MR. JACKLEY:** I'm going to anticipate that if

1 we go through the media and the different books that a
2 lot of people will have heard about this case or about
3 some the players in this case and other information
4 from the internet, the newspaper, the TV, et cetera.

5 So I just want to ask you a couple questions.
6 You said you could be an open person.

7 Do you feel you are an open person?

8 **PROSPECTIVE JUROR:** I'd like to think that I
9 am the, but I'm probably not.

10 **MR. JACKLEY:** You can -- do you consider
11 yourself a fair person?

12 **PROSPECTIVE JUROR:** I would say fair, but
13 judgmental a little.

14 **MR. JACKLEY:** In a trial -- in a jury trial,
15 such as this, the judge is going to provide jury
16 instructions, instructions on the law.

17 Do you feel you are the type of person that
18 could follow what those instructions are?

19 **PROSPECTIVE JUROR:** Probably.

20 **MR. JACKLEY:** Okay.

21 Do you feel that you could sit here and
22 separate what you may have seen in the newspaper, or
23 the TV, or in your case on the internet, and separate
24 that from what you would anticipate seeing or hearing
25 from the witness stand?

1 Could you separate that?

2 **PROSPECTIVE JUROR:** I don't know. I don't
3 think so.

4 **MR. JACKLEY:** Okay.

5 So, again, knowing what you know, what you've
6 seen on the internet, you don't feel that you would
7 make a good juror either for Mr. Graham or for the
8 State of South Dakota?

9 **PROSPECTIVE JUROR:** Probably not.

10 **MR. JACKLEY:** Okay.

11 No objection, Your Honor.

12 **THE COURT:** Thank you, ma'am. You may be
13 excused.

14 **THE CLERK:** Leah Lutheran.

15 **MR. MURPHY:** While Ms. Lutheran gets seated,
16 I think that dialogue where somebody was willing to
17 say, you know, I may be judgmental, that's what jury
18 selection is about is really bringing to the front
19 those kinds of things even when sometimes you feel
20 they are not so flattering about yourself and just
21 being straight forward and tell me your decisions
22 based on that.

23 Ms. Lutheran, you were one of the late
24 arrivals?

25 **PROSPECTIVE JUROR:** Definitely. Sorry.

1 **MR. MURPHY:** So what I am going to do is I am
2 going to cover some of the topics you heard me go
3 through with a couple of the other late arrivals.

4 First, do you have any questions about what
5 we're doing here in the jury selection process?

6 **PROSPECTIVE JUROR:** No.

7 **MR. MURPHY:** All right.

8 Do you have any relationships with anybody
9 here that is seated in front of the bar?

10 **PROSPECTIVE JUROR:** No.

11 **MR. MURPHY:** What about the personal hardship
12 issue of being in trial 8:30 to 5:00?

13 **PROSPECTIVE JUROR:** No.

14 **MR. MURPHY:** Okay.

15 You heard me read the witness list. Any
16 folks there that you know, had had contact with
17 personally, professionally, or otherwise?

18 **PROSPECTIVE JUROR:** I don't know him
19 personally. I hear names, but other than that, no.

20 **MR. MURPHY:** All right.

21 Then we're up to where we basically started.
22 Let me -- that was -- anybody else in this second row
23 have any media exposure, prejudgment based on what
24 you've read, seen on the internet, books you have
25 read, movies?

1 **PROSPECTIVE JUROR:** No.

2 **MR. MURPHY:** How about the first row?

3 I already mentioned -- already talked with
4 you, ma'am, about yours.

5 Let's start here in the first row here.

6 Anybody here been following this case in media or any
7 of the other cases?

8 **PROSPECTIVE JUROR:** I haven't been following,
9 this but I do work part time in media here in Rapid
10 City at Rushmore Radio. And it's not news oriented
11 and it won't affect anything, but I wanted to make
12 sure that wasn't an issue.

13 **MR. MURPHY:** Sure.

14 You are Mr. West?

15 **PROSPECTIVE JUROR:** Yes.

16 **MR. MURPHY:** All right.

17 Anybody in the second row there following the
18 case?

19 Have any in the third row?

20 Sir?

21 **PROSPECTIVE JUROR:** Wayne Rosby.

22 **MR. MURPHY:** Mr. Rosby, what have you learned
23 about the case?

24 **PROSPECTIVE JUROR:** I read the article
25 yesterday in the paper. I don't know much more about

1 it. You asked about historical stuff.

2 **MR. MURPHY:** Uh-huh.

3 **PROSPECTIVE JUROR:** I graduated approximate
4 high school in college in Sioux Falls so from time to
5 time I have heard things or read things. I can't tell
6 you a lot of specifics other than I know a little bit
7 about the AIM Movement. I have taken classes in
8 Indian studies from Augustana and graduate studies,
9 but I don't think any of that affects my opinion one
10 way or the other.

11 **MR. MURPHY:** All right.

12 And nothing about what you read in the
13 article in the paper yesterday affects your thought
14 process going in?

15 **PROSPECTIVE JUROR:** No, I don't see that it
16 would.

17 **MR. MURPHY:** Okay. Thank you.

18 Somebody else raise their hand?

19 Anybody else in the third row?

20 Okay. Going back to Mr. Nepstad.

21 **PROSPECTIVE JUROR:** That's correct. Just
22 back to listening to the discussions as a matter of
23 fairness, guilt or innocence, preconceived notions,
24 and I do have those. And that's my concern, just out
25 of fairness. I take jury duty very seriously.

1 **MR. MURPHY:** Sure.

2 **PROSPECTIVE JUROR:** I just wanted it to be
3 out there that I have --

4 **MR. MURPHY:** In going back to the discussion
5 we just had with the previous juror. Do you feel that
6 you just can't put those aside?

7 **PROSPECTIVE JUROR:** It would be difficult.
8 Just out of pure fairness.

9 **MR. MURPHY:** And that's what we want. That's
10 why we're here.

11 Kind of following up on the discussion that
12 both Mr. Jackley and I had with Ms. Boehler, how hard
13 would it be -- you said, candidly, it would be
14 difficult. It's hard to say what would be impossible
15 or not, but going into it, do you think that that is
16 going to be an impediment for you to listen to the
17 evidence from both sides freely?

18 **PROSPECTIVE JUROR:** Yes. Pretty opinionated
19 so --

20 **MR. MURPHY:** Pretty opinionated. My wife
21 tells me I am, too. So I won't hold that against you.

22 In light of this repeated discuss now, Your
23 Honor, I believe that this probably is a for-cause
24 issue now, Your Honor.

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

1 **THE COURT:** Thank you, sir. You may be
2 excused.

3 **THE CLERK:** Vincent Steele.

4 **MR. MURPHY:** Mr. Steele, I see that you were
5 one of the late arrivals, as well?

6 **PROSPECTIVE JUROR:** Yeah.

7 **MR. MURPHY:** Do you recall about when you
8 came into the courtroom?

9 **PROSPECTIVE JUROR:** The names were starting
10 to be read.

11 **MR. MURPHY:** Okay.

12 Now we've seen with a couple of the other
13 jurors I have gone through those topics. Let's start
14 with participants here. Any of us that you know, had
15 past contact with, positive negative, any of us look
16 familiar enough to you?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** What about any of the names that
19 I have read a couple times?

20 **PROSPECTIVE JUROR:** I am friends with Thelma
21 Rios.

22 **MR. MURPHY:** Would you mind standing. It's
23 hard for Tina to hear you.

24 **PROSPECTIVE JUROR:** I am friends with Thelma
25 Rios.

1 **MR. MURPHY:** You are friends with Thelma
2 Rios?

3 **PROSPECTIVE JUROR:** Yeah.

4 **MR. MURPHY:** Who else?

5 **PROSPECTIVE JUROR:** That's it.

6 **MR. MURPHY:** Anything about your friendship
7 with Ms. Rios -- she's not on trial here today. She
8 may be a witness.

9 Is it a friendship such that if she's a
10 witness you are going to accept her testimony in a way
11 differently than any other witness or are you going to
12 favor it more and just assume that it's the gospel
13 even if there is evidence to contrary?

14 **PROSPECTIVE JUROR:** I would -- probably will,
15 yeah.

16 **MR. MURPHY:** Okay.

17 Have you been friends with her for a long
18 time?

19 **PROSPECTIVE JUROR:** Yes.

20 **MR. MURPHY:** Years?

21 Been friends with her for years?

22 **PROSPECTIVE JUROR:** Yes.

23 **MR. MURPHY:** Okay.

24 If the judge instructs you to try to put
25 aside your friendship and just listen to the evidence

1 that's presented from the witness stand, are you going
2 to be able to do that or is your friendship going to
3 cause you difficulties?

4 **PROSPECTIVE JUROR:** It is going to cause a
5 lot of difficulties.

6 **MR. MURPHY:** A lot of difficulties?

7 Your Honor, I believe there is a basis for
8 cause.

9 **MR. JACKLEY:** May I have just a minute, Your
10 Honor?

11 May I voir dire for just a moment, Your
12 Honor?

13 **THE COURT:** You may.

14 **MR. JACKLEY:** Good morning, sir.

15 **PROSPECTIVE JUROR:** Good morning.

16 **MR. JACKLEY:** I would anticipate that we're
17 going to hear from a wide variety of witnesses and we
18 may well hear from Thelma Rios.

19 So my question to you, sir, is would you be
20 able to put aside in your mind that relationship and
21 weigh her testimony, if she testifies, fairly?

22 Would you be able to do that?

23 **PROSPECTIVE JUROR:** I probably would agree
24 with her.

25 **MR. JACKLEY:** You would.

1 So you wouldn't be able to judge her
2 testimony outside of that relationship that you have
3 with her?

4 **PROSPECTIVE JUROR:** Probably not.

5 **MR. JACKLEY:** No objection, Your Honor.
6 Thank you, sir.

7 **THE COURT:** Thank you, sir. You may be
8 excused.

9 **THE CLERK:** Brett Kavanaugh.

10 **MR. MURPHY:** Mr. Kavanaugh, before I get to
11 you, I saw Mr. Harbert, you raised your hand?

12 **PROSPECTIVE JUROR:** Yes, sir. James Harbert.

13 I have a professional relationship with a
14 missionary that was down at Sharps Corner on the
15 reservation. And he said that he and his family were
16 driven off the reservation by the American Indian
17 Movement which has kind of colored my feelings about
18 that particular issues. I don't know if that's an
19 issue in this trial or not, but I thought I would make
20 that known.

21 **MR. MURPHY:** Well, it may very well be in the
22 sense that the -- there is going to be a lot of
23 evidence presented or at least we anticipate about the
24 American Indian Movement. Many of the witnesses are
25 going to be people that are going to be perceived as

1 supporters of the American Indian movement, including
2 my client, at that time.

3 Do you feel that because of that experience
4 or that knowledge that that may taint your ability to
5 treat each witness fairly and my client fairly and put
6 all of that aside and just listen to what they have to
7 say or is it going to taint your view of the people
8 that come before the Court that have affiliations with
9 the American Indian movement?

10 **PROSPECTIVE JUROR:** I think I can listen to
11 the other. I only have one side of the story from the
12 missionary. I haven't heard the other side of the
13 story.

14 **MR. MURPHY:** Sure.

15 Are you saying that you can put it aside
16 completely?

17 **PROSPECTIVE JUROR:** Yes, sir.

18 **MR. MURPHY:** Great. Thank you.

19 Mr. Kavanaugh. I apologize for disregarding
20 you for a moment. You were one of the late arrivals.

21 Do you recall where I was when you came in?

22 **PROSPECTIVE JUROR:** It was just before you
23 started reading the list.

24 **MR. MURPHY:** Okay.

25 So let's talk about participants, any

1 connections with any of us?

2 **PROSPECTIVE JUROR:** No, sir.

3 **MR. MURPHY:** What about any of the witnesses
4 that you heard me list?

5 **PROSPECTIVE JUROR:** No, sir.

6 **MR. MURPHY:** The trial duration issue, is
7 there anything about your work, school --

8 **PROSPECTIVE JUROR:** There is, sir. I am a
9 student at the School of Mines. And up until --
10 actually December 17 is the day I take my last final.
11 But before that I have numerous exams and numerous
12 presentations and in-class time and I have to be in
13 school for -- the last three weeks of the semester.

14 **MR. MURPHY:** Before you got here we were down
15 that path with somebody else.

16 Your Honor, in light of the -- this
17 gentleman's school schedule, I move to release him.

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

19 **THE COURT:** Thank you, sir. You may be
20 excused.

21 **THE CLERK:** Loren Kasuske.

22 **MR. MURPHY:** Seems to be the hot seat.
23 That's the third juror.

24 So before I go back with Mr. Kasuske, I saw
25 Mr. Almeida.

1 **PROSPECTIVE JUROR:** Yeah.

2 **MR. MURPHY:** What's your situation.

3 **PROSPECTIVE JUROR:** I go to Western Dakota
4 Tech for law enforcement. I talked to my adviser on
5 the break, and that three weeks is going to be taking
6 tests and finals. He said he could make provisions
7 for me if you need me as a juror so I put that out
8 there.

9 **MR. MURPHY:** Sure.

10 What -- were the provisions the kind of
11 provisions that you can live with?

12 **PROSPECTIVE JUROR:** Yeah, they are.

13 **MR. MURPHY:** All right.

14 Then I appreciate you relaying that
15 information. If he's willing to make those
16 provisions --

17 Thank you.

18 Mr. Kasuske?

19 **PROSPECTIVE JUROR:** Kasuske.

20 **MR. MURPHY:** No even close.

21 So what point in the jury selection did you
22 come in?

23 **PROSPECTIVE JUROR:** From the beginning.

24 **MR. MURPHY:** Great. We're up to media.

25 Anything so far in?

1 **PROSPECTIVE JUROR:** No.

2 **MR. MURPHY:** Nothing. All right.

3 Saved me about four pages. Mr. West said us
4 too.

5 This is where sometimes it's nice to go
6 first, sometimes it's not so nice. You kind of have
7 to be the bad guy here.

8 Okay. Anybody -- I think I covered the
9 fourth row.

10 Anything about media coverage, anything else,
11 that affects anybody?

12 All right. I suppose if you worked for the
13 Rapid City Journal you probably wouldn't would be
14 happy that not many people read that article.

15 Okay. Let's talk about the agencies involved
16 in this case. I have already talked about my law
17 office and Mr. Mandel at the U.S. Attorney's Office,
18 these two gentlemen from the Attorney General's
19 Office.

20 Just go back to those agencies. Anybody had
21 any experiences or business or personal dealings with
22 any of those agencies that causes them to -- not
23 even -- do you have any contacts with these agencies?

24 What about the FBI or the Pennington County
25 State's Attorney's Office?

1 All right. There is some organizations in
2 town that work closely with the court system. There
3 is one called the CASA Program, Court Appointed
4 Special Advocates. There is WAVI, Working Against
5 Violence Incorporated. And MADD, Mothers Against
6 Drunk Driving.

7 Anybody here worked with or support any of
8 those organizations?

9 Okay. And you are Ms. Bendowski?

10 **PROSPECTIVE JUROR:** Uh-huh.

11 **MR. MURPHY:** What organization do you work
12 with?

13 **PROSPECTIVE JUROR:** WAVI and MADD.

14 **MR. MURPHY:** Okay.

15 And in what capacity in?

16 **PROSPECTIVE JUROR:** WAVI through Wal-Mart.
17 We team up with them every year during Christmas and
18 during the holiday seasons.

19 And then MADD, I am part of through --
20 started in high school and then just stuck with it.

21 **MR. MURPHY:** Okay.

22 Now, you work with WAVI. Do you work fairly
23 closely or support that mission pretty closely?

24 **PROSPECTIVE JUROR:** Yes.

25 **MR. MURPHY:** One of the things -- the

1 allegations in this case is that my client is
2 responsible for the death of a woman. He's charged
3 with two counts of murder. The victim is the same
4 person Anna Mae Aquash.

5 And going -- we'll talk about that later in a
6 more general context, but in light of the fact that
7 you worked with WAVI, knowing that, does that cause
8 you to feel that you might not be able to be fair to
9 my client because the allegation is a crime against a
10 woman?

11 **PROSPECTIVE JUROR:** No, I think I can be
12 unbiased.

13 **MR. MURPHY:** Nothing about the Mothers
14 Against Drunk driving activity?

15 This isn't a DUI case.

16 **PROSPECTIVE JUROR:** No.

17 **MR. MURPHY:** Anybody else on this side worked
18 with anybody?

19 Mr. Rosby?

20 **PROSPECTIVE JUROR:** Yes. I am an elementary
21 school principal and I've had contacts with those
22 organizations from time to time with the children that
23 I serve.

24 **MR. MURPHY:** Okay.

25 Does that -- do you think that will affect

1 you in how you view the case?

2 **PROSPECTIVE JUROR:** No.

3 **MR. MURPHY:** None of the people from WAVI or
4 CASA are going to be witnesses but I just wanted to
5 know.

6 Nothing there?

7 **PROSPECTIVE JUROR:** No.

8 **MR. MURPHY:** Mr. Kasuske?

9 **PROSPECTIVE JUROR:** My wife and I are foster
10 parents and adoptive parents and we deal with CASA
11 from time to time.

12 **MR. MURPHY:** All right.

13 **PROSPECTIVE JUROR:** For some of our foster
14 children.

15 **MR. MURPHY:** Sure.

16 Anything about that that causes you concern
17 about -- because they are involved in the court
18 system -- that might lead you to be unbiased in this
19 case?

20 **PROSPECTIVE JUROR:** No, sir.

21 **MR. MURPHY:** Let's go --

22 Sir, your name?

23 **PROSPECTIVE JUROR:** Just before you were
24 talking about the FBI, I do have friends that -- one
25 friend is a retired FBI agent and one friend is

1 current State's Attorney. But the FBI agent worked
2 after the time involved so he's told --

3 **MR. MURPHY:** Has he talked to you about the
4 case?

5 **PROSPECTIVE JUROR:** Not specifics just
6 general things he's heard about, but nothing specific.

7 **MR. MURPHY:** Do you mind me asking which FBI
8 agent that is?

9 **PROSPECTIVE JUROR:** William Grode.

10 **MR. MURPHY:** Okay.

11 And his son is a State's Attorney.

12 **PROSPECTIVE JUROR:** Yeah.

13 **MR. MURPHY:** So you know Patrick?

14 **PROSPECTIVE JUROR:** I do. Since grade
15 school.

16 **MR. MURPHY:** Anything -- are you going to be
17 able to put what they said aside?

18 **PROSPECTIVE JUROR:** Yes.

19 **MR. MURPHY:** Completely?

20 **PROSPECTIVE JUROR:** Yeah.

21 **MR. MURPHY:** Anybody else over here?

22 Okay. They covered the clock. Looks like
23 we're going into legislative session.

24 **THE COURT:** Ten minutes before the magic
25 hour.

1 **MR. MURPHY:** Ten minutes. Good. All right.

2 I want to talk to folks about their
3 experience or your experiences with the criminal
4 justice system.

5 And again, I want to really stress this is a
6 situation where private meetings are available. We
7 can do this in private if it is at all sensitive. I
8 want to start out by talking about people who have
9 been either victims of a crime, of a crime themselves,
10 or their spouse, their kids, a friend. I mean, it's
11 not just about you. It could be anybody that you have
12 a close relationship, and I want to talk about how
13 that experience of being close with someone who was a
14 victim of a crime may affect their ability to be
15 unbiased here.

16 And I am going to start with -- and one of
17 the allegations -- and this is -- let me start
18 generally with crimes of violence that do not have
19 anything to do with sexual assault or rape or child
20 molestation. Just general crimes of violence, I am
21 thinking aggravated assaults, murders, kidnappings,
22 anything like that.

23 Anybody here had any experience either
24 themselves or with somebody close to them regarding
25 any of those?

1 Okay, we will start in the front row.

2 Your name?

3 **PROSPECTIVE JUROR:** Russell Anderberg.

4 **MR. MURPHY:** What's your situation? Is it
5 something you would like to talk about in private?

6 **PROSPECTIVE JUROR:** Yeah.

7 My aunt --

8 **MR. MURPHY:** I'm sorry --

9 **PROSPECTIVE JUROR:** An aunt of mine --

10 **MR. MURPHY:** Did you want to talk in private
11 about that?

12 **PROSPECTIVE JUROR:** No. I'm fine.

13 An aunt of mine was kidnapped by one of my
14 uncles, and my grandma and my mom were pregnant at the
15 same time so he's like three months younger than I am.
16 She called me, of course -- I got some size to me --
17 to go hunt him down and take care of him. You know.
18 So, yeah.

19 **MR. MURPHY:** Well, and that's -- one of the
20 allegations is when the charges are read, there is two
21 charges pending against my client. One is
22 premeditated murder and one is called felony murder.
23 And felony murder is a murder that occurs during the
24 commission of some other felony, in this case that
25 other felony is alleged to be kidnapping. You have

1 had some personal experience with a kidnapping case.

2 How do you think that will affect your
3 ability to be completely unbiased going into this
4 case? Because that's.

5 **PROSPECTIVE JUROR:** It won't be unbiased.

6 **MR. MURPHY:** You won't be unbiased?

7 **PROSPECTIVE JUROR:** No. Because I know -- I
8 mean -- it took probably ten years where she was
9 always looking behind her. Even if we were at a
10 family function.

11 **MR. MURPHY:** All right.

12 **PROSPECTIVE JUROR:** Because she was always
13 jumpy.

14 **MR. MURPHY:** I hear you.

15 I would ask that Mr. Anderberg be excused.

16 **MR. JACKLEY:** May I voir dire, Your Honor?

17 **THE COURT:** You may.

18 **MR. JACKLEY:** Sir, the incident that you
19 talked about -- the matters you talked about that was
20 something wholly unrelated to this case; is that fair?

21 **PROSPECTIVE JUROR:** Correct.

22 **MR. JACKLEY:** Something that happened a long
23 time something?

24 **PROSPECTIVE JUROR:** Yeah.

25 **MR. JACKLEY:** In this trial, when the jury is

1 selected, you will hear evidence regarding, as
2 Mr. Murphy indicated, a murder and then a kidnapping
3 associated with the murder.

4 Do you believe that you could sit fairly and
5 hear that evidence regarding this case?

6 **PROSPECTIVE JUROR:** No.

7 **MR. JACKLEY:** No?

8 **PROSPECTIVE JUROR:** I could not.

9 **MR. JACKLEY:** And that's based upon those
10 prior experiences?

11 **PROSPECTIVE JUROR:** Yeah.

12 **MR. JACKLEY:** You are telling me that you
13 couldn't separate that prior experience from this
14 particular case in?

15 **PROSPECTIVE JUROR:** Probably not.

16 **MR. JACKLEY:** Okay.

17 Fair enough for me, and thank you.

18 I have no objection, Your Honor.

19 **THE COURT:** You may be excused.

20 How many we got left?

21 **THE CLERK:** Two left.

22 Jo Ann Lemke.

23 **MR. MURPHY:** Morning, Ms. Lemke.

24 Do you happen to be Dr. Lemke, the
25 pediatrician's, sister or mother?

1 **PROSPECTIVE JUROR:** No.

2 **MR. MURPHY:** Okay.

3 My daughter is there seems about every other
4 week. She skates competitively in ice skating and she
5 has a way of landing on her head a lot. I should be
6 getting frequent points or something.

7 Were you here from the beginning?

8 **PROSPECTIVE JUROR:** Uh-huh.

9 **MR. MURPHY:** All right.

10 Was there anything that we covered?

11 **PROSPECTIVE JUROR:** No problems at all.

12 **MR. MURPHY:** No problems? No witness issues?

13 **PROSPECTIVE JUROR:** No.

14 **MR. MURPHY:** Nothing about the media?

15 **PROSPECTIVE JUROR:** No.

16 **MR. MURPHY:** Okay.

17 We were just talking about crimes of violence
18 not of a sexual nature and there were some other
19 hands. Let me start the second row.

20 Third row?

21 Ma'am, your name?

22 **PROSPECTIVE JUROR:** Sheila Garrigan.

23 **MR. MURPHY:** Ms. Garrigan.

24 **PROSPECTIVE JUROR:** When I was around 15
25 years old, my uncle was stabbed by a bunch of

1 classmates of mine. And it took them about a month to
2 capture all of them. At that time I was sent to
3 Wyoming because I had to give my statement, I guess.
4 I was a key witness because I knew who they all were.

5 **MR. MURPHY:** Does that -- probably not a very
6 pleasurable experience on any level?

7 **PROSPECTIVE JUROR:** No.

8 **MR. MURPHY:** Is it something that even today
9 influences the way you look at the criminal justice
10 system or the way people who are accused of crimes are
11 treated?

12 **PROSPECTIVE JUROR:** No.

13 **MR. MURPHY:** No effect whatsoever on your
14 view of this case?

15 **PROSPECTIVE JUROR:** No. I think they got the
16 time they needed.

17 **MR. MURPHY:** Okay.

18 Anybody in the back row there?

19 Okay. Let's turn our attention over here.

20 Anybody on this side that has past exposure with the
21 criminal justice system, crimes of violence?

22 Ma'am?

23 **PROSPECTIVE JUROR:** Melanie Stephens.

24 **MR. MURPHY:** Ms. Stephens, would you mind
25 standing up so Tina can hear.

1 **PROSPECTIVE JUROR:** My sister was kidnapped
2 when we were in high school.

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

4 As you heard, kidnapping is going to be a
5 very big part of this case. It's what's called a
6 predicate offense to one of the charges. There will
7 be a requirement, if you are selected as a juror, to
8 determine whether a kidnapping occurred.

9 How is your experience with your sister going
10 to affect your ability to be completely fair?

11 **PROSPECTIVE JUROR:** It's still affecting us
12 today.

13 **MR. MURPHY:** It does.

14 **PROSPECTIVE JUROR:** Our relationship, yes.

15 **MR. MURPHY:** And it appears it's still a
16 matter of emotion?

17 **PROSPECTIVE JUROR:** Yes. Very much so.

18 **MR. MURPHY:** Just talking about it in the
19 abstract here, it's tough for you?

20 **PROSPECTIVE JUROR:** Yeah.

21 **MR. MURPHY:** I am not going to ask you any
22 further questions.

23 I'd ask that she be removed for cause.

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

25 **THE COURT:** Thank you, ma'am.

1 **THE CLERK:** Michael Stevenson.

2 **MR. MURPHY:** Mr. Stevenson, were you here
3 from the getgo?

4 **PROSPECTIVE JUROR:** Shortly after you
5 started.

6 **MR. MURPHY:** Shortly after.
7 Let's start with the personal hardship issue.

8 **PROSPECTIVE JUROR:** Yes. That's my only
9 concern would be leaving on the 10th.

10 **MR. MURPHY:** Okay.
11 Is that something you prearranged?

12 **PROSPECTIVE JUROR:** Yes.

13 **MR. MURPHY:** Is it -- I am not going to ask
14 you what it is, but is it something that is of
15 substantial importance to you?

16 **PROSPECTIVE JUROR:** Yeah, it is.

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

18 Would it be fair to say that if you were
19 forced to stay here as a juror, that you might not
20 give your full attention to the process?

21 **PROSPECTIVE JUROR:** A little bit, yes.

22 **MR. MURPHY:** Okay.

23 Your Honor, I move for cause.

24 **MR. JACKLEY:** May I ask John a question real
25 quick?

1 **MR. MURPHY:** Sir, when do you plan to be
2 back?

3 **PROSPECTIVE JUROR:** On the 22nd.

4 **MR. JACKLEY:** I have no objection, Your
5 Honor.

6 **THE COURT:** You may be excused.

7 **THE CLERK:** This is our last one.

8 Tony Randolph.

9 Mr. Randall, if you will raise your right
10 hand. I need to swear you in, please.

11 (Whereupon, a prospective juror was then
12 sworn.)

13 **THE CLERK:** Thank you.

14 If you will please take a seat where
15 Mr. Stevenson left.

16 **MR. MURPHY:** Mr. Randolph, I notice you just
17 arrived a few minutes ago and we have been going at
18 this for a couple hours now. I am going to go through
19 things relatively briefly.

20 First off, if you wouldn't mind looking
21 around, we got Bob Mandel from the U.S. Attorney's
22 Office, Rod Oswald from the Attorney General's Office,
23 Mr. Marty Jackley, the Attorney General, my paralegal
24 Erin Duchaneaux, my client, John Graham, myself. I am
25 John Murphy.

1 Do you recognize any of us?

2 **PROSPECTIVE JUROR:** No.

3 **MR. MURPHY:** And if you wouldn't mind because
4 she has to take down everything you say, if you could
5 answer out loud.

6 **PROSPECTIVE JUROR:** No, I don't.

7 **MR. MURPHY:** You have been sworn as a juror.
8 We're here to exchange information. If there is any
9 question that I ask you that you don't want to answer
10 in front of this crowd, we have the ability to do in
11 private.

12 Have you been through jury selection before?

13 **PROSPECTIVE JUROR:** No. This is my first
14 time.

15 **MR. MURPHY:** You didn't get a chance to see
16 the video or anything?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** The trial is expected to last
19 through December 17, for the next three weeks, 8:30
20 to 5:00. We will be doing half day on the 3rd we will
21 have all day off on the 10th.

22 Is there any personal or professional
23 hardship or substantial inconvenience that is going to
24 be caused to you by that?

25 **PROSPECTIVE JUROR:** No.

1 **MR. MURPHY:** Have you heard me read the names
2 of the witnesses?

3 **PROSPECTIVE JUROR:** No, I haven't.

4 **MR. MURPHY:** Okay.

5 I will go through these slowly so Tina gets
6 them down. Just say stop if you hear any name that
7 you have a relationship with.

8 Charlie Abourezk, Abe Alonzo, Roger Amiotte,
9 Barry Bachrach, Clyde Bellecourt, Serle Chapman, Theda
10 Clarke, Jean Ann Day, Don Dealing, Frank Dillon,
11 Jeanette Eagle Hawk, Kamook Banks or Kamook Ecoffey,
12 Robert Ecoffey, Allen Garber, Cleo Marshall Gates,
13 James Graf, Naneek Graham, Dr. Don Habbe, Candy
14 Hamilton, Ray Hand Boy, Evan Hodge, Angie Begay Janis,
15 Arlo Looking Cloud, Denise Maloney, vine Richard also
16 known as Dick Marshall, mike McRoden, Russell Means,
17 David Melmer, Nathan Merrick, George Palfy, Dr. Gary
18 Peterson, Mitchell Pourier, David Price Thelma Rios,
19 Bob Riter, Madonna Gilbert Thunderhawk, Gene Roach,
20 William or Bill Wood, Troy Lynn Irving Yellow Wood.

21 None of those?

22 **PROSPECTIVE JUROR:** No.

23 **MR. MURPHY:** This case is a case that
24 involves the killing of a woman named Anna Mae Aquash.
25 There is dispute that she was, in fact, killed. And

1 it's been the subject of multiple court cases. It was
2 the *United States vs. Arlo Looking Cloud* back in 2004.
3 Mr. Looking Cloud was convicted in the same
4 allegations or set of allegations as here today.

5 Dick Marshall went to trial in federal court
6 just in April. He was acquitted.

7 Thelma Rios was a defendant in this case up
8 until a couple weeks ago, and she entered a plea
9 bargain.

10 Any of those cases that have been covered by
11 the media -- any of those ring a bell?

12 **PROSPECTIVE JUROR:** No.

13 **MR. MURPHY:** Did you happen to read the Rapid
14 City Journal's article yesterday?

15 **PROSPECTIVE JUROR:** No, I didn't.

16 **MR. MURPHY:** Anything about the Aquash case
17 whether it be on the internet, books, movies,
18 documentaries, anything?

19 **PROSPECTIVE JUROR:** No.

20 **MR. MURPHY:** All right.

21 The agencies, the U.S. Attorney's Office, my
22 law office, the Attorney General's Office, FBI, any
23 relationships with any of those?

24 **PROSPECTIVE JUROR:** No.

25 **MR. MURPHY:** What about CASA, WAVI, MADD?

1 **PROSPECTIVE JUROR:** No.

2 **MR. MURPHY:** All right. Crimes of violence
3 outside of the context of a sex offense. Any
4 experiences with the court system or somebody close to
5 you that has been the victim?

6 **THE COURT:** Mr. Murphy, how much longer in
7 the general here? We're after 12:00.

8 **MR. MURPHY:** Okay. Just one more question.
9 You may sit down, sir.

10 I just want to make sure I -- we are
11 finishing with crimes of violence where you might have
12 been a victim or somebody close to you.

13 Was there anybody I missed on that side?

14 Okay. I think this would be a good breaking
15 point.

16 **THE COURT:** Ladies and gentlemen, we will
17 recess until approximately 1:15. The same instruction
18 applies. You may not under any set of circumstances
19 whatsoever discuss this case with anybody. Period.

20 Thank you.

21 (Off the record at 12:04 p.m.)

22 **THE COURT:** Ladies and gentlemen, obviously
23 we're running short of prospective jurors. I am going
24 to tell you what I think we're going to do. That is,
25 we're going to go as far as we can today. Whatever

1 number we are left with is prequalified. Once I know
2 where we are at the end of the day, I will tell you
3 whether you are coming back early in the morning or
4 not until the afternoon because we will attempt to go
5 through another panel without having you sit here like
6 bumps on a log.

7 That's the best I can do for you. The
8 weather and other things have gotten in our way and we
9 will do our best to handle that.

10 Mr. Murphy will continue his voir dire at
11 this time.

12 **MR. MURPHY:** Thank you.

13 I saw everybody shake their head. You don't
14 want to sit through this again.

15 Well, we left off --

16 I am sorry, your name?

17 **PROSPECTIVE JUROR:** Michelle Shelton. I have
18 a history of abuse. I didn't know if I should --

19 **MR. MURPHY:** Well, let's touch base. That's
20 kind of where I was going next so we'll start with
21 you.

22 Obviously it's of concern. Is that something
23 you feel comfortable talking in public or did --

24 **PROSPECTIVE JUROR:** Probably private.

25 **MR. MURPHY:** Private. Okay.

1 Would you write down -- start a list,
2 Ms. Shelton.

3 Your Honor, would we anticipate going through
4 those who are comfortable speaking in public and then
5 taking a recess?

6 **THE COURT:** Yes.

7 **MR. MURPHY:** So, again, anybody -- we'll just
8 recess 30, 40 minutes from now and anybody who had
9 responded that they would like to talk about something
10 in private we'll arrange that. It takes a while. We
11 have to get the court reporter's machine back there
12 and up and running.

13 Sir, your name.

14 **PROSPECTIVE JUROR:** Craig Greenwalt.

15 **MR. MURPHY:** Anybody else before we get
16 further into the problem? Okay.

17 I left off talking about people who either
18 themselves their family, friends, kids, whatever, who
19 have been victims of crimes. And I said I wanted to
20 talk before lunch about those crimes not involving
21 sexual assault, rape, child molestation, those kind of
22 things.

23 Now I want to talk about those experiences.
24 And this is obviously a very sensitive issue. And
25 it's why I broke it apart because we're about ten

1 minutes before lunch. And I didn't want to start down
2 this road and then break for lunch. So I reserved it
3 for after lunch.

4 One of the allegations -- my client is not
5 charged with rape. But one of the state's allegations
6 is that prior to Ms. Aquash being killed she was, in
7 fact, raped and they allege that my client did that.
8 That will be an issue in contest.

9 However, in my experience of doing this kind
10 of work for 17 years now, I understand there are a
11 number of people in the community, men and women, who
12 have been very strongly affected by sex crimes.
13 That's a pretty broad category, whether as a child or
14 one of their own children, whether as an adult,
15 whether one of their kids.

16 So that's going to be an issue. This is
17 where really the rubber hits the road in the sense of
18 asking you to be candid, whether in private or in
19 public, about how your experiences or the experiences
20 of those who you love or care for may affect your
21 ability to be impartial in this case when you know now
22 that the state is going to allege, essentially accuse
23 my client of committing a rape against a woman.

24 So I will start over on this side. The left
25 side here. Would anybody who has an issue -- some

1 response to that, raise your hand and then we'll
2 decide whether we're going to talk about it in public
3 or private. Anybody whether it was yourself or your
4 kids or friends.

5 Ma'am, you are Ms. Israel?

6 **PROSPECTIVE JUROR:** Yes.

7 **MR. MURPHY:** Is that something you would like
8 to reserve for a private discussion?

9 **PROSPECTIVE JUROR:** I would.

10 **MR. MURPHY:** Sure, Ms. Israel.

11 Anybody else on this side?

12 And you are Ms. --

13 **PROSPECTIVE JUROR:** Repstein.

14 **MR. MURPHY:** Is that also something you would
15 like to talk about in private or in public?

16 **PROSPECTIVE JUROR:** No. I can just -- my
17 grandson was abused. Not sexually, but verbally and
18 physically.

19 **MR. MURPHY:** Is it something -- is that
20 experience something that would affect your ability to
21 sit fairly here?

22 **PROSPECTIVE JUROR:** No.

23 **MR. MURPHY:** Okay.

24 Anybody else who has any connection with any
25 victim of a sexual assault of any kind or a child

1 molestation that would be willing to discuss that?

2 And we're asking that you please be willing
3 to discuss it. We'll use the most amount of
4 discretion as possible. It's not something to
5 publicize.

6 Anybody over here?

7 Okay. Let's turn to this side of the room.

8 Same issue. Sir, your name?

9 **PROSPECTIVE JUROR:** Robert Rasch.

10 **MR. MURPHY:** And Mr. Rasch, would you like to
11 talk about that in private?

12 **PROSPECTIVE JUROR:** Yeah.

13 **MR. MURPHY:** Okay. Anybody be else?

14 Ms. Bendowski?

15 **PROSPECTIVE JUROR:** My best friend's son was
16 and then my husband's -- my God -- my daughter's God
17 father's niece was.

18 **MR. MURPHY:** Okay.

19 Is that experience of having people close to
20 you that have been the victims of sexual assault
21 something that weighs heavily on your mind as you sit
22 here today?

23 **PROSPECTIVE JUROR:** Not really. It's
24 different circumstances.

25 **MR. MURPHY:** Not going to affect you in your

1 deliberations?

2 **PROSPECTIVE JUROR:** No.

3 **MR. MURPHY:** Anybody else that might be
4 affected by a crime of sexual.

5 **PROSPECTIVE JUROR:** Does that include
6 professionally?

7 **MR. MURPHY:** Yeah.

8 **PROSPECTIVE JUROR:** I work with a lot of
9 adjudicated youth who have sexual abuse issues.

10 **MR. MURPHY:** All right.

11 Both as victims and perpetrators?

12 **PROSPECTIVE JUROR:** Yes.

13 **MR. MURPHY:** All right.

14 Is that something that has caused you to form
15 opinions or biases that might influence the way you
16 view the evidence here?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** You work in corrections?

19 **PROSPECTIVE JUROR:** Yes.

20 **MR. MURPHY:** Okay.

21 Anybody else?

22 All right. Your Honor, would you like to --
23 we've got four people on the list that would like to
24 discuss the matter in private.

25 Should we recess now?

1 **THE COURT:** We should.

2 The rest of you folks kind of stay put and
3 you may talk about anything but this case. The
4 weather would be a good start.

5 **MR. MURPHY:** Should we call them one by one?

6 **THE COURT:** Yes.

7 **MR. MURPHY:** Ms. Shelton.

8 (Whereupon, the following proceedings were
9 then had in chambers.)

10 **MR. MURPHY:** We're back in chambers. We're
11 with Ms. Shelton. Just for the record, it's apparent
12 you are visibly distraught about the topic.

13 And so rather than dive too much into the
14 facts, I am just going to ask you initially if
15 whatever your experience or somebody's experience
16 close to you was, it's still present enough that this
17 case, if you were presented evidence in this case that
18 involved evidence of a sexual assault, would you find
19 it hard to remain unbiased and to focus purely on the
20 evidence that comes before you and not allow that
21 outside influence to come in?

22 **PROSPECTIVE JUROR:** The abuse I suffered was
23 as a child and it's hard for me because I haven't told
24 very many people. I think I can look at the facts. I
25 just really understand how it affects your life.

1 **MR. MURPHY:** Sure.

2 And one of the concerns, obviously here, is
3 the state is accusing my client of committing this
4 act. He's not charged with. But in light of your
5 personal experience and the effects it's had on you to
6 this day, do you think you could be fair to my client
7 because he's not charged with rape, but not allow that
8 allegation to affect the way you view him or the other
9 evidence that's presented?

10 **PROSPECTIVE JUROR:** Yeah. I think -- if I
11 just go off the facts.

12 I've been on a jury before that involved post
13 traumatic stress, which that was something I was
14 diagnosed with, but I know that you just go off the
15 facts.

16 **MR. MURPHY:** Okay.

17 And you feel comfortable -- if you we're in
18 my client's position, if we had a juror pool of all
19 the people that had past experiences and whatnot, you
20 would feel comfortable being judged by that group?

21 **PROSPECTIVE JUROR:** Uh-huh.

22 **MR. MURPHY:** I have no motion.

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

24 **MR. JACKLEY:** I will make it real brief.

25 Appreciating that all the jurors come with

1 different backgrounds and difference experiences, and
2 we're really asking everybody to set those aside to
3 view the evidence the best that they can as it comes
4 out, do you feel you could do that?

5 **PROSPECTIVE JUROR:** I do.

6 **MR. JACKLEY:** I appreciate that. I have
7 nothing further, Your Honor.

8 **THE COURT:** Thank you very much, ma'am.

9 (Off the record.)

10 **THE COURT:** Have a seat.

11 **PROSPECTIVE JUROR:** I didn't specifically
12 touch bases when you called me, and no offense taken,
13 but it did give me some time to do some reflection
14 over the lunch break.

15 And there is two things that you need to be
16 aware of. One is that my brother was hit in
17 California about -- a little over a year ago by a
18 hit-and-run driver was that eluding law enforcement.
19 And I was -- I was scheduled to leave Wednesday
20 morning to go pick up his remains which has been a
21 somewhat contentious situation in itself. And I was
22 actually going to put that aside. You deliver a very
23 persuasive point about civic duty.

24 But I also -- and you talked about news
25 articles, but I think beyond the immediate articles

1 and web research, the kids that were in this
2 jurisdiction and in this geography back in the 70s
3 were somewhat deeply -- affected by the events. And
4 not so much as a part of racial prejudice, but I think
5 the political organization at the time left a lot of
6 very significant and longstanding feelings within the
7 people -- at least some of the people in the
8 community.

9 And having thought about that over lunch, I
10 wouldn't want to be -- wouldn't want to be a defendant
11 on a trial with someone walking into it with that --
12 those long held feelings and impressions. And I think
13 you mentioned some individuals that were associated
14 with AIM. And I don't think I could regard their --
15 take into account their testimony with any
16 credibility.

17 **MR. MURPHY:** Sure. So basically if I hear
18 what you are saying, you personally lived through that
19 period of time?

20 **PROSPECTIVE JUROR:** Yes.

21 **MR. MURPHY:** Your were affected by it at the
22 time?

23 **PROSPECTIVE JUROR:** Yes.

24 **MR. MURPHY:** And you carry forward from that
25 views about the American Indian Movement and some of

1 the participants in the movement and you can't set
2 those aside?

3 **PROSPECTIVE JUROR:** No.

4 **MR. MURPHY:** Okay.

5 And they are pretty deeply held -- and sounds
6 from your voice very firmly held beliefs.

7 Essentially what you are saying
8 notwithstanding what instructions the judge might give
9 you about putting aside personal experiences and only
10 listening to the witnesses as they testify, folks who
11 might testify like Russell Means I am assuming you are
12 eluding to and Clyde Bellecourt, you could not treat
13 those like other witnesses but you would bring in your
14 past experiences?

15 **PROSPECTIVE JUROR:** Right.

16 **MR. MURPHY:** Your Honor, in light of that, I
17 would move for cause.

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

19 **MR. JACKLEY:** Sir, understanding that all of
20 the potential jurors bring with them background and
21 other life experiences, and appreciating that anybody
22 in the area over the age of let's just say 45 or 50
23 would have lived here when that was going on, let me
24 ask you a couple questions about that.

25 Was there anything that happened in the 70s

1 that happened specifically to you in other --

2 **PROSPECTIVE JUROR:** No.

3 **MR. JACKLEY:** So this would --

4 **PROSPECTIVE JUROR:** Actually, I would have to
5 retract that and the -- the posturing of AIM -- and I
6 probably have to coach that. I can't specifically say
7 they were AIM members, but I think that there were
8 individuals of that age group, young men, who did a
9 lot of posturing within the community as a show of
10 strength. And you know, given the fact that youth
11 will do that, it did have an impact on me specifically
12 and there were events that did affect me personally.

13 **MR. JACKLEY:** And you understand that AIM is
14 not on trial here?

15 **PROSPECTIVE JUROR:** I understand that.

16 I am talking about the individuals who were
17 in a leadership position of that organization at that
18 time, and the fact that they will be -- or they are
19 proposed to be witnesses in this trial.

20 **MR. JACKLEY:** Anyone in particular come to
21 mind?

22 **PROSPECTIVE JUROR:** Russell Means for one.
23 And that's -- he's the primary. I think he was
24 probably the most visible in the movement and I think
25 that he certainly scored high points and leaving the

1 longest impression certainly at that time was a very
2 negative impression and I haven't been able to absolve
3 myself of that.

4 **MR. JACKLEY:** So what are you telling me is
5 you have a hard time separating that prior knowledge
6 with what you may hear in this particular trial?

7 **PROSPECTIVE JUROR:** Yes, I will.

8 **MR. JACKLEY:** I have no objection, Your
9 Honor.

10 **THE COURT:** Any objections?

11 **MR. MURPHY:** No objection.

12 We both have no objection.

13 **THE COURT:** Fine.

14 Thank you, sir. You may be excused.

15 We have one potential juror left and we'll
16 call him or her in to replace in gentleman, but we
17 have a couple left to interview.

18 Okay.

19 (Off the record.)

20 **THE COURT:** Afternoon.

21 **MR. MURPHY:** Ma'am, I apologize. This is
22 about as private as we can get.

23 **PROSPECTIVE JUROR:** That's fine.

24 **MR. MURPHY:** These are the necessary court
25 personnel. Nothing I can do about that.

1 **PROSPECTIVE JUROR:** That's fine.

2 **MR. MURPHY:** When I brought up the topic of
3 past crimes, involving sexual violence whether
4 friends, family, whatever, you indicated you had
5 something you wanted to talk about.

6 Would you mind at this point explaining what
7 the response you had was and share it with us.

8 **PROSPECTIVE JUROR:** My son.

9 **MR. MURPHY:** A victim of a crime?

10 **PROSPECTIVE JUROR:** Molested.

11 **MR. MURPHY:** Okay.

12 And it goes without saying, but we have a
13 make a record, a fairly traumatic experience for a
14 mother to go through?

15 **PROSPECTIVE JUROR:** Yes.

16 **MR. MURPHY:** Very traumatic for your son.
17 May I ask how many years ago this was?

18 **PROSPECTIVE JUROR:** Probably about 24.

19 **MR. MURPHY:** Is it something that carries
20 with you today?

21 **PROSPECTIVE JUROR:** Oh, yeah. You never
22 forget.

23 **MR. MURPHY:** The issue before us is fairness.
24 And the state is going to allege that my client
25 committed a sexual crime against somebody who wasn't

1 in a position to resist. And I would assume that's
2 similar, at least factually, in a broad sense to what
3 happened to your son?

4 **PROSPECTIVE JUROR:** Right.

5 **MR. MURPHY:** Can you -- can you be fair to
6 somebody who is accused of a crime or something like
7 that knowing that your son went through something like
8 that?

9 **PROSPECTIVE JUROR:** I would try.

10 **MR. MURPHY:** Okay.

11 **PROSPECTIVE JUROR:** You know, I can't
12 necessarily say.

13 **MR. MURPHY:** Well, and that's -- everybody
14 can try. It's hard.

15 That's really why this is one of those stuff
16 points. We don't want to get into a situation where
17 at a later time once the jury is picked you realize
18 that you just can't put it aside especially once
19 evidence starts coming in. And especially evidence
20 that may be graphic of one kind or another.

21 Kind of looking ahead or projecting ahead, if
22 you start hearing evidence that the state puts
23 forward, that my client did in fact rape Anna Mae
24 Aquash even though he's not charged with that, how do
25 you envision that affecting your ability to be fair

1 and listen to all of the evidence and with murder
2 which he is charged with?

3 **PROSPECTIVE JUROR:** It -- it would have a
4 bearing I'm sure.

5 **MR. MURPHY:** Okay.

6 Is it -- is it a bearing that you can say
7 now, unequivocally, you could set aside or are you
8 saying I can't tell you? Or are you saying I can't
9 say with some sense of surety that I am going to put
10 that aside?

11 **PROSPECTIVE JUROR:** I can't necessarily say
12 that I can put it aside.

13 **MR. MURPHY:** All right.

14 **PROSPECTIVE JUROR:** The other thing I should
15 be candid about is where I grew up, we had issues with
16 Native Americans and I have to say that as well.

17 **MR. MURPHY:** Sure. And that's going to be a
18 topic.

19 **PROSPECTIVE JUROR:** My home town is Moberge.
20 And Russell Means was a big part of that up there.

21 **MR. MURPHY:** Okay.

22 And let's talk about that now because then we
23 don't have to do another private conference.

24 **PROSPECTIVE JUROR:** Okay.

25 **MR. MURPHY:** Russell Means is expected or

1 it's participated that he will be a witness as well as
2 perhaps other AIM leaders. There is going to be a lot
3 of evidence about AIM and we're also talking about the
4 race issue, too, about Native Americans.

5 Sounds like you have a pretty strong feelings
6 about Mr. Means and his conduct during the period of
7 time in the 70s.

8 **PROSPECTIVE JUROR:** Yes. very. And as well
9 as the ones that lived right across the river from us.

10 **MR. MURPHY:** Okay.

11 In a perfect world, each witness is supposed
12 to come to the witness stand --

13 **PROSPECTIVE JUROR:** Clean.

14 **MR. MURPHY:** -- clean. And that the jurors
15 are not supposed to have any preconceived notions,
16 favorable or unfavorable, about them. Just listen to
17 what comes out of their mouth and asses it for what it
18 is.

19 **PROSPECTIVE JUROR:** Right.

20 **MR. MURPHY:** Sounds to me what you are saying
21 when somebody like Russell Means comes to the stand or
22 other witnesses who may have been AIM activists or AIM
23 participants you are going to already have
24 preconceived notions about them and their character?

25 **PROSPECTIVE JUROR:** Certain individuals,

1 yeah.

2 **MR. MURPHY:** And they are not going to be
3 favorable impressions?

4 **PROSPECTIVE JUROR:** Correct.

5 **MR. MURPHY:** And even if you were asked to
6 set those aside, those are part of who you are right
7 now?

8 **PROSPECTIVE JUROR:** Correct.

9 **MR. MURPHY:** And you know, it's also easy for
10 a judge to say you got to set those aside, but what
11 we're trying to find out is if it's really something
12 you can do.

13 **PROSPECTIVE JUROR:** Right.

14 **MR. MURPHY:** Sounds to me like you are saying
15 you couldn't set those aside?

16 **PROSPECTIVE JUROR:** On top of what happened
17 with my son, it would probably be pretty difficult.

18 **MR. MURPHY:** All right.

19 **PROSPECTIVE JUROR:** Sum total. I don't mean
20 to --

21 **MR. MURPHY:** No.

22 **PROSPECTIVE JUROR:** No offense.

23 **MR. MURPHY:** That's why we're here. I really
24 mean it when we say my client -- we all want you to be
25 as candid as possible. There is no judgments here.

1 Everybody comes to the table with biases and
2 prejudices.

3 All right. Well, I guess one of the things
4 maybe to put this in another context is if you were on
5 trial, 12 jurors who had your experiences and your
6 feelings about the Indian people and AIM activists and
7 also the sex sexual assault, you wouldn't want to be
8 on trial with a juror like you?

9 **PROSPECTIVE JUROR:** No.

10 **MR. MURPHY:** Sometimes that's a good model.
11 I would move for cause.

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

13 **MR. JACKLEY:** Ma'am, in your discussions with
14 Mr. Murphy you were talking about it would be
15 difficult, and as you know all the jurors or potential
16 jurors that are here today come with them life
17 experiences.

18 **PROSPECTIVE JUROR:** Sure.

19 **MR. JACKLEY:** And with those experiences come
20 good and bad. And you are talking now a little bit
21 about your experiences you generally had in the
22 Mobridge area along with an experience that was 24
23 years ago?

24 **PROSPECTIVE JUROR:** Uh-huh.

25 **MR. JACKLEY:** Was there ever a specific

1 instance involving you and any particular AIM member
2 or are you just talking about general atmosphere?

3 **PROSPECTIVE JUROR:** Walking down the street
4 during the real focus on the AIM Movement, especially
5 in Mobridge and that area -- I and my sisters were
6 walking down the street and we were young at the time.
7 And some Native American men forced us to walk around
8 them off the sidewalk because they were in charge.

9 **MR. JACKLEY:** And you would agree that that
10 happened a long time?

11 **PROSPECTIVE JUROR:** It happened a long time
12 ago, but it sticks with you and I think it happened
13 because I was young and my sisters were younger than
14 I.

15 **MR. JACKLEY:** You have been very candid
16 today.

17 **PROSPECTIVE JUROR:** Yes.

18 **MR. JACKLEY:** Do you consider yourself a fair
19 person?

20 **PROSPECTIVE JUROR:** Yes.

21 **MR. JACKLEY:** Do you consider yourself
22 somebody that is able to follow instructions? For
23 example, if the judge were to give particular
24 instructions on what the law is, and those type
25 things, could you follow those instructions?

1 **PROSPECTIVE JUROR:** Regarding the law, yes.

2 **MR. JACKLEY:** And you talked about how
3 this -- it may be difficult but you would agree that,
4 you know, given certain life experiences to hear a
5 murder case with a murder/kidnapping allegation in and
6 of itself can be difficult; would that be fair?

7 **PROSPECTIVE JUROR:** True.

8 **MR. JACKLEY:** Do you think you could sit
9 there and set aside -- even though it would be
10 difficult -- but set aside those past experiences and
11 view the evidence as it would come in in this trial?

12 Could you do that?

13 **PROSPECTIVE JUROR:** I could possibly with
14 everything except the molestation of my son.

15 **MR. JACKLEY:** Okay.

16 **PROSPECTIVE JUROR:** As a mother, it's just
17 very difficult.

18 **MR. JACKLEY:** Okay.

19 That's the incident that happened about 24
20 years ago?

21 **PROSPECTIVE JUROR:** Uh-huh.

22 **MR. JACKLEY:** When you say except for that,
23 what do you mean by that?

24 **PROSPECTIVE JUROR:** Being protective and him
25 being forced at that age and a rape.

1 I also had a couple of gals that worked for
2 me that were raped, you know, and I was the manager.
3 I'm retired now. But from that perspective and
4 knowing what they went through so it's kind of hard.

5 **MR. JACKLEY:** It's hard --

6 **PROSPECTIVE JUROR:** To be objective.

7 **MR. JACKLEY:** It's hard, but could you
8 separate those instances to give both in this instance
9 the state and the defendant a fair trial as fair as
10 you could do?

11 **PROSPECTIVE JUROR:** I would try.

12 **MR. JACKLEY:** I pass for cause, Your Honor.

13 **THE COURT:** I am not going to. I think the
14 response to the question about sitting on a jury was a
15 very flat emphatic no.

16 I think the combinations of feelings which
17 ran high in that time era on both sides are such that,
18 unlike politicians, are not disremembered. I think
19 she has a clear recollection of those events. They
20 sound real. They were certainly power plays on both
21 sides. And her feelings, I gather, are much akin to
22 the old folks trying to vote when the Black Panthers
23 were standing in front of the Pennsylvania voting
24 booth.

25 I think you couple that with the incidents

1 with her son, I don't think I would risk either the
2 state or Mr. Graham's position when she's as candid as
3 she has been.

4 So the challenge for cause is granted. You
5 may be excused ma'am.

6 Thank you.

7 (Off the record.)

8 **THE COURT:** Mr. Fur.

9 **MR. MURPHY:** This is as private as we can
10 get. There is a number of people that are designated
11 as essential courtroom personnel. This is as private
12 as we can go.

13 You indicated you had a response on the topic
14 of crimes of violence, specifically sex crimes. You
15 indicated you had a response so this is our time to
16 hear from you as to what your experience and the
17 experience of somebody close to you was and how that
18 will affect your ability to be a fair juror here.

19 **PROSPECTIVE JUROR:** Okay.

20 Somebody very close to me, I don't know,
21 about 14, 15 years ago in another state was affiliated
22 with a biker gang who I later found out raped her and
23 sewed her mouth shut. And I guess when I still look
24 at the scars to this day -- I don't know. It's pretty
25 hard to deal with.

1 **MR. MURPHY:** Okay.

2 Obviously it affects you to this day?

3 **PROSPECTIVE JUROR:** Uh-huh.

4 **MR. MURPHY:** Is this some person close to you
5 presently?

6 **PROSPECTIVE JUROR:** Uh-huh.

7 **MR. MURPHY:** All right.

8 Let's tie that to this case. The state is
9 alleging and is going to present evidence that my
10 client raped Anna Mae Aquash. Knowing that, that they
11 are going to make that allegation -- and they haven't
12 charged him with that, but it's going to be some of
13 the evidence they're going to put out against him --
14 initially what is your thoughts of how you are going
15 to be able to -- how you are going to react to that
16 evidence and how you are going to set that aside in
17 determining whether or not he was responsible for
18 that?

19 **PROSPECTIVE JUROR:** Well, I guess the way I
20 feel about that is I know that this person or people
21 that did this were never -- never went to -- this
22 person never went to the police and it was never --
23 justice was never served. And I just don't know if
24 that's going to have a bearing on my opinion or the
25 way I feel that the outcome of anything should be, I

1 guess.

2 **MR. MURPHY:** I mean, would you feel that part
3 of your role here might be then to see that justice is
4 serviced here in regard to this case because it wasn't
5 served in your friend's case?

6 **PROSPECTIVE JUROR:** I don't know if I can
7 honesty -- I mean, maybe. I can't say, you know. Not
8 being if that position I can't say.

9 **MR. MURPHY:** One of the things that's unique
10 about this case, as a juror, it's conceivable that you
11 could determine in your mind that my client raped Anna
12 Mae Aquash, but still have to decide whether or not he
13 killed her. Those are separate events. And you don't
14 have to -- whether or not he committed the rape is a
15 separate and distinct issue from whether or not he
16 committed the crime of murder.

17 What I am trying to ask you, and I am not
18 doing a great job of it -- is if you were to come to
19 the conclusion that my client ask did in fact rape
20 Anna Mae Aquash, in light of your personal experiences
21 with the crime of rape, is that going to affect your
22 ability to look fairly at whether the evidence
23 supports a finding that he committed the crime of
24 murder?

25 **PROSPECTIVE JUROR:** Probably not.

1 **MR. MURPHY:** Probably not -- it won't
2 affect -- you won't be so outraged by the issue of the
3 rape that it would affect your ability to look fairly
4 at the evidence as it would pertain to murder?

5 **PROSPECTIVE JUROR:** Probably not.

6 **MR. MURPHY:** Probably not. Okay.

7 **PROSPECTIVE JUROR:** I mean, I can't say.

8 **MR. MURPHY:** No, I know. None of us can
9 until you are presented with the issue. We're just
10 trying to get our best sense of it.

11 You would endeavor to try to put those things
12 apart, separate them, and look fairly at the evidence
13 whether it's for a finding that he committed the crime
14 of murder and not allow your experiences as somebody
15 close to a rape victim affect that?

16 **PROSPECTIVE JUROR:** Yeah. I could possibly
17 try, I guess. I mean, I -- I can't say.

18 **MR. MURPHY:** Okay.

19 **THE COURT:** Mr. Jackley, do you have
20 anything?

21 **MR. JACKLEY:** Sir, you talked about an event
22 that happened to somebody close to you 14 or 15 years
23 ago.

24 Do you feel you would be able to separate
25 that event and keep an open mind to the evidence you

1 hear in this trial?

2 Do you feel you could do that for us?

3 **PROSPECTIVE JUROR:** Yeah, I think so.

4 **MR. JACKLEY:** And do you feel you also could
5 follow the Judge's instructions as the Judge may
6 instruct you with respect to what may or may not be
7 evidence relating to what Mr. Murphy has talked about?

8 Can you follow the Judge's instructions?

9 **PROSPECTIVE JUROR:** Yeah.

10 **THE COURT:** I have some questions because the
11 gentleman is obviously emotionally distraught about
12 this.

13 Is that fair?

14 **MR. JACKLEY:** Uh-huh.

15 **THE COURT:** Kind of in light of what
16 Mr. Murphy questioned about was the rape is a separate
17 event. But the question in my mind is if there are
18 allegations or arguments about one of the reasons she
19 was killed or part of the reasons or motive for
20 killing her was a rape, how is your ability to
21 separate that out and address only the murder without
22 any consideration of the rape?

23 **PROSPECTIVE JUROR:** I don't know. I honestly
24 can't say, I guess.

25 **THE COURT:** On the Court's motion, the Court

1 is going to excuse the juror for cause. Simply
2 believe because of that potential connection.

3 **MR. JACKLEY:** Thank you, sir.

4 **THE COURT:** Thank you.

5 **MR. MURPHY:** That's all we've got for
6 privates.

7 **THE COURT:** Yeah.

8 (Whereupon, the following proceedings were
9 then had in open court.)

10 **THE CLERK:** Marvin Lockman.

11 If would you please raise your right hand. I
12 need to swear you in, please.

13 **THE COURT:** Thank you.

14 **THE CLERK:** Please have a seat next to the
15 lady there in the brown sweater.

16 Okay.

17 **MR. MURPHY:** My name is John Murphy. I
18 really hate to do this to the rest of your folks. We
19 have been waiting for somebody to throw something. We
20 have been going since 9:30 this morning, and we've
21 covered a number of topics, and so I have to go back
22 through those with you.

23 I am going to go back through with you in an
24 abbreviated way, but I still have to do a meaningful
25 job of taking the time to make sure that none of the

1 topics we covered so far caused you to not be able to
2 be fair to one side or the other in this case.

3 As I said, my name is John Murphy. I am John
4 Graham's attorney, John Graham, who is the defendant
5 in this case. You are going to find out he is charged
6 with murder. There is two counts: Premedicated
7 murder and felony murder. Felony murder in this case
8 means someone was killed during the course of another
9 felony, and in this case that was a kidnapping.

10 Next to John is my paralegal Erin Duchaneaux.

11 The far end of the table is Marty Jackley,
12 the Attorney General for the State of South Dakota,
13 his Assistant Attorney General, Rod Oswald, and Bob
14 Mandel from the U.S. Attorney's Office.

15 Do you know any of us or have any personal or
16 professional contacts with any of us?

17 **PROSPECTIVE JUROR:** No, I don't.

18 **MR. MURPHY:** We're going to have clerks
19 coming and going so we wont' go through that. But we
20 have Judge Delaney and Tina Pruss is who is the court
21 reporter.

22 Do you have any contacts personally or
23 professionally with either of them.

24 **PROSPECTIVE JUROR:** No, I don't.

25 **MR. MURPHY:** The trial that we're here about

1 is expected to last through December 17. And we'll be
2 going 8:30 to 5:00 each day. December 3 will be a
3 half day and we'll recess at noon, and December 10 we
4 will have off.

5 Any personal, work, family, medical
6 obligations between -- it's three weeks -- the next
7 three weeks that it's going to make it extremely
8 difficult for you to sit as a juror for that duration?

9 **PROSPECTIVE JUROR:** No.

10 **MR. MURPHY:** Have you had any involvement or
11 were you involved in the reelection campaign of
12 Mr. Jackley?

13 **PROSPECTIVE JUROR:** No.

14 **MR. MURPHY:** I am now going to go through
15 this long list of witnesses one by one. I am going to
16 read them so if -- during -- I say a name, and you
17 recognize the name, just say stop out loud and I will
18 stop, okay?

19 **PROSPECTIVE JUROR:** Okay.

20 **MR. MURPHY:** Charlie Abourezk, Abe Alonzo,
21 Roger Amiotte, Barry Bachrach, Clyde Bellecourt, Serle
22 Chapman, Theda Clarke, Jean Ann Day, Don Dealing,
23 Frank Dillon, Jeanette Eagle Hawk, Kamook Banks or
24 Kamook Ecoffey, Robert Ecoffey, Allen Garber, Cleo
25 Marshall Gates, James Graf, Naneek Graham, Dr. Don

1 Habbe, Candy Hamilton, Ray Handboy, Evan Hodge, Angie
2 Begay Janis, Arlo Looking Cloud, Denise Maloney, vine
3 Richard also known as Dick Marshall, mike McRoden,
4 Russell Means, David Melmer, Nathan Merrick, George
5 Palfy, Dr. Gary Peterson, Mitchell Pourier, David
6 Price Thelma Rios, Bob Riter, Madonna Gilbert
7 Thunderhawk, Gene Roach, William or Bill Wood, Troy
8 Lynn Irving Yellow Wood.

9 Any of those?

10 **PROSPECTIVE JUROR:** No.

11 **MR. MURPHY:** Okay.

12 Now let's talk -- every time I read that list
13 I dry out.

14 Just so you know, you weren't the only late
15 arrival. We have been through this process so I don't
16 want you --

17 **PROSPECTIVE JUROR:** So I'm not special?

18 **MR. MURPHY:** Not special.

19 This case is -- has been well publicized.
20 This involves the murder of a woman named Anna Mae
21 Aquash. It was on the front cover of the Rapid City
22 Journal yesterday. There has been three other cases
23 involving the same facts and allegations. Arlo
24 Looking Cloud went to trial in 2004. And he was
25 convicted of that offense.

1 Dick Marshall, Richard Marshall, went to
2 trial in just April of this year, and he was
3 acquitted.

4 And Thelma Rios was charged up until about
5 two or three weeks ago and she entered a plea bargain.

6 Have you follow any of those cases on the
7 news, internet?

8 **PROSPECTIVE JUROR:** I haven't really followed
9 them, no.

10 **MR. MURPHY:** Are you familiar with the topic
11 or the subject matter?

12 **PROSPECTIVE JUROR:** I have read, like, the
13 headlines. That would be about the extent of it.

14 **MR. MURPHY:** Anything from reading that
15 that's caused you any -- to form any opinions as to
16 what happened or who did what or anything like that?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** Okay.

19 What about some of the books that have been
20 written about the incidents -- the allegation was that
21 this crime occurred in 1975 or 76. And that was the
22 time during which the American Indian Movement was
23 active down in Pine Ridge. There was books like In
24 The Spirit of Crazy Horse and some movies like
25 Incident at Oglala about that time frame.

1 Do you recall watching or reading any of
2 those things?

3 **PROSPECTIVE JUROR:** No.

4 **MR. MURPHY:** Okay.

5 A number of agencies involved in this case.
6 There is my law office, Murphy Law Office, and the
7 U.S. Attorney's Office and the Attorney General's
8 Office and the Pennington County State's Attorney's
9 Office.

10 Do you have any involvement professionally or
11 personally with people involved in any of those
12 agencies?

13 **PROSPECTIVE JUROR:** No.

14 **MR. MURPHY:** What about with the FBI or the
15 Bureau of Indian Affairs?

16 **PROSPECTIVE JUROR:** No.

17 **MR. MURPHY:** Any involvement with Court
18 Appointed Special Advocates, WAVI, which is Working
19 Against Violence Incorporated or Mothers Against Drunk
20 Driving?

21 **PROSPECTIVE JUROR:** No.

22 **MR. MURPHY:** All right.

23 Now, we covered people who have, either
24 themselves, or a friend, a family member, children,
25 spouses, whatever, who have been the victims of

1 crimes. That's where we just started off here or left
2 off.

3 Have you or anybody close to you --

4 Let me start this by saying we just came back
5 from having private hearings.

6 If there is anything in response to that that
7 you don't want to take up in this public forum, all
8 you have to do is say, yes, I have an answer but I
9 would like to talk in private.

10 Has anybody close to you or yourself been
11 involved as a victim of a crime whether that's rape,
12 sexual assault, any crime of violence or any crime to
13 any extent where you feel that it might affect your
14 ability to sit fairly in this case.

15 **PROSPECTIVE JUROR:** No.

16 **MR. MURPHY:** Okay.

17 Well, we caught you up to speed pretty
18 quickly. I'm sure everybody is saying, boy, I wish
19 the whole morning had gone that quick.

20 All right. We're going to move past some of
21 the things we just talked about and go into whether or
22 not you have ever been a juror in a criminal case.

23 Of the 56 here, or I guess we're down to 54,
24 who has about juror that has actually sat on a jury
25 before? Okay. Lots of you.

1 Who has sat on a criminal case before?

2 **PROSPECTIVE JUROR:** Which means what?

3 **MR. MURPHY:** Where a crime was charged. It
4 wasn't a case involving, like, a fight over money but
5 it was where somebody was charged with DUI or
6 aggravated assault or something like that.

7 I am not going to go into what individual
8 cases you sat on, but I want to ask, did anybody who
9 sat on a jury in a criminal case come out of it having
10 had a negative experience?

11 And what I'm talking about are having been
12 involved in jury selection where somebody reports they
13 were on a jury and they felt that they got browbeaten
14 by the other jurors or that they were forced into
15 rendering a verdict that they didn't feel comfortable
16 with or they were dismayed by the level of the
17 process.

18 Anybody have any negative experiences as
19 jurors? Good. Okay.

20 All right. Well, now we're going to go -- we
21 talked about some of the specific issues. Now we're
22 going to talk about some of the legal principles
23 involved in this case or in any criminal case. And
24 the reason we're going to talk about those is because
25 the judge is going to give you the law.

1 And he's going to tell you, like I said,
2 it's -- many of you who have been on juries know you
3 get this big packet of law. And one of the
4 instructions says, if you are a juror, you are the
5 judges of the facts. That is, you decide what
6 happened. But Judge Delaney is the judge of the law.
7 He tells you what law you have to follow.

8 And it's not in every case that people say I
9 can follow the law and that's why I am going to talk
10 to you about this. Some people say, you know what, I
11 would like to, I try to, but I know in advance I
12 can't. And that's why I am going to talk about some
13 of these things.

14 The first of those is the presumption of
15 innocence. Who here understands the concept of
16 presumption of innocence?

17 Sir, your name?

18 **PROSPECTIVE JUROR:** James Harbert.

19 **MR. MURPHY:** Mr. Harbert, just explain what
20 you understand the presumption of innocence to be.

21 **PROSPECTIVE JUROR:** The defendant is innocent
22 until proven guilty at a reasonable -- proof of guilt,
23 I guess you could say. That's how I understand it.

24 **MR. MURPHY:** Anybody have any serious
25 disagreement with that discussion? Not that you would

1 probably attack the guy. I volunteered him for you.

2 Anyways, the presumption of innocence. So
3 now I am going to give you basically a quiz. I am
4 going to ask you, when -- for those 54 of you that are
5 left, if the judge got an email from the governor that
6 said, boy, the budget is tight. Are you going to have
7 to wrap this trial up right now and get a vote. You
8 had a choice, first choice, find my client guilty;
9 second choice, find my client not guilty; third option
10 ask for more information. Say I need more information
11 before I can vote.

12 Who would vote guilty?

13 Who would vote not guilty?

14 Okay. Who would vote need more information?

15 Okay. Really big problem for me because I'm
16 never supposed to tell jurors they are wrong, but
17 almost everybody except for three of you are wrong.
18 They always say, you know, when you read the trial
19 books, never tell juror they are wrong.

20 But my client is sitting here presumed
21 innocent and the state hasn't put on any evidence.
22 And so if the governor says, we're out of money, we
23 got to wrap this thing up, the only vote that you
24 could reasonably come back with -- legally come back
25 with is that he is innocent. He's not guilty of the

1 crime because no evidence has been put forward.

2 As the gentleman said just a moment ago, he's
3 presumed innocent and that presumption carries all the
4 way to the end of the trial.

5 Now, dovetailing into the presumption of
6 innocence is -- part of this is, yeah, he's presumed
7 innocent but he's been charged with a crime. I see
8 some head shaking. He's sitting here charged with a
9 cry. You know, when we're dealing with our daily
10 affairs, the daily way we go about our lives, there is
11 that saying, well, where there smoke there is fire.
12 And I want to ask you seriously to look inside
13 yourselves for a moment and say, can I really presume
14 that Mr. Graham innocent because the state has gone
15 through all the effort of charging him. And we're
16 sitting now here in a courtroom about to start a jury
17 trial.

18 And so, ma'am, your name is?

19 **PROSPECTIVE JUROR:** Jackie Andersen.

20 **MR. MURPHY:** I saw you nodding your head
21 right away. And --

22 **PROSPECTIVE JUROR:** To me to get where you
23 are here, you are going to prove you are innocent, not
24 guilty.

25 **MR. MURPHY:** Okay. And that's why I am

1 bringing this up.

2 **PROSPECTIVE JUROR:** And that's what I have --
3 to me if you got this far, there were some
4 circumstances, and now you have to prove the
5 innocence, not the guilty.

6 **MR. MURPHY:** So you are saying that because
7 of the fact that we're here today --

8 **PROSPECTIVE JUROR:** There is some question
9 about he is really innocent.

10 **MR. MURPHY:** Your belief is, and not at all
11 unusual, that it's his job to show that he's innocent
12 of the crime, not the state's job to show that he's
13 guilty?

14 **PROSPECTIVE JUROR:** Because he's gotten this
15 far.

16 **MR. MURPHY:** Okay.

17 Did you have more?

18 **PROSPECTIVE JUROR:** If it was -- no.

19 **MR. MURPHY:** Anybody else share that view or
20 can relate to that view?

21 Okay. Well, what -- let's go back then. If
22 the judge says that Mr. Graham has no duty to prove
23 anything, he is presumed innocent, the state carries
24 the burden every step of the way from the beginning to
25 the end, can you reconcile that with your own personal

1 beliefs because he's gotten this far he should have to
2 prove that he's innocent?

3 **PROSPECTIVE JUROR:** Can I -- say that again.
4 What?

5 You want to know if I can change to the fact
6 that he's innocent until proven guilty?

7 **MR. MURPHY:** Can you accept that he doesn't
8 have to prove anything? I don't have to ask a single
9 question.

10 **PROSPECTIVE JUROR:** No.

11 **MR. MURPHY:** You are saying no?

12 **PROSPECTIVE JUROR:** No.

13 **MR. MURPHY:** No matter what the instructions
14 of the law?

15 **PROSPECTIVE JUROR:** No, I am sorry. That's
16 honest.

17 **MR. MURPHY:** I want you to be honest. Don't
18 ever apologize. That's why I said in the beginning
19 we're here not about judging, not about anything else.
20 We just want candor. You have seen 30 and people have
21 already been excused because a lot of it because they
22 were candid.

23 I heard you now say, regardless of what the
24 judge tells you, in light of the posture of the case,
25 my client is going to need to prove that he didn't

1 commit the crimes?

2 **PROSPECTIVE JUROR:** Correct.

3 **MR. MURPHY:** That's a pretty strongly held
4 belief?

5 **PROSPECTIVE JUROR:** I have --

6 **MR. MURPHY:** I am asking you. You are
7 pretty --

8 **PROSPECTIVE JUROR:** Judgmental, yes. Or
9 however, yeah.

10 **MR. MURPHY:** Okay. All right.

11 Your Honor, in light of that I ask that the
12 witness be excused for cause.

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

14 **MR. JACKLEY:** May I voir dire?

15 **THE COURT:** You may.

16 **MR. JACKLEY:** Ma'am, I agree with counsel in
17 part. Under the rules and under what the Judge's
18 instructions are going to be is that a defendant is
19 presumed innocent until such time as the state proves
20 beyond a reasonable doubt guilt.

21 Do you consider yourself a fair person?

22 **PROSPECTIVE JUROR:** I try.

23 **MR. JACKLEY:** And that's all I can ask.

24 And if the judge were to instruct you that
25 the defendant -- that this defendant is presumed

1 innocent until such time as the government proves
2 beyond a reasonable doubt the guilt, could you follow
3 that instruction?

4 No?

5 **PROSPECTIVE JUROR:** I can tell myself that's
6 what I am supposed to be doing, but I don't think that
7 way. So honestly, no. It would have to -- they would
8 have to prove innocent or not enough evidence or
9 whatever because to me, to get to a point, there has
10 to be some burden of guilt to get you here to begin
11 with. I mean, That's just how I think.

12 **MR. JACKLEY:** Could you -- do you think you
13 could set aside that background or that perception and
14 follow what the Judge would instruct in this case?

15 Could you do that?

16 **PROSPECTIVE JUROR:** No.

17 **MR. JACKLEY:** I will pass for cause, Your
18 Honor.

19 **THE COURT:** Ma'am, I am going to excuse you
20 from the jury. I thank you for your candor.

21 In accordance with what Mr. Murphy is asking,
22 his statements of the law are indeed correct. There
23 is a presumption of innocence that follows the
24 defendant, Mr. Graham, throughout until each of you
25 are satisfied beyond a reasonable doubt that the state

1 has proved -- has proven every element of a crime
2 charged.

3 The defendant at no point in time --
4 Mr. Graham, at no point in time has the obligation to
5 prove or disprove anything.

6 If you will recall, you heard time and again
7 on television and radio, that there is a right to
8 silence. That right is absolutely worthless if
9 Mr. Graham can remain silent and you draw an inference
10 because of that that he must be guilty.

11 You may not take his exercise of silence --
12 he's the only one that can waive it. What he will do
13 I don't have a clue. But if he remains silent, you
14 cannot base anything upon that silence. It is not a
15 hint of guilt in any way, shape, or form, and you must
16 accept that principle if we're going to try this case
17 or any other criminal case.

18 And the fact that this is murder makes it no
19 different under the rules of law than DUI or
20 shoplifting. The rules apply across the board and you
21 need be comfortable with that.

22 Thank you.

23 **MR. MURPHY:** Ma'am, you had a question.

24 **PROSPECTIVE JUROR:** I had a question. I
25 agree with her.

1 **MR. MURPHY:** You agree with her?

2 **PROSPECTIVE JUROR:** Yeah.

3 **MR. MURPHY:** And going back to -- even though
4 the judge has just told you that the law says you
5 should presume my client innocent and not require that
6 he put forward any evidence --

7 **PROSPECTIVE JUROR:** But it is just --

8 **MR. MURPHY:** It's in your mind?

9 **PROSPECTIVE JUROR:** Uh-huh.

10 **MR. MURPHY:** Yeah.

11 And we have had a very candid discussion with
12 Ms. Andersen about that.

13 Is it fair to say that regardless of what the
14 judge just instructed as to the law, if you were to
15 sit on this jury, you would expect my client prove
16 that he was not guilty?

17 **PROSPECTIVE JUROR:** I obey the rules --

18 **THE COURT REPORTER:** Mr. Murphy, I am not
19 able to understand her.

20 **MR. MURPHY:** You were saying, if you were to
21 obey your conscience, you would retire this he prove
22 that he was not guilty?

23 **PROSPECTIVE JUROR:** Yeah.

24 **MR. MURPHY:** That's what you feel is part of
25 your personal thoughts?

1 **PROSPECTIVE JUROR:** It is -- and obey --

2 **MR. MURPHY:** Okay.

3 Would it be fair to say that you are going to
4 require, if you are a juror on this case, that my
5 client prove that he's not guilty?

6 **PROSPECTIVE JUROR:** That's what I say unless
7 there is proof that -- the evidence would be -- that
8 he did all these things then I can say. But otherwise
9 if I am not convinced that the state's thing is --
10 which is what we learn to this day, what we are
11 reading and all that kind of stuff and you if all the
12 evidence -- I mean, can't put in all that, then
13 nobody -- it is not -- then I can't --

14 **MR. MURPHY:** Okay.

15 Your Honor, may we approach briefly?

16 **THE COURT:** Yes.

17 (Whereupon, a discussion was then held off
18 the record.)

19 **MR. MURPHY:** Ma'am, thank you for your
20 candor. I have moved for cause for you to be excused.
21 And --

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

23 **THE COURT:** Thank you, ma'am.

24 **MR. MURPHY:** We have had some discussion now
25 about the presumption of innocence.

1 Does that jog anybody's mind in you are
2 willing to say, boy; I don't know if I could really
3 hold the state to its burden? I would expect
4 Mr. Graham to come up with something to prove that
5 he's not guilty?

6 Sir, your name?

7 **PROSPECTIVE JUROR:** Britt Brown.

8 **MR. MURPHY:** Mr. Brown, what's your feelings
9 on the matter?

10 **PROSPECTIVE JUROR:** In my eye you are
11 depending him.

12 **MR. MURPHY:** Uh-huh.

13 **PROSPECTIVE JUROR:** The state is trying to
14 incarcerate him.

15 **MR. MURPHY:** Right.

16 **PROSPECTIVE JUROR:** In my eye you are
17 defending him and not plead him guilty. They are
18 trying to presume guilt.

19 **MR. MURPHY:** Right.

20 **PROSPECTIVE JUROR:** So in my eye, one of the
21 things is that you are on side of the fence and they
22 are on the other. And it's one of the things that I
23 don't think is going to come to -- that I am going to
24 meet here.

25 **MR. MURPHY:** Is part of that were you talking

1 about two sides here. Are you --

2 **PROSPECTIVE JUROR:** One is trying to prove
3 guilt and one is trying to prove innocent.

4 **MR. MURPHY:** Correct.

5 Are you saying that the defendant should have
6 to try to prove his innocence as part of this?

7 **PROSPECTIVE JUROR:** In a way, yes, sir.

8 **MR. MURPHY:** Okay.

9 And you -- knowing the law says Mr. Graham
10 could sit here during the trial, I could decide not to
11 ask a single question, not call a single witness, he
12 could decide not to testify, but in your view, then
13 that would mean he's given up?

14 **PROSPECTIVE JUROR:** Yes, sir.

15 **MR. MURPHY:** And it's not about whether the
16 state has met their case, it's that he has to put on a
17 case against theirs?

18 **PROSPECTIVE JUROR:** Yes.

19 **MR. MURPHY:** As you heard the judge, that's
20 not the way the technical law is written.

21 **PROSPECTIVE JUROR:** Right.

22 **MR. MURPHY:** You believe that in your heart?

23 **PROSPECTIVE JUROR:** Yes, sir.

24 **MR. MURPHY:** Pretty firmly convinced that
25 that's the way things should be?

1 **PROSPECTIVE JUROR:** Yes.

2 **MR. MURPHY:** Your Honor, based on that I'd
3 ask that Mr. Brown be excused for cause.

4 **MR. JACKLEY:** May I voir dire, Your Honor.

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

6 **MR. JACKLEY:** Afternoon, Mr. Brown.
7 Would you consider yourself a fair person?

8 **PROSPECTIVE JUROR:** Yes.

9 **MR. JACKLEY:** Would you be, in general, be
10 able to follow the instructions if a judge gives an
11 instruction whether it be about reasonable doubt, or
12 be about presumption of innocence, do you feel you
13 would be able to look at that instruction and to the
14 best of your ability follow that instruction?

15 **PROSPECTIVE JUROR:** No, I do not.

16 **MR. JACKLEY:** And is that -- is that because
17 of the discussions you had with Mr. Murphy regarding
18 the presumption?

19 **PROSPECTIVE JUROR:** Yes.

20 **MR. JACKLEY:** If I told you -- and this kind
21 of goes along with the discussion that I had with the
22 other potential juror that, you know, I would
23 anticipate that the judge will instruct -- and the
24 judge has indicated that there exists a presumption of
25 innocence that exists until such time as the state

1 proves all of the elements beyond a reasonable doubt.

2 Are you telling me that you could not follow
3 that instruction?

4 **PROSPECTIVE JUROR:** Unless he has proven
5 himself not guilty and you have proven him guilty.

6 **MR. JACKLEY:** And you would hold me, as the
7 state, to my burden under that instruction and I would
8 have the burden or the requirement to prove each of
9 the elements beyond a reasonable doubt?

10 You would hold me to that?

11 **PROSPECTIVE JUROR:** I wouldn't hold you
12 accountable, but I would hold you to the evidence put
13 forth.

14 **MR. JACKLEY:** And that's all I ask.

15 Your Honor, I would pass for cause.

16 **MR. MURPHY:** I would like to voir dire
17 because you just said he would have to unprove his
18 guilt. I believe that's the word you used or until it
19 was unproven that he was guilty.

20 **PROSPECTIVE JUROR:** Until you unproved he was
21 guilty.

22 **MR. MURPHY:** Yeah. Until I unprove it.

23 So in your view, the way things should work
24 is that he has a duty to prove that he's not guilty
25 just as they have a duty to prove that he is guilty?

1 **PROSPECTIVE JUROR:** Yes, sir.

2 **MR. MURPHY:** Okay.

3 That's not subject to negotiation?

4 **PROSPECTIVE JUROR:** Yes.

5 **MR. MURPHY:** Okay.

6 Your Honor, I renew my motion to strike him.

7 **THE COURT:** Yeah. I am going to grant it.

8 It's a very difficult position to be in and
9 that's a very common -- you know, even with your kids
10 that we do that. But it's not the premise upon which
11 our law is built. And that's truly and firmly a
12 constitutional issue under both our state and federal
13 constitutions. And the candor of saying -- it's much
14 easier to say sure I can do that. So I appreciate
15 people that say they can't and leave us with a jury
16 that everybody is absolutely comfortable with, can and
17 will indeed apply the principles I express.

18 So I am going to grant the challenge. And
19 again, thank you for your straight forward answer,
20 sir.

21 **MR. MURPHY:** Thank you, sir.

22 You will allowed to go now.

23 Mr. Harbert, you had your hand raised?

24 **PROSPECTIVE JUROR:** Yeah. I was on a murder
25 trial jury and where there was only one witness to the

1 crime. And since then I have come to the conviction
2 that there had to be at least two witnesses to a crime
3 in order to accept their testimony. That the crime
4 was committed.

5 I don't know if that plays a role in this
6 trial, but that's the conviction I have come to since
7 then. Every matter must be established by at least
8 two witnesses.

9 **MR. MURPHY:** All right.

10 Not an issue at least for what we're talking
11 about now but thank you for bringing that to my
12 attention.

13 We now had kind of a protracted discussion
14 about the presumption of innocence. In light of what
15 the judge just said about the state of our laws, both
16 state and federal that it is not subject to debate
17 that the law says my client is presumed innocent. And
18 we have seen two people have somewhat contrary views
19 to that and that's understandable. Anybody else have
20 any thoughts they are comfortable sharing about that
21 or feelings that they may not be able to really give
22 my client the benefit of the presumption of innocence?

23 One of the things that we kind of suggested
24 or talked about a bit is where there is smoke there is
25 fire. That's how we deal with our kids and spouses

1 and whatnot. One of the issues is my cline has in
2 fact been charged. He's been indicted. And many
3 people have confidence in our governmental
4 organization and system and so they might think, boy,
5 it's not a mistake that he -- my client, John Graham,
6 is here. That they why don't make mistakes like that.
7 Is there anybody here who just has a hard time
8 believing that this is a mistake that the state has
9 erred in charging him with these very series crimes.

10 **MR. JACKLEY:** I am going to object to the
11 compound nature of that question.

12 **THE COURT:** Run the question by me again. I
13 can't read lips behind you and I don't have a screen
14 up.

15 **MR. MURPHY:** You don't have a screen up.
16 Okay.

17 The question, Your Honor, anybody here
18 believe that it's unlikely that the state mistakenly
19 charged my client with the crimes that we talked
20 about, murder?

21 **PROSPECTIVE JUROR:** Can you rephrase that?

22 **THE COURT:** Yeah. I'm not -- if -- I find
23 the question difficult to follow.

24 **MR. JACKLEY:** With that I withdraw my
25 objection at this time.

1 **MR. MURPHY:** Let me -- I appreciate you -- if
2 I ask a question, especially since we have been going
3 for about five hours my tongue may get tangled up a
4 bit.

5 Mr. Graham is sitting here and we know he's
6 been charged with two counts of murder. And we're at
7 a process now we're about to start a trial. The state
8 has brought charges against him. He's been arrested
9 and now he's facing those charges. Do you find it
10 hard to believe that that's -- could be a mistake. Is
11 it something where you say, boy, they just can't be
12 wrong about charging somebody with such serious
13 crimes?

14 **PROSPECTIVE JUROR:** My opinion on that, let's
15 see if I can phrase this correctly for -- to get it
16 out the way I feel in this social security ass speck.
17 Okay. Mistakes can happen no matter where you are at
18 and what are you doing. For myself -- and I have a
19 little different perspective. I am on the Rapid City
20 school board. Just a little bit about myself. And we
21 actually have hearings that affect students, staff and
22 everything. And as a school board member, I have to
23 set as a -- well juror and the judge per se. My
24 administration has to bring forth the expectations
25 that we expect for them to show that this is really

1 correct. And that -- in that, it's -- I cannot and I
2 will not judge whoever they will bringing forward
3 until I have heard everything. So I also know that
4 mistakes can happen. And that -- I have also had
5 where I have known that a person -- somebody could
6 give the wrong information that make a person look
7 guilty and they are not. Okay.

8 **MR. MURPHY:** All right.

9 **PROSPECTIVE JUROR:** So that's why I'm asking
10 you to rephrase that question because this person
11 might be here because of this evidence -- but is it
12 true evidence until you hear it, see it, and can take
13 it in and -- hear, see, feel all those things.

14 **MR. MURPHY:** Sure.

15 **PROSPECTIVE JUROR:** I need to have in order
16 to make my decision.

17 **MR. MURPHY:** So you are willing to conceive
18 that this might be a mistake in prosecution.

19 **PROSPECTIVE JUROR:** Could be, yeah.

20 **MR. MURPHY:** Okay.

21 That's exact -- thanks for clarifying it.
22 You put it in a little better phraseology than I did.

23 That's what I am wondering if there is
24 anybody out here who says, boy, I really have a hard
25 time believing that it could be possible that somebody

1 could be charged with two counts of murder and have
2 made it all the way through the system and that it was
3 all a mistake; that the prosecution got it wrong or
4 law enforcement got it wrong.

5 And I saw you shaking your head, Mr. West.
6 What's your comments?

7 **PROSPECTIVE JUROR:** I was just echoing your
8 thoughts before about what you were going to say.
9 Because I -- I was thinking about how to rephrase the
10 question and that's exactly the way I would have
11 expressed it. You are absolutely right.

12 **MR. MURPHY:** And it is something that you can
13 conceive of that this could be a mistaken prosecution?

14 **PROSPECTIVE JUROR:** No, not for me
15 personally.

16 **MR. MURPHY:** You can't?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** In your situation --

19 **PROSPECTIVE JUROR:** Let me start over.
20 Ask me your question again.

21 **MR. MURPHY:** Are you able to concede to
22 believe that this could be a mistaken prosecution?

23 **PROSPECTIVE JUROR:** Absolutely. It could be
24 a mistake, sure.

25 **MR. MURPHY:** Anybody disagree -- I mean, if

1 you are thinking about -- just being candid with
2 yourself --

3 Ma'am, I am sorry I don't know your name.

4 **PROSPECTIVE JUROR:** Casandra Heying.

5 **MR. MURPHY:** You were shaking your head.

6 **PROSPECTIVE JUROR:** I don't believe so. I
7 don't think we should have made it this far if there
8 was any mistake.

9 **MR. MURPHY:** Okay. That's what I am getting
10 at.

11 You're of the mind that it's just not likely?
12 Going into this you think John must have done
13 something wrong to get here?

14 **PROSPECTIVE JUROR:** Yeah.

15 **MR. MURPHY:** Okay.

16 And even though the judge will tell you he's
17 presumed innocent and all of that stuff, and that's
18 the law, sitting here today, you are saying, no, that
19 isn't the way it is?

20 **PROSPECTIVE JUROR:** That's what I believe,
21 yeah.

22 **MR. MURPHY:** Okay. And that's why we're
23 having this discussion.

24 Firmly held belief?

25 **PROSPECTIVE JUROR:** Yeah.

1 **MR. MURPHY:** Okay.

2 Even if the judge reiterates two or three
3 times what the law is, you are still going to believe
4 that my client did something wrong to get himself
5 here?

6 **PROSPECTIVE JUROR:** Yes.

7 **MR. MURPHY:** All right.

8 Your Honor, I would move for cause on this
9 juror.

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

11 **MR. JACKLEY:** May I voir dire, Your Honor?

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

13 **MR. JACKLEY:** There has been a lot of
14 discussion about a mistake, and my questioning will
15 focus more on what's required when it comes to burdens
16 of proof. Okay.

17 You heard Mr. Murphy talk before about asking
18 whether any of you had served on a jury before and
19 that there was talk about a civil jury, which of
20 course is a different burden of proof. We call that a
21 preponderance. My law school professor used to get
22 mad when lawyers would say that means 51 percent. We
23 don't deal in percentages, but I think that's an easy
24 way to understand that.

25 So there is a different burden of proof when

1 it comes to a civil matter versus a criminal matter.
2 And a criminal case, which is what we're here for
3 today, it's a much more serious matter, and the state
4 carries a much more serious burden and that is beyond
5 a reasonable doubt.

6 Mr. Murphy has been talking to you about
7 charges. And I, as a prosecutor, don't necessarily
8 bring a charge, but another body, a Grand Jury, may
9 bring a charge. And there is a different standard of
10 proof that a Grand Jury may have versus what a jury
11 would have.

12 In that context, do you think you would be
13 able to be a fair person and view the evidence as it
14 may come in by the witnesses -- could you do that for
15 us?

16 **PROSPECTIVE JUROR:** Yes.

17 **MR. JACKLEY:** As if the judge would instruct
18 in more detail about what a Grand Jury indictment
19 means or doesn't mean, would you be able to follow
20 what the judge says on that?

21 **PROSPECTIVE JUROR:** Possibly.

22 **MR. JACKLEY:** You think you could do that for
23 us?

24 **PROSPECTIVE JUROR:** Yes.

25 **MR. JACKLEY:** Your Honor, I would pass for

1 cause.

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

3 **MR. MURPHY:** I'd like to further voir dire.

4 Ma'am, you probably feel like, oh, boy. Boy
5 did I -- you said --

6 And I appreciate your candor. You said
7 possibly you could follow the instructions. That's
8 not a ringing endorsement?

9 **PROSPECTIVE JUROR:** Yes.

10 **MR. MURPHY:** And I want to go back to what
11 you said when we were talking before. The judge can
12 tell you that the presumption of innocence is. You
13 can read it. Give it to you ten different ways --

14 **PROSPECTIVE JUROR:** Yes.

15 **MR. MURPHY:** -- but what you were telling me
16 when I was talking before, regardless of all that, in
17 your heart of heart, you see my client charged,
18 whether he was charged by Mr. Jackley individually or
19 a Grand Jury or whomever, you believe he got here
20 because he did something wrong?

21 **PROSPECTIVE JUROR:** He made some kind of
22 mistake, yes.

23 **MR. MURPHY:** And, again, regardless of what
24 the judge tells you in the instructions, you are going
25 to continue to believe that?

1 **PROSPECTIVE JUROR:** Yes.

2 **MR. MURPHY:** And you said that very
3 unequivocally?

4 **PROSPECTIVE JUROR:** Uh-huh.

5 **MR. MURPHY:** Okay.

6 I would you renew my motion, Your Honor.

7 **THE COURT:** I am going to grant it,
8 Mr. Murphy -- or Mr. Jackley. And as with all things
9 here, that's fine. And it's exactly something we need
10 to know.

11 There is a -- you know, the fact that a Grand
12 Jury found or didn't find something doesn't matter.
13 They do both. And they are mistaken from time to time
14 as to both. Either in not indicting or indicting on a
15 charge that turns out not to be correct. I have seen
16 both of them in ten years. So they are neither always
17 right nor always wrong.

18 But you will be instructed that the fact that
19 someone has been charged with a crime does not mean
20 they did something wrong. It cannot even be used as,
21 again, like the right to silence is even a hint that
22 they did something wrong.

23 It is simply a matter of saying, this -- we
24 think you committed a crime and this is the crime we
25 think you committed. That is not evidence. All of us

1 will say that to our children from time to time, I
2 think you did this, and I have no proof of it, but I
3 think you did it. We do that all the time and that is
4 not how and why we're here. What the Grand Jury did
5 is completely irrelevant to this case. We are
6 starting from scratch.

7 And with that, and your candor, ma'am, I am
8 going to excuse you. And if anybody has questions
9 about that, that's -- this is the time to bring it up.

10 **MR. MURPHY:** You are free to go. Thank you
11 for your candor.

12 Before we leave that topic, now that the
13 judge has given more information about how this works,
14 anybody else have any feeling along the lines of what
15 Ms. Haines just talked about?

16 Okay. Your Honor, we're at 2:30 or a little
17 past.

18 Do you want to take a break or want to keep
19 going.

20 **THE COURT:** Are you going to pass at this
21 point?

22 **MR. MURPHY:** No.

23 **THE COURT:** I think we'll go to 3:00 anyway
24 unless there is an emergency out there?

25 All right. We'll continue a spell.

1 **MR. MURPHY:** Okay. Good.

2 The judge has talked about it a bit and
3 now -- it stems right from the presumption of
4 innocence, and that is the right of my client not to
5 testify if he so desires. And if the state has the
6 burden from the beginning to the end, and my client is
7 presumed innocent, then that means as we've talked
8 about, he doesn't have to put on any evidence, he
9 doesn't have to ask any questions or call a single
10 witness, and he doesn't have to get up on the stand
11 himself.

12 But we're a courtroom full of humans. And
13 many of you may say, boy, you know, if he doesn't get
14 up and tell his side of the story, he must have
15 something to hide. Or I am not going to be able to
16 vote not guilty unless I hear his side of the story or
17 have him subjected to cross-examination.

18 This is where -- again, we talk about the
19 real human dynamics. And so I need to get candid
20 responses from any of you folks who think in any way,
21 shape, or form in my client decides not to testify
22 that you are going to think he must have something to
23 hide or he's probably guilty or there is something
24 else being kept from us.

25 Anyone?

1 **PROSPECTIVE JUROR:** I wouldn't think that.

2 **MR. MURPHY:** You wouldn't think that,
3 Mr. Parker?

4 **PROSPECTIVE JUROR:** No.

5 **MR. MURPHY:** You feel very comfortable with
6 the idea that, as a defendant, if they have got the
7 burden, he shouldn't have to get up on the stand and
8 provide any evidence?

9 **PROSPECTIVE JUROR:** No. Because the one
10 reason that -- there is several reasons why he
11 shouldn't get up there. He might mess it himself up
12 when he's actually innocent.

13 **MR. MURPHY:** Sure.

14 Anybody disagree with what Mr. Parker said?

15 He said, that's just not the way I view
16 thing. If I was the defendant, I'd certainly want to
17 get up and answer my accusers.

18 Anybody sitting -- sir, your name?

19 **PROSPECTIVE JUROR:** Jake Salano.

20 **MR. MURPHY:** Okay, Mr. Salano?

21 **PROSPECTIVE JUROR:** If I was in his shoes, I
22 would want to get up and tell everybody, hey, my side
23 of the story. That way is sounds better coming from
24 him or whoever. That A, it's a mistake. I was --
25 whatever. The evidence is wrong. I just -- I just

1 disagree with him.

2 **MR. MURPHY:** Sure. That's fair.

3 And do you think, when you are thinking about
4 this, if my client were to decide not to testify, for
5 whatever reason, that you would say, boy, it must mean
6 that he did it or he's got something to hide or I am
7 going to hold that against him in some way because I
8 wouldn't do that?

9 **PROSPECTIVE JUROR:** Not necessarily.

10 I am just saying that I think it would be
11 better if I got up or whoever and tell the jury that
12 their side of the story.

13 **MR. MURPHY:** Sure.

14 **PROSPECTIVE JUROR:** You know, I ain't saying
15 he's guilty or anything like that.

16 **MR. MURPHY:** Okay. All right.

17 All right. I appreciate your candor.

18 Ma'am, I am sorry, your name?

19 **PROSPECTIVE JUROR:** Nancy.

20 **MR. MURPHY:** Nancy, what's your last name?

21 **PROSPECTIVE JUROR:** Hanson.

22 **MR. MURPHY:** Okay.

23 Ms. Hanson, what are your feelings about the
24 notion that somebody who is charged with two counts of
25 murder might go through an entire jury trial and

1 decide not to get up on the stand?

2 **PROSPECTIVE JUROR:** I don't have a problem
3 with that.

4 **MR. MURPHY:** Okay.

5 **PROSPECTIVE JUROR:** It's up to the
6 prosecution to prove him guilty.

7 **MR. MURPHY:** Okay.

8 So you wouldn't hold that against him?

9 **PROSPECTIVE JUROR:** No.

10 **MR. MURPHY:** Again, I kind of use that
11 looking in your heart-of-hearts-sole-searching-type
12 thing. Anybody here saying, boy, yeah, I know that's
13 the answer I am supposed to give, but I really think
14 that if the defendant doesn't testify, he's hiding
15 something or is probably guilty?

16 Great. I appreciate that.

17 And we're going to keep moving along. We're
18 going to go into the beyond a reasonable doubt
19 standard. We talked about. We talked about the
20 state's burden that if my client is presumed innocent,
21 the state has the burden.

22 And who here has heard the phrase on TV or
23 Law and Order or in books beyond a reasonable doubt?

24 Everybody --

25 Let me ask you this, has anybody not heard

1 that phrase?

2 Okay. I want to take some time to talk about
3 the real words, what that means, beyond a reasonable
4 doubt. The state has to prove their case beyond any
5 reasonable doubt. If you think of doubts, say, there
6 is numbers, if you had one doubt, and it's based on
7 reason, it's not just some fantastical notion that you
8 know the prosecution is a group of aliens from the
9 planet sorb or anything like. You all made it this
10 far. You made -- you are all reasonable.

11 If you have any one doubt that's reasonable,
12 based on the state of their evidence, on any one of
13 the elements or any material fact, your duty --

14 **MR. JACKLEY:** Your Honor, I am going to
15 object. That's a misstatement of the law.

16 **MR. MURPHY:** I don't believe it is.

17 **THE COURT:** Hold on.

18 Well, I am going to correct the statement as
19 to material fact, but as to any one of the elements
20 necessary to the crime, the question is fair.

21 **MR. MURPHY:** Okay.

22 Well, and my mistake, Your Honor. I believed
23 the instructions said that the jury has to find by
24 proof beyond a reasonable doubt of all elements and
25 any material fact therein.

1 **THE COURT:** Well, I think all elements may or
2 may not include material facts, but all of the acts or
3 omissions necessary to constitute the crime which is
4 charged.

5 **MR. MURPHY:** All right.

6 And maybe this a good way to start talking
7 about elements. For those of you who haven't served
8 on a jury in a criminal case, you aren't asked to
9 decide one thing. It's not just -- you are not just
10 asked is the defendant guilty of the crime of murder
11 in Count One or Murder in Count Two.

12 The judge will break down the crime alleged
13 into a bunch of elements, and maybe three, four, or
14 five. They are separate facts that you have to find.
15 And you have to find each and every one of them beyond
16 a reasonable doubt. So that's what we're talking
17 about.

18 So let me -- I am going to use this banister.
19 It's kind of a -- it helps me kind of conceptualize
20 beyond a reasonable doubt. We're starting a trial or
21 we will start a trial in the next couple days. At
22 that point there will be no evidence in front of you.
23 My client is presumed innocent. So therefore, since
24 no evidence is presented, all you have in front of you
25 is reasonable doubt.

1 But the case is going to go along and
2 probably early on into the case, you are going to
3 learn that Anna Mae Aquash was killed. She was shot
4 in the back of the head. So you are going to have
5 evidence that establishes that somebody died and it
6 wasn't by accident.

7 And evidence will come in at various times
8 that may move the kind of doubt meter back and forth
9 in your mind as you are processing information. And
10 you may get to a point where you believe the state has
11 proven pretty -- quite a bit. Proven a lot. Put in a
12 lot of evidence. Had a lot of witnesses.

13 But you get to a point you have a doubt based
14 on reason about one of the elements. Any one of the
15 elements. You believe they have proven all that
16 stuff, but you got a doubt about that one last thing.

17 And I want to ask you, who here feels
18 comfortable with the notion that as a juror, under the
19 law, even if they have proven all that other stuff
20 behind me, your duty is to find the defendant not
21 guilty?

22 Ma'am, Ms. Lemke, you are shaking your head.
23 Can you tell me what your thoughts are about that?

24 **PROSPECTIVE JUROR:** Well, they haven't proven
25 everything in my mind and there is still some elements

1 there that they haven't proven to me, I guess, and
2 that's reasonable doubt.

3 **MR. MURPHY:** Okay.

4 And would you feel comfortable in that
5 situation even though they have proven a lot, that
6 still voting not guilty because they haven't proven
7 everything beyond a reasonable doubt, all the elements
8 beyond a reasonable doubt?

9 **PROSPECTIVE JUROR:** If the judge has the
10 different elements and that one is not proven, he has
11 to be not guilty.

12 **MR. MURPHY:** All right. And that's what
13 we're talking about here.

14 Now, who here has kids? Many of you.

15 I have raised three kids. I have never
16 employed the reasonable doubt standard in my
17 household. Okay. I don't know, is there any parent
18 here who actually has? Raise your hand.

19 That's not the way we deal with the common
20 affairs and certainly not the way my wife deals with
21 me. You know, that's -- you get hunches, you get
22 suspicions, and you form conclusions based on those.
23 You know, you see that your kids did things or there
24 is a toy they used to play with that is no longer
25 around and you've kind of figure, without knowing

1 beyond a reasonable doubt, that they lost it, they
2 left it on the playground. I go through two winter
3 jackets a year. It seems they evaporate. I don't
4 have proof beyond a reasonable doubt that my youngest
5 daughter has lost her jackets, but I have a pretty
6 good reason to believe that they has.

7 But this is much more serious than that.
8 We're in the criminal justice system here. And I want
9 to have the discussion with anybody who feels that
10 they are going to have a hard time applying the beyond
11 a reasonable doubt standard for Mr. Graham in light of
12 the severity of the charges.

13 **PROSPECTIVE JUROR:** Is it possible for us to
14 get more information about that?

15 **MR. MURPHY:** No. No. That's -- and it's a
16 great question. No. The state has the burden of
17 putting forth their evidence. And if at the end of
18 the presentation of the state's case or the
19 presentation of the state and the defense's case, if
20 you go back there in the jury room and you are going
21 through those elements, you have any one reasonable
22 doubt about any of those elements, the law that the
23 judge will give you will say it's your duty to -- it's
24 your job as a juror to vote not guilty. You won't be
25 able to ask for the trial -- to have the trial

1 reopened again to put more information on. You are
2 struck with what you got.

3 **PROSPECTIVE JUROR:** You are allowed to ask
4 questions, though?

5 **MR. MURPHY:** There are times when you are
6 allowed to ask question, but you are not going to be
7 able to get more evidence. Okay. That's -- once the
8 trial is done, your job as a juror at that point is to
9 deal with the evidence that you have been given and
10 decide whether or not the state has met their burden,
11 proven beyond any reasonable doubt each and every
12 element of the offenses.

13 Does that cause you pause?

14 **PROSPECTIVE JUROR:** But if we have -- if
15 there was some confusion within jury, there would be a
16 way to try and clarify it?

17 **THE COURT:** Do you want me to address that?

18 **MR. MURPHY:** I suppose you better, Your
19 Honor.

20 **THE COURT:** On occasion during deliberations,
21 jurors, one or more of them, may have a question.
22 That question will be reduced to writing by any juror
23 that has one. Need not be the foreman or foreperson
24 that does it. Ask it will be given to me by the
25 bailiff.

1 I will have to call counsel together and we
2 will look at the question and decide whether I can
3 answer it. And sometimes I may tell you you go with
4 what you got; and other times I may provide some
5 clarifying instruction or something that I believe
6 will help resolve that issue.

7 I will always have to make a record of it.
8 Everything we do here has a record, but there is the
9 distinct possibility that you can request additional
10 information and -- let me say guidance.

11 You are not going to get more evidence.
12 That's done. But you may have questions about
13 something, some process, some instruction, you are
14 entitled to ask about that and I may or may not be
15 able to help you.

16 Yes, ma'am?

17 **PROSPECTIVE JUROR:** If something was said
18 during the trial and we're deliberating, but one
19 person heard it this way, one person heard it that
20 way, since it's already in the record can we get that
21 part of it?

22 **THE COURT:** No.

23 There are a number of reasons for that and
24 the reasons are it emphasizes -- the primary is it
25 emphasizes one piece or one sentence of evidence over

1 all the other. And you are to rely upon your own
2 memory. You will have the opportunity to discuss the
3 case with others, those that you are sitting in
4 determination with. And you will eventually be called
5 upon to make up your mind as to how to vote.

6 Again, there sometimes can be clarification,
7 but I don't -- I am hard pressed to think of
8 circumstances in which I will give you a partial
9 transcript of what was said. Okay. Or what was done.

10 So -- and I will allow you to take notes
11 during the trial.

12 **PROSPECTIVE JUROR:** I was going to ask that
13 question, too.

14 **THE COURT:** But your notes don't control over
15 your memory and someone's else's notes certainly don't
16 control over your memory. They are yours notes to
17 help you remember, but they are not the transcript nor
18 a record.

19 Your notebooks will be left here whenever you
20 leave the courtroom.

21 **MR. MURPHY:** Before I get to your question,
22 sir, you asked the question originally. Now you have
23 been told that you are not going to get more evidence.
24 You may get clarification on what a word means or
25 something like that.

1 But how does that make you feel, then, if you
2 know that you may be asked as a juror and told that
3 it's your duty to vote not guilty if you have any
4 reasonable doubt, even though you think the state has
5 proven the vast majority of its case?

6 **PROSPECTIVE JUROR:** I have no problem with.

7 **MR. MURPHY:** You believe that's the way the
8 system should work.

9 **PROSPECTIVE JUROR:** Absolutely.

10 **MR. MURPHY:** Sir, you raised your hand.

11 Your name for Ms. Pruss?

12 **PROSPECTIVE JUROR:** Mr. Huling.

13 Now, from what I understand -- it's my first
14 time -- but there is two -- multiple counts alleged
15 against the gentleman. Now, if they prove beyond a
16 reasonable doubt for, like, one of them, and the
17 second one there is a doubt for, then we can -- is not
18 guilty for the entire thing or just that specific that
19 there is a doubt for?

20 **MR. MURPHY:** The judge will give you the
21 instructions that are very detailed as to each over
22 fence. And each offense has a number of elements.
23 And so when you are asked to consider the case, you
24 will be presented with Count One and there will be --
25 let's just say five elements. And for each of those

1 elements, for you to vote guilty, you have to believe
2 that the state has resolved all of the doubts that you
3 had in regard to each of those elements.

4 And then we'll go on to the next count which
5 may have five or six elements, too. So you treat each
6 charge separately.

7 **PROSPECTIVE JUROR:** Okay.

8 **MR. MURPHY:** But, for each of those, the
9 state has to prove all of the elements beyond a
10 reasonable doubt.

11 **PROSPECTIVE JUROR:** All right.

12 **MR. MURPHY:** Does that clarify it for you?

13 **PROSPECTIVE JUROR:** Yeah.

14 **MR. MURPHY:** Do you have any -- does that
15 seem to put too much of a burden on the state?

16 **PROSPECTIVE JUROR:** No.

17 **THE COURT:** You can vote -- your reactions to
18 both counts may be the same or they may be different.
19 The fact that you determine one way on one count or
20 believe one way on one count does not control nor
21 should it impact your decision on another count.

22 All of that stuff will be covered later in
23 instructions.

24 **MR. MURPHY:** We have been talking about the
25 reasonable doubt standard and how we apply it. Before

1 I move to kind of a related issue, anybody have qualms
2 about applying that standard in this case?

3 Just knowing what you know about yourself, do
4 you think you would say if I have a really strong gut
5 feeling that Mr. Graham committed crime A or crime B,
6 that's going to be enough for me?

7 I don't think the state should have to prove
8 all and resolve all of the elements beyond a
9 reasonable doubt. I am going to be okay with a hunch,
10 a suspicion, good enough type deal?

11 Okay. We have talked -- we have used terms
12 today, guilty, not guilty, and innocent. Talked about
13 the presumption of innocence.

14 Who here would volunteer to explain the
15 difference between not guilty and innocent?

16 Anybody feel they have kind of a grasp?

17 **PROSPECTIVE JUROR:** I will give it a shot.

18 **MR. MURPHY:** Sure.

19 Mr. West?

20 **PROSPECTIVE JUROR:** I would say not guilty
21 means that the evidence presented did not present a
22 conclusion beyond a reasonable doubt that the
23 defendant did indeed commit the act. And I would say
24 innocent would mean that he did not do the act.

25 **MR. MURPHY:** Okay. Great.

1 **PROSPECTIVE JUROR:** I hope I am right.

2 **MR. MURPHY:** You are right. Exactly.

3 This is one of those things that sometimes
4 people talk about it like lawyer speak. When you
5 listen to TV or radio or you are watching a crime
6 drama, the verdict is always guilty or not guilty,
7 it's not guilty or innocent. And the reason why is
8 what we have just been talking about. It's the
9 state's burden to prove the client -- or the defendant
10 guilty.

11 The client, the defendant, Mr. Graham, has no
12 duty to prove that he's innocent. All that has to be
13 shown whether through the state's case or the state
14 and the defense case is that the state hasn't met its
15 burden of proving each and every element. If there is
16 one doubt or there is ten doubts left, he's not guilty
17 because the state hasn't proven him guilty beyond a
18 reasonable doubt.

19 Does that make sense?

20 That seem kind of hyper lawyerly to any of
21 you?

22 Sir, in the black vest, what's your name?

23 **PROSPECTIVE JUROR:** Tom.

24 **MR. MURPHY:** Did you have any -- I saw you
25 kind of roll your eyes in regard to that whole thing.

1 Does the beyond a reasonable doubt standard
2 or the idea that the state has to prove each and every
3 element -- does that cause any qualms?

4 **PROSPECTIVE JUROR:** No.

5 **MR. MURPHY:** You feel that's the right way
6 things should be done?

7 **PROSPECTIVE JUROR:** Yes.

8 **MR. MURPHY:** All right.

9 We're going to go back and talk a little bit
10 more about the American Indian Movement. We talked
11 about that earlier before lunch. As you have heard
12 Russell Means is potentially a witness, Clyde
13 Bellecourt. The state is going to present a lot of
14 evidence about the activities of the American Indian
15 Movement in the 1970s.

16 Show of hands, who lived in this part of the
17 world in the 1970s, say 1975?

18 All right. I am going to start in the first
19 row.

20 Ma'am, your name for the court reporter?

21 **PROSPECTIVE JUROR:** Jo Ann Paulson.

22 **MR. MURPHY:** Ms. Paulson, what are your
23 recollections of the time when AIM was a presence down
24 on Pine Ridge and there was Wounded Knee and the
25 Courthouse riots and whatnot?

1 **PROSPECTIVE JUROR:** Okay. At that time, in
2 75, I had moved to Moorcroft, Wyoming just previous to
3 that. I had taught at Eagle Butte, South Dakota. And
4 I think I should inform the defense that the Tribal
5 Chief of Police at the time for the Cheyenne River
6 Reservation was at that time my brother-in-law. We
7 never -- by the time -- by 75 he was my ex
8 brother-in-law. So, you know, I have heard from other
9 people about his activities. Very briefly. I know
10 there were interactions there with AIM.

11 You know, we got the Rapid paper in Moorcroft
12 and my family lives in Spearfish. So, you know, I saw
13 some things.

14 **MR. MURPHY:** Anything that stuck in your mind
15 that caused you either to be fearful or to form an
16 opinion about the American Indian movement that is
17 either favorable or not favorable?

18 **PROSPECTIVE JUROR:** Oh, there were things
19 both ways. I had many Native American friends. I
20 attended the Pow Wows. The family into which I had
21 been married was more traditional so, you know, their
22 take on AIM was somewhat negative. They didn't like
23 being told, for example, how to be Indian. You know.
24 It wasn't any -- ever anything personal for me.

25 **MR. MURPHY:** All right.

1 **PROSPECTIVE JUROR:** I should also probably
2 tell you that when I was in Riverton, Wyoming in let's
3 see -- in the 90s probably. It was early 90s. I
4 dated for a time retired FBI Agent Gary Adams. He and
5 I were both in professions that required a high level
6 of confidentiality. I didn't talk about my job; he
7 didn't talk about his. I knew that he was here in
8 Rapid City during the time of the AIM.

9 **MR. MURPHY:** Right.

10 **PROSPECTIVE JUROR:** That was it. We did not
11 talk about his involvement.

12 **MR. MURPHY:** Okay.

13 **PROSPECTIVE JUROR:** So, you know, I had
14 peripheral views and nothing really too much one way
15 or the other.

16 **MR. MURPHY:** All right.

17 Anybody else in the first row?

18 How about the second row?

19 Ms. Lutheran?

20 **PROSPECTIVE JUROR:** I was raised here,
21 basically.

22 **MR. MURPHY:** All right.

23 **PROSPECTIVE JUROR:** So my husband will never
24 move out of this area.

25 So what would you like to know?

1 **MR. MURPHY:** Did you form any opinions during
2 that time about the American Indian Movement?

3 **PROSPECTIVE JUROR:** Well, I was just -- we
4 got married in 72. So, you know, we were young. We
5 had gone through high school. We had our thing we
6 were doing. No, not really.

7 **MR. MURPHY:** Okay.

8 **PROSPECTIVE JUROR:** It wasn't anything
9 negative in that aspect. No. I -- no.

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

11 Anybody else in that second row that lived in
12 the area or had experiences with AIM?

13 Okay. Let's go to the third row.

14 Sir, your name?

15 **PROSPECTIVE JUROR:** Barry Winter.

16 **MR. MURPHY:** Okay.

17 Mr. Winter, you lived here or in South
18 Dakota?

19 **PROSPECTIVE JUROR:** Born and raised here.

20 **MR. MURPHY:** Born and raised.

21 What were your experiences with AIM?

22 **PROSPECTIVE JUROR:** They visited our
23 business. I have people on both sides that have
24 people that are -- that we did business with, were
25 partners with, and everything else that were Native

1 American.

2 **MR. MURPHY:** Okay.

3 **PROSPECTIVE JUROR:** But there were also some
4 other ones that I didn't want to be around. There was
5 just a mixture of both.

6 **MR. MURPHY:** Okay.

7 And we're talking about when you say other
8 people you didn't want to be around, were they members
9 of the American Indian Movement or people you believe
10 were supporters of the American Indian Movement?

11 **PROSPECTIVE JUROR:** Well, my experience with
12 them is that they did a lot of things from my point of
13 view that were not right.

14 **MR. MURPHY:** Okay.

15 **PROSPECTIVE JUROR:** And also had some friends
16 that had a business down there in Wounded Knee. What
17 they had to go through because of things that were
18 taking place down there wasn't right.

19 **MR. MURPHY:** And you are talking about -- for
20 those that might not have been here -- the occupation
21 of Wounded Knee in 1973?

22 **PROSPECTIVE JUROR:** Right.

23 **MR. MURPHY:** The American Indian Movement
24 took over that community.

25 **PROSPECTIVE JUROR:** Yeah.

1 **MR. MURPHY:** Your friends, their business was
2 affected?

3 **PROSPECTIVE JUROR:** Right.

4 **MR. MURPHY:** Yeah.

5 Would it be fair to say terminated their
6 business?

7 **PROSPECTIVE JUROR:** Yes.

8 **MR. MURPHY:** Were they ever able to recover?

9 **PROSPECTIVE JUROR:** Yes, they were able to
10 recover through the government.

11 **MR. MURPHY:** Okay.

12 Because AIM is going to be a part of this
13 case and you are going to hear evidence that during
14 the time period in question my client was somebody who
15 supported the American Indian Movement. He lived down
16 in Denver at that time, but he was a supporter.

17 Do you believe that's going to affect your
18 ability to give him the presumption of innocence and
19 to treat him fairly because he's associated with the
20 group that caused damage to your business and you said
21 some of their activities were not positive, even
22 negative.

23 **PROSPECTIVE JUROR:** My experience with AIM is
24 that there is good ones and there is bad ones.

25 **MR. MURPHY:** Okay.

1 **PROSPECTIVE JUROR:** The good ones -- they had
2 a good point of view about some stuff.

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

4 **PROSPECTIVE JUROR:** And then there was others
5 that took it a lot further than I would.

6 **MR. MURPHY:** Okay.

7 So you are willing to look at individual
8 members?

9 **PROSPECTIVE JUROR:** Yes.

10 **MR. MURPHY:** And that's why we're talking
11 about this. We're talking about this kind of in the
12 context of guilt by association. And so appreciate
13 your perspective on that.

14 Let me continue in that row.

15 Anybody else here?

16 Ms. Shelton?

17 **PROSPECTIVE JUROR:** I guess I was really
18 young and I really didn't know anything about it. I
19 never really paid much attention to it. My parents
20 just kind of thought it was -- I don't really know
21 anything about that. I didn't get into it.

22 **MR. MURPHY:** All right.

23 Anybody -- let's go to the back row.

24 Ma'am, your name?

25 **PROSPECTIVE JUROR:** Muriel Anderson.

1 **MR. MURPHY:** Okay.

2 Ms. Anderson, what are your recollections
3 with AIM?

4 **PROSPECTIVE JUROR:** I had just recently moved
5 to the area and so there is a lot of names that I
6 recognize. I remember what happened.

7 **MR. MURPHY:** When you say what happened, what
8 are you referring to?

9 **PROSPECTIVE JUROR:** Snippets in newspaper
10 articles. I don't remember a lot of -- yeah. There
11 was some opinions formed back then and there was a lot
12 of prejudice back then, but it was a long time ago.
13 And I think I have grown up a lot and I think that I
14 can be very open minded.

15 **MR. MURPHY:** Okay. Good.

16 Anybody else in the back row?

17 All right. Let's take a gander over here.
18 Folks, in the front row?

19 Anybody that lived in the area?

20 Ma'am, your name?

21 **PROSPECTIVE JUROR:** Jackie Dittman.

22 **MR. MURPHY:** What were your recollections?

23 **PROSPECTIVE JUROR:** I was pretty young. I
24 just remember my parents about it. It was a big deal.

25 **THE COURT REPORTER:** Mr. Murphy, I can't hear

1 her.

2 **PROSPECTIVE JUROR:** I just remember my
3 parents talking about it. I don't know any of the
4 details. I just recognize the name Russell Means.

5 **MR. MURPHY:** Okay.

6 Didn't form any hard and fast opinions about
7 all AIM people or anything like that in?

8 **PROSPECTIVE JUROR:** Huh-uh.

9 **MR. JACKLEY:** Anybody else here in the front
10 row?

11 Second row?

12 How about the third row?

13 Sir?

14 **PROSPECTIVE JUROR:** I was in high school and
15 college at the time, and from my perspective, the
16 American Indian Movement was created because there was
17 a perception, right or wrong -- I am not going to make
18 that judgment -- that the United States Government was
19 treating the Native Americans unfairly. And there
20 were a lot of bad things that happened.

21 I don't know for sure, but I think the reason
22 that Wounded Knee was taken over was because of the
23 historical -- the Wounded Knee Massacre that happened
24 back in the 1800s.

25 I don't have any issue with AIM per se. But

1 I do have issues with any kind of violence -- violent
2 protestations. There -- our world is a violent place.
3 And more from a perspective of Gondii where he resists
4 and, I believe, in more civil disobedience. And I
5 look at AIM as being a form -- they were created to
6 have civil disobedience to the wrongs that they
7 believed were committed.

8 So I don't have an opinion of what they did
9 was right or wrong other than when it becomes violent,
10 it's wrong.

11 **MR. MURPHY:** Okay.

12 Would you be willing to acknowledge that just
13 because somebody might be part of a group or a
14 supporter of a group, they shouldn't be held
15 responsible for the conduct of everybody in that
16 group?

17 **PROSPECTIVE JUROR:** Definitely not. They
18 should not be held accountable.

19 **MR. MURPHY:** Because you have talked about
20 there is violent activities, but there was also
21 nonviolent activities?

22 **PROSPECTIVE JUROR:** Right.

23 **MR. MURPHY:** All right. Good.

24 Anybody else in the third row?

25 **PROSPECTIVE JUROR:** I was raised here, but I

1 was too young.

2 **MR. MURPHY:** All right.

3 Anybody else who was?

4 Nobody wants to admit they were old enough to
5 remember. I was still in diapers.

6 Let's talk to the back row.

7 Ma'am?

8 **PROSPECTIVE JUROR:** I moved here in 73.

9 **MR. MURPHY:** Right in the start of things.

10 **PROSPECTIVE JUROR:** Yeah.

11 **MR. MURPHY:** Where did you move here from?

12 **PROSPECTIVE JUROR:** Illinois.

13 So we didn't have --

14 **MR. MURPHY:** Yeah.

15 **PROSPECTIVE JUROR:** Caught on to that right
16 away.

17 But a lot of the exposure of what was
18 happening here, we really didn't hear that much when I
19 was growing up. And went to Vermillion so I was on
20 the campus and that was my first exposure to AIM and
21 all the people involved against that organization and
22 everything. So now -- I was young. I work with a man
23 that was a member of AIM for a few years.

24 **MR. MURPHY:** Okay.

25 And, you know, 73, 74, 75, are when things

1 really heated up. There was the courthouse riots in
2 both Custer and Minnehaha County in 74. Seventy-five
3 there was the shoot-out at Jumping Bull, the incident
4 at Oglala where the two FBI agents were killed.

5 Do you recall those instances?

6 **PROSPECTIVE JUROR:** Uh-huh.

7 **MR. MURPHY:** Did it cause you to form at that
8 time any feelings about AIM?

9 **PROSPECTIVE JUROR:** Yes.

10 **MR. MURPHY:** What were the feelings.

11 **PROSPECTIVE JUROR:** I am sure -- I didn't
12 have enough understanding of what was going on. So
13 usually it was just what the media threw at us. The
14 local newspaper and the television stations at that
15 time. And being young, in your 20s you didn't pay a
16 whole lot of attention to what was going, you know, if
17 it didn't really relate to you. I don't have any hard
18 core judgments.

19 **MR. MURPHY:** Okay.

20 Nothing that's carried forward to this day?

21 **PROSPECTIVE JUROR:** No.

22 **MR. MURPHY:** Anybody else in the back row?

23 Well, I am going to ask something kind of
24 related to that. But we talk -- who -- I am not going
25 to ask who here is a member of a political party?

1 **MR. JACKLEY:** Objection, Your Honor.
2 Relevance.

3 **THE COURT:** I don't know where it's going
4 yet, but the moment we're going to take a 15-minute
5 recess in any event and I am going to talk to counsel
6 about something else.

7 Thank you.

8 (Off the record.)

9 **THE COURT:** Let me know when we are all here.

10 **THE BAILIFF:** I believe we're all here, Your
11 Honor.

12 **THE COURT:** Are we ready?

13 **THE BAILIFF:** I think we're good.

14 **THE COURT:** Okay.

15 Folks, we may get real close to five o'clock
16 and have 10 or 15 minutes left to go with your group
17 because we're going to have to bring in another panel
18 tomorrow. But if you are going to stay that extra 10
19 or 15 minutes, you won't have to come in until
20 substantially later tomorrow. I think as investments
21 go, that might be not too bad.

22 I am going to assume, unless I hear
23 otherwise, you are willing to do that. I will
24 likewise try and hold the lawyers to the number of
25 questions. I had one one day say, a few questions,

1 Judge, and I shut him down at 73. So I am promise
2 they will do better than that.

3 **MR. MURPHY:** Yeah. And I am not even going
4 to go down the political route I left off at.

5 I am just going to sum up that topic by
6 asking if there is anybody here who feels that they
7 may judge my client not on what he did, but on the
8 activities of the AIM. That's what I was getting at.

9 Whether it's a political party or an
10 environmental group or advocacy organization, each
11 person should be judged and tried on what they did as
12 opposed to maybe what their leader of their group did
13 or some other members of that group; is that fair?

14 Okay. Good.

15 And by the way, although we're going to try
16 what we can to get this done by 5:15, Tina has
17 instructed me that does not give me permission to talk
18 quicker. And so I am going to keep my pace because I
19 have been yelled at by court reporter since I started
20 practicing about talking too fast.

21 The next and probably the last very sensitive
22 issue -- and we brushed upon it, but we need to go
23 back to it -- is the issue of race. And my client is
24 a member of a Canadian Indian Tribe. Many of the
25 witnesses in this case are going to be Indian. And I

1 need to have that discuss with you.

2 And I am going give you some examples of
3 where race has come up in my own experiences when I
4 think about the voir dire. My 11 year old was a huge
5 fan of the Laura Ingalls Wilder series. She read all
6 of the books in sequence. When she finished with one
7 we would go right down to Borders and get her the next
8 one.

9 Part of her practice was to read out loud.
10 Now, for those of you that have read those books, you
11 know there is some statements in there that are just
12 downright racist. I remember a statement by the
13 mother saying, if she had to choose between wolves and
14 Indians, she would always choose wolves. That's part
15 of our experience. Race and race dynamics are part of
16 our experience.

17 During the summer my daughter and one of her
18 friends from day care wanted to go down to the old
19 Storybook Island area. There is the creek that goes
20 through there, and wander, and get their feet wet
21 because the day care was actually right near there.
22 There was an Indian family sitting on the banks of the
23 creek having a picnic and we were going to walk over
24 because there was a rope there that they could swing
25 out. Not much of a swing because it would be about

1 6 inches of water.

2 As we walked over there, the girl that was
3 with my daughter, who has great parents, is a great
4 kid said I don't want to go over there. I am afraid
5 they will stab me. And I said, who, and she said
6 those Indians.

7 That was something that she had picked up
8 through her environment and it's not right or wrong.
9 It's just part of what she had experienced. We all
10 have prejudices, whether it's gender or sexual
11 orientation or height or race, economics, there is
12 many, many things that we have that we might not be
13 particularly proud about, but this is the time to talk
14 about them.

15 And, you know, when I bring up this topic I
16 am almost always assuming that nobody is going to say,
17 boy, race plays a part in this for me. But I did have
18 a case where it was an aggravated assault case. My
19 client was Indian. And a woman in the juror pool
20 raised her hand and this is what I meant about when we
21 say we appreciate candor. She said, you know, the way
22 I was raised, I was raised out in the Valley, I was
23 raised just to believe that Indian people were not
24 honest, and they were dangerous, and I don't think I
25 could be fair to your client. And I have never

1 appreciated a juror's honesty more.

2 So I need to ask here, any of you -- and
3 again we can have a private meeting if you need.
4 We're all adults -- if the fact of race -- the fact
5 that most of the fact witnesses or many of the fact
6 witnesses are going to be Indian, whether that's going
7 to play any part, favorable or unfavorable, against
8 those witnesses and against my client?

9 Anybody have any feelings at all that they
10 might allow race or race might insert itself into the
11 process?

12 Okay. I am going to take y'all for your
13 word. Nobody has raised their hand. And we'll just
14 hope, together as a community, that we're above
15 allowing those kind of things in the process.

16 We've talked about the burden of proof and I
17 am not going to go book into that. The presumption of
18 innocence. Some those things.

19 One of the things I want to talk to you about
20 is this notion of solving the crime. I'd like you to
21 raise your hand if it would make it easier for you to
22 vote not guilty if I proved to you who did it. I
23 proved -- I got some witnesses together or got one of
24 the state's witnesses to confess on the stand that
25 they did the killing, not John Graham.

1 Would that make it easier for you to vote not
2 guilty than if there wasn't such a confession?

3 Maybe I am not wording that right.

4 Sir, your name?

5 **PROSPECTIVE JUROR:** Matt Almeida.

6 **MR. MURPHY:** Mr. Almeida, would it make it
7 easier if we were able to prove somebody else? I
8 mean, I proved it beyond a reasonable doubt?

9 **PROSPECTIVE JUROR:** Yeah. Obviously if you
10 proved that someone else did it beyond a reasonable
11 doubt, obviously he wasn't the one who did it.

12 But on the flip side, if someone goes up
13 there and says that they did it, and you can't prove
14 it, they can't prove it, and they proved that your
15 client beyond a reasonable doubt committed the crimes
16 that are against him, then it doesn't matter what she
17 said because they proved beyond a reasonable doubt
18 that your client did it.

19 **MR. MURPHY:** That's a good point. I never
20 thought it about it way. Okay.

21 What I'm getting at is we got CSI, there is
22 like 19 different versions of Law and Order and John
23 Grisham novels and movies are some of the most popular
24 in the country. We like to solve the crime, you know.

25 And one of things about this process is my

1 client doesn't have to solve the crime. Often times
2 jurors either want the defense to solve the crime or
3 want to solve it themselves. And that's not the role
4 of the jury.

5 The role of the jury is, again, to look at
6 the evidence that the state has put forward or the
7 evidence that has been presented and say, has the
8 state resolved all reasonable doubts. Have they
9 proven each and every element?

10 I want to address that -- there is not really
11 a lot of questions to ask, but that's part of the s
12 process is to pull back and say, my role isn't to
13 solve the crime. It's to determine whether the state
14 has met it's burden. And that's where the job of the
15 juror ends.

16 And that may not be where you want it ended.
17 As amateur sleuths, you may want to be in the process
18 of either solving the crime yourself or having me
19 solve it. But I don't have that responsibility. I
20 have been doing that 17 years. Never had that perry
21 Mason moment. I am really, really waiting for it, but
22 it just hasn't happened yet.

23 Couple other topics. This courtroom, once
24 you -- once the jury is seated, is probably going to
25 be packed. And it's a public trial. Neither side has

1 any control over who comes. And really, we don't have
2 any control over what happens in the gallery.

3 I need you to know that now because I need to
4 know -- I need to make sure that nobody holds my
5 client or the state possible if there is conduct in
6 galley that is disruptive. And I'm not assuming there
7 is going to be any riots or fights, but just talk or
8 people making comments or anything like that.

9 There has been a couple trials already and
10 everything has been more or less orderly, but there
11 has been times when people have more or less blurted
12 out things. Said thing that are on their minds. This
13 is a pretty contentious case.

14 Knowing that there is going be a packed
15 galley, does anybody have any concerns about their own
16 safety that -- their own safety might be in jeopardy
17 if they sit on this case because it's got this
18 political dynamic that goes back all the way to the
19 70s?

20 All right. The last thing I want to talk to
21 you about is sympathy. One of the judge's
22 instructions is going to be that as a juror you put
23 sympathy and bias aside. You don't decide the case
24 based on who you feel sorry for.

25 Anna Mae Aquash was a relatively young woman

1 in her 30s when she died. She had two daughters that
2 were young. She was a woman and she was a mother.

3 Who here would agree that it's wrong -- raise
4 your hands if it's wrong for anybody to die in an
5 unjustified homicide?

6 Keep your hands raised if you think it's
7 worse for a mother to be killed than a non mother.

8 Got couple hands. You, sir, had your hand
9 raised.

10 Do you think it's worse for somebody who is a
11 mother to be killed than somebody who isn't?

12 **PROSPECTIVE JUROR:** Yeah.

13 **MR. MURPHY:** Okay.

14 And that's a real natural reaction. I was
15 raised by an Irish mother of five boys. She would
16 have been right there with you shaking her head.

17 What -- how do you think that's going to
18 affect your view if this case?

19 **PROSPECTIVE JUROR:** Just like the punishment
20 phase probably. If he gets found guilty. Maybe like
21 the death penalty or something like that.

22 **MR. MURPHY:** I will tell you punishment won't
23 be any part of the jury's process. The jury simply
24 finds guilty or not guilty. Punishment is up to the
25 judge.

1 Do you think that your sympathies for a young
2 mother who was killed are going to cause you to view
3 the evidence differently in a way against Mr. Graham
4 just by virtue of the fact that she was a young mother
5 at the time she was killed?

6 **PROSPECTIVE JUROR:** No.

7 **MR. MURPHY:** Okay.

8 Mr. Almeida, I saw you also had your hand
9 raised.

10 **PROSPECTIVE JUROR:** It's more of a -- we're
11 here to decide if he did it or not from the evidence
12 put forward.

13 That doesn't mean that I can say -- of
14 course, it's going to -- have more of an affect on
15 somebody that's a mother. It's going to have more of
16 a impact on the kids' life so obviously, yeah, it's a
17 little bit worse.

18 **MR. MURPHY:** You can factor that in and it's
19 going to affect?

20 **PROSPECTIVE JUROR:** But it doesn't affect the
21 evidence they put forward of whether he's guilty or
22 not.

23 **MR. MURPHY:** Anybody else in the last two
24 rows thinking as we're talking about this that they
25 may be sympathetic or they may allow sympathy to play

1 into how they view the evidence by virtue of the fact
2 that the person who was kill was a woman and was a
3 mother?

4 Anybody over here that would allow sympathy
5 to get involved or be part of the process?

6 Or do think you should be allowed, as a
7 juror, to consider those kind of factors, whether the
8 person was young or old, rich or poor, mother on non
9 mother?

10 Is that part of the process that the jury
11 should be allowed to consider?

12 Ms. Lutheran?

13 **PROSPECTIVE JUROR:** I don't know -- no, it's
14 not part of the process the jury can consider. It's
15 hard to take sympathy out of anything. Nobody should
16 die.

17 **MR. MURPHY:** Right.

18 **PROSPECTIVE JUROR:** Whatever way that they
19 die.

20 So the sympathy is the fact that the person
21 is no longer with you.

22 **MR. MURPHY:** Right.

23 **PROSPECTIVE JUROR:** In that aspect as far as
24 it judging me, no. I mean, my way, I judge things, I
25 will cry at movies. I will do all those things

1 because that's the type of person I am.

2 But as far as making the judgment, it has to
3 be proven to me.

4 **MR. MURPHY:** Okay.

5 **PROSPECTIVE JUROR:** In that aspect.

6 **MR. MURPHY:** Anybody feel differently?

7 You know, we're almost asking an impossible
8 task. When the instructions are given to you and it
9 says you cannot consider sympathy, when are you doing
10 your deliberations, it's all -- it's part of trying to
11 impose the legal system on humans. But what we're
12 basically asking to you do is do the best job you can
13 and not allow that to affect you.

14 All right. My last question is going to
15 be -- we've covered a lot of topics.

16 Is there anything that I should have asked
17 you or that during the course of the process of voir
18 dire you said, boy, there is something they should
19 know about that we haven't talked about yet that may
20 affect my ability to sit as a juror over the next
21 three weeks?

22 Is there anything at all that I missed or
23 that you think should be brought to our attention, the
24 judge's attention, before I sit down?

25 Mr. Parker?

1 **PROSPECTIVE JUROR:** What about the evidence?
2 Will evidence be brought into this courtroom?

3 **MR. MURPHY:** Yeah. Evidence is testimony,
4 documents -- evidence is anything really, other than
5 what the attorneys say. One of the good parts of the
6 law is you are told whatever we say doesn't matter.
7 It's what you hear from there. What you see on a
8 document or a map or something like that.

9 **PROSPECTIVE JUROR:** What about evidence
10 that's -- that the jury never even knew existed?

11 **MR. MURPHY:** You are going to hear it all
12 here. I mean, and that's --

13 **PROSPECTIVE JUROR:** Because that's one thing
14 I don't like. Where maybe that evidence could save
15 the person from going to the electric chair.

16 **MR. MURPHY:** Like the innocence project and
17 stuff like that?

18 **PROSPECTIVE JUROR:** Right.

19 **MR. MURPHY:** We can't talk too much about the
20 facts.

21 **MR. JACKLEY:** Your Honor, may we approach
22 with respect to that colloquy?

23 **THE COURT:** Yes.

24 (Whereupon, a discussion was then had at the
25 bench and off the record.)

1 **THE COURT:** Let me talk a little bit about
2 evidence because it seems we're going back over some
3 ground we have been over before.

4 Evidence consists of exhibits that I allow in
5 as evidence. There are two kinds. One is
6 demonstrative, just to illustrate a point that isn't
7 evidence. The point it illustrates is the evidence.
8 Exhibits which are offered. For instance they could
9 be a map, they could be photographs, that I let into
10 the record, those things are evidence.

11 You will be allowed to view the exhibits and
12 take them with you into the jury deliberation room.
13 There may be very rare exceptions to that but at the
14 moment I can't think of any that apply here.

15 The only other evidence is the testimony that
16 comes from the mouth of a witness. Period. And those
17 things are all you get. If they are not complete, as
18 my mother would say, is is. That's what you get to
19 live with.

20 It is the objective of the state to put in a
21 complete case. They are not going to leave anything
22 out on purpose. And it's the objective of this trial
23 to present the evidence to you that allows you to make
24 a determination.

25 But once the case is closed, Mr. Jackley

1 rests for the state, Mr. Murphy rests for the defense,
2 and whenever any rebuttal, if there is any, is
3 finished, it's all done.

4 The things counsel say, questions,
5 objections, none of those things are evidence. Their
6 opening statements are not evidence. That's simply to
7 tell you what they believe the case -- the evidence
8 will show. Mr. Murphy may make his opening statement
9 at the start of the trial or may reserve it until the
10 end of the state's case. I have not a clue what
11 Mr. Murphy plans to do. And I expect he will tell us
12 sooner or later. Maybe he won't.

13 The closing arguments are exactly what that
14 says, they are arguments. They are not evidence.
15 They are an attempt to convince you of what each side
16 believes the evidence has shown or not shown. And
17 then you get to go back and decide what it did show
18 and what it didn't show. That's really your job.

19 I will take care of the law. You will decide
20 the facts. Okay. My law -- my job is pretty simple.
21 Yours is pretty hard. My job gets reviewed by other
22 people on occasion from time to time and your decision
23 will control the outcome, folks. And it's your job to
24 do it well and fairly and in accordance with the law I
25 give you. I trust that you will do that.

1 **MR. MURPHY:** I hope that answers your
2 question.

3 Does anybody else have a point that they
4 thought of that might affect their ability.

5 Mr. Harbert?

6 **PROSPECTIVE JUROR:** Yes, sir. The time in
7 which the crime was alleged to be committed, 35 years
8 ago?

9 **MR. MURPHY:** Correct.

10 **PROSPECTIVE JUROR:** Sounds to me like an
11 unusual length of time between the commission of the
12 crime and the bringing a personal to trial. And I
13 don't know how that weighs on anybody else's mind.

14 Why has it taken 35 years to finally come up
15 with the charge?

16 **THE COURT:** I will take care of that.

17 The first response, sir, is it doesn't
18 matter. Okay?

19 **PROSPECTIVE JUROR:** Okay.

20 **THE COURT:** We're dealing with a crime that
21 occurred some time ago. The passage of time does not
22 make it not a crime. Okay?

23 **PROSPECTIVE JUROR:** Okay.

24 **THE COURT:** There may be reasons which are
25 simply not relevant to the issues or the facts you

1 have to decide.

2 You have to decide what happened from the
3 information you get, the evidence you get, 35 years
4 ago. And giving wonderment about the 35 years, why,
5 or putting any importance on that at all is a mistake
6 and takes you beyond your rolls as a jury. Okay?

7 **PROSPECTIVE JUROR:** Yes.

8 Thank you.

9 **THE COURT:** That's not a bad question,
10 however, but my answer, I think, is clear enough to
11 control that.

12 **PROSPECTIVE JUROR:** Yes, sir.

13 Thank you.

14 **MR. MURPHY:** Anything else before I sit down?
15 Ma'am?

16 **PROSPECTIVE JUROR:** Jackie Dittman.

17 I just have a question being it a murder
18 trial, is there any risk to the jurors.

19 **MR. MURPHY:** Do you have a concern that there
20 is any risk to you? I mean --

21 **PROSPECTIVE JUROR:** I would hope not.

22 **MR. MURPHY:** Okay.

23 I guess to the extent that any -- we have had
24 multiple trials in this case. There has never been
25 any harm or violence towards anybody involved in any

1 of the juries or anything like that. So I hope that
2 answers your concern.

3 Is it something that weighs heavily on your
4 mind or might make you think you have to wrote one way
5 or another?

6 **PROSPECTIVE JUROR:** No.

7 **THE COURT:** I have no concern whatsoever for
8 me or the proceedings in the courtroom. And I frankly
9 have no concerns for you.

10 But something should arise, I need to know
11 about it immediately. As far as can happen. Anybody
12 tries to talk to you about this case, you shut them
13 down and you call the courthouse immediately and we
14 will take care of that. Okay?

15 **MR. MURPHY:** And that includes the media?

16 **THE COURT:** That includes the media.

17 Anybody tries to talk to you -- that includes
18 your husband or wives as the case may be. Shut them
19 down.

20 **MR. MURPHY:** And the Court also will
21 appreciate getting that call from the spouse.

22 Ms. Plasencio, you had your hand raised?

23 Would you mind standing up so Tina can hear
24 you.

25 **PROSPECTIVE JUROR:** I wanted to go back to

1 the mother or not mother and the sympathy thing. And
2 I really didn't think about it until you mentioned it.
3 And I have been thinking about it since then.

4 But I feel like someone who is part of a
5 jury, someone who is a mother still might have some
6 sympathy knowing that a young mother lost her life.

7 **MR. MURPHY:** Sure.

8 **PROSPECTIVE JUROR:** You know, and not -- I
9 mean, was not by accident.

10 So I feel like I would have a little sympathy
11 for that knowing that I am a mother and --

12 **MR. MURPHY:** By the way, congratulations. I
13 haven't seen you since you had your child.

14 But, yeah, that's something that I would want
15 to hear about.

16 Do you think it's something that you are
17 going to be able to put aside?

18 If the judge tells you that you shouldn't
19 allow sympathy to be part of your deliberations or
20 your consideration --

21 **PROSPECTIVE JUROR:** Like I said, never
22 crossed my mind until you brought that up and then I
23 really started thinking about it.

24 **MR. MURPHY:** Do you think that's going to
25 stick with you throughout the trial.

1 **PROSPECTIVE JUROR:** I think it might. Yeah.

2 **MR. MURPHY:** How strongly?

3 Because you know there is lots of mothers and
4 lots of fathers in the audience.

5 **PROSPECTIVE JUROR:** I realize that.

6 **MR. MURPHY:** And that's not to diminish your
7 experience in any way. I am just saying there is a
8 lot of parents -- you don't even have to be a parent
9 to love children and to be sympathetic towards
10 children who are left orphaned.

11 Do you think you can -- set that aside and do
12 your best to just consider the evidence that comes
13 from the witness stand or from the exhibits and
14 whatnot and not allow that to --

15 **PROSPECTIVE JUROR:** Yeah. I mean, I would
16 try. I wouldn't want to use that against him just
17 because she was a mother. I don't know the situation.
18 But I would try.

19 **MR. MURPHY:** You would try your best?

20 **PROSPECTIVE JUROR:** Yeah.

21 **MR. MURPHY:** Kind of a hard follow-up, but do
22 you think you are going to be successful in trying?

23 Do you think you can do it?

24 If you are saying I just can't, then let's
25 know that now and I will move to strike.

1 **PROSPECTIVE JUROR:** It's hard to say. When I
2 look at it for my daughter, I wouldn't want that for
3 her.

4 **MR. MURPHY:** Sure.

5 **PROSPECTIVE JUROR:** So I kind of look at it
6 as her daughters -- she no longer there.

7 **MR. MURPHY:** Do you think it might affect
8 your ability to sit fairly in regard to Mr. Graham
9 because the victim of the crime was a mother and left
10 two daughters?

11 **PROSPECTIVE JUROR:** Maybe. Yeah.

12 **MR. MURPHY:** I will move to strike, Your
13 Honor.

14 **THE COURT:** I am sorry?

15 **MR. MURPHY:** I will move to dismiss the
16 juror.

17 **THE COURT:** Do you wish to voir dire,
18 Mr. Jackley?

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

20 **THE COURT:** Let me make a point.

21 You have been excused, folks --

22 Anybody here that doesn't have sympathy for a
23 mother and children of that mother, I think there is
24 probably something wrong with you.

25 However, that doesn't mean that somebody, in

1 particular, did it, and it's the job of the state to
2 establish who did do it. And the fact that the mother
3 died, was killed, has little to do with that.

4 The evidence must establish who killed or not
5 establish who killed beyond a reasonable doubt that
6 mother. And the sympathy for the mother makes you
7 decide that somebody charged with it in the absence of
8 proof, that's wrong.

9 I think all of you believe that that's a
10 tragedy and I think all of you believe that whoever
11 did it should be brought to justice. But that who did
12 it must be proved beyond a reasonable doubt by the
13 state's case. And sympathy is not a substitute for
14 doubt -- or for proof, rather.

15 Questions?

16 All right. Thank you, ma'am.

17 **MR. MURPHY:** Anybody else in?

18 **PROSPECTIVE JUROR:** I have a quick
19 clarification.

20 **MR. MURPHY:** Mr. West?

21 **PROSPECTIVE JUROR:** What you were talking
22 about with the trial itself, you know everybody at
23 work where I work knows that I am on jury duty. I can
24 say I am on jury duty. I will be out for three weeks
25 and that's perfectly fine. I don't want to say

1 anything else.

2 Is that a good boundary line to make?

3 **THE COURT:** That's it.

4 Anybody that's paying attention to what goes
5 on and you say that you are in trial for three weeks,
6 knows what trial you are in.

7 **PROSPECTIVE JUROR:** I understand that, but I
8 also don't want to say --

9 **THE COURT:** I mean we give them -- even those
10 who don't read the Journal will know what trial you
11 are in. And that's okay. You don't have to explain
12 it. You just -- the response is, I simply cannot talk
13 to you about it.

14 If it goes beyond that, that's when I want to
15 be called. You are going to have friends and
16 associates just eager to know what's going on. And
17 you have to shut it down right now. Otherwise you are
18 forming opinions, and you can't do that.

19 **MR. MURPHY:** And I said that was going to be
20 my last question.

21 That brings up a point. Is anybody here
22 going to have a hard time -- because one of the
23 instructions the judge will give to the jury that is
24 picked is that during the course of that trial, you
25 are not to read the paper on any article involving

1 this, you are not to watch the news or listen to the
2 radio for any information about the case as it's going
3 on.

4 Some of you may work in the media field where
5 it's just completely impossible for you to avoid that.
6 It may be part of your job or just part of who you
7 are, you are a news junky.

8 Is that going to cause anybody difficulty
9 professionally or personally if you are to abstain
10 from the paper and internet and TV and radio for the
11 next three weeks?

12 **PROSPECTIVE JUROR:** We can't watch the
13 national news at night?

14 **MR. MURPHY:** Not unless --

15 **THE COURT:** How many of you think I am going
16 to say you can read the newspaper?

17 How many of you think -- wrong.

18 How many of you think I am going to say go
19 home and watch the evening news? No.

20 **PROSPECTIVE JUROR:** There is national news
21 and then there is local news.

22 **THE COURT:** That's right. If I were you -- I
23 don't want you watching any of the local news. Okay.

24 **PROSPECTIVE JUROR:** National news?

25 **THE COURT:** That's dangerous.

1 I mean, I simply don't know to what extent
2 this will be picked up nationally. Most of our trials
3 here, it's not going to happen. This one has enough
4 interest that it may appear. And you may accidentally
5 come across it and you may hear about it on the radio
6 if you are listening.

7 You are honor bound to shut it down because
8 later it will be hard to tell where you got this
9 feeling or this information. And none of us deserve
10 of that. Okay.

11 Questions?

12 Yes, ma'am.

13 **PROSPECTIVE JUROR:** Can I have my husband
14 pull out the comics and the cross word for me?

15 I have to do the cross word.

16 **MR. MURPHY:** No problems there.

17 **THE COURT:** Or the Sodoku or whatever that
18 is.

19 **MR. MURPHY:** Thank you very much for your
20 attention. I know it's been a long day. I really
21 appreciate it.

22 I pass for cause, Your Honor.

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

24 **MR. JACKLEY:** May I, Your Honor?

25 **THE COURT:** Yes, you may.

1 **MR. JACKLEY:** Good afternoon.

2 My name is Marty Jackley. I am the Attorney
3 General for South Dakota. I know that it's been a
4 long day. We've been going at this for some time.

5 Fortunate for you there are certain kinds of
6 personalities. Some personalities, if they ask you
7 what time it is, they built you a clock; other
8 personalities when you ask them what time it is, they
9 tell you what time it is.

10 I am going to try to get done by 5:00 or
11 5:15. I will do my best. Okay. So bear with me. I
12 have some important questions to ask so I appreciate
13 your attentiveness.

14 When Mr. Murphy started out a better part of
15 six hours ago, he introduced himself and talked a
16 little bit about himself. The reason he did that is
17 to try to pick your brain to see if there is anything
18 in your background that you can think of to see
19 whether or not there is any business dealings or
20 anything that you had with him. So I am going to do
21 the same thing.

22 I grew up in Sturgis. My dad is Mike
23 Jackley. He's a long time lawyer in Sturgis. He was
24 also a prosecutor.

25 Any of you know or had any dealings with Mike

1 Jackley out of Sturgis? Makes it easy.

2 You know, when you ask that questions you
3 hope he hasn't prosecuted somebody.

4 When I -- when I was finished with law
5 school, I became a lawyer and practiced here if Rapid
6 City at a law firm named Gunderson Palmer Goodsell and
7 Nelson. It's name has changed a little bit.

8 But have any of you had any business dealings
9 with that law firm, anything of that nature that
10 either I or Mr. Murphy should know about?

11 Ma'am?

12 **PROSPECTIVE JUROR:** Are you asking personal
13 or business?

14 **MR. JACKLEY:** Let me ask you this.

15 If you've had any dealings with Gunderson
16 Palmer that you think Mr. Murphy or I should know
17 about in trying to analyze whether or not you would be
18 a fair juror.

19 **PROSPECTIVE JUROR:** No.

20 **MR. JACKLEY:** Okay.

21 Prior to becoming attorney -- I am sorry.

22 **PROSPECTIVE JUROR:** Shelly Broderick.

23 My sister-in-law works at Gunderson Palmer.

24 **MR. JACKLEY:** Anything about that that will
25 have any effect on you sitting in judgment here today

1 either with respect to the state or with respect to
2 Mr. Graham?

3 **PROSPECTIVE JUROR:** No.

4 **MR. JACKLEY:** Okay.

5 Sir?

6 **PROSPECTIVE JUROR:** I manage the IT company
7 that supports their network.

8 **MR. JACKLEY:** Okay.

9 Again, same question. Anything about that
10 working at Gunderson Palmer and my prior relationship
11 as a partner there have any affect on your sitting as
12 a potential juror?

13 **PROSPECTIVE JUROR:** No, sir.

14 **MR. JACKLEY:** Anybody else?

15 Okay. After I was done in private practice
16 here in Rapid City I became the United States Attorney
17 and, of course, Bob Mandel is with the United States
18 Attorney's Office.

19 Is there anything about my time as the U.S.
20 Attorney or the Attorney General's office that causes
21 you any concern that would prevent you from being fair
22 either to the state of South Dakota or to Mr. Graham?

23 And finally, now, in my capacity as Attorney
24 General, I represent the State of South Dakota.

25 Is there anything in that background of me

1 being representative of the state that would cause you
2 any concern?

3 Do you have any dealings with the state that
4 you think would be important for either Mr. Murphy or
5 I to know?

6 **PROSPECTIVE JUROR:** Does working for them
7 matter?

8 **MR. JACKLEY:** We talked -- I heard you talk
9 earlier.

10 Anything -- anybody else that would have any
11 relationship with the state that you think we should
12 know about?

13 I know we went through a lot of names and a
14 lot of witnesses. And I need to go through a couple
15 more. They are not necessarily going to be witnesses
16 in the case. Their names may come up and it may
17 trigger something in your memory, a potential bias.
18 That's why I ask the questions.

19 You have been introduced to the lawyers here
20 today. There may be a few more lawyers involved in
21 either representing a witness or another other aspects
22 of case and I just want to go through them.

23 If you know them, would you please raise your
24 hand and we can talk about that. And when I say know,
25 if you recognize the name, it's no concern; but if

1 you've had any business dealings or you have had a
2 type of relationship which may affect your judgment
3 then I would ask that you raise your hand.

4 The first one is Dana Hanna?

5 How about Jim Leach?

6 Greg Erlandson?

7 How about Bob Van Norman?

8 How about Judge John Schlimgen out of Sioux
9 Falls? Okay.

10 We talked about a lot of witnesses. Let me
11 ask you about the victim in this case, Annie Mae
12 Aquash. Understanding that she died in the 1975, 76
13 time frame.

14 Did any of you happen to know Annie Mae
15 Aquash prior to her death?

16 How about either of her two daughters, Denise
17 Maloney? Does anybody know Denise?

18 How about Debbie Pictou? Anybody know
19 Debbie?

20 Okay. A couple of potential witness or names
21 that may come up during the trial. If you could give
22 me a hand signal in you know these individuals.

23 Angie Palfy?

24 Richard Two Elk.

25 John Trudell?

1 Bruise Ellison? He is also an attorney here
2 in town?

3 Loralie Decora?

4 You guys are making it easy for me.

5 Bill Means? He also goes by Kills Means.

6 **PROSPECTIVE JUROR:** I don't have -- as an
7 acquaintance, kind of, in college. You know, my
8 maiden name was Carr. We occasionally sat within a
9 few desks of each other in class. I never really knew
10 him, just who he was.

11 **MR. MURPHY:** Did you know him as Russell
12 Means' brother?

13 **PROSPECTIVE JUROR:** Later.

14 But I knew that he was, but, you know, by
15 then I was out of college and gone. So I guess -- I
16 guess what I'm saying -- you know, I went to the
17 college library, and once in a while he would come
18 around behind the stacks and say, whoo.

19 **MR. JACKLEY:** His name may come up in the
20 trial -- not testify, but his name may come up in the
21 trial.

22 Anything based on that prior knowledge keep
23 you from being a fair juror either to Mr. Graham or to
24 the State of South Dakota?

25 **PROSPECTIVE JUROR:** You know, I don't think

1 so because, like I said, it was why I knew who he was
2 and we -- we passed in the hall and would say hi, you
3 know. Once in a while he would show up in the
4 library. But you know, other than that --

5 **MR. JACKLEY:** And even based upon that prior
6 association, do you think you can sit in fair judgment
7 when witnesses testify and listen to the testimony and
8 judge it to the best that you can in?

9 **PROSPECTIVE JUROR:** Oh, yeah. He was just
10 another one of -- you know, you have your friends and
11 then there are a lot of people that you just say hi
12 to.

13 **MR. JACKLEY:** And that's all that we can ask
14 of you.

15 **PROSPECTIVE JUROR:** Yeah. I would have no
16 basis to judge him.

17 **MR. JACKLEY:** Okay.

18 How about his other brother Ted Means? Does
19 anybody know Ted Means?

20 Dennis Banks? Anybody know Dennis Banks?

21 How about David Hill? Does anybody know
22 David Hill?

23 And lastly, Leonard Crow Dog. Does anybody
24 know him?

25 Okay. I think it was Ms. French who knew Ray

1 Hand Boy.

2 Do you recall that?

3 **PROSPECTIVE JUROR:** Yeah.

4 **MR. MURPHY:** Ray Hand Boy was married to
5 Evelyn Bordeaux. Evelyn has since passed. Does that
6 help?

7 **PROSPECTIVE JUROR:** That's not the right one.

8 **MR. JACKLEY:** Okay.

9 The other question I had -- Ms. Little, are
10 you any relation to Peggy Little that used to be at
11 the U.S. Attorney's Office?

12 **PROSPECTIVE JUROR:** I am married to a Little.

13 **MR. JACKLEY:** Okay. Okay.

14 You have heard the judge talk a little bit
15 about it and Mr. Murphy talked quite a bit about it
16 that this is a murder case; a felony murder kidnapping
17 case.

18 I am not allowed to talk about sentencing
19 issues other than I can say that this is not a capital
20 case or a death penalty case. So you don't have to
21 worry about any of those type issues, okay?

22 With respect to any other sentencing issues,
23 that is going to be left solely to the judge.

24 So can I see a hand of those of you that will
25 accept that and put sentencing out of your mind and

1 just leave that up to the judge?

2 Everybody agree with that concept in?

3 Okay. This is a murder case. You know, we
4 don't know what evidence you will see yet. But it's
5 plausible that there could be some graphic evidence.
6 The lawyers will try to be respectful on what is
7 introduced. Much of it may come through x-rays or
8 other things, but you may see some graphic evidence.
9 And I just need to tell you up front about that.

10 Does that concern anyone that there may be
11 more graphic evidence that we need to talk about?

12 We're okay with that?

13 Okay. Mr. Murphy touched on it a little bit
14 with a couple questions about the fact that this is a
15 1975 case. And I know that the question came up --
16 there is no statute of limitations with respect to
17 murder. I need to ask you with respect to that
18 concept. And the judge talked to you a little bit
19 about the rule of law and that it doesn't matter about
20 1975.

21 But my question to you is, does that concern
22 anybody?

23 Does anybody have a concern about the fact
24 that a case this old can be brought?

25 If you'd raise your hand and we can talk

1 about it if you have a concern about that concept.

2 Everybody is okay?

3 Can I see a raise of hands of those of you
4 that will treat this 1975 murder case just like you
5 would any other murder case coming from two years ago?

6 Can I see a show of hands?

7 Okay. I think we covered this in pretty good
8 detail with the media coverage. And I know the judge
9 has instructed you to not look at any additional media
10 coverage that may come about the case.

11 But I look back and I understand that we all
12 come to the jury pool with life experiences. We can't
13 take that away from you. You see certain things and
14 really those life experiences can -- is what makes a
15 jury strong.

16 Is anybody -- when you -- when we talk about
17 the media coverage, the Aquash case, anything that you
18 are seen, does that cause you any cause or concern
19 that you want to talk to me further about?

20 Anything that you have read, anything that
21 you've saw, anything of that nature, that you feel I
22 should know about as the lawyer for the state?

23 **THE COURT:** We're about 5:15.

24 **MR. JACKLEY:** Everybody agree, then -- can I
25 see a show of hands that you will judge this case not

1 based upon what you read in the newspaper or the TV,
2 but you will base it upon what you have see from the
3 witness stand?

4 Can I see a show of hands of those of you
5 that will do that? Thank you.

6 Mr. Murphy talked a little bit about the
7 indictment and the charge of murder and felony murder
8 kidnapping. I want to talk to you about the concept
9 of aiding and abetting.

10 And with all of the legal matters that
11 Mr. Murphy and I have talked about, we would
12 anticipate that the judge would give you a more
13 detailed instruction on the exactness of the law.

14 My goal here is to just have a general
15 discussion about the topic and then to talk to any of
16 those of you that may have a concern about that topic.

17 Aiding and abetting, generally, is a concept
18 that a defendant has to know a crime was being
19 committed and knowingly participate in that crime. If
20 that happens, then a defendant is held responsible for
21 the crime just like the principle offender.

22 I will give you an example. The most common
23 example would be a robbery. I am going to pick on
24 Mr. Mandel and Mr. Oswald. Let's assume they are
25 going to rob a bank. And Mr. Oswald is going to be

1 the driver and Mr. Mandel is going to go in and rob
2 the bank. So they pull up. Mr. Oswald has got the
3 getaway vehicle. Mr. Mandel goes in. He robs the
4 bank, comes out, Oswald and Mandel take off.

5 Mr. Oswald aided and abetted. He knew that a
6 crime was being committed and he knowingly
7 participated. He helped out in the crime.

8 Does anybody have a problem with that general
9 concept that if you didn't do the full act, you
10 shouldn't be held responsible?

11 Can I see a show of hands of those of you
12 that think Mr. Oswald, you know, if instructed on
13 aiding and abetting, should be just as responsible as
14 Mr. Mandel in that scenario?

15 Can I see a showing of hands?

16 **PROSPECTIVE JUROR:** That he should be?

17 **MR. JACKLEY:** That he should be.

18 We had about an hour discussion on reasonable
19 doubt. And it's dangerous for me to go back into it,
20 but it's a very important concept. And it's one that
21 the judge is going to give you further instructions
22 on. I know there were a lot more questions kind of
23 coming towards that, what is reasonable doubt.

24 And understanding the judge will instruct on
25 that, I want to read you a sentence regarding it and

1 then ask you whether or not you can follow this
2 general concept. Proof beyond a reasonable doubt is
3 proof that leaves you firmly convinced of the
4 defendant's guilt. There are very few things we know
5 with absolutely certainty. In other words, reasonable
6 doubt is not an absolutely certainty.

7 If you are given an instruction along those
8 terms, would you be able to follow it?

9 Can I see a showing of hands of those of you
10 that would be able to follow it?

11 Okay. Is there anybody in this jury that
12 would require the state to prove beyond all doubt?

13 Okay. I want to take a minute -- and there
14 was a question a little bit ago about evidence, and
15 the judge gave a little further instruction on that
16 and I want to talk to you about two types of evidence,
17 direct and circumstantial evidence.

18 And again, as with all of these questions, I
19 would anticipate that you may receive more information
20 from the judge on it, but I want to just talk to you
21 about a concept. I want to -- and maybe I will do
22 this through example what direct evidence is.

23 I am going to use a stabbing example. Once
24 again, I am going to pick on Mr. Mandel and
25 Mr. Oswald. And let's assume Mr. Mandel is in his

1 house and Mr. Oswald goes in, and I am sitting there,
2 and I watch Mr. Oswald stab Mr. Mandel. I have seen
3 direct evidence. I mean, I am a witness. I saw it
4 happen. My testimony would be direct evidence of the
5 crime happening. You don't have to draw any
6 inferences from that.

7 Taking the example a little further in
8 dealing with circumstantial evidence, I am going to
9 use the same players. Although this time instead of
10 me being in the house witnessing it, I am in the front
11 yard. I am able to say that I know that Mr. Mandel is
12 in the house. He's the only one in the house. I see
13 Mr. Oswald run in the house with the knife. I hear
14 Mr. Mandel screaming. And I see Mr. Oswald run out of
15 the house with a bloody knife.

16 Now, I -- I am not direct evidence of exactly
17 what happened in there. But I can testify to the
18 circumstantial evidence of just that, that there was
19 only two people in the house; I heard screaming; and I
20 seen Mr. Oswald with a bloody knife. The jury from
21 that can draw inferences from that that a stabbing
22 occurred and who did it.

23 Now, I need a -- to see a show of hands of
24 those you, would you feel you would be able to use
25 common sense when it comes to drawing inferences or

1 viewing circumstantial evidence.

2 Would everybody be able to use common sense?

3 I am always hesitant to ask the question
4 about CI shows because I don't get to watch them at
5 home because my wife says, you yell at the TV about
6 how that can't really happen. I am probably not an
7 expert on it, but it came up in previous questions so
8 I need to ask a couple questions regarding it.

9 Let me see a show of hands of how many of you
10 watch CSI or Law and Order or those type of shows.
11 Everybody but lawyers get to watch those. There was a
12 few hands go up.

13 Under most circumstances, legal issues,
14 unless there is like a voluntariness on Miranda and
15 search and seizure, those are all dealt with by the
16 judge ahead of time, and the lawyers.

17 So for the most part in a jury trial, unless
18 the jury specifically instructs you on a particular
19 voluntariness-type issue, you know, you won't be
20 dealing with Miranda, you won't have to be wonder
21 whether somebody was given Miranda. You won't have to
22 be wondering whether or not there should have been a
23 search warrant for something. We will already have
24 resolve those issues.

25 Everybody understand that?

1 Anybody going to be disappointed that it's
2 not like CSI where we're fighting about Miranda and
3 stuff you will be okay with that?

4 Okay. Similarly, this is a 1975 case. Many
5 of the forensic shows and the CSI there is all kinds
6 of DNA and smoking gun issues and those type of
7 things. You know, I don't anticipate that you are
8 going to necessarily see that in this case.

9 Again, does -- are you till going to be able
10 to view the evidence that you view and place weight
11 into that evidence without seeing fancy
12 forensic-file-type evidence?

13 Will you be able to do that?

14 Can I see a showing of hands?

15 Now, a question had come up -- I am -- I want
16 to be careful not to pick on somebody too much -- a
17 question had come up. I think it was -- was it you
18 regarding you had been on a jury before?

19 **PROSPECTIVE JUROR:** Yes, sir.

20 **MR. JACKLEY:** Okay.

21 And the question come up and I think you said
22 it was a murder jury.

23 **PROSPECTIVE JUROR:** Uh-huh.

24 **MR. JACKLEY:** And that only one witness had
25 testified and you would feel more comfortable if there

1 would have been two witnesses.

2 Is that a fair characterization?

3 **PROSPECTIVE JUROR:** Yes.

4 **MR. JACKLEY:** I am not picking on you but let
5 me talk about that concept with respect to the long
6 discussion we had about presumption of innocence and
7 reasonable doubt. I appreciate that the state bears
8 the ultimate burden of proof in this case; that the
9 state bears the burden to prove beyond a reasonable
10 doubt that the certain elements of the offense
11 occurred. And the presumption of innocence exists
12 until such time as the state proves beyond a
13 reasonable doubt all of the elements. And then the
14 presumption goes away.

15 If we're going to do that with one witness --
16 I am not suggesting that it's only going to be one
17 witness -- under the law, if the state is able to
18 prove beyond a reasonable doubt with one witness, and
19 the judge instructs you that under the law you must
20 convict if it's proven beyond a reasonable doubt,
21 would you be able to do that even though you had that
22 prior experience?

23 **PROSPECTIVE JUROR:** No. No. I believe there
24 would have to be two witnesses.

25 **MR. JACKLEY:** There would have to be two

1 witnesses?

2 **PROSPECTIVE JUROR:** Right.

3 **MR. JACKLEY:** That comes from that previous
4 matter that you sat on?

5 **PROSPECTIVE JUROR:** Right.

6 It also just comes from my personal
7 experience with having been found guilty by one
8 witness who said something different than I did and
9 people accepted his testimony rather than mine. So
10 that's why I believe there has to be two witnesses.

11 **MR. JACKLEY:** I will come back to that
12 example.

13 Let me use the example I did with direct and
14 circumstantial evidence. Where I am the witness and I
15 am sitting at the kitchen table. Mr. Oswald comes in
16 and stabs Mr. Mandel. And you know there is only
17 going to be one witness to it because in this example
18 Mr. Oswald didn't survive the stabbing. I am the only
19 witness and I come in and testify and you are sitting
20 there as a juror.

21 And even though you feel -- the state proved
22 beyond a reasonable doubt that all of the elements for
23 that stabbing murder were there, you still would not
24 be able to convict?

25 **PROSPECTIVE JUROR:** Well, you are talking

1 about one eyewitness and then you mentioned
2 circumstantial evidence after that.

3 **MR. JACKLEY:** You would be willing to
4 consider that circumstantial evidence?

5 **PROSPECTIVE JUROR:** Right. That would be
6 part of being a witness against the accused.

7 **MR. JACKLEY:** And you would be able to draw
8 reasonable inferences from that circumstantial
9 evidence?

10 **PROSPECTIVE JUROR:** Right.

11 **MR. JACKLEY:** And you would be willing to use
12 your common sense in drawing those inferences?

13 **PROSPECTIVE JUROR:** Yes.

14 **MR. JACKLEY:** That's all I can ask. Thank
15 you.

16 This came up in earlier questioning, the
17 issue of plea agreements. It was talked about with
18 Thelma Rios and, you know, it was further kind of
19 talked about a little bit with Arlo Looking Cloud.

20 I want to talk to you for a minute about plea
21 agreements. Plea agreements are a deal where a
22 defendant and the government reach an agreement and
23 there is a resolution made short of trial. It's a
24 fairly common practice. I want to ask you about your
25 feelings for -- about it.

1 Does anybody have concerns with plea
2 agreement practice?

3 In other words, does anybody sitting here
4 think that's absolutely wrong?

5 There should be no reason why the government
6 should reach a plea agreement?

7 Everything should go to trial?

8 Anybody have that type of belief?

9 Okay. Now, often times with plea agreements,
10 or deals there -- there is a benefit exchanged between
11 the government and a potential witness. And you will
12 likely hear some evidence of that at trial.

13 Are all of you willing to at least view that
14 evidence with an open mind as to what the witness is
15 saying and what potential benefits may exist for the
16 witness?

17 Will you look at that with an open mind?

18 Can I see a showing of hands?

19 Okay. Is anybody here of the belief that --
20 that because there is a plea agreement, there is no
21 way in heck you are going to listen to word one from
22 that witness at all?

23 I mean, does anybody have that kind of
24 belief?

25 Okay. The indictment in this matter -- and

1 it will be read as the judge had indicated by me at
2 the time of opening statement. And it talks about on
3 or about a certain date. And I would anticipate that,
4 again, the judge will give further instructions, but
5 that the state does not have to prove an exact date
6 and time.

7 In other words, we don't have to prove that
8 something happened on December 11 at 8:15. We have to
9 prove on or about.

10 Does that concern anybody?

11 The fact that we don't have to be -- have to
12 have that kind of exactness. That it can be on or
13 about.

14 Does that cause any problems or concern?

15 Is everybody telling me -- can I see a show
16 of hands of those of you that will be willing to
17 follow the judge's instruction on the on or about
18 part?

19 Thank you.

20 Another topic that I need to be very careful
21 about, Mr. Murphy asked some questions about race and
22 I feel the need to do just a little bit of follow up.
23 I am very appreciative of the way that everybody
24 answered that, but I need to also ask it a little
25 further.

1 He asked it about the defendant. And the
2 victim in this case, Annie Mae Aquash, is a Native
3 American person.

4 Does that in any way affect anybody's
5 judgment on how they will view this case and the
6 evidence whether she's Native American or non Native
7 American?

8 Does everyone here believe that a Native
9 American should be treated just the same that a non
10 Native American should be?

11 Thank you.

12 We also had a lot of discussion about AIM.
13 AIM stands for the American Indian Movement. I will
14 tell you right now that AIM is not on trial. AIM is
15 not going to be an essential element of the offense,
16 but it's become part of the discussion.

17 Again, we all come to this courtroom with
18 experiences in life. You may have read something
19 about AIM. You may have seen something about AIM. I
20 am sure the word AIM will be discussed a little bit in
21 the courtroom.

22 But did anybody have any specific run-ins
23 with AIM or specific issues with AIM in addition to
24 what you talked about with Mr. Murphy that you think I
25 should know about that would prevent you from sitting

1 in fair judgment to either the defendant or the State
2 of South Dakota?

3 I am just kind of going to close out. I got
4 about two or three more little areas to talk about. I
5 represent the State of South Dakota; and you know, you
6 will be hearing from law enforcement officers.

7 I need to ask you the question, have you ever
8 had any run-ins with law enforcement or issues with
9 law enforcement that you think would affect your
10 judgment in this case?

11 You are just mad as heck that you got that
12 speeding ticket or you felt you weren't treated
13 fairly?

14 Anything that would spill over and affect
15 your judgment as with respect to either me as the
16 lawyer or with respect to any of the law enforcement
17 officers that testify?

18 Okay. I need to ask you kind of the catchall
19 question that Mr. Murphy asked. This is the last time
20 I am going to be able to talk to you for a while. The
21 next time really you will see me again is at opening
22 statement if you are selected for the jury.

23 So it's been a long day. Have there been any
24 questions that you think either Mr. Murphy or I should
25 have asked that you think would be important if you

1 are standing in my shoes to know about in representing
2 the state or if you are standing in Mr. Murphy's shoes
3 representing Mr. Graham?

4 Anything in your backgrounds or that we
5 talked about today that you want to ask me about or
6 that you feel we should know about?

7 Kind of the catchall question.

8 Sir?

9 **PROSPECTIVE JUROR:** I know most of the guys
10 in public safety down on Pine Ridge and the BIA
11 criminal investigators and stuff. But I mean none of
12 them were around at this time so shouldn't have any
13 affect.

14 **MR. JACKLEY:** I think the only two would have
15 been around are --

16 **PROSPECTIVE JUROR:** Ecoffey, Bob, was around.

17 **MR. JACKLEY:** Ecoffey and Mitch Pourier.

18 **PROSPECTIVE JUROR:** Yeah.

19 But the rest of them ain't.

20 **MR. JACKLEY:** Anything about working there --

21 **PROSPECTIVE JUROR:** They have never discussed
22 any of this.

23 **MR. JACKLEY:** Okay.

24 No concern to you?

25 **PROSPECTIVE JUROR:** Not really.

1 **MR. JACKLEY:** Okay.

2 Anything else that I should have asked you --
3 I am kind of asking to you do my job for me.

4 **PROSPECTIVE JUROR:** I used to work for -- I
5 used to work in law enforcement. I don't know if that
6 had any bearing.

7 **MR. JACKLEY:** It has no bearing.

8 Let me ask you anything about those
9 experiences that would affect the way that you would
10 fairly judge the evidence as it would come in in the
11 trial?

12 **PROSPECTIVE JUROR:** No.

13 **MR. JACKLEY:** Okay.

14 Anybody have anything else that we should
15 know about?

16 I am going to take just a second and talk to
17 my co-counsel and -- if that's okay -- Your Honor?

18 **THE COURT:** Absolutely.

19 **MR. JACKLEY:** Your Honor, the State of South
20 Dakota would pass for cause.

21 **THE COURT:** Mr. Jackley underestimates
22 himself. He told me it would take an hour or more.
23 He did very well.

24 Ladies and gentlemen, what we're going to do
25 is one o'clock tomorrow, 1:15 or these folks maybe

1 later?

2 Mr. Murphy?

3 **MR. MURPHY:** There is only going to be 34.

4 **THE COURT:** We have 34, but I am going to
5 have other panels for -- they are going to get
6 oriented.

7 **MR. MURPHY:** What time are we starting?

8 **THE COURT:** We're going to start about 8:30.
9 The other panel, in addition to the 34, will be
10 oriented by then so we can bring in another panel
11 besides that. Should give us enough.

12 Our difficulty is how many more we can seat
13 so if we have these folks come in 3:00 o'clock.

14 **MR. MURPHY:** I would say 2:00 o'clock.

15 **MR. JACKLEY:** Yeah.

16 **THE COURT:** We're going to continue jury
17 selection for the additional jurors to make up the
18 necessary 56, with panels coming in tomorrow morning.
19 Following that, of course -- we will have a complete
20 jury plus the additions to come to 56 -- at that time
21 we will start the peremptory challenge process which
22 means eventually all but 14 of you will be set free at
23 that time.

24 So when we'll start that precisely, folks, I
25 don't have a clue, but certainly not before

1 2:00 o'clock. And if you would be back here at
2 2:00 o'clock, we may have you sitting in a jury room
3 or another courtroom until such time as we're ready do
4 that.

5 But I think that's a fair estimate of the
6 time it will take. So if you will be so kind as to
7 come back at 2:00 o'clock, remembering the instruction
8 about news, newspaper, and simply shutting down
9 conversation. If somebody is pushing you, let me
10 know.

11 Yes, ma'am?

12 **PROSPECTIVE JUROR:** So we should know by the
13 end of tomorrow if we're staying?

14 **THE COURT:** I want you back here reporting to
15 the bailiffs at 14:00, 2:00 o'clock.

16 **PROSPECTIVE JUROR:** Ten four.

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

18 **PROSPECTIVE JUROR:** When will we know if
19 we're one of the 14.

20 I think that's what she's asking.

21 **THE COURT:** You will know that some time
22 tomorrow or Wednesday, depending on how far we get
23 tomorrow. We originally expected this to take until
24 Friday, and we're way ahead of schedule.

25 That's -- all I can say is, thank you, folks,

1 for where we are.

2 Thank you for your patience.

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

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

3

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

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

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

11

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

13

COPY

14

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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