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

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* * I N D E X * *

WITNESS (ES) : DIRECT CROSS REDIRECT RECROSS

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EXHIBITS:

OFFERED/ADMITTED

(None.)

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

2 (Whereupon, the following proceedings were
3 had in chambers outside the presence of the
4 perspective jury panel.)

5 **THE COURT:** We're here for my ruling on the
6 motion to quash the subpoena for the appearance of
7 Mr. Marshall.

8 Mr. Hanna?

9 **MR. HANNA:** Your Honor, I submitted filings
10 to you --

11 **THE COURT:** I got it.

12 **MR. HANNA:** -- which I presume you got.
13 Those --

14 **THE COURT:** I have questions. What's the
15 statute of limitations at Pine Ridge?

16 **MR. HANA:** I am not sure about the statute.

17 **THE COURT:** Why not?

18 **MR. HANA:** However, I will say this --

19 **THE COURT:** No. I asked a question.

20 **MR. HANNA:** All right.

21 **THE COURT:** The statute of limitations
22 appears to be one year, which would indicate it ran
23 some 35 years ago. And if you are not sure of it, I
24 want to know why you are not sure of it.

25 I have wasted -- I've spent three hearings on

1 this and nobody gives me the statute of limitations
2 until 4:00 o'clock last night.

3 **MR. HANA:** Judge, the statute of limitations
4 would not necessarily bar a prosecution in this case.

5 I would remind the Court that three weeks ago
6 Thelma Rios plead guilty to accessory to kidnapping in
7 a document -- or accusatory instrument that stated the
8 crime took place between 1975 and 2009. Therefore, a
9 prosecutorial theory could accommodate an ongoing
10 crime that began in 1975 --

11 **THE COURT:** I don't accept that.

12 **MR. HANA:** You accepted it three weeks ago,
13 Your Honor.

14 **THE COURT:** What I did in the plea agreement
15 has nothing to do with this case. The statute of
16 limitations --

17 What's the penalty for homicide in the Tribal
18 Court?

19 **MR. HANA:** One --

20 **THE COURT:** What's the penalty?

21 **MR. HANA:** The maximum is a year. The
22 federal law has just been changed to allow Tribal
23 courts to impose a three-year sentence.

24 **THE COURT:** Why doesn't the Major Crimes Act
25 have, according to its terms, the exclusive

1 jurisdiction over this?

2 **MR. HANA:** It does not have exclusive
3 jurisdiction. Tribal courts have jurisdiction over
4 the same -- they are -- there are dual sovereignties.

5 **THE COURT:** Doesn't the major crimes act
6 state it has the exclusive jurisdiction?

7 **MR. HANA:** No, it does not.

8 It states it has exclusive jurisdiction as
9 opposed to states, but the United States Supreme Court
10 has decided in cases involving *Wheeler* and United
11 States against *Lara*, L-A-R-A, the tribes and federal
12 prosecutions and the federal government are dual
13 sovereigns.

14 **THE COURT:** I think they did not address that
15 issue although they could have is my recollection of
16 those cases.

17 **MR. HANA:** That is not my recollection of
18 those case.

19 Those cases definitely say that the tribe --
20 that the tribe and the federal government, just as a
21 state and the federal government, can bring the same
22 case based upon the same evidence. Double jeopardy
23 does not apply because they are dual sovereignties.
24 So the Major Crimes Act doesn't say homicide can only
25 be prosecuted in federal court.

1 **THE COURT:** Well, my conclusions are these.
2 Number one, that as far as the other states going
3 anywhere, would be unconstitutional for them after
4 immunity is granted here to prosecute or attempt to
5 prosecute Mr. Marshall.

6 Number two that Pine Ridge has no continuing
7 jurisdiction over this crime. The statute of
8 limitations ran some 30 plus years ago.

9 And I am somewhat concerned that nobody
10 bothered to give me the statute of limitations some 30
11 years ago -- or when we started this, a one year
12 statute of limitations on homicide.

13 It's my understanding --

14 **MR. HANA:** A conspiracy --

15 **THE COURT:** I understand the laws on
16 conspiracy, and I don't believe that this falls within
17 the categories of conspiracy. And I think that
18 Mr. Graham is going to be tried on the events that
19 happened 35 years ago and not on some sort of a
20 conspiracy that continues up and through his trial.

21 Now, it has to be in furtherance of the
22 criminal act and there is all kinds of ifs, whats, and
23 whys about conspiracy and I don't believe it applies
24 to this.

25 And I believe the immunity given Mr. Marshall

1 is sufficient to protect him. And if we're talking
2 about the dual sovereignty, I see there is no
3 difference between the tribe and foreign countries.
4 In indeed, many of our cases indicate that. The
5 Uniform Child Custody Jurisdiction Enforcement Act
6 treats the tribes as foreign countries and it applies
7 to them just as it applies to us.

8 And in terms of that, if the Fifth Amendment
9 does not apply in Germany, it's hard for me to believe
10 it applies here with a separate sovereign nation. And
11 the sovereign nation is there, the states -- if not
12 the federal government has it -- I am going to hold
13 here as a matter of law that Mr. Marshall under
14 immunity must testify.

15 **MR. HANA:** Judge, that brings us to the next
16 issue, which is, I have raised a motion to quash issue
17 on the grounds that the prosecutor is attempting to
18 make Richard Marshall testify for improper reasons;
19 that he -- that it is punitive. And as there is a --
20 I brought this under the state statute that says upon
21 a showing that a subpoena is punitive, it should be
22 quashed.

23 And I have asked the Court for an opportunity
24 to make a showing of that in an evidentiary hearing.
25 The Court has advised that I would have to wait until

1 you ruled on this issue because if you ruled in our
2 favor then we wouldn't have to go to the other issue.

3 Since you have ruled against us, I would ask
4 the Court, prior to Mr. Marshall testifying, set aside
5 time for us to have an evidentiary hearing in which I
6 will be able to make a showing --

7 **THE COURT:** Are you telling, me that if there
8 a bona fide reason to have him testify in this trial,
9 the fact that he may have additional motives, if
10 indeed he has those, would require the quashing of the
11 subpoena?

12 **MR. HANA:** I am saying that a state statute
13 provides that if a subpoena -- if I can make a showing
14 that a subpoena has been served for a punitive
15 purpose, then it should be quashed.

16 Also I can make a showing --

17 **THE COURT:** Do you have any law to suggest if
18 there is a valid reason to call Mr. Marshall to
19 testify in the course of this trial that the fact that
20 there may be other motivations, whether or not there
21 are, on behalf of the prosecutors in issuing the
22 subpoena would invalidate the subpoena for the
23 purposes of this trial?

24 **MR. HANA:** I have authority which I have
25 cited in my original brief that it is a violation of

1 due -- constitutional due process to put a -- call a
2 witness to the stand for the purpose of eliciting
3 testimony --

4 **THE COURT:** That's if the sole purpose --
5 let's say I grant -- let's say I agree with that. If
6 that's the sole purpose that's fine.

7 My question is, if there is a bona fide
8 reason separate and apart from that issue, does that
9 require the quashing of the subpoena and do you have
10 any authority for that proposition?

11 **MR. HANA:** Yes, I do. I have cited it in my
12 brief and it talks about the primary purpose. The
13 cases talk about the primary purpose. If the primary
14 purpose is to elicit testimony that the government can
15 later claim is false in order to bring a perjury
16 prosecution, then that is a violation of the
17 constitutional guarantee of due process.

18 So the fact that there may be some relevance
19 to his testimony is not -- is overcome if we can make
20 a showing that the primary purpose is punitive. If we
21 can make a -- and I can make a showing, I submit, that
22 the primary purpose of calling Richard Marshall is to
23 punish him for having gone to trial and been
24 acquitted.

25 I can make a showing with witnesses, which I

1 would like to call, that Mr. Jackley has threatened to
2 do just that, to charge Mr. Marshall with perjury in a
3 prosecution in front of the parole board if he does
4 not cooperate with the government and goes to trial.

5 I can make an offer of proof that I have two
6 attorneys who will testify that they were told by
7 Mr. Jackley, prior to Mr. Marshall's acquittal, that
8 if he -- that he should go to -- he should cooperate
9 and not go to trial because if you wins a trial, there
10 are going to be perjury charges brought --

11 **THE COURT:** Only if he commits perjury.

12 **MR. JACKLEY:** Correct.

13 **MR. HANA:** Judge, a jury has determined that
14 the government's witnesses were not telling the truth.
15 What I --

16 **THE COURT:** How did -- how did a jury
17 determine that?

18 **MR. HANA:** I believe --

19 **THE COURT:** I have never seen a jury make
20 that decision in its life. They come back guilty or
21 not guilty or hung.

22 **MR. HANA:** I recall Mr. Mandel telling the
23 jury, you decide the facts. And the State Supreme
24 Court has said that prosecutors don't decide the
25 facts, the juries decide the facts.

1 **THE COURT:** I agree.

2 What does not guilty mean, Mr. Hanna?

3 **MR. HANA:** The accusation has not been proven
4 beyond a reasonable doubt.

5 **THE COURT:** All right. That does not mean
6 that they don't believe some or all of the testimony
7 given by witnesses. It simply means that they are not
8 satisfied the proof as to every element of the case
9 has been proven beyond a reasonable doubt. And that
10 could include things like the date.

11 **MR. HANA:** Judge, rather than prejudge the
12 issue, I am asking for a hearing in which I can
13 present testimony.

14 **THE COURT:** How long is it going to take you
15 to do that?

16 **MR. HANA:** Perhaps an hour. No more than an
17 hour.

18 **THE COURT:** You got your hearing at 8:30
19 tomorrow morning.

20 **MR. HANA:** Are we excused, Judge?

21 **THE COURT:** You are.

22 **MR. MURPHY:** Judge, before we go back out
23 there, there is a couple other issues I just wanted to
24 bring up. We were notified, both Mr. Jackley and I
25 this morning, Rachel Embler is on the jury panel this

1 morning. I previously indicated with all of you by
2 email that she is a TV reporter from KOTA and has
3 covered the story. We also were advised this morning
4 that Ms. Embler actually sat in as a professional
5 reporter all day yesterday during jury selection. So
6 she's been through jury selection as a reporter and
7 now she's on the panel and so I would move to have her
8 dismissed for cause because she's sat through jury
9 selection as a reporter.

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

11 At least the paper could get the headline
12 right. That would help. My understanding is that the
13 headlines are not written by the person who wrote the
14 article. I could be wrong.

15 **MR. MURPHY:** The young man who wrote the
16 article is right here.

17 **THE COURT:** Well, headline is wrong.

18 **MR. JACKLEY:** I think she needs to go through
19 the process so at this point I would pass for cause.
20 I mean, I think she has to go through the process. I
21 don't think it should be a automatic removal, but
22 that's just the state's position. I think after a
23 couple questions it may be a for cause issue, but I
24 think at this point just having sat in the courtroom
25 does not exclude somebody from the voir dire process.

1 **MR. MURPHY:** I don't think it's the fact that
2 she sat through. She sat through in a professional
3 capacity and so has now formed conclusions, made
4 assessments of what the strategies of the parties are,
5 et cetera, as a professional; and now we're saying,
6 okay, on Monday you do that and on Tuesday you come
7 in --

8 **THE COURT:** I think if she becomes a
9 potential juror, I agree with Mr. Jackley. I don't
10 think it would take many questions to address the
11 issue and then I will make a decision.

12 Next?

13 **MR. MURPHY:** Lorelei Decora. We've got that
14 motion. I just kind -- I got to get a sense of when
15 we're going to take that up. We believe that her
16 Grand Jury transcript should be read. She's not
17 available as a witness. As we've indicated, Mr. Leach
18 has already indicated in that letter that she is going
19 to take the Fifth Amendment.

20 In light of Ms. Rios's plea where Ms. Decora
21 is not a suspect in this case or has been named as a
22 suspect, she certainly has that right. Mr. Leach
23 needs to come in and assert with her or assert on her
24 behalf that she will in fact be taking the Fifth.

25 And so I just kind of want to get a sense of

1 when you have time on your calendar. Mr. Leach is
2 pretty busy, but he said he would make himself
3 available.

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

5 **MR. JACKLEY:** I mean, I guess the way I look
6 at this, number one, I am not yet convinced she's
7 unavailable.

8 Number two, having gone through now four
9 hearings in regard to our ability to give somebody
10 immunity, I think that could become an issue where if
11 she does come in and take the Fifth, I think the state
12 has an opportunity to asses whether or not the state
13 would provide use and derivative use immunity, and in
14 turn, request the Court to compel testimony. So I
15 don't think that issue is ripe yet at this time.

16 **THE COURT:** When is she scheduled to testify?

17 **MR. MURPHY:** She's one of my witnesses so she
18 would be scheduled on either the 9th or the 13th.
19 We filed the motion and Mr. Leach's letter some time
20 ago and so if there are going to be in discussions
21 with Mr. Leach about offering immunity, I ask that
22 they get on that. They know Mr. Leach has said she's
23 going to assert the Fifth. They are the only ones in
24 the room that have the power to grant immunity. So we
25 need to get on the stick on that.

1 **MR. JACKLEY:** Judge, frankly, I would like an
2 opportunity to see what Thelma Rios tells the jury
3 before we make a decision on whether or not we would
4 grant use and derivative use immunity.

5 **THE COURT:** Would it not be more practical to
6 have the preliminary discussions with Mr. Leach so at
7 least we can streamline the process?

8 **MR. JACKLEY:** I've had some preliminary
9 discussions with Mr. Leach and I believe Mr. Oswald
10 has too. I think they are probably in the nature of
11 plea discussions and inappropriate for me to talk
12 about.

13 I just wanted to advise the Court that we are
14 having discussions but there is a reason why I am not
15 talking about those discussions.

16 **THE COURT:** Okay.

17 You will advise me, Mr. Murphy, in advance
18 several days when you realistically think you are
19 going to call. If we have not resolved the issue by
20 then, we'll schedule a hearing at 8:30 in the morning.

21 Anything further?

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

23 **THE COURT:** Thank you.

24 Let's get to choosing the few after many are
25 called.

1 (Off the record.)

2 **THE COURT:** Please call the roll of the jury.

3 (Whereupon, the roll call of the prospective
4 jury was then taken.)

5 **THE COURT:** Ladies and gentlemen, you have
6 been selected as potential jurors for the trial of the
7 State of South Dakota versus John Graham. Mr. Graham
8 is accused of two crimes. The first one is
9 premeditated murder. The second crime is murder while
10 in the course or commission of a felony. The detailed
11 elements of these crimes will be explained to you
12 later in some detail. That is sufficient to tell you
13 at this time what this case is about.

14 Before we go any further, let me tell you
15 that this is the second day of jury selection and we
16 will have to impanel what we call 56 jurors. Those
17 will be jurors or potential jurors who have passed the
18 examination to demonstrate that they have no biases,
19 life experiences or the like that would prohibit them
20 from giving a truly fair and impartial hearing of this
21 case.

22 We left here yesterday with 49. So we need
23 to pick seven more. And so you are in the position of
24 where many are called and few are chose en. But the
25 process will still likely go into the afternoon.

1 There is a fairly lengthy amount of questioning called
2 voir dire that must happen. And I will give you some
3 further instructions and explanations. But first I am
4 going to ask counsel to introduce themselves.

5 Mr. Jackley?

6 **MR. JACKLEY:** Thank you, Your Honor.

7 My name is Marty Jackley from the Attorney
8 General's Office. I am here with Rod Oswald, also
9 from the Attorney General's Office, and Bob Mandel who
10 is with the United States Attorney's Office.

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

12 **MR. MURPHY:** Morning.

13 My name is John Murphy. I am a sole
14 practitioner in Rapid City and my client is John
15 Graham from Canada. And this is my paralegal, Erin
16 Duchaneaux.

17 **THE COURT:** Thank you.

18 I am going to ask the clerk to take the next
19 step and that is to issue an oath to you that during
20 the course of the voir dire or jury selection you will
21 answer the questions posed to you truthfully and
22 honestly. That is the process by which we end up with
23 a jury.

24 So would you please swear the jury, ma'am.

25 If you would all rise and raise your right

1 hands.

2 (Whereupon, the Prospective jury panel was
3 then sworn.)

4 **THE COURT:** Ladies and gentlemen, I can give
5 you a long welcome speech. I assume you would prefer
6 the short one, which means I am glad you are here.
7 There is a reason you are here and it will become more
8 clear as we go.

9 This trial is going to take some time. There
10 is no way it's going to be short. It's going to run
11 at least through next week and probably some days into
12 the following week. We're not scheduled to go beyond
13 the following Friday, a week from -- two weeks from
14 today, effectively -- three weeks from today,
15 effectively, and that's going to impose problems for
16 all of you. I will address that in a minute.

17 I am aware that it's a severe imposition on
18 your time. The reason we call so many jurors and we
19 end up seating 56 is the process of jury selection
20 that is required by our state laws. We -- here each
21 side gets what we call 20 peremptory challenges. That
22 means of the 56, they must remove 20 per side. They
23 don't have a choice in that matter. They just simply
24 must do that. And it can do that if they need to
25 remove people they really like but 20 have to go. In

1 addition, we're going to have two alternate jurors so
2 we have a total of 14 sitting through the trial.
3 Nobody will know who the alternates are including me.

4 At the end of the trial, we'll pull numbers
5 all of a box and the numbers of those jurors will
6 require them to be excused immediately before the
7 deliberation of the case. For those that have
8 invested that much time in the process, I am sorry.
9 But that's the only way we can do that and ensure over
10 the three weeks we still have 12 when we're done.

11 So when we have additional jurors, each side
12 gets one more of the peremptory challenges. That
13 gives you 42 of those and 14 which comes to the 56 we
14 will have here.

15 Because of the length of the selection
16 process, I want to give you a warning that I normally
17 hold off on until we start the trial, but it's real
18 simple. You cannot talk to anybody about this case.
19 And anybody includes any living human being no matter
20 how close to you that human being may be. You will
21 undoubtedly be asked a question or what's this about
22 or what you are doing or what's going on and your
23 answer to that question is very simple. You can't
24 talk about it. If someone keeps pushing, I need to
25 know about it. That can amount to a crime called jury

1 tampering and that's not a fun place to be. There is
2 reasons for that. And as you will find during voir
3 dire you are not to form any opinions about this case
4 until a couple weeks down the pike. And if you start
5 discussing it with somebody, you automatically pick a
6 sequence of things to tell. And that sequence will
7 begin to form an opinion for you. And those of us
8 that have opinions on controversial matters, global
9 warming or TSA pat downs we will tend to cherry pick
10 information that supports our opinion whatever it may
11 be and to blow off that information or evidence that
12 is contrary to that. So I am asking you not only to
13 not discuss this, but not to form any opinions.

14 And throughout the trial, if you are on the
15 14 or throughout this proceeding, you will avoid the
16 news, you will avoid newspapers, you will avoid local
17 internet stations or things, blogs that may have
18 information about this trial. The reason for that is
19 again pretty simple. At the end of two to three weeks
20 you are going to be asked to decide a case based on
21 the evidence that came to you in this courtroom.
22 After several weeks of reading newspaper accounts or
23 whatever, you will not be able to separate what you
24 read from the newspaper a week and a half ago and what
25 evidence you heard here. And that will then give us

1 the potential of a verdict that is not based upon the
2 evidence in the Court. I realize that's difficult.
3 But, I am going to leave that task to you and give you
4 the honor or the chance of honor to do what you must.

5 When you leave the trial for a break in this
6 selection process to include the noon hour, when you
7 return, I want you to take of those in our potential
8 panel exactly the same seats you had when we left. So
9 everybody approximate can keep track of who is who.
10 None of the counsel and the parties to this case are
11 allowed to talk to you. Even if it's simply good
12 morning from a distance, nobody can tell what was said
13 and it has that ora of they shouldn't be doing that.

14 So if they appear to be rude and get off an
15 elevator if you get on, or refuse to even look at you,
16 they don't have any choice in the matter. That's the
17 way the system works.

18 Now comes the guilt trip. There are some of
19 you who cannot possibly serve because of serious and
20 unchangeable conditions. I will, in a minute, ask you
21 to identify yourselves if you cannot do so. But I
22 want the you to give a thought to public service is
23 something we don't do much any more in this country.
24 They really taken over by all kind of agencies and
25 processes that remove much of that burden. But I want

1 you to give some thought to those who do. We have
2 servicemen, National Guard and reservists whose public
3 service calls them repeatedly to ship out to hazardous
4 areas believing behind family and friends during
5 holidays and other days. They do that. They do it
6 without complaint, inconvenient as it may be. It puts
7 the duty of public service before all else sometimes
8 including life.

9 Now I think if we more military terms get it
10 up and look at that, I think we can all find that most
11 of us can find a way to sit through this even though
12 we're midway between Thanksgiving and Christmas. You
13 will have Friday afternoon off this Friday. You will
14 have the following Friday off and in its entirety.
15 Your weekends will be off. Our daily schedule starts
16 on or about 8:30 depending on whether I have to
17 resolve some matters outside the presence of the jury.
18 We'll have one morning break, noon break from noon to
19 1:15 and an afternoon break and I will promise you
20 that we will end at five o'clock because I am leaving
21 and if I am not here nothing happens. So that's where
22 we are.

23 Now, I would ask those to identify themselves
24 who believe they truly cannot serve for the next two
25 and a half to three weeks. Please raise your hand.

1 Yes, sir, can you tell us why.

2 Please stand.

3 **PROSPECTIVE JUROR:** I am Meyer. I am
4 scheduled to be in Austin Texas, let's see, Thursday
5 through Sunday; Columbus, Ohio, Monday Thursday; and
6 Minneapolis, Friday through Sunday.

7 **THE COURT:** Let me ask, if I may, what causes
8 that interesting itinerary?

9 **PROSPECTIVE JUROR:** Actually, it's Austin,
10 Texas. It's a swim meet for my daughter. Columbus
11 Ohio is work. A meeting. And Minneapolis is my
12 original home.

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

14 **MR. MURPHY:** I pass -- I'd excuse.

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

16 **THE COURT:** Okay. Thank you, sir.

17 You may be excused.

18 Back left behind you.

19 Yes, sir. Please stand.

20 **PROSPECTIVE JUROR:** Justin Horner. This
21 coming Monday I have to close on a house and get
22 moved.

23 **THE COURT:** Where are you doing this?

24 **PROSPECTIVE JUROR:** In town.

25 **THE COURT:** Can you not set your closing at

1 noon? That's when I closed mine.

2 **PROSPECTIVE JUROR:** I suppose I could. But
3 work requires me to be out of town frequently and I
4 took vacation next week to be able to get this done.

5 **THE COURT:** Where are you working?

6 **PROSPECTIVE JUROR:** I work in Wyoming
7 sometimes.

8 **THE COURT:** Doing what?

9 **PROSPECTIVE JUROR:** At an ethanal plant over
10 there.

11 **THE COURT:** And do you own it?

12 **PROSPECTIVE JUROR:** No.

13 **THE COURT:** You work there?

14 **PROSPECTIVE JUROR:** Yeah.

15 **THE COURT:** If you broke your leg you
16 wouldn't be there?

17 **PROSPECTIVE JUROR:** Yeah.

18 **THE COURT:** There are many called, few are
19 chosen. Unfortunately you are going to have to take a
20 risk.

21 Thank you.

22 Ma'am?

23 **PROSPECTIVE JUROR:** Patricia Hogan. I am
24 getting married on Saturday.

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

1 **THE COURT:** Not if you break your leg, right?

2 **PROSPECTIVE JUROR:** No -- well, yeah,
3 probably.

4 **MR. JACKLEY:** No objection.

5 **THE COURT:** I am not that mean.

6 You are excused, ma'am.

7 Yes, sir?

8 **PROSPECTIVE JUROR:** Aaron wood. I am
9 self-employed and I have contracts that have deadlines
10 as a builder.

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

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

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

14 **THE COURT:** You are self-employed?

15 **PROSPECTIVE JUROR:** Yes.

16 **THE COURT:** That means you are the boss?

17 **PROSPECTIVE JUROR:** Yes.

18 **THE COURT:** You have people working for you?

19 **PROSPECTIVE JUROR:** No.

20 **THE COURT:** What are you doing?

21 **PROSPECTIVE JUROR:** Building houses.

22 **THE COURT:** How many you working on right
23 now?

24 **PROSPECTIVE JUROR:** Two.

25 **THE COURT:** Where?

1 **PROSPECTIVE JUROR:** Out in Thunder Plains by
2 the base.

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

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

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

6 Yes, ma'am?

7 **PROSPECTIVE JUROR:** Virginia Wright. I am
8 scheduled to work two days next week and three the
9 following because my bosses are gone and there are two
10 of us that will keep our shop open.

11 **THE COURT:** And what are these businesses?

12 **PROSPECTIVE JUROR:** It's the Reflections of
13 South Dakota Art Gallery downtown Rapid City.

14 **THE COURT:** Is this a business as far as
15 you -- are you salaried or do you get paid hourly?

16 **PROSPECTIVE JUROR:** I am paid hourly.

17 **THE COURT:** Ma'am, I am really not inclined
18 for people at work.

19 **PROSPECTIVE JUROR:** Well, if I am not there
20 the place is not open. So that's the way it is.

21 **THE COURT:** Where are your bosses?

22 **PROSPECTIVE JUROR:** They are going on
23 vacation to Cancun, I believe.

24 **THE COURT:** Together?

25 **PROSPECTIVE JUROR:** Yes.

1 **THE COURT:** Is this a private business?

2 **PROSPECTIVE JUROR:** Yes.

3 **THE COURT:** We're are a one-person
4 establishment. It's me, myself, and I when I am
5 there.

6 Mr. Murphy?

7 **MR. MURPHY:** No objection.

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

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

10 **THE COURT:** You are excused.

11 **PROSPECTIVE JUROR:** I don't like to do it --

12 **THE COURT:** You are excused.

13 **PROSPECTIVE JUROR:** Thank you.

14 **THE COURT:** We'll get there in a moment, sir.

15 Anybody else on that side of the room?

16 Yes, sir?

17 **PROSPECTIVE JUROR:** Nicholas Roden. I own a
18 karaoke DJ business here in town and I have contracts
19 with a couple bars. I do have other employees but
20 they work the same nights that I do, too.

21 **MR. MURPHY:** May I ask a question?

22 **THE COURT:** Yes.

23 **MR. MURPHY:** If you work in bars, do you work
24 till two, three in the morning?

25 **PROSPECTIVE JUROR:** Correct. When the bar

1 closes, yes.

2 **MR. MURPHY:** We're going to need you to
3 remain attentive from 8:30 to 5:00 during the day.

4 Do you typically go home and then sleep till
5 noon or so?

6 **PROSPECTIVE JUROR:** Correct.

7 **MR. MURPHY:** Do you think it's going to be
8 difficult for you to get here at eight and be bright
9 and chipper and ready to go?

10 **PROSPECTIVE JUROR:** Obviously, yes. I was
11 late this morning.

12 **MR. MURPHY:** I saw.

13 I have no objection, Your Honor.

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

15 **THE COURT:** Thank you.

16 You may be excused.

17 Anyone else?

18 Yes, ma'am?

19 **PROSPECTIVE JUROR:** Megan Ripkama. I am a
20 paramedic student. I am ready to take my initial
21 registry test and the last test is on Tuesday of next
22 week.

23 **THE COURT:** I think you are out of here.

24 You, sir, you are out of here. You are
25 excused, as well. I can't do this with these people

1 and not let you out.

2 **PROSPECTIVE JUROR:** Justin Horner.

3 **THE COURT:** All right.

4 I thank the rest of you for giving up what I
5 know to be valuable time and opportunities to do
6 things within the next coming weeks.

7 We're going to proceed with the opening
8 questions in the jury selection process. Mr. Murphy
9 will begin.

10 We need to fill seven. As your name is
11 called, you get to come up into the first bench. As
12 people are excused from that place, others will be
13 called up, if they are excused.

14 **THE CLERK:** Debbie Scott, Arletta Daily,
15 Robin Buckingham, Kimberly Vanloan, Thomas Vanvlack,
16 James Whitman, Daniel Staddie.

17 **THE COURT:** You may begin, Mr. Murphy.

18 **MR. MURPHY:** Thank you.

19 Good morning, folks. My name is John Murphy.
20 As the judge told you, this is the second day of jury
21 selection. When we started yesterday, I thought, boy,
22 those people are really bad luck because they made it
23 all the way to the 29th of the month. And you made
24 it to the last day, the 30th, and now you are facing
25 possibly to be in a jury trial for three weeks.

1 Initially, I should say nobody wanted to be
2 trying a case of this duration between Thanksgiving
3 and Christmas. The court dockets are incredibly
4 packed so when trial dates become available, we have
5 to take those dates, whether it's winter or summer,
6 and there is always going to be some inconvenience.
7 And I know for many of you just like us, we got kids
8 in Christmas programs at school that we're going to
9 miss and piano recitals and things like that for kids,
10 grandkids, and whatnot.

11 We're going to try to make this process go as
12 smoothly as possible. Trials just don't go -- it's
13 not like TV. There is lots of breaks and stuff like
14 that, so bear with us.

15 I am going to be talking to you seven. You
16 are the panel that we got. As the judge indicated at
17 the end of the day yesterday we were seven short out
18 of the 56. So now we got to fill in and get seven
19 more jurors.

20 What's going to happen, though, is that you
21 folks, as people are excused for whatever reason, then
22 one of you folks will have to sit in and rather than
23 start jury selection from the very beginning with the
24 new person because if I do that you will start
25 throwing your shoes at me because it would take hours.

1 What I will do is just say did you hear my
2 questions and did you have any responses to anything I
3 said before. So we don't go start from the very
4 beginning and go forward.

5 Who among you folks have been through jury
6 selection before?

7 Okay. Less than half of you. But you've got
8 some experience.

9 For those of who haven't been through jury
10 selection, I want to give you some idea of why we're
11 doing this. The judge indicated we got to strike down
12 42 people total to get to the right number.

13 But the broader purpose of this whole process
14 is to find out whether you are the right person for
15 this case. You know, not every person is right for
16 all cases because we all come to the courtroom, the
17 courthouse, with certain personal experiences that
18 might make you predisposed one way or the other or
19 just feeling to the point where you are just not
20 comfortable with the subject matter so much so that
21 you just don't feel like you can sit through it
22 fairly.

23 When I think about this process, I think
24 about my dad who -- he passed away in June, but he was
25 89 at that point. He had led this incredibly rich

1 life. He had served in World War II. He had five
2 sons that he raised. Owned his own business. Really
3 a fair guy. He was always willing to look at both
4 sides and give people the benefit of the doubt.

5 But he had a life long probable with the IRS.
6 He just -- never any legal problems with them. He
7 just didn't like the way the tax system worked and he
8 would have been the first guy to say, if one of the
9 parties was the IRS, I'm not the juror for that case.
10 You know that's -- it's not going to be something that
11 I can sit through and give each side a fair shake.

12 So that's what we're doing here today is
13 trying to see whether you are the right jurors for
14 this case not whether you are bad person or a good
15 person or anything like that.

16 And so when we're talking, what I want is for
17 you to feel comfortable to talk back, to give us
18 information. We can only decide that if we hear from
19 you. And this is strangely the only time during the
20 entire trial -- we might be together for three weeks.
21 And the only time that you get to communicate
22 otherwise -- once you are picked, if you are picked,
23 you will sit there and you will listen to witnesses,
24 listen to the attorneys, and listen to the judge, but
25 you don't get to say anything. So that's why we want

1 to facilitate the communication. If I ask anything on
2 any subject matter that you say, boy, I just don't
3 feel like answering it in a room full of 50 people, we
4 have a mechanism. We go in the back room, get the
5 court reporter's machine back there, and we do what's
6 called a private hearing.

7 And just so you know, yesterday, we did that
8 on a number of occasions. There were topics that were
9 raised where somebody said I have an answer that you
10 should know about but I am not comfortable sharing it
11 in a public forum. That happens in almost all trials.

12 Because I am going to be asking you questions
13 for the next several hours, I think it's fair I give
14 you some information about myself and my situation
15 here so that it's not just me bugging you with
16 questions. I am going to first introduce Erin. Erin
17 Duchaneaux is my paralegal. She has been with my
18 office for a number of years, going on five years now,
19 even though she doesn't look old enough to have done
20 that for that long. Her husband Cam is a local Rapid
21 City police officer and they have three kids. She's
22 got a very young one and one in fifth grade and one in
23 seventh grade.

24 John Graham is my client. He's from the
25 Yukon Territory up in Canada, and he's here. His

1 daughter and long-term companion -- or one of his
2 daughters. His other daughter is expecting so she
3 couldn't come down.

4 As I indicated earlier, I've got a sole
5 practice. I am the only attorney in my law firm. It
6 is located over by the Rapid City ice rink and swim
7 center. There is that old house up on the hill.
8 That's my office. And I live in town. My wife is a
9 social worker. We've got three kids. The youngest is
10 in fifth grade. So that's about me.

11 What I am going to do is I am going to
12 start -- I am going to kind of break jury selection
13 down into three sections. The first is going to be
14 the nuts and bolts stuff, the things about whether you
15 know the participants and then we're going to move
16 into the legal issues.

17 Because if you are picked as jurors, you are
18 going to be the judges of the facts, but you are going
19 to have to follow Judge Delaney's laws. And we're
20 going to talk about the law and whether or not that's
21 law you feel comfortable with. And then at the end we
22 will talk about some specific issues.

23 I want to revisit one issue that we already
24 talked about which is the personal hardship issue.
25 The judge asked if anybody was going to have trouble

1 sitting through the case until what we anticipate
2 December 17 being the last day of the trial.

3 Is there anything that comes to mind that
4 makes you think that you might not be able to sit and
5 be attentive?

6 On most occasions five days a week or four
7 and a half days a week from 8:30 to 5:00 and to go
8 through the trial and be able to really pay attention
9 and listen to the evidence and not be distracted by
10 thoughts that you should be somewhere else or anything
11 like that?

12 Sir, your name?

13 **PROSPECTIVE JUROR:** Tom Vanvlack.

14 **MR. MURPHY:** The reason why I will ask you
15 your name each time I do the question is so Tina can
16 identify who is talking.

17 What's your situation?

18 **PROSPECTIVE JUROR:** I have a root canal
19 tomorrow morning.

20 **MR. MURPHY:** What time?

21 **PROSPECTIVE JUROR:** 7:45.

22 **MR. MURPHY:** Okay.

23 **PROSPECTIVE JUROR:** I don't have a problem --
24 I would just be late if that were the case.

25 **MR. MURPHY:** Is it something that you would

1 be able to reschedule or -- is it one of these things
2 that you had to schedule months if advance?

3 **PROSPECTIVE JUROR:** They scheduled it
4 yesterday because it's extreme right now.

5 **MR. MURPHY:** Okay.

6 Do you know how long you would be out of
7 commission tomorrow?

8 **PROSPECTIVE JUROR:** However it takes them to
9 fill it. I don't know. They drill a hole and put
10 some stuff in, I guess.

11 **THE COURT:** I had one.

12 Don't you want to put it off till after
13 Christmas?

14 **PROSPECTIVE JUROR:** I'd rather not.

15 **MR. MURPHY:** Okay.

16 I am assuming it's not going to be something
17 that is going to be done by nine in the morning or
18 that you are?

19 **PROSPECTIVE JUROR:** They said it's short so I
20 don't know.

21 **MR. MURPHY:** I have never had one before.

22 **THE COURT:** You know, he might be finished by
23 then, but he's not going to be back here so --

24 **MR. MURPHY:** I think I'll move to excuse you
25 because I am not sure how much novocaine and how you

1 are going to be feeling after that.

2 **PROSPECTIVE JUROR:** Either that or the
3 Percocet or one or the others.

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

5 **MR. JACKLEY:** No objection.

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

7 You may be excused.

8 **THE CLERK:** Cheryl Adams.

9 **MR. MURPHY:** Ma'am, did you have any response
10 to -- we just started, but is there any personal
11 hardship that you think we need to be aware?

12 **PROSPECTIVE JUROR:** I get migraine headaches,
13 but there is no rhyme nor reason to when I get them.

14 **MR. MURPHY:** All right.

15 There are things -- is it stress or fatigue
16 that cause triggers?

17 **PROSPECTIVE JUROR:** Yeah. And lights.
18 Fluorescent lights.

19 **MR. MURPHY:** One of my nieces gets them, too,
20 so I am familiar with the lighting situation.

21 Is the amount of these lights likely to cause
22 that as an issue?

23 **PROSPECTIVE JUROR:** Possibly could.

24 **MR. MURPHY:** Okay.

25 When you get them are you out for --

1 **PROSPECTIVE JUROR:** Two days, three days.

2 **MR. MURPHY:** Well, Your Honor, I would move
3 to strike.

4 **THE COURT:** I would, too.

5 **MR. JACKLEY:** No objection.

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

7 Good luck with the migraines. They are
8 pretty ugly.

9 **MR. MURPHY:** That seems to be the hot seat.

10 **THE CLERK:** Barbara Mitzel.

11 **MR. MURPHY:** If you are crowded by your
12 jackets we have this whole bench up here.

13 Ms. Mitzel, did you have any issues with the
14 time frame?

15 **PROSPECTIVE JUROR:** No, I don't.

16 **MR. MURPHY:** Anybody else in this row?

17 Just so you know, Tina, our wonderful court
18 reporter, has reminded me to slow down. So if I seem
19 like I am talking slower, it's because Tina has to be
20 here all day reporting every word. And it's very
21 fatiguing job. It's a tough process. If I talk at my
22 natural speed, we'll get down about every fifth word.
23 So we're going to slow it down a bit.

24 We're going to start by talking about
25 relationships you might have, personal, professional,

1 or whatnot, with any of the participants in the case.
2 And we're going to start with myself, my paralegal,
3 Erin, or my client, John.

4 Do any of you have any history with any of
5 us? I don't recognize any faces. No.

6 What about, we've got three prosecutors
7 handling the prosecution side. We've got Marty
8 Jackley, the Attorney General; Rod Oswald, Assistant
9 Attorney General; and Bob Mandel, from the U.S.
10 Attorney's Office.

11 Professionally or personally any
12 relationships there?

13 Ma'am, your name?

14 **PROSPECTIVE JUROR:** Robin Buckingham.

15 **MR. MURPHY:** What's the --

16 **PROSPECTIVE JUROR:** I know Marty Jackley
17 socially.

18 Rod Oswald helped on a case when I was a
19 teen-ager.

20 **MR. MURPHY:** All right.

21 Is your social relationship with Mr. Jackley
22 one that might in any way shape or form influence the
23 way you handle this case?

24 **PROSPECTIVE JUROR:** No.

25 **MR. MURPHY:** Let me ask you the question this

1 way. If you were to determine at the end of the case
2 that the state had not met it's burden and that you --
3 that they had not proved their case beyond a
4 reasonable doubt, and you were to render a verdict of
5 not guilty based on that, would you feel awkward
6 around Mr. Jackley because of that?

7 **PROSPECTIVE JUROR:** It's his job to do his
8 job.

9 **MR. MURPHY:** You know, that's -- sometimes
10 people say, boy, I would feel like -- I'd feel awkward
11 around somebody. You don't have --

12 **PROSPECTIVE JUROR:** No.

13 **MR. MURPHY:** Okay.

14 What about with Mr. Oswald, your experience
15 with him. Anything that --

16 **PROSPECTIVE JUROR:** No.

17 **MR. MURPHY:** Okay.

18 Anybody else?

19 We have Judge Delaney and Tina Pruss, the
20 judge and the court reporter. Judge Delaney is active
21 in the community.

22 Any involvements with either of them socially
23 or personally?

24 Good.

25 I am going to -- we have got a long list of

1 witnesses, about 50 witnesses. Not all of them will
2 be called, but we have to question you about any
3 potentials because what we don't want to happen is a
4 witness show up and you raise your hand and say, boy,
5 that's my next door neighbor or something like that.
6 And then we're in trouble.

7 Because it's such a long list, I am going to
8 go through one name after another. If you hear a name
9 that you recognize, just say stop and then we'll talk
10 about your knowledge of that person:

11 Charlie Abourezk, a local attorney in town.

12 Abe Alonzo, retired Denver Police Officer.

13 Roger Amiotte, who is a rancher from down in
14 the Wambli area.

15 Barry Bachrach. He is an attorney from
16 Massachusetts.

17 Clyde Bellecourt. He's from the twin cities
18 area and former American Indian movement activist.

19 Serle Chapman, a tour guide, leader, and an
20 author of some books. Photographer.

21 Theda Clarke, a woman from Pine Ridge,
22 originally.

23 Jean Ann Day. She's from Wisconsin.

24 Don Dealing, he was an FBI agent. He's now a
25 retired FBI agent. He was in Rapid City and South

1 Dakota in the 70s.

2 Frank Dillon. A man from Denver.

3 Jeanette Eagle Hawk also from Denver.

4 One of the witness's name is Darlene Nichols.

5 She also goes by Kamook Nichols or Kamook Banks or
6 Kamook Ecoffey. She -- she owns the Subway restaurant
7 down on Pine Ridge. Lives in Rapid City.

8 Robert Ecoffey. He also lives Rapid City.

9 Allen Garber was an FBI agent in South Dakota
10 from the 70s and 80s.

11 Cleo Marshall Gates.

12 James Graf, an FBI agent from Rapid City. I
13 believe still lives in Rapid City.

14 Naneek Graham, my client's oldest daughter.

15 Dr. Don Habbe. He works at Clin Lab and is a
16 pathologist.

17 Candy Hamilton, a local journalist, has lived
18 in Rapid City and down on the reservation.

19 Ray Hand Boy. Ray used to work at Sioux San.
20 May still. Was married to a woman named Evelyn
21 Bordeaux.

22 Evan Hodge is an FBI agent from the east
23 coast.

24 Angie Begay Janis, a woman from Denver.

25 Mary Johnson.

1 Fritz Arlo Looking Cloud, also known as Arlo
2 Looking Cloud. He was a defendant in this case
3 prosecuted in federal court and convicted and
4 sentenced to a life sentence back in 2004.

5 Does that name ring a bell? It was covered
6 by the newspaper in the media quite a bit. It was the
7 same case as this case or the same basic case.

8 Denise Maloney. That is the alleged -- the
9 victim of the crime, was a woman named an Anna Mae
10 Pictou Aquash. Her daughter is Denise Maloney.

11 Dick Marshall, also goes by Richard Marshall,
12 or Vine Richard Marshall. He was a defendant in this
13 case as well. He went to trial in federal court in
14 April and was acquitted. And that was covered
15 extensively by the Rapid City Journal and local media.

16 That ring any bells for anybody?

17 I am beginning to wonder if anybody reads our
18 paper.

19 Mike McRoden. He's a local FBI agent working
20 in the local office as we speak.

21 Russell Means. American Indian activist.
22 Actor.

23 You are nodding your head, ma'am. I am
24 sorry, what's your name?

25 **PROSPECTIVE JUROR:** Debbie Scott.

1 **MR. MURPHY:** Ms. Scott, what's your knowledge
2 of Mr. Means?

3 **PROSPECTIVE JUROR:** Just from movies or
4 hearing of him.

5 **MR. MURPHY:** Any personal feelings one way or
6 the other about him that would make you unable to view
7 his testimony like anybody else's?

8 **PROSPECTIVE JUROR:** Possibly.

9 **MR. MURPHY:** Okay.

10 Is it something that from what you know about
11 him from whatever source might make you prejudge his
12 testimony in one way or another? Whether it's
13 favorable or unfavorable, that doesn't matter, but
14 just not treat him like any other witness.

15 What I mean by that, like any other witness,
16 that's going to be on the witness stand. And when a
17 witness comes up whether they are a cop, a minister, a
18 person of any other profession or age or race or
19 anything, they all take the same oath. And what you,
20 as jurors, are supposed to do is treat them all the
21 same until such time as we hear testimony that helps
22 us form an opinion as to whether they respect that
23 oath, whether they are telling the truth or whether
24 they're competent or anything like that.

25 What we want to avoid in this process is

1 having a situation where because of your feeling about
2 a particular witness or a particular kind of person,
3 that you might not give them the same neutral unbiased
4 perspective when they start their testimony.

5 Is there anything about Mr. Means that you
6 couldn't put aside that and you would prejudge his
7 testimony or prejudge him?

8 **PROSPECTIVE JUROR:** I could, I guess. I
9 just -- there is certain things I don't agree with the
10 way he had done things.

11 **MR. MURPHY:** Okay.

12 Do you think you can try to put those aside
13 to the best of your ability?

14 **PROSPECTIVE JUROR:** I can't -- no.

15 **MR. MURPHY:** Okay.

16 And that's -- that's what we're here about.
17 There is no wrong answers. If it's something where
18 you can't listen to his testimony, like anyone else's,
19 then we need to know that how.

20 And at this point if the judge tells you it's
21 your duty as a juror is that going to really change
22 anything or are you still going to have those
23 preconceived notions of Mr. means?

24 **PROSPECTIVE JUROR:** I could probably still
25 have them.

1 **MR. MURPHY:** You would probably still have
2 them?

3 **PROSPECTIVE JUROR:** Yeah.

4 **MR. MURPHY:** Will you try your best to be
5 fair?

6 **PROSPECTIVE JUROR:** I would.

7 **MR. MURPHY:** Okay. That's all we can ask.
8 Anybody else with Mr. Means?

9 Actually I apologize, but I am only supposed
10 to answer questions of this group because you may
11 never have to be in the hot seats.

12 David Melmer, he's a local journalist who
13 writes a member of the Indian newspapers.

14 Nathan Merrick, a form BIA officer.

15 George Palfy. He is from Denver.

16 Dr. Garry Peterson. He's a pathologist from
17 the twin cities -- he's now retired -- but was for
18 many years.

19 Mitch Pourier was a BIA officer and I believe
20 also worked with the U.S. Marshal Service at one time
21 here in South Dakota.

22 Dave Price. Former FBI agent from South
23 Dakota.

24 Thelma Rios. Thelma Rios lived in Rapid City
25 for many, many years. She was also charged in this

1 case. And she entered a plea bargain about three
2 weeks ago. That was also covered quite a bit by the
3 newspaper, radio, and TV.

4 Anybody recall anything about Ms. Rios or any
5 of her past activities? She's been a community
6 activist for decades. Okay.

7 Bob Riter, an attorney from Pierre.

8 Madonna Gilbert Thunderhawk. She goes by
9 Madonna Big Earth or Thunderhawk and is from Rapid
10 City.

11 Gene Roach.

12 William or Bill Wood, former FBI agent.

13 And last is Troy Lynn Irving, also known as
14 Troy Lynn Yellow Wood.

15 Okay. Great.

16 Really glad everybody showed up. Yesterday
17 because of the weather with people showing up late, I
18 had to go through that list four times. As each new
19 person came in we had to go through that. By the end
20 I was just racing through the names and Tina was
21 scrambling to keep up with me.

22 I talked a bit going through these witnesses
23 that this case has a quite a history. You will learn
24 about -- and you will learn bits about it during the
25 case. And what I mean by that is we had a federal

1 trial over in federal court in 2004 involving
2 Mr. Looking Cloud. And then Mr. Marshall was charged
3 in the same case in federal court, went to trial in
4 April and was acquitted.

5 Recently had the issue with Ms. Rios. And --
6 where she was charged in this case as well and entered
7 a plea bargain. There has also been a lot of
8 coverage -- in fact, Sunday's newspaper, the front
9 page was about this case. And then page 6 and 7 there
10 was a three-page spread all about this case.

11 Have any of you had any contact with any of
12 the forms of media, whether it's internet, radio, TV,
13 newspaper, having anything to do with Mr. Graham's
14 case or Mr. Looking Cloud's, Ms. Rios' or
15 Mr. Marshalls?

16 **PROSPECTIVE JUROR:** I have just read the
17 paper.

18 **MR. MURPHY:** Okay.

19 Your name?

20 **PROSPECTIVE JUROR:** Jim Whitman.

21 **MR. MURPHY:** Sir, did you read the article in
22 Sunday's paper?

23 **PROSPECTIVE JUROR:** Yes.

24 **MR. MURPHY:** Gave a lot of information.

25 **PROSPECTIVE JUROR:** Well, I didn't get it all

1 in. I just read it.

2 **MR. MURPHY:** We kind of skim. You get the
3 headline and --

4 Have you previously on any other occasions
5 read articles about the case?

6 **PROSPECTIVE JUROR:** Just parts of it.

7 **MR. MURPHY:** Anything about any of those
8 articles or any of the information you received cause
9 you to believe you already have something about the
10 case figured out?

11 **PROSPECTIVE JUROR:** I don't think so, no.

12 **MR. MURPHY:** You put aside whatever you might
13 have read?

14 **PROSPECTIVE JUROR:** Yes.

15 **MR. MURPHY:** Anybody else have --

16 **PROSPECTIVE JUROR:** Just skimming the paper.
17 Didn't see Sundays paper at all. I was hunting.

18 **MR. MURPHY:** Successful day?

19 **PROSPECTIVE JUROR:** Very.

20 **MR. MURPHY:** All right.

21 Good for you.

22 And nothing about that exposure caused you
23 to --

24 **PROSPECTIVE JUROR:** Just hints of names, but
25 I couldn't remember them to tell you honestly.

1 **MR. MURPHY:** Okay. Sure.

2 **PROSPECTIVE JUROR:** Bits and pieces.

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

4 Anybody else whatsoever?

5 Any contact -- it was on the news last night;
6 on the radio this morning. Kind of a big case. So --

7 One of the instructions the judge has already
8 given to you -- and it's sometimes a tough one -- if
9 you are picked for this case for the next three weeks
10 basically you will not be allowed to read the news or
11 listen -- you know listen to the news, radio, or if
12 you come across something where you are flipping
13 through channels and there is something, you are
14 supposed to keep flipping.

15 Is that going to cause a hardship? Actually,
16 for some people, that's their job.

17 This case and the context of this case --
18 this case is about the death of Anna Mae Aquash. But
19 that crime -- she was killed. The question for you as
20 a jury is who did that. She was killed in 1975 or
21 1976 down on the Pine Ridge Reservation. It was at a
22 time, a very tumultuous time, in South Dakota history.
23 And there has been a number of books written both
24 about this case and in a broader context. Books like,
25 In The Spirit Of Crazy Horse or American Indian Mafia,

1 there was The Unquiet Grave, We The People. There has
2 been a number of books.

3 There is also the movie produced Robert
4 Redford called Incident At Oglala that involved the
5 shooting of two FBI agents in June of 1975 down on
6 Pine Ridge. Both of those FBI agents were killed.

7 Anybody scene any of those or read any of
8 those books?

9 In the Spirit of Crazy Horse was assigned
10 reading in schools for colleges for many years.

11 So nobody? Okay. All right.

12 I got a number of agencies that are going to
13 be involved in this case. We talked about the
14 participants. There is my law office, Murphy Law
15 Office.

16 Anybody had any experience with my law office
17 at any time? I don't recognize any faces, but --

18 There is also the Attorney General's Office
19 and Mr. Jackley is the Attorney General. That's a
20 large state agency. It covers civil matters as well
21 as criminal, criminal consumer protection, things like
22 that.

23 Have any of you had any dealings with the
24 Attorney General's Office?

25 **PROSPECTIVE JUROR:** My son has been in

1 trouble, but I don't think it had anything to do with
2 the Attorney General.

3 **MR. MURPHY:** Your name?

4 **PROSPECTIVE JUROR:** Daniel Staddie.

5 **MR. MURPHY:** Okay.

6 And you don't recognize it as something that
7 was prosecuted by his agency?

8 **PROSPECTIVE JUROR:** No.

9 **MR. MURPHY:** Ms. Buckingham?

10 **PROSPECTIVE JUROR:** My son was in trouble
11 years ago, too, but I don't think it was the same
12 people.

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

14 And, yeah, it's -- their office is different
15 from the Pennington County State's Attorney's Office,
16 which is the local prosecuting agency. But -- and I
17 was going to get to the Pennington County State's
18 Attorney's Office because they are actually -- though
19 they don't have a prosecutor at the table -- part of
20 this case, too.

21 Any dealings with the Pennington County
22 State's Attorney's Office ma'am?

23 **PROSPECTIVE JUROR:** My niece is Laura
24 Roetzel.

25 **MR. MURPHY:** Okay.

1 Well, Lara is the chief deputy and her
2 husband, Scott, also works there.

3 Are you related to Jim Mitzel?

4 **PROSPECTIVE JUROR:** No.

5 **MR. MURPHY:** He's one of the federal
6 probation --

7 **PROSPECTIVE JUROR:** I know him, but I am not
8 related to him.

9 **MR. MURPHY:** Because you are related by blood
10 to somebody in the State's Attorney's Office and this
11 case was commenced in Rapid City jointly -- it was a
12 joint prosecution between the Pennington County
13 State's Attorney's Office and the Attorney General's
14 Office and Mr. Mandel, who is sitting here from the
15 U.S. Attorney's Office, do you think that would affect
16 in any way how you view the prosecution?

17 It might make you more favorable to the
18 prosecution because your niece is a prosecutor and a
19 well known prosecutor?

20 **PROSPECTIVE JUROR:** No, it wouldn't.

21 **MR. MURPHY:** Okay.

22 You would be able to be put that relationship
23 completely aside?

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

25 **MR. MURPHY:** Okay.

1 Some other agencies that will be involved
2 most notably is the FBI. We have listed -- there is
3 probably going to be six or seven FBI agents or
4 retired FBI agents as witnesses.

5 Anybody here have any familiarity with the
6 FBI or other law enforcement agencies whether it's a
7 Sheriff's Office, the Rapid City Police Department,
8 the BIA, DCI?

9 Close relationships with any law enforcement
10 officers in town? Okay.

11 We've got some organizations that are
12 involved in the court system regularly. There is
13 three that come to mind most. One is CASA, Court
14 Appointed Special Advocates and then there is Working
15 Against Violence incorporated, or WAVI, and Mothers
16 Against Drunk Driving, which is MADD.

17 Do any of you have any past experience with
18 any of those organizations either as a volunteer,
19 financial contractors, somebody who supported them?

20 And you are?

21 **PROSPECTIVE JUROR:** Arletta Daily.

22 **MR. MURPHY:** Ms. Daily.

23 **PROSPECTIVE JUROR:** Sure. I send money to
24 WAVI and --

25 **MR. MURPHY:** Okay.

1 One of the reasons why that's somewhat
2 pertinent to this case, the allegation in this case,
3 just in a nut shell, is that my client, John Graham,
4 who is a man, killed a woman. That's what the state
5 is alleging. And there is no way to beat around the
6 bush about that allegation.

7 Is your involvement with WAVI -- it used to
8 be Women Against Violence and then it changed to
9 Working Against Violence, but primarily it is women
10 who suffered other crimes at the hands of men.

11 Does that cause you to have any --

12 **PROSPECTIVE JUROR:** I don't think I am
13 prejudice that way at all. Except we know that if you
14 take stats, there are more women needing help
15 sometimes than men.

16 **MR. MURPHY:** Sure.

17 **PROSPECTIVE JUROR:** So I suspect there are a
18 lot of places like that.

19 **MR. MURPHY:** Okay.

20 **PROSPECTIVE JUROR:** I am on the board of
21 church response.

22 **MR. MURPHY:** Our community needs more people
23 like you. And there is so many needs. And WAVI does
24 good work.

25 **PROSPECTIVE JUROR:** But I don't think I am

1 prejudice.

2 **MR. MURPHY:** Okay.

3 While we're talking about this, this is --
4 it's a sensitive issue. It's kind of a strange issue
5 in a lot of ways.

6 Would all of you agree -- I would just ask
7 you for a show of hands that it is always wrong for a
8 person to be killed without justification. I mean,
9 where there is not self-defense or some other
10 justification.

11 Would you raise your hand if you believe
12 that's always right.

13 Ma'am, you hesitated.

14 **PROSPECTIVE JUROR:** No. I was just
15 listening.

16 **MR. MURPHY:** Well, now if you would raise
17 your hand if you believe or feel really it's more
18 about a feeling, that it's more wrong when a woman is
19 killed than a man.

20 Anybody -- what about if that woman is a
21 mother?

22 Do you feel that that is -- that's a worse
23 crime than say somebody who is a man or somebody who
24 doesn't have children?

25 Anybody have those feelings? Okay.

1 It's a tough question because all life is
2 sacred and each life means something. But I can tell
3 you my mom, who was a very traditional Irish mother
4 would have been shaking her head yeah. You know,
5 mothers -- she was the kind of lady that you dropped
6 her off in front of the shopping store. And she would
7 stand in front of the doors -- it could be 15 degrees
8 below zero -- and wait until I raced up there and
9 opened the door for her. She had very distinct ideas
10 of what an Irish mother should be treated like; and
11 the queen of England was second rate to an Irish
12 mother.

13 Anyone else?

14 We talked about CASA. Anybody else involved
15 in any other organizations that have anything to do
16 with the court system or victims of crime or
17 prosecution of criminals or anything like that?

18 **PROSPECTIVE JUROR:** Just because I am
19 curious, I own a martial arts school. I teach
20 self-defense. I have parents who are in Game Fish and
21 Parks, the police department, all areas of life but
22 they are parents of students where I am teaching
23 self-defense.

24 Is that relevant?

25 **MR. MURPHY:** Let me ask you, is it something

1 that -- is it relevant to you?

2 Do you think that having -- everybody comes
3 here with prior experience. It may affect you, may
4 not.

5 The relationships that you develop with
6 people in the law enforcement community, are those
7 things that are going to tend to make you believe a
8 law enforcement officer's testimony a little more than
9 somebody else's?

10 **PROSPECTIVE JUROR:** No.

11 **MR. MURPHY:** You are going to treat every
12 witness exactly the same and when they get up there,
13 you are going to judge their testimony based on
14 whether their evidence adds up to anything or whether
15 they respected the oath and told the truth?

16 **PROSPECTIVE JUROR:** People say what they
17 believe.

18 **MR. MURPHY:** Uh-huh.

19 And it doesn't matter whether they are cop or
20 somebody else?

21 **PROSPECTIVE JUROR:** No.

22 **MR. MURPHY:** Okay.

23 And said Game Fish and Parks, that
24 relationship was with your parents?

25 **PROSPECTIVE JUROR:** Yes.

1 **MR. MURPHY:** That's a law enforcement agency
2 in some ways. They've kind of got a dual role.

3 Does that cause to you feel like you might --
4 that you would favor the law enforcement component of
5 a criminal case more than the defense perspective?

6 **PROSPECTIVE JUROR:** Everybody has the right
7 to their side.

8 **MR. MURPHY:** Okay. Good.

9 Anybody else? Okay.

10 I drink about a gallon of water a day while I
11 am up here. So --

12 The next area that I'd like to talk to you
13 about -- let me jump back. I am sorry. Mr. Jackley,
14 the Attorney General, was just elected back on
15 November 2. And the campaign started, six or nine
16 months before that.

17 Were any of you involved in the reelection
18 effort of Mr. Jackley or worked with the republican
19 party specifically, Ms. Rip --

20 You are Ms. Buckingham?

21 **PROSPECTIVE JUROR:** Yes.

22 **MR. MURPHY:** What activities did you --

23 **PROSPECTIVE JUROR:** I belong to Republicans
24 and ambassadors.

25 **MR. MURPHY:** Did you do fundraising and get

1 out the vote activities?

2 **PROSPECTIVE JUROR:** Yes.

3 **MR. MURPHY:** Would it be fair to say you
4 invested time and energy in helping Mr. Jackley get
5 elected?

6 **PROSPECTIVE JUROR:** Yes.

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

8 Were you also a personal financial
9 contributor to his campaign?

10 **PROSPECTIVE JUROR:** Yes.

11 **MR. MURPHY:** In light of the fact that he is
12 the lead prosecutor for the state in this case, and
13 you have invested time, energy, and money in his
14 election, would it be fair to say that that is going
15 to affect you in some way even if it's a small way on
16 how you view his presentation of the evidence?

17 **PROSPECTIVE JUROR:** I believe everybody has a
18 job to do, whether it's anybody here. When it comes
19 to politics, I support who I am going to support. But
20 when it goes it a job -- I am expecting you to do your
21 job. I don't care who you are.

22 **MR. MURPHY:** Sure.

23 **PROSPECTIVE JUROR:** So if you are asking, am
24 I going to favor his whatever he says over somebody
25 else, no. I want him to prove what he's got to say

1 because this gentleman has a right to his rights.

2 **MR. MURPHY:** Okay.

3 And that's -- that's why you are here. And I
4 appreciate --

5 **PROSPECTIVE JUROR:** It's a passion.

6 **MR. MURPHY:** Passion. Yes. And.

7 This next issue is an issue of substantial
8 delicacy. I want to talk about that and remind you
9 again this is an area where, as I said yesterday, we
10 had a number of private hearings based on this issue.

11 And what I am going to ask, essentially,
12 we're going to talk about people who have been victims
13 of crimes and I want you to think -- I am not just
14 talking about yourself. It could be anybody close to
15 you or anybody who, because of something that happened
16 to them, has had an impact on you. It could be a
17 niece or nephew, a spouse, one of your kids, one of
18 your parents. Anything --

19 Something is beeping.

20 **PROSPECTIVE JUROR:** Sorry.

21 **MR. MURPHY:** No problem.

22 And so I want you to think broad because when
23 we're talking about people who have been victims of
24 crimes, we know that it doesn't have to be something
25 that happened to you. It could be something that

1 happened to somebody, you know, years ago. Or
2 somebody that is close to you through a family or
3 professional experience.

4 One of the allegations in the -- in this
5 case -- my client is not charged with rape, but the
6 state is going to allege that he committed the act of
7 rape against Anna Mae Aquash. They are going to
8 allege that that happened in Rapid City in 1975.

9 I want to start out with that and ask if just
10 that topic causes anybody to feel that knowing the
11 state is going to allege that John committed this act
12 makes you feel like you may have personal experiences
13 through whatever associations that render you unable
14 to sit comfortable or fairly in this case?

15 We won't go into the details at this point.
16 We will just talk about if that causes any concern.

17 Ms. Rypkema, you are looking at me kind of
18 intently.

19 **PROSPECTIVE JUROR:** No. Just listening.

20 **MR. MURPHY:** Okay.

21 One of the issues is the allegation of rape
22 is separate and apart from the charges that are
23 brought against Mr. Graham. And that's something
24 that's going to be alleged, but not part of the actual
25 case.

1 Does anybody here have qualms that if they
2 were to find or believe in any way, shape, or form
3 that this act of rape occurred that would so cloud
4 their judgment because of the anger over that
5 allegation that it would affect their ability to look
6 at the evidence regarding the crime of murder as a
7 completely separate and distinct event?

8 Anyone?

9 Do I need to phrase that again? Do you -- I
10 am getting some glossy looks.

11 What about victims, again in the broad
12 context of any other crime that may have affected you
13 whether it be assault, theft, or robbery anything like
14 that?

15 Anybody here, either themselves or somebody
16 close to them, been the victim of a crime?

17 And Ms. Buckingham, is it something you feel
18 you could --

19 **PROSPECTIVE JUROR:** Incest.

20 **MR. MURPHY:** Okay.

21 **PROSPECTIVE JUROR:** In my family.

22 **MR. MURPHY:** I won't -- I am not here to pry
23 or anything, but is it something that -- it's a
24 traumatic crime. It's a substantial issue.

25 Is that something that because of that.

1 experience makes it difficult for you to think that
2 you could sit fairly in this case and asses the
3 evidence in a completely unbiased and neutral way?

4 **PROSPECTIVE JUROR:** I think I can.

5 **MR. MURPHY:** Okay.

6 Sometimes we had -- yesterday some people
7 said, boy, because of the experience I had or my
8 family had just being in the courthouse was difficult
9 for some people. Being in this room was difficult.
10 They didn't think they could sit. Wasn't they were
11 going to favor one side or the other it just --

12 **PROSPECTIVE JUROR:** It's just why do I do
13 what I do?

14 **MR. MURPHY:** All right.

15 Who here has been a juror in a past, actually
16 sat as a juror?

17 Okay. I will start with you, sir.

18 Mr. Whitman, what kind of jury did you sit on
19 and about how long ago?

20 **PROSPECTIVE JUROR:** Two years ago.

21 **MR. MURPHY:** So you just -- not only did you
22 make it to the end of the month you --

23 **PROSPECTIVE JUROR:** Just in time, right.

24 **MR. MURPHY:** You know, you should go out and
25 get a lottery ticket.

1 What kind of jury did you sit on.

2 **PROSPECTIVE JUROR:** Civil.

3 **MR. MURPHY:** Was it a good experience?

4 **PROSPECTIVE JUROR:** Yes, it was.

5 **MR. MURPHY:** Okay.

6 Was the jury deliberations respectful?

7 **PROSPECTIVE JUROR:** Uh-huh. Yeah. We all
8 came to a good consensus.

9 **MR. MURPHY:** Do you recall what the burden of
10 proof was in that civil case?

11 **PROSPECTIVE JUROR:** The burden?

12 **MR. MURPHY:** Were you told that you had to
13 find for one side or the other based on the
14 preponderance of the evidence?

15 **PROSPECTIVE JUROR:** Yes.

16 **MR. MURPHY:** Okay.

17 What do you recall the preponderance of the
18 evidence standard meaning?

19 **PROSPECTIVE JUROR:** As far as the plaintiff?

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

21 **PROSPECTIVE JUROR:** Whether they were
22 requiring a substantial benefit from it. One person
23 was injured.

24 **MR. MURPHY:** It was an injury case.

25 **PROSPECTIVE JUROR:** That was part of it.

1 **MR. MURPHY:** Do you recall being instructed
2 that for you to find for the plaintiff, the plaintiff
3 had to prove their case more -- just above 50 percent?

4 They had to prove it just more than the other
5 side?

6 The plaintiff didn't have to prove their case
7 beyond a reasonable doubt?

8 **PROSPECTIVE JUROR:** Yes. Correct.

9 **MR. MURPHY:** Just had to prove by a
10 preponderance?

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

12 **MR. MURPHY:** Were you on a jury, too?

13 **PROSPECTIVE JUROR:** Yes, I was.

14 **MR. MURPHY:** And Ms. Mitzel, what was your
15 jury experience?

16 **PROSPECTIVE JUROR:** There was two that I sat
17 on. One was a car accident with injuries; and the
18 other one was a rape.

19 **MR. MURPHY:** Okay.

20 Was that here in Pennington County?

21 **PROSPECTIVE JUROR:** Yes.

22 **MR. MURPHY:** All right.

23 And how long ago was the rape case you sat
24 on?

25 **PROSPECTIVE JUROR:** Probably about eight

1 years.

2 **MR. MURPHY:** Okay.

3 Was it a situation -- did you enjoy the
4 process of being a juror?

5 **PROSPECTIVE JUROR:** I did.

6 **MR. MURPHY:** And the deliberations, were they
7 respectful?

8 **PROSPECTIVE JUROR:** Yes.

9 **MR. MURPHY:** Everybody listened to each
10 other's opinions and respected them.

11 **PROSPECTIVE JUROR:** Yes.

12 **MR. MURPHY:** What do you recall about the
13 standard of proof that the Court asked you to apply in
14 this rape case?

15 **PROSPECTIVE JUROR:** Well, I taught they
16 proved beyond a doubt that he was guilty.

17 **MR. MURPHY:** But the standard was beyond a
18 reasonable doubt?

19 **PROSPECTIVE JUROR:** Yes.

20 **MR. MURPHY:** That the state had to prove?

21 **PROSPECTIVE JUROR:** Yes.

22 **MR. MURPHY:** What do you interpret that to
23 mean?

24 What did those words mean to you?

25 **PROSPECTIVE JUROR:** Without a doubt I was

1 convinced, yeah.

2 **MR. MURPHY:** All right.

3 And let's see, Ms. Vanloan, did you also sit
4 on a jury?

5 **PROSPECTIVE JUROR:** No.

6 **MR. MURPHY:** Ms. Buckingham, how many have
7 you sat on?

8 **PROSPECTIVE JUROR:** I sat on one before.

9 **MR. MURPHY:** How long ago?

10 **PROSPECTIVE JUROR:** Eight, ten years ago.
11 It's been a long time.

12 **MR. MURPHY:** Was it a criminal or civil case?

13 **PROSPECTIVE JUROR:** Civil. Running a red
14 light.

15 **MR. MURPHY:** Did you also have a good
16 experience?

17 **PROSPECTIVE JUROR:** Yes.

18 **MR. MURPHY:** And Ms. Daily, did you sit on a
19 jury before.

20 **PROSPECTIVE JUROR:** No.

21 **MR. MURPHY:** Ms. Scott?

22 **PROSPECTIVE JUROR:** Yes.

23 **MR. MURPHY:** What kind of jury or how many
24 times?

25 **PROSPECTIVE JUROR:** Just once. It was the

1 beginning of the month.

2 **MR. MURPHY:** Lucky you.

3 **PROSPECTIVE JUROR:** Yeah.

4 **MR. MURPHY:** So you are the Veteran.

5 Was that a criminal or civil case?

6 **PROSPECTIVE JUROR:** Criminal. I don't even
7 remember.

8 **MR. MURPHY:** Do you remember what the charge
9 was?

10 **PROSPECTIVE JUROR:** He -- it was for theft.

11 **MR. MURPHY:** How did the process go?

12 Was it an enjoyable experience?

13 **PROSPECTIVE JUROR:** Yeah. Yeah.

14 **MR. MURPHY:** Okay.

15 Did you get tired of the delays and stuff
16 like that or --

17 **PROSPECTIVE JUROR:** No. It went -- it was
18 just one day. It went real quick.

19 **MR. MURPHY:** Okay.

20 With a one-day trial everybody has their
21 ducks in a row. On these longer trials when witnesses
22 are flying in from all other the country things can
23 start and stop. /

24 Anything about that process make you feel
25 like jury duty wasn't for you?

1 **PROSPECTIVE JUROR:** No, I guess not.

2 **MR. MURPHY:** Okay. Good.

3 I am going to talk about some of the legal
4 principles involved and some of have you been jurors
5 especially in criminal cases so you are going to be
6 somewhat familiar with these legal principles.

7 But each case we want to go through and make
8 sure not only that you understand the principles, but
9 that you are willing to apply them. And the reason
10 why we talk about willing to apply them is because at
11 the end of this case the judge is going to give you
12 some jury instructions and one of those jury
13 instructions says that you, as jurors, are judges of
14 the facts. And the judge used that phrase earlier when
15 he was doing his introduction.

16 What does that mean, judges of facts? You
17 decide what happened; you decide what witnesses'
18 testimony was believable, what wasn't believable, what
19 you think has been established.

20 The judge is the judge of the law. He's
21 going to give you the law. And part of your oath as a
22 juror if you are picked is that you are agreeing in
23 advance to follow that law, whatever it is.

24 Now, often times the packet of law that the
25 judge gives you is 30, 40, 50 pages long.

1 Ms. Scott, in your theft case, how thick was
2 the packet?

3 Was it substantial for that case?

4 **PROSPECTIVE JUROR:** I don't think so. I
5 don't remember.

6 **MR. MURPHY:** Okay.

7 Does anybody remember the kind of packet of
8 jury instructions they got when they sat on a jury
9 being pretty substantial? Okay.

10 Well, in this case I will tell you they will
11 probably be a pretty good set of instructions. We're
12 not going to go through all of those, we're just going
13 to hit some of the highlights.

14 The first one of the instructions that the
15 judge is going to give you is that the presumption of
16 innocence carries in this case. Sitting here today,
17 my client, John Graham, is presumed to be innocent.
18 And that presumption stays with him until such time as
19 the state has proven beyond any reasonable doubt
20 otherwise.

21 So as you sit and listen to witness after
22 witness whether they are called by the prosecution or
23 the defense, throughout this presentation of evidence,
24 until you go back and deliberate he sits presumed
25 innocent. And that's a concept that is universally

1 recognized in the states in this country.

2 Who here has heard of the presumption of
3 innocence before?

4 Ms. Mitzel, is that something that means --
5 is that a concept that you are familiar with?

6 **PROSPECTIVE JUROR:** Yes.

7 **MR. MURPHY:** Do you have any thoughts about
8 whether that's a standard that's fair to start a trial
9 with?

10 **PROSPECTIVE JUROR:** It is fair.

11 **MR. MURPHY:** It is fair.

12 One of the things that -- you know, it comes
13 up in a case like this. We're humans. This is a
14 human system. We're trying to apply laws in a very
15 human context.

16 My client has been charged with two serious
17 crimes, murder. Two counts of murder. One person is
18 alleged to be the victim, but it's two different
19 counts. And we have been through this system and we
20 have gotten all the way up to today where this trial
21 is about to begin.

22 It would be very natural for somebody to say,
23 well, you know, he must have done something wrong.

24 Who maybe thinks, just on any level, a gut
25 feeling, he didn't end up here by accident? They

1 don't make mistakes that big?

2 Anybody?

3 Ms. Daily, I see you kind of --

4 **PROSPECTIVE JUROR:** That's kind of a funny
5 question.

6 **MR. MURPHY:** It is a funny question. But you
7 know, it's kind of like --

8 **PROSPECTIVE JUROR:** If you believe the
9 newspapers.

10 **MR. MURPHY:** Right.

11 And sometimes it's hard to believe that the
12 police and the prosecution could make a mistake and
13 charge somebody who hadn't done something wrong.

14 Is it fair to say that your hunch would be
15 probably it's unlikely that this is all a complete
16 mistake?

17 **PROSPECTIVE JUROR:** Not necessarily.

18 **MR. MURPHY:** Not necessarily.

19 What -- by virtue of the fact that my client
20 has been charged with these crimes, do you have any
21 feeling that, well, where there is smoke there is
22 probably fire?

23 **PROSPECTIVE JUROR:** I don't think I would let
24 that enter into it.

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

1 Let me see who I can pick on.

2 Ms. Scott, you've sat on a trial before. You
3 saw somebody who was accused of a crime charged with a
4 crime, et cetera.

5 Did you either before or since get the idea
6 that, well, certainly wasn't a mistake? The
7 prosecution and the police and the FBI are unlikely to
8 make mistakes and charge the wrong person?

9 **PROSPECTIVE JUROR:** I don't think -- I guess
10 I don't know.

11 **MR. MURPHY:** I know I am putting you on the
12 spot. You had the most recent jury experience so you
13 have been through it within the last month. So it is
14 a tough question.

15 **PROSPECTIVE JUROR:** I think what they came up
16 with -- I feel that it is right; that they wouldn't
17 have made a mistake.

18 **MR. MURPHY:** That they wouldn't
19 intentionally?

20 **PROSPECTIVE JUROR:** No, they wouldn't do it
21 on purpose.

22 **MR. MURPHY:** Are you able to conceive that
23 they can make mistakes?

24 **PROSPECTIVE JUROR:** I am sure they can.
25 Everybody does.

1 **MR. MURPHY:** It's kind of one of those
2 things. I think of when my son, who is now 23, got
3 called down to the principals office in fourth or
4 fifth grade. You know, I usually had the belief going
5 in that he had done something to get his behind in the
6 principal's office. You know it wasn't -- even though
7 I would try to be a fair dad, listen to both sides and
8 figure out -- and certainly listen, I kind of figured
9 out in advance, when you get the call, you better come
10 down to the school, that he's done something. He's
11 not been able to sit in his seat. He was one of those
12 kids that can literally fall out of his seat he had so
13 much energy and just land on the floor during the
14 middle of class.

15 Anybody -- you are nodding and you share that
16 experience that these kind of things happen?

17 **PROSPECTIVE JUROR:** Yes.

18 **MR. MURPHY:** Now, this is a much more serious
19 context than that. But it's the same general
20 principles. You have been called in to sit in
21 judgment of somebody who has been accused, who has
22 been charged, and now we're months into the process
23 and he's going to trial.

24 Any of you on any level think just looking at
25 Mr. Graham here today you are saying, boy, I have to

1 believe he did something wrong to get here?

2 **PROSPECTIVE JUROR:** Well, of course, you have
3 to -- they had to have grounds to charge him.

4 **MR. MURPHY:** Uh-huh.

5 **PROSPECTIVE JUROR:** So there was something
6 that they believed was enough to charge him with it.
7 So he must have done something in their eyes to be
8 charged. Whether they can prove their case one way or
9 the other is left up to us to decide.

10 **MR. MURPHY:** I could not have put that better
11 myself. Thank you. That's a per statement of what
12 we're talking about.

13 Anybody here have any disagreements, not that
14 you are going to disagree with a fellow juror, but any
15 modifications of what was just said? Okay.

16 Now, I am going to do something -- I am going
17 to give you a brief quiz. We talked about the
18 presumption of innocence. We're going to assume due
19 to the recession and budget crisis while the judge is
20 up there --

21 You know, Your Honor, if you don't mind, you
22 didn't give this presentation this morning about the
23 use -- what you are looking at on the screen.

24 **THE COURT:** Yes.

25 **MR. MURPHY:** Do you want to tell the jury why

1 you are looking at the screen? We didn't go through
2 that today.

3 **THE COURT:** For all practical purposes in the
4 courtroom I am deaf. And I have realtime
5 transcription on the screen that allows me to read
6 word for word and that helps me make sense of the
7 sounds that I am hearing from various people as they
8 talk. I used to say I can't understand women but let
9 me just say their voices are harder for me to follow
10 in the course of a conversation.

11 **MR. MURPHY:** I didn't want you to think he
12 was paying Pong or Pacman or something during the
13 trial.

14 **THE COURT:** Actually, it's Freecell,
15 Mr. Murphy.

16 **MR. MURPHY:** Okay. And he may be, we don't
17 know. But at least we're understanding if during any
18 of our discussions or when there is a witness on the
19 stand and you may be sitting in the jury box thinking
20 boy this is important but must not be because the
21 judge is looking at the screen, you know he's reading
22 the testimony.

23 All right. Let's assume the governor said --
24 sent an email to the judge and the clerk and said we
25 don't have the money to have a three-week long trial

1 and pay the jurors the outrageous sums of money that
2 you get as jurors. And so you got to take a vote now.
3 And option A was guilty, option B is not guilty, and
4 option C is I need more information before I can
5 render a decision.

6 Who would vote A?

7 Who would vote B?

8 Who would vote C?

9 Okay. Ms. Buckingham, you did not raise your
10 hand.

11 **PROSPECTIVE JUROR:** I don't have any
12 information.

13 **MR. MURPHY:** Okay.

14 So what would your vote be then?

15 **PROSPECTIVE JUROR:** I can't vote him guilty
16 if I don't have any information.

17 **MR. MURPHY:** You got the answer right. As
18 for the other of you, I got to be the one to tell
19 you -- my client is sitting here presumed innocent.
20 And you haven't heard a single bit of evidence. And
21 that's really what the presumption of innocence boils
22 down to is that until and unless the state proves its
23 case beyond a reasonable doubt, you have to carry the
24 assumption that he is not guilty of the crimes and if
25 the state doesn't meet the burden, your duty is to

1 vote not guilty.

2 That's what the presumption of innocence
3 means. That's -- it's kind of the bedrock of our
4 criminal justice system. What goes directly in the
5 presumption of innocence is the right of the defendant
6 in this case John, not to testify if he decides he
7 doesn't want to. This is kind of where we really get
8 down to the nuts and bolts of how you feel about a
9 case and what predispositions come into it.

10 If the state has the burden of proving their
11 case beyond a reasonable doubt and he is presumed
12 innocent, that means Mr. Graham could come in here,
13 not ask a single question, not call a single witness,
14 and not get on the stand himself. Because it's the
15 state's job to prove that he's guilty. He's presumed
16 innocent. He doesn't have to prove himself not
17 guilty.

18 But we're humans. And there is a very human
19 desire to believe that a defendant who doesn't testify
20 must be hiding something or is guilty or otherwise is
21 not fully participating in the process.

22 You know, say there is crumbs on the counter
23 and you asked your kid, did you have one of the
24 cookies before dinner time and they didn't say
25 anything in response, just were silent. You may draw

1 some inferences there that the reason they are not
2 saying anything is because they actually did have the
3 cookie before dinner.

4 Mr. Scott, I am not picking on you. You are
5 just the farthest from me.

6 If Mr. Graham decides not to testify, how are
7 you going to view that?

8 How is that going to influence your thought
9 process?

10 **PROSPECTIVE JUROR:** I would think that he
11 would be hiding something, I guess.

12 **MR. MURPHY:** Okay. That's fair.

13 **PROSPECTIVE JUROR:** I would think if he was
14 innocent or something he would want to let us know
15 that.

16 **MR. MURPHY:** Okay.

17 I will turn to you, Ms. Daily. What are your
18 feelings about that?

19 **PROSPECTIVE JUROR:** About the same.

20 **MR. MURPHY:** About the same.

21 Ms. Buckingham?

22 **PROSPECTIVE JUROR:** It's his right.

23 **MR. MURPHY:** Okay.

24 So you wouldn't make any inference or draw
25 any inference or come to any conclusions if a

1 defendant, in this case John, decided not to get up on
2 the stand?

3 **PROSPECTIVE JUROR:** No.

4 **MR. MURPHY:** Can you think of reasons other
5 than having to hide something why somebody might not
6 want to get up on the stand?

7 **PROSPECTIVE JUROR:** I guess I would assume
8 it's your job to help him through this. Not prove it,
9 but help him -- I don't know quite how to explain it,
10 but he doesn't have to do anything.

11 **MR. MURPHY:** Okay. Good.

12 Ms. Vanloan?

13 **PROSPECTIVE JUROR:** It's his choice.

14 **MR. MURPHY:** Would you hold it against him in
15 any way, shape, or form?

16 **PROSPECTIVE JUROR:** Huh-uh.

17 **MR. MURPHY:** Can you conceive of reasons
18 separate and apart from hiding something or something
19 like that why somebody would not want to get up on the
20 stand.

21 **PROSPECTIVE JUROR:** Uh-huh. Maybe he has a
22 memory impairment or something.

23 **MR. MURPHY:** Okay.

24 Ms. Mitzel?

25 **PROSPECTIVE JUROR:** I believe it's his right.

1 **MR. MURPHY:** Okay.

2 Any qualms at all about sitting in a case --
3 you have sat in a criminal case before?

4 **PROSPECTIVE JUROR:** Yes.

5 **MR. MURPHY:** Did the defendant testify there?

6 **PROSPECTIVE JUROR:** I don't remember.

7 **MR. MURPHY:** It's been years ago.

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

9 **MR. MURPHY:** Any qualms at all about the idea
10 that somebody could go through a three-week long
11 trial, perhaps 50 witnesses called, but not get up on
12 the stand themselves?

13 **PROSPECTIVE JUROR:** That doesn't bother me.

14 **MR. MURPHY:** Mr. Whitman?

15 **PROSPECTIVE JUROR:** I don't have any problem
16 with it.

17 **MR. MURPHY:** You wouldn't draw any
18 conclusions?

19 **PROSPECTIVE JUROR:** No.

20 **MR. MURPHY:** You, ma'am?

21 **PROSPECTIVE JUROR:** I wouldn't have any
22 problem with it either.

23 **MR. MURPHY:** Let's go back to you two because
24 it's a very natural reaction. It's often how we
25 conduct ourselves in our daily lives.

1 The judge is going to instruct you and it's a
2 very direct instruction that you are not allowed to
3 draw any inference whatsoever about the fact that a
4 defendant does not testify.

5 If Mr. Graham decides not to testify, you are
6 not to form any opinion or conclusion or inference
7 based on that, but that's not a law that everybody can
8 apply. That's why we talked about can you follow the
9 judge's instruction.

10 Ms. Scott, if the judge tells you that it's
11 your duty to not form any conclusion or make any
12 inferences, are you really going to be able to do that
13 or are you feeling like you might struggle with the
14 idea of putting aside the fact that my client might
15 not testify?

16 **PROSPECTIVE JUROR:** I might struggle.

17 **MR. MURPHY:** Uh-huh.

18 And that's -- again, that's natural for more
19 people. The right to remain silent, it's a hard
20 concept to accept. We -- we need to, in a sense, now,
21 as opposed to once the jury is impaneled, find out
22 whether that's something -- that struggle is going to
23 be too hard.

24 Would it be fair to say that as you sit here
25 today, even if the judge were to tell you what the law

1 is, and that you are supposed to put that aside, that
2 you think you might continue to believe that if he
3 didn't testify, he was hiding something?

4 **PROSPECTIVE JUROR:** Yes.

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

6 And just having the judge tell you that the
7 law is different isn't going to change your personal
8 feelings on the matter?

9 **PROSPECTIVE JUROR:** Right.

10 **MR. MURPHY:** All right.

11 You know, in light of that, what I am going
12 to ask is if this juror could excused, Your Honor.

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

14 **MR. JACKLEY:** May I voir dire briefly, Your
15 Honor?

16 **THE COURT:** You may.

17 **MR. JACKLEY:** Good morning.

18 I'll get a chance after Mr. Murphy is done to
19 talk to all of you, but I get an opportunity when thee
20 is an issue for cause to come up and ask a couple
21 questions to determine what my position is. That's
22 what I am doing now, okay.

23 We're talking about some legal issues and
24 Mr. Murphy covered earlier that the judge will
25 instruct the jury both initially when the trial begins

1 what the law is, and then at the end of the trial in
2 more detail. Okay. So the judge decides and will
3 instruct on what the law is.

4 We have many laws in society. And I want to
5 use as my example the speed limit. Let's say out by
6 Ellsworth Air Force Base right on the interstate it's
7 65. You know what the law is. You know what the
8 speed limit is. You may not like it, but you
9 generally follow it.

10 In other words you may not agree with the
11 law, you may not agree with a certain thing, but are
12 you able to follow that?

13 **PROSPECTIVE JUROR:** Yes.

14 **MR. JACKLEY:** Similarly, if the judge gives
15 you an instruction of law, you may not agree with it
16 but would you generally be able to follow that?

17 **PROSPECTIVE JUROR:** I would try.

18 **MR. JACKLEY:** Are you generally a fair
19 person?

20 **PROSPECTIVE JUROR:** Yes.

21 **MR. JACKLEY:** Can you be an open-minded
22 person.

23 **PROSPECTIVE JUROR:** I try to be, yes.

24 **MR. JACKLEY:** And that's the best you can do,
25 right?

1 **PROSPECTIVE JUROR:** Yes.

2 **MR. JACKLEY:** That's all we can ask of you.
3 Your Honor, I would pass for cause.

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

5 **MR. MURPHY:** Ma'am -- boy, you probably
6 really feel picked on now. Why did I open my mouth.

7 This is what I talked about at the beginning.
8 There is no judgments here. We're really here because
9 we all care about starting out this process the best
10 way possible.

11 You have said, in a response to Mr. Jackley's
12 question, you would try. That's different from saying
13 you can do it. And this isn't a thing like the speed
14 limit. The speed limits are a pretty easy law to
15 understand and grasp that you have to follow hose laws
16 so you don't cause accidents. This is a personal
17 issue.

18 **PROSPECTIVE JUROR:** Right.

19 **MR. MURPHY:** And I have asked you and I think
20 you have been fairly clear that you would struggle
21 with the presumption of innocence and my client's
22 right not to testify, even if the judge told you that
23 the law is otherwise; is that a fair statement?

24 **PROSPECTIVE JUROR:** Yes.

25 **MR. MURPHY:** And even though you would try

1 you can't guarantee you are going to be able to put
2 that aside and those feelings aside.

3 **PROSPECTIVE JUROR:** Right.

4 **MR. MURPHY:** Right. Okay.

5 Your Honor, I renew my motion.

6 **THE COURT:** I teach a constitutional law
7 class. We talk about the Fourth Amendment. And I
8 tell the students that if I get stopped by a police
9 officer and they ask if I can -- if they can search my
10 car, I say no. And it really bothers some of my
11 students that I would say no. And that's my right to
12 say no.

13 And they say, well, if you don't have
14 anything to hide, why don't you do that. And I said
15 because it's my right to say no. And that's hard for
16 them to understand and I see your point. And that is
17 exactly why I am going to allow you to be excused here
18 for your candor in saying I would do my best, but that
19 may not be good enough. So I thank you for that and I
20 will excuse you.

21 I see people watching the clock and that
22 normally means, let's get out of dodge for a minute or
23 two.

24 Remember not to discuss this case. We'll
25 come back in about 15 minutes or so. If we need more

1 time, we'll do that, too.

2 (Off the record.)

3 **THE COURT:** Okay.

4 One of the statements and warnings I did give
5 yesterday and forgot today is no electronics. That
6 includes Sawals. I don't want telephones, I don't
7 want anything that's capable of recording. Jurors
8 that are ultimately selected may bring their cell
9 phones, but they will go in the possession of the
10 bailiffs except during breaks or lunch hours.

11 Anybody caught doing that outside of the
12 jurors will be removed from the courtroom for the
13 duration. That's just the way it's going to be. And
14 so that's the rule. And I understand we are addicted
15 to cell phones. I am not. I don't know where mine
16 is. We will have them shut off now. If you brought
17 them in, shut them off. That will be the rule from
18 day -- starting tomorrow flat out.

19 Thank you.

20 **MR. MURPHY:** We need to call a replacement
21 juror for Ms. Scott.

22 **THE CLERK:** Lynell Rice-Brinkworth.

23 **MR. MURPHY:** Ms. Brinkworth, good morning.
24 You have heard what I have said so far?

25 **PROSPECTIVE JUROR:** Yes.

1 **MR. MURPHY:** Rather than go through it again,
2 is there anything at all including those topics that
3 we talked about, victims of crime or anything, that
4 you had any response to whatsoever?

5 **PROSPECTIVE JUROR:** I don't believe so.

6 **MR. MURPHY:** Any particular personal hardship
7 if you have to stay with us till December 17?

8 **PROSPECTIVE JUROR:** I do own my own business.
9 And I do work part time for a nonprofit organization
10 so it's there. I mean to me this is my civil duty. I
11 am willing to be here. I can't deny it, but I am
12 willing to do that.

13 **MR. MURPHY:** Great. That's all we can ask.
14 And I appreciate that.

15 None of the witnesses?

16 **PROSPECTIVE JUROR:** No.

17 And I actually have only been in the area for
18 a little over the year.

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

20 Well, I'm going to start back with you,
21 Ms. Daily. You probably had that idea. You've heard
22 the colloquy we had with Ms. Scott. And essentially
23 what we're getting at is this is an opinion, a feeling
24 you have, and that's not good, bad, or indifferent.
25 It's just who you are. And what we need to explore

1 like we did with Ms. Scott is whether that's a feeling
2 you have that you hold strong enough that it would be
3 difficult for you to set that aside if you were asked
4 to sit on this jury or if it's something that you can
5 set aside and not draw any inference of anything if my
6 client decides not to testify.

7 **PROSPECTIVE JUROR:** I could set it aside,
8 yes. I am pretty strong that way.

9 **MR. MURPHY:** Okay.

10 Ms. Brinkworth?

11 **PROSPECTIVE JUROR:** Yes.

12 **MR. MURPHY:** We just started this discussion
13 on not only the presumption of innocence, but the
14 right to not testify. We had a couple responses of
15 people who said just -- they would believe that if
16 somebody didn't get up to testify, they might be
17 something to hide or that might be indicative of
18 guilt.

19 What are your feelings on that?

20 **PROSPECTIVE JUROR:** Kind of like a couple
21 others said, my first instinct is hum. But I also
22 believe that we are given the laws and we have to
23 abide by them. And I can set that aside.

24 **MR. MURPHY:** Okay.

25 Everybody then at least we know right now --

1 I ask for a raise of a hands -- as a commitment if my
2 client chooses not to testify, that will not be held
3 against him or any inference of guilt or anything else
4 made because he didn't -- you if you can commit to
5 that, please raise your hand. Thank you.

6 All right. We're going to move on to the
7 next legal concept which is the beyond a reasonable
8 doubt standard. And we're going to talk about that.

9 But first, I didn't ask you, have you ever
10 served on a jury before.

11 **PROSPECTIVE JUROR:** No.

12 **MR. MURPHY:** Okay.

13 Some of you have served on jurors involving
14 criminal cases, some of you haven't. Before we get
15 into the reasonable doubt standard, I want to talk
16 about the elements of an offense. Because, you may,
17 if you haven't sat on a criminal jury -- let's use a
18 DUI case. You may think when you go back there you
19 are given an instruction is the defendant guilty or
20 not guilty of DUI. That's the verdict form.

21 But in the instructions the judge would
22 instruct you that before you could find a defendant
23 guilty of DUI, you would have to find beyond a
24 reasonable doubt individual elements. The elements of
25 the offense. The crime may be DUI, but the elements

1 are that the person was driving or in control of a
2 vehicle in the particular county and they had more
3 than .08 alcohol by weight in their blood. So you
4 have to find three things, three elements.

5 I have forgot already who here sat on a
6 criminal jury.

7 Ms. Mitzel, do you recall in the case that
8 you sat on that there were individual elements that
9 you had to find in order to reach a determination?

10 **PROSPECTIVE JUROR:** Yeah.

11 **MR. MURPHY:** The elements -- in this case
12 there is two crimes charged, premeditated murder and
13 felony murder kidnapping. And each of those are going
14 to have a number of elements.

15 And one of the things the judge is going to
16 instruct you is that those elements each must
17 individually be proven by the state beyond a
18 reasonable doubt. There is no hierarchy of elements.
19 There is not some elements that are more important
20 than others. Each element is there.

21 And I don't know -- I am sure in some big
22 securities fraud case they might have a crime that has
23 16 elements. And if you, as a juror, were on that
24 case and you found the state or the government had
25 proved 15 out of 16 but they hadn't proved one of

1 them, one out of 16, the instruction would tell you
2 that it's your duty as a juror to find the defendant
3 not guilty. Even though they had proved 15/16th of
4 their case.

5 Just hearing that, what does that -- does
6 that strike you as a fair way to proceed?

7 **PROSPECTIVE JUROR:** No. It strikes me as a
8 very fair way to proceed because I have kids and, yes,
9 they get just to that line where they think they can
10 get their allowance, but they haven't finished. Yes,
11 they have got 1,516th of it done, but the rule is you
12 have to have this done before you get your allowance.
13 I feel the same way about the law.

14 **MR. MURPHY:** You are a tough mom.

15 My kids are 25, 23, and 11. And my older
16 kids have just bugged me for years now that I treat
17 the 11 year old like she's my granddaughter. So,
18 yeah, 1,216th or 8/16th she's going to get her
19 allowance when it's the last one.

20 Okay. You have endorsed the concept of this.

21 Anybody else?

22 Let me ask you, Ms. Vanloan, how do you feel
23 about the idea that the state has to prove each and
24 every element and if on any one element they haven't
25 met their burden of beyond a reasonable doubt it's

1 your duty to vote not guilty.

2 Does that does concern you?

3 **PROSPECTIVE JUROR:** No.

4 **MR. MURPHY:** Do you feel it's a fair way for
5 us to proceed?

6 **PROSPECTIVE JUROR:** Yes. She explained it
7 very well.

8 **MR. MURPHY:** She did.

9 Ms. Daily, how do you feel about that?

10 **PROSPECTIVE JUROR:** I could go with that.

11 **MR. MURPHY:** I am sorry.

12 **PROSPECTIVE JUROR:** I could go with that.

13 **MR. MURPHY:** Is it something -- I appreciate
14 you can go with it, but is it something you feel is
15 the way our criminal justice system should be
16 structured?

17 **PROSPECTIVE JUROR:** I -- I might go to some
18 judge and question why it's that way.

19 **MR. MURPHY:** Why would you question it?

20 **PROSPECTIVE JUROR:** If I thought all the
21 facts were there before, I might question it. I might
22 wonder.

23 **MR. MURPHY:** Okay.

24 You might think that places too high of a
25 burden on the state to prove their case?

1 **PROSPECTIVE JUROR:** I am not sure I think
2 that but I would probably question it.

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

4 If the judge tells you that's your job, are
5 you able to follow in this case?

6 And it's phrased as a duty. You know, the
7 jurors have this honor and this duty to follow the law
8 and apply it. That's how we get consistency from one
9 trial to another. If individual jurors could say,
10 well, in this case, you know, it's a serious crime.
11 If I have a pretty strong hunch that person A did it
12 or did something wrong, I am going to find them guilty
13 based on a hunch instead of on individual scrutiny of
14 the evidence. That would leave chaos.

15 Okay. Let's talk about the beyond a
16 reasonable doubt standard. We've got the sense of the
17 elements. This goes into the presumption of innocence
18 forward. And I am just going to say the words, beyond
19 a reasonable doubt. We don't -- we hear it all the
20 time. We watch Law and Order or CSI and we hear that
21 standard, but what does that mean?

22 The state, the prosecution, has to prove each
23 and every element, and those elements often contain
24 facts within them -- they have to prove those beyond a
25 reasonable doubt.

1 Now, I will just ask you if you would raise
2 your hand if you think you are an unreasonable person.
3 None of you. You've made it this far. Well, you are
4 smiling.

5 Do you think you are unreasonable there?

6 **PROSPECTIVE JUROR:** No.

7 **MR. MURPHY:** Okay.

8 This is where I'm sure if my wife was in the
9 back she would be going you --

10 Anyways, you've made it this far. You've
11 filled out the questionnaire. You've shown up, you
12 have answered a bunch of questions.

13 The state has to prove to you each and every
14 element beyond any reasonable doubt that they had met
15 their burden or all the elements. And it's hard to
16 conceptualize because we don't deal with that kind of
17 thing in the way we make day-to-day judgments. We
18 often make assumptions and conclusions based on
19 hunches or imperfect information. We do this all the
20 time with our kids and our family members.

21 Those are -- it's not the way we scrutinize
22 the evidence to make decisions in our daily life. So
23 sometimes it helps to have kind of a visual context.

24 Imagine, if you would, we're at the beginning
25 of this case and the state hasn't proved any evidence.

1 So if I had a jar here of marbles, each marble
2 representing a fact or an element or something
3 material the state had to prove, the jar would be full
4 right now because we're at the beginning of the case.
5 They haven't proved anything.

6 Imagine as the case goes on they prove
7 certain facts to you. And as you go back to the
8 deliberation room you agree they have proven certain
9 things that they have to prove. So you are taking
10 marbles out. You are taking doubts out of the jar.

11 In this case, there is not going to be any
12 dispute that Anna Mae Aquash was killed. There is no
13 dispute about that. That's going to be one of the
14 elements. And so we're taking those out.

15 But what if you get to a point where the jar
16 has one marble left? It's a doubt and it's not an
17 unreasonable doubt. It's not based on some belief
18 that there was some grand marching conspiracy. It's
19 one doubt. You believe they have proved everything
20 else. All the other doubts at out of the jar now.

21 Can you follow the law and say my duty, then,
22 is to vote not guilty because they haven't resolved
23 that last doubt?

24 Can you do that?

25 **PROSPECTIVE JUROR:** Yes.

1 **MR. JACKLEY:** Your Honor, I am going to
2 object and request that the Court instruct the jury as
3 to what reasonable doubt means and I can approach with
4 a further objection but I don't want to give a
5 speaking objection.

6 **THE COURT:** I don't know if the question is a
7 problem. But it is my job to describe reasonable
8 doubt in the jury instructions. And there are
9 probably three or four different descriptions of it
10 that are generally accepted in our jury instructions.

11 Suffice it to say that it has to be a
12 substantial doubt. That is, enough that would make
13 you stop and think and be comfortable before you would
14 proceed.

15 There is all kinds of decisions in our life
16 that we make that. If there is a real possibility
17 that the person is not guilty or that a particular
18 element has not been proven to that level of
19 certainty, then you are down to a not guilty.

20 Lawyers will describe it a different way or
21 different ways when they talk to you, but obviously
22 beyond any doubt is silly. We can't get there. But
23 it is beyond a reasonable doubt and that means
24 something you would comfortably rely on in your own
25 life and important affairs.

1 Mr. Murphy at various times, or this one
2 included, will describe it in words of his choosing.
3 Mr. Jackley will describe it in words of his choosing.
4 But when all is said and done that's where we are
5 going to be.

6 Would you act on the information you have in
7 an important affair of your life or would you need
8 something more before you could go forward in an
9 important affair of your life or would a reasonable
10 person do that?

11 I don't even know how accurate it is, but I
12 always use the expression when I was trying cases that
13 if a physician told me I needed to amputate one of my
14 kid's legs, I would go get a second opinion. Okay.
15 Doesn't mean I wouldn't let it happen, but it sure
16 would mean I want to be pretty sure. And no physician
17 would tell me it's an absolute necessity. But they
18 would certainly give me strong feelings one way or the
19 other that it was necessary or not necessary for a
20 reasonable chance of a good outcome.

21 I don't even know whether that's a good
22 description. That's the one I used and it seemed to
23 pass muster with the courts. You know, simply you got
24 to be comfortable moving forward. A reasonable person
25 would have to be, it's something important. If you

1 wouldn't do it without more evidence, then that's your
2 answer.

3 **MR. MURPHY:** Your Honor, just I want
4 clarification because the words I have been using I
5 want to make sure that we're all on the same page,
6 this is an accurate statement. The state has a burden
7 and that burden is they have to prove each element
8 beyond a reasonable doubt?

9 **THE COURT:** That's correct.

10 **MR. MURPHY:** Okay.

11 And that's, I thought, the words I was using.
12 And I don't know any deviation from those words.
13 That's what I am talking about here. The state has
14 burden of proving beyond a reasonable doubt each
15 element.

16 So going back to the example, 'if at the end
17 of the case you have a reasonable doubt about the case
18 or about one element, that is your duty, then, to vote
19 not guilty. That is a tough standard.

20 We talked before about civil juries versus
21 criminal cases. In the civil law, when people are
22 fighting by and large about money, whether it's a
23 contract dispute or a personal injury case, they are
24 fighting about money. The standard is a
25 preponderance. And a preponderance says that you rule

1 in favor of the side that has proven their case more
2 than the other side. So it could just be
3 50-and-a-half to 49-and-a-half percent if we could
4 really ever quantify these things. We really can't.

5 But if you found that the plaintiff proved
6 its case a bit more than the defendant proved its
7 defense, you would have to find in favor of the
8 plaintiff. Vice versa.

9 There is another standard in law called clear
10 and convincing evidence. It is, the prevailing side
11 has to prove their case more than preponderance but
12 less than a beyond a reasonable doubt. It's a pretty
13 rare standard. It applies a lot of times in cases
14 that don't involve juries.

15 But what we're here today for is a criminal
16 case, and in a criminal at case the state has the
17 burden and the burden stays with it from the very
18 beginning to the very end. It never shifts to
19 Mr. Graham. And they have to prove beyond a
20 reasonable doubt that they have established by
21 evidence every element. It's the highest standard we
22 have in law.

23 Now, I want to go back and -- I will start
24 with you, Mr. Whitman.

25 Do you have any feelings about the kind of

1 evidence or the fairness of requiring the state to
2 prove beyond a reasonable doubt to you, each and every
3 element, before you would be entitled to vote guilty?

4 Does that cause you any concern that that
5 makes it too darn hard on the state?

6 **PROSPECTIVE JUROR:** No, it doesn't bother me.

7 **MR. MURPHY:** Okay.

8 What about you Ms. Mitzel, is that a standard
9 you can fairly apply?

10 **PROSPECTIVE JUROR:** Yes.

11 **MR. MURPHY:** And you, ma'am?

12 **PROSPECTIVE JUROR:** Yes.

13 **MR. MURPHY:** What about you, Ms. Buckingham?

14 **PROSPECTIVE JUROR:** Yes.

15 **MR. MURPHY:** Do you have any qualms about
16 that?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** Ms. Daily, how do you feel about
19 this.

20 **PROSPECTIVE JUROR:** I could handle it.

21 **MR. MURPHY:** You could handle it?

22 **PROSPECTIVE JUROR:** Yes.

23 **MR. MURPHY:** Okay.

24 That is the abstract legal concept. One
25 thing I use sometimes also to demonstrate. The jar of

1 marbles is one way.

2 Another way if you thought of this banister
3 as being the case, we're starting at that end where we
4 have no evidence. Got complete doubt. But as the
5 case goes along and witnesses testify, evidence may
6 come in and it may move us. And if we looked at the
7 other end of the banister, that would be complete
8 certainty. The state doesn't have to prove their case
9 to complete certainty, but they have to prove it
10 beyond a reasonable doubt.

11 We might get to a point where the case ends,
12 the evidence ends, you go back in the room and you
13 said, well, the state proved a lot, 75 percent, but I
14 still have some doubts, reasonable doubts, about some
15 of the elements.

16 What would you vote, Ms. Buckingham?

17 **PROSPECTIVE JUROR:** There is still doubt.

18 **MR. MURPHY:** So the vote would have to be?

19 **PROSPECTIVE JUROR:** You can't vote that he's
20 guilty if there is doubt.

21 **MR. MURPHY:** Right. It's a not guilty vote.

22 What if you get all the way up to where you
23 believe the state has proved 90 percent of their case,
24 but you still have a reasonable doubt about one of the
25 elements. And it may only be one of the elements out

1 of seven or twelve or whatever it is.

2 Mr. Whitman, what would your vote to have to
3 be under the law?

4 **PROSPECTIVE JUROR:** It would have to be not
5 guilty.

6 **MR. MURPHY:** Okay.

7 Ms. Daily, do you have any problems -- I know
8 you said you can handle this, but any problems at all
9 on getting to that point and feeling that, boy, I am
10 not sure if that's the duty I can respect?

11 **PROSPECTIVE JUROR:** No. I can respect it.

12 **MR. MURPHY:** Okay.

13 We're now going to talk about some of the
14 topics that may come up in this case because they may
15 affect for personal reasons your ability to apply the
16 reasonable doubt standard.

17 One of those is the American Indian Movement.
18 This case involves allegations of a crime that
19 happened in 1975 or 1976. It's a long time ago, 34,
20 35 years ago? And at the point in South Dakota, the
21 American Indian Movement was active, particularly down
22 on Pine Ridge.

23 So I am going to start out just by asking you
24 if any of you have any recollections at all of the
25 American Indian Movement whether it was specifically

1 here or in any location?

2 Ms. Daily, what were your recollections of
3 the American Indian Movement?

4 **PROSPECTIVE JUROR:** I was at National College
5 across street. We had to lock our doors for a while
6 because there was a lot of action going across the
7 street and behind the courthouse here. There were
8 some, you know, protests and so forth.

9 **MR. MURPHY:** Did that cause you fear?

10 **PROSPECTIVE JUROR:** Sometimes people on your
11 roof even.

12 **MR. MURPHY:** On your roof. Okay.

13 **PROSPECTIVE JUROR:** No, it didn't, but I am
14 familiar with that time.

15 Yes, I am that old.

16 **MR. MURPHY:** I will tell you, yesterday we
17 had about -- 80 some jurors in here and everybody
18 pretended like they were too young. We are all --
19 almost all of us are old enough to remember.

20 Did that cause you any fear at the time any
21 concern?

22 **PROSPECTIVE JUROR:** No.

23 **MR. MURPHY:** Okay.

24 Anybody else?

25 Did anybody here live in Rapid City or South

1 Dakota in 1975.

2 Ms. Mitzel?

3 **PROSPECTIVE JUROR:** I lived here. I remember
4 reading about it and watching it on TV.

5 **MR. MURPHY:** Did you form any opinions about
6 that?

7 **PROSPECTIVE JUROR:** No.

8 **MR. MURPHY:** About the movement or its
9 members or anything like that?

10 **PROSPECTIVE JUROR:** Not really.

11 **MR. MURPHY:** Okay.

12 Anybody since then -- 75 is a long time ago,
13 but certainly with books and newspapers, movies, and
14 other things, has anybody formed any opinions at all
15 about the American Indian Movement or the members of
16 the American Indian Movement since then?

17 When I say that phrase, the American Indian
18 Movement, what comes to your mind, Mr. Whitman, when
19 you hear that phrase?

20 **PROSPECTIVE JUROR:** Being that it was a such
21 a long time ago I don't know if I have the retention
22 for it.

23 **MR. MURPHY:** All right.

24 **PROSPECTIVE JUROR:** But I don't -- I didn't
25 have any opinions about it at all.

1 **MR. MURPHY:** Okay.

2 Well, you know, at that time -- most of you
3 probably know that this -- there was the wounded need
4 occupation in 1973.

5 Do all of you have -- raise your hand if you
6 don't know what I am talking about when I talk about
7 Wounded Knee.

8 **PROSPECTIVE JUROR:** Can you explain?

9 **MR. MURPHY:** Okay.

10 That was a time period when members of the
11 American Indian Movement occupied a village called
12 Wounded Knee down on Pine Ridge where there was a
13 standoff with law enforcement for about 67 days or
14 something like that.

15 Are you familiar with that event?

16 **PROSPECTIVE JUROR:** No.

17 **MR. MURPHY:** Everybody else is familiar?

18 The other events, kind of key events from
19 that time frame, June 26, 1975, at a place near Oglala
20 called Jumping Bull's place, there was a shoot-out
21 between members of the American Indian Movement and
22 two FBI agents. Both of the FBI agents were killed as
23 well as one of the members of AIM. It was a huge
24 issue, a nationwide issue. It resulted in a massive
25 infusion of law enforcement in this community.

1 Who recalls that incident or has heard of
2 that?

3 All right. Ms. Mitzel, what were your
4 recollections of that or what are your feelings about
5 that incident?

6 **PROSPECTIVE JUROR:** Well, pretty much how you
7 described it. I remember just seeing it on the news
8 and that two FBI agent agents were killed.

9 **MR. MURPHY:** And you as well.

10 **PROSPECTIVE JUROR:** I know of it through
11 history because I am a history major.

12 **MR. MURPHY:** Okay.

13 And then there were subsequent issues. There
14 was some bombings. There were -- there was a
15 shoot-out in Oregon. Some other instances involving
16 AIM. The were courthouse riots where charges were
17 brought both in Custer County and Minnehaha county.

18 Who recalls the courthouse riot cases?

19 Any of you?

20 Okay. The reason why I bring up the history
21 of AIM or these issues is that's going to be something
22 of this case. There is going to be a historical
23 context. The events in question happened within that
24 context. And I suspect that a number of the state's
25 witnesses are going to talk about that.

1 You are going to learn that my client, John,
2 was somebody who supported the goals of the American
3 Indian Movement. You will you hear that it wasn't
4 like -- it wasn't like being a member of a political
5 party where you actually have a card where you are a
6 member of a particular party, but you had supporters.
7 People who considered themselves members.

8 Because the American Indian Movement is
9 alleged to have committed a number of crimes or
10 members have committed crimes, I wanted to see
11 whether -- by virtue of my client's association with
12 the American Indian Movement, whether that's going to
13 make you think he was more likely to commit acts or
14 criminal activity because he was associated with that
15 movement.

16 Do you have any feelings about that,
17 Ms. Brinkworth?

18 **PROSPECTIVE JUROR:** So you are asking if I
19 feel like he --

20 **MR. MURPHY:** Because he was a supporter of a
21 group like AIM that was involved in militant political
22 activities, do you feel that's likely to cause you to
23 believe that he's more likely to have committed acts
24 of violence himself?

25 **PROSPECTIVE JUROR:** No.

1 **MR. MURPHY:** Would it be fair to say that you
2 would agree that somebody shouldn't be determined to
3 be guilty by their association of other people?

4 **PROSPECTIVE JUROR:** Yes.

5 **MR. MURPHY:** What about you, Ms. Daily?

6 **PROSPECTIVE JUROR:** Same.

7 **MR. MURPHY:** Okay.

8 We don't have to look at it necessarily in
9 the context of AIM. There is many organizations,
10 whether it be an environmental group or a chamber of
11 commerce or political parties, there may be members of
12 that group that are corrupt or involved in scandals or
13 whatnot.

14 Ms. Buckingham, if that were the case, would
15 you feel it would be fair to judge all members of an
16 organization by the acts of a few of the members?

17 **PROSPECTIVE JUROR:** No.

18 **MR. MURPHY:** Okay.

19 Same for you, Ms. Vanloan?

20 **PROSPECTIVE JUROR:** Same.

21 **MR. MURPHY:** Ms. Mitzel, since you have some
22 recollection of AIM and the events, do you think in
23 any way the fact that my client supported AIM might
24 cause you to believe that he was more likely to be
25 involved in acts of violence or commit crimes?

1 **PROSPECTIVE JUROR:** No.

2 **MR. MURPHY:** Are you willing to keep an open
3 mind that there may have been many people involved in
4 the American Indian Movement that were there for
5 community organization purposes or completely peaceful
6 reasons?

7 **PROSPECTIVE JUROR:** Yes.

8 **MR. MURPHY:** Okay.

9 That the acts of a few people shouldn't carry
10 over to everybody in that group?

11 **PROSPECTIVE JUROR:** Yeah.

12 **MR. MURPHY:** Okay.

13 Mr. Whitman, do you --

14 **PROSPECTIVE JUROR:** I'd feel the same way.

15 **PROSPECTIVE JUROR:** I feel strongly the same
16 way.

17 **MR. MURPHY:** Okay. Thank you. All right.

18 Okay. This is perhaps probably the last of
19 the very sensitive issues. And I meant it when I said
20 it before, and I know it would be the same for the
21 Attorney General and the judge. This is an area where
22 we really aren't here to cast any judgments and we are
23 certainly able to have those private meetings to talk
24 about it.

25 I want to talk about the issue of race. Race

1 and feelings about race are throughout our society in
2 every state, and frankly, in just about every country.
3 We all come to this courthouse as a complete person
4 who may have their own prejudices whether it's race or
5 orientation or political affiliation or whatever. We
6 all have those type of prejudices.

7 We need to explore that because my client,
8 John, is a Canadian Indian. Anna Mae Aquash was
9 Canadian Indian. And perhaps half or more of the
10 witnesses are Native American whether they are
11 recognized by a federal tribe or not, they are
12 affiliate or associate with Native Americans.

13 And this is a tough issue. You know, I -- I
14 had a case. It was just down the hall, actually,
15 where during jury selection my client was Indian. He
16 was involved in an altercation with somebody being
17 stabbed and we went through this discussion. And one
18 of the jurors --

19 **MR. JACKLEY:** Your Honor, I am going to
20 object.

21 **THE COURT:** Overruled.

22 **MR. MURPHY:** -- where during the course of
23 the voir dire, I asked whether that person -- whether
24 anybody had any issues that might impair their ability
25 to sit fairly. And this woman candidly, openly said

1 yes, I was raised in a family where I came to
2 believe -- and it's hard part of who I am now --
3 whether I -- she said, I am not proud of it -- but
4 that I believe that people who are Indian are
5 dishonest and/or violent. That's who she was. And we
6 appreciated the fact that she was candid. And she was
7 removed because of that.

8 I want to bring that up here because it is
9 somebody that is so important as we go forward that
10 every witness, whatever their race, religion, position
11 in society, be treated the same when they take the
12 oath and it's up to you to decide based on what the
13 testimony is whether you believe them or disbelieve
14 them. But not based on a factor like race.

15 Does anybody here have any feelings about
16 race or race dynamics that might cause them to be in
17 any way, shape, or form biased one way or another in
18 this case?

19 Okay. Did you have any comment?

20 **PROSPECTIVE JUROR:** No.

21 **MR. MURPHY:** Who among you likes to watch CSI
22 or Law and Order, John Grisham movies?

23 Somebody has to because they have 14
24 different Law and Orders, half a dozen CSIs, so
25 somebody has to be paying all of that advertising.

1 One of the parts of watching those shows is
2 you, as a viewer, get to solve the crime. You know,
3 that's why people read whodunits and whatnot.

4 As a juror, that's not your job. It's a
5 harsh way of putting it, but your job is to decide
6 whether the state has met its burden.

7 Ms. Buckingham, if I was able to during the
8 course of this trial establish beyond any doubt that
9 somebody else committed crime. Say I got one of the
10 state's witnesses to jump up and yell I did it, would
11 that make it easier for you to vote not guilty if you
12 believed that witness?

13 **PROSPECTIVE JUROR:** I suppose so.

14 **MR. MURPHY:** Well, I have never had that
15 happen. I am waiting for that day.

16 But that's not -- would you believe that
17 that's my role? My job here is to prove that somebody
18 else did it?

19 **PROSPECTIVE JUROR:** I believe your job is to
20 defend your client.

21 **MR. MURPHY:** Okay.

22 As part of that defense, do you believe that
23 my job to show to you that somebody else committed the
24 crime in?

25 **PROSPECTIVE JUROR:** No.

1 **MR. MURPHY:** Okay.

2 What about you, Ms. Vanloan, do you think
3 that's part of the defense's job to show that somebody
4 else did the crime?

5 **PROSPECTIVE JUROR:** No. Just that he did not
6 do it.

7 **MR. MURPHY:** Okay.

8 Do I even need to show that he did not do it
9 or is it my job to help you determine whether the
10 state has proven that he did do it?

11 **PROSPECTIVE JUROR:** Just prove that he's
12 innocent.

13 **MR. MURPHY:** Okay.

14 Do you believe that's part -- that's my job?

15 **PROSPECTIVE JUROR:** Yes.

16 **MR. MURPHY:** Okay.

17 Let's talk about that because that's a good
18 response in the sense it opens up that dialogue.

19 You know from our previous discussions that
20 it's the state's burden of proving their case,
21 correct?

22 **PROSPECTIVE JUROR:** Yes.

23 **MR. MURPHY:** Are you comfortable with that?

24 **PROSPECTIVE JUROR:** Yes.

25 **MR. MURPHY:** And that I don't have to ask a

1 single question, put on a single witness, submit a
2 single exhibit?

3 Do you understand that?

4 **PROSPECTIVE JUROR:** I understand.

5 **MR. MURPHY:** So do you think I have to prove
6 that my client didn't commit this crime?

7 **PROSPECTIVE JUROR:** Well, you just have to
8 prove that he's innocent, I guess is what I am saying.

9 **MR. MURPHY:** If I were to tell you that I
10 don't have to prove that he's innocent, it's not --
11 because he doesn't have any burden, it's the state's
12 job to prove him guilty, is that something you can --
13 you are comfortable with?

14 This isn't a contest where they have to prove
15 my client guilty and I have to prove him innocent.

16 **PROSPECTIVE JUROR:** No, I am comfortable with
17 that.

18 **MR. MURPHY:** Ms. Mitzel, how do you feel
19 about what we just talked about?

20 Are you comfortable with the idea this is not
21 a contest where I have to prove one thing and they
22 have to prove one thing and you have to decide who
23 proved their case better?

24 That the burden states on the state?

25 **PROSPECTIVE JUROR:** Yes.

1 **MR. MURPHY:** Okay.

2 What about the idea, though, that if the
3 crime in your mind at the end hasn't been solved, but
4 you don't believe the state has met it's burden, do
5 you feel that you can at that point could -- if you
6 haven't figured it out, vote not guilty because the
7 state hasn't proven the case to you?

8 Is that something -- you are looking at me
9 and I am thinking I probably asked a pretty poor
10 question.

11 **PROSPECTIVE JUROR:** I think if I am
12 understanding you correctly you are reiterating it's
13 the state's job to prove the 16 of the 16 elements?

14 **MR. MURPHY:** Right.

15 And even if you get to the end of the case
16 and you can't figure out what happened, are you going
17 to hold that against either side or hold that against
18 Mr. Graham that he didn't prove that, the state did?

19 **PROSPECTIVE JUROR:** I wouldn't hold it
20 against him because it's the state's burden to prove
21 it.

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

23 Let's see. I am getting very near the end.
24 I am sure you are much appreciative of that.

25 I am at the end. The only thing I haven't

1 asked at this point is you have been sitting here --
2 we've talked a lot -- about a number of topics. But
3 you may have said to yourself, boy, you know I've got
4 an issue with being on this jury for something that
5 Murphy hasn't asked me about or hasn't come up yet.
6 He should probably know this or the judge should
7 probably know this.

8 Is there anything because the chase involves
9 charges of murder, the fact that there is -- anything
10 that has happened or been said or done that you
11 probably should let us know what's going on?

12 Anything?

13 Okay. Well, great. Thank you very much for
14 your attention. I appreciate.

15 **THE COURT:** One of our 49 from yesterday got
16 significantly ill. Coward. And anyway to remedy
17 that, we're going to call an eighth juror forward at
18 this time to join these seven. Mr. Murphy will
19 probably take a few minutes to get that juror up to
20 speed and we will proceed from there.

21 **MR. MURPHY:** And this row is pretty tight
22 already.

23 **THE COURT:** Yeah. We'll move them to the
24 next row.

25 **THE CLERK:** Rachel Embler.

1 **PROSPECTIVE JUROR:** Maybe I should say I work
2 for KOTA. I am covering this case.

3 **MR. MURPHY:** Yeah. You have to formally sit
4 in the chair.

5 We kind of knew this was coming.

6 **PROSPECTIVE JUROR:** Yeah. I know. I
7 figured.

8 **MR. MURPHY:** Just for the record, you are a
9 TV and internet journalist for KOTA?

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

11 **MR. MURPHY:** You have been covering this
12 story?

13 **PROSPECTIVE JUROR:** Yes, I was here
14 yesterday.

15 **MR. MURPHY:** For all eight or nine hours of
16 it.

17 **PROSPECTIVE JUROR:** A good portion of it.

18 **MR. MURPHY:** And that wasn't the beginning.
19 You have covered it in the past?

20 **PROSPECTIVE JUROR:** I have covered the AIM
21 stuff and Aquash stuff before, yes.

22 **MR. MURPHY:** So you come to the case with a
23 basic of knowledge separate and apart from what you
24 are going to hear on the witness stand?

25 **PROSPECTIVE JUROR:** I did a whole time line

1 of events leading up to everything yesterday --

2 All right.

3 Your Honor, at this point, based on --

4 **THE COURT:** You're out of here.

5 **MR. MURPHY:** So you can just stay here and go
6 back to work, I guess.

7 **THE COURT:** Get your tablet and get moved to
8 the back row, please.

9 **THE CLERK:** Zackeriah Horn.

10 **MR. MURPHY:** Good morning, Mr. Horn.

11 **PROSPECTIVE JUROR:** Morning.

12 **MR. MURPHY:** During the course of
13 everything -- during the course of everything that's
14 gone on this morning, have you been heard able to
15 hear?

16 **PROSPECTIVE JUROR:** Real quick, I work for
17 NBC, News Center One, and I know about all of this as
18 well. I couldn't avoid the news at all because I work
19 six days a week there. I am in production. I do web
20 stories, too.

21 **MR. MURPHY:** You have covered this case, in
22 particular?

23 **PROSPECTIVE JUROR:** Yeah.

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

25 **THE COURT:** I was going to try and put a

1 little humor in and say working for the newspaper
2 won't get you off.

3 **PROSPECTIVE JUROR:** I know a lot about AIM,
4 too.

5 **THE COURT:** I am suspicious we're going to
6 waive fair well.

7 **MR. JACKLEY:** Yeah.

8 **MR. MURPHY:** Yeah.

9 **THE CLERK:** Sandy Richards.

10 **MR. MURPHY:** Good morning. We have hit two
11 of the three major networks. Let see how we do here.

12 **PROSPECTIVE JUROR:** Hi.

13 **MR. MURPHY:** What news group do you work for?

14 **PROSPECTIVE JUROR:** None.

15 **MR. MURPHY:** Okay.

16 **PROSPECTIVE JUROR:** Sorry.

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

18 Were you able to hear the questions I have
19 asked throughout the morning?

20 **PROSPECTIVE JUROR:** Yes.

21 **MR. MURPHY:** Okay.

22 Just initially, any of them stand out as --
23 that you had issues or concerns or anything about?

24 **PROSPECTIVE JUROR:** No.

25 **MR. MURPHY:** Okay.

1 Why don't -- very briefly, I am just going to
2 go through the December 17 deadline. Is that going to
3 cause you any particular hardships staying in the
4 trial from 8:30 to 5:00?

5 **PROSPECTIVE JUROR:** No.

6 **MR. MURPHY:** Anything involving any of the
7 participants?

8 **PROSPECTIVE JUROR:** No.

9 **MR. MURPHY:** And the witnesses, did those --

10 **PROSPECTIVE JUROR:** No.

11 **MR. MURPHY:** One thing I am going to ask you
12 because Tina is trying to take down both of our
13 answers, please wait until I finish and then answer
14 back so she can get both down.

15 Familiarity with the case through the
16 newspaper, the media?

17 **PROSPECTIVE JUROR:** Not a lot. I mean, I've
18 vaguely heard of the case but nothing really sticks
19 out. I try not to read depressing news.

20 **MR. MURPHY:** Okay. All right.

21 So you didn't form any opinions about
22 anything?

23 **PROSPECTIVE JUROR:** No.

24 **MR. MURPHY:** Did you follow or do you have an
25 interest in the history of the AIM?

1 Have you read the book In the Spirit of Crazy
2 Horse?

3 **PROSPECTIVE JUROR:** No. I grew up in
4 Minnesota. I've only lived here for ten years. I am
5 a science teacher so I am not a history buff.

6 **MR. MURPHY:** Okay.

7 Any of the agencies involved in this case, do
8 you have any personal or professional relationships?

9 **PROSPECTIVE JUROR:** No.

10 **MR. MURPHY:** Where are you teacher at?

11 **PROSPECTIVE JUROR:** Stevens.

12 **MR. MURPHY:** Andy court organizes, WAVI, CASA
13 MADD?

14 **PROSPECTIVE JUROR:** No.

15 **MR. MURPHY:** The issue about you or anybody
16 close to you getting -- being the victim of a crime,
17 is that anything that has raised any issues?

18 **PROSPECTIVE JUROR:** No.

19 **MR. MURPHY:** Caused you any concern?

20 **PROSPECTIVE JUROR:** No.

21 **MR. MURPHY:** Have you ever been a juror
22 before?

23 **PROSPECTIVE JUROR:** No. I was called earlier
24 in the month but I wasn't chosen.

25 **MR. MURPHY:** Okay.

1 You thought you probably got lucky again,
2 too?

3 **PROSPECTIVE JUROR:** Yeah.

4 **MR. MURPHY:** Until the two journalists got in
5 the way.

6 Okay. Presumption of innocence, we talked
7 about that. Sitting here right now my client is
8 presumed innocent and that presumption carries with
9 him until the close of the evidence. It is a standard
10 legal concept.

11 Does that cause you any concern at all?

12 **PROSPECTIVE JUROR:** No. Some people just
13 don't like public speaking and that's his right.

14 **MR. MURPHY:** Okay.

15 And that goes to his ability to be remain
16 silent?

17 **PROSPECTIVE JUROR:** Right.

18 **MR. MURPHY:** Burden of proof, do you think
19 it's too tough for the state to have to prove each
20 element of the crime beyond a reasonable doubt?

21 **PROSPECTIVE JUROR:** No. That's their job.

22 **MR. MURPHY:** And you, as a juror, would hold
23 them to their job?

24 **PROSPECTIVE JUROR:** Yes.

25 **MR. MURPHY:** Even if you got to that point

1 where you thought they had proven each and every
2 element except for one or one part of one, if you had
3 a reasonable doubt about one element, you could say
4 not guilty?

5 **PROSPECTIVE JUROR:** Yes.

6 **MR. MURPHY:** The American Indian Movement,
7 any past history growing up in Minnesota because there
8 was a chapter in Minnesota for quite a while?

9 **PROSPECTIVE JUROR:** No.

10 **MR. MURPHY:** The race issue, any feelings
11 that you bring to the court today about Indians,
12 Native Americans, people of color?

13 **PROSPECTIVE JUROR:** No.

14 **MR. MURPHY:** Law enforcement witnesses, do
15 you have any past experiences with law enforcement
16 that might cause you to either favor or disfavor the
17 testimony of somebody who has a law enforcement
18 background?

19 **PROSPECTIVE JUROR:** No.

20 **MR. MURPHY:** Because my client was a
21 supporter of the American Indian Movement, you are
22 going to hear testimony about people talking about
23 acts of violence or disobedience of AIM.

24 Can you treat him as an individual and not
25 hold him responsible for the acts of other AIM

1 members?

2 **PROSPECTIVE JUROR:** Correct.

3 **MR. MURPHY:** Anything else that you think I
4 should know that might cause you to not be the right
5 juror for this case?

6 **PROSPECTIVE JUROR:** No.

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

8 Is the fact that you are a teacher at
9 Stevens -- are you in the process of doing finals or
10 giving finals?

11 **PROSPECTIVE JUROR:** That's not til January.

12 **MR. MURPHY:** Okay. So you just have to sweat
13 through vacation and do it afterwards?

14 **PROSPECTIVE JUROR:** Yeah.

15 **MR. MURPHY:** I pass for cause, Your Honor.

16 **THE COURT:** Thank you.

17 Mr. Jackley?

18 **MR. JACKLEY:** Thank you, Your Honor.

19 Good morning. My name is Marty Jackley. I
20 am going to be fairly short. I am going to try to
21 work to get you out of here by close to noon, okay, so
22 bear with me.

23 I know it's been a long morning. I can
24 honestly say in all my years of practice that I've
25 never had a juror choose to go get a root canal rather

1 than listen to two lawyers. That might be a hint to
2 keep a short.

3 I need to take a minute to introduce myself a
4 little further to make sure that anybody in addition
5 to Ms. Buckingham doesn't know who I am. I have a
6 wife, Angela. Two little kids, a six-year-old son,
7 four-year-old daughter. I grew up in Sturgis. My dad
8 was a lawyer in Sturgis. He was long time State's
9 Attorney there.

10 Does that ring any bells?

11 Anybody know my dad, Mike Jackley?

12 Okay. Before I became a prosecutor, I was a
13 defense lawyer, a lawyer here in Rapid City, at the
14 law firm of Gunderson, Palmer, Goodsell and Nelson.

15 Do any of you have a professional
16 relationship or do any work with Gunderson Palmer that
17 either Mr. Murphy or I should know about it?

18 Okay. After I left private practice I became
19 the United States Attorney for South Dakota.

20 Do any -- and Bob Mandel works at the United
21 States Attorney's Office.

22 Do any of you have any issues with the United
23 States Attorney's Office of the federal government
24 that would in any way affect the way you hear evidence
25 and your fairness in this trial?

1 As Mr. Murphy indicated, I now am the
2 Attorney General. I work at the Attorney General's
3 office. I represent the State of South Dakota along
4 with Rod Oswald.

5 Do any of you have any issues with the
6 Attorney General's Office?

7 How about anything against the state? Is the
8 DOT coming and being mean to anybody or have any other
9 issues that I should know about that you will be
10 holding against me?

11 Okay. Ms. Richards, you indicated you are a
12 teacher at Stevens. I also have a little sister,
13 Josalyn Hafner (phonetic).

14 Do you know Josalyn?

15 **PROSPECTIVE JUROR:** Yes.

16 **MR. JACKLEY:** Does that in any way affect
17 your ability to sit on the jury and be fair to either
18 the state or to Mr. Murphy's client?

19 **PROSPECTIVE JUROR:** No.

20 **MR. JACKLEY:** Okay.

21 Mr. Murphy went through a long list and I
22 have some additional people that I want to ask you
23 about. Many of these folks probably won't testify but
24 their names may come up in trial and so I am just
25 going to explore whether or not you have a any or have

1 any knowledge of them that would affect how you see
2 these proceedings. Okay.

3 I want to start with a few attorneys that may
4 either be representing clients or their names may come
5 up in the proceedings. One is Dana Hanna. Two is Jim
6 Leach. Greg Erlandson. He's a lawyer at the Bangs
7 McCullen Law Firm. Bob Van Norman. John Schlimgen.
8 He's a judge in Sioux Falls.

9 I want to take just a minute -- the victim in
10 this case is Annie Mae Aquash and she died in 1975.

11 Does anybody know -- did anybody know Annie
12 Mae Aquash?

13 She has two daughters. One is Denise
14 Maloney. Do any of you know Denise?

15 The other daughter is Debbie Maloney. Do any
16 of you know Debbie?

17 Okay. And then just -- I got eight
18 additional witnesses I want to go through with you
19 that the names may come up to see if it rings any
20 bells with you. Angie Palfy. Richard Two Elk. John
21 Trudell. Bruce Ellison. He's also a lawyer here in
22 town. Loralie Decora. Sometimes goes by Loralie
23 Means. Dennis Banks. Dave Hill. Leonard Crow Dog.
24 You guys are easy.

25 As the judge indicated earlier this morning,

1 and as Mr. Murphy talked about, this is a murder case.
2 The two counts in the charge by indictment is murder
3 and felony murder in the commission of a kidnapping.

4 In a murder case, such as this, this is not a
5 capital case. So this is not a death penalty. So
6 nobody has to be worried about the death penalty here.

7 Otherwise, I am not allowed to talk about
8 sentencing issues because any sentencing issues are
9 left to the judge. So can I see a show of hands of
10 those of you that will put sentencing out of your mind
11 and leave that up to the judge at a different time?

12 Okay. It is a murder case. I anticipate
13 that the lawyers will be respectful and not try to
14 bring in too much graphic evidence, but somebody did
15 die. There will be some evidence brought in that may
16 be of a graphic nature. Most of it we can anticipate
17 getting through x-rays and other things, but you will
18 likely be seeing and photos.

19 Does that cause anybody any concern?

20 Okay. This is a 1975 murder case. Happened
21 a while ago. There is no statute of limitations in
22 South Dakota for a murder case. There are statutes of
23 limitations for other crimes, but not for murder
24 cases. And the judge --

25 Let me just state, does that cause anybody

1 any concern that there is no statute of limitations?

2 So you are willing to treat a 1975 murder
3 case just like you would a 2009 murder case?

4 Can I see a showing of hands?

5 Okay. The judge will be reading additional
6 jury instructions about the charges in this case. And
7 as we move forward in the proceedings, the prosecutor
8 has an opportunity to read the actual indictment to
9 you. And within those instructions and within the
10 indictment there is going to be a legal concept called
11 aiding and abetting.

12 Can I see a show of hands, has anybody ever
13 heard of aiding and abetting?

14 Okay. Let me just take a minute and talk
15 about that. What -- in a nut shell what aiding and
16 abetting is, if somebody knows a crime is being
17 committed and they knowingly help out in committing
18 that crime, they are responsible for the crime.

19 Let me give you an example. I am going to
20 pick on Mr. Oswald. Mr. Oswald and I we're going to
21 go rob a bank. And we need to a get-away car and
22 someone needs to go into the bank. I am going to be
23 the bank robber and Mr. Oswald is going to drive the
24 get-away war.

25 So we pull up to the bank. I get out and rob

1 the bank. I get back in the car and Mr. Oswald and I
2 drive away. He's aided and abetted. In other words
3 he knew a crime was being committed and he helped in
4 the commission of the crime. So even though he didn't
5 go in and rob the bank, he's still guilty of robbery.

6 Does anybody have a problem with that
7 concept?

8 Can I see a showing of hands of those of you
9 that think you can apply that concept, the concept of
10 aiding and abetting?

11 Okay. You are going to hear and maybe you
12 have heard because I know a lot of hands went up about
13 CSI, direct evidence and circumstantial evidence. Let
14 me just talk for a minute about that. Direct evidence
15 is when somebody sees something directly. You have
16 knowledge of it actually happening.

17 Circumstantial evidence is something that you
18 have to draw an inference from. Perhaps the best
19 example would be, I am going to use a stabbing
20 example. Again, I will pick on Mr. Oswald. And we'll
21 have Mr. Mandel be part of the scenario. So we have a
22 situation where I will be the witness and I am sitting
23 at the kitchen table and I see Mr. Oswald stab
24 Mr. Mandel. I am direct evidence. I mean, I can
25 testify that I watched Mr. Mandel -- or Mr. Oswald

1 come in and stab Mr. Mandel. That's direct evidence.

2 Now, let me talk to you about circumstantial
3 evidence. Same type of scenario but this I am not
4 sitting at the kitchen table to watch it. I am
5 standing outside. So I see Mr. Oswald go into the
6 house. I see him carrying a knife. I hear screaming.
7 I hear yelling. I watch Mr. Oswald run out with a
8 bloody knife.

9 Now, there is no direct evidence from me
10 that -- I didn't see the stabbing. But there is some
11 circumstantial evidence there. I can testify to what
12 I saw. Some other circumstantial evidence would be a
13 bloody knife. But inferences need to be drawn from
14 that.

15 In other words, it's not direct, but it's
16 evidence that would -- could be considered, but there
17 needs to be inferences.

18 Can I see a showing of hands of those of you
19 that are willing to use your common sense when it
20 comes to circumstantial evidence and drawing
21 inferences?

22 Can you use your common sense?

23 Okay. We talk about CSI shows, and I am at
24 somewhat of a disadvantage because as a lawyer my wife
25 doesn't let me watch those because I scream at the TV

1 when I say that just can't happen that way; it doesn't
2 happen that way. I need to talk to you because I
3 think, generally, the public watches those and
4 sometimes I think those shows leave some
5 misimpressions on how things really work. And I want
6 to talk to you about Miranda and search and seizure.

7 Often times when you watch those shows, that
8 becomes a big part of the shows, whether or not a
9 defendant was given Miranda before he gave a statement
10 or whether or not law enforcement had the right to a
11 search and seizure and properly obtained a warrant.

12 For the most part, those are issues that are
13 handled before trial. There may be limited instances
14 when the judge may instruct you on voluntariness or
15 things of that nature; but for the most part, those
16 legal issues aren't going to be a part of this trial,
17 whether there was a Miranda, whether or not there was
18 a warrant, whether or not evidence seized
19 appropriately.

20 The other thing I want to talk to you about
21 when it come to CSI shows -- and this is a 1975 case.
22 When you watch forensic files or you watch CSI, there
23 is always a ton of scientific evidence, a ton of DNA,
24 a ton of all kinds of different neat technology. You
25 are not likely going to see that in this case.

1 Does that cause anybody a problem?

2 Can I see a showing of hands of those of you
3 that are willing to see whatever evidence is presented
4 on the stand and apply that to the elements of the
5 crime?

6 Can I see a showing of hands of those of you
7 that can do that?

8 Okay. Mr. Murphy talked a little bit about a
9 couple of cases, the Looking Cloud case, the Rios
10 case, and the word plea agreement came up or deals.
11 And I want to just take a minute and talk to you about
12 plea agreements.

13 Plea agreements are a common practice in the
14 criminal justice system where the government reaches
15 an agreement with a particular individual on how a
16 case is going to be resolved. It helps the system
17 flow through. Not every case necessarily goes to
18 trial.

19 Anybody -- let me see a showing of hands of
20 anybody that's heard of plea agreements?

21 Does that process that is engaged in, does
22 that concern anybody?

23 Okay. Another thing that commonly happens
24 are deals are made with respect to -- or -- matters
25 maybe regarding getting somebody immunity or other

1 things that will come out or potentially come out that
2 you will hear about.

3 I need a showing of hands of those of you
4 that are willing to, you know, judge a witness by what
5 the witness says, take into account all the evidence,
6 but that you won't exclude a witness because that
7 witness either has a plea agreement or because they
8 have some type of a deal.

9 You will listen to all of their testimony; is
10 that fair?

11 You won't prejudge it?

12 Okay. Another thing that's fairly routine in
13 the criminal justice system -- and I am going to use
14 something wholly different than this case -- but a
15 drug case. In most drug cases that go on in a
16 criminal courtroom, the main witnesses are all a bunch
17 of drug dealers or they can typically be people that
18 have -- are in the criminal element. Because in real
19 life, the common person isn't going to be real helpful
20 to the government on a drug case because they are not
21 involved in selling the drugs, they are not involved
22 in using a drug.

23 So often times much of the testimony in a
24 case of that nature comes from people either charged
25 with crimes or given a deal or given some type of

1 immunity.

2 Does that concern you with respect to how you
3 would particularly judge a case?

4 Does that cause any concern or pause that
5 many of the witnesses you that will hear from may have
6 a criminal record or some type of a plea bargain or
7 deal?

8 Okay. Here is another concept of the law.
9 And, again, the judge is going to instruct you
10 regarding many areas of law, but one area that I
11 anticipate may come up is the charges that I will read
12 to the jury in opening statements will talk about a
13 crime being committed on or about a certain date. In
14 other words, it isn't on or about this particular date
15 at 10:15 a.m. It's not that precise. It's just on or
16 about.

17 If the judge instructs that all the
18 government has to prove for a particular element is a
19 crime committed on or about a certain date, can you
20 follow that instruction?

21 Can I see a showing of hands of those of you
22 that can follow that?

23 Okay. I want to talk just a minute and talk
24 about reasonable doubt. It's an important concept in
25 our justice system that the government bears -- and

1 that's me -- bears the burden to prove each and every
2 element beyond a reasonable doubt. That's the
3 concept. Once the government proves each and every
4 element beyond a reasonable doubt, the presumption of
5 innocence goes away.

6 You heard some disagreement about Mr. Murphy
7 and I about reasonable doubt and the judge provided
8 you an instruction; and I want to take just a minute
9 and talk about what reasonable doubt is and then ask
10 whether you think you can apply something of this
11 nature.

12 I am going to read you, really,
13 three sentences and then when I am done I am going to
14 ask whether anybody have any concerns about that --
15 concerns about whether you could apply something of
16 that nature.

17 Proof beyond a reasonable doubt is proof that
18 leaves you firmly convinced of the defendant's guilt.
19 There are very few things that we know with absolute
20 certainty. In criminal cases, the law does not
21 require proof that overcomes every possible doubt.

22 Now, if you are given an instruction such as
23 that, or generally in that nature, would you be able
24 to apply that standard to the government?

25 Could I see a showing of hands?

1 Could you apply that?

2 The government has to prove each and every
3 element beyond a reasonable doubt. The government
4 doesn't have to prove all facts beyond a reasonable
5 doubt.

6 Now, remember the example that Mr. Murphy
7 gave you the jar and the marbles. Applying that to
8 the elements of the offense -- let's assume for the
9 hypothetical that there are four elements to an
10 offense. So you have the jar, and you place four
11 marbles in the jar. If the government proves all four
12 of those elements beyond a reasonable doubt, you pull
13 those four marbles out, and you convict.

14 If you talk about facts and everything, if
15 you have a marble jar full of marbles, that include
16 facts and elements, we're back to there are four
17 elements of the offense. Once you pull the four
18 marbles out or once the government has proven beyond a
19 reasonable doubt those four elements, all the other
20 facts can remain in the jar. It's really the elements
21 of the offense.

22 So, can I see a showing of hands of those of
23 you that feel that you can sit on a jury, and that
24 once the government has proven all of the essential
25 elements beyond a reasonable doubt, that you could

1 render a verdict of guilty?

2 Okay. Mr. Murphy talked a little bit about
3 race, which is always a very delicate subject. So I
4 want to talk to you about two general concepts of
5 that. One, there was a discussion about the American
6 Indian Movement. We're going to refer to that as AIM
7 throughout case. I will tell you that AIM is not on
8 trial. And AIM is not an essential element of any
9 offense. Okay.

10 Does anybody have any background with AIM or
11 any additional concerns that you thought about that
12 would not allow you to sit in favor judgment in this
13 case?

14 Okay. The other thing that was talked about
15 was race and there was a discussion about Mr. Graham
16 being a Canadian Indian. I will tell you that Anna
17 Mae Aquash is also Native American. She was the one
18 that was murdered in this case.

19 Would everybody agree with me by a showing of
20 hands that everybody should be treated fairly when it
21 comes to a case such as this irrespective of whether
22 you are a Indian or non Indian?

23 Can I see a showing of hands?

24 That race really has no business in this
25 courtroom?

1 Can I see a showing of hands?

2 Okay. I hate to even going into media
3 coverage because if I bounce somebody we'll have
4 somebody from the Rapid City Journal put on. We've
5 had a unique circumstance. I need to talk about it
6 for just a minute. We all have a lot of experiences
7 in life. That's what makes our jury system such a
8 good system.

9 We don't check all of our life experiences at
10 the door when we walk into the jury. What we have to
11 do is use common sense. We have to be fair. We don't
12 want to prejudge anything, but there are life
13 experience and information that you bring to the jury.

14 And I want to take just a minute -- and there
15 has been a lot of coverage about this case. I mean,
16 it's a murder case. Happened a long time ago. I
17 think some of you had indicated that you have seen
18 either the Rapid City Journal article or you have seen
19 things on TV.

20 And what I really need to do is make sure
21 that you are not prejudging the case at all; that
22 anything you have seen and/or read that really what
23 you will do is pay attention to what the witnesses say
24 in the trial.

25 Can you all do that for me?

1 Can I see a showing of hands?

2 Okay. I am going to be like Mr. Murphy and I
3 am going to ask you to do my job for me now. It's the
4 catchall question.

5 As you sit here now, is there anything that
6 we've talked about that causes a little bit of pause
7 as to maybe you wouldn't be a good juror either for
8 Mr. Graham or the state?

9 I mean, anything that you can think of --
10 this is kind of my last opportunity to speak with you
11 on a dialogue -- that would prevent you from being a
12 fair juror?

13 Can I have just a moment, Your Honor?

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

15 **MR. JACKLEY:** Your Honor, I want to thank the
16 potential jurors for their attentiveness.

17 And the state would pass for cause at this
18 time.

19 **THE COURT:** Ladies and gentlemen, that kind
20 of ends the process here. So these eight -- this is
21 the November jury panel?

22 **THE CLERK:** Yes.

23 **THE COURT:** Sorry about that.

24 These eight get to come back at 2:00 o'clock.
25 The rest of you are excused, and for the first time

1 you do not have a call back be time. And I thank you
2 for your participation in the system. And we will see
3 you at 2:00 o'clock. That's when the other 48 will be
4 coming back. And we'll go through the strike down
5 process at that time. We will probably start the case
6 some time around nine or ten o'clock in the morning.

7 Thank you.

8 (Whereupon, the prospective jury panel was
9 then in recess.)

10 **THE COURT:** Anything else before
11 2:00 o'clock?

12 **MR. JACKLEY:** I don't need a record if you
13 don't.

14 **THE COURT:** We will start without it.

15 (Whereupon, a discussion was held off the
16 record.)

17 **THE COURT:** Now that you are all here sitting
18 patiently and quietly, you can sit here patiently and
19 quietly for an extended length of time. You may talk
20 quietly among yourselves if you would. Please do not
21 move from where you are. We will take a break if
22 necessary. You just need raise a hand.

23 We're going through the process where the
24 attorneys are going to get those called and those
25 chosen. So we'll end up with 14 of you. The rest

1 will be free to go. And it will take a fair amount of
2 time to do this.

3 So at this point, relax.

4 (Whereupon, the peremptory challenges were
5 then exercised by the state and the defense.)

6 **THE COURT:** Ladies and gentlemen, the Clerk
7 is going to call out the names of the 14 that are
8 going to remain. As those names are called, I am
9 going to ask these people to move out of the jury box
10 and give those 14 a place to sit so we can make sure
11 we have the right 14.

12 You may proceed.

13 **THE CLERK:** Gilbert Martinez, Nancy Hansen,
14 Mildred Fisher, Scott Denotter, Sheila Garrigan, Jacob
15 Solano, Cynthia Christensen, Hildur French, Michelle
16 Shelton, Barry Winter, James Eppard, Jo Ann Lemke,
17 Tony Randolph, James Whitman.

18 **THE COURT:** Mr. Murphy, are you satisfied
19 these are the 14 jurors selected?

20 **MR. MURPHY:** I am.

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

22 **MR. JACKLEY:** I am, Your Honor.

23 **THE COURT:** Ladies and gentlemen, I am going
24 to excuse you. You are free as the end of your month
25 has come and gone. And I want to thank you for your

1 kind attendance here, cooperation, and willingness to
2 go through this for us all.

3 Again, thank you.

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

6 **THE COURT:** Would you all please rise.

7 **MR. OSWALD:** Would you place them under the
8 trial oath before they are dismissed?

9 (Whereupon, the jury panel was then given the
10 trial oath.)

11 **THE COURT:** Folks, we're going to reconvene
12 in the morning in a different courtroom. It's going
13 to be courtroom number five, which is down the
14 hallway. And as you look at it, there is four on the
15 right and five on the left at the end of the hall.

16 You go from here with the bailiffs to your
17 gathering room where you will meet in the morning
18 before you are brought into court.

19 I have a hearing in this matter scheduled for
20 8:30 tomorrow morning which will take place probably
21 in the courtroom. As soon as we're finished with that
22 hearing, we will call you in and commence the trial.

23 Again, the admonition stands as always. You
24 are not to talk to anyone or allow anyone to engage
25 you in conversation about this trial. If anyone

1 attempts to do so, beyond a shut down from friends and
2 acquaintances that are going to obviously ask you, you
3 shut them down.

4 Anybody goes further than that, we need to
5 know about it and know about it now. So call or
6 contact us and we'll go from there.

7 **MR. MURPHY:** What time did you want them to
8 report?

9 **THE COURT:** I think they need not be here
10 until 9:30. That will give us time, I hope, to have a
11 hearing and have a break to get ready for the start of
12 the trial.

13 Thank you very much, and I look forward to
14 having this case tried before you. You got good
15 lawyers here.

16 Thank you.

17 (Whereupon, the proceedings in this matter
18 were then concluded.)

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STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF PENNINGTON)

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

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

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

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

COPY

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