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

FILE NO. CRI 09-3953

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

TRANSCRIPT OF
JURY TRIAL

VOLUME 3 OF 10

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
DECEMBER 1, 2010

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

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

MR. JOHN MURPHY
Attorney at Law
Representing John Graham

* * I N D E X * *

WITNESS (ES) :	DIRECT	CROSS	REDIRECT	RECROSS
PATRICK DUFFY	8	10		
MATT KINNEY	13	17	21	
ROGER AMIOTTE	80	87	91	93
JOHN MUNIS	95	100	103	
WILLIAM WOOD	107	120	152, 158	155
NATHAN MERRICK	159	175		
RAY HAND BOY	188	199		

1	EXHIBITS:	OFFERED/ADMITTED
2	1 - Aerial Photo	82/82
3	2 - Photo	83/83
4	3 - Photo	84/84
5	4 - Photo	85/85
6	5 - Photo	86/86
7	6 - Bracelet	165/165
8	7 - Photo	166/166
9	8 - Bullet in Box	120/120
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* * P R O C E E D I N G S * *

(Whereupon, the following proceedings were then had in open court outside the presence of the jury.)

THE COURT: All right, ladies and gentlemen. We're here to begin a hearing scheduled for 8:30. Puts us pretty close to the clock. I think Mr. Hana is supposed to be on board.

MR. HANA: Thank you, Your Honor.

THE COURT: We're a little short of room here, Mr. Hanna, and I don't know how you wish to proceed, but I will give you the grace of choosing your position.

MR. HANA: Thank you, Your Honor.

Your Honor, we have made a motion to quash the subpoena that was served on Mr. Richard Marshall. Mr. Marshall was served with a subpoena by the state two weeks after he was acquitted in a federal trial in charges related to the charges pending here.

Our motion, sir, is directed toward -- we're asking the Court to quash on the grounds that the motion is punitive and that the primary purpose of the state in subpoenaing Mr. Marshall is to seek to elicit testimony from him that the prosecution will later claim is false in order to charge Mr. Marshall with a

1 perjury charge either by indictment or by a petition
2 to revoke his parole.

3 As the Court is aware, Mr. Marshall is on
4 lifetime parole for a crime that he was convicted of
5 in 1976.

6 And I have witnesses which I would like to
7 present and I would also ask the Court to take
8 judicial notice of the affirmations set forth in the
9 motion to quash.

10 With the Court's permission I have two
11 witnesses here. They are in the courtroom. If you
12 would like me to ask one of them to step out --

13 **THE COURT:** Please sequester the witnesses.

14 **MR. HANA:** Mr. Kinney, could you please wait
15 out site.

16 I have another witness who is present here.
17 Mr. Duffy, could you wait outside for just a
18 minute, please.

19 **THE COURT:** You may proceed.

20 **MR. HANA:** Judge, the record before the
21 Court, as well as the testimony you will hear from
22 these witnesses, support a finding that the prosecutor
23 has no legitimate interest in calling Richard Marshall
24 to testify in this matter.

25 Mr. Marshall, if compelled to testify, will

1 give truthful testimony. But our version and our
2 understanding of the truth is different from that of
3 the government's theory of the facts.

4 And we have a legitimate fear that should
5 Mr. Marshall's testimony conflict with the
6 government's theory of the case, which they have good
7 reason to know that it will, then he would be charged
8 with perjury and he is in a unconscionable situation,
9 which is, if he testifies truthfully as he understands
10 the truth, then he is likely to be charged with
11 perjury in a parole violation or by means of
12 indictment.

13 Mr. Jackley has stated to the Court that
14 Mr. Marshall has -- will have no problem with a
15 perjury prosecution or a perjury charge as long as he
16 tells the truth.

17 The Court asked Mr. Jackley a critical
18 question, which is, who decides the truth in that
19 situation, and Mr. Jackley replied that the state
20 does.

21 Now, juries --

22 **THE COURT:** Well, that's not true. First of
23 all, in any charge of perjury, a jury decides whether
24 the elements of the crime of perjury have been met.
25 The same thing would have to be decided at a parole

1 violation. There may be a different burden of proof.
2 I don't deal with those so they are beyond my ken.

3 But in terms of the criminal charge and
4 perjury, you know, there has to be some element of
5 consciousness of falseness and a defense of telling
6 the truth as -- without -- is a sound defense.

7 So it's not a matter of the state deciding.
8 The state decides, as it does in all cases, who to
9 charge and with what in any criminal case. That's
10 their job. Whether the state can prove the case or
11 has any evidence to back it up is what the jury is
12 for. That's what they do.

13 And I perceive under the worse case where
14 Mr. Marshall would be charged with perjury, that he
15 would -- the state would have to prove the elements.
16 If they can't do that then Mr. Marshall walks, if they
17 can Mr. Marshall has a problem.

18 **MR. HANA:** Judge, the inquiry here, though,
19 for the purpose of the motion is the prosecute's
20 purpose in calling Mr. Marshall.

21 **THE COURT:** I understand that. We have been
22 down that road about three times, so let's get on with
23 it. I mean, I understand the issue, and I have
24 reviewed the statute and I am prepared to go forward
25 with the case.

1 **MR. HANA:** Then I would like to call my first
2 witness, Your Honor.

3 **THE COURT:** Please do.

4 **MR. HANA:** I would call Mr. Duffy.

5 **THE COURT:** Please raise your right hand.

6 PATRICK DUFFY,
7 called as a witness herein, having been duly sworn,
8 under oath testified as follows:

9 **DIRECT EXAMINATION**

10 **BY MR. HANA:**

11 **Q.** Would you state your name.

12 **A.** Patrick Duffy.

13 **Q.** Mr. Duffy, what is your profession?

14 **A.** I'm a trial lawyer.

15 **Q.** And how long have you been a member of the
16 bar in South Dakota?

17 **A.** Twenty-three years.

18 **Q.** Is your practice -- is your office here if
19 Rapid City?

20 **A.** It is.

21 **Q.** Have you followed and taken an interest in
22 the various cases involved in the matter involving the
23 death of Anna Mae Aquash?

24 **A.** I have. My friends have tried these cases.

25 **Q.** Were you present in the United States

1 District Court house here in Rapid City at a hearing
2 in the Magistrate's court in which Richard Marshall
3 was -- had a detention hearing over in Magistrate
4 Court?

5 **A.** I don't think I was present at the hearing.
6 I was in the courtroom, the magistrate courtroom on
7 the third floor of the federal building. I was not
8 there to watch the hearing, but I was there. I don't
9 believe I stayed for the actual hearing itself or I
10 came come after it was over.

11 **Q.** Did you have a conversation with then United
12 States Attorney Martin Jackley in the courtroom?

13 **A.** I did.

14 **Q.** And could you --

15 By the way, are you here today as a result of
16 being served with a subpoena?

17 **A.** I am.

18 **Q.** Okay.

19 Could you relate to the Court your
20 conversation with Mr. Jackley?

21 **A.** What I can remember about my conversation
22 with Mr. Jackley was that I asked him whether there
23 were going to be any more indictments in this case.
24 And Mr. Jackley said to me, no, I think this is it.
25 We'll finish this up and have a couple of perjury

1 trials or perjury cases. I can't tell you the
2 specificity of which word he used, but that's what I
3 remember about that conversation.

4 Q. And this was before Richard Marshall actually
5 went to trial; is that correct?

6 A. It is.

7 MR. HANA: I have no other questions.

8 THE COURT: Mr. Jackley.

9 MR. JACKLEY: Briefly Your Honor.

10 **CROSS-EXAMINATION**

11 **BY MR. JACKLEY:**

12 Q. Good morning, Mr. Duffy.

13 A. Good morning.

14 Q. Mr. Duffy, with respect to that would you
15 have deemed that a confidential conversation or just a
16 conversation in passing?

17 A. It was a conversation in passing, Marty.

18 Q. It wasn't a clandestine-type meeting between
19 you and I or anything?

20 A. No.

21 Q. Anything inappropriate -- did you deem
22 anything inappropriate from that conversation?

23 A. I didn't.

24 Q. Did you deem anything from that conversation
25 that I was threatening anybody with perjury at that

1 time?

2 **A.** To tell you the truth, I didn't give any
3 thought as to the perjury. The thought that I gave to
4 it was this case, these cases, seemed to be coming to
5 an end so I didn't ascribe any significance to that.

6 **Q.** I want to just -- make sure we're clear on
7 the time frame. I was U.S. Attorney at the time of
8 the conversation, correct?

9 **A.** You were.

10 **Q.** So that would have been prior to any
11 acquittal of Richard Marshall?

12 **A.** Yes.

13 **Q.** Mr. Duffy, one final line of questioning.

14 You've followed this case for some time you
15 indicated?

16 **A.** I have.

17 **Q.** Part of that following was during the Arlo
18 look cloud you would have sat in on at least part of
19 the trial; would that be fair?

20 **A.** Well, Jim McMahan is a good friend of mine,
21 and between McMahan and Bob Mandel, both really
22 outstanding lawyers, I watched most of that case to
23 watch and learn.

24 **Q.** You are generally familiar with what I would
25 call the prosecution's theory of the criminal venture

1 traveling from Denver to Rapid City to Rosebud to
2 Richard Marshall's house, and then the death on a
3 bluff; would that be fair?

4 **A.** I was familiar with that I think before the
5 trials. If you just read In the Spirit of Crazy Horse
6 you will have some sense of what happened; but yes, I
7 am familiar with that.

8 **Q.** And given at least the government's position
9 and some witness testimony that just prior to Annie
10 Mae's death she was brought to Richard Marshall's
11 house where they went into a bedroom and there has
12 been accounts of perhaps a gun being exchanged,
13 perhaps shells being exchanged, perhaps a note being
14 exchanged that talks about get rid of this baggage; do
15 you see that there is a legitimate prosecution
16 reasoning to at least want to call Richard Marshall to
17 testify before a jury in the John Graham trial?

18 **MR. HANA:** Judge, I object. This is beyond
19 the scope of the inquiry in this hearing.

20 **THE COURT:** Overruled.

21 **A.** So the question is whether I see legitimacy
22 in you calling Richard Marshall to the stand in the
23 trial of John Graham?

24 **Q. (BY MR. JACKLEY)** That's correct.

25 Not that you necessarily agree that he did

1 any of that but the legitimacy of a prosecutor to
2 subpoena and call Richard Marshall as a witness in the
3 trial of John Graham?

4 **A.** I don't know whether I can say it's
5 legitimate or illegitimate?

6 **Q.** That's fair.

7 **MR. JACKLEY:** No further questions.

8 **THE COURT:** Thank you, Mr. Duffy.

9 (Witness excused.)

10 **MR. HANA:** I would ask Mr. Kinney to step in.

11 **THE COURT:** Please raise your right hand.

12 MATT KINNEY,

13 called as a witness herein, having been duly sworn,
14 under oath testified as follows:

15 **THE COURT:** Please take a seat.

16 **DIRECT EXAMINATION**

17 **BY MR. HANA:**

18 **Q.** Sir, will you state your name for the record,
19 please.

20 **A.** Matt Kinney.

21 **Q.** Are you an attorney, sir?

22 **A.** Yes, sir.

23 **Q.** Do you know Mr. Jackley?

24 **A.** I do.

25 **Q.** Friends?

1 **A.** Sort of -- yes, college friends. Known him
2 since law school.

3 **Q.** Okay.

4 Are you here pursuant to being served with a
5 subpoena?

6 **A.** Yes.

7 **Q.** Okay.

8 Did you have a conversation with Mr. Jackley
9 over the telephone during the trial of Richard
10 Marshall in April of this year?

11 **A.** April 15, yes.

12 **Q.** Okay.

13 Could you relate to the Court the substance
14 of your conversation in terms of Mr. Jackley's
15 statements about Mr. Marshall?

16 **A.** This was during the Marshall trial. I was in
17 Spearfish. I believe it may have been day two or
18 three of the trial. And I have had ongoing
19 discussions with Mr. Jackley and Mr. Oswald about
20 Ms. Rios' case because I was representing Thelma Rios
21 throughout all of this year.

22 And Mr. Jackley advised me how the trial was
23 going. Because I -- I am not sure if I called him or
24 he called me, but he had told me that Angie Begay had
25 testified at the Marshall trial. And Ms. Begay or

1 Janis as she's known now, is a central witness in the
2 case against Thelma Rios so we started to discuss
3 that. And I asked him how was trial was going. And
4 he advised me that he thought the trial was going
5 well. Especially the establishment of the Janis
6 testimony. And then we talked a little bit about the
7 implications of a conviction or an acquittal for
8 Mr. Marshall.

9 Q. And did Mr. Marshall -- did Mr. Jackley
10 express to you an opinion that Marshall should take a
11 deal or plead guilty or what might happen should he be
12 acquitted?

13 A. I don't think he told me that he thought
14 Marshall should make a deal. I don't recall.

15 I will state that the conversation didn't
16 rise to any level of alarming thought where I
17 definitely have a strong memory of what occurred.

18 But I do recall him stating that Marshall may
19 continue to have some sort of criminal liability, if
20 you will, whether he is acquitted or not. And of
21 course, I didn't know a lot about Mr. Marshall's
22 history. I didn't think he was a central witness to
23 Ms. Rios' defense from the discovery I was reading.

24 Bear in mind that I was appointed in December
25 of 09 and this was April of 2010. So a case with this

1 much information, I was still learning the case
2 throughout the winter and the spring. So there were
3 times when we would have these conversations and I
4 knew that the state had a lot more information in
5 their minds than I did.

6 So during some of these conversations,
7 Mr. Jackley -- and there were very few, but he would
8 kind of tell me this is the way we perceive it. In
9 these conversations served my client because we -- we
10 had to decide how we wanted to proceed with the case.
11 Will this eventually be a case that would be plead or
12 a case that we would take to trial.

13 So I believe the intent of Mr. Jackley's
14 conversation with me was to advise that Richard
15 Marshall may have criminal liability, in fact, that he
16 could be violated on parole for reasons that I wasn't
17 quite sure of at first. But I don't do a lot of
18 federal law practice. But it was clear to me that
19 Mr. Marshall could be a state witness at some point.
20 And that was relevant to perhaps tying together
21 anything that Mr. Marshall may have known in the eyes
22 of Mr. Jackley in relation to what occurred at Rapid
23 City, which was the last time that my client had been
24 involved in this case.

25 Q. Did Mr. Jackley advise you or discuss with

1 you that Mr. Marshall is on lifetime parole?

2 A. I believe so.

3 Q. Did he advise you or discuss with you the
4 fact that Mr. Marshall has been twice violated on
5 parole, and that if he is violated again, he could go
6 to prison for the rest of his life?

7 A. I do recall something of that nature. Not
8 those exact words. I do recall something that it was
9 a situation where this case could affect his freedom
10 whether he was acquitted or not.

11 Q. Didn't Mr. Jackley advise you that if
12 Mr. Marshall were acquitted, the state could still
13 bring a petition to revoke his parole?

14 A. I thought -- yes. I thought he had mentioned
15 something to that nature, yes.

16 MR. HANA: I don't have any other questions.
17 Thank you.

18 **CROSS-EXAMINATION**

19 **BY MR. JACKLEY:**

20 Q. Mr. Kinney, let me start with this. Did you
21 deem anything with respect to the conversation you and
22 I had as inappropriate?

23 A. Not at all.

24 Q. In fact, it was a plea discussion -- in the
25 nature of plea discussions between a lawyer

1 representing the state and a lawyer representing
2 Thelma Rios, correct?

3 A. Predominantly, yes.

4 Q. In other words, Richard Marshall wasn't the
5 focus, necessarily, of that conversation; is that
6 fair?

7 A. I walked away from the conversation thinking
8 that your thoughts on Ms. Janis' testimony was the
9 focus of that conversation. But you -- we talked
10 about the trial and how it was going.

11 Q. And the time frame, would have been, that
12 discussion, correct, would have occurred prior to any
13 acquittal of Richard Marshall; is that fair?

14 A. Correct.

15 Q. And maybe this isn't a fair question because
16 I don't know how detailed the conversation was, but
17 when you talked to Mr. Hana about criminal
18 liability -- let me just generally discuss that with
19 you -- that you would agree that if a defendant is
20 acquitted in federal court, that the state and the
21 federal government are separate sovereigns and the
22 defendant could still be subject to criminal liability
23 in state court; is that fair?

24 A. Yeah. I know that they are separate
25 sovereigns. That I know. And I think that was

1 implied in our conversation, yes.

2 Q. In other words, an acquittal of Richard
3 Marshall in federal court would not necessarily
4 present a state indictment with respect to the Annie
5 Mae Aquash case; is that fair?

6 A. Yes.

7 Q. And you would agree with me that when it
8 comes to parole violations, that that is not the
9 responsibility of the Attorney General; that there is
10 a separate parole board that handles those matters is
11 that fair?

12 A. Yeah. And you specifically referred to that.

13 Q. So in other words, the Attorney General can't
14 just say, somebody violates parole; there is a whole
15 separate body that deals with parole; is that fair?

16 A. Yes.

17 Q. Is it also fair that if somebody has two
18 strikes and a pending parole matter that they may have
19 some criminal exposure or problems; is that fair?

20 A. Yes.

21 Q. Mr. Kinney, I know you had focused on Rios
22 because that was your client and Rios is what I would
23 refer to as the beginning part of the state's theory
24 of the criminal venture, but I want to ask you a
25 question in regard to Richard Marshall given your

1 familiarity of the case.

2 It's the prosecution's general theory -- and
3 I am not asking you to accept the theory -- but it's
4 the prosecution's theory that a kidnapping occurred in
5 Denver, that the criminal venture went to Rapid City,
6 that the criminal venture then further went to
7 Rosebud, and then on to Pine Ridge at Richard
8 Marshall's house.

9 It is further the government's theory at
10 Richard Marshall's house there may have been
11 discussions about a baggage note, Ms. Aquash may have
12 been held against her will, there may have been an
13 exchange of a firearm, there may have been exchange of
14 ammunition; and within hours after she theft Richard
15 Marshall's house she was killed.

16 Do you see a legitimate prosecution reason
17 for a prosecutor to wish to have Richard Marshall
18 testify in the Graham trial -- not that you
19 necessarily agree with that scenario -- but do you see
20 a legitimate prosecution reason to subpoena Richard
21 Marshall to testimony at Mr. Graham's murder trial?

22 **A.** I will withhold my opinion, but I can
23 definitely say yes.

24 **MR. JACKLEY:** No further questions, Your
25 Honor.

REDIRECT EXAMINATION

1
2 **BY MR. HANA:**

3 **Q.** Mr. Kinney, would you agree that if the
4 primary purpose for calling Richard Marshall would be
5 to elicit testimony from him that would later be used
6 against him in a parole revocation or a perjury
7 charge, that would be illegitimate purpose for calling
8 that witness; would you agree with that.

9 **A.** I would think so.

10 **Q.** And is it your testimony that Mr. Jackley
11 told you in substance, if Mr. Marshall is acquitted,
12 the state can still violate him on parole. The state
13 would have that power to do that?

14 **A.** I believe so, yes.

15 **MR. HANA:** No other questions.

16 Thank you.

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

18 You may step down.

19 (Witness excused.)

20 **MR. HANA:** Your Honor, I would ask the Court
21 to take judicial notice of the affirmations that were
22 set forth in my motion. And I affirm again that I had
23 a conversation with Mr. Jackley while Mr. Marshall's
24 case was pending in which we -- Mr. Jackley was
25 discussing why Mr. Marshall should plead guilty to

1 something and cooperate. I advised Mr. Jackley I do
2 not believe the government can prove the accusation
3 and Mr. Jackley responded to me, even -- in effect --
4 words to these effect, even he wins at trial, how are
5 you going to beat the perjury charge. I asked him
6 what -- what do you mean? What perjury charge? And
7 he informed me that the state could bring a parole
8 violation against him if he is acquitted based on the
9 testimony that he gave in 2003 to the Grand Jury.
10 That that statement was made to me.

11 And I would ask the Court whether -- to
12 inquire of Mr. Jackley whether he admits or denies
13 that conversation took place.

14 I would also ask the Court to ask Mr. Jackley
15 whether or not the state has had discussions about
16 bringing some -- bringing or encouraging an action,
17 either a perjury indictment or using his influence
18 with the parole board -- and you can see by law that
19 the Attorney General appoints three members of the
20 parole board. So it is not as though they are
21 entirely separate agencies of the state. Whether or
22 not they have had discussions about charging Richard
23 Marshall with perjury if he in fact testifies to facts
24 that are inconsistent with the government's witnesses.

25 I think at the very least the Attorney

1 General should make that affirmation if, in fact, they
2 are denying this is a purpose.

3 And finally, Judge, I would say in addition
4 to these facts, that Mr. Jackley has made statements
5 that if Mr. Marshall is acquitted, he can be charged
6 with perjury in a parole violation. That this was a
7 contingent plan that was being discussed and
8 considered prior to the acquittal.

9 Given that, in view of the fact that
10 Mr. Jackley knows based upon Mr. Marshall's prior
11 Grand Jury testimony, recordings of statements that he
12 made to Serle Chapman a witness in this case, that --
13 and the evidence that came out in the trial, that
14 Mr. Marshall is going to testify -- if he is compelled
15 to testify -- he did not give a gun to Theda Clarke
16 and that the statements made by Arlo Looking Cloud to
17 that effect are false.

18 Knowing that, the government's purpose in
19 calling him has to be to show -- to try to argue to
20 the jury that the evidence that they elicited from
21 their own witness, Mr. Marshall, is false.

22 It is improper for an attorney to call a
23 witness to the stand to elicit statements from the
24 witness for the purpose of arguing to the jury that
25 the evidence they elicited is false because false

1 evidence has no relevance.

2 Also, it is simply improper. It is
3 misconduct to put on a witness who you believe or --
4 and are going to argue has testified falsely. In the
5 absence of any legitimate reason for calling
6 Mr. Marshall to testify, plus the testimony that shows
7 that Mr. Jackley has essentially -- I perceive that as
8 a threat F Mr. Marshall goes to trial, and is found
9 not guilty, we can still violate him on his parole.
10 The elements and they were already discussing the idea
11 of a perjury charge in a parole violation real
12 violation.

13 Judge, we are asking the Court --
14 respectfully asking the Court not to allow the Court
15 to be manipulated in this way. Mr. Jackley should at
16 least be called upon to say what facts he intends to
17 prove by Mr. Marshall's testimony. And if what they
18 intend to prove is -- or are going to argue is
19 Mr. Marshall gave false testimony, then they have an
20 illegitimate purpose for calling him to the stand, and
21 the primary purpose in this case for calling
22 Mr. Marshall, is to elicit testimony, compel
23 testimony, that they will later claim is false in
24 order to bring a perjury accusation in a vindictive
25 reaction to Mr. Marshall's exercise of his

1 constitutional right to go to trial.

2 We respectfully ask the Court to make those
3 inquiries of the state and to grant Richard Marshall's
4 motion to quash the subpoena, Your Honor.

5 **THE COURT:** Are you suggesting to me that
6 it's improper for the prosecution to consider during
7 the course of a trial a potential perjury charge
8 against a witness in the trial that the state believes
9 to have perjured himself or herself?

10 **MR. HANA:** No, but that is not the facts --

11 **THE COURT:** Please answer my question,
12 Mr. Hanna.

13 **MR. HANA:** All right.

14 Your question is, if a witness --

15 **THE COURT:** Come on. Listen to the question.
16 I don't want you to rephrase it. This isn't politics.
17 All right.

18 My question was, do you somehow think that
19 it's improper for a prosecutorial team to consider the
20 potential of bringing a perjury charge against a
21 witness who testifies falsely at a trial or whom they
22 believe to have testified falsely; and they would have
23 to have sufficient evidence to get it by either a
24 magistrate or a Grand Jury. All right.

25 Now, is it improper to even consider that?

1 **MR. HANA:** No, sir. But it is improper --

2 **THE COURT:** Now, I didn't ask you if it is
3 improper. I asked you if it's improper to do that.
4 Not anything else.

5 **MR. HANA:** No.

6 **THE COURT:** It would be a natural thought in
7 the course of prosecuting?

8 **MR. HANA:** Yes.

9 But to decide before a witness has testified,
10 before Richard Marshall testified in a trial, that if
11 he denies what we're accusing, then we're going to
12 charge him with perjury. To decide --

13 **THE COURT:** Where is your evidence that that
14 decision was ever made?

15 **MR. HANA:** That decision was being
16 considered --

17 **THE COURT:** Of course.

18 **MR. HANA:** -- that if he denies what we're
19 accusing him of, then we are going to take revenge his
20 acquittal by charging him with perjury.

21 If Mr. Marshall has not even testified, and
22 they have already decided that they want to bring a
23 perjury charge against him if he testifies --

24 **THE COURT:** If they believe he testifies
25 falsely. I mean, I think that's rational thought.

1 **MR. HANA:** It is not rational thought if
2 their decision that he's testified falsely is based
3 solely on he has testified differently than our
4 witnesses. Our whole trial in federal court was about
5 essentially one thing, did he give a gun to Theda
6 Clarke.

7 **THE COURT:** All right.

8 Now, answer me this. How can the prosecution
9 in this case, without leaving a hole you can drive
10 trucks through when the issue -- and when an important
11 element of the case at least as I understand their
12 theory is where a gun or where or when a gun or means
13 of obtaining the weapon by which they allege
14 Ms. Aquash was skilled, and there is testimony
15 involving, A, it occurred at Mr. Marshall's house?

16 And B, there is some testimony perhaps, and I
17 am not familiar to that degree, that it came from
18 Mr. Marshall himself. I don't know whether that is
19 his testimony or not, but just the fact that it's
20 allege to have occurred at his house and he is alleged
21 to have been there would make him a witness without
22 which a jury is going to look at Mr. Jackley and say
23 get out of here.

24 **MR. HANA:** The witness who will give that
25 testimony, and I base this on the fact that it

1 happened in federal court, will be one person, Arlo
2 Looking Cloud.

3 If the prosecution has already decided if
4 Mr. Marshall gives testimony that contradicts that of
5 Arlo Looking Cloud, then we are going to charge him
6 with perjury -- if that --

7 **THE COURT:** Without going into Mr. Arlo
8 Looking Cloud's testimony that would still be a matter
9 of proof.

10 My problem, Mr. Hana, is I don't see any
11 basis for your claim that there is a primary motive of
12 calling Mr. Marshall to get him on a perjury charge.
13 I mean, I just don't understand that. I don't see how
14 they cannot call him or at least make him available to
15 be called, if necessary. I don't understand that.

16 As the theory of this case is understood by
17 me now, without having heard any of the evidence of
18 the case, but I have reviewed records and exhibits and
19 motions. So I have some idea of the theory and it's
20 consistent with what Mr. Jackley represented here. I
21 cannot conceive that he would not be at least a
22 witness that is deemed if not essential very important
23 to the case.

24 Now, whether Mr. Marshall is going to support
25 the theory or not is another matter. The ultimate

1 question of perjury is whether the state can prove
2 beyond a reasonable doubt that he did in fact lie
3 under oath about a material matter. And that's an
4 entirely separate charge and case and that's the
5 pressure every single witness that takes this stand is
6 under. Every single witness from the police officers
7 to coconspirators, if there is such a thing, to the
8 forensic examiners to the pathologist to everybody
9 that is here. If you lie about this you are subject
10 to a perjury charge. Mr. Marshall is in no worse
11 position than anybody else.

12 And the fact that the state is aware that he
13 or other witnesses might give testimony that is false
14 for one reason or another certainly raises that issue.
15 I have sat on cases where it's an obvious issue. I
16 have sat on cases -- I just flat told a witness, you
17 know, there is a Fifth Amendment here. It was in a
18 civil case, but it was -- strikes me he was walking
19 down a bad road and I wanted to make sure he was
20 advised of his rights.

21 But that's what every witness is subject to
22 and I don't perceive it's different. If they lie,
23 they are all subject to a perjury charge, but the
24 state still have to prove the testimony, knowingly,
25 intentionally false. And we have -- all kinds of

1 times we have conflicting testimony in civil and
2 criminal cases. The light was red, the light was
3 yellow, the light had turned green. And the fact that
4 people give different versions doesn't create perjury.

5 And Mr. Marshall can testify as to what he
6 believes and understands to be the truth. And unless
7 the state can prove at a later time and place that
8 that statement was intentionally false, there is no
9 perjury charge. And if it is intentionally false,
10 then one would -- a charge need not be brought but it
11 could be brought. Sometimes they are brought,
12 sometimes they aren't. And we have cases all the time
13 where witnesses say things they know not to be true.

14 So I don't -- my problem is I don't perceive
15 any motive, particularly one from the conversations
16 given by the evidence, that says we're going to
17 threaten him to make him testify our way or charge him
18 by perjury. Charging with perjury requires, first of
19 all, proof sufficient evidence to get it past a Grand
20 Jury or to get it past a magistrate in a preliminary
21 hearing. So it can't be just pulled out of the air.

22 And you know, I mean, you are familiar with
23 the cases more than I, but we have Mr. Looking Cloud's
24 testimony and a number of circumstances. And if you
25 are -- you seem to express some concern about stacking

1 Mr. Marshall against Mr. Looking Cloud. I don't know
2 where that goes.

3 But I don't -- I just have trouble seeing any
4 improper purpose here much less a priority -- a
5 primary one.

6 I am sorry, Mr. Hana, I just don't see the
7 argument. I think it's perfectly proper for the
8 prosecutors when they look at calling witnesses to
9 consider what testimony they might give, what
10 testimony they might not give, to look at each witness
11 as every attorney does and to look for motives for
12 them to shade testimony, color testimony, sometimes
13 outright lie about it.

14 And an attorney for every side, both the
15 defense and the prosecution in every case, is looking
16 for the reasons that -- by which they can attack
17 credibility or the veracity of a witness called. I
18 think that's -- any trial lawyer that doesn't do that
19 should quit trying cases. That's where I see it.

20 I don't see that it's an improper purpose
21 even if they believe that from the bottom of their
22 hearts that Mr. Marshall is going to perjure himself.
23 I still think he is a witness that may or may not be
24 essential to the case, but he certainly is one that
25 the prosecution must take considerable thought about

1 calling or not calling. The fact that he's been
2 subpoenaed does not even mean he's going to be called.

3 But a critical element of the case involves
4 Mr. Marshall's house at a time when he's alleged to
5 have been there. So I don't know where to go with
6 that.

7 **MR. HANA:** Let me just -- I am not going to
8 belabor the point and I am not going to argue with the
9 Court.

10 I would just like to say this, though. All
11 that -- all that has to happen in terms of charging
12 him with a parole violation -- there is no magistrate
13 straight, there is no judge. A petition is filed and
14 he goes to prison until there is a hearing.

15 And of course, you are aware that the
16 standard of proof is much lower so there is no
17 judicial gatekeeper there, Your Honor.

18 I would just say this finally -- I don't want
19 to argue with the Court, but I want to make my point
20 which is this -- Mr. Jackley's statements to the Court
21 about Mr. Marshall won't have a problem with perjury
22 as long as he tells the truth, mean, as I understand
23 it, the government's understanding of the truth.

24 And the problem with that is the government's
25 understanding of the truth, the official government

1 version of the truth, changes over time. In 2004, the
2 government told a Court of Appeals that Arlo Looking
3 Cloud gave the murder weapon to the shooter.

4 Now, in 2008, there is a different government
5 version of the truth which is that Richard Marshall
6 gave the gun to -- that was used in the killing. So
7 the government's version of the true changes over
8 time.

9 And my argument here is that the government
10 seeks now, and intends now, to elicit testimony which
11 if it conflicts with their latest version of, quote,
12 the truth, that Mr. Marshall is going to be punished
13 by being sent to prison for the rest of his life
14 through a parole violation.

15 I understand your ruling. My prediction is
16 if Mr. Marshall testifies and says I did not give a
17 gun to Theda Clarke, Mr. Jackley is -- and the state
18 is going to charge him with perjury even though that
19 testimony would be true, and it was proven true in a
20 court of law in my opinion, Your Honor.

21 Thank you.

22 **THE COURT:** I understand your presentation.
23 I also think the case has been under investigation
24 down a wandering road for 35 years. And I assume as
25 you wander down that road, there are different

1 versions that come from different forces, and
2 different sides, and different angles. And as the
3 evidence mounts and changes one way or direction,
4 one's idea of what happened has to alter accordingly.

5 I have no idea when the alterations came and
6 what they do. I understand fair is in the eye of the
7 beholder. I hate that word. Okay. And truth is the
8 same way. Truth is always in the eye of the beholder.
9 If you disagree with me, then -- you know, I have my
10 version of truth, you have yours, and we perceive it
11 and we all have a filter through which we pass other
12 activities.

13 Still there is a burden on Mr. Jackley if the
14 perjury charge is filed to be able to prove that
15 charge.

16 **MR. HANA:** I do appreciate the Court's
17 observation. The conflicting testimony in and of
18 itself doesn't mean anybody committed perjury.

19 **THE COURT:** Absolutely.

20 And it's not unusual in criminal cases or
21 civil cases. Sit in on a divorce if you want to see
22 conflicting testimony. Good grief.

23 **MR. HANA:** Judge, I understand your ruling.
24 You are denying my motion to quash.

25 I would ask this -- two things. One, for the

1 record, Mr. Marshall is not waiving any
2 attorney/client privilege when he testifies.

3 Secondly, I would ask the Court's permission
4 if he is called to testify that I be allowed to stand
5 next to the witness box while he testifies so that I
6 may give him legal advise should he require legal
7 advise. Particularly with regard should he be asked
8 any questions concerning communications he may have
9 with his prior attorney.

10 But I believe he has --

11 **THE COURT:** One, if he's asked that question,
12 I am probably -- I am going to stick my own nose in
13 it.

14 **MR. HANA:** I would hope so.

15 **MR. JACKLEY:** I am not going to ask that
16 question, Your Honor.

17 **THE COURT:** No.

18 And I am not -- it's not going to go there in
19 my court. Okay. And it's just not. And -- because
20 telling a jury they can't consider it, the study shows
21 they remember what they can't consider better than
22 what they remember they can consider.

23 **MR. HANA:** In view of the fact that
24 Mr. Marshall has been subpoenaed, he asserted the
25 Fifth Amendment, that there has been an order of

1 immunity and an order -- court's order directing him
2 to testify, it may become necessary for him to request
3 or be advised as to a legal matter. I would
4 respectfully ask the right to stand next to him --

5 **THE COURT:** You are not going to stand next
6 to him during the course of the trial. If he needs to
7 ask for advice, I can make whatever arrangements I
8 think appropriate at that time. I am not going to
9 have lawyers standing by witnesses. Period.

10 But you are certainly -- I assume you are
11 going to be in the courtroom and if I perceive there
12 is a question or Mr. Marshall raises the issue, we
13 will hear it outside the presence of the jury and if
14 necessary and resolve the issue.

15 **MR. HANA:** Mr. Marshall will testify. And --
16 should he be called to testify --

17 **THE COURT:** If he's called.

18 **MR. HANA:** -- I would simply ask that the
19 state advise me the day before he is to testify so
20 that I can make arrangements to have him here. He's a
21 working man. He lives on the Pine Ridge Reservation.
22 Rather than have him hang around here every day until
23 he's called --

24 **THE COURT:** Given the circumstances, is there
25 any difficulty with that, Mr. Jackley?

1 **MR. JACKLEY:** Can I leave it like we do with
2 every other witness that we will try to, but as the
3 Court is aware we're trying to get it orderly done
4 with respect to the jury's time and we will try to
5 identify --

6 **THE COURT:** You can give him a tentative time
7 that we plan to call him Thursday morning, but it's
8 possible we would call him late Wednesday afternoon.

9 **MR. JACKLEY:** That would be perfect.

10 **THE COURT:** That kind of thing.

11 **MR. HANA:** That's fine.

12 **THE COURT:** Trial time is interesting to say
13 the least.

14 **MR. HANA:** Thank you for hearing me, Your
15 Honor.

16 **MR. JACKLEY:** Your Honor, I understand that
17 the Court has ruled, but for purposes of an appellant
18 record, can I make a statement on the record or make a
19 couple of observations or not?

20 **THE COURT:** You are certainly entitled to
21 respond to the motion although I have made the ruling.
22 Go ahead.

23 **MR. JACKLEY:** For purposes of the record I
24 know that early on Mr. Hana had indicated he wanted
25 certain affirmations that he had placed in his

1 filings, judicial notice, and I strenuously object to
2 that.

3 There was a discussion about his version of
4 perjury, et cetera. And I believe that it's clear
5 that with respect to any claims of a federal perjury
6 charge that federal law has a five-year statute of
7 limitations. So that wouldn't make sense that there
8 were discussions or threats of federal perjury from a
9 2003 Grand Jury because that would have been beyond
10 any statute of limitations.

11 The other thing that I take issue with is the
12 reference to perhaps an improper influence with the
13 parole board. It was placed in both his written
14 briefs and mentioned today. Your Honor, that is an
15 independent board. The Attorney General does seat
16 three on that board, but there is no evidence of any
17 improper influence or improper dealings with the
18 parole board. The parole board decides when there is
19 parole violations, not the Attorney General.

20 And the last point is in discussions with the
21 parole board, the issues and the problems that Dick
22 Marshall has with the paroled board don't have
23 anything to do, necessarily, with the Graham case.
24 They have to do with the fact that he has two strikes.
25 He has a pending third strike, which is a DUI. So it

1 has absolutely nothing to do with any claims of
2 perjury and I just wanted to make that clear for the
3 record.

4 Thank you.

5 **THE COURT:** The appointment process,
6 Mr. Hanna, I am appointed or was appointed by the
7 Governor which is the Executive Branch of the State of
8 South Dakota. I think I cut the arguments between the
9 state -- they win some and they lose some and the
10 defense wins some and loses some; and I feel
11 absolutely no beholdng to the state because I was
12 appointed by the Executive Branch which is, of course,
13 the Attorney General, as well.

14 I have no qualms about -- they've lost a few
15 motions in this case. And I don't believe there is an
16 implied immediate -- it's not that there cannot be
17 improper influence, but I don't think it exists as a
18 matter of general presumption. I -- the appointments
19 are all over the place. Somebody has got to appoint
20 them. They don't --

21 How many members are there on the parole
22 board?

23 **MR. MURPHY:** Nine.

24 **MR. JACKLEY:** Nine. Three by the Attorney
25 General, three by the Governor, and three by the

1 Supreme Court.

2 **THE COURT:** In any event, I think I find no
3 reason to find merit to that. I find reason --
4 understand the fear, but I don't find anything to
5 justify the fear.

6 So there we are. We're done.

7 Thank you.

8 I asked the jury to appear at approximately
9 9:30. We're going to take a break, ladies and
10 gentlemen.

11 I want to, again, advise people, I want no
12 electronics in the courtroom. None. Nada. Zip.
13 That includes cell phones and the like. They will be
14 left behind, placed in cars, or whatever there may be.
15 There are exceptions for counsel and counsel's support
16 staff, but that's it.

17 I ask people in the absence of emergency when
18 you are in here stay in here until there is a break.
19 It's a small courtroom. The traffic in and out can be
20 distracting, particularly, to witnesses who are
21 oriented in that general direction.

22 Also, the jury sits there and they can see
23 people in the audience during testimony, and if people
24 are watching with an interest in the case, there can
25 be head noddings or head shakings of that's true or

1 that's not true. If that occurs, you get out of the
2 courtroom and you don't come back.

3 Thank you.

4 (Whereupon, the following proceedings were
5 then had in open court in the presence of the jury.)

6 **THE COURT:** Mr. Jackley, are you satisfied
7 this is the jury selected?

8 **MR. JACKLEY:** I am, Your Honor.

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

10 **MR. MURPHY:** I am.

11 **THE COURT:** All right.

12 Ladies and gentlemen, we're about to begin
13 the trial. It will proceed in this manner. The
14 prosecution --

15 Who is going to read the indictment?

16 Mr. Jackley, are you starting that?

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

18 **THE COURT:** Mr. Jackley will read the
19 indictment. That is a statement of the charges. It
20 will be read aloud by him to you. It is not evidence.
21 It is simply a document which describes the charges
22 and the things the state must prove. You must not
23 draw any inference from that indictment against
24 Mr. Graham's presumption of innocence. It simply sets
25 out the elements which must be proven.

1 Following that, the state will make an
2 opening statement before it begins it's case in chief.
3 An opening statement is not evidence. It's simply an
4 outline of what the state believes the evidence to be
5 or what the evidence will show.

6 The defense will then have an opportunity to
7 present an opening statement at that time. The
8 defense may reserve a statement to be made as the
9 prosecution does before the start of its case in
10 chief. Mr. Murphy will announce that at the time that
11 it's called.

12 In this case, the state has the burden of
13 proving the defendant guilty beyond a reasonable
14 doubt. A reasonable doubt is a doubt based upon
15 reason and common sense; the kind of doubt that would
16 make a reasonable person hesitate to act.

17 Proof beyond a reasonable doubt, therefore,
18 must be proof of such convincing character that a
19 reasonable person would not hesitate to rely and act
20 upon it. However, proof beyond a reasonable doubt
21 does not mean proof beyond all possible doubt.

22 In this proceeding, Mr. Graham has an
23 absolute right not to testify. It is his and will be
24 his decision as to whether to do so. You must not --
25 you are not allowed to draw any inference or even a

1 hint of guilt should he choose to remain silent. That
2 is absolutely contrary against the system of law in
3 the United States and the State of South Dakota.

4 It is your job as a jury to resolve the
5 factual issues in this case. And you must resolve
6 those issues in the course of your deliberation.
7 Factual issues, as I use that term, means for you to
8 decide whether the evidence presented proves beyond a
9 reasonable doubt the elements of a given charge.
10 Those are the facts that are in dispute.

11 I will provide the rules of law which govern
12 your decision making. Those rules are contained in
13 instructions that I give you, these now, those that
14 might be given during the course of the trial, and
15 those that will be given just before you begin your
16 deliberations.

17 We're going to have some discussion of what
18 is evidence and what is not. Evidence is relatively
19 simple. It is the sworn testimony of witnesses. It
20 is documents or other things that I may allow to be
21 received as exhibits. It includes any facts which the
22 parties, that is the state and the defense, stipulate
23 to or are agreed to exist. And any facts that may
24 have been judicially noticed, that is facts which I
25 say you may but are not required to accept as true

1 even without testimony.

2 I may receive evidence at a time during the
3 course of the trial, one or more times, that is
4 allowed in for a limited purpose. Some items of
5 evidence may be used for this purpose, but not that.
6 I will explain to you for which purposes or purpose it
7 may be used and you may not use it to decide any other
8 question of fact.

9 Then we have the question of what isn't
10 evidence. Besides the obvious, it's everything that I
11 didn't just include. But it includes the objections
12 that may be made by counsel to testimony or exhibits
13 that they believe should not be put into evidence.
14 Those objections, and when to make them, are at the
15 prerogative of counsel. There may be objections they
16 could make. That's knowledge. And objections which
17 they should make, and in law school they told us that
18 was wisdom. So the fact that they may object to one
19 type of testimony on one occasion and not at another
20 has nothing to do with the propriety of the objection
21 being made.

22 My rulings on objections should not concern
23 you at all. I will make the best judgment I can at
24 that time as to whether the objection is sound and
25 should be sustained; or whether I believe the

1 objection is not sound and I would then overrule the
2 objection.

3 Things that I -- objections that I sustain or
4 exhibits that I do not allow to be received should not
5 be a concern of yours. I understand curiosity makes
6 you want to know what they are, but by ruling them
7 out, I am forbidding you to consider those matters as
8 evidence presented in the case.

9 There may come a point in time when I tell
10 you some evidence or testimony in the like which has
11 already been made or spoken, I may tell you that you
12 cannot consider that in resolving questions. That's
13 an extremely difficult thing to do once you have heard
14 it. That's the unring the bell sort of thing. And I
15 expect you to make every effort you can to comply with
16 that.

17 You will have the opportunity to take notes.
18 Your notebooks will be left either in the courtroom or
19 with the bailiffs when you are not here. You will be
20 allowed to take them into your deliberations, but the
21 notes do not override your memory. They are to assist
22 your memory and they are not evidence. You are
23 required to resolve the case on what you heard and
24 based on what you heard.

25 You will be outside the courtroom from time

1 to time. You understand this case is going to run for
2 a fair number of days. I have given you the advice
3 previously. I must now give it to you again. At any
4 time you are outside the courtroom, you may not
5 converse with or discuss with anybody, including
6 yourselves, the matters of the trial.

7 You are to not make any decisions or form any
8 opinions as to how you decide this case until all of
9 the evidence has been presented to you. That again is
10 something that is very difficult for human beings to
11 do. But as you understand, we proceed with one side,
12 then the other. And if you start forming an opinion
13 beforehand, that interferes with your ability to hear
14 all other evidence with an open mind that follows your
15 opinion making. You will begin to filter information
16 at that time. Again, that's human nature and the way
17 our minds work so you must be every conscious to avoid
18 forming opinions as this matter proceeds.

19 The attorneys will ignore you. They are not
20 being rude. That is their function and if they are
21 not ignoring you, I will be somewhat irritated and
22 that's not good. If people persist in asking you
23 questions beyond they are curious, you may tell them
24 you are sitting on a jury and you have now said all
25 you can say. If they persist in questioning you that

1 must be brought to the attention of the Court
2 immediately.

3 You are not to watch news broadcasts, read
4 newspapers, or anything else that may have a chance to
5 bring outside information to you. Even if it is
6 reporting what happened here, it may have a different
7 cast or put you in a different frame of mind as to
8 something than what you had when you heard the
9 information. It is someone else's interpretation of
10 what was heard and you will be unable two weeks from
11 now to sort out your source of information.
12 Consequently, you must ignore and take conscious steps
13 to avoid all outside information in deciding this
14 case.

15 At this stage of the game, counsel, are we
16 ready to proceed?

17 **MR. JACKLEY:** The state is, Your Honor.

18 **MR. MURPHY:** So is the defense.

19 **THE COURT:** Mr. Jackley, if you would read
20 the indictment.

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

22 (Whereupon, the Indictment was then read in
23 open court.)

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

25 Are you prepared to give your opening

1 statement?

2 **MR. JACKLEY:** I am, Your Honor.

3 **THE COURT:** Please proceed.

4 **MR. JACKLEY:** May it please the Court,
5 Counsel.

6 Good morning.

7 My name is Marty Jackley and I represent the
8 State of South Dakota. I want to begin by thanking
9 you for agreeing to serve on the jury and for your
10 attentiveness throughout the trial.

11 I want to take this opportunity to take you
12 back in time to December of 1975. It's the early
13 morning hours. We're in a location in the South
14 Dakota Badlands just south of Kadoka. There is a
15 highway that runs to the interstate. Highway 73.
16 There is a red Ford Pinto driving north headed to the
17 interstate. Headed to Kadoka.

18 In that car, driving, is a middle-aged lady
19 named Theda Clarke. Sitting next to her is the
20 defendant, John Graham. In the back seat is Arlo
21 Looking Cloud. And then either next to him or in the
22 hatchback part is Annie Mae Aquash, the victim in this
23 case.

24 It's the early morning hours. The sun may
25 just be coming up giving a hint of redness in the sky.

1 It's December. There is a chill in the air. It's
2 been a long journey, but it's a journey coming to an
3 end.

4 The evidence will show that as Theda Clarke
5 drove the Pinto headed north, she stopped. She turned
6 around. She headed south. Stopped again. Turned
7 around heading back north. She's looking for a place.
8 She turned around a third time, headed south, and she
9 found that place.

10 She pulled the red Pinto over on the side of
11 the road. John Graham knew the task at hand and he
12 got out of the vehicle. He grabbed Annie Mae Aquash.
13 Arlo Looking Cloud was more hesitant. Theda Clarke
14 looks to him and says, go with him. Arlo Looking
15 Cloud does.

16 As Arlo Looking Cloud is catching up to John
17 Graham and Annie Mae Aquash on the bluffs overlooking
18 the Badlands the sun is starting to come up. There
19 remains a chill in the air. Arlo Looking Cloud
20 witnesses Annie Mae begging for her life and at times
21 perhaps praying.

22 And then standing over the bluff John Graham
23 takes a 32-caliber revolver, puts it to the back of
24 Annie Mae Aquash's head and fires one shot. Annie
25 Mae's lifeless body falls approximately 20 feet down.

1 the Badland cliffs.

2 How did we get to this point?

3 Earlier that year the evidence will show that
4 there was a lot of rumor and suspecting that Annie Mae
5 Aquash was an FBI informant. The evidence will show
6 that that wasn't true, but that's what the American
7 Indian Movement and those members in the American
8 Indian Movement thought.

9 It really began in June of 1975, the year of
10 the murder, when there was a national American Indian
11 Conference in New Mexico, Farmington. It was at that
12 conference there was again rumors of Annie Mae being a
13 government informant, giving information to the
14 government about criminal activities. A man by the
15 name of Leonard Peltier took Annie Mae out and put a
16 gun to her head to scare her into not being an
17 informant.

18 Then later that month at a place called
19 Jumping Bull's, two FBI agents were killed. Later
20 that fall, just before the murder, in Marlin Brando's
21 motor home were riding, among others, Annie Mae
22 Aquash, Leonard Peltier, and Kamook Banks who now goes
23 by Kamook Ecoffey. It was in that motor home that
24 Leonard Peltier gave the incriminating statements
25 about what he had done to those two FBI agents. So

1 now Annie Mae is suspected as being an informant. She
2 now has seriously incriminating evidence against
3 Leonard Peltier.

4 The third thing then occurs with respect to
5 the informant concerns. Annie Mae had earlier been
6 arrested for firearms violations. She had a court
7 date, November 24, 1975, the year of her murder.

8 Unsuspectingly, a federal judge released her
9 on very limited bond conditions which gave rise to
10 further suspicions she must be an informant. She has
11 incriminating evidence. We suspected it all along.
12 And now a judge has released her without perhaps the
13 best of reasoning.

14 It's November 24, 1975, so members of the
15 American Indian Movement want to get her out of town.
16 You will hear evidence that just prior to another
17 court date, arrangements are made for Ray Hand Boy and
18 Evelyn Bordeaux -- Evelyn since passed away -- to
19 bring Annie Mae from Pierre, South Dakota to Denver.
20 They do just that. Ray travels with her. Ray Hand
21 Boy brings her to Denver to Troy Lynn Yellow Wood's to
22 hide her out.

23 For the next couple of weeks Annie Mae Aquash
24 is closely watched by individuals of AIM. Again,
25 she's suspected of being an informant and she has a

1 lot of information they believe.

2 Then a phone call happens. A phone call
3 involving Thelma Rios and Angie Begay. Thelma Rios is
4 in Rapid City, South Dakota, and calls to have Annie
5 Mae Aquash brought to Rapid City to answer to being a
6 federal informant.

7 The day of the phone call a further meeting
8 is held in Denver at Troy Lynn Yellow Wood's. You
9 will hear from several of the people present for that
10 meeting. Angie Begay, the individual that had taken
11 the phone call or had been involved in the initial
12 phone call. You will hear from George Palfy. You
13 will hear from Troy Lynn Yellow Wood.

14 You would hear about how they had a meeting
15 in Denver. The meeting also involved some individuals
16 with the Crusade for Justice. You will hear further
17 talk of an informant. You will hear about at the
18 meeting an indication of, this is what we do to
19 informants, which is precisely what was done.

20 After the meeting -- and during the meeting I
21 should say, Annie Mae Aquash is in the basement of
22 Troy Lynn Yellow Wood's. She's being watched. She's
23 being watched by John Graham.

24 Arlo Looking Cloud arrives at Troy Lynn's
25 house just in time to assist with her transport --

1 Annie Mae's transport to Rapid City. Before they
2 transport Annie Mae to Rapid City, they tie her hands.
3 She's bound and tied. You will hear from at least two
4 or three witnesses about that. She's taken against
5 her will. She's visibly upset. She's crying.

6 The journey begins. The kidnapping. Against
7 her will she is put in Theda Clarke's red Pinto that I
8 talked to you earlier about. The four that are in the
9 vehicle are Theda Clarke, John Boy Graham, Arlo
10 Looking Cloud, and Annie Mae, tied and bound, is put
11 in the back of the hatchback.

12 They travel -- it's approximately
13 December 10. They travel that evening to Rapid City.
14 They arrive at Thelma Rios' empty apartment at
15 Knollwood Apartments near Rapid City. Remember Thelma
16 was on the call about bringing Annie Mae forth because
17 she's a federal government informant.

18 Thelma Rios had given Theda Clarke the keys
19 to the empty apartment. So that night at Thelma Rios'
20 house the four stay. That's John Graham, Arlo Looking
21 Cloud, Theda, and John Graham. John Graham is
22 watching over Annie Mae Aquash. That night John
23 Graham stays in the bedroom with Annie Mae Aquash.

24 The next day, there is a place in Rapid City
25 called WKLDOC. WKLDOC stand for Wounded Knee Legal

1 Defense Offense Committee. They were involved in some
2 of the reservation defenses. Annie Mae Aquash is
3 brought to WKLDLOC for further discussions of what to
4 do with the informant. Those discussions are had and
5 the decision is made to further travel to the Rosebud
6 Reservation. Annie Mae is again visibly upset at
7 times at WKLDLOC. She's taken against her will.

8 They go to Rosebud Reservation. They being
9 the same group that you will hear me talk about from
10 the minutes of the bluff and that is John Graham,
11 Theda Clarke, Arlo Looking Cloud, and Annie Mae
12 Aquash. The foursome arrives in the evening at a
13 place at Rosebud called Bill Kills Means.

14 When they arrive at Kills Means', they stop.
15 John Boy Patton, the defendant, and Theda Clarke go
16 inside. Arlo Looking Cloud stays to guard Annie Mae
17 Aquash. After about five or ten minutes, John Graham
18 and Theda Clarke emerge. Arlo goes inside at Kills
19 Means' to use the bathroom and comes back out.

20 The foursome then travel in a circular route
21 back to the Pine Ridge Indian Reservation and stop at
22 the next house. They stop at Dick Marshall's house.
23 It's late in the evening of her murder. Perhaps even
24 into the next day.

25 When the foursome arrive at Dick Marshall's

1 house they knock on the door and they awake Dick
2 Marshall and his wife Cleo Marshall. It's now Cleo
3 Gates. They go inside. Annie Mae sits at the table
4 with Cleo Marshall. And for some reason, Dick
5 Marshall, Theda Clarke, Arlo Looking Cloud, and John
6 Graham go into Dick Marshall's bedroom. They are in
7 there for five or ten minutes. Dick Marshall then
8 emerges. And sitting at the table is Annie Mae Aquash
9 and Cleo Gates. Dick Marshall has a discussion with
10 Cleo about Annie Mae and about what they are going to
11 do with her. And Cleo Marshall says, no way, she's
12 not going to stay. We are not going to be involved in
13 this.

14 Dick Marshall then goes back into the bedroom
15 where, again, it's Theda Clarke, John Graham, and Arlo
16 Looking Cloud. He's in there for a few more minutes.
17 They then emerge and the foursome again leaves. John
18 Graham, Theda Clarke, Arlo Looking Cloud, and Annie
19 Mae Aquash.

20 It's late into the evening. The foursome
21 then drives in a circular route. They go to a place
22 at Potato Creek -- and you will see a map where all of
23 these locations are -- and they stop there, because
24 Arlo's Looking Cloud's grandmother lives there, to get
25 gas. They then proceed on.

1 At some point as they proceed on they see law
2 enforcement lights. At this point in time there is
3 now a gun. The gun is passed from Theda Clarke to
4 Arlo Looking Cloud when they see the lights.
5 Fortunately for the officer he went a different way.
6 He had gone a different direction. Was looking for
7 somebody else. So the foursome continue as the gun is
8 continued to be passed back and forth under the seat
9 between Theda and Arlo.

10 They make two more stops in Wambli, South
11 Dakota. They are of little consequence. Nobody was
12 home. And that's when they proceed on 44 to the
13 junction of 73 and travel up that road north to the
14 bluff that I talked to you earlier about.

15 It's now February -- after the shooting, not
16 much is heard until February 24, 1976. A rancher in
17 the Kadoka area, Roger Amiotte, is out checking cattle
18 in a remote area and he comes upon the lifeless body
19 of Annie Mae Aquash.

20 He immediately called law enforcement. Annie
21 Mae has been in the elements for a considerable amount
22 of time. It's South Dakota, it gets warm in the day
23 and cold at night. Annie Mae is not recognizable.

24 An initial autopsy is done and I will tell
25 you up front, Dr. Brown missed the bullet. They were

1 unable to determine who she was and so the method back
2 then used was they amputated both of Annie Mae's hands
3 and sent them in to the FBI lab for fingerprint
4 analysis. So at this point in time, the body has not
5 been identified. It's unidentifiable.

6 On March 2, Annie Mae is buried as an
7 unidentified person. On March 3, the day after the
8 burial, the FBI lab determines that it is in fact
9 Annie Mae Aquash from the fingerprints. Of course,
10 arrangements are made through the family and the body
11 is exhumed for further testing.

12 On March 11, a second autopsy is completed by
13 Dr. Garry Peterson. Through the x-ray machine that
14 was not available in the first autopsy, the bullet is
15 found lodged in Annie Mae Aquash's left temple. Cause
16 of death, gunshot wound to the back of the head. But
17 not just that, a gunshot wound that was so close when
18 the gun was put to the head it left powder burns.

19 We're now talking about 1976, a long time
20 ago. It was a lengthy and continuing investigation.
21 The evidence will show that there has been times of
22 little cooperation by those involved and those with
23 knowledge.

24 And then in 1988 some things broke in the
25 case. Arlo Looking Cloud began talking about his

1 involvement. Those discussions continued, and then in
2 1994, April 24, 1994, South Dakota's United States
3 Marshal Robert Ecoffey and Mitch Pourier, BIA
4 investigator, went up to Canada to talk to John
5 Graham. They met with John Graham in his own
6 territory. They met with him at a park. They began
7 discussing what information they obtained in the last
8 several years of the investigation. They discussed
9 with him the information that they had about what
10 occurred at Troy Lynn Yellow Wood's in Denver; about
11 him tying up Annie Mae Aquash.

12 At that time his response to that was --
13 Graham turned to Marshal Ecoffey and said, looks like
14 you guys have my future planned out for me. You have
15 your case.

16 Shortly thereafter, Marshal Ecoffey and Mitch
17 Pourier showed Graham the photographs of Annie Mae
18 Aquash laying dead below the bluff. Photographs that
19 you may well see here in the courtroom into evidence.
20 When those photographs were shown to John Graham, he
21 teared up.

22 As they continued to discuss -- as he looked
23 at those photographs, John Graham looked in the
24 direction of the White Horse community and said,
25 quote, I'm ready to leave this place. I'll probably

1 spend the rest of my life in jail anyway, end quote.

2 John Graham further disclosed to Marshal
3 Ecoffey and Mitch Pourier that he did in fact take
4 Annie Mae from Denver and took her to the reservation.
5 As Marshal Ecoffey and Mitch Pourier were talking to
6 John Graham at that picnic table and talking about his
7 involvement, and the killing of Annie Mae Aquash, you
8 will hear testimony that John Graham was shaking so
9 bad he shook the picnic table. He knew.

10 John Graham's final indication was that, yes,
11 he had taken her, but he had left her at a safe house
12 in Pine Ridge. The evidence will show that Dick
13 Marshall's house was anything but a safe house.

14 But furthermore, the witness testimony will
15 show that Annie Mae Aquash was not left at Dick
16 Marshall's house. She was taken to a bluff and shot
17 in the back of the head.

18 Further developments came in the case. Two
19 individuals, cooperating witnesses, Kamook Banks
20 Ecoffey, Dennis Banks' former common law wife, and
21 Serle Chapman, a British journalist, came to the
22 United States Government with information and a
23 willingness to help to solve what had happened and
24 prove once and for all what had occurred.

25 John Graham gave an initial statement -- a

1 further statement to Serle Chapman. You will hear
2 about that statement. Arlo Looking Cloud continued to
3 talk.

4 And then in 2003 the United States indicted
5 Arlo Looking Cloud, and yes, he went to trial and he
6 was convicted for his petition in the death of Annie
7 Mae Aquash. And I would anticipate that he will be
8 talking to you at some point in this trial.

9 And yes, he hopes to get a benefit from
10 talking to you. But as you look at that testimony,
11 consider what all Arlo Looking Cloud had said before
12 he was indicted and before he was convicted. You will
13 hear about what he said in 1988, what he said to Annie
14 Mae Aquash's daughter in April of 2002 about not only
15 his involvement, but more importantly, John Graham's
16 involvement and participation in the killing of Annie
17 Mae Aquash that has remained constant even though Arlo
18 Looking Cloud at times minimizes what his involvement
19 was, it's pretty clear that John Graham's involvement
20 was the trigger man. And his role in the kidnapping.

21 At the end of the trial I will have an
22 opportunity to once again come before you in my final
23 closing argument. And I am going to look you in the
24 eye and I am going to ask that based upon the evidence
25 that has been presented that you convict John Graham

1 with the murder and felony murder kidnapping of Annie
2 Mae Aquash.

3 Thank you for your attentiveness.

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

5 **MR. MURPHY:** Thank you, Your Honor.

6 Good morning, folks.

7 We're going to be here together for probably
8 10 to 13 days. And during the course of that time,
9 you are going to hear two bodies of general evidence.
10 Those that are in dispute: Those things that are
11 subject to dispute, and those things that are not.

12 I submit to you what you are going to learn
13 that is not subject to dispute boils down to two
14 things and two things only. First, that Anna Mae
15 Aquash was killed as the result of being shot in the
16 back of the head. You are not going to hear any
17 quibbling with that.

18 Secondly, that that death happened some time
19 between November 24, 1975, and February 24, 1976.
20 That three months window between when she was released
21 from jail in Pierre, November 24, 1975, when she was
22 last seen by law enforcement and the court personnel,
23 and February 24, 1976 when her body was recovered.

24 Now that presentation of the known undisputed
25 facts will probably take all of about a half day to

1 present. So what are we going to be talking about for
2 the remaining eight or ten days and why such a short
3 presentation of known facts?

4 The reason why it's going to be such a short
5 presentation of the known undisputed facts, you are
6 not going to hear evidence about the fingerprints
7 linking my client to the gun that was used to kill
8 Anna Mae Aquash or any other item.

9 You are not going to receive evidence about a
10 ballistic match between the gun and the bullet that
11 was used to kill Anna Mae Aquash and my client.

12 You are not going to hear evidence of
13 footprints in the dirt or any other items recovered at
14 the crime scene that link my client in any way, shape,
15 or form to this crime.

16 You are not going to hear a reported
17 confession where my client says I did it or I was
18 involved in the killing of Annie Mae Aquash.

19 And you are not going to hear anything about
20 DNA evidence or serological evidence linking my client
21 to the crime or the allegation as we talked about
22 during jury selection that there was sexual
23 intercourse or rape involved in this case.

24 In fact, the DNA evidence and the serological
25 evidence that's going to be presented is going to be

1 presented by my client.

2 Because you are going to hear that in
3 2000 during an interview with Serle Chapman, one of
4 the witnesses that Mr. Jackley just referred to, my
5 client was told, hey, you have been alleged to have
6 raped Anna Mae Aquash. And you will hear what my
7 client's response was. I never raped Anna Mae Aquash.
8 I never had sex with Anna Mae Aquash. She was my
9 friend and my friend alone. And even if it requires
10 exhuming the body, I want there to be DNA tests
11 because I did not have sex with Anna Mae Aquash and I
12 want to prove that that is the case.

13 That statement was given in 2000 before he
14 was charged, before he had an attorney, when he was
15 presented with this evidence. He said, I want this
16 tested so it can be resolved.

17 And you are going to hear that later, once my
18 client was charged, and this allegation was brought up
19 again, he did two things. He asked the court system
20 to do two things. He said, first, I want the FBI and
21 the U.S. Attorney's Office to get the evidence: Her
22 under garments and her clothing and a Kotex pad that
23 was present when she was autopsied and would contain
24 evidence that would help alleviate or remove this
25 allegation of rape.

1 And I want -- once that information or that
2 evidence is obtained by the FBI or the U.S. Attorney's
3 Office, because they held the evidence, I want it sent
4 out for testing. And the court ordered those two
5 things.

6 Low and behold, the FBI could find the
7 underwear, but the Kotex mysteriously disappeared.
8 Nobody seems to know where that went. But the
9 underwear was sent. It was tested. No DNA. In fact,
10 you will learn 30 years before when Anna Mae Aquash's
11 body was found and her clothing -- all eight items of
12 her clothing were obtained by the FBI, the FBI sent
13 all that clothing out for testing to determine whether
14 semen was present on any one of the garments. And in
15 fact, nothing was recovered that linked my client to
16 any allegation of rape or sex or any misconduct in
17 regard to Ms. Aquash. So you are not going to hear
18 that evidence because the government doesn't have it.

19 So what I anticipate the remaining eight or
20 ten days of testimony is going to be about is -- it's
21 going to break down into basically three categories of
22 evidence. The first category is going to be evidence
23 about the American Indian Movement. The second
24 category of evidence is going to be about the days,
25 weeks, and months immediately prior to Ms. Aquash's

1 death. And the third evidence -- or category of
2 evidence is going to involve two witnesses: Arlo
3 Looking Cloud and Serle Chapman. So I am going to
4 address what those categories of evidence are likely
5 to show and to not show.

6 In regard to the American Indian Movement,
7 you are going to hear a wealth of information about
8 the American Indian Movement between 1973 and 1975.
9 You are going to hear how after the occupation at
10 Wounded Knee in 1973 a small group of upper echelon
11 AIM leaders became involved in a sequence of violent
12 activities. Militant activities. 1974, we had
13 courthouse riots. 1975 -- June 26, 1975, two FBI
14 agents and one AIM member were killed in a shoot-out
15 at Jumping Bull's.

16 Just a few months later, September 5, 1975,
17 in a response to that shoot-out -- because that
18 shoot-out caused a massive infusion of FBI presence
19 here in South Dakota. They were looking for the
20 killers of these two FBI agents. It was priority
21 number one. They did a raid at a place called
22 Al Runnings. And at that raid they arrested people, a
23 small group of AIM leader. And in the tent where they
24 were -- where one of them was found, there were
25 grenades, handguns, illegal sawed-off carbide rifles,

1 dynamite, and other explosives.

2 One month after that, October 12, 1975,
3 Columbus Day, that same group of people -- or that
4 same loose group of people -- some came, some went,
5 but there was core group that were involved in placing
6 bombs in Pine Ridge, bombing the power plant and
7 trying to blow up other places.

8 And from the bombing on October 12, 1975, the
9 same group of people got into a motor home, traveled
10 to the pacific northwest, hiding from law enforcement.
11 Because by now almost all of them are fugitives from
12 the law. And they are pulled over at one point by a
13 Highway Patrolman in Oregon. They had left Washington
14 State coming through Oregon. And what is the
15 response? They get into a shoot-out with the Highway
16 Patrolman. The Highway Patrolman could have been
17 killed. And at the end of that shoot-out, two of the
18 people in that group escaped, Leonard Peltier and
19 Dennis Banks.

20 Now, you will be listening to that evidence
21 and wondering what is the link between that evidence
22 and John Graham. And I will tell you that there is
23 almost no link at all. That group -- that core group
24 of people involved in these militant activities
25 involved Anna Mae Aquash, Kamook Banks now known as

1 Kamook Ecoffey, Dennis Banks her husband, and Leonard
2 Peltier. In each of those instances -- or almost
3 every one of those instances, that's the group of
4 people.

5 Who is John Graham at that time? What is he
6 doing?

7 He's a 20-year-old Canadian guy living down
8 in Denver with his girlfriend Angie traveling to Pow
9 Wows and sun dances, hanging out. And he happens to
10 have a relationship -- a friendly relationship with
11 one of those people, Anna Mae Aquash, because they are
12 both from Canada. She's older. She's taken him under
13 her wing at times, but that is his only connection to
14 this group of AIM militants.

15 In fact, one of the interesting you are going
16 to hear -- excuse me. I am going to grab some water.
17 As I told you during jury selection I will go through
18 a gallon a day.

19 What you are going to hear is the one
20 incident of that violent sequence that Anna Mae Aquash
21 was not involved in was the incident at Jumping Bulls'
22 place where the FBI agents were shot.

23 Why wasn't she involved in that incident?

24 Because on that date she, and my client John
25 Graham, and a couple other people were at a peaceful

1 assembly in Cedar Rapids, Iowa. They were supporting
2 a guy named Leonard Crow Dog during his trial. One
3 incident in that sequence of ever escalating events
4 that Anna Mae Aquash was not at was when she was with
5 my client at a peaceful assembly. All of those other
6 instances my client wasn't there. He had no
7 connection to any of these folks other than a friendly
8 relationship with Anna Mae Aquash built on their
9 common origins in Canada.

10 Now, the next category of evidence you are
11 going to hear about is day, weeks, and months before
12 Ms. Aquash's death. Denver, Rapid City, Pine Ridge,
13 Rosebud, maybe some other places. And you are going
14 to hear testimony from probably as many as ten
15 witnesses about what happened at these various
16 locations. Who did what, and what was seen, and what
17 wasn't seen.

18 And rather than summarize all of that
19 evidence, I am going to ask you to do one thing.
20 Listen closely. Because you are going to hear each of
21 the witnesses that the state presents that testify
22 about these events, in Denver and Rapid City and down
23 on the reservations, gives radically different stories
24 depending on when they are talking and who they are
25 talking to.

1 Not only do individual witnesses contradict
2 themselves over and over again, often times under
3 oath, because many of these witnesses have given sworn
4 statement and testimony before; but two of the
5 witnesses may claim to have been in the same room and
6 seen the same thing and they will contradict each
7 other on almost every material fact. Simply put, I
8 ask you to listen so that you can gauge how believable
9 any of these people are.

10 And I will suggest to you that though there
11 will be a suggestion that the failure of these
12 witnesses to stay straight on their stories or stay
13 straight with each other is due to the passage of
14 time; that that isn't the case because you are going
15 to hear they have given statements sometimes over a
16 period as long as 20 years.

17 Their statements all have started to change
18 in about the last ten years. And that's because a
19 virtual cottage industry has grown around this case.
20 And there is a group of people that want to be on the
21 right side of history and so now they are telling a
22 story that is consistent with what the government has
23 been saying about the case as opposed to what they
24 said for years and years as I said often times under
25 oath.

1 The last category of evidence you are going
2 to hear involves the two star witnesses: Arlo Looking
3 Cloud and Serle Chapman. Arlo Looking Cloud in 2004
4 was convicted of the murder of Anna Mae Aquash. He
5 was sentenced to life. Life in federal prison.

6 He appealed that conviction and lost. He
7 said there wasn't enough evidence and my attorney
8 dropped the ball and my sentence should not be imposed
9 and the Court of Appeals said no. The conviction is
10 upheld. Your sentence is upheld.

11 After he lost his appeal, he filed a petition
12 saying that he should get a new trial because of
13 problems with the way his case was handled and how his
14 attorney did and that his claims of innocence were not
15 presented. And that motion kind of floated around.
16 In fact, I think it may still be pending.

17 What you are going to learn, though, is that
18 when Arlo Looking Cloud got to that point where all
19 other options were out and he was doing a life
20 sentence in a hellish federal prison down in
21 Louisiana, he hired an attorney -- or his family hired
22 an attorney, a former AIM attorney. A guy who used to
23 represent Leonard Peltier, and he said, let's make a
24 deal. Do whatever is necessary to get me out of here.

25 And they came to the government. And they

1 started the process called a Rule 35 process. Rule
2 35, simply put, is where somebody asks the government
3 to file a motion, to go before the judge, and to say,
4 Judge, reconsider your life sentence. Cut me some
5 slack.

6 But the condition for a Rule 35 motion, as
7 you will hear, is the government has to say to the
8 judge, this guy provided us substantial assistance in
9 some prosecution. He cooperated with us. He provided
10 us material.

11 So Arlo Looking Cloud, when he starts that
12 negotiations for the Rule 35, suddenly changes his
13 story in every material way.

14 We're going to hear how in 2008, after he
15 started negotiating with the government, he suddenly
16 claimed to have heard my client and Anna Mae Aquash in
17 a bedroom having sex. Previously, sworn statements,
18 he said, yeah, they were in a room once together.
19 They were playing cards and talking. But, now, in
20 2008, he invents this rape allegation that they were
21 having sex and it was at a time when Anna Mae Aquash
22 was a captive.

23 Why is that important? Why is the 2008 date
24 important for that change?

25 Two things. One, he's at a point where he

1 needs to deal. But secondly, they coincides with the
2 time that my client's charges in federal court were
3 dismissed; and the state wanted to prosecute him here
4 in Rapid City. So they get Arlo Looking Cloud to say
5 John Graham raped Anna Mae Aquash in Rapid City.

6 Arlo Looking Cloud was willing to change his
7 story from a couple of old Canadian friends playing
8 cards in a room to a rape to fit their theory of
9 prosecution.

10 At the same time Arlo Looking Cloud showed
11 that he would be willing to do anything to help them
12 in any prosecution because in 2008 the government
13 became interested in Dick Marshall. You have heard
14 about Dick Marshall.

15 Arlo Looking Cloud had given statements,
16 recorded statements, sworn statements, for years.
17 Never ever mentioned Dick Marshall. Even when he was
18 on trial for his life and had an incentive to come to
19 the government with any other information to get a
20 good deal, he had never ever mentioned Dick Marshall.
21 In fact, he had said he had not gone to Dick
22 Marshall's house.

23 But because Dick Marshall became a suspect
24 2008, Arlo Looking Cloud suddenly says, you know what,
25 I just remembered myself and Theda and John and Anna

1 stopped at Dick Marshall's house and we went in a
2 bedroom and we had a private meeting and I saw a gun
3 and I -- it was all of this other discussion. And now
4 he'll tell you, well, you know, I never told you that
5 before because I was afraid of Dick Marshall.

6 Never once in the past had he ever indicated
7 any fear of Dick Marshall. Dick Marshall at this
8 point is a 60-something-year-old guy. And at that
9 point -- previous to that point, Arlo Looking Cloud
10 had every incentive to come forward with information
11 like that but he didn't come forward because it didn't
12 happen. He came forward with it, he invented it once
13 the prosecution said they wanted Dick Marshall.

14 You are also going to hear something about
15 Arlo Looking Cloud and his incentive to lie to get out
16 of his life sentence, to do anything necessary. And
17 that is, during the process of this case, he came
18 under the wing of an informant -- paid informant named
19 Kamook Banks now Kamook Ecoffey. The former AIM
20 militant. The former wife of Dennis Banks. Had left
21 AIM. Become involved in the movies. And then became
22 a paid informant. The government gave her about
23 \$40,000 for doing and interviews.

24 What you are going to hear is during the
25 course of an interview she had with Arlo -- the first

1 interview she had with him -- Arlo asks her one
2 question that rings above all other. Arlo says,
3 Kamook, who should I implicate. And Kamook Banks, who
4 has a very complicated history with this case, says,
5 only John Boy. She tells him the person Arlo is
6 supposed to implicate is my client.

7 Leaving Arlo, the next big witness for the
8 state is a guy named Serle Chapman. Serle Chapman is
9 a British guy. Him and his wife run a tour agency
10 called Go Native America Dot Com. They bring tourists
11 from Europe and around the United States out to
12 reservations and they expose them to Indian culture.
13 And Mr. Chapman writes books on Indians and gives
14 lectures on Indians, and he has basically made his
15 entire career on Indians. And you will learn that
16 he's even tried to pass himself off as being Indian
17 even though he has not a drop of Indian blood.

18 You are going to hear how Serle Chapman in
19 the year 2000 began researching and writing a book
20 called Blood Sweat and Tears. Inside the American
21 Indian Movement. And at the time he was researching
22 it, he goes to the FBI and he tells them that during
23 the process of researching it various AIM members had
24 given him information about Anna Mae Aquash.

25 And you will hear how he basically lied to

1 the FBI. He puffed up what information he had. He
2 said I've got these recorded interviews where people
3 talk about things like Farmington, New Mexico. You
4 just heard Mr. Jackley talk about how there was an
5 incident in Farmington where Leonard Peltier put a gun
6 to Annie Mae Aquash's head.

7 What you are going to learn in this case is
8 that the interview he did where he said -- told the
9 FBI that he had learned that Leonard Peltier had done
10 this. Actually, the guy he was talking to said
11 Leonard Peltier, him, and Anna Mae Aquash went outside
12 at Farmington to smoke a joint, to hang out. There
13 was some joking around about the informant accusation
14 and that was the end of it.

15 But Serle Chapman goes to the FBI wit them
16 and he starts selling his services and he baits them
17 and they say, you know what, we need your help and we
18 will pay you. We'll reimburse you. So between 2000
19 and 2003 Serle Chapman does a lot of recorded
20 interviews. And immediately upon starting that he
21 starts sending them the bill. In the beginning the
22 bills were small, \$600 here \$400 there, plane tickets
23 and hotel rooms. But very soon he starts asking for
24 big money.

25 And you are going to hear how Serle Chapman

1 is ultimately paid by the FBI \$100,000 by the FBI for
2 recording very few interviews from 2001 to 2003.
3 After 2003, he doesn't do a single interview. Not at
4 least one that's recorded. But the government pays
5 him \$70,000 from 2003 to 2009.

6 Not only do they pay him a hundred thousand
7 dollars, Serle Chapman and his wife are not citizens.
8 They came to this country to make money here, but they
9 only have a four year Visa. So you will hear the
10 letters he starts writing to the authorities, to
11 Mr. Mandel, to the FBI, saying you need to get us
12 Visas; and they do. They hand walk his Visa
13 applications through the Immigration and Customs
14 Enforcement Agency. They get him extensions on Visas.
15 They get him new Visas.

16 And low and behold, three weeks before Serle
17 Chapman is going to testify against Dick Marshall,
18 they give him and his wife green cards. Permanent
19 resident status.

20 So Serle Chapman is paid \$100,000, gets green
21 cards for himself and his wife, and what do we get in
22 return?

23 Well, he records one interview with my
24 client. One interview. And when the recorder is on
25 what does my client say? Anna Mae Aquash was my

1 friend. I did not have sex with her. I did not rape
2 her. I was asked by Anna Mae at a time when she was a
3 fugitive and was afraid of the FBI to help take her
4 from Denver which had been hot because there was so
5 many people that knew she was there up to a home in
6 Pine Ridge to leave her at a safe house.

7 Now Serle Chapman is going to come in and
8 say, you know, when he, Serle Chapman, decided to turn
9 off the tape recorder suddenly my client made
10 incriminating statements. And you will hear how
11 that's a pattern with Serle Chapman.

12 Even though the government had equipped him
13 and fitted him with a body wire, he had tape recording
14 devices, even had something where he could record
15 phone calls, everything he gathered that was suddenly
16 devastating and implicated people in this case was
17 when the recorder was miraculously off.

18 I will ask you to consider seriously whether
19 Arlo Looking Cloud and Serle Chapman respect the oath
20 or whether they are testifying based on other reasons.

21 In the end of this case, what it boils down
22 to is nothing forensic, nothing direct linking my
23 client to the case. A whole bunch of evidence about
24 AIM and some -- a few people in AIM. A few bad
25 apples, if you will, that have nothing to do with my

1 client. A bunch of people who have given wildly
2 inconsistent events about Denver and Rapid City and
3 down on the reservation. And two guys, Arlo and
4 Serle, who have bias and motives to lie, financial
5 incentives and all sorts of other reasons for slanting
6 their testimony.

7 Now when the case is done, I am not going to
8 come before you and tell you how I think you should
9 vote. That's not my role.

10 I am going to ask you really one question.
11 Based on what you have heard on the witness stand and
12 all of the inconsistencies and the lack of direct
13 evidence connecting my client in any way, shape, or
14 form to this crime, can you really say beyond a
15 reasonable doubt that the state's proven anything?

16 Have they proven the elements against my
17 client?

18 That's what I am going to ask you to ask
19 yourselves.

20 Thank you very much.

21 **THE COURT:** Thank you.

22 Ladies and gentlemen, not knowing exactly the
23 process in which we're going to go and the time frame,
24 the first witness is scheduled for one o'clock. I
25 would ask you to return here at 12:45 so we can

1 prepare to enter the courtroom and hear that witness
2 commencing at one o'clock.

3 You are again reminded to leave your
4 notebooks here and not to discuss this case nor allow
5 anyone to discuss it with you pending the final
6 resolution of the case. And for you not to inform --
7 not to form or begin to form any opinion on this case
8 until all the evidence has been presented.

9 The opening statements of counsel are not
10 evidence. They are simply their explanation of what
11 they believe the evidence will show or not show in
12 this case to help guide you through the process as
13 testimony is presented.

14 Thank you for your attention, and I will see
15 you at 12:45.

16 (Off the record.)

17 **THE COURT:** Okay.

18 Satisfied this is the jury, Mr. Jackley?

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

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

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

22 **THE COURT:** I believe you are at bat,
23 Mr. Murphy -- I am sorry. Mr. Jackley. I will get it
24 right.

25 **MR. JACKLEY:** The state would call Roger

1 Amiotte, Your Honor.

2 **THE COURT:** If you would please come forward,
3 sir, and take a stop right here., I will get you sworn
4 in.

5 **ROGER AMIOTTE,**
6 called as a witness herein, having been duly sworn,
7 under oath testified as follows:

8 **THE COURT:** Please take a seat in that chair,
9 sir.

10 **DIRECT EXAMINATION**

11 **BY MR. JACKLEY:**

12 **Q.** Good morning.

13 Could you please state your name for the
14 record.

15 **A.** My name is Roger Amiotte.

16 **Q.** Mr. Amiotte, where do you live?

17 **A.** I live 18 miles south of Kadoka or 2 miles
18 north of Highway 44/173.

19 **Q.** Mr. Amiotte, what do you for a living?

20 **A.** I am a rancher.

21 **Q.** Have you done that for quite some time?

22 **A.** All my life.

23 **Q.** Mr. Amiotte, I want to take you back to
24 February of 1976.

25 Where did you live back there?

1 **A.** I lived at the same location.

2 **Q.** And you were a rancher at that time?

3 **A.** I was.

4 **Q.** Did you make a finding on your property?

5 Did you find something on February 24, 1976?

6 **A.** Yes, I did.

7 **Q.** Could you please describe that to this jury,
8 what you found, what you were doing.

9 **A.** All right.

10 I was building some fence. A
11 projection of -- extending the fence that was already
12 on location. And I was searching for a Badland bank,
13 a vertical bank, to run my fence against that would
14 effectively stop my livestock from getting out on the
15 road.

16 **Q.** When you were doing that, did you come upon
17 something?

18 **A.** Yes, I did. I found a person lying in --
19 near the bottom of this canyon, and I determined that
20 it was about 30 foot away. And the person was not
21 alive.

22 **Q.** Mr. Amiotte, I am handing you what's been
23 previously marked as State's Exhibit No. 1, an aerial
24 photo.

25 Do you generally recognize that photograph?

1 **A.** Yes, I do. That's -- would be about a mile
2 north of my house.

3 **Q.** Does it depict your ranch area and your house
4 area?

5 **A.** Yes, it does.

6 **MR. JACKLEY:** Your Honor, I would offer
7 State's Exhibit No. 1.

8 **MR. MURPHY:** No objection.

9 **THE COURT:** Thank you.

10 It will be received.

11 **MR. JACKLEY:** Can I show it to the jury, Your
12 Honor?

13 **THE COURT:** You may.

14 **Q.** **(BY MR. JACKLEY)** Mr. Amiotte, on Exhibit 1
15 there is a yellow dot.

16 Could you generally describe where that dot
17 is?

18 **A.** That would be the location about a mile north
19 of my home where I discovered the body lying.

20 **Q.** And there is a highway that runs next to
21 that.

22 What highway is that?

23 **A.** That's Highway 73.

24 **Q.** And if you were to head north on that, which
25 town would you eventually get to?

1 **A.** Kadoka. The nearest town.

2 **Q.** Mr. Amiotte, I am handing you State's
3 Exhibit 2.

4 Do you generally recognize that photograph?

5 **A.** Yes, I do.

6 **Q.** What is it?

7 **A.** It's a photo of the location of where I found
8 the person.

9 **MR. JACKLEY:** Your Honor, I would offer
10 State's Exhibit 2.

11 **MR. MURPHY:** No objection.

12 **THE COURT:** Received.

13 **Q.** **(BY MR. JACKLEY)** Mr. Amiotte, there is what
14 appears to be a white sheet there.

15 Could you describe where that location is?

16 **A.** Well, it's at the foot of about a 30-foot
17 cliff. And that's to mark the spot where the body was
18 laying.

19 **Q.** Is that sheet still there?

20 **A.** Yes, it is.

21 **Q.** Mr. Amiotte, I am handing you what's
22 previously been marked State's Exhibit 3.

23 Do you generally recognize what that
24 photograph depicts?

25 **A.** Yes, I do.

1 Q. What is that?

2 A. That's the person that I found.

3 Q. That you found February of 1976?

4 A. Right.

5 MR. JACKLEY: Your Honor, I would offer
6 State's Exhibit 3.

7 MR. MURPHY: No objection.

8 THE COURT: Received.

9 Q. (BY MR. JACKLEY) Mr. Amiotte, does that
10 generally depict the way she was laying when you saw
11 her first?

12 A. Yes, sir.

13 MR. MURPHY: Your Honor, may I ask for
14 clarification? I thought this was Exhibit 3.

15 MR. OSWALD: That's on the back side.

16 MR. MURPHY: Okay.

17 Thank you.

18 Q. (BY MR. JACKLEY) Mr. Amiotte, what was the
19 approximate distance from the top of the bluff to the
20 bottom of the bluff where the body was found?

21 A. About 30 foot, the cliff.

22 Q. I am handing you what's been previously
23 marked as State's Exhibit 4.

24 Do you generally recognize what that
25 photograph depicts?

1 **A.** Yes, I do. It's the location where I came
2 upon that body.

3 **Q.** Further identifying the bluff that the body
4 was below?

5 **A.** Yes, sir.

6 **THE COURT:** Mr. Jackley, as you take those in
7 would you pass them by me. I can't see that very
8 well.

9 **MR. JACKLEY:** Sorry.

10 **THE COURT:** That's all right. I would like
11 to see them so I have some idea of what's being shown
12 to the jury.

13 **MR. JACKLEY:** As Mr. Murphy looks at that for
14 clarification purposes, many of the exhibits will have
15 two different stickers on them. There is a yellow
16 sticker that would be used in prior proceedings and
17 the brown sticker would be for these proceedings here
18 today.

19 **THE COURT:** The one that says State's Exhibit
20 will be for these proceedings, correct?

21 **MR. JACKLEY:** Correct.

22 **THE COURT:** The yellow is not for these?

23 **MR. JACKLEY:** Correct.

24 Your Honor, I would offer State's Exhibit 4.

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

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

2 **Q.** **(BY MR. JACKLEY)** Mr. Amiotte, you had
3 indicated that essentially the distance from the top
4 of the cliff where this individual is standing to the
5 bottom where the body was found is how many foot?

6 **A.** Around 30 foot.

7 **Q.** Mr. Amiotte, when you came upon the body, did
8 you notice any distinctive jewelry?

9 **A.** Yes, I did. She did have jewelry. There was
10 a bracelet or -- her arm was extended from beneath her
11 and a turquoise bracelet that I noticed.

12 **Q.** Mr. Amiotte, I am handing you what's been
13 marked State's Exhibit 5.

14 Do you generally recognize what that
15 photograph depicts?

16 **A.** Yes, sir. That would be the jewelry that
17 caught my attention, anyway, from 30 foot away.

18 **MR. JACKLEY:** Your Honor, I would offer
19 State's Exhibit 5.

20 **MR. MURPHY:** May I see the exhibit?

21 No objection.

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

23 **Q.** **(BY MR. JACKLEY)** And Mr. Amiotte, what does
24 State's Exhibit 5 depict again?

25 **A.** A spider, butterfly, I wasn't sure.

1 **Q.** But that is the piece of jewelry that you
2 noticed that stuck in your mind when you had come upon
3 the body in February of 1976?

4 **A.** Yes. It was kind of a -- I didn't -- you
5 know, I didn't know whether it was a man or a woman.
6 And it was something that was kind of unisex jewelry
7 for the times.

8 **Q.** Did it appear that the body had been outdoors
9 or in the elements for a while?

10 **A.** Quite a long while.

11 **MR. JACKLEY:** No further questions at this
12 time, Your Honor.

13 **THE COURT:** Thank you.

14 Mr. Murphy?

15 **CROSS-EXAMINATION**

16 **BY MR. MURPHY:**

17 **Q.** Mr. Amiotte, my name is John Murphy.

18 We have never met before?

19 **A.** No.

20 **Q.** I am going to ask you some questions about
21 your testimony and I am going to refer to Exhibit 2.

22 Can you get a good view of Exhibit 2 or would
23 you like me to dim the lights?

24 **A.** I can see it.

25 **Q.** Okay.

1 The road we see there is Highway 73?

2 **A.** Yes, it is.

3 **Q.** And the white spot where the sheet is, that's
4 where Ms. Aquash's body was found?

5 **A.** Yes.

6 **Q.** It's about 150 feet if you went from
7 Highway 73 directly to the bluff above where
8 Ms. Aquash's body was found?

9 **A.** I would suppose. A hundred, hundred fifty.

10 **Q.** It's a good estimate based on your
11 familiarity with the land, a hundred to a hundred
12 fifty feet?

13 **A.** Yeah. At the present time the road was a lot
14 narrower then.

15 **Q.** Okay.

16 So even back then it would even be a little
17 farther?

18 **A.** Not necessarily.

19 **Q.** Okay.

20 Somewhere in the ballpark of a hundred to
21 150?

22 **A.** Right.

23 **Q.** Now, at the present time there a fence that
24 runs along the western border of Highway 73, correct?

25 **A.** That's correct.

1 **Q.** But at the time in 1976 there wasn't a fence
2 for half to three-quarters of a mile, correct?

3 **A.** That's true.

4 **Q.** And so --

5 **THE COURT:** Can we establish what is east and
6 west there?

7 **MR. JACKLEY:** Sure, Your Honor.

8 **Q.** (BY MR. MURPHY) Mr. Amiotte, that is west of
9 73, correct?

10 **A.** That's on the west side of the highway.

11 **Q.** So on the west side of the highway there
12 wasn't any fence line for half to three-quarters a
13 mile?

14 **A.** Not in that area, no. The cliff and the
15 draw, or canyon, you would call it, whatever, was a
16 natural barrier that I used. I just fenced it off at
17 both ends.

18 **Q.** Sure.

19 But at this time on February 24, 1976, you
20 were out there because you were going to join the
21 missing portion?

22 **A.** Right.

23 **Q.** Your cows were getting out on the road?

24 **A.** Right.

25 **Q.** And it was a nice day, the day that you went

1 out there to check the fence line?

2 **A.** Yes, I was.

3 **Q.** In fact, it had been a pretty warm February,
4 hadn't it?

5 **A.** I am guessing about 60 degrees. It was very
6 nice.

7 **Q.** When you approached, did you approach from
8 the roadside or were you down in the draw?

9 **A.** I was in the draw.

10 **Q.** You were on your horse?

11 **A.** No, I was afoot.

12 **Q.** Afoot.

13 When you got to that area where you saw the
14 body, saw the bracelet, did you see anything around
15 that area that stuck in your mind, any ropes, or
16 casings, or anything else?

17 **A.** There was nothing there.

18 **Q.** Okay.

19 And later that day, you brought law
20 enforcement back with you?

21 **A.** Yes.

22 **Q.** And did you walk all around that area at that
23 time?

24 **A.** No, I didn't. I stayed out of the -- it was
25 a law situation. I stayed up on the cliff.

1 Q. Okay.

2 And you stayed up on the cliff and you looked
3 down at where the body was?

4 A. Right.

5 Q. Did you see anything at all that drew your
6 attention or caused you concern up on the cliff?

7 A. Nothing there.

8 Q. All right?

9 MR. MURPHY: Nothing further.

10 Thank you.

11 **REDIRECT EXAMINATION**

12 **BY MR. JACKLEY:**

13 Q. Mr. Amiotte, you and Mr. Murphy talked about
14 a fence. And just -- I wanted to do a couple
15 follow-ups just so that I have it right.

16 This way would be headed south going that
17 way, correct?

18 A. That's right.

19 Q. And so north would be the way the pen is
20 facing, correct?

21 A. Correct.

22 Q. In 1994, would there have been a fence
23 running somewhat parallel to the highway?

24 A. No.

25 Q. Okay.

1 In 1976, if you were to go north a little
2 ways -- I believe now there is a type of a turn off so
3 to speak -- would there have been a fence?

4 **A.** Yes.

5 **Q.** Okay.

6 How far would the fence have been
7 approximately -- if we go directly across from the bed
8 sheet, how far north would you have to go to have hit
9 that fence, approximately?

10 **A.** Less than a quarter of a mile. It would
11 be -- I'm going to say probably 400 foot.

12 **Q.** Okay.

13 Just a couple of follow-up questions. How
14 far is the location where you found the body
15 approximately from your house?

16 **A.** A little over a mile.

17 **Q.** And your house would be to the south
18 direction, correct?

19 **A.** Yes.

20 **Q.** Is this location where -- where you found the
21 body visible from the road?

22 **A.** No, it isn't.

23 **MR. JACKLEY:** No further questions, Your
24 Honor.

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

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

2 **REXCROSS-EXAMINATION**

3 **BY MR. MURPHY:**

4 **Q.** Sir, in regard to -- in regard to the fence
5 you indicated was about 400 foot up the road, that was
6 a fence where there was a little bit of a landing, a
7 turn off?

8 **A.** Yes. There is a -- an approach approximately
9 where it is today from the highway.

10 **Q.** Uh-huh.

11 **A.** And the fence extended from that point in and
12 to the base of that -- of that draw there.

13 **Q.** So that wasn't a section of fence of miles;
14 it's just a short section of fence?

15 **A.** It was a short section of fence.

16 However, on north the highway was fenced.

17 **Q.** All right.

18 So if somebody were to say they had to cross
19 a fence to get to the bluffs where you looked down at
20 this body, that would mean they crossed a short
21 section of fence some 400 feet north on the highway
22 and they would have then had to walk all along the
23 bluffs 400 feet south and then some feet in, maybe a
24 hundred feet in?

25 **A.** Well, from that location there is a fence

1 about, like I'm saying, that is in the Badlands.

2 Q. All right.

3 So -- and maybe I didn't ask the question
4 clear enough. There is a fence somewhere up this
5 direction?

6 A. Right.

7 Q. If somebody said they crossed a fence and
8 then walked to the bluff, they would have to walk that
9 whole 400 feet down the road -- or down along the
10 bluffs to get to where you could see down to the
11 bottom, correct?

12 A. Yes.

13 Q. All right.

14 MR. MURPHY: All right. Thank you.
15 Nothing further.

16 MR. JACKLEY: Nothing further, Your Honor.

17 THE COURT: Thank you, Mr. Amiotte. You are
18 excused.

19 And if you are here on subpoena, you are
20 released from that.

21 (Witness excused.)

22 MR. MANDEL: The state would call John Munis,
23 Your Honor.

24 THE COURT: Please come forward sir.

25 Stop right here and we'll get you sworn in.

1 **Q.** Can you tell us how that came about, sir?

2 **A.** I was down on the Pine Ridge Reservation, I
3 believe it was the 25th of February of 1977. My
4 recollection. And we were advised by the Bureau of
5 Indian Affairs that an individual had been located in
6 a remote area. And there was no identification on the
7 body. And the body had been brought up to Pine Ridge
8 Hospital and an autopsy was currently being conducted
9 on the body.

10 **Q.** Did you ever go to the scene, sir?

11 **A.** To the --

12 **Q.** The scene where the crime took place.

13 **A.** I did not.

14 **Q.** You just went to the autopsy?

15 **A.** Correct.

16 **Q.** Can you tell me what the procedure was for
17 conducting autopsies down there at that time?

18 **A.** At that time, the pathologist that was being
19 used was out of -- I believe, it was Scottsbluff,
20 Nebraska, and his name was Dr. Brown.

21 And on that particular occasion I went to the
22 autopsy room where it was being performed. And the
23 primary reason was to see if there was any evidentiary
24 items or if there was any identification that had been
25 found on the body.

1 **Q.** Where was that autopsy room where the
2 autopsies were performed?

3 **A.** In the basement of the hospital at Pine
4 Ridge.

5 **Q.** When you went there, were you able to gather
6 any evidence that was of note regarding the body?

7 **A.** There wasn't any evidence concerning
8 identification for the body, no.

9 **Q.** What was the condition of the body based on
10 your observation?

11 **A.** It was somewhat decomposed.

12 One of the things that I thought I would
13 attempt to do at that time is to take fingerprints,
14 but it was obvious because of the condition of the
15 body that that was beyond my ability.

16 **Q.** What was the difficulty in that regard, if
17 you recall?

18 **A.** The hands were somewhat shelved. They were
19 in more or less a closed position. And in touching
20 the flesh, it was evident that it would come lose from
21 the body.

22 **Q.** What action -- first of all, I take it at
23 that point there was no other way to identify the
24 body?

25 **A.** That is correct.

1 **Q.** What action did you then take regarding
2 obtaining fingerprints?

3 **A.** Well, once I determined that I wasn't able to
4 get the prints, I made a telephone call back to our
5 lab in Washington DC and asked them for a
6 recommendation as to what should be done. The bureau
7 told me that I should ask the pathologist to remove
8 the hands and have them submitted back there so that
9 they could take fingerprints.

10 **Q.** So I understand, you felt that you were not
11 able to obtain fingerprints from the hands there at
12 the scene?

13 **A.** That is correct.

14 **Q.** So what action did -- who took the action
15 regarding --

16 **A.** I asked the pathologist if he would remove
17 the hands, which he did. And I -- my recollection is
18 that he turned the hands over to the criminal
19 investigator, Nate Merrick, and Nate Merrick in return
20 turned the hands over to me.

21 I took the hands from the reservation back to
22 Rapid City and I was directed in submitting them to
23 the bureau they should be in a formaldehyde solution.
24 I believe they recommended 10 percent formaldehyde
25 solution. And I believe I went to one of the

1 hospitals to get the solution and encompassed the
2 hands in that solution and submitted them to the
3 bureau along with the clothing that the deceased had.

4 Q. And just so I understand, the formaldehyde
5 solution, it was just a liquid solution that they were
6 suspended in?

7 A. Correct.

8 Q. That was so they wouldn't suffer any more
9 damage while they were transported?

10 A. That is correct.

11 Q. And I want to make sure I understand this,
12 the laboratory had some specific technique for
13 obtaining fingerprints that couldn't be done out in
14 the field?

15 A. They did. I am not familiar with what
16 technique they used but they did have the ability to
17 take prints from that type of a hand.

18 Q. But that was the reason they wanted the hands
19 transported?

20 A. That is correct.

21 Q. Beyond that, did you have any continued
22 involvement in this investment?

23 A. I did not.

24 Q. Was it assigned to another agent?

25 A. It was and I am not sure which agent it was

1 assigned to.

2 Q. Okay.

3 MR. MANDEL: I have nothing further, Your
4 Honor.

5 THE COURT: Mr. Murphy?

6 MR. MURPHY: Thank you.

7 CROSS-EXAMINATION

8 BY MR. MURPHY:

9 Q. Mr. Munis, my name is John Murphy. I am just
10 going to ask you a few questions.

11 At the time that you showed up at the
12 autopsy, you were made aware that the body had been
13 found the previous day?

14 A. It could have been either that day or the
15 previous day. I am not sure.

16 Q. But if prior testimony indicated the body was
17 found on the 24th of February, you're clear that the
18 autopsy that you attended was on the 25th of
19 February?

20 A. My recollection is it was the 25th, yes.

21 Q. And if you have any questions about that,
22 would it help to refresh your recollection if I showed
23 you the autopsy report?

24 A. It would or if you were to show me my what's
25 referred to as an FD302.

1 **MR. MURPHY:** Your Honor, may I approach?

2 **THE COURT:** You may.

3 **Q. (BY MR. MURPHY)** Mr. Munis, I am first going
4 to show you the autopsy report. If you might read
5 that first paragraph.

6 Does that help you in identifying the date?

7 **A.** Yes, it does. It does confirm February 25
8 was the correct date.

9 I believe I made a mistake of saying 1977.
10 This shows 1976.

11 **Q.** Okay.

12 Would you like to also see your 302?

13 **A.** Yes.

14 This confirms that I did receive them on the
15 25th.

16 **Q.** So you had no prior involvement with the body
17 until the day after it was found?

18 **A.** I did not.

19 **Q.** And part of the process that you were
20 involved in was to take what are called -- sometimes
21 called artifacts from the body; is that correct?

22 **A.** That is correct.

23 **Q.** And you took the clothing that was removed by
24 the pathologist, correct?

25 **A.** That is correct.

1 **Q.** And that included underwear and outer
2 garments, as well?

3 **A.** It did.

4 **Q.** In the autopsy it indicates that there was
5 also a Kotex pad that was recovered from the underwear
6 at the time the body was autopsied.

7 Do you recall taking possession of that Kotex
8 pad?

9 **A.** I have no recollection of that, no.

10 **Q.** Okay.

11 If it was in the underwear, it would have
12 gone with the underwear when you took the underwear?

13 **A.** I assume it would have. Yes.

14 **Q.** Do you recall from the autopsy report the
15 statement by the pathologist that a Kotex pad was in
16 the crotch of the panties at the time they were
17 removed from the body?

18 **A.** I don't have recollection of that.

19 **Q.** In any case, you have no idea what happened
20 to that Kotex pad?

21 **A.** I have no idea.

22 **Q.** All right.

23 And -- but the underwear and other items were
24 collected by you, you firmly recall that?

25 **A.** Yes, they were.

1 Q. And they were placed into evidence?

2 A. Correct.

3 Q. Okay.

4 MR. MURPHY: Nothing further.

5 Thank you.

6 THE COURT: Mr. Mandel?

7 REDIRECT EXAMINATION

8 BY MR. MANDEL:

9 Q. Sir, do you recognize that autopsy report?

10 A. I do.

11 Q. Is that the report from the autopsy that you
12 attended on that date?

13 A. Yes, it is.

14 Q. That indicates the autopsy was on the
15 25th of February, 1976?

16 A. That is correct.

17 MR. MANDEL: I'd offer State's Exhibit 11,
18 Your Honor.

19 MR. MURPHY: I object. It's a hearsay
20 document. We obtained the testimony.

21 THE COURT: Sustained at this point.

22 MR. OSWALD: May we approach?

23 (Whereupon, a discussion was held at the
24 bench.)

25 MR. OSWALD: Your Honor, the State's

1 Exhibit 11, the autopsy report, was previously
2 referred to at great length as to the Kotex. And to
3 the dates and it was shown to this witness. And if
4 the Court -- we're not arguing with the Court's
5 ruling. We ask for a motion to strike the hearsay of
6 the Kotex from the report that was used for this
7 witness by the defense.

8 **THE COURT:** Fundamentally, I don't see a
9 difficulty in getting the report into evidence. But
10 at this point it is hearsay -- it's just simply
11 without foundation. The use -- to whatever extent
12 Mr. Murphy objects to it, I can't imagine there is
13 difficulty in meeting those requirements to get it.

14 **MR. MURPHY:** It will come in through
15 Dr. Peterson. I used it to refresh his recollection.
16 He said it would help.

17 **THE COURT:** That's what I would assume.
18 Is he going to testify?

19 **MR. OSWALD:** He will.

20 **THE COURT:** We need it before then?

21 **MR. OSWALD:** Well, he referred to it, Judge.
22 He specifically referred to --

23 **THE COURT:** I understand that. That doesn't
24 necessarily make it admissible as far as I know. I
25 could be educated on that subject, but I don't think

1 it does.

2 **MR. OSWALD:** That's what our position is is
3 it doesn't make what he -- what Mr. Murphy said
4 admissible either if he referred to the document.

5 **THE COURT:** Number one, it's probably a
6 little late for that objection. But number two, I
7 think it's probably fair game to ask and it was a
8 refreshing recollection. You don't let the reports in
9 on refreshed recollection. At least I don't.

10 **MR. MURPHY:** In the future how many attorneys
11 do we need to do these bench conferences?

12 Mr. Mandel is asking the questions.

13 **THE COURT:** Six or seven, but the only one
14 talking is Mr. Oswald.

15 (Whereupon, the discussion at the bench was
16 then concluded.)

17 **MR. MANDEL:** Nothing further, Your Honor.

18 **THE COURT:** Thank you.

19 You may step down, sir.

20 You are excused from the subpoena if that's
21 how you are here.

22 (Witness excused.)

23 **MR. JACKLEY:** Your Honor, would it be
24 appropriate before the state calls its next witness --
25 we have a stipulation to be read to the jury by

1 counsel regarding the fingerprints.

2 **THE COURT:** It would be appropriate.

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

4 Stipulation. The parties to this action have
5 agreed and stipulated to certain matters. You may
6 accept this stipulation as if proven by the parties.

7 The parties agree that the fingerprints taken
8 from the hands of the body found by Roger Amiotte on
9 February 24, 1976, belonged to Annie Mae Aquash.
10 Thus, the body found by Roger Amiotte has been
11 positively identified as Anna Mae Aquash.

12 **THE COURT:** Thank you.

13 Ladies and gentlemen, as I indicated earlier,
14 evidence consists of and includes stipulations and
15 agreements by the parties as to evidence obtained.

16 Thank you.

17 **MR. MANDEL:** The state would call Bill Wood,
18 Your Honor.

19 **THE COURT:** Please raise your right hand.

20 BILL WOOD,
21 called as a witness herein, having been duly sworn,
22 under oath testified as follows:

23 **THE COURT:** Please take a seat.

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DIRECT EXAMINATION

BY MR. MANDEL:

Q. Afternoon, sir.

Could you state your name, please.

A. William B. Wood.

Q. Sir, where do you reside?

A. Fredericksburg, Virginia.

Q. What is your occupation?

A. I am retired.

Q. What are you retired from?

A. The Federal Bureau of Investigation.

Q. What were your specific duties with the FBI?

A. I was assigned to Rapid City, South Dakota.

I was an investigator, special agent, working on the Pine Ridge Indian Reservation.

Q. So I don't lose track here, what years were you employed by the FBI?

A. From 1966 to 1997.

Q. And what years were you in Rapid City?

A. From 1975 to 1992.

Q. During the time you were here, you were at all times a special agent of the FBI?

A. Yes, sir.

Q. As part of your duties here, were you involved in the investigation of the death in 1976 of

1 Annie Mae Pictou Aquash?

2 **A.** Yes, sir.

3 **Q.** Can you tell us when and how you first became
4 involved in that, sir?

5 **A.** It was -- the case was originally assigned to
6 another agent. And -- for various reasons, I took the
7 case over just a couple of days after the initial
8 investigation was started and after the autopsy.

9 **Q.** At that time had any identification of the
10 body been made?

11 **A.** No, sir.

12 **Q.** What efforts were made by the FBI to identify
13 that individual?

14 **A.** At the time of the first autopsy, the hands
15 were removed by the pathologist and were sent to the
16 FBI identification division for -- for them to take
17 fingerprints from the hands.

18 **Q.** Did the identification division have some
19 ability to get fingerprints from these decomposed
20 hands that were not available from the field?

21 **A.** Yes, sir. The hands were what I would refer
22 to as mummified, but they were shriveled up and dried
23 out and they have special techniques that they use for
24 that purpose of getting the fingerprints if there are
25 any remaining.

1 **Q.** Was an identification made as to whose body
2 it was?

3 **A.** Yes, sir.

4 **Q.** Whose body was it?

5 **A.** It was the body of Anna Mae Aquash.

6 **Q.** Do you recall when that identification was
7 made?

8 **A.** I think it was around March the -- around
9 March the 2nd. I don't recall the exact date. It
10 was in March of 76. I would have to look.

11 **Q.** When you were informed as to who it was, did
12 that raise your interest level in the case?

13 **A.** Yes, it did.

14 **Q.** Why was that?

15 **A.** Because she was a known associate or member
16 of the American Indian Movement, and people that were
17 involved in the Pine Ridge Indian Reservation area
18 with Leonard Peltier and some others.

19 **Q.** During the course of the first autopsy, no
20 identification had been made, correct?

21 **A.** That is correct.

22 **Q.** Was it the intention of the FBI to have the
23 body buried before an attempt could be made at that
24 identification?

25 **A.** No, sir, it was not.

1 Q. Was the body buried?

2 A. Yes, sir, it was.

3 Q. And that was prior to when you got the
4 identification?

5 A. Yes, sir.

6 Q. Can you explain how or why that happened?

7 A. The Bureau of Indian Affairs on Pine Ridge
8 basically had custody -- or took custody of the body.
9 And they ordered the body to be interred in basically
10 what would be a pauper's grave at Red Cloud Indian
11 School near there.

12 Q. After the identification was made, did you
13 believe further action had to be taken regarding the
14 body?

15 A. Yes, sir.

16 Q. Why did you believe that?

17 A. Well, because I didn't believe the initial
18 report that was made in the autopsy. I just wanted to
19 check and see if that was exactly what another
20 pathologist would come up with. I wanted to see if
21 there were any injuries to the body that could be
22 determined. I didn't think that the first autopsy had
23 been complete enough.

24 Q. Do you recall what the cause of death had
25 been in the first autopsy?

1 **A.** I believe it was exposure.

2 **Q.** And you questioned that?

3 **A.** Yes, sir.

4 **Q.** What action did you then take in that regard?

5 **A.** I got a court order -- I submitted an
6 affidavit to the federal court in Rapid City to Judge
7 Bogue and requested that the body be exhumed.

8 **Q.** And what does exhume mean?

9 **A.** That her body be dug up and another -- I
10 wanted another autopsy done and that's what the
11 request was for.

12 **Q.** Were you present when the body was exhumed?

13 **A.** Yes, sir, I was.

14 **Q.** How did that take place?

15 **A.** It was done by the Bureau of Indian Affairs.
16 They used a backhoe. And when they got to the coffin,
17 then they used shovels, and they had some people that
18 were Bureau of Indian Affairs employees. Once they
19 got the casket out of the ground, then they put it on
20 a flatbed truck and it was transferred to the hospital
21 to the morgue at the Pine Ridge Hospital.

22 **Q.** Was there some sort of an arrangement made
23 for another pathologist to perform a second autopsy?

24 **A.** Yes, sir. Dr. Garry Peterson, he's the chief
25 medical examiner -- or at that time was for Hennepin

1 County in Minnesota and he was the person that was
2 requested to do the autopsy.

3 Q. Do you know how his presence there came
4 about?

5 A. Yes, sir.

6 Q. How was that?

7 A. Bruce Ellison who at one time had represented
8 Anna Mae Aquash in federal court had contacted -- I
9 don't recall if he contacted me or not. But anyway he
10 had requested that Garry Peterson be used to do the
11 second pathological examination of the remains.

12 Q. Do you recall, was the initial plan to use
13 Dr. Peterson or was he merely to be present?

14 A. No. As far as I was recall, he was to be the
15 person doing the autopsy.

16 Q. Okay.

17 What first took place regarding the autopsy?

18 A. You mean at the hospital?

19 Q. Yes.

20 What's the first action that took place?

21 Was there an x-ray performed?

22 A. I honestly don't recall if there was or not.

23 Q. Okay.

24 What do you recall taking place, sir?

25 A. I recall that Dr. Peterson -- he removed the

1 organs which had been originally removed by Dr. Brown
2 in the first autopsy. And there was -- then he was
3 examining -- reexamining the body and the head. And
4 in looking at the head, the skull cavity is where he
5 found a bullet.

6 Q. Do you recall if that was through the use of
7 x-ray or not?

8 A. I think it may have been, but -- it probably
9 was. That was the standard procedure.

10 Q. Then what was -- what was done with the
11 bullet that was found?

12 A. It was turned over to me.

13 Q. You have in front of you, sir, what I think
14 is marked State's Exhibit 8?

15 A. Yes, sir.

16 Q. What exactly is that?

17 A. This is basically the piece of metal that was
18 removed and later confirmed to be a bullet fragment
19 and it was -- I placed it in this box as evidence.

20 Q. That consists of a bullet in a small box?

21 A. Yes, sir.

22 Q. First of all, I assume you can't -- you
23 can't -- do you recall the bullet as looking like the
24 one you obtained at that time?

25 A. Yes, sir.

1 **Q.** Are there other ways that you can identify
2 that as being the one that you got?

3 **A.** Well, there are my initials on the box. This
4 is the box that I used. There is a date on there of
5 March the 11th of 1976. And, of course, my initials
6 appear on that. I don't recall if I was able to put
7 any marks on the bullet.

8 **Q.** Did you use that box to send the bullet in to
9 the FBI laboratory?

10 **A.** Yes, sir, I did.

11 **Q.** Could you explain to us procedurally how that
12 works in a case such as this.

13 **A.** I send a cover letter with it and give them a
14 little brief history of where the bullet came from.
15 And then ask them to see what they -- if they can
16 identify it. I merely tell them that it's a piece of
17 metal that was removed from a head during an autopsy.

18 **Q.** You don't even make the assumption that it
19 was a bullet, in other words?

20 **A.** No, sir.

21 **Q.** I assume, although you don't state that, you
22 probably reached that conclusion when you saw it?

23 **A.** Yes, sir.

24 **Q.** When you sent it into the laboratory, what
25 type of examination are you expecting them to perform

1 on it?

2 **A.** I expect them to try to determine the caliber
3 of the bullet and if there are any markings on the
4 bullet that could probably identify it from the weapon
5 that it was fired from.

6 **Q.** Okay.

7 After that -- the examination is performed at
8 the laboratory, what takes place with the bullet?

9 **A.** Then the bullet is placed back in the
10 original container and returned to the person that
11 sent it, to the agent that sent it. And a report is
12 submitted to that office.

13 **Q.** And what do you do so you can maintain the
14 ability to continue to identify that?

15 **A.** Well, this -- this is placed into what we
16 call evidence and it's placed in an evidence locker
17 and is kept under lock and key until it's used in
18 court.

19 **Q.** Now, during the autopsy, did Dr. Peterson
20 indicate anything as to what the cause of death was in
21 that case?

22 **A.** Dr. Peterson, as I recall, put down that the
23 cause of death had been gunshot wound to the head.

24 **Q.** Did you continue further investigation in
25 this matter, sir?

1 **A.** Yes, sir.

2 **Q.** What actions did you take after the autopsy?

3 **A.** Trying to interview as many people as we
4 could that we knew that were familiar with Anna Mae
5 Aquash and possibly her movement during that period of
6 time prior to the last time that she was known to have
7 been in the area.

8 **Q.** At that time, did you have any success with
9 that part of the investigation?

10 **A.** No, sir, we did not.

11 **Q.** Was Annie Mae Aquash an individual who was
12 known to you?

13 **A.** I have seen photographs of her.

14 **Q.** Were people uncooperative or were they just
15 not knowledgeable regarding this matter?

16 **MR. MURPHY:** Objection.

17 **THE COURT:** Sustained.

18 The cooperative stands, but knowledgeable
19 doesn't.

20 **Q.** **(BY MR. MANDEL)** Let me rephrase my question.

21 Were the people you dealt with in that regard
22 cooperative?

23 **A.** No, sir, they were not.

24 **Q.** Did you gain any useful information in that
25 regard?

1 **A.** No, sir.

2 **Q.** Was one of the individuals you interviewed an
3 individual by the name of Cleo Marshall?

4 **A.** Yes, sir.

5 **Q.** Did she provide any information regarding
6 this?

7 **MR. MURPHY:** Objection. Calls for hearsay
8 and it's leading.

9 **THE COURT:** The answer to the question
10 doesn't, but the next question might. It's a yes or
11 no question.

12 **A.** Would you repeat the question, please?

13 **MR. MANDEL:** I'd ask the reporter to read
14 that back.

15 (Whereupon, the question was then read back
16 by the Court Reporter.)

17 **A.** No, she did not.

18 **Q.** **(BY MR. MANDEL)** Essentially, did she indicate
19 she had no knowledge of the matter?

20 **MR. MURPHY:** Objection. It's leading and
21 it's putting hearsay into the record.

22 **THE COURT:** Sustained.

23 **Q.** **(BY MR. MANDEL)** Did you conduct further
24 investigation out at the scene where this took place?

25 **A.** Yes, sir, we did.

1 **Q.** Can you tell us what sort of investigation
2 you conducted out there, and with what objective?

3 **A.** We went out with a metal detector to -- the
4 objective was to see if we could find anything else of
5 value out there. The use of the metal detector would
6 have been to try to find any metal that might be in
7 the area.

8 **Q.** Do you recall what the scene looked like?

9 **A.** Vaguely.

10 **Q.** If I showed you a photograph, do you think
11 you might recognize it?

12 **A.** Yes, sir.

13 **Q.** Sir, I am showing you what's been marked
14 State's Exhibit No. 2. I think I am reading this
15 right.

16 Are you able to identify that area?

17 **A.** As I recall, this is the crime scene where
18 the body was found.

19 **Q.** Do you recall how wide an area you searched
20 in terms of looking for the location of metal or
21 things at the site?

22 **A.** Not specifically. I think we -- I think we
23 searched a number of yards out, but I don't recall the
24 exact amount -- the exact distance.

25 **Q.** Do you recall where the body was believed to

1 have been initially shot?

2 **A.** It was our belief that she was shot above an
3 embankment and the body was found at the base of the
4 embankment.

5 **Q.** Sir, I am showing you State's Exhibit No. 2
6 up on the -- being projected up on the wall there.

7 We've had previous testimony that this white
8 spot is where the body was located there.

9 Is that consistent with your recollection?

10 **A.** Yes, sir.

11 **Q.** Okay.

12 When you say you searched with a metal
13 detector, where did you do that searching?

14 **A.** We did on the top of the embankment and --

15 **Q.** Would that be up in this area?

16 **A.** Yes, sir.

17 And then down at the base where the body was
18 found. We did further examination in that area.

19 **Q.** Okay, sir, I will show you State's Exhibit
20 No. 4. That shows the body located at the bottom
21 there, again, of that Badlands wall. You did
22 searching down in the area where the body was located
23 as well as up at the top of that photograph?

24 **A.** Yes, sir.

25 **Q.** Do you recall how long you spent out there

1 doing it?

2 **A.** I guess it took a couple hours.

3 **Q.** Did you have any success?

4 **A.** No, sir, we did not.

5 **MR. MANDEL:** Your Honor, I would offer
6 Exhibit No. 8 at this time.

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

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

9 **MR. MANDEL:** I have no further questions at
10 this time, Your Honor.

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

12 **CROSS-EXAMINATION**

13 **BY MR. MURPHY:**

14 **Q.** My name is John Murphy. We have only spoken,
15 I believe, once on the phone; is that correct?

16 **A.** That's correct.

17 **Q.** And I am going to ask you some questions. If
18 I ask a question that doesn't make sense please just
19 let me know.

20 Now, it's my understanding you worked for the
21 FBI for a number of years, but what years were you
22 involved in the investigation of the death of Anna Mae
23 Aquash?

24 **A.** Oh, from -- as I testified earlier, from the
25 first part of March of 1976 until -- in that regard I

1 don't recall when the case was reassigned to another
2 agent. I honestly don't recall the date.

3 Q. Did you get the case from Agent Don Dealing?

4 A. Yes.

5 Q. And it went on to Agent Garber?

6 A. Correct.

7 Q. Okay.

8 Would it be accurate -- refresh your
9 recollection if Agent Garber took over about 1980, 81?

10 Was that more or less consistent with your
11 thoughts?

12 A. Somewhere in that time period, yes.

13 Q. All right.

14 And part of your duties as you just talked
15 about was to go to the crime scene and search the
16 area, correct?

17 A. Yes.

18 Q. And you had been trained before at the FBI
19 academy and whatnot in how to go about doing a search
20 for forensic evidence?

21 A. Yes.

22 Q. And when you went out, you didn't go out by
23 yourself, did you?

24 A. No.

25 Q. You brought a team with you?

1 **A.** I brought -- some other agents were with me,
2 yes.

3 **Q.** To the best of your knowledge, they were
4 similarly trained?

5 **A.** Yes, sir.

6 **Q.** And you brought a metal detector?

7 **A.** Yes.

8 **Q.** Anything else -- did you bring with you any
9 instruments or tools?

10 **A.** Not that I recall.

11 **Q.** Okay.

12 At the point you went out there, Ms. Aquash's
13 body had already been identified, correct?

14 **A.** That I don't know. I would have to look at
15 the date of when we went out there and I don't recall
16 what the date was.

17 **Q.** Let me see if I've got that. I don't have
18 that 302 with me, but it would it be fair to say if
19 you had -- if you hadn't known who Ms. Aquash was --

20 If you had just received information that a
21 body had been found in the area and the preliminary
22 diagnosis was death by exposure, would you and your
23 team of FBI agents have gone out there to do an
24 extensive search of the area?

25 **A.** Possibly.

1 **Q.** Would it be more likely that once you found
2 out that the decedent was Anna Mae Aquash that you
3 would have taken follow-up steps to thoroughly search
4 the area?

5 **A.** Yes.

6 **Q.** And in any regard, you did thoroughly search
7 the area?

8 **A.** Yes.

9 **Q.** All right.

10 You didn't cut corners or anything like that?

11 **A.** No.

12 **Q.** You found nothing of forensic value either on
13 the bluffs or down below; is that fair?

14 **A.** Not that I recall.

15 **Q.** All right.

16 If you had recalled it -- if you had gathered
17 some evidence, whether it be bullet casings or actual
18 spent bullets or other items, you would have put them
19 in evidence bags like Exhibit 8?

20 **A.** Yes.

21 **Q.** And you would have tested them or kept them,
22 right?

23 **A.** Correct.

24 **Q.** And you don't have any of those things?

25 **A.** No, sir.

1 **Q.** So it would be fair to say nothing of
2 evidentiary value was found?

3 **A.** Yes.

4 **Q.** Okay.

5 Now, I want to talk to you about the burial
6 of the body. The first burial. Your recollection
7 March 2, 1976?

8 **A.** That's when I received a call from the Bureau
9 of Indian Affairs investigator that was assigned to --

10 **Q.** And that Investigator was Nathan Merrick?

11 **A.** Correct.

12 **Q.** Would it help refresh your recollection as to
13 the date if I showed you your report on that?

14 **A.** I recall that it was March the 2nd.

15 **Q.** Okay.

16 At that point, were you aware that people on
17 the scene -- people who had come on February 24, 1976,
18 found the body, had already concluded that foul play
19 was present?

20 That they suspected this was a homicide or
21 some suspicious death?

22 **A.** Not -- no, because that was after the
23 autopsy.

24 **Q.** Okay.

25 So nobody told you when you came on the case

1 some time that first couple days in March that people
2 had already concluded before her -- this body was
3 identified, that there was foul play suspected?

4 **A.** Nobody had concluded that, no.

5 **Q.** Or nobody had told you that they had
6 concluded that?

7 **A.** Okay.

8 **Q.** Okay.

9 Would that be more fair to say?

10 **A.** Yes.

11 **Q.** Now, the autopsy was done on February 25, and
12 the body was buried March 2. That was only three
13 business days after the autopsy.

14 Is that a fair recollection or would you like
15 to look at a calendar?

16 I can show you a calendar if that would help.

17 **A.** I would have to look at a calendar.

18 **MR. MURPHY:** May I approach the witness, Your
19 Honor?

20 **THE COURT:** You may.

21 **Q. (BY MR. MURPHY)** I am going to show you just
22 for demonstrative purposes a calendar marked
23 February 1976.

24 What day of the week was February 24?

25 **A.** It was a Tuesday.

1 Q. Okay.

2 And that was the date the body was found?

3 A. Yes.

4 Q. And the autopsy was done on the 25th?

5 A. Yes.

6 Q. Okay. And that's the Wednesday.

7 What date is March 2?

8 A. March 2 is a Monday.

9 Q. All right.

10 So then after the autopsy, there was
11 Thursday, Friday, and by Monday the body had been
12 buried, correct?

13 A. Yes.

14 Q. Okay.

15 Do you know what the rush was?

16 A. I wasn't consulted.

17 Q. All right.

18 Well, let me ask you about that. This is a
19 person who had not been identified. There had been no
20 identification at the time she was buried, correct?

21 A. That's correct.

22 Q. And somebody had taken the effort of removing
23 her hands and sending them to the FBI lab, right?

24 A. Correct.

25 Q. And those results hadn't come back yet,

1 correct?

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

3 **Q.** And it normally takes several days,
4 especially during that period of time, prior to all
5 the computerization we have now, for the lab and FBI
6 to do their job, correct?

7 **A.** Yes.

8 **Q.** All right.

9 And there is processes involved or mechanisms
10 involved for preserving a body while you wait for
11 further identification, correct?

12 **A.** At that time on Pine Ridge I don't recall how
13 many lockers they had in the morgue which was
14 sometimes refrigerated and sometimes not.

15 **Q.** Well, do you recall that from your review of
16 the initial autopsy report and other documents that
17 after the initial autopsy, the body actually had been
18 wrapped in a powdered formaldehyde to preserve?

19 **A.** Do I recall?

20 **Q.** That in Pine Ridge, after Dr. Brown did his
21 autopsy, he took efforts to preserve the body with a
22 formaldehyde powder?

23 Do you -- do you recall that?

24 **A.** Well, when she was exhumed.

25 **Q.** When she was exhumed you saw the evidence of

1 that?

2 **A.** Yes.

3 I did not know that before.

4 **Q.** All right.

5 But you saw when her body was exhumed that
6 she actually had been coated in a powder that was
7 meant to preserve her?

8 **A.** Yes.

9 **Q.** Okay.

10 Now, it's my understanding you are saying it
11 was the BIA that ordered that she be buried
12 immediately, correct?

13 **A.** Yes.

14 **Q.** And specifically it was -- that was
15 communicated to you by Nate Merrick?

16 **A.** Correct.

17 **Q.** At that point from the initial finding of the
18 body, the FBI had been involved in the investigation,
19 had it not?

20 **A.** Yes.

21 **Q.** FBI agents were out at the scene with BIA
22 agents right away, correct?

23 **A.** They were called to the scene, yes.

24 **Q.** And they all reviewed the scene together,
25 correct?

1 **A.** Yes.

2 **Q.** And when the body was brought back to Pine
3 Ridge Hospital, the hands, the underwear, and all the
4 other garments were turned over from the BIA to the
5 FBI, correct?

6 **A.** They were -- as far as I recall -- and I
7 wasn't at the first autopsy -- there was an agent
8 present at the autopsy.

9 **Q.** An FBI agent?

10 **A.** Yes.

11 **Q.** And you know that that FBI agent took the
12 hands, correct?

13 **A.** Yes.

14 **Q.** And shipped them off to the FBI lab?

15 **A.** Yes.

16 **Q.** And you know the clothing was also put into
17 FBI evidence, correct?

18 **A.** Yes.

19 **Q.** As well as the bullet, correct?

20 **A.** No. The bullet wasn't from the first
21 autopsy.

22 **Q.** Right.

23 But, I mean, ultimately, the bullet was taken
24 into FBI custody, correct?

25 **A.** Yes.

1 **Q.** So how is it that -- if this was something
2 that the FBI didn't want, how is it that the FBI
3 couldn't control when Ms. Aquash's body was buried?

4 **A.** I can't answer that.

5 **Q.** In any regard, about six days later, March 8,
6 there begins to be a process where the body is going
7 to be exhumed, correct?

8 **A.** Yes.

9 **Q.** And it appears that both the FBI and
10 Mr. Ellison, who was an attorney for AIM, are working
11 at the same time to get the body exhumed; is that your
12 recollection?

13 **A.** I had no indication that anybody was seeking
14 exhumation of the body other than myself was seeking a
15 court order for that. As far as I knew I was the only
16 person trying to do that.

17 **Q.** You weren't aware of FBI reports that
18 Mr. Ellison showed up at your office on March 8 asking
19 that Anna Mae's body be exhumed so that they could
20 find out the cause of death?

21 **A.** That may have occurred. And I was probably
22 made aware of that at the time. But my --

23 I guess what I am saying is that my attempt
24 to do the court order was already in process. And
25 there was nobody else doing it up until the point when

1 Mr. Ellison made his comments.

2 Q. Okay.

3 Well, in any regard, Mr. Ellison was an AIM
4 lawyer, correct?

5 A. Yes.

6 Q. All right.

7 And he came to the FBI and said we don't buy
8 this diagnosis of death by exposure, correct?

9 A. I wasn't present.

10 Q. All right.

11 Were you made aware of those conversations
12 with other FBI agents?

13 A. I was made aware that there were
14 conversations, yes.

15 Q. Of that nature?

16 A. I think so.

17 Q. Would it help to refresh your recollection to
18 look at a 302 of one of your fellow agents?

19 A. Sure.

20 **MR. MURPHY:** May I approach, Your Honor?

21 **THE COURT:** You may.

22 Q. **(BY MR. MURPHY)** Would you identify what that
23 document is and the date of the document?

24 A. Yes. This is what's called an FD302 and it's
25 a form that's used to record an interview conducted by

1 a special agent of the FBI with another person.

2 Q. And what was the date of the interview in
3 this case?

4 A. March the 8th, 1976.

5 Q. And the interview was done with?

6 A. Bruce Ellison.

7 Q. All right.

8 If you need to take a minute to read through
9 that, if it refreshes your recollection.

10 A. Okay.

11 Q. Does that help refresh your recollection of
12 activities going on with your office?

13 MR. MANDEL: Your Honor, might I see what's
14 being shown to him?

15 MR. MURPHY: And maybe, for the record, I am
16 looking at Graham document 774.

17 Q. (BY MR. MURPHY) Sir, after having reviewed
18 that document, you are now refreshed as to some of the
19 conversations that were made known to you about
20 Mr. Ellison's activities?

21 MR. MANDEL: Objection. Hearsay.

22 Might I ask a couple questions?

23 THE COURT: Overruled.

24 The question is is his memory refreshed and
25 the answer is yes or no.

1 **Q.** **(BY MR. MURPHY)** Is your memory now refreshed
2 as to conversations that you were made aware of
3 regarding Mr. Ellison's activities pertinent to the
4 exhumation of Ms. Aquash's body?

5 **A.** Yes.

6 **Q.** So at the time that you were involved in this
7 investigation, and at the time you were preparing
8 materials for Judge Bogue, people at AIM were also
9 seeking the same kind of relief, correct?

10 **MR. MANDEL:** Objection. It's questioning the
11 witness's knowledge of hearsay that he received from
12 another agent.

13 **THE COURT:** I don't think that's hearsay the
14 way it's formed.

15 You may answer.

16 **A.** Can you have the question read back?

17 **Q.** **(BY MR. MURPHY)** Sure.

18 (Whereupon, the question was then read back
19 by the Court Reporter.)

20 **A.** That became my knowledge after that
21 conversation. I did not say they were doing that
22 prior to that date.

23 **Q.** **(BY MR. MURPHY)** That's fine.

24 You saw the report was dated March 8?

25 **A.** Yes.

1 **Q.** And that's actually the same date that you
2 got your court order from Judge Bogue; is that
3 correct.

4 **A.** Again, I would have to recollect -- I would
5 have to refresh my memory of that.

6 **MR. MURPHY:** Your Honor, may I approach the
7 witness again?

8 **THE COURT:** You may.

9 **MR. MURPHY:** May I have standing permission
10 to approach?

11 **THE COURT:** As far as I am concerned you may,
12 and that goes for both sides unless it's a hostile
13 witness. That is, more than an opposition witness.
14 Then we ask. Otherwise, go ahead.

15 **MR. MURPHY:** It's just less words for Tina to
16 write down.

17 **Q.** **(BY MR. MURPHY)** Agent, what I am going to
18 show you is something that appears to be an affidavit
19 you prepared to get the exhumation of the body.

20 If you wouldn't mind just page through. I
21 want to make sure that's an accurate representation of
22 your document.

23 **A.** Yes, sir.

24 **Q.** If you wouldn't mind turning to the last page
25 and noting the date that you filed that affidavit.

1 **A.** March the 8th.

2 **Q.** All right.

3 So the same date?

4 **A.** Yes.

5 **Q.** And you had to prepare this affidavit before
6 you even went into court to get that court order,
7 correct?

8 **A.** Yes.

9 **Q.** Do you even -- do you recall at this point
10 what date that court order was signed?

11 **A.** I assume it was signed on the 8th.

12 **Q.** Do you have a recollection of the judge
13 actually signing it on the day that you prepared your
14 affidavit or are you -- I am trying to get a sense --
15 are you sure the same day you drafted this affidavit
16 the judge signed order?

17 **A.** I can't say.

18 **Q.** All right.

19 So it was either the 8th or some date after
20 that, correct?

21 The order was granted some day either on the
22 8th of March or some day after?

23 **A.** You are asking when the order was granted?

24 **Q.** Yeah.

25 **A.** That was granted the same day.

1 Q. Okay.

2 So you recall that?

3 A. Yes.

4 Q. All right.

5 Now, at the time that you found out that Anna
6 Mae Aquash was the decedent, that raised some red
7 flags in your mind, did it not?

8 A. Yes.

9 Q. At this point you knew Ms. Aquash's name,
10 correct?

11 A. Yes.

12 Q. She was wanted as a fugitive on a number of
13 federal guns and weapons charges, correct?

14 A. Yes.

15 Q. And some of those charges were being
16 prosecuted in Pierre, South Dakota?

17 A. Yes.

18 Q. And others -- she was a fugitive on weapons
19 charges out of Oregon, correct?

20 A. Yes.

21 Q. And you also knew at this time that she was
22 affiliate of Leonard Peltier, correct?

23 A. An affiliate?

24 Q. Associated with.

25 Somebody who knew Mr. Peltier.

1 **A.** Yes.

2 **Q.** And Dennis Banks?

3 **A.** Yes.

4 **Q.** And other AIM leaders?

5 **A.** Yes.

6 **Q.** And you as an FBI agent in February of 76
7 were very interested in the whereabouts and activities
8 of Mr. Banks and Mr. Peltier, were you not?

9 **A.** Yes.

10 **Q.** Mr. Peltier at this point was the prime
11 suspect in the killing of two FBI agents?

12 **A.** Yes.

13 **Q.** There was a nationwide man hunt for him,
14 correct?

15 **A.** Yes.

16 **Q.** And Mr. Banks was also a fugitive from
17 justice on other charges, correct?

18 **A.** Yes.

19 **Q.** And there was a belief that he was also with
20 Mr. Peltier or involved or had knowledge of
21 Mr. Peltier's activities?

22 **A.** Yes.

23 **Q.** All right.

24 And you knew Ms. Aquash ran with these two
25 guys and she might have information of value to you,

1 correct?

2 **A.** Yes.

3 **Q.** You were interested in questioning her?

4 **A.** She had been questioned in the past.

5 **Q.** All right.

6 But you would have liked to have more
7 information from her?

8 **A.** Yes.

9 **Q.** Now, knowing in early March that Ms. Aquash
10 was the decedent and she was a person of substantial
11 interest to the FBI, why would the FBI allow AIM to
12 choose who was going to do the second autopsy?

13 **A.** When the name was proposed, we had no
14 objection to it because we knew of Mr. Peterson's --
15 Dr. Peterson's reputation. And he would have been a
16 person that we would have chosen ourselves.

17 **Q.** Are you aware that at the time Dr. Peterson
18 did this autopsy, the second autopsy, he was still in
19 his residency?

20 He was still, basically, in medical school.

21 **A.** I wasn't --

22 **Q.** You testified on direct that you thought he
23 was the chief pathologist for Hennepin County.

24 You are aware that that happened years later?

25 **A.** Okay.

1 **Q.** And are you aware or were you aware that when
2 mister -- or Dr. Peterson came out a resident in the
3 pathologist program, he didn't even bring his own
4 tools with him to do the autopsy?

5 Were you aware of that?

6 **A.** I didn't recall that, no.

7 **Q.** Do you recall him asking you and other FBI
8 agents to help him get the tools necessary to do the
9 autopsy?

10 **A.** I didn't -- I didn't recall that.

11 **Q.** Did the FBI not have it's own pathologist at
12 the time?

13 **A.** We were using W.O. Brown out of Scottsbluff,
14 Nebraska.

15 **Q.** I know the BIA was using W.O. Brown.

16 Was the FBI also using him?

17 **A.** Yes, from time to time yes.

18 **Q.** So you had some confidence in his abilities?

19 **A.** I can't say. I didn't have that much
20 experience with him.

21 **Q.** Okay.

22 Well, you said when you learned of his
23 autopsy diagnosis of exposure, you suspected the
24 legitimacy of that diagnosis; is that a fair
25 characterization?

1 **A.** Yes.

2 **Q.** When did you become aware of Dr. Brown's
3 autopsy report?

4 **A.** It would have been whenever we received it.

5 **Q.** Bear with me for just a moment. I am going
6 to show the autopsy report.

7 Can you state the date it was reported?

8 **MR. MANDEL:** Objection.

9 **THE COURT:** Why?

10 **MR. MANDEL:** It's not admitted into evidence.
11 In fact, counsel objected to its admission and now he
12 wants to read from the document.

13 **THE COURT:** All right.

14 The objection is it's not in evidence?

15 **MR. MANDEL:** Yes.

16 **MR. MURPHY:** Your Honor, the witness said
17 that he would be able to identify the date he got the
18 report from the date on the report. I am showing him
19 the date of the report.

20 **THE COURT:** Show him the date of the report.

21 **Q.** **(BY MR. MURPHY)** Does -- was this reported on
22 March 15, 1976?

23 **A.** Okay.

24 **Q.** All right.

25 **A.** That wouldn't necessarily be the date that I

1 received it.

2 Q. Well, if it wasn't prepared -- if the report
3 wasn't prepared until March 15, you couldn't have
4 received it before the exhumation and your request for
5 a court order which happened around March 8?

6 A. Well, as I recall, there was a statement made
7 at the time of the autopsy. Prior to the report being
8 submitted by Dr. Brown, there was a statement made
9 that his finding -- his preliminary finding was that
10 she had died of exposure.

11 Q. And when you say a statement, you mean he
12 said something? An oral statement?

13 A. Yes. Not to me.

14 Q. Not to you.

15 So you weren't there, but you heard from
16 somebody else that he had concluded exposure?

17 A. Yes.

18 Q. And without any other information, you
19 concluded that that was a dubious diagnoses?

20 A. I concluded that -- I don't recall at what
21 point I concluded that. But to me, a diagnosis of
22 exposure in the position that she was found at the
23 bottom of that bluff, it just -- and once I knew who
24 she was, it just didn't make sense.

25 Q. Okay.

1 It seemed on direct you said that something
2 to the effect immediately upon learning of the
3 diagnosis that you questioned the validity of W.O.
4 Brown's conclusion.

5 Do I --

6 **A.** I don't know that those were my words.

7 **Q.** Okay. And that's what I want to make sure I
8 understand.

9 It was now the diagnoses of death by exposure
10 that led you to question and seek exhumation?

11 **A.** Yes. Well, it was a combination.

12 **Q.** Well, you don't exhume many bodies, do you?

13 **A.** No, we don't.

14 **Q.** It's a radical procedure?

15 **A.** Yes.

16 That's why it has to be done by court order.

17 **Q.** Right.

18 And -- I will leave it at that.

19 Now, you continued to work on this case for
20 the next four years, correct?

21 **A.** Yes.

22 **Q.** And part of your investigation in this case
23 was to interview other people that may have
24 information about Ms. Aquash, correct?

25 **A.** Yes.

1 Q. And you received some information very early
2 on -- I'm talking about March 8, 1976, about
3 Ms. Aquash and a potential cause of death, correct?

4 A. Not necessarily. I don't know how you draw
5 that conclusion.

6 Q. Okay.

7 Well, I am looking at your affidavit that you
8 filed with the -- with Judge Bogue on March 8, and in
9 your affidavit you discuss a suspicious phone call
10 that came in to the Pine Ridge ambulance in the early
11 part of February.

12 A. Okay.

13 Q. About a possible hit-and-run victim being
14 found in the same location of where Ms. Aquash's body
15 was ultimately found?

16 A. Yes.

17 Q. Do you recall that?

18 A. Yes.

19 Q. And, in fact, it was so significant to you
20 that you included it in your affidavit to the Court,
21 correct?

22 A. Yes.

23 Q. And you had reason to doubt the veracity of
24 that phone call, correct?

25 A. Yes.

1 **Q.** All right.

2 You learned by your own interviews and
3 investigation that a man named Selo Black Crow and his
4 wife Irene had made a call to the ambulance some time
5 before the body was found, weeks before, and said that
6 there may be a body out there on the side of the road?

7 Something to that effect, correct?

8 **A.** I think it was -- as I recall it was Irene
9 Black Crow that made the phone call.

10 **Q.** Okay.

11 And -- but you went, then, and questioned
12 Selo and Irene about this call, correct?

13 **A.** Eventually.

14 **Q.** And when you questioned them, they gave
15 somewhat nonsensical answers to your questions?

16 **A.** Initially we didn't get much specific
17 information from Selo. And it took us a while before
18 we interviewed Irene.

19 **Q.** Well, you did do an interview of Selo and
20 Irene on March 12, 1976?

21 **A.** Okay.

22 **Q.** So that would have just been four days after
23 the body was exhumed, correct?

24 **A.** Yes.

25 **Q.** And I think that's actually the same day that

1 the body was autopsied. I may be off, but it was
2 close to the time of the autopsy, correct, the second
3 autopsy?

4 **A.** Yes, March the 11th.

5 **Q.** So just one day after?

6 **A.** Yes.

7 **Q.** And you confronted Selo and Irene about the
8 suspicious nature of their call, correct?

9 **A.** Yes.

10 **Q.** And Selo and Irene lived in close proximity
11 to Highway 73?

12 **A.** Correct.

13 **Q.** Down in Wambli?

14 **A.** It was near Wambli.

15 **Q.** And Highway 73 essentially runs between
16 Wambli and Kadoka?

17 **A.** Essentially.

18 **Q.** Okay.

19 And you learned that Selo and Irene were
20 folks affiliated with the American Indian Movement,
21 correct?

22 **A.** Selo was -- he was a Medicine Man and had sun
23 dances and other ceremonies conducted at his property
24 and a lot of Indian people went to those ceremonies.

25 **Q.** And a lot of people who were affiliated with

1 the American Indian Movement, correct?

2 A. Yes, as far as I recall.

3 Q. And in fact, you learned from a neighbor of
4 his that in the period of time preceding the finding
5 of Ms. Aquash's body that there had been suspicious
6 activity at Selo's house, correct?

7 A. Yes.

8 Q. In fact, he reported to you -- the
9 neighbor -- the next door neighbor reported to you an
10 Indian woman closely resembling or resembling
11 Ms. Aquash being left at that house, Selo's house,
12 correct?

13 A. I don't recall that it was -- that it was a
14 that woman closely resembled. That part of the
15 statement I don't believe is in my interview with
16 them.

17 Q. Okay.

18 An Indian female who appeared to be in here
19 late 20s or early 30s, medium to slender build.

20 Is that the information you were given?

21 A. If that's what's in my recording of the
22 interview, yes.

23 Q. Would you like to see your interview?

24 A. Yes.

25 MR. MURPHY: Graham document 3,494.

1 Q. (BY MR. MURPHY) Take all the time you need.

2 A. Okay.

3 Q. Does that refresh your recollection of the
4 conversation you had with --

5 A. Says another -- well, he describes two Indian
6 females. One in her late 30s, short, talky build
7 wearing dark clothing, and another Indian female who
8 appeared to be in late 20s or early 30s, medium to
9 slender build, wearing a black jacket, old blue jeans,
10 and had long hair worn in braids.

11 Q. Okay.

12 So the first woman would not match
13 Ms. Aquash's description, but the second would, at
14 least generally, approximate her build, age, and
15 whatnot?

16 A. I don't recall her exact description.

17 Q. Okay.

18 Would that be, then, in the autopsy reports?

19 A. It would be in a number of places, but yes.

20 Q. And you have seen her picture?

21 A. Yes.

22 Q. And didn't you see her in person on any
23 occasion?

24 A. Maybe one occasion.

25 Q. Well, and the information that came to you

1 was that the -- an Indian male, two Indian females
2 came to Mr. Black Crow's house. The slender
3 20-to-30-year-old Indian woman was left at the house.
4 The other two drove away, correct?

5 A. Yes.

6 Q. And that at some later date or some later
7 time, she was picked up from that house again in a
8 gold car and driven away, correct?

9 A. The person that was left there was, yes.

10 Q. And at certain times you discussed that
11 information with Selo and his wife, correct?

12 A. Yes.

13 Q. And rather than answer your question about
14 that, when you confronted him with the information,
15 Selo and Irene became visibly shaken, is that -- is
16 that a fair, accurate statement of what their reaction
17 was?

18 A. If that's what I put in the interview.
19 Again, I would have to see what the interview says.

20 MR. MURPHY: Graham document 113.

21 A. This is an interview that -- of Nate Merrick
22 where he did an interview with Irene -- let me see.

23 Q. (BY MR. MURPHY) Read it to yourself again --
24 I don't want to rush you -- and then I will ask you
25 questions about the report.

1 **A.** Okay.

2 He's --

3 **Q.** Like I said -- I ask you -- I got to ask you
4 questions other than it becomes narrative.

5 This is your report, correct?

6 **A.** It's my report of an interview with Nate
7 Merrick who had done an interview with somebody else.

8 **Q.** With Selo and Irene?

9 **A.** Yes.

10 **Q.** And then he confronted them with this
11 information and they became visibly shaken?

12 **MR. MANDEL:** Objection. Hearsay.

13 **MR. MURPHY:** It's not offered for the truth
14 of the matter asserted.

15 **THE COURT:** What's it offered for?

16 **MR. MURPHY:** It's nonverbal conduct so it's
17 outside the realm of hearsay under 801.

18 **THE COURT:** Overruled.

19 **Q.** **(BY MR. MURPHY)** That was the information you
20 had, they became visibly shaken when confronted with
21 this information?

22 **A.** That was what Mr. Merrick told me.

23 **Q.** Right.

24 And he told you that and you then did
25 follow-up interviews with Selo and Irene, did you not?

1 **A.** At some point, yes.

2 **Q.** Okay.

3 Would you again like -- I don't want to put
4 words in your mouth. Do you want to look at your
5 reports?

6 **A.** Yes.

7 **MR. MURPHY:** Graham document 114.

8 **Q.** **(BY MR. MURPHY)** Is that a report that you and
9 Agent David Price -- a report that you and Agent Price
10 did?

11 **A.** Yes.

12 **Q.** And the date of that report is?

13 **A.** The interview was conducted on March the
14 18th.

15 **Q.** And that was an interview done by you?

16 **A.** Yes -- well, myself and Price, and I recorded
17 the interview.

18 **Q.** All right.

19 And that was an interview with Selo and
20 Irene?

21 **A.** Irene, I believe, was present. I don't
22 recall exactly. It says that she was present at some
23 point. However, we were not able to interview her
24 specifically.

25 **Q.** And that was because Selo wouldn't let you

1 talk to her?

2 A. That is correct.

3 Q. And following up upon that, on March 31,
4 1976, you interviewed Herman Zimiga, Z-I-M-I-G-A?

5 A. Yes.

6 Q. And he was the gentleman who provided the
7 initial information about the suspicious activity at
8 Selo Black Crow's house, correct?

9 A. Yes.

10 Q. And you confirmed what Agent Merrick had
11 already told you that he had seen this pair of Indian
12 women and an Indian male at Selo Black Crow's house in
13 January or early February of 1976?

14 A. Yes. I believe he stated to us that there
15 was a lot of activity around there and he specifically
16 mentioned that particular incident, but he said there
17 had been a lot of activity.

18 Q. And mentioning the specific activity of a
19 gold car, two Indian women, one Indian man, a slender
20 Indian woman being dropped off at the house, and the
21 gold car returning some time later and taking her
22 away, correct?

23 A. Yes.

24 MR. MURPHY: No further questions.

25 Thank you.

REDIRECT EXAMINATION

1
2 **BY MR. MANDEL:**

3 Q. During your time in Rapid City, did you do a
4 lot of investigation on the Pine Ridge Indian
5 Reservation?

6 A. Yes, sir.

7 Q. There are a lot of Indian people living down
8 there?

9 A. Yes, sir.

10 Q. Tell me, do they fit all sizes and
11 descriptions?

12 A. Yes.

13 Q. Does the fact that two Indian females and one
14 Indian male were at Selo Black Crow's house shed any
15 light regarding this investigation based on what you
16 know of it?

17 **MR. MURPHY:** Objection. Calls for a
18 conclusion.

19 **THE COURT:** Overruled.

20 A. No.

21 Q. **(BY MR. MANDEL)** I am really asking, did that
22 add anything to this investigation?

23 A. No, it did not.

24 Q. Were you able ever determine anything as to
25 the identity of those people?

1 **A.** No.

2 **Q.** Were you able to determine any connection
3 with this case?

4 **MR. MURPHY:** Objection. Leading.

5 **THE COURT:** Sustained.

6 **Q.** **(BY MR. MANDEL)** What were you able to
7 determine from that information?

8 **A.** Nothing, really.

9 **Q.** Did you follow up regarding any information
10 you received from Selo and Irene Black Crow?

11 **A.** We did finally interview Irene.

12 **Q.** As a result of that arm of this
13 investigation, were you able to find out anything
14 useful regarding anything in this case?

15 **MR. MURPHY:** Objection. Calls for a
16 conclusion.

17 **THE COURT:** Overruled.

18 **A.** We were able to finally put to rest that
19 aspect of the investigation.

20 **Q.** **(BY MR. MANDEL)** With no productive leads
21 arising out of it?

22 **A.** That's correct.

23 **Q.** In terms of the exhumation that took place,
24 you said that Judge Bogue issued his order on March 8,
25 1976?

1 **A.** That's the date that the affidavit was
2 signed, yes.

3 **Q.** But did you -- do you believe the order for
4 exhumation was issued on the same date?

5 **A.** I believe that it was, but I don't know that
6 conclusively because that was the affidavit, I
7 believe, and I don't know where the order is.

8 **Q.** Okay.

9 How soon after the order was obtained did the
10 exhumation take place?

11 **A.** The exhumation took place on the 11th, the
12 same date as the second autopsy.

13 **Q.** So obviously the order was at least before
14 then?

15 **A.** Yes, sir.

16 **Q.** And the order was based on your affidavit?

17 **A.** Yes, sir.

18 **Q.** In terms of questioning Dr. Brown's results
19 in the initial autopsy, first of all, is there any
20 question but that he missed the bullet when he did the
21 autopsy?

22 **A.** He did miss it, yes.

23 **Q.** Okay.

24 **A.** There is no question in my mind that he
25 missed it.

1 **Q.** When you had a -- developed a question as to
2 his results, was that before or after you had
3 determined who the victim was -- before and after the
4 identification had been made.

5 **A.** I don't recall what was in my mind at that
6 time, but I know that once we determined the
7 identification, then my suspicions were heightened.

8 **Q.** Let me rephrase the question, then.

9 Did you seek the exhumation before the body
10 was identified?

11 **A.** No.

12 **Q.** Is that at least one of the reasons it was
13 sought?

14 **A.** Yes.

15 **MR. MANDEL:** Nothing further, Your Honor.

16 **MR. MURPHY:** If I may just briefly, Your
17 Honor?

18 **THE COURT:** Yes.

19 **REXCROSS-EXAMINATION**

20 **BY MR. MURPHY:**

21 **Q.** You were asked questions about the value of
22 the information you were given by Selo and Irene. You
23 prepared report after report about your investigation
24 of Selo and Irene in the months after the body was
25 found, correct?

1 **A.** I did -- I prepared whatever interviews that
2 I had with them, yes.

3 **Q.** And it was important enough for you to
4 include it in the affidavit that you sent over to
5 Judge Bogue, correct?

6 **A.** Yes.

7 **Q.** So you wouldn't put in completely frivolous
8 materials in an affidavit submitted to a United States
9 District Court Judge, would you?

10 **A.** No, I would not.

11 **Q.** In fact, in the years to follow, your agency
12 and activities involving you concentrated again and
13 again on Mr. Black Crow; isn't that accurate?

14 **A.** I don't know in what regard --

15 **Q.** Well, do you remember a man named Tom
16 Raymond?

17 **A.** No.

18 **Q.** A sheriff from Kadoka?

19 **A.** No.

20 **Q.** Not familiar with the use by the FBI of Tom
21 Raymond to work with Mr. Black Crow to try to figure
22 out what more he knew that he wasn't telling you?

23 **A.** I don't recall that specifically. You would
24 have to refresh my memory on that one.

25 **Q.** Well, let's go back to the dates of the

1 exhumation. I had showed you previously your
2 affidavit, which you dated March 8, correct?

3 A. Okay.

4 Q. Do you need to look at the date --

5 A. No, I saw the date of March the 8th on
6 there.

7 Q. Could you please tell me what date it was
8 filed with the Clerk of Courts?

9 A. March the 9th.

10 Q. All right.

11 And we talked that on March 8 Bruce Ellison,
12 the AIM lawyer, was already down at the FBI asking for
13 exhumation, correct?

14 A. He had mentioned that they were interested in
15 it to Agent Green, yes.

16 Q. So at least contemporaneous with your
17 efforts, AIM was trying to get the body exhumed,
18 right?

19 A. Yes.

20 Q. Okay.

21 And if your filing didn't get to the court
22 till March 9, the court order couldn't have been
23 granted before March 9, correct?

24 A. Okay.

25 MR. MURPHY: Nothing further.

1 Thank you.

2 **CONTINUED REDIRECT EXAMINATION**

3 **BY MR. MANDEL:**

4 Q. Did the investigation at the crime scene with
5 the metal detectors take place before or after the
6 exhumation?

7 **MR. MURPHY:** Goes beyond the scope of recross,
8 Your Honor.

9 **THE COURT:** Overruled.

10 A. I would have to see the date that we went out
11 and did that.

12 **MR. MANDEL:** Nothing further.

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

14 You may be excused.

15 **MR. MURPHY:** Mr. Wood, you are released from
16 my subpoena as well.

17 (Witness excused.)

18 **THE COURT:** We're going to take a break,
19 folks. We'll be in recess until three o'clock.

20 (Off the record.)

21 **THE COURT:** Newcomers in the courtroom, no
22 electronic. No activity expressing approval or
23 disapproval of anything that is said or done.

24 Thank you.

25 Ready to proceed, Counsel?

1 **MR. MANDEL:** Yes, Your Honor.

2 The state calls Nate Merrick.

3 **THE COURT:** Please come forward, sir.

4 NATE MERRICK,

5 called as a witness herein, having been duly sworn,

6 under oath testified as follows:

7 **THE COURT:** Please take a seat.

8 **DIRECT EXAMINATION**

9 **BY MR. MANDEL:**

10 **Q.** Good afternoon, sir.

11 Would you state your name?

12 **A.** My name is Nathan Merrick.

13 **Q.** Sir, where do you live?

14 **A.** At the present time I live in Rosalie,
15 Nebraska.

16 **Q.** How long have you been living there?

17 **A.** Oh, for the past five years and in Nebraska
18 back home for the last 16 years.

19 **Q.** Are you originally from Nebraska?

20 **A.** Yes. I'm an Omaha Indian from the Omaha
21 Indian reservation.

22 **Q.** What's your current employment, sir?

23 **A.** Today I work as a Public Defender for our
24 Tribal Court.

25 **Q.** How long have you been doing that?

1 **A.** About nine years now.

2 **Q.** Sir, do you have a background in law
3 enforcement?

4 **A.** Yes, I do.

5 **Q.** Can you tell us what that consists of?

6 **A.** I became a police officer in 1969. I went to
7 the Indian Police Academy that same year and I worked
8 for the Omaha Tribe as a police officer. And then I
9 went to work in 1972 as a BIA police officer for the
10 Bureau of Indian Affairs first at Fort Thompson, South
11 Dakota. And then in 1973 during the Wounded Knee
12 siege I was assigned there and I remained at Pine
13 Ridge from 1973 until 1977.

14 And then I continued my law enforcement
15 career after that, for about 15 years I worked for BIA
16 law enforcement.

17 **Q.** On a number of different reservations?

18 **A.** Yes.

19 **Q.** Did you ultimately retire from that position?

20 **A.** Yes. I left the government service in 1994.

21 **Q.** And at that time you went back to Nebraska?

22 **A.** Yes. That's my home and that's where my
23 family is so I moved home.

24 **Q.** Now, what exactly was your position when you
25 worked down at Pine Ridge?

1 **A.** When I first arrived there I was a police
2 officer and in a short period of time I was a night
3 captain of police for the police department. And then
4 I became a criminal investigator in 1974 as a trainee.
5 And then I became a complete investigator in 1975.
6 And then from that point on I worked in criminal
7 investigations.

8 **Q.** What were your duties as a criminal
9 investigator?

10 **A.** We had many duties, but the most important
11 things in the work that I did involved 14 major
12 crimes. All felony investigations is what we did.
13 There was several BIA investigators at the Pine Ridge
14 agency. I was just one of them. I think there was
15 about five or six of us and we worked with the FBI in
16 investigating all sorts of felony crimes on the
17 reservation.

18 **Q.** Do you recall responding to a particular
19 crime on February 24, 1976?

20 **A.** Yes. It was about that time I was on duty
21 and the radio dispatch called me on the radio. I was
22 with another investigator. We were working on
23 something else. And they informed me that there was a
24 body found out near the Badlands. And I believe they
25 said it was north of Wambli off the highway. And

1 there was officers out there already. So we were --
2 we traveled from Pine Ridge all the way out there
3 which is about a two-and-a-half-hour drive.

4 Q. Had uniformed officers already responded to
5 that?

6 A. Yes.

7 The area was secured off and uniformed
8 officers had secured it and there was a couple of FBI
9 agents there when I got there. And then there was
10 other BIA investigators also present.

11 Q. Is that kind of typical as to how the
12 response worked back in those days?

13 A. Yes. That was typical, you know, because of
14 any time that there was a body found on the
15 reservation, we responded to investigate to find out
16 the cause. Find out any circumstances that we could.

17 Q. So do you remember what you observed when you
18 got to the scene?

19 A. I recall that day was -- it was a pretty nice
20 day and it was -- it wasn't cold. It was sort of not
21 real warm, but it was a pretty nice day. Right off
22 the highway from north of Wambli, the highway between
23 Wambli and Kadoka, I believe, and about maybe 75 to a
24 hundred yards west of the highway in a deep ravine --
25 at the bottom of that ravine was a body of a woman.

1 **Q.** I am going to ask you to first look at what's
2 been marked State's Exhibit 2 and ask you if you can
3 recognize that.

4 **A.** Appears to be similar or the same as the area
5 in which the body of this lady was found. And the
6 highway is located right up at the top. And then the
7 ravine is similar to what I saw that day.

8 **Q.** If Mr. Amiotte were to have testified that
9 the body was initially located where that white area
10 is on the photograph, is that at all consistent with
11 your recollection?

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

13 **Q.** I am showing you what's been marked State's
14 Exhibit 1.

15 Can you recognize the roads in that area?

16 **A.** Well, it's a picture of Highway 73 and the
17 intersecting Highway 44. It's an overview, looks
18 like, from an airplane, but without further
19 examination or being told more I would say that's the
20 highway between Kadoka and Wambli.

21 **Q.** Does that depict the area that you went to
22 that day?

23 **A.** Yes.

24 **Q.** Sir, let me display that.

25 Can you see it up there okay, sir?

1 **A.** Yes, I do.

2 **Q.** Does that yellow dot on the photograph relate
3 to anything that you are familiar with?

4 **A.** I never saw this picture before today but it
5 appears to be the highway and the location north of
6 Wambli where that body was found.

7 **Q.** At least based on your recollection, does
8 that approximate where you were that day?

9 **A.** Yes, it appears to be so.

10 **Q.** And sir, I will show you what's been marked
11 State's Exhibit 3.

12 Can you tell me if you can identify that?

13 **A.** Yes. This is a picture -- a Polaroid picture
14 that I believe that I took at the crime scene -- of
15 what I call the crime seen at the time of a female --
16 appeared to be an Indian person with blue jeans on and
17 a red type of sweater type thing and a blouse.

18 **Q.** That was from the scene on that day?

19 **A.** Yes.

20 **Q.** Sir, I will show you Exhibit No. 5 and --
21 excuse me -- yeah, number five, and ask if you can
22 recognize that?

23 **A.** Yes. This again is a Polaroid picture of
24 a -- of the -- appears to be the arm of the
25 unidentified female and it's a butterfly bracelet with

1 a turquoise stone in the middle of the bracelet. I
2 took that picture.

3 Q. Okay.

4 And Polaroid photographs -- I never thought I
5 would have to say this -- these were instant
6 photographs that appeared right at the time?

7 A. Yes. That's what I carried with me.

8 Q. Sir, I will show you what's been marked
9 State's Exhibit 6 and ask you if you can recognize the
10 item in there?

11 A. Yes. This is the bracelet that was on that
12 unidentified female's wrist. This is the one I took a
13 picture of.

14 MR. MANDEL: Offer Exhibit 6, Your Honor.

15 MR. MURPHY: No objection.

16 THE COURT: It will be received.

17 Q. (BY MR. MANDEL) And I will then show you
18 what's been marked State's Exhibit 7.

19 A. Yes. This is a picture of the same bracelet,
20 and I believe I might have taken this picture, too,
21 because I had both a 35 millimeter and a Polaroid
22 camera.

23 MR. MANDEL: Your Honor, if I could, could I
24 give the bracelet to the jury to look at?

25 THE COURT: That would be fine.

1 **Q.** **(BY MR. MANDEL)** Sir --

2 **MR. MURPHY:** Mr. Mandel, that hasn't been
3 received into evidence yet I don't believe, the blowup
4 of Exhibit 7.

5 **MR. MANDEL:** Your Honor, I thought I had
6 offered Exhibit 7.

7 I offer Exhibit 7 at this time.

8 **MR. MURPHY:** No objection.

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

10 **Q.** **(BY MR. MANDEL)** Mr. Merrick, does Exhibit 7
11 show the body in the condition it was at the time you
12 arrived there?

13 **A.** Yes, it does.

14 **Q.** That was a photograph taken before the body
15 had been moved in any way?

16 **A.** Right there, yes. At the scene.

17 **Q.** When you began the investigation, when you
18 located the body, what action did you begin to take at
19 that time?

20 **A.** Well, when I first arrived and the body was
21 down in the ravine, I believe there was some other
22 investigators that were with me. And we were all
23 working together. We did a complete grid search of
24 the entire area. We -- in other words, we walked in
25 the -- in circles and back and forth looking for any

1 kind of evidence that we could find connected to this
2 body.

3 But after we did all the search, looking for
4 weapons or anything on the top of the ravine, half way
5 down to the -- to where the body was laying, I think
6 it was about like maybe an 18-foot ravine, high, on
7 the side of the bank, there was stands of hair that
8 were on the bank. So, you know, we collected those
9 strands of hair and obviously they came from her --
10 the unidentified person.

11 Q. Obviously, why?

12 A. Because her hair was long and that was hair
13 that was right from that embankment so she must have
14 been thrown off that embankment or fell off it, one of
15 the two.

16 Q. Did you locate any other evidence at the
17 scene?

18 A. We didn't locate any other evidence because
19 there wasn't any to be found. Just pictures were what
20 I took and that was about all.

21 Q. Were you able to locate a weapon of some sort
22 at the scene?

23 A. No, sir. We looked but we couldn't locate
24 any weapons.

25 Q. What were the initial determinations that you

1 made when you were there?

2 **A.** When I got down to the body and made a closer
3 observation, the position she was laying, it was
4 really apparent to me that she had been pushed or
5 thrown off of that -- the embankment. The cliff.

6 And right around the base of her skull on the
7 back there was what appeared to be coagulated, dried
8 up old blood. It was dark in color. Discolored dirt
9 you might say. It was appear to be like old blood.

10 **Q.** Was the blood just on her or was it on the
11 ground?

12 **A.** It was on the ground.

13 **Q.** Did you make a determination as to what sort
14 of injury had been received or how?

15 **A.** Couldn't make any real determination except
16 that she had blood coming from her head so it was sort
17 of apparent to us that we were dealing with some sort
18 of foul play because of the blood that was behind her
19 head on the ground.

20 **Q.** Did you make any determination as to where
21 the injury took place?

22 **A.** We could not make any determination about
23 where the injury had actually taken place other than
24 where were body was laying.

25 **Q.** Did you seek anything such as footprints or

1 tire prints or things of that sort that would aid in
2 the investigation?

3 **A.** Yes. We looked. We looked very hard to see
4 if we could find tire prints or footprints. The
5 ground was sort of hard like not real soft ground.
6 It's winter time. So if there was any footprints
7 there, they weren't there to our -- we couldn't see
8 them. It's my recollection that there was no
9 footprints or tire prints.

10 **Q.** Was that consistent with the conditions at
11 that area at that time?

12 **A.** Yes.

13 **Q.** Did you make any efforts to identify the
14 victim?

15 **A.** Yes, we did. I recall distinctly calling
16 back on dispatch that day and asking them if there was
17 any missing persons out in the area.

18 And I think one of my fellow investigators
19 asked also to check the surrounding reservations like
20 Rosebud and that. But that's where it just began.
21 You know, we had an unidentified body so we naturally
22 tried to identify it.

23 **Q.** Did you search the body looking for any
24 possessions, identification, things like that?

25 **A.** No, we didn't. We didn't look for any kind

1 of identification at that time because the body was in
2 a position where we felt it was best that we just get
3 the body picked up and removed entirely, clothing and
4 all and everything, and then taken to the morgue and
5 then where we could make better examinations of the
6 clothing and what was in the pockets and everything
7 else. We didn't do it right at the crime scene.

8 Q. What was the condition of the body you -- as
9 you first observed it?

10 A. The body was badly deteriorated. It was like
11 blackened in color and it was, like, sort of like it
12 was drying up and being shriveled up. Sort of dry
13 shriveled if you can get my understanding. It was --
14 the body was badly deteriorated.

15 Q. Was the face identifiable?

16 A. The face was all black and unidentifiable.
17 You could obviously tell that it was a female and that
18 was about all that we could tell.

19 Q. What took place then?

20 What was done next regarding transporting the
21 body and stuff?

22 A. I believe Pine Ridge ambulance had arrived
23 and the police -- we helped get the body picked up and
24 taken to the Pine Ridge morgue where it was kept.

25 Q. In terms of the autopsy that took place, can

1 you tell us exactly what was arranged and how it
2 happened?

3 **A.** The next day when I arrived at work, I
4 believe my boss and others had already made
5 arrangements for Dr. Brown from Scottsbluff -- he's a
6 pathologist that we commonly used almost on
7 everything -- to come to Pine Ridge and do the
8 autopsy. And he arrived later that day. I don't
9 recall exact time or anything, but he arrived and I
10 was told to go up and work with the FBI and see if we
11 could collect evidence or -- and witness the autopsy.

12 And I went to the hospital and -- to the
13 Indian health hospital in the basement where the body
14 was being kept and Dr. Brown went in and started the
15 autopsy.

16 **Q.** Was any effort made to seek identification at
17 that point?

18 **A.** Yes. I believe the FBI was there and I was
19 there and I believe clothes were being collected and
20 looking for identification and also we -- the autopsy
21 itself -- I stayed in there for a while. And because
22 of the stench and the conditions and everything, I
23 stepped out in the hallway. And I didn't stay for the
24 entire autopsy.

25 And then after the autopsy was over,

1 Dr. Brown came out and we had a discussion together
2 and -- with the FBI and myself -- and I believe they
3 might have made phone calls as to what to do next for
4 identification and we had -- we were told that we
5 should get the hands of the unidentified person so
6 that we could get the fingerprints and they could have
7 them identified. And that was done.

8 Q. Was there a reason the fingerprints couldn't
9 have been taken at the scene?

10 A. Yes. The condition of the hands, the fingers
11 were like blackened and shriveled up so that it would
12 be impossible to take fingerprints like that. We
13 didn't have the equipment for that.

14 Q. Was there an x-ray machine that was normally
15 used in autopsy?

16 A. Well, there was an x-ray machine down there
17 that they used for autopsies. It was like a gurney.
18 It was a gurney where they could strap a body on and
19 they can put it up and they could take an x-ray. And
20 my closest recollection to that was that day I asked
21 the x-ray technician -- it was a white lady that
22 worked there for Indian Health Services, an x-ray
23 technician -- I asked her if we could put that body on
24 the gurney and they could take an x-ray and she told
25 me that the machine was broke down and they couldn't

1 do this case -- it.

2 Q. So no x-ray took place on that date?

3 A. No, sir.

4 Q. Going back to the hands, do you have a
5 recollection of what took place in terms of how they
6 were handled and what happened to them?

7 A. I believe that -- my best recollection is
8 that when it was decided to get the hands, I went in
9 and I talked to Dr. Brown with an FBI agent, and
10 Dr. Brown took the hands off at our request and put
11 them in a jar -- I don't know what solution it was --
12 and he gave the hands to me and then I immediately
13 handed them off to an FBI agent -- or a couple FBI
14 agents that were there present and they took
15 possession of them.

16 Q. Was that preliminary determination made as to
17 cause of death by the doctor at that time?

18 A. I don't recall him making a preliminary
19 determination of the cause of death. I don't recall
20 him telling us what the cause of death was. If he did
21 it wasn't to me.

22 Q. Did you continue to work on this
23 investigation after the autopsy?

24 A. I guess I was part of an investigation team
25 there, but I never really worked on it. I was around

1 the office working on a lot of other cases because we
2 constantly had felonies going on and I was working on
3 other things.

4 So immediately after the autopsy I got sort
5 of an emergency call from my family in Nebraska and I
6 left Pine Ridge and I didn't -- went back home to
7 Nebraska for about a week and a half or so. I didn't
8 come back for about a week and a half. A lot of
9 things had transpired during that time.

10 Q. Do you recall conducting any interviews of
11 Selo or Irene Black Crow?

12 A. No, I don't.

13 Q. Were you aware of any involvement they had in
14 this matter?

15 A. You know, I recall the name Selo Black Crow
16 being brought up and talked about, but I don't
17 remember the substance of it or what connections were
18 or -- I don't recall all of that. I don't know if it
19 was --

20 Q. After the autopsy took place were you
21 essentially through working on this matter?

22 A. Yes.

23 Q. As to Selo and Irene Black Crow, are you
24 aware of whether the investigation of any involvement
25 on their part went anywhere?

1 **A.** Yes, that's correct.

2 **Q.** Do you recall going out to the scene with FBI
3 Agent Don Dealing?

4 **A.** 35 years ago -- there was several agents
5 there. And I know it could have been him that was
6 there but there was others. I just distinctly
7 remember being with my partner Doug Perisian. He was
8 a BIA investigator. Him and I road in the same car
9 out there.

10 **Q.** Okay.

11 If Agent Dealing indicated in a report that
12 he drove out with you and Doug Perisian and also a man
13 named Jim Stensgard, would that refresh your
14 recollection?

15 **A.** Stensgard I remember him distinctly. But I
16 can't recall if he was in my car or if he was in an
17 FBI car but there was several of us out there at the
18 crime scene.

19 **Q.** Sure.

20 At the crime scene when you get out there
21 there is BIA and there is FBI?

22 **A.** Yes, that's true.

23 **Q.** And you are working together?

24 **A.** Yes.

25 **Q.** Collecting information together?

1 **A.** Yes.

2 **Q.** Reviewing the crime scene both below and
3 above to see if you can find any forensic evidence?

4 **A.** Yes. That was what we were doing, yes.

5 **Q.** And at the crime scene, you determined that
6 foul play is at issue, correct?

7 **A.** Well, that's a good question because we had a
8 body that had blood underneath it's head. And my only
9 assumption was that we needed to do a thorough
10 examination and investigation because I suspected that
11 there was foul play.

12 **Q.** Okay.

13 I mean, if on a previous occasion you said,
14 well, it was pretty evident that this person had
15 expired due to foul play so we were looking for any
16 kind of weapon that might have been used would that be
17 accurate?

18 **A.** Yes, that's absolutely true.

19 **Q.** And that's right at the scene?

20 **A.** Yes.

21 **Q.** And you are there with other Tribal officers
22 as well as FBI agents, correct?

23 **A.** Yes.

24 **Q.** You are trying to get as much information
25 exchanged as possible?

1 **A.** Yes.

2 **Q.** So you can solve this case, correct?

3 **A.** Yes.

4 **Q.** So it would be natural then if you suspected
5 foul play and saw blood at the back of the head, you
6 would have communicated that to the FBI agents at the
7 scene?

8 **A.** I believe they all saw the same thing.

9 **Q.** Sure.

10 And you would have talked about it?

11 **A.** I believe we did.

12 **Q.** Do you have any idea why none of the FBI
13 reports produced at the scene mention anything about
14 foul play?

15 **A.** You know, that's a question for them.

16 **Q.** Fair enough. Fair enough.

17 In any regard, once you go out there and get
18 the evidence, or try to get the evidence, the only
19 thing you are able to get at the scene are these long
20 hairs that were on the face of the cliff?

21 **A.** Yes.

22 **Q.** And did you turn those over to the FBI?

23 **A.** Yes, I did.

24 **Q.** And was that pretty much standard procedure
25 when you -- when there was a suspicious death, and you

1 gathered forensic evidence, to turn everything over to
2 the FBI?

3 **A.** Yes.

4 **Q.** So back at the autopsy scene or the scene
5 where the autopsy was done, you similarly turned over
6 everything that was gathered to the FBI?

7 **A.** Yes.

8 **Q.** They took custody of the hands?

9 **A.** Yes.

10 **Q.** The clothes?

11 **A.** Yes.

12 **Q.** Everything basically that the pathologist
13 gave them, correct?

14 **A.** That's true.

15 **Q.** Okay.

16 Now, in your entire search, you talked today
17 about doing a grid search of the area.

18 Could you be a little more detailed, where
19 was the grid search done above on the bluffs, below,
20 or both?

21 **A.** My recollection is there were several
22 officers -- there some uniform officers -- and we
23 together decided that we needed to do sort of a grid
24 search. So we lined up the officers on the highway
25 and we took a section and then we walked all the way

1 to the ravine and we did that in a four-way pattern so
2 we could check the ground all over. I'd say maybe a
3 hundred yards in each direction. So there was lots of
4 officers involved. We just walked and looked, and if
5 one of us would see something we would let the other
6 ones know and take care of that. We did sort of a
7 grid search. That's what I am talking about but we
8 found nothing.

9 Q. And an extensive search revealed nothing?

10 A. That's right.

11 Q. No ropes, no casings, no shells?

12 A. Nothing.

13 Q. I want to ask you about the timing of the
14 burial of the body. Now, the body was found
15 February 24, correct?

16 A. Yes.

17 Q. And we've already heard some testimony that
18 the autopsy wasn't actually completed until the next
19 day which would be the 25th of February?

20 A. Yes.

21 Q. That fair with your recollection?

22 A. That's fair, yes.

23 Q. And the body was buried on March 7, 1976.

24 That would have been the following Monday.

25 A. Sir, by that time, I had this emergency to go

1 back to Nebraska so I had to -- my family wanted me
2 home so I went to Nebraska so those things that
3 happened after that autopsy, I don't know about.

4 Q. Okay. And that's why I am asking you the
5 question.

6 So from the date of the autopsy for a period
7 of a week and a half or so, you were gone?

8 A. Yes.

9 Q. Well, do you recall telling FBI Agent Wood on
10 March 2 that it was the BIA's decision to bury Anna
11 Mae Aquash immediately?

12 A. You know, 35 years ago, I might have said
13 that. I don't even recall because I wasn't there.
14 Somebody might have mentioned that to me and I might
15 have repeated it. But I don't know who ordered her to
16 be buried.

17 Q. Well, that's my question. And if you weren't
18 there, how would you have communicated to Agent Wood
19 that the body was being buried upon the authority of
20 the BIA.

21 A. If you would have asked me that question 35
22 years ago I could tell you.

23 Q. Right.

24 A. Kind of a long time ago.

25 Q. Well, that's where I am going with this.

1 We didn't have cell phones 35 years ago?

2 **A.** No. Barely had a Polaroid.

3 **Q.** Yeah. And you were back home with your
4 family in Nebraska?

5 **A.** Yes, I was there, yeah.

6 **Q.** And so -- I mean, do you have any
7 recollection at all of conducting any official
8 business regarding this case while you were back home
9 with your family?

10 **A.** While I was back home with my family?

11 **Q.** Yeah.

12 **A.** Well, no. But if that's March 2 you are
13 talking about, I might not have been gone for two
14 weeks or a week and a half. I might have only been
15 gone for four or five days. I just remember that I
16 had left right after the autopsy and I came back
17 later.

18 **Q.** This is only -- February only had 28 days in
19 that year so we're only talking about a five or
20 six-day period?

21 **A.** Yeah, it could have been that.

22 **Q.** Do you recall previously testifying that you
23 were gone seven to ten days?

24 **A.** I might have said that, too.

25 **Q.** Yeah?

1 **A.** But if I was gone three or four days, it's 35
2 years ago, so I just know that I went back to
3 Nebraska.

4 **Q.** All right.

5 Do you recall, though, that it was your
6 decision to have this body buried before it was
7 identified?

8 **A.** No. I didn't make no decision like that. I
9 wasn't there to do that.

10 **Q.** I guess that's what I am getting to.

11 You are clear in your mind even though it was
12 35 years ago, it was not your decision to have the
13 body buried prior to identification?

14 **A.** I wasn't really authorized to make a decision
15 like that because I had a boss at that time. And it
16 was clearly not my responsibility or my decision to
17 have a body buried.

18 **Q.** Okay.

19 **A.** I did not do that.

20 **Q.** So if Agent Wood's reports indicated that it
21 was you who ordered the body to be buried prior to
22 identification that would be inaccurate?

23 **A.** Yes.

24 **Q.** And frankly because you suspected foul play
25 and because you had gone through the effort of having

1 the hands removed so that identification could be
2 obtained, you wouldn't have wanted that body buried,
3 would you have?

4 **A.** Well, a reasonable person would want to keep
5 the body as long as you could until it's investigated
6 and not bury it. I mean, that's just a reasonable
7 thing to do. I don't think I would have ordered a
8 body buried or had a body buried, no.

9 **Q.** You would have waited more than three days?

10 **A.** Identify the body. If they could keep the
11 body refrigerated or whatever.

12 **Q.** Okay.

13 And you know from your involvement in this
14 case that, in fact, the coroner or the pathologist did
15 in fact try to preserve the body after the autopsy?
16 Dr. Brown I am talking about.

17 **A.** If he did I am not aware of that because
18 right after the autopsy, I was like pretty much done.

19 **Q.** All right.

20 Regarding the day that you found the body,
21 where the body was located was -- how many -- you
22 indicated about a hundred yards off the road?

23 **A.** Yes. It was about maybe 75 to a hundred.
24 Something like that I would say.

25 **Q.** All right.

1 And regarding the temperature, you said today
2 you weren't sure if it was a very warm day or --

3 **A.** I said I was sure it was a warm day.

4 **Q.** It was a warm day?

5 **A.** Yeah. I distinctly remember that I didn't
6 wear gloves. It was a pretty pleasant day.

7 **Q.** All right.

8 Now, the state asked you whether -- after the
9 autopsy whether your involvement in this case more or
10 less ended.

11 You indicated you weren't involved for too
12 much longer?

13 **A.** No.

14 **Q.** Do you recall, though, having interviews with
15 Selo and Irene Janis or Selo and Irene Black Crow
16 going into the middle of March of that year?

17 **A.** I don't recall having any interviews with
18 them or talking with them.

19 **Q.** Would it refresh your recollection if I
20 showed you a report?

21 **A.** It sure would. I would like to see it.

22 **Q.** Sure.

23 Take your time to review that.

24 **A.** Yes, I have looked at this report.

25 **Q.** All right.

1 Having looked at that report, does that
2 refresh your recollection of having gone out and
3 talking to Selo and Irene Black Crow some time on
4 March 12, 1976?

5 **A.** I don't recall, you know, any details like
6 that. But if -- if they did talk to me, and it was
7 concerning any kind of a death, regardless of what it
8 was, I probably would have made notation of it. And I
9 probably would have let the FBI know about what I had
10 heard or found. That was a common thing for me to
11 pass information on important issues.

12 **Q.** Especially in that case because you
13 immediately suspected foul play?

14 **A.** Well, any information that I would have
15 gotten regarding any kind of a death on the
16 reservation I would have passed on to the FBI, yes.

17 **Q.** And you went out and talked to Selo and Irene
18 about a call they had made that was deemed suspicious
19 to the ambulance?

20 **A.** You know, I don't really recall that. It's
21 not clear in my mind if I did. It's possible that I
22 did, but I don't think it went anywhere as far as the
23 investigation is concerned.

24 **Q.** Do you recall telling the FBI that they were
25 visibly shaken when you approached them about the --

1 **A.** I don't recall that, but it's possible I
2 could have said that.

3 **Q.** Okay.

4 **A.** It's 35 years ago, sir.

5 **Q.** All right.

6 Do you recall where Selo and Irene lived?

7 **A.** No, I don't.

8 **MR. MURPHY:** Nothing further.

9 **A.** And I didn't go to Wambli to talk to them.
10 If it happened at all it was in Pine Ridge because --
11 the reason is I went out to do that crime scene and I
12 never did go back to Wambli for a couple months after
13 that.

14 **Q. (BY MR. MURPHY)** So if you talked to them,
15 they came to you?

16 **A.** Must have been. Might have been in my office
17 or someplace if that happened at all.

18 **MR. MURPHY:** Okay.

19 Thank you.

20 **THE COURT:** Anything further from the state?

21 **MR. MANDEL:** No, Your Honor.

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

23 You may be excused. You are released from
24 any subpoena that may be there.

25 **MR. MURPHY:** You are released from my

1 subpoena, sir.

2 (Witness excused.)

3 **MR. MANDEL:** The state calls Ray Hand Boy,
4 Your Honor.

5 **THE COURT:** Stop right up here, sir. We'll
6 get you sworn in. Please raise your right hand.

7 RAY HAND BOY,
8 called as a witness herein, having been duly sworn,
9 under oath testified as follows:

10 **THE COURT:** Please take a seat.

11 **DIRECT EXAMINATION**

12 **BY MR. MANDEL:**

13 **Q.** Good afternoon, sir.

14 Could you state your name, please.

15 **A.** Raymond Charles Hand Boy.

16 **Q.** Okay.

17 Last name two words or one word?

18 **A.** Pardon?

19 **Q.** Is your last name --

20 **A.** Hand Boy.

21 **Q.** Is your last name two words or one word?

22 **A.** I am sorry. I am hard of hearing.

23 **Q.** I will try and talk louder.

24 Is your last name spelled as two words or one
25 word?

1 **A.** Two words.

2 **Q.** Were you married to an individual named
3 Evelyn Bordeaux?

4 **A.** Yes.

5 **Q.** When were you married?

6 **A.** New Years 1977.

7 **Q.** How long were you married, sir?

8 **A.** Five years.

9 **Q.** What happened at that time?

10 **A.** Pardon.

11 **Q.** What happened at that time?

12 **A.** When we were married?

13 **Q.** No.

14 Did something happen to your wife?

15 **A.** Yes. She got killed in a car accident.

16 **Q.** Okay.

17 Did you know an individual by the name of
18 Annie Mae Aquash?

19 **A.** I knew who she was. I didn't know her
20 personally.

21 **Q.** To some extent were you involved in the
22 American Indian Movement back in 1975?

23 **A.** Pretty much, yeah.

24 **Q.** What was your involvement?

25 **A.** Just being around. Just being around, do

1 errands. Pretty much about it.

2 Q. Do you remember receiving a phone call
3 regarding Ms. Aquash back on November 24 of 1975?

4 A. Phone call wasn't for me, it was for my wife.

5 Q. Okay.

6 Do you know what the phone call was about?

7 A. No.

8 Q. Did you --

9 A. I found out later, but I didn't know then.

10 Q. As a result of the phone call, did you take a
11 trip?

12 A. Yes.

13 Q. What took place first?

14 A. What took place first?

15 Q. Yeah.

16 A. My wife just asked me if I -- if we could go
17 get one of her friends in Pierre at the time. And
18 that was pretty much what the phone call was about.
19 And they would get -- give her some fund for gas and
20 stuff to do it.

21 Q. Where were you living at the time?

22 A. 913 Blaine, Rapid City.

23 Q. Okay.

24 So you took off from Rapid City and went to
25 Pierre?

1 **A.** Yes.

2 **Q.** And Evelyn was with you?

3 **A.** Yes.

4 **THE COURT:** Let me -- I may be confused. I
5 thought they were married in 77 on New Years Day.

6 **THE WITNESS:** It wasn't New Years Day. I was
7 trying to remember the exact date.

8 **THE COURT:** Well, 77, and now we're talking
9 about 75.

10 **THE WITNESS:** Yeah.

11 **THE COURT:** Were you living together and not
12 married at that time?

13 **THE WITNESS:** Yeah.

14 **THE COURT:** I just want to get my dates
15 straight.

16 Thank you.

17 **THE WITNESS:** I am sorry. I should have
18 cleared that up myself.

19 **Q.** **(BY MR. MANDEL)** So the two of you left Rapid
20 City and headed over to Pierre?

21 **A.** Yes.

22 **Q.** Do you recall about what time of day that
23 was?

24 **A.** It was early evening. I couldn't tell exact
25 time. It was dark.

1 **Q.** Do you know why you were asked to do this?

2 **A.** No.

3 My wife indicated then that her friend, which
4 was Annie Mae, needed a ride, and I didn't know
5 exactly where we were going at the time. But we went
6 and did it. Took her.

7 **Q.** Do you know where you went when you got to
8 Pierre?

9 **A.** Went to Denver.

10 **Q.** No.

11 I am asking you where you went in Pierre to
12 pick her up?

13 **A.** It was -- I don't know exact streets or
14 anything, but I -- I can tell you -- I know my way
15 there as far as that goes. It was a motel.

16 **Q.** Do you recall how many -- how tall it was?
17 How many stories?

18 **A.** Yeah. Probably maybe six stories. Five or
19 six stories. Kind of a tall building for Pierre.

20 **Q.** Okay.

21 What happened when you got there?

22 **A.** We pulled in. There was a gas station right
23 across from the motel. We pulled in there. It was
24 closed. And my wife got out and went into the motel
25 and then her and Annie Mae came back to the car.

1 Q. You just waited in the car?

2 A. Yeah, I just waited for them.

3 Q. Do you recall what Annie Mae was wearing when
4 she came out?

5 A. A dark jacket.

6 Q. Anything else you recall?

7 A. Blue jeans, I think. That's about it. I
8 can't remember anything else.

9 Q. Do you remember what time of day it was when
10 you finally found her?

11 A. It was early evening. It was still -- it was
12 dark. I know we left Rapid City and it was daylight
13 when we left so when we got there it was just getting
14 dark and it was -- the sun was already down.

15 Q. When she came out to the car with Evelyn, did
16 Annie Mae have anything with her, any suitcase, or
17 anything like that?

18 A. No. Just -- just a bag.

19 Q. Like --

20 A. Yeah. A purse, I think.

21 Q. Okay.

22 What happened then?

23 A. They just told me that we were going to
24 Denver and they gave me directions to go. So before
25 we left town we stopped at a truck stop and I got gas

1 and we headed south.

2 Q. Do you remember how you headed down towards
3 Denver?

4 A. Went through Fort Pierre and I think we hit
5 the road, 81, 81 South coming out of Pierre going
6 through Fort Pierre and then going south onto the
7 interstate. Then we went to -- went to the interstate
8 for a little bit and then we got off on the road going
9 toward Mission. Then we went south and went down
10 toward Valentine -- just straight south to the
11 interstate down there, 90 -- or 80. I am sorry.

12 Q. In Nebraska?

13 A. Yeah.

14 Q. What did you do then?

15 A. We just took 80 west and drove until we came
16 to Denver.

17 Q. Where exactly were you heading to as far as
18 you knew at that point?

19 A. I didn't know. I didn't know where we were
20 going in Denver because I never been there.

21 Q. But you knew you were going to Denver?

22 A. Yes. That's what they indicated was where we
23 were heading.

24 Q. During the time Annie Mae and your wife were
25 in the car did you hear any conversations between

1 them?

2 **A.** Mostly -- well, all I heard was they talked
3 about their kids. And that's about it, really,
4 because I couldn't really pay attention to what they
5 were saying. It was bad weather and I had to pay
6 attention to the road mostly. But they were talking
7 about most -- mostly what I heard was about their
8 kids. About their children.

9 **Q.** Other than that do you remember anything?

10 **A.** No.

11 You know, I have tried to think since this
12 has been going on but I can't remember anything else
13 they said other than -- that sticks to my mind.

14 **Q.** Do you remember where they were seated in the
15 car?

16 **A.** My wife was in front with me when we started
17 out and then when I stopped and got gas she got in the
18 back seat with her and they were talking.

19 **Q.** Did you drive all night heading down towards
20 Denver?

21 **A.** Yeah.

22 **Q.** Do you recall about what time it was when you
23 got in the Denver area?

24 **A.** No. It was -- I don't know. Maybe
25 two o'clock. It had to be somewhere around there

1 because -- I didn't pay attention, but I know when
2 they got out it was still dark when we left.

3 Q. Do you recall -- did you actually go to the
4 city of Denver or in the area somewhere?

5 A. We went to where there were a bunch of
6 apartment buildings, like -- you know, kind of like
7 apartment buildings. And they just told me where to
8 go. I didn't know the street names or anything. They
9 just told me where to go, which way to turn, and I
10 just did what they said. They told me to stop and she
11 got out.

12 Q. Did they both know where they were going or
13 just your wife or what?

14 A. I think my wife knew, too. She's been down
15 to Denver, too, she told me.

16 Q. What were the buildings like there?

17 A. Like apartment buildings. Not real tall, but
18 like -- I don't know, projects, I guess you would call
19 them.

20 Q. Were they single-story buildings or taller
21 than that?

22 A. Two stories at the most, I think. Most of
23 them.

24 Q. What -- where did you go with her -- I mean,
25 I know you kind of followed directions in turning left

1 and turning right and so on but where did you finally
2 arrive at? Was it one --

3 A. I thought it was Denver --

4 Q. I mean, was it one of these buildings you
5 were describing?

6 A. Where did she go?

7 Q. Right.

8 Where did you take her?

9 A. I don't know. She just got out on the street
10 there and they said their goodbyes, they hugged each
11 other, and we just drove off.

12 Q. You don't know -- you didn't see what
13 building she went into or anything?

14 A. No, I didn't.

15 Q. And you just took off?

16 A. I was trying to concentrate on getting back
17 because it was still bad weather and I knew I had to
18 drive through that.

19 Q. In terms of whether you were right in Denver
20 or not, do you know for sure?

21 A. No.

22 Q. Is it safe to say at least you knew you were
23 in the area?

24 A. Yeah. Yeah. That's what they indicated. I
25 didn't know the area. I kind of do now but I probably

1 couldn't find that place if I tried.

2 Q. Did you ever see Annie Mae again after you
3 dropped her off in Denver?

4 A. No.

5 Q. Did you ever hear about her after that?

6 A. Yeah. After she was -- after she died.

7 Q. What did you hear in that regard?

8 MR. MURPHY: Objection. Calls for hearsay.

9 THE COURT: That depends. At the moment I am
10 going to sustain it unless you tell me what it's being
11 offered for.

12 Q. (BY MR. MANDEL) Did you ever discuss this
13 matter with your wife?

14 A. Pardon?

15 Q. Did you ever discuss Annie Mae's death with
16 your wife?

17 A. Afterwards, yeah.

18 Q. Did she indicate to you she knew anything
19 about what had happened to her?

20 A. No.

21 Q. Did anyone else?

22 A. No.

23 MR. MURPHY: Objection. Calls for --

24 THE COURT: It's overruled.

25 Q. (BY MR. MANDEL) Were you familiar with the

1 WKLDOC house in Rapid City?

2 A. Which house?

3 Q. WKLDOC, Wounded Knee Legal Defense Offense
4 Committee?

5 A. Yeah.

6 Q. Was that in the neighborhood you lived?

7 A. Probably about 10 blocks, 12 blocks from
8 where I lived then.

9 Q. Had you ever been there?

10 A. Yeah.

11 Q. Were you there at that time at all?

12 A. When?

13 Q. After you took Annie Mae down, were you ever
14 down there at that time do you remember?

15 A. No.

16 MR. MANDEL: I have nothing further, Your
17 Honor.

18 THE COURT: Mr. Murphy?

19 CROSS-EXAMINATION

20 BY MR. MURPHY:

21 Q. Mr. Hand Boy, my name is John Murphy.
22 Pleasure to meet you.

23 A. Same here.

24 Q. I will try to talk loudly, but if you miss
25 something, just let me know.

1 **A.** Okay. Sure.

2 **Q.** I want to talk to you about the trip you
3 took.

4 **A.** Yeah.

5 **Q.** You drive all the way from Rapid to Pierre.
6 That takes, what, about three hours?

7 **A.** Something like that. Maybe two and a half.
8 It was a little longer, the roads were pretty bad.

9 **Q.** Sure.

10 And then probably if the roads were bad
11 another six to eight hours down to Denver?

12 **A.** Yeah. It could -- 90 was pretty good -- I
13 mean, 80 before -- after we got on 80 it was snowy but
14 you could make the speed limit or faster.

15 **Q.** But from when you get to Pierre to when you
16 get to Denver or wherever you got, Annie Mae Aquash is
17 telling you where she needs to go?

18 **A.** Yeah.

19 **Q.** She knows where she wants to end up?

20 **A.** Uh-huh.

21 **Q.** I'm sorry. You have to answer yes or no.

22 **A.** Yes, sir.

23 **Q.** And it appears, at least obvious, that she's
24 already planned out where she's going to end up in
25 Denver?

1 **A.** They seemed to know, yeah.

2 **Q.** You didn't have to stop anywhere or ask for
3 directions or anything like that?

4 **A.** No.

5 **Q.** Okay.

6 At that point, you didn't ask her any
7 questions about where she was going, did you?

8 **A.** No, I didn't.

9 **Q.** And that wasn't your role, right?

10 **A.** No. I hardly knew her, but I knew of her
11 through my wife.

12 **Q.** Sure.

13 But even then if she said she was -- you were
14 told by your wife she's in some danger or she needs
15 some help, and she knows where she's going to go,
16 that's your job is just to give her a ride, correct?

17 **A.** Well, they never indicated they was in any
18 kind of danger.

19 **Q.** Okay.

20 Well, let me ask you about that. You said
21 today that you didn't really hear any of the
22 conversation that transpired between your wife and --

23 **A.** Well, I heard some but not nothing to do with
24 anything like -- what happened to her, you know.

25 **Q.** All right.

1 Well, I want to bring you back. I know it's
2 2010 now. You gave an interview with Robert Ecoffey
3 way back in 1996.

4 Do you recall talking to Mr. Ecoffey?

5 **A.** Yeah. Some of that.

6 **Q.** And do you recall telling him that in your
7 interview that Anna Mae wanted to come back to Rapid
8 City from Pierre, but Rapid City was too hot and so
9 therefore she decided she wanted to go down to Denver?

10 **A.** No. I don't remember that.

11 **Q.** If I show you a copy of the document, would
12 that help refresh your recollection?

13 **A.** Probably -- I mean, no, I don't think it
14 would because I don't remember every saying that to
15 Bob.

16 **Q.** Okay.

17 Do you remember telling him -- saying -- Hand
18 Boy said that Anna Mae was quiet and that she talked
19 to Evelyn saying that she was scared because while she
20 was in custody if Pierre, South Dakota, the FBI had
21 threatened her.

22 Do you recall that statement to Mr. Ecoffey?

23 **A.** You know, I don't.

24 **Q.** Would you like to review a cop --

25 **A.** Yeah, I would.

1 **MR. MURPHY:** Showing the witness document
2 1,323.

3 **Q.** **(BY MR. MURPHY)** Take your time. You can read
4 start to finish, if you like.

5 **A.** You know I remember --

6 **Q.** Having read this now, knowing that this was
7 conducted 14 years ago, closer to the events, does
8 that help refresh your recollection some of things --

9 **A.** I remember talking to him, but I don't
10 remember telling him that it was hot in Rapid City.

11 **Q.** Okay.

12 But in regard to the overhearing Anna Mae
13 tell your wife while you are in the car that she was
14 scared because while she was in custody in Pierre she
15 had been threatened by the FBI, does that refresh your
16 recollection as to that statement?

17 **A.** I think what was said then between them two
18 was that she indicated that the police were after her
19 and she didn't want to go to Rapid.

20 **Q.** Okay.

21 **A.** And that's what I indicated to Bob.

22 **Q.** Even though he put it down that --

23 **A.** Yeah --

24 **Q.** -- she felt --

25 **A.** She thought maybe she was in danger there by

1 someone other -- I thought she was just trying to
2 avoid the police.

3 Q. The police or the FBI?

4 A. Yeah. Whatever. Law enforcement. Yeah.

5 Q. Okay.

6 Thank you.

7 MR. MURPHY: Nothing further.

8 THE COURT: Anything further?

9 MR. MANDEL: No, Your Honor.

10 THE COURT: Thank you, Mr. Hand Boy.

11 You may be excused.

12 Is he here on subpoena?

13 MR. MURPHY: I don't have him subpoenaed.

14 MR. JACKLEY: We'd release him, Your Honor.

15 THE COURT: You are released from your
16 subpoena.

17 Thank you, sir.

18 (Witness excused.)

19 MR. JACKLEY: May we approach, Your Honor?

20 THE COURT: Yeah.

21 (Whereupon, a discussion was held at the
22 bench and off the record.)

23 THE COURT: Ladies and gentlemen, we had a
24 flight cancelation for a witness for the case that was
25 supposed to come in this afternoon. Welcome to court

1 time and troubles.

2 We're going to close down for the night.
3 We'll reconvene at 8:30 in the morning. Please leave
4 your notebooks here.

5 You are again reminded -- you are going to
6 get tired of this reminder, but I'm in trouble if I
7 don't give it to you -- you are reminded that you are
8 not to discuss this case with anybody under any
9 circumstances. Upon discussion you shut it down
10 immediately. You are not to form any opinions based
11 on the evidence you've heard until all the evidence is
12 presented to you.

13 You are to avoid watching the news, reading
14 newspapers, or anything of that ilk until this matter
15 is completed and you have reached a verdict.

16 Thank you. We are in recess.

17 (Whereupon, the proceedings in this matter
18 were then concluded.)
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25

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

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

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

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

11
 12 IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.
 13

14 COPY

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