

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 6 OF 10

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
DECEMBER 6, 2010

COPY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * 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
DARLENE KAMOOK ECOFFEY	7	8	89,115	102
RICHARD MARSHALL	117	129	135	
THEDA CLARKE	152			
JENNIFER GERING	162			
ARLO LOOKING CLOUD	186	231		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBITS:

OFFERED/ADMITTED

35 - Photo

225/225

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

2 (Whereupon, the following proceedings were
3 had in open court with the jury not present.)

4 **THE COURT:** Okay.

5 I think over the weekend I made some reviews
6 of some of the decisions I have made and I have come
7 to a conclusion that one of them was wrong. And that
8 pertains to the testimony of what was said by Leonard
9 Peltier in the camper. I reversed my decision on that
10 and the state will reopen to address that issue.

11 Mr. Murphy has made any number of objections
12 to that which I previously sustained in large and we
13 need to reassert those objections at this time.

14 Mr. Murphy?

15 **MR. MURPHY:** That's correct, Your Honor. I
16 would reassert the objections I made both in court and
17 also incorporate my motion in limine on this specific
18 issue which set forth a number of authorities
19 including the *Shepard* decision wherein the U.S.
20 Supreme Court said specific instances of past conduct
21 cannot be admitted for the purpose of proving state of
22 mind. And I cited a number of other authorities on
23 the issue.

24 There is also the issue of the confrontation
25 clause. The unavailability issue has not been

1 resolved. And so, for all of those reasons previously
2 asserted, I would reassert those at this point.

3 **THE COURT:** And I realize this is a Supreme
4 Court issue, but I have given it multiple thoughts on
5 several occasions and that's the best result I can
6 give at this time.

7 Before we get something going, I want to
8 advise the audience once again, if there is a cell
9 phone in here, get it gone. If there are any
10 electronics in here, get it out of here.

11 My staff attorney will be on a Blackberry.
12 He's doing some research for me on the internet. But
13 he's entitled to do that because he works for me. The
14 rest of you are out of luck.

15 In terms of -- again, I want to clarify that
16 we will not have reactions in the audience pro or con
17 to the testimony or proceedings in any way, shape, or
18 form. The reason for that is it simply amounts to
19 unsworn testimony easily visible by the jury. And
20 that makes it difficult for me to retain a jury
21 hearing and deciding the case only from the evidence
22 that comes from the witness stand and exhibits. That
23 may be difficult. Things are said with which you
24 disagree. But nonetheless, I am going to assume we
25 are going to carry forward and we should.

1 And having said that, we would call the jury
2 in and get the morning under way.

3 (Off the record.)

4 **THE COURT:** Satisfied this is the jury,
5 Mr. Jackley?

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

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

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

9 **THE COURT:** Ladies and gentlemen, I changed a
10 ruling I had made before regarding some testimony
11 pursuant to some statements by Mr. Peltier. I have
12 changed that ruling and am allowing the state to
13 reopen to go to that area.

14 Thank you.

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

16 The state calls Kamook Banks.

17 **THE COURT:** Please come forward, ma'am.

18 I believe you are still sworn, but we'll do
19 it again anyway.

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

23 **THE COURT:** Please take a seat.
24
25

DIRECT EXAMINATION

BY MR. JACKLEY:

Q. Good morning.

A. Good morning.

Q. Kamook, I want to take you back to the time frame after October 12, 1975, when you were riding in the motor home and there was a discussion about Leonard Peltier.

Do you recall that time period?

A. Yes, I do.

Q. Who, again, was present for the discussion involving Leonard Peltier?

A. It would be myself, Dennis Banks, Kenny Loud Hawk, my sister Bernie Nichols, and Annie Mae, and Leonard.

Q. Did you witness or did you see -- did you witness and see Leonard Peltier make what appears to be incriminating statements?

A. Yes, I did.

Q. Would you please look to the jury and to the best that you can describe what he said and any hand movements he said when he made it?

A. He held his hand like this (indicating). He was standing -- there was a little table. We were sitting at the table. He was standing by the table in

1 the motor home. He held his hand like this
2 (indicating) and he said, that motherfucker was
3 begging for his life but I shot him anyway.

4 Q. Kamook, who was he referring to?

5 A. He was talking about the FBI agents.

6 MR. JACKLEY: No further questions, Your
7 Honor.

8 THE COURT: Thank you.

9 I think, Mr. Murphy, you are up on cross.

10 MR. MURPHY: Thank you, Your Honor.

11 **CROSS-EXAMINATION**

12 **BY MR. MURPHY:**

13 Q. Mrs. Ecoffey, my name is John Murphy and I
14 represent John Graham. I am going to ask you a series
15 of questions.

16 Let me know if I ask a question that's
17 convoluted or anything like that, okay?

18 A. Okay.

19 Q. I want to bring you back to the general time
20 frame. You have been testifying about 73 through 75
21 in South Dakota.

22 At this point, you were living on Pine Ridge
23 more or less?

24 A. Pretty much.

25 Q. Okay.

1 And during that time period, it was pretty
2 scary to live in Pine Ridge on occasion, wasn't it?

3 **A.** For a lot of people it was.

4 **Q.** Yeah.

5 There were a lot of shootings, correct?

6 **A.** Yes.

7 **Q.** There was the goon squad?

8 **A.** Yes.

9 **Q.** And the goon squad often shot at AIM members
10 or their families?

11 **A.** Yes.

12 **Q.** A number of AIM supporters were killed in
13 that time period, correct?

14 **A.** Yes.

15 **Q.** And the FBI at this point was also regularly
16 appearing on Pine Ridge, correct?

17 **A.** I read that but I didn't know that myself.

18 **Q.** After June of 1975, when the FBI agents were
19 killed, you -- at that point you saw a lot more of the
20 FBI, did you not?

21 **A.** Personally, no, I did not.

22 **Q.** Okay.

23 But you did see the goon squads and the
24 supporters of Dick Wilson, correct?

25 **A.** Yes.

1 Q. All right.

2 Let's talk about -- you mentioned Dennis
3 Banks -- would you call him your common-law husband?
4 Would that be a fair way of describing him?

5 A. Yeah, that would be.

6 Q. When did you meet Mr. Banks?

7 A. In February of 1972.

8 Q. How old would you have been then?

9 A. Seventeen.

10 Q. And he would have been how old about?

11 A. Thirty-four.

12 Q. Did you begin a romantic relationship at that
13 time or did it develop later?

14 A. It developed later.

15 Q. How much later?

16 A. Six months, maybe.

17 Q. Okay.

18 So by the time you were at Wounded Knee
19 together you were a couple?

20 A. In 73, a year later, yes.

21 Q. When did you have your first child with
22 Mr. Banks?

23 A. In August of 1974.

24 Q. All right.

25 And then at the time of like the motor home

1 incident, you were pregnant with your second child by
2 him?

3 **A.** Yes, I was.

4 **Q.** Okay.

5 And at this time period, Mr. Banks was a
6 leader in the American Indian Movement?

7 **A.** He was.

8 **Q.** Very charismatic person?

9 **A.** I guess.

10 **Q.** Okay.

11 He had rose to a leadership role within the
12 American Indian Movement at that time, correct?

13 **A.** Well, he had originally been one of the
14 original cofounders of the American Indian Movement.

15 **Q.** Okay.

16 And when we talk about the American Indian
17 Movement, we're not talking about -- especially, like,
18 by 1975 -- we're not talking about one well-organized
19 movement, are we?

20 **A.** By 1975 they are -- I would say that he was
21 still kind of together.

22 **Q.** Well, there was factions from Minnesota, from
23 Denver, from South Dakota, from California, correct?

24 **A.** There were many states that had different
25 chapters of the American Indian Movement.

1 Q. Okay.

2 And the whole initial premise behind the
3 movement was Indian self-determination, correct?

4 A. Yes, I would say.

5 Q. And -- so not being told what to do by
6 somebody else, correct, basically?

7 A. Well, I think the American Indian Movement --
8 back then I think it was started not just for
9 self-determination, but also it brought light to a lot
10 of Native American issues, treaty right, land rights.

11 Q. Education issues?

12 A. Yes.

13 Q. And there was a lot of good people working in
14 the movement, weren't there?

15 A. Yes.

16 Q. A lot of people that had nothing to do with
17 violence but were there for the people?

18 A. Yes.

19 Q. Let's bring you up to Wounded Knee. That's
20 1975.

21 Do you recall being there?

22 A. Yes, I do.

23 Q. And for those who don't know what Wounded
24 Knee was, that was a time when the American Indian
25 Movement occupied a village called wounded knee,

1 correct?

2 **A.** It was a time when the American Indian
3 Movement was in the area and there were members of the
4 tribe, including some elders, that had asked the
5 American Indian Movement for some help on the
6 reservation. So it was the American Indian Movement
7 but it was also just a lot of people. Some didn't
8 belong to the American Indian Movement.

9 **Q.** Sure.

10 And when we talk about belonging to the
11 American Indian Movement, would you have called
12 yourself a member back then?

13 **A.** Yes.

14 **Q.** But you didn't have, like, a membership card?

15 **A.** No.

16 **Q.** You just supported it and became --

17 **A.** Yeah. What you believed in, yeah, at the
18 time.

19 **Q.** So at Wounded Knee there came to be a point
20 when there was a standoff with federal and Tribal
21 authorities, correct?

22 There was shooting back and forth?

23 **A.** It was a standoff between Tribal and federal
24 authorities and the people that were at Wounded Knee.

25 **Q.** Right. Okay.

1 And there was lots of gun fire back and forth
2 between the two?

3 **A.** Over 71 days, yes.

4 **Q.** Seventy-one days.

5 Some people got killed?

6 **A.** Yes.

7 **Q.** Okay.

8 And you were there and Dennis was there?

9 **A.** Yes.

10 **Q.** Anna Mae Aquash was there?

11 **A.** Yes.

12 **Q.** And in fact, Anna Mae Aquash got married at
13 Wounded Knee?

14 **A.** She.

15 **Q.** Do you remember that ceremony?

16 **A.** Yes, I do.

17 **Q.** Now, after Wounded Knee, after the occupation
18 or the standoff ended, many, many people were
19 prosecuted for their role in that, were they not?

20 **A.** Yes, they were.

21 **Q.** In fact, the Wounded Knee Legal Defense
22 Offense Committee was created to help represent some
23 of the hundreds of people that were charged as a
24 result of the so-called occupation; is that fair?

25 **A.** Yes.

1 **Q.** John Graham was not there, was he?

2 **A.** At?

3 **Q.** At Wounded Knee?

4 **A.** There were hundreds and hundreds of people
5 there. I don't know.

6 **Q.** You never saw him?

7 **A.** At Wounded Knee?

8 **Q.** Yes.

9 **A.** No.

10 **Q.** Okay.

11 And you didn't get charged and Dennis didn't
12 get charged with actions as a result of Wounded Knee,
13 did you?

14 **A.** He did get charged. I didn't get charged.

15 **Q.** Let me -- I should have put that differently.

16 The day before the occupation ended, you and
17 Dennis left Wounded Knee?

18 **A.** Actually, I left on April 27 and it wasn't
19 over until May 5.

20 **Q.** Okay.

21 So about eight days before the end of the
22 occupation?

23 **A.** Yes.

24 **Q.** And Dennis also got out before the end?

25 **A.** He left the night before it ended.

1 Q. Okay.

2 So he was charged, though, as a result?

3 A. Yes, he was charged.

4 Q. Okay.

5 Do you remember what he was charged with?

6 A. Now I don't, but he did have a trial in
7 St. Paul, Minnesota.

8 Q. Okay.

9 Now, that ended in -- you said April of 19 --

10 A. No. No. It ended in May of 1973. The first
11 week of May.

12 Q. I want to bring you up to, now, the early
13 parts of 1975. You talked on direct about some of the
14 leaders and insiders in AIM.

15 Do you recall a man named Doug Durham?

16 A. Yes, I do.

17 Q. And Doug Durham was somebody that Dennis
18 knew?

19 A. Yes.

20 Q. And Leonard knew?

21 A. Probably.

22 Q. Okay.

23 You knew him?

24 A. Yes.

25 Q. In fact, Doug Durham was pretty close to you

1 and Dennis at one point, wasn't he?

2 **A.** He was.

3 **Q.** He flew Dennis around the country in his
4 plane?

5 **A.** Yes.

6 **Q.** He was kind of like Dennis's right-hand man
7 in some regards, wasn't he?

8 **A.** He was.

9 **Q.** And it came to be a point when Mr. Durham
10 admitted to being an FBI informant, correct?

11 **A.** Yes.

12 **Q.** And he acknowledged that he had been working
13 with the FBI to secretly gather information about AIM
14 for some time?

15 **A.** Yes.

16 **Q.** And he had information about Dennis's
17 criminal activities, true?

18 **A.** I believe that when Doug Durham had a press
19 conference he said that he had never seen any kind of
20 illegal activities.

21 **Q.** Well, Mr. Banks, Dennis, was a fugitive
22 during a time period when Mr. Durham was flying him
23 around in his airplane?

24 **A.** There was one time that I recall that Dennis
25 was a fugitive when he did fly him. But a couple of

1 years before time period, he wasn't wanted on any
2 charges.

3 Q. During this time period Mr. Banks had been in
4 possession of a large number of weapons, correct?

5 A. You mean with Doug?

6 Q. During the time period in question Dennis
7 often had guns and explosives with him?

8 A. In 1975?

9 Q. 75, 74, 73?

10 A. Seventy-five.

11 Q. He did?

12 A. Yes.

13 Q. Okay.

14 Now, the response when Doug Durham was outed
15 as an informant was for AIM to hold a press
16 conference, correct?

17 A. I am sorry. I don't understand.

18 Q. When it was discovered that Mr. Durham was an
19 informant for the FBI --

20 A. The press conference that I mentioned?

21 Q. Yes.

22 -- Dennis and other AIM leaders held a press
23 conference and Doug Durham was there, correct?

24 A. No. Doug held his own press conference and
25 that's how he announced that he had been working for

1 the FBI.

2 Q. And you are saying that Dennis Banks wasn't
3 at that press conference?

4 A. I wasn't at the press conference, so I don't
5 know. But I -- my understanding is that he had a
6 press conference. I don't know who was there.

7 Q. In any regard, that was the avenue at which
8 point -- or by --

9 Do you need a glass of water?

10 A. Sure.

11 Q. So let me put it this way. In March of 1975,
12 Doug Durham is exposed as an informant, there is no
13 question that he's an informant because he's admitted
14 it, and a press conference is held; is that a fair
15 statement?

16 A. Yes.

17 Q. Okay.

18 I want to move you forward another couple
19 months to June of 1975. And I am going to ask you
20 these questions and they are not designed to humiliate
21 or embarrass you, but I need to talk to you about your
22 discovery of the affair between your husband and Anna
23 Mae Aquash.

24 You discovered that in about June of 1975?

25 A. I didn't discover it in -- I didn't go out

1 looking for the information.

2 Q. Right.

3 A. It was just told to me and that's how I found
4 out. So I didn't discover it.

5 Q. Okay.

6 You learned about it in June of 1975?

7 A. Right.

8 Q. In fact, you learned about it at the
9 Farmington convention we talked about?

10 A. I did.

11 Q. At that point you had one child with Dennis?

12 A. Yes.

13 Q. And one on the way?

14 A. At that time, I didn't know I had one on the
15 way.

16 Q. June of 75 -- in November you were how many
17 months pregnant during the motor home incident?

18 A. Seven.

19 Q. Seven months. Okay.

20 So you would have been about four months
21 pregnant, I guess, if my math is right?

22 A. Maybe. I don't --

23 Q. Okay.

24 Anyway, Anna Mae knew you knew about the
25 affair?

1 **A.** She knew when the conference was over.

2 **Q.** All right.

3 And at this point we're going forward from
4 this point over the next five months up until like the
5 motor home incident.

6 Dennis and Anna Mae are together on a number
7 of occasions, correct?

8 **A.** You mean from June to --

9 **Q.** To the motor home incident.

10 **A.** To my knowledge, she only came when -- in
11 November -- I am sorry. October.

12 **Q.** Columbus day?

13 **A.** Yes. A few days before that.

14 **Q.** And then she was on the motor home trip with
15 you?

16 **A.** Yes.

17 **Q.** And just to be fair, you weren't happy about
18 the fact that Anna Mae Aquash was having an affair
19 with your common-law husband?

20 **A.** No.

21 **Q.** Okay.

22 I want to bring you back to the Farmington
23 convention in June of 1975. You were asked some
24 questions on direct about conversations you had with
25 Anna Mae about what transpired.

1 Do you remember that?

2 A. You mean when her and I were in jail
3 together?

4 Q. Yes.

5 And we didn't get into the specifics but you
6 said Anna Mae was upset about the incident in
7 Farmington, correct?

8 A. Yes.

9 Q. All right.

10 Now, as part of your work in this case, when
11 you were working for the FBI, you interviewed people
12 like Dino Butler, correct?

13 A. I wasn't working for the FBI.

14 Q. Okay.

15 When you were doing interviews that
16 ultimately were turned over to the FBI?

17 A. Yes.

18 Q. Okay.

19 And Mr. Butler was alleged to have been
20 present at the event in question, correct?

21 A. He was.

22 Q. And he told you the event happened nothing
23 like it had been retold over time; is that fair to
24 say?

25 A. When I visited with Dino?

1 **Q.** Yes. On the tape recorded conversation you
2 had with him.

3 **A.** I am sorry --

4 **Q.** The version of events he gave you isn't quite
5 like the events that people are talking about today;
6 is that fair to say?

7 **MR. JACKLEY:** Objection, Your Honor, as to
8 what people are talking about today.

9 **MR. MURPHY:** I will move on. That's fine.

10 **Q.** **(BY MR. MURPHY)** Anyway, in regard to the
11 Farmington incident that Anna Mae talked to you about
12 in November in the jail cell, John Graham wasn't part
13 of that incident, was he?

14 **A.** No.

15 **Q.** And in fact, going to and from Farmington,
16 Mr. Graham and Ms. Aquash rode in the caravan
17 together; is that your recollection?

18 **A.** I'm not sure how they got there.

19 **Q.** Okay.

20 But anyways, you saw Mr. Graham there at
21 Farmington and you saw Ms. Aquash there at Farmington?

22 **A.** Right.

23 **Q.** You never heard my client at Farmington ever
24 mention anything about Anna Mae Aquash being an
25 informant, did you?

1 **A.** No.

2 **Q.** Okay.

3 And whatever happened in Farmington, that's
4 in June. Over the next five months, six months, till
5 December, Ms. Aquash remains involved in AIM and
6 AIM-related activities, does she not?

7 **A.** Yes, she did.

8 **Q.** And we'll talk about some of those, but she
9 was on a day-to-day basis involved with AIM activities
10 in Pine Ridge and in other states, correct?

11 **A.** She was.

12 **Q.** Okay.

13 She didn't leave the area -- nothing that
14 happened in Farmington caused her to decide to move
15 back home to Canada, right?

16 **A.** I didn't see Annie Mae everyday, but I just
17 had heard, because people talk, that I knew she was in
18 the area somewhere.

19 **Q.** Well, this happened in June and you know she
20 was busted at Al Runnings' in September?

21 **A.** Uh-huh.

22 **Q.** Yes?

23 **A.** Yes. I am sorry.

24 **Q.** You saw her on Columbus day which is
25 October 12?

1 **A.** Right.

2 **Q.** And then you are in a motor home with her all
3 the way up to November 14?

4 **A.** Right.

5 **Q.** So whatever happened in Farmington, she
6 decided not to relocate to Canada and not come back to
7 the U.S.?

8 **A.** No.

9 **Q.** Okay.

10 Now, let's bring you up to June of 1976, or
11 later in June, June -- 1975, the shoot-out at Jumping
12 Bull's. You lived at Jumping Bull's at this time
13 period?

14 **A.** There were several houses there. We lived in
15 one of the houses on the property.

16 **Q.** Okay.

17 Is that part of what's called tent city or
18 was called tent city?

19 **A.** No. That was down the road a ways, down
20 behind where we lived.

21 **Q.** All right.

22 **A.** It was within walking distance.

23 **Q.** Sure.

24 So the same general vicinity?

25 **A.** Right.

1 Q. And the shoot-out occurs and two FBI agents
2 are killed?

3 A. Yes.

4 Q. And one AIM member is killed?

5 A. Yes.

6 Q. Mr. Peltier, Mr. Rubideaux, Mr. Butler are
7 all implicated in that crime?

8 A. Yes.

9 Q. John Graham was not there during the
10 shoot-out, was he?

11 A. I don't know who was there during the
12 shoot-out. I wasn't there.

13 Q. Weren't you told by Ms. Aquash that
14 Mr. Graham and he were -- or Mr. Graham and she were
15 out at Cedar Rapids at Leonard Crow Dog's trial?

16 A. I knew that trial was going on. I was only
17 in Oglala. So who was down at the tent city, I don't
18 know who was there and who wasn't.

19 Q. You've studied this case more or less by
20 living it for the last 35 years.

21 Have you ever heard anybody put John Graham
22 at Jumping Bull's during the shoot-out?

23 A. Not during the shoot-out.

24 Q. Okay.

25 And would it be a surprise to you that

1 Ms. Aquash would have gone to Leonard Crow Dog's trial
2 to lend support to Mr. Crow Dog?

3 **A.** Would it be a surprising to me?

4 **Q.** Yeah.

5 **A.** No.

6 **Q.** Because during that time period one way that
7 AIM members peacefully showed their support of the
8 movement was to go to the trials of people standing
9 trial for activities related to Wounded Knee or other
10 matters?

11 **A.** Yes.

12 **Q.** Was that pretty common back there?

13 **A.** Yes.

14 **Q.** So it wouldn't surprise you that Ms. Aquash
15 and Mr. Graham went to Cedar Rapids for Crow Dog's
16 trial.

17 **A.** No.

18 **Q.** Crow Dog's trial was kind of a big deal,
19 wasn't it?

20 **A.** I think so.

21 **Q.** He was a Medicine Man?

22 **A.** Yes.

23 **Q.** Okay.

24 Now, after the shoot-out, immediately after,
25 like in the days after, you became aware that

1 Ms. Aquash had come back to Pine Ridge, correct?

2 A. Yes.

3 Q. And she came back to help Mr. Peltier,
4 Mr. Rubideaux, Mr. Butler and others escape, correct?

5 A. Well, there were a lot of people there
6 because they were also having services for Joe Stunts
7 who was the other person that had been killed at the
8 shoot-out.

9 Q. Right.

10 But there was an effort to get Leonard and
11 Dino and other people off the reservation to safe
12 hiding, correct?

13 A. I -- I don't know because I wasn't part of
14 that.

15 My understanding is that they had already
16 left.

17 Q. Okay. All right.

18 So you don't recall what Ms. Aquash was doing
19 back in Pine Ridge at that time?

20 A. Well, she had just been staying in Oglala so
21 she was there.

22 Q. Okay.

23 And Oglala is the same community where the
24 shoot-out happened?

25 A. Correct.

1 Q. All right.

2 August of 75. We're up to the month before
3 Al Runnings'. There has been a sun dance at Crow
4 Dog's paradise.

5 Do you recall that?

6 A. Yes.

7 Q. That was late July, early August?

8 A. Usually in August.

9 Q. Yeah.

10 Ms. Aquash is present there, correct?

11 A. Yes.

12 Q. Mr. Graham is present at the sun dance,
13 correct?

14 A. Probably. There were hundreds of people at a
15 sun dance and everybody camps separately.

16 Q. You were there at times?

17 A. Yes.

18 Q. No violent activities occurred?

19 A. No.

20 Q. And during this whole period of time,
21 Mr. Peltier, Mr. Banks, and others had gone under
22 ground more or less, correct?

23 A. After this the sun dance was over, yes.

24 Q. And at the -- well, I will bring you up to
25 September now. September of 1975 is the raid at Al

1 Runnings'. Al Runnings' property is right next to
2 Crow Dog's Paradise; is that a fair statement?

3 **A.** Yes, it sits adjacent to it.

4 **Q.** Crow Dog's Paradise is where the sun dance
5 was and adjacent to that is Al Runnings' land?

6 **A.** Yes. Al Runnings was married to Leonard Crow
7 Dog's sister. Basically it's just one big property.

8 **Q.** Okay.

9 And you recall that on September 5, 1975, the
10 FBI came into Al Runnings' place and also into Crow
11 Dog's place looking for people that had been involved
12 in the shoot-out, correct?

13 **A.** I know they were there. What they were
14 looking for I don't know.

15 **Q.** All right.

16 They executed search warrants, they arrested
17 people, and other things like that?

18 **A.** Yes.

19 **Q.** And of the people they arrested was Anna Mae
20 Aquash, correct?

21 **A.** Yes.

22 **Q.** She was there in a tent with explosives and
23 illegal weapons, correct?

24 **A.** I read that.

25 **Q.** Yeah.

1 And Dino Butler was in the vicinity where she
2 was at, correct?

3 **A.** Dino Butler?

4 **Q.** Uh-huh.

5 Do you recall Dino and --

6 **A.** Nilak.

7 **Q.** Nilak being arrested along with Anna Mae
8 Aquash?

9 **A.** Maybe. I wasn't there.

10 **Q.** All right.

11 Let me ask you this. You've discussed on
12 your direct examination that from Farmington on, Anna
13 Mae Aquash was suspected of being an informant for
14 the -- for the federal government, correct?

15 **A.** I would say there were a lot of people that
16 didn't trust her at the time.

17 **Q.** Okay.

18 And you have indicated before that some of
19 those people were the American Indian Movement
20 leadership, correct?

21 **A.** That's correct.

22 **Q.** Yet, between Farmington and June and December
23 of 75, right smack dab in the middle, September of
24 1975, she's entrusted with a catch of illegal weapons
25 in close proximity to other AIM leaders and other AIM

1 activists on Pine Ridge, correct?

2 **A.** She traveled with us in October.

3 **Q.** I am talking about September, though.

4 In September, she's entrusted with being in a
5 tent full of weapons, illegal weapons, right?

6 **A.** I guess. I wasn't there. So I don't know
7 what she was charged with or what she had or what
8 other people had there.

9 **Q.** But you have speculated as to what AIM
10 leaders thought about her?

11 **A.** Right.

12 **Q.** And yet, presumably, those AIM leaders are
13 allowing her to hang out with them and their illegal
14 weapons, correct?

15 **A.** Well, I spoke for Dennis and Leonard because
16 I was around them. I knew they didn't trust her.
17 They weren't at Crow Dog's.

18 **Q.** Okay.

19 They were on the run, correct?

20 **A.** Right.

21 **Q.** Dino Butler was charged with Leonard and the
22 Jumping Bull shoot-out, correct?

23 **A.** Yes.

24 **Q.** And so he was an affiliated with Leonard,
25 correct?

1 **A.** He was.

2 **Q.** There was no great fission or separation
3 between Dino and Leonard, was there?

4 **A.** No.

5 **Q.** Okay.

6 Nor was there in 1975 between Dino and
7 Dennis, was there?

8 **A.** No, but I wouldn't call Dino Butler one of
9 the leaders of the American Indian Movement.

10 **Q.** He was actively involved in AIM throughout
11 this period of time?

12 **A.** He was.

13 **Q.** He was charged with shooting one of the FBI
14 agents?

15 **A.** He was.

16 **Q.** So he was involved in high level AIM
17 activity, right?

18 **A.** Right.

19 **Q.** Now, just a few days after the Al Runnings'
20 incident you were in a vehicle down in Kansas,
21 correct?

22 **A.** Yes.

23 **Q.** And you were there -- it was your sister
24 Bernie. Each of you had one of your children with?

25 **A.** She didn't have any children with you.

1 Q. You had one --

2 A. My oldest daughter.

3 Q. And there was several other people in the
4 vehicle, correct?

5 A. Right.

6 Q. And there was dynamite and grenades in that
7 vehicle, wasn't there?

8 A. There was.

9 Q. And the car caught on fire in Kansas?

10 A. It did.

11 Q. You escaped but the car exploded, correct?

12 A. Well, the car started to smoke so as -- when
13 we pulled over to the side of the road, we all got out
14 and then the car exploded.

15 Q. Already.

16 In any regard, you are then charged with a
17 host of weapons charges or explosives charges down in
18 Kansas, correct?

19 A. Yes.

20 Q. These are federal charges?

21 A. Yes.

22 Q. And you were also threatened with child
23 endangerment charges?

24 A. No, I was not.

25 Q. You weren't threatened at all with anything

1 to do with your child being present with you?

2 A. No.

3 Q. Was that ever brought up as an issue with
4 you?

5 A. No.

6 Q. Okay.

7 At this point Dennis is not with you,
8 correct?

9 A. No.

10 Q. You don't know where he is?

11 A. No. I don't know where he.

12 Q. What's that?

13 A. I didn't know where he is.

14 Q. You did not know where he is?

15 A. No.

16 Q. And I apologize, one of my ears is clogged up
17 with a head cold so I am having trouble hearing some
18 of this.

19 A. Okay.

20 Q. Anna is not with you, correct?

21 A. No.

22 Q. So on those charges -- and we'll get to --
23 we'll go ahead a little bit but ultimately those
24 charges are reduced down to misdemeanors of some sort,
25 the explosive charges against you?

1 **A.** They -- I believe they were. I plead guilty
2 and was on probation for three years.

3 **Q.** You got a probationary sentence?

4 **A.** Yes.

5 **Q.** Okay.

6 But that didn't come for a while, yet, did
7 it?

8 You -- that didn't come until later in the
9 year or actually into 1976 that you got your
10 three-year probationary sentence?

11 **A.** No, because by 197 -- maybe. It happened in
12 75, so, yeah, it would have been the next year.

13 **Q.** In the next year. Okay.

14 Were you at the Wagner pork plant protest?

15 **A.** No.

16 **Q.** From the time that you had the car explosion,
17 I believe that was 197 -- September 6, 1976.

18 Does that ring a bell?

19 **A.** I think so.

20 **Q.** Okay.

21 **A.** It was in September. I don't remember the
22 exact day.

23 **Q.** Close enough.

24 But between that time and Columbus day,
25 October 12, 1975, you are stuck down in Kansas or

1 Oklahoma; is that true?

2 A. Both.

3 Q. Okay.

4 Because you got the charges pending down
5 there?

6 A. Yes.

7 Q. And during this whole period of time you
8 don't know where Dennis is, right?

9 A. No.

10 Q. And you don't know where Anna Mae is?

11 A. No.

12 Q. But you are allowed to come back to South
13 Dakota on Columbus day for a memorial dinner?

14 A. Yeah. My mother -- I mean, my grandma was
15 having a memorial dinner for my Uncle Buddy. He had
16 been killed at Wounded Knee.

17 Q. Okay.

18 He was shot by either a goon or an FBI during
19 that --

20 A. In court testimony, it was a Marshal, I
21 believe.

22 Q. Okay.

23 That's kind of -- gives you an idea of how
24 dangerous it was at Wounded Knee, correct?

25 A. Right.

1 Q. Somebody close to you was shot and killed?

2 A. Yes.

3 Q. So you go to this memorial dinner on Columbus
4 days and at some point somebody comes to you and tells
5 you to go to Oglala?

6 A. She came to me and said when this is over you
7 need to come with me.

8 Q. And who was that person?

9 A. It was Dela Mae Star.

10 Q. And you go to Kenny Loud Hawk's house?

11 A. We did.

12 Q. Okay.

13 And you don't know initially why you are
14 going to Kenny Loud Hawk's house, do you?

15 A. I assumed Dennis was there. She didn't say
16 that. But -- that was it.

17 Q. That's the kind of way things worked is
18 somebody told you you need to come with me and you
19 didn't ask questions?

20 A. Because she wouldn't have asked me just to go
21 with her otherwise.

22 Q. Unless it was something important?

23 A. Yes.

24 Q. You get to Loud Hawk's house, you walk in,
25 and you look into a room in the back or one of the

1 rooms, correct?

2 **A.** Well, we had been there all evening.

3 **Q.** At Loud Hawk's house?

4 **A.** Yes.

5 **Q.** Okay.

6 Let me ask you, when you go into Loud Hawk's
7 house, you see Leonard Peltier, Dennis Banks, and Anna
8 Mae Aquash in a room, correct?

9 **A.** Right.

10 **Q.** And they are making bombs, correct?

11 **A.** Right.

12 **Q.** All right.

13 And you haven't seen your common-law husband
14 in about six weeks by this point have you?

15 **A.** Maybe six weeks or longer.

16 **Q.** Or longer.

17 And one of your first reactions was you said
18 you wondered why was she there meaning Anna, correct?

19 **A.** I wondered why she was there because she
20 never came around when I was around before.

21 **Q.** Okay.

22 **A.** She didn't -- because she knew that I knew of
23 her relationship with him and so she did not come
24 around basically just to rub it in my face or
25 whatever. She didn't do that. So I was surprised

1 when I walked in because she was there. So I was
2 there wondering why she was there because she wouldn't
3 have done that otherwise.

4 Q. But she was there first, right?

5 She got there first?

6 A. She was -- yeah, she was -- when we came to
7 the house they were there.

8 Q. They were already there and they were making
9 bombs?

10 A. Right.

11 Q. And bomb making is a dangerous activity,
12 isn't it?

13 A. It is.

14 Q. In fact, didn't Dennis get his arm hurt
15 pretty substantially making a bomb or with something
16 to do with a bomb at one point?

17 A. No.

18 Q. Didn't he hurt his arm?

19 A. No.

20 Q. Okay.

21 In any regard, you see her there, you see
22 them there, they are together making bombs.

23 And that's kind of unusual for a woman to be
24 involved in making bombs, isn't it, with an AIM?

25 A. Not back then.

1 **Q.** Not back then.

2 So that was kind of what was going on at the
3 time?

4 **A.** Right.

5 **Q.** And you don't just trust anybody to make
6 bombs, do you?

7 **A.** I don't think so.

8 **Q.** No. Because things could go wrong, right?

9 **A.** Right.

10 **Q.** And you know Anna had previous explosive
11 experience because she was caught with dynamite and
12 other explosives at Al Runnings, right?

13 **A.** Well, I knew that there were guns at Al
14 Runnings'. Was there dynamite, I have no idea about
15 that.

16 **Q.** Okay.

17 If we hear about that later or something you
18 are not going to dispute whether there was explosives?

19 **A.** I don't know exactly what was found at Al
20 Runnings'.

21 **Q.** Okay.

22 And you don't know what Dennis had been doing
23 the previous six or seven weeks or what Anna had been
24 doing the previous six or seven weeks?

25 **A.** No.

1 Q. Okay.

2 Now you've testified before that you thought
3 the reason Anna Mae was in there making bombs was
4 because they wanted to get her fingerprints on the
5 bombs, correct?

6 A. That's right.

7 Q. Your theory has been that she was suspected
8 of being an AIM informant so these AIM leaders brought
9 her into the bomb making process and put her
10 fingerprints on things, correct?

11 A. I believe so.

12 Q. At this point Leonard Peltier is wanted for
13 the murder of two FBI agents, correct?

14 A. Yes.

15 Q. And at this point, Dennis has become a
16 fugitive because he refused to go to his sentencing
17 for one of the courthouse riot cases, correct?

18 A. Right.

19 Q. So these are two highly wanted guys. I mean
20 the FBI is looking for these guys everywhere?

21 A. Yes.

22 Q. And you don't see them wearing latex gloves
23 or anything to prevent their fingerprints from being
24 on the bombs, do you?

25 A. I don't remember any gloves.

1 **Q.** Okay.

2 Well, you have testified about this a number
3 of times before. You would have mentioned gloves if
4 you recalled them, right?

5 **A.** Right.

6 **Q.** And your theory is that they wanted her
7 fingerprints on the bomb or on the bombs so if the
8 bombs were discovered, she would be implicated?

9 **A.** Yes.

10 **Q.** But if she's an FBI informant, then she's
11 going to already be acknowledging that she was present
12 when the bombs were made, right?

13 **A.** But she wasn't an FBI informant.

14 **Q.** But you said that the reason why she were
15 having her make the bombs was because they suspected
16 her of being an informant?

17 **A.** They didn't trust her.

18 **Q.** They didn't trust her so they invited her
19 over to Kenny Loud Hawk's house while they are highly
20 wanted fugitives to make bombs with them?

21 **A.** Right.

22 **Q.** Okay.

23 So they basically have invited the fox into
24 the hen house, right?

25 **A.** I guess that's a close analogy.

1 **Q.** You don't see anybody guarding her at this
2 point?

3 **A.** Well, no there was nobody standing there.

4 **Q.** Okay.

5 Let me ask you if she was an FBI informant
6 like you say they suspected, and she were to tell the
7 FBI they were making bombs, her fingerprints on the
8 bombs would be the best proof possible that she
9 actually saw what she said she saw, wouldn't it?

10 **A.** Probably.

11 **Q.** So the whole fingerprints on the bombs
12 theory, that's something you just created and
13 testified about at previous hearings?

14 **A.** Well, they asked why I thought that she had
15 done it.

16 **Q.** Leonard never told you that, Dennis never
17 told you that, Anna never told you, did they?

18 **A.** No.

19 **Q.** In fact, nobody said anything while you are
20 there at Loud Hawk's house about making sure her
21 fingerprints are on the bombs?

22 **A.** No.

23 **Q.** The next day is the day of the bombings, do
24 you recall that day?

25 **A.** Yes.

1 **Q.** You and Anna, Dennis, Leonard and some other
2 people go out and plant these bombs around various
3 places, correct?

4 **A.** Dennis and Leonard -- I am sorry. Dennis and
5 Leonard and Annie Mae, they got out of the car.

6 **Q.** You stayed in the car?

7 **A.** Yes.

8 **Q.** They went out and planted the bombs like at
9 the power plant, do you remember that?

10 **A.** Yes.

11 **Q.** Where else did they plant the bombs?

12 **A.** I remember that one. I don't remember where
13 else.

14 **Q.** So in any regard, now we're a day after the
15 bomb making, and this woman that you say they
16 suspected of being an informant is invited to get into
17 a car with them while they are fugitives, while they
18 are the subject of a massive man hunt, and drive
19 around in various locations and plant bombs together,
20 correct?

21 **A.** Yes.

22 **Q.** They don't shun her and leave her at some
23 location to be far away from them. They actually have
24 her in the car with them at this point?

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

1 Q. And she is not tied up during this point?

2 A. No.

3 Q. You don't hear anybody say guard her?

4 A. No.

5 Q. Essentially, free to come and go with these
6 guys as she wants?

7 A. Um --

8 Q. Nobody is forcing her and nobody is forcing a
9 gun on her saying get out and plant these bombs?

10 She was a willing participant?

11 A. She was with us.

12 Q. Yes.

13 And she wasn't being forced to do it?

14 A. No.

15 Q. Again, going back to this theory that
16 starting in June in Farmington and continuing forward,
17 Anna Mae Aquash is suspected by these AIM leaders as
18 being an informant, and there is grave concern about
19 that. She's at Al Runnings' house with explosives,
20 she's making bombs at Kenny Loud Hawk's house, she's
21 now planting bombs and driving around with the guys,
22 correct?

23 A. That's right.

24 Q. Okay.

25 Now, the motor home trip. The motor home

1 trips starts basically right after the bombs are
2 planted, correct?

3 A. Yes.

4 Q. You guys have this motor home that Marlin
5 Brando had donated to you.

6 A. I just know it belonged to him. I wasn't
7 there when they had acquired the motor home. I am not
8 sure how that came about.

9 Q. You had met Marlin Brando before, hadn't you?

10 A. I did.

11 Q. Was that part of being affiliated with
12 Dennis. You went out to California and stayed at his
13 house, correct?

14 A. When the trial -- we had stayed at his house
15 when all of that had already happened.

16 Q. You stayed at his house in 1974, correct?

17 A. My daughter was maybe eight months old when I
18 stayed at his house, and she was born in 1974.

19 Q. Okay.

20 A. So it was actually -- it was after Dennis's
21 trial, I believe --

22 Q. Okay.

23 A. -- was over in St. Paul that I had stayed at
24 his house. We visited. We didn't live there and stay
25 there for any length of time.

1 Q. Okay.

2 So whether it's 1974 or 75, you had met
3 Marlin Brando?

4 You were out in California, correct?

5 A. Yes.

6 Q. And somehow somebody gets a motor home from
7 him and you and -- would you please rename all the
8 people that were in the motor home?

9 A. Dennis Banks, Kenny Loud Hawk, my sister
10 Bernadine Nichols, Leonard Peltier, Annie Mae, Dave
11 Hill, and myself.

12 Q. Okay.

13 A pretty select group of AIM people at this
14 point, fair?

15 And you got some of the leaders of AIM, the
16 founding leader of AIM, correct?

17 A. Yes.

18 Q. We have Kenny Loud Hawk who had gone
19 through -- ultimately went through a massive trial
20 regarding his involvement in AIM activities, correct?

21 A. No. The charges were dropped against Kenny
22 also. He never went to trial.

23 Q. After years, though, right?

24 A. Yes.

25 Q. He was litigating his case for many, many,

1 many years?

2 **A.** Yes.

3 **Q.** A book was written by Loud Hawk ultimately?

4 **A.** Yes.

5 **Q.** And then you are the common-law wife of one
6 of the founders?

7 **A.** Yes.

8 **Q.** Anna Mae is somebody who has been involved in
9 high level AIM activity since at least 73, correct?

10 **A.** Right.

11 **Q.** Not anybody was invited to be on this motor
12 home trip, were they?

13 **A.** I don't think there was -- we just happened
14 to be together. There was no occasion to invite other
15 people along. It wasn't a vacation where we were
16 taking people, inviting other people along.

17 **Q.** Sure.

18 Well, Anna Mae or Annie Mae -- she's listed
19 on the indictment as Anna Mae but you call her Annie
20 Mae was that the --

21 **A.** Yes, I have always called her Annie Mae.

22 **Q.** Okay.

23 And Annie Mae had been invited somehow to get
24 to Loud Hawk's house?

25 **A.** Right.

1 Q. And she was invited along on the bombings?

2 A. Yes.

3 Q. As were you?

4 A. Yes.

5 Q. And you guys all end up in the vehicle and
6 you said this wasn't a vacation. That's a pretty --
7 that's an understatement, I guess, I would say.

8 A. That's right.

9 Q. At this point, the pressure to find Leonard
10 Peltier is enormous, is it not?

11 A. I assume so.

12 Q. But he's --

13 A. He was being looked for.

14 Q. He was probably the most wanted man in the
15 United States from the FBI's perspective, correct?

16 A. Probably.

17 Q. Yeah.

18 And Dennis is a federal fugitive who was
19 closely affiliated with Leonard Peltier?

20 A. Yes.

21 Q. And Anna Mae is somebody who is an AIM
22 activist who is now a fugitive from her charges in
23 Pierre, correct?

24 A. Right.

25 Q. So it's pretty important that you guys don't

1 get caught, right?

2 **A.** Right.

3 **Q.** That could mean ruin for Anna Mae, Dennis,
4 and Leonard, correct?

5 **A.** Right.

6 **Q.** Could also mean problems for you because you
7 would have been harboring or assisting fugitives,
8 correct?

9 **A.** Probably.

10 **Q.** And you've got charged still pending in
11 Kansas, right?

12 **A.** In November I did.

13 **Q.** Yeah.

14 In November you still had your federal
15 charges down there for the explosives?

16 **A.** From September when our car blew up, yes.

17 **Q.** Same with Bernie?

18 **A.** Right. Bernie wasn't with us in the motor
19 home when it got stopped.

20 **Q.** I'll get to that. I am just talking about as
21 you leave.

22 Bernie was in the motor home?

23 **A.** When we left South Dakota.

24 **Q.** When you started your trip out west?

25 **A.** Yes.

1 **Q.** And you had your daughter and she was
2 pregnant?

3 **A.** Was by herself.

4 **Q.** Bernie was by herself?

5 **A.** Yes.

6 **Q.** All right.

7 Now, in the motor home, it's not just you --
8 this group of AIM leaders and fugitives, there is also
9 dynamite, grenades, and weapons, correct?

10 **A.** Yes.

11 **Q.** There is timers, hollowed out watches, light
12 bulbs that are set up as timers and other devices,
13 correct?

14 **A.** Correct.

15 **Q.** There is also one of the guns that had been
16 taken off of one of the murdered FBI agents, correct?

17 **A.** I learned that some years later.

18 **Q.** Okay.

19 So this motor home is filled with highly
20 wanted federal fugitives and evidence of a host of new
21 potential federal crimes, correct?

22 **A.** Yes.

23 **Q.** Yes. You just can't drive around with
24 dynamite, grenades, and timing devices, can you?

25 **A.** No.

1 Q. Okay.

2 During the trip you go from -- where do you
3 start your trip, Nebraska?

4 A. Chadron, Nebraska.

5 Q. And you end up going to a place in Washington
6 State called Chiquiti's.

7 Am I pronouncing it right?

8 A. John Chiquiti.

9 It was his residence where we had stayed.

10 Q. And do you happen to know, just for Tina's
11 purposes, how to spell his name?

12 A. I think it's C-H-I-Q-U-I-T-I.

13 Q. And Mr. Chiquiti lives out on a --

14 A. Chiquiti.

15 Q. -- lives out on a reservation somewhere in
16 Washington State, correct?

17 A. Right.

18 Q. It's a remote area?

19 A. Yes.

20 Q. And you guys are heading out there to hide
21 out, correct?

22 A. Yes.

23 Q. Because you were under the understanding that
24 that would be a safe place for -- at least for a while
25 for Leonard and Dennis and Anna to stay?

1 **A.** Well, we went -- I didn't know where we were
2 going. That's where we ended up. So why we are there
3 I am assuming it was because it was a remote area.

4 **Q.** All right.

5 You get -- on the trip out there, takes a
6 number of days to get out there, correct?

7 **A.** It took us a couple days.

8 **Q.** Because there was some bad weather and some
9 other things?

10 **A.** Right.

11 **Q.** During the time period that you are driving
12 out, you stop at gas stations, correct?

13 **A.** Yeah.

14 **Q.** And you stop along the way and you do some
15 shopping at a thrift store like a Salvation Army?

16 **A.** No.

17 **Q.** You don't remember your sister Bernie telling
18 you about getting some clothing and --

19 **A.** That happened when we were already in
20 Washington State.

21 **Q.** Okay. I stand corrected.

22 So in Washington state, you went to stores,
23 correct?

24 **A.** Her and Annie Mae did with Leonard.

25 **Q.** All right.

1 At no time from when you left Chadron to when
2 you got to Mr. Chiquiti's, did you ever see Anna Mae
3 tied up?

4 **A.** No.

5 **Q.** She was not being guarded?

6 **A.** No.

7 **Q.** You never heard anybody say keep an eye out
8 on her?

9 **A.** No.

10 **Q.** You were never given instructions as to what
11 to do if she was to start talking to a gas station
12 attendant or a clerk at a store?

13 **A.** No.

14 **Q.** She was let into stores and gas stations?

15 **A.** I am assuming so. I don't remember stopping
16 at gas stations and getting out.

17 **Q.** Do you remember that she went shopping with
18 Bernie and Leonard at some point in Washington state?

19 **A.** Yes.

20 **Q.** And nobody was told what to do if she starts
21 talking to the authorities or anything like that,
22 correct?

23 **A.** No.

24 **Q.** All right.

25 But you've told a number of juries and Grand

1 Jurors that your theory is that the reason Anna Mae
2 Aquash was brought on this trip is because they wanted
3 to keep an eye on her, right?

4 A. I never testified at a Grand Jury.

5 Q. Okay. I am sorry.

6 An actual jury trial. You have testified at
7 two of those before?

8 A. Yes.

9 Q. And you told those juries the reason Anna Mae
10 was brought along is she was a suspected informant and
11 they wanted to keep an eye on her?

12 A. Yes, I believe that.

13 Q. Okay.

14 But you didn't hear anybody say anything like
15 that?

16 A. When we were in the motor home --

17 Q. Well, I asked you the questions before.

18 Nobody ever said we're bringing her here --

19 A. No.

20 Q. -- because she's an informant?

21 A. No.

22 Q. And nobody ever said anything about guarding
23 her?

24 A. No.

25 Q. Nobody ever said anything about not letting

1 her talk to other people, right?

2 **A.** No, they never said that.

3 **Q.** All right.

4 So again, kind of like your fingerprints on
5 the bomb theory, you got two highly wanted fugitives,
6 Leonard and Dennis, in a motor home full of illegal
7 explosives, and what you learn later, the weapon of
8 one of the dead FBI agents, and you would agree that's
9 probably about one of the most incriminating evidence
10 that somebody could get caught with?

11 **A.** Right.

12 **Q.** And rather than leave Anna Mae in Pine Ridge
13 or Chadron or wherever she was beforehand, they
14 decided to bring her along to keep an eye on her?

15 That's your theory?

16 **A.** That's what I believe, yes.

17 **Q.** Okay.

18 And this makes sense to you because she would
19 be less -- scratch that. I will withdraw that.

20 These guys, Dennis and Leonard, have evaded
21 capture now for five months, correct?

22 **A.** Well, Leonard because they were looking for
23 him since June; and Dennis since August.

24 **Q.** August --

25 **A.** Or September. Sorry.

1 **Q.** So three to five months they have evaded the
2 authorities, right?

3 **A.** Yes.

4 **Q.** And they have done this despite a massive
5 infusion of FBI resources trying to find out where
6 they are at, right?

7 **A.** Right.

8 **Q.** And yet these are the same guys that decide
9 to bring along with them a suspected informant as they
10 go from one place to presumably a safe place to hide
11 further?

12 That's what your theory is?

13 **A.** Yes.

14 **Q.** Okay.

15 In fact, you learned that during the time
16 period that y'all are in Washington, Bernie and Annie
17 and Leonard also go actually into the town of Seattle,
18 correct?

19 **A.** Yes.

20 **Q.** And Leonard goes off with another woman at
21 that point in time and Bernie and Annie are left
22 alone?

23 **A.** They were actually all in the same house.
24 They never went separately.

25 **Q.** Mr. Peltier went into a bedroom with the

1 other woman, correct?

2 **A.** That's what my sister said.

3 **Q.** Yeah. And your sister wasn't somebody who
4 was guarding Annie Mae, was she?

5 **A.** No.

6 **Q.** So now Leonard Peltier, one of the most
7 wanted men in the country, leaves Annie Mae and your
8 sister in a separate bedroom in a town of a million
9 people or so, right?

10 **A.** Right.

11 **Q.** Even though he suspects she's the informant
12 that's working for the federal government?

13 **A.** Right.

14 **Q.** Okay.

15 Nothing in the world to prevent her from
16 walking out that apartment, knocking on a door, going
17 to the police, saying I got your man, was there?

18 **A.** No.

19 **Q.** Okay.

20 And it's on this trip where Leonard Peltier,
21 who believes according to you that Anna Mae is an
22 informant, deciding to spontaneously get up in front
23 of her and confess to executing in cold blood the FBI
24 agent, correct?

25 **A.** Right.

1 **Q.** Yet, from the point of that confession
2 forward he does not say, well, now she knows what I
3 did, lock her up, does he?

4 **A.** No.

5 **Q.** And he doesn't have somebody standing guard
6 on her 24/7?

7 **A.** No.

8 **Q.** And you get out to Chiquiti's out there in
9 the middle of nowhere in Washington and he doesn't
10 himself or through somebody else take her out into the
11 woods and kill her now that he knows that she know he
12 was the guy who killed the FBI agents, does he?

13 **A.** No.

14 **Q.** Absolutely nothing like that -- no discussion
15 like that that now she knows I killed the FBI agents
16 so we must do something with her?

17 **A.** No.

18 **Q.** This whole issue about this grand confession
19 by Peltier --

20 You began your first discussions with the FBI
21 in the summer of 2000, correct?

22 **A.** Yes.

23 **Q.** And you broke up with Dennis Banks in 1989?

24 **A.** Yes.

25 **Q.** And you testified earlier that you began to

1 suspect he had some inside knowledge of her death way
2 back in 1976, correct?

3 A. Because he's the one who called me and told
4 me about her dying.

5 Q. Right. Okay.

6 So 76 you have -- a red flag is raised.
7 Would that be -- a concern is raised in your mind?

8 A. Right.

9 Q. And in 1989 you break it off with him,
10 correct?

11 A. Right.

12 Q. You don't tell the authorities about
13 Peltier's confession in 1989, 90, or in any year up
14 until the end of 2000, correct?

15 A. No. He was already doing life.

16 Q. Dennis?

17 A. No.

18 Q. Or Peltier?

19 A. Peltier had already been convicted.

20 Q. Well, whether he had been convicted or not,
21 this information had never gone to a trial or anything
22 else like that?

23 A. No.

24 Q. You were one of the only people in the world
25 who supposedly knows this, right?

1 **A.** Yes.

2 **Q.** Peltier has gone up for parole on a number of
3 occasions between his life conviction and 2000 when
4 you met the FBI, right?

5 **A.** Right.

6 **Q.** You have no allegiance to Dennis Banks from
7 1989 forward, do you?

8 **A.** No.

9 **Q.** You meet with the FBI in July and August of
10 2000, correct?

11 **A.** Right.

12 **Q.** You don't tell them this tidbit of
13 information until December of 2000, correct?

14 **A.** I don't remember exactly when I told him.

15 **Q.** Okay.

16 You didn't tell it to them at your first
17 meeting?

18 **A.** No.

19 **Q.** Your second meeting?

20 **A.** No.

21 **Q.** Same thing with the issue about knowing or
22 believing that Dennis Banks had prior knowledge, you
23 don't tell the FBI that at your first several
24 meetings, do you?

25 **A.** I don't remember when I told them.

1 Q. Okay.

2 And between 1989 and 2000, you didn't tell
3 the authorities that, did you?

4 A. No.

5 Q. During that all of this period of time you
6 are aware through the grapevine that Anna Mae Aquash's
7 death is being investigated by federal authorities,
8 right?

9 A. Right.

10 Q. You heard when Grand Jurors were being
11 convened and witnesses were being called and whatnot,
12 right?

13 A. No.

14 Q. You didn't hear any talk in the community?

15 A. I did not -- I did not live around here. I
16 didn't -- years and years later I heard that there had
17 been a couple of Grand Juries. I didn't visit people
18 around here. I didn't know what was going on.

19 Q. You knew it was actively being investigated
20 by the FBI from the time of her death on?

21 A. Honestly, I didn't know what was going on.

22 Q. You didn't have any contact with anybody who
23 talked about the investigative efforts?

24 A. No. I don't remember ever having a personal
25 conversation with anybody saying that they went to a

1 Grand Jury --

2 Q. I am not talking just about Grand Juries.

3 I mean, you knew that was a case of an
4 unsolved murder that somebody was investigating?

5 A. Yes.

6 Q. And you didn't tell them about the Peltier
7 confession or your suspicions about Dennis, did you?

8 A. No.

9 Q. Not until 2000 when you start working with
10 the FBI or when you start talking to the FBI?

11 A. Right.

12 Q. All right.

13 Now, I want to talk to you about something
14 you mentioned earlier that at a period of time when
15 you are out in Washington state, you and Bernie
16 actually left, correct?

17 A. Right.

18 Q. You flew back to Kansas or Oklahoma?

19 A. Well, we had a court hearing in Kansas.

20 Q. Okay.

21 A. I don't remember if we flew to Kansas or
22 Oklahoma.

23 Q. Okay.

24 You go back for your court appearance and
25 that's regarding the car explosion, right?

1 **A.** Right.

2 **Q.** And how long are you gone, two or three days?

3 **A.** A short time.

4 **Q.** Do you recall how many nights you might have
5 spent there?

6 **A.** I would say it wasn't more than a week,
7 maybe.

8 **Q.** Okay.

9 **A.** Member a few days.

10 **Q.** Okay.

11 You end up flying back to Washington?

12 **A.** Yes.

13 **Q.** And you rejoin Dennis, Leonard, Annie, all
14 those people?

15 **A.** Yes.

16 **Q.** Bernie doesn't decide to come back?

17 **A.** Huh-uh. She stayed.

18 **Q.** Now, after you leave Washington State, you
19 guys get into the motor home and you start driving.
20 You end up in Oregon.

21 You remember that?

22 **A.** Yes. We were driving south.

23 **Q.** Do you know where you were supposed to go?

24 **A.** Honestly, no. We were -- they didn't tell me
25 where we were going. We were just going.

1 **Q.** That was kind of the way things worked is
2 pretty much everybody was on a need-to-know basis?

3 **A.** I didn't need to know. I mean, I was just
4 there.

5 **Q.** You were just there, and these guys were
6 wanted felons?

7 **A.** Right.

8 **Q.** Or wanted fugitives, I should say.

9 So they are not going to communicate a lot of
10 information?

11 **A.** No. They didn't say we were going to a
12 certain spot for a certain reason.

13 **Q.** Okay.

14 Because that might put them in peril down the
15 line?

16 **A.** I don't know.

17 **Q.** Isn't that what you suspect that if everybody
18 has a lot of information as to the destination, that
19 information could get out to the authorities?

20 **A.** It's possible.

21 **Q.** All right.

22 But yet Leonard Peltier in front of a
23 suspected informant confesses to killing an FBI agent?

24 **A.** He did.

25 **Q.** Okay.

1 Because he suspected she was an informant?

2 **A.** He did think that she was an informant.

3 **Q.** And that's -- that explains why he would
4 confess --

5 **A.** I don't know why he did it in front of her.

6 **Q.** In any regard, you get to Oregon, you are
7 heading south. The Oregon Highway Patrol pulls you
8 over or pulls the motor home over?

9 **A.** Yes.

10 **Q.** A shoot-out occurs, correct?

11 **A.** Yes.

12 **Q.** And you are arrested? Anna Mae is arrested?

13 **A.** Yes.

14 **Q.** Leonard and Dennis both escape?

15 **A.** Yes.

16 **Q.** You are now charged with a slew of new
17 federal charges in Oregon, correct?

18 **A.** Right.

19 **Q.** Possession of explosives, including grenades
20 and dynamite, correct?

21 **A.** Right.

22 **Q.** Possession of a weapons with obliterated
23 serial numbers?

24 **A.** Yes.

25 **Q.** In total you are facing 80 years of federal

1 charges in Oregon, correct?

2 A. I don't remember.

3 Q. Does that sound about right from what you
4 previously markedly testified to?

5 A. Probably.

6 Q. Annie Mae is facing the same charges,
7 correct?

8 A. Yes. We were arrested together, yes.

9 Q. And who else was arrested?

10 Was it Mr. Redner?

11 A. Russ Redner and Kenny Loud Hawk.

12 Q. So the four of you are charged with,
13 basically, all the stuff that's found in the motor
14 home?

15 A. Right.

16 Q. All right.

17 And when you are in jail, at some point, you
18 are taken into jail, into Oregon, and then are you
19 transferred back to Kansas or Oklahoma?

20 A. To Kansas.

21 Q. To Kansas. Okay.

22 And during that time period you and
23 Mr. Loudner and -- or Mr. Redner and Mr. Loud Hawk and
24 Ms. Aquash are given some discovery. That's legal
25 documents, correct?

1 You are given information about your case
2 from your attorneys?

3 **A.** Well, that was the very initial stages of
4 being charged. We hadn't really began any court
5 proceedings as far as going to trial or anything at
6 that time.

7 **Q.** Okay. Let me be more specific. That was
8 probably too broad.

9 You are told that the reason the motor home
10 is pulled over, the reason that motor home was
11 targeted, was there were two informants listed as
12 informant A and B who had given the authorities
13 detailed information about the motor home and who was
14 inside it, correct?

15 **A.** Correct.

16 **Q.** You find that out while you are in jail,
17 correct?

18 **A.** Yes.

19 **Q.** And this immediately raises all sorts of
20 concern as to who informant A and B are, correct?

21 **A.** I -- we were -- I don't know. I mean --

22 **Q.** Would it help to refresh your recollection
23 with what you testified to previously?

24 **A.** Sure.

25 **Q.** Okay.

1 At the time the disclosures are made about
2 informants A or B it's clear that it couldn't have
3 been Annie Mae?

4 **A.** That's correct.

5 **Q.** She had been in the motor home throughout the
6 entire course of events.?

7 **A.** Yes.

8 **Q.** The only two people that were arrested who
9 had flown out of the motor home group was you and
10 Bernie, correct?

11 **A.** That's right.

12 **Q.** And immediately suspicions started to gather
13 that it was you and Bernie who were informants A and
14 B, correct?

15 **A.** Never to my knowledge. I never heard that
16 before.

17 **Q.** Nobody has ever told you that suspicions
18 started going on you?

19 **A.** No.

20 **Q.** And you weren't told or didn't hear through
21 the rumor mill that because of your anger at Dennis
22 because of his affair with Annie Mae, and whatnot,
23 that you had talked to authorities back when you went
24 to your court hearing in Kansas?

25 **MR. JACKLEY:** Your Honor, I am going to

1 object to the and whatnot.

2 **THE COURT:** I think she can answer.

3 **A.** I never heard that before today.

4 **Q.** **(BY MR. MURPHY)** Well, you didn't have an
5 alibi, Annie Mae did, right?

6 **A.** An alibi to what?

7 **Q.** She was in the motor home throughout. You
8 were gone, right?

9 **A.** Yeah.

10 **Q.** Bernie was gone?

11 **A.** Right.

12 **Q.** You were in the federal system down in Kansas
13 on serious charges, right?

14 **A.** Yes.

15 **Q.** You're a young mother with one on the way,
16 right?

17 **A.** Right.

18 **Q.** You have all right of reasons to make a deal,
19 don't you?

20 **A.** No. I had no reason to make a deal.

21 **Q.** Well, you were facing huge time down there in
22 Kansas and you are facing now huge time in Oregon,
23 correct?

24 **A.** Yes.

25 **Q.** And there is all sorts of things that you

1 could have been charged with, but you weren't, like,
2 hiding fugitives such as Dennis and Leonard, right?

3 **A.** I had a lot of charges, but that wasn't one
4 of them.

5 **Q.** So ultimately the charges in Oregon are
6 dismissed against you?

7 **A.** Yes.

8 **Q.** You get three years of probation for the
9 Kansas City explosive case?

10 **A.** Yes.

11 **Q.** You are never charged at Wounded Knee?

12 **A.** No.

13 **Q.** You are not arrested at Jumping Bull because
14 you had been gone that morning?

15 **A.** Yes. I wasn't there.

16 **Q.** Okay.

17 And you had been at Al Runnings' and Crow
18 Dog's, but you weren't there the day the raid was
19 conducted, correct?

20 **A.** I wasn't staying there.

21 **Q.** Okay.

22 **A.** So I wasn't --

23 **Q.** You were in and out during that period of
24 time?

25 **A.** Right.

1 Q. And now, today -- and it's in recent years --
2 you've testified that Leonard Peltier confessed to the
3 execution of the FBI agents and that your husband had
4 prior knowledge of Anna Mae's death, correct?

5 A. Right.

6 Q. That's what's come out since 2000, right?

7 A. Right.

8 Q. I want to talk to you about the assistance
9 you have given the government in the prosecution of
10 this case and other cases.

11 You did some interviews with various people
12 associated with the case, correct?

13 A. That's correct.

14 Q. How many people in total do you think you
15 interviewed?

16 A. Ten, maybe. I'm not absolutely sure.

17 Q. It's a number close there to.

18 A. Okay.

19 Q. I mean -- let me ask you this.

20 The years that you were involved in regarding
21 interviews was between 2001 or late 2000 about 2003;
22 is that correct?

23 A. Yes. I think so.

24 Q. Okay.

25 And on December 16, 2000, you did an

1 interview with Arlo Looking Cloud, correct?

2 A. That's right.

3 Q. You picked him up at the jail in Denver?

4 A. Yes.

5 Q. And you interviewed him with Troy Lynn Yellow
6 Wood?

7 A. Yes.

8 Q. And I guess I want to ask you first before we
9 get into that about that interview with Troy Lynn and
10 Arlo, do you recall about how many hours it took?

11 A. When they were together?

12 Q. When you and Arlo and Troy Lynn were
13 together.

14 A. Three.

15 Q. Okay.

16 Would it be a surprise to you if it filled up
17 nine cassette tapes, the duration of that interview?

18 A. Would it surprise me?

19 Q. Yeah.

20 A. No.

21 Q. Okay.

22 Two hundred fifty-seven page single-spaced
23 transcript.

24 Would that surprise you?

25 A. No.

1 **Q.** And at another occasion you interviewed just
2 Troy Lynn by herself, correct?

3 **A.** That's right.

4 **Q.** And that filled ten cassettes?

5 **A.** I don't know how many it made. It was a long
6 conversation.

7 **Q.** Sure.

8 Do these appear to be the ten cassettes of
9 Troy Lynn's interview with you?

10 **A.** I have never seen them before.

11 **Q.** Oh, you haven't?

12 **A.** No.

13 **Q.** Who kept the cassettes for you, the FBI or --

14 **A.** I never had those cassettes.

15 **Q.** Because you were wearing a wire at that
16 point?

17 **A.** That's right.

18 **Q.** Same thing with Arlo?

19 **A.** Right.

20 **Q.** In any regard, you had a lengthy conversation
21 with Ms. Yellow Wood?

22 **A.** Yes.

23 **Q.** She wasn't reluctant to share information
24 with you?

25 **A.** She wasn't reluctant?

1 Q. Yeah.

2 A. She was not reluctant.

3 Q. And that was in 2000, correct?

4 A. Right.

5 Q. When you interviewed her, she never told you
6 that Anna said to her, if you let them take me out of
7 this place, you'll never see me alive, did she?

8 A. I don't remember if that was -- I talked to
9 her for about eight hours.

10 Q. Right.

11 A. I don't remember -- she told me a lot of
12 stuff.

13 Q. Okay. That's fair enough.

14 Let's go back to the interview you had with
15 Mr. Looking Cloud. December 16, 2000. You pick him
16 up at the jail. He tells you right off the bat that
17 his head is foggy based on pills they gave him in
18 jail?

19 A. He said something to that effect.

20 Q. Okay.

21 And you know at this point Mr. Looking Cloud
22 is more or less an intoxicated -- a street person, a
23 drunk, a drug addict, at that point?

24 A. That was the first time I saw Arlo.

25 Q. But you had a gathered information about him?

1 **A.** Right.

2 **Q.** You knew he had substance abuse problems?

3 **A.** Right.

4 **Q.** During the course of that interview isn't it
5 true that he asks you, quote, how many people should I
6 implicate, and you answer him, only John Boy.

7 Do you recall that exchange?

8 **A.** I recall that exchange after hours of
9 conversation with him.

10 **Q.** Okay.

11 You told Mr. Looking Cloud, a man whose brain
12 has been affected by alcohol and drug usage, when he
13 asks you the direct question, how many people should I
14 implicate, you tell him directly, only John Boy?

15 **A.** Up to that point my knowledge was it was John
16 Boy so he had already -- Arlo had already said at that
17 point that he was afraid of all the other leaders.

18 **Q.** Ma'am, I am asking you what your direct
19 information was to Arlo Looking Cloud on December 16?

20 **MR. JACKLEY:** Your Honor, I am going to
21 object. I think the witness should be able to answer
22 the question as opposed to without interruption.

23 **THE COURT:** Overruled. It's
24 cross-examination. Mr. Murphy is entitled to an
25 answer to his questions.

1 **Q.** **(BY MR. MURPHY)** After you tell him, only John
2 Boy, he asks you again, only John Boy. And at that
3 point Troy Lynn Yellow Wood says, back at John Boy?

4 **A.** Yes.

5 **Q.** You then tell Mr. Looking Cloud, cuz it's
6 come down pretty much to, a, like your word against
7 his, you know.

8 You told him that?

9 **A.** Yes.

10 **Q.** So you tell Mr. Looking Cloud, essentially,
11 how to start preparing a defense?

12 **A.** No.

13 **Q.** At a later point in the interview, after
14 Mr. Looking Cloud leaves the car, Serle Chapman gets
15 in, does he not?

16 **A.** Yes.

17 **Q.** And he tells you that the police officers who
18 are listening in on the wire didn't get to hear or he
19 thought they might not have been able to hear what was
20 being said.

21 Do you recall that?

22 **A.** I think so.

23 **Q.** He told you how to relay your story. How to
24 puff up your story to the police if they couldn't have
25 heard the recording; isn't that true?

1 **A.** I don't know.

2 Is that what that says?

3 **Q.** Do you recall Mr. Chapman saying, quote,
4 because I think these guys are having trouble hearing
5 him, him being Arlo, so here is my advice. You need
6 to be very very positive when you go in and say he
7 went through it. He put himself there. Said he was,
8 you know, he, John Boy, shot her.

9 Do you recall that?

10 **A.** Yes.

11 **Q.** Okay.

12 So you tell Mr. Looking Cloud to implicate
13 John Boy, meaning my client, John Graham, and
14 Mr. Chapman tells you how to very very positively put
15 forth the story when you relay it to law enforcement,
16 correct?

17 **A.** Right.

18 **Q.** In fact, you know Mr. Chapman has later
19 claimed that he delivered you to the FBI; isn't that
20 fair?

21 **A.** No.

22 **Q.** You weren't aware of that?

23 **A.** No. I never heard that before.

24 **Q.** Okay.

25 Would you doubt it if it was in reports or

1 letters from Mr. Chapman?

2 **A.** I went to the FBI. Nobody took me. I -- it
3 was my choice.

4 **Q.** Okay.

5 So if Mr. Chapman is to claim at a later
6 point that he delivered you to the FBI, he would be
7 overstating his role?

8 **A.** It was my choice to go to the FBI.

9 **Q.** Okay.

10 I want to talk to you now about the issue
11 that's come up a couple times in our discussion. I've
12 used the term that you worked for the FBI and you said
13 you didn't work for them?

14 **A.** Right.

15 **Q.** But you got paid \$49,083.44 for your
16 cooperation with them?

17 **A.** I got reimbursed.

18 **Q.** Okay. Let's talk about that.

19 **A.** Okay.

20 **Q.** Now, you are not disputing that they gave
21 you -- the money paid to you was \$49,083.44?

22 **A.** No.

23 **Q.** And you indicated you did interviews starting
24 late 2000. They ended up about 2003, correct?

25 **A.** I think so.

1 Q. And you did ten interviews plus or minus
2 during that time period?

3 A. That's correct.

4 Q. And because you claimed it as reimbursement,
5 you didn't pay -- have to pay taxes on any of this,
6 did you?

7 A. I don't know. I mean, I filed taxes and if
8 that came into my salary before you used it then my
9 salary at some point was considered taxable. So --

10 Q. So if you are getting --

11 A. That was original money that came to me. The
12 reimbursements. So that came out of my pocket. So I
13 am assuming I paid taxes on those.

14 Q. Well, let me show you. When you would
15 provide receipts to the government, or where you would
16 ask for money, you filled out a form each time,
17 correct?

18 Do you recall these forms?

19 A. Okay. Yes.

20 Q. And they are signed Maverick because that was
21 your code name?

22 A. Right.

23 Q. They would put in the amount they were paying
24 you. So for instance, in this case, they gave you a
25 check for \$17,000?

1 **A.** That wasn't a reimbursement.

2 **Q.** Well --

3 **A.** The small amounts were for reimbursements.

4 **Q.** Let me just take a look at this. I want to
5 make sure that I am showing you the report and that
6 we're stating this accurate.

7 It says that you received from Jeffrey
8 Campbell the total amount zero dollars for services
9 rendered, correct?

10 **A.** Yes.

11 **Q.** And \$17,000 in a cashier's check for
12 expenses, correct?

13 **A.** Right.

14 **Q.** And so -- and then -- pardon me.

15 It gives you a little note down below saying
16 that if you get -- you get money for services, that's
17 taxable, right?

18 **A.** Right.

19 **Q.** Obviously, then, the expenses aren't taxable,
20 right?

21 They are reimbursed expenses in your view,
22 correct?

23 **A.** I guess.

24 **Q.** And when you got a \$25,000 check, from Agent
25 Graf, in 2005, again, that's listed as zero dollars

1 for services. All \$25,000 were for expenses, correct?

2 **A.** Right.

3 **Q.** And again, you are told that you only have to
4 report it as income if it's a service, not an expense,
5 right?

6 **A.** Right. That's what it says.

7 **Q.** You have no recollection now whether you paid
8 any taxes on any of the \$49,000 that they gave you?

9 **A.** I paid taxes and if I paid -- not on the
10 large amounts.

11 But like I said, the smaller amounts were out
12 of my pocket. So that was considered whatever my
13 income had been before that. So that part I would
14 have paid taxes on.

15 **Q.** That's not what I am asking you.

16 I understand you said -- you are saying that,
17 well, you had already paid taxes on the money. And so
18 when you get a hotel room or something like that, they
19 reimburse you, you have already paid taxes on the
20 money?

21 **A.** Right.

22 **Q.** What I am asking you is, the \$49,083.44 that
23 they gave to you, you didn't report this on any of
24 your income tax returns as income, did you?

25 **A.** No.

1 **Q.** So you didn't pay a penny of tax on this
2 \$49,000, correct?

3 **A.** Not on the 25 or whatever the other amount
4 was.

5 **Q.** Well, you didn't pay it on the \$500 checks?
6 You might have already paid taxes on your
7 income, but when you get this \$500 check or an 800 or
8 a 1,200 or a \$1,300 check, you didn't then submit that
9 to the tax man?

10 **A.** No.

11 **Q.** All right.

12 And you said it's reimbursements.

13 Now, we have looked through all of your
14 receipts. We got those. And you provided the FBI a
15 total of \$5,457.07 for receipts for all of this
16 \$49,000?

17 **A.** If that's what it says. I don't remember
18 exactly.

19 **Q.** Okay.

20 So you are not claiming that you provided
21 proof to the government that you were due and owing
22 \$49,000 in reimbursed expenses?

23 **A.** No.

24 **Q.** Okay.

25 Even though when you got that \$17,000 check

1 and when you got that \$25,000 check, you listed them
2 as reimbursable expenses?

3 A. Right.

4 Q. And so you didn't have to pay taxes on it,
5 right?

6 A. Right.

7 THE COURT: Pick a convenient point,
8 Mr. Murphy, where to break. It need not be
9 immediately.

10 MR. MURPHY: If we could go another ten
11 minutes I think I could wrap it up.

12 THE COURT: Okay.

13 Q. (BY MR. MURPHY) You claimed on direct that
14 one of the reasons why you needed so much money from
15 the FBI was because Dennis Banks showed up on your
16 door step, right?

17 That was what was you said on direct?

18 A. What I said was that they had asked me to
19 move to a secure location.

20 Q. Uh-huh.

21 A. My daughter came home one night because she
22 was unaware of what was going on at the time. She
23 lived with me. And she -- he was helping her. He was
24 carrying the diaper bag and she was carrying the baby
25 and I opened the door and they were there.

1 **Q.** So because Dennis Banks knew where you lived,
2 now you needed another \$25,000 to relocate?

3 **A.** I didn't ask for it. I called Mark Vocolich
4 (phonetic) and told him that Dennis Banks showed up at
5 my door and he said, then you need to move again.

6 **Q.** So they paid you 17 grand for the first move,
7 25 grand for the second?

8 **A.** He also told he at the time -- he said does
9 he know what kind of car you drive and I said yes. He
10 said you need to get rid of your car.

11 **Q.** Let me ask you, Dennis Banks showing up on
12 your door step, of the ten or so interviews you did,
13 one of them was with Dennis Banks?

14 **A.** Right.

15 We didn't talk about Annie Mae.

16 **Q.** You talked about matters related to this
17 case?

18 **A.** It was a whole different case.

19 **Q.** That was during the time period when you are
20 cooperating with the FBI?

21 **A.** Right.

22 **Q.** And during this entire period of time,
23 including up to weeks ago, your children and Dennis
24 Banks have regular contact?

25 **A.** They do.

1 Q. I mean, they -- your daughter's Facebook
2 pages are --

3 A. They have very close to their father.

4 Q. They are not keeping secrets of their
5 whereabouts because they are showing up at film
6 festivals and marches with him, correct?

7 A. Are you talking about -- well, they are not
8 afraid of their father. My daughter works for her
9 father's organization.

10 Q. Sure.

11 November 13, your daughter Tashina, she's the
12 oldest?

13 A. Right.

14 Q. She's the one who was in the motor home and
15 whatnot?

16 A. Right.

17 Q. She attended the American Indian film
18 festival with Dennis?

19 A. Right.

20 Q. May 8, Dennis suffers a heart attack. Your
21 children collectively release press releases on his
22 behalf, right?

23 A. Yes. Like I said, she's very close to her
24 father.

25 Q. Same with the other children, too?

1 I mean, they have contact with him?

2 A. They do.

3 Q. So you are saying that just because Dennis
4 Banks learned your location, that the FBI just sent
5 you another check for 25 grand and said move?

6 A. No. He learned my location previous to the
7 last ten years whenever all of this had happened.

8 I actually -- my daughter actually asked if I
9 could update and install a security system in our home
10 when we lived in Albuquerque, and that would be
11 Tashina. So that was part of my expense also.

12 It's not her father she was afraid of.

13 Q. You are doing interviews with Dennis Banks in
14 01. The check for 25 grand was January 13, 2004?

15 A. That was after Arlo got indicted, yes.

16 Q. Actually, that was right after Arlo went to
17 trial?

18 A. It is.

19 Q. He was indicted in 2003?

20 A. Yes. In December, I believe.

21 Q. And went to trial 2004?

22 A. Yeah.

23 Q. Just a short time before his trial where you
24 testified about the fingerprint theory and some of the
25 theories you have today, you got that check for 25

1 grand?

2 **A.** Right.

3 **MR. MURPHY:** I have nothing further.

4 Thank you.

5 **THE COURT:** Thank you.

6 We'll be in recess for 15 minutes, folks.

7 Remember, once again, you talk to nobody, you
8 form no opinions.

9 Thank you.

10 (Off the record.)

11 **THE COURT:** I presume we're comfortable with
12 the jury, Mr. Jackley?

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

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

15 **THE COURT:** I think we're ready for your
16 redirect, Mr. Jackley.

17 You are still under oath, ma'am.

18 Please stake take a seat.

19 **REDIRECT EXAMINATION**

20 **BY MR. JACKLEY:**

21 **Q.** Kamook, I want to take you back -- do you
22 recall when you corrected Mr. Murphy about whether or
23 not you were working for the FBI.

24 Do you remember that?

25 **A.** Yes.

1 Q. Were you working for the FBI?

2 A. No.

3 Q. Who were you working for back at that time
4 frame, back in 2000?

5 What were you doing for a living?

6 A. I was a casting director. I worked in the
7 entertainment business.

8 Q. Was that your profession after you had left
9 the days of AIM that we discussed?

10 A. Yes. I did that for 16 years.

11 Q. You and Mr. Murphy spent some time talking
12 about reimbursed expenses.

13 How many times were you required to move
14 because of this case?

15 A. Two time.

16 Q. What was going on -- what was the event going
17 on that caused your first move?

18 A. You mean before I moved?

19 Q. The first move. Right.

20 What caused that?

21 A. Well, it was -- I believe that it was
22 whenever Arlo was -- had been indicted.

23 Q. Do you know, was Arlo Looking Cloud indicted
24 with John Graham?

25 A. Yes.

1 **Q.** Okay. So that was the first move.

2 When was the second move or what precipitated
3 the second move?

4 **A.** Because that was when Dennis Banks had come
5 to my door.

6 **Q.** Did you also have a security system installed
7 in your house?

8 **A.** Yes, I did.

9 **Q.** Did you want to -- did you want to move two
10 times?

11 **A.** No.

12 **Q.** Was it an easy thing to pick up and move two
13 times?

14 **A.** No.

15 **Q.** Did you make a profit or an income off of
16 these two moves?

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

18 **Q.** I want to now take you back to your and
19 Mr. Murphy's discussion about Farmington. And I
20 believe that would have been in June of 1975.

21 Do you recall that?

22 **A.** Yes.

23 **Q.** At Farmington in June of 1975, were there
24 concerns about Anna Mae being an informant raised?

25 **A.** Yes.

1 **Q.** Did it appear to you that AIM, through AIM
2 leadership, began watching Annie Mae during that
3 general time frame?

4 **MR. MURPHY:** Object. Leading.

5 **THE COURT:** Sustained.

6 **Q. (BY MR. JACKLEY)** In relation to those
7 informant concerns, did you notice whether AIM was
8 doing anything or took any action?

9 **A.** You mean in June?

10 **Q.** Yes.

11 **A.** Yes.

12 **Q.** What were they doing with respect to Annie
13 Mae Aquash?

14 **A.** Well, people were paying more attention to
15 her.

16 **Q.** Okay. Paying more attention to her.

17 Would an example of that be -- I believe you
18 discussed with Mr. Murphy in Washington the setting of
19 where Leonard Peltier had gone shopping for women's
20 clothing with Bernie and Annie Mae?

21 **A.** Yes.

22 **Q.** Do you recall Mr. Murphy discussing with you
23 in that time frame with Jumping Bull's, Cedar Rapids?

24 Do you recall that general discussion?

25 **A.** Yes.

1 **Q.** And the inquiry about whether -- or the
2 discussion about Annie Mae going with John Graham to
3 Cedar Rapids?

4 Do you recall that?

5 **A.** Yes.

6 **Q.** Would Cedar Rapids have been after the
7 June 1975 Farmington incident?

8 **A.** Yes, it was.

9 **Q.** You had a long discussion with Mr. Murphy
10 about Kenny Loud Hawk's place and the making of bombs.

11 Do you recall that?

12 **A.** Yes.

13 **Q.** What was your observation as to why Annie Mae
14 was brought into it?

15 Why she was being a part of that. What was
16 occurring at Kenny Loud Hawk's?

17 **A.** Well, as I had said before, I honestly think
18 that they did not trust her. And I think that to keep
19 her closer they could keep a better eye on her.

20 **Q.** Was she also close after that event when she
21 rode in the motor home -- in Marlin Brando's motor
22 home after Columbus Day of 1975?

23 **A.** Yes.

24 **Q.** I want to now put it in a time frame so
25 everybody is clear.

1 So we have Kenny Loud Hawk's occurred about
2 when?

3 What time frame?

4 **A.** In October of 1975.

5 **Q.** And that -- would that have been prior to a
6 federal judge releasing Annie Mae in November of 1975?

7 **A.** Yes.

8 **Q.** Do you recall discussing with Mr. Murphy
9 about Wounded Knee and people being killed?

10 Do you recall that discussion?

11 **A.** Yes.

12 **Q.** Do you know who Ray Robinson is?

13 **A.** Yes, I do.

14 **Q.** Tell the jury who Ray Robinson is.

15 **A.** Ray Robinson -- Ray Robinson was a person who
16 had come to Wounded Knee and he was very active where
17 he came from. He -- he fought for civil rights. He
18 came to Wounded Knee. He never left.

19 **Q.** With respect to Jumping Bull's, the location
20 I believe you testified that you were living at where
21 the two agents were shot, did you ever see John Graham
22 at Jumping Bulls?

23 **A.** Yes, I did.

24 **Q.** Okay.

25 But in fairness, not the day of the FBI

1 shooting; is that fair?

2 **A.** Yes.

3 **Q.** But you had seen him there on other
4 occasions?

5 **A.** Yes.

6 **Q.** Do you recall your discussion with Mr. Murphy
7 about after the motor home was pulled over and Leonard
8 Peltier and Dennis Banks fled, the discussion that
9 Leonard Peltier was off the reservation for safe
10 keeping.

11 Do you generally recall that discussion?

12 **A.** I am sorry. Can you say that again?

13 **Q.** After the motor home incident, was Leonard
14 Peltier arrested at that incident?

15 **A.** No.

16 **Q.** If you know, where did Leonard Peltier
17 ultimately head to?

18 **A.** Canada.

19 **Q.** If you know, was Leonard Peltier extradited
20 from Canada?

21 **A.** He was.

22 **Q.** Kamook, were you informant A or informant B?

23 **A.** No, I was not.

24 **Q.** Kamook, do you recall discussing with
25 Mr. Murphy your interview with Arlo Looking Cloud and

1 Troy Lynn on or about December 16, 2000?

2 A. Yes.

3 Q. Do you recall Mr. Murphy's discussion of that
4 interview and what Arlo had said generally?

5 A. Yes.

6 Q. And part of your discussion with Mr. Murphy
7 was about the implication of John Graham, do you
8 recall that?

9 A. Yes.

10 Q. And it was a fairly lengthy discussion that
11 you had with Arlo and Troy Lynn?

12 A. Yes, it was.

13 Q. What -- what was some of the information that
14 you discussed with Arlo and Troy Lynn prior to the
15 discussion about John Graham being implicated in the
16 offense?

17 Do you recall any of that discussion?

18 MR. MURPHY: Your Honor, objection. And ask
19 to approach.

20 THE COURT: Very well.

21 (Whereupon, a discussion was held at the
22 bench.)

23 MR. MURPHY: I asked about Kamook's
24 statements to Arlo which was only --

25 THE COURT: Quiet.

1 **MR. MURPHY:** I asked only -- I asked Kamook
2 to talk about what she said which was, only implicate
3 John Boy. Arlo states Troy Lynn's statements are not
4 relevant of scope of the inquiry. It's her
5 statements. Arlo is going to be on the stand. He can
6 be examined about what he told her. But the question
7 and the issue was what she told Arlo to deflect
8 attention away from others.

9 **MR. JACKLEY:** Your Honor, he specifically
10 cross-examined regarding this statement. He
11 specifically -- he elicited testimony --

12 **THE COURT:** Shut it down.

13 **MR. JACKLEY:** He -- Mr. Murphy specifically
14 cross-examined this witness about that interview --
15 about what Troy Lynn said, about what Arlo said. And
16 about what Kamook said.

17 I would cite the Court to *State vs. Salalla*,
18 S-A-L-A-L-L-A, Westlaw 58968, 2000, South Dakota case,
19 where the Supreme Court stated the trial court acted
20 within its discretion in ruling that defendant's
21 introduction of exculpatory portions of declarant's
22 hearsay statement to police officer resulted in waiver
23 of confrontation right and ability of state to, quote,
24 complete the picture, end quote. By eliciting other
25 inculpatory portions of the statement.

1 And that's precisely what occurred here where
2 I examined regarding the implication of John Graham
3 and the state should be entitled to, quote, complete
4 the picture, end quote.

5 **THE COURT:** Arlo is going to be here, right?

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

7 **THE COURT:** Arlo is going to be here, right?

8 **MR. JACKLEY:** Yes.

9 **THE COURT:** Can't you ask Arlo?

10 **MR. JACKLEY:** He's just cross-examined this
11 witness with what would be perceived as --

12 **THE COURT:** Just answer my question.

13 **MR. MURPHY:** Our position would be under
14 that -- under that case, if this witness during the
15 interview made other statements that were
16 inculpatory -- and this really isn't an issue of
17 inculpatory or exculpatory; it's about bias.

18 But if he made statements during that
19 interview, they would be subject to be presented. I
20 impeached her on her statement that she told Arlo
21 only, implicate John Boy. Now they want to bring in
22 Arlo's statements and Troy Lynn's statements, not
23 hers. That's the problem with their examination.
24 They ultimately could go back through everything Arlo
25 told this witness over a six-hour interview under

1 their theory.

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

3 **THE COURT:** He's going to be here. You can
4 ask Arlo. She's subject to being recalled if
5 necessary. Arlo's statements are here. I mean -- the
6 question was whether she directed him to -- the
7 question of what he asked her at that point --

8 **MR. JACKLEY:** Right. He elicited testimony
9 of what Arlo's testimony was and I believe he elicited
10 testimony of what Yellow Wood said and I shouldn't be
11 foreclosed from going into that.

12 **THE COURT:** I mean, I don't understand the
13 problem with calling the people and having them here
14 to testify. You are going to call them both.

15 **MR. JACKLEY:** I know -- the problem is he
16 examines on these matters that he believes are
17 exculpatory and then I can't go into the inculpatory
18 matters.

19 **THE COURT:** You can have Arlo here. And you
20 can go over every statement he made. You got complete
21 transcripts. Other than the question he asked that's
22 the only place you are going to go.

23 **MR. JACKLEY:** So I won't cross the boundary,
24 can I ask her about the implication of John Graham and
25 why she said what she said? Can I put it back into

1 that context?

2 **MR. MURPHY:** I would argue no because she's
3 going to say, well, the reason I did that is because
4 Arlo told me A, B, C, D, and E. That exchange -- the
5 only reason for that question --

6 **THE COURT:** I think he can ask her why she
7 said that. I don't know how he cannot.

8 **MR. MURPHY:** Well, then if she starts talking
9 about Arlo's --

10 **THE COURT:** We're not going into Arlo's
11 statement other than that. If it gets into Arlo's
12 statements, we'll shut down. He's not going to -- all
13 the things Arlo said to her, at this point, that's
14 hearsay. You can bring it in through Arlo and then
15 you have the ability to bring her back and confront
16 her if he says something different. I think you can
17 always bring her back. I don't think we're going to
18 go through Arlo's statements here.

19 And Mr. Murphy was very limited. So that's
20 that. I think you are entitled to ask her why but
21 we're not going to go back through a litany of Arlo's
22 statements to her. We're not going to go there.
23 Later, if he says different things, there may be a
24 basis for doing that.

25 **MR. JACKLEY:** I respect the Court's ruling.

1 (Whereupon, the discussion at the bench was
2 then concluded.)

3 **Q.** **(BY MR. JACKLEY)** Kamook, I want to be very
4 careful with these questions. I don't want to elicit
5 from you what Arlo told you, okay, during that
6 interview. Okay?

7 **A.** Okay.

8 **Q.** And I don't want to elicit what Troy Lynn
9 Yellow Wood told you.

10 **A.** Okay.

11 **Q.** Which means my questions are really being
12 directed at what generally you were discussing. Okay.

13 **A.** Okay.

14 **Q.** Mr. Murphy had inquired about your statement
15 regarding the implication of John Graham in this case.

16 Do you recall that?

17 **A.** Yes.

18 **Q.** Prior to that part of the interview, had you
19 discussed several individuals?

20 **A.** Yes.

21 **Q.** Had you discussed their involvement in the
22 murder of Annie Mae Aquash?

23 **A.** Yes.

24 **Q.** Not asking you what Arlo said, but I want to
25 ask you what his reaction or emotions were when you

1 were discussing the murder of Annie Mae Aquash of in
2 December of 2000.

3 What were his reactions and emotions at
4 times?

5 **A.** Arlo was very emotional when I would ask him
6 certain questions. There were times where he became
7 choked up. Where he couldn't answer. There were a
8 few times where his eyes got very watery. He looked
9 out the window because he couldn't answer. He was
10 very emotional.

11 **Q.** Mr. Murphy's reference to the implication of
12 John Graham is on page 168 a transcript.

13 Prior to that discussion, and the reference
14 to the implication of John Graham, had you discussed
15 John Graham?

16 **A.** Yes.

17 **MR. JACKLEY:** No further questions, Your
18 Honor.

19 **THE COURT:** Thank you.

20 Mr. Murphy?

21 **MR. MURPHY:** Thank you.

22 **RE-CROSS-EXAMINATION**

23 **BY MR. MURPHY:**

24 **Q.** Ma'am, I saw you during the break talking
25 with Mr. Jackley.

1 Do you recall that?

2 A. Yes.

3 Q. You were a witness on the stand at that
4 point, correct?

5 A. Yes.

6 Q. But you decided to have a conversation with
7 an attorney during the course of your examination?

8 A. Is that not allowed?

9 Q. Well, let me ask you, I mean, you are now
10 married to the lead investigator, correct?

11 A. Right.

12 Q. So your intent and desire is to help the
13 prosecution in this case, is it not?

14 A. Yes.

15 Q. And that's why at various times when you have
16 been asked to propound upon theories like the
17 fingerprint theory and the motor home captive theory
18 you have been willing to go before juries and
19 speculate as to what you think?

20 A. Well, I have always been asked my opinion and
21 that was my opinion.

22 Q. And you used words like I think and I guess?

23 A. Yes.

24 Q. Even though the evidence that you observed
25 didn't necessarily support what you thought or you

1 guessed, right?

2 **A.** It is what I thought.

3 **Q.** Okay.

4 Well, now Mr. Jackley asked you about working
5 for the FBI. You said, no, at the time you got
6 involved in this case, you were working in the movie
7 industry, correct?

8 **A.** That's right.

9 **Q.** 2000 -- well, let me ask you, you weren't
10 working for the FBI, but they had fitted you for a
11 body wire, right?

12 **A.** Actually, it was not a body wire. It was
13 just a --

14 **Q.** Secret recording device?

15 **A.** Yes.

16 **Q.** And you went out and did interviews of people
17 that they were interested in, correct?

18 **A.** No. It's people that I was interested in and
19 I told them that's who I would like to talk to.

20 **Q.** Let me ask you, you said you had hadn't even
21 seen the tapes. We've got 19 tapes of conversations
22 with Troy Lynn.

23 They must have been pretty interested in Troy
24 Lynn if they are going to take 19 tapes full of her
25 talking, right?

1 **A.** When I first visited with Troy Lynn, I told
2 Jim Graf that I wanted to visit with Troy Lynn because
3 at that point I had already heard a lot of things that
4 Troy Lynn had been saying. So I said to him that I am
5 leaving this area. I am driving back to New Mexico.
6 And I want to stop and visit Troy Lynn.

7 **Q.** And you recorded that conversation?

8 **A.** Yes, but that wasn't the original -- I
9 originally just wanted to go visit her. And over
10 time, he came to me and asked me if I would do that.

11 **Q.** But you don't consider that working for the
12 FBI?

13 **A.** No.

14 **Q.** Okay.

15 Working in cooperation with the FBI?

16 Would you give us that much?

17 **A.** Yes.

18 **Q.** All right.

19 Well, if you are not working for the FBI, I
20 want to talk to you about the money they gave you.

21 In 2003, your income apart from what the FBI
22 gave you was about \$20,000, correct?

23 **A.** I -- in 2003?

24 **Q.** Yeah. That's what you said under oath --

25 **A.** I did. I worked on a movie for about eight

1 weeks.

2 Q. Okay.

3 And you made \$20,000?

4 A. On that movie.

5 And I had another job.

6 Q. In the five years prior to that, so we're
7 going basically 98 through 2003, the most you ever
8 made in one year was \$35,000, correct?

9 A. Maybe.

10 Q. Well, in July -- in -- excuse me.
11 February 3, 2004, you testified at Arlo Looking
12 Cloud's case?

13 A. Yes.

14 Q. You were asked the question in the five years
15 prior to that time, what is the most you made in any
16 one year? Your answer, maybe 35.

17 Do you recall that?

18 A. Yes.

19 Q. And then you were asked preceding to that,
20 just the whole year, 2003, all the money that you
21 made? Answer, probably not very much this year.
22 Question, well, are we talking -- can you give us a
23 ballpark on an amount? Answer, okay. We are talking
24 about last year.

25 That would have been 2003, right?

1 **A.** Yes.

2 **Q.** Question, yes. Answer, probably only about
3 \$20,000.

4 Is that what you said under oath at that
5 point?

6 **A.** Yes. That was for one movie.

7 **Q.** Okay.

8 Well, but the prior five years, the most you
9 made in about a year was about 35,000?

10 **A.** Yes, and a movie takes anywhere from three to
11 four months.

12 **Q.** I am just asking you how much you made
13 because Mr. Jackley asked you if you ever profited
14 from your involvement in that case and you said no.

15 2003, taxpayers gave you \$17,000 in one
16 check, right?

17 **A.** Right.

18 **Q.** That's almost 100 percent more than the
19 entire rest of the money you earned doing movies,
20 correct?

21 **A.** Okay.

22 **Q.** So you made \$17,000 from the taxpayers and
23 only \$20,000 from working.

24 That's a profit, isn't it?

25 **A.** You mean because --

1 **Q.** Well, if you are your working career only
2 amounted to 20,000 and the FBI gives you an additional
3 17,000, you have almost double the amount of money
4 coming in your house that year alone, correct?

5 **A.** \$20,000 is what I made on a movie. I also
6 had another job besides that one.

7 **Q.** Well, when you were asked how much you made
8 last year, 2003, at that time under oath at least you
9 said you only made 20,000 for the whole year?

10 **A.** The conversation, I believe, up to that point
11 had been about movies. Nobody asked me about another
12 job.

13 **Q.** Question, how much money do you make in a
14 year, ma'am? Answer, it depends on the movie and the
15 budget of the movie. It differs. Well, let's talk
16 about the year 2003. How much did you make in 2003?

17 **A.** Right.

18 **Q.** It was not a question limited to movies. And
19 on that -- to that question, you said, 2003, you made
20 20 grand?

21 **A.** Yes.

22 **Q.** Now you are saying you made a little more
23 than that?

24 **A.** I worked for Lagoon Industries at the time
25 and I was a supervisor and we were doing digital

1 analyzing for the state of New Mexico for the land
2 office.

3 Q. All right.

4 But you are not denying that that \$17,000
5 check came in pretty handy, are you?

6 A. It came in handy when it was time to move.

7 Q. And the \$25,000 check you got almost a year
8 exactly afterwards, that was -- that came in handy,
9 too, didn't it?

10 A. In moving it did.

11 Q. Okay.

12 Well, we're going to talk about the moving.
13 I just want to compare it to your income.

14 Since you said you averaged about \$35,000 a
15 year; a \$25,000 check basically doubles your income
16 for that year, too, doesn't it?

17 A. Yes.

18 Q. All right.

19 Now, you -- you referenced repeatedly that
20 these checks were for moving. I am showing you the
21 sheet -- the voucher for your \$17,000 check. It says,
22 does it not, that it's \$17,000 for expenses for a
23 period of February 1, 2003, to February 1, 2004?

24 That's what it says?

25 A. Yes.

1 **Q.** So they gave you a \$17,000 check for expenses
2 covering a one-year period?

3 **A.** Right.

4 **Q.** The next check, \$25,000. It's for \$25,000
5 for expenses for the period from February 1, 2004, to
6 February 1, 2005, correct?

7 **A.** Yes.

8 **Q.** So there is nothing on any of these vouchers
9 about it being moving expenses. They are basically
10 paying a year's salary in advance at a time?

11 **A.** That also -- not only was it to cover moving
12 expenses, that also was to cover of the expense of the
13 rent, which is where -- to pay for the place where I
14 was eventually located.

15 **Q.** Ma'am, you didn't do any interviews in 2004,
16 2005?

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

18 **Q.** They paid you --

19 **A.** That was after Arlo's trial happened in 2004
20 and I believe I testified at that trial that I was not
21 able at that point because I -- because of testifying,
22 I did not feel safe to go back into the movie industry
23 and begin working in public and being around a lot of
24 people.

25 **Q.** Ma'am, you got that \$17,000 check one month

1 before you testified in Arlo's trial?

2 **A.** Right.

3 **Q.** And you just said after Arlo's trial you
4 didn't feel safe going back into the movies.

5 July 27, 2003, one month before you testified
6 in Arlo's trial, they paid you one year in advance
7 expenses. February 1, 03, to February 1, 04, they
8 paid you that in January.

9 It was before you could have known anything
10 about the outcome of Arlo's trial; isn't that true?

11 **A.** No. At that point I had already visited
12 several people.

13 **Q.** You had been visiting people for three years?

14 **A.** Right, but during that time -- by the first
15 check, I had already spent a lot of time talking to
16 people.

17 **Q.** Ma'am, it's undeniable what the document
18 says?

19 **A.** Right.

20 **Q.** And that is that one month before Arlo
21 Looking Cloud's trial, they paid you a check that
22 almost equaled your annual income for advanced
23 expenses for the upcoming year.

24 That's what it says?

25 **A.** Okay.

1 **Q.** And then one year almost exactly later, they
2 give you another check, \$25,000, for expenses to be
3 paid in advance, correct?

4 **A.** Right.

5 **Q.** You didn't provide a single receipt for
6 either of those checks?

7 **A.** No, I did not.

8 **Q.** \$50,000 tax free -- what's that equal, about
9 \$65,000 in real money? 70,000?

10 **A.** I don't know what you mean by real money.

11 **Q.** Okay.

12 And you indicated that the AIM leaders were
13 paying more attention to Annie Mae after Farmington?

14 That was your testimony just now?

15 **A.** Yes.

16 **Q.** Like paying more attention by inviting her to
17 participate at Al Runnings' house, correct, to be
18 there?

19 **A.** She was there. I don't know if she had been
20 invited.

21 **Q.** She was there in a tent full of explosives by
22 herself, correct?

23 **A.** That's what I heard.

24 **Q.** Okay.

25 And they invited her -- by paying more

1 attention to her they invited her to come to Loud
2 Hawk's house and help make bombs with them?

3 A. She was there when I got there.

4 Q. And you saw her making bombs?

5 A. Yes.

6 Q. And they invited her along on the motor home
7 trip?

8 A. Yes he.

9 Q. So by paying more attention to her, they
10 allowed her to participate with them in more criminal
11 activity, correct?

12 A. Yes.

13 Q. More criminal activity that she could have
14 been a witness to if she really was an informant,
15 right?

16 A. Yes.

17 Q. Mr. Jackley asked you about Ms. Aquash going
18 into stores to buy women's clothing with Mr. Peltier.

19 They went to a Good Will store, did they not?

20 A. Yes.

21 Q. Good Will stores sell everything from men's
22 clothing, women's clothing, kitchen stuff, everything
23 you can imagine pretty much, right?

24 A. My sister told me they when to get clothes.

25 Q. They got clothes. All right.

1 And you didn't hear her say Leonard Peltier
2 was guarding Anna Mae Aquash at that time?

3 **A.** No.

4 **Q.** In fact, you never saw Leonard Peltier
5 guarding Annie Mae, did you?

6 **A.** No.

7 **Q.** Same thing at Loud Hawk's house, the bomb
8 making you were asked about, never saw them guarding?

9 **A.** No.

10 **Q.** Never were told keep an eye on her?

11 **A.** No.

12 **Q.** Mr. Jackley asked you about the time being at
13 Loud Hawk's house. That was before she was released
14 from federal custody in November, right?

15 **A.** Yes, because that was in October.

16 **Q.** Okay.

17 But --

18 **A.** We were at Loud Hawk's in October.

19 **Q.** But that was after she had already flown the
20 coupe regarding the Al Runnings' charges, correct?

21 **A.** I know they had been arrested in September
22 and he were at Loud Hawk's in October. And then in
23 November when I was taken back to Kansas after we were
24 arrested, and Annie Mae was taken to South Dakota.

25 **Q.** You said today you are not informant A or B?

1 **A.** No, I am not.

2 **Q.** The issue is, at the time, you were one of
3 the only -- you and Bernie were the only people that
4 left the motor home and flew back to Kansas during the
5 time of the trip, correct?

6 **A.** Yes.

7 **Q.** And you knew that that was something that
8 might cause people to be suspicious once they saw
9 those A and B informant affidavits, correct?

10 That they might suspect you and Bernie?

11 **A.** I never thought that.

12 **Q.** Even though you had outstanding charges and
13 you had left for a couple days?

14 **A.** I never thought that. I was not the
15 informant. I would have been informing on myself.

16 **MR. MURPHY:** Okay.

17 Nothing further.

18 **CONTINUED REDIRECT EXAMINATION**

19 **BY MR. JACKLEY:**

20 **Q.** Kamook, are you involved in this case so you
21 could be required to move twice?

22 **A.** Pardon me?

23 **Q.** Are you involved in this case so that you
24 could be able to move twice?

25 **A.** You mean back then?

1 **Q.** Let me ask this.

2 Why are you involved in this case?

3 What is your motive in this case?

4 **MR. MURPHY:** Objection. Self-servicing.

5 **THE COURT:** Sustained.

6 **Q. (BY MR. JACKLEY)** Let me ask this.

7 Did you ask the FBI to move on either of your
8 two moves?

9 **A.** No.

10 **Q.** Did the FBI require you to move?

11 **A.** Yes, they told me that I should move.

12 **Q.** Was the FBI appeared to be concerned about
13 something?

14 **A.** My safety.

15 **Q.** Did you make any money based upon your
16 involvement in this case?

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

18 **MR. JACKLEY:** No further questions, Your
19 Honor.

20 **MR. MURPHY:** Just a moment, Your Honor.

21 Thank you. Nothing further.

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

23 You may be excused.

24 (Witness excused.)

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

1 Marshall, Your Honor.

2 **THE COURT:** Please come forward, sir.

3 RICHARD MARSHALL,

4 called as a witness herein, having been duly sworn,

5 under oath testified as follows:

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

7 **DIRECT EXAMINATION**

8 **BY MR. JACKLEY:**

9 Q. Good morning, Mr. Marshall.

10 A. Good morning.

11 Q. Do you please state your name.

12 A. Richard Marshall.

13 Q. Mr. Marshall, where do you live?

14 A. I presently live in Porcupine, South Dakota.

15 Q. Mr. Marshall, I want to take you back to

16 December of 1975.

17 Where did you live then?

18 A. I lived in Allen, South Dakota.

19 Q. Mr. Marshall, I am handing you what has

20 previously been marked State's Exhibit 30.

21 Do you recognize that house?

22 A. Yes, I do.

23 Q. Is that the house that you lived in in 1975?

24 A. Correct.

25 **MR. JACKLEY:** May I show the jury on the

1 screen, Your Honor?

2 **THE COURT:** You may.

3 **Q. (BY MR. JACKLEY)** Mr. Marshall, in December of
4 1975, were you married?

5 **A.** Yes, I was.

6 **Q.** Who were you married to?

7 **A.** I was married to Cleo Clifford.

8 **Q.** Were you a supporter of the American Indian
9 Movement?

10 **A.** Yes, I was.

11 **Q.** One evening in December of 1975 were you
12 visited by a group that included Annie Mae Aquash?

13 **A.** That I can't remember clear right away. That
14 was over 30 some years ago.

15 **Q.** Let me ask you this, Mr. Marshall.

16 Do you recall a time when you had a group of
17 people come visit you late one evening in December of
18 1975?

19 **A.** We always had company all the time and I
20 can't say how many people showed up when but we always
21 had company all the time.

22 **Q.** Do you know Theda Clarke? Sometimes goes by
23 Theda Nelson.

24 **A.** Well, I have heard of her name recently
25 when -- the first time that I was handed a subpoena

1 saying I was going to be subpoenaed to Grand Jury
2 from -- I think he was a U.S. Marshal then by the name
3 of Robert Ecoffey.

4 Q. Mr. Marshall, do you recall ever meeting with
5 an individual by the name of Serle Chapman?

6 A. Serle Chapman, yes, I recall that.

7 Q. Do you recall meeting with him on July 27,
8 2001?

9 Do you recall that, generally?

10 A. Vaguely, I remember, yeah.

11 Q. And do you recall it was being taped?

12 A. I think it was, yeah. Yeah, I think it was
13 taped yeah.

14 Q. In fact, at one point you asked him for a
15 opportunity to proofread the transcript, didn't you?

16 A. I can't recall that.

17 Q. Mr. Marshall, are you here voluntarily today?

18 A. I was subpoenaed.

19 Q. You don't want to be here today, do you?

20 A. I was subpoenaed so I am here.

21 Q. Are you concerned that your testimony that
22 you give today could be used against you in some form
23 or manner?

24 A. Oh, yeah. I always have that concern.

25 Q. Mr. Marshall, do you recall telling Serle

1 Chapman in the taped interview that you remember being
2 visited and that Annie Mae was with them?

3 **MR. MURPHY:** Objection. Leading.

4 **A.** I --

5 **THE COURT:** Hold on.

6 **A.** I can't recall saying that.

7 **THE COURT:** Overruled.

8 Go ahead, Mr. Marshall.

9 **A.** I can't recall saying that.

10 **Q. (BY MR. JACKLEY)** Do you recall telling Serle
11 Chapman that that night Cleo Marshall gave Anna Mae
12 Aquash clothing?

13 **A.** No, I don't remember saying that.

14 **Q.** Do you deny saying it or you just can't
15 remember?

16 **A.** I can't remember.

17 **Q.** If I showed it to you, would that help you
18 any?

19 **A.** It may.

20 **MR. JACKLEY:** May I approach, Your Honor?

21 **THE COURT:** You may.

22 **Q. (BY MR. JACKLEY)** Do you recall stating,
23 Mr. Marshall --

24 **MR. MURPHY:** Your Honor, I am going to
25 object. This is an proper way to refresh

1 recollection.

2 **THE COURT:** Ask him to read it first.

3 **Q. (BY MR. JACKLEY)** Mr. Marshall, can you please
4 read the paragraph that I am indicating to you on page
5 ten of the transcript.

6 **A.** We were married and we --

7 **Q.** Not out loud, sir.

8 **A.** Okay.

9 **Q.** Mr. Marshall, does that refresh your
10 recollection of when Anna Mae was brought to your
11 house in December of 1975?

12 **A.** Not really, but you know, it's been so long
13 ago.

14 **Q.** Mr. Marshall, do you recall talking to
15 Marshal Bob Ecoffey on December 26, 2003?

16 Do you recall meeting with Mr. Ecoffey about
17 that time frame?

18 **A.** I remember he said I was going to be
19 subpoenaed.

20 **Q.** Do you remember talking to him about when
21 Theda, Arlo -- excuse me. Theda, Anna Mae, and two
22 young guys appeared at your house one December evening
23 in 75?

24 **A.** Yeah, he mentioned that, yeah.

25 **Q.** Well, what did you mention?

1 **A.** What did I mention? I told him I couldn't
2 clearly remember that date and time and I asked him to
3 talk to my wife Cleo because we had a lot of people
4 coming over all the time.

5 **Q.** And Cleo would be a better person to maybe
6 answer some of those questions?

7 **A.** Yes. That's what I told him, yeah.

8 **Q.** Mr. Marshall, is it -- would it be fair to
9 state that you remember nothing about Annie Mae Aquash
10 coming to your house in December of 1975?

11 **A.** Well, it happened so long ago and since that
12 time with all the news and I have been in jail for
13 almost two years and reading discovery, I start to
14 remember certain parts of way back then. That
15 happened a long time ago.

16 **Q.** Mr. Marshall, what parts do you remember,
17 then?

18 **A.** Well, Mr. Bob Ecoffey mentioned when he told
19 me that these people came to my house. And like I
20 mentioned, we always had a lot of company coming over.
21 And that -- that I remember one time this lady came --
22 her name was Theda. And she knew my wife. And my
23 wife knew her. And I didn't know her.

24 **Q.** That night or that time that Theda came, is
25 there something she wanted?

1 **A.** She asked us to keep a woman there.

2 **Q.** Okay.

3 Did she have any written documentation with
4 her when she asked you to keep a woman there?

5 **A.** I did not see any written document --
6 anything written.

7 **Q.** Were you aware of a written document?

8 **A.** No, I'm not.

9 **Q.** When she asked you to keep this woman there,
10 did it appear that this woman was free to leave?

11 **A.** Well, there was others there and they were
12 all in the living room. And we was all standing
13 around.

14 **Q.** What do you remember about this woman that
15 appeared at your house that Ms. Clarke wanted to keep
16 there?

17 What do you recall about her?

18 **A.** To me she was just a different person.
19 That's the first time I ever laid eyes on them people.

20 **Q.** First time you had ever met this young woman?

21 **A.** First time I met these people that came to my
22 house.

23 **Q.** Was the lady that -- that you were going to
24 keep there, was she a young woman?

25 **A.** I don't know.

1 Q. Did -- do you recall her saying anything to
2 you or was she quiet?

3 A. She didn't say nothing.

4 Q. What was she wearing?

5 A. I can't remember.

6 Q. Mr. Marshall, in your house, do you have a
7 bedroom?

8 A. Oh, yeah. It's a four-bedroom house.

9 Q. And in your bedroom, did you have a dresser
10 that you recall?

11 A. A dresser?

12 Q. Yes.

13 A. Yeah, each bedroom had a dresser in it.

14 Q. Do you remember how many drawers that dresser
15 had?

16 A. Not right off hand.

17 Q. Mr. Marshall, back to the interview that you
18 had with Bob Ecoffey of December 26, 2003, I'd like
19 you to read the last two paragraphs --

20 **MR. MURPHY:** Objection. This is improper.

21 **THE COURT:** Overruled.

22 Q. **(BY MR. JACKLEY)** And read it to yourself,
23 please.

24 Mr. Marshall, does that in any way help
25 refresh your recollection as to what occurred at your

1 house or what may have occurred at your house in
2 December of 1975?

3 **A.** Not really.

4 **Q.** Did you ultimately keep this young lady at
5 your house that evening?

6 **A.** Nope.

7 **Q.** What do you remember about that?

8 **A.** That elderly lady asked if we could keep that
9 lady there. I said no. And I immediately went and
10 told Cleo what she had asked.

11 **Q.** But I thought Cleo was standing there?

12 **A.** Yeah. She was standing right there.

13 **Q.** Why would you need to go ask Cleo something?

14 **A.** Because in the Lakota tradition, the lady
15 runs the house. So I asked her and Cleo said nope.
16 And we had children also. Young children there. And
17 it was late.

18 **Q.** Do you know why Cleo said no?

19 **MR. MURPHY:** Objection. Calls for
20 speculation.

21 **THE COURT:** Sustained.

22 **Q.** **(BY MR. JACKLEY)** Were these discussions about
23 keeping this young lady there, were they had in front
24 of the young lady?

25 **A.** I believe they were.

1 **Q.** Did she say anything during those
2 conversations?

3 **A.** Nope.

4 **Q.** Did you -- were you the one that informed
5 Theda Clarke that the young lady wasn't going to stay
6 at your house?

7 **A.** I told them that nobody was going to stay
8 there.

9 **Q.** How did Theda Clarke take that?

10 **A.** She acted mad.

11 **Q.** Wasn't happy, was she?

12 **A.** She wasn't happy. Looked upset.

13 **Q.** Do you remember what type of clothing Cleo
14 gave this young lady that evening?

15 **A.** No, I can't remember that.

16 **Q.** Do you remember when they came to your house
17 were you woke up or -- were you sleeping?

18 **A.** We were sleeping, correct.

19 **Q.** Okay.

20 Did both you and Cleo get up when they came?

21 **A.** We both got up.

22 **Q.** The bedroom that we talked about with the
23 dresser in it, the room that you slept in, did it have
24 a door?

25 **A.** Oh, yeah. All four doors -- all bedrooms had

1 doors on them.

2 Q. Mr. Marshall, is your house considered an AIM
3 safe house?

4 A. No.

5 Q. Did this young lady that evening in December
6 of 1975 leave your house alive?

7 A. They all left.

8 Q. Everybody that came there that evening with
9 this young lady including Theda Clarke, left, is that
10 what you are saying?

11 A. They all left.

12 Q. They didn't stay at your house?

13 A. Nope. We locked the doors when they left.

14 Q. Why did you lock the doors as soon as they
15 left?

16 A. Because we had children there and we always
17 lock our door every night.

18 Q. Did you ever see this young lady again after
19 she left your house that night?

20 A. I didn't see any of them.

21 Q. And this would have been the first time that
22 you had ever met this young lady?

23 A. First time I ever laid eyes on all of them.

24 Q. Did you attend the wake of Annie Mae Aquash?

25 A. I believe we did.

1 **Q.** Can you -- Mr. Marshall, can you explain to
2 me why when you never knew Annie Mae Aquash, this was
3 the first night the young lady had come to your house,
4 why you would then attend her wake of somebody that
5 you didn't know?

6 **A.** Well, in Lakota tradition, the lady of the
7 house always cooks all the time. And Cleo wanted to
8 take some food over there. That's what we did. We
9 took some food over there.

10 **Q.** As you sit here today, Mr. Marshall, are you
11 sure that Cleo Marshall went to Anna Mae's wake?

12 **A.** We stopped there.

13 **Q.** You stopped there?

14 **A.** Both of us. We dropped the food off and we
15 left.

16 **Q.** Mr. Marshall, as you sit here in court today,
17 do you see the gentleman in the blue shirt seated at
18 counsel's table?

19 **A.** I see him.

20 **Q.** Have you ever seen him before?

21 **A.** Nope.

22 **Q.** Who was it, then, that showed up at your
23 house that night with Theda Clarke and this young
24 lady, if you know?

25 **A.** They were young boys.

1 Q. There was two of them, weren't there?

2 A. They were young boys.

3 Q. There was two of them, weren't there?

4 A. Yeah.

5 Q. And they both left that evening, didn't they?

6 A. They all left.

7 MR. JACKLEY: No further questions, Your
8 Honor.

9 THE COURT: Mr. Murphy?

10 MR. MURPHY: Thank you.

11 **CROSS-EXAMINATION**

12 **BY MR. MURPHY:**

13 Q. Now, Mr. Jackley has told you that this event
14 happened in December of 1975.

15 You don't recall exactly when this event
16 happened, do you?

17 A. No, I can't recall exactly the date.

18 Q. Fall or winter of 1975?

19 Some time in the fall or winter?

20 A. Some time there, yeah.

21 Q. And as to what time of night they came to
22 your house, you don't recall?

23 A. I don't recall that either, sir.

24 Q. You think Cleo might have a better
25 recollection?

1 **A.** She might have, yes.

2 **Q.** If she testified some time between 10:30 and
3 midnight would that sound about right to you?

4 **A.** I couldn't say because I didn't see the
5 clock.

6 **Q.** Sure. Okay.

7 Well, let's talk about November, December,
8 1975.

9 At that time you were working, right?

10 **A.** Correct. We were both employed.

11 **Q.** Yeah.

12 Where were you working?

13 **A.** I was a construction worker for the Oglala
14 Sioux Housing.

15 **Q.** Okay.

16 Where was Cleo working?

17 **A.** And she was -- she was a technician with one
18 of the programs at the hospital.

19 **Q.** Okay.

20 **A.** Mental health. She had a mental health tag.

21 **Q.** How many kids did you have?

22 **A.** We had two.

23 **Q.** How old?

24 **A.** Them little guys were probably about three.

25 **Q.** Okay.

1 **A.** Both about the same age.

2 **Q.** All right.

3 And at this point we're not going to --

4 **MR. MURPHY:** Your Honor, may we approach on
5 one issue?

6 It will be brief.

7 (Whereupon, a bench conference was then
8 held.)

9 **MR. MURPHY:** I'm going to ask him if he was
10 on bond. I am not going to ask him anything about the
11 Montileaux incident or the crime he committed. I want
12 to make sure that's understood that's the only scope
13 and that this didn't get a relitigation of the motion
14 in limine about the criminal history of Mr. Marshall.

15 **MR. JACKLEY:** Well, it's the state's
16 position, Your Honor, if he's going to ask about bond,
17 the state should be entitled to ask him more about
18 that situation.

19 **MR. MURPHY:** My position is that one of his
20 conditions of bond was that he did not have a weapon
21 in the house. That's the only relevant -- whether we
22 get into the whole issue of him being involved in a
23 shooting at a bar in scenic is completely irrelevant
24 to his bond conditions.

25 **THE COURT:** Can we not duck the whole issue

1 by asking him if he was allowed to have guns in the
2 house?

3 **MR. MURPHY:** Well --

4 **THE COURT:** Then we kind of avoid the whole
5 issue.

6 **MR. MURPHY:** Yes, I can ask that.

7 The question is, why isn't he allowed to have
8 guns, well, because he's on bond. I mean, that would
9 be fine for them to redirect, but not to get into the
10 whole Monteleaux shooting.

11 **THE COURT:** Yeah. I don't think we're going
12 to go into the shooting. That is irrelevant, but he
13 can ask about bond.

14 **MR. MURPHY:** Yeah, that's all I want to get
15 into.

16 **THE COURT:** That he's on bond from a court
17 proceeding. I think we can go there. That's prior to
18 anything on this. Okay. We can go that far. It's a
19 bond on a court proceeding. A criminal proceeding
20 even, but what it's for is irrelevant.

21 **MR. MURPHY:** Thank you.

22 (Whereupon, the bench conference was then
23 concluded.)

24 **Q. (BY MR. MURPHY)** Sorry for the interruption,
25 Mr. Marshall.

1 So you and Cleo -- it's at night, you both
2 have to work the next day, is that your recollection?

3 **A.** Yes, sir.

4 **Q.** You got two young kids. And I'm not going to
5 ask you -- and I want to make sure you understand --
6 anything about any particular crime.

7 But at this time, when these folks came to
8 your house, you were on bond, correct?

9 **A.** Yes, I was.

10 **Q.** And a condition of your bond was that you
11 were not allowed to have any weapons in your house,
12 correct?

13 **A.** Correct.

14 **Q.** And when you were put on bond, what did you
15 do with the weapons you had?

16 **A.** My parents came over and my stepfather took
17 them with him.

18 **Q.** Okay.

19 And at this time period, November or
20 December, 1975, on Pine Ridge, there was a strong law
21 enforcement presence, correct?

22 **A.** Uh-huh. Right.

23 **Q.** And at any time the authorities could come
24 into your house and check to make sure you were
25 complying about your bond conditions?

1 **A.** Oh, yeah, they could do that.

2 **Q.** And during the course of time you were on
3 bond, did you ever violate your bond?

4 **A.** Nope.

5 **Q.** When these folks came to your house, did you
6 have any guns or bullets in your house?

7 **A.** Nope.

8 **Q.** Let's talk about your house. You were asked
9 some questions by Mr. Jackley about being a safe house
10 and whatnot.

11 Your house was well known as an AIM house,
12 correct?

13 **A.** Well, I don't think so. Just had a lot of
14 friends.

15 **Q.** Well --

16 **A.** And my wife and I, we always try to help
17 people out.

18 **Q.** Do you recall previously stating, and we were
19 about, like, a, one of the strongest AIM families
20 there in Allen at the time.

21 **A.** I would say there was a lot of AIM families
22 in that community then.

23 **Q.** But do you recall telling Mr. Chapman you
24 were one of the strongest?

25 **A.** No, I can't recall saying that.

1 Q. Okay.

2 Do you recall telling him that people came to
3 your house regularly for help?

4 A. Yeah -- not regularly, but whenever somebody
5 needed help. Whether it was -- I had a pickup then so
6 if an elderly couple wanted wood hauled, I would go
7 help haul wood. And then if we had extra groceries we
8 would help somebody out, particularly the elderly and
9 the grandmothers that were taking care of a lot of
10 grandchildren.

11 Q. And if people came to your house, and you
12 knew them, you would let them spend the night at your
13 house from time to time?

14 A. Yeah, if they were relatives and we knew
15 them.

16 Q. Relatives or people you knew?

17 A. Uh-huh.

18 Q. Now, your wife, Cleo, is related to Joe
19 Morgan, correct?

20 A. That's her stepbrother.

21 Q. Stepbrother.

22 And so that's -- if Arlo Looking Cloud -- or
23 there has been testimony about Arlo Looking Cloud
24 being a friend of Joe Morgan, that would be the Joe
25 Morgan that is Cleo's stepbrother?

1 **A.** Yeah. That's the only Joe Morgan that I know
2 of.

3 **Q.** So what you know about the night in question,
4 whatever date this was, was that you think about four
5 people showed up at your house?

6 **A.** About that, yeah.

7 **Q.** And you hadn't seen any of them before?

8 **A.** Nope.

9 **Q.** Two of them were youngsters and two of them
10 were women, correct?

11 **A.** Correct.

12 **Q.** All right.

13 They asked you -- or Theda asked you or the
14 woman you believe might have been Theda --

15 **A.** The elderly one, yeah.

16 **Q.** The elderly one asked you if they could leave
17 the other lady there, correct?

18 **A.** That's what she asked.

19 **Q.** She asked if they could leave her.

20 She did not ask you if you would help harm
21 this woman, correct?

22 **A.** Nope.

23 **Q.** She did not ask you to tie this woman up?

24 **A.** Nope.

25 **Q.** In fact, had somebody asked you to tie the

1 woman up, you wouldn't have had to consult with Cleo
2 about the issue?

3 A. I would have told them to get the hell out.

4 Q. Yeah. That would have been your reaction?

5 A. Yeah.

6 Q. There would have been no reason to go over
7 and kind of respect the traditional way of advising
8 the woman of the house?

9 A. Right.

10 Q. That's clear in your head?

11 A. Right.

12 Q. There was no discussion whatsoever with any
13 of these people about any intent to harm the other
14 lady?

15 A. No discussion.

16 Q. And you are clear no guns, no bullets, in the
17 house?

18 A. Nope.

19 Q. You had a night stand in your bedroom?

20 A. We had a little small table by the bed. It
21 was not a night stand.

22 Q. Did it have any drawers in it?

23 A. No drawers. It was just a little stand to
24 hold up the lamp.

25 Q. You said that when they left, the older lady

1 seemed a lit bit upset, correct?

2 **A.** Yeah, she seemed upset.

3 **Q.** Because she wasn't able to leave the other
4 lady with you?

5 **A.** I believe that's why she was upset.

6 **MR. MURPHY:** Nothing further.

7 Thank you.

8 **MR. JACKLEY:** May I have a just a moment,
9 Your Honor?

10 **THE COURT:** Yes.

11 **MR. JACKLEY:** Your Honor, with respect to
12 Mr. Murphy's inquiry regarding the gun, I am going to
13 make a motion to declare this witness adverse and to
14 proceed.

15 **THE COURT:** I am kind of treating it that way
16 to begin with.

17 Go ahead.

18 **REDIRECT EXAMINATION**

19 **BY MR. JACKLEY:**

20 **Q.** Mr. Marshall, one evening in December of
21 1975, you gave the people that showed up at your house
22 a gun, didn't you?

23 **A.** No, I did not.

24 **Q.** Explain to me why in August of 2001 --

25 **MR. MURPHY:** Objection, Your Honor. Move to

1 approach.

2 **THE COURT:** I'm not sure what it is, but
3 somebody better come up and talk to me.

4 (Whereupon, a discussion was held at the
5 bench.)

6 **MR. MURPHY:** What they are trying to do is to
7 get into this conversation where Mr. Marshall
8 allegedly said something to the effect of, back in the
9 day when you were asked to do something you did it, or
10 some variation of that.

11 That causes all sorts of issues for
12 Mr. Graham because it is a statement he made of a
13 general inculpatory nature that is going to be
14 attributed to my client. It was an unrecorded
15 statement. He has previously denied making that
16 statement. And therefore, it should not be allowed to
17 be admitted.

18 Nothing we said opened that door because
19 when -- this bears out at the Dick Marshall
20 transcripts in the prior litigation what was asked of
21 him back in this interview was something to the
22 effect, there has been rumors about you giving a gun
23 and there has been rumors about it being a 32. And
24 some time during that conversation Mr. Marshall
25 allegedly something to the effect, well, back in the

1 day, you didn't ask too many questions.

2 That has no bearing here and should not be
3 used to -- this is about John Graham. It's not about
4 Dick Marshall. And Dick Marshall's statements should
5 not be used to inculcate John Graham when Mr. Graham
6 was not present during that conversation in 2001 or
7 whenever it was. He did not adopt that admission or
8 otherwise endorse it in any way.

9 **MR. JACKLEY:** Your Honor, it's the state's
10 position that we should be entitled to ask
11 Mr. Marshall whether or not he said it. And if he
12 said it, in what context he said it in.

13 **MR. MURPHY:** They know he's going to deny
14 making the statement.

15 **THE COURT:** What do you have to show me he
16 actually made it?

17 **MR. JACKLEY:** Nothing.

18 **MR. MURPHY:** Nothing. It was not recorded.

19 **MR. JACKLEY:** I have the notes -- I have the
20 notes from an interview. I have highlighted the
21 reference.

22 **THE COURT:** Whose interview?

23 **MR. JACKLEY:** Serle Chapman.

24 **MR. MURPHY:** Those notes were not
25 contemporaneous. They were made after the interview

1 allegedly.

2 **THE COURT:** It simply is not responsive to
3 the question asked by Mr. Jackley. I mean, it's a
4 completely nonresponsive answer. Doesn't add anything
5 so it's out.

6 (Whereupon, the discussion at the bench was
7 then concluded.)

8 **Q. (BY MR. JACKLEY)** Mr. Marshall, is it a fair
9 observation that you are having trouble remembering at
10 times certain things that happened at your house in
11 December of 1975?

12 **A.** Yeah. That's because -- it's been so long
13 ago and I have had a couple head injuries since then
14 so my memory isn't that clear -- that good.

15 **Q.** Is part of it, too, that you just simply put
16 some of these things behind you that happened back in
17 1975?

18 Is that fair?

19 **A.** Well, there is a lot of things that I put
20 behind me and moved on with my life.

21 **Q.** In fact, do you recall telling Marshal
22 Ecoffey when he gave you a subpoena, that quote, it
23 happened a long while ago. Those things I put behind
24 me and moved on, end quote.

25 Do you recall that?

1 **A.** I can't recall saying that.

2 **Q.** Mr. Marshall, do you recall testifying before
3 a Federal Grand Jury on February 15, 2003?

4 **A.** That I remember, yeah.

5 **Q.** Do you recall advising the Federal Grand
6 Jury, quote, so I tell Mr. Ecoffey it happened a long
7 while ago. It's hard for me to recollect. I can't
8 recall a lot of events, dates, or times. I said those
9 things I put behind me and moved on.

10 Do you recall that now?

11 **A.** Not right away. I can't remember saying that
12 right away.

13 **Q.** But you don't dispute that you told the
14 Federal Grand Jury that, do you?

15 **A.** If that's what it says I probably said that.

16 **Q.** And you went on to -- do you recall going on
17 to state, but whatever Cleo would remember, I said,
18 that I can't remember.

19 Do you recall that?

20 **A.** No, I can't recall saying that.

21 **Q.** But you believe that's true that Cleo -- that
22 Cleo would have some more information about what
23 happened at your house that night?

24 **A.** Yeah, she may have. Yeah.

25 **Q.** Mr. Marshall, is there any reason that you

1 would have a conversation with your visitors outside
2 of the presence of Cleo that evening?

3 **A.** No, there would be no reason to do that.

4 **Q.** Would there be any reason that you would need
5 to go into your bedroom with some of your visitors
6 that evening?

7 **A.** No.

8 **Q.** Mr. Marshall, we talked about you going to
9 the wake of Annie Mae Aquash; do you recall that?

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

11 **Q.** Did you have great respect for Annie Mae
12 Aquash?

13 **A.** Well, after the news of her death and then
14 her being involved in the American Indian Movement,
15 and we had heard that she was down in Wounded Knee,
16 and we had heard where she had come from. And to my
17 wife and I, we were, you know, respectful of that.
18 The distance she had come to participate in the
19 occupation.

20 **Q.** Would it bother you if some harm would have
21 come to her?

22 Does that bother you?

23 **A.** Oh, yeah.

24 **Q.** Do you recall having a taped conversation
25 with Serle Chapman on July 27, 2001, and talking about

1 John Boy, John Graham?

2 Do you recall that?

3 A. Not right off hand.

4 MR. MURPHY: Page number, counsel?

5 MR. JACKLEY: Page 12.

6 Q. (BY MR. JACKLEY) With respect to the taped
7 interview, do you recall being asked the question, now
8 this --

9 MR. MURPHY: Objection. There hasn't been a
10 question posed to the witness where he's claimed a
11 lack of recollection.

12 Your Honor, I'd ask to approach so you can
13 see the nature of the question.

14 THE COURT: I believe there has.

15 You may continue the question.

16 Q. (BY MR. JACKLEY) Do you recall the question
17 being asked, now this guy --

18 MR. MURPHY: Your Honor, I am going to object
19 on the nature of the character evidence that is about
20 to come in before the Court. I'd ask that you look at
21 the question before it is read.

22 MR. JACKLEY: May I approach?

23 THE COURT: Uh-huh.

24 (Whereupon, a discussion was then had at the
25 bench.)

1 **MR. JACKLEY:** Your Honor, this witness has
2 testified that he doesn't even know John Graham. I
3 have a taped interview statement where, after the
4 question is posed -- and I don't object to redacting
5 part of the character part -- but the gist of the
6 question is, now this guy, John Boy -- and I don't
7 mind taking the rest out -- is just a supporter. He
8 did it. And he tells me at one point -- he says, I am
9 not going to say I am not -- and he's cut off,
10 apparently by Dick Marshall, who states, John Boy's
11 like that. I think that's important because it shows,
12 number one, that he knew John Boy. And in the context
13 of the question I should be entitled to know what he
14 is referring to.

15 **THE COURT:** The problem is, I think he's
16 entitled to show that he knows John Boy. I don't like
17 the preceding question.

18 **MR. JACKLEY:** I don't mind redacting, those
19 aren't the words I chose and the question. I don't
20 mind taking out, quote, he's just a total F'ing prick,
21 end quote. I think that should be removed. If he
22 doesn't object, I won't read that.

23 **MR. MURPHY:** Well, the issue is --

24 **THE COURT:** Leave it in -- I would leave
25 that.

1 **MR. MURPHY:** The other issue is, that the
2 remainder that he wants to get in -- at one point he
3 says I'm not going to say I'm not. That is part of a
4 disputed statement because that is the statement that
5 Chapman says my client made when Chapman turned the
6 recorder off. So he could ask him, didn't you mention
7 that you knew that Graham was from up in Canada. I
8 mean that's the next part.

9 **THE COURT:** The first part he's just a total
10 fucking prick. And then, answer, John Boy is like
11 that.

12 **MR. MURPHY:** That's the problem. That's the
13 character. And so that's what he's --

14 **MR. JACKLEY:** That's what he's objecting to
15 and I don't mind taking that out. When he says John
16 Boy is like that, that is a --

17 **MR. MURPHY:** That is a character statement.
18 Just two lines down from that he says -- you know, he
19 claims that he doesn't know John Boy. But -- I just
20 think it's character evidence that should not come in.

21 **THE COURT:** You can stop at that period. You
22 may address that answer if he recalls -- acknowledges
23 he knows him. Mr. Chapman from here. And you can
24 beat him up all you want.

25 **MR. MURPHY:** You are going to allow him to

1 ask this guy whether Chapman says he was a fucking
2 prick. That's character assassination in front of the
3 jury.

4 **THE COURT:** He's just -- I don't know what
5 that has to --

6 **MR. MURPHY:** Right. Let's get that out of
7 there.

8 **MR. JACKLEY:** Yeah --

9 Judge, one of the reasons I want to ask him
10 is because --

11 **THE COURT:** What do you want to ask?

12 **MR. JACKLEY:** I want to -- I don't care about
13 the, now this guy. Mr. Murphy wants it in there. I
14 am fine with it.

15 But I want to ask, you know, because he did
16 it and he tells me at one point he says -- he says I'm
17 not going to say I'm not and then Marshall says John
18 Boy is like that.

19 **MR. MURPHY:** That is completely improper that
20 they've tried to admit an unrecorded alleged
21 confession.

22 **MR. JACKLEY:** This is recorded.

23 **MR. MURPHY:** Well, but the statement he's
24 relaying that my client said is not recorded. That's
25 when Chapman said the recorder was turned off. So

1 they want to elicit an unrecorded --

2 **THE COURT:** Well, you may ask him to read
3 that to himself. And you may ask him -- you may not
4 read that out loud at all. You may ask him, did he
5 say there that he acknowledged knowing John Boy.

6 **MR. MURPHY:** Fair enough.

7 **THE COURT:** That's it.

8 (Whereupon, the bench conference was then
9 concluded.)

10 **MR. JACKLEY:** May I approach, Your Honor?

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

12 **Q. (BY MR. JACKLEY)** Mr. Marshall, I am going to
13 ask you to read something to yourself, not to the
14 jury, this highlighted part on page 12 of the
15 transcript that I am placing in front of you.

16 Please read what Serle Chapman indicated to
17 you to yourself.

18 Have you read it to yourself, Mr. Marshall?

19 **A.** I have read it.

20 **Q.** The transcript further indicates your
21 response was, John Boy's like that.

22 Do you see that?

23 **A.** I see that.

24 **Q.** I thought you earlier testified that you
25 didn't know John Graham?

1 **A.** Yeah, I don't know him.

2 **Q.** How would you know that he's like that?

3 **A.** That's a question. John Boy's like that? A
4 question back to that man there.

5 **Q.** Mr. Marshall, Mr. Murphy and you had a
6 discussion about bond requirements and possession of
7 guns.

8 Do you recall that?

9 **A.** Yes, I do, sir.

10 **Q.** Have you ever owned or possessed a 32-caliber
11 revolver?

12 **A.** No, I never have, sir.

13 **Q.** Have you ever been in contact with law
14 enforcement specifically on or about March 2, 1975,
15 when you were in possession of a 32-caliber revolver?

16 **A.** I can't recall that.

17 **Q.** Can you recall being in possession of one in
18 the trunk of a vehicle you were driving?

19 **A.** No, I can't recall ever driving a vehicle on
20 that day.

21 **Q.** Do you recall it being in the trunk of a
22 vehicle you were in on or about March 2, 1975?

23 **A.** No, I can't recall that either, sir.

24 **MR. MURPHY:** Your Honor, I am going to object
25 to this line of questioning. We were -- he was

1 questioned about in November or December of 1975
2 whether he had any guns in his house at that time.
3 This is now months preceding.

4 **THE COURT:** We're beyond the cross quite a
5 ways.

6 **MR. JACKLEY:** No further questions, Your
7 Honor.

8 **THE COURT:** Thank you.

9 Ladies and gentlemen, it is noon time. We're
10 going to break from now until about 1:30 because I
11 have to have a hearing before we go in. So we'll see
12 you then.

13 You are reminded not to talk to anybody.
14 Don't form any opinions on this until it is submitted
15 to you for your decision.

16 Thank you.

17 **MR. JACKLEY:** Your Honor, I am not releasing
18 him from his subpoena.

19 **THE COURT:** You are not free to go.

20 We are in recess.

21 (Off the record.)

22 (Whereupon, the following proceedings were
23 had in open court and out of the presence of the
24 jury.)

25 **THE COURT:** Ready to go, folks?

1 Please close the door -- Jeff, would you
2 close the door, please.

3 Thank you.

4 Do you have anything or wish to proceed with
5 anything before we go a little further, Mr. Urlandson?

6 **MR. ERLANDSON:** I assume that we're
7 proceeding with our motion to quash the subpoena, Your
8 Honor.

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

10 **MR. ERLANDSON:** I do have, if the Court
11 pleases at some point here, some additional medical
12 information updated medical information. To the
13 extent it might be relevant to any of the Court's
14 consideration.

15 **THE COURT:** Is it such that you would
16 consider it private?

17 I was going to -- we're going to go into some
18 discussions, but I'd like to see the medical
19 information and I don't think that that's open for
20 anybody else to hear.

21 **MR. ERLANDSON:** I would appreciate that, Your
22 Honor.

23 **THE COURT:** Do we have medical records here?

24 **MR. ERLANDSON:** No. Just in the form of
25 witness testimony, Your Honor.

1 **THE COURT:** Okay.

2 So let us begin the testimony if we can.

3 Ma'am?

4 Ms. Clarke, how are you?

5 Can you speak? Apparently not.

6 Are you going to speak with us?

7 Is your client able to communicate,

8 Mr. Erlandson?

9 **MR. ERLANDSON:** She is, Your Honor, on a
10 limited basis.

11 **THE COURT:** Okay.

12 I need to put you under oath. If you would
13 please raise your right hand as best you can.

14 THEDA CLARKE,
15 called as a witness herein, having been duly sworn,
16 under oath testified as follows.

17 **THE COURT:** You have to answer.

18 **THE WITNESS:** I do.

19 **THE COURT:** Okay. Thank you.

20 You have been called as a witness.

21 Do you understand that?

22 You have to answer me, ma'am.

23 Do you understand what a witness is?

24 **THE WITNESS:** Yes.

25 **THE COURT:** Okay. You are obviously ill; is

1 that correct?

2 Are you sick? Are you sick?

3 **THE WITNESS:** Yes.

4 **THE COURT:** All right.

5 **MR. ERLANDSON:** She has a hard time hearing,
6 Your Honor.

7 **THE COURT:** Me too.

8 Would it help if I am louder?

9 Where are you living now?

10 **THE WITNESS:** Ponderosa Villa.

11 **THE COURT:** Okay.

12 How far is that from here? How long a drive?

13 How long did it take you to get here?

14 **THE WITNESS:** Three hours.

15 **THE COURT:** Three hours.

16 Take you that long to get home?

17 **THE WITNESS:** Yes.

18 **THE COURT:** What was the weather like?

19 **THE WITNESS:** Clear.

20 **THE COURT:** Clear.

21 Temperature?

22 **THE WITNESS:** Warm.

23 **THE COURT:** Warm.

24 How warm? Warm for winter?

25 You got a sweat -- sweatshirt on. Would you

1 go outside without a sweatshirt?

2 **THE WITNESS:** Yes.

3 **THE COURT:** You would.

4 Where did you go to school? High school.

5 **THE WITNESS:** Saint Francis Mission, Saint
6 Francis, South Dakota.

7 **THE COURT:** What years?

8 When did you graduate?

9 **THE WITNESS:** 1942.

10 **THE COURT:** You went there in 1942.

11 Is that when you were born?

12 **THE WITNESS:** That's when I graduated.

13 **THE COURT:** You graduated in -- how old are
14 you now?

15 **THE WITNESS:** Twenty-four.

16 **THE COURT:** Right. Let's try a little better
17 than that.

18 How old are you now?

19 **THE WITNESS:** I don't really know. I can't
20 figure it out according to that new system.

21 **THE COURT:** Okay.

22 How would you try and figure it out?

23 Forty-two -- you were 18 when you graduated?

24 You were born in 1924?

25 **THE WITNESS:** Twenty-two.

1 **THE COURT:** Twenty-two. Okay.

2 So that would make you about 78 plus ten
3 about 88 -- no --

4 **THE WITNESS:** Eighty-six.

5 **THE COURT:** Eighty-six. Close enough.

6 How many people in your high school class?

7 **THE WITNESS:** I don't recall.

8 **THE COURT:** Your basketball team beat ours up
9 real bad. I remember that. Saint Francis used to
10 have a pretty good basketball team.

11 Do you remember that?

12 **THE WITNESS:** Yes.

13 **THE COURT:** Yeah, I thought so. I'd like to
14 remember the name of the kid. He beat us all by
15 himself.

16 Did you go to college at all?

17 **THE WITNESS:** No.

18 **THE COURT:** No?

19 You did not go to college?

20 **THE WITNESS:** No, I didn't.

21 **THE COURT:** Okay.

22 What was your first job?

23 **THE WITNESS:** Saint Mary's Hospital in Saint
24 Mary -- Kansas City, Missouri.

25 **THE COURT:** How did you get to Kansas City

1 from Saint Francis?

2 **THE WITNESS:** I went to nurse's training in
3 Kansas City.

4 **THE COURT:** Okay.

5 Are you a practicing nurse?

6 **THE WITNESS:** Yeah, registered.

7 **THE COURT:** You were a registered nurse.

8 Where did you get your training there?

9 **THE WITNESS:** Saint Mary's Hospital.

10 **THE COURT:** Okay.

11 Did you work in any other hospitals after
12 that?

13 **THE WITNESS:** Oh, yes?

14 **THE COURT:** Whereabouts?

15 **THE WITNESS:** All over the country.

16 **THE COURT:** You traveled around, then, quite
17 a bit?

18 **THE WITNESS:** Yes.

19 **THE COURT:** Did you work in South Dakota in
20 any of them?

21 **THE WITNESS:** Yes, in Pine Ridge.

22 **THE COURT:** Okay.

23 The Indian Health Service?

24 **THE WITNESS:** Yes.

25 **THE COURT:** Okay.

1 Did you work on other reservations?

2 **THE WITNESS:** No.

3 **THE COURT:** Okay.

4 You were -- did you work in private
5 hospitals?

6 **THE WITNESS:** Yes.

7 **THE COURT:** All right.

8 How many different ones, any idea?

9 **THE WITNESS:** No, I don't have any idea. It
10 was several.

11 **THE COURT:** Okay.

12 Do you have children?

13 **THE WITNESS:** Three.

14 **THE COURT:** How old are they?

15 **THE WITNESS:** Nineteen --

16 **THE COURT:** I don't believe that. Nineteen.

17 No.

18 **MR. OSWALD:** My daughter is 19.

19 **THE COURT:** I don't think so. Unless --

20 Did you have a child when you were 70? I
21 don't think so.

22 **THE WITNESS:** No.

23 **THE COURT:** All right.

24 When was your oldest child born?

25 **THE WITNESS:** I don't recall.

1 **THE COURT:** Okay.

2 And you had three children?

3 **THE WITNESS:** Yes.

4 **THE COURT:** Girls? Boys?

5 **THE WITNESS:** Two boys and a girl.

6 **THE COURT:** Who of the oldest?

7 **THE WITNESS:** The boy.

8 **THE COURT:** Both boys or boy, girl, boy?

9 **THE WITNESS:** Two boys and a girl.

10 **THE COURT:** Okay.

11 The girl was the youngest?

12 **THE WITNESS:** Yes.

13 **THE COURT:** Okay.

14 Who was their father?

15 **THE WITNESS:** Edward Clarke.

16 **THE COURT:** How long were you married?

17 **THE WITNESS:** Seventeen years.

18 **THE COURT:** Okay.

19 Now, what kind of a facility or place are you

20 living now?

21 **THE WITNESS:** It's a nursing home.

22 **THE COURT:** A nursing home.

23 And where is it? Where? Chadron?

24 **THE WITNESS:** No. Crawford.

25 **THE COURT:** Crawford. I always get speeding

1 tickets there.

2 How long have you been there?

3 **THE WITNESS:** Four years.

4 **THE COURT:** Four years.

5 Where were you before that? Where before
6 Crawford?

7 **THE WITNESS:** I don't remember.

8 **THE COURT:** Okay.

9 How long have you been ill or sick?

10 **THE WITNESS:** About six years.

11 **THE COURT:** Okay.

12 Is that when you started being in a nursing
13 home?

14 **THE WITNESS:** Yes.

15 **THE COURT:** About six years ago?

16 **THE WITNESS:** Four years ago..

17 **THE COURT:** Four years ago.

18 You know, where were you living 25, 35 years
19 ago?

20 **THE WITNESS:** I don't remember.

21 **THE COURT:** You don't remember.

22 Were you living at Pine Ridge?

23 **THE WITNESS:** Yes.

24 **THE COURT:** Okay.

25 Were you at Wounded Knee?

1 **THE WITNESS:** Yes.

2 **THE COURT:** Okay.

3 Were you around when some Native American
4 groups all over the country began to form a movement
5 to assert their rights?

6 **THE WITNESS:** Yes.

7 **THE COURT:** Okay.

8 Were you part of that movement?

9 **MR. ERLANDSON:** Objection, Your Honor.

10 **THE COURT:** I guess I shouldn't go there.

11 **MR. ERLANDSON:** On behalf of Mr. Clarke, I
12 assert her Fifth Amendment rights against
13 self-incrimination.

14 **THE COURT:** I am sorry.

15 **MR. ERLANDSON:** I renew our position --

16 **THE COURT:** I am sorry. I had no need to go
17 there.

18 However, I am satisfied she's competent to
19 testify. Having said that, then we need to get to the
20 next point.

21 Do you have medical records to give me? I
22 can look at them, but unless they change my mind, it's
23 not going to do anything.

24 **MR. ERLANDSON:** I don't have any additional
25 medical records, Your Honor.

1 I do have testimony from one, if not two,
2 additional witnesses that might shed some additional
3 light on the answers that you heard --

4 **THE COURT:** Okay.

5 **MR. ERLANDSON:** -- and the accuracy of those
6 answers, Your Honor.

7 **THE COURT:** I'm not buying the 19 year old.
8 Okay. We can start with that.

9 Okay. If you do, bring them in.

10 **MR. ERLANDSON:** Some of it is private medical
11 information, Your Honor.

12 **THE COURT:** Okay.

13 Can we save that for last?

14 **MR. ERLANDSON:** Sure.

15 **THE COURT:** Then I don't have to play
16 revolving doors.

17 **MR. ERLANDSON:** Sure.

18 Can I have just one minute?

19 **THE COURT:** Sure.

20 **MR. ERLANDSON:** Your Honor, we'll just have
21 one witness, and that will be Jennifer Gering. She
22 would like to -- I'd like to present some information
23 about the medications, medical conditions, and
24 Ms. Clarke's current condition.

25 **THE COURT:** Okay.

1 Folks, I am going to ask folks to leave
2 because we're going to get into the private and
3 personal medical records of this witness. You have
4 heard the statements and examinations so far. We will
5 let you know as soon as this is over. I expect it
6 will not take more than five minutes to ten minutes at
7 the most.

8 Thank you.

9 (Whereupon, the courtroom was then cleared of
10 any spectators.)

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

12 JENNIFER GERING,

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

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

16 Mr. Erlandson?

17 **MR. ERLANDSON:** Thank you, Your Honor.

18 **DIRECT EXAMINATION**

19 **BY MR. ERLANDSON:**

20 **Q.** Would you state your name for the record,
21 please.

22 **A.** Jennifer Gering.

23 **Q.** And what do you do for a living?

24 **A.** I am a medication aide going to nursing
25 school.

1 Q. Okay.

2 And where do you work?

3 A. I work as Ponderosa Villa in Crawford.

4 Q. And do you know Theda Clarke?

5 A. Uh-huh.

6 Q. How do you know her?

7 A. She's a resident there.

8 Q. And are you familiar with her medical
9 condition?

10 A. I am. Her -- the medications she's currently
11 taking, yes.

12 Q. If you wouldn't mind, would you please
13 summarize the medications that Theda is on presently
14 and the associated medical conditions?

15 A. She is on --

16 Do you want me to say the name of the
17 medication?

18 Q. Please.

19 A. Glyburide and Adamet for her diabetes. She
20 is on Prilosec and Tums for gird. She is on an iron
21 supplement for anemia. Klonopin for anxiety. She's
22 on Celexa for aggravated depression. Risperidone it's
23 for -- it's an anti-psychotic medication. She's on
24 Diabion for hypertension. Remeron for depression.
25 Plavix for an injection fraction. Dilantin for CVA.

1 **Q.** Okay.

2 Do any of these medications affect her
3 ability to recall past events?

4 **A.** They are supposed to kind of help. You know,
5 at her age, whether they do or not --

6 **Q.** Are you familiar with -- strike that.

7 **MR. ERLANDSON:** I have nothing further, Your
8 Honor.

9 **THE COURT:** Do you deal with her commonly?

10 **THE WITNESS:** Yeah.

11 **THE COURT:** Is she coherent?

12 **THE WITNESS:** Yes.

13 **THE COURT:** Got a pretty good idea of who,
14 what, where, and why?

15 **THE WITNESS:** Yes.

16 **THE COURT:** She knows who you are?

17 **THE WITNESS:** Uh-huh.

18 **THE COURT:** Okay.

19 **THE WITNESS:** She has troubles with numbers.

20 **THE COURT:** Me, too.

21 Given the statement of the meds, though, and
22 time to think and consider the questions, she should
23 be able to answer them?

24 **THE WITNESS:** I would think so. Uh-huh.

25 **THE COURT:** Okay.

1 I don't have any anything further.

2 Anybody else?

3 **MR. JACKLEY:** Not from the state, Your Honor.

4 **THE COURT:** Okay.

5 How do you spell Gering?

6 **THE WITNESS:** G-E-R-I-N-G.

7 **THE COURT:** Okay.

8 You are from Gering, Nebraska then?

9 **THE WITNESS:** My husband's great grandfather
10 founded Gering.

11 **THE COURT:** Oh, okay.

12 Thank you.

13 (Witness excused.)

14 **THE COURT:** Okay. I think I have to let the
15 folks in for the motion hearing or I will get scabbed
16 out of town. Allow them back in --

17 Do we need to -- I need to get to the magic
18 question before we have a crowd in, right -- folks, I
19 am sorry. I am dancing the wrong direction. It will
20 be another three or four minutes before you can come
21 in.

22 **MR. JACKLEY:** I think they can hear that.

23 **THE COURT:** I am sorry again. Come on back
24 in.

25 (Whereupon, the courtroom was then reopened

1 to the public.)

2 **THE COURT:** Okay.

3 How do we wish to proceed at this point?

4 We are at the point where Ms. Clarke has been
5 sworn. Is under oath. I have made a ruling that
6 she's competent to testify.

7 And, at which point, does anybody prefer who
8 makes the inquiry?

9 I think she's your witness, Mr. Jackley.

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

11 Ms. Clarke, can you hear me?

12 **THE WITNESS:** Yes.

13 **MR. JACKLEY:** Ms. Clarke, if you are called
14 to testify today, and you are given an oath to testify
15 about the truth, what do you intend to do?

16 Are you going to testify or are you going
17 to -- Ms. Clarke?

18 Are you going to testify or are you going to
19 exercise --

20 **THE WITNESS:** What do I say to that?

21 **MR. ERLANDSON:** Let him finish his question.

22 **MR. JACKLEY:** Are you going to testify or are
23 you going to exercise your Fifth Amendment right to
24 not incriminate against yourself?

25 **MR. ERLANDSON:** She'll exercise her Fifth

1 Amendment right.

2 **MR. MURPHY:** Your Honor, I believe the
3 response needs to come from the witness, not the
4 attorney.

5 **THE COURT:** Will you testify today, ma'am?
6 Break it down. Will you take the stand and
7 answer questions.

8 **MR. JACKLEY:** Ma'am, if I call you as a
9 witness today, will you agree to raise your right
10 hand? Will you do that for me?

11 **THE WITNESS:** (Indicating.)

12 **MR. JACKLEY:** If you testify, will you agree
13 to raise your right hand and tell the truth?
14 Will you agree to do that for me?

15 I am sorry, ma'am, what did you say?

16 **THE WITNESS:** Yes.

17 **MR. JACKLEY:** Okay.

18 Do you wish to testify or do you wish to
19 exercise your right to not testify?

20 **THE WITNESS:** Not testify.

21 **MR. JACKLEY:** Okay.

22 So you will exercise your Fifth Amendment
23 right per your advise of counsel?

24 **THE WITNESS:** Yes.

25 **MR. JACKLEY:** Can I keep going?

1 **THE COURT:** I accept that. That's been the
2 representation as to what would occur and it's been
3 affirmed by the witness.

4 Next step.

5 Do you have anything further to ask?

6 **MR. MURPHY:** No, I don't.

7 **MR. JACKLEY:** Ma'am, if you exercise your
8 Fifth Amendment right, I, as a prosecutor, have the
9 ability to do what we call compel testimony. I have
10 the ability to have you testify and I have to agree to
11 not use your testimony against you.

12 Do you understand me?

13 Maybe let me go at it this way. If I go to
14 the judge and I ask the judge to have you testify
15 here, and I agree to not use that against you -- we
16 call that use or derivative use immunity -- will
17 you -- will you do that?

18 **THE WITNESS:** What do I say?

19 **MR. ERLANDSON:** It would be my recommendation
20 and advice to my client not to cooperate with regard
21 to that testimony.

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

23 **MR. JACKLEY:** I am satisfied, Your Honor.

24 **THE COURT:** At this point we will excuse the
25 witness and go from there.

1 Mr. Murphy, do you have any questions?

2 I mean, I don't see much point in going to
3 jail.

4 **MR. MURPHY:** I -- we would not be seeking
5 that as any form of relief.

6 **THE COURT:** It seems a little unduly harsh.

7 **MR. JACKLEY:** Your Honor, the only thing I
8 ask is that you not release her from her subpoena
9 unless -- until you declare her unavailable. I should
10 say, unless you declare her unavailable.

11 **THE COURT:** I don't perceive she's
12 unavailable.

13 Mr. Murphy?

14 I mean, she's available but we're going to go
15 nowhere.

16 **MR. MURPHY:** Right. That's a finding the
17 Court will make. I don't have anything on that.

18 **THE COURT:** It would appear to me she's
19 unavailable for all particular purposes in this
20 hearing.

21 You -- let me describe just -- because we
22 don't have a video. Ms. Clarke is elderly. And I am
23 not sure of the dates and the accuracy of it, but she
24 indicates that she graduated from high school
25 somewhere around 1942. And that she's 80 some years

1 of age. She appears very limited in mobility. I
2 believe she's capable of understanding, but she is
3 clearly not in good health.

4 I think she is competent to testify. She has
5 legal counsel. She has exercised her right to
6 silence. And despite an offer of immunity by
7 Mr. Jackley, she has stated that she will not testify
8 and that is concurrent with the advice of counsel.

9 At that point and under those facts and
10 observations, I would declare her to be unavailable.
11 And at that point she is released from her subpoena.
12 And you may -- you may exit if you wish,
13 Mr. Erlandson, together with your client.

14 Thank you, ma'am.

15 **MR. MURPHY:** Your Honor, then we would
16 request to proceed with our discussion on my motion in
17 limine.

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

19 You may begin.

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

21 On April 23 of this year, I filed a motion in
22 limine. It is my understanding the state intends to
23 call Ms. Clarke or now to have her declared
24 unavailable so they can put one statement by her
25 before the jury, presumably through Kamook Ecoffey.

1 That statement is an isolated statement. It
2 was an unrecorded statement. And it happened,
3 supposedly, in the year 2000, some 25 years after the
4 incident.

5 I want to go through the issues that I see as
6 making that statement inadmissible either through
7 Ms. Ecoffey or any other third-party source. First is
8 the issue of confrontation. Theda Clarke is not on
9 trial, but the state is seeking to inculcate my client
10 through her statement. That statement essentially
11 boils down to her saying that's why we did it. We
12 didn't want to -- we didn't want to have this happen
13 to us again. That's essentially the statement that
14 they want to put through -- put in before the jury
15 through Ms. Ecoffey.

16 The statement uses the term we twice, which
17 is broadly inculpatory, but in the context of this
18 case clearly is inculpatory towards my client.

19 An out-of-court statement by a third-party
20 declarant that implicates the accused violates my
21 client's right to confrontation.

22 I would read one short quote from *United*
23 *States vs. One Star*, a 1992, Eighth Circuit Court out
24 of the District of South Dakota. That case says,
25 quote, the admission of out-of-court statements by an

1 unavailable declarant to inculcate a third party
2 requires careful thought. Because the defendant has
3 no opportunity to cross-examine the witness, the Court
4 must be thoroughly satisfied the statements are
5 accompanied by significant indicia of reliability.
6 Absent factors that clearly indicate the
7 trustworthiness of the statements, a confrontation
8 clause problem arises, unquote. It cites to *Brutten* a
9 U.S. Supreme Court case, and *Riley*, an Eighth Circuit
10 case.

11 In this case, let's be very clear, the
12 statement the state intends to offer is being offered
13 for the truth of the matter asserted. They want to
14 establish that Anna Mae Aquash was killed because she
15 was perceived to be an informant. It is hearsay and
16 John can't confront the declarant because Ms. Clarke
17 has just been ruled unavailable.

18 It does not fall outside of hearsay because
19 it is not a co-conspirator statement. It is a
20 statement made 25 years after the alleged events. And
21 it was not made in furtherance of the conspiracy.

22 The state has argued or asserted that this is
23 a statement against interest. And it appears it is a
24 statement against Ms. Clarke's interest.

25 However, a statement against interest is not

1 a firmly rooted exception to the rule against hearsay.
2 That's the *Lilly* decision, United States Supreme
3 Court. Restated recently in *Linder, L-I-N-D-E-R*, 2007
4 South Dakota 68.

5 Because it is a -- because it is not a firmly
6 rooted hearsay exception, to be admissible it must be
7 corroborated by facts clearly indicating the
8 trustworthiness of the statement in addition to the
9 matters I mentioned previously in regard to the
10 confrontation issue.

11 We have a line of cases that talk about what
12 the Court can and should look at when deciding whether
13 or not the statement was corroborated by circumstances
14 or facts clearly indicating trustworthiness.

15 First, the Court may consider whether the
16 statement was made under oath. That's the *Engesser*
17 2003 decision and the *Cottier* 2008 decision. In this
18 case we know Ms. Clarke's out-of-court statement was
19 not made under oath.

20 The *Davi* decision, *D-A-V-I*, 1993 South
21 Dakota, said the Court can consider whether the
22 statement was oral or recorded. The statement the
23 state intends to offer was oral. It was not recorded.

24 We have previously heard the testimony of
25 Kamook Ecoffey where she talked about how she had a

1 recording device. She had a secretly concealable
2 recording device. You saw how we presented that she
3 had recorded in one -- for one witness alone, Troy
4 Lynn Yellow Wood, 19 cassettes full of information.
5 She recorded interviews with at least ten people. Yet
6 this statement is not recorded.

7 Of import is that Ms. Ecoffey did record
8 secretly other statements made by Theda Clarke. The
9 one in question was not recorded, but others were. In
10 the recorded statements, she makes no incriminating
11 statements and she does not say anything close to what
12 the statement wants to admit.

13 *Engesser* also says the Court may consider
14 whether the out-of-court statement was subject to
15 cross-examination. That was not the case here.

16 Last, *Engesser* says the Court can consider
17 the declarant's character. Here, we got a statement
18 allegedly made by Clarke to Ecoffey that was not under
19 oath, not recorded, not subject to cross. An oral
20 statement.

21 And I am going to present the Court what we
22 previously submitted, which is Exhibit N. That is a
23 selection of prior statements that were recorded --
24 other than the very first page -- that were recorded
25 secretly or openly with Ms. Clarke. In each of those

1 statements, when Ms. Clarke was questioned by
2 Ms. Ecoffey about the incidents at issue here, she
3 denied being involved. When she was told that she had
4 supposedly done one thing or another, she would laugh
5 or say, boy, people on the internet seem to know more
6 about this than I do.

7 She -- at every juncture where the statements
8 were recorded, she denied being involved. Yet, the
9 state wants to introduce that one statement when the
10 recorder wasn't on. And it wasn't because Ms. Clarke
11 asked the recorder to be off. It was just that
12 Ms. Ecoffey decided not to record it. That's the
13 statement they want in.

14 I submit to the Court that there is nothing
15 indicating the kind of corroboration, reliability,
16 circumstantial guarantees of trustworthiness that are
17 required. And I submit to the Court that this is
18 probably one of the most damning pieces of information
19 that the state is trying to admit.

20 And that should heighten the Court's scrutiny
21 because this out-of-court, unrecorded statement that
22 is inconsistent to all of her recorded statements has
23 the potential to damage my client's case irreparably.

24 The other thing I want to reference is the
25 very first document on the top of Exhibit N is

1 document 607 which was taken in 2001 shortly after the
2 statement that is at issue right now.

3 At that time, Ms. Clarke was not living in a
4 nursing home. She was not receiving medical
5 attention, but yet she openly discusses with
6 Ms. Ecoffey the fact that she has Alzheimers. Further
7 raising the specter that the statement she made, if
8 she made it, is certainly subject to dispute. But
9 where that statement is reliable or corroborated by
10 other circumstances showing particularized
11 trustworthiness.

12 I would ask the Court to rule that this
13 statement does not come in. It should not come in.
14 And that the -- any probative value is so outweighed
15 by the prejudice to my client, that it shouldn't come
16 in on those grounds as well.

17 But certainly the kind of trustworthiness
18 circumstances and guarantees that are required under
19 the confrontation clause as well as the state of mind
20 exception are not present.

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

22 **MR. JACKLEY:** Your Honor, the state has
23 provided the Court with a detailed brief on *Crawford*
24 and unavailability so I will get to the point.

25 It is the state's position that *Crawford*

1 would not preclude the use of this statement because
2 Kamook Ecoffey is not a law enforcement officer and we
3 have provided the Court with that case law.

4 I believe that today the Court has found
5 Theda Clarke unavailable. Rule 804(b)(3) specifically
6 allows for the use of a statement such as this. It
7 provides a statement which was, at the time of its
8 making, so far contrary to the declarant's pecuniary
9 or proprietary interest -- and I emphasize
10 declarant's. The declarant in this case being Theda
11 Clarke -- or so far tended to subject her to criminal
12 liability. It's permissible.

13 Your Honor, we have a transcript of the notes
14 directly taken after the interview. Mr. Murphy
15 indicated that the witness, Kamook Banks, that would
16 testify about this, chose not to record it. And I
17 believe that that is inaccurate. I believe that
18 Kamook Banks --

19 **THE COURT:** We can't argue with the fact that
20 it was not recorded?

21 **MR. JACKLEY:** Right. But it wasn't by her
22 choosing.

23 She will be subject to cross-examination on
24 the issues that would essentially go to weight, not
25 admissible. That is the existence or nonexistence of

1 a transcript.

2 But I think the important part for the
3 indicia of reliability is, directly after the
4 interview, Kamook Banks sat down with an FBI agent and
5 they did a transcript of the interview.

6 Moreover, Kamook Banks is here subject to
7 cross-examination regarding the statement. And when
8 we talk about the statement, in the context of Kamook
9 Banks and Theda Clarke talking about Annie Mae being
10 an informant, and the murder of Annie Mae Aquash,
11 Theda Clarke states, quote, yeah, that's why we did it
12 and it wasn't ever gonna happen again, end quote.
13 That's clearly against her interest to have said that.
14 And I believe that there is an indicia of reliability
15 based upon the existence of this transcript and I
16 believe that the state is entitled to introduce this
17 statement and the fact that the defendant is entitled
18 to cross-examine the witness regarding the
19 circumstances surrounding the statement.

20 **MR. MURPHY:** May I respond, Your Honor?

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

22 **MR. MURPHY:** First, *Crawford* has not been an
23 issue in this case. *Brutten* and the confrontation
24 clause, which are alive and well outside of *Crawford*,
25 are. There has not been any case law that says just

1 because *Crawford* only applied to testimonial
2 statements, that the confrontation clause does not
3 apply when a third party's out-of-court declarations
4 are going to be used against a defendant who did not
5 make the statement, did not adopt the statement, and
6 where they were not a co-conspirator statements.

7 What the state hasn't addressed is the *Lilly*
8 issues and the issues that we talked about regarding
9 the pre-admissibility issue. This is not a weight of
10 the evidence issue. The particularized guarantees of
11 trustworthiness, the requirements that the statement
12 be so corroborated by facts and circumstances showing
13 that it is trustworthy and has indicia of such are not
14 about weight, they are about admissibility.

15 The fact than Ms. Ecoffey is subject to
16 cross-examination is irrelevant. The issue is that
17 Ms. Clarke is not subject to cross-examination. The
18 state keeps referencing a transcript. That's an
19 inaccurate statement. What it is is this woman's --
20 after -- whether she decided not to use the recorder
21 or whether the recorder wasn't working or she didn't
22 have one is irrelevant.

23 The fact of the matter is this is a woman who
24 went to a witness's house, she has recorded multitudes
25 of statements. She did not use her recorder at this

1 time. So it was her choice. And she did not do so.
2 And so she took some notes afterwards and they are
3 saying that is indicia of reliability. It is not.

4 We don't know anything about the reliability
5 of Ms. Clarke's statement to her. As I indicated, she
6 said it was at a time near when Ms. Clarke was already
7 suffering from Alzheimers.

8 She also says in her statements that she --
9 that Ms. Clarke made the statement at the end of the
10 day after a long interview. That raises issues about
11 fatigue and competency at the time of the making of
12 the statement.

13 But we got an uncross-examined, unsworn,
14 unrecorded statement that is inconsistent with every
15 other recorded statement she made and it is damaging
16 to my client and he has no ability to cross-examine
17 the declarant.

18 **THE COURT:** You addressed issues also earlier
19 in terms of accomplice testimony and conspiracy
20 testimony, did we not?

21 **MR. MURPHY:** I don't believe directly. We
22 talked about it not being a co-conspirator statement
23 because it was made 25 years after the fact.

24 **THE COURT:** I don't believe it's a
25 co-conspirator statement, period.

1 **MR. MURPHY:** Right.

2 **MR. JACKLEY:** May I briefly respond to that,
3 Your Honor?

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

5 **MR. JACKLEY:** If you examine the actual
6 statement, there is no *Brutten* issue. In other words,
7 she doesn't say John Graham did this. What she --

8 **THE COURT:** Then why do you want it in?

9 **MR. JACKLEY:** Because it ties her into it and
10 it says we. In other words, she didn't do it alone.

11 **MR. MURPHY:** There are two Supreme Court
12 cases that address this. There is *Grey vs. Maryland*
13 and I believe the other one is called *Marsh*. There is
14 a great dialogue about how the statement in those
15 cases making the same kind of argument. And the
16 Supreme Court says, well, it wouldn't take very
17 intelligent jurors to look up and see the defendant at
18 the defense table and realize that the we implicated
19 him.

20 That's just -- they have established or tried
21 to establish that the we means John Graham, Arlo
22 Looking Cloud, and Theda Clarke. So to allow in a
23 statement that says twice, we did this because we
24 didn't want this to happen again, clearly is
25 inculpatory and clearly is a *Brutten* confrontation

1 issue.

2 **MR. JACKLEY:** Your Honor, I believe that most
3 of the *Brutten* problems are typically salvaged or
4 addressed by redactions in which you take out the name
5 of a co-conspirator for a defendant and you put in we
6 or you put in some other --

7 **THE COURT:** Come on. Get serious.

8 **MR. JACKLEY:** I am, Judge. I mean, she does
9 not say John Graham in this statement.

10 **MR. MURPHY:** I would cite the Court to *Iron*
11 *Shell vs. Leaply* that says that's a fiction.

12 **THE COURT:** I mean, the only possible reason
13 you want the statement in is because you want we to
14 include Mr. Graham. I understand that.

15 But to tell me that we can't draw a rational
16 conclusion or that 14 people aren't going to
17 immediately know that we includes John Graham is --
18 you know --

19 **MR. JACKLEY:** But, Judge, my reading of
20 *Brutten* is this, that the statement itself cannot do
21 that. But a jury is allowed to draw inferences from
22 other evidence in a trial; and then therefore, there
23 is not a *Brutten* problem. That's precisely what is
24 occurring here. It will take the jury to draw
25 inferences from other evidence in this courtroom which

1 is permissible and which does not create a *Brutten*
2 issue. That's the basis behind all the *Brutten* case
3 redactions. That is permissible.

4 **MR. MURPHY:** That, Your Honor, is in cases
5 where the statement is so attenuated that there are
6 multiple steps to link.

7 *Iron Shell* and numerous other cases in this
8 state as well as federally say that if the clear
9 implication -- the obvious inference is that the we
10 applies to the defendant, the redaction isn't
11 permissible, that the statement should not come in.

12 **THE COURT:** Well, I make the requisite
13 findings. First of all, the short note is, I don't
14 think it's admissible. Rule out conspiracy and
15 accomplices. But it's truly an out-of-court statement
16 that implicates Mr. Graham beyond cavel. There is --
17 might as well put John Boy or JG on it instead of we.
18 And I don't see that it's humanly possible to mistake
19 that connection.

20 There is no opportunity to confront or
21 cross-examine Ms. Clarke based upon that. That's a
22 fundamental right. A Fifth Amendment -- sixth?

23 **MR. MURPHY:** Sixth.

24 **THE COURT:** -- to confront our accusers. And
25 that guarantee from Colonial days. The right got so

1 far out of whack that *Crawford* came in, but it's a
2 still a straight-forward confrontation issue and it's
3 trying to cross-examine someone on what was said with
4 all of the other available information that is
5 presented to us in dozens of different statements and
6 that like. It would be -- it would be fair
7 confrontation, and to deprive the defendant of that
8 opportunity, I think is constitutionally invalid.

9 And then if you go down the list of, under
10 oath, it's not recorded, it's a concealed recorder
11 that -- is apparently it's non operable, but
12 regardless it didn't operate. The other statements
13 are contrary. There is no opportunity to
14 cross-examine.

15 For whatever it's worth, the person taking
16 the statement is very clearly, no matter how it's
17 characterized, working for the FBI or very closely
18 with. Her husband is a part of that accommodation.
19 So there is a connection to law enforcement one way or
20 the other.

21 The extent to which she's working for or
22 cooperating with I am not sure that there is a
23 distinction with a difference there.

24 Doesn't mean that the statement is
25 inaccurate. It doesn't mean that it was not precisely

1 remembered and put down. I am not saying that at all.
2 I am just saying it runs afoul of the South Dakota and
3 the United States Constitutions.

4 And at that point, lacking any other
5 significant indicia of reliability -- it doesn't even
6 come down to he said/she said. She's not here to say
7 and so that's out.

8 **MR. JACKLEY:** For purposes of the record,
9 Your Honor, I would request that if it is, in fact,
10 being excluded under *Brutten*, that proper limiting
11 instruction be given to correct any concerns that the
12 Court has alluded to.

13 **THE COURT:** I think a limiting instruction
14 would be an exercise in futility. I don't think the
15 we can be cured. I don't think there is any way I can
16 cure that defect. I can give an instruction on
17 reliability which I think would be prejudicial to the
18 state's case. I don't see that going there is helpful
19 at all.

20 **MR. JACKLEY:** Would the Court consider a
21 redaction of the statement to remove the we?

22 **THE COURT:** No.
23 What am I going to replace it with?

24 **MR. JACKLEY:** I.

25 **THE COURT:** Then how is it admissible?

1 Then it's irrelevant.

2 **MR. JACKLEY:** It's a statement against
3 interest. If she was involved in the criminal venture
4 it's further evidence that the jury can consider.

5 **THE COURT:** Well, it says I did it and I
6 didn't want it to happen again.

7 How does that relate to Mr. Graham?

8 If it doesn't make it more or less likely
9 that Mr. Graham did or did not do something, then it's
10 irrelevant by definition. So, no.

11 I'll take your offer of proof as to what's
12 there and we'll go from there.

13 Please call your next witness.

14 **MR. JACKLEY:** Your Honor, for purposes of the
15 record, can I mark for purposes of the appellate
16 record Exhibit 23 which is the statement that's been
17 excluded?

18 **THE COURT:** Yes. Absolutely.

19 (Whereupon, the following proceedings were
20 had in open court with the jury present.)

21 **THE COURT:** Satisfied this is the jury?

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

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

24 **THE COURT:** You may proceed, Mr. Oswald.

25 **MR. OSWALD:** The state calls Arlo Looking

1 Cloud.

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

3 ARLO LOOKING CLOUD,

4 called as a witness herein, having been duly sworn,
5 under oath testified as follows:

6 **THE COURT:** Please take a seat in the witness
7 chair, sir.

8 **DIRECT EXAMINATION**

9 **BY MR. OSWALD:**

10 Q. Would you introduce yourself, please.

11 A. My name is Arlo Looking Cloud.

12 Q. Arlo, were you convicted of a particular
13 crime regarding Anna Mae Aquash?

14 A. Yes, sir.

15 Q. Could you tell the jury what crime you were
16 convicted of?

17 A. Aiding and abetting.

18 Q. In what, murder?

19 A. Yes, sir.

20 Q. Was that in federal court?

21 A. Yes, sir.

22 Q. Did you at some point agree to testify in
23 this case?

24 A. Yes, sir.

25 Q. Did you want something from the government in

1 regard to that testimony?

2 **A.** No, sir.

3 **Q.** Did the government offer to give you or give
4 a recommendation to the -- or not a recommendation but
5 a letter to the judge that you cooperated for a
6 sentence reduction?

7 **MR. MURPHY:** Objection. Leading.

8 **THE COURT:** Overruled.

9 **A.** Sir, can you explain the question?

10 **Q.** (BY MR. OSWALD) Are you -- is there a -- you
11 would like a sentence reduction, wouldn't you?

12 **A.** Yes, sir.

13 **Q.** And your understanding is that if you
14 cooperated that the government will inform the judge
15 as to your level of cooperation?

16 **MR. MURPHY:** Again, leading, Your Honor.

17 **THE COURT:** Overruled.

18 **A.** Yes.

19 **Q.** (BY MR. OSWALD) How old are you, Arlo?

20 **A.** Fifty-seven.

21 **Q.** In -- what year were you born?

22 **A.** Fifty-three.

23 **Q.** 1953?

24 **A.** Yes.

25 **Q.** So in 1975, did you know John Boy Graham or

1 John Boy Patton?

2 A. I was -- it was the first time I met him.

3 Q. Okay. We'll talk about that.

4 Did you know Theda Clarke?

5 A. Yes, sir.

6 Q. How did you know Theda Clarke, sir?

7 A. I did some driving for her in the past.

8 Q. Now, Arlo, just after Thanksgiving in 1975 --

9 I want to take you there. Okay.

10 You got it in your mind?

11 A. Yes, sir.

12 Q. At some point were you north of Wambli and

13 south of Kodaka?

14 A. Yes, sir.

15 Q. That's where I want to take you.

16 Where were you in the motor vehicle, sir?

17 A. In the back seat.

18 Q. Describe the car.

19 A. It was a red Pinto station wagon.

20 Q. Who was in the car?

21 A. Theda Clarke, John Graham, Annie Mae Aquash,

22 and I.

23 Q. Where was Annie Mae in the car at that time?

24 A. In the back hatchback in the back.

25 Q. Where was John Graham?

1 **A.** In the front passenger's side.

2 **Q.** So how long had Theda been driving in that
3 area prior to this?

4 **A.** A few hours, I think.

5 **Q.** Which way were you headed?

6 If we're talking you had already passed
7 Wambli, let's start there.

8 Which way were you headed?

9 **A.** North.

10 **Q.** Is that on the way to Kodaka?

11 **A.** Yes, sir.

12 **Q.** Describe what happened as you were headed
13 north?

14 **A.** When I woke we stopped and we turned around
15 and we went left, south, on the same highway, on the
16 same road.

17 **Q.** Theda still driving?

18 **A.** Yes, sir.

19 **Q.** Then what happened after she went south?

20 **A.** She drove for a while and then she turned
21 south and then she went north and then she stopped and
22 she went south again and then she stopped.

23 **Q.** Everybody still in the same car?

24 **A.** Yes, sir.

25 **Q.** Nobody left off?

1 **A.** No, sir.

2 **Q.** When she stopped, what took place?

3 **A.** John Boy got out and he went in the back.

4 **Q.** And what did he do in the back?

5 **A.** He got Annie Mae Anna Mae and he walked
6 towards the side.

7 **Q.** To the side, you said?

8 **A.** Yes. Toward the area there.

9 **Q.** What did you do?

10 **A.** I sat in the car and Theda told me go with
11 him.

12 **Q.** Did you do that?

13 **A.** Yes, sir.

14 **Q.** Where did you guys go?

15 **A.** I proceeded to follow him.

16 **Q.** What did you see when you were right behind
17 them?

18 **A.** I see him standing with Anna Mae and then I
19 seen him shoot her.

20 **Q.** Did you see what kind of gun he shot her
21 with?

22 **A.** No.

23 **Q.** Not at that time?

24 **A.** Not at the time.

25 **Q.** Did you hear Anna Mae saying anything before

1 you heard the shot?

2 **A.** She was saying something but I couldn't -- I
3 couldn't identify -- I couldn't -- sounded like she
4 was praying, but in her language.

5 **Q.** Okay.

6 It was in her native language you think?

7 **A.** I think.

8 **Q.** You are fluent in Lakota, aren't you?

9 **A.** Yes, sir.

10 **Q.** And did it sound like Lakota language?

11 **A.** No, sir.

12 **Q.** Well, where was John Boy in relation to Anna
13 Mae when you here the shot?

14 **A.** He was beside her.

15 **Q.** Did you see the flash of the gun?

16 **A.** No.

17 **Q.** How close was Mr. Graham to Anna Mae when you
18 here the shot?

19 **A.** He was beside her.

20 **Q.** What did you see Anna Mae do when you heard
21 the shot?

22 **A.** She went over the bank there.

23 **Q.** Did you hear one shot?

24 **A.** Yes, sir.

25 **Q.** Did you go down the bottom of the cliff and

1 check her out at all?

2 A. No, sir.

3 Q. What did you guys do then when -- after you
4 saw her go over the cliff?

5 A. I asked for the gun and I emptied the rounds.

6 Q. Why did you ask for the gun?

7 A. I figured I'd be next. I thought I would be
8 next.

9 Q. Did you empty some rounds, then?

10 A. Yes, sir.

11 Q. Where at?

12 A. I don't recall, but I know I fired them
13 toward the west. Anywhere.

14 Q. Was Anna Mae crying before she was shot?

15 A. No, sir.

16 Q. Now the pan that you say shot her, do you see
17 him here in the courtroom today?

18 A. Yes, sir.

19 Q. Where is he seated?

20 A. Seated right there.

21 Q. Who color shirt is he wearing?

22 A. Dark blue.

23 MR. OSWALD: Your Honor, may the record
24 reflect this identification?

25 THE COURT: Yes.

1 **Q.** **(BY MR. OSWALD)** After you emptied the rounds,
2 what did you folks do?

3 **A.** We left.

4 **Q.** Was there anything said between the three of
5 you when you got back in the car?

6 **A.** No, sir.

7 **Q.** When you left, which direction did you go?

8 **A.** South.

9 **Q.** What happened then?

10 **A.** Then we stopped at a bridge and we buried the
11 gun.

12 **Q.** Did you have anything to bury it in?

13 **A.** A pillow case.

14 **Q.** Later on, much later, did you go back to that
15 bridge?

16 **A.** Yes.

17 **Q.** Why?

18 **A.** To see if it was still there.

19 **Q.** Was it?

20 **A.** No, sir.

21 **Q.** Was the pillow case still there?

22 **A.** No, sir.

23 **Q.** Who actually buried it?

24 **A.** We both did.

25 **Q.** Now, when you went back to look for that gun

1 again, how much later was it from the time that you
2 looked for it to when you buried it?

3 **A.** A few years.

4 **Q.** After you folks buried the gun, what
5 happened?

6 **A.** We left and we got on to 18 and was headed
7 back towards again Denver.

8 **Q.** Mr. Looking Cloud, in Denver, were you a
9 resident of Denver at this time?

10 **A.** Yes, sir.

11 **Q.** Who was Troy Lynn Yellow Wood?

12 **A.** Troy Lynn Yellow Wood is the niece of Theda
13 Clarke.

14 **Q.** Now, we were talking about the incident on
15 the cliff, right? I want to take you back a few days.
16 Are you with me there?

17 **A.** Yes, sir.

18 **Q.** You are in Denver?

19 **A.** Yes, sir.

20 **Q.** Whose house did you go over to?

21 **A.** Troy Lynn.

22 **Q.** Why did you go to Troy Lynn's house?

23 **A.** I went to look for a friend of mine.

24 **Q.** And that was who?

25 **A.** Joe Morgan.

1 Q. Why did you do that?

2 A. So I do go party around.

3 Q. Where and you go to look for Troy Morgan?

4 A. Troy Lynn's.

5 Q. When you got to Troy Lynn's, what happened?

6 A. I knocked on the door. The back door. And
7 Troy Lynn answered the door. And she told me to wait,
8 so I waited, and Theda came out.

9 Q. Then what happened?

10 A. And Theda asked me what I was doing. If I
11 was doing anything or if I was sober and if I could
12 help her drive to Rapid City. And then she told me
13 we'll be right back.

14 Q. What did you say?

15 A. I thought about it and I said yeah. Since
16 they was going to be for maybe a day.

17 Q. Did she ever mention to you why?

18 **MR. MURPHY:** Objection. Calls for hearsay.

19 Q. **(BY MR. OSWALD)** Just answer yes or no.

20 A. Yes.

21 **THE COURT:** Sustained. That question
22 doesn't, but the next one will.

23 Q. **(BY MR. OSWALD)** She told you why, then --
24 just answer yes or no.

25 Did she tell you why?

1 **A.** Yes.

2 **Q.** Did you go in the house, then?

3 **A.** Yes.

4 **Q.** What did you see in the house?

5 **A.** I went down to the basement. She told me to
6 go down to the basement.

7 **Q.** What did you see there?

8 **A.** I go down to the basement and I see
9 Mr. Graham and I see a lady sitting on a couch.

10 **Q.** Have you ever met this lady before?

11 **A.** I have never met either of them.

12 **Q.** You mean Graham and this lady?

13 **A.** Yes.

14 **Q.** Did you get introduced to Mr. Graham?

15 **A.** Yes, sir.

16 **Q.** Did you eventually find out who this lady was
17 that was downstairs?

18 **A.** Yes, sir.

19 **Q.** Who was that?

20 **A.** Anna Mae Aquash.

21 **Q.** What happened downstairs then?

22 **A.** She told me to wait, and a few minutes later
23 she came downstairs and asked us -- she told us if we
24 was ready to go.

25 **MR. MURPHY:** Objection. Calls for hearsay.

1 **THE COURT:** Sustained.

2 **MR. MURPHY:** Move to strike.

3 **THE COURT:** I'm going to change the ruling.
4 Overruled.

5 **Q. (BY MR. OSWALD)** What did she say, then, to
6 you?

7 **A.** She asked if we was ready to go.

8 **Q.** And then?

9 **A.** And then she asked --

10 **THE COURT:** Hold on. That's one answer.

11 **Q. (BY MR. OSWALD)** And did you answer to that?

12 **A.** Yes, sir.

13 **Q.** Did she add anything to that?

14 **MR. MURPHY:** Objection. Calls for hearsay.

15 **THE COURT:** I want to know where we're going.
16 We're getting into hearsay other than introductory
17 comments.

18 **Q. (BY MR. OSWALD)** Mr. Looking Cloud, when you
19 say she, are we talking about Theda?

20 **A.** Yes, sir.

21 **Q.** So we're not talking about Anna Mae Aquash
22 saying these things to you?

23 **A.** Yes. It's not Anna Mae.

24 **Q.** After the conversation, what did you see
25 happening?

1 **A.** Theda asked for a rope.

2 **Q.** Did a rope show up?

3 **A.** Yes.

4 **Q.** What -- who had the rope at that point, you?

5 **A.** No, sir. Theda -- Troy Lynn. She asked Troy
6 Lynn to get the rope.

7 **Q.** Then what happened?

8 **A.** She brought down a rope.

9 **Q.** What happen then?

10 **A.** And John Boy tied her up.

11 **Q.** Were you present and you saw that?

12 **A.** Yes, sir.

13 **Q.** How did he tie her up?

14 **A.** He tied her hands.

15 **Q.** In the front or the back?

16 **A.** Front.

17 **Q.** What happened then, Arlo?

18 **A.** And then we leave.

19 **Q.** When you left, did you go out the door of the
20 back or the front?

21 **A.** The back door.

22 **Q.** Then where did you go once you got out the
23 back door?

24 **A.** We went to Theda's car, to the Pinto.

25 **Q.** Can you describe the seating arrangement?

1 **A.** I was driving and Theda was in the
2 passenger's side and John Boy was in the back seat and
3 Anna Mae was in the back compartment there, the trunk
4 area.

5 **Q.** That hatchback area?

6 **A.** Yes, sir.

7 **Q.** Is it the same Pinto as we talked about
8 earlier?

9 **A.** Yes, sir.

10 **Q.** Did you ever hear Anna Mae saying anything?

11 **A.** No.

12 **Q.** Right then?

13 **A.** No, sir.

14 **Q.** What did you think when you saw the rope and
15 saw her hands being tied?

16 **MR. MURPHY:** Objection. Relevance.

17 **THE COURT:** Overruled.

18 **Q.** **(BY MR. OSWALD)** You may answer.

19 You can answer, sir.

20 **A.** That it might be serious.

21 **Q.** I am sorry?

22 **A.** It could be serious.

23 **Q.** It could be serious, you said?

24 **MR. OSWALD:** Is that what he said?

25 **THE COURT:** Yes.

1 **Q.** **(BY MR. OSWALD)** Answer this yes or no if you
2 would, Mr. Looking Cloud.

3 Did you know why you were going to Rapid City
4 with Anna Mae?

5 **A.** I was told --

6 **Q.** Yes or no, sir.

7 **A.** No.

8 **Q.** Well, what were you told?

9 **MR. MURPHY:** Objection. Calls for hearsay.

10 **THE COURT:** Sustained.

11 **Q.** **(BY MR. OSWALD)** So you got in this car and
12 that's where we're at and she's tied up in the
13 hatchback.

14 From there, what happened next?

15 **A.** I drove north.

16 **Q.** Where did you go?

17 **A.** I went through Cheyenne and somewhere on the
18 other side of Cheyenne Theda drove.

19 **Q.** Did you have any conversations on the trip
20 inside the car?

21 **A.** No.

22 **Q.** Do you recall if you stopped for bathroom
23 breaks or gas or anything?

24 **A.** No, sir.

25 **Q.** No you didn't or no you don't recall?

1 **A.** I don't recall.

2 **Q.** Did you do any sleeping on the way up, if you
3 recall?

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

5 **Q.** Was Anna Mae always in the hatchback all the
6 way on the trip?

7 **A.** Yes, sir.

8 **Q.** Did you know where you were headed for? What
9 town?

10 **A.** Yes, sir.

11 **Q.** What town was that?

12 **A.** Rapid City.

13 **Q.** Eventually did you get to Rapid City?

14 **A.** Yes, sir.

15 **Q.** Then what happened?

16 **A.** Then we go to an apartment.

17 **Q.** Do you know whose apartment?

18 **A.** At the time I did not.

19 **Q.** Did you find out later?

20 **A.** Yes, sir.

21 **Q.** Whose apartment?

22 **A.** Thelma Rios.

23 **Q.** Describe this apartment.

24 **A.** It was empty.

25 **Q.** Like empty like no people or no furniture?

- 1 **A.** No people and no furniture.
- 2 **Q.** Was it an old one or new apartment?
- 3 **A.** A new apartment.
- 4 **Q.** Was Anna Mae with you at this time?
- 5 **A.** I don't recall.
- 6 **Q.** Was John Graham with you at this time?
- 7 **A.** We were all together.
- 8 **Q.** So let me reask you, then, was Anna Mae still
9 with you?
- 10 **A.** We were all together.
- 11 **Q.** What didn't you recall in the first question
12 I just asked you?
- 13 **A.** She was not with me.
- 14 **Q.** Where was she?
- 15 **A.** She was probably inside the apartment in a
16 room.
- 17 **Q.** Well, you were all -- were you all three
18 together or four of you together from Denver to Rapid
19 City?
- 20 **MR. MURPHY:** Objection. Leading the witness.
- 21 **A.** Yes.
- 22 **THE COURT:** Overruled.
- 23 **Q.** **(BY MR. OSWALD)** And you said you were all
24 together at the apartment, right?
- 25 **A.** Yes, sir.

1 Q. All four of you?

2 MR. MURPHY: Asked and answered.

3 THE COURT: Overruled.

4 A. Yes.

5 Q. (BY MR. OSWALD) What happened in this
6 apartment, Arlo?

7 A. Theda asked me if I was hanging over and I
8 said yes so she gave me a couple pills and I took the
9 pills and I went to sleep.

10 Q. Was Theda a nurse?

11 A. Yes, sir.

12 Q. Do you know what kind of pills she gave you?

13 A. I assumed they were aspirin.

14 Q. You had been drinking?

15 A. The night before, yes.

16 Q. Okay.

17 What do you recall happening next, sir?

18 A. I go use the restroom.

19 Q. Are you still in the apartment are we talking
20 about?

21 A. Yes, sir.

22 Q. Then what happened?

23 A. Then I passed the top --

24 MR. MURPHY: Your Honor, I am going to object
25 at this point and ask that we briefly approach the

1 bench.

2 **THE COURT:** Very good.

3 (Whereupon, a bench conference was then
4 held.)

5 **MR. MURPHY:** I just wanted to renew my motion
6 in limine regarding the rape allegation at this point.

7 **THE COURT:** I don't think the rape allegation
8 can fly a kite, but they can proceed with this matter.
9 There may or may not be matters of sexual play.
10 Whether or not there is or not I don't know but I
11 think they are entitled to go there. But I ain't
12 going to call it a rape unless there is some evidence
13 of that.

14 **MR. MURPHY:** I just wanted my record
15 preserved.

16 Thank you.

17 **THE COURT:**

18 (Whereupon, the discussion at the bench was
19 then concluded.)

20 **Q. (BY MR. OSWALD)** All right.

21 We're at the point where you went to the
22 bathroom?

23 **A.** Yes, sir.

24 **Q.** Then what happened?

25 What did you observe?

1 A. I heard two people having sex.

2 Q. You heard those noises?

3 A. Yes, sir.

4 Q. Where were they coming from?

5 A. From the room where John Boy and Anna Mae
6 were at.

7 Q. What did you do then?

8 A. I used the bathroom and I went back to my
9 room.

10 Q. Did you ever see Anna Mae untied from when
11 you left Denver?

12 A. I don't recall.

13 Q. What happened next?

14 A. Well, Theda wanted me to go with her across
15 the street to another apartment.

16 Q. Did you do that.

17 A. Yes, sir.

18 Q. What did you do across the street there?

19 A. Went across the street. We got some
20 breakfast.

21 Q. Did you eat there or did you have to haul the
22 food somewhere?

23 A. I believe we hauled it back. We hauled it
24 back to the apartment.

25 Q. You testified that you thought you heard --

1 that you heard noises of two people having sex.

2 Where was Theda at this time?

3 A. I don't recall.

4 Q. Now, the two people that you talked about,
5 which two are we talking about?

6 A. John Boy and Anna Mae.

7 Q. What happened next, Mr. Looking Cloud?

8 A. We -- we get the food from the ladies there
9 at the house and we go back. And I go back to sleep
10 again.

11 Q. Then what happened?

12 A. Then in the afternoon Theda wakes me and she
13 wants me to go get some gas.

14 Q. Did you do that?

15 A. Yes, sir.

16 Q. What did you do?

17 A. I went down to the gas station and not far
18 from there I have a friend. His name is Tony Red
19 Cloud. So I go visit him.

20 Q. Then what happened?

21 A. And then I have dinner with him and then I go
22 back to the apartment.

23 Q. Were you late getting back there?

24 A. Yes.

25 Q. What happened when you got back there?

1 **A.** She was pretty upset. She wanted to know
2 where I went. Where I was.

3 **Q.** And who is she?

4 **A.** Theda.

5 **Q.** Did you tell her?

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

7 **Q.** Did she curse you out?

8 **A.** Yes.

9 **Q.** What happened next?

10 **A.** And then we leave and I drive to Sharp's
11 Corner.

12 **Q.** Then what happened?

13 **A.** And then she drives.

14 **Q.** Anna Mae?

15 **A.** Theda drives from an -- Sharp's Corner.

16 **Q.** Where was Anna Mae at this time?

17 **A.** In the back area.

18 **Q.** Who was all in the car?

19 **A.** There was John Boy, Theda, I, and Anna Mae.

20 **Q.** John Boy, the same man you pointed out
21 earlier here?

22 **A.** Yes, sir.

23 **Q.** Where did you go?

24 **A.** Theda drives from Sharp's Corner and when I
25 woke, later I find out we're in Rosebud.

1 **Q.** Were you and Tony Red Cloud drinking, by the
2 way, in Rapid City?

3 **A.** No, sir.

4 **Q.** You went to Rosebud, you said?

5 **A.** Yes.

6 **Q.** Where at in Rosebud?

7 **A.** We went to a house.

8 **Q.** Do you know whose house?

9 **A.** Later I find out. It's --

10 **MR. MURPHY:** Objection. Lack of personal
11 knowledge.

12 **THE COURT:** Ask the next question.

13 **Q.** **(BY MR. OSWALD)** At the house that you went
14 to, did you -- you were all still four together?

15 **A.** Yes, sir.

16 **Q.** What happened when you got to this house?

17 **A.** Theda goes inside.

18 **Q.** Okay.

19 And then what happened when Theda went
20 inside?

21 **A.** She went inside and then she comes out. She
22 gets John Boy and they both go back in. And --

23 **Q.** Why didn't you go in at this time?

24 **A.** She tells me to stand --

25 **MR. MURPHY:** Objection. Hearsay.

1 **THE COURT:** Sustained.

2 **Q. (BY MR. OSWALD)** Were you ordered to do
3 something?

4 Just answer this yes or no.

5 **A.** Yes.

6 **MR. MURPHY:** Your Honor, it's an end run
7 around the hearsay.

8 **THE COURT:** I understand that, but it's --
9 it's overruled.

10 **MR. OSWALD:** May the answer stand?

11 **THE COURT:** The answer stands.

12 **Q. (BY MR. OSWALD)** What did you do, then,
13 outside when those two, John Boy and Theda, went in?

14 **A.** She tells me --

15 **MR. MURPHY:** Objection. Hearsay.

16 **THE COURT:** Yeah.

17 Mr. Looking Cloud, you need to quit answering
18 every question or almost every question with what
19 somebody else said. The question was what did you do.
20 That's the answer I expect to come with the question.

21 **THE WITNESS:** Yes, sir.

22 **THE COURT:** Thank you.

23 **Q. (BY MR. OSWALD)** What did you do outside,
24 then?

25 **A.** I stand.

1 Q. Where was Anna Mae?

2 A. In the same area. The same trunk area.

3 Q. Did you walk away from the car?

4 A. No, sir.

5 Q. Did Anna Mae walk away from the car?

6 A. No, sir.

7 Q. Just answer this yes or no also.

8 Would you do that for me?

9 A. Yes, sir.

10 Q. Did you do what you were supposed to do?

11 MR. MURPHY: Objection. It's going through
12 the hearsay again.

13 THE COURT: I think we asked him what he did.
14 He said stand. I think he can answer that question.

15 Q. (BY MR. OSWALD) You may answer.

16 A. Can I have the question, please?

17 Q. Did you do what you were supposed to do?

18 A. Yes, sir.

19 Q. Did Anna Mae talk to you out there?

20 A. No, sir.

21 Q. Did you see her moving around at all?

22 A. No, sir.

23 Q. What was she doing in the trunk -- or excuse
24 me, hatchback?

25 A. I don't know.

1 Q. Were you watching her at all?

2 A. No, sir.

3 Q. Where were you standing?

4 A. I was standing in the back.

5 Q. The back of what?

6 A. The Pinto.

7 Q. The car?

8 A. Yes.

9 Q. Did you ever leave that car area where you
10 were standing when John Boy and Theda were in the
11 house?

12 A. No, sir.

13 Q. Do you know how long they were in the house?

14 A. Not long.

15 Q. At some point did they come out?

16 A. Yes, sir.

17 Q. Then what did you do?

18 A. Then I asked Theda if I -- if I can use the
19 restroom, the bathroom.

20 Q. Just answer this yes or no. Did you go in
21 the house?

22 A. Yes, sir.

23 Q. Did you use the restroom?

24 A. Yes, sir.

25 Q. Did you leave this Rosebud area eventually?

- 1 **A.** Yes, sir.
- 2 **Q.** In the same car?
- 3 **A.** Yes, sir.
- 4 **Q.** Was Anna Mae in still the same spot?
- 5 **A.** Yes, sir.
- 6 **Q.** Who drove, do you know?
- 7 **A.** I drove for a little while till we got to the
8 highway and Theda drove.
- 9 **Q.** Where did you go?
- 10 **A.** We go to Allen.
- 11 **Q.** Do you know whose house you went to?
- 12 **A.** Yes, sir.
- 13 **Q.** And who is that?
- 14 **A.** Dick Marshall.
- 15 **Q.** What happened at Dick Marshall's when you
16 first got there?
- 17 **A.** We go inside.
- 18 **Q.** You say we, who do you mean, sir?
- 19 **A.** The same four.
- 20 **Q.** What happened inside of Dick Marshall's house
21 when you first went in?
- 22 **A.** Theda goes into the bedroom with Dick
23 Marshall. He was already in there.
- 24 **Q.** Just Theda alone?
- 25 **A.** Yes, sir.

1 **Q.** Who was then left, any children around or
2 what are we talking about?

3 **A.** No, sir.

4 **Q.** Okay.

5 So who was out there outside of the bedroom?

6 **A.** There was Cleo, Anna Mae, John Boy, and I.

7 **Q.** How long was Theda and Mr. Marshall in that
8 bedroom?

9 **A.** Not very long.

10 **Q.** Can you give me like hours or minutes?

11 **A.** Minutes.

12 **Q.** What happened, then, when they came out?

13 **A.** She asked us to go into the bedroom.

14 **Q.** Theda did?

15 **A.** Yes. Yes, sir.

16 **Q.** So when you say us, who went in there?

17 **A.** John Boy and I.

18 **Q.** And you?

19 **A.** Yes, sir.

20 **Q.** The two of you went in also?

21 **A.** Yes, sir.

22 **Q.** So who was in the bedroom now?

23 **A.** It was Dick Marshall, Theda, John Boy, and I.

24 **Q.** What did you see when you went in there?

25 **A.** Dick Marshall was passing a note back to

1 Theda.

2 Q. Did you see what was on the note?

3 A. No, sir.

4 Q. Do you have any idea where that note came
5 from?

6 MR. MURPHY: Objection. Calls for
7 speculation.

8 THE COURT: The answer is yes or no.

9 A. No, sir.

10 Q. (BY MR. OSWALD) What did you see Theda do
11 with this note?

12 A. She puts it in her pocket.

13 Q. Did you look at the note?

14 A. No, sir.

15 Q. Did you -- had you touched it?

16 A. No, sir.

17 Q. Nobody handed it to you?

18 A. I don't recall.

19 Q. Did you see anybody reading the note?

20 A. No, sir.

21 Q. After she stuck that note in her pocket, what
22 happened?

23 A. Dick Marshall reaches in the bottom drawer
24 and he pulls out a box, opens the box, and there is a
25 pistol in there and he hands it to Theda.

1 Q. And he hands it to who?

2 A. Theda.

3 Q. Did she take it?

4 A. Yes, sir.

5 Q. What did she do it with, do you know?

6 A. She pockets it.

7 Q. Anything else that she was handed?

8 A. Yes, a box. A box of shells.

9 Q. Did you see what she did with the shells?

10 A. Yes.

11 Q. What?

12 A. She pockets them.

13 Q. Did you hear the conversation that occurred
14 inside that bedroom? Just yes or no.

15 A. No, sir.

16 Q. You didn't?

17 A. No, sir.

18 Q. Was there any talk inside that bedroom when
19 you were there?

20 A. No, sir.

21 Q. So when you and John Boy went in the second
22 time, there was no conversation?

23 **MR. MURPHY:** Asked and answered.

24 A. No, sir.

25 **THE COURT:** Sustained.

1 **Q.** **(BY MR. OSWALD)** What happened then, sir,
2 after the shells and the gun got handed?

3 **A.** Then we leave.

4 **Q.** In the same car?

5 **A.** Yes, sir.

6 **Q.** With Annie Mae?

7 **A.** Yes, sir.

8 **Q.** Do you remember who was driving then?

9 **A.** I was, sir.

10 **Q.** Where was Annie Mae?

11 **A.** In the same area in the back.

12 **Q.** Then where did you go?

13 **A.** Then we took the road from Allen and I don't
14 know what the number is, but we go through Red Water.
15 On the Red Water bridge going towards Wambli this big
16 old owl comes out of nowhere and goes in front of the
17 windshield where Theda is sitting. And then we
18 proceed --

19 **Q.** Okay.

20 Let me ask this, that sticks in your mind,
21 that owl?

22 **A.** Yes.

23 **Q.** In Lakota tradition, does that have any
24 meaning to you?

25 **MR. MURPHY:** Objection. Relevance.

1 **THE COURT:** Sustained.

2 **Q. (BY MR. OSWALD)** Where did you go, then, from
3 Allen?

4 Whose place?

5 **A.** My grandmother's.

6 **Q.** Where was that?

7 **A.** In Potato Creek.

8 **Q.** Why did you go there?

9 **A.** To get some gas.

10 **Q.** And how did you get gas at Potato Creek?

11 **A.** I siphoned it from her car.

12 **Q.** Did you talk to grandma at that time?

13 **A.** A little.

14 **Q.** Was this your boyhood home?

15 **A.** No.

16 **Q.** Was this the grandma that raised you?

17 **A.** No, sir.

18 **Q.** Where did you go from Potato Creek?

19 **A.** We go towards Wambli.

20 **Q.** Who is in the car?

21 **A.** The same four.

22 **Q.** What happened when you went towards Wambli?

23 **A.** There was a junction going towards Interior
24 and just before you get to the junction we see a red
25 light in the back. Theda points out that there is a

1 red light behind us.

2 Q. A red light, like, are you talking like a
3 stoplight or something else?

4 A. Like a flashing red light. A police car.

5 Q. Okay.

6 So did you see it, then?

7 A. Yes, sir.

8 Q. What happened then when you saw that?

9 A. Theda hands me the gun.

10 Q. Then what happened?

11 A. I put it underneath the seat and we continue.

12 Q. And then you continued to -- till what
13 happened?

14 A. Till the red light goes towards -- when he
15 hits the junction, he goes north towards Interior and
16 Theda asks for the gun back.

17 Q. Did you give it to her?

18 A. Yes, sir.

19 Q. Did you know at this time whether that gun
20 was loaded or unloaded?

21 A. No, sir.

22 Q. You didn't know?

23 A. Yes, sir.

24 Q. Can you describe this gun, sir?

25 A. It was a silver -- silver with a red handle,

1 I think. Yeah. Silver with a red handle.

2 Q. Do you know the difference between an
3 automatic, semiautomatic and a revolver?

4 A. Yes, sir.

5 Q. Was this a revolver or semi-automatic?

6 A. Revolver.

7 Q. Okay.

8 After she -- after you hand this gun back to
9 her, what happened?

10 Where did you go?

11 A. We go to Wambli.

12 Q. Where at in Wambli?

13 A. We go to a house.

14 Q. Do you know whose house?

15 A. No, sir.

16 Q. What happen at this house?

17 A. We switch drivers. I get in the back seat.
18 Theda drives, and John Boy gets on the passenger's
19 side.

20 Q. Did you go into this house?

21 A. No, sir.

22 Q. So was this house just a stopping-off point?

23 A. No, sir.

24 Q. Explain that, please.

25 A. She goes to the house but there was no one

1 home so she comes back into the car and she drives to
2 another house.

3 Q. Anna Mae still in the hatchback?

4 A. Yes, sir.

5 Q. Then what happened at this other house?

6 A. No one was home or no one answered the door.

7 Q. Was this daylight or dark?

8 A. I believe it was still -- it was still dark.

9 Q. Then what happened after the second house?

10 A. The third house -- that would be the third
11 house and we rested. I think we rested. Went to
12 sleep maybe for a little while.

13 Q. All of you?

14 A. I know I did.

15 Q. What did the others do?

16 A. I don't know.

17 Q. Where did you go then?

18 A. We go north headed towards Kodaka.

19 Q. And then what happened?

20 A. And then we stop.

21 Q. Is that where we started this story?

22 A. Yes, sir.

23 It's not a story, it's the truth.

24 Q. Do you -- do you have any remorse about what
25 happened to Annie Mae?

1 **MR. MURPHY:** Objection. Relevance.

2 **THE COURT:** Sustained.

3 **Q. (BY MR. OSWALD)** Okay. Don't answer that.

4 After -- let me take you back after you

5 buried the gun.

6 You said you headed to Denver?

7 **A.** Yes, sir.

8 **Q.** All four of you?

9 **A.** Yes, sir.

10 **Q.** Excuse me.

11 **A.** Three.

12 **Q.** Three of you?

13 **A.** Yes, sir.

14 **Q.** And it was Theda, you, and who else?

15 **A.** It was Theda, John Boy, and I.

16 **Q.** Do you know John Trudell?

17 **A.** Yes, sir.

18 **Q.** Did you ever tell him this or parts of it?

19 **A.** Yes, sir.

20 **Q.** Was Troy Lynn along at the time?

21 **A.** Yes, sir.

22 **Q.** Did you ever call Anna Mae's daughter?

23 **A.** Yes, sir.

24 **Q.** When was that, sir?

25 **A.** 2003, maybe. 2003, maybe.

1 Q. Where did you call to?

2 Do you know the country?

3 A. No.

4 Q. Did you talk to the person who identified
5 herself as Anna Mae's daughter?

6 A. Yes, sir.

7 Q. What was her first name?

8 A. Denise.

9 Q. What did you tell Denise?

10 MR. MURPHY: Your Honor, objection. He's
11 being asked about prior statements before he's been
12 impeached.

13 THE COURT: I am going to sustain it.
14 Where are we in terms of your examination?

15 MR. OSWALD: We could take a recess.

16 THE COURT: We should.

17 MR. OSWALD: Okay.

18 THE COURT: I promise 15 minutes, folks.
19 Remember the admonition not to talk to
20 anybody about the case and not to form any opinions.

21 Thank you.

22 (Whereupon, the following proceedings were
23 had out of the presence of the jury.)

24 THE COURT: Counsel, I want to think about
25 that last ruling. I am not sure where I want to go

1 with that.

2 (Off the record.)

3 **THE COURT:** Okay.

4 Satisfied this is the jury, Mr. Jackley?

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

6 **MR. MURPHY:** Yes, sir.

7 **THE COURT:** Mr. Oswald, you may pick up -- I
8 changed the last ruling I made. You may pursue that
9 line of questioning.

10 **MR. OSWALD:** Thank you.

11 **Q. (BY MR. OSWALD)** Mr. Looking Cloud, we were
12 talking about what you told Denise.

13 Do you remember that?

14 **A.** Yes, sir.

15 **Q.** Okay.

16 What was it you told her?

17 **MR. MURPHY:** Your Honor, I renew my objection
18 because the statement doesn't predate the motive to
19 fabricate.

20 **THE COURT:** Overruled.

21 The objection is noted.

22 **Q. (BY MR. OSWALD)** You may answer that.

23 **A.** I told her that John Boy shot her and there
24 was Theda and I, and I was sorry.

25 **Q.** And what?

1 **A.** I -- if I had known that something like that
2 was going to happen.

3 **MR. MURPHY:** Objection, Your Honor. This is
4 self-serving and it doesn't respond to the question.

5 **THE COURT:** That's true. That -- the
6 objection is sustained.

7 That answer is stricken. Folks will
8 disregard it.

9 **Q.** **(BY MR. OSWALD)** Mr. Looking Cloud, do you
10 know Robert Ecoffey?

11 **A.** Yes, sir.

12 **Q.** At some point in 1994 did you meet Robert
13 Ecoffey at that crime scene?

14 **A.** Yes, sir.

15 **Q.** Excuse me, was this 1995?

16 **A.** Yes, sir.

17 **Q.** Okay.

18 I'd like to show you what's been marked
19 State's Exhibit 35.

20 Do you see that picture?

21 **A.** Yes, sir.

22 **Q.** Do you recognize whose in there?

23 **A.** Yes, sir, I you do.

24 **Q.** Does this depict what occurred and what you
25 observed on that day?

1 **A.** Yes, sir.

2 **Q.** Whose in that picture, sir?

3 **A.** There is Mr. Ecoffey, Mr. Ianuchi, and
4 myself.

5 **Q.** Is that how you looked back then?

6 **A.** Yes, sir.

7 **Q.** You just -- had you just gotten out of jail,
8 then?

9 **A.** Yes, sir.

10 **MR. OSWALD:** I would offer Exhibit 35.

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

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

13 **MR. OSWALD:** I would like to put this on the
14 wall, if you may?

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

16 **Q.** **(BY MR. OSWALD)** Mr. Looking Cloud, where are
17 we at right here referring to State's Exhibit 35?

18 **A.** We are on the edge.

19 **Q.** Is that where Anna Mae went over?

20 **A.** Yes.

21 **Q.** Are you telling your story to Mr. Ecoffey
22 right there?

23 **A.** Yes, sir.

24 **Q.** Mr. Looking Cloud, on the way back to Denver,
25 the three of you now, did Theda make any comments

1 about what took place?

2 Just yes or no.

3 **A.** Yes, sir.

4 **MR. OSWALD:** I am offering the next question
5 as a co-conspirator exception to the hearsay.

6 **MR. MURPHY:** Object, your Honor. Doesn't
7 meet the requirements.

8 **THE COURT:** Come on up.

9 (Whereupon, a discussion was then held at the
10 bench.)

11 **THE COURT:** First of all, whisper.

12 **MR. OSWALD:** If anybody asks or talks about
13 it, just tell them that I did it. Theda is saying
14 this.

15 **MR. MURPHY:** Statement is exculpatory another
16 defendant requiring corroboration before they are
17 admissible. The other thing as co-conspirator
18 statements, it has to do more than merely describe or
19 discredit an event. It has to somehow further the
20 event. The event was over at that time.

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

22 May I reply?

23 **THE COURT:** Your response to the
24 corroboration? I think that that's a correct
25 statement of the law.

1 **MR. OSWALD:** I don't believe it is, Judge.

2 **THE COURT:** You got authority for me? Either
3 side.

4 **MR. OSWALD:** The authority is that I don't
5 believe there is authority on the other side for
6 corroboration. People -- *State vs. Tiegen* didn't
7 require corroboration.

8 **MR. MURPHY:** This isn't co-conspirator
9 statements. I would not be able to admit this
10 statement and -- if I was trying to prove that Theda
11 did it, because I don't have corroboration for a
12 statement that exculpates a codefendant. I believe
13 804(b)(3), statements against interest, is the rule.
14 This is a statement against Theda's interest and I can
15 grab the rule -- Marty has it here.

16 **MR. OSWALD:** Actually, Judge --

17 **THE COURT:** Read the last sentence.

18 **MR. OSWALD:** Okay.

19 Judge, I'm not talking that statute.

20 **THE COURT:** Is not admissible unless
21 corroborating circumstances clearly indicate the
22 trustworthiness of the declarant. It's not met.

23 **MR. OSWALD:** This is a co-conspirator
24 statement by somebody in furtherance of the
25 conspiracy. It had just happened, Judge. It's

1 clearly under *State vs. Tiegen* admissible. This
2 statute is the wrong one that's cited for applying --

3 **THE COURT:** I am not awed by the conspiracy
4 but I am struck by the corroboration and I don't think
5 you got it. In fact, there is no indicia -- there is
6 no indication that it is reliable for crying out loud.
7 I mean all your evidence is directly contrary.

8 So how are you trying to tell me there is
9 some evidence that this is reliable?

10 **MR. OSWALD:** I just -- I just think that
11 reliability of corroboration is not the standard you
12 use for a co-conspirator statement.

13 **MR. MURPHY:** If the evidence is all --
14 whether it's a co-conspirator or any other basis you
15 are now trying to put in testimony that you know to be
16 untrue or at least believed to be untrue.

17 **THE COURT:** I think the last statement in the
18 rule controls. It's not in.

19 **MR. OSWALD:** Judge, for my record, I would
20 like to cite S.D.C.L. 19-16-3 subsection five. And I
21 know the Court's ruling, but I would like the Court to
22 look at this. *State vs. Tiegen*.

23 **THE COURT:** Call me wishy washy but that
24 seems to change my mind. When I read the
25 co-conspirator analysis and the cases cited.

1 **MR. MURPHY:** Okay.

2 **THE COURT:** Overruled.

3 (Whereupon, the discussion at the bench was
4 then concluded.)

5 **Q. (BY MR. OSWALD)** Mr. Looking Cloud, we were
6 talking about what Theda said on the way back to
7 Denver there?

8 **A.** Yes, sir.

9 **Q.** What was it she said about what just
10 happened?

11 **A.** She said if anyone questions or says anything
12 that she done it.

13 **Q.** Mr. Looking Cloud, you have in your life a
14 lot of criminal convictions, don't you?

15 **A.** Yes, sir, I do.

16 **Q.** Spent a lot of time in jail?

17 **A.** Yes, sir.

18 **Q.** You had an alcohol problem?

19 **A.** Yes, sir.

20 **Q.** Have you done some drugs?

21 **A.** Yes, sir.

22 **Q.** Somebody said you have been homeless. Is
23 that true?

24 Do you understand the question, sir?

25 **A.** I might need to explain that.

1 Q. Okay. Go ahead and explain, sir.

2 A. I was not homeless, but sometimes I would go
3 out on binges.

4 Q. How has this affected your life, sir?

5 MR. MURPHY: Objection. Relevance.

6 THE COURT: Sustained.

7 MR. OSWALD: If I may have a minute, Judge?

8 THE COURT: You may.

9 MR. OSWALD: Thank you.

10 I pass this witness, Judge.

11 THE COURT: Thank you.

12 Mr. Murphy?

13 MR. MURPHY: Thank you.

14 **CROSS-EXAMINATION**

15 **BY MR. MURPHY:**

16 Q. Mr. Looking Cloud, my name is John Murphy. I
17 am going to ask you a bunch of questions.

18 You stop me if you don't understand a
19 question, okay?

20 A. Yes, sir.

21 Q. I want to start more or less where you
22 started at the scene where you say my client shot
23 Ms. Aquash.

24 Now, when that event allegedly occurred it
25 was getting light out, correct?

1 **A.** Yes, sir.

2 **Q.** Going back a bit, you were at Cleo Gates'
3 house?

4 **A.** Yes.

5 **Q.** And would you dispute her estimate that that
6 happened between 10:30 and midnight?

7 **A.** I don't recall.

8 **Q.** All right.

9 So you are not saying she's wrong when she
10 testified that it happened between 10:30 and midnight?

11 **A.** Yes.

12 **Q.** Okay.

13 And from there you go to Potato Creek which
14 is a pretty short distance, correct?

15 **A.** Yes.

16 **Q.** And you siph -- you have your brief words
17 with your grandma?

18 **A.** Yes.

19 **Q.** You siphon some gas?

20 **A.** Yes.

21 **Q.** And I believe that then only took a few
22 minutes, correct?

23 **A.** Yes, sir.

24 **Q.** And you go to one house in Wambli, right?

25 **A.** Yes, sir.

1 Q. Theda knocks on the door, nobody answers?

2 A. Yes, sir.

3 Q. You drive to the next house in Wambli, same
4 thing?

5 A. Yes, sir.

6 Q. Both of those events, knocking on the door,
7 take just a few minutes, correct?

8 A. Yes.

9 Q. Now, today, for the first time, in all the
10 prior statements you have given, you said that between
11 that second house and arriving out on the Badlands,
12 you guys may have rested.

13 Do you remember you saying that?

14 A. Yes.

15 Q. And you have never said that before in any of
16 your sworn or unsworn statements, have you?

17 A. I did mention that before.

18 Q. Can you identify any time in any of the
19 multitude of statements you have given when you ever
20 mentioned the group resting at any point in this
21 venture?

22 A. At the lost house maybe.

23 Q. And that's what you are saying today.

24 And the reason you are saying that is because
25 you just testified about six months ago at Dick

1 Marshall's trial, right?

2 A. Right.

3 Q. And after you testified, you know an issue
4 came up about you not being able to explain what you
5 did between midnight when you left Cleo's and six or
6 so in the morning when it got light out, right?

7 You didn't have an explanation for that?

8 A. No, sir.

9 Q. Six hours missing, essentially.

10 So today for the first time in front of this
11 jury you say you guys were resting?

12 A. I was. I know I was.

13 Q. But you don't about anybody else?

14 A. Yes.

15 Q. So it's a little different than what you
16 testified to on direct?

17 A. Yes, sir.

18 Q. All right.

19 Well, let's talk about the deals you have
20 made in this case and let's start at the very
21 beginning because you were asked by Mr. Oswald about
22 your hopes for a benefit from this case, do you recall
23 that?

24 You hoped to get a good deal out of this?

25 A. Yes, sir.

1 Q. All right.

2 You started brokering deals in this case all
3 the way back in 1994, didn't you?

4 A. Yes, sir.

5 Q. In fact 1994, Abe Alonzo and Robert Ecoffey
6 came to you while you were in jail, right?

7 A. Yes, sir.

8 Q. You were facing some serious charges there
9 weren't you?

10 A. No, sir.

11 Q. You were facing felony assault on a police
12 officer?

13 A. Yes, sir.

14 Q. That's a pretty serious charge isn't it?

15 A. Yes, sir.

16 Q. Especially for a guy who at that point had
17 four prior felonies.

18 MR. OSWALD: Is that a question?

19 Objection.

20 THE COURT: What's the question?

21 MR. MURPHY: It's a question.

22 Q. (BY MR. MURPHY) It's a real serious matter to
23 be charged with a felony crime of violence to have
24 four prior felonies, isn't it?

25 A. I would need to explain that.

1 **Q.** Well, were you convicted in 1979 in Florida
2 of aggravated assault?

3 **A.** No, sir.

4 **Q.** You weren't.

5 So if your rap sheet says differently it's
6 wrong?

7 **A.** Yes, sir.

8 **Q.** And in 1987, convicted in one county in
9 Colorado with robbery with a knife?

10 **A.** No, sir, I was never convicted of that.

11 **Q.** So your rap sheet is wrong there, too?

12 **A.** I was never convicted of robbery.

13 **Q.** And 1987 in another county in Colorado
14 aggravated robbery?

15 **A.** That's one.

16 **Q.** And 1988, somewhere else in Colorado, felony
17 trespass.

18 You were convicted of that too, weren't you?

19 **A.** Yes.

20 **Q.** Okay.

21 So by your statement, by your count, you only
22 had two prior felonies before the felony charge for
23 assaulting a police officer, right?

24 **A.** You would have to explain that two felonies.

25 **Q.** Well, you didn't dispute the aggravated

1 robbery in 87?

2 A. Yes.

3 Q. You got that conviction, right?

4 A. It was not -- I was never convicted of
5 robbery.

6 Q. Okay.

7 So your rap sheet is wrong there, too?

8 What about the ag assault in Florida?

9 A. There was nothing. There was nothing there.

10 Q. All right.

11 Well, let me put -- let me ask it this way.

12 You've been convicted of more than 40 offenses

13 throughout your life, correct?

14 A. Correct.

15 Q. And in fact, your rap sheet reveals that you
16 got 12 separate convictions for providing false
17 information, true?

18 A. True.

19 Q. And now you are disputing some of the prior
20 felonies but at the time these two officers came to
21 you in 1994, while you sat there in the jail, you were
22 facing one serious felony and you had a track record
23 with the court system, didn't you?

24 A. Yes, sir.

25 Q. And you were looking at some time?

1 **A.** Yes, sir.

2 **Q.** And by that time in 1994, you already knew
3 how to work the system, didn't you?

4 **MR. OSWALD:** Objection. Vague. Speculative.

5 **THE COURT:** Overruled.

6 **Q.** **(BY MR. MURPHY)** You may answer.

7 **A.** The question, please?

8 **Q.** You knew how to work the system by 1994,
9 didn't you?

10 **A.** Work the system how?

11 **Q.** Well, you had done a lot of plea bargains,
12 right?

13 You had done over 40 plea bargains, hadn't
14 you?

15 **A.** Actually, they were guilty pleas.

16 **Q.** You plead guilty to a lot of charges, but you
17 had lots more charges thrown out, didn't you?

18 **A.** Yes, sir.

19 **Q.** Sometimes you would have six or seven charges
20 on a day but they would give you a deal for one
21 charge, right?

22 **A.** Yes, sir.

23 **Q.** And so Ecoffey comes to you and he tells you
24 that the District Attorney would consider dropping the
25 assault on a police officer charge if you cooperated

1 with their investigation?

2 That's what he told you, didn't he?

3 **A.** Yes.

4 **Q.** And you said you would consider that, right?

5 **A.** Yes, sir.

6 **Q.** And Detective Alonzo told you the same thing,
7 should you decide to cooperate with that, he would
8 have a special word with the District Attorney, right?

9 **A.** Yes.

10 **Q.** And so shortly thereafter you hired an
11 attorney, or you had an attorney, and he worked out an
12 immunity agreement, didn't he?

13 **A.** Yes, sir.

14 **Q.** And that immunity agreement basically said
15 you wouldn't get into trouble if you told them what
16 they wanted to hear, right?

17 **A.** Yes, sir.

18 **Q.** Now, pursuant to the immunity agreement,
19 signed November 3, 1994, the charges disappear about
20 assaulting the law enforcement officer, don't they?

21 They got dismissed?

22 **A.** Yes, sir.

23 **Q.** And you go in and you decide to talk to them
24 pursuant to this agreement, tell them your side of the
25 story, right?

1 **A.** Yes.

2 **Q.** And you tell them that Aquash was never tied
3 up; isn't that true?

4 **A.** I don't recall.

5 **Q.** Okay.

6 Well, let me see if I can find it for you.
7 Were you asked by Robert Ecoffey, okay, do you -- a-
8 somebody untie her then. Not that you can remember.
9 Okay.

10 You couldn't remember then, could you?

11 **A.** Okay.

12 **Q.** Okay.

13 And when asked if she was ever tied up, you
14 couldn't recall that either, could you?

15 **A.** Yes.

16 **Q.** Robert Ecoffey asked you, okay, did you guys
17 tie her up. Your answer, no.

18 **A.** Yes, sir.

19 **Q.** Okay.

20 Little different story today, right?

21 **A.** Well, there was three interrogations, I
22 think. Three or four interrogations.

23 **Q.** Sometimes maybe more like 14, weren't there?

24 **A.** Maybe.

25 **Q.** When you were asked to give a complete story

1 back in 1994, which was much closer to the time in
2 events, they asked you if there was anything sexual
3 that happened and you said no, correct?

4 A. I don't recall.

5 Q. Okay.

6 If you had said something like that it would
7 probably be here in the transcript, wouldn't it?

8 A. There is several transcripts.

9 Q. Of that one interview?

10 A. Several interviews.

11 Q. All right.

12 I am talking about the first one you gave
13 when you -- when you assaulted the law enforcement
14 officer and they dumped the charge --

15 MR. OSWALD: Object as to when you assaulted
16 the officer.

17 THE COURT: He was charged with it. The
18 charge went away.

19 Proceed.

20 Q. (BY MR. MURPHY) In fact, at that point you
21 told Mr. Ecoffey and Mr. Alonzo, that John and Anna,
22 Anna Mae were always together. You described them as
23 if they were friends, correct?

24 A. Yes, sir.

25 Q. And you never mentioned anything about rape

1 or hearing sex noises or anything like that, did you,
2 back in 1994?

3 A. Yes, sir.

4 Q. You didn't. That's something you added, oh,
5 about 30 years later or 20 years later, right?

6 A. No, sir.

7 Q. That's something you started talking about in
8 2008, right?

9 A. No, sir.

10 Q. Okay. Well, we'll get to that.

11 Same time, 1994, you get this deal, you give
12 about a 25-page single-spaced statement. You never
13 mention Dick Marshall whatsoever, do you?

14 A. Yes, sir.

15 Q. You do -- you think you did mention Dick
16 Marshall or you didn't?

17 A. I didn't.

18 Q. And you didn't mention going to a house on
19 Rosebud, did you?

20 A. No, sir.

21 Q. And you didn't know anything about Thelma
22 Means' house at that time or Thelma Rios' house at
23 that time?

24 You didn't have any information as to where
25 you were in Rapid City, right?

1 **A.** Right.

2 **Q.** You also said on that occasion you never saw
3 the gun; isn't that true?

4 **A.** That's true.

5 **Q.** But what you did say is at the scene of the
6 alleged crime, after the shooting, you took the gun
7 away from my client and shot it into the ground,
8 emptied the entire cylinder.

9 Do you remember that?

10 **A.** Yes.

11 **Q.** The problem was, you found out later they did
12 a complete metal detector search of that whole area,
13 right?

14 **A.** Yes, sir.

15 **Q.** And so after you found that out, around 2008,
16 you started giving this story about how you shot the
17 gun into the west -- out into the air in the west to
18 explain why nobody found any bullets in the ground,
19 right?

20 **A.** Right.

21 **Q.** I want to talk to you about your next
22 interview, July 25, 1995. The next year after that
23 first one, right?

24 Do you remember that?

25 **A.** Yes.

1 Q. And you are taken to the Badlands -- that was
2 the picture they put up on the wall, right?

3 A. Right.

4 Q. And you are taken there by Mr. Alonzo and
5 Mr. Ianuchi and Mr. Ecoffey?

6 A. Right.

7 Q. But you are driven up there from Denver by
8 Mr. Ianuchi and Mr. Alonzo.

9 Do you recall that?

10 A. Yes.

11 Q. And your attorney is not with you, is he?

12 A. No, sir.

13 Q. And you are alone in the car with these two
14 officers, right?

15 A. Yes.

16 Q. And they start telling you about how
17 Mr. Ianuchi was part of a murder squad in
18 Philadelphia?

19 A. Correct.

20 Q. And that he needed nine certified murders in
21 order to get on that police murder squad?

22 A. Correct..

23 Q. And he told you how they didn't like to have
24 defendants go to trial so back in Pennsylvania where
25 he was at, they had this murder squad to take

1 defendants out and kill them rather than have to go
2 through trial, right?

3 A. Right.

4 Q. And Mr. Alonzo said he wanted to be part of
5 that, right?

6 A. Right.

7 Q. And he told you if you didn't cooperate, he
8 would make it look like you had a -- did a run for it,
9 so he could shoot you, too, didn't he?

10 A. Right.

11 Q. He was messing with your head, wasn't he?

12 A. Yes, sir.

13 Q. And you were scared, weren't you?

14 A. Yes.

15 Q. You were a young guy in a car with these two
16 cops that you don't trust, right?

17 A. Yes.

18 Q. And they want you to come out and cooperate
19 in this investigation, right?

20 A. Yes, sir.

21 Q. And they start telling you, basically, if you
22 don't things their way they are going to kill you,
23 right?

24 A. Yes.

25 Q. And they take you out to the Badlands where

1 that picture was taken, but you don't even recall that
2 as being the place where the events you supposedly
3 witnessed happened, correct?

4 A. Correct.

5 Q. You can't tell them whether this was it or
6 not?

7 A. Correct.

8 Q. But they ask you to go through the story
9 again.

10 Do you recall that?

11 A. Yes.

12 Q. And there scared for your life, you are asked
13 to give all the details you can and at that point you
14 are not worried about anybody else but yourself is
15 that fair to say?

16 A. Yes.

17 Q. And you go through the story. You never
18 mention anything about hearing any sex noises,
19 anything like that, do you?

20 A. Yes.

21 Q. It's true you didn't say that, right?

22 A. Right.

23 Q. You never brought that up? You never brought
24 up Dick Marshall's house, right?

25 A. Right.

1 Q. You said that Anna Mae was not tied up, do
2 you remember that?

3 A. Yes.

4 Q. Okay.

5 After that rather than getting to go back
6 home, getting released on your own recognizance, you
7 are taking to a federal maximum security prison down
8 in Elreno?

9 A. Yes.

10 Q. You are not charged with anything?

11 A. Yes, sir.

12 Q. And you don't have an attorney that's
13 representing you in regard to that, correct?

14 A. Correct.

15 Q. These officers somehow orange straighted that
16 you would be locked up in a federal maximum security
17 prison without charges or anything else?

18 That's your understanding of how it worked?

19 A. I don't know how anything worked but --

20 Q. You ended up there?

21 A. Yes, sir.

22 Q. And you had no explanation of why you were in
23 there federal maximum security lockdown situation?

24 A. Yes, sir.

25 Q. And you spent quite a bit of time there,

1 didn't you?

2 A. Yes, sir.

3 Q. Months?

4 A. Yes, sir.

5 Q. And again, not convicted of anything to get
6 you there, just the police messing with your mind,
7 weren't they?

8 A. Yes, sir.

9 Q. They were breaking you down. That's what you
10 knew at the time. They were breaking you down, right?

11 A. Yes, sir.

12 Q. And you were a pretty easy guy to break down,
13 weren't you?

14 A. I'd been in prison before.

15 Q. Well, but let's talk about your mental
16 health. You know your drug usage -- what was your
17 drug of choice back then?

18 A. There was no particular.

19 Q. Did you testify about six months ago that
20 mescaline was your drug of choice?

21 A. Yes.

22 Q. That's a hallucinogenic?

23 A. Yes.

24 Q. And you liked heroine?

25 A. No.

1 Q. You testified that you used to used heroine,
2 right?

3 A. Yes, sir.

4 Q. In fact, you've claimed in an interview that
5 Abe Alonzo used to give you money so you could buy
6 Cheeba, which is the street slang for heroine, right?

7 A. Yes, sir.

8 Q. And you liked methamphetamine and marijuana,
9 too, right?

10 A. Yes, sir.

11 Q. And you had a history of drinking to the
12 point of blacking out, didn't you?

13 A. Yes, sir.

14 Q. In fact -- let's see. Where is the rap
15 sheet?

16 In your presentence report in federal court,
17 you acknowledged that many years of heavy alcohol --

18 **MR. OSWALD:** Objection, Your Honor. It's
19 improper impeachment at this time. There is no
20 question. Nothing to refresh.

21 **THE COURT:** Lay a foundational question.

22 Q. **(BY MR. MURPHY)** The years of heavy alcohol
23 and drug use, it started to affect the way you -- your
24 ability to think clearly, hadn't it?

25 A. No, sir.

1 Q. Okay.

2 Didn't you tell the United States Probation
3 Office that many years of heavy alcohol and drug use
4 have affected your thought process and mental
5 condition?

6 A. What I witnessed impacted my --

7 Q. Did you tell the presentence -- the U.S.
8 Probation Officer who came and did an interview with
9 you back in 2004 that drugs and alcohol had affected
10 your mental health and your ability to remember
11 things?

12 A. I don't recall.

13 Q. You are not -- did you object to that
14 statement when it was in your presentence?

15 A. I have no -- I have -- I had no counsel with
16 me at the time and the PSI needed to be gone over.

17 Q. Right.

18 A. Exactly.

19 Q. And you and your attorney went over it?

20 A. No, we never did.

21 Q. Sir, at your sentencing hearing, the judge
22 went through the presentence with you.

23 Do you remember that?

24 A. No, sir.

25 Q. You don't remember there when the judge asked

1 if there was any objections to any of the things put
2 in the presentence?

3 A. No, sir.

4 Q. Okay.

5 You don't recall it or you are saying it just
6 didn't happen?

7 A. I don't recall.

8 Q. Because the years of heavy drug and alcohol
9 abuse have affected your ability to keep things
10 straight, right?

11 That's a fair statement?

12 A. Yes.

13 Q. Okay.

14 So even things that happened in 2004 when you
15 were locked up are hard to keep straight?

16 It's hard to recall those things, right?

17 A. No, sir.

18 Q. Well, you were in jail at the time you did
19 that presentence interview in 2004, right?

20 A. Yes.

21 Q. And you have been in jail or prison every day
22 since then, correct?

23 A. Correct.

24 Q. You haven't had access to illegal drugs or
25 alcohol, right?

1 **A.** Right.

2 **Q.** But here today even having six years of
3 sobriety, you can't say whether you went through that
4 presentence or whether the judge went through it with
5 you, can you?

6 **A.** No, sir.

7 **Q.** Okay.

8 In any regard, after you did that time in
9 Elreno, you came out of it knowing these guys were
10 playing for keeps, right?

11 These guys --

12 **A.** Yes.

13 **Q.** They wanted -- if you didn't give them the
14 story they wanted, you were going to have a pretty
15 miserable life, right?

16 **A.** Yes.

17 **Q.** And you knew the answers you had given them
18 so far weren't the answers they wanted, right?

19 **A.** Yes.

20 **Q.** You had told your story a couple times and
21 yet they are still sending you off to federal prisons
22 beg it be consistently just to be held and toyed with,
23 right?

24 **A.** Yes.

25 **Q.** So let's bring it up to 2,000. You are in

1 jail in December of 2000.

2 Do you recall that?

3 **A.** No, sir.

4 **Q.** Okay.

5 Do you recall Troy Lynn Yellow Wood and
6 Kamook coming to the jail to pick you up one day?

7 **A.** Yes, sir I do.

8 **Q.** And do you recall that being in the winter?

9 **A.** Yes, sir.

10 **Q.** Troy Lynn was a friend of yours, right?

11 **A.** Yes.

12 **Q.** And Kamook was a relative of yours? Kind of
13 attenuated relative?

14 **A.** No, sir.

15 **Q.** Don't you remember Kamook telling you that
16 you were half brothers with Richard Lee Lamont, right?

17 **A.** Right.

18 **Q.** And that she -- her mother was a Lamont,
19 right?

20 **A.** I guess.

21 **Q.** Okay.

22 And that -- that actually is right in the
23 beginning of the interview. She establishes she has a
24 family connection with you through the Lamonts.

25 Do you recall that now?

1 **A.** Yes, sir.

2 **Q.** So you are talking with friends and relatives
3 and you talk to them for hours, don't you?

4 **A.** Yes.

5 **Q.** They get you cigarettes, do you recall that?

6 **A.** Yes, sir.

7 **Q.** And got you breakfast? Although, actually,
8 it was about lunch. It was your first meal of the
9 day.

10 Do you remember that?

11 **A.** Yes, sir.

12 **Q.** Do you remember how your mind was really
13 foggy because of the pills they gave you in the jail?

14 **A.** Yes, sir.

15 **Q.** The jail gave you some kind of medication to
16 sedate you?

17 **A.** Yes, sir.

18 **Q.** They talked to you for 257 pages.

19 You have seen this transcript before, haven't
20 you?

21 **A.** Yes, sir.

22 **Q.** In fact, you have been able to read a lot of
23 the discovery if your case over the last six or seven
24 years?

25 **A.** No, sir.

1 **Q.** Well, you went through a federal prosecution
2 for murder, right?

3 **A.** I did not go through the files.

4 **Q.** You didn't read your own files?

5 **A.** Some.

6 **Q.** Some. Okay.

7 Well, you are talking now, not to cops, but
8 to friends and relatives and you are asked about
9 whether there was any sexual activity between my
10 client, John Graham, and Anna Mae Aquash.

11 Do you recall them bringing that topic up?

12 **A.** Yes, sir.

13 **Q.** And actually they bring it up twice, and on
14 both occasions, you say, didn't happen.

15 Do you remember that?

16 **A.** Yes.

17 **Q.** In fact, you said they were hanging out in a
18 room and it sounded like they were playing cards and
19 talking.

20 Do you remember that?

21 **A.** Yes, sir.

22 **Q.** You also don't bring up Dick Marshall, do
23 you?

24 **A.** Yes, sir.

25 **Q.** And you don't bring up a note, do you?

1 **A.** No, sir.

2 **Q.** You don't bring up anything about seeing a
3 gun being passed from to Theda?

4 **A.** Yes, sir.

5 **Q.** And that's because you don't even acknowledge
6 ever being in Dick Marshall's house at that the point,
7 do you?

8 **A.** Yes.

9 **Q.** That's because it hadn't become part of the
10 story line, right?

11 **MR. OSWALD:** I will object as argumentative,
12 Judge.

13 **THE COURT:** Sustained.

14 **Q.** **(BY MR. MURPHY)** Okay. I will rephrase that.
15 At the time that you ultimately got
16 prosecuted in 2003, the prosecution was painting a
17 different story of this whole case.

18 Do you remember that?

19 **A.** No, sir.

20 **Q.** Well, they didn't have a component about
21 going out to Rosebud, did they?

22 That wasn't even part of the picture, was it?

23 **A.** No, sir.

24 **Q.** You hadn't learned what their theory of the
25 case was at that point nor had you in 2000, had you?

1 **A.** Yes, sir.

2 **Q.** You didn't know Dick Marshall was going to be
3 a suspect, did you?

4 **A.** No, sir.

5 **Q.** You didn't know he was going to get charged
6 in 2008, did you?

7 **A.** No, sir.

8 **Q.** And so at that point, even though you talked
9 for nine cassettes, 257 pages, details like sexual
10 conduct between my client and Dick Marshall don't even
11 come up, do they?

12 **A.** No, sir.

13 **Q.** And the issue about sex does come up twice
14 but both times you deny it, right?

15 **A.** Yes, sir.

16 **Q.** And at that time my client hadn't been
17 charged, had he?

18 **A.** I don't recall.

19 **Q.** Well, he was charged with you, originally
20 wasn't he?

21 **A.** Yes, sir.

22 **Q.** And you weren't charged till 2003, right?

23 **A.** Yes.

24 **Q.** And he wasn't charged in state court until
25 2008, was he?

1 **A.** Yes, sir.

2 **Q.** And that's when they made the sex allegation
3 for the first time, isn't it?

4 **A.** Yes, sir.

5 **Q.** And that's the first time you ever testified
6 about hearing any noises consistent with sexual
7 activity, isn't it?

8 **A.** Yes, sir.

9 **Q.** Okay.

10 So that detail got added in 2008 when they
11 started saying my client raped Anna Mae Aquash, do you
12 recall that now?

13 **A.** Yes, sir.

14 **Q.** Okay.

15 That was pretty helpful to them, wasn't it,
16 when you started saying, after 20 years of giving
17 statements, that he did that?

18 That was pretty helpful to those guys?

19 **A.** It was the truth, sir.

20 **Q.** Awe.

21 Just wasn't the truth when you talked to
22 friends and relatives for six hours, right?

23 **A.** That's questionable, sir.

24 **Q.** It's questionable --

25 **A.** That they are my friends other relatives.

1 Never knew them before.

2 Q. Troy Lynn Yellow Wood?

3 A. Yes.

4 Q. Troy Lynn Yellow Wood was a woman who let you
5 stay at her house?

6 A. I never stayed at her place.

7 Q. Oh.

8 So if she said you were free to come and go
9 at her house and crash at her house, she was lying?

10 A. She wasn't lying, but I never stayed at her
11 place.

12 Q. You weren't allowed to just walk in the front
13 door without knocking?

14 A. I knocked.

15 Q. You always knocked?

16 A. Yes, sir.

17 Q. So you weren't going to tell Troy Lynn and
18 Kamook the truth because you didn't like them?

19 A. I really didn't know them, sir.

20 Q. Well, you spent six hours talking to them.

21 A. They talked to me.

22 Q. They talked to you, you talked to them. They
23 asked you questions about what did it sound like when
24 John and Anna were together. I don't know. Some card
25 games or something like that.

1 That's the kind of thing you told them,
2 right?

3 **A.** Yes.

4 **Q.** And if you were interested if the truth then,
5 certainly the truth at that point didn't involve sex,
6 did it?

7 **A.** Yes.

8 **Q.** All right.

9 And back then when you are talking you said
10 you never saw the gun. You didn't even know one
11 existed, did you, didn't you?

12 **A.** Yes, sir.

13 **Q.** Today you tell a story this gun is being
14 handed back and forth to you. You see it in Dick
15 Marshall's house. You know it's a revolver. It's got
16 a red handle. But back then when you are talking to
17 somebody who at least thinks she's your friend and
18 let's you say at her house, and somebody who is
19 related to you through your families, you say I didn't
20 see a gun, right?

21 **A.** Right.

22 **Q.** During this long discussion with Kamook and
23 Troy Lynn, they start telling you that my client is
24 blaming you for the killing of Anna Mae Aquash, don't
25 they?

1 **A.** Yes.

2 **Q.** You didn't know that they were lying to you,
3 did they?

4 **A.** No.

5 **Q.** My client was up in Canada. He hadn't said a
6 word about you being involved in this.

7 You know that now, don't you?

8 **A.** Yes.

9 **Q.** But back then, the year 2000, they tell you
10 it's going to be your word against his and he's saying
11 you committed the crime.

12 That gets you mad, doesn't it?

13 **A.** Yes, sir.

14 **Q.** And you ask Kamook, how many people should I
15 implicate, huh? And she tells you only John Boy,
16 right.

17 **A.** Yes.

18 **Q.** And she further tells you she's the FBI
19 informant. She's working with law enforcement. But
20 she tells you, because it's going to come down to
21 pretty much your word against his, right?

22 **A.** Yes, sir.

23 **Q.** She's setting you up to tell you to keep
24 pointing the finger at my client, right?

25 Isn't that the case?

1 **A.** Yes, sir.

2 **Q.** And the only person she wants you to
3 implicate is John Graham, right?

4 That's what she tells you, only John Boy?

5 **A.** I would like to be explain.

6 **Q.** No. I am asking you what she said -- you
7 said --

8 **A.** Okay, yes.

9 **Q.** She gave you one name?

10 **A.** Yes.

11 **Q.** Did it seem odd to you that at that point
12 she's telling you who to implicate?

13 **A.** I would like to explain.

14 **Q.** Well -- did it seem --

15 **A.** Yes.

16 **Q.** All right.

17 Because you knew at this point or you
18 believed at this point that Kamook and Anna -- or
19 Kamook didn't like Anna Mae?

20 **A.** I don't know.

21 **Q.** You made that statement in recorded jail
22 calls that you knew Kamook didn't like Anna.

23 Do you recall making those statements?

24 **A.** Yes.

25 **Q.** Because Anna Mae was having an affair with

1 her husband, right?

2 A. Right.

3 Q. And then you are talking to this woman who
4 doesn't like Annie Mae, according to what you
5 believed. Was the wife who was betrayed by Annie Mae.
6 And she's telling you to point the finger at somebody
7 else.

8 Did you think you were getting played at that
9 point?

10 A. Yeah. I thought the whole thing was just
11 like a gest.

12 Q. Like a gest?

13 A. Yes.

14 Q. You didn't know you were being recorded?

15 A. I thought they were just kind of like fooling
16 around.

17 Q. When you talked to them for all this time?

18 They were fooling around when they asked you
19 if you ever heard sex or all these other detailed
20 questions they asked you, that was just joking around?

21 A. I didn't know who these people were.

22 Q. Well, you knew Troy Lynn from way back in the
23 1970s?

24 A. Exactly.

25 Q. And you had contact with her all through from

1 1970s, 1980s, 1990s. This is all the way in 2000.

2 A. Right.

3 Q. You knew her pretty darn well?

4 A. Yes, sir.

5 Q. Okay.

6 Another thing you left out in this is any
7 discussion of any alleged meeting or any other
8 activity up at the Wounded Knee Legal Defense Offense
9 Committee, right?

10 A. Yes, sir.

11 Q. You said you guys, meaning you, Anna, and
12 John, stayed in an apartment for the entire time you
13 were up in Rapid City.

14 Do you remember telling them that?

15 A. Yes.

16 Q. Nobody left other than Theda to get some
17 food, right?

18 A. Yes, sir.

19 Q. All right.

20 But things started changing pretty quickly
21 after the 2000 interview. Specifically in 2003 you
22 were charged with one count of murder, right?

23 Do you remember that?

24 A. Yes.

25 Q. And you said you were convicted of aiding and

1 abetting.

2 Do you remember that?

3 A. Yes, sir.

4 Q. But you were charged with committing the
5 murder or aiding and abetting, right?

6 A. Yes.

7 Q. Charged either way?

8 A. Yes, sir.

9 Q. And the jury didn't have to find you guilty
10 of one or the other, they could have found you guilty
11 of both, right?

12 A. Yes.

13 Q. So you don't know if they found you guilty of
14 aiding and abetting or being the shooter, do you?

15 MR. OSWALD: Objection, Your Honor.

16 THE COURT: It's a fair question.

17 Q. (BY MR. MURPHY) You might answer the
18 question.

19 A. Yes, I don't know.

20 Q. You don't know. Okay.

21 Well, you are charged with murder. You are
22 facing life, right?

23 You know that?

24 A. Yes, sir.

25 Q. And you decide to go back one more time and

1 talk with Mr. Ecoffey.

2 Do you remember that?

3 Do you remember that.

4 A. Yes.

5 Q. He reads you your Miranda rights and all of
6 that. Gives you all the warnings required under the
7 law, right?

8 A. Right.

9 Q. And at this point, you are fighting for your
10 life, fair statement?

11 A. Yes.

12 Q. I mean, you don't want to go to prison. You
13 don't want to go down for this murder rap, do you?

14 A. Yes, sir.

15 Q. You have every incentive to tell them what
16 they want to hear, don't you?

17 A. Just the truth, sir.

18 Q. Well, okay.

19 You are asked if you hear my client having
20 any sexual activity with Anna Mae.

21 Do you remember that?

22 A. Yes, sir.

23 Q. And what you told them is, I don't think she
24 was tied up in a room. I don't know. I think she was
25 talking to John -- John Boy. They asked, okay. You

1 answer, they must have known each other.

2 Is that accurate?

3 A. Yes.

4 Q. And you also tell Mr. Ecoffey, while you are
5 trying to make the deal of your life, that the three
6 of you, John, Anna, and you, yourself, you three,
7 stayed in the apartment, that empty apartment, the
8 entire time. None of you left.

9 Do you remember that?

10 A. Yes, sir.

11 Q. And nobody went down to the WKLDQC office.
12 Do you remember telling them that?

13 A. No, sir.

14 Q. Okay.

15 You were asked the question, okay, Arlo, you
16 didn't take her down to the Wounded Knee defense house
17 that day. I don't think so. No. We just stayed in
18 that house all day.

19 That's what you told them?

20 A. Yes.

21 Q. And you told them that John was -- or that --
22 excuse me. That Anna Mae was not tied up during this
23 event, right?

24 A. Right.

25 Q. And you never mentioned Dick Marshall or

1 going to his house, right?

2 A. Right.

3 Q. And you say that you shot the gun into the
4 ground, right?

5 A. Yes.

6 Q. Because you hadn't gotten your discovery yet
7 so you hadn't figured out that the metal detector had
8 searched the ground, right?

9 A. Yes.

10 Q. So at this point you are still telling the
11 shooting the ground story; you hadn't quite moved to
12 the shooting into the air story?

13 A. Fair.

14 Q. That didn't come until later once you got the
15 police reports?

16 A. Right.

17 Q. In fact, they repeated asked you about Dick
18 Marshall. You don't mention anything about him, fair?

19 A. Fair.

20 Q. You don't mention anything about the red
21 lights that you say you saw today. You don't mention
22 seeing a gun passed from Dick Marshall to Theda,
23 right?

24 A. True.

25 Q. No bullets? None of that stuff?

1 **A.** True.

2 **Q.** At that point, sir, you have the biggest
3 incentive in the world to give them the complete
4 story, don't you?

5 **A.** Yes.

6 **Q.** But you don't know what story they want to
7 hear yet, do you?

8 **A.** No, sir.

9 **Q.** Okay.

10 So you can't give them all the details they
11 want. You give those details, later, once you figure
12 out what they want to hear?

13 **A.** No, sir.

14 **Q.** Well, 2008 your story gets a lot different,
15 doesn't it?

16 **A.** Yes, sir.

17 **Q.** All right.

18 Well, things don't work out for you in 2003.
19 You get convicted at trial in 2004.

20 Do you remember that?

21 **A.** Yes.

22 **Q.** You get sentenced to life, right?

23 **A.** Yes, sir.

24 **Q.** And right after you get sentenced to life --
25 well, let's talk about your trial first. Let me back

1 up.

2 You go to trial. You call one witness,
3 right?

4 A. Yes.

5 Q. That guy testifies for about five minutes,
6 right?

7 A. Yes, sir.

8 Q. You come to the conclusion your trial was a
9 complete farce, right?

10 It was a joke?

11 A. Yes, sir.

12 Q. You didn't get a fair trial?

13 A. Yes, sir.

14 Q. You claim your attorney dropped the ball?

15 A. Yes, sir.

16 Q. You also claim that nobody would listen to
17 you when you tried to tell them about dropping Anna
18 Mae off at a safe house.

19 Remember that?

20 A. No, sir.

21 Q. Didn't you tell David Seals that in an
22 interview in February of 2004?

23 A. No, sir.

24 Q. He came to the jail and interviewed you, do
25 you remember that?

1 **A.** Yeah. He was some kind of a writer.

2 **Q.** Yeah. A writer.

3 And you told him that you visited your
4 friend, Tony Red Cloud, in Rapid City and wasn't even
5 with Annie Mae after they dropped off her off at a
6 safe house on Pine Ridge 100 miles from Rapid City.
7 You told him, I never saw her again or even John Boy I
8 don't think.

9 That's what you told him, right?

10 **A.** Yes, sir.

11 I can't explain, though, right?

12 **Q.** Well, you can explain at some point, but I'm
13 asking you, that's what you told this guy, right?

14 **A.** Yes.

15 **Q.** That you and John dropped Annie Mae at a safe
16 house in Pine Ridge, right?

17 **A.** Well, that's what he said.

18 **Q.** Okay.

19 But you just said that's what you said.

20 You remember saying that now, don't you?

21 **A.** I didn't say it, but he said it.

22 **Q.** So he got it wrong?

23 **A.** Yes.

24 **Q.** In fact, up until the jail records showed
25 that he had come over and visited you, you denied that

1 he even did that interview, didn't you?

2 A. Yes, sir.

3 Q. Okay.

4 But then when they showed you, hey, we got
5 jail cards proving this guy gave the interview, then
6 you said, yeah, maybe he did interview me, but now he
7 wrote it down wrong.

8 That's how things have changed?

9 A. Yes, sir.

10 Q. Shortly after you were convicted, about six
11 months after you got that life sentence, you were
12 asked by Mr. Mandel to go before a Grand Jury.

13 Do you remember that?

14 A. Yes, sir.

15 Q. And what you told the Grand Jury is is that
16 you were innocent of the charges?

17 A. Yes, sir.

18 Q. But nobody would listen to you, right?

19 A. Yes, sir.

20 Q. So you appealed your sentence trying to get
21 your conviction and your life sentence overturned,
22 right?

23 A. Yes.

24 Q. And again, you made the same arguments. You
25 said, hey, I'm innocent, and my attorney didn't

1 present the defense I wanted him to.

2 Remember that?

3 A. I didn't go through the appeal.

4 Q. Well, you testified before that you read the
5 appeal.

6 A. Well, after it was done.

7 Q. And that was --

8 A. After it was affirmed.

9 Q. After it was affirmed.

10 So you know what your attorney said on your
11 behalf?

12 A. After it was affirmed.

13 Q. Right.

14 And that attorney was Terry Gilbert?

15 A. Yes.

16 Q. A really well-known attorney from out in
17 Ohio, right?

18 A. I don't know.

19 Q. Well, he wasn't the attorney who took your
20 case to trial, right?

21 A. Right.

22 Q. But the Eighth Circuit didn't agree with you
23 and they affirmed your life sentence?

24 A. Yes.

25 Q. And that came down in 2005, and so at that

1 point you had run the course of appeals, hadn't you?

2 A. Yes.

3 Q. Things were starting to look pretty grim?

4 A. Well, I had two more appeals, I think.

5 Q. Okay.

6 We'll talk about those in a second. In the

7 meantime you are sent down to a --

8 Who do you keep looking at over there?

9 A. I am looking at the clock.

10 Q. Okay.

11 You are looking somewhere over there aren't
12 you, though?

13 A. I was looking at the time.

14 Q. When I ask you a question you keep looking
15 over there?

16 A. I am just looking at the time.

17 Q. Really? Each question?

18 A. Yes.

19 Q. All right.

20 You get sent down to a prison down in
21 Louisiana in the meantime, don't you?

22 A. Yes, sir.

23 Q. And it's a hell hole?

24 A. Yes.

25 Q. People are getting stabbed every week?

1 **A.** Yes.

2 **Q.** People are dying, get murdered regularly?

3 **A.** Yes.

4 **Q.** There is the Arian Brotherhood, the Mexican
5 Mafia, the Bloods, Crips, assorted other gangs?

6 **A.** Yes.

7 **Q.** You are not part of a gang?

8 **A.** No.

9 **Q.** And you are all alone there, aren't you?

10 **A.** Yes.

11 **Q.** And it's a dangerous place to be alone, isn't
12 it?

13 **A.** Yes.

14 **Q.** So at that point you have lost your appeals,
15 you start doing some other appeals, some petitions, to
16 get your conviction thrown out, a habeas corpus
17 action, right?

18 **A.** Yes.

19 **Q.** You are hoping that will get you out, right?

20 **A.** Yes, sir.

21 **Q.** Bring the same causes of action. You say
22 that your attorney dropped the ball and nobody
23 listened to your defense?

24 **A.** Yes, sir.

25 **Q.** But that's denied as well, right?

1 **A.** I don't recall.

2 **Q.** Do you recall testifying that it was denied?

3 I didn't hear your answer.

4 **A.** Yes.

5 **Q.** You testified before that it was denied?

6 **A.** One of them was.

7 **Q.** Do you have another one going out there?

8 **A.** Yes.

9 **Q.** Is that your Rule 35 motion?

10 **A.** No, sir.

11 **Q.** You have two habeases going?

12 **A.** Yes.

13 **Q.** That other one is just kind of floundering
14 out there, right?

15 **A.** Yes.

16 **Q.** You don't know what is happening with it?

17 **A.** Yes, sir.

18 **Q.** You are certainly not banking on that to get
19 you out of prison, are you?

20 You are not counting on that to get you out
21 of prison?

22 **A.** Yes, sir.

23 **Q.** What you are counting on getting you out of
24 prison is your cooperation in this case, right?

25 **A.** Yes, sir.

1 Q. All right.

2 A. If I speak the truth.

3 Q. Well --

4 A. -- they will.

5 Q. And we have already talked about your various
6 versions of the truth and we'll get back to that.

7 Things changed in 2007. You had run your
8 appeals. You will lost your first habeas. But in
9 2007, my client, John Graham, was brought back to the
10 United States.

11 Do you recall that?

12 A. Yes, sir.

13 Q. And he was charged over in federal court,
14 right?

15 A. Yes, sir.

16 Q. And he was charged with Dick Marshall, right?

17 A. Yes, sir.

18 Q. And the government came to you again with
19 another immunity agreement.

20 Do you remember that?

21 A. No, sir.

22 Q. Handing you August -- a letter dated
23 August 8, to your then attorney, John Schlingin,
24 correct?

25 Let me break it up. Is the letter dated

1 August 8, 2008?

2 A. Yes.

3 Q. And is John Schlingin the person who it's
4 addressed to?

5 A. Yes, sir.

6 Q. And was he your attorney at the time?

7 A. Yes, sir.

8 Q. And he -- and is it captioned *United States*
9 *vs John Graham*?

10 A. Yes, sir.

11 Q. All right.

12 And does it start by saying this confirms
13 conversations in which you, Mr. Schlingin, indicated
14 that you, Mr. Looking Cloud, would be willing to
15 provide information and testimony against Mr. Graham?

16 A. Yes, sir.

17 Q. All right.

18 So when I talk about the immunity agreement
19 that they gave you in 2008, you agree this is
20 basically that agreement?

21 A. Yes, sir.

22 Q. All right.

23 You actually, by this point, 2008, have
24 multiple attorneys working on your behalf, don't you?

25 A. Yes, sir, I do.

1 Q. You have a guy from Boston, a guy named Barry
2 Bachrach?

3 A. Yes, sir.

4 Q. He used to be Leonard Peltier's attorney?

5 A. Yes, sir.

6 Q. In fact, he ran Leonard Peltier's
7 presidential campaign at one point.

8 Were you aware of that?

9 MR. OSWALD: Objection. Relevancy.

10 MR. MURPHY: I will tie it in.

11 THE COURT: Continue.

12 Q. (BY MR. MURPHY) Do you recall that?

13 A. No, sir.

14 Q. Okay.

15 Do you recall knowing that he was Peltier's
16 attorney for a while, right?

17 A. Right.

18 Q. And that he was fired by Peltier?

19 A. I wouldn't know.

20 Q. Okay.

21 And anyways, he agreed to work for you for
22 free, right?

23 A. Yes, sir.

24 Q. And essentially, your case, you knew, was
25 about trying to get back at Leonard Peltier, right?

1 **A.** I am sorry. The question?

2 **Q.** You knew part of your case, part of the
3 interest in your case, was to prevent Leonard Peltier
4 from getting paroled, didn't you?

5 **A.** No, sir.

6 **Q.** You never heard that?

7 **A.** No, sir.

8 **Q.** You never testified about that before?

9 **A.** No, sir.

10 **Q.** Well, August 8, they come to you. They say,
11 let's make a deal. We now got Dick Marshall and John
12 Graham indicted in federal court, right?

13 **A.** Yes, sir.

14 **Q.** And so for the first time now, in -- well,
15 let me put it this way. Fourteen days after you enter
16 that immunity agreement, you go before a Federal Grand
17 Jury.

18 Do you recall that?

19 **A.** Yes, sir.

20 **Q.** August 20, 2008?

21 **A.** Yes, sir.

22 **Q.** For the first time in 14 years, through all
23 the repeated times you told this story, suddenly you
24 add major new details.

25 Do you remember that?

1 **A.** Yes, sir.

2 **Q.** The first time in 14 years you indicated that
3 Anna Mae was tied up.

4 Do you remember that?

5 **A.** Yes, sir.

6 **Q.** Because they told you they needed her to be
7 tied up, didn't they?

8 **A.** No, sir.

9 **Q.** They told you that kidnapping was going to be
10 part of the equation.

11 Do you remember that?

12 **A.** No, sir.

13 **Q.** You were staying fully aware of what this
14 case was all about. This was a great interest to you,
15 right?

16 **A.** Yes, sir.

17 **Q.** In fact, it was of great interest to you
18 because when you got those other attorneys and you
19 entered that immunity agreement, you started working
20 on what's called a Rule 35 motion.

21 Do you remember that?

22 Do you remember that?

23 **A.** No, sir.

24 **Q.** You don't remember testifying about your
25 Rule 35 motion?

1 Well, let me put it to you this way. Do you
2 remember that your attorneys were going to ask the
3 government not for some letter like Mr. Oswald was
4 talking about, but your attorneys were asking the
5 government to go into federal court, to go back in
6 front of Judge Piersol and to ask on your behalf for
7 Judge Piersol to reduce your sentence.

8 Do you remember that?

9 A. Yes, sir.

10 Q. That's the Rule 35 motion that I'm talking
11 about.

12 Do you remember now that that's what that's
13 called, that Rule 35 motion?

14 A. Yes, sir.

15 Q. In fact, you just testified about it in Dick
16 Marshall's trial six months ago, right?

17 A. I was told that if I spoke the truth that
18 they would agree that they would speak to the Court.

19 Q. They would speak to the Court to get you out
20 of your life sentence, right?

21 A. Yes.

22 Q. And in fact, you have said on a number of
23 occasions, since you started working that deal, that
24 that's what this is all about, getting you out of
25 prison, right?

1 **A.** The truth.

2 **Q.** No. That's not what you said when you were
3 giving recorded jail conversations.

4 In those conversations somebody asked you
5 what's this all about and you said it's about getting
6 out.

7 Do you remember that?

8 **A.** No, sir.

9 **Q.** Do you remember telling people in those
10 conversations that you expected to be out soon?

11 **A.** No, sir.

12 **Q.** You expected -- in fact, one of your friends
13 told you that once you got out he would be over so you
14 guys could hang out and party a bit together?

15 **A.** No, sir.

16 **Q.** Do you remember talking to your friends in
17 Lakota because you didn't think other people could
18 hear you when you were talking about working this deal
19 to get out?

20 **A.** No, sir.

21 **Q.** So if the recorded jail conversations show
22 that, they are somebody else's conversations?

23 **A.** No, sir.

24 **Q.** They would be your conversations?

25 **A.** Yes.

1 Q. All right.

2 This Rule 35, you know what information they
3 want to hear, don't you?

4 A. Just the truth.

5 Q. You have been asked to tell the truth a
6 number of times before, right?

7 A. Yes.

8 Q. And in fact, you have acknowledged you don't
9 have any problem lying to law enforcement to cut a
10 deal, do you?

11 A. No, sir.

12 Q. You said you don't feel bad using the
13 government to get out of prison, correct?

14 A. No, sir.

15 Q. You didn't say that?

16 A. Yes --

17 Q. Did you say it or not?

18 A. The question, please.

19 Q. The question is, you have said before under
20 oath that you don't feel bad about using the
21 government to get out of prison?

22 A. No, sir.

23 Q. Dick Marshall's trial just six months ago,
24 you were asked, and so you didn't feel bad if you
25 could use the government to get out of prison, right?

1 Your answer, yes. Question, and they had lied to you.
2 You didn't feel bad if you lied to them to get out of
3 prison, right? Answer, no.

4 Remember that?

5 A. I didn't understand the question.

6 Q. You didn't understand those questions?

7 A. Yes.

8 Q. What was ambiguous about them?

9 What was confusing?

10 A. I am sorry. I'm not too aware of the English
11 language.

12 Q. You have been speaking the English language
13 in this room perfectly well for two hours, sir.

14 A. I am sorry. I don't understand ambiguous.

15 Q. Okay.

16 What was hard to understand about those
17 questions that you were asked just six months ago?

18 A. I just didn't understand it.

19 Q. You didn't understand --

20 A. Yeah.

21 Q. The question, and so you didn't feel bad if
22 you could use the government to get out of prison,
23 right? Your answer, yes.

24 Let me ask you, do you recall the question,
25 and in fact, in the course of your experience in the

1 criminal justice system, you have frequently lied to
2 law enforcement officers, haven't you? Your answer,
3 yes.

4 A. Yes.

5 Q. And we talked previously about your 12 prior
6 convictions for giving false statements, right?

7 Correct?

8 A. Yes.

9 Q. Okay.

10 No question about those. Those aren't part
11 of the rap sheet that you dispute?

12 A. I don't know what you mean.

13 I have two felony conviction --

14 Q. There is no question before you.

15 Let me just look through my notes.

16 One of the other issues that came up after
17 you started working this cooperation agreement in 2008
18 was the gun. Because that was the first time after
19 all these years of telling your story, the first time
20 you ever admitted or acknowledged or even thought
21 about being at Dick Marshall's house, right?

22 A. Yes.

23 Q. And you went into court at Dick Marshall's
24 trial, and you didn't really know exactly what you
25 were supposed to say, did you?

1 **A.** Just the truth.

2 **Q.** You didn't know the questions you were going
3 to be asked, did you?

4 **A.** No. No, sir.

5 **Q.** And so you were asked, where did you get this
6 gun -- or excuse me. You were asked, where did Dick
7 Marshall pull this gun out of? And you said, from the
8 night stand next to the bed.

9 Do you remember that?

10 **A.** Yes, sir.

11 **Q.** You said that under oath. That was supposed
12 to be the truth at that point, right?

13 **A.** It is the true, yes, sir.

14 **Q.** And he reached in one of the drawers from the
15 night stand.

16 Do you remember telling them that?

17 **A.** Yes.

18 **Q.** But, what came out during your testimony at
19 Dick Marshall's trial is that there was no drawers in
20 the night stand.

21 Remember that?

22 **A.** I didn't hear other testimony.

23 **Q.** Well, you have said before that you've read
24 through Cleo Gates' testimony.

25 Do you remember that?

1 A. Yes.

2 Q. And Cleo Gates was the witness who said there
3 were no drawers in that night stand?

4 A. I didn't hear her testimony at that trial.

5 Q. You heard it since then?

6 A. Since then I have heard.

7 Q. Yeah.

8 A. But she's mistaken.

9 Q. You heard it since then and so today, rather
10 than repeat the night stand truth, you say the gun and
11 the bullets came from the bottom drawer of the
12 dresser, right?

13 A. Night stand, dresser, still the same.

14 Q. Well, you were pretty specific before. You
15 were asked point blank questions and you described a
16 night stand next to the bed.

17 A. Well, I -- same thing.

18 Q. But once --

19 A. The point is --

20 Q. -- once you read Cleo Gates' testimony and
21 you find out that a government witness says there was
22 no drawers in that night stand, now you are very clear
23 today that you saw Dick Marshall get down there and
24 pull that bottom drawer out?

25 A. Still means the same thing.

1 Q. That's the same thing?

2 A. Yeah.

3 Q. Same thing but it's a pretty important thing?

4 A. The point is he got the gun from the dresser
5 or whatever. The drawer.

6 Q. You needed to do some damage control to
7 change your statement so that you wouldn't get caught
8 up in that same lie again, right?

9 A. No, sir.

10 Q. That's why today it's the drawer and the
11 dresser, last time it was the night stand. Doesn't
12 have a drawer.

13 The only thing that changed is in between you
14 found out about what Cleo's testimony is, right?

15 A. No, sir.

16 Q. That's how you worked the system over and
17 over again during these 14 years of giving statements,
18 right?

19 A. No, sir.

20 Q. Well, up until they offered you the Rule 35
21 to get you out of that life sentence, you have given
22 hundreds of pages of statements, recorded and
23 otherwise, right?

24 A. Yes, sir.

25 Q. And every one of those up until 2008, John

1 and Anna Mae got together -- got along together like
2 friend, right?

3 That's what you always said?

4 **A.** Yes, sir.

5 **Q.** And that when you saw them together they were
6 talking or they were playing cards, right?

7 **A.** Yes, sir.

8 **Q.** And when you were asked point blank about
9 rape or sex between them, you said all I heard was
10 them talking and playing cards, right?

11 **MR. OSWALD:** Objection. Asked and answered,
12 Judge. Three times.

13 **MR. MURPHY:** I will move on.

14 **THE COURT:** Overruled.

15 **Q.** **(BY MR. MURPHY)** Fourteen years, given this
16 statement over and over again, talking with friends,
17 talking with family, trying to work deals, you never
18 mentioned going into Dick Marshall's house, you never
19 mentioned seeing a gun being taken out of a drawer,
20 you never mention a note, anything like that, right?

21 **A.** Right.

22 **Q.** Today you talked about standing outside at
23 this house in Rosebud and that you went into the house
24 at one point to go to the bathroom, right?

25 **A.** Yes, sir.

1 Q. And you were asked about that one previous
2 time and you said that you had to go in and urinate,
3 right?

4 A. Yes.

5 Q. And the government asked you to add that
6 detail in because they were trying to make a case that
7 there was some contact out in Rosebud.

8 Do you remember that?

9 A. The question, please?

10 Q. There came a point after 14 years of giving
11 this statement that the government changed its theory
12 about what happened and they said that the group of
13 you went to Rosebud.

14 Do you remember that?

15 Let me put it to you this way. Fourteen
16 years of statements, you never once mentioned going to
17 Rosebud, right?

18 A. Yes, sir.

19 Q. And then in 2008 you are in Rosebud, right?

20 A. Yes, sir.

21 Q. And to kind of drive the point home, they
22 asked you to put yourself actually inside a house on
23 Rosebud, right?

24 A. No, sir.

25 Q. Well, that's the first time you ever

1 indicated that you had to go pee so you went into the
2 house, right?

3 A. Yes, sir. I had to piss.

4 Q. Sir, starting well before 1975 and continuing
5 well after, you have had conviction after conviction
6 for public urination, right?

7 A. Yes, sir.

8 Q. And so -- but out there in the middle of the
9 reservation, after 14 years of omitting that detail,
10 suddenly you decide you have to go inside this
11 person's house, whom you don't know, to use the
12 bathroom to urinate, right?

13 A. Yes, sir.

14 Q. Okay.

15 But that became a pretty important detail for
16 the government, right, in Dick Marshall's trial?

17 A. Yes, sir.

18 Q. Okay.

19 You were asked questions about your
20 conversation in 2003, 2002 with Denise Maloney.

21 Do you remember that?

22 A. Yes.

23 Q. You call up the daughter of a woman who has
24 been killed, right?

25 A. Yes, sir.

1 Q. And you are -- you were asked whether you
2 told her the story about what happened, right?

3 A. Yes, sir.

4 Q. That would be a pretty important person to
5 tell the truth to, wouldn't it be?

6 A. Yes, sir.

7 Q. And you told her that you never even got out
8 of the car on the night in question, but that John and
9 Theda went out and shot Anna Mae, right?

10 A. I don't recall.

11 Q. You don't recall telling her that, huh?

12 Well, let me ask you this, if you had told
13 her that, that's at different truth than the truth you
14 are giving today, right?

15 A. Yes, sir.

16 Q. Okay.

17 And it's a different truth that -- than you
18 gave on and off over the last 14 years, right?

19 A. Yes.

20 Q. The truth kind of moves around a bit here,
21 doesn't it?

22 A. Yes.

23 Q. One of the things that changed is the
24 discussion about a fence --

25 **THE COURT:** Mr. Murphy, it's 5:00.

1 **MR. MURPHY:** Can we go another five minutes
2 and I may be able to finish.

3 **THE COURT:** That's a question.

4 **MR. MURPHY:** Yeah. I think so.

5 **THE COURT:** By 5:15.

6 **MR. MURPHY:** Okay. Great.

7 **THE COURT:** I promised them five o'clock.

8 **MR. MURPHY:** If anybody has scheduling issues
9 I am willing to cut off now.

10 **THE COURT:** Let's do that and we'll come in
11 tomorrow.

12 **MR. MURPHY:** Okay. Very well.

13 Thanks.

14 **THE COURT:** Ladies and gentlemen, we're in
15 recess once again for the evening. You are reminded
16 you may not talk to anybody about this case. You may
17 not read news, watch news, or form any opinions on it
18 until we give it to you for final determination.

19 Thank you.

20 (Whereupon, the following proceedings were
21 then had in open court and out of the presence of the
22 jury.)

23 **MR. MURPHY:** Your Honor, I'd ask that the
24 witness not be allowed to communicate with any
25 attorneys or any of the parties while he's still on

1 the stand.

2 **THE COURT:** That's good. You may not talk to
3 any of the attorneys while you are still on the stand.

4 **MR. MURPHY:** We'd ask that be including
5 investigators and other personnel of the prosecution.

6 **THE COURT:** Say again.

7 **MR. MURPHY:** I'd like that to include
8 investigators and other personnel.

9 **THE COURT:** Yeah, nobody, about this case.
10 We'll see you tomorrow.

11 (Whereupon, the proceedings in this matter
12 were then concluded.)

13

14

15

16

17

18

19

20

21

22

23

24

25

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

3
 4
 5
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

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

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

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

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

COPY

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