


UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

**FILED**  
MAR 23 2009  
  
CLERK

UNITED STATES OF AMERICA,  
Plaintiff,

Case No. CR 08-50079

vs.

JOHN GRAHAM, a.k.a.  
JOHN BOY PATTON, and  
VINE RICHARD MARSHALL, a.k.a.  
RICHARD VINE MARSHALL, a.k.a.  
DICK MARSHALL,  
Defendants.

DEFENDANT MARSHALL'S  
RESPONSE IN OPPOSITION TO  
GOVERNMENT'S NOTICE OF  
*RES GESTAE* / RULE 404(B) EVIDENCE;  
AND MOTION IN LIMINE

NOW COMES defendant Richard Marshall, by and through his attorney, Dana L. Hanna, and hereby responds in opposition to the government's Notice of *Res Gestae* Evidence or in the Alternative Federal Rule of Evidence 404(b) Regarding Montileaux Incident [doc. #201] and with respect thereto, pursuant to Federal Rules of Evidence 403 and 404(b), the defendant moves for an order *in limine* precluding the government from offering or eliciting any evidence in trial regarding defendant's prior offense. Grounds for the motion *in limine* are that evidence concerning the defendant's prior offense is not *res gestae* evidence because the facts of the defendant's prior offense have absolutely no connection or relevance to the killing of Anna Mae Aquash on December 12, 1975; and that evidence of the defendant's prior offense is inadmissible under FRE Rule 404(b) because it has no probative value or relevance to any issue of fact in this case, it is extremely prejudicial, and it is only being offered in an attempt to prove the defendant's propensity to commit the crime charged.

The factual assertions made by the government in its filing are erroneous and untrue; such mis-statements of fact were made in reckless disregard of easily discoverable and available facts about the defendant's prior offense that are contained in the Court records and trial transcript of that case. The trial transcript from Richard Marshall's 1976 trial disproves beyond all doubt the factual assertions made by the government.

The government claims that Marshall possessed a .32 caliber revolver when he was arrested on March 1, 1975, but that law enforcement personnel returned that .32 caliber revolver to one Rosalie Janis on June 1, 1975. The government makes the latter claim on the basis of a receipt showing that the Sheriff's department gave "one 1968 Ford automobile ... and entire contents that were seized at the time of the arrest of Russell Means & Richard Marshall" to one Rosalie Janis on June 1, 1975 [ Exhibit 'A' ]. The receipt makes no mention of guns. On the basis of those purported facts, the government argues that that .32 caliber revolver that was seized on March 1, 1975 *might possibly have been* the same .32 caliber revolver that John Graham used to shoot Anna Mae Aquash on December 12, 1975.

The government has obviously made these claims—which have now been reported and distorted in the local media and national wire services<sup>1</sup>—without ever having read the official court transcripts in the Montileaux case. Had federal prosecutors made any investigation of the facts in the public record before making extremely prejudicial mis-statements of fact to the court, they would have known that the official court reporter's trial transcript in the case of *State of*

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<sup>1</sup> The lead sentence in the story that went out over the Associated Press wire service on March 19, 2009, and which was repeated that day on the air as news on both Rapid City television stations, KELO and KEVN, and their internet web sites was: "Federal prosecutors say the handgun used to kill a Canadian woman in 1975 was the same revolver taken from one of the two men charged with being an accessory to her murder." The story went on to say: "Prosecutors say Marshall had a .32-caliber pistol in his possession when he was arrested for shooting Montileaux, and that was the gun used to kill Aquash."

*South Dakota v. Richard Marshall* disproves the government's factual assertions beyond all doubt. The .32 caliber handgun that was seized by State Patrolmen from a car in which Richard Marshall and seven other people were riding on March 1, 1975 could not possibly have been the weapon that was used to kill Anna Mae Aquash and that was then buried in December 1975, because the .32 caliber revolver that was seized on March 1, 1975 was held as evidence in police custody at all times after it was seized until it was offered into evidence as State's Exhibit 8 at Richard Marshall's trial on April 2, 1976.

I

**THE COURT RECORDS OF THE TRIAL OF STATE V. MARSHALL  
CONCLUSIVELY DISPROVE THE GOVERNMENT'S CLAIM THAT DEFENDANT  
MARSHALL POSSESSED A HANDGUN ON MARCH 1, 1975  
THAT MIGHT HAVE BEEN THE WEAPON THAT WAS USED TO KILL  
ANNA MAE AQUASH ON DECEMBER 12, 1975.**

In the trial and appeal in the case of United States v. Arlo Looking Cloud, the government offered evidence and argued that on or about December 12, 1975, Arlo Looking Cloud and John Graham led Anna Mae Aquash out to a cliff in the Badlands, that Looking Cloud gave a handgun to John Graham, that Graham shot Aquash in the head with that handgun, and that Arlo Looking Cloud and Graham then buried the gun under a bridge not far from the murder scene. The gun has never been recovered. Forensic evidence indicates that the bullet recovered from the body of the victim was fired by a .32 caliber handgun.

On information and belief, in the trial of Richard Marshall, Arlo Looking Cloud, now a government witness, will testify that he did not give a handgun to Graham, but he saw Richard Marshall give a handgun and box of shells to Theda Clarke at his home in Allen, South Dakota earlier that night that Aquash was killed.

Now the government wants to introduce evidence that Richard Marshall shot Martin Montileaux in a bar in Scenic, South Dakota on March 1, 1975, that when he was arrested he possessed a .32 caliber revolver which was seized by law enforcement, and that the gun was returned to one Rosalie Janis on June 1, 1975; therefore, the government argues, that .32 revolver might somehow have then been given to Richard Marshall, and so it might have been the weapon that was used to murder Aquash and that was buried in the Badlands on December 12, 1975. Based on those “facts” and imaginative speculations, the government contends that evidence regarding the defendant Richard Marshall’s prior offense is an “integral part” of the defendant’s and the co-defendant’s alleged involvement in the killing of Anna Mae Aquash, primarily because “Defendant Marshall’s possession of the .32 caliber revolver during the Montileaux incident, and the gun’s release from custody on June 1, 1975, tends to logically prove he had the opportunity to provide the weapon during the Aquash criminal venture” [Government’s Notice, Page 3].

The government’s application to introduce this evidence must be denied because the facts the government puts forward to support its application are not facts: they are mis-statements of facts.

First, the government’s assertion that on March 1, 1975, Richard Marshall had “possession” of a .32 caliber revolver that was “involved in the Montileaux matter” is misleading and inaccurate. According to the evidence presented in trial by the State, a .32 handgun and four other firearms were found in a car that neither belonged to nor was driven by defendant Marshall, in which Richard Marshall had been one of 8 passengers. There was and is no evidence that Richard Marshall ever personally possessed that .32 handgun or that he knew

that it was in the car. It was found under a seat.

More importantly, the government's factual assertion that the .32 revolver that was seized as evidence by police on March 1, 1975 was for some inexplicable reason "released from police custody" to someone named Rosalie Janis on June 1, 1975 is demonstrably false. The .32 caliber revolver that was taken as evidence from a 1968 Ford on March 1, 1975 could not have been the weapon that killed Anna Mae Aquash in December 1975 because that handgun was kept in police custody as evidence at all times from when it was seized and logged as evidence on March 1, 1975 through the trial of Richard Marshall in April 1976. It could not have been the gun that was used to kill Aquash and which was then buried in December 1975 because State prosecutors produced it in the courtroom and offered it as an exhibit in the trial on April 2, 1976.

These facts concerning the case entitled *State of South Dakota vs. Richard Marshall* and the evidence presented in the trial of the case are to be found in the official court reporter's certified copy of the trial transcript, excerpts from which are referenced herein by page and line and attached hereto as exhibits. That transcript has been part of the public record and available since 1976.

The trial of defendant Richard Marshall began on April 1, 1976.<sup>2</sup> The evidence in the case showed that an American Indian male named Martin Montileaux was shot under the chin with a single bullet fired almost straight on from a .22 caliber gun in the men's room at a bar in Scenic, South Dakota on March 1, 1975. Mr. Montileaux died of pneumonia, following complications caused by the shooting injury, in a hospital some two or three weeks later.

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<sup>2</sup> Richard Marshall's co-defendant was Russell Means. The trials were severed. Richard Marshall was out of jail on bond and had been for some months when his trial began. Means went on trial some time after Marshall's trial and conviction. Means was acquitted.

Merlyn Muir, a South Dakota State Highway Patrolman, testified that on the night of March 1, 1975, he pursued a Ford car going west on Highway 44, at speeds that varied between 40 and 80 miles per hour, from Farmingdale to where it stopped 2 miles east of Rapid City. The passengers were ordered out of the car. There were eight passengers in the car—three men and five women. The Ford was being driven by David Clifford and the other two males, who were passengers, were Richard Marshall and Russell Means. Richard Marshall was neither the owner or the driver of the car. One of the five women in the car was his wife [Trial transcript, *State v. Richard Marshall*, Vol. V, pages 16-26, attached hereto as “EXHIBIT ‘B’”].

After all 8 passengers exited the car, law enforcement officers recovered five guns from the vehicle—two rifles from the backseat and three pistols: a .357 Strum Ruger, a .22 revolver and an H&R .32 caliber revolver. The .32 caliber revolver was found under the right front seat of the vehicle [Transcript, Vol. V, pg. 29]. All five weapons were taken into police custody on March 2, 1975, where they remained until they were produced in the courtroom and offered as evidence at the trial of Richard Marshall on April 2, 1976. The .32 caliber revolver that was found under the seat was examined and identified by Trooper Muir in the courtroom as the same .32 revolver he had taken from the car on March 1, 1975. It was marked “State’s Exhibit 8” for identification [Transcript, Vol. V, pg. 29, lines 3- 8]. The State later offered State’s Exhibit 8 into evidence [Transcript, Vol. V, pg. 77]. It was not received, since it played no part in the shooting of Montileaux.

Therefore, the .32 caliber revolver that the government contends was “released from police custody” on June 1, 1975 was in fact continually in police custody from the time it was seized on March 2, 1975 until April 2, 1976 when the prosecution identified it as “State’s Exhibit

#8" in Richard Marshall's trial. Obviously, it could not have been the gun that was used to kill Anna Mae Aquash on December 12, 1975.

The evidence of the defendant's prior offense therefore does not play any part, let alone an integral part, in the killing of Aquash and it is not admissible as *res gestae* evidence.

## II

**OFFICIAL COURT RECORDS OF THE TRIAL OF STATE V. MARSHALL  
CONCLUSIVELY DISPROVE THE GOVERNMENT'S CLAIM THAT DEFENDANT  
MARSHALL'S PRIOR OFFENSE IS SIMILAR IN KIND TO  
THE CRIME CHARGED IN THE INDICTMENT AND IS THEREFORE ADMISSIBLE  
UNDER RULE 404(B) TO PROVE MODUS OPERANDI.**

The government contends that evidence regarding the shooting of Montileaux is relevant and admissible as Rule 404(b) evidence because "both instances involve a similar scheme and *modus operandi* of the victim being shot with a small caliber handgun in the back of the head/neck while facing away from the perpetrator" [Transcript, Vol. V, pg. 6].

This too is a reckless mis-statement of fact that the government should have known is not true, but which was evidently made without reviewing the official court records of the case or the actual evidence presented at trial. The trial transcript of *State v. Richard Marshall*, Volume IV, pages 2-31, attached hereto as EXHIBIT 'C', records the following facts and evidence.

In defendant's 1975 trial, Dr. Edward James, a neurosurgeon who treated Montileaux in the hospital, testified that Mr. Montileaux had a spinal cord injury from the bullet and he died of complications, including pneumonia, that were caused by the gun shot injury about two or three weeks after the shooting.

The entrance wound was at the top of the Adam's apple, under the chin, and it passed to

the decedent's left at a slight angle of 10-15 degrees from the horizontal. The shot, which was fired from the front, was not straight on, but it was almost straight-on, [Transcript, Volume IV, pg. 46-47], at a range that could not have been closer than three feet [Transcript, Vol. IV, pg. 47, line 16-25]. The bullet went in a downward direction from the entrance wound near the chin to where it lodged in the shoulder. The bullet entered under the chin above the Adam's apple, struck the spinal cord, and lodged in the shoulder.

The bullet was fired by an individual who was evidently standing in front of Montileaux, facing him.

Therefore, the government's assertion that "both instances involve a similar scheme and *modus operandi* of the victim being shot with a small caliber handgun in the back of the head/neck while facing away from the perpetrator" is simply not true.


Moreover, the circumstances of the two incidents are obviously dissimilar. In the Aquash case, the government contends, and Richard Marshall denies, that he aided and abetted others in the killing of Aquash by giving them a gun. It is an uncontested fact in this case, which the government admits, that Richard Marshall was not even present when Anna Mae Aquash was shot, execution style, on a cliff in the Badlands. The government's claim that the circumstances of the defendant's spontaneous and unplanned alcohol-fueled barroom shooting in Scenic show a common "similar scheme and *modus operandi*" with the kidnaping and execution of Aquash, at which Marshall was not present, lacks any foundation in fact or law.

WHEREFORE, the defendant respectfully requests the Court to deny the government's application to allow it to introduce evidence of defendant's prior offense in the trial in this case and he further moves the court to enter an order *in limine* directing the government to refrain

from offering such evidence or making any reference to such evidence by its prosecutors or through its witnesses in the trial.

Dated this 20<sup>th</sup> day of March, 2009.

VINE RICHARD MARSHALL, Defendant

BY: 

Dana L. Hanna  
Attorney for Defendant Marshall  
PO Box 3080  
Rapid City, SD 57709  
(605) 791-1832  
dhanna@midconetwork.com

**CERTIFICATE OF SERVICE**

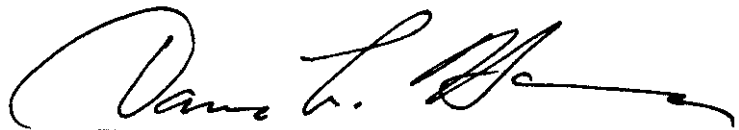
I hereby that I have served a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO GOVERNMENT'S NOTICE OF *RES GESTAE* / RULE 404(B) EVIDENCE; AND MOTION IN LIMINE on the other parties in this case by mailing the same, postage prepaid, the attorneys of record at the addresses listed below:

Marty J. Jackley  
United States Attorney  
PO Box 2638  
Sioux Falls, SD 57101

Robert Mandel  
Assistant United States Attorney  
515 Ninth Street, #201  
Rapid City, SD 57701

John Murphy  
Murphy Law Office  
328 E. New York St., #1  
Rapid City, SD 57701

Dated this 20<sup>th</sup> day of March, 2009.



Dana L. Hanna

**RECEIPT** Date 1 June 1975 **4181**

Received From Comm. Ct. Sheriff's Dept.

Address One 1968 White Ford Commercial, Lidou 445.063-2079

Byd. entire contents that were seized at the home of  
FBI inst of Russell Means & Richard Marshall.

ACCOUNT		HOW PAID	
AMT. OF ACCOUNT		CASH	
AMT. PAID		CHECK	
BALANCE DUE		MONEY ORDER	

By Rosalie Janis

BK608 R44/97m

Exhibit A

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**TIME AND PLACE:**

**Courtroom  
Pennington County Courthouse  
Rapid City, South Dakota  
April 2, 1976, at the hour of  
9:30 a.m.**

**COURT REPORTER:**

**Kathy L. Davis  
Official Court Reporter  
Pennington County Courthouse  
Rapid City, South Dakota**

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MR. KLAUCK: No, Your Honor.

MR. ZASTROW: No, Your Honor.

THE COURT: All right. Mr. Klauck you may proceed and call your next witness.

MR. KLAUCK: State calls Merlyn Muir.

(State's Exhibits 7, 8, 9, 10 and 11 marked for identification.)

MERLYN MUIR,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KLAUCK:

Q Would you state your full name and occupation?

A Merlyn Muir, South Dakota Highway Patrolman.

Q For how long have you been so employed?

A About fourteen and a half years.

Q Were you so employed on March 1st, 1975?

A Yes, I was.

Q Were you working on the night of March 1st, 1975?

A Yes, sir.

Q Now, at approximately midnight or shortly thereafter, can you tell me where you were on the night of March 1st/2nd, 1975?

A I was right here in town in the city limits.

Q Were you in a patrol vehicle?

1 A Yes, I was.

2 Q Would you tell me briefly, how that vehicle was equipped?

3 A My particular vehicle?

4 Q Yes, or highway patrol vehicles in general.

5 A In reference to what? What do you mean?

6 Q Lighting and so forth.

7 A They are all equipped with what we call a bar light,  
8 which is a red light that covers the entire -- it goes  
9 across the whole car -- siren, public address system.

10 Q Okay. Now officer, sometime around that time, did you  
11 receive any radio traffic in regard to a shooting  
12 incident in Scenic, South Dakota?

13 A Yes, sir.

14 MR. ZASTROW: I would object to  
15 the form of questions, particular when the States Attorney  
16 is adding a lot of things into the question. I don't  
17 think it's foundational at all.

18 THE COURT: At this point, it's  
19 still foundational. Objection overruled.

20 BY MR. KLAUCK:

21 Q All right, Officer, where did that radio traffic  
22 emanate?

23 A First traffic I heard was from the county jail.

24 Q Were you alone at that time?

25 A Yes, I was.

1 Q What was that traffic?

2 MR. ZASTROW: Object as hearsay.

3 MR. KLAUCK: Your Honor, the  
4 State is submitting radio traffic to show probably cause  
5 for the officer's subsequent actions.

6 THE COURT: Gentlemen, approach  
7 the bench, please.

8 (Off the record discussion  
9 held at the bench between counsel and the Court, outside  
10 the hearing of the jury.)

11 THE COURT: Objection sustained.

12 BY MR. KLAUCK:

13 Q Now, Officer, as a result of this radio traffic, what  
14 did you do?

15 A I got into another patrol car with another officer.

16 Q Okay, and where were you at that time?

17 A At the Highway Patrol Office here in Rapid City.

18 Q Who was the other officer?

19 A Officer Dean Fish.

20 Q Did you go in his vehicle?

21 A Yes, sir.

22 Q And is his vehicle equipped as yours is?

23 A Exactly.

24 Q What did you do then?

25 A We patrolled east on Highway 44 out of Rapid City.

1 Q All right. And how far east did you patrol?

2 A We got to a point approximately twenty miles east of  
3 Rapid City.

4 Q Did you stop at that time?

5 A Yes, sir.

6 Q Where did you stop?

7 A On an approach road, kind of off on a shoulder near  
8 Farmingdale, South Dakota.

9 Q In which direction was your vehicle facing?

10 A We were facing in kind of a northwesterly direction.

11 Q At that time, did you make a determination as to what  
12 you were going to do?

13 A Yes.

14 Q What was that?

15 A We were going to stop some vehicles that were coming  
16 our direction.

17 Q Did there come a time when you stopped a vehicle?

18 A Yes, sir.

19 Q Could you describe the vehicle?

20 A This was one we stopped. It was a new Ford station-  
21 wagon.

22 Q Did you allow that vehicle to proceed?

23 A Yes, we did.

24 Q During this time, were you in radio contact with other  
25 law enforcement units?

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A Yes, sir.

Q Which units were they?

MR. ZASTROW: Your Honor, I would object as hearsay, also.

THE COURT: Overruled. He may answer.

A The one unit that we were most frequently in contact with was Sheriff Mel Larson.

Q All right. Did there come a time when you saw Sheriff Mel Larson?

A Yes, sir.

Q Where was that?

A At that point that I've described and he was headed west on Highway 44.

Q All right. Were there any other vehicles near Sheriff Larson's unit when you saw him?

A Yes, there was.

Q What type of vehicle was that?

A There were two other vehicles. One was a dark colored Buick Riviera and a light colored '68 Ford convertible.

Q Where was Sheriff Larson?

A Behind the two vehicles when I first saw him.

Q What kind of a unit was he driving?

A He was driving the county four-wheel drive Dodge pickup.

Q Did he have any -- or was he using any of his lighting

1 system on that vehicle?

2 A Yes, he was.

3 Q What was he using?

4 A He had a regular clear white spotlight and a red top  
5 light and they were both on.

6 Q At that point, was he behind the Buick?

7 A Yes, at that point, he was behind both of the vehicles  
8 when I first observed him.

9 Q Then, what did you observe him do?

10 A Then he passed the first car, the Buick, and got in  
11 between them -- actually, behind the Ford.

12 Q Had they passed you when you observed that?

13 A They were passing about this time.

14 Q Were you in radio contact with him at this time?

15 A Yes, sir.

16 Q What did you and Officer Fish do at that time?

17 A We pulled out and went in pursuit of this Ford that he  
18 was behind with our red light and siren on.

19 Q Okay. Now, for how long a period of time did you pursue  
20 this vehicle?

21 A Approximately fifteen minutes.

22 Q Can you tell me approximately what distance you covered  
23 during this pursuit?

24 A Somewhere in the neighborhood of seventeen miles.

25 Q And your pursuit commenced then at Farmingdale?

1 A Just this side of Farmingdale?

2 Q Where did it conclude?

3 A At a point approximately two miles east of Rapid City  
4 on Highway 44.

5 Q Would you describe the nature of the pursuit during this  
6 time and this distance?

7 MR. ZASTROW: Object to the form  
8 of the question. It's vague and open ended.

9 THE COURT: Objection sustained.

10 BY MR. KLAUCK:

11 Q Officer, you positioned yourself behind Sheriff Larson,  
12 is that correct?

13 A No, we passed the Sheriff.

14 Q Where were you positioned then?

15 A Directly behind the Ford.

16 Q Were you attempting to stop the Ford?

17 A Yes, we were.

18 Q How did you do that?

19 A With red light and siren.

20 Q Now, is this your revolving light?

21 A Yes. There are two revolving lights and a steady red  
22 light to the front on these lights.

23 Q Can you describe how this vehicle that you were pursuing  
24 was driven?

25 A Yes. It was driven in a very erratic manner.

1 Q Could you be more specific?

2 A Speeds varied from forty miles an hour to eighty miles  
3 an hour. The vehicle was off on both shoulders of the  
4 road between when we first got behind it and when it  
5 was eventually stopped.

6 Q Did you ever attempt to pass that vehicle?

7 A No, we didn't

8 Q Officer, there came a time when the vehicle was stopped,  
9 is that correct?

10 A Yes.

11 Q Where did that occur?

12 A Approximately two miles east on Highway 44.

13 Q Was that on the highway?

14 A Yes, adjacent to Highway 44 on an approach road between  
15 the highway. Actually, the vehicle stopped on a railroad  
16 track.

17 Q Had the vehicle left the highway at any time?

18 A Yes, it had.

19 Q Where did it go when it left the highway?

20 A Just prior to its stopping, it turned off the highway  
21 to the north and went through a small trailer court,  
22 through some type of a wooden fence and back out on the  
23 highway headed back east.

24 Q All right. Did it stop at that time?

25 A It pulled off onto the approach road, headed south, and

1 then stopped on the railroad tracks.

2 Q Do you know what caused it to stop?

3 A Well, initially, it was hit by Sheriff Larson's pickup  
4 and then it hung up on the railroad tracks as it attempted  
5 to cross the tracks.

6 Q Now, during the pursuit, were you able to see how many  
7 people were in the car?

8 A No, not exactly.

9 Q Could you tell if there were more than one?

10 A Yes, I could tell there were several people in the  
11 vehicle.

12 Q Could you determine whether they were men or women?

13 A Not at this point, no sir.

14 Q Now, after the vehicle had stopped, where was your unit?

15 A Our unit was on the south shoulder of Highway 44, facing  
16 east, a little to the rear and to the west of the stopped  
17 vehicle.

18 Q All right. What did you do when the vehicle stopped?

19 A I immediately got out of the patrol car.

20 Q All right. Did you see what Officer Fish did?

21 A Yes.

22 Q What did he do?

23 A He put his public address system on and talked over the  
24 address system. He told the occupants of the vehicle to  
25 get out with their hands up and they were under arrest.

1 Q Where were you at that time?

2 A I was down in the ditch, immediately west of the vehicle

3 and to the south of the patrol car.

4 Q Did the occupants exit the vehicle?

5 A Yes, they did.

6 Q Can you tell me how many people exited?

7 A Yes, there were eight.

8 Q Were these men and women?

9 A Yes, sir.

10 Q Do you know how many men there were?

11 A Three men, five young women.

12 Q Were you able to identify any of the men?

13 A Yes, sir.

14 Q Who were they?

15 A The men were Richard Marshall, Russell Means and

16 David Clifford.

17 Q Were you able to determine -- strike that.

18 Was this a two-door or four-door vehicle?

19 A Two-door.

20 Q Were you able to determine from which door the Defendant

21 exited?

22 A Yes, sir.

23 Q Which door?

24 A The right side.

25 Q And Russell Means?

1 A Right side.

2 Q And Davy Clifford?

3 A Left side.

4 Q Were you able to determine who the driver had been?

5 A Not at this point, I wasn't.

6 Q Now, Officer, did you note the wearing apparel of the  
7 Defendant, Richard Marshall, or Russell Means?

8 A No, sir, I didn't.

9 Q Did you note their grooming?

10 A No, sir.

11 Q Now, is Richard Marshall present in the courtroom?

12 A Yes, he is.

13 Q Would you point to him, please?

14 A First gentleman on this side of the table. (Indicating.)

15 MR. KLAUCK: The record should  
16 reflect the witness has pointed to the Defendant.

17 BY MR. KLAUCK:

18 Q Now, after these individuals exited the vehicle, what  
19 did you do?

20 A After they went to the rear of the car towards the  
21 sheriff's pickup, I went over to the vehicle.

22 Q What did you do at that time?

23 A I went over the vehicle to secure it and then I looked  
24 into the vehicle.

25 Q What, if anything, did you see when you looked in?

1 A Guns, mainly.

2 Q All right. Could you tell me where these guns were  
3 when you saw them?

4 A There were two rifles on the back seat, one of the  
5 pistols on the front seat and one of the pistols was  
6 lying on the rear floorboard and I hadn't yet seen the  
7 other one at this point.

8 Q Were those items visible to you when you looked into  
9 the car?

10 A The two rifles and one pistol were readily visible, yes.

11 Q All right, and how many weapons did you find in total?

12 A Five.

13 Q All right, and what, if anything, did you do with those  
14 weapons?

15 A I took them out of the vehicle. I checked them to see  
16 if they were loaded. I checked serial numbers and wrote  
17 them down.

18 Q Can you describe these weapons for me?

19 A Yes, I can. The two shoulder weapons were rifles. One  
20 was a 30-30 caliber Winchester, lever action, a 30  
21 caliber M-1 Carbine, a 357 Strum Ruger, a 22 Long Rifle  
22 revolver and a H & R 32 caliber revolver.

23 Q Now, Officer, did you inspect these weapons to determine  
24 if they were loaded?

25 A Yes, I did.

1 Q What did you find?

2 A They all five were loaded.

3 Q Were they all fully loaded?

4 A With the exception of the 22, yes, sir.

5 Q Now, the 22 -- by that, you mean the 22 pistol?

6 A Yes.

7 Q What did you find when you examined that weapon?

8 A It had five leaded rounds and one in the case in the  
9 cylinder.

10 Q Now, Officer, did you smell of the barrels of any of  
11 those weapons to determine if they had been recently  
12 fired?

13 A No, I didn't.

14 Q I'll show you what's been marked as State's Exhibit 7.  
15 Would you examine that, please, and identify it for me,  
16 if you can?

17 A Yes, sir. This is the 22 long rifle, single action  
18 revolver that I found in this vehicle.

19 Q Where did you find that?

20 A This weapon was laying on the floor, the rear floor,  
21 behind the passenger side seat on the floorboard.

22 Q Is that the weapon that had five loaded cartridges and  
23 one in the case of the cylinder?

24 A Yes, it is.

25 Q What did you do with that weapon after you examined it?

1 A After recording serial numbers, et cetera, I turned all  
2 these weapons over to Deputy Sheriff Duane Plucker.

3 Q State's Exhibit No. 8, would you examine it and can you  
4 identify that?

5 A Yes, I can.

6 Q Would you do so?

7 A This is the 32 revolver that I found under the right  
8 front seat of this vehicle.

9 Q After you examined that weapon, what did you do with it?

10 A I also turned this over to Deputy Sheriff Plucker.

11 Q That weapon was fully loaded?

12 A Yes, sir.

13 Q State's Exhibit 9, would you identify that for me, if  
14 you can?

15 A Yes, sir. This is a 357 Ruger revolver which I found  
16 on the front seat of this vehicle.

17 Q Did you also turn that weapon over to Deputy Sheriff  
18 Plucker?

19 A Yes, I did.

20 Q Was that fully loaded?

21 A Yes, sir.

22 Q And State's Exhibit 10?

23 A Yes, this is a 30 caliber Carbine I found on the rear  
24 seat of this vehicle. I turned it over to Deputy Sheriff  
25 Plucker, also.

1 Q Was that fully loaded?

2 A Yes, sir.

3 Q How many rounds did those contain, do you know?

4 A It depends on the magazine in them. They can have  
5 either a fifteen or thirty round clip.

6 Q Did you check the clip on that weapon?

7 A Yes, sir.

8 Q Did you determine how many rounds it contained?

9 A I don't remember counting it. I know there were rounds  
10 in the magazine or clip.

11 Q All right. State's Exhibit 11.

12 A This is a 30-30 caliber Winchester, lever action, that  
13 I found on the rear seat of this vehicle.

14 Q That was fully loaded?

15 A Yes, sir.

16 Q Did you turn that rifle over to Deputy Sheriff Plucker?

17 A Yes, I did.

18 Q How many rounds did that contain?

19 A I don't recall.

20 Q Now, Officer, do those exhibits appear to be in  
21 substantially the same condition now as when you last  
22 observed them?

23 A Yes, they do.

24 Q After the individuals were arrested, did you see what  
25 happened to them?

1 A After they left the scene, no. I had no further contact  
2 with them.

3 Q Did you speak with any of the individuals who came out  
4 of the car?

5 A No, sir.

6 MR. KLAUCK: Thank you. That's  
7 all.

8 THE COURT: You may cross  
9 examine.

10 CROSS EXAMINATION BY MR. ZASTROW:

11 Q Officer Muir, I believe you stated that you stopped a  
12 stationwagon?

13 A Yes, sir.

14 Q Did you talk to anyone in the stationwagon?

15 A No, I didn't. Officer Fish did.

16 Q Did you get out of your vehicle?

17 A Yes, sir.

18 Q Did you look into the stationwagon at all?

19 A No, I didn't even approach the vehicle.

20 Q What were the names of the people that were driving  
21 that vehicle?

22 A I don't have that information.

23 Q Did you get the license number?

24 A We called it in. It would be on tape, but I don't have  
25 it with me.

1 Q That's how it was returned to you?

2 A Right.

3 Q Did you put markings on there, did you say, on the  
4 container?

5 A Yes, my call sign is on the container.

6 MR. KLAUCK: Thank you. That's  
7 all.

8 THE COURT: You may cross  
9 examine.

10 MR. ZASTROW: I have no questions,  
11 Your Honor.

12 THE COURT: You're cautioned  
13 not to discuss your testimony with any other witness.  
14 You may be excused. Thank you.

15 (Witness excused.)

16 MR. KLAUCK: Your Honor, the  
17 State would move into evidence State's Exhibits Nos. 2,  
18 10 and 11.

19 THE COURT: Which one is 2?

20 MR. KLAUCK: 2 is the bullet.  
21 The State would move into evidence 7, 8, 9, 10 and 11.

22 MR. CONNOLLY: May we take a  
23 look at these exhibits?

24 THE COURT: Yes, you may.

25 (Off the record discussion.)





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**TIME AND PLACE:**

Courtroom  
Pennington County Courthouse  
Rapid City, South Dakota  
April 1, 1976 at the hour of  
9:00 a.m.

**COURT REPORTER:**

Kathy L. Davis  
Official Court Reporter  
Pennington County Courthouse  
Rapid City, South Dakota

1                   You will be given an instruction later about  
2 circumstantial evidence. I submit that the prosecution  
3 does not even have credible circumstantial evidence and  
4 we will establish it, through our testimony, if they don't  
5 submit witnesses.

6                   Thank you.

7                   THE COURT: Gentlemen, the  
8 witnesses have been sequestered. Has each side made sure  
9 their witnesses are not in the courtroom?

10                   MR. ZASTROW: There are none  
11 that we are aware of.

12                   THE COURT: Is anybody in the  
13 courtroom that's been subpoenaed to testify?

14                   All right. The State may proceed and call its  
15 first witness.

16                   MR. KLAUCK: The State calls  
17 Dr. James.

18                   DR. EDWARD JAMES,  
19 called as a witness, being first duly sworn, testified  
20 as follows:

21                   DIRECT EXAMINATION BY MR. KLAUCK:

22                   Q Doctor, would you state your full name and occupation,  
23 please?

24                   A Edward James, neurosurgery.

25                   Q All right, Doctor, and where do you practice neurosurgery?

1 A Rapid City, South Dakota.

2 Q For how long have you practiced neurosurgery in Rapid  
3 City?

4 A Three years.

5 Q Just briefly, what is neurosurgery?

6 A It's a practice of medicine directed towards surgical  
7 diseases, treatment of diseases of the nervous system.

8 Q Would you state your educational background?

9 A Yes. I went to medical school at the University of  
10 Saskatchewan at Canada. I interned at Michigan. I  
11 took a year of general surgery training at the University  
12 of Iowa and I took my post graduate surgical training  
13 at the University of Iowa.

14 Q Are you licensed to practice medicine in South Dakota?

15 A I am.

16 Q Are you licensed to practice medicine in other parts  
17 of the country?

18 A I am not.

19 Q In any other country?

20 A In Canada.

21 Q Doctor, as a neurosurgeon, do you belong to any particu-  
22 lar societies or boards?

23 A No, I do not belong to the American Board of Neurosurgery.  
24 I have a fellowship in the College of Surgeons in Canada  
25 in neurosurgery.

1 Q All right. I want to direct your attention to the early  
2 morning hours of March 2nd, 1975, and ask if you had an  
3 occasion to examine an Indian man at that time?

4 A I did.

5 Q And where did this examination take place?

6 A The emergency room, St. John's Hospital, or Rapid City  
7 Regional East, as it's known now.

8 Q Would you describe this individual as you observed him  
9 that morning?

10 A Yes. The patient was in the emergency room. He was  
11 responsive, in the sense that he was able to verbalize  
12 and follow commands. He had a wound in his neck, in  
13 the front part of his neck, to the right side of the  
14 midline. There was very little bleeding from the  
15 wound. The patient spoke in a whisper, in a very hoarse  
16 voice. He was unable to move his lower extremities at  
17 all and his upper extremities only in parts. He had  
18 loss of sensation corresponding with the injury to the  
19 spinal cord, which he'd sustained, resulting in loss of  
20 function from the standpoint of movement and sensation  
21 below the level of the spinal cord injury.

22 Q All right. And what, if any, remedial measures were  
23 taken, Doctor?

24 A There were no remedial measures to be taken. The  
25 patient had sustained a complete injury to the cervical

1 spinal cord, resulting in loss of all function below  
2 the level of the injury.

3 Q Now, how were you able to determine that this injury  
4 occurred to the spinal cord?

5 A Well, by the examination -- the fact that there was  
6 no function below the C-6 level of the spinal cord --  
7 that is the lower cervical spine level -- and also,  
8 x-ray evaluation tended to substantiate the level of  
9 injury.

10 Q What, if anything, did the examination reveal?

11 A X-ray examination revealed a metallic fragment lodged  
12 in the muscles at the back of the neck/shoulder area  
13 on the left and there were small metallic fragments  
14 overlying the spine in the midline, indicating that a  
15 missile had passed from the entrance wound in the right  
16 front of the neck, across the midline and into the  
17 back of the musculature.

18 Q Doctor, could you point to where the missile entered  
19 the body?

20 A Approximately this level. (Witness indicating.)

21 Q All right, could you point to where the missile was  
22 lodged in the body?

23 A Would be back in here. (Witness indicating.)

24 Q All right. Did that then penetrate or sever the spinal  
25 cord?

1 A Yes.

2 Q Now, Doctor, after your initial observation on the  
3 morning of March 2nd, when did you next observe the  
4 deceased?

5 A The following day.

6 Q Would you describe his condition at that time?

7 A His condition was relatively unchanged. He remained  
8 completely paralyzed below the level of the spinal  
9 cord injury. He was conscious and verbalizing. He had  
10 had an episode on that morning of respiratory arrest.  
11 In other words, he had sort of spontaneously ceased  
12 to breathe and required some resuscitative efforts.  
13 He had come around from that and was breathing adequately  
14 at that time.

15 Q Now, is a respiratory failure consistent with this type  
16 of injury?

17 A Yes, it is.

18 Q All right. Now, Doctor, how many times did you observe  
19 him -- I believe that would have been March 3rd, is that  
20 correct?

21 A Yes.

22 Q The following day?

23 A No, that would be March 2nd.

24 Q The same day?

25 A Yes, because he came home early in the morning.

1 Q And did you observe him on March 3rd?

2 A Yes.

3 Q Would you describe his condition as you recall it at  
4 this time?

5 A The patient was much the same, the difference being  
6 he developed a considerable temperature elevation.  
7 There was no change in his neurologic state, which would  
8 be as expected.

9 Q What, if anything, did you do to help him in his condition?

10 A Well, the main treatment for this sort of problem is  
11 what you would call supportive care, in a sense that  
12 you treat him with suctioning, turning, skin care,  
13 antibiotics, intravenous medication, assisting his  
14 ventilation by what is called intermittent positive  
15 pressure breathing, which is a technique to inflate  
16 his lungs at intervals.

17 Q To what extent was he paralyzed at that time?

18 A The same extent, in that he had no function below the  
19 level of the spinal cord injury.

20 Q Now, Doctor, did you then observe him on March 4th again?

21 A Yes.

22 Q Just briefly, what was his condition at that time?

23 A There was no essential change, aside from a persisting  
24 temperature elevation and secretions. There was no  
25 neurologic change.

1 Q Was he given any antibiotics at that time?

2 A Yes, antibiotics were continued four times a day.

3 Q Would you describe to the jury the condition of the  
4 deceased, Martin Montileaux, during the remainder of  
5 the time he was in the hospital?

6 A He had additional problems. He had some disorientation,  
7 confusion, which was episodic. He continued to run an  
8 elevated temperature, a spiking temperature, of course,  
9 indicative of the infection. He showed no signs of  
10 neurologic improvement, which would be anticipated  
11 because of the type of injury. In addition, he began  
12 to show bleeding from the gastrointestinal tract,  
13 presumably the stomach. I would say that's essentially  
14 what occurred and he showed no neurologic improvement,  
15 as I stated and he continued to run an elevated  
16 temperature and showed signs of bleeding from his  
17 stomach. He showed deterioration in his course and he  
18 expired in the early morning of the 7th of March, I  
19 believe.

20 Q Doctor, these conditions that you have indicated, are  
21 those consistent with this type of injury?

22 A Yes, the injury to the spinal cord in the neck results  
23 in paralysis in functioning below the level of the  
24 injury, which means essentially, that it paralyzes his  
25 legs completely, his arms in parts, depending on the

1 level of the spinal cord injury. It also paralyzes  
2 his chest musculature, so it interferes rather markedly  
3 with his ability to breathe.

4 Q Doctor, had any consideration been given to removing  
5 this missile that was lodged in his back shoulder there?

6 A No, it would serve no purpose to remove the bullet from  
7 the musculature.

8 Q Based upon your education and your experience and your  
9 care of the deceased, Martin Montileaux, do you have an  
10 opinion, based upon a reasonable medical certainty, as  
11 to what caused his death?

12 A Yes, I do.

13 Q Would you state that opinion?

14 A Well, in my opinion, the patient died as a result of  
15 a missile injury to the spinal cord, resulting in what  
16 is called quadriplegic, with a series of complications  
17 that follow this type of injury; namely, respiratory  
18 problems, gastrointestinal bleeding -- and eventually,  
19 they succumb from such causes.

20 Q Those causes resulted from the missile injury?

21 A Yes, indirectly.

22 Q Now, Doctor, you stated that the deceased could  
23 verbalize. Did you, at any time during your period of  
24 care, discuss with him what happened?

25 A No, I did not.

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MR. ZASTROW: Excuse me, Your

Honor.

THE COURT: Do you want to

approach the bench?

(Off the record discussion

held at the bench between counsel and the Court, outside

the hearing of the jury.)

THE COURT: Ladies and gentlemen,

there has been a stipulation entered into by both parties

and when things are stipulated to, that means they are to

be taken by you as true and correct without the necessity

of offering evidence to that effect.

As I understand, the stipulation is as follows:

That both the State and the defense stipulate that the

decedent's name is Martin Montileaux, that this is the same

gentleman who was treated by Dr. James and Martin Montileaux

is the individual that is deceased as a result of this

incident.

Is that the stipulation?

MR. CONNOLLY: That's correct.

MR. ZASTROW: Yes, Your Honor.

MR. KLAUCK: Yes, Your Honor.

THE COURT: Is there anything

further that I may have left out?

MR. KLAUCK: The individual

1 that was treated by Dr. James.

2 THE COURT: Yes, is Martin  
3 Montileaux, so you can take that as being proven even  
4 though we don't go through the testimony to prove it.

5 You may proceed.

6 MR. KLAUCK: That's all.

7 Thank you.

8 THE COURT: You may cross  
9 examine.

10 CROSS EXAMINATION BY MR. ZASTROW:

11 Q Dr. James, you indicated and you pointed at your back  
12 where the major piece of the missile was lodged. Now,  
13 I wonder if I take off my jacket and I stand here, if  
14 you could point to my back exactly where that was.

15 A Well, right about in this area. (Witness indicating.)

16 Q Right there?

17 THE COURT: Maybe you can  
18 describe that for the record, so we know in words where  
19 that is.

20 A Sort of at the base of the neck and shoulder area on  
21 the left side.

22 THE COURT: Thank you.

23 BY MR. ZASTROW:

24 Q Before you go, Doctor, you indicated that the spinal  
25 cord was severed, is that correct?

1 A Yes.

2 Q I believe you referred to C-6 level or something like  
3 that?

4 A Yes.

5 Q Can you locate that on my neck and demonstrate to the  
6 jury where that would be?

7 A Well, the C-6 vertebra is about right there. (Witness  
8 indicating.)

9 Q How many vertebrae are there in the neck, Doctor?

10 A Seven.

11 Q So this would be next to the last vertebra, is that  
12 correct?

13 A Sort of between the sixth and seventh vertebrae.

14 Q Doctor, now, as I understand it, the entrance wound  
15 is just under the chin?

16 A Little lower down than that.

17 Q About right there?

18 A Approximately.

19 Q About maybe three quarters or an inch from the base  
20 of Mr. Montileaux's chin?

21 A Well, the thyroid cartilage, the Adam's apple here --  
22 it would be right across from that to the right side.

23 Q Except it was on the right side, right?

24 A Yes.

25 Q So the direction of travel was from here to here, is

1           that correct?

2           A Well, it's a little more horizontal than that, I would  
3           say. I think the neck wound was lower down than you're  
4           pointing. It wasn't up here or down here. It was  
5           down here. (Witness indicating.)

6           Q I see. How much lower? How far from the chin was it,  
7           as you recall?

8           A Well, I don't relate it to the chin because everybody's  
9           chin length is different. I would relate it to the  
10          Adam's apple or thyroid cartilage and it was about  
11          opposite the lower edge of that.

12          Q Okay. It was going in a downward direction from the  
13          entrance wound to where it lodged in the shoulder?

14          A Yes, there was some inferior angulation.

15          Q Of necessity, if the bullet is going to end up where  
16          you indicated, is that correct, that being the muscle  
17          of the upper shoulder?

18          A The bullet ended up there, yes, but whether that was  
19          because it was deflected off bone or what, I don't  
20          really know.

21          Q You couldn't make that determination?

22          A No, I could tell there was metallic fragments at the  
23          level where it struck the spine and there was a wound  
24          here and there was a major portion of the missile back  
25          there.

1 Q Okay. Did you make any determination of the height of  
2 Mr. Montileaux when you examined him?

3 A No, I didn't. He wasn't a tall man. I would say 5'6"  
4 or something like that.

5 Q Five foot, six?

6 A Or five foot, eight, I would guess.

7 Q Could you give me your best estimate of his weight?

8 A Well, I would think 160 pounds or something like that.  
9 I'm not sure.

10 Q So the man that you saw, you would guess between five  
11 foot, six and five foot, eight and 160 pounds?

12 A Just a guess. The man is obviously on a stretcher. I  
13 never saw him upright or facing me. I didn't have a  
14 better estimate of how tall he was. I just don't know.

15 Q In your course of treatment, you did not feel that that  
16 was important at all?

17 A As to how tall he was?

18 Q Yes.

19 A No.

20 Q Now, were any blood samples to be taken for the purpose  
21 of any transfusions or anything like that?

22 A No.

23 Q You did not. Was he ever given any blood?

24 A No.

25 Q That was never required during the course of his

1 treatment in the hospital?

2 A It was not.

3 Q Okay. So as far as you know, was there ever a blood  
4 sample taken?

5 A Yes, I'm sure there was because the emergency room  
6 staff would routinely draw routine blood for determining  
7 his white blood count, his hemoglobin level and this  
8 sort of thing.

9 Q Did you ever have a blood alcohol count taken?

10 A No, I did not.

11 Q Did anyone in law enforcement ever request it?

12 A Not from me.

13 Q Not from you?

14 A No.

15 Q Now, when you examined Mr. Montileaux in the hospital,  
16 were you the first doctor to see him?

17 A No, I was not.

18 Q Who was the first doctor to see him?

19 A I would presume whoever was working in the emergency  
20 room.

21 Q Did you ever discuss with him Mr. Montileaux's condition?

22 A I'm sure I did when I arrived.

23 Q Do you have anything in your records or any recollection  
24 of who that doctor was?

25 A None.

1 Q Now, when you arrived and examined Mr. Montileaux at  
2 the hospital the first evening, what was the condition  
3 of the wound? Had it been cleaned?

4 A Well, yes, superficially, and the wound was small --  
5 a puncture type wound with some discoloration around  
6 the edges.

7 Q Okay. Now, do you know what tattooing is in reference  
8 to a gunshot?

9 A I think I know what you're referring to, sort of, what  
10 I probably would call a powder burn sort of thing, is  
11 that what you mean?

12 Q I believe tattooing is the imbedding of unburned powder  
13 in his skin, which would be imbedded in the skin.

14 A Yes.

15 Q That would not be removed by a superficial cleaning,  
16 would it?

17 A That's correct.

18 Q Did you make any examination to determine whether there  
19 was any tattooing?

20 A No, I did not in a specific sense. The wound margins  
21 were discolored, but what the discoloration was due to  
22 I don't have direct knowledge.

23 Q Tattooing would be something entirely different than  
24 discoloration, would it not, or don't you know?

25 A Well, it's not my field of expertise, let's put it that

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way.

Q You did not make any determination of whether there were any powder burns around the wound?

A No, not directly.

Q Okay, and have you had any training at all in forensic medicine which would give you a knowledge of how to determine from the type of wound the distance from which the missile would have been fired?

A No, I haven't any training or any knowledge.

Q Okay.

MR. ZASTROW: I have no further questions.

MR. KLAUCK: Gentlemen, do you want to approach the bench?

(Off the record discussion held at the bench between counsel and the Court, outside the hearing of the jury.)

(State's Exhibit 1 marked for identification.)

REDIRECT EXAMINATION BY MR. KLAUCK:

Q Doctor, let me show you what's been marked as State's Exhibit No. 1 and would you tell me what that exhibit depicts, if you can?

A Well, it depicts a picture of a man's neck with a wound in front of it.

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Q All right, and does it appear to you that that wound is consistent or similar to the wound that was suffered by Martin Montileaux?

A Yes, I would say it is.

Q Now you can't see the face of Martin Montileaux, so you can't say that is Martin Montileaux, but would you say that's identical with the one you examined?

A Well, it looks like it's roughly the same sort of thing, yes.

MR. KLAUCK: Okay, thank you.

That's all.

THE COURT: Any recross?

RE CROSS EXAMINATION BY MR. ZASTROW:

Q Doctor, this photograph that you observed, you can't identify that as being Martin Montileaux or being the wound that Martin Montileaux had?

A That's correct.

Q Okay, now, this particular photograph would indicate that the wound is right up close to the chin?

A Yeah, but you can make the wound as close to the chin as you want by flexing your head or extending it. It would change.

Q Do you think that is any accurate reflection of where the wound actually is?

A I think that what I was trying to say is that there is

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no way you can determine the location of the wound by the position of the chin. It's much more sensible to refer it to a fixed structure in the midline.

Q I see. From this photograph, can you do that?

A Not really.

MR. ZASTROW: Okay, fine.

THE COURT: Anything further, Mr. Klauck?

MR. KLAUCK: No, your honor.

THE COURT: Thank you, Doctor. You may be excused.

(Witness excused.)

MR. KLAUCK: State calls Dr. Kelley.

DR. DONALD H. KELLEY,  
called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KLAUCK:

Q Doctor, would you state your full name and occupation, please?

A Donald Howard Kelley. I'm a pathologist.

Q Would you tell the jury what pathology consists of?

A It's a specialty of medicine which consists of determining the cause of disease by examination of tissue and by biochemical testing.

