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

FILE NO. CRI 09-3953

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

TRANSCRIPT OF  
JURY TRIAL

VOLUME 9 OF 10

\* \* \* \* \*

BEFORE: THE HONORABLE JOHN J. DELANEY,  
Circuit Court Judge  
Pennington County Courthouse  
Rapid City, South Dakota  
DECEMBER 9, 2010

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

MR. MARTY JACKLEY  
Attorney General  
MR. ROD OSWALD  
Assistant Attorney General  
MR. ROBERT MANDEL  
Assistant U.S. Attorney  
Representing the State of South Dakota  
  
MR. JOHN MURPHY  
Attorney at Law  
Representing John Graham

\* \* I N D E X \* \*

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

EXHIBITS:   OFFERED/ADMITTED  
  
(None.)

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

2                   (Whereupon, the following proceedings were  
3 had in open court and outside the presence of the  
4 jury.)

5                   **THE COURT:** Folks, at this time is a very  
6 brief hearing outside the presence of the jury while  
7 we put on the record the settling of jury  
8 instructions.

9                   Counsel, you have both been provided with  
10 copies of the instructions that I prepared as a final  
11 set of instructions for the jury. This is the time to  
12 make such objections as you find to those  
13 instructions.

14                   Mr. Jackley?

15                   **MR. JACKLEY:** The state has no objection,  
16 Your Honor.

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

18                   **MR. MURPHY:** The state has no -- I mean, the  
19 defense has no objections, Your Honor.

20                   **THE COURT:** All right.

21                   Let's -- we're settled with these. We'll  
22 call the jury in and we will proceed with the closing  
23 arguments.

24                   (Off the record.)

25                   **THE COURT:** Ladies and gentlemen, we're in

1 the final stages of the trial.

2 Counsel, are you both satisfied this is the  
3 jury?

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

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

6 **THE COURT:** The first part of this is for me  
7 to read the instructions of the court governing the  
8 law and the definitions which will control this case  
9 as you determine the facts.

10 I read them to you now though I will send  
11 copies to the jury room for you, to give you an  
12 outline of those principles, definitions, et cetera,  
13 to prepare you to listen more appropriately to the  
14 closing arguments of both the state, Mr. Jackley  
15 Mr. Oswald, and the defense through Mr. Murphy.

16 When I am finished with this the state will  
17 make its closing argument in chief; Mr. Murphy will  
18 then present his; and then Mr. Jackley will make a  
19 final rebuttal on the part of the state.

20 At that point, you will be given the case for  
21 deliberation. I will at that point remove the two  
22 jurors who sit as alternates from the case and they  
23 will be excused. The remaining 12 will then consider  
24 the evidence under these instructions and resolve the  
25 issues in this case.

1           (Whereupon, the jury instructions were read  
2 aloud in open court.)

3           **THE COURT:** I would advise you, if you send  
4 questions for purposes of the Court, or when you have  
5 reached a verdict, it may take a spell to gather  
6 counsel and to consider the question or to be prepared  
7 to receive your verdict.

8           Having said that, Mr. Jackley -- Mr. Oswald,  
9 are you prepared to give your closing argument?

10          **MR. JACKLEY:** Your Honor, may Mr. Murphy and  
11 I approach for just one second, please?

12          **THE COURT:** Yes.

13          (A discussion was held at the bench.)

14          **MR. JACKLEY:** On instruction number three  
15 with kidnapping, I think this needs to be or instead  
16 of and. I am requesting that the Court make that  
17 change. I am not asking it to be read again but in  
18 the instructions that go to the jury that -- I believe  
19 we don't have -- the state does not have to show all  
20 of these items of kidnapping. We just have to show  
21 one per the statute.

22          **THE COURT:** Yeah.

23          **MR. MURPHY:** No objection.

24          **THE COURT:** I agree with that.

25          **MR. JACKLEY:** It's here, Judge --

1           **THE COURT:** I will make a statement to the  
2 jury now. I found a couple typos in the instructions  
3 while I was reading and I suggest we make corrections  
4 before we send the copies back to the jurors. I  
5 was -- will say that I read them and it said an and  
6 when, in fact, it should be or.

7           **MR. MURPHY:** Tina wasn't keeping a record of  
8 it so we don't need to worry about the record because  
9 the ones they get will be the right ones.

10          **THE COURT:** Yeah.

11          (Whereupon, the discussion held at the bench  
12 was then concluded.)

13          **THE COURT:** Ladies and gentlemen, counsel  
14 have asked me to make something clear in an  
15 instruction, and it pertains to the elements of  
16 kidnapping where I talked about seizing, confining,  
17 kidnapping, abducting, and carrying away. Between  
18 abduct and carry away, the and should be replaced by  
19 an or. Making them one or the other being sufficient.  
20 And I will make that correction in the copies that I  
21 give you before I send them out to you.

22                 Thank you, counsel.

23                 At this stage, Mr. Oswald, if you are ready  
24 to give the argument, you may proceed.

25                 **MR. OSWALD:** Thank you.

1           Counsel, ladies and gentlemen of the jury,  
2 John Graham and Theda Clarke and others, Arlo Looking  
3 Cloud, are responsible for what happened to Anna Mae.  
4 I can't tell you who did the order -- who made that  
5 order. Can't tell you that.

6           But I can tell you Anna Mae was suspected of  
7 being an informant, and a call was made to Denver from  
8 Rapid City ordering her from there back to Rapid City  
9 to stand -- to answer to charges of being an  
10 informant.

11           Picture this woman in your mind, if you  
12 would. Standing on a hilltop being marched to a  
13 cliff, a petite young woman, only seconds to live.  
14 Her knees probably weak with fear. Her surroundings  
15 probably blinded by fright. And what does she do?  
16 She begins to pray because she knows her existence is  
17 about over. What words she used in her Native tongue  
18 we will never know.

19           Now see in slow motion this man, grabbing  
20 that pistol. Circling the grip on that gun. Holding  
21 it up to a head. Boom. And it's over. She tumbles  
22 down the cliff.

23           John Graham was in it from the start and he  
24 was in it to the end. He was, at the very least,  
25 folks, an aider and abettor on both counts of murder.

1           Let's just look at this case from the scene  
2 of the crime. Just -- take in your mind and eliminate  
3 testimony right now of Rapid City, WKLDLOC. Eliminate  
4 testimony of anything. Consider the scene of the  
5 crime.

6           If you were responsible for solving this  
7 crime in 1976 when she was found, how would you begin  
8 to analyze it?

9           We have a young woman whose clothing is  
10 intact; so that probably suggests not a sexual motive  
11 in this crime. We probably -- we have from the  
12 autopsy -- we know it was a bullet to the back of the  
13 head. She was decomposing and we know that it was a  
14 32-caliber handgun and she was shot from behind. In  
15 close contact. It's likely from this fact alone that  
16 it wasn't a fight or some type of a struggle or combat  
17 from that fact alone.

18           The killer had to consciously think about  
19 pointing the gun at her head and pulling the trigger.  
20 So immediately, logically, you have an element of  
21 premeditation.

22           Now, the killer was behind or beside her.  
23 And the bullet wound was from the right side and to  
24 the left. As you can see, from the right side and to  
25 the left.



1           There is a high probability the shooter was  
2 right handed. You cannot tell much from the angle of  
3 the bullet, of course, except later on in testimony,  
4 she was speaking in her Native tongue and she probably  
5 had her head bowed.

6           But because of the blood evidence that seeped  
7 from her head, we can figure that she was shot at the  
8 scene and not --

9           **MR. MURPHY:** Objection, Your Honor. This is  
10 facts not in evidence.

11          **THE COURT:** That's true.

12          **MR. OSWALD:** Logical inferences, Your Honor,  
13 from the scene.

14          **THE COURT:** We had evidence to that?

15          **MR. OSWALD:** It's logical inferences from the  
16 scene of the crime and photos.

17          **THE COURT:** I think you are entitled to make  
18 your argument.

19           The objection is overruled.

20          **MR. OSWALD:** Because of the blood evidence,  
21 folks, she was probably not carried there, so she  
22 probably walked to the cliff.

23           Also, no evidence of any quantity of blood  
24 around except around her head where the blood drained  
25 from her lifeless body on the frozen hardpan.

1           Now, Anna Mae was left to decompose there  
2 without regard for any dignity. This suggests the  
3 killers were in a hurry, but clever enough to pick  
4 up -- and pick a ravine-type of burial site for her.

5           This also suggests that the killers had  
6 little regard for this human being. The manner of  
7 death, the location, the mechanism of death strongly  
8 suggests hostile, contemptuous-like feelings towards  
9 this woman.

10           This also suggests that it was planned out,  
11 premeditated because if this killing was done in the  
12 heat of passion, it's an unusual spot to march someone  
13 to a cliff over some kind of a jealousy argument of  
14 some sort.

15           So one could guess from the scene of the  
16 crime that it could have been someone or a group that  
17 would feel no sympathy or respect towards this human  
18 being.

19           Anna Mae was wrongly accused of being an  
20 informant and was sent to eternity because of it.

21           Now, if you just took this crime scene  
22 analysis, folks, and held it up to the light, and if  
23 you meshed Looking Cloud's testimony about how it  
24 happened, it's pretty close. There were no missing  
25 person reports on Anna Mae. There was a warrant, but

1 no missing person reports. Only one person tried  
2 calling the police in Denver.

3           If Candy Hamilton would have told her story,  
4 folks, the FBI could have been on the trail of these  
5 WKLDOC people like Thelma Rios and the others. Had  
6 Angie told immediately what she knew to the FBI it --  
7 they would have been led to Denver, probably to John  
8 Graham, Arlo Looking Cloud, Theda Clarke years ago.  
9 Justice would have been served years ago.

10           Silence, though, from these people occurred  
11 because of some blind loyalty to an organization whose  
12 corruption masked itself in principle ideology.  
13 Perhaps more painful to Anna Mae than the bullet was  
14 the betrayal of the people that she embraced.

15           I'm going to talk about certain concepts,  
16 folks, if I can now, and then I will talk about  
17 individual witnesses. The first concept I want to  
18 talk about is the informant status. Angie Begay heard  
19 that she was an informant because of that phone call.  
20 Leonard Peltier felt she knew too much and put a gun  
21 to her head in Farmington, New Mexico a few months  
22 earlier.

23           Anna Mae also heard in that motor home, that  
24 agent begged for his life and I shot him anyway. Such  
25 callousness, folks, about human life would play out,

1 again, six months later with Anna Mae. After all, if  
2 you really think about it, Peltier's statement in the  
3 wrong hands would have sunk him.

4 Kamook knew of the accusations also, folks,  
5 of her being an informant. Being a perceived  
6 informant against an organization that has secrets to  
7 hide would probably get someone killed.

8 Informant status, folks, equals motive. The  
9 killing was committed by a group of persons, whether  
10 actually present or not. Motivated to keep their  
11 secrets hidden. Anna Mae could have exposed bomb  
12 making, unsolved killings of FBI agents, and the  
13 whereabouts of fugitives. She just knew too much.

14 Two independent witnesses, folks, saw this is  
15 what we do to informants (indicating). The throat  
16 slashing in that Denver house as to how they are going  
17 to deal with informants.

18 Finally, a judge in Pierre who let her out on  
19 bail helped sink Anna Mae as a perceived informant.

20 Kidnapping, folks. Anna Mae was taken  
21 against her will to Rapid City. If I leave here, you  
22 will never see me alive again. Remember those words?  
23 Tied up and hauled in the back of a Pinto hatchback.  
24 Arlo Looking Cloud offered this information years ago.  
25 It's a factor that implicates himself as much as the

1 others.

2           If you ignore Looking Cloud, and let's --  
3 let's ignore that for a minute. Let's assume he plead  
4 the fifth. Didn't testify for a minute. This  
5 evidence is still overwhelming that Anna Mae was  
6 kidnapped from Denver.

7           Angie Begay Janis's phone call, George Palfy,  
8 Troy Lynn -- we can take all of their testimony, twist  
9 it, turn it upside down. Do what you want, but  
10 scrutinize it, and there is one piece of Troy Lynn's  
11 testimony that stands out as probably the biggest  
12 circumstantial, logical inference of a kidnapping.  
13 And that is Troy Lynn tried to call the police. One  
14 doesn't call the police because you think you are  
15 going on vacation for a ride in a car. Troy Lynn  
16 knew. George Palfy knew. Angie Janis knew. She was  
17 tied up. My goodness sakes.

18           Now, not only the call, but John Graham  
19 showed a consciousness of guilt when he denied  
20 everything to Ecoffey and Pourier in 1994. He told  
21 them, finally, okay, okay, I drove her from Denver to  
22 the reservation. At the time he said this Anna Mae  
23 had been dead for about 19 years. And if he actually  
24 thought it was an innocent trip, don't you come with  
25 it to Ecoffey and Pourier?

1           How about Anna Mae crying at WKLD.OC. And  
2 Candy Hamilton saying to a distraught Anna Mae, come  
3 to Oglala. You will be safe there. People care for  
4 you. Finally, though, Candy said, it appeared that  
5 Anna Mae was not free to leave WKLD.OC.

6           Cleo Marshall Gates seeing a quiet Anna Mae  
7 being escorted and led to a chair in her house. No  
8 one has said Anna Mae jumped in the car in Denver and  
9 wanted to go except this guy here. He's the only one  
10 to have implied that in 1994.

11           Sure, she told Troy Lynn and Palfy -- I am  
12 talking about Anna Mae -- she told those two to back  
13 off, the same as any of us would do to protect or save  
14 some of our children or our friends or loved ones.  
15 You know that story. You know how Troy Lynn testified  
16 to that.

17           Troy Lynn testified as to the flanking as  
18 Anna Mae was led away. Theda, Anna Mae, and John  
19 Graham in the hallway. Theda said, get out of the  
20 F'ing way. Folks, this is an abduction, a seizing,  
21 and a carrying away of a human being. Carrying away  
22 doesn't mean lifting up and hauling like a  
23 wheelbarrow. Carrying away means she was kidnapped,  
24 folks.

25           I will remind you, the burden of proof is on

1 the state, but in order for you to find reasonable  
2 doubt of a kidnapping -- if you are going to find a  
3 reasonable doubt that that took place, you will have  
4 to find Troy Lynn is lying, Angie Begay Janis is  
5 lying, George Palfy is lying; plus you then have to  
6 completely ignore the evidence of motive.

7 And then you have to ignore our crime scene  
8 analysis that we just walked through.

9 And then if you want, now, throw Looking  
10 Cloud into this mix. Even though others -- others saw  
11 the tying, besides just Arlo, that evidence is  
12 corroborated, folks. Not just him.

13 Finally, to find reasonable doubt to a  
14 kidnapping, folks, you will also have to ignore John  
15 Graham's statement. I'm ready to leave this place and  
16 I'll probably spend the rest of my life in jail.

17 I want to talk about the death. There is an  
18 instruction called the *corpus delicti*. You can find  
19 beyond a reasonable doubt that Anna Mae is dead,  
20 folks, by a bullet wound to her head. That's clear.

21 So even if one of you thinks that maybe Theda  
22 did the shooting, or Arlo did the shooting, you can  
23 still find John Graham guilty of murder while in the  
24 commission of a felony. John Graham and Theda were  
25 the active participants in the captivity of Anna Mae

1 and she died during the continued kidnapping across  
2 state and county lines.

3 Now, there is no doubt that the actual  
4 gunshot was in Jackson County. But let me read that  
5 venue statute again to you. Venue is the county or  
6 counties in which a criminal case must be charged and  
7 tried. When a crime, or any element essential to that  
8 crime, is committed in more than one county, or the  
9 acts or effects of the acts essential to the crime are  
10 committed in more than one county, venue is properly  
11 placed in any of those counties. Any of those  
12 counties. The acts or effects started from Denver and  
13 led all the way through, folks.

14 This instruction is important to note because  
15 no one should be able to get away with their crimes  
16 because of county lines, folks. The indictment  
17 charges murder while in the commission of a felony in  
18 Pennington County, but Anna Mae was kidnapped in  
19 Denver, brought to Rapid City, and her captivity  
20 continued.

21 So the same goes for premeditated murder.  
22 Although the actual shot, folks, came in Jackson  
23 County on this horrific act, it all began in Denver  
24 and it carried through each county Anna Mae was hauled  
25 through.



1           Regarding the dates of the capture and  
2 execution, the jury instruction talks about on or  
3 about. And I'd like to read that to you, folks. The  
4 indictment alleges the offenses were committed on or  
5 about certain dates. The proof need not establish  
6 with certainty the exact date of the offenses charged.  
7 It is sufficient if the evidence establishes beyond a  
8 reasonable doubt the offenses were committed on a date  
9 reasonably near the date alleged.

10           The law factors in, folks, human memory.  
11 Especially over 35 years. And it does not intend for  
12 a jury to find a technicality so that Anna Mae's final  
13 death -- her final breath goes without justice.

14           The note. Arlo Looking Cloud saw a note  
15 passed. There is corroborative evidence from Cleo  
16 about that. This wasn't any kind of note, folks. It  
17 was the death warrant.

18           I can't tell you who wrote that note, but  
19 from the analysis we can narrow it down. It did not  
20 come from Denver because Anna Mae had not yet been  
21 found, as I call it, guilty by the WKLDOC people of  
22 being an informant. And it did not come from the  
23 Marshall house because it was already in existence.

24           That leaves two places, folks. It came from  
25 either WKLDOC or Bill Means' residence in Rosebud.

1 Understand that the call was made to have Anna Mae  
2 brought to Rapid City, not to Bill Means' house.

3 Theda and John Graham were in it from the  
4 start. Arlo was the undisputed outsider so it is  
5 logical and commonsensical for Arlo to be told to wait  
6 outside at Kills Means' house just like he said.

7 Dick Marshall took three people into his  
8 bedroom. Two young men who he didn't know. They show  
9 up and go into his bedroom with the door closed, and a  
10 note was being passed around. Think about this on  
11 your own, folks. Just think about that. Any time  
12 someone brings a woman into your house and the three  
13 go into the bedroom, it's not certainly a plan for a  
14 Christmas party. Not under these circumstances.

15 The gun. The second Anna Mae's life was  
16 stolen from her, it is common sense that if you were  
17 the outsider, perhaps others would want -- would not  
18 want any witnesses. Let's analyze that gun thing at  
19 the cliff. Arlo asks for the gun immediately and  
20 fires off some rounds emptying it.

21 How would he know there were more rounds in  
22 there? Because he knew where the ammunition came  
23 from. Plus in his mind, folks, this was the only gun.  
24 Otherwise, why stop at Dick Marshall's? That one  
25 incident of emptying the gun tells you everything that

1 you need to know about the ammo, the gun, and the  
2 killers.

3 Remarkably eerie are John Graham's words to  
4 Robert Ecoffey and Mitchell Pourier in 1994, I'm ready  
5 to leave this place. I will spend the rest of my life  
6 in jail.

7 Wouldn't normal human beings say to Ecoffey  
8 and Pourier, hey, what are you trying to say here? I  
9 gave her an innocent ride to Rapid City. And then to  
10 the reservation. That's it.

11 This man claims he was just along for the  
12 ride and he dropped her off at a safe house. If  
13 that's true, how is it that Arlo Looking Cloud, Theda  
14 and this man, John Graham, got back to Denver in the  
15 same car at the same time?

16 Who are the two people that are in this thick  
17 and thin?

18 When Arlo showed up at Troy Lynn's, which two  
19 persons were watching Anna Mae already?

20 Who ordered her tied up and then who tied her  
21 up?

22 Whose girlfriend had connections enough to  
23 get the call to bring Anna Mae back to Rapid City?

24 John Graham suggested that he was helping her  
25 get away from the FBI in Denver and in Rapid City, and

1 Anna Mae was directing this trip. It's a stupid  
2 notion. Just plain stupid. It's not based upon  
3 anything other than him wanting to get away with  
4 murder.

5 At Troy Lynn's, with all the people present  
6 and the throat slashing, who was not present at that  
7 time? Arlo Looking Cloud.

8 Theda Clarke and John Graham were there. I'm  
9 not trying to say this to defend Arlo's honor, folks.  
10 Rather, just illustrates just one more example of who  
11 was in this from the beginning. You can find this man  
12 guilty without Arlo's testimony.

13 Let me talk about Arlo Looking Cloud's  
14 evidence. Of course, the defense is, once a person  
15 has lied then they are a liar for life. Let me get  
16 this straight, folks. The defense claims Arlo is  
17 telling lies about this whole incident. But it's the  
18 same telling that put Arlo himself behind bars. He  
19 did not make up John Graham's involvement years and  
20 years and years ago for a get-out-of-jail-free card.

21 Do you think Arlo's so quick that he has to  
22 think, you know what, I am going to need a gimmick.  
23 Some kind of gimmick. So I am going to have to kind  
24 of cook up some story so if I go down for this, if I  
25 get convicted, then I am going to have to -- maybe the

1 government will give me some kind of deal, and I can  
2 rat somebody else off. Who shall I pick? Oh, let's  
3 just pick this man? No. That was a gimmick -- that's  
4 not a gimmick he thought of. He has been talking  
5 about this, who was in that car, who shot who, all the  
6 time.

7 How many people that participates in the  
8 murder of a mother call the daughter and tell her  
9 about the mother's death?

10 How many people that participated in the  
11 murder of a mother tell the friends about the crime?

12 Remember, this is a man who turned his head  
13 and looked out the window and had tears in his eyes  
14 when recalling the incident to Kamook.

15 Folks, the wagon of justice is loaded with  
16 lies, it's half truths and deceit, and it's being  
17 pulled hard from the shadows into the light to expose  
18 a senseless killing of a mother.

19 Robert Ecoffey. I would like to talk about  
20 that. He devoted many years to solving this case. No  
21 one dare say this verdict is a rush to judgment. Your  
22 verdict encompasses years of uncovering reluctance,  
23 fear, and pure lies.

24 Robert Ecoffey and others exposed this murder  
25 by unmasking many people whose selfishness presided

1 over truth; by people whose self-interest overrode  
2 sensibility for a young lady whose body was left to  
3 rot. Such dehumanization.

4 Robert Ecoffey talked with John Graham and  
5 was able to get one of the closest statements to  
6 criminal culpability in this case, I'm ready to leave  
7 this place. I will probably spend the rest of my life  
8 in jail. John Graham told Robert and Mitch after much  
9 discussion that he took Anna Mae to the reservation.

10 Did John Graham at that time forget about  
11 Rapid City? The WKLDOD area? Dick Marshall's place  
12 when talking with Bob and when he talked to the press  
13 that we showed you?

14 Or was it not offered to Ecoffey and Pourier  
15 to conceal his guilt?

16 His guilt has been proven beyond a reasonable  
17 doubt as to aiding and abetting, folks, in a  
18 premeditated murder. His guilt has also been proven  
19 and established beyond any doubt to felony murder.

20 John Graham, with legs trembling and watery  
21 eyes, with his admissions and obvious omissions, told  
22 Bob and Mitch everything they needed to know.

23 This is a man who committed a heinous act and  
24 has gotten away with it for many years. Now he wants  
25 the 12 of you to reward him once and for all for his

1 slide past the alter of truth.

2 We've talked about the dates and the county  
3 lines.

4 I would like to discuss the elements, folks.  
5 The elements of kidnapping are that John Graham had  
6 the specific intent to seize, abduct, or carry away  
7 Anna Mae. This does not mean he ordered it or that he  
8 was in charge. Doesn't mean that. This means he got  
9 involved in a criminal venture of kidnapping Anna Mae  
10 purposefully. He not only was an aider and abettor,  
11 but he was one of the principals to kidnapping her  
12 from Denver until she dropped to her death on that  
13 cliff alone and forever.

14 Look at this paragraph. While Mr. Graham  
15 must be shown to specifically intend to kidnap Anna  
16 Mae, he may be found guilty of murder while in the  
17 commission of a felony such as kidnapping even if the  
18 killing was unintentional, accidental, or negligent.  
19 If any of you struggle with John Graham as the actual  
20 shooter, he is still an aider and abettor, folks.  
21 That's the bottom line, too.

22 The state does not have to prove John Graham  
23 personally killed Anna Mae while in the commission of  
24 a felony. We only have to prove the kidnapping and  
25 her death regardless by whose hand it was caused by.

1           Now, the jury instruction for premeditated  
2 murder. Understand, folks, there is no time element  
3 to establish premeditation. It can happen in a flash  
4 or be months in planning. Grabbing a gun, consciously  
5 pointing a gun at a person, not just at a body part,  
6 an arm or a leg, but at the back of the head. The  
7 vital spot that will ensure her silence forever. And  
8 then pulling the trigger while somebody is praying is  
9 premeditated murder.

10           The state does not have to prove who gave  
11 that order, folks, who gave that gun, or who had sex  
12 with whom. Who was -- or who was in this conspiracy  
13 complete top to bottom. We don't have to prove that  
14 today.

15           The independent evidence from the crime scene  
16 should be overwhelming, but it's also corroborated and  
17 has corroborated that with what others said.

18           Let's assume that one of you may think that  
19 Theda or Arlo did the actual shot. He can still be  
20 guilty of premeditated murder as an aider and abettor.  
21 The captain of the ship, folks, and the navigator will  
22 both sink in the storm.

23           Find him guilty on both counts, and trust  
24 this judge to do his job; not to consider the subject  
25 of penalty of punishment.



1 I would like to talk about corroboration.  
2 The accomplice jury instruction requires you to have  
3 independent corroborative evidence of the killing of  
4 Anna Mae other than just Arlo. We already talked  
5 about the crime scene and how it lines up to this  
6 testimony. But here are some points I wanted to bring  
7 out for you. The forensics of the 32-caliber bullet,  
8 the head wound, x-rays, Dr. Peterson's testimony of a  
9 contact wound. John Graham being at Marshall's just  
10 prior to the killing. John Graham being an active  
11 participant the whole time. His statements to Bob and  
12 Mitch in Canada. His one statement alone should be  
13 sufficient for corroboration and I have already  
14 repeated that twice.

15 Lastly, the man who conveniently just  
16 happened to store his guns at his parents' house, Dick  
17 Marshall. You just judge that man's credibility. You  
18 heard him and you saw him on that witness chair. For  
19 35 years, folks, the coils of justice have been wound  
20 very tight. Now is the time. This is not a difficult  
21 case, folks. The threshold of evidence has been met,  
22 and then some. Arlo Looking Cloud has been  
23 corroborated, but still, this case has been shown  
24 beyond a reasonable doubt with or without him.

25 Only you folks can establish accountability.

1 You have to shine the light of truth on the darkness  
2 that is now Anna Mae's. You have to get this right,  
3 folks.

4 This is the man who years ago -- and, again,  
5 I am not defending his honor, folks. Don't mistake  
6 that. But he gives it up. He gives it up. And he  
7 stands and he tells them what took place many years  
8 ago. Yes, criminal convictions, yes, he does. Look  
9 at that proffer letter, folks, from the federal  
10 government to him. It's not a get-out-of-jail-free  
11 card, folks.

12 And there is no motive -- no motive to -- for  
13 Arlo Looking Cloud against this man. Arlo Looking  
14 Cloud threw Theda in there, too, and that's  
15 exceptionally clear. There is no motive. Think about  
16 that. This is the same story that put himself behind  
17 bars. His is a crime that has escaped justice for  
18 many, many, many years and it's not going to happen  
19 any more.

20 Thank you.

21 Thank you, Judge.

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

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

24 Good morning, ladies and gentlemen. I want  
25 to start from both my perspective and my client's

1 perspective by saying thank you. You folks, whether  
2 voluntarily or not, inherited the most difficult job  
3 assigned to civilians in this democracy. And whether  
4 you volunteered or not, it's a job that requires  
5 incredible courage because you have accepted the  
6 responsibility of sitting in judgment of another  
7 person. And some people say, well, if you don't  
8 volunteer, it's not a courageous effort.

9           But when our men and women go across the gulf  
10 and go fight in battles overseas on behalf of our  
11 country, the assessment of their courage isn't based  
12 on whether they were drafted or enlisted, it's  
13 assessed based on the acceptance of responsibility  
14 they made; what things they accepted to do; what  
15 responsibilities they agreed to take upon themselves.

16           November 30, Tuesday of last week, about  
17 four o'clock, each of you stood up, raised your right  
18 hand and you took the juror's oath. And when you did  
19 that, that was the beginning of this adventure and it  
20 was the beginning of your acceptance of the  
21 responsibility the jurors have in this system.

22           The responsibilities you have are not easy.  
23 I would never make light of the responsibilities you  
24 have. You are being asked to sit in judgment of a man  
25 who has been accused of murder. The judge's

1 instructions outline for you some of your  
2 responsibilities.

3 First and foremost to put aside sympathy and  
4 bias. You heard Mr. Oswald just a few moments ago  
5 repeatedly use the phrase mother, and we talked about  
6 that in jury selection. How they would try to get you  
7 sympathetic to look through the evidence through that  
8 window, through those glasses, so that you would rush  
9 to judgment against my client, John. He repeatedly  
10 used that phrase, mother. Why? Of course, to appeal  
11 to your sense of sympathy which the judge has told you  
12 is not proper.

13 The other responsibility the judge outlined  
14 for you in the instructions is to critically examine  
15 the facts, and that is going to be so important  
16 through this case because as you are going to hear  
17 later on, there is a huge difference between a theory  
18 and a fact.

19 So I am going to start with one of the jury  
20 instructions that goes to the issue of how you  
21 critically examine the facts. I apologize, folks. I  
22 am new to this technology. I am going to read  
23 instruction number five. Page 16 of your packet. The  
24 highlighted section. If any member of the jury has a  
25 reasonable doubt that Mr. Graham committed the offense

1 charged or a reasonable doubt as to any single fact or  
2 element necessary to constitute the offense charged in  
3 a particular count, then it is that juror's duty to  
4 give him the benefit of the doubt and vote for a  
5 verdict of not guilty on that count.

6           It's what I mean when I say you have accepted  
7 the responsibility of engaging in a critical  
8 examination of each and every fact. Because as I want  
9 to talk to you in a bit, what you heard from the  
10 witness stand is not -- does not make it a fact. You  
11 have to decide what is a fact. There is fluff, there  
12 is facts, there is speculation, there is all sorts of  
13 stuff. And you have to make that decision. What do I  
14 really believe. What has the state really proven to  
15 me, and that's what I am talking about in regard to  
16 the critical examination.

17           The other assignment or responsibility you  
18 accepted was to apply the beyond a reasonable doubt  
19 standard. And as we talked about in jury selection,  
20 that's not how we conduct our day-to-day lives. We  
21 don't make assessments on a day-to-day basis by  
22 demanding proof beyond a reasonable doubt. We operate  
23 on hunches and bias and speculation.

24           But we're not in day-to-day life here. We're  
25 in a trial. And this man, John Graham, is accused of

1 murder. We have to up the ante. Elevate our  
2 analysis. Require at every juncture that the state  
3 proves its case beyond a reasonable doubt. That  
4 applies to elements, and it applies to facts.

5           One of the toughest responsibilities you have  
6 is being told that it is your duty to vote not guilty  
7 if the state hasn't met its burden. You may feel  
8 and -- Mr. Oswald clearly wanted you to feel -- that  
9 you would be letting down the system or the memory of  
10 Annie Mae if you didn't vote guilty.

11           Look at the judge's instructions on  
12 reasonable doubt. Right up there. The word duty. It  
13 is your duty and you honor the duty and you honor the  
14 oath you took when you force the state to prove its  
15 case beyond a reasonable doubt. You are not letting  
16 down the system. You are not letting down anybody.  
17 You are following your oath and adopting the duty that  
18 you agreed to take on.

19           I mention the emphasis on facts, not on  
20 theories. There are or there is a huge difference  
21 between facts and theories. Theories can be  
22 interesting, they can be intriguing, they can be  
23 compelling. But unless -- in a criminal trial, unless  
24 a theory is supported every step of the way by facts  
25 that you believe have been proven beyond a reasonable

1 doubt, a theory means nothing.

2           The theory that the state supports or puts  
3 forward in the case -- or the many theories that you  
4 heard about over the last six or seven days of  
5 testimony, were not supported by facts that were  
6 proven beyond a reasonable doubt.

7           Now, one of the things that you have to  
8 consider in this case -- part of your job as a juror  
9 is to consider the elements of the offense or the  
10 offenses. But I want to say or suggest to you that  
11 you have to take a step back from the elements. And  
12 this goes to what we heard from the witness stand.

13           Before you can consider whether the state has  
14 proven each and every element of the crimes beyond a  
15 reasonable doubt, you have to make that critical  
16 assessment of what really was proven from the witness  
17 stand.

18           What did they prove out that was true that  
19 you can say you wouldn't pause or hesitate to act upon  
20 it?

21           What came from that witness stand that was so  
22 rock solid I don't need to check on it?

23           I submit to you very little over the last six  
24 days of testimony that came from that witness stand is  
25 actually a fact. You have heard from witness after

1 witness after witness. Witnesses who lied, witnesses  
2 who could not keep their stories straight when  
3 retelling it over the years, and not on little  
4 details, on major details. Witnesses that claim to be  
5 in the same little apartment observing the same event  
6 at the same time and cannot keep their stories  
7 straight. They contradicted each other over and over  
8 again.

9           Witnesses that had financial bias, who were  
10 interested in becoming celebrities or heroes. That is  
11 what you heard from the witness stand. That was the  
12 quality of evidence that you heard over and over  
13 again.

14           I ask you to ask yourself, if the state's  
15 witnesses really observed these events, were really  
16 there perceiving the events as they happened, then why  
17 can't any one of them keep their story straight from  
18 month to month. Because as we heard, many of these  
19 witnesses have given the statements 13, 14 times.  
20 Some of it going back 20 years, much closer to the  
21 events. On major details they could not keep it  
22 straight. And they claim to be two or three of them  
23 in the same room and they are contradicting each other  
24 on huge matters such as who was present and when  
25 things happened. If they had really perceived the



1 events they claimed to have perceived, they wouldn't  
2 have had so much trouble retelling the stories over  
3 and over again.

4 As a juror being asked to convict my client  
5 of murder, I would -- I would hope that you would have  
6 been presented with better quality evidence. Before  
7 you are asked to call somebody a murderer, you deserve  
8 better quality evidence than what was presented here.  
9 My client, somebody who has been accused of murder and  
10 of rape, he deserves better quality evidence.

11 This case is 35 years old. And in 35 years,  
12 they have tried this case twice before and that's  
13 still the quality of evidence that they can produce.  
14 Poor quality, inconsistent, biased, contradictory  
15 evidence.

16 I want to talk to you about the rape  
17 allegation. Mr. Jackley, in his opening statement,  
18 said he was going to prove to you beyond a reasonable  
19 doubt that my client raped Anna Mae Aquash.

20 **MR. JACKLEY:** Objection, Your Honor.  
21 Misstatement of the record.

22 **THE COURT:** I am not in a position to address  
23 that as to -- I have no recollection of what was  
24 addressed in the opening statement. The jury will  
25 have to recall that on their own.

1           **MR. MURPHY:** I will tell you it is my  
2 recollection that such an accusation was leveled  
3 against my client. That is the vilest accusation one  
4 can make against a man. An accusation that has been  
5 haunting my client since 2008 when Arlo Looking Cloud  
6 first made it.

7           You sat through six days of testimony and  
8 what did you hear about that accusation? What quality  
9 of evidence was presented on that point, which was  
10 clearly a point that was brought in for one reason and  
11 one reason only, and that reason was to assassinate  
12 his character; to get you people to hate him.

13           What was the evidence you heard? You heard  
14 Arlo admit that since 1994 he has been telling and  
15 retelling this story and even when he was point blank  
16 asked by Kamook and Troy Lynn, did you ever see  
17 anything funny going on between Annie Mae and John he  
18 said no. They played cards, they talked, they looked  
19 like friends.

20           But then in 2008, when my client is  
21 brought -- when his charges are dismissed in federal  
22 court and he's brought over to state court, he's  
23 willing to tell the Grand Jury under oath, oh, yeah, I  
24 walked by the bedroom where they were inside. The  
25 bedroom where he said previously they had been playing

1 cards and I heard sex noises.

2 That is the sum total of the evidence that  
3 was presented to you over about 18 witnesses to  
4 substantiate an accusation against a man that he raped  
5 a woman who he considered his friend. You deserve  
6 more and he deserves a hell of a lot more.

7 It was an irresponsible, reckless claim and  
8 you should care because it's indicative of how far  
9 they will go on just pathetic evidence to try to ruin  
10 somebody and to try to assassinate their character so  
11 you will have a sense of umbrage and forget your  
12 responsibilities to apply the law and demand proof  
13 beyond a reasonable doubt. That's one statement by  
14 Arlo they say was proof of a rape.

15 Arlo, a man, who as pathetic as he, is  
16 somebody who I don't think any of us would ever even  
17 have walk their dog much less rest a rape accusation  
18 on his words.

19 That's why we have the beyond a reasonable  
20 doubt standard. To protect people like John from weak  
21 allegations based on horrible quality evidence.

22 That incident, the rape allegation, is not  
23 the only instance of unfair play that you heard during  
24 the course of this trial. The prayer allegation.

25 Do you recall when Arlo was on the stand and

1 we talked about a time when he was before a Grand  
2 Jury? During that time before the Grand Jury, he was  
3 asked by Mr. Oswald, was she praying. And Arlo said,  
4 no. Point blank. And then I read the highlighted  
5 section of this sworn statement. And it's important  
6 that it's a sworn statement because one of the  
7 instructions that the judge gave you is that prior  
8 inconsistent statements break into two groups.  
9 Unsworn statements, you can only consider those to  
10 show that somebody changed their stories. But if  
11 somebody is presented with a sworn statement by them,  
12 during a trial, that statement is evidence.

13 So what happened during the trial? I read to  
14 Arlo this statement, where, during his Grand Jury  
15 testimony, after --

16 Can you see that, folks? Is it focused  
17 enough? Thanks.

18 It was after he said, no, she wasn't praying,  
19 Mr. Oswald said, now, Arlo, during the break you  
20 talked to Marty Jackley about the prayer issue and we  
21 asked you then if you wanted to come back and discuss  
22 it a little more. Can we discuss it some more? Yes.

23 And then we get to the next page, you  
24 discussed a little bit more about you saw or heard  
25 some prayer from Anna Mae. Now, does that ring a bell

1 to you now? Answer. She seemed like she was praying.

2 They basically told Arlo what to say. And  
3 you saw him on the stand. He is the most pliable guy  
4 in the world. He is putty that can be molded. You  
5 just wind him up, tell him what you want him to say.  
6 And what did Arlo say when I confronted him with that?  
7 I said, they told you they wanted the drama and you  
8 were willing to give it to them, and he said, yeah.

9 I submit to you that if I engaged in that  
10 kind of conduct I'd probably lose my license to  
11 practice law. Coaching, putting words in a witness's  
12 mouth. They do it during a Grand Jury proceeding.

13 It would be nice if that was the only type of  
14 misconduct that we saw in the way they have  
15 manipulated witnesses and manipulated evidence. The  
16 only John Boy statement. Recall with Kamook and Troy  
17 Lynn. Arlo, this drug-addicted, strung-out career  
18 criminal, pathological liar, is there in the car and  
19 they are interviewing him and Arlo asks one question  
20 of Kamook. How many people should I implicate and  
21 Kamook's statement, only John Boy. And he asks, only  
22 John Boy? And Troy Lynn says, back at John Boy.

23 Kamook, a person at that point who is working  
24 for the FBI -- she didn't want to admit that. Let's  
25 face it. This is 2000. Between 2000 and 2003, this

1 woman gets paid 50 grand tax free to do ten  
2 interviews. Her husband is the U.S. Marshal. The  
3 lead investigator. The FBI is listening in on the  
4 recording device. She is an FBI employee at this  
5 point. They get to throw her 50 grand tax free to do  
6 some interviews.

7 And what does she follow up after she tells  
8 Arlo, only implicate John Boy, because it's come down  
9 pretty much to, uh, like your word against his, you  
10 know. And Arlo admitted they had told him that my  
11 client, way back then, was making stuff up against  
12 him, which wasn't true. My client had never  
13 implicated him. We heard the same thing about Dick  
14 Marshall. Arlo had been told Dick Marshall is ratting  
15 you out. Give us information about him.

16 Arlo had been telling a story from the early  
17 90s on and only in 2008 when Dick Marshall became a  
18 suspect did suddenly Dick Marshal and the gun appear.  
19 They spoonfed him from the get go.

20 I submit to you if I conducted myself with a  
21 witness, like Kamook did with Arlo, I would be charged  
22 with witness tampering. Telling a witness who to  
23 implicate. It's criminal. But that's the quality of  
24 the evidence they want you to convict my client for  
25 murder on. You should be outraged.

1           This is a 35-year investigation and they want  
2 you to find him guilty of two counts of murder when  
3 they have FBI employees telling witnesses who to  
4 finger.

5           I said before, you can't get to the elements  
6 until you find out what is fact, what is fiction.  
7 What is fact, what is fluff, because a lot of what we  
8 heard is just plain fluff.

9           Let's start in Denver. What happened in  
10 Denver? The sources are Troy Lynn, Angie, George  
11 Palfy, and Arlo. As I indicated before, and you heard  
12 it, they could not keep their stories straight about  
13 anything. Whether Annie Mae was in the basement or a  
14 bedroom; whether Annie Mae was tied up, whether she  
15 wasn't; whether Arlo was there or whether he wasn't;  
16 how many people were in the room, what they were  
17 doing, et cetera. They couldn't keep that straight at  
18 all.

19           And they gave this incredibly inconsistent  
20 time line which is relevant because it goes to the  
21 celebrity issue or the cottage industry issue. I want  
22 you to recall back to George Palfy's testimony and  
23 Troy Lynn's testimony. Troy Lynn said a bunch of  
24 people showed up all of a sudden and there was a short  
25 meeting, 15 to 30 minutes at most. They left. Theda

1 started saying we've got to go now. And that's when  
2 she goes -- she, Troy Lynn, goes back and makes some  
3 calls. Tries to call the police and makes some other  
4 calls. And that's right before they are leaving.

5 And as a side note, that's also when she said  
6 she made that dramatic statement, if I leave here  
7 you'll never see me alive again.

8 And I don't want to digress too much, but  
9 when we were talking with Kamook, she gave -- Troy  
10 Lynn gave that huge interview, nine cassettes with  
11 Arlo and then ten more cassettes by herself. When she  
12 was being interviewed ten years ago, that traumatic  
13 statement never made it into the record. That only  
14 got added on later as this case has become the cause  
15 celeb.

16 But let's go back to Troy Lynn's testimony.  
17 Pretty concise short meeting. Calls. They go.

18 George Palfy gets up on the stand. He says,  
19 yeah, I got a call. I was at the AIM house. I don't  
20 know if she was looking for me, but she said, can you  
21 come over. And he said, I did my paperwork. I had to  
22 finish up my paperwork which took another half hour,  
23 45 minutes. And then I drove across town, which took  
24 another 45 minutes. So at the earliest, he got there  
25 an hour, more likely an hour and a half, after the



1 call.

2           Why does this timeline mean anything? The  
3 reason it means something is because both Troy Lynn  
4 and George Palfy claimed to have been in the room when  
5 one of the Crusade for Justice guys made this gesture.  
6 George Palfy would have arrived an hour after that  
7 gesture would have been made. But it's part of the  
8 internet gossip mill that we heard about and the  
9 fanatical obsession with this case. People --  
10 somewhere along the line, that gesture became part of  
11 the case and now everybody wants to be part of it.

12           And what do you remember about Troy Lynn?  
13 Troy Lynn said over and over again in past statements,  
14 she didn't know anything about what the meeting was  
15 about. Didn't know what they were talking about.  
16 But, then, in more recent statements, she said, oh, my  
17 only responsibility, my only contact with this meeting  
18 was when I went in, put the coffee tray down, turned  
19 around and left, and that's when I saw this gesture.

20           These people all want to get in on the action  
21 and they are willing to say things that are not true,  
22 could not be true, in order to be part of the case.

23           Troy Lynn indicated -- she was this main  
24 witness from Denver -- that the explanation for her  
25 inconsistencies and omissions was because she only

1 wanted to give minimal information. This is the same  
2 gal who spoke for 19 cassettes to Kamook alone. You  
3 probably saw when I was examining her, I had a stack  
4 of her prior statements that was about that high. She  
5 had talked to investigators. She had talked to  
6 anybody who would listen. And her statements make  
7 her -- especially her recent statements make her to be  
8 quite the hero.

9 That's the kind of testimony you got. It is  
10 not unbiased or impartial. It's testimony by people  
11 who want to claim to be part of this, and they  
12 certainly want to be the heroes in it.

13 I would like you to think of three things we  
14 can take away from the Denver testimony. And there is  
15 three things that I think come out as consistent.  
16 First, the time line, and this is critical. George,  
17 Angie, Troy Lynn, and Arlo all put this event  
18 happening at the end of November. George was positive  
19 about it. Angie was positive about it. And Arlo said  
20 the one thing he could say that he could tie to some  
21 outside fact was he said, I know it happened during my  
22 son's birthday. His mother had taken his son up to  
23 Scottsbluff and that's why I was going out to find a  
24 drinking buddy and his son was born November 27.

25 The only wiggle room on that was Troy Lynn.

1 She said Annie Mae came on November 24 and she stayed  
2 a week, plus or minus a day. At best that brings us  
3 up to December 1<sup>st</sup> or 2<sup>nd</sup>.

4 Why is this pivotal? It's pivotal because  
5 that establishes the trip that my client took with  
6 Annie Mae. It happened at the end of November. And  
7 what's going to become really crucial in a few moments  
8 when we talk about the WKLDLOC meeting. Because as you  
9 know, the WKLDLOC meeting was clearly established --  
10 whatever that meeting was, I should say, because we  
11 didn't hear much about that -- it happened on  
12 December 15, plus or minus a day.

13 You have the court documents as exhibits.  
14 Candy Hamilton said it happened during Dick Wilson  
15 Senior's trial. They have a two-week gap that they  
16 have never provided you any evidence on. Two weeks  
17 they cannot explain between the end of November and  
18 December 15, they have no explanation for events. Why  
19 is this pivotal? Because it goes to the safe house  
20 issue.

21 I want you to go back to Denver. How did  
22 Annie Mae get to Denver? Annie Mae called Evelyn  
23 Bordeaux and Ray Handboy and said, I need to get out  
24 of here. Take me to -- take me somewhere. She didn't  
25 tell them where she was going. She didn't tell them

1 any of the details. She said, pick me up and take me  
2 to Denver, and Annie Mae directed it, day by day or  
3 mile by mile where they go. They get down to Denver.  
4 She says, drop me off at this street corner and she  
5 gets out. Ray and Evelyn know nothing about where  
6 she's going.

7           What do we know next? Troy Lynn says Theda  
8 brought Annie Mae over and left her at my house. So  
9 we know Annie Mae went to Denver, made contact with  
10 Theda and said, arrange a safe house for me.

11           And what did Troy Lynn say about the plans  
12 and the comments Theda made when they dropped Annie  
13 Mae off? Keep her safe. Protect her. And Troy Lynn  
14 said the plan was Annie Mae would stay at her place  
15 for a little while and then move on to the next safe  
16 house.

17           As we see winding through the rest of the  
18 story later on, that safe house issue comes back over  
19 and over again, but what I want you to bring from that  
20 is that we have that two-week period missing from when  
21 John Graham takes Annie Mae up to Rapid City, and  
22 when -- or wherever he took her, Pine Ridge -- and  
23 when -- or the village of Oglala -- and when Annie Mae  
24 is seen without anybody else and -- without John,  
25 without Theda, without Arlo, 15 days later at the

1 WKLDOC hearing. Annie Mae was at a safe house during  
2 that period of time.

3 Let's go up to the WKLDOC house in Rapid  
4 City. And I'd ask you to keep those two things  
5 separate, Rapid City and WKLDOC. Rapid City. Arlo is  
6 really the only witness who testified about Rapid  
7 City. And what did Arlo say over and over again? He,  
8 Annie Mae, and John stayed in an empty apartment all  
9 day together. They got there late at night. They  
10 next day they stayed in the apartment together. That  
11 was when he saw John and Annie Mae playing cards and  
12 talking.

13 It's also when he said John was guarding the  
14 front door. He was specifically asked by Troy Lynn  
15 and Kamook, was John guarding the bedroom? No. He  
16 was guarding the front door. I asked him about his  
17 prior statement. Why was he guarding the front door?  
18 To keep anybody from coming in.

19 At that point, at the end of November, Annie  
20 Mae is a fugitive and she's afraid of the FBI or the  
21 Marshal service kicking down the door, so her friend  
22 John Graham is guarding the front door.

23 They also -- or Arlo also says, and Angie  
24 Janis confirmed this. That trip in November that John  
25 Graham was on happened in the end of November and they

1 were back in Denver in two days. John Graham took  
2 Annie Mae to a safe house. Dropped her off. They  
3 were back in Denver in two days. And we don't know  
4 what happened between the end of November and  
5 December 15, but it clearly did not implicate John  
6 Graham.

7           That's where we get to the WKLDLOC house.  
8 Candle Hamilton, the only witness who testified,  
9 December 15, clear as a bell, she had testified about  
10 that under oath multiple times before. She said, I  
11 was there. I spent the night with my friend Kathy  
12 James, who was a witness at the trial. You will see  
13 in the exhibit, December 16, Kathy James was a witness  
14 at the Dick Wilson trial.

15           Now, the state tried to get her confused or  
16 tried to get her to change her story and say, well,  
17 couldn't it have been this deposition? Couldn't you  
18 have been at a deposition earlier in December? She  
19 said, I am a legal worker. I know the difference  
20 between a trial. I asked her, this is a trial, right?  
21 Yeah, this is a trial. That's what I went to.

22           She was at the Dick Wilson trial on  
23 December 15. And that date is probably established  
24 beyond dispute because when Mr. Ecoffey was up on the  
25 stand, he admitted that he had tried to cross

1 reference the Dick Wilson Senior trial and the Russell  
2 Means trial. The only date those two trials had in  
3 common of December 15. It was the last day of the  
4 Russ Means trial and the first day of the Dick Wilson  
5 trial.

6           What do we know about WKLDLOC? What we know  
7 about WKLDLOC is at that point Annie Mae Aquash was  
8 clearly not in anybody's custody. There was clearly  
9 no kidnapping there. She meets Candy for coffee in  
10 the kitchen three steps from the back door. She is  
11 not tied, she is not restrained, she is not -- Candy  
12 says, hey, do you want to come back down to Oglala.  
13 You know, I know you are running from the feds. You  
14 might be safe there. Annie Mae says no. Clearly not  
15 kidnapped.

16           Also, Candy Hamilton travels throughout the  
17 WKLDLOC house that day. Upstairs, downstairs, in the  
18 kitchen, et cetera. Says she know -- she knew what  
19 John Boy looked like. He wasn't there, Theda wasn't  
20 there, Arlo wasn't there.

21           One of the instructions on the elements of  
22 felony murder is that if you are to find Mr. Graham  
23 guilty of felony murder, you must find that Ms. Aquash  
24 died as a result of or while committing kidnapping, or  
25 aiding and abetting kidnapping. As a result of or

1 while the kidnapping was going on.

2 This is sometimes called the causal break  
3 instruction. The kidnapping has to be the cause of  
4 the murder. There has to be a continuous connection  
5 between those two events. If there is a break between  
6 those two events, felony murder has not occurred; or  
7 at least it has not occurred in regard to my client.

8 That is why that two-week break becomes such  
9 a huge issue because they haven't proven to you one  
10 bit by any evidence where the heck Annie Mae was and  
11 what she was doing between the end of November and  
12 December 15.

13 My client cannot be guilty of the crime of  
14 felony murder. They have to show a continuous  
15 transaction; that she was continuously kidnapped and  
16 that he was involved in that and they don't have him  
17 at WKLD.OC. They don't have him in the State of South  
18 Dakota. They don't have an explanation for two weeks  
19 that evaporated.

20 The other thing I want to talk about WKLD.OC  
21 is this is one of the first good examples or the  
22 theory versus fact issue; speculation versus what's  
23 reality. What was the -- the only witness about  
24 WKLD.OC was Candy Hamilton.

25 The state has tried to allege and



1 speculate -- put forward this theory that some  
2 Tribunal occurred at WKLDOC where Annie Mae was found  
3 guilty of being an informant or guilty of treason. It  
4 would make a great law and order episode, but what  
5 facts do they have to support it? Not one fact.

6 Candy Hamilton said she was in the house all  
7 day. There were some people having a meeting in the  
8 other room. She never heard Annie Mae's name  
9 mentioned. She never heard the word informant  
10 mentioned. It was -- there was no screaming or  
11 anything like that. It was just a meeting in another  
12 room.

13 She also said something interesting. She  
14 said I was a lady from the south. I was not upper  
15 echelon in AIM. I was not somebody who was a leader  
16 allowed to be in a decision-making role. Yet they  
17 allowed her to have free access to the house and roam  
18 around all day when they are supposedly conducting a  
19 Tribunal to convict Annie Mae? It was pure  
20 speculation. We know nothing about what that meeting  
21 was about.

22 Consider all the other options. There are  
23 500 criminal trials going on at this point. Annie Mae  
24 is up to her ass -- pardon me -- up to her neck in  
25 alligators. She's got explosive charges and

1 kidnapping -- or grenade charges and obliterated  
2 serial numbers charges out of Pierre at this time.  
3 She's on the run. She's a fugitive. That meeting  
4 could have been about her legal chances, about her  
5 likelihood of going to prison, it could have been  
6 about anything. It might not even have been about  
7 her. They have speculated and they have concocted  
8 this theory, but they have no support for it.

9           So we've got the reasonable doubt established  
10 in Rapid City about what the two-week period means.  
11 We established that. We go to this issue about  
12 whether there was a meeting or not.

13           We also go back to the safe house issue. And  
14 the safe house issue is important and it comes up  
15 again because we talked about this two weeks that they  
16 can't explain, but there was a question put to Troy  
17 Lynn Yellow Wood by the state. Why didn't you follow  
18 up? If Annie Mae had been taken out of your house and  
19 if you were concerned about how safe she was, why  
20 didn't you follow up on it? And she said, well, a  
21 couple weeks after she left, I got a call from my  
22 friend Wilma Blacksmith who lives in Oglala. And she  
23 said Annie Mae was fine. She was safe in Oglala.

24           What is Oglala? Oglala is a village on the  
25 reservation. That two-week -- that call two weeks

1 later from Wilma to Troy Lynn would have been during  
2 this period of time when the state can't explain where  
3 Annie Mae was.

4           What did John Graham tell Ecoffey and  
5 Pourier? I dropped Annie Mae off at a village on the  
6 reservation.

7           Dick and Cleo's house. Let's move it up to  
8 the next step. Timing, again, comes into play. What  
9 did Cleo say and what did she admit to saying  
10 previously under oath? The folks that came to her  
11 house came there right after Thanksgiving. Again,  
12 helping to establish the two-week gap that the state  
13 can't explain between when John was with Annie Mae and  
14 when Annie Mae was seen alive at WKLD0C two weeks  
15 later.

16           What do we know about what happened at Dick  
17 and Cleo's house? What is uncontroverted, not  
18 disputed, by either of those witnesses? There was no  
19 gun. There were no bullets in that house. The  
20 meeting was about -- or the discussion was about,  
21 could they leave Annie Mae at Dick and Cleo's house.

22           Why would they have picked Dick and Cleo's  
23 house. Well, Dick talked quite a bit about this.  
24 Everybody knew their house, Cleo entertained  
25 everybody; and they were the kind of people that were

1 AIM supporters that if people needed help, that's  
2 where they came.

3 What did Dick and Cleo say was the reason for  
4 them to come to the house? It was to leave Annie Mae.  
5 It wasn't to kill her. It wasn't to harm her. It  
6 wasn't to do anything bad. It was to leave her.

7 And one of the things that I want to go back  
8 to is what Cleo actually said at the trial in prior  
9 sworn statements she gave. The implication by the  
10 state has been that when they went to Dick and Cleo's  
11 house they were asking Dick and Cleo to participate in  
12 the kidnapping of Annie Mae.

13 I showed Cleo two of her prior sworn  
14 statements on this issue. What did he say to you at  
15 that time? He being Dick Marshall. He said, they  
16 want us to keep her here. What did you understand  
17 that to mean? To hide her. This is substantive  
18 evidence. This is evidence you can consider because  
19 it was under oath.

20 On a previous time, sworn statement, was  
21 there some request made of you and Dick that evening  
22 by these people? Well, they came in, they went --  
23 they came out of the bedroom and called me in the  
24 kitchen and he said they want us to keep her here.  
25 Who said that? Dick. I said, what for? I don't

1 know. Just keep her here. And I said, no.

2 When John was with Annie Mae in late  
3 November, he was helping or trying to help her find a  
4 safe house. It didn't work out at Dick and Cleo's but  
5 it worked out somewhere else in Oglala, and that's  
6 what Wilma Blacksmith's call was all about.

7 Oglala is important because what did Troy  
8 Lynn -- or I am sorry -- Candy Hamilton say when she  
9 was testifying? Her and Annie Mae used to live right  
10 outside of Oglala. Annie Mae had friends in Oglala.  
11 That's where the incident at Jumping Bull's happened.  
12 That was an AIM stronghold. If Annie Mae was going to  
13 go to a house or to a place to find a safe house to  
14 hide while she was a fugitive, Oglala would have been  
15 it.

16 Now, there is one thing that I have to  
17 acknowledge. During this trial, Cleo said something,  
18 and it was very vague, about possibly a discussion of  
19 tying up Annie Mae. It was very vague. And I brought  
20 up that the first time after 20 some years of giving  
21 statements about this case that she had ever made that  
22 reference was last April when her ex-husband was on  
23 trial. That was the first time. Her prior sworn  
24 testimony was unequivocal. There was nothing about  
25 tying her up.

1 I think the lesson to be learned from that is  
2 you never want to have your ex-wife being a witness  
3 against you. That is the sum total because it was so  
4 out of character with everything she had ever said  
5 before under oath.

6 The only evidence that conflicts --

7 **THE COURT:** Mr. Murphy, a juror has requested  
8 a break.

9 **MR. MURPHY:** Oh.

10 **THE COURT:** Can we take five minute?

11 **MR. MURPHY:** Certainly.

12 **THE COURT:** I am sorry to interrupt a closing  
13 argument, ladies and gentlemen. But we have had a  
14 request for a break and we will take one for five  
15 minutes or so. The bailiffs will let us know when we  
16 come back.

17 Folks, it's still too early to talk about  
18 this case or think about it or form opinions until  
19 Mr. Murphy and Mr. Jackley have finished their closing  
20 arguments. So we will see you in a few moments.

21 Thank you.

22 (Off the record.)

23 **THE COURT:** I am satisfied.

24 Counsel?

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

1           **MR. MURPHY:** Yes.

2           Folks, we left off at Dick and Cleo's house.  
3 How Dick and Cleo had both said, absolutely no gun, no  
4 bullets. No nefarious meeting about killing or  
5 harming Annie Mae. The only evidence on that point  
6 was Arlo Looking Cloud.

7           And I want to take you over to the accomplice  
8 instruction the judge read to you. Particularly, the  
9 bracketed section up there. I am going to read that  
10 to you. "In determining when an accomplice has been  
11 corroborated you must first assume the testimony of  
12 the accomplice is removed from the case and then  
13 determine whether there is any evidence remaining  
14 which tends to connect the defendant with the crime  
15 charged."

16           What does that mean? It means you got an  
17 accomplice. And the judge has said Arlo is an  
18 accomplice. Take it out of the case. Pretend like it  
19 doesn't exist and see what's left over. Dick and Cleo  
20 are what is left over, and they said no gun, no  
21 bullets, no kidnapping. That's the evidence you have  
22 to consider.

23           Pretend like Arlo's testimony doesn't even  
24 exist. Nothing corroborates Arlo. What, in fact, we  
25 know about Arlo's testimony on this point is that it

1 was a complete fabrication, part of his ongoing  
2 manipulation. You got an opportunity to see that  
3 before your very eyes.

4 The night stand issue. Arlo admitted between  
5 when he testified at Dick Marshall's trial and when he  
6 testified here he read Cleo Gate's testimony.

7 Why is that important? At Dick Marshall's  
8 trial he said, yeah, I saw Dick Marshall get the gun  
9 and the bullets from the night stand beside the bed.  
10 But Cleo at that trial was asked, was there a night  
11 stand next to the bed? No. There was a table. Did  
12 it have any drawers? No.

13 So what did Arlo do, because he is an expert  
14 at milking deals and changes his story to make sure he  
15 get a deal. He changed it right before your eyes in  
16 this trial. He said, no, Dick went down to the bottom  
17 drawer of a dresser and pulled out the gun and the  
18 bullets there. He is willing to change his testimony  
19 over and over again when it fits the new theory or to  
20 explain a past lie.

21 The state proposed a theory at Dick  
22 Marshall's house and this note and this gun that has  
23 not been supported by any evidence that you can  
24 consider -- that you can consider reliable or that  
25 does not come from an accomplice. It's yet another



1 unsupported theory. It's interesting. It makes good  
2 drama, but you have the duty to separate fact from  
3 fiction. You have the duty to separate what's a  
4 theory and what's a theory supported by believable  
5 facts.

6 The next event, it brings us up to the  
7 Badlands where supposedly my client killed Annie Mae.

8 Who testified about what happened at the  
9 Badlands? One witness. Arlo Looking Cloud.

10 We go back to that jury instruction. How are  
11 you supposed to consider the testimony of Arlo? You  
12 are supposed to pretend it doesn't exist and then see  
13 what else is there. Arlo is the only witness who can  
14 testify on this point. He's the only witness who did  
15 testify on that point. Remove him, their case is  
16 gone. That's just the reality.

17 They have charged my client with aiding and  
18 abetting premeditated murder or committing  
19 premeditated murder. Their theory has been my client  
20 was the gunman. The only source of that evidence is  
21 Arlo Looking Cloud. And you are told it's your duty  
22 as jurors to, first, pretend like that testimony  
23 doesn't exist.

24 Well, what else corroborates the statement  
25 that my client held his -- a gun up and killed Annie

1 Mae? There simply is not -- no forensics, no other  
2 eyewitness, no confession, nothing.

3           When you look at the elements of the offense  
4 of premeditated murder, you know, you will realize  
5 that they have to have evidence that my client killed  
6 or aided and abetted the killing of Annie Mae; and  
7 they have nothing on that point other than Arlo  
8 Looking Cloud's accomplice, bogus testimony.

9           Even if there wasn't an accomplice rule --  
10 and that's a rule meant to protect people when  
11 somebody like Arlo tries to finger others.

12           Even if they didn't have that rule, could you  
13 base a finding of guilt beyond a reasonable doubt on  
14 anything Arlo said?

15           I mean, to prove their case, both for felony  
16 murder or for premeditated murder, they have to prove  
17 my client specifically intended to do acts; that he  
18 participated directly in this killing, he aided and  
19 abetted the killing, he caused her death during the  
20 course of a kidnapping.

21           What testimony did you hear about any of  
22 that? It all came from Arlo. And Arlo was perhaps  
23 one of the least believable people every to grace a  
24 courtroom. His testimony was sad. Yet their case  
25 rises and falls on his testimony. Everything at the

1 Badlands come in through Arlo.

2 And they are going to say the crime scene  
3 analysis corroborates Arlo. Statements of counsel are  
4 not evidence. I ask you, where was the crime scene  
5 analysis during this trial? They had cop after cop up  
6 there. Did they ever have any of these trained  
7 professionals try to conduct an analysis of the crime  
8 scene that somehow magically linked my client to these  
9 crimes? Absolutely not.

10 They didn't put a -- produce a shred of  
11 forensic or crime scene analysis or other analysis  
12 that established any link between my client and the  
13 killing of Annie Mae Aquash up on that bluff west of  
14 Highway 73.

15 I want to take a moment to talk about Arlo.  
16 And I just want to put it to you bluntly. How dare  
17 they base these charges on his testimony. They know  
18 him. He's testified over and over again since he got  
19 convicted. He was a guy -- I mean, notwithstanding  
20 the 12 convictions for making false reports to law  
21 enforcement, the 40 other convictions he has, the  
22 felonies, all of that. He's a guy who gets up on the  
23 stand and says, I have no problem lying to the  
24 government to get a deal. I will provide them  
25 whatever deals -- or details they want if it helps me

1 get out of jail. He was somebody who by his own  
2 admissions was willing to do or say anything to make  
3 them happy.

4 Arlo in many ways is like the perfect  
5 prosecution witness. His brain has been ravaged by  
6 drug abuse and alcohol issues. He's been manipulated.  
7 He learned how to use the system over 40 years ago.  
8 We talked about all of the charges he's been able to  
9 get thrown out. All the convictions.

10 He was spoonfed information in this case by  
11 key people even when they were working for the FBI.  
12 He's been privy to other witness's testimony. His 40  
13 years of making deals has given him a pretty good  
14 touch at figuring out how he needs to change his story  
15 when they need a new story to be told. We saw that  
16 over and over again. Dick Marshall becomes a suspect.  
17 Arlo suddenly sees a gun. John Graham gets moved over  
18 to state court, suddenly there is a rape.

19 The other things about Arlo, and it probably  
20 was apparent, this is a guy who desperately wants to  
21 be special. And he's become more special since 2008  
22 when he started changing his story to fit their needs  
23 than he's ever been in his life. And that's a huge  
24 motivator. Probably not nearly as much as a motivator  
25 for him to lie or to say or do anything they want as

1 the idea of going back to that hell hole prison in  
2 Louisiana for the rest of his life.

3           Imagine what that prospect would do to  
4 anyone. Not just somebody who is a drug-addicted  
5 career criminal. Anybody facing the idea of going  
6 back to that Louisiana prison where he's all alone, he  
7 has no gangs to protect him, and people are getting  
8 stabbed and killed daily. He would say anything.

9           Now, the state tried with Arlo to point to  
10 two consistencies. Said, well, you know, you have  
11 changed your story on every other detail umpteen  
12 times, but, Arlo, haven't you always said that it was  
13 John, you, and Annie Mae that got out of the car? And  
14 it -- wasn't it always you that said John was the one  
15 who was the trigger man? And Arlo said yes.

16           So we pointed out to him or we asked him  
17 questions about his statement to Denise Maloney. And  
18 he denied that, but then Denise Maloney got up on the  
19 stand and what did she say? Arlo -- when he's talking  
20 to the daughter of a woman who has been killed says  
21 Theda and John went up over a hill. I don't know who  
22 shot her. He couldn't even keep the big details  
23 straight from story to story. And that would have  
24 been the easy part because anybody could have gone and  
25 kept those straight if they wanted to finger him. It

1 was always the case, that whatever Arlo said, somebody  
2 else did it.

3 And they like to say his statements caused  
4 him to be incarcerated. I take you back to Arlo's  
5 testimony and his 2004 interview with David Seales  
6 (phonetic). What did he say? I'm innocent. I took  
7 her to a safe house but nobody would listen to me.  
8 Okay.

9 Arlo has given multiple versions of events.  
10 He could not keep his story straight on anything and  
11 that's the purpose of cross-examination. That's why  
12 we have it. It's considered the great truth finder.  
13 If Arlo saw what he said he saw before you guys, he  
14 would be able to keep that same story straight over  
15 the years, and he hasn't kept it straight.

16 We talked -- we had some great examples of  
17 that where he created new stories before your eyes. I  
18 mentioned the night stand issue just a moment ago.  
19 That was new for you. Different from 20 other  
20 versions of events, but new for you.

21 The other one was the six hour gap. The last  
22 trial he testified at he said, went to Dick  
23 Marshall's, spent a few minutes siphoning gas, two  
24 short visits to houses where nobody answered the door,  
25 and then out to the Badlands.

1           What did we find out from Cleo? At most that  
2 trip would take an hour and a half. At most. And  
3 that was all the way to Kadoka. We're not even nearly  
4 that far.

5           He also says over and over again in the past  
6 that he was out on the bluffs with my client and Annie  
7 Mae when the sun was coming up. It's December.  
8 6:00 a.m. He's got about six hours between when they  
9 left Dick Marshall's house and when they got out to  
10 the Badlands to account for and he doesn't have an  
11 explanation at Dick Marshall's trial. He's presented  
12 with that and he read Cleo's testimony.

13           So what did he invent for you today -- or  
14 when he testified a couple days ago? We stopped at  
15 one of the houses and we rested. That was new for  
16 you. A problem with one of his stories comes up, he's  
17 going to fill the gap.

18           Other examples of how he changed -- I mean,  
19 umpteen years of telling the story. No mention of  
20 Dick Marshall and the gun. No mention of John having  
21 any sexual relation with Annie. The fence issue that  
22 came up. When he was supposedly out at the Badlands,  
23 they pulled off to the side of the road. You heard  
24 from Mr. Amiotte, there was no fence there. But when  
25 he went with the authorities there in 95, they pulled

1 onto a landing. The cops are going to want to have  
2 their cars on the side of the road. They pulled onto  
3 a landing 400 feet up the road where there was a  
4 fence. What happened magically? Every story Arlo  
5 told after that point, after he was out on those  
6 bluffs in 95, involved John and Annie Mae climbing  
7 over the fence. That's how malleable his mind is.  
8 And it's why I said to you, how dare they base a  
9 prosecution for murder on that guy. He's been used,  
10 he's been played, he's unworthy of belief.

11           The last element I want to discuss with you,  
12 the elements of the crime charged, is the time of  
13 death. And I beg you, do not treat that as a  
14 technicality like Mr. Oswald would like you to. There  
15 are no technicalities here. Each of those elements  
16 must be proven to you by evidence beyond a reasonable  
17 doubt. That is your duty. This are no lesser or  
18 greater elements.

19           Do we know when Annie Mae died? No. We have  
20 no idea. Arlo, John, Annie Mae, Theda are in Rapid  
21 City the end of November. We hit that two-week gap  
22 where nobody knows where she is, but we got good  
23 evidence to believe she's in Oglala or at a safe  
24 house. Shows up at WKLDOC December 15. She's alive  
25 then, but John is not anywhere in the vicinity.



1 Nobody places him there. Nobody even places him in  
2 the same state. 12/15 she leaves WKLD.OC. We have no  
3 accounting for her movements, her whereabouts, until  
4 her body is found on February 24, 1976.

5 The pathologist said most of the  
6 decomposition happened in February. And I went  
7 through the weather charts for February in that  
8 location with him. And you have the exhibit. The  
9 last 15 days before Annie Mae's body was found were  
10 incredibly warm. Day after day where the highs are  
11 above 60s and the lows are above freezing. Periods of  
12 48 hours contiguous staying above freezing. He said,  
13 I believe most of the decomposition happened during  
14 that time period. So we don't know -- there was no  
15 time of death. He was honest. We don't know when she  
16 died. We can't say that.

17 But we have some other evidence that you can  
18 use your common sense to apply to this. The hair.  
19 Annie Mae's hair. When she was at Troy Lynn's house  
20 November 24, Troy Lynn said she had very short hair.  
21 As -- shorter than yours? Yes, shorter than mine.

22 If she was killed two or three days later,  
23 like their theory was, her hair wouldn't have grown  
24 out. If she was killed December 15, her hair could  
25 not have grown out by that time.

1           What did Nate Merrick tell you about the  
2 crime scene? What evidence was recovered from the  
3 crime scene? His words, long dark hair on the face of  
4 the bluff.

5           The picture of Annie Mae dead at the scene  
6 that has been admitted is not good. It's hard to  
7 view. Clearly, though, not short hair. How long  
8 would it take her hair to grow out? It would take a  
9 lot longer than December 15. It would take a lot  
10 longer than the end of November. Could it have been  
11 late January? Early February?

12           We heard testimony from multiple witnesses  
13 about the suspicious activity at Ceelo Black Crow's  
14 house late January, early February where a young 20 to  
15 30-year-old petite Indian woman was dropped off at his  
16 house and he's an AIM person. He lives near the crime  
17 scene. And then that woman is seen being picked up  
18 later.

19           That is reasonable doubt, and it's reasonable  
20 doubt as to who killed Annie Mae and it's certainly  
21 reasonable as to time of death. They have to prove  
22 time of death --

23           **THE COURT:** Five minutes.

24           **MR. MURPHY:** I want to talk to you about some  
25 of the unsupported theories that were proposed -- put

1 before you. Theories about Annie Mae being forced to  
2 engage in bombing -- bomb making so that her  
3 fingerprints would be found on the bombs.

4 Theories such as that Annie Mae was killed  
5 because Leonard Peltier confessed to killing the FBI  
6 agents in front of her.

7 Theories about Annie Mae being dragged along  
8 on the motor home trip because she was suspected of  
9 being an informant.

10 All of those theories came from one person,  
11 Kamook Ecoffey. Perhaps the most complicated witness  
12 in this case. A form AIM militant. Married to Dennis  
13 Banks. Gets paid \$50,000 for doing ten interviews.  
14 Is the woman whose husband was having an affair with  
15 Annie Mae. Who is now married to the lead  
16 investigator. Very complicated web of bias and  
17 reasons to fabricate, reasons to deflect attention.

18 A woman, who through all of her activities  
19 with AIM, ended up getting three years of probation  
20 and never worried about having her kids taken away  
21 even though her kids were riding along with her -- or  
22 one kid was riding along with her when she's in a car  
23 full of explosives that blows up. And she's later in  
24 a motor home chalked full of explosives and weapons.

25 There is a lot that goes on behind the scenes

1 of Kamook, but let's talk about her theories. Does it  
2 make any sense at all that if Annie Mae was suspected  
3 of being an informant by Peltier and Banks as early as  
4 June of 75 at Farmington that they would have her at  
5 Al Runnings' house in September in a tent full of  
6 explosives and guns; that they would have her there on  
7 October 12, 75, making bombs with them; that they  
8 would have her with them the next day while they  
9 placed these bombs; and then most ridiculously, that  
10 Leonard Peltier, a guy who is wanted nationwide for  
11 killing two FBI agents, who is on the run for his  
12 life, would invite Annie Mae into the motor home with  
13 the rest of them to travel around the country but  
14 allow her to get out at gas stations and thrift stores  
15 and to go to Seattle with him and Bernie when he goes  
16 and hooks up with some other woman and leaves Bernie  
17 and Annie Mae alone?

18 Does that make any sense? I mean, it doesn't  
19 even pass a blush test.

20 Would Leonard Peltier, a guy who supposedly  
21 put a gun to her head six months or five months  
22 earlier, and believed she was an FBI informant, then  
23 confess right in front of her to executing FBI agents?

24 Those theories are pure speculation and at  
25 least Kamook admitted when she testified she had

1 nothing to support them. Nothing that indicated any  
2 of those were true.

3 The general prosecution theory is that Annie  
4 Mae was killed because she was an AIM leader -- or she  
5 was suspected of being an informant by AIM leaders. I  
6 ask you, what connection does any of that have to  
7 John? He was never, during the course of this trial,  
8 even placed in the same room as an AIM leader.

9 Nobody showed him to be a AIM devotee. He  
10 had no motive. What is his motive for killing Annie  
11 Mae? Nothing has been established.

12 Theda. What's the worse they could say about  
13 Theda? Bossy, older woman. Yeah, so what. Takes a  
14 lot to go from a bossy, older woman to being a killer  
15 or somebody who orchestrates a killing.

16 John. He's the killer? What have you seen  
17 during that trial that indicates anything about this  
18 guy being violent? Having a propensity towards  
19 killing people? Having anything to do with AIM  
20 militant activities? Everything you heard about him  
21 was he was a quiet, nice, unassuming guy who had no  
22 connection with any of the AIM military activities.

23 Arlo. If you were going to orchestrate the  
24 assassination of a high level AIM operative, you would  
25 have Arlo along on the trip? It makes no sense. Arlo

1 had no motive and he was the least reliable person in  
2 the world. Theda had no motive. John had no motive.

3 John's oral responses. Much has been made  
4 about John's statements. Those statements are not  
5 incriminating. Consider the context. John, at that  
6 point, is a roofer. A Canadian Indian living up in  
7 the Yukon with his kids and his girlfriend. FBI has  
8 come up beforehand and threatened him. Pourier,  
9 Ecoffey, Graf from the FBI, and a guy from the Royal  
10 Canadian Mounted Police wait for him at his work  
11 place. They map out what they say is a bullet-proof  
12 case against him and that they are going to get him.

13 Even though we know that some of the  
14 statements were ridiculous like that a 12-year-old  
15 girl participated in the kidnapping. But they are not  
16 asking him whether these things are true. They're  
17 telling him, we've got you. Pretty natural for him to  
18 be pretty fatalistic and say things like, yeah, sounds  
19 like you guys have my life planned out for me. Yeah,  
20 looks like I will be spending the rest of my life in  
21 jail.

22 They weren't there to talk nice to him. They  
23 were there to tell him your goose is cooked. That was  
24 his response. He didn't say I did. In fact, over and  
25 over again he said I did not.

1 I want you to consider, what is the truest  
2 statement John made about what was in his heart. The  
3 truest statement he made was when Ecoffey showed him  
4 those pictures of Annie Mae dead -- and Ecoffey  
5 testified to this -- he looked off in the distance, he  
6 looked up, his eyes filled with tears, and he said,  
7 she was my friend. Hardly the statements of a  
8 cold-blooded killer that would march her out to the  
9 end of a cliff and put a gun to the back of her head.

10 I said in the opening, I'm not going to tell  
11 you how to vote. It's not my role. You are jurors.  
12 You have accepted the responsibility. You took the  
13 oath.

14 I want you to ask yourself on each and every  
15 element on each and every fact, can I really say,  
16 really say, that the evidence they provided was so  
17 strong that I don't pause or hesitate to act on it;  
18 that the state has proven its case beyond a reasonable  
19 doubt. Each and every fact, each and every element,  
20 ask yourself that. That's your job. That's your  
21 duty.

22 The evidence doesn't support that. This  
23 evidence wasn't of that quality. You would pause and  
24 hesitate to act on just about everything that was  
25 presented to you.

1 I don't get to speak again; Mr. Jackley does.  
2 I ask you just to ask yourself as he makes  
3 statements -- to think for a moment how I might  
4 respond if I had the opportunity.

5 I said in the beginning, thank you from both  
6 of us. I sincerely mean that. You have a tough job  
7 ahead of you. And I know you will conduct yourselves  
8 pursuant to your oath and I thank you for that.

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

10 **MR. JACKLEY:** May it please the Court,  
11 Counsel.

12 After listening to evidence for approximately  
13 five days, it comes as no surprise that the majority  
14 of what defense counsel has just talked about can be  
15 boiled down to reading jury instructions to you that  
16 the judge has already read to you; claiming misconduct  
17 by a witness, including Kamook Ecoffey; attacking the  
18 prosecution team in words defense counsel used, quote,  
19 loss of a license, end quote, and attacking Arlo  
20 Looking Cloud. In a nut shell that's what you heard  
21 for the last hour.

22 I want to take care of the first three items  
23 quickly. The judge has read to you the jury  
24 instructions already. Please consider them carefully  
25 in making a determination in this case.



1           As to Kamook Ecoffey's testimony, you may  
2 recall part of her testimony, she talked about an  
3 interview she did with Troy Lynn and Arlo on tape. In  
4 fact, remember, defense counsel, to make a big show,  
5 went and grabbed the nine tapes. Remember him doing  
6 that?

7           And remember, she testified about how it was  
8 about a six-hour conversation wherein Arlo, basically,  
9 throughout the conversation, relayed his story that  
10 you heard from the witness stand.

11           And recall when I got up after the allegation  
12 come about the, implicate John Graham, and I pointed  
13 that out; and I further pointed out that the reference  
14 to the implication of John Graham was on page 168 of  
15 that transcript. Page 168. And I talked to her about  
16 what had happened prior to page 168, including things  
17 on page 109.

18           Think about it. Kamook Ecoffey just heard  
19 several hours of Arlo Looking Cloud talking about what  
20 occurred, including what had occurred on the bluff.  
21 She's talking to Arlo Looking Cloud. Who else is he  
22 -- is she going to ask to implicate when she's talking  
23 to Arlo Looking Cloud who is out on the bluff with one  
24 person, John Graham. Use your common sense. That's  
25 not witness misconduct, and it's disingenuous to

1 suggest that.

2 With respect to prosecution misconduct, you  
3 sat here and listened to my opening statement. Look  
4 at your notes. Do you recall me standing here during  
5 opening statement and telling you that the State of  
6 South Dakota would prove beyond a reasonable doubt  
7 that John Graham raped Annie Mae Aquash?

8 Frankly, the first one to talk about rape  
9 throughout this case, including voir dire, is defense  
10 counsel. He's now trying to slip it in as an  
11 essential element to the offense, which it is not.  
12 The state does not need to prove there was a rape.

13 The only evidence that has been discussed  
14 about any sexual relations is with respect to Arlo  
15 Looking Cloud indicating that on occasion when they  
16 were staying at Thelma Rios', he went by the bedroom  
17 and he heard sex going on. That's what was discussed  
18 in opening statement, that was discussed on the  
19 witness stand.

20 Then Mr. Murphy shows you a transcript, one  
21 page, of Arlo Looking Cloud's September of 2009 Grand  
22 Jury testimony regarding the prayer. And the  
23 testimony that you heard throughout Arlo's discussion,  
24 you know, and much of it came through defense counsel,  
25 that he gave testimony under oath in August of 2008 to

1 a Federal Grand Jury, not a State Grand Jury.

2 As well as discussed with law enforcement  
3 officers at the scene of the crime what Annie Mae was  
4 doing in the moments before her death. And what Arlo  
5 said prior to September of 09 Grand Jury testimony in  
6 both 08 and in 1995 was she was praying. And, of  
7 course, when she finished praying, she stood up and he  
8 shot her.

9 To suggest that the prosecution team in 2009  
10 planted this praying thing in her mind after you heard  
11 about the August of 2008 under-oath testimony of Arlo  
12 Looking Cloud about praying and you heard about what  
13 he told law enforcement in 1995 is nothing short of  
14 disingenuous.

15 Now, let's talk about the attack on Arlo  
16 Looking Cloud. As Mr. Murphy has told you, his  
17 position is that there is no corroborating evidence.  
18 And I want to take an opportunity to walk through that  
19 corroborating evidence. What Arlo Looking Cloud did  
20 was reprehensible. What he described to you should  
21 not have happened. Arlo Looking Cloud -- and it came  
22 out in Mr. Murphy's opening statement -- has been held  
23 responsible for his actions. He's been convicted of  
24 committing -- or aiding and abetting in the commission  
25 of the murder of Annie Mae Aquash.

1           The problem Mr. Graham has is that Mr. Graham  
2 was with Arlo Looking Cloud every step of the way  
3 beginning in Denver. In fact, the evidence you heard  
4 places him about two or three steps ahead of Arlo  
5 Looking Cloud when he put that gun to Annie Mae's  
6 head.

7           Let's talk about that corroborating evidence  
8 beginning in Denver. You heard Arlo Looking Cloud  
9 take the stand and testify that John Graham, with the  
10 help of Theda Clarke, tied up Annie Mae Aquash. The  
11 kidnapping has started.

12           The additional corroborating evidence is what  
13 you heard from Angie Janis Begay. John Graham's  
14 girlfriend of all other people -- or former girlfriend  
15 that he lived with -- told you that Annie Mae was tied  
16 up.

17           George Palfy -- no reason to come in here and  
18 lie about John Graham -- told you that Annie Mae  
19 Aquash was tied up.

20           Troy Lynn came in here and testified and told  
21 you that on the way out Anna Mae was flanked by none  
22 other than Arlo Looking Cloud and John Graham.

23           Annie Mae was downstairs in the basement when  
24 Troy Lynn and Palfy heard about or saw the reference  
25 by Corky Gonzalez that this is what we do to

1 informants, we kill them.

2 But through the testimony of Troy Lynn, we  
3 know that Annie Mae didn't need to hear that. She  
4 already knew because on her way out she told Troy Lynn  
5 what? If I leave her, Annie Mae said, you will never  
6 see me alive again. She knew. She was kidnapped and  
7 she was on her death March.

8 So what do they do? Arlo tells you, they put  
9 her in the trunk hatchback area of a red Ford Pinto.

10 Who else told you that? George Palfy. And  
11 Troy Lynn. She's tied up. She's in the back of the  
12 hatchback.

13 Now, if you want to disregard the words of  
14 all those people, consider them all to be liars, take  
15 the words of John Graham. Remember, on April 21,  
16 1994, John Graham was interviewed by United States  
17 Marshal Bob Ecoffey and BIA CI Mitch Pourier. And  
18 what does he finally tell them, okay, okay. I drove  
19 from Denver. Those are his words.

20 And when they explain to him all the evidence  
21 about the tying up, including the evidence that John  
22 Graham tied her up, what does John Graham say? He  
23 says, it looks like you have your future planned for  
24 me -- or my future planned for me. You have your  
25 case. That's his admission.

1           And if you want to then go a step further and  
2 say, well, geez, the U.S. Marshal came up here and was  
3 untruthful, along with Mitch Pourier, although they  
4 have no reason to be. It's not shown to you.

5           Remember that 36-second clip that was played  
6 for you that will go back to the jury room as evidence  
7 where John Graham was giving a media interview? You  
8 see, John Graham liked to talk to the media. What did  
9 he tell you? What did he say? I drove her from  
10 Denver to Pine Ridge.

11           He was careful when he interviewed with the  
12 law enforcement. He said he drove her from Denver but  
13 he wasn't real specific as to where. But his problem  
14 is he got arrogant. He did a media interview and he  
15 slipped. He said, I drove her from Denver to Pine  
16 Ridge.

17           We know from the additional evidence that you  
18 heard that they went to Rapid City. We know they went  
19 to two places. Arlo Looking Cloud has told you about  
20 Thelma Rios' place. Told you what they did at Thelma  
21 Rios' place.

22           We know, too, from the testimony and the  
23 examination that Thelma Rios has been held responsible  
24 for her actions in this case, much like Arlo Looking  
25 Cloud.

1           They did another stop in Rapid City and that  
2 was at WKLD, the Wounded Knee Legal Defense Offense  
3 Committee. And you heard from Candy Hamilton about  
4 that, remember? Remember Candy Hamilton described  
5 Annie Mae's crying. And eventually gave it up that  
6 Annie Mae wasn't free to leave. The kidnapping  
7 continuing.

8           And remember the word that Candy Hamilton  
9 described of what was going on at WKLD?  
10 Interrogation. This wasn't a friendly meeting, this  
11 was an interrogation. Exactly what they did. That's  
12 exactly what the evidence showed.

13           Now, defense counsel wants to talk about  
14 dates, and of course you heard the judge read the jury  
15 instructions, and what the jury instructions say is  
16 that the state has to prove on or about. In other  
17 words, near to that time. All the witnesses that  
18 testified have testified that it occurred after  
19 Thanksgiving, which is November 27, 1975, a couple of  
20 weeks after that.

21           Defense counsel wants to hang his hat on  
22 Candy Hamilton. He had a disagreement with Mr. Oswald  
23 about whether or not this was December 15 or  
24 December 14, whether or not she was attending a trial  
25 or a pretrial hearing or a deposition. I am not sure

1 whether it was December 15 or December 14, but the  
2 evidence showed it happened in mid December and that's  
3 what the witnesses testified to you about.

4           When they get done with WKLD, they head for  
5 the Rosebud Indian Reservation to Kills Means'. Arlo  
6 testified to you about that.

7           Additional corroborating evidence to what  
8 Arlo testified comes from Candy Hamilton. Recall that  
9 Candy Hamilton testified that after she left WKLD,  
10 she was headed to Russell Means' trial in Sioux Falls  
11 and she stopped with several others at Kills Means'  
12 house. Bill Kills Means' house. And she stayed in  
13 the car. She didn't testify that there was a red  
14 Pinto there. She didn't testify that Arlo Looking  
15 Cloud was there standing over Annie Mae or that Annie  
16 Mae was still in the trunk. In other words, Annie Mae  
17 Aquash wasn't left at Kills Means' house.

18           And Graham -- Mr. Graham could no longer  
19 claim that because remember that video clip when he  
20 said I drove her from Denver to Pine Ridge. He took  
21 out his ability to say that he left her at Kills  
22 Means' because of his own words. He slipped up.

23           Remember the two significant stops you heard  
24 evidence on are Kills Means' and Marshall's, the two  
25 potential safe houses. There has been not a scintilla



1 bit of evidence that Kills Means' was a safe house.  
2 And his problem is, Candy Hamilton -- and the  
3 testimony I just talked to you about -- his problem is  
4 his own words that he took her to Pine Ridge.

5 And remember where the body was found? It  
6 was found on Rosebud. It was found by Roger Amiotte  
7 on Pine Ridge. Kills Means' wasn't a safe house.

8 They then traveled from Kills Means' to Dick  
9 Marshall's. Arlo told you in detail what he recalled  
10 about happening at Dick Marshall's. That is they  
11 arrive; that initially Theda went in the bedroom with  
12 Dick Marshall. She came out. They brought in John  
13 Boy and Arlo. The door was shut. Remember, Cleo said  
14 that. The door was shut. They then came out. Cleo  
15 backs that up. Talks about the two trips into the  
16 bedroom. She can't testify as to what happened in the  
17 bedroom, but backs that up. And Arlo says Dick  
18 Marshall -- I don't know whether it was a drawer out  
19 of a dresser or night stand -- but he testified out of  
20 a drawer came a red box. Out of the red box came a  
21 pistol with a brown handle and silver. Dick Marshall  
22 then handed Theda Clarke the shells. And according to  
23 Arlo and Cleo, then Annie Mae was given -- or the  
24 group was given some clothes for Annie Mae and they  
25 left.

1 Arlo is corroborated by Cleo by the fact that  
2 they arrived, that Annie Mae left alive, so it's not a  
3 safe house and they went in the bedroom twice.

4 Now, Dick Marshall -- remember when he  
5 testified? He had a hard time remembering that  
6 anybody even showed up. And then some prompting from  
7 me and showing him some documents, oh, yeah, I do, I  
8 guess, think that -- I do remember that in the middle  
9 of December, mid December -- remember what he  
10 testified, mid December --

11 **MR. MURPHY:** Objection, Your Honor.  
12 Misstatement of the facts.

13 **THE COURT:** I think that's the jury's  
14 decision to make as to whether the statement is an  
15 accurate recollection of the fact. They have their  
16 notes and they have their recollections independent of  
17 mine.

18 **MR. JACKLEY:** Mid December they arrive at his  
19 house. And it was Thelma, Annie Mae, and two young  
20 guys. Arlo -- or excuse me. Dick Marshall had a hard  
21 time with the bedroom. Frankly, for the same reasons  
22 that Arlo Looking Cloud for many years had a problem  
23 talking about what happened in that bedroom.

24 What happened in that bedroom was the first  
25 time that a gun has been produced. It's the first

1 evidence of a gun. It goes directly to intent to  
2 first degree murder. Remember, I asked Dick Marshall  
3 the question about, he didn't want to be here  
4 voluntarily and he's concerned about what could happen  
5 to him based upon his testimony.

6 But the real reason that Dick Marshall is so  
7 important is because he backs up Arlo and Cleo about  
8 one important fact. And that is, in mid December,  
9 Anna Mae Aquash walked out of his house alive. He  
10 didn't kill her.

11 Dick Marshall's house is not a safe house.  
12 Cleo told you that. Dick Marshall told you that. And  
13 Arlo, Dick, and Cleo all back up the fact that she  
14 wasn't left there. John Graham is now out of safe  
15 houses. Those are the two major stops.

16 I have talked a little bit about Denver to  
17 Rapid City and then what went on. I want to back up  
18 for a minute. If you just take from Rapid -- or from  
19 Denver to Rapid, I submit to you the state has proven  
20 beyond a reasonable doubt that John Graham  
21 committed -- or aided and abetted in the commission of  
22 felony murder kidnapping.

23 The state has shown that important acts  
24 occurred in Pennington County. That's WKLD0C, that's  
25 Thelma Rios.

1           The state has proved that on or about  
2 December 10<sup>th</sup> through the 12<sup>th</sup> -- it just has to be  
3 near that -- that the kidnapping occurred.

4           The state has proven that John Graham either  
5 committed the kidnapping or certainly aided and  
6 abetted in the kidnapping; and the further evidence,  
7 that Annie Mae Aquash was in fact killed.

8           But continuing on, the additional evidence  
9 further supports a conviction for felony murder  
10 kidnapping along with premeditated murder. They have  
11 now left Cleo and Dick Marshall's. They have made  
12 some non relevant stops. Not of any consequence. And  
13 they are at the bluff. And they are at the bluff in a  
14 red Pinto. They are not at Ceelo Black Crow's in a  
15 gold car. Annie Mae Aquash wasn't killed by a motor  
16 vehicle accident. She was killed with a 32-caliber  
17 bullet put in the back of her head. This isn't a  
18 motor vehicle accident case.

19           So what happened when they get there? Arlo  
20 says John Graham takes Annie Mae Aquash out of that  
21 red Ford Pinto. Theda Clarke says, go with him. So  
22 what does he do? He listens to Theda. And John  
23 Graham steps ahead of him.

24           What does John Graham do? He puts a  
25 32-caliber pistol with a brown handle and silver to

1 the head of Annie Mae Aquash and he pulls the trigger.

2 What is the corroborating evidence of that?

3 The 32-caliber bullet just happens to be the same  
4 caliber that Arlo testified was obtained at Dick  
5 Marshall's house.

6 Dr. Peterson took the stand. It just so  
7 happens that there were powder burns because the  
8 pistol was so close to the back of Annie Mae's head.

9 Been a lot of talk about Arlo concocting this  
10 story, but you heard about the different statements  
11 that he has given. Remember in 1995 when he talked to  
12 Ianuchi and Marshal Bob Ecoffey and he went to the  
13 scene, and there are pictures of that in evidence.  
14 John Graham is with him every step of the way. In  
15 1995 he hasn't fabricated or made some deal with the  
16 government. He hasn't been charged till 2003 and  
17 convicted in 2004.

18 Then in 2000, remember when he met with  
19 Kamook and Troy Lynn, Arlo Looking Cloud, before he's  
20 again charged or convicted. Remember where defense  
21 counsel wants to say there is witness misconduct.  
22 What does Arlo do? Tells the same and fairly  
23 consistent story. The most consistent part of it is  
24 every step of the way is John Graham.

25 Then in 2002, again, prior to Arlo Looking

1 Cloud being charged, guilt has set in. He wants to  
2 talk to the daughter of Annie Mae Aquash. That can't  
3 be an easy discussion to call the daughter of somebody  
4 you were just involved in -- years back -- in her  
5 murder.

6 He makes that phone call though. And you  
7 heard Denise Maloney take the stand. You heard how  
8 she described Arlo's emotions. It's not an easy phone  
9 call, and I'm sure he minimized some of what his  
10 conduct was.

11 But remember, again, another consistent  
12 statement that was given in 2002, that none other than  
13 John Graham was out on the bluff with Annie Mae  
14 Aquash.

15 **THE COURT:** Four minutes, Mr. Jackley.

16 **MR. JACKLEY:** But perhaps the additional  
17 corroborating evidence with respect to what happened  
18 on that bluff comes from John Graham. Remember when  
19 Marshall Ecoffey and Mitch Pourier interviewed him and  
20 were talking to him about his involvement? And after  
21 they outlined the case and talk about that, what does  
22 he say? He says, I'm ready to leave this place. I  
23 will probably spend the rest of my life in jail.

24 And if that doesn't speak for itself, the  
25 picnic table does. What does he do when asked the

1 direct question? That picnic table is shaking so bad  
2 that both investigators took huge note of it.

3 Ladies and gentlemen, I talked to you about  
4 the felony murder kidnapping. With respect to the  
5 premeditated murder in Count Two, the state, again,  
6 has to prove that a material act occurred in  
7 Pennington County. That's WKLD0C, that's Thelma Rios;  
8 that this happened on or about or near the time frame  
9 of December 12<sup>th</sup> through December 14<sup>th</sup>. The state has  
10 proven that beyond a reasonable doubt.

11 The state has to prove that John Graham  
12 committed or aided and abetted in the commission -- or  
13 aided and abetted in the killing of Annie Mae Aquash.

14 Folks, when Theda Clarke and John Graham and  
15 Arlo Looking Cloud pulled up to that bluff, they both  
16 put themselves -- or they all three put themselves as  
17 an aider and abettor in the murder of Annie Mae Aquash  
18 no matter who pulled the trigger. The evidence showed  
19 beyond a reasonable doubt that John Graham pulled that  
20 trigger, but the state doesn't have to prove that.

21 The state has to prove that John Graham aided  
22 and abetted in the murder of Annie Mae Aquash. He  
23 knew that the murder was going to happen, and he  
24 participated in a material way. And that was dragging  
25 her all the way from Denver to Rapid City, to Kills

1 Means', to Marshall's, and onto a bluff, and that that  
2 murder was premeditated murder.

3 This wasn't a shooting by accident. This  
4 wasn't a motor vehicle accident. That gun was put to  
5 the back of her head and it was premeditated when that  
6 trigger was pulled.

7 Almost 35 years to the day, John Graham  
8 pulled Annie Mae Aquash from a red Ford Pinto. He  
9 walked a young lady that had lost a lot of her spirit  
10 out to a bluff. On her way out, she was praying in  
11 her Lakota language. She stopped praying, she stood  
12 up, and John Graham took a 32-caliber pistol, silver  
13 with a brown handle, and he put it so close to her  
14 head it left powder burns.

15 It's time to hold John Graham accountable and  
16 enter a guilty verdict for felony murder kidnapping  
17 and premeditated murder.

18 On behalf of the State of South Dakota, I  
19 thank you for your attentiveness.

20 Thank you, Your Honor.

21 **THE COURT:** Bailiffs approach, please.

22 (Whereupon, the bailiffs were then sworn.)

23 **THE COURT:** Ladies and gentlemen, we now have  
24 to remove the two alternates from the jury panel. I  
25 am going to ask the clerk to draw one number out --



1 one piece of paper out. Juror 3, Tony Randolph. And  
2 will you pull one more paper out. That would be Jacob  
3 Solano. The two of you are excused. Your call back  
4 is six o'clock Friday night -- they are done. You are  
5 all finished. Thank you for your service.

6 I don't know how you feel about being  
7 removed, but it's the only way we can try the case.  
8 Thank you very much for your close attention during  
9 the trial, and at this point you are excused.

10 Ladies and gentlemen, you are the remaining  
11 12. This case is now turned over to you for your --  
12 to you for your deliberations and to decide the issues  
13 in front of you.

14 We await your word.

15 (Whereupon, the jury was then recessed to  
16 begin their deliberation.)

17 **THE COURT:** Anything further, counsel?

18 **MR. JACKLEY:** Not from the state, Your Honor.

19 **MR. MURPHY:** Nor from the defense.

20 **THE COURT:** And we have to discuss the matter  
21 about if the jury goes into tomorrow, overnight, and  
22 the rules pertaining thereto.

23 So let us take a moment or two before we  
24 break for lunch.

25 (Off the record.)

1           (Whereupon, the following proceedings were  
2 had out of the presence of the jury.)

3           **THE COURT:** Okay.

4           We're present in court with Mr. Murphy here,  
5 Mr. Jackley, Mr. Oswald, and Mr. Mandel about the  
6 question raised by the jury wanting to have a  
7 definition of the term preponderance.

8           The Court is entitled to give a response or a  
9 definition to them. Frankly, the Court is entitled to  
10 give them a dictionary and it ain't going to do that.  
11 Okay.

12           But whether or not the word was used in the  
13 instructions -- and it was not -- it was raised in  
14 voir dire.

15           **MR. MURPHY:** Your Honor, if I may, I found  
16 it. It's actually in the legal principles section.  
17 It's not in the definition of reasonable doubt.

18           **THE COURT:** So it's in there. It's part of a  
19 pattern jury instruction and I hate it because it  
20 raises question where people address preponderance  
21 when preponderance has nothing to do with a criminal  
22 case.

23           It would be my intension to respond by  
24 saying, first of all, that preponderance is the burden  
25 of proof that applies only in civil cases. It has no

1 function or place whatsoever in a criminal matter. It  
2 is a much lower burden of proof and simply does not  
3 apply. And that's where I would keep it.

4           **MR. MURPHY:** The only addition I would ask,  
5 since it didn't appear in the reasonable doubt  
6 section, which sometimes it does in some of the  
7 patterns, it is then referring them at the conclusion  
8 of that to the applicable standard which is set out in  
9 instruction number whatever that is. Because they are  
10 about three pages shy of the reasonable doubt  
11 definition or the legal principles section.

12           So giving the definition that you just  
13 suggested and then referring them to the definition of  
14 the applicable standard that you have already set  
15 forth would be my request.

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

17           **MR. JACKLEY:** Your Honor, because this is a  
18 criminal case, it is the state's request that at most  
19 the jury be instructed preponderance is the burden  
20 most commonly applied in civil cases.

21           **THE COURT:** Is there any place it's applied  
22 in other than civil cases?

23           **MR. JACKLEY:** Sometimes by clear and  
24 convincing evidence is used --

25           **THE COURT:** Well, but it apply --

1 preponderance applies only in civil cases.

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

3 And then just refer them -- please consult  
4 the instructions you have been provided in this case.

5 I think it's dangerous to start quibbling  
6 over which instructions to send them to. I think it's  
7 better and more appropriate --

8 **THE COURT:** My concern, Mr. Jackley, is I  
9 don't want them playing with preponderance at all.  
10 And I don't want -- if that's a factor in their  
11 deliberation it needs to be shut down quickly.

12 **MR. JACKLEY:** Then don't we accomplish that  
13 by just simply stating please consult your  
14 instructions.

15 **THE COURT:** No.

16 If we solved that, it would already be  
17 solved. There is 12 people there. Most of whom can  
18 read and they each have a copy of the instructions.  
19 And I would imagine if they are looking at it,  
20 that's -- it came up from looking at the instructions.  
21 And I don't think it solves the question at all.  
22 That's the problem.

23 Even if it does, you and I will not know  
24 that. And I want to make sure that the answer -- that  
25 the question is taken care of with as clear and simple

1 a statement as I can give them.

2 If I would -- I think I should refer them to  
3 the reasonable doubt instruction.

4 **MR. MURPHY:** Because somewhere they have  
5 gotten off track with those legal principles. They  
6 haven't been looking at the right instruction. And to  
7 shut down any discussion of preponderance because I  
8 know in voir dire we both brought it up and I remember  
9 Marty making the statement about law professors hating  
10 51/49 and all of that stuff. So they heard it and now  
11 they are obviously considering it and that has no  
12 function here.

13 **THE COURT:** Yeah.

14 You know, I envision, with or without  
15 accuracy, a discussion going on about X -- you know,  
16 well, there is more evidence of this than that and  
17 that's not even approaching the burden. And if  
18 that -- that should not be guiding the discussion.  
19 And I am afraid of that because it's wrong and if  
20 that's not occurring, an instruction that it should  
21 not occur, is harmless. If it is going on, failing to  
22 shut it down in disastrous.

23 **MR. JACKLEY:** In light of the Court's  
24 position, would the Court consider instructing,  
25 preponderance is the burden applied in civil cases.

1 Please consult the reasonable doubt instruction at  
2 whatever number it is.

3 **MR. MURPHY:** That doesn't do anything to  
4 foreclose the discussion they are already having which  
5 is --

6 **THE COURT:** I am going to say it applies only  
7 in civil cases and it has no place -- I will even be  
8 redundant -- or use whatsoever in a criminal. Please  
9 see the instruction on beyond a reasonable doubt  
10 definition.

11 **MR. MURPHY:** Set forth in whatever?

12 **THE COURT:** Yeah.

13 **MR. JACKLEY:** Okay.

14 **THE COURT:** That's what I'm going to do. And  
15 of course I have moved my computer, but let me get it  
16 typed up and I will give it to you.

17 (Off the record.)

18 **THE COURT:** The jury has indicated they wish  
19 to go home for the night. I told the bailiff to  
20 inquire if they felt there was any likelihood of being  
21 able to reach a verdict by 8:00 o'clock or so, having  
22 dinner and staying and deliberating until then.

23 If the answer is no, I'm going to send them  
24 home because I -- I think to do otherwise would not  
25 help their state of minds and I will bring them in for

1 a cautionary instruction, again, a very specific one.  
2 I don't want to send them to a hotel. I don't think  
3 that's going to improve their minds either.

4 **MR. MURPHY:** You are going to bring them back  
5 in?

6 **THE COURT:** Yeah.

7 **MR. MURPHY:** Then I better get the jail to  
8 get my client over here.

9 (Off the record.)

10 (Whereupon, the following proceedings were  
11 had in open court with the jury present.)

12 **THE COURT:** Looks like the right jurors to  
13 me.

14 Counsel?

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

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

17 **THE COURT:** Ladies and gentlemen, as you  
18 begin to figure out any time you leave or come back,  
19 you have to come through here so we can count to 12  
20 and make sure you are the 12 we started with.

21 It's my understanding that a significant  
22 percentage of you wish to call it for the evening. My  
23 options in those cases are two. One is to place you  
24 in a hotel. The other is to send you home.

25 I am assuming you would prefer to go home.

1 But in doing that, you need be extra, extra specially  
2 careful to avoid contact -- better avoiding contact  
3 with anybody other than your immediate family.  
4 Responding to no questions with anything other than I  
5 can't talk about that.

6 And I know I can't keep you from thinking  
7 about the case at night, but you cannot resolve the  
8 case without considering it with all the opinions and  
9 considerations of the other 11 jurors.

10 To that end, you're probably better off not,  
11 you know, spending your wake -- your sleeping hours  
12 awake.

13 We appreciate the difficult work it is to do  
14 what you are doing and we will honor your request to  
15 go home. I'd like you to come back at 8:30 in the  
16 morning if you can. And you'll -- once you are here  
17 we'll come into the room just to make sure you are  
18 you, and then we will return you to your  
19 deliberations.

20 I have provided the explanation requested --  
21 the definition to some extent that was requested. I  
22 will entertain all questions that you have. There are  
23 a lot of them I will not be able to answer according  
24 to the rules of jury trials. If that happens, I will  
25 just simply say I cannot provide further answer on



1 that. You must read the instructions, rely on them,  
2 and your recollection of the testimony and exhibits in  
3 the case.

4 So thank you for today and we'll see in the  
5 morning. Have a good night, good meals, and sleep  
6 well.

7 (Whereupon, the proceedings in this matter  
8 were then concluded.)  
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1 STATE OF SOUTH DAKOTA )  
 ) SS. CERTIFICATE  
 2 COUNTY OF PENNINGTON )

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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**

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Tina Rae Pruss  
 Official Court Reporter and  
 Notary Public  
 Pennington County, South Dakota  
 My Commission expires: 10-04-2012