

PROCEEDINGS

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CLERK: All rise please.

COURT: Please be seated. Okay. We were in direct examination of Mr. Hall I believe. Are we going to continue with that? Is that correct?

MR. CAMIEL: Your Honor, I think direct examination, I think finished.

COURT: Oh you finished. So we can start cross.

MR. CAMIEL: You can start cross.

COURT: All right. Sorry about that. Would you get Mr. Hall please? Come on forward Mr. Hall. Pat would you swear him in again please?

CLERK: Do you solemnly swear that the statements you are about to make in the matter will be the truth, the whole truth and nothing but the truth so help you God?

MR. HALL: Yes.

COURT: Good morning.

MR. HALL: Good morning.

COURT: Yes, you may proceed.

(CROSS EXAMINATION OF KEVIN DOUGLAS HALL)

MR. LIGHT: Good morning Mr. Hall.

MR. HALL: Good morning Brant.

1 MR. LIGHT: Mr. Hall I want to go back over a little bit of your direct
2 testimony as of yesterday. Isn't it true that in the fall of 2005 you were buying and
3 selling dangerous drugs?

4 MR. HALL: Pardon? Speak please louder.

5 MR. LIGHT: Isn't it true that in the fall of 2005 you were buying and
6 selling dangerous drugs?
7

8 MR. HALL: January of 2005 I believe, yes.

9 MR. LIGHT: And you have a lengthy criminal history dating back to 1975
10 don't you?
11

12 MR. HALL: 1974, 1975, ball park, yes.

13 MR. LIGHT: In 1982 you were sentenced to the Montana State Prison
14 correct?
15

16 MR. HALL: Yes, by your office.

17 MR. LIGHT: Okay. I recall.

18 MR. HALL: I recall too.

19 MR. LIGHT: Now in 2003 you were charged with criminal possession of
20 dangerous drugs with intent to distribute, isn't that true?
21

22 MR. HALL: I believe it was October of that year, yes.
23
24
25

1 MR. LIGHT: And, isn't it also true that in 2004 in reference to that case you
2 had a psychological evaluation prepared by Michael Skoloti at the request of your
3 attorney?

4 MR. HALL: I don't know who requested it, but yes, there was an
5 evaluation.
6

7 MR. LIGHT: And isn't it also true that pursuant to that psychological
8 evaluation Dr. Skoloti found that you were suffering from memory impairments
9 from the accident that took place in 1996?
10

11 MR. HALL: That is what he said, yes.

12 MR. LIGHT: Okay. Now, in 2004 you were on disability, correct?

13 MR. HALL: Yes.

14 MR. LIGHT: And, in 2005 you were on disability, correct?
15

16 MR. HALL: Yes.

17 MR. LIGHT: And you were taking medications for those disabilities,
18 correct?
19

20 MR. HALL: Yes.

21 MR. LIGHT: Isn't it also true that pursuant to that psychological evaluation
22 you told Dr. Skoloti that you have numerous memory problems and constantly
23 have to remind yourself of even simple things such as your address?
24

25 MR. HALL: That is why they gave me the meds that I take now, yes.

1 MR. LIGHT: But you told them that in 2004 correct?

2 MR. HALL: Yes.

3 MR. LIGHT: Okay. Isn't it also true that you indicated in that
4 psychological evaluation that you couldn't even remember the incidents leading up
5 to your arrest?
6

7 MR. HALL: No, I couldn't at that time, no.

8 MR. LIGHT: And, Your memory problems were so serious in 2004 that you
9 were subsequently adjudicated unfit to proceed and you were sent to the State
10 Hospital, correct?
11

12 MR. HALL: Negative.

13 MR. LIGHT: You weren't?

14 MR. HALL: Well, I went to the State Hospital for an evaluation, but the
15 proceedings still went on.
16

17 MR. LIGHT: Okay. You don't recall being found unfit to proceed and that
18 is the reason that you went to the State Hospital to be evaluated?
19

20 MR. HALL: I don't ever remember even hearing that said. I just know that
21 it was said they needed a forty-five (45) day evaluation. I went. I did it and I came
22 home.

23 MR. LIGHT: Okay. So, we can safely say that you have had at least a
24 fifteen year history of memory problems due to your 1996 accident, correct?
25

1 MR. HALL: Correct. I can't remember anything prior, hardly.

2 MR. LIGHT: And, you have a very long history of drug abuse which you
3 testified to, correct?

4 MR. HALL: Yes sir.

5
6 MR. LIGHT: Subsequently you were actually convicted in 2005 and
7 sentenced to the Department of Corrections and you were placed on ISP which you
8 indicated yesterday, correct?

9 MR. HALL: Correct.

10
11 MR. LIGHT: And, that is intensive supervision correct?

12 MR. HALL: Correct. Well, I don't know what they call it. I know I was on
13 ISP.

14 MR. LIGHT: And, it was in 2005 while you were on ISP that you were
15 buying and selling drugs with Sissy Atkinson correct?
16

17 MR. HALL: Negative.

18 MR. LIGHT: That's not true?

19
20 MR. HALL: Negative.

21 MR. LIGHT: You don't deny that you were buying and selling drugs in
22 2005?

23 MR. HALL: I never ... In 2005, I was on ISP. You get blood tested or
24 urinated twice or three times a week. You can't.
25

1 MR. LIGHT: Now, you indicated that Tamara Hawkhalter or Tamara Hall
2 was residing with you in 2005. Was that correct?

3 MR. HALL: Correct.

4 MR. LIGHT: And she was there whenever you had contact with Sissy?

5 MR. HALL: Could you either rephrase that or ...

6 MR. LIGHT: She was residing with you in 2005, is that true?

7 MR. HALL: Yes.

8 MR. LIGHT: And, she would have been there when you had contact with
9 Sissy, is that correct?
10
11

12 MR. HALL: Sometimes; sometimes not.

13 MR. LIGHT: Okay. And, of course, Tamara also has a long history of drug
14 abuse doesn't she?
15

16 MR. HALL: I don't know if I can answer that. I don't know how far back
17 her history goes. I know she started drugs when she was young.

18 MR. LIGHT: Well, I have convicted her of drugs as well, haven't I?

19 MR. HALL: Oh yeah. Yeah, later on. But I don't know how far back it
20 goes is what I am trying to tell you.
21

22 MR. LIGHT: Okay. Do you recall her being convicted in 2003 of a drug
23 offense?
24
25

1 MR. HALL: I am trying to remember ... I know she was convicted. I am
2 trying to remember exactly when it was. I know she was convicted of a drug
3 offense ball park in that era.

4 MR. LIGHT: And, that was subsequent ...

5 MR. HALL: I think it was 2004.

6 MR. LIGHT: And, that was subsequently revoked in 2007 cause she was
7 using drugs?
8

9 MR. HALL: Yes.

10 MR. LIGHT: And, she would have been residing with you as she was using
11 drugs/
12

13 MR. HALL: Yes.

14 MR. LIGHT: Now, you indicated yesterday that you and, I believe counsel
15 showed you your statement that you gave to Centurion Ministries, is that correct?
16 That was admitted, wasn't it?
17

18 COURT: I have it here. It is Exhibit Four (4).

19 MR. LIGHT: Okay. Thank you. So, again, you recall making the statement
20 for Centurion Ministries is that correct?
21

22 MR. HALL: I made two written statements for your office and Centurion I
23 believe.
24

25 MR. LIGHT: And, you have reviewed the statement dated July 25, 2010?

1 MR. HALL: I glanced at it.

2 MR. LIGHT: May I approach Your Honor?

3 COURT: You may.

4 MR. HALL: They asked me dates I believe yesterday.

5
6 MR. LIGHT: I am showing you petitioner's Exhibit Four and just ask that
7 you take a second and look at it.

8 MR. HALL: I reviewed it, thank you.

9
10 MR. LIGHT: Isn't it true that after talking to you Centurion Ministries
11 actually prepared the statement, correct?

12 MR. HALL: Someone did, yes.

13 MR. LIGHT: Okay. You simply reviewed it and then signed it, correct?

14 MR. HALL: Yes sir.

15
16 MR. LIGHT: And, after reviewing it you signed it because it was accurate,
17 correct?

18 MR. HALL: Ballpark, yeah.

19
20 MR. LIGHT: Pardon?

21 MR. HALL: Ballpark, yes.

22 MR. LIGHT: Well, is it accurate or not?

23
24 MR. HALL: There is a lot more to that than just that little bit, yes.

25 COURT: Why don't you just flush that out for me?

1 MR. LIGHT: I am.

2 COURT: I am confused.

3 MR. LIGHT: That is part of what I have got here Your Honor. Okay, I am
4 gonna read to you part of what this says okay.

5 MR. HALL: Yes sir.

6 MR. LIGHT: You indicate shortly after his suicide, Sissy Atkinson came
7 over correct?
8

9 MR. HALL: Yes sir.

10 MR. LIGHT: During her visit she began to describe her bad karma and so
11 forth and then you go on to talk about what she said, correct?
12

13 MR. HALL: Yes sir.

14 MR. LIGHT: And, that was during that visit right after the suicide
15 happened, right?
16

17 MR. HALL: Yes sir.

18 MR. LIGHT: Then after ...

19 MR. HALL: Well ...

20 MR. LIGHT: Let me finish. Then after you go through what she said this is
21 what it says. Sissy brought this up more than on one occasion, but never provided
22 more detail. So she talked about it more times, but never provided more details
23 than on that first visit, is that correct?
24
25

1 MR. HALL: Correct.

2 MR. LIGHT: So, based on that we can assume then that the details are held
3 within this statement, correct?

4 MR. HALL: Negative.

5 MR. LIGHT: Well sir, you said ...

6 MR. HALL: Do you want details or do you want the facts?

7 MR. LIGHT: Well, I want to talk about this statement.

8 MR. HALL: Okay. I'm sorry.

9 MR. LIGHT: And then we will get on to that. I want to talk about the
10 statement that you were reading. You indicated during that visit, and then you
11 went on and described the details and then you said Sissy brought this up on more
12 than one occasion, but never provided more details. That certainly indicates to me
13 that the details are all contained within this statement.

14 MR. HALL: If you read it that way.

15 MR. LIGHT: Okay. Thank you.

16 COURT: I need you to pursue that more. I am not comfortable with this
17 dichotomy between what he is describing as detail and you are describing as detail.
18 There is clearly a gap here that we need to flush out and if you are comfortable
19 doing it that's very good. Otherwise I will have other counsel do it.
20
21
22
23
24
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1 MR. LIGHT: Well, I have some more questions about what he said
2 yesterday that aren't contained within the statement if that's where you want me to
3 go.

4 COURT: All right. Go ahead.

5
6 MR. LIGHT: Now, on direct exam yesterday you discussed Sissy stating
7 something about jealousy and the girls were jealous of the girl that they beat up.
8 But that is not contained in this statement is it?

9
10 MR. HALL: No it isn't.

11 MR. LIGHT: And, you didn't make any change to put that in this statement
12 back in July of 2010, did you?

13 MR. HALL: No I did not.

14
15 MR. LIGHT: Okay. Also, on direct examination yesterday you discussed
16 the girls luring her over.

17 MR. HALL: Uh huh.

18 MR. LIGHT: And that is not ...

19
20 MR. HALL: That was their plan.

21 MR. LIGHT: And that is not contained in the July 2010 statement, is it?

22 MR. HALL: No.

23
24 MR. LIGHT: And, when you reviewed it you had an opportunity to make
25 changes and add that and you didn't do so, is that right?

1 MR. HALL: That is correct.

2 MR. LIGHT: Also, yesterday you talked about the girl was messing with
3 other girls' boyfriends or something to that effect that Sissy had indicated to you.
4 And likewise Mr. Hall, that is not in Your July 2010 statement either, is it?
5

6 MR. HALL: Correct.

7 MR. LIGHT: And, you had an opportunity to make that change and place it
8 in here and you chose not to at that time, correct?
9

10 MR. HALL: I made no choice at all. I just corrected the errors that they had
11 there, initialed it and let 'er ride.

12 MR. LIGHT: Okay. So, you indicated yesterday that you watched the
13 Dateline broadcast about the Kim Nees homicide, is that correct?
14

15 MR. HALL: I did see it, correct.

16 MR. LIGHT: And, was I correct that you watched the Dateline broadcast
17 about the Kim Nees homicide prior to making out this statement, is that correct?
18

19 MR. HALL: Let me ask you the date on that again please?

20 MR. LIGHT: May I approach Your Honor.

21 MR. HALL: Or, you can tell, me either one.

22 MR. LIGHT: July 25, 2010.

23 MR. HALL: Yes, I had seen the Dateline program by then, yes.
24
25

1 MR. LIGHT: Isn't it true that the facts that you ... May I approach again
2 Your Honor?

3 COURT: Yes you may

4 MR. LIGHT: Isn't it true that the facts that are contained within this
5 statement, the facts in this statement, were all facts that were contained in the
6 Dateline broadcast?
7

8 MR. HALL: I couldn't hear you, you had your back to me.

9 MR. LIGHT: I am sorry. Isn't it true that the statements that you indicate
10 about the incident, about what Sissy told you that are in that statement before you
11 were also contained in the Dateline broadcast?
12

13 MR. HALL: Yeah it is the truth, yeah.

14 MR. LIGHT: Have you talked to Tamara Hall about this? About what Sissy
15 may have said or didn't say?
16

17 MR. HALL: Of course.

18 MR. LIGHT: Isn't it true that Tamara has a different recollection of what
19 Sissy said than what you said?
20

21 MR. HALL: I do not know.

22 MR. LIGHT: Okay. Have you ever read her statement that she gave to
23 Centurion Ministries?
24

25 MR. HALL: No sir.

1 MR. LIGHT: That is all we have Your Honor. Thank you.

2 COURT: Mr. Camiel?

3 (REDIRECT EXAMINATION OF KEVIN DOUGLAS HALL)

4 MR. CAMIEL: Good morning Mr. Hall.

5 MR. HALL: Good morning sir.

6 MR. CAMIEL: Mr. Hall, back in February of 2010, you were asked if you
7 would give an interview to an investigator from the Attorney General's Office, is
8 that right?
9

10 MR. HALL: Yes sir.

11 MR. CAMIEL: And you agreed to do that?

12 MR. HALL: Yes sir.

13 MR. CAMIEL: You agreed to let them tape record their interview with
14 you?
15

16 MR. HALL: Yes sir.

17 MR. CAMIEL: And, do you remember telling them at that time that Sissy
18 Atkinson told you that one girl lured her away because she was jealous of her?
19

20 MR. HALL: Yes sir.

21 MR. CAMIEL: You also told them at that time that Sissy Atkinson had
22 mentioned this on five or six occasions?
23

24 MR. LIGHT: Your Honor, I am gonna ...
25

1 MR. HALL: More so.

2 COURT: Yes, what's the ...

3 MR. LIGHT: Never mind. He already got it out. He is leading his witness
4 Your Honor.

5
6 COURT: All right.

7 MR. CAMIEL: I don't have anything further Your Honor.

8 COURT: Now, I missed that last question because I was trying to deal with
9 ...

10
11 MR. CAMIEL: Sure. Sissy Atkinson brought up this incident involving
12 Kim Nees ...

13 MR. LIGHT: Objection, leading Your Honor.

14 MR. CAMIEL: Did Sissy Atkinson bring up the incident involving Kim
15 Nees on several occasions?

16 MR. HALL: Yes sir.

17
18 MR. CAMIEL: Would five or six be a fair estimate of how many times she
19 brought it up?
20

21 MR. HALL: Five or six I know, five or six Tammy, fifteen between the two
22 of us; we are talking months here of that.

23 MR. CAMIEL: You also ... You mentioned that sometimes Tammy was
24 there when Sissy brought this up?
25

1 MR. HALL: Correct.

2 MR. CAMIEL: Were there times when Sissy brought it up when Tammy
3 wasn't there?

4 MR. HALL: Correct.

5 MR. CAMIEL: Nothing further.

6
7 (RECROSS OF KEVIN DOUGLAS HALL)

8 MR. LIGHT: Just one last follow up. But, Mr. Hall you just indicated on
9 redirect that Sissy brought this up several times, but in your statement, isn't it true
10 in your statement Sissy brought this up more than once, but never provided more
11 details than was in this initial statement. That is what you said. Is that correct or
12 not?
13

14 MR. HALL: Could you rephrase that please sir. I don't understand what
15 you are getting at.
16

17 COURT: Mr. Light if you want to give him the document that is fine.

18 MR. LIGHT: Look at this statement.

19 MR. HALL: Right.

20 COURT: Let him review it Mr. Light. Give him some space.

21 MR. HALL: You want me to read this?
22
23
24
25

1 MR. LIGHT: No you can read it to yourself. Isn't it true that in this written
2 statement of July 25, 2010, that you indicated Sissy brought this up on more than
3 one occasion, but never provided more details?

4 MR. HALL: Correct.

5 MR. LIGHT: And, that is not in here, these other details, right?

6 MR. HALL: No.

7 MR. LIGHT: That is all I wanted. Thank you.

8 COURT: Well all right. Thank you. I am going to conduct some
9
10 questioning here because this is a Judge determination of this issue. I believe that I
11 have some scope to pursue some questions. Mr. Hall, I am a little confused, I
12 guess would be the word, about why there is such a difference between this
13 statement which is Petitioner's Exhibit Four and the details, for instance, that you
14 provided yesterday. Could you explain that please?
15
16

17 MR. HALL: This statement was here; we were talking about one incident,
18 one time. They didn't ask me about when, February, March, April, May, June or
19 July. They were asking me the first time when she came to me and that is all they
20 said. I am sorry I didn't give complete details, what color, how long, but the
21 bottom line is, I know for a fact, girls murdered Kim Nees and I know he is not a
22 girl. That is the facts I got from her.
23
24
25

1 MR. LIGHT: Your Honor, I would ask that that be stricken. That is not
2 responsive to the Court's questions.

3 COURT: I concur. I will strike it. When you first started testifying
4 yesterday you exhibited a fairly detailed and notable memory, I guess would be the
5 best way to describe it. How do you bounce that against this testimony today
6 about the psychological evaluation and the troubles with an accident and so on?
7

8 MR. HALL: What had happened with me and why I had to get it. Right
9 now, even yesterday I went without my meds yesterday. When you guys put me
10 on the stand I had been sicker than a dog out there. I have got barrets esophagus. I
11 have got Crohn's colitis. The lining of my stomach has been operated on and is
12 reattached to my esophagus. It is separating as we are sitting her right now. Part
13 of my lining is down inside my intestines. I had a quick surgery, a couple quick
14 surgeries within the last two weeks and am scheduled for major surgery, I believe
15 they told me on the 8th. When this happens, like since I have been here, I have
16 eaten two bites of a French dip sandwich and I tried to eat some toast. What
17 happens is your ammonia level goes up. These pills I take keeps my ammonia
18 levels down. If your ammonia levels go up in your blood system, you have poor
19 memory. Even the State down at Warm Springs didn't realize what was going on
20 until after I had come back and gotten treatment. It wasn't from the brain injury
21 that was causing it. It is because my stomach lining was folded and I had
22
23
24
25

1 extremely high ammonia levels as I did yesterday. And, that gives you sort of a
2 foggy, hazy state if you don't stay on your meds. I thought I was going to be here
3 one day. I didn't know I would be here this many days.

4 COURT: So, the memory that you exhibited yesterday about dates and so
5 on was that obscured by this high ammonia level or was it not?
6

7 MR. HALL: I don't think it was obscured. I think I tend to ramble on is
8 what it is. I get kind of like nervous and rambly.
9

10 COURT: Well, I think one of the bottom line questions here is you have
11 acknowledged very frankly and forthrightly a serious history of drug abuse.

12 MR. HALL: Yes sir.

13 COURT: So, how am I to take your testimony? I mean, is your mind ...
14

15 MR. HALL: I was put on ISP in January of 2005. I am sure you are
16 familiar with ISP and what those officers do.

17 COURT: Somewhat.

18 MR. HALL: You can't ... Even those tests come up and tell you how much
19 caffeine and nicotine you got in your system. I am amazed at what they can tell.
20
21 All the time I was on parole from January 2005 to January 2010 I did fine except
22 on one occasion. I got stupid, went out, thought maybe I could handle it and I
23 couldn't. And now, God knows, the only thing I need in me is the love of God and
24
25

1 good food. I have been sober almost five straight years now. I haven't even taken
2 ... I mean I am doing good.

3 COURT: Do you go to self-help meetings?

4 MR. HALL: Oh yeah.

5 COURT: How many?
6

7 MR. HALL: Four, five a week.

8 COURT: All right. I will allow counsel to follow up on anything the Court
9 asked. Mr. Camiel?
10

11 MR. CAMIEL: I don't have any other questions Your Honor.

12 COURT: Mr. Light?

13 MR. LIGHT: No thank you.
14

15 COURT: All right. May this witness be excused Mr. Camiel?

16 MR. CAMIEL: Yes sir.

17 COURT: Mr. Light?

18 MR. LIGHT: Yes Your Honor.
19

20 COURT: All right. Thank you sir. You may step down.

21 MR. HALL: God bless you.

22 COURT: All right. Mr. Camiel.

23 MR. CAMIEL: Your Honor we would call Michael McIntire.
24
25

1 COURT: Come over here in front of the Clerk please and raise your right
2 hand.

3 CLERK: Do you solemnly swear that the statements you are about to make
4 in the matter now before you will be the truth, the whole truth, and nothing but the
5 truth so help you God?
6

7 MR. MCINTIRE: I do.

8 COURT: Come on around here please. Good morning.

9 MR. MCINTIRE: Good morning.
10

11 COURT: Scoot on up there please. Thank you. I just want to be sure we
12 can hear you.

13 (DIRECT EXAMINATION OF MICHAEL JOHN MCINTIRE)

14 MR. CAMIEL: Good morning. Could you tell us your full name and spell
15 your last name?
16

17 MR. MCINTIRE: My name is Michael John McIntire. M-c-I-n-t-i-r-e.

18 MR. CAMIEL: Mr. McIntire, where do you live?
19

20 MR. MCINTIRE: Great Falls, Montana.

21 MR. CAMIEL: How long have you lived in Montana?
22

23 MR. MCINTIRE: My whole entire life on and off.

24 MR. CAMIEL: Were there periods where you were in the service, out of
25 state?

1 MR. MCINTIRE: Yes sir.

2 MR. CAMIEL: And, did you go to high school in Great Falls?

3 MR. MCINTIRE: I graduated from Great Falls High.

4 MR. CAMIEL: After that you joined the Army?

5 MR. MCINTIRE: Yes sir.

6 MR. CAMIEL: How are you currently employed?

7 MR. MCINTIRE: I am an independent contractor for the State of Montana
8 and run my own business roofing and general construction.
9

10 MR. CAMIEL: How long have you been doing that?

11 MR. MCINTIRE: On and off, I would say for twenty (20) years.

12 MR. CAMIEL: Were you living in Great Falls in the 2004 to 2005 time
13 period?
14

15 MR. MCINTIRE: Yes sir.

16 MR. CAMIEL: Where did you live?

17 MR. MCINTIRE: I lived at 925 8th Avenue South.

18 MR. CAMIEL: And do you have family?

19 MR. MCINTIRE: I lived there with my daughter at the time.

20 MR. CAMIEL: How old was she?

21 MR. MCINTIRE: At that time she would have been two or three years old.
22
23
24
25

1 MR. CAMIEL: And were you raising your daughter by yourself at that
2 time?

3 MR. MCINTIRE: Yes I was.

4 MR. CAMIEL: Can you describe the address that you just indicated. Is it
5 an apartment, is it a house?
6

7 MR. MCINTIRE: It is a twelve-plex. It is a multi-family unit.

8 MR. CAMIEL: And was your unit on the ground floor?

9 MR. MCINTIRE: Yes it was.
10

11 MR. CAMIEL: While you were living there did you become acquainted
12 with a woman named Sissy Atkinson?

13 MR. MCINTIRE: Yes sir.

14 MR. CAMIEL: How did that come about?
15

16 MR. MCINTIRE: She moved in right next door to me, her and her
17 boyfriend Les Wright.

18 MR. CAMIEL: Les Wright?
19

20 MR. MCINTIRE: Yes.

21 MR. CAMIEL: Do you remember when it was that she moved in next door
22 to you?

23 MR. MCINTIRE: I think it was in the fall of 2004.
24
25

1 MR. CAMIEL: While she was your neighbor, and you say right next door,
2 is it literally the next unit over?

3 MR. MCINTIRE: Yes. Not even that far over. My door was probably not
4 more than probably two foot from hers.
5

6 MR. CAMIEL: While she was living next door, did you become aware of
7 any activity going on or appearing to be going on at her apartment?

8 MR. MCINTIRE: About "twenty-four/seven" it was going on.

9 MR. CAMIEL: And what was that?
10

11 MR. MCINTIRE: People coming in and out nonstop at all hours of the
12 night, all hours during the day. Eventually, it escalated to where people were
13 trying to kick her door in; were showing up with firearms outside the apartment
14 complex, threatening to shoot her over, they were saying, being ripped off.
15

16 MR. CAMIEL: And, did you become concerned about that activity because
17 of your daughter?

18 MR. MCINTIRE: Yes I was.

19 MR. CAMIEL: Did you do anything as you became concerned?
20

21 MR. MCINTIRE: I had spoken to the property owner at that time which
22 was Tom and Lonnie, Pat and Lonnie, I think is who owns the property. I also
23 spoke to Sgt. John Cameron with the Great Falls Police Department.
24
25

1 MR. CAMIEL: Did you talk to Sissy Atkinson about the activity going on
2 at her apartment?

3 MR. MCINTIRE: After a colored gentleman I know by the name of JR
4 showed up threatening to shoot her, I spoke to her when I seen her later on that
5 day.
6

7 MR. CAMIEL: Do you remember when that was that you spoke to her?
8 Any indication of date?
9

10 MR. MCINTIRE: It was I think in 2005; somewhere in there.

11 MR. CAMIEL: Where were you when you spoke to her?

12 MR. MCINTIRE: I was on my porch.

13 MR. CAMIEL: So, this is a face to face, in person, conversation?
14

15 MR. MCINTIRE: Yes it was.

16 MR. CAMIEL: Where was she?

17 MR. MCINTIRE: She was coming out of her unit.
18

19 MR. CAMIEL: What did you say to her?

20 MR. MCINTIRE: I explained to her that I didn't appreciate the activity that
21 was going on. I didn't appreciate the gentleman out there with a firearm because
22 of the fact I was in fear of my daughter's safety at that time and safety of other
23 children that lived in the apartment complex.
24

25 MR. CAMIEL: When you told her about your concerns did she respond?

1 MR. MCINTIRE: Yes she did.

2 MR. CAMIEL: What did she say?

3 MR. LIGHT: Objection. Hearsay. For the record Your Honor.

4 COURT: Is this going to be the statement against interest?

5 MR. CAMIEL: Yes.

6 COURT: Well, I will overrule based on the Court's previous ruling.

7 MR. CAMIEL: What did she say in response to your comments?

8 MR. MCINTIRE: She looked at me straight in the face and told me I didn't
9
10 know who I was messing with and that she had killed some girl up on the
11 reservation and that she would kill me.

12 MR. CAMIEL: How did you respond to that?

13 MR. MCINTIRE: Well, I didn't take the threat to heart too much. I wasn't
14
15 really too scared of her. She, at that time looked like she weighed no more than
16 ninety (90) pounds soaking wet. It was her live-in boyfriend at the time that I was
17 more in fear of than her because he was a registered violent offender.

18 MR. CAMIEL: At that, time did you tell anybody about the threat that she
19
20 made to you?

21 MR. MCINTIRE: I spoke to my friends and family about it.

22 MR. CAMIEL: Did you feel the need to go to law enforcement?

23 MR. MCINTIRE: At that time, no.
24
25

1 MR. CAMIEL: Did there come a point in time where you read or heard
2 something about Sissy Atkinson that triggered your deciding to tell someone else
3 about the threat that she made to you?

4 MR. MCINTIRE: Yes.

5 MR. CAMIEL: Could you describe that?

6 MR. MCINTIRE: In 2005, because of all the problems that were going with
7 her and the activity, I moved to Billings for a year to get away from her. That is
8 how bad she terrorized me. I figured I needed to leave. I was in fear of my safety
9 at that point in time and I came back in 2006, back to Great Falls. Eventually I
10 ended up meeting a girl. I moved into a house in June of 2007 and I seen an article
11 in the paper involving Barry and when I read the article, Sissy's name was in it and
12 I was like, then everything came together.
13
14
15

16 MR. CAMIEL: And, as a result of reading about her, did that article involve
17 the Kim Nees murder case?

18 MR. MCINTIRE: Yes it did.

19 MR. CAMIEL: And, was that the first time you learned that there had been
20 a murder up on the reservation?
21

22 MR. MCINTIRE: Yes.

23 MR. CAMIEL: So, in reaction to reading that article what did you do?
24
25

1 MR. MCINTIRE: I called the State's attorney's office and told them that I
2 had knowledge of a crime where somebody had confessed to me the crime and
3 they told me that somebody would get back to me, which they never did.

4 MR. CAMIEL: Do you know who you talked to at the State's attorney's
5 office?
6

7 MR. MCINTIRE: No I don't.

8 MR. CAMIEL: Do you know if it was the Cascade County District
9 Attorney's office or the Attorney General's office?
10

11 MR. MCINTIRE: The Attorney General's office is who I called.

12 MR. CAMIEL: In Helena?

13 MR. MCINTIRE: Yes.

14 MR. CAMIEL: Okay. Do you know the date you called?
15

16 MR. MCINTIRE: It was in June of 2007.

17 MR. CAMIEL: You indicated nobody got back to you?

18 MR. MCINTIRE: No.

19 MR. CAMIEL: Did you do anything further with regard to the information
20 you had about Sissy Atkinson's statement to you?
21

22 MR. MCINTIRE: Yes. I contacted Sgt. John Cameron again and explained
23 to him that I knew about the situation and that I had contacted the State Attorney's
24 office and that nobody responded to me and what should I do about it. At that time
25

1 he explained to me that it was basically a closed matter. It was not in his
2 jurisdiction and that I needed to find other avenues.

3 MR. CAMIEL: Okay. So, what did you do?

4 MR. MCINTIRE: I eventually called the Great Falls Tribune and spoke to
5 the reporter that did the article and he is the one that had somebody contact me I
6 think, eventually.

7 MR. CAMIEL: As a result of contacting the Great Falls reporter were you
8 contacted by any investigators who worked for Centurion Ministries?
9

10 MR. MCINTIRE: Yes. That is who I was contacted by.

11 MR. CAMIEL: Okay. Was that first contact in person or on the phone?
12

13 MR. MCINTIRE: I believe it was on the phone at first.

14 MR. CAMIEL: And, did you tell them, the investigator that you spoke to on
15 the phone, what Sissy Atkinson had told you?
16

17 MR. MCINTIRE: Yes.

18 MR. CAMIEL: Okay. Did there come a point in time where you met in
19 person with one of the investigators?
20

21 MR. MCINTIRE: Yes there was.

22 MR. CAMIEL: Do you remember when that was?
23

24 MR. MCINTIRE: I met one of the investigators; I think it was in 2009, in
25 Aberdeen, Maryland.

1 MR. CAMIEL: You were living in Maryland at the time?

2 MR. MCINTIRE: Yes I was.

3 MR. CAMIEL: And, did the investigator actually come out to Maryland to
4 meet with you?

5 MR. MCINTIRE: Yes he did.

6 MR. CAMIEL: And, did you have any further contact with any of the
7 investigators from Centurion Ministries in person?
8

9 MR. MCINTIRE: After I came back to Montana I talked to them once
10 again, after I got in contact with them.
11

12 MR. CAMIEL: What was the time period you were living in Maryland?

13 MR. MCINTIRE: Two thousand nine (2009) to the spring of 2010.

14 MR. CAMIEL: And your reason for being in Maryland was what?

15 MR. MCINTIRE: My dad was sick at the time.

16 MR. CAMIEL: Did you eventually review and sign a statement that was
17 prepared for you by the investigators of Centurion Ministries?
18

19 MR. MCINTIRE: Yes I did.

20 MR. CAMIEL: Your Honor, if I could approach?

21 COURT: You may.
22
23
24
25

1 MR. CAMIEL: Mr. McIntire, I am handing you what has been marked as
2 Petitioner's Exhibit Six (6) for identification. I would ask you to take a look at
3 that.

4 MR. MCINTIRE: Yes.

5 MR. CAMIEL: Is that the statement that you signed?
6

7 MR. MCINTIRE: Yes sir.

8 MR. CAMIEL: Do you see the date on the statement?
9

10 MR. MCINTIRE: Yes.

11 MR. CAMIEL: What is that date?

12 MR. MCINTIRE: It is the 26th day of July 2010.

13 MR. CAMIEL: Your Honor, I would offer Petitioner's Exhibit Six (6).
14

15 MR. LIGHT: Your Honor, I object. I have no problem with him using it to
16 refresh the memory of the witness, but there are things contained in the statement
17 that he has not testified to. So, I am not sure what the relevancy is of offering it at
18 this time. He can ask him questions.
19

20 COURT: Well, the last number of objections were that the testimony was
21 the same as in the statement and now the objection is that the statement includes
22 things that weren't in the testimony.

23 MR. LIGHT: That is correct.
24
25

1 MR. CAMIEL: Your Honor, counsel will, I am sure, cross examine
2 regarding any differences between the statement and the testimony.

3 MR. LIGHT: In all due respect Your Honor, I can question him about his
4 statement without having that statement admitted. I have done that on several
5 occasions.
6

7 COURT: Well, I will rule that the basis for the objection is not set forth in
8 the rules of civil procedure, so the objection is overruled.
9

10 MR. CAMIEL: Thank you Your Honor I have no other questions.

11 COURT: All right. Cross? Do you want me to hand this to him?

12 (CROSS EXAMINATION OF MICHAEL JOHN MCINTIRE)

13 MR. LIGHT: Please Your Honor. We are talking about that statement Mr.
14 McIntire. Did you draft that statement?
15

16 MR. MCINTIRE: No sir.

17 MR. LIGHT: Did ... Who drafted it?

18 MR. MCINTIRE: I don't have a clue.

19 MR. LIGHT: Did you review it?
20

21 MR. MCINTIRE: Yes I did.

22 MR. LIGHT: Did you sign it?
23

24 MR. MCINTIRE: Yes I did.
25

1 MR. LIGHT: Now, you indicated that Sissy Atkinson was your neighbor
2 during the years of 2004 and 2005, is that correct?

3 MR. MCINTIRE: Yes sir.

4 MR. LIGHT: And, you indicated that you believed that there was drug
5 activity going on next door. Is that correct?
6

7 MR. MCINTIRE: Yes sir.

8 MR. LIGHT: Did you ever report that to the police?

9 MR. MCINTIRE: Yes I did.
10

11 MR. LIGHT: So, there should be a police report on file that you ...

12 MR. MCINTIRE: There is police reports on file.

13 MR. LIGHT: Okay. Did you ever report to police the fact that you
14 witnessed an individual over there threatening to shoot Sissy?
15

16 MR. MCINTIRE: No I did not.

17 MR. LIGHT: After allegedly being threatened by Sissy, did you
18 immediately report that threat to the police?
19

20 MR. MCINTIRE: No I did not.

21 MR. LIGHT: Okay. Sir, did there come a time where you were made aware
22 that Sissy Atkinson had notified family services about you?
23

24 MR. MCINTIRE: I know I was contacted at one point in time, yes.
25

1 MR. LIGHT: And it was after Sissy had contacted family services that you
2 contacted the police about this Sissy Atkinson statement sometime in 2007. Would
3 that be correct?

4 MR. MCINTIRE: No.

5 MR. LIGHT: That's not correct?

6 MR. MCINTIRE: Not that I know of.

7 MR. LIGHT: Well, did you contact Centurion Ministries after Sissy
8 Atkinson had reported you to family services?
9

10 MR. TOAVS: Your Honor, I am going to object that that question is
11 assuming facts that aren't into evidence.
12

13 COURT: Sustained.

14 MR. LIGHT: Were you reported to Department of Family Services?
15

16 MR. MCINTIRE: I don't know. I was never contacted by them.

17 MR. LIGHT: Okay. You have never been contacted by family services?
18

19 MR. MCINTIRE: Not having anything to do with that residence, no.

20 MR. LIGHT: Something to do with your child?

21 MR. MCINTIRE: Yes.

22 MR. LIGHT: Okay. Are you aware whether or not Sissy Atkinson had
23 anything to do with that report to family services about your child?
24

25 MR. MCINTIRE: I know who did it, yes.

1 MR. LIGHT: She did?

2 MR. MCINTIRE: No she didn't do it.

3 MR. LIGHT: Okay. Was it after that report to family services about your
4 child that this incident took place with Sissy Atkinson?

5
6 MR. TOAVS: Objection. It's vague as to this incident.

7 COURT: Yes. I am going to sustain.

8 MR. LIGHT: You have indicated that at one point there was a report to
9 family services concerning your child, correct?

10
11 MR. MCINTIRE: Yes. My wife had abandoned me and the child.

12 MR. LIGHT: Okay. Did the incident with Sissy, the conversation you had
13 with Sissy Atkinson where she threatened you; did that take place after the report
14 to family services?

15
16 MR. MCINTIRE: Yeah. It happened after. They had contacted me before
17 she had even moved into the apartment building.

18 MR. LIGHT: Okay. That is all I have. Thank you.

19
20 MR. CAMIEL: I have no other questions.

21 COURT: May this witness be excused? Mr. Camiel?

22 MR. CAMIEL: Yes Your Honor.

23 COURT: Mr. Light?

24
25 MR. LIGHT: Yes.

1 COURT: Any objection.

2 MS. PLUBELL: No objection.

3 MR. LIGHT: No objection.

4 COURT: You may be excused.

5 MR. MCINTIRE: Thank you sir.

6 COURT: All right. Petitioner.

7 MR. CAMIEL: Your Honor, we would call Dean Mahlum.

8 CLERK: Do you solemnly swear that the statements you are about to make
9
10 in the matter will be the truth, the whole truth, and nothing but the truth so help
11 you God?
12

13 MR. MAHLUM: Yes.

14 (DIRECT EXAMINATION OF DEAN MAHLUM)
15

16 MR. CAMIEL: Could you please state your full name and spell your last
17 name?

18 MR. MAHLUM: Dean Mahlum. M-a-h-l-u-m.

19 MR. CAMIEL: Mr. Mahlum, where do you reside?
20

21 MR. MAHLUM: Wolf Point, Montana.

22 MR. CAMIEL: How long have you lived up in that area?
23

24 MR. MAHLUM: All my life.

25 MR. CAMIEL: How are you presently employed?

1 MR. MAHLUM: I am the School Service Coordinator for the Rocky
2 Mountain Information Network.

3 MR. CAMIEL: When did you begin that job?

4 MR. MAHLUM: October of 1998.

5 MR. CAMIEL: Prior to that, how were you employed?

6 MR. MAHLUM: I was basically the Assistant Chief for the Wolf Point
7 Police Department.
8

9 MR. CAMIEL: Over what period of years were you the Assistant Chief of
10 the Wolf Point Police Department?
11

12 MR. MAHLUM: June, I believe, of 1994 until I took this position.

13 MR. CAMIEL: Prior to that position with the Wolf Point Police Department
14 how were you employed?
15

16 MR. MAHLUM: I did a short period that I had an insurance agency. Prior
17 to that I was the Roosevelt County Sheriff.

18 MR. CAMIEL: What years were you the Roosevelt County Sheriff?

19 MR. MAHLUM: I took office in January of 1983 through 1987.
20

21 MR. CAMIEL: Prior to becoming the sheriff of the Roosevelt County
22 Sheriff's office, or taking the position of sheriff, how were you employed?
23

24 MR. MAHLUM: I was employed as Roosevelt County Undersheriff.

25 MR. CAMIEL: In what years did you hold that position?

1 MR. MAHLUM: June of 1976 until I took office in 1983.

2 MR. CAMIEL: And, prior to being the undersheriff in Roosevelt County
3 how were you employed?

4 MR. MAHLUM: From January of 1973 until I moved back to Wolf Point as
5 the undersheriff I was a deputy sheriff and detective with the Yellowstone County
6 Sheriff's Department.
7

8 MR. CAMIEL: Now, the years that you worked as undersheriff in the
9 Roosevelt County Sheriff's Office included the time period involving the Kim
10 Nees murder investigation?
11

12 MR. MAHLUM: That is correct.

13 MR. CAMIEL: And, in terms of law enforcement with the Roosevelt
14 County Sheriff's Office, were you in charge of the investigation in your office?
15

16 MR. MAHLUM: Sheriff Carpenter would have been in charge of the
17 investigation. He was the ultimate authority with that.

18 MR. CAMIEL: Were you the lead investigator from your office in that
19 investigation?
20

21 MR. MAHLUM: Correct.

22 MR. CAMIEL: And, did you coordinate your investigation with the FBI?
23

24 MR. MAHLUM: We worked with them, yes.
25

1 MR. CAMIEL: Was this a situation where initially the FBI started as the
2 lead investigative agency and then the Roosevelt County Sheriff's Office became
3 the lead investigative agency?

4 MR. MAHLUM: Actually, I would say it was more of a joint, and I don't
5 know that I would use the term lead, with the way the jurisdictional issues are
6 worked there on the reservation and within Roosevelt County.

7 MR. CAMIEL: Mr. Mahlum, I want to ask you about a few names just to
8 get some clarification. Are you familiar with a woman named JoAnn Jackson?
9

10 MR. MAHLUM: By name, yes.

11 MR. CAMIEL: And is that same woman also known as JoAnn Todd?
12

13 MR. MAHLUM: I am not familiar with the Todd. Could very well be. I
14 don't know.
15

16 MR. CAMIEL: You know JoAnn Jackson to be married to Michael Todd?
17

18 MR. MAHLUM: I have no knowledge of that.

19 MR. CAMIEL: Are you familiar with a woman named Sissy Atkinson?
20

21 MR. MAHLUM: Yes.

22 MR. CAMIEL: And, has she also used the name Dottie Sue Ness?
23

24 MR. MAHLUM: I believe she did. She was married to Mike Ness I
25 believe, or lived with.

1 MR. CAMIEL: And, are you also familiar with a woman with the name
2 Maude Grayhawk?

3 MR. MAHLUM: Yes.

4 MR. CAMIEL: And, at one time was her name also Maude Kern when she
5 was married to Dana Kern?
6

7 MR. MAHLUM: I don't know if she was married to Dana Kern or not, but I
8 believe she used that name.

9 MR. CAMIEL: You were familiar with the fact that back in 1979 at the
10 time of the Kim Nees murder, a guy by the name of Steve Grayhawk worked for
11 the Poplar Police Department?
12

13 MR. MAHLUM: I believe it was the Poplar Police Department, yes.

14 MR. CAMIEL: And, Steve Grayhawk is the father of Maude Grayhawk?
15

16 MR. MAHLUM: I am not sure.

17 MR. CAMIEL: And, the chief of the Poplar Police Department around the
18 time of the Kim Nees murder was Bobby Atkinson?
19

20 MR. MAHLUM: Sir, I am not sure if it was Bobby Atkinson or Robert
21 Murray. My recollection. I just ... They both served, but I don't know what
22 the time periods were.

23 MR. CAMIEL: You are aware of the fact that Bobby Atkinson at some
24 point in time was the chief of the Poplar Police Department?
25

1 MR. MAHLUM: Correct.

2 MR. CAMIEL: And, he was the chief of the Poplar Police Department at
3 the time of the Barry Beach trial, wasn't he?

4 MR. MAHLUM: Again, I believe that is the case, but I am not absolutely
5 certain.
6

7 MR. CAMIEL: And, Bobby Atkinson is the brother of Sissy Atkinson?

8 MR. MAHLUM: Correct.

9 MR. CAMIEL: Now, as a part of the investigation of the Kim Nees murder,
10 you were involved with interviewing people who lived up on what was called
11 Cockroach Hill, is that right?
12

13 MR. MAHLUM: Correct.

14 MR. CAMIEL: That is a hill. It is kind of a bluff that overlooks what is
15 commonly known as train Bridge Park?
16

17 MR. MAHLUM: Train bridge park; I had never heard it referred to that, but
18 train bridge was a term that was used to describe the river. I never heard it in those
19 terms though.
20

21 MR. CAMIEL: You recall that you wrote a letter to the, actually to the
22 parole board, where you indicated that Kim Nees body was found in Poplar in an
23 area known as "Train Bridge".
24
25

1 MR. MAHLUM: I wrote a letter to the parole board and I may have used
2 that term. I don't know Mr. Camiel.

3 MR. CAMIEL: In any event, there is a hill that sits adjacent to the train
4 bridge and the river and the area on the east side of the river and that hill or that
5 bluff is known by some of the people as Cockroach Hill?
6

7 MR. MAHLUM: Correct.

8 MR. CAMIEL: And. Kim Nees body was found in the river adjacent to that
9 bluff. Isn't that right?
10

11 MR. MAHLUM: It was in the area. I don't know that I would use the term
12 "adjacent" to describe the distances from the top of the hill to where the river is.
13

14 MR. CAMIEL: And, to get into the area to where Kim Nees body was
15 found at that time, there were two roads off of Highway Two that lead down into
16 that area?

17 MR. MAHLUM: There was a turnoff that went into it. There was also a
18 trail basically, off of the road and down the barrow pit that you could get into the
19 area, yes.
20

21 MR. CAMIEL: And, within days of the murder you were up on that bluff
22 interviewing neighbors to see if anybody had seen or heard anything?
23

24 MR. MAHLUM: That was done. I was there. But from a time frame I
25 don't know if it was within days or not.

1 MR. CAMIEL: But, you were personally involved in interviewing some of
2 those people who lived up on the hill?

3 MR. MAHLUM: Two, I believe, yes.

4 MR. CAMIEL: And, one of the people that you interviewed was a woman
5 named Mabel Sparvoir?
6

7 MR. MAHLUM: Correct.

8 MR. CAMIEL: And, she lived in a house that was on the west side of that
9 hill overlooking that area that we just talked about?
10

11 MR. MAHLUM: The back of her house faced that area, yes.

12 MR. CAMIEL: And, you also ... In addition to interviewing her, you
13 interviewed her son Joel?
14

15 MR. MAHLUM: Correct.

16 MR. CAMIEL: And, when you went to interview him you were taking
17 notes.
18

19 MR. MAHLUM: That would be standard procedure. But, I don't recall my
20 written notes or what those were at this time.

21 MR. CAMIEL: And again, you were asking specific questions as to whether
22 they heard anything late the night that Kim Nees was murdered, isn't that right?
23
24
25

1 MR. MAHLUM: That would, I am sure, have been one of the questions we
2 would have asked, yes. Did you hear anything? Did you see anything? Those
3 types of questions.

4 MR. CAMIEL: And, when you asked Joel Sparvoir if he heard anything ...

5
6 MS. PLUBELL: Your Honor we are going to object on the grounds of
7 hearsay. Furthermore, the testimony, they testified at trial and that has been
8 submitted to the Court.

9
10 COURT: Well, I don't hear any hearsay so far. But obviously hearsay,
11 unless there is an exception, would be sustained. I will let you proceed. We will
12 just take it a step by step.

13 MR. CAMIEL: Well Your Honor, the next question I think is going to elicit
14 what the State is concerned about, so I think we should argue it now.

15
16 COURT: Okay. Go ahead.

17 MR. CAMIEL: Mr. Mahlum interviewed Joel Sparvoir and Mabel Sparvoir
18 about whether they heard anything that night. Now, yesterday during the cross
19 examination of Stephanie Eagle Boy, or at the end of that examination, well,
20 during the examination they questioned her about whether Joel Sparvoir heard
21 anything or whether the Aunt Mabel Sparvoir heard anything. Then, at the end of
22 her testimony they offered the trial testimony of both Joel Sparvoir and Mabel
23 Sparvoir. They offered it, accompanied by a motion to strike the testimony of
24
25

1 Stephanie Eagle Boy and a representation that their testimony at trial was
2 inconsistent with what Ms. Eagle Boy had testified to. The offering of that trial
3 testimony ... that trial testimony is former testimony; it was testimony, of course,
4 at trial under oath on this subject matter. We are allowed, under evidence Rule 806
5 to impeach that testimony. This witness interviewed Joel and Mabel Sparvoir and
6 the statements that he took from them would impeach that testimony and give
7 credit to the testimony of Stephanie Eagle Boy as it would be consistent with her
8 testimony. One of the things this Court is required to do, as we talked about
9 yesterday, is to weigh the weight and credibility of the witnesses that we present to
10 determine whether or not someone like Stephanie Eagle Boy would ever get to go
11 in front of a jury. And, in doing that, we believe that the Court, hearing what Joel
12 Sparvoir told this witness, would factor into her credibility. And, while this may
13 not be admissible at trial, it should be heard by this Court as it decides whether or
14 not to credit that testimony and what weight to give to that testimony.
15
16
17

18 COURT: Does the State have a response?

19
20 MR. LIGHT: Well, first of all Your Honor, I don't think we opened the
21 door at all with Stephanie Eagle Boy. We asked her at the time of the incident, did
22 she make statements to these people. I don't go into what those statements were. I
23 didn't go there at all because I thought that was hearsay. We then offered the...
24 and there was no objection, their trial testimony because the Court said it wanted
25

1 weight the credibility of these witnesses. Now, if they want to challenge what Joel
2 or Mabel said they are available to testify. Joel Sparvoir can come in and testify as
3 to what he said. But, to do it again through hearsay, and I don't know what the
4 exception is and if they are going to go on 806, that is attacking when a hearsay
5 statement has been admitted. We offered direct evidence at trial, not a hearsay
6 statement. I stayed away from hearsay Your Honor.
7

8 MR. CAMIEL: Well Your Honor, they offered the transcripts of the trial
9 testimony. That is former testimony and because that testimony wasn't given at
10 this proceeding, it is open to be challenged under evidence Rule 806. And, that
11 rule allows us to challenge the testimony as if the witness was here and gave that
12 testimony in Court.
13

14 COURT: Well let's take a brief recess.
15

16 (RECESS)

17 CLERK: All rise please.

18 COURT: Please be seated. All right Rule 806 is the rule being utilized here.
19 That rule presupposes that this evidence that I have admitted of trial testimony is
20 hearsay. How would that be hearsay?
21

22 MR. CAMIEL: Well Your Honor, the witnesses that the State is asking you
23 to discredit haven't come into this Court to testify. They testified at another
24
25

1 proceeding so they weren't here. It is the same as; it is of the same vein as former
2 testimony given at another proceeding. If we offer ...

3 COURT: It is not hearsay. How could that possibly be hearsay? This rule
4 applies specifically to hearsay or to some other exceptions which don't apply in
5 this case.
6

7 MR. CAMIEL: Well, I would point out that they, whatever you call what
8 they introduce or how they introduced it, they offered testimony for the truth of the
9 matter asserted in that testimony. They have asked this Court to use that testimony
10 in its calculus in weighing the weight and credibility of the witness Stephanie
11 Eagle Boy.
12

13 COURT: Agreed.

14 MR. CAMIEL: They moved to strike her testimony on the strength of that
15 former testimony that they offered. We are offering, through these questions,
16 impeachment to that testimony. This Court has to, as this Court indicated, go
17 through an initial gate keeping of weighing her credibility and the weight of her
18 testimony, Ms. Eagle Boy. And, this Court is allowed to look at everything that
19 affects her credibility. I mean, I thought that is what I heard the State argue
20 yesterday and this goes directly to her credibility. It is directly consistent with
21 what she testified to.
22
23
24

25 COURT: Yes Mr. Light.

1 MR. LIGHT: First of all Your Honor, my motion to strike yesterday had to
2 do with this hearing as far as due diligence and not new. And, the Court, of course,
3 ruled against me in that matter. I think what is important... I think the Court is
4 correct and I was very, very specific in my question. I did not get any hearsay
5 from her, from Mabel, or Joel. In fact, I did not even attack their credibility. What
6 they want to now do is attack the credibility of Mabel and Joel when there has
7 never been any hearsay offered. Their credibility has never been attacked. And, it
8 is not hearsay Your Honor. If they want to offer some rebuttal then they can call
9 Mabel and Joel to do so, but not for the matter they want.
10
11

12 COURT: Yeah. I don't believe Rule 806 applies. I am going to sustain the
13 objection of the State. You may proceed with this witness if you wish.
14

15 MR. CAMIEL: Your Honor, I would like to make an offer of proof and
16 have this information in the record.

17 COURT: But, those admitted evidence are not hearsay. Why would I
18 accept an offer of proof on something that is so black and white?
19

20 MR. CAMIEL: Well Your Honor, I understand the Court's ruling and you
21 have indicated that we can't introduce it in this hearing, but we need to have what
22 we are attempting to introduce in the record so that if there is a review of this
23 matter, a reviewing Court sees what it is we are trying to get in.
24

25 COURT: Mr. Light?

1 MR. LIGHT: Well, I would object Your Honor. You have held it can't
2 come in so it shouldn't be reviewed at this point. If they file an appeal for
3 whatever reason, or we do, then we can set forth why we think the Court was
4 wrong and set forth some facts. But, I don't think an offer of proof is needed when
5 you sustain an objection Your Honor.
6

7 MR. CAMIEL: Your Honor, I disagree because there is no way for a
8 reviewing Court to know the substance of what we are trying to get in. Because
9 this is a Court, a Judge proceeding, this Court can take an offer of proof and yet
10 separate that from the evidence that it is going to hear, that it is going to weigh.
11

12 COURT: Well, I am certainly aware of the offer of proof and I am often
13 very, generally very flexible about that. But, in this particular instance, you have
14 to argue to me that those statements admitted as evidence, trial testimony, is
15 hearsay in order to apply. And, I have not found anything that is even close to
16 identifying that as hearsay. And therefore, an offer of proof is just not appropriate
17 it seems to the Court.
18

19
20 MR. CAMIEL: I would ask that I have the notes marked as an exhibit so I
21 can have that as part of the record.

22 COURT: What notes?
23
24
25

1 MR. CAMIEL: It is the notes of Mr. Mahlum; his notes of his interview
2 with Joel Sparvoir and Mabel Sparvoir. That was where I was going with this. He
3 did the interview. He took the notes and I want those to be part of the record.

4 MS. PLUBELL: Well Your Honor, at this point we are not sure that they
5 are his notes. That has not been established. We haven't seen what he has and Mr.
6 Mahlum hasn't seen them.

8 MR. CAMIEL: I didn't get that far yet.

9 COURT: You didn't, I agree. All right. Mr. Mahlum, if you would come
10 forward please. Mr. Mahlum, do you recognize you are still under oath?
11

12 MR. MAHLUM: I do sir.

13 COURT: All right. I will let you lay the foundation for these notes.

14 MR. CAMIEL: Thank you Your Honor. Mr. Mahlum, I am going to hand
15 you what has been marked, with the Court's permission, if I can approach?
16

17 COURT: Yes.

18 MR. CAMIEL: As Petitioner's Exhibit Ten (10).

19 MR. MAHLUM: Yes sir.

20 MR. CAMIEL: Mr. Mahlum, let's start with the first page of Petitioner's
21 Exhibit Ten (10). You see the name Brant Warbird at the bottom ...
22
23
24
25

1 MR. LIGHT: Your Honor, I am going to object at this time. I don't know if
2 he has laid a foundation as to whom even reviewed these. He hasn't authenticated
3 what they are yet.

4 MR. CAMIEL: I was getting there.

5
6 COURT: Well, let's do it a bit more directly okay, without questions related
7 to the substance.

8 MR. CAMIEL: The first page is a type written page isn't it?

9 MR. MAHLUM: Yes.

10
11 MR. CAMIEL: The next two pages are handwritten, is that correct?

12 MR. MAHLUM: Correct.

13 MR. CAMIEL: And, that is in your handwriting?

14 MR. MAHLUM: Yes sir.

15
16 MR. CAMIEL: And, the first of those two handwritten pages; are those the
17 notes that you took when you interviewed Joel Sparvoir?

18 MR. MAHLUM: Yes.

19
20 MR. CAMIEL: And also, the notes that you took when you interviewed
21 Mabel Sparvoir?

22 MR. MAHLUM: The only reference that I see is to Joel.

23 MR. CAMIEL: Okay. Do you see a reference to mother?

24
25 MR. MAHLUM: About half way down the first page.

1 MR. CAMIEL: Was Mabel Sparvoir Joel Sparvoir's mother?

2 MR. MAHLUM: Yes.

3 MR. CAMIEL: After you took those notes, after the interview that you
4 conducted with Joel Sparvoir, did you give those notes to the FBI case agent in this
5 case?
6

7 MR. MAHLUM: That is what the first page would indicate. I don't
8 remember doing that, but it indicates that it came from Mr. Warbird.

9 MR. CAMIEL: And, Mr. Warbird was the FBI case agent?
10

11 MR. MAHLUM: Yes.

12 MR. CAMIEL: And, do you know when you took those notes in terms of
13 date?
14

15 MR. MAHLUM: I do not. There is not a reference to that on these.

16 MR. CAMIEL: On the first page, if you look at the bottom, does that at all
17 help you refresh your recollection as to when you conducted the interview?
18

19 MR. MAHLUM: Mr. Camiel, I don't know what you are trying to reference
20 to me I guess.

21 MR. CAMIEL: I am sorry. On the first page; on the type written page.

22 MR. MAHLUM: I am sorry.

23 MR. CAMIEL: I apologize.
24
25

1 MR. MAHLUM: It indicates that special agent Warbird dictated this on 25-
2 June-1979.

3 MR. CAMIEL: Does it indicate when the investigation was conducted?

4 MR. MAHLUM: It references 6-19-79 investigation date. Now, whether or
5
6 not that reflects to my notes I have no idea.

7 MR. CAMIEL: Does this indicate; does the front page indicate that you
8 gave your notes of the interview that you conducted to special agent Warbird?

9 MR. MAHLUM: It says that they were made available.

10 MR. CAMIEL: Your Honor, he has identified the notes as his. He
11
12 recognizes his handwriting.

13 COURT: Okay. Your goal is to get these into the record.

14 MR. CAMIEL: Yes.

15 COURT: Only for purposes of review because the Court is not allowed to
16
17 offer proof, correct?

18 MR. CAMIEL: That is correct.

19 COURT: Any objection from the State? The Court would not consider
20
21 them for purposes of this proceeding. It would be just a matter of record for
22
23 review.

24 MS. PLUBELL: That is fine Your Honor.

25 COURT: Okay. We will admit these for purposes of review only.

1 MR. CAMIEL: Now Mr. Mahlum, as a result of the interview that you
2 conducted with Joel Sparvoir did you talk to other people in that household?

3 MR. MAHLUM: Apparently his mother.

4 MR. CAMIEL: Okay. And did you ever talk to Stephanie Eagle Boy?

5 MR. MAHLUM: No sir.

6 MR. CAMIEL: Did you know who she was?

7 MR. MAHLUM: No sir.

8 MR. CAMIEL: As a result of the interview with Joel Sparvoir and his
9 mother Mabel Sparvoir, did you then go to other neighbors and talk to them?
10
11

12 MR. MAHLUM: I have no recollection of doing that myself.

13 MR. CAMIEL: Now, as a part of your investigation, did you go to
14 downtown Poplar and talk to the bar owners, the tavern owners?
15

16 MR. MAHLUM: I personally didn't. That probably was done. It would be
17 normal procedure.

18 MR. CAMIEL: Do you have any recollection of whether or not you
19 conducted any interview of Roberta Ryan who was the owner of the Bum Steer
20 Bar?
21

22 MR. MAHLUM: I do not recall personally doing that.

23 MR. CAMIEL: Do you know if anyone in your department interviewed
24 her?
25

1 MR. MAHLUM: I have no recollection of recall if they did or not.

2 MR. CAMIEL: Nothing further.

3 COURT: Okay. Cross?

4 (CROSS EXAMINATION OF DEAN MAHLUM)

5
6 MS. PLUBELL: Your Honor, just for the record, we intend to call Mr.
7 Mahlum too, but we will limit our cross with what was raised. I am just presuming
8 that they would object if we didn't.

9
10 COURT: Is there any reason why we can't finish this witness so he would
11 be free to go? Is there any reason why we couldn't give her full scope here and
12 then I would obviously give petitioners the same courtesy when it comes to
13 redirect?

14 MR. CAMIEL: I have no objection to that.

15 MS. PLUBELL: Thank you.

16 COURT: Let's do it that way.

17 MS. PLUBELL: Mr. Mahlum, what was Poplar like back in 1979?

18
19 MR. MAHLUM: Poplar was a, I guess I would describe it as a somewhat
20 thriving community, lots of things going on different from what it is now. All the
21 small communities.
22

23 MS. PLUBELL: What kind of activities did teenage kids participate in in
24 Poplar? What kind of activities did they participate in back in 1979?
25

1 MR. CAMIEL: Your Honor, I am going to object to foundation at this
2 point.

3 COURT: Well, I think that is what she is laying. Overruled. Go ahead.

4 MR. MAHLUM: Normal school activities - band, football, basketball, those
5 kinds of things. After that fact, my recollection, there were not a lot of structured
6 activities, partying, driving, doing those kinds of things.

8 MS. PLUBELL: Was cruising one of the things young people did?

9 MR. CAMIEL: Objection. Leading.

10 COURT: It calls for a yes or no answer. Overruled.

11 MR. MAHLUM: Yes.

12 MS. PLUBELL: Where did kids cruise in Poplar?

13 MR. MAHLUM: There was a stretch where they would go west of town,
14 turn north and then back in to town, probably the drive-in theatre area east of town,
15 the area just below the high school which was the area that this homicide occurred
16 in. It was also a spot that people were in and out of all the time.

17 MS. PLUBELL: What was that area commonly referred as?

18 MR. MAHLUM: Train Bridge I think was the one that I was most familiar
19 with.

20 MS. PLUBELL: Can you just describe a little bit for the Judge's benefit
21 what that area was like?
22
23
24
25

1 MR. MAHLUM: As you come west out of Wolf Point, I am sorry, out of
2 Poplar, I would say approximately one-half mile, a little less west of Poplar on
3 Highway Two, of the high school, the Poplar River intersects that and you cross
4 that on a bridge. A short distance down the river from that the Burlington
5 Northern main line crosses that so there is another bridge there which formed a,
6 between Highway Two and the Poplar River bridge and the river; I guess you
7 could say almost a triangle area that was accessed. I can't remember in 1979. I
8 believe it was the football field that is kind of on the northwest corner of that.
9
10

11 MS. PLUBELL: And were there ... Were there houses in that area?

12 MR. MAHLUM: To the east there were, some distance.

13 MS. PLUBELL: And, did you actually have an opportunity to calculate that
14 distance?
15

16 MR. MAHLUM: I did.

17 MS. PLUBELL: How did you do that?

18 MR. MAHLUM: I used a laser range finder.

19 MS. PLUBELL: And what distance was that?
20

21 MR. MAHLUM: It was over eight hundred (800) yards from the top of the
22 bluff where Mr. Camiel referred to as where Sparvoirs lived, to the area to the
23 river.
24
25

1 COURT: I just want clarify that. Eight hundred yards from the top of the
2 bluff to the train bridge area?

3 MR. MAHLUM: Sir, where the top of the bluff there was along the river,
4 there was a small area of brush that separated from the trail. To that brush to the
5 top of the hill was eight hundred yards. The river was a short distance beyond that,
6 like maybe thirty (30) or forty (40) yards.
7

8 COURT: And, this brush you are describing, could I reasonably presume
9 that that is the general area in which all these activities are alleged to have
10 occurred?
11

12 MR. MAHLUM: Yes sir.

13 COURT: Eight hundred yards?

14 MR. MAHLUM: Yes sir. Actually, it was some over, I don't remember the
15 exact. It was over eight hundred (800) yards.
16

17 MS. PLUBELL: When did you learn about Kim's murder?

18 MR. MAHLUM: I was out of town the day her body was found. I believe it
19 was the second day, or the second morning. I don't have a calendar in front of me
20 and I am sorry.
21

22 MS. PLUBELL: Who was serving as Roosevelt County Sheriff at the time?

23 MR. MAHLUM: Donald Carpenter.
24

25 MS. PLUBELL: Is he still alive?

1 MR. MAHLUM: Yes ma'am.

2 MS. PLUBELL: Did you become involved in the investigation?

3 MR. MAHLUM: It would have been the second morning.

4 MS. PLUBELL: Okay, so you did become involved?

5 MR. MAHLUM: Yes ma'am.

6 MR. MAHLUM: Yes ma'am.

7 MS. PLUBELL: And, I believe you already indicated that your role was the

8 lead investigator?

9 MR. MAHLUM: Yes.

10 MR. MAHLUM: Yes.

11 MS. PLUBELL: And, even though you weren't initially at the crime scene,

12 did you examine the crime scene shortly after the homicide when you became

13 involved?

14 MR. MAHLUM: Yes. I was there, down in the location that this happened.

15 MS. PLUBELL: Was there any evidence in that area around the crime scene

16 of a freshly dug hole?

17 MR. MAHLUM: No ma'am.

18 MR. MAHLUM: No ma'am.

19 MS. PLUBELL: At the time you were signed as the lead investigator, did

20 you have experience investigating other homicides?

21 MR. MAHLUM: I did.

22 MR. MAHLUM: I did.

23 MS. PLUBELL: In your career how many homicides have you investigated

24 or been the administrator in charge of those investigations?

25

1 MR. MAHLUM: Fifty-one (51) I believe. Fifty-one or fifty-two.

2 MS. PLUBELL: Now, did you actually see Kim Nees body at the time it
3 was recovered?

4 MR. MAHLUM: No ma'am.

5 MS. PLUBELL: Through photographs and the results of the autopsy did
6 you learn the nature of Kim Nees injuries?
7

8 MR. MAHLUM: I did.

9 MS. PLUBELL: Were those injuries confined to certain parts of her body?
10

11 MR. MAHLUM: Yes.

12 MS. PLUBELL: And, can you explain please?

13 MR. CAMIEL: Your Honor, I am going to object to lack of foundation. He
14 didn't see the body at the crime scene. There has been no other information ...
15

16 COURT: Well, I will sustain for now.

17 MS. PLUBELL: Your Honor, may I please make an offer?

18 COURT: All I am asking is that you lay the foundation for his ability to
19 answer these kinds of questions about the body and specificity.
20

21 MS. PLUBELL: Were you intimately involved in this homicide
22 investigation?

23 MR. MAHLUM: I was.
24
25

1 MS. PLUBELL: Did you review all of the photographs that were taken
2 related to the crime scene or in conjunction with the autopsy?

3 MR. MAHLUM: At one point or other during the investigation, yes.

4 MS. PLUBELL: And, did you review Dr. Pfaff's autopsy report?
5

6 MR. MAHLUM: I did.

7 MS. PLUBELL: And as a result of doing that ...

8 MR. CAMIEL: Your Honor, I am going to object. If he is going to testify
9 to what the medical examiner found that is not based on personal knowledge.
10

11 MS. PLUBELL: Your Honor, I am not asking him what the medical
12 examiner found. I am asking what his knowledge was in relation to the
13 investigation of the injuries to this victim and why that is significant. And, it is
14 incredibly significant to what all of the hearsay statements that have come in are
15 because it is our position that the injuries are not consistent with what one of those
16 hearsay statements are.
17

18 MR. CAMIEL: Your Honor, this isn't the witness that could testify to that.
19 Dr. Pfaff testified at trial. The medical examiner could be called, a pathologist, but
20 this witness didn't attend; I haven't heard that he attended the autopsy. I haven't
21 heard that he saw the body at the crime scene. I haven't heard that he has any
22 training with regard to the cause of injuries that he sees in photographs. It is
23 simply not a sufficient foundation to get into this area with this particular witness.
24
25

1 COURT: Well, the Court is going to overrule the objection based on the
2 following: That as long as the questions are limited to this gentleman's
3 understanding of the evidence for purposes of his own investigation the Court is
4 going to allow the State to proceed.
5

6 MS. PLUBELL: Thank you Your Honor. For the purposes of your
7 investigation, did you determine whether the injuries were confined to certain parts
8 of the body?
9

10 MR. MAHLUM: Yes ma'am.

11 MS. PLUBELL: And what parts of the body were those injuries confined
12 to?
13

14 MR. MAHLUM: Primarily to the skull, the head region and also to the
15 hands, backs of the hands.

16 MS. PLUBELL: And, was that information divulged to the public?
17

18 MR. TOAVS: Excuse me, could I ask counsel to repeat the question please?
19

20 MS. PLUBELL: Was the information related to the location of the injuries
21 divulged to the public?
22

23 MR. CAMIEL: Your Honor, I am going to object as to relevancy.
24

25 COURT: Overruled.

MR. MAHLUM: Ma'am, would you restate the question please, sorry.

1 MS. PLUBELL: Was the information about the injuries to the victim's
2 hands divulged to the public?

3 MR. MAHLUM: No.

4 MS. PLUBELL: Was the information about the location and the nature of
5 the injuries significant to your investigation?
6

7 MR. MAHLUM: Absolutely.

8 MS. PLUBELL: And can you explain why that is?

9 MR. MAHLUM: First, with the number and types of wounds to the head to
10 me indicated that we were dealing with a situation that probably involved a lot of
11 emotion, anger, that type of thing because of the numbers and severity. The
12 second thing with the injuries to the hands indicated to me that those were most
13 likely from a defensive type reaction trying to protect herself from being struck.
14 The lack of other injuries to the body; other places on the body again strengthened
15 my feeling that ...
16
17

18 MR. CAMIEL: Your Honor, I am going to object what his feelings were.

19 COURT: Sustained. Just your logical conclusions please.
20

21 MR. MAHLUM: Thank you Your Honor.

22 MS. PLUBELL: Did that lead you to a logical conclusion?
23

24 MR. MAHLUM: That due to the lack of other injuries, we were dealing
25 with one perpetrator as opposed to a large group of people.

1 MS. PLUBELL: Have you been involved in homicide investigations or
2 assault investigations where the victim has been ...

3 MR. TOAVS: Your Honor I would like to move to strike that statement by
4 the witness. That was not within the scope of the Court's earlier ruling that the
5 witness would be entitled to testify about his investigation. That was a conclusion
6 that was drawn and this witness simply is not ... There has been no foundation laid
7 that he has any sort of training or experience upon which to form that kind of
8 conclusion to offer that to the Court Your Honor.
9
10

11 MS. PLUBELL: Your Honor, he investigated fifty-one homicides.

12 COURT: Well, I remember that.

13 MS. PLUBELL: I don't understand ...

14 COURT: Let me do it this way. I am going to sustain, but only for purposes
15 of setting a bit more foundation because we went from a few facts to conclusion
16 and not enough sort of laying the foundation about why that conclusion was
17 reasonable.
18

19 MS. PLUBELL: All right Your Honor, I will attempt to do that. In your
20 career as a law enforcement officer, have you been involved in other, either
21 homicide investigations or assaults of any nature where there was a group attack on
22 the victim?
23

24 MR. MAHLUM: Yes ma'am.
25

1 MS. PLUBELL: And specifically, have you been involved homicides?

2 MR. MAHLUM: Yes ma'am.

3 MS. PLUBELL: And, what is the significance of the kind of injuries that
4 you see in ...

5
6 MR. CAMIEL: Your Honor, I am sorry. Before counsel proceeds I would
7 ask to be able to *voir dire* as to when these homicides occurred and where he is
8 relying on.

9
10 COURT: That is part of the foundation. I don't have any problem. You
11 may do so.

12 MR. CAMIEL: Mr. Mahlum, you testified that you were involved in
13 investigations involving other homicides involving multiple assailants?

14 MR. MAHLUM: Correct.

15 MR. CAMIEL: Can you tell us what those homicides were?

16
17 MR. MAHLUM: In Yellowstone County, without researching as far as
18 name, which would have been during the time that I worked down there, I assisted
19 in a ... Was involved in a homicide of a gentleman that was beat to death near a
20 pond south of Billings by two individuals. I worked a homicide ...

21
22 MR. CAMIEL: What homicide was that?

23 COURT: He said he couldn't remember the names.

24
25 MR. CAMIEL: Do you remember what year?

1 MR. MAHLUM: Nineteen seventy-four (1974) or nineteen seventy-five
2 (1975) because I had been assigned to a city/county detective task force. It was a
3 uncle and nephew that were convicted of beating this gentleman to death.

4 MR. CAMIEL: Okay. Any other homicides involving multiple assailants?

5
6 MR. MAHLUM: Yes. The victims name was Cantrell. Again, I can't tell
7 you off the top of my head the year. I would have to research that. That was in
8 Roosevelt County. Two assailants. That particular one was a stabbing case. I
9 would have to go back and go through those cases Mr. Camiel, to pull specific
10 other cases out, but there were numerous assault cases and additional homicide
11 cases.
12

13 MR. CAMIEL: The two homicides that you recall, or one in Yellowstone
14 County involving an uncle and nephew as the assailants and the other is a
15 Roosevelt County case involving a stabbing?

16
17 MR. MAHLUM: Yes.

18 MR. CAMIEL: And, the Yellowstone County case, the method of attack
19 that was used in that case was what?
20

21 MR. MAHLUM: Was a beating.

22 MR. CAMIEL: So, you were involved in one prior case that you can recall
23 that involved a beating where there were multiple assailants?
24
25

1 MR. MAHLUM: That I immediately, sitting here right now. If I had the
2 time to research that, there are more.

3 MR. CAMIEL: But that is the only one you recall now?

4 MR. MAHLUM: Yes sir.

5
6 COURT: So give me a ballpark? How many other would you expect if you
7 did the research; a reasonable estimation of multiple assailants homicides?

8 MR. PLUBELL: Your Honor I would request that it be with respect to
9 assaults too.

10
11 COURT: Well, I was going to get there.

12 MS. PLUBELL: Okay. I am sorry. I am a little eager.

13 MR. MAHLUM: Your Honor, in Roosevelt County we worked fourteen
14 (14) homicide cases that we had, in some of those, multiple suspects. The problem
15 that I am having in recalling this for you is whether they were, I am trying to rule
16 out those that involved a firearm, stabbing, those types of things, but I know that
17 there were, and I am just going to give you a ballpark figure I guess. That is the
18 best I can do for you right at this point. But five, six or seven.
19
20

21 COURT: What about assaults?

22 MR. MAHLUM: Again, I can't quote specific cases, but they were
23 numerous because we had I believe, one year in Poplar we had, one month in
24
25

1 Poplar, I am sorry, thirty (30) some felony cases and a high percentage of those
2 were assault cases; felony assault cases.

3 COURT: Okay. Do you want to continue your *voir dire*?

4 MR. CAMIEL: Briefly. Mr. Mahlum, the Yellowstone County case that
5 you talked about, were you involved in the recovery of the body in that case?
6

7 MR. MAHLUM: No. I was involved; I got involved with that later that
8 afternoon.

9 MR. CAMIEL: So, you had nothing to do with viewing the body at the
10 scene?
11

12 MR. MAHLUM: No.

13 MR. CAMIEL: And you had nothing to do with the autopsy?

14 MR. MAHLUM: No.

15 MR. CAMIEL: So, you didn't personally see the injuries on that victim?
16 No, but I was told by ... In answer to your question no I did not see the ...
17

18 MR. CAMIEL: Mr. Mahlum, do you have any training in pathology or
19 forensic pathology?
20

21 MR. MAHLUM: No sir. Formal training, no.

22 MR. CAMIEL: Have you ever testified as an expert witness with regard to
23 the cause of injuries?
24

25 MR. MAHLUM: No.

1 MR. CAMIEL: And, of course, you didn't see Kim Nees body?

2 MR. MAHLUM: That is correct. Well, no sir, I did see Kim Nees body
3 because I believe I took the ink, made her prints from her body after she had
4 returned back to the mortuary in Wolf Point.

5
6 MR. CAMIEL: And that was post autopsy?

7 MR. MAHLUM: Absolutely.

8 COURT: All right. Ms. Plubell.

9 MS. PLUBELL: Why don't we just try this another way. You have already
10 testified that the injuries were confined to the head, neck and hands is that my
11 understanding?
12

13 MR. MAHLUM: Yes.

14 MS. PLUBELL: All right. I am going to hand you what has been marked as
15 State's Exhibit One (1). It is a graphic photo Your Honor. Can you identify that?
16

17 MR. MAHLUM: Yes.

18 MS. PLUBELL: What is that?

19 MR. MAHLUM: This is a photograph of Kim Nees that was taken by Dr.
20 Pfaff at time of autopsy.
21

22 MS. PLUBELL: And, was that a photograph that you reviewed in your
23 investigation of this homicide?
24

25 MR. MAHLUM: Yes ma'am and also in Dr. Pfaff's office.

1 MS. PLUBELL: All right. Did Dr. Pfaff testify at trial?

2 MR. MAHLUM: He did.

3 MS. PLUBELL: Was it necessary for the State to introduce that photograph
4 at trial?

5 MR. CAMIEL: I am going to object to relevance.

6 MS. PLUBELL: It shows the location of the injuries and the lack of injury.

7 COURT: Well, I think he meant the relevance of that particular question.

8 MS. PLUBELL: I am trying to establish the foundation.

9 COURT: Well, I am going to give you some latitude. I will overrule.

10 MS. PLUBELL: Was it necessary for the State to introduce that particular
11 photograph at the trial?

12 MR. TOAVS: Objection Your Honor. That calls for information that this
13 witness cannot possibly have. There is no foundation to ask that.

14 COURT: Well, I agree about foundation. I will sustain as to that.

15 MS. PLUBELL: Did you work with Mr. Racicot on developing the
16 evidence that would be presented at trial?

17 MR. MAHLUM: Yes.

18 MS. PLUBELL: Did you and he make a decision that this photograph was
19 not necessary?
20
21
22
23
24
25

1 MR. MAHLUM: The decision would have been made between he and
2 County Attorney McCann. But, I was aware that this photograph was not
3 introduced at time of trial.

4 MS. PLUBELL: If Mr. Beach had presented a theory, at the time of trial,
5 that Kim Nees was beaten to death by a group of people, would you have
6 advocated for the admission of this photograph?
7

8 MR. CAMIEL: Your Honor, this is calling for speculation.

9 COURT: I will sustain.
10

11 MR. LIGHT: Can we have just a second Your Honor?

12 MS. PLUBELL: Does this photograph reflect the injuries of Kim Nees as
13 you were aware of them on that date during the autopsy to the best of your
14 knowledge?
15

16 MR. CAMIEL: Your Honor, I am going to object. He didn't attend the
17 autopsy.

18 COURT: I will sustain as to the phrasing of the question.
19

20 MS. PLUBELL: Okay. Does the photograph, based on your investigation
21 in the case, reflect the nature of Kim Nees injuries accurately as far as the location
22 on her body?
23

24 MR. TOAVS: Objection Your Honor. That lacks foundation. This witness
25 did not view the body.

1 MS. PLUBELL: He ...

2 COURT: Just a minute. Well, I think within the narrow confines of the
3 question that it is reasonable. Remember now, your answer is set to be limited
4 solely to your own investigation; not to speculation, not to comments from other
5 people. So you may proceed.
6

7 MS. PLUBELL: I forgot where I was. I guess I move to admit the State's
8 exhibit Your Honor.

9 MR. CAMIEL: Your Honor I would ask to *voir dire* again.
10

11 COURT: You may.

12 MS. PLUBELL: Your Honor ... Well ...

13 MR. CAMIEL: Mr. Mahlum, just to be clear, you didn't attend the autopsy?
14

15 MR. MAHLUM: Correct.

16 MR. CAMIEL: The only time that you viewed the body was after it was
17 returned to the mortuary?

18 MR. MAHLUM: Exactly.
19

20 MR. CAMIEL: After the body was made up in preparation for final
21 disposition?

22 MR. MAHLUM: No, that is not true.

23 MR. CAMIEL: When you viewed the body your purpose was to get
24 fingerprints?
25

1 MR. MAHLUM: Major case prints, that is correct.

2 MR. CAMIEL: And, that was the sole purpose of your visit to the
3 mortuary?

4 MR. MAHLUM: Well, obviously while I was there I observed the condition
5 of the body because that was important to me to know what I was dealing with.
6

7 MR. CAMIEL: You didn't take ... The photograph that you have in front of
8 you is not a photograph that you took?

9 MR. MAHLUM: No sir, it is not.
10

11 MR. CAMIEL: Do you know how long after the body was recovered that
12 that photograph was taken?

13 MR. MAHLUM: I believe the body was taken to Great Falls the following
14 day, but again I am not sure of that because I wasn't involved with that.
15

16 MR. CAMIEL: And you didn't accompany the body to Great Falls?

17 MR. MAHLUM: I did not.

18 MR. CAMIEL: Or accompany the body when it came back to Wolf Point?
19

20 MR. MAHLUM: I did not.

21 MR. CAMIEL: How many days after the autopsy did the body come back
22 to Wolf Point?

23 MR. MAHLUM: I am not sure of an exact date, but it would be normally
24 returned as soon as the autopsy was completed, would be procedure.
25

1 MR. CAMIEL: But, you have no personal knowledge as to how long after
2 the autopsy it was that you viewed the body?

3 MR. MAHLUM: No.

4 COURT: Ms. Plubell?

5 MS. PLUBELL: Your Honor ... Well ... Does this photograph accurately
6 depict what you saw when you viewed Kim Nees' body?
7

8 MR. MAHLUM: With the exception the hair had been removed when I saw
9 it during the course of the autopsy and obviously there were other; when I saw the
10 body there were other marks on the body, incisions from the autopsy.
11

12 MS. PLUBELL: The State moves for admission of, I forgot the number. I
13 think it is Number One (#1).
14

15 MR. CAMIEL: Your Honor there is lack of foundation. He has indicated
16 that this photo actually doesn't accurately depict what he saw because the body
17 was in a different condition when he viewed the body.
18

19 COURT: Sustained.

20 MR. LIGHT: Could we just have a second Your Honor.

21 MS. PLUBELL: Mr. Mahlum, based upon your investigation, were there
22 any significant injuries from the chest down on Kim Nees' body?
23

24 MR. MAHLUM: No ma'am.

25 MS. PLUBELL: Were there any injuries to her stomach?

1 MR. MAHLUM: No ma'am.

2 MS. PLUBELL: To her torso; to her legs?

3 MR. MAHLUM: No ma'am.

4 MS. PLUBELL: Was there any ... Are you familiar with kicking types of
5 assaults?
6

7 MR. TOAVS: Objection. That is vague.

8 COURT: Overruled.

9 MR. MAHLUM: I have seen those types of assaults, yes.
10

11 MS. PLUBELL: Have you seen those types of injuries?

12 MR. MAHLUM: Correct.

13 MS. PLUBELL: And were there any of those types of injuries on Kim
14 Nees' body?
15

16 MR. CAMIEL: Object. Lack of foundation. There is no foundation that
17 this witness can discern kicking from bumping into something, to any other
18 mechanism for cause of an injury.
19

20 COURT: Well, I think that goes to weight and credibility. I am a little
21 concerned about the foundation though. So, I will sustain for purposes of
22 establishing foundation.
23
24
25

1 MS. PLUBELL: Based upon Your investigation of prior assault cases where
2 you know that there have been hitting and kicking injuries, have you had that kind
3 of experience? Is that right?

4 MR. MAHLUM: I have seen those types of injuries, yes.

5 MS. PLUBELL: And have you seen ... You have seen those types of
6 injuries?
7

8 MR. MAHLUM: Correct.

9 COURT: Fairly frequent, infrequent?
10

11 MR. MAHLUM: Again, Your Honor I would, my definition of frequent or
12 infrequent, numerous times, but to put a number with that I ...

13 COURT: But numerous times?

14 MR. MAHLUM: Yes sir.

15 MS. PLUBELL: And, in your review of the photographs and the body, did
16 Kim Nees have those types of injuries?
17

18 MR. CAMIEL: Objection. Lack of foundation.

19 COURT: Well, I think again it goes to the weight and credibility. I am
20 going to overrule the objection and allow the testimony within its limited scope.
21

22 MR. MAHLUM: No.

23 MS. PLUBELL: What impact did Kim's homicide have on the local
24 community?
25

1 MR. CAMIEL: Your Honor, I am going to object to lack of foundation.

2 COURT: Sustained.

3 MS. PLUBELL: Are you aware of what impact Kim Nees homicide had on
4 the local community?

5
6 MR. CAMIEL: Again, until there is a foundation laid I don't think he
7 should be able to answer to how he is aware.

8 COURT: Yeah. Based on that objection I am going to sustain.

9
10 MS. PLUBELL: Okay. Mr. Mahlum, were you the lead investigator in this
11 homicide?

12 MR. CAMIEL: Asked and answered.

13 COURT: Sustained.

14 MS. PLUBELL: Were you in the Poplar area investigating the Kim Nees
15 homicide?
16

17 MR. MAHLUM: Yes ma'am.

18 MS. PLUBELL: Were you there daily after the homicide?

19
20 MR. MAHLUM: Yes ma'am.

21 MS. PLUBELL: Did you interact with all, or not all, but many of the local
22 community members?

23 MR. MAHLUM: I did.
24
25

1 MS. PLUBELL: What was the atmosphere of the community after the
2 homicide?

3 MR. CAMIEL: Your Honor, I am going to object as to vague.

4 COURT: Sustained.

5
6 MS. PLUBELL: Were there rumors that were passed onto you during your
7 investigation?

8 MR. MAHLUM: Yes.

9
10 MS. PLUBELL: Before we get into that. Was there initially a person who
11 became a person of interest to you in the homicide?

12 MR. MAHLUM: In the early beginning ...

13 MS. PLUBELL: Yes.

14 MR. MAHLUM: Yes ma'am.

15 MS. PLUBELL: Right after.

16 MR. MAHLUM: Yes.

17 MS. PLUBELL: And who was that person?

18 MR. MAHLUM: Barry Beach.

19 MS. PLUBELL: The initial person who was of interest to you?

20 MR. MAHLUM: Oh I'm sorry. I'm sorry. Greg Norgaard. I didn't
21 understand your question.

22 MS. PLUBELL: And why was that?
23
24
25

1 MR. MAHLUM: Because he was the boyfriend of the victim.

2 MR. TOAVS: Your Honor, I am going to object at this point because there
3 is no foundation. This witness is ... I think when Mr. Camiel was conducting his
4 direct examination we had a lot of objections over Mr. Mahlum answering some
5 questions about what his investigation revealed. Now, the State is eliciting a lot of
6 testimony from Mr. Mahlum concerning the substance of what his investigation
7 revealed.
8

9 COURT: I know, but I gave her a lot of latitude. You are going to be able
10 to cross. And for purposes of this objection I will sustain for now.
11

12 MS. PLUBELL: During your investigation did you determine it was
13 necessary to interview people who had been at the Legion Club on June 15th to the
14 early morning hours of June 16, 1979?
15

16 MR. MAHLUM: Yes.

17 MS. PLUBELL: And why was that?

18 MR. MAHLUM: For a couple of reasons. One we were trying to establish
19 who may have been around, out and about. Number two, we were trying to
20 determine the location; a timeline of Greg Norgaard.
21

22 MS. PLUBELL: Did the sheriff's office keep an interview log of all of the
23 people that were interviewed from the Legion Club?
24

25 MR. MAHLUM: Yes ma'am.

1 MS. PLUBELL: Are you familiar with that?

2 MR. MAHLUM: Yes ma'am.

3 MS. PLUBELL: Does it still exist?

4 MR. MAHLUM: I believe it does, yes.

5 MS. PLUBELL: Does that log include Richard Holen's name?

6 MR. CAMIEL: Your Honor, I am going to object to lack of foundation. I
7 would move to *voir dire*.

8
9 COURT: Well, you may *voir dire*. I am not going to sustain for now, but go
10 ahead.

11
12 MR. CAMIEL: Mr. Mahlum, you didn't prepare did you; prepare the
13 interview log yourself?

14 MR. MAHLUM: I did not.

15
16 COURT: All right. I am going to sustain the objection based on that answer.

17 MR. CAMIEL: Your Honor, one additional question. I am sorry.

18 COURT: Yes.

19
20 MR. CAMIEL: Did you do the interviews at Legion Bar?

21 MR. MAHLUM: No.

22 MS. PLUBELL: Are you aware of who was interviewed and who was not
23 interviewed in this case?
24
25

1 MR. CAMIEL: Your Honor, I am going to object unless there is personal
2 knowledge.

3 COURT: Well, I think that is what she is inquiring about. Overruled.

4 MR. MAHLUM: Would you restate the question please?

5
6 MS. PLUBELL: Well, I want to establish something for the record. Just for
7 purposes of the appeal that may occur. Do you know whose notes those are?

8 MR. MAHLUM: I do.

9 MS. PLUBELL: And whose notes are they?

10
11 MR. MAHLUM: Robert Murray?

12 MS. PLUBELL: Is Robert Murray still alive?

13 MR. MAHLUM: No ma'am.

14 MS. PLUBELL: Is there any way to call him?

15
16 MR. MAHLUM: None that I am aware of.

17 MS. PLUBELL: Did Richard Holen ever come to the sheriff's office with
18 any information?

19 MR. MAHLUM: Not that I am aware of.

20
21 MS. PLUBELL: Did he have the opportunity to provide information to the
22 sheriff's office?

23 MR. CAMIEL: Objection. Lack of foundation.

24
25 COURT: Sustained.

1 MS. PLUBELL: Did Mr. Holen ever come forward to the sheriff's office?
2 Was the sheriff's office in charge of the investigation locally within the Poplar
3 area?

4 MR. MAHLUM: Yes.

5 MS. PLUBELL: Did Mr. Holen ever come forward with any information
6 about seeing Kim in her truck on June 16, 1979 around 2:30 a.m. with a bunch of
7 passengers?
8

9 MR. CAMIEL: Your Honor, I am going to object to a lack of foundation.
10 He can talk about if he ever came forward to him, but I don't know how he can say
11 ...
12

13 MS. PLUBELL: He was the lead investigator?

14 COURT: Yeah. I am going to give her some latitude. I am going to
15 overrule. You may proceed.
16

17 MR. MAHLUM: No he did not.

18 COURT: Don't get impatient with the Court.

19 MS. PLUBELL: I am sorry. It's not you' Your Honor. If he had come
20 forward with information about seeing Kim's truck ...
21

22 MR. CAMIEL: Objection. Calls for speculation.

23 COURT: Sustained.

24 MS. PLUBELL: How long have you known Richard Holen?
25

1 MR. MAHLUM: Twenty (20) plus years.

2 MS. PLUBELL: Have you ever known him to be shy about sharing
3 information?

4 MR. MAHLUM: Absolutely not.

5 MR. CAMIEL: Again, vague.

6 COURT: Well, overruled.

7 MS. PLUBELL: Richard Holen says he was with Gretchen Youpee at 2 to
8 2:30 in the morning on June 16, 1979 ...
9

10 MR. CAMIEL: I am going to object to the form of the question.

11 COURT: Sustained.

12 MS. PLUBELL: Are you aware that Richard Holen says that?

13 COURT: You may answer that question.

14 MR. MAHLUM: Yes.

15 MS. PLUBELL: And do you know Gretchen Youpee?

16 MR. MAHLUM: I know of her, yes.

17 MS. PLUBELL: Is it possible for her to be here to testify?

18 MR. MAHLUM: I don't believe so now.

19 MS. PLUBELL: Were ... Do you know who Steve Grayhawk is?

20 MR. MAHLUM: I do.
21
22
23
24
25

1 MS. PLUBELL: What kind of ... Was he a law enforcement officer at the
2 time of the homicide?

3 MR. MAHLUM: He was.

4 MS. PLUBELL: What agency did he work for?

5
6 MR. MAHLUM: I believe he worked for the Fort Peck Tribal Police and
7 also for the Poplar City Police.

8 MS. PLUBELL: Were either of those entities heavily involved in the
9 investigation?

10
11 MR. TOAVS: Objection. It is vague as to the word undefined phrase
12 heavily.

13 COURT: I am going to give her some latitude, overruled.

14 MS. PLUBELL: Were any of those entities involved on a day to day basis
15 in that homicide investigation?

16
17 MR. MAHLUM: No.

18 MS. PLUBELL: Would they do things if you requested it of them?

19
20 MR. MAHLUM: Yes.

21 MS. PLUBELL: Did you request Mr. Grayhawk to go interview Richard
22 Holen?

23 MR. MAHLUM: I have no recollection of ever doing that.
24
25

1 MS. PLUBELL: Now, you talked a little bit about the interviewing the
2 Sparvoirs.

3 MR. MAHLUM: Correct.

4 MS. PLUBELL: And that was on the area, the Cockroach Hill or whatever
5 the terminology is.
6

7 MR. MAHLUM: Correct.

8 MS. PLUBELL: And, I believe that Mr. Camiel asked you whether law
9 enforcement went door to door in that, in that area.
10

11 MR. MAHLUM: I believe Sheriff Carpenter and ...

12 MR. TOAVS: Objection. There is no foundation for this witnesses answer.

13 COURT: Sustained.

14 MS. PLUBELL: How strong was the law enforcement presence in Poplar?
15

16 MR. CAMIEL: Objection. Vague.

17 COURT: Sustained.

18 MS. PLUBELL: How many officers were in Poplar during the
19 investigation?
20

21 MR. MAHLUM: We normally had myself, Sgt. Wilson, probably a deputy
22 or two, the criminal investigators for the BIA and at least one agent of the FBI that
23 worked this case on a daily basis to begin, and through the course of probably three
24
25

1 to four months. Those numbers then came down as time progressed, but we still
2 continued to have basically a daily presence in Poplar following leads on this.

3 MS. PLUBELL: Was there general cooperation among community
4 members with your investigation?

5 MR. CAMIEL: Objection. Vague.

6 COURT: I think we are getting to some specific information. I am going to
7 overrule.
8

9 MS. PLUBELL: Were community members willing to come forward to
10 provide information to law enforcement?
11

12 MR. MAHLUM: They were supportive, yes.

13 MS. PLUBELL: And were law enforcement officers encouraging that?

14 MR. MAHLUM: Yes.

15 MS. PLUBELL: Did Roberta Ryan come forward with any information?

16 MR. MAHLUM: That name is not familiar to me so I don't recall anything
17 from that person.
18

19 MS. PLUBELL: Back in 1979, was it unusual for teenagers who were still
20 minors to try to get into some of the local bars?
21

22 MR. MAHLUM: Uncommon was not but to play pool or do those types of
23 things.
24
25

1 MS. PLUBELL: Are you familiar with JoAnn Jackson, Maude Grayhawk
2 and Sissy Atkinson?

3 MR. MAHLUM: I know those names, yes.

4 MS. PLUBELL: Were they ever considered persons of interest or suspects
5 in this Kim Nees homicide?
6

7 MR. MAHLUM: Yes.

8 MS. PLUBELL: Why?

9 MR. MAHLUM: Because of information that would come forward from
10 people in the Poplar area. We looked at those individuals trying to either include
11 them in the investigation or exclude them.
12

13 MS. PLUBELL: And, did you follow through with the information that was
14 provided?
15

16 MR. MAHLUM: We did. We followed all of those that we got.

17 MS. PLUBELL: Has there ever been any physical or reliable circumstantial
18 evidence through your investigation and your knowledge of the investigation to
19 connect any of these women to the Kim Nees homicide?
20

21 MR. MAHLUM: No.

22 MS. PLUBELL: Have any of these women given confessions to law
23 enforcement officers to this homicide?
24

25 MR. MAHLUM: None.

1 MS. PLUBELL: I think we have no further questions at this time your
2 Honor.

3 COURT: Okay. Redirect?

4 MR. CAMIEL: Your Honor, I am wondering if we could take a break at this
5 time as I am trying to locate a document.
6

7 COURT: Yes. Let's take brief recess.

8 (RECESS)

9 CLERK: All rise please.
10

11 COURT: Please be seated. Mr. Mahlum, do you recognize you are still
12 under oath?

13 MR. MAHLUM: Yes sir.

14 MR. CAMIEL: Mr. Mahlum, you were asked to give testimony about the
15 distance and you cited a distance of eight hundred yards.
16

17 MR. MAHLUM: Eight hundred plus, yes.

18 MR. CAMIEL: That was from the top of the hill to the river?
19

20 MR. MAHLUM: No, it was from the top of the hill to the area where the
21 road intersected down to the river to the train bridge and the small string of trees
22 that are, or brush I guess, that are located there. It was not to the river.
23

24 MR. CAMIEL: All right. And, the truck was found on this roadway before
25 you get to the river?

1 MR. MAHLUM: Correct.

2 MR. CAMIEL: Are you familiar, you were talking about the bluff; are you
3 familiar with the large rock that sits at the bluff; part way down the bluff?

4 MR. MAHLUM: Not anything part way down the bluff.

5
6 MR. CAMIEL: Are you familiar with a large rock that sits part way down
7 the bluff?

8 MR. MAHLUM: No.

9 MR. CAMIEL: So, you don't know if there is one or isn't one?

10
11 MR. MAHLUM: Not part way down. I believe there is one at the very top
12 of the hill, but not part way down am I aware of anything.

13 MR. CAMIEL: Now, between where the Nees' pickup was found and the
14 houses on the bluff, there are no physical obstructions are there?

15 MR. MAHLUM: No.

16
17 MR. CAMIEL: Somebody could see from the bluff to where the pickup was
18 located isn't that right?

19
20 MR. MAHLUM: Depending on time of day, correct.

21 MR. CAMIEL: Nothing physical that would obstruct the view?

22 MR. MAHLUM: No.

23 MR. CAMIEL: Nothing physical that would obstruct the sound?

24
25 MR. MAHLUM: No.

1 MR. CAMIEL: You didn't conduct any analysis as to what somebody could
2 or couldn't hear from the bluff to the location where the truck was located?

3 MR. MAHLUM: No.

4 MR. CAMIEL: What you did do as a part of your investigation was
5 interview witnesses who lived on top of the bluff to see if they heard anything.
6

7 MR. MAHLUM: I believe I interviewed two witnesses, correct.

8 MR. CAMIEL: And your investigation revealed that there were witnesses
9 who lived up there who heard screams for help.
10

11 MS. PLUBELL: Your Honor, objection; lack of personal knowledge and I
12 believe that the answer is going to call for hearsay.

13 MR. CAMIEL: Your Honor, they have opened the door to this by
14 suggesting that the distance was too far to hear anything. Their investigation
15 revealed and this witness interviewed witnesses who did hear something.
16

17 MS. PLUBELL: Your Honor. The witnesses he is referring to are the
18 witnesses that we provided the trial transcript for.
19

20 MR. CAMIEL: That is exactly right.

21 MS. PLUBELL: Number One and Number Two. The fact that he
22 determined in his investigation the distance, doesn't open that up. We didn't ask
23 him any questions about what people could or could not hear. We asked him the
24 distance between the houses and the location of the crime.
25

1 MR. CAMIEL: The suggestion being that he ...

2 COURT: Just a minute.

3 MR. CAMIEL: I am sorry.

4 COURT: Well actually, in cross examination you did ask about diggings,
5 whether he had done any investigation of diggings.
6

7 MS. PLUBELL: I asked about digging, if there was any evidence at the
8 crime scene, physical evidence. I didn't ask about hearing.

9 COURT: I understand. Just so I can do this properly, why don't you ask the
10 question again. Don't answer yet until I give the okay.
11

12 MR. MAHLUM: Yes sir.

13 MR. CAMIEL: Your investigation revealed that people who lived in the
14 house on the west end of the bluff could hear screams for help the night that Kim
15 Nees was murdered at about 2:30 a.m.
16

17 COURT: Based on the phrasing of that question I overrule the objection.

18 MR. MAHLUM: Would you repeat please?

19 MR. CAMIEL: Yes. Your investigation revealed through your interviews
20 of Joel Sparvoir and Mabel Sparvoir that they could hear screams for help coming
21 down from near the train bridge at 2:30 in the morning on the night that Kim Nees
22 was murdered.
23

24 MR. MAHLUM: I would have to look at the notes sir as far as time.
25

1 MR. CAMIEL: Your Honor, I think you have the exhibit.

2 COURT: I believe I gave it to the Clerk.

3 MR. CAMIEL: May I approach?

4 COURT: Yes you may.

5 MR. MAHLUM: Thank you. In my notes Mr. Sparvoir indicated ...

6
7 COURT: Objection. I am not going to allow any of that. You just answer
8 this yes or no question. That is all I want you to do. Ask it again.

9 MR. CAMIEL: Okay. Did your investigation reveal that Joel Sparvoir and
10 Mabel Sparvoir who lived at the house on the west end of the bluff could hear
11 screams for help at 2:30 in the morning on the night that Kim Nees was murdered?
12

13 COURT: Just a minute. Yes ma'am.

14 MS. PLUBELL: Your Honor, he is testifying to the hearsay.

15
16 COURT: No. He is asking if his investigation revealed whether some
17 people could have heard screams at that time of day. He used the word could. He
18 did use the word did. He used the word could. That is part of the investigation. I
19 think that is well within the parameters. Yes sir?
20

21 MR. LIGHT: Well, we liked the way you phrased the question Your Honor.

22 COURT: No, he said it exactly the same.

23 MR. LIGHT: He used names and times and I don't think that is proper.
24
25

1 COURT: Well, they were part of the investigation; whether those people
2 could have heard, not whether they did, but whether they could have heard sounds
3 screaming from that particular spot. I think it is very appropriate. You may
4 proceed. Do you get the question?
5

6 MR. MAHLUM: Your Honor, the way that you phrased that question, yes it
7 was possible that someone on the bluff could have heard that.

8 MR. CAMIEL: You were asked about the involvement of the Poplar Police
9 Department in the investigation.
10

11 MR. MAHLUM: Yes.

12 MR. CAMIEL: When the evidence was first collected from the crime scene
13 because it was a weekend some of that evidence was kept ...
14

15 MS. PLUBELL: Objection Your Honor. It exceeds the scope of direct
16 examination.

17 COURT: Well, I have given a lot of latitude here. I am going to ... I mean
18 the key is to get the best evidence for this. I don't think that I am going to ...
19 Because I opened this up to a broad cross, I am going to allow this broad and I will
20 give you an opportunity to address it as well. Go ahead.
21

22 MR. CAMIEL: When the evidence was initially collected from the crime
23 scene because it was a weekend it was kept in the Judge's chambers at the Poplar
24 Police Department, isn't that correct?
25

1 MR. MAHLUM: I don't know what happened to the evidence that first day
2 because I was not there.

3 MR. CAMIEL: At the time of trial you learned for the first time that the
4 evidence that had been kept at the Poplar Police Department ...

5
6 MS. PLUBELL: Objection Your Honor.

7 COURT: Yes.

8 MS. PLUBELL: It exceeds the scope of direct examination. He is talking
9 about trial now.

10
11 COURT: Well, I agree. This is sort of went beyond the scope and you
12 didn't address this in your direct exam initially and so I think, to keep this thing
13 within some boundaries, I am going to sustain.

14
15 MR. CAMIEL: You were, it has been asked repeatedly, but you were the
16 lead Wolf Point investigator in this case?

17 MR. MAHLUM: Yes, for Roosevelt County.

18
19 MR. CAMIEL: And, you were responsible for the evidence that was
20 collected as a part of your duties as the lead investigator.

21 MR. MAHLUM: No sir. The persons that collected the evidence would
22 have been responsible for that until it was turned over to whoever is in charge of
23 the evidence room.

24

25

1 MR. CAMIEL: You learned that a room in which the evidence was kept
2 was broken into by Poplar Police officer Steve Grayhawk, didn't you?

3 MS. PLUBELL: Objection Your Honor, lack of foundation.

4 MR. LIGHT: When, where?

5 COURT: Well, I am going to sustain.
6

7 MR. CAMIEL: You were asked at the trial whether or not, at Mr. Beach's
8 trial, whether or not the evidence was properly protected. Do you recall that?

9 MR. MAHLUM: I do.
10

11 MR. CAMIEL: And, you indicated that it wasn't.

12 MR. MAHLUM: Correct.

13 MR. CAMIEL: And, that is because you were referring to the fact that the
14 evidence room had been broken into ...
15

16 MS. PLUBELL: Objection Your Honor. That calls for speculation and
17 there is a lack of foundation.

18 MR. CAMIEL: I am asking him about his own testimony.
19

20 COURT: I think I am going to overrule. You may proceed.

21 MR. CAMIEL: You testified that the evidence wasn't properly protected
22 because you knew that officer Steve Grayhawk broke into the room where the
23 evidence was kept.
24
25

1 MR. MAHLUM: Mr. Camiel, I wasn't there. I don't know. I know that
2 there was an issue with the plywood door on that room. How that was done I have
3 absolutely no idea.

4 MR. CAMIEL: And, you know that the issue was that the door was kicked
5 in by Officer Steve ...

7 MR. LIGHT: Your Honor. Lack of foundation. He just indicated ...

8 COURT: I sustain.

9 MR. CAMIEL: Mr. Mahlum, how many wounds did Ms. Nees have?
10

11 MR. MAHLUM: Over twenty (20). I would have to look for the exact
12 number.

13 COURT: You have not ... Or you may have started it, but you never
14 formally moved to the admission of that picture and I don't know whether you
15 intended to.
16

17 MS. PLUBELL: I did and you determined it was inadmissible.

18 MR. LIGHT: We thought you sustained it Your Honor.

19 MR. TOAVS: We objected on the basis the photograph wasn't ...
20

21 COURT: Oh, that's right. Okay. So, you need to correct your record Pat.
22 Okay.

23 MS. PLUBELL: We are not through with that issue.

24 MR. CAMIEL: No further questions.
25

1 MS. PLUBELL: No further questions.

2 COURT: Okay. May this witness be ... Wait a minute. I do have a
3 question. You talked about the distance from the top of the bluff to this general
4 location where the murder occurred, right?

5
6 MR. MAHLUM: Yes.

7 COURT: As being a bit over eight hundred yards?

8 MR. MAHLUM: That is correct.

9 COURT: Would you look across. Can you see that house across the street?

10
11 MR. MAHLUM: Sir, I can't from here. I would have to move.

12 COURT: Yeah step up here. Is that further, closer, similar?

13 MR. MAHLUM: Much closer.

14 COURT: Much closer?

15
16 MR. MAHLUM: Yes.

17 COURT: Okay. Next. In terms of the digging, the question about whether
18 you discovered any digging; did you conduct an investigation looking for diggings
19 in the area?
20

21 MR. MAHLUM: I did not. I was not ... The day of the crime scene, the
22 first morning sir, I was not there.

23 COURT: How about the second, third, fourth, fifth day?
24
25

1 MR. MAHLUM: I was down in that area the second day just to familiarize
2 myself with what the area looked like, where things had been at.

3 COURT: And then how could you testify that there weren't any diggings?

4 MR. MAHLUM: Just from the fact that there ... And again, there were no
5 reports. There was none of that information ever flowed to me.
6

7 COURT: All right. Now, you may follow up. I will start with the State.

8 MR. LIGHT: Nothing.

9 COURT: All right, the petitioners?
10

11 MR. CAMIEL: Nothing.

12 COURT: All right. May this witness be excused petitioners?

13 MR. TOAVS: Yes Your Honor.

14 COURT: State?
15

16 MS. PLUBELL: Subject to possible rebuttal Your Honor, recall.

17 COURT: Well, I guess you are here for the duration.

18 MR. MAHLUM: Thank you Your Honor.

19 MS. PLUBELL: He was anyway Your Honor.
20

21 COURT: All right. Next witness.

22 MR. TOAVS: Could we have a moment Your Honor?

23 COURT: Yes. Yes sir?
24
25

1 MR. CAMIEL: Your Honor, with regard to petitioner's witnesses that
2 would end the witnesses that we have which the Court has said could testify. The
3 Court left it somewhat open as to whether or not Dr. Leo would be allowed to
4 testify at a future proceeding and so we don't want to rest at this point with that
5 question still open.
6

7 COURT: Well let's dig into it then. What is your position with regard to
8 what he would testify and why. I think we have gone through it, but just to make
9 sure.
10

11 MR. CAMIEL: Your Honor we would offer his testimony in support of the
12 ineffective assistance of counsel claim with regard to defense counsel's failure to
13 properly attack the content to the confession. Dr. Leo would be able to offer
14 testimony as he did at the clemency hearing indicating various factual flaws in the
15 confession. There were a whole list of specific things that were said in the
16 confession that simply didn't match the crime scene and he would be able to point
17 those out. He would also testify that there was evidence available to defense
18 counsel to show that contamination had occurred during the course of the
19 interrogation of Mr. Beach. That the Louisiana detectives who conducted the
20 interrogation of Mr. Beach somewhat surprisingly tape recorded their conversation
21 with Sheriff Mahlum and that transcript demonstrates that the Louisiana detectives
22 made a mistake about their understanding of the clothing that the victim was
23
24
25

1 wearing at the time her body was recovered. Their mistake, they thought she was
2 wearing a brown jacket and a plaid shirt. She wasn't. She was never wearing a
3 brown jacket and the shirt was completely different. But, their mistake ended up in
4 Mr. Beach's confession and Dr. Leo would be able to give testimony that that is
5 clear evidence of contamination by the Louisiana detectives. So, he would be able
6 to provide very specific testimony, not only about the phenomenon of false
7 confessions and the frequency of false confessions and the type of interrogation
8 techniques that research has shown may lead to false confessions, but to the
9 specific areas that defense counsel never pursued in terms of showing the lack of
10 reliability of the confession.
11
12

13 COURT: Well, as I stated before, I need you to respond to the issue that you
14 told the Court that the procedural constitutional innocence claims were all record
15 based. And now you are saying well they are all record based except. How can
16 you reconcile the fact that that they are either record based or they're not?
17

18 MR. CAMIEL: Well Your Honor, the procedural claims in terms of the
19 prosecutors conduct at the trial in opening statement and closing argument and
20 referring to evidence that we think shouldn't have been referred to is all record
21 based. When I told the Court that all of the procedural evidence, or all of the
22 evidence related to those claims was record based I was in error. I was thinking in
23 terms of Dr. Leo. We offered, initially offered Dr. Leo, under our theory that the
24
25

1 Court prospectively would look at what a new jury would hear. But, Dr. Leo's
2 testimony is also relevant to our ineffective assistance counsel claim and so the
3 only way I can reconcile that is I misspoke and hadn't completely thought through
4 the other area in which Dr. Leo's testimony would be relevant.

5
6 COURT: Well, I appreciate it. All right State, let's hear from you.

7 MR. LIGHT: Well Your Honor, if in fact there is another hearing where the
8 Court is gonna allow the State to investigate and respond to the constitutional
9 claims of ineffective assistance of counsel and misconduct we would probably
10 argue that Dr. Leo is not an expert that is needed. We will point out that many,
11 many courts including here in Montana, his expert testimony has been denied
12 because of course, like yourself, you can understand the fifth test and certain things
13 don't fit; a confession may not fit the evidence or what is reliable or not. So, we
14 would probably object to it and file briefs citing why and offer some case law to
15 why it is not relevant and why it is not needed in that area.
16
17

18 COURT: But, do I remember right, also, that the State's chief concern about
19 any opening of the procedural constitutional innocence claims would be that they
20 wanted to have an opportunity, a delay basically, so that they could muster a case
21 themselves which would have to do with Timer Moses notes, former Governor
22 Racicot's presence perhaps. I wouldn't mind seeing Marc again myself, but ...
23
24
25

1 MR. LIGHT: We would have to get the Court's permission to talk to Mr.
2 Moses and get permission from him without violating client privilege to look at his
3 file. That is routine when you are talking about trial strategy and why something
4 was done and why something wasn't done. My experience is usually strategic
5 reasons and strategic reasons is one of the first things that the Supreme Court looks
6 at. In addition, we are talking about prosecutor misconduct. Again, we would have
7 to talk to Mr. Racicot and find out what his reasoning was and what actually
8 happened and present testimony to the Court.
9
10

11 COURT: Well, let me ask this of the State, do you all have any legal or
12 procedural objection to a proceeding the Court would conduct with regard to
13 constitutional procedural claims of innocence?
14

15 MS. PLUBELL: Well, first the Court has to establish, I mean conclude, that
16 evidence establishes actual innocence. And, if the Court concludes that, then yes,
17 we ...
18

19 COURT: Actual innocence not to the level of setting him free, but to the
20 level of requiring a new trial?

21 MR. LIGHT: Yes.

22 MS. PLUBELL: Right. Well, to litigate the constitutional claims.
23

24 COURT: Does the petitioners agree with that procedural approach?
25

1 MR. CAMIEL: No Your Honor. If the Court determines that without even
2 looking at the constitutional claims we have demonstrated that there is new
3 evidence under the Clark test that entitles Mr. Beach to a new trial, we don't even
4 need to go any further.

5
6 COURT: Right. I didn't think so either. But, the problem is, they want to
7 go further if you are going to bring Dr. Leo. I mean they want to do a
8 constitutional procedural innocence hearing. I don't know that it is even
9 necessary, but I can't deny the State an opportunity to do that if you are going to
10 bring Dr. Leo and get into this procedural stuff.

11
12 MR. CAMIEL: I would point out that we raised the ineffective assistance of
13 counsel claim in the original petition. It was filed January 18, 2008. So, this is
14 nothing new. At no time since then have they ever sought Timer Moses file or to
15 interview or a waiver of the attorney/client privilege. So, this is not a new issue
16 that we have raised. This has been raised for nearly, for about four years.

17
18 COURT: Well, it seems ... I will give you a chance here Ms. Plubell.

19
20 MS. PLUBELL: Okay.

21 COURT: But, it seems to the Court, again, I think this reflects back on our
22 discussion at the very get go. That is that we don't, the Court would ordinarily
23 never get to a procedural constitutional innocence hearing if it were to determine
24 that in this actual innocence hearing there is sufficient evidence, again following
25

1 all the standards about a properly instructed jury and guilt beyond a reasonable
2 doubt, that a new trial would be required. Do you agree with that?

3 MR. CAMIEL: I think we do Your Honor.

4 COURT: I mean, isn't that what we decided initially that that was sort of
5 the format?
6

7 MR. CAMIEL: Yeah. My view is that if the Court finds that these
8 witnesses satisfy the Clark test and that the Court finds that a jury finds them
9 credible, there is a reasonable probability of a different outcome. We don't need to
10 go any further. The Court would then just order a new trial. We wouldn't have to
11 worry about the constitutional issues because presumably at a new trial we are
12 starting fresh.
13

14 COURT: But yet, do you still want to call Dr. Leo as part of a procedural
15 hearing?
16

17 MR. CAMIEL: Well, we think ... The problem is we don't know at what
18 point, we don't know how the Court is going to go about that fifth Clark factor. It
19 has been our view that the Court needs to factor in the constitutional error in
20 analyzing that fifth factor because if the Court agrees with us that this was a
21 constitutionally flawed trial, that there was in fact either ineffective assistance of
22 counsel or prosecutorial misconduct, that would affect the Court's view of whether
23 there is a reasonable probability of a different outcome. If the Court thought that
24
25

1 the original heard things that it shouldn't have heard ... On the other hand, and the
2 Supreme Court's decision wasn't as clear as I think we would have all liked it to
3 be, but they did weave in the Court's consideration of constitutional error.

4 COURT: Does the State agree that the fifth factor in Clark would include
5 some look at whether procedural error created information for the jury that would
6 be problematic?
7

8 MS. PLUBELL: Your Honor, Mr. Beach has raised the constitutional
9 claims, claiming that errors occurred at his trial. Those are all claims. They are
10 ineffective assistance of counsel and prosecutorial misconduct. He knew of those
11 claims when his trial was over. He could have raised those claims in a timely
12 fashion. He failed to do so. He is raising them now. They are time-barred. That
13 is the reason why the State did not ask for Timer Moses file or anything of that
14 nature. We were not litigating those issues. He has to overcome the time bar. He
15 has to ... And there is no presumption that constitutional error occurred. That is
16 basically what they are asking right now is to presume that he can get a trial that
17 was fair. The State does not agree with that.
18
19
20

21 COURT: Well, why did the Supreme Court mention at least once or twice
22 about ...
23

24 MS. PLUBELL: I have no idea. I don't understand it.
25

1 COURT: I really admire that because that is sort of the way I feel. Now,
2 just give me a minute here.

3 MS. PLUBELL: Your Honor, may I clarify?

4 COURT: Yeah.

5
6 MS. PLUBELL: As the State indicated from the first day, it is our position
7 that this Court's role, the first step, is what we have been doing the last, I can't
8 even remember how many days we have been here and that is whether or not there
9 is sufficient evidence to overcome the time bar. And then we go into the
10 constitutional issues.
11

12 COURT: Well, we wouldn't do that at a Court hearing. That would be part
13 of a new trial if the Court goes that far, right?

14 MS. PLUBELL: Well, how is the Court going to decide the constitutional
15 issues Your Honor?
16

17 COURT: How do you think it ought to?

18 MS. PLUBELL: Through a hearing, just like in any other post conviction
19 case.
20

21 COURT: A hearing on procedural errors?

22 MS. PLUBELL: Yes.

23 COURT: So, you are claiming that we should have another hearing?
24
25

1 MR. LIGHT: Well, you have to decide whether or not the time bar ... You
2 have to argue the constitutional claim.

3 COURT: I understand.

4 MS. PLUBELL: And, the one thing that I can say is that they can't have it
5 both ways. They can't argue to the Court that the errors are edited from the record
6 and so the Court can ... I mean the Court would have to review the entire trial
7 transcript. And then, consider that trial transcript including Mr. Beach's
8 confession in light of what it heard today. And, I suppose, the Court could choose
9 to do that. That is not what we are advocating. But, they can't say, 'but before
10 you do that, we want to add Mr. Leo's testimony'.

13 COURT: Well, it appears to this Court, as I look through this, that the best
14 approach is as follows: The Court will at this point disallow testimony by Dr. Leo
15 because that deals with a strictly procedural innocence claim. The Court retains
16 the authority after analysis of the evidence presented in this hearing to determine
17 whether the remand instruction requires a hearing on substantive procedural
18 innocence at which time then we would take up the issue of Dr. Leo again. I do
19 not know. This is very hard to interpret just whether that would be permissible or
20 not, or whether that is even within the Court's scope.

23 MS. PLUBELL: Your Honor, it would be helpful for both parties to brief
24 that specific issue for the Court.
25

1 COURT: That would be very helpful. I think I will ask for that. So, just be
2 aware that that is now a requirement of the Court that the parties brief whether in
3 fact the Court should hold a substantive procedural innocence hearing pursuant to
4 the remand, *Schlupp*, *Sowyer*, *Pope*, you name it.

5
6 MS. PLUBELL: When would the Court like that?

7 COURT: Let me just go on about what I think it ought to entail.

8 MS. PLUBELL: Okay.

9
10 COURT: I think the other key component of that is, is that a necessary
11 antecedent to this week's hearing about actual innocence or can the Court proceed
12 with what it has got from this hearing and make a decision pursuant to the remand?

13 MS. PLUBELL: Your Honor, I didn't hear the last part.

14
15 COURT: Whether the Court has enough or is sufficient under the remand
16 for the Court to make a decision about actual innocence based on what we have
17 heard from this hearing.

18 MS. PLUBELL: Does the Court contemplate that will include the trial
19 transcript?
20

21 COURT: Whatever I have admitted; whatever is in play in this hearing.
22 And, it may be that because I have admitted some of that stuff that I am going to be
23 required to go on to a procedural hearing. That is what you are going to have to
24 address in the briefs.
25

1 MS. PLUBELL: What ...

2 COURT: Yes ma'am just keep asking.

3 MS. PLUBELL: I am sorry.

4 COURT: No, no, no.

5
6 MS. PLUBELL: Just for a point of reference, there has not been any
7 evidence presented at this hearing with respect to the constitutional claims.

8 COURT: I don't believe so because I haven't allowed it; Dr. Leo for sure.
9 All right. Any questions from the petitioner about the purpose of that briefing; the
10 intent of it, the scope of it?
11

12 MR. TOAVS: I think we have questions Your Honor, but I think what we
13 will do is ... I don't know that you could explain it any better.
14

15 COURT: Okay. Well, we will hear from the State now about ... Is the
16 petitioner going to rest now? Given the Court's ruling about Dr. Leo?

17 MR. TOAVS: Yes Your Honor. If Your Honor would allow us, we would
18 like to present Dr. Leo's report along with his testimony from the clemency
19 hearing by way of offer of proof.
20

21 COURT: I am not going to allow that. This is relegated to a procedural, a
22 hearing on procedural substantive innocence, not the hearing we are conducting.
23

24 MR. CAMIEL: Your Honor, I think what we are suggesting is that if the
25 Court determines that there is not going to be a second phase that we would want

1 Dr. Leo's clemency hearing testimony admitted as an exhibit simply for the record
2 so that we have an offer of proof. We are not talking about calling him as an offer
3 of proof, but so that there is a record of what we believe his testimony would have
4 been had we been allowed that second phase.

5
6 COURT: We have taken that step with a couple of items here already. Any
7 objection?

8 MS. PLUBELL: Your Honor, the only thing that to me is significant is that
9 in relationship to Dr. Leo's testimony at the clemency hearing, there was an exhibit
10 admitted of a very lengthy interview between Dr. Leo and Mr. Beach and that is
11 very pertinent in that whole package of information.

12
13 COURT: So, you would request that the Court include all of that?

14 MS. PLUBELL: Yes.

15
16 COURT: Any objection?

17 MR. CAMIEL: No.

18
19 COURT: All right. Which reminds me, there was going to be an exhibit
20 that you were going to track down for purposes of some of those items I had
21 admitted.

22 MS. PLUBELL: May I approach Your Honor?

23
24 COURT: Yes. And as I ... I think that was it. All right. I better make a
25 note here. This goes with whose testimony?

1 MS. PLUBELL: JD Atkinson.

2 COURT: JD Atkinson. All right. Then I will grant you your request to
3 include Dr. Leo's testimony from the clemency hearing into the record. The Court
4 will not use it for purposes of review for its determination at this point. It must
5 include the full interview conducted by Dr. Leo with Mr. Beach. And, I would just
6 ask counsel, consult and make sure that the Clerk has the documents you all agree
7 ought to be included. Okay now. Petitioner's rest. Is that my understanding?
8

9 MR. TOAVS: Yes Your Honor.

10 COURT: All right. The State?

11 MR. LIGHT: Your Honor could we possibly take a break and then decide
12 where we are at. This all kind of came at us right now.
13

14 COURT: Yeah. Why don't we just take a noon recess?
15

16 MR. LIGHT: Thank you. We appreciate it.

17 COURT: Do you want that or do you think you are just ...
18

19 MR. LIGHT: That's fine.

20 MS. PLUBELL: That's fine.

21 COURT: Cause, if you don't have to go beyond noon there is no use
22 coming back.

23 MS. PLUBELL: We are not sure. We have to talk about a few things.
24

25 MR. LIGHT: We do have witnesses here Your Honor.

1 COURT: Well, we will take a noon break. We will come back at 1:00
2 o'clock.

3 MS. PLUBELL: Thank you Your Honor.

4 (LUNCH RECESS)

5
6 CLERK: All rise please.

7 COURT: Please be seated. Thank you. All right. Petitioner has rested.
8 What is the State's position?

9 MR. LIGHT: Your Honor, we appreciate your time to consult and we are
10 not going to call any further witnesses.
11

12 COURT: All right. So that is it then.

13 MR. TOAVS: Whoa.

14 COURT: I guess not.

15
16 MR. TOAVS: May it please the Court, we do intend to call Dean Mahlum
17 in rebuttal. Because the State's case was sort of mixed in with Mr. Mahlum, we
18 would like to recall him briefly in rebuttal and presently Your Honor; we are
19 preparing a rebuttal exhibit over the noon hour that is not quite here yet. And, it
20 may be a matter of fifteen or twenty minutes before it is here. So, we would
21 appreciate the Court's indulgence.
22

23 COURT: All right let's hear from Ms. Plubell.
24
25

1 MS. PLUBELL: Your Honor, they had the opportunity to cross examine
2 him. You get to rebut your cross examination?

3 COURT: She had objected to some testimony and I gave you full range
4 over the objection actually.

5 MR. TOAVS: Well ...

6
7 COURT: I said I was going to give you as much openness as I have given
8 the State and I thought that was probably over the top consideration at the time, but
9 I did it. Now you are telling me you want to call him back. I know why you want
10 to call him back, but legally and procedurally I don't see how you can possibly do
11 rebuttal.
12

13 MR. TOAVS: Well Your Honor, we didn't object when the State presented
14 their testimony with Mr. Mahlum in our case, which was technically our case.
15 And, if we would have opposed that request then they would have called Mr.
16 Mahlum in their case and we would have had an opportunity to do rebuttal. As it
17 was, the testimony all came in sort of mixed up at one time. The topic for rebuttal
18 in terms of Mr. Mahlum concerns his testimony about the eight hundred yard
19 distance. During the course of the lunch hour Your Honor, we were able to pull up
20 a Google map of the area in question and the proposed rebuttal would consist of
21 asking Mr. Mahlum to identify, on the aerial photograph, which points he
22 measured from and how he came up with eight hundred yards. We would
23
24
25

1 anticipate that the testimony from Mr. Mahlum, based on our rebuttal exhibit will
2 be significantly different than that testimony that he gave concerning eight hundred
3 yards by a factor of three times greater than the actual distance Your Honor.

4 MS. PLUBELL: Your Honor, they had the ability to interview Mr. Mahlum.
5 They had the ability to ask him questions about his proposed testimony. There is
6 no reason that that should not have been ready.
7

8 COURT: Yes sir?

9 MR. CAMIEL: Your Honor, Mr. Mahlum, to my knowledge, has never
10 previously testified to the distance or to using a range finder or to eight hundred
11 yards. He certainly didn't testify to that at trial. He didn't testify to that at the
12 clemency hearing. There is no report that he has ever prepared. So, the very first
13 time we ever heard him give that distance was on the stand this morning. We
14 didn't anticipate it because it had never come up before. And, we believe that we
15 ought to be allowed to demonstrate that that testimony is accurate.
16
17

18 COURT: Well, why didn't you do that at the time he was on the stand?
19 You certainly had the full range of this Court.
20

21 MR. CAMIEL: We did, but we didn't have the ability at that moment. He
22 is on the stand. He first tells us eight hundred yards. We don't have internet
23 access. We had no ability to prepare an exhibit or to prepare the aerial photo in
24
25

1 order to use that with him. Over the lunch hour as quickly as we could, we went
2 about doing that.

3 COURT: Yes Mr. Light.

4 MR. LIGHT: In all due respect Your Honor that is what happens in trials.
5 They cross examined him about that point. It happens all the time and you don't
6 get to simply call somebody back when you discover they said something you
7 didn't like. We were presented with at least five witnesses today that we
8 interviewed right before they went on the stand Your Honor. So, I think fairness
9 has been given to the parties. He was cross examined Your Honor on that point I
10 would add.
11
12

13 COURT: Well, you know, it is a darn shame that in some situations like this
14 a Judge can't use his own experience of having driven through Poplar and seen the
15 distance between that bluff and where we are talking about and I have to take only
16 the evidence in front of me. But, that is the nature of the beast. I am sorry
17 gentleman, but I think you missed your opportunity. I don't think it would be fair
18 to the State in this particular circumstance to expand this to consider that rebuttal.
19 Your request is denied. All right. Anything else? Any other considerations? Yes
20
21
22 sir?

23 MR. LIGHT: Just one thing Your Honor, I want to make sure of. I don't
24 know if this Court is going to, in light of the Clark factors, when looking at the
25

1 evidence that has been presented over the last couple days, whether or not the
2 Court is actually going to review the trial transcript in determining cumulative,
3 reliability; whatever else the Court wants to determine. And, we just want to know
4 if the Court is going to consider that or not. We don't know if the Court has an
5 accurate transcript. I know that counsel ruled for the clemency transcript and we
6 did find some pages missing and I would like to maybe offer one that is complete
7 because there were a number of pages missing. I think it is just a mistake.
8

9 COURT: Did I admit the full clemency transcript?
10

11 MR. LIGHT: Well, they filed a motion and, I believe, I saw the motion
12 where, I believe, Mr. Camiel is going to admit it because it is here marked Your
13 Honor, A, B, and C, and I think that he filed a motion prior to hearing, if I am
14 correct.
15

16 MR. TOAVS: What I did Your Honor is, in the course of this little trial, I
17 would generally file the original depositions with the Court in the event that we
18 needed to refer to them so that the Court had a copy. That is what I did with the
19 clemency transcript is I just lodged it with the Court under cover of Mr. Camiel's
20 Affidavit that it was a true and correct copy. So, we haven't offered or moved for
21 the admission of the clemency transcript.
22

23 COURT: Well, is there any stipulation we could achieve about cumulative.
24 I mean, is the State contending that anything we have heard is cumulative?
25

1 MS. PLUBELL: No Your Honor. What we are contending is that the
2 evidence, I mean, their, they want to have it both ways. They want the Court to
3 consider this evidence; they don't want the Court to consider, you know, the fact
4 that Mr. Beach confessed; anything of that nature, just this that they presented to
5 you.
6

7 COURT: Well, that is the remand though; to be fair to the petitioner that is,
8 the Supreme Court has said that.
9

10 MS. PLUBELL: I don't believe that is accurate.

11 COURT: Really?

12 MS. PLUBELL: No.

13 COURT: You think the Supreme Court said I can go back to the original
14 trial and take anything I want out of that?
15

16 MS. PLUBELL: I think you can review the entire trial transcript if you
17 review in its entirety. But, if the Court does not wish to do that then we would ask
18 the Court to at least take judicial notice of Dr. Pfaff's testimony at the trial. We are
19 not asking for the photographs to be admitted, even though he has spelled out
20 which photographs he relied upon. But, his testimony about the nature of the
21 injuries is significant to the evidence that was presented in determining, in this
22 Court's determination, of the reliability or these probabilities.
23
24
25

1 COURT: Well, I don't think it is a question of whether this Court would
2 like to consider the transcript or, you know, whether it is too much work or too
3 little work. I think the question is, is that my obligation in this proceeding to
4 consider that transcript? And, as I remember the factors, it is either merely
5 impeaching or cumulative and I am asking is there any testimony we have received
6 that was cumulative or merely impeaching.
7

8 MS. PLUBELL: Well, for point clarification Your Honor, I have no idea
9 how this Court is going to ultimately rule about how this process is working.
10

11 COURT: Neither do I.

12 MS. PLUBELL: And, they are asking you ... The one thing that you just
13 have to adamantly state is that you can't presume there was constitutional error.
14 That has to be proven to the Court somehow. Just because they have filed
15 something saying we think there has been error, how is the Court possibly ever
16 going to get there? Well, if the Court doesn't want to consider the transcript, then
17 it is the State's position that nothing has been proven at this hearing with respect to
18 constitutional error.
19
20

21 COURT: Well, that is a given. There is absolutely ... I haven't allowed
22 anything to be presented regarding the constitutional substantive errors; procedural
23 errors. I concur with you, but I don't understand the point. My point is, is do I
24 need to review that trial transcript for purposes of the Clark five factors with regard
25

1 to the testimony I have received. I don't see why it would be necessary, but I am
2 going to give the parties a chance to tell me.

3 MS. PLUBELL: I believe, at least with respect to Dr. Pfaff's testimony, that
4 it is necessary Your Honor because all of the hearsay statements that we have
5 heard over the last few days talk about a group beating. They talk about, you
6 know, this gang of girls beating this girl up. And, I think Dr. Pfaff's testimony is
7 very pertinent to that issue of the reasonable probability standard. There has to be
8 some credibility, I mean, there has to be some likelihood that what they are saying
9 actually fits with the physical evidence of this case.
10
11

12 COURT: What about the petitioner?

13 MR. CAMIEL: Well Your Honor, I heard the State rest and then after they
14 rested I heard them ask the Court to then accept additional evidence or take judicial
15 notice of prior testimony. Our view is that the Court looks at the first four Clark
16 factors which have been discovered since trial; could have been discovered sooner.
17 Is it material and is it cumulative or merely impeaching? And, I haven't heard the
18 State argue against any of those factors. I can tell the Court from what I have
19 heard from argument from counsel; they are not arguing that any of this was
20 presented at trial. They are not arguing that any of this could have been discovered
21 any sooner. In fact, they conceded eventually, I think, on all of the issues, all of
22 the evidence that we have ...
23
24
25

1 MS. PLUBELL: Your Honor, that is not true.

2 MR. CAMIEL: All of the evidence that we presented is material though.

3 The sole issue at trial was the identity of Kim Nees' killer. And finally, on the
4 issue of merely impeaching, the evidence that has been admitted has been admitted
5 for a substantive purpose. It is not cumulative. Nobody testified at the trial, for
6 example, to seeing vehicles; Kim Nees's vehicle go into that train bridge area.
7 Nobody testified at trial to seeing any other vehicle there. Nobody testified at trial
8 to the statements made by JoAnn Jackson to her co-workers that she was there
9 when Kim Nees was killed, or any of the statements made by Sissy Atkinson or
10 any of the statements made by Maude Grayhawk. So, there can be no argument
11 that any of this is cumulative. Either none of the evidence that was presented is
12 impeaching or merely impeaching. Merely impeaching is defined by the Courts as
13 evidence that is impeaching on a collateral matter. All of the evidence presented
14 here goes to a material issue that was before the jury. So, we believe the Court, at
15 this point, could find that we have met all four of the Clark factors and then that
16 leaves for the Court the analysis of the fifth factor and what goes into that. And,
17 the Court talked to us about the briefing in terms of analyzing what we think the
18 Supreme Court meant with that fifth factor and how the Constitutional error comes
19 into play in analyzing that fifth factor. Now, in analyzing that fifth factor, we
20 believe that, at that point, the Court has to look at the evidence that the State had at
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1 trial because the Court has to determine respectively whether a new jury acting
2 reasonably, would reach a different result; a different outcome. And, to do that,
3 the Court has to look at what did they have and what do we have now and is there a
4 reasonable probability that a new jury, instructed properly, would have a
5 reasonable doubt. And, coming into play as a part of that, we will argue to the
6 Court in our briefing. The Court then has to also consider the impact of any
7 constitutional error. Now, we agree that we haven't proven that yet. But, if the
8 Court finds that there was indeed constitutional error, that the jury heard things that
9 it shouldn't have heard or that defense counsel was ineffective in some regard, then
10 the Court has to consider that in determining what impact this new evidence would
11 have because the Court would have to look at what impact that had on the first
12 trial. So, we believe that the State has no ability to show we haven't met those first
13 four factors and now the next step is that fifth factor.

17 COURT: I want to emphasize, before I let the State respond; I want to
18 emphasize with regard to the briefing because I want the briefing to be sure and
19 address this issue of whether the Court, depending on the Court's, let's see how to
20 put this; can the actual innocence testimony be taken independently in the sense
21 that if the Court finds that that meets the Clark factor, the fifth factor basically, that
22 ... and therefore orders a new trial, if that solves the problem. Or, is the Court
23 absolutely required to move on to the procedural questions also? It seems to me
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25

1 that I can bifurcate and if I find, for instance, that the actual innocence does not set
2 the ground for a new trial, then the question would be do I have to move on to the
3 procedural and determine whether that would lead to a new trial. Does that make
4 sense to the parties? Yes ma'am.

5
6 MS. PLUBELL: Your Honor, I would like to refer the Court, I mean, we
7 can do this in briefing, but just so you know, refer the Court to the case of *Schlugg*
8 which, of course, the Court in *Beach* did reference and adopt and, I think it is
9 important to realize there is a quote at 316. I tried to set this out in my response to
10 the memorandum the difference between ...

11
12 COURT: See all my notes on that particular page?

13
14 MS. PLUBELL: Yeah. The difference between that free standing actual
15 innocence claim. But, I think what is important is that the petitioner should be
16 allowed to pass through the gateway and then argue the merits of his underlying
17 claims. So, I am a little confused by the argument that counsel just made because
18 he said I conceded that we haven't proven to you any constitutional claims, then
19 yet he said, "But if the Court finds constitutional claims" and I don't know how the
20 Court is going to find those.

21
22 COURT: I can't at this point because nothing has been proven. There is no
23 way the Court can ever get into the constitutional procedural innocence issues
24 because we have not gone there in this hearing. I have looked only solely at actual
25

1 innocence testimony and evidence. I think that that is really the nature of the
2 briefing. Let me talk a little bit about that briefing. Let's ... Can we all agree that
3 we don't need a reiteration of the facts? We don't need a reiteration of the
4 procedural background, that we can just focus exclusively so I can focus my
5 attention and energy on just the argument? Number two, I want those briefs.
6 Obviously they have to be filed with Roosevelt County Clerk of Court. I want a
7 courtesy copy to the Judge. I want a courtesy electronic copy to the Judge as well.
8 I am really, really tempted to limit the number of pages because I don't want to
9 have to plow through thirty pages of briefing on this.

12 MS. PLUBELL: If you want to limit, it is fine.

13 COURT: Well, I am also reluctant to do that because, you know, this is a
14 very critical issue in a very important case. So, I won't limit you, but I would ask
15 counsel to please, please stay focused; try to focus narrowly like a laser on the
16 Court's primary concern which is what is the role of this procedural substantive
17 innocence claim with regard to what we have done and what we need to do. I
18 think, by necessity, I am going to have to ask counsel to include a paragraph or two
19 or three about whether the Court is obligated by the remand; required by the
20 remand by the spirit and not just the letter of it but, by the spirit of the remand
21 whether I need to go and look at that trial transcript. I have heard some pretty
22 good arguments about why that ought to occur, but I would like to see that in
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1 writing. Now, recognizing it is summertime in Montana and we don't get much of
2 it July, August and winter and all that stuff, I don't want to press counsel too hard
3 on this, but I recognize Mr. Beach has had a lot of delays. So, what would be a
4 reasonable time frame for counsel, recognizing your personal and professional
5 lives, which I am very respectful of, in order to provide me this brief? They will
6 be simultaneous briefs.
7

8 MR. CAMIEL: Your Honor, we would suggest sixty days just based on our
9 other trial obligations.
10

11 COURT: Oh, well, it is your client. Any objection?

12 MS. PLUBELL: We have no objection to that Your Honor. That is more
13 than reasonable.
14

15 COURT: Yeah, I agree. All right. October 3rd is a Monday. So, by close of
16 business October 3rd. Actually, let me change that. I am on holiday for that first
17 two weeks of October anyway so I might as well give you the full time because I
18 can't consider it if I am gone and give you an opportunity to sort of work this into
19 the rest of your life since we are going to take sixty days anyway. So, we will say
20 by close of business October 14th. All right. Now, are we satisfied? Do we have
21 all the exhibits? Madam Clerk, do you believe you have got all the exhibits that
22 have been entered?
23

24 CLERK: I believe so.
25

1 COURT: Are the parties satisfied that we added to everything that we
2 wanted to add to? I know there were a couple instances and I am very, very
3 concerned that I not end this until everybody is happy with the exhibits. Yes sir?

4 MR. CAMIEL: Your Honor, with regard to Dr. Leo's testimony, we need to
5 add Mr. Beach's statement to that and the State wants to add the transcript of the
6 confession which Dr. Leo referred to and we need to make sure we get those
7 together properly and consult with counsel to make sure that they are in agreement.
8

9 COURT: There is no hurry on that because that is only for appellate
10 purposes anyway.
11

12 MR. CAMIEL: Yeah.

13 MS. PLUBELL: Right. We both have them. We just can't find the right
14 one.
15

16 COURT: Mr. Light, did you have anything further?

17 MR. LIGHT: No Your Honor. That is fine.

18 COURT: Ms. PLUBELL, I think you were sort of in charge of making sure
19 from your side that we had all of the attachments to various exhibits. Are you
20 comfortable that we have got them?
21

22 MS. PLUBELL: Yes.

23 COURT: All right.
24
25

1 MS. PLUBELL: The only thing I didn't do yesterday; we relied on the
2 transcript, I mean, looked at this transcript that they had submitted to you just for
3 ...

4 COURT: You have to identify please. Which transcript?

5
6 MS. PLUBELL: Oh, the clemency transcript. I am sorry. And, we noticed
7 that there were some pages missing and when I looked at that, that has been
8 submitted to you for JB and Bonnie and Roberta. I didn't check the pagination.

9
10 COURT: Would you like to do that? I don't have any problem. I mean, I
11 would just as soon it be accurate, right?

12 MS. PLUBELL: Well, we might as well do it now and then you will have
13 the whole thing. They are all good Your Honor.

14
15 COURT: Okay. Excellent. Thank you. All right. I guess we are then good
16 to go. Now, just to be sure I am going to go one more time for each party. Have
17 we satisfied you that we have received what evidence or objections or motions that
18 you deem are appropriate for purposes of this hearing? Petitioners first.

19
20 MR. CAMIEL: Your Honor, I guess the only thing we would add is the
21 Court said we couldn't put on any rebuttal. Through rebuttal we were going to
22 attempt to introduce an exhibit. We would like that exhibit to be made part of the
23 record.

24
25 COURT: Denied. Anything else from the State's perspective?

1 MS. PLUBELL: Nothing from the State Your Honor.

2 COURT: All right. I just want to compliment counsel. You have made this
3 a much easier process then it might have been. You are very intelligent. You
4 stayed focused. You have obviously got a grasp of the law and the facts. I really
5 admire you and appreciate it. Thank you very much. We are adjourned.
6

7 MS. PLUBELL: Thank you.

8 MR. TOAVS: Thank you Your Honor.
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CERTIFICATE

1 STATE OF MONTANA)
2 : SS.
3 County of Fergus)

4 I, Deidre Dietrich, the official Court Reporter within and for the 10th Judicial
5 District, State of Montana, duly appointed, qualified and acting, do hereby certify
6 that the foregoing proceedings were duly taken by me and before me at the time
7 and place specified in the caption hereof.
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15 _____
16 Deidre Dietrich
17 Official Court Reporter
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