

IN THE DISTRICT COURT  
OF THE FIFTEENTH JUDICIAL DISTRICT  
OF THE STATE OF MONTANA  
IN AND FOR THE COUNTY OF ROOSEVELT

BARRY ALLAN BEACH,

Petitioner,

-vs-

STATE OF MONTANA,

Respondent.

---

) Case No.: 1068-C  
) August 1 – 3, 2011  
)  
)  
)  
)  
)  
)  
)

APPEARANCES:

For the Petitioner: PETER A. CAMIEL

Attorney at Law  
710 Cherry St.  
Seattle, WA 98104

TERRANCE L. TOAVS

Attorney at Law  
429 2<sup>nd</sup> Ave. South  
Wolf Point, MT 59201

For the Respondent:

BRANT LIGHT  
TAMMY K. PLUBELL  
Assistant Attorney General  
215 N. Sanders, 3<sup>rd</sup> Floor  
P.O. Box 201401  
Helena, MT 59620-1401

DEIDRE DIETRICH, COURT REPORTER  
10<sup>th</sup> Judicial District  
55 Windy Ridge Trail, Ryegate, MT 59074  
(406) 535 – 1081, (406) 208 - 1526

PROCEEDINGS

1  
2  
3 CLERK: All rise please.

4 COURT: Please be seated. All right. Good morning everyone.

5 MR. CAMIEL: Good morning.

6 MR. LIGHT: Good morning.

7  
8 COURT: First and foremost, please turn off any cell phones. If I hear a cell  
9 phone go off, including mine, I will fine you and it will go to your favorite local  
10 charity. Second, let's have some introductions. I know Mr. Light casually but,  
11 Mr. Light we will start with you.  
12

13 MR. LIGHT: Brant Light, Chief Prosecutor for the Attorney General's  
14 office.

15 MS. PLUBELL: Tammy Plubell, Montana Assistant Attorney General.

16 MR. CAMIEL: Good morning Your Honor. Peter Camiel representing Mr.  
17 Beach.  
18

19 MR. TOAVS: Good morning Your Honor. My name is Terrance Toavs. I  
20 am co-counsel representing Barry Beach.  
21

22 COURT: All right.

23 MR. McCLOSKEY: Jim McCloskey Your Honor, of Centurion Ministries  
24 the investigator on the case.  
25

1 MS. OLSON: Ann Mary Olson Your Honor. I am a member of Mr. Toavs  
2 office staff.

3 COURT: Mr. Beach, right?

4 MR. BEACH: Yes sir. I am Barry Beach.

5  
6 COURT: All right. Second, I just want the record to reflect that I met with  
7 the State's counsel for just a minute. We talked only about security issues that I  
8 believe one of the counsel had. I believe we resolved that. But, just so the defense  
9 attorneys know that we did not conduct any *ex parte* discussions. Second, third,  
10 fourth, at 10:15 we are going to take a break for sure. I have got two emergency  
11 hearings I have to do. Unfortunately we will have to clear the courtroom and we  
12 will do that. I am hoping that it will be about a fifteen minute break which will be  
13 just adequate for everybody to use the facilities and so on. Next, I did an order on  
14 media coverage. I wasn't sure how many folks we were going to get and what the  
15 issues were going to be. One of the questions that was raised was about  
16 interviewing of witnesses outside of the courtroom and, as I mentioned to the  
17 media representative, that is really counsels' bailiwick and not the Court's. If you  
18 all have a concern about that then I want to hear it. If you don't have a concern  
19 about that, I would like to know it. Let's start with the State please.  
20  
21  
22

23 MR. LIGHT: Your Honor I guess we wouldn't have a problem with it as  
24 long as the interview would be taking place after they have testified.  
25

1 COURT: After testimony?

2 MR. LIGHT: Yes.

3 COURT: Good point.

4 MR. CAMIEL: Your Honor, we agree. Once a witness is excused by the  
5 Court then, it is up to the witness, we would think, whether they were interviewed  
6 or not.

7  
8 COURT: All right. So, let's talk about what constitutes excusal. Will there  
9 be any witness that you anticipate from either side that would be recalled at some  
10 point, rebuttal or otherwise, so that we don't have a mistake based on that one little  
11 clarification. Mr. Light?

12  
13 MR. LIGHT: Possibly there could be some rebuttal witnesses Your Honor  
14 but, you know, we would ask that they be recalled. But, we would inform the  
15 Court at the time that the witness is subject to recall.

16  
17 COURT: Okay. Mr. Camiel?

18 MR. CAMIEL: I would think that we would follow the same practice.

19  
20 COURT: All right. I think that answers the question. All right. So, no  
21 interviews unless the witness has been specifically excused by the Court. Next, I  
22 want to start with a little bit of looking at the forest as opposed to the trees here. In  
23 particular, as you look at the remand order from the Montana Supreme Court, the  
24 Court says in paragraph forty-five (45), a substantive innocence claim, if  
25

1 successful, results in the prisoner's release. By contrast, if successful procedural  
2 claim results in a new trial, both petitions filed by the, well let me put it this way,  
3 the petition for post conviction relief filed by the petitioner and the proposed  
4 amended petition both call for a new trial, which seems to indicate to the Court that  
5 we have procedural claims. What I want to hear from counsel is, do you see the  
6 difference between these two types of claims and what claim is before the Court as  
7 restricting or limiting the type of evidence that the Court should or ought to  
8 receive? We will start with the defense.

9  
10  
11 MR. CAMIEL: Thank you Your Honor.

12 COURT: I am going to need you to speak up. Unfortunately, because we  
13 have got a lot of folks and it is going to be a hot day we got to run that noisy  
14 machine.

15  
16 MR. CAMIEL: Your Honor, in the petition filed on behalf of Mr. Beach,  
17 we did raise procedural claims, claims of constitutional error that would otherwise  
18 be time barred. But, under the Supreme Court analysis, if we convinced this Court  
19 that we indeed have new evidence that meets the Clark test, at least the way we  
20 view it, the first four prongs of the Clark test then, as the Court considers that fifth  
21 factor, we believe that the Court needs to consider the constitutional claims and the  
22 impact that those would have. And, in particular, looking prospectively as the  
23 Supreme Court says, at a new trial with a new jury, what a clean trial would look  
24  
25

1 like. And, we have raised issues in the petition about both prosecutor error and  
2 defense counsel error at the original trial. Now, those are in the record and so I  
3 don't anticipate that we would be calling witnesses to pursue those claims. But,  
4 we would want to be able to argue those claims to the Court and point out to the  
5 Court where in the record, in the original trial, those things occurred. Just as an  
6 example, one of the constitutional claims that we make is that there was a reference  
7 in opening statement to hair evidence by the prosecuting attorney. He told the jury  
8 in opening statement that there was a hair found on the victim Kim Nees' sweater.  
9 He said it was a pubic hair. He told the jury that they were going to hear evidence  
10 from a crime lab person that that hair actually matched Mr. Beach. Now, such  
11 evidence was never introduced at trial. A hair examiner was never called. Then,  
12 in closing argument, the prosecuting attorney returned to that issue, reminded the  
13 jury that he had told them about hair evidence and then said that for technical  
14 reasons it couldn't be introduced. That is all in the record. But, we would want  
15 the Court to consider that when it analyzes that fifth Clark factor in terms of what  
16 impact the new evidence would have and the fact that a new jury presumably  
17 wouldn't hear anything like that; they wouldn't hear references to evidence that  
18 was never admitted. There are other issues that we have raised in the original  
19 petition having to do with other areas of what we believe was prosecutor error as  
20 well as ineffective assistance of counsel claims. Those were time-barred and so  
21  
22  
23  
24  
25

1 never considered on the merits by any reviewing Court to date. But, we think  
2 through the gateway of this new evidence, the Court will get to consider that. So, I  
3 guess that is a long way for me to answer the question that we want to be able to  
4 argue it to the Court at the appropriate time. We think it has to be a part of the  
5 Court's analysis of that fifth Clark factor, that modified Clark factor, but we don't  
6 anticipate calling any witnesses to prove that. We think the Court can rely on the  
7 transcript of the trial to document those errors. Now, I would point out I guess,  
8 one caveat to that is we make reference to Dr. Richard Leo and we are going to  
9 argue to the Court that at a new trial a jury would get to hear an expert such as Dr.  
10 Leo address the confession and the interrogation process. Now, we argued in our  
11 petition that it was ineffective assistance of counsel for defense counsel not to  
12 pursue challenges to the confession that we point out in the petition. There were  
13 numerous areas in that confession that should have been challenged as factually  
14 inaccurate when you match them up with the crime scene. Dr. Leon would be  
15 testifying about that in addition to the interrogation techniques and so I think that  
16 does, in fact, dovetail with that claim but it is also separate from that claim because  
17 it is something that a jury would get to hear at a new trial in addition to the new  
18 evidence that we will present to the Court from the original petition and then if the  
19 Court allows us to amend the new evidence in the amended petition.  
20  
21  
22  
23  
24  
25

1 COURT: Well, it sounds like you are saying that if the Court could rely on  
2 the original transcript, this is a procedural, an issue of constitutional error, then  
3 why are we here today? What possible evidence would I hear except those about  
4 actual innocence which doesn't appear to be before the Court?  
5

6 MR. CAMIEL: Well, the reason we are here is we don't get to present this  
7 Court, or argue to this Court about those constitutional errors until we show you  
8 that we have new evidence that meets the Clark test. We have to present that  
9 evidence to you and that is the vehicle for us being allowed to argue the  
10 constitutional error. Without presenting that new evidence to you, that  
11 constitutional error has been ruled time-barred. So, we are here because the  
12 Supreme Court says that to get to the procedural errors, we have to start by  
13 showing that we have, in fact, new evidence, and then you would get to consider  
14 the procedural error.  
15  
16

17 COURT: So, do you believe that that new evidence then is actual innocence  
18 evidence or only substantive constitutional error, procedural error?  
19

20 MR. CAMIEL: We believe that it is evidence of actual innocence in that it  
21 undermines the confession, which was the only evidence used to convict Mr.  
22 Beach. At a new trial, if a jury hears this new evidence, we believe that the jury  
23 would find at a minimum reasonable doubt about the validity of the confession.  
24  
25 And the Supreme Court has indicated that that is the standard that this Court needs



1 to look at. At the very end of the Supreme Court decision they indicate that the  
2 Court has to consider, must assess, whether a jury acting reasonably ...

3 COURT: I have read it, at least eight or nine times. I am still reading it. I  
4 am still working my way through that thing. All right. I understand your  
5 perspective. Now, let me hear from the State about this same issue.  
6

7 MS. PLUBELL: Thank you Your Honor. It is probably not going to  
8 surprise you, but we don't agree on this. One thing that I think became clear from  
9 the remarks of Mr. Camiel is that all of these claims he is saying are based on the  
10 trial record, so they clearly could have been raised in a timely fashion making it all  
11 the more, I guess, problematic that we are here thirty (30) years after the fact. Our  
12 interpretation of *Schlup vs. Delo* and all of the cases that follow is that this ... You  
13 have to have an extraordinary situation to overturn a conviction thirty (30) years  
14 after the fact. But, we can't make anything concrete in criminal law because we  
15 don't want someone who is innocent to be penalized. Therefore, you have this  
16 notion of actual innocence. So, the purpose of this hearing is just to determine  
17 whether Beach can get through the gateway to overcome the time bar. If he does  
18 that, it is only then that he can go back and litigate the constitutional claims and we  
19 completely disagree that those constitutional claims can be litigated just based on  
20 the trial record. Those are not appropriate for the Court's consideration today.  
21 Our interpretation of the Montana Supreme Court's decision is this hearing is to  
22  
23  
24  
25

1 determine whether you get through the gateway. I think the Court could consider  
2 the evidence in light of a trial where there was no error.

3 COURT: So, do you see this as actual innocence as opposed to any  
4 procedural innocence?  
5

6 MS. PLUBELL: Yes.

7 COURT: But, the Supreme Court goes on and on about procedural  
8 innocence.  
9

10 MS. PLUBELL: The Supreme Court does, but it is only to the extent that  
11 first you have to get there. I mean, first you have to establish the actual innocence  
12 before you can ever get there. They clearly held that his petition is time-barred.  
13 And, with respect to ...  
14

15 COURT: Well, I don't mind having four good minds working on this  
16 remand and help the Court understand, you know, what precisely the Supreme  
17 Court asked of it. Like I say, I have read it many, many times and I am still  
18 working through it. Go ahead.  
19

20 MS. PLUBELL: Just to make a record Your Honor, with respect to the issue  
21 of the confession, I know that the State has made its position clear, but we believe  
22 that that has no business being in this particular proceeding because it has been  
23 litigated by every Court and the confession has always been upheld. Further, to the  
24 extent that they want the Court, they want to get in Dr. Leo's testimony under the  
25

1 ... well this is what a new trial would look like. That isn't completely true because  
2 as far as I know, prosecutors just don't stipulate to testimony such as Dr. Leo  
3 coming in. You would have to undergo a rigorous argument before a trial Court  
4 before that evidence ever got in anyway. Moreover, based on what he testified to  
5 at the clemency hearing, that definitely would not be allowed in a criminal trial, so  
6 we just think it is important to keep that in mind as we are going through these  
7 proceedings today.  
8

9 COURT: All right. Give me one more time. Let me try to reiterate what I  
10 believe you have argued and that is that the procedural claims are all barred  
11 because they weren't raised initially, because they are all record based. The actual  
12 innocence gateway claims would be heard today for purposes of the Courts  
13 remand.  
14

15 MS. PLUBELL: Yes.

16 COURT: Anything else you would add to that?

17 MS. PLUBELL: If this Court were satisfied that Mr. Beach could make it  
18 through the gateway, then those matters would have to be litigated as they always  
19 are in post conviction. We don't have ... I mean ...  
20

21 COURT: You mean at a trial?

22 MS. PLUBELL: Yes. We have never heard from Timer Moses in this case.  
23  
24 You know, a lot of the claims are with respect to Timer Moses providing  
25

1 ineffective assistance of counsel. We haven't had access to his file because there is  
2 not an IAC claim right now. It is procedurally barred. It is time-barred. We  
3 couldn't even get his records right now. The other thing I would like to say is that  
4 I would like that we be true to the record in this case and Mr. Camiel ...

5  
6 COURT: Wouldn't we all?

7 MS. PLUBELL: Mr. Camiel brought out that Mr. Roscoe talked about hair  
8 evidence in his opening, and indeed he did that and this is all in the trial transcript.  
9 And then it came to his attention that there was a problem with where the evidence  
10 was originally stored and in the ... I think it was in the city courtroom or  
11 something to that effect, and there was an officer that broke the hasp and he is  
12 related to Maude Grayhawk. I want to be perfectly clear about that.

13  
14 COURT: Sorry, I missed that last point.

15  
16 MS. PLUBELL: He is related to Maude Grayhawk who is one of the  
17 women that they are claiming knows something about this homicide. And, as soon  
18 as Marc Racicot learned about that, he didn't know about it until the time of trial  
19 when he was going through his witnesses and he immediately went to Judge's  
20 chambers and Timer Moses was there and he disclosed that information. You  
21 know, Timer wasn't going to stipulate to the chain of custody and he didn't use the  
22 evidence. And, it wasn't until Mr. Racicot's rebuttal closing argument that he  
23  
24  
25

1 made reference to that and it was in direct response to what Timer Moses said in  
2 his closing. So, I just wanted to make that point of clarification Your Honor.

3 MR. CAMIEL: Would Your Honor allow a brief reply?

4 COURT: Sure, by all means.

5  
6 MR. CAMIEL: Your Honor, in terms of the distinction between the new  
7 evidence, actual innocence and the procedural error, I think the best clue that we  
8 get from the Supreme Court is when they talked about the *Pope* case. In *Pope* he  
9 had new DNA evidence and the Supreme Court said that that evidence allowed  
10 him also to argue his constitutional claims which were otherwise time-barred. And  
11 then, that combination the Court said, allowed him to get a new trial. If we present  
12 the new evidence to the Court and the Court decides we have proved actual  
13 innocence and Mr. Beach gets a new trial, the constitutional errors are mute.  
14  
15 Nobody needs to worry about them.

16  
17 COURT: Yeah but, actual innocence is he goes free.

18 MR. CAMIEL: Yes.

19  
20 COURT: Procedural innocence is you get a new trial.

21 MR. CAMIEL: Right.

22 COURT: That is what the Supreme Court decision says.

23  
24 MR. CAMIEL: Well, if we prove the actual innocence ...  
25

1 COURT: Well, that is what my concern is today. If I go through all this to  
2 hear all this actual evidence, why wouldn't I then make a decision about he is free  
3 or not as opposed to a new trial? A new trial means it is all on procedure. Actual  
4 evidence means, you know, he could go free without a trial the way I read these  
5 opinions. Do you disagree?  
6

7 MR. CAMIEL: Well, I think ... I do to a point. If we convince the Judge  
8 that Mr. Beach is actually innocent, I agree he goes free and there is no new trial.  
9 But, if the Court finds that he, that we demonstrate new evidence under the Clark  
10 test and then the Court gets to the fifth prong of the Clark test, then I think the  
11 Court gets to consider as well, the procedural error. Because the Court has to take  
12 a look back and forward and the Court has to look back at what happened at the  
13 original trial. But, it has to look forward at what would happen at a new trial. I  
14 think this is a hybrid situation where we are arguing that there were procedural  
15 errors but, in addition, we have new evidence that we believe points to actual  
16 innocence. If the Court thinks that the evidence is new evidence, but not strong  
17 enough to find that he is actually innocent standing on its own, a free standing  
18 actual innocence claim, the Court can then look to the procedural error to see if,  
19 although he doesn't get set free, he is entitled to a new trial.  
20  
21  
22

23 COURT: Go ahead.  
24

25 MS. PLUBELL: Your Honor, may I respond please?

1 COURT: Just one minute.

2 MS. PLUBELL: Okay.

3 MR. CAMIEL: Your Honor, my co-counsel makes, what I think is a very  
4 good point, that the distinction is between proof beyond a reasonable doubt and  
5 with procedural error analysis the Court would find that no reasonable jury would  
6 have found Mr. Beach guilty beyond a reasonable doubt versus actually innocent  
7 beyond a reasonable doubt. And, it is a difference in the standard of proof. It is a  
8 higher standard if you have a free standing innocence claim. If somebody gets a  
9 clean trial, a fair trial, and they don't claim there were any errors at the trial, but  
10 then they come up with new evidence that they argue shows they are actually  
11 innocent, they have a higher burden than if somebody comes to the Court and says  
12 we have new evidence, but in addition, there were procedural errors. The burden  
13 isn't as high and the Supreme Court talks about that and refers to the U.S. Supreme  
14 Court cases that discuss the distinction between free standing claims of actual  
15 innocence and actual innocence claims that involve procedural claims.  
16  
17  
18  
19

20 COURT: I am curious. Go ahead. You can consult. That is fine. I am  
21 curious. Do the petitioners see the remand in any way that would authorize this  
22 Court to determine actual innocence and set Mr. Beach free?

23 MR. CAMIEL: Yes. I don't think there is any question that the Court could  
24 find hearing the new evidence that Mr. Beach is actually innocent; that the Court  
25

1 doesn't even need to get to the procedural claims and in that instance could order  
2 that he be set free, charge dismissed, no new trial. Alternatively the Court could  
3 say I don't find that he is actually innocent under that higher standard, but I find  
4 that there is a reasonable probability that a new jury would not be able to convict  
5 him beyond a reasonable doubt; that there would be a different outcome in which  
6 case I won't set him free, but I order a new trial.  
7

8 COURT: So, would you say that if I don't find that he is actually innocent,  
9 that is the interpretation of the word gateway; that the gateway is to the new trial.  
10

11 MR. CAMIEL: If the Court finds that we don't meet the higher standard of  
12 actual innocence, then the Court doesn't stop there, but then looks at the reasonable  
13 probability of a different outcome standard.  
14

15 COURT: Right. All right. Now from the State.

16 MS. PLUBELL: Your Honor, I do concur that based on case law on actual  
17 innocence, free standing versus procedural actual innocence, that this Court has the  
18 ability to find a free standing actual innocence claim and if it did so set Mr. Beach  
19 free. Obviously the State doesn't believe that that burden can be met and as the  
20 United States Supreme Court said in *Herrera* the reason that burden is so  
21 incredibly high is that rulings would be more disruptive of our federal system than  
22 to provide for. They are talking about federal *habeas* obviously; review a free  
23 standing claims of actual innocence. I need to address Mr. Camiel's reliance on  
24  
25



1 the case of *State vs. Pope* because in that case the State was not contesting the  
2 underlying constitutional error.

3 COURT: Right, right.

4 MS. PLUBELL: The State admitted that the jury had been wrongly  
5 instructed. We have never ... We have always defended against the notion that  
6 any constitutional error occurred at Mr. Beach's trial. So, the State's position is  
7 that at the end of this hearing, if the Court believed that Mr. Beach met that  
8 incredibly high free standing actual innocence claim then yes, the Court could set  
9 him free. If the Court however believed that Mr. Beach met the standard that is  
10 slightly lower related to procedural actual innocence then he can go back and  
11 litigate the constitutional challenges. But, what Mr. Camiel is asking this Court to  
12 do is to presume that there were constitutional violations at trial and the State has  
13 never, will never, concede that.

14 COURT: And, you also basically argue that they are too late in arguing  
15 those procedural errors anyway.

16 MS. PLUBELL: The only way that they can go back and argue them Your  
17 Honor is through that gateway. That is all that gateway gives them.

18 COURT: So if ... You believe that if they get through the gateway because  
19 of that lesser standard, then they could argue the procedurals?  
20  
21  
22  
23  
24  
25

1 MS. PLUBELL: Right. And then if they prevail on that, then you get a new  
2 trial. But, you can't presume that there were constitutional errors at the trial.

3 COURT: I agree. You are not asking me to presume there is constitutional  
4 errors?

5  
6 MR. CAMIEL: No, definitely not. We are arguing that we can point the  
7 Court to the record and the Court can then decide whether or not that constitutes  
8 constitutional error. And I think ... We struggle with the Supreme Court decision  
9 as I think the Court indicated, but it seems that there is distinction between  
10 substantive innocence and procedural innocence and we are telling the Court that  
11 they are both in front of you. Substantive innocence has the higher standard;  
12 procedural innocence has the lower standard. But, we don't read the Supreme  
13 Court decision as saying that this case should be bifurcated and that if we show  
14 you that Mr. Beach is procedurally innocent, then he should file some separate  
15 petition alleging his constitutional claims. We read the Supreme Court decision as  
16 directing this Court to first go through the Clark factors one through four and then  
17 in analyzing the fifth factor, look at the constitutional claims. The Court would  
18 have to we believe in looking at what happened at the first trial versus looking  
19 prospectively as the Supreme Court says, what would happen at a new trial. I  
20 don't see how you can bifurcate it. That fifth factor requires the Court to do some  
21 prospective viewing of what a new trial would look like and that means the Court  
22  
23  
24  
25

1 has to think of what evidence did the State have at the original trial; what happened  
2 at that original trial. And, there is the presumption that at a new trial any  
3 constitutional errors wouldn't occur. I don't read this decision as saying that we  
4 then go back and file some new post-conviction petition alleging the constitutional  
5 claims. There is nothing in the Supreme Court decision that suggests that.  
6

7 COURT: Yeah. I don't believe that they have any intent for this Court to set  
8 up some separate process where we would have another proceeding. I don't  
9 believe that that was their intent at all. I think they want it all accomplished  
10 through this District Court and then if they get it considered again. They get it  
11 considered again. Yes ma'am?  
12

13 MS. PLUBELL: Your Honor, I agree that they want it all accomplished  
14 through this District Court, that what happens is that we haven't had the ability  
15 because his petition is time- barred right now. And so, we haven't been ... We  
16 didn't need to address the merits of his claims. So, I mean, I can't imagine what  
17 they would have done if we tried to get Timer Moses' file in this case. I have  
18 never seen an ineffective assistance of counsel claim litigated where the State  
19 didn't have access to that.  
20  
21

22 COURT: Well, that is another whole can of worms.

23 MS. PLUBELL: Well Your Honor, I think that is why the State's argument  
24 makes sense.  
25

1 COURT: All right. I believe that we are all sort of ... Have identified the  
2 forest that we are dealing with, which I appreciate because I think that we are all  
3 looking in the same direction and that is very helpful as opposed to sort of  
4 bouncing around trying to determine as we listen to the evidence where we are  
5 really headed. All right. Given that, let's start. Mr. Camiel.

7 MR. CAMIEL: Your Honor, with the Court's permission we wanted to give  
8 the Court an outline of the Order of Proof that we ...

9 COURT: Yeah. I think that would be helpful.

10  
11 MR. TOAVS: So Your Honor, in that regard, our proposal is that we first  
12 present to you the new evidence that is outlined in the original 2008 Petition for  
13 Post Conviction Relief. And then, following the presentation of those witnesses  
14 we would ask Your Honor to consider testimony of three witnesses whose  
15 testimony is not new evidence under the Clark test, but whose testimony would be  
16 part of a new trial in the consideration of the fifth Clark factor where we look  
17 prospectively at the impact of the new evidence on a subsequent trial before a new  
18 jury. And, those witnesses would include Dr. Richard Leo who is the false  
19 confession expert, Robert Atkinson and testimony from Mr. Beach's Louisiana  
20 lawyer Paul Kidd. All three of these witnesses testified at the clemency hearing  
21 and they have evidence that, well not new evidence under the Clark test; would be  
22 evidence that supplements what the new trial would look like if you were just to  
23  
24  
25

1 look at the bare trial transcript. And, following the presentation of those witnesses  
2 Your Honor, our proposal is then to renew permission or a motion to amend the  
3 petition. And, if that motion is granted, we are prepared today to present  
4 testimony of the new evidence contained in our proposed amended petition and  
5 those witnesses would include Kevin Hall, Steffie Eagle Boy, Michael McIntyre,  
6 John Strom and Billy Smith.  
7

8 COURT: Well, I appreciate that outline and I really do believe that we want  
9 to keep that amended petition until the end. I think you have a very high bar on  
10 that new, new evidence if you will, the amended petition evidence, because of the  
11 due diligence factor. I think that due diligence factor is very, very compelling  
12 when it comes to the proposed amended petition because the Court gave you a  
13 dance, or gave you a free ride on the evidence, the due diligence argument for the  
14 evidence in the original petition. There is no question about that. They just gave  
15 you the benefit of the doubt, I believe, was their language. But, that does not cover  
16 evidence that you could have brought in at that time, but now want to bring in  
17 under an amended petition. That due diligence is going to be a very high barrier I  
18 am afraid. I haven't made up my mind. I will give you a chance to argue it and  
19 present, but I think you got a real hurdle there. All right. Let me hear from the  
20 State about this.  
21  
22  
23  
24  
25

1 MS. PLUBELL: Your Honor, the only thing I feel that I need to respond....  
2 I appreciate their outline. I think that that is helpful for all of us. And, the only  
3 thing I feel that I need to respond to is that it is not appropriate to consider  
4 evidence that is not new in this proceeding.  
5

6 COURT: Yeah. I am having a real trouble with that.

7 MS. PLUBELL: The State's position is that that is just not appropriate and  
8 that isn't contemplated by *Clark* or by *Schlep vs. Delo* or any case that I am aware  
9 of.  
10

11 COURT: Mr. Toavs, the problem with that is that the Court is to look at  
12 what the jury, acting reasonably, properly instructed, would have found him guilty  
13 beyond a reasonable doubt based on that new evidence, not on a new trial with a  
14 whole set of other evidence. It is the evidence that is now in existence from that  
15 petition. It is not bringing in new things that all of the sudden you get to open up  
16 that trial. Where do you find that authority?  
17

18 MR. TOAVS: Well Your Honor, in paragraph forty-eight (48) of the  
19 Supreme Court opinion, the Court says that the trial Court must then determine  
20 what impact, looking prospectively at a new trial with a new jury, this new  
21 evidence may have on that new jury. And so I guess ...  
22

23 COURT: Yeah. Well, it would be that evidence that exists in the petition.  
24

25 MR. TOAVS: Right. And ...

1 COURT: But not evidence that doesn't exist in the petition, like your  
2 attorney or the doctor or whoever.

3 MR. TOAVS: Well, I guess maybe the best way for me to answer that Your  
4 Honor is to go through the three witnesses that I have identified and explain why  
5 we believe that you should consider that evidence in envisioning what would the  
6 impact of the new evidence be on a new jury in a new trial. The first witness ...

8 MS. PLUBELL: Your Honor ...

9 COURT: Hold on, hold on. You had outlined this in some order which I  
10 really appreciated. Let's just take that when it comes in the order. I think  
11 otherwise we are going to get ourselves sort of cart before our horse here. We may  
12 learn a lot in the meantime anyway about what the answer to that issue is. Okay.  
13 So, given your outline let's start with Number One (#1).

16 MR. CAMIEL: Your Honor, our first witness will be Judy Grayhawk.

17 COURT: Okay. Yes sir?

18 MR. LIGHT: Can we be heard before she comes in please?

19 COURT: Ms. Grayhawk I am sorry. Just give us one more minute please. I  
20 apologize.

22 MR. LIGHT: Your Honor, before Ms. Grayhawk takes the stand, we want  
23 to object to her as a witness. We presume that she is being offered to present  
24 hearsay statements allegedly attributed to Maude Grayhawk or Kirn. However,  
25

1 there has been no showing at this time that Maude Grayhawk is unavailable. And,  
2 I think before they try to get into hearsay testimony because the declarant is  
3 unavailable, there has to be some showing first that she is unavailable and that  
4 burden, of course, falls on the petitioner because it is their witness to show that  
5 Maude Grayhawk is unavailable. So, we think there needs to be some evidence as  
6 to unavailability before they first call Judy Grayhawk to get in hearsay.  
7

8 COURT: Well, you are sort of presuming a lot about your evidence before  
9 we have even heard it. But you can tackle it if you wish.  
10

11 MR. CAMIEL: Well Your Honor, I would tackle it in two ways. First of all  
12 they are correct in indicating that Judy Grayhawk would testify to statements that  
13 Maude Grayhawk made to her. But we believe that that should be considered by  
14 the Court as substantive evidence both under a due process analysis, under a line of  
15 United States Supreme Court cases and also that it, in fact, qualifies under the prior  
16 statement against interest. But, let me start with the due process analysis.  
17

18 There is a line of Supreme Court cases that indicate that in a situation where  
19 there is a third party confession some witness confesses to someone and that  
20 witness isn't in Court to give the confession directly, that if there are circumstantial  
21 guarantees of trustworthiness that the hearsay rules cannot be used to trump a  
22 defendant's right to put on evidence. So, we believe that there are circumstantial  
23 guarantees of trustworthiness with regard to not only the statement that Judy  
24  
25



1 Grayhawk is going to testify about, but this is going to come up several times in  
2 the course of our presentation and I anticipate hearsay objections repeatedly. The  
3 circumstances were this, Judy Grayhawk is the sister-in-law of Maude Grayhawk  
4 and I don't know how familiar the Court is with all the parties here, but Maude  
5 Grayhawks's father, Steve Grayhawk was a Poplar police officer at the time of the  
6 Kim Nees murder.  
7

8 MR. LIGHT: Your Honor, we are going to object at this time. The  
9 objection from the State is that they have not shown unavailability. That is what  
10 this argument should be for. I understand they want it to be a statement of interest  
11 but the only way that you get a statement of interest in is first, under 804 the  
12 declarant has to be unavailable. And, all I am asking is have they showed this  
13 Court that Maude Grayhawk Kirn is not available. Once they prove she is  
14 unavailable, if they can prove that to the Court, then they can say we have a  
15 statement of interest; then they can go forward and talk about the corroborating a  
16 statement of interest. We will make argument on that. But, the first threshold that  
17 they have to meet is, in fact, have they shown this Court, as in any trial that they  
18 want to get that in, is Maude Grayhawk unavailable? And, that is what we would  
19 like to hear Your Honor. We don't think she is unavailable.  
20  
21  
22

23 COURT: Do you disagree with his analysis about unavailability has to be  
24 shown first?  
25

1 MR. CAMIEL: I disagree, but I am happy to tell the Court that she is  
2 unavailable and explain why and go through the efforts that we made to get her  
3 here. And, Mr. Toavs submitted an Affidavit, I believe last week, outlining the  
4 efforts that we made to get Ms. Grayhawk here. We had the Clerk of the  
5 Roosevelt County Court issue a subpoena on June 30<sup>th</sup> for Ms. Grayhawk. We  
6 learned that she had been residing in Cascade County. We had the Cascade  
7 County Sheriff's Office go to the address where we believed that she was residing.  
8 She was not there. Her daughter was there. Her daughter told the sheriff that she  
9 was in the Denver County Jail. We made contact with the Denver County Jail and  
10 found out that she is in fact in the Denver County Jail. We sent her a certified  
11 letter asking if she would accept a subpoena indicating that her travel and lodging  
12 and witness fee would be taken care of. But, in addition Mr. Toavs contacted the  
13 Denver County Attorney to confirm when she is going to be released, found out  
14 she won't be released until September 6<sup>th</sup>. He sent a letter to the Denver County  
15 Attorney. They called him back last week. They indicated under no circumstances  
16 would she be released to honor a subpoena to come to this Court and testify. She  
17 is serving a sentence for probation violations and I believe a DUI and sits in the  
18 Denver County Jail until September 6<sup>th</sup>.

19  
20  
21  
22  
23  
24 COURT: Okay. Give me a break here. Mr. Light, I remember that  
25 Affidavit, so why are you raising this issue about unavailability?

1 MR. LIGHT: Because that is totally the inappropriate procedure for  
2 subpoenaing an out of State witness. If the Court would like, I would like to  
3 question Mr. Toavs about that.

4 COURT: Well, I guess the question is do you believe this Court has  
5 authority to tell the Denver County Sheriff what to do to get that witness here?  
6

7 MR. LIGHT: Absolutely. Absolutely we do Your Honor. This State, as  
8 well as Colorado, is part of the Uniform Act to secure out of State witnesses. This  
9 happens all the time. We have a statute, 46-15-113. The Supreme Court has  
10 indicated in *State vs. Stanfield*, it is the only acceptable procedure to subpoena  
11 witnesses. And, the reason that is because a subpoena from this county or  
12 Roosevelt County doesn't have any bearing in Denver. What they should have  
13 done is what the State and other defense attorneys do is they come before this  
14 Court; they get a certificate that Maude Kirn is a material witness. That is then  
15 filed in the District Court where she is being held and she is compelled to be here.  
16 Compelled. I think it is a lack of good faith when they say well we asked her to  
17 sign the acknowledgement to return voluntarily when they know she can't get out  
18 of jail until September. There are absolute steps that you do in these kind of cases  
19 to ensure that these witnesses are here. I have done it in many cases when people  
20 are held on homicides in other states; on rape in other states. And, I compel that  
21 other State to allow them to bring back and we transport that person back. In  
22  
23  
24  
25

1 addition, I might add, Your Honor, if they know she is there until September and  
2 can't get out, then you take other means. You do a deposition; you do a phone  
3 deposition; you do a Vision Net deposition. We all go to Denver. I have gone out  
4 of State to do depositions. There is lots of things you can do to show good faith  
5 and diligence other than just saying she is held in jail on a DUI. That's it. Now we  
6 want to use her prior statement to get in hearsay. And, there is case law to support  
7 Your Honor.

8  
9 COURT: 46-13 what?

10  
11 MR. LIGHT: 46-15-113 Your Honor. That is the statute; subpoena of  
12 witnesses in another State to testify. And, I would point out the case of *State vs.*  
13 *Sanderson. State vs. Sanderson* Your Honor. It is 184 Mont. Lexis 776. In that  
14 case the Supreme Court has indicated that is the only proper procedure for  
15 subpoenaing an out of State witness because a subpoena from Roosevelt County  
16 doesn't mean anything. It has no authority whatsoever. So, for them to say that  
17 they really tried to get her here Your Honor is again, a lack of good faith and a lack  
18 of due diligence. Again, there has been numerous cases Your Honor where Courts  
19 have ruled against the State and have said listen you didn't do anything; you didn't  
20 use this act that is available. You didn't use the statute that is available, so how  
21 can you say she is unavailable? And, that has been upheld. And, I think that  
22 because the burden is on them that is what should be held to them. They should be  
23  
24  
25

1 held to that high standard of due diligence and good faith. Again, I think they have  
2 made almost ... She is in jail. That is all they can tell you. And that she  
3 voluntarily wouldn't come back. Well, she can't come back.

4 MR. TOAVS: Can I be heard Your Honor?

5 COURT: Well, you're going to have to be.  
6

7 MR. TOAVS: Thank you Your Honor. I appreciate the State's comments  
8 concerning 16, or 46-15-113, but the problem with that is that that is a statute that  
9 applies in criminal cases. But this is a civil proceeding. So, the only way I know  
10 how to get a witness from out State's testimony in Montana in the course of my  
11 civil practice is we ask them to come, offer to pay, which we did, or we go and we,  
12 during the course of discovery, we take a deposition. Of course, we did file the  
13 motion to conduct discovery and take depositions which Mr. Light's office  
14 vigorously opposed and which you ruled was a motion that was premature. So, we  
15 did request leave to take a deposition. The criminal ...  
16  
17

18 COURT: Did that discovery request include a request for deposition for this  
19 particular lady or was it a generalized, unspecified discovery, because that is what I  
20 recall.  
21

22 MR. TOAVS: The motion, Your Honor, was to conduct discovery on two  
23 issues. First of all to interview witnesses that had previously been uncooperative  
24 when we would go to talk to them voluntarily, one of which is Maude Grayhawk.  
25

1 It was also to investigate and attempt to find a match to the unidentified prints that  
2 are on the Nees vehicle, including the bloody palm print.

3 COURT: So, essentially you are arguing the Court tied your hands to get the  
4 one method, or one of the methods to get evidence from this lady?  
5

6 MR. TOAVS: Well Your Honor, the Court ruled that it was premature  
7 pursuant to the State's position and so I am not saying you tied our hands, but I am  
8 saying that we did request leave to take the depositions which would have included  
9 Maude Grayhawk. Since this is a civil proceeding Your Honor, I don't believe that  
10 the statutes concerning criminal procedure are available.  
11

12 COURT: All right. What do you think Mr. Light?

13 MR. LIGHT: Well Your Honor, first of all this is a civil proceeding, but a  
14 criminal case is underlying and I have, in fact, used this statute on numerous  
15 occasions and I believe that if they had come before this Court a few weeks ago  
16 and said she is in jail, this Court would have signed that certificate and it would  
17 have been filed ...  
18

19 COURT: That is for damn sure.  
20

21 MR. LIGHT: So, that is important. I think there is also a difference  
22 between a discovery deposition and a preserving evidence deposition and that is  
23 what they could have easily done Your Honor. They could have set up a phone  
24 deposition. In all due respect, we have had eight months to prepare for this hearing  
25

1 Your Honor and to find out at the last minute that they are not calling Maude Kim  
2 simply because ... Well she was never served. Actually, I don't think she was ever  
3 served. She has never been served. They know where she is at. They know how  
4 long she is going to be there, yet they haven't done anything to really get her here  
5 and they want to get in ... She is a material witness. She is extremely important in  
6 this case and now they want to call witnesses to get in hearsay based on what I  
7 believe is a lack of good faith and due diligence.  
8

9 MR. CAMIEL: Your Honor, with the Court's permission there is ... The  
10 unavailability issue is important, but it is not the only avenue that we are arguing to  
11 get these statements in. Eight zero three dash twenty-four (803-24) which is the  
12 catch-all exception, deals with situations involving statements against interest  
13 where there hasn't been a showing of unavailability. Now, we believe we have  
14 made that showing, but 803-24 allows the Court to consider the statement against  
15 interest of a witness where there is no showing of unavailability if there are  
16 otherwise circumstantial guarantees of trustworthiness. And, that is the safety  
17 valve for situations that the Supreme Court was talking about to allow a defendant  
18 to get in witnesses that would otherwise be barred by the hearsay rule when there  
19 are circumstantial guarantees that the statement is trust- worthy. And so we would  
20 ask the Court to consider that vehicle for allowing this testimony as well.  
21  
22  
23  
24

25 COURT: Well, I need to think about this. Let's take a brief recess.

1 (RECESS)

2 CLERK: All rise.

3 COURT: Please be seated. Well, this is a heck of a dilemma. I could just  
4 postpone this hearing and we could solve that problem, but that is so unfair to all of  
5 the witnesses and to Mr. Beach, not to mention the State. Rule eight zero four  
6 (804) provides that if absence is relied upon as the ground of unavailability that  
7 there be a showing of inability to obtain the testimony through other means such as  
8 deposition. And, I believe that the Court effectively tied the petitioner's hands in  
9 this matter by its ruling so they can't be held to that requirement.  
10  
11

12 On the other hand I recognize the State's position that they could have  
13 gotten proceedings under 46-15-113, which are pretty reasonable; fairly easily  
14 available. The Court certainly would have jumped at the opportunity to rescue  
15 itself from the problem of the inability to get a deposition. So, here is how I am  
16 going to rule. I am going to rule that given that process is under the criminal  
17 procedure matter and this is a civil procedure matter that it gives some deference to  
18 the petitioner's position. Number Two, the Court did, in fact, prevent the  
19 petitioner from getting his testimony in another way, like deposition. So, I am  
20 going to allow the presentation of this witness due to the unavailability of this  
21 particular lady. Now, the argument with regard to any future witnesses who may  
22 be unavailable, we will take that up on a case by case basis. But, for this particular  
23  
24  
25



1 witness in this particular circumstance, the Court is going to allow it. You may  
2 call the witness.

3 MS. PLUBELL: Your Honor, just for the record, we would like to state that  
4 when the Court is considering this hearsay testimony with respect to the fact that  
5 Mr. Beach is trying to make a free standing actual innocence claim, that the Court  
6 give due consideration that he is asking for that to be freed based on hearsay.  
7 Thank you.

8  
9 COURT: Fair enough. Okay.

10  
11 MR. TOAVS: Your Honor, can I approach.

12 COURT: Ma'am you just come on forward. Sorry for the delay. You just  
13 come over here in front of the Clerk please.

14  
15 CLERK: Do you solemnly swear the statements you are about to make in  
16 this matter will be the truth, the whole truth and nothing but the truth so help you  
17 God?

18 MS. GRAYHAWK: I do.

19  
20 COURT: Okay ma'am. If you just come right around here in front of the  
21 bench and come right over here. Once you get yourself seated we will talk about  
22 how to make yourself heard all right. Now, scoot right on up and that microphone  
23 will bend down and why don't you just say your name so we hear how it is picking  
24 up.  
25

1 MS. GRAYHAWK: Judy Grayhawk.

2 COURT: Excellent.

3 MR. CAMIEL: Ms. Grayhawk could you spell your last name for the court  
4 reporter?

5 MS. GRAYHAWK: G-r-a-y-w-h, G-r-a-y-h-a-w-k.

6 MR. CAMIEL: A little bit nervous?

7 MS. GRAYHAWK: This microphone is ...

8 MR. CAMIEL: Ms. Grayhawk where do you live?

9 MS. GRAYHAWK: Poplar.

10 MR. CAMIEL: And how long have you lived there?

11 MS. GRAYHAWK: All my life.

12 MR. CAMIEL: Where in Poplar do you live right now?

13 MS. GRAYHAWK: 404 11<sup>th</sup> Avenue East.

14 MR. CAMIEL: Can you describe Poplar in terms of the size of the  
15 community?

16 MS. GRAYHAWK: Real small town, one main street, no stores hardly, a  
17 couple grocery stores, everybody knows everybody's business there.

18 MR. CAMIEL: Does Poplar sit on the reservation?

19 MS. GRAYHAWK: Yes it does.

20 MR. CAMIEL: Ms. Grayhawk, are you currently employed?  
21  
22  
23  
24  
25

1 MS. GRAYHAWK: Yes.

2 MR. CAMIEL: Where do you work?

3 MS. GRAYHAWK: Fort Peck Housing.

4 MR. CAMIEL: And what do you do for them?

5 MS. GRAYHAWK: Receptionist, secretary.

6 MR. CAMIEL: How long have you worked there?

7 MS. GRAYHAWK: I just went back to work in March of this year. I took a  
8 couple years off.  
9

10 MR. CAMIEL: Are you married?

11 MS. GRAYHAWK: I am married now, but I think my husband is trying to  
12 divorce me, I don't know.  
13

14 MR. CAMIEL: And does that have something to do with you coming here  
15 today?  
16

17 MS. GRAYHAWK: Yes.

18 MR. CAMIEL: We will get to that. What is your husband's name?

19 MS. GRAYHAWK: Steve Grayhawk.  
20

21 MR. CAMIEL: And is he known by a nickname?

22 MS. GRAYHAWK: Yes.

23 MR. CAMIEL: What is that?  
24

25 MS. GRAYHAWK: PV.

1 MR. CAMIEL: PV?

2 MS. GRAYHAWK: Capital P, Capital V, yeah.

3 MR. CAMIEL: And do you have children?

4 MS. GRAYHAWK: Yes I do.

5 MR. CAMIEL: What are the names of your children?

6 MS. GRAYHAWK: Steve Grayhawk III. Well, he is not the third, but  
7 Steven Lee Grayhawk. He has a nickname of Mouse. Dennis Grayhawk and  
8 Brian Grayhawk.  
9

10 MR. CAMIEL: How long have you been married?

11 MS. GRAYHAWK: Going on 35 years.

12 MR. CAMIEL: Now, you mentioned your husband who goes by PV; his  
13 name is Steve. Who is his father?  
14

15 MS. GRAYHAWK: Steve Grayhawk Sr. because there is three Steve  
16 Grayahawks in our family. A lot of people refer to him as Old Stevie, my husband  
17 Young Stevie and then the youngest Steve, they call him Mouse.  
18

19 MR. CAMIEL: I will use the phrase Old Stevie to try to keep everybody  
20 straight. Is he involved or was he involved in law enforcement?  
21

22 MS. GRAYHAWK: Yes he was involved in law enforcement all his life.  
23 All through my marriage, yeah. Anything before that I don't know.  
24

25 MR. CAMIEL: Was he a member of the Poplar police department?

1 MS. GRAYHAWK: Yes he was.

2 MR. CAMIEL: Was he a member of the Poplar police department back in  
3 1979 at the time of the Kim Nees murder?

4 MS. GRAYHAWK: Yes he was.

5 MR. CAMIEL: Who is Maude Grayhawk?

6 MS. GRAYHAWK: My sister-in-law.

7 MR. CAMIEL: So, she is your husband's sister?

8 MS. GRAYHAWK: Yes.

9 MR. CAMIEL: And, Old Stevie is her father?

10 MS. GRAYHAWK: Correct.

11 MR. CAMIEL: And, how do you get a long with Maude?

12 MS. GRAYHAWK: Well, to anybody that has in-laws you are different,  
13 you are a newcomer, you are married, but I always got a sense she, I don't know,  
14 didn't like me sometimes. But then, I always gave her the benefit of the doubt. I  
15 never really paid that much attention to her. To me she was just my husband's  
16 sister. I married him. I wasn't there for her. I was more interested in my  
17 marriage.  
18  
19  
20  
21

22 MR. CAMIEL: What was her relationship with your son, who goes by the  
23 nickname Mouse?

24 MS. GRAYHAWK: My relationship?  
25

1 MR. CAMIEL: No, Maude's relationship.

2 MS. GRAYHAWK: She is his aunt.

3 MR. CAMIEL: Was she close to him?

4 MS. GRAYHAWK: I think she was only when ... Yeah, I guess she was, I  
5  
6 don't know.

7 MR. CAMIEL: Did they do things together?

8 MS. GRAYHAWK: She just basically drank with him; drank beer with  
9  
10 him.

11 MR. CAMIEL: Ms. Grayhawk, I want to turn your attention to several years  
12 ago in 2004. Was there an occasion where you received a phone call from Maude  
13 Grayhawk that was unusual?

14 MS. GRAYHAWK: Yes.

15 MR. CAMIEL: Where were you when you got the call?

16 MS. GRAYHAWK: Home.

17 MR. CAMIEL: When ... And she called your home phone?

18 MS. GRAYHAWK: Yes, correct.

19 MR. CAMIEL: Was she calling to talk to you?

20 MS. GRAYHAWK: No.

21 MR. CAMIEL: Who did she want to talk to?

22 MS. GRAYHAWK: Mouse.  
23  
24  
25

1 MR. CAMIEL: Mouse?

2 MS. GRAYHAWK: Yes.

3 MR. CAMIEL: When she asked for your son Mouse, did she indicate why  
4 she was wanting to talk to him?

5 MS. GRAYHAWK: Yes.

6 MR. CAMIEL: What did she say?

7 MS. GRAYHAWK: She said Judy, where is Mouse? I said he's sleeping.  
8  
9 But she sounded deeply depressed or just like, well where is he. And I go, well, he  
10 is sleeping. He is an EMT and he needs to sleep. His hours were odd. But she  
11 said, well. Where is he? And I said he is sleeping. She said ... She just kept me on  
12 the phone and she said I don't even care to live anymore. I said well why not,  
13 what's wrong. She said, 'Oh, over that Kim Nees murder, I think I'm going to  
14 prison'. I said, to prison for what? She said, well I didn't kill that girl, but I kicked  
15 her in the head a few times. I guess I am the one that lured her down there.  
16  
17

18 MR. CAMIEL: She said she was the one who lured her down there?

19 MS. GRAYHAWK: She said she was the one that lured her down there.

20 MR. CAMIEL: Now, you knew this was Maude on the phone? You had  
21 talked to her before on the phone? You knew her voice?  
22

23 MS. GRAYHAWK: Yeah.

24 MR. CAMIEL: Did she indicate what triggered her talking about this?  
25

1 MS. GRAYHAWK: She was running away from an investigator she said.  
2 She said I got to get out of her, that's why I want Mouse to pick me up so we can  
3 go somewhere. I said who are you running from or what is going on? And she  
4 said there is an investigator over here. Earlier there was an investigator over here  
5 at my house. And he wants to talk to me, but I got to get out of here.  
6

7 MR. CAMIEL: Did she say who the investigator was?

8 MS. GRAYHAWK: Ron Kemp.

9 MR. CAMIEL: Did you know Mr. Kemp?  
10

11 MS. GRAYHAWK: I still don't know him. I don't even know how he  
12 looks.

13 MR. CAMIEL: But, you remember that is the name that she said?

14 MS. GRAYHAWK: Yeah.  
15

16 MR. CAMIEL: Did she indicate what the investigator wanted to talk to her  
17 about?

18 MS. GRAYHAWK: The Kim Nees murder.  
19

20 MR. CAMIEL: After she made these statements to you on the phone, did  
21 the phone call continue?

22 MS. GRAYHAWK: Just for a few more seconds, yeah. Well, I just kept  
23 her on the line because I kind of became flabbergasted or that is ... I didn't know  
24  
25



1 what to say. I didn't want to hear anymore, because as long as I have been married  
2 in this family I didn't have the slightest idea she was involved.

3 MR. CAMIEL: Now, did you know what the Kim Nees murder was?

4 MS. GRAYHAWK: Yeah. Back in 1979 I heard about it and since then. I  
5 never kept up with it though.  
6

7 MR. CAMIEL: So, in 1979 when Kim Nees was murdered were you living  
8 in Poplar at the time?

9 MS. GRAYHAWK: Yeah.  
10

11 MR. CAMIEL: Did you get involved in paying attention to the details of  
12 that investigation?

13 MS. GRAYHAWK: Not really. I am not really into ... I mean I was just  
14 raising a baby and I was married. I felt bad for her; I really felt bad for her, but I  
15 just didn't really keep up with it.  
16

17 MR. CAMIEL: So now, Maude makes this statement to you on the phone.  
18 When the phone call ended how were you feeling?  
19

20 MS. GRAYHAWK: If there was a stronger word than shock, I don't know,  
21 if there was a better word for shock I would say it, but I don't know. Astounded  
22 maybe.  
23

24 MR. CAMIEL: What did you do after you received these statements from  
25 Maude?

1 MS. GRAYHAWK: I was ... I tried to gather my wits together and in those  
2 days I was really close to my sister Mary. I called her up and talked to my sister.

3 MR. CAMIEL: Now what is your sister Mary's full name?

4 MS. GRAYHAWK: Mary Nordwick.

5 MR. CAMIEL: I am sorry the last name?

6 MS. GRAYHAWK: Mary Nordwick.

7 MR. CAMIEL: When you called her what did you tell her?

8 MS. GRAYHAWK: I said, Mary you are not going to believe this, but I  
9 need someone to talk to because I said Maude just more or less confessed to me  
10 that she had played a part in that murder and man I said, I didn't think she ... I  
11 didn't know that was happening. I said I am just shocked. I need someone to talk  
12 to.  
13  
14  
15

16 MR. CAMIEL: Did you tell anyone else?

17 MS. GRAYHAWK: I told my husband.

18 MR. CAMIEL: Your husband?

19 MS. GRAYHAWK: Yeah.

20 MR. CAMIEL: When you told him how did he react?

21 MS. GRAYHAWK: He just said ah, that is just Maude isn't it? Or, Maude  
22 is always like that. He didn't seem to be too concerned or, I don't know, I don't  
23 know how he was shocked. It is not what I would have expected. I mean ...  
24  
25

1 MR. CAMIEL: After you talked to your husband did you go anywhere?

2 MS. GRAYHAWK: Yeah. Well, after we talked I said I can't handle this  
3 information. I said ... He said well should we ... Well what are you going to do?  
4 I said I don't know. I got to like kind of calm down or something, or what should  
5 we do. So I said, let's go down to the Legion Club because Glenna works down  
6 there.  
7

8 MR. CAMIEL: Who is Glenna?

9 MS. GRAYHAWK: Glenna is Kim Nees relative. I think she is her cousin.  
10

11 MR. CAMIEL: And why did you want to go see Glenna?

12 MS. GRAYHAWK: Because for some reason I wanted to tell her that what  
13 I heard. I was dumbfounded so I wanted Glenna to know what I heard. I wanted  
14 her to hear it from me and just to know.  
15

16 MR. CAMIEL: I want to make sure you keep your voice up okay.

17 MS. GRAYHAWK: I wanted Glenna to know what I had heard from  
18 Maude. I wanted Glenna to hear that Maude was involved.  
19

20 MR. CAMIEL: Did you go down to where Glenna works?

21 MS. GRAYHAWK: Yes I did.

22 MR. CAMIEL: Where did she work?

23 MS. GRAYHAWK: The Legion Club.  
24

25 MR. CAMIEL: Did you go down with anyone?

1 MS. GRAYHAWK: My husband.

2 MR. CAMIEL: And did you talk to Glenna at that time?

3 MS. GRAYHAWK: Yes I did.

4 MR. CAMIEL: Now, after you talked to Glenna, did you repeat to her what  
5  
6 Maude had told you?

7 MS. GRAYHAWK: Yes, exactly.

8 MR. CAMIEL: Did you, after talking to Glenna, go to the police with this  
9  
10 information?

11 MS. GRAYHAWK: No.

12 MR. CAMIEL: Why?

13 MS. GRAYHAWK: They wouldn't do anything. I mean the police on the  
14  
15 reservation that investigated it; they would have blew me off.

16 MR. CAMIEL: So, you didn't think they would take it seriously?

17 MS. GRAYHAWK: No. Well, I don't know if they would take it seriously,  
18  
19 but they wouldn't do any investigation.

20 MR. CAMIEL: Did you talk ... At some point were you contacted by  
21  
22 investigators from Centurion Ministries?

23 MS. GRAYHAWK: Yeah, I was.

24 MR. CAMIEL: Do you remember when that first was?  
25

1 MS. GRAYHAWK: It might have been like maybe not quite a year later, or  
2 a ... my time frame is kind of off because that was like seven years ago.

3 COURT: It is very important.

4 MS. GRAYHAWK: Okay.

5  
6 COURT: Try to remember as best you can a time frame when they  
7 contacted you.

8 MS. GRAYHAWK: Okay. Okay, like maybe about a month later; the next  
9 month. Yeah. I was contacted by Richard Hepburn.

10  
11 COURT: What was his name please?

12 MS. GRAYHAWK: His name is Richard Hepburn. I think he is an  
13 investigator.

14  
15 COURT: And, about a month after Maude had called you, he contacted  
16 you?

17 MS. GRAYHAWK: He said Glenna told him what I had relayed to her and  
18 he wanted to know if it was true what I had told her and if I would sign a  
19 statement. But, I was scared and I was trying to take off from him because I  
20 thought, I am talking about my family here. What am I doing, you know?  
21

22 MR. CAMIEL: So Mr. Hepburn came to you and he said he had talked to  
23 Glenna Lockman and he was trying to get you to confirm what you told her?  
24

25 MS. PLUBELL: Objection Your Honor. Leading.

1 COURT: I think under the circumstances I am going to overrule. I just  
2 think it is so easy to get the witness too confused in this circumstance. I am going  
3 to allow that question to go forward.

4 MS. PLUBELL: Thank you Your Honor. We just feel that we need to make  
5 a record.  
6

7 COURT: Yeah, yeah.

8 MR. CAMIEL: You can answer if you can remember the question.

9 MS. GRAYHAWK: I don't remember the question.  
10

11 MR. CAMIEL: Okay.

12 COURT: Try and phrase it without leading.

13 MR. CAMIEL: Why did Mr. Hepburn tell you he was there to see you?  
14

15 MS. GRAYHAWK: Okay. He came to my office and he introduced  
16 himself and then he said, "I am here because Glenna relayed to me some  
17 information you have about that Kim Nees murder". And, for awhile I started  
18 hiding from him.  
19

20 MR. CAMIEL: When you first talked to Mr. Hepburn from Centurion  
21 Ministries did you confirm to him the information or the statement that Maude had  
22 told you?

23 MS. GRAYHAWK: Yeah. I told him it was the truth, but I wouldn't sign a  
24 statement right away.  
25

1 MR. CAMIEL: You refused to sign a statement?

2 MS. GRAYHAWK: Right away, yeah.

3 MR. CAMIEL: And, were there attempts by Mr. Hepburn or other  
4 investigators from Centurion Ministries to try to convince you to sign a statement?  
5

6 MS. GRAYHAWK: It was just Richard that would ask me to sign a  
7 statement. No one else ever asked me.

8 MR. CAMIEL: All right. Did you talk to your husband about whether or  
9 not you should sign a statement?  
10

11 MS. GRAYHAWK: Yeah.

12 MR. CAMIEL: And did he try to talk you out of signing a statement?

13 MS. GRAYHAWK: Yes.

14 MR. CAMIEL: Did he say why?  
15

16 MS. GRAYHAWK: Yeah.

17 MR. CAMIEL: What did he say?

18 MS. PLEBULL: Objection, hearsay.  
19

20 COURT: Sustained.

21 MR. CAMIEL: Okay. Did the fact that you were even thinking about trying  
22 to sign a statement cause some turmoil in your marriage?

23 MS. GRAYHAWK: Yes it did.

24 MR. CAMIEL: In what way?  
25

1 MS. GRAYHAWK: Well, he would start calling me or fighting me because  
2 he said that is my sister you're talking about.

3 MS. PLUBELL: Objection, or motion to move to strike; hearsay. The  
4 answer is going to be hearsay.  
5

6 MR. CAMIEL: Your Honor, it is not offered for the truth. It is to show her  
7 state of mind and why she did what she did.

8 COURT: I am going to overrule the objection based on that. Go ahead  
9 ma'am.  
10

11 MS. GRAYHAWK: Well, I am talking about my family that I have been  
12 married to all these years and I felt like I was back-stabbing them. But then, a part  
13 of me said you can do that because you got to tell the truth. I felt like I was  
14 betraying them and I still feel that way; like I am betraying my family. But, there  
15 is another part of me that is saying, you got to stick with the truth and you are  
16 telling the truth, so that is what gives me strength.  
17

18 MR. CAMIEL: Did your husband talk to you about divorce if you want  
19 through with the statement?  
20

21 MS. GRAYHAWK: Two times. Yes he did.

22 MR. CAMIEL: And what was the indication of what would happen in terms  
23 of your marriage if you signed a statement?  
24  
25



1 MS. GRAYHAWK: He said he was going to divorce me. The first time I  
2 went to the hearing in Deer Lodge he ended up coming with me.

3 MR. CAMIEL: You ended up signing a statement; a sworn statement,  
4 didn't you?

5 MS. GRAYHAWK: Yes.

6 COURT: May I interrupt just a second? Does the State contest anything  
7 about the timing of this conversation with this lady and Mr. Hepburn? Has that got  
8 anything to do with the State's position in this case? Do I need to pursue that at all?  
9

10 MS. PLUBELL: I am sorry Your Honor. I didn't hear the last part of that.

11 COURT: Does the timing, the dates on which this woman had the  
12 conversation with Mr. Hepburn, does that, is the State contesting any of that? Is  
13 that part of any of the State's considerations?  
14

15 MS. PLUBELL: We are not contesting that it happened in 2004.

16 COURT: Okay.

17 MS. PLUBELL: That she talked to the investigator.

18 COURT: Okay. All right.

19 MS. PLUBELL: We do think it may play a part in the Court's analysis.

20 COURT: Okay. All right. Go ahead.

21 MR. CAMIEL: Thank you Your Honor. Your Honor, if I could approach  
22 the Clerk and have a document, her statement, marked?  
23  
24  
25

1 COURT: Yes. Deidre how are you doing on the sound? Are you doing all  
2 right?

3 COURT REPORTER: Good.

4 MR. CAMIEL: Your Honor, if I could approach the witness?

5 COURT: You may.

6 MR. CAMIEL: Ms. Grayhawk, I am handing you what's been marked as  
7 Petitioner's Exhibit One (#1). Do you recognize that?  
8

9 MS. GRAYHAWK: Yes.

10 MR. CAMIEL: What is that?

11 MS. GRAYHAWK: This is my signed, my sworn, statement.

12 MR. CAMIEL: Did you sign it under oath?

13 MS. GRAYHAWK: Yes.

14 MR. CAMIEL: That is the statement you ended up giving to the Centurion  
15 Ministries investigator?  
16

17 MS. GRAYHAWK: Yes.

18 MR. CAMIEL: And, what is the date on that statement?

19 MS. GRAYHAWK: The 9<sup>th</sup> day of February, 2007.

20 MR. CAMIEL: So, there was quite a gap between you finally signing a  
21 statement and from when you first heard Maude Grayhawk on the phone?  
22

23 MS. GRAYHAWK: Yes.  
24  
25

1 MR. CAMIEL: And, that was because of your reluctance as a result of your  
2 family situation?

3 MS. GRAYHAWK: Yes.

4 MR. CAMIEL: Now, in addition to signing the statement, did you go to  
5 Deer Lodge and testify at the clemency hearing in front of the parole board?  
6

7 MS. GRAYHAWK: Yes I did.

8 MR. CAMIEL: You indicated that your husband accompanied you down  
9 there?  
10

11 MS. GRAYHAWK: Yes.

12 MR. CAMIEL: When you were subpoenaed to come to this proceeding, did  
13 that reignite any problems in your marriage?  
14

15 MS. GRAYHAWK: Yes.

16 MR. CAMIEL: In what way?

17 MS. GRAYHAWK: He said basically the same thing. He is really mad at  
18 me. We fought all day Saturday. I cried all day Saturday and then I finally just  
19 drove up here yesterday morning. I don't know if he is ever going to forgive me. I  
20 don't know.  
21

22 MR. CAMIEL: Ms. Grayhawk, do you know Barry Beach?  
23

24 MS. GRAYHAWK: No I don't.  
25

1 MR. CAMIEL: You ever had any communications with him or contact with  
2 him?

3 MS. GRAYHAWK: No.

4 MR. CAMIEL: How about members of the Beach family?

5 MS. GRAYHAWK: No. I don't know them either.

6 MR. CAMIEL: Nothing further. Thank you.

7 COURT: All right.

8  
9 (CROSS EXAMINATION OF JUDY GRAYHAWK)  
10

11 MS. PLEBULL: Good morning.

12 MS. GRAYHAWK: Good morning.

13 MS. PLUBELL: What would you like me to call you?

14 MS. GRAYHAWK: Judy.

15 MS. PLUBELL: And we met once before, right Judy?

16 MS. GRAYHAWK: Yes.

17 MS. PLUBELL: Thank you for being here today. The reaction to Kim Nees  
18 murder in Poplar was pretty, well, people were shocked weren't they?  
19  
20

21 MS. GRAYHAWK: To say the least, yeah.

22 MS. PLUBELL: And it was the talk of the town wasn't it?

23 MS. GRAYHAWK: Yes it was.  
24  
25

1 MS. PLUBELL: And there was a lot of speculation going on about what  
2 might have happened wasn't there?

3 MS. GRAYHAWK: If there was I wasn't in on it. I never, like I said, I  
4 never really followed up on it. I just read it in the papers.

5  
6 MS. PLUBELL: So, you didn't ever hear any rumors or speculation or  
7 theories about what happened even though this is a really small town?

8 MS. GRAYHAWK: Yeah. I never heard anything until this admission from  
9 my sister-in-law.

10  
11 MS. PLUBELL: All right. But, you had been friends with Glenna Lockman  
12 prior to that, correct?

13 MS. GRAYHAWK: No.

14 MS. PLUBELL: No? You didn't know Glenna Lockman at all?

15  
16 MS. GRAYHAWK: I knew her because she was my husband's classmate.

17 MS. PLUBELL: But you weren't friends with her?

18 MS. GRAYHAWK: But I wasn't friends with her.

19  
20 MS. PLUBELL: All right. So, Maude Grayhawk is your sister-in-law and  
21 she has been your sister-in-law since the time of the Kim Nees murder, correct?

22 MS. GRAYHAWK: Correct.

23  
24 MS. PLUBELL: You and Maude have had some difficulties over the years  
25 haven't you?

1 MS. GRAYHAWK: Yeah.

2 MS. PLUBELL: And if Maude were here to testify, but she is not, she  
3 would probably ...

4 MR. CAMIEL: Your Honor, I am going to object. This is stating facts that  
5 are not in evidence; what Maude might or might not say.  
6

7 MS. PLUBELL: I can withdraw the question Your Honor. I can phrase it a  
8 different way.

9 COURT: I think that will be easier.  
10

11 MS. PLUBELL: But, it is fair to say isn't it that there has been some  
12 extreme difficulties with you and Maude over the years hasn't there?

13 MS. GRAYHAWK: I wouldn't call them extreme. But yeah, she has been  
14 difficult to live with.  
15

16 MS. PLUBELL: And, of course, we are only hearing your side of that  
17 today, correct?

18 MS. GRAYHAWK: Yeah.  
19

20 MS. PLUBELL: We are not hearing what her side is, correct?

21 MS. GRAYHAWK: Probably.

22 MS. PLUBELL: And, you two are definitely not close are you? You and  
23 Maude are not close. You don't have a close relationship?  
24  
25

1 MS. GRAYHAWK: Well, this last job that she had, it is hard to get a job  
2 around that small town, I helped her find that job and it turned into a permanent  
3 position with the United States government and she ended up making more money  
4 than me ...

5 MS. PLUBELL: But, you did that because she is family, is that correct?  
6

7 MS. GRAYHAWK: Well, yeah.

8 MR. CAMIEL: Your Honor I am going to object. She is cutting off the  
9 answer.  
10

11 COURT: Yeah, give her a little chance.

12 MS. PLUBELL: I am sorry. Okay, okay. But, Maude is not someone you  
13 go and confide in is she?  
14

15 MS. GRAYHAWK: No.

16 MS. PLUBELL: And you are not someone that she would go confide in  
17 either is she?  
18

19 MS. GRAYHAWK: I don't know. She kind of like, would borrow my  
20 clothes sometimes and ask me ... Well like she ... I felt bad for her so I helped her  
21 find that job.

22 COURT: And she would borrow your clothes occasionally?  
23

24 MS. GRAYHAWK: Yeah. She always liked my clothes and a couple times  
25 she asked Mouse if she could come over and borrow a couple of my shirts. And,

1 she said can you get a bunch of her best shirts and bring them over to the house  
2 and I will go through them and I will borrow a couple of her blouses so Mouse  
3 took them over to her and she took about three of them and never brought them  
4 back yet.

5  
6 COURT: Was this before the phone call or after the phone call?

7 MS. GRAYHAWK: It was before the phone call.

8 MS. PLUBELL: Did you ever hear any rumors about Maude being involved  
9 in Kim's murder?

10  
11 MS. GRAYHAWK: No.

12 MS. PLUBELL: And this phone call with Maude, when Maude called, it  
13 happened in February 2004 right?

14  
15 MS. GRAYHAWK: Right.

16 MS. PLUBELL: And it lasted about two minutes, right?

17 MS. GRAYHAWK: Yeah, a few minutes, about three minutes.

18 MS. PLEBULL: Pardon me?

19  
20 MS. GRAYHAWK: About three minutes maybe.

21 MS. PLUBELL: I believe when you testified at the clemency hearing you  
22 said about two minutes. Does that sound about right?

23  
24 MS. GRAYHAWK: Yeah, something like that.  
25



1 MS. PLUBELL: And Maude told you that an investigator wanted to talk to  
2 her, correct?

3 MS. GRAYHAWK: Correct.

4 MS. PLUBELL: And, isn't that the first thing she told you? Well, first she  
5 wanted to talk to your son.  
6

7 MS. GRAYHAWK: First she was looking for my boy Mouse.

8 MS. PLUBELL: Right, because she wanted him to come and get her.

9 MS. GRAYHAWK: Yeah.

10 MS. PLUBELL: And then she told you that there was an investigator who  
11 wanted to talk to her correct?  
12

13 MS. GRAYHAWK: Yes.

14 MS. PLUBELL: And she named him as Ron Kemp?

15 MS. GRAYHAWK: Correct.

16 MS. PLUBELL: And you didn't know who that was?

17 MS. GRAYHAWK: I still don't know how he looks.

18 MS. PLUBELL: Okay. And she was upset?

19 MS. GRAYHAWK: She was basically upset. She was like despondent,  
20 like, you know, ... Because she said I don't care if I live or die.  
21

22 MS. PLUBELL: And then she blurted out to you that she was involved in  
23 Kim Nees homicide right?  
24  
25

1 MS. GRAYHAWK: Correct.

2 MS. PLUBELL: And that she lured Kim down there?

3 MS. GRAYHAWK: Yes.

4 MS. PLUBELL: And kicked her in the head, right?

5 MS. GRAYHAWK: A few times.

6 MS. PLUBELL: And that was all she did according to this conversation that  
7 you heard?  
8

9 MS. GRAYHAWK: Yes. She said she wasn't the one that killed the girl.

10 MS. PLUBELL: And, this really bothered you didn't it?  
11

12 MS. GRAYHAWK: Yeah it did.

13 MS. PLUBELL: And, you didn't want to carry this burden around. You  
14 didn't want this placed on your shoulders did you?  
15

16 MS. GRAYHAWK: I didn't want to keep it hidden.

17 MS. PLUBELL: And even though Maude had mentioned this investigator  
18 Ron Kemp, you didn't share that information with him did you?  
19

20 MS. GRAYHAWK: No. Like I said, I still don't know how he looks. I  
21 have never spoke to him before.

22 MS. PLUBELL: And instead you went to the Legion Club right?  
23

24 MS. GRAYHAWK: Yeah.  
25

1 MS. PLUBELL: If you had shared the information with Ron ... Well never  
2 mind. But as you recall the conversation with Maude, she wanted to get away  
3 from this Ron Kemp correct?

4 MS. GRAYHAWK: Correct.

5  
6 MS. PLUBELL: And so, are you aware that Maude actually cooperated  
7 with him?

8 MR. CAMIEL: Your Honor, I am going to object to the form of the  
9 question. It is offering facts that are not into evidence.  
10

11 COURT: Based on the "were you aware", I will sustain for now.

12 MS. PLUBELL: You don't know whether or not she ever met with Ron  
13 Kemp do you?

14 MS. GRAYHAWK: No.

15  
16 MS. PLUBELL: And you don't have any background information about  
17 why Ron Kemp wanted to talk with her do you?

18 MS. GRAYHAWK: No.

19  
20 MS. PLUBELL: How would you feel if you were being accused of  
21 participating in a murder that you knew you didn't commit?

22 MS. GRAYHAWK: How would I feel?

23 MS. PLUBELL: Yes.  
24  
25

1 MS. GRAYHAWK: That is hard to answer because I don't think I would  
2 have killed; I would have never killed anybody in the first place. I don't know. It  
3 is a tough question to answer.

4 MS. PLUBELL: You would be upset wouldn't you, when you knew you  
5 were innocent?  
6

7 MS. GRAYHAWK: Yeah. I would be upset.

8 MS. PLUBELL: Would you be even more upset if an officer, a law  
9 enforcement officer told you that he had an eye witness to place you at the scene?  
10

11 MR. CAMIEL: Your Honor I am going to object again. It is offering facts  
12 not in evidence.

13 COURT: What are we talking about, yous and pronouns? I need a lot more  
14 specificity.  
15

16 MS. PLUBELL: Well the problem is, is that they are calling this witness  
17 first your Honor and it is ...

18 COURT: Well ask the same question again, but don't use pronouns.

19 MS. PLUBELL: Okay.  
20

21 COURT: Use the names of the individuals you are identifying and then I  
22 can hear an objection in a better light.  
23  
24  
25

1 MS. PLUBELL: Well, if Ron Kemp, who was an investigator, came to your  
2 house and told you that he had an eye witness to place you at the scene of the Kim  
3 Nees homicide, that would be upsetting to you wouldn't it?

4 MS. GRAYHAWK: Yes.

5 MS. PLUBELL: In fact, you might even feel panicked, right?

6 MS. GRAYHAWK: Probably, yeah.

7 MS. PLUBELL: No further questions Your Honor.

8 COURT: Did Ron Kemp do that?

9 MS. GRAYHAWK: No. He never ever did do that.

10 COURT: All right. Redirect.

11 MR. TOAVS: If I may, Your Honor, I noticed the time. You mentioned a  
12 10:15.

13 COURT: Yeah. I really appreciate that. Do you think you will be able to  
14 finish up here fairly quickly?

15 MR. CAMIEL: I am not sure that I will Your Honor.

16 COURT: All right. We will take a recess folks. I have got two hearings.  
17 We will have to clear out the courtroom because there is privacy issues;  
18 confidentiality issues. Diane, you may stay.

19 (RECESS)

20 CLERK: All rise.

1 COURT: Please be seated. All right. Well, here is what happened folks. I  
2 have a mental commitment and a juvenile detention hearing and they weren't ready  
3 with the people that needed to be. So we are just going to go ahead with this and  
4 they will let me know when they get, particularly the mental commitment, when  
5 they get her down here from the hospital and then we will take a break. I am sorry  
6 about the in and out, but I was doing my best. Okay. We were going to do  
7 redirect.  
8

9 (REDIRECT EXAMINATION OF JUDY GRAYHAWK)  
10

11 MR. CAMIEL: Thank you Your Honor. Ms. Grayhawk, when you got the  
12 call from Maude, did she indicate when the investigator contacted her in relation to  
13 when she was calling you?  
14

15 MS. GRAYHAWK: She said that same day or prior to her calling me.

16 MR. CAMIEL: But she said the same day?

17 MS. GRAYHAWK: Same day, yeah.

18 MR. CAMIEL: After receiving this confession from Maude, did you talk to  
19 your father-in-law, Old Stevie about what Maude had told you?  
20

21 MS. GRAYHAWK: Just before I went to the hearing in Deer Lodge he was  
22 coming in to my office a lot. And on the way out I stopped him and said you know  
23 Old Stevie, I think I am going to have to talk about; tell what Maude did. And he  
24 said ...  
25

1 MS. PLUBELL: Objection, hearsay.

2 COURT: Sustained. Ma'am here is the scoop. You are not allowed to  
3 testify about what other people say, except for Maude.

4 MS. GRAYHAWK: Okay.

5  
6 MR. CAMIEL: I will ask a different question. After the phone call with  
7 Maude did you have further contact with her?

8 MS. GRAYHAWK: No.

9 MR. CAMIEL: Do you know why you didn't have further contact with her?  
10

11 MS. GRAYHAWK: She moved away shortly after that.

12 MR. CAMIEL: Do you know where she moved to?

13 MS. GRAYHAWK: To Denver.

14 MR. CAMIEL: Now, you were asked about your relationship with Maude  
15 in cross examination. You indicated you helped her get a job?  
16

17 MS. GRAYHAWK: Yes.

18 MR. CAMIEL: Did you have animosity toward Maude? Were you mad at  
19 her when you indicate that you heard this statement?  
20

21 MS. GRAYHAWK: Oh you mean when she ...

22 MR. CAMIEL: Yeah.

23 MS. GRAYHAWK: No. I didn't have no animosity toward her.

24 MR. CAMIEL: Do you have any reason that you would make this up?  
25

1 MS. GRAYHAWK: No.

2 MR. CAMIEL: This has been hard for you hasn't it? Coming forward?

3 MS. GRAYHAWK: Yes, yes.

4 MR. CAMIEL: Would it be fair to say you would prefer she never told you  
5  
6 this?

7 MS. GRAYHAWK: Yes. I just ... This has just ... I wish that I had never  
8 heard that.

9 MR. CAMIEL: Nothing further.

10 COURT: Okay.

11  
12 (REXCROSS EXAMINATION OF JUDY GRAYHAWK)

13 MS. PLUBELL: So Judy, you never talked to Maude about the Kim Nees  
14 homicide before this phone call?

15  
16 MS. GRAYHAWK: No.

17 MS. PLUBELL: In February 2004, right?

18 MS. GRAYHAWK: No.

19 MS. PLUBELL: And you never talked to her about it afterwards did you?  
20

21 MS. GRAYHAWK: No.

22 MS. PLUBELL: It was just this one, two minute interval that happened,  
23 correct?

24  
25 MS. GRAYHAWK: The phone call, yeah.



1 COURT: All right. This is the first of a number of witnesses where the  
2 Court is going to ask whether she can be excused with the sense of our discussion  
3 earlier. To the State, any objection to her being excused?

4 MS. PLUBELL: I don't think the State has any objection Your Honor.

5 COURT: And, she is under subpoena, is that correct?  
6

7 MR. CAMIEL: We subpoenaed her, yeah.

8 COURT: Then, she should be released from subpoena from the State's  
9 perspective?  
10

11 MS. PLUBELL: I believe so Your Honor, yes.

12 COURT: Okay.

13 MR. CAMIEL: We have no objection to her being excused.  
14

15 COURT: Okay. Ma'am, one of the things I found very compelling about  
16 your testimony was the conflict between your family and the truth.

17 MS. GRAYHAWK: Yeah.

18 COURT: And, I just want you to know that I appreciate very much that you  
19 have taken the route you have. That is, even though it has been challenging and  
20 you are probably paying a heavy cost.  
21

22 MS. GRAYHAWK: Yeah.

23 COURT: I think the truth is worth it.  
24

25 MS. GRAYHAWK: It is.

1 COURT: Thank you very much. You may be excused. You are free to stay  
2 or free to go as you wish.

3 MS. GRAYHAWK: Thank you.

4 COURT: Okay. Next witness.

5  
6 MR. CAMIEL: Your Honor, the next witness is going to be Janice White  
7 Eagle Johnson.

8 MS. PLUBELL: Your Honor, at this time the State has another objection,  
9 aside from the unavailability issue. And that is the nature of the statement in this  
10 particular case.  
11

12 COURT: Okay. Should we exclude the witness for this?

13 MS. PLEBULL: Yes.

14 COURT: Okay. Sorry Deputy. Take her out for a little bit.

15 MS. PLUBELL: Sorry about that.

16 COURT: All right. Give me the name of the witness please.

17 MS. PLUBELL: It is Janice White Eagle Johnson.

18 COURT: Okay, go ahead.

19  
20 MS. PLUBELL: And, the nature of our objection is that she is apparently  
21 going to repeat something that Maude said that it doesn't inculcate Maude.  
22

23 COURT: Oh, not a statement against interest.

24 MS. PLUBELL: It is not a statement against interest.  
25

1 COURT: Okay. And so, you are objecting to the hearsay because the  
2 exception does not apply.

3 MS. PLUBELL: It does not apply.

4 COURT: Fair enough. Anything else?

5 MS. PLEUELL: I believe that is it.

6 COURT: Okay. Mr. Camiel?

7 MR. CAMIEL: Your Honor ...

8 CLERK: I believe the witness took the exhibit.

9 COURT: Deputy, I need you to go and grab.... there she is over there. Do  
10 you have that piece of paper that was up here?  
11

12 MS. GRAYHAWK: I do.

13 COURT: Would you hand that to the deputy please? Thank you. I forgot to  
14 ask.  
15

16 MR. CAMIEL: You Honor, I forgot to offer it and I would offer Petitioner's  
17 Exhibit Number One (#1).  
18

19 COURT: Any objection to Number One? Do you remember it?  
20

21 MS. PLUBELL: We haven't seen it.

22 MR. CAMIEL: I am sorry.

23 COURT: Number One was the, hang on a second, was her statement.  
24  
25

1 MR. LIGHT: We are not going to make a blanket on all these statements,  
2 but on this particular statement we do not object.

3 COURT: Well, here is the scoop. This is just; your objection will be related  
4 to just admission of this exhibit and nothing else.

5  
6 MR. LIGHT: Okay. Thank you.

7 COURT: No objection?

8 MR. LIGHT: No objection.

9 MS. PLUBELL: No objection.

10  
11 COURT: Admitted.

12 MR. CAMIEL: Thank you Your Honor.

13 COURT: Okay, let's see.

14  
15 MR. CAMIEL: Your Honor, Janice White Eagle Johnson was a co-worker  
16 of Maude Grayhawk's. The investigators came to the Indian Health Center to  
17 interview Maude Grayhawk. Janice White Eagle Johnson was, I believe she was at  
18 the switchboard or at the front desk and she was asked if she could contact Maude  
19 Grayhawk and she called; she is going to indicate she called Maude Grayhawk.  
20 Ms. Grayhawk indicated she didn't want to talk to the investigators. She was  
21 asked by Ms. White Eagle Johnson why not. She said they want to talk to me  
22 about the Kim Nees murder case. She was asked, "Well, what did you have to do  
23 with it"? She said my car was down there that night. Those girls had my car. Her  
24  
25

1 admission that her car was down there at the Kim Nees murder scene is, in fact, a  
2 statement against her interest. It both exposes her to criminal liability, but also to  
3 the other aspects of that rule. An admission that her vehicle was down there when  
4 she denied that she was down there previously to investigators exposes her to  
5 criminal liability. It also exposes her to disgrace, ridicule and hatred as her vehicle  
6 was down at the Kim Nees murder scene. I think it is sufficiently against her  
7 interest that the Court ought to permit it.  
8

9  
10 COURT: Why would she be subject to criminal liability if her vehicle was  
11 down there? Maybe she wasn't driving.

12 MR. CAMIEL: If she provided a vehicle for people to use to go commit this  
13 crime, she may have some form of accomplice liability. If her vehicle was down  
14 there, she may have been down there. She may deny that she was, but by her  
15 admission that her own car was down there, she is basically making ... For her to  
16 say my vehicle was down there that night, and that is what Ms. White Eagle  
17 Johnson will say. She said my vehicle was down there that night. She is putting  
18 her vehicle at the scene of a homicide and she is going to have some explaining to  
19 do if the authorities find out about that statement. And, it is not the kind of  
20 statement that a person would make and expose themselves to that kind of scrutiny  
21 by law enforcement unless it was probably true.  
22  
23  
24  
25

1 COURT: All right. Objection overruled. You may proceed with the  
2 witness. And that, my ruling, hinges upon if I hear testimony pursuant to the  
3 representation.

4 MR. CAMIEL: Thank you Your Honor.

5  
6 (DIRECT EXAMINATION OF JANICE WHITE EAGLE JOHNSON)

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

10  
11 MS. JOHNSON: Yes.

12 COURT: You just come right on around here ma'am. You just scoot up  
13 and you can lower that microphone to suit your purposes.

14  
15 MS. JOHNSON: Okay.

16 MR. CAMIEL: Ma'am, I am going to have you state your full name and  
17 spell out your last name for the court reporter.

18 MS. JOHNSON: Janice White Eagle Johnson. My last name is W-h-i-t-e-  
19 E-a-g-l-e-J-o-h-n-s-o-n.  
20

21 MR. CAMIEL: Ma'am, where do you presently live?

22 MS. JOHNSON: Poplar.

23 MR. CAMIEL: How long have you lived in Poplar?

24  
25 MS. JOHNSON: All my life.

1 MR. CAMIEL: And, I am not asking this to get personal, but how old are  
2 you?

3 MS. JOHNSON: 61 years.

4 MR. CAMIEL: Are you presently employed?

5 MS. JOHNSON: Yes.

6 MR. CAMIEL: Where do you work?

7 MS. JOHNSON: Indian Health Service.

8 MR. CAMIEL: Prior to going to work for the Indian Health Service, were  
9 you in the service, the military?  
10  
11

12 MS. JOHNSON: Yes I was.

13 MR. CAMIEL: What branch?

14 MS. JOHNSON: The Army.

15 MR. CAMIEL: For how long?

16 MS. JOHNSON: Four years.

17 MR. CAMIEL: Did you serve overseas?

18 MS. JOHNSON: Yes I did.

19 MR. CAMIEL: Where?

20 MS. JOHNSON: Vietnam.

21 MR. CAMIEL: And after you came back from being overseas did you  
22  
23  
24  
25 continue in the service in some capacity?

1 MS. JOHNSON: Yes I did.

2 MR. CAMIEL: What did you do?

3 MS. JOHNSON: I joined the Army Reserve.

4 MR. CAMIEL: How long were you in the Reserves?

5 MS. JOHNSON: Seventeen years.

6 MR. CAMIEL: And, after that, did you continue with the service?

7 MS. JOHNSON: Yes I did.

8 MR. CAMIEL: What did you do?

9 MS. JOHNSON: I went to work ... I was already working with the  
10 government Indian Health Service.  
11  
12

13 MR. CAMIEL: So, you have been with Indian Health Service now how  
14 long?  
15

16 MS. JOHNSON: Forty-two years.

17 MR. CAMIEL: What do you do for them?

18 MS. JOHNSON: Pardon me? Medical coder.

19 MR. CAMIEL: Medical coder?  
20

21 MS. JOHNSON: Yes.

22 MR. CAMIEL: And, the facility that you work at, is that right in Poplar?  
23

24 MS. JOHNSON: Yes it is.  
25



1 MR. CAMIEL: Do you know Maude Kern or Maude Grayhawk; she also  
2 has had the last name Kern?

3 MS. JOHNSON: Yes I do.

4 MR. CAMIEL: How do you know her?

5 MS. JOHNSON: She was my neighbor next door and I worked with her at  
6 the clinic.  
7

8 MR. CAMIEL: How long was she a co-worker?

9 MS. JOHNSON: I am guessing, five, six, seven years.  
10

11 MR. CAMIEL: What did she do at the clinic?

12 MS. JOHNSON: She was in contract services.

13 MR. CAMIEL: Do you recall an occasion where some investigators from  
14 Centurion Ministries came to the clinic looking for Maude?  
15

16 MS. JOHNSON: Yes I do.

17 MR. CAMIEL: Where were you when they came in?

18 MS. JOHNSON: I was working the switchboard because our regular  
19 switchboard operator was on some kind of leave, so we were alternating taking  
20 turns on the switchboard.  
21

22 MR. CAMIEL: Do you remember who from Centurion Ministries came in  
23 looking for Maude?  
24

25 MS. JOHNSON: Yes I do.

1 MR. CAMIEL: Who?

2 MS. JOHNSON: It was Mr. McCloskey.

3 MR. CAMIEL: Mr. McCloskey?

4 MS. JOHNSON: Yes.

5 MR. CAMIEL: And do you remember anybody else?

6 MS. JOHNSON: Two more from there.

7 MR. CAMIEL: Did they come up to the switchboard?

8 MS. JOHNSON: Yes they did.

9 MR. CAMIEL: And did they ask something?

10 MS. JOHNSON: Yes.

11 MR. CAMIEL: What did they ask?

12 MS. JOHNSON: They asked me to call Maude Grayhawk. They wanted to  
13 talk to her.

14 MR. CAMIEL: And did you do that?

15 MS. JOHNSON: Yes I did.

16 MR. CAMIEL: What did she respond to you?

17 MS. JOHNSON: She told me to tell them that she wasn't in.

18 MR. CAMIEL: Okay. And did you tell them that?

19 MS. JOHNSON: Yes I did.

20 MR. CAMIEL: After that did you have further conversation after they left?

21  
22  
23  
24  
25

1 MS. JOHNSON: Yes.

2 MR. CAMIEL: And that was conversation with Maude?

3 MS. JOHNSON: Yes.

4 MR. CAMIEL: Okay. What was that conversation?

5 MS. JOHNSON: She came out of her office because contract care services  
6 was right across from the switchboard where I was at and she came out and she  
7 asked me if they left and I said I thought they did and I asked her why and she  
8 didn't want to talk to them. And she said that they are investigating the Kim Nees  
9 murder.  
10  
11

12 MR. CAMIEL: Did you know what the Kim Nees murder was?

13 MS. JOHNSON: Yes.

14 MR. CAMIEL: Were you living in Poplar at the time?

15 MS. JOHNSON: I was, yes.

16 MR. CAMIEL: When she told you that they were investigating the Kim  
17 Nees murder, what did you say?  
18

19 MS. JOHNSON: I asked her why they wanted to talk to her.

20 MR. CAMIEL: Did she respond?

21 MS. JOHNSON: Yes.

22 MR. CAMIEL: What did she say?  
23  
24  
25

1 MS. JOHNSON: My car was down there that night. Those girls had my  
2 car.

3 MR. CAMIEL: When she told you that did you react or respond?

4 MS. JOHNSON: No.

5  
6 MR. CAMIEL: Did you understand, at the time, the significance of what  
7 she was telling you?

8 MS. JOHNSON: I think it took me awhile to realize that it was important.

9 MR. CAMIEL: After she ... Let me turn to when she made this statement.  
10  
11 Do you remember when it was that the Centurion Ministries investigators came in  
12 trying to find Maude?

13 MS. JOHNSON: I couldn't tell you when; 2005, maybe 2006.

14 MR. CAMIEL: At some point did you come forward with what Maude had  
15 told you?  
16

17 MS. JOHNSON: Yes.

18 MR. CAMIEL: How did that come about?

19 MS. JOHNSON: Could you repeat that question again?  
20

21 MR. CAMIEL: Sure. How did you come forward and give a statement  
22 about what Maude had told you after the Centurion Ministries investigators  
23 showed up?  
24

25 MS. JOHNSON: I think they wanted to talk to me.

1 MR. CAMIEL: Did you agree to talk to them?

2 MS. JOHNSON: Yes.

3 MR. CAMIEL: Did you volunteer the information; the statement that  
4 Maude had given you?

5 MS. JOHNSON: Yes.

6 MR. CAMIEL: Did they want you to sign a statement?

7 MS. JOHNSON: Yes.

8 MR. CAMIEL: And did you agree to do that?

9 MS. JOHNSON: Yes.

10 MR. CAMIEL: If I could approach the Clerk.

11 COURT: Let's try and get these exhibits marked beforehand, okay folks. It  
12 saves us.

13 MR. CAMIEL: I apologize.

14 COURT: That's all right. You didn't know.

15 MR. CAMIEL: If I can approach Your Honor.

16 COURT: Yes you may.

17 MR. CAMIEL: Ma'am, do you recognize what has been marked as  
18 Petitioner's Exhibit Number Two (#2) for identification?

19 MS. JOHNSON: Yes.

20 MR. CAMIEL: What is that?  
21  
22  
23  
24  
25

1 MS. JOHNSON: It is my sworn statement.

2 MR. CAMIEL: And what is the date of that statement?

3 MS. JOHNSON: The 9<sup>th</sup> day of February 2007.

4 MR. CAMIEL: I would offer Petitioner's Exhibit Number Two.

5 COURT: Any objection?

6 MR. LIGHT: No objection.

7 COURT: Admitted.

8 MR. CAMIEL: Thank you. After you had the discussion with Maude  
9  
10 where she told you her car was down there, did you ever talk to her again about  
11 this?  
12

13 MS. JOHNSON: No.

14 MR. CAMIEL: Did she continue to work at the Indian Health Service?

15 MS. JOHNSON: Yes.

16 MR. CAMIEL: For how much longer?

17 MS. JOHNSON: I don't recall.

18 MR. CAMIEL: Did she eventually move away?

19 MS. JOHNSON: Yes.

20 MR. CAMIEL: Did you ever go to law enforcement and tell them about  
21 what Maude had told you before you gave this statement to Centurion Ministries?  
22  
23

24 MS. JOHNSON: No.  
25

1 MR. CAMIEL: Was there a reason why you didn't go to law enforcement?

2 MS. JOHNSON: I guess I just didn't want to play a part in it or didn't think  
3 it was that important. Now I realize how important it is, but I think I didn't think it  
4 was important.

5  
6 MR. CAMIEL: Did you have any animosity or bad feelings or bad blood  
7 with Maude?

8 MS. JOHNSON: No.

9  
10 MR. CAMIEL: Did the two of you get along?

11 MS. JOHNSON: Yes.

12 MR. CAMIEL: And, you indicated that in addition to being co-workers you  
13 were actually neighbors?

14 MS. JOHNSON: Yes.

15  
16 MR. CAMIEL: Thank you.

17 COURT: All right. Now we get to take our little recess folks. So, we will  
18 take a brief recess and we will come back. I am hoping in about fifteen minutes.

19  
20 (RECESS)

21 CLERK: All rise.

22 COURT: Please be seated. Well, my apologies folks, but those things just  
23 took a little longer than I had hoped or expected. One of the reasons why I am glad  
24 we are here in Lewistown, believe it or not, so I can get that stuff done. Okay. We  
25

1 were going to do cross examination. Ma'am, if you would come back please. Ms.

2 White Eagle Johnson do you understand that you are still under oath?

3 MS. JOHNSON: Yes I do.

4 COURT: Okay.

5  
6 (CROSS EXAMINATION OF JANICE WHITE EAGLE JOHNSON)

7 MR. LIGHT: Thank you Your Honor. Good afternoon ma'am. Ma'am,  
8 you were handed Petitioner's Exhibit Number Two which I am going to show you  
9 again. Now, you didn't write that or type that yourself, or prepare it yourself did  
10 you?  
11

12 MS. JOHNSON: No.

13 MR. LIGHT: It was prepared for you?

14 MS. JOHNSON: Yes.

15  
16 MR. LIGHT: And you simply just signed the statement, is that right?

17 MS. JOHNSON: Yes.

18 MR. LIGHT: And, isn't it true that nowhere in this statement, dated  
19 February 9, 2007, does it indicate when this took place, right? When the  
20 conversation you had with Maude took place?  
21

22 MS. JOHNSON: Yes.

23 MR. LIGHT: It doesn't say that in this statement anywhere on what date or  
24 time or when that occurred does it?  
25



1 MS. JOHNSON: No.

2 MR. LIGHT: And, when you testified on direct examination, to the best of  
3 your knowledge, this conversation you had with Maude was sometime in 2005 or  
4 2006, correct?

5 MS. JOHNSON: I am just guessing. I don't remember.

6 MR. LIGHT: Okay. So, you really have no recollection when it took place.  
7  
8 Would that be accurate?

9 MS. JOHNSON: Yeah.

10 MR. LIGHT: And, I noticed you signed the statement on February of 2007,  
11  
12 correct?

13 MS. JOHNSON: Yes.

14 MR. LIGHT: So, it could have been two or three years later that you signed  
15  
16 this, right; that you made out the statement as to when it actually took place,  
17 correct?

18 MS. JOHNSON: I signed the statement after I talked to the Centurion  
19  
20 Ministries.

21 MR. LIGHT: If, in fact, this conversation may have taken place in 2005 or  
22  
23 2006 and it was at least a year or maybe two years before you actually signed this  
24 statement?

25 MS. JOHNSON: It could have been that year too, 2007.

1 MR. LIGHT: Now, on the day that this conversation took place, you  
2 indicated that three individuals from Centurion Ministries entered where you were  
3 working, is that correct?

4 MS. JOHNSON: Yes sir.

5 MR. LIGHT: And did you talk to them before you talked to Maude?  
6

7 MS. JOHNSON: I talked to them first I believe.

8 MR. LIGHT: And did they tell you why they were there?  
9

10 MS. JOHNSON: No.

11 MR. LIGHT: I take it for granted they had to tell you that they wanted to  
12 speak to Maude though, right?

13 MS. JOHNSON: They wanted to speak to Maude Grayhawk, yes.

14 MR. LIGHT: And, prior to them introducing themselves to you, did you  
15 have any knowledge of Centurion Ministries?  
16

17 MS. JOHNSON: No sir.

18 MR. LIGHT: Were you aware that they were in the area talking to people?  
19

20 MS. JOHNSON: No sir.

21 MR. LIGHT: After hearing Maude make this alleged statement, how long  
22 before you told law enforcement what you heard?

23 MS. JOHNSON: Could you repeat that again?  
24  
25

1 MR. LIGHT: After hearing the alleged statement, did you ever tell law  
2 enforcement what you heard?

3 MS. JOHNSON: No not till the ... I thought Centurion Ministries were the  
4 law enforcement.

5 MR. LIGHT: Other than Centurion Ministries, did you ever tell anybody  
6 else in law enforcement? Did you ever tell the Poplar police what you had heard?  
7

8 MS. JOHNSON: No.

9 MR. LIGHT: Did you ever tell the Roosevelt County Sheriff's office what  
10 you heard?  
11

12 MS. JOHNSON: No.

13 MR. LIGHT: Did you ever tell any of the prosecutors anything you had  
14 heard?  
15

16 MS. JOHNSON: No. I thought the Centurion Ministries were the police  
17 department.

18 MR. LIGHT: Now, previous to the alleged statement, you never heard  
19 Maude discuss the Kim Nees homicide did you? Prior to the alleged statement?  
20

21 MS. JOHNSON: No.

22 MR. LIGHT: Okay. And, after hearing the alleged statement, you and  
23 Maude never discussed the Kim Nees homicide, correct?  
24

25 MS. JOHNSON: No.

1 MR. LIGHT: Okay. I am going to hand you back the statement just for a  
2 second. In this statement, isn't it true that Maude told you "my car was down  
3 there", correct? Isn't that in the statement?

4 MS. JOHNSON: Yes, but it is not all in there.

5  
6 MR. LIGHT: I am only talking about the statement that you said was under  
7 oath. She indicated, "My car was down there", correct?

8 MS. JOHNSON: Yes.

9  
10 MR. LIGHT: It doesn't say anything in that statement as to what is down  
11 there does it?

12 MS. JOHNSON: It should have read my car was down there that night.

13  
14 MR. LIGHT: I am looking at this statement and it doesn't indicate where  
15 exactly 'down there' is, does it? Correct? All she said was down there, right?

16 MS. JOHNSON: Where the Kim Nees murder took place, yeah.

17 MR. LIGHT: But it doesn't say that.

18 MS. JOHNSON: No, it doesn't say that. But that is what we knew it meant.

19  
20 COURT: All right. Are you going to pursue that 'what we knew it meant'  
21 part? If you are not I am gonna.

22 MR. LIGHT: Go ahead Your Honor.

23  
24 COURT: What do you mean when you say we knew that?

25 MS. JOHNSON: Well ...

1 COURT: Did she tell you that specifically or is that your supposition  
2 afterwards?

3 MS. JOHNSON: She said that the Centurion ... Well, she said the CI's or  
4 the criminal investigators were there investigating the Kim Nees murder. So I  
5 asked her why they wanted to talk to her and she said my car was down there that  
6 night.  
7

8 COURT: Oh I see. Okay. So, that is how you make that connection?

9 MS. JOHNSON: Yes.

10 MR. LIGHT: And then she followed that up by saying 'the girls had my  
11 car'.  
12

13 MS. JOHNSON: The girls had my car.

14 MR. LIGHT: At no time did Maude ever indicate that she was down there  
15 with the car did she?  
16

17 MS. JOHNSON: No.

18 MR. LIGHT: And, I take it for granted that prior to this incident taking  
19 place, you had heard rumors and gossip about Maude Grayhawk and Sissy  
20 Atkinson and the Kim Nees murder, isn't that true?  
21

22 MS. JOHNSON: Yes.

23 MR. LIGHT: That is all I have thank you.

24 COURT: Redirect.  
25

1 (REDIRECT EXAMINATION OF JANICE WHITE EAGLE JOHNSON)

2 MR. CAMIEL: Thank you. Ma'am, when the statement was prepared  
3 before you signed it, did you read it over?

4 MS. JOHNSON: I just glanced at it, but I thought it said everything that I  
5 thought I had said, but I realize it was not everything I said later.  
6

7 MR. CAMIEL: The thing that was left out was the words 'that night'?

8 MS. JOHNSON: Yes sir.

9 MR. CAMIEL: Was anything else left out?  
10

11 MS. JOHNSON: I guess we should have put down by the bridge.

12 MR. CAMIEL: I am sorry. Did she say ...?

13 MS. JOHNSON: Well, he keeps asking me how do I assume they meant  
14 down there. So I probably should have made the sentence.  
15

16 MR. CAMIEL: Well, let me ask you another question. When Maude made  
17 the statement to you, did she sound worried about the fact that her car was down  
18 there?  
19

20 MS. JOHNSON: Yes.

21 MR. CAMIEL: Did it appear to you that that is why she didn't want to talk  
22 to the investigators?  
23

24 MR. LIGHT: Your Honor. Objection. That is leading.

25 COURT: Yes, I sustain.

1 MR. CAMIEL: Now, it was Maude ... Was it Maude that told you why the  
2 investigators were there?

3 MS. JOHNSON: Yes.

4 MR. CAMIEL: Do you know whether she could see the investigators when  
5 they showed up?  
6

7 MS. JOHNSON: Yes.

8 MR. CAMIEL: How was that possible?

9 MS. JOHNSON: There is a window at her office.  
10

11 MR. CAMIEL: So, when you called her and said the investigators were  
12 looking for her, did it appear she already knew they were there?

13 MS. JOHNSON: Yes.

14 MR. CAMIEL: And, she already knew they were looking for her?

15 MS. JOHNSON: Yes.  
16

17 MR. CAMIEL: That is all. Thank you.

18 COURT: Re-cross.  
19

20 (REXCROSS EXAMINATION OF JANICE WHITE EAGLE JOHNSON)

21 MR. LIGHT: Counsel again asked you about your statement and I guess I  
22 am a little bit confused. You indicated this statement could have been made in  
23 2007, is that correct?  
24

25 MS. JOHNSON: Yes.

1 MR. LIGHT: Okay. Just one second. Thank you.

2 COURT: All right. May this witness be excused, and is she under  
3 subpoena?

4 MR. CAMIEL: She is under subpoena by the petitioner and we have no  
5 objection to her being excused.  
6

7 COURT: Okay. How about from the State's perspective?

8 MR. LIGHT: No objection.

9 MS. PLEBULL: No objection.  
10

11 COURT: All right. You may be excused ma'am. You are free to go or stay  
12 as you wish. What do you propose for your next witness?

13 MR. TOAVS: The petitioner would propose next to call Ron Kemp.  
14

15 COURT: And how long do you anticipate that that would take?

16 MR. TOAVS: Thirty minutes.

17 COURT: Well, we haven't been able to sort of stay on track here, but I  
18 think we will just take a lunch break at this time. We will reconvene at one-thirty  
19 (1:30).  
20

21 (LUNCH BREAK)

22 CLERK: All rise.

23 COURT: Please be seated. All right. Petitioner's next witness.  
24

25 MR. TOAVS: Your Honor, the petitioner calls Ron Kemp.



1 MS. PLEBULL: Your Honor, just for point of clarification, the State would  
2 like to renew its objection concerning unavailability of the witness Maude  
3 Grayhawk Kern and we also understand the Court has made its ruling. But, just to  
4 place on the record that the pretrial discovery motion which was filed on Mr.  
5 Beach's behalf nowhere named Maude Kern. It specified witnesses they wished to  
6 interview and she was not on there.  
7

8 COURT: Wait a minute, wait a minute. You didn't say that the first time.

9 MS. PLUBELL: Your Honor, we just got to review the motion at the break.  
10

11 COURT: Does this explain why the petitioners took so long to subpoena  
12 Maude, that you really didn't have a plan to call her? What is the scoop?  
13

14 MR. CAMIEL: No Your Honor. We did have a plan to call her.

15 COURT: Why isn't she in the list?

16 MR. CAMIEL: I don't have it.

17 MR. TOAVS: Could we have a moment Your Honor?  
18

19 COURT: Yeah.

20 MR. CAMIEL: Your Honor, I think the list of named people, the people  
21 that we listed in the discovery motion are people that we wanted to have examined  
22 regarding the palm print. I don't think we listed the names of the people we  
23 wanted to interview.  
24

25 MS. PLEBULL: If I may Your Honor.

1 COURT: Yeah, but let me ask a question first. Would you pronounce your  
2 name so I get it right?

3 MS. PLEBULL: It's Plubell.

4 COURT: Ms. Plubell this isn't sort of a regular trial proceeding where you  
5 have, you know, a deadline for revelation of witnesses and if you miss that then the  
6 Supreme Court has got some fairly clear guidelines how the District Courts deal  
7 with that. Do you agree with that? Or is there some formal process in place in this  
8 case that would give the Court reason to exclude these witnesses.  
9  
10

11 MS. PLUBELL: Well, Your Honor, it goes back to the whole notion of  
12 unavailability and the assumption we were operating under is that they would have  
13 Maude Kern here. Our position has been very clear through all of the pleadings  
14 that the State has filed, that these statements would not be admissible as hearsay  
15 and we repeat that over and over. They were well aware of our position that in  
16 order to get those statements in they were going to have to have the witness here so  
17 we have the ability to question her and then they could question her about the  
18 statements and if she denied making them, then they could call their witnesses.  
19  
20 And, as a point of clarification Your Honor, in the discovery motion I believe at  
21 page three, the last paragraph, it says Beach also requests leave to take depositions  
22 of various individuals listed below. And the only individuals he lists are ... And  
23 then he goes on to say that he would also like palm prints. The only individuals he  
24  
25

1 lists are beginning on page five and I believe ending on page eight and Maude  
2 Grayhawk is not there. The significance of that also Your Honor, is that it is very  
3 different taking a deposition for discovery purposes where you are trying to fish for  
4 information versus to perpetuate testimony.

5  
6 COURT: Yes sir.

7 MR. CAMIEL: Your Honor, we have had every intention of attempting to  
8 get this witness to appear. We had a subpoena issued. We heard she was living in  
9 Great Falls. We had the Cascade County sheriff go out and try and serve her there.  
10 It was only then, and that was in June, it was only then that we learned that she was  
11 in Denver. We learned that ... The Cascade County sheriff learned that from her  
12 daughter. We confirmed it and found out she was in the Cascade County jail. And  
13 then we tried to make arrangements through the Cascade County District  
14 Attorney's office. So this wasn't ... The cases to talk about unavailability and the  
15 lack of good faith effort on the part of counsel, most of those cases are, were,  
16 somebody tries to subpoena somebody the day before or a few days before. We  
17 went to efforts of using the legal authority to try and find her and ultimately she is  
18 sitting in jail. As I read the statute, because this is a civil proceeding, the  
19 mechanism that Mr. Light talked about isn't available. It is available in criminal  
20 prosecutions in grand jury subpoenas. Now, the rule says we have to make a  
21 reasonable effort and I think that is the specific language used in the rule, to secure  
22  
23  
24  
25

1 the presence of the witness, and I believe that we have done that. We have done  
2 what is in our power to do, to secure the presence of this witness.

3 COURT: Okay Ms. Plubell, I need to understand just so I am ruling  
4 consciously here, what the nature of your objection again is the unavailability of  
5 witness, but then you added in this notion of failure to list or something like that.  
6 What is the basis of that part of the objection?  
7

8 MS. PLUBELL: Your Honor, in the Court's ruling earlier, when you ruled  
9 on the issue of unavailability, which I believe Mr. Light had already argued, and if  
10 you need to hear anymore about the case law on that issue he is well qualified to do  
11 that. But, when you came back in after recessing, you indicated that you were  
12 basing your ruling on the fact that you hamstrunged them through your order on  
13 discovery.  
14

15 COURT: In part. In part.  
16

17 MS. PLUBELL: But, your order on discovery had nothing to do with  
18 Maude.  
19

20 COURT: Oh, I see what you are saying. I see what you are saying.

21 MR. TOAVS: May I be heard Your Honor?  
22

23 COURT: Yes.  
24

25 MR. TOAVS: And, I appreciate Your Honor's opportunity for me to review  
the discovery motion and I know that Your Honor is aware that that is the

1 document that I signed. I have had a chance to look at the motion and, on page  
2 two at line twenty-six (26), it says that the discovery sought by this motion  
3 includes Number Two, interview through depositions, witnesses who refuse to give  
4 voluntary statements to Beach's investigators. Now, no where in the motion did  
5 we specifically identify which witnesses had refused to give statements to Beach's  
6 investigators but, that definitely includes Maude Kern. In fact, the State of  
7 Montana knows because at the clemency hearing both of the witnesses that you  
8 just heard testify there including Janice White Eagle Johnson, that when the  
9 Centurion Ministries investigators came to talk to her she advised Janice White  
10 Eagle to tell Centurion Ministries investigators that she was not there and to  
11 misrepresent her whereabouts. And so Your Honor, we did not specifically  
12 identify every person that had refused to talk to Centurion Ministries over the  
13 years. The list of individuals that is included in the motion, Your Honor, is the list  
14 of individuals that have been uncooperative. But, it is also individuals who have  
15 never had their fingerprints taken by law enforcement, to our knowledge.  
16  
17 Whereas, Maude Kern is not on the list because she has had her palm prints and  
18 fingerprints taken.  
19  
20  
21

22 COURT: All right. As an officer of the Court, are you representing to this  
23 Court that even though this lady, Maude Kern's name was not listed, that she was  
24 included in that discovery order?  
25

1 MR. TOAVS: She most certainly was Your Honor. And, I can also  
2 represent to Your Honor that it was my office that was in charge, in terms of our  
3 team in getting the witness subpoenas out. They were all issued within about a  
4 week of each other. There was no delay in the issuance of Maude's subpoenas and  
5 we pursued her appearance at this trial, I would say, even more aggressively than  
6 we pursued the other ones simply because I had talked to the DA and written a  
7 letter to, copied it to the District Attorney's office in Denver.  
8

9 COURT: All right.  
10

11 MS. PLUBELL: Your Honor, just one ... I am sorry...but I feel that I have  
12 to make a record. I am very sorry Your Honor. I am just trying to do my job.  
13

14 COURT: No, that is fine.

15 MS. PLUBELL: The one point that I have to make is that Centurion  
16 Ministries knew full well that they did interview Maude early on in their  
17 investigation. They may have even interviewed her more than once, but then she  
18 had had enough. So, I want that to be on the record. And I also want to be  
19 perfectly clear that on page three, beginning at line twenty-two (22); it says Beach  
20 also requests leave to take depositions of various individuals listed below. I am not  
21 sure how we could possibly even know how to respond to unidentified,  
22 uncooperative witnesses.  
23  
24  
25

1 COURT: Well, I recognize that the Supreme Court was unhappy with the  
2 original District Court here for not making an independent judicial inquiry about  
3 something, but I don't think that that is the case here. If I remind counsel that they  
4 are officers of the Court and when they make statements to the Court that they are  
5 putting their professional credence on the line, not to mention their ticket. So,  
6 based on my understanding of the order, the discovery request, based on my  
7 understanding of the purpose and goal of the petitioner, the Court's original ruling  
8 with regard to availability stands and both legs of that ruling that the Court  
9 articulated also stand. All right. Next witness.  
10  
11

12 MR. TOAVS: Ron Kemp please.

13 (DIRECT EXAMINATION OF RON KEMP)

14  
15 CLERK: Do you solemnly swear the statements you are about to make in  
16 the matter will be the truth, the whole truth, and nothing but the truth so help you  
17 God?

18 MR. KEMP: I do.

19  
20 COURT: Right over here sir.

21 MR. TOAVS: Good afternoon Mr. Kemp.

22 MR. KEMP: Good afternoon.

23  
24 MR. TOAVS: Will you please state your full name and spell your last  
25 name.

1 MR. KEMP: Ron Kemp. K-e-m-p.

2 MR. TOAVS: And Mr. Kemp, how are you employed sir?

3 MR. KEMP: I am employed with the 15<sup>th</sup> Judicial District Court, chief  
4 probation officer.

5  
6 MR. TOAVS: And is that for the whole 15<sup>th</sup> Judicial District?

7 MR. KEMP: That is correct.

8 MR. TOAVS: And, what counties do you cover?

9 MR. KEMP: I cover Sheridan, Daniels and Roosevelt c  
10 Counties...

11  
12 MR. TOAVS: When did you assume the post of chief probation officer for  
13 the 15<sup>th</sup> district?

14 MR. KEMP: May 2011.

15 MR. TOAVS: Just this year?

16 MR. KEMP: Correct.

17 MR. TOAVS: Prior to that sir, what was your employment?

18 MR. KEMP: Roosevelt County Undersheriff.

19 MR. TOAVS: And, did you serve in that capacity for very long?

20 MR. KEMP: November 2003 until May of 2011.

21 MR. TOAVS: Prior to that, during some period there, were you employed  
22 by the Roosevelt County Attorney's office as a criminal investigator?  
23  
24  
25



1 MR. KEMP: I was.

2 MR. TOAVS: What were the years of that employment?

3 MR. KEMP: 2003 until November of 2006.

4 MR. TOAVS: And then, is it after you left the Roosevelt County Attorney's  
5 office that you became the undersheriff?  
6

7 MR. KEMP: That is correct.

8 MR. TOAVS: And then you served as undersheriff until you became the  
9 youth probation officer?  
10

11 MR. KEMP: That is correct.

12 MR. TOAVS: Now, prior to beginning your employment with the  
13 Roosevelt County Attorney's office, did you have any experience in law  
14 enforcement?  
15

16 MR. KEMP: Twenty-five years.

17 COURT: You said County Attorney?

18 MR. TOAVS: Yes. I can clarify?

19 COURT: You were an investigator for the County Attorney?  
20

21 MR. KEMP: I was Roosevelt County Criminal Investigator for the County  
22 Attorney's office.  
23  
24  
25

1 MR. TOAVS: And, just so that we have a clear record Mr. Kemp, what  
2 were the years of your service to Roosevelt County as the County Attorney's  
3 Criminal Investigator?

4 MR. KEMP: 2003 to 2006.

5  
6 MR. TOAVS: And then, prior to 2003, did you have any experience in law  
7 enforcement?

8 MR. KEMP: Twenty-five years.

9  
10 MR. TOAVS: Where did you work in law enforcement before coming to  
11 the Roosevelt County attorney's office?

12 MR. KEMP: I started out in about 1977 or 1978 in Glendive as an intern for  
13 the Glendive Police Department. I think it was in December of 1978 my internship  
14 ended so I went to Valley County and was a reserve deputy on the old Glasgow Air  
15 Force base. On November of 1979 I was called back to Glendive as a full time  
16 police officer. I remained in Glendive from November 1979 until I think April of  
17 1994. Then ...

18  
19  
20 MR. TOAVS: Then what did you do in 1994?

21 MR. KEMP: The city of Wolf Point wanted to start a police department so I  
22 was hired to start the police department there and assume the position of Chief of  
23 Police.  
24  
25

1 MR. TOAVS: And, did you serve in the capacity of Wolf Point Chief of  
2 Police for a significant period of time?

3 MR. KEMP: 1994 until 2003.

4 MR. TOAVS: And then, beginning in 2003, did you cease your activities  
5 with the Wolf Point PD?  
6

7 MR. KEMP: I did.

8 MR. TOAVS: And what did you do after that?

9 MR. KEMP: That's when I went to work for the County Attorney's office.  
10

11 MR. TOAVS: Was there a period of time when you served as the  
12 Administrative Officer for the Poplar police department?

13 MR. KEMP: I did. I think I was contracted by the city of Poplar to organize  
14 their police department. I want to say in August of 2003; maybe September until  
15 November 2006.  
16

17 MR. TOAVS: Now, do you remember a time in February of 2004 when you  
18 were asked to conduct some investigation in relation to the Kim Nees murder?  
19

20 MR. KEMP: I do.

21 MR. TOAVS: What can you recall about that?

22 MR. KEMP: The County Attorney requested that. I interviewed some  
23 people that possibly had some information.  
24

25 MR. TOAVS: Information about?

1 MR. KEMP: The Kim Nees case.

2 MR. TOAVS: And, in that capacity, did you ever have occasion to seek to  
3 interview an individual by the name of Maude Grayhawk or Maude Kern?

4 MR. KEMP: I did.

5 MR. TOAVS: How did that come about?

6 MR. KEMP: I interviewed another individual by the name of Calvin Lester,  
7 I believe, who had given some information about Maude.  
8

9 MR. TOAVS: And so, is that how you determined that you would like to  
10 interview Maude?  
11

12 MR. KEMP: I was told by the County Attorney, based on that information,  
13 to follow up and interview Maude.  
14

15 MR. TOAVS: And then at some point on February 17, 2004, did you travel  
16 to Poplar, Montana, to make contact with Maude Grayhawk Kern?

17 MR. KEMP: I did.

18 MR. TOAVS: And when you traveled to Poplar, Montana, were you  
19 accompanied by a representative of Centurion Ministries?  
20

21 MR. KEMP: The day before I interviewed her I think I was, yes.

22 MR. TOAVS: And so do you remember which day; do you remember the  
23 particular date when you first made contact with Maude in Poplar, Montana?  
24  
25

1 MR. KEMP: I would have to look at my notes, but it would be the day  
2 before I did the interview.

3 MR. TOAVS: I have a copy of what I understand to be your notes. Would  
4 it be helpful to you to review these in order to refresh your recollection?  
5

6 MR. KEMP: Yeah.

7 MR. TOAVS: Does reviewing your notes refresh your memory about the  
8 first time or the date when the first time was that you went to Poplar, Montana and  
9 made contact with Maude Grayhawk Kern?  
10

11 MR. KEMP: I believe it would have been the 16<sup>th</sup> of February because the  
12 interview was done on the 17<sup>th</sup>.

13 MR. TOAVS: So, it was on February 16, 2004?  
14

15 MR. KEMP: I believe so.

16 MR. TOAVS: And, can you tell me what happened then on February 16,  
17 2004 in relation to your investigation of the Kim Nees murder.

18 MR. KEMP: Well, I went to work that day and the County Attorney said  
19 that he wanted me to go and interview Maude or try to set up an interview. I didn't  
20 know who Maude Grayhawk was. I didn't know where she lived or anything else.  
21 So, I don't know if it was Rich Hepburn or who it was that went with me, but he  
22 took me and showed me where she lived.  
23  
24

25 MR. TOAVS: And then, did you go to Maude's home in Poplar, Montana?

1 MR. KEMP: Yeah. We parked out front and I got out and I believe the  
2 entrance to the house was on the side. I think it was maybe the south side, I am not  
3 sure, but it was a side entrance. I started walking up the driveway and a lady came  
4 out of the house and it turned out to be Maude Grayhawk, I believe.  
5

6 MR. TOAVS: So, she was leaving her residence and you were walking up  
7 to the door. Is that how it went?

8 MR. KEMP: Well, I was walking up. I don't know if she was leaving or  
9 saw me coming. I don't know. We met outside anyways.  
10

11 MR. TOAVS: And then how did you identify this individual to be Maude?

12 MR. KEMP: I asked her if Maude was there.

13 MR. TOAVS: And, what did she tell you?

14 MR. KEMP: She said she was Maude.  
15

16 MR. TOAVS: And then what happened after that?

17 MR. KEMP: I told her who I was and that I wanted to know if I could talk  
18 to her about the Kim Nees case.  
19

20 MR. TOAVS: And what did she say?

21 MR. KEMP: I don't remember her exact words, but we agreed to meet the  
22 following day at the Poplar Police Department.  
23

24 MR. TOAVS: Do you remember Maude's mentioning that she wasn't going  
25 to be around very long?

1 MR. KEMP: I think she said she was going to leave for Denver or  
2 something. She was going somewhere out of state or going to leave the area for a  
3 little while and so that is why I wanted to do it the next day.

4 MR. TOAVS: Now, during this initial meeting with Maude, how long did  
5 that take in terms of minutes?  
6

7 MR. KEMP: Minutes, it wasn't very long at all. I don't know, five minutes  
8 maybe.

9 MR. TOAVS: And, did you tell her anything about the reasons why you  
10 wanted to talk to her about the Kim Nees murder at that first meeting?  
11

12 MR. KEMP: No.

13 MR. TOAVS: Why not?

14 MR. KEMP: I didn't know if she would show up.

15 MR. TOAVS: In other words, what do you mean by that?

16 MR. KEMP: Well, I never tell anybody what I want to talk to them about. I  
17 just ... Other than what the generals are, but as far as getting into the information  
18 that I am looking for I see if they will meet with me first.  
19  
20

21 MR. TOAVS: So, you didn't mention any of this information you had  
22 obtained from Calvin Lester to Maude during this first meeting with her in Poplar?  
23

24 MR. KEMP: In that driveway?

25 MR. TOAVS: Yeah.

1 MR. KEMP: No.

2 MR. TOAVS: Are you positive about that?

3 MR. KEMP: Pretty sure.

4 MR. TOAVS: Now ...

5  
6 COURT: I am curious. Why did you delay a day? Why didn't you just  
7 interview her then?

8 MR. KEMP: I wanted to give her some time to think about it.

9  
10 COURT: But, you just said she didn't know what you were going to talk  
11 about.

12 MR. KEMP: Well, like she knew I was going to talk to her about the Kim  
13 Nees case.

14 MR. TOAVS: Do you remember her asking for additional time?

15  
16 MR. KEMP: I don't. I just know that by the time we were done, we agreed  
17 to meet at the Poplar Police Department the next day.

18 MR. TOAVS: Did you meet with Maude then the following day?

19  
20 MR. KEMP: We did.

21 MR. TOAVS: Now, during the course of that meeting did Maude Grayhawk  
22 Kern; did she deny being there on the night of the Kim Nees murder?

23  
24 MR. KEMP: When we first started talking and I told her that I needed to  
25 talk to her about the Kim Nees case and was interested in any information she



1 might have. I believe she said something to the effect that she wasn't involved in it  
2 and then started talking about different things that she thought might have  
3 happened or whatever.

4 MR. TOAVS: And, during the course of this statement that she made to  
5 you, did she indicate to you whether she had called anyone else to talk to them  
6 about her interview with you scheduled for the following day in between the time  
7 when you first met her and the time when you saw her at the police department in  
8 Poplar?  
9

10  
11 MR. KEMP: She said she talked to her dad. She said she called ...

12 MR. TOAVS: And who is her father?

13 MR. KEMP: Steve Grayhawk

14  
15 MR. TOAVS: And is that the ... Do you know Steve Grayhawk her father  
16 to be Steve Grayhawk Sr.?

17 MR. KEMP: I believe so.

18  
19 MR. TOAVS: And, do you know if he was ever affiliated with the Poplar  
20 Police Department at the time of the Kim Nees murder?

21 MR. KEMP: I have heard he worked there. I don't know for a fact. I was  
22 in Glendive when that all happened, so I don't know.

23  
24 MR. TOAVS: Did she mention to you that she had consulted with anyone  
25 else before speaking with you the following day, and that would be the 17<sup>th</sup>?

1 MR. KEMP: Yeah. She said that, I think she said she called Sissy Atkinson  
2 that night and told her that I wanted to talk to her about something.

3 MR. TOAVS: About something?

4 MR. KEMP: The Kim Nees case.

5 MR. TOAVS: Okay. And did she tell you whether Sissy Atkinson had any  
6 advice her?  
7

8 MS. PLEBULL: Objection, hearsay.

9 COURT: Sustained. Is this Maude you are asking about? Or is it ...?  
10

11 MR. TOAVS: It is a statement, I am asking the witness to testify about a  
12 statement that Maude Kern made to him.

13 COURT: Oh, overruled.

14 MS. PLUBELL: No Your Honor, he is asking what Sissy said to Maude.  
15

16 COURT: Well, that is what I thought, but then I rethought it. Why don't  
17 you re-ask the question and we won't have any trouble.

18 MR. TOAVS: Mr. Kemp, did you learn anything during the course of your  
19 interview from Maude Grayhawk whether she felt that there were others  
20 encouraging her not to talk to you about the case?  
21

22 MR. KEMP: She told me that there were others that had encouraged her.

23 MR. TOAVS: And who did that include?  
24  
25

1 MS. PLUBELL: Your Honor I am going to object. This is just a backdoor  
2 way to get hearsay in.

3 MR. TOAVS: Your Honor, we are not offering this for the truth.

4 COURT: No, I disagree. Overruled. You may proceed.

5 MR. TOAVS: Who had told her not to talk to you?  
6

7 MR. KEMP: According to my notes, Sissy Atkinson.

8 MR. TOAVS: Do you have any recollection about Maude Kern or Maude  
9 Grayhawk Kern telling you she had spoken with anyone else in between the time  
10 when you had made initial contact with her and the time when you spoke to her at  
11 the police department there in Poplar?  
12

13 MR. KEMP: The only ones I remember are her dad and Sissy Atkinson.

14 MR. TOAVS: Would reviewing your notes help refresh your memory at all  
15 whether she mentioned to you that she had called anyone else?  
16

17 MR. KEMP: I don't see anybody else's name in here.

18 MR. TOAVS: May I approach the witness Your Honor?  
19

20 COURT: You may.

21 MR. TOAVS: Three paragraphs from the bottom on the second page there  
22 is a mention of an individual named Rose. Do you see that?  
23

24 MR. KEMP: Yes. I guess my notes say that she told Rose she was going to  
25 talk to me too.

1 MR. TOAVS: Now, do you know who the reference to Rose is there?

2 MR. KEMP: No, I have no idea. Rose Atkinson is what my notes say  
3 above that. But I don't know that person.

4 MR. TOAVS: Now, during the course of this interview you had questioned  
5 ... Well let me ask it to you this way in a non-leading way. During the course of  
6 this interview, did you ask Maude questions about your statement that you had  
7 obtained from Calvin Lester?  
8

9 MR. KEMP: I didn't tell her who I got it from but she was giving me her  
10 theory on what could of or might have happened and that she wasn't involved. I  
11 did ask her, I said, "Well why would; tell me why a relative of yours, who  
12 apparently had nothing to gain from this, tell me you were there?"  
13

14 MR. TOAVS: Did she have an answer for that?  
15

16 MR. KEMP: She started to cry.

17 MR. TOAVS: At some point during your interview with Maude did she  
18 begin to express some doubt about whether she may have been there or not?  
19

20 MR. KEMP: She asked me if I thought she could be there or had been there,  
21 but was too intoxicated to remember it.

22 MR. TOAVS: Was that all that was said about that particular issue?  
23

24 MR. KEMP: Yeah.  
25

1 MR. TOAVS: How long would you say that your interview with Maude  
2 lasted?

3 MR. KEMP: I got three pages of notes. I am guessing probably forty (40)  
4 minutes maybe; maybe 45.

5  
6 MR. TOAVS: And, during the course of the interview, did Maude give you  
7 any indication that she had been to the train bridge park that night; the place where  
8 the murder had occurred, on the night when the murder occurred?

9 MS. PLUBELL: I am sorry Your Honor I didn't hear the question.  
10

11 COURT: Okay. Would you ask again please?

12 MR. TOAVS: My question was Mr. Kemp, during the course of your  
13 interview with Maude Grayhawk Kern; did she give you any indication whether  
14 she had been present at the location of the murder in the Nees case on the night of  
15 the murder?  
16

17 MR. KEMP: Let me think. She said that her and four other girls went down  
18 there to party.  
19

20 MR. TOAVS: And, did she identify who those girls were?

21 MR. KEMP: I believe she did. JoAnn Jackson, Jordis Ferguson, Sissy  
22 Atkinson and her.  
23

24 MR. TOAVS: No further questions of the witness Your Honor.

25 (CROSS EXAMINATION OF RON KEMP)

1 MS. PLUBELL: Well let's just start right there Mr. Kemp okay.

2 MR. KEMP: Okay.

3 MS. PLUBELL: In Maude's statement to you when she said that, she was  
4 talking about far earlier in the evening was she not?

5 MR. KEMP: I believe she told me, my notes say 2130 to 2200 hours.

6 MS. PLUBELL: And, she was not in any way saying that she was at the  
7 scene of the murder when the murder happened, was she?  
8

9 MR. KEMP: No she wasn't.

10 MS. PLUBELL: And, are you familiar with the organization ...

11 COURT: May I stop you for a second? Is there something in the record that  
12 establishes the relative time of death?  
13

14 MS. PLUBELL: It's ... Well, from the trial record there is somewhat Your  
15 Honor. Dr. Path's testimony, along with the testimony of the last time anyone  
16 could definitively say they had seen Kim versus testimony of the officers from, the  
17 tribal officers who saw the truck at one point and then went back later when the  
18 truck was still there. But it is not conclusive.  
19

20 COURT: Is there a range that the parties could agree would be a reasonable  
21 range for the Court to ... Because when this gentleman says a time frame, it seems  
22 like that range of death might be relevant.  
23

24 MS. PLUBELL: Well, it depends on who you listen to.  
25

1 COURT: So, there is no real agreement.

2 MS. PLUBELL: It would have to have been after twelve forty-five (12:45)  
3 when she was last seen, A.M. and, the body was discovered at seven A.M.

4 COURT: Is that reasonably ... Do you reasonably concur with that general  
5 range?  
6

7 MS. PLUBELL: Oh, twelve forty-five A.M. I am sorry Your Honor.

8 COURT: Twelve forty-five A.M.

9 MR. CAMIEL: It is my understanding that she was last seen at Twelve  
10 forty-five A.M. There was testimony in the record about screams being heard  
11 around Two A.M. The truck was seen in the park by the train bridge by officers up  
12 on the highway I think at four something A.M., but they didn't actually go down to  
13 the truck and discover the body until seven A.M.  
14  
15

16 COURT: And you said that she claimed she was there at 2100 some odd  
17 hours?

18 MR. KEMP: Yeah. My notes say that when they were there no one was  
19 there and it was 2130 to 2200 which is Nine-thirty (9:30) P.M. to ten (10:00) P.M.  
20 They ran out of alcohol and they left.  
21

22 MS. PLUBELL: Wasn't it a common practice back then for teenagers, or  
23 young people, in Poplar to kind of cruise Main Street?  
24

25 MR. KEMP: I don't know ma'am. I wasn't even working there then.

1 MS. PLUBELL: Oh okay. I am sorry. Are you aware that that was sort of a  
2 common place where people congregated?

3 MR. KEMP: That is what I have been told.

4 MS. PLUBELL: And, are you familiar wit the organization of Centurion  
5 Ministries?  
6

7 MR. KEMP: I am.

8 MS. PLUBELL: And, how did you become familiar with that particular  
9 organization?  
10

11 MR. KEMP: Through the Roosevelt County Attorney at that time.

12 MS. PLUBELL: And, had representatives from Centurion Ministries been  
13 meeting with the Roosevelt County Attorney?  
14

15 MR. KEMP: I believe they had.

16 MS. PLUBELL: And, the Roosevelt County Attorney at that time was Fred  
17 Hoffman, is that correct?  
18

19 MR. KEMP: That is correct.

20 MS. PLUBELL: And, at that time Fred Hoffman, according to what you  
21 testified at the parole board hearing, believed that he had to cooperate with  
22 Centurion Ministries to avoid looking like he was part of some conspiracy, correct.  
23 ?  
24

25 MR. TOAVS: Objection. Lacks foundation.



1 COURT: I am sorry?

2 MR. TOAVS: I object on the basis of foundation and relevance.

3 MS. PLUBELL: It goes to why he ended up ever interviewing Maude, Your  
4 Honor.

5  
6 COURT: Well, I think I will sustain for foundation if you want to lay  
7 foundation.

8 MS. PLUBELL: Did you testify at Mr. Beach's clemency proceeding in  
9 June of 2007?

10  
11 MR. KEMP: I did.

12 MS. PLUBELL: And, do you recall indicating why Fred Hoffman believed  
13 he needed to cooperate with Centurion Ministries?

14 MR. TOAVS: I object again on foundation.

15  
16 COURT: Well, she is trying to lay the foundation, overruled.

17 MR. KEMP: I know what I was told by Fred Hoffman.

18 MS. PLUBELL: When Centurion Ministries came to Poplar their sole  
19 purpose was to somehow dig up evidence that Mr. Beach was innocent, wasn't it?  
20

21 MR. TOAVS: Objection. Lacks foundation.

22 COURT: Sustained.

23 MS. PLUBELL: Are you aware of what Centurion Ministries purpose was  
24 when they came to Poplar and started meeting with Fred Hoffman?  
25

1 MR. KEMP: I believe that they were ...

2 MR. TOAVS: Objection. There is no foundation.

3 MS. PLUBELL: I asked him if he was aware Your Honor.

4 COURT: I think the objection would be speculation, but as to foundation  
5  
6 overruled.

7 MS. PLUBELL: Did you meet with investigators from Centurion  
8 Ministries?

9 MR. KEMP: I did.

10 MS. PLUBELL: Do you have any information about the effect on the  
11 community when Centurion Ministries made its presence and purpose known in  
12 Poplar?  
13

14 MR. TOAVS: Object. It is beyond the scope Your Honor.

15 MS. PLUBELL: I don't think it is beyond the scope Your Honor. This is a  
16 very small community where people were coming in and conducting all sorts of  
17 investigation based on rumor and speculation.  
18

19 COURT: Yeah. Because this is a Judge hearing I think there is a little more  
20 latitude here. I am going to overrule. You may proceed.  
21

22 MR. KEMP: Can you repeat your question please?

23 MS. PLUBELL: What was the effect upon that small community to  
24 Centurion Ministries' presence in the community?  
25

1 MR. KEMP: As far as I can speak for my involvement with this  
2 investigation was, some people liked them and some people didn't.

3 MS. PLUBELL: Did it stir up discussion about the Nees homicide?

4 MR. KEMP: It did.

5 MS. PLUBELL: Are you aware of rumors starting to circulate after that?

6 MR. TOAVS: Object on relevance.

7 COURT: Overruled.

8 MR. KEMP: Am I aware of any of the rumors?

9 MS. PLUBELL: Did the rumor mill begin after that; after Centurion  
10 Ministries made their presence known?  
11

12 MR. KEMP: Personally, I didn't hear anything new but, like these names,  
13 Calvin Lester, Maude Grayhawk; I didn't know these people before.  
14

15 MS. PLUBELL: All right. Anything you did in this case you did it at Mr.  
16 Hoffman's direction, correct?  
17

18 MR. KEMP: That is correct.

19 MS. PLUBELL: And, you were an investigator for the County Attorney.  
20 You were not acting in a law enforcement official capacity?  
21

22 MR. KEMP: That is correct.

23 MS. PLUBELL: And, at some point, isn't it true that Centurion Ministries  
24 produced an alleged eye witness to the Nees homicide?  
25

1 MR. KEMP: Yes.

2 MS. PLUBELL: And, that person's name was Calvin Lester, correct?

3 MR. KEMP: That was Calvin Lester.

4 MS. PLUBELL: And, Mr. Hoffman directed you to interview Calvin Lester,  
5  
6 didn't he?

7 MR. KEMP: Yes.

8 MS. PLUBELL: But, before you ever interviewed Calvin Lester, Centurion  
9  
10 Ministries had already gotten some sort of signed statement from him didn't they?

11 MR. KEMP: I believe so.

12 MS. PLUBELL: And, did you ever review that statement?

13 MR. KEMP: I think I did.

14 MS. PLUBELL: And then you interviewed Calvin Lester as well didn't  
15  
16 you?

17 MR. KEMP: I did.

18 MS. PLUBELL: Do you recall when you did that?

19  
20 MR. KEMP: It would have been before the Maude Grayhawk interview.

21 MS. PLUBELL: In February of 2004?

22 MR. KEMP: Right.

23  
24 MS. PLUBELL: So, if your notes reflected February 13<sup>th</sup> of 2004, would  
25 that seem about right?

1 MR. KEMP: It probably would be.

2 MS. PLUBELL: Did you take notes from that interview?

3 MR. KEMP: I might of. I usually do. I haven't seen them since that  
4 interview.

5  
6 MS. PLUBELL: Do you recall if there were discrepancies between the  
7 information Calvin Lester provided to Centurion Ministries and the information he  
8 provided to you?

9  
10 MR. KEMP: I don't recall what he said to them. I just remember what he  
11 told me.

12 MS. PLUBELL: All right. And, he claimed to have witnessed this homicide  
13 back when he was ten (10) years old, correct?

14  
15 MR. KEMP: He said that when he was ten that he had heard some noises  
16 and went down to the railroad tracks and from bushes saw some girls kicking or  
17 had somebody on the ground.

18  
19 MS. PLEBELL: And, in that he implicated Maude Grayhawk as one of  
20 those girls, didn't he?

21 MR. KEMP: He said he recognized her as being one of them, yes.

22  
23 MS. PLUBELL: And consequently, Centurion Ministries wanted Fred  
24 Hoffman to have you interview Maude, correct?

25 MR. TOAVS: Objection Your Honor. That lacks foundation.

1 MS. PLUBELL: Did Centurion Ministries ...

2 COURT: Just a minute, let me rule.

3 MS. PLUBELL: Okay. I am sorry.

4 COURT: I will sustain.

5 MS. PLUBELL: Did Centurion Ministries want you to interview Maude  
6 Grayhawk?  
7

8 MR. KEMP: Fred Hoffman, I believe ... Centurion Ministries through Fred  
9 Hoffman did, yes.  
10

11 MS. PLUBELL: And, in fact, they actually initially gave you a ride to her  
12 house, correct?

13 MR. KEMP: To show me where she lived, yeah.

14 MS. PLUBELL: You introduced yourself to Maude and told her why you  
15 wanted to talk with her, right?  
16

17 MR. KEMP: I told her, yeah.

18 MS. PLUBELL: And, you specified it was about the Kim Nees murder  
19 didn't you?  
20

21 MR. KEMP: That is correct.

22 MS. PLUBELL: And, she volunteered to you that she was going back and  
23 forth between Poplar and was in the process of maybe moving to Denver, correct?  
24

25 MR. KEMP: Denver. I believe she told me she would be leaving, yeah.

1 MS. PLUBELL: And that she would be leaving shortly?

2 MR. KEMP: Yeah. She was leaving within, I believe within a week or two.

3 I don't remember.

4 MS. PLUBELL: And, she had no reason to volunteer that information to  
5 you did she?  
6

7 MR. KEMP: No.

8 MS. PLUBELL: And, this is information that you would not have been  
9 aware of had she not volunteered it to you?  
10

11 MR. KEMP: That is correct.

12 MS. PLEBULL: But, she agreed to set up a time to meet with you the  
13 following day, didn't she?  
14

15 MR. KEMP: That is correct.

16 MS. PLUBELL: And, she showed up for that interview?

17 MR. KEMP: Yes she did.

18 MS. PLUBELL: And, there was no reason why she had to do that either was  
19 there?  
20

21 MR. KEMP: No.

22 MS. PLUBELL: And, during your interview with Maude you told her, you  
23 didn't tell her who, but you told her you had an eye witness that placed her at the  
24 scene of the Nees homicide, didn't you?  
25

1 MR. TOAVS: Could I ask counsel to speak up a little bit. I am having a  
2 difficult time hearing her questions.

3 MS. PLUBELL: I know it is hard with the back. During the interview with  
4 Maude you told her you had an eye witness that placed her at the scene of the Nees  
5 homicide.  
6

7 MR. KEMP: Yeah. I told her a relative.

8 MS. PLUBELL: And, that had seen her there.

9 MR. KEMP: Yeah.  
10

11 MS. PLUBELL: And, that eye witness was Calvin Lester, correct?

12 MR. KEMP: That is correct.

13 MS. PLUBELL: That is who you were referring to. And, Calvin Lester  
14 later recanted his statement didn't he?  
15

16 MR. TOAVS: Objection. Foundation.

17 COURT: Sustained.

18 MS. PLUBELL: Are you aware that Calvin Lester later recanted his  
19 statement?  
20

21 MR. KEMP: At the time I asked Calvin to take a polygraph and I worked  
22 with the FBI to set that up. And I was later contacted by the FBI and said that he  
23 decided not to take the polygraph. I wasn't given any reason or anything. Later on  
24  
25



1 I learned through different legal sources that he evidently recanted his story, that is  
2 correct.

3 MS. PLUBELL: And, that all came about when the FBI did an interview  
4 with him in relationship to the polygraph, correct?  
5

6 MR. KEMP: To take the polygraph, yeah.

7 MS. PLUBELL: And, that was something you had requested.

8 MR. KEMP: Pardon?

9 MS. PLUBELL: That was something you had requested and set up with the  
10 FBI.  
11

12 MR. KEMP: Yeah.

13 MS. PLUBELL: So, really there was no eye witness that placed Maude at  
14 the scene correct?  
15

16 MR. KEMP: If he recanted, no.

17 MS. PLUBELL: Now, you had experience in law enforcement and so one  
18 of the techniques you used when you interviewed Maude was to repeatedly tell her,  
19 but you know, I have this eye witness.  
20

21 MR. KEMP: That is correct.

22 MS. PLUBELL: And so how would you explain that?

23 MR. KEMP: That is what I asked her to do. Why would someone,  
24 particularly a relative say you were there if you weren't?  
25

1 MS. PLUBELL: And, you pressed her because that is what you do when  
2 you are interviewing, correct?

3 MR. KEMP: I don't know that I pressed her, but I asked her several times.

4 MS. PLUBELL: And eventually, Maude became upset by that didn't she?

5 MR. KEMP: She started to cry.

6 MS. PLUBELL: And, would you agree that it isn't unreasonable to become  
7 upset over the prospect of an alleged eye witness placing you at the scene of a  
8 crime you didn't commit?  
9

10 MR. KEMP: That is possible, yes.

11 MS. PLUBELL: Especially when the crime in question is murder?

12 MR. KEMP: Correct.

13 MS. PLUBELL: When you pressed Maude, she finally offered a theory,  
14 right, that maybe she was using so many drugs and drinking so much that she just  
15 blacked it out.  
16

17 MR. KEMP: I believe what she said, she asked me, "Do you think it is  
18 possible I could have been there, but was too drunk to remember it?"  
19

20 MS. PLUBELL: Did she not reference drugs as well?

21 MR. KEMP: I don't remember. I don't have anything about drugs in ... I  
22 don't have anything about that in my notes, but I know that during the interview  
23 she did say that during that time frame she had been smoking a lot of marijuana.  
24  
25

1 MS. PLUBELL: And drinking a lot of alcohol.

2 MR. KEMP: Right.

3 MS. PLUBELL: And, that was merely a theory she posed to try and answer  
4 a hypothetical of why an eye witness would place her at the scene, correct?  
5

6 MR. KEMP: Could be.

7 MS. PLUBELL: And, that hypothetical turned out to be based on inaccurate  
8 information, right?  
9

10 MR. KEMP: The information that I had from Calvin Lester.

11 MS. PLUBELL: And, Maude did not confess to anything did she?

12 MR. KEMP: No she did not.

13 MS. PLUBELL: And, she did not implicate anyone else like Sissy  
14 Atkinson, did she?  
15

16 MR. KEMP: She indicated that she had been with Sissy that evening, but  
17 she did not implicate Sissy in the homicide?

18 MR. KEMP: No, she didn't say that Sissy did it.

19 MS. PLUBELL: And, she never stated that she did not think Barry Beach  
20 was not guilty of the homicide did she?  
21

22 MR. KEMP: No.

23 MS. PLUBELL: She only offered a theory that he might have had some  
24 help.  
25

1 MR. KEMP: That is correct.

2 MS. PLUBELL: And, that help being to lure Kim down to the train bridge  
3 area.

4 MR. KEMP: I believe that is correct, that she thought she might have been  
5 lured down there by somebody.  
6

7 MS. PLUBELL: So, without Calvin Lester's eye witness account which he  
8 later admitted was untrue, you never would have interviewed Maude Grayhawk  
9 would you?  
10

11 MR. KEMP: I don't know if I would have never interviewed her, but I  
12 wouldn't have had the information provided by Calvin Lester.

13 MS. PLUBELL: Thank you.

14 COURT: Before we do redirect, we need to step back here for a second.  
15 Under what exception to the hearsay rule should this testimony be allowed about  
16 any statements made by Maude Grayhawk. There certainly isn't any statements I  
17 have heard of statements against interest.  
18

19 MR. TOAVS: No Your Honor, but there are statements that we believe  
20 would be construed against her best interest. For example, the two individuals that  
21 she called prior to meeting with Ron, including Rose Atkinson and Sissy Atkinson.  
22 That will become more clear as the hearing goes on in relationship to those people  
23 Your Honor. And then ...  
24  
25

1 COURT: So, you are telling me I should accept this testimony from this  
2 gentleman based on something I am going to hear down the road. I don't know  
3 about that one.

4 MR. TOAVS: Well, that is also ...

5  
6 COURT: That doesn't fit within ... Where is the hearsay exception for that  
7 one?

8 MR. TOAVS: Well that is under Rule 801 Your Honor. Those are not  
9 offered for the truth of whatever matters were asserted, but merely for the fact that  
10 these are the two individuals that she called prior to meeting with Mr. Kemp. In  
11 addition, we believe that Ms. Kern's statement that maybe she was there and just  
12 can't remember that that is not a statement that someone would make if they knew  
13 they hadn't been there. And, more importantly, Your Honor, Mr. Kemp is offered  
14 for purposes of proving the circumstances that precipitated Maude Grayhawk's  
15 phone call to Judy Grayhawk on the day before. It is our burden under the rule  
16 Your Honor, under 804, to show the circumstances surrounding the declaration and  
17 the hearsay declarant Maude Grayhawk made the phone call to Judy Grayhawk the  
18 same day that Mr. Kemp talked to her. So, his testimony forms part of the  
19 circumstances under Rule 804(b)(3) that the Court considers in determining what  
20 weight to place upon that statement that Maude Grayhawk made to Judy Grayhawk  
21 the day before.  
22  
23  
24  
25

1 COURT: Yeah, but that is 804(b)(3) is statement against interest. I haven't  
2 heard anything that is a statement against interest that would allow me to allow  
3 the... any testimony, statements made by that lady to this gentleman.

4 MR. TOAVS: Your Honor under 804(b)(3) it is required that corroborating  
5 circumstances clearly indicate the trustworthiness in the statement. And, Mr.  
6 Kemp's testimony is offered in that regard, in relation to the Judy Grayhawk  
7 testimony because it was after Mr. Kemp came to her home and said he wanted to  
8 talk to her about the Nees murder that she got on the phone and called Judy  
9 Grayhawk, Sissy Atkinson and Rose Atkinson.  
10  
11

12 COURT: Well, the whole idea about corroboration is when it is still a  
13 statement against interest.

14 MR. TOAVS: Your Honor, I think my point, and maybe I am not being  
15 clear, but Mr. Kemp offers background information that is not hearsay that has to  
16 do with his own statements.  
17

18 COURT: But, I have statements from him that are direct quotations from  
19 this lady and I am wondering whether I should exclude those from my  
20 consideration because they are hearsay. The State objected and I should have  
21 made them be more explicit about the objection for this particular witness, but we  
22 will worry about that at some other point. But, the fact is how could I allow  
23 anything that this lady said because they are not statements against interest?  
24  
25

1 MR. TOAVS: Well, I guess without knowing what particular statement we  
2 are talking about Your Honor, I have a hard time responding.

3 COURT: Anything this lady said that is repeated on the stand would be  
4 excluded because of the hearsay. Anything, unless it is a statement against  
5 interest. I heard no statement against interest therefore I would exclude any  
6 statement that he said she said. Then, any corroboration or any other testimony I  
7 can accept from him, but I would have to exclude any statement that she made to  
8 him that he articulated on the stand. That is what I am asking you about. Give me  
9 a reason why I shouldn't exclude those.  
10  
11

12 MR. CAMIEL: Your Honor, if I could. There are two parts to Mr. Kemp's  
13 testimony. One part explains the context of Maude Grayhawk's call to Judy  
14 Grayhawk. There is no hearsay there. Mr. Kemp is saying he goes up and tells  
15 Maude Grayhawk I want to talk to you about the Kim Nees murder. And then she  
16 gets on the phone and among the people she calls is Judy Grayhawk and says she  
17 doesn't want to talk to the investigator and then gives the statement that she gave  
18 that the Court heard from Judy Grayhawk. None of that involves any hearsay. The  
19 part that we believe is a statement against interest is when she is asked about being  
20 down there and was she involved, and instead of saying there is no way, I was  
21 never down there. She says, is it possible I was there and I don't remember it  
22  
23  
24  
25

1 because I was too drunk. That is not a denial. That is a statement ... That is not  
2 the kind of statement that somebody would make if they were not there.

3 MS. PLUBELL: Your Honor, if I may.

4 MR. CAMIEL: Your Honor, I am sorry ...

5 COURT: No, let him finish. Let the gentleman finish and I will allow you.  
6

7 MR. CAMIEL: Time and time again in the context, for example, of a  
8 defendant being questioned by police officers, the Court often hears that they ask  
9 somebody if they were involved with something and they didn't deny it. Or ...  
10  
11 This is similar to that.

12 COURT: This rule does not take about not denying, it talks about  
13 statements against interest. There is sort of semi-equivocation statements. This is  
14 you got to have a statement against interest.  
15

16 MR. CAMIEL: For her to tell a law enforcement person; he is an  
17 investigator for a District Attorney, when she is asked whether she was down there,  
18 for her to ask him, is it possible that I was there and I don't remember because I  
19 was too drunk, we suggest is not a statement in her favor, it is a statement against  
20 her interest. It suggests that maybe she was there and she is trying to use  
21 intoxication as a way of hedging her involvement.  
22

23 COURT: Sir, would you refer to your notes, refresh your memory and then  
24 tell me what she precisely said with regard to you; this sort of gee, is it possible?  
25



1 MS. PLUBELL: Your Honor, if I may, may I please?

2 MR. KEMP: You want me to go? In my notes I have that she doesn't  
3 remember if she was there; that she might have blacked out. That is what I wrote  
4 in my notes. What she told me was, "Is it possible that I could have been there and  
5 I don't remember it because I was intoxicated".  
6

7 COURT: Okay ma'am.

8 MS. PLUBELL: I think it is very important, since we want to talk about  
9 context, that the whole context of her offering that was in response to an officer  
10 telling her that there was an eye witness who is nowhere to be seen in this  
11 proceeding, who placed her at the scene of the crime. This is nothing more than a  
12 hypothetical explanation to a hypothetical question based on false information. It  
13 is not a statement against interest.  
14  
15

16 COURT: All right. The Court is going to strike from its consideration any  
17 statement made by Maude Grayhawk Kern to this gentleman that was repeated on  
18 the stand. It doesn't mean I am striking the rest of the testimony, but any statement  
19 made by her, because the Court has not found that statements made were  
20 statements against interest. All right. You may proceed with redirect.  
21

22 (REDIRECT EXAMINATION OF RON KEMP)

23 MR. TOAVS: Thank you Your Honor. Just to be clear Mr. Kemp, other  
24 than telling Maude Grayhawk Kern on the 16<sup>th</sup> you wanted to talk to her about the  
25

1 Nees murder, did you give her any information that you had gathered during your  
2 investigation?

3 MR. KEMP: No.

4 MR. TOAVS: So, is it fair to conclude that the only thing she knew is that  
5 you were from the Roosevelt County Attorney's Office?  
6

7 MS. PLUBELL: Objection. Asked and answered.

8 COURT: Well, overruled.

9 MS. PLUBELL: Called for speculation as well Your Honor.  
10

11 COURT: Sustained.

12 MR. TOAVS: What was the only information you told her?

13 MR. KEMP: That I wanted to talk to her about the Kim Nees case.  
14

15 MR. TOAVS: And, did you also tell her who you were?

16 MR. KEMP: I told her who I was and where I worked.

17 MR. TOAVS: And who you worked for?

18 MR. KEMP: Yes.  
19

20 MR. TOAVS: Now, you were asked a series of questions by Ms. Plubell  
21 concerning Calvin Lester. Do you recall that?

22 MR. KEMP: Yes.  
23

24 MR. TOAVS: And, do you know of your own personal knowledge whether  
25 Calvin Lester recanted?

1 MR. KEMP: Of my own personal knowledge?

2 MR. TOAVS: Right.

3 MR. KEMP: Just what I have been told by counsel, that he had refused to  
4 take it and had recanted.

5  
6 MR. TOAVS: Now, do you know ... Do you have any information about  
7 why Calvin Lester recanted?

8 MR. KEMP: No.

9  
10 MR. TOAVS: Do you have anything that tells you that his testimony was  
11 false?

12 MR. KEMP: No. I have never talked to him since I did the interview.

13  
14 MR. TOAVS: And, at the time that you conducted this interview with  
15 Maude Grayhawk did you believe it to be true, the information that is from Calvin  
16 Lester that you were asked about?

17 MR. KEMP: I don't know if it was true or not. I know he said it. I know  
18 what he told me. I was wanting to meet with Maude to see what she had to say.

19  
20 MR. TOAVS: No further questions Your Honor.

21 MS. PLUBELL: No further questions Your Honor.

22 COURT: Is this gentleman under subpoena?

23  
24 MR. TOAVS: Yes he is Your Honor.

25 COURT: May he be released from subpoena? Any objection?

1 MR. TOAVS: No Your Honor.

2 MS. PLUBELL: No Your Honor.

3 MR. KEMP: All right. Thank you.

4 COURT: You're welcome. All right. Now let's not get into the same  
5  
6 trouble here. I want to hear if there is any objection with regard to something like  
7 hearsay.

8 MR. CAMIEL: Your Honor, the petitioner's next witness is Don  
9 O'Connell.

10  
11 COURT: Any hearsay issues?

12 MR. LIGHT: Well, just that it is not a statement against interest Your  
13 Honor. I think you will see.

14 COURT: I need to understand, is this witness going to talk, testify, about  
15 statements made by somebody else.

16  
17 MR. LIGHT: Yes he is Your Honor.

18 COURT: And, is that testimony going to be about statements made by  
19 Maude Grayhawk?  
20

21 MR. LIGHT: No.

22 COURT: By some other person?

23 MR. LIGHT: Somebody else who I understand is here and I think  
24 procedurally Your Honor they can't ask him hearsay. It is not a statement against  
25

1 interest, so it has to be for impeachment purposes and they have to ask her whether  
2 or not she made the statement. So, that is our trouble we have with Don  
3 O'Connell. It is hearsay and it is not a statement against interest.

4 MR. CAMIEL: Your Honor, Mr. O'Connell will be asked about a phone  
5 call that he received from Sissy Atkinson. We are not offering it as a statement  
6 against interest. We are not offering it for the truth of the matter that she asserted  
7 in the phone call. We are offering it to show her state of mind at the time that she  
8 made the call. Now, Mr. O'Connell will testify that at 5 o'clock in the morning,  
9 the morning that Kim Nees' body was discovered and her body was discovered by  
10 the police at Seven A.M. (7 A.M) At five A.M. (5 A.M.), Mr. O'Connell received  
11 a call from Sissy Atkinson and in that call she told him that Kim Nees body was  
12 down by the train bridge in the river. So, that is before the police discovered the  
13 body. Now, we are not offering this for the truth of whether or not the body was  
14 actually there. We are offering it to show Sissy Atkinson's state of mind when she  
15 made that call. So, it is not hearsay.

16 MR. LIGHT: The trouble is Your Honor; her state of mind is not relevant at  
17 that time. It is not relevant. They are offering it simply because he is going to say  
18 they got the call at five o'clock about the body and it wasn't discovered by the  
19 sheriff until seven o'clock. They are clearly offering it for the truth of the matter.  
20 That is exactly what they did at the clemency hearing and that is what they are  
21  
22  
23  
24  
25

1 trying to do here. I am just saying how can they get that in. They want to impeach  
2 her without calling her first.

3 COURT: The nice thing about a Judge consideration of a matter like this is I  
4 can exclude this and I don't have to worry about a jury being prejudiced. So, if  
5 you bring this person on it is my understanding the only thing I am going to take  
6 from it is state of mind, nothing else, no facts.  
7

8 MR. CAMIEL: That is correct and I would point out in the State's response  
9 to our prehearing memorandum on this specific issue, the State indicated, and I am  
10 quoting from page twenty-seven (27), presumably, if somebody knew about the  
11 Nees homicide before the police discovered her dead body, such would be relevant  
12 in a homicide trial.  
13

14 MS. PLUBELL: That ...

15 MR. CAMIEL: If somebody knew. And, what we are offering this for is  
16 the state of mind of Sissy Atkinson when she made this statement.  
17

18 COURT: As long as you go for her state of mind, but any facts that this  
19 gentleman gives about what he heard from that conversation are going to be  
20 excluded.  
21

22 MR. CAMIEL: He will indicate and I want to be clear with the Court; he  
23 will indicate the time that he received the phone call and when he received the  
24 phone call she told him Kim Nees body was down by the train bridge.  
25

1 COURT: So, what is that to do with state of mind?

2 MR. CAMIEL: That shows her knowledge at that time.

3 COURT: Knowledge is facts, that is not state of mind. State of mind is an  
4 emotional involvement, a sort of, I mean, that is what the rules contemplate. It is  
5 emotions or intense feelings or something of the sort. It is not facts.  
6

7 MR. CAMIEL: But, we are not offering this for a hearsay purpose and if I  
8 can explain, we are not offering it to prove that what she said was true, that the  
9 body was there, but the fact that she said it shows her state of mind that she would  
10 have had an awareness that the body was there or she thought the body was there  
11 or believed the body was there. Whether it is true or not, is not the reason why we  
12 are offering it. So, we are not offering it for a hearsay purpose. We are not trying  
13 to prove that the body was there at five A.M. (5 A.M.). when she called.  
14  
15

16 COURT: Boy, I don't know. Mr. Light?

17 MR. LIGHT: Well, I have a lot of trouble with this Your Honor. When they  
18 can simply call the person to ask her whether she said that or not, they are offering  
19 it as a factual statement coming from a material witness. Her state of mind ... This  
20 doesn't go to her state of mind. Her state of mind would be was she agitated, was  
21 she upset; that is state of mind. This is a factual statement. It is not ...  
22  
23

24 COURT: I concur with the State. If you want to bring this witness on  
25 strictly for state of mind, which this Court has tried to articulate, I think Mr. Light

1 did a better job in terms of using the words agitation and so on. But still, emotions,  
2 stress, things like that. I could deal with that. But any facts will not be accepted.

3 So bring him on if you want.

4 MR. CAMIEL: If I could have a moment Your Honor.

5  
6 COURT: Well, this isn't a jury trial, but how about a stand and stretch. All  
7 right. Let's go back at it.

8 MR. CAMIEL: Your Honor we are going to call Richard Holen.

9  
10 COURT: Okay hold on. State the name again.

11 MR. CAMIEL: Richard Holen. H-o-l-e-n.

12 COURT: Any hearsay problems in this witness?

13  
14 MR. CAMIEL: No, he is an eye witness.

15 COURT: Sir, come on forward.

16 (DIRECT EXAMINATION OF RICHARD HOLEN)

17 CLERK: Do you solemnly swear the statements you are about to make in  
18 the matter will be the truth, the whole truth and nothing but the truth so help you  
19 God?  
20

21 MR. HOLEN: Yes.

22 COURT: Come right over here sir. Scoot on up to that microphone.

23 MR. CAMIEL: Could you state your full name and spell your last name.

24  
25 MR. HOLEN: Richard Dean Holen. H-o-l-e-n.



1 MR. CAMIEL: Mr. Holen, where do you live?

2 MR. HOLEN: Poplar.

3 MR. CAMIEL: How long have you lived there?

4 MR. HOLEN: My entire life.

5 MR. CAMIEL: How old are you?

6 MR. HOLEN: Fifty-two (52).

7 MR. CAMIEL: What do you do for a living?

8 MR. HOLEN: Farm and ranch.

9 MR. CAMIEL: Where is your ranch?

10 MR. HOLEN: In between Poplar and Wolf Point.

11 MR. CAMIEL: And, do you have family there?

12 MR. HOLEN: Yes.

13 MR. CAMIEL: And, has your family been around the Poplar area for a long  
14 time?

15 MR. HOLEN: All my life.

16 MR. CAMIEL: Well, let me ask you this, do you have any criminal history?

17 MR. HOLEN: Yes.

18 MR. CAMIEL: What criminal history do you have?

19 MR. HOLEN: Drugs in 1992 and then cattle in 2008.

20 MR. CAMIEL: Now, in 1979 where were you living?

21  
22  
23  
24  
25

1 MR. HOLEN: Poplar, Montana, in town.

2 MR. CAMIEL: In town?

3 MR. HOLEN: Yes.

4 MR. CAMIEL: And whereabouts in town did you live?

5 MR. HOLEN: Well, the Poplar lumber yard sits on the lot where I lived in a  
6 trailer house as we speak, but at that time the Tasty Freeze ... It is right beside  
7 Butch's Exxon pretty much, just a little ways from Exxon.  
8

9 MR. CAMIEL: Is it close to Main Street?

10 MR. HOLEN: Right on Main Street.

11 MR. CAMIEL: And, in 1979 how old were you?

12 MR. HOLEN: Nineteen (19).

13 MR. CAMIEL: Did you know Kim Nees?

14 MR. HOLEN: Yes.

15 MR. CAMIEL: How did you know her?

16 MR. HOLEN: I didn't know her very well, but she was a girl in town.

17 MR. CAMIEL: In terms of your age in relation to hers, were you ahead of  
18 her or behind her in school?  
19

20 MR. HOLEN: Ahead of her.

21 MR. CAMIEL: How far ahead?

22 MR. HOLEN: Maybe a year.  
23  
24  
25

1 MR. CAMIEL: And did you know Barry Beach?

2 MR. HOLEN: A little bit.

3 MR. CAMIEL: In terms of your age and Mr. Beach's?

4 MR. HOLEN: He is younger.

5 MR. CAMIEL: How much younger do you know?

6 MR. HOLEN: I don't know for sure, two, three, four years; something like  
7 that.

8  
9 MR. CAMIEL: Were you familiar with the Nees, the pickup truck that the  
10 Nees family had?

11 MR. HOLEN: Yes.

12 MR. CAMIEL: What did that pickup truck look like?

13 MR. HOLEN: It was turquoise; kind of an off-green pickup; it was a  
14 turquoise color. It had a headache rack toolbox on it.

15 MR. CAMIEL: Do you remember the make?

16 MR. HOLEN: Chevy, GMC, I think.

17 MR. CAMIEL: And, any distinguishing features beside the color that you  
18 remember?

19 MR. HOLEN: Well, it had a toolbox on back. I am sure. Yeah, it had a  
20 headache rack. It was a tool, you know, a toolbox.

21 MR. CAMIEL: In the bed?

1 MR. HOLEN: No, it is on the box, you know how they ... Just a tool box,  
2 you lift a lid on each side they can come up.

3 MR. CAMIEL: And how often had you seen that truck in say, June of  
4 1979?

5 MR. HOLEN: Pretty much almost every day.

6 MR. CAMIEL: And did you have a vehicle then?

7 MR. HOLEN: Yes.

8 MR. CAMIEL: What kind of vehicle did you have?

9 MR. HOLEN: Nineteen seventy-eight (1978) Ford LTD 2 sports coupe car.

10 MR. CAMIEL: I want to have you turn your attention to the night Kim  
11 Nees was murdered, June 15, 1979, is the evening before. Do you have a  
12 recollection of that evening?  
13

14 MR. HOLEN: Yes.

15 MR. CAMIEL: Do you know where you were that evening?

16 MR. HOLEN: Yes.

17 MR. CAMIEL: Where were you?

18 MR. HOLEN: Well at which part? That was stampede, I mean not  
19 stampede; it was Wild West Days in Poplar, Montana.  
20

21 MR. CAMIEL: Was that going on that weekend?

22 MR. HOLEN: Yes.  
23  
24  
25

1 MR. CAMIEL: So, that evening after the dinner hour do you know where  
2 you were?

3 MR. HOLEN: There was a dance at the Legion.

4 MR. CAMIEL: And did you attend that?

5 MR. HOLEN: Yes.

6 MR. CAMIEL: Did you go with anyone?

7 MR. HOLEN: No.

8 MR. CAMIEL: Do you know about what time you got to the Legion?

9 MR. HOLEN: I think I was at probably two or three different places that  
10  
11  
12 night.

13 MR. CAMIEL: I am sorry.

14 MR. HOLEN: At that time there was a lot of bars in that town.

15 MR. CAMIEL: Okay. And, at some point did you end up at the Legion?

16 MR. HOLEN: Yes.

17 MR. CAMIEL: And, were you there drinking?

18 MR. HOLEN: Yes.

19 MR. CAMIEL: Okay. While you were at the Legion that night did anything  
20  
21  
22 unusual happen?

23 MR. HOLEN: Well, there was a fight I guess.

24 MR. CAMIEL: Do you remember who the fight was between?  
25

1 MR. HOLEN: I and Craig King.

2 MR. CAMIEL: I am sorry you and?

3 MR. HOLEN: Craig King I guess.

4 MR. CAMIEL: Any other fights?

5 MR. HOLEN: Oh there was a big one outside, yeah.

6 MR. CAMIEL: Do you remember who was involved in that one?

7 MR. HOLEN: It was John Brewster and Alex Trottier, Artie Braaten and I  
8 think Allen Sandbecker was there too.  
9

10 MR. CAMIEL: Now, while you were at the Legion were you ... How long  
11 did you stay?  
12

13 MR. HOLEN: It was in and out all night, I mean, you know, until it closed.

14 MR. CAMIEL: Do you remember what time they closed?

15 MR. HOLEN: They kick everybody out at about a quarter to two.  
16  
17 Everybody is gone by two o'clock.

18 MR. CAMIEL: And did you stay around until closing?

19 MR. HOLEN: Yeah.

20 MR. CAMIEL: Why?

21 MR. HOLEN: I had a date.

22 MR. CAMIEL: And who did you have a date with?

23 MR. HOLEN: A girl that was barmaiding in there.  
24  
25

1 MR. CAMIEL: What is her name?

2 MR. HOLEN: Gretchen Youpee.

3 MR. CAMIEL: Gretchen Youpee?

4 MR. HOLEN: Yes.

5 MR. CAMIEL: Do you know how you spell her last name?

6 MR. HOLEN: Y-o-u-p-e-e.

7 MR. CAMIEL: And so you waited around until closing and then did you go  
8  
9 out with Gretchen?

10  
11 MR. HOLEN: We was driving around yes.

12 MR. CAMIEL: In your car?

13 MR. HOLEN: Yes.

14 MR. CAMIEL: Do you have an idea of when you left the Legion with  
15  
16 Gretchen Youpee?

17 MR. HOLEN: Like I have said before, I mean, it had to be at least a quarter  
18  
19 after two, or at two thirty.

20 MR. CAMIEL: And that's because you knew it closed at two?

21 MR. HOLEN: Yeah.

22 MR. CAMIEL: And, you had to wait.

23 MR. HOLEN: Well, they had to clean up; the barmaids had to finish up  
24  
25 inside.

1 MR. CAMIEL: When you left the Legion Club with Gretchen Youpee, you  
2 were in your car?

3 MR. HOLEN: Yes.

4 MR. CAMIEL: And where did you drive to?

5 MR. HOLEN: We went west out of town.

6 MR. CAMIEL: On what road?

7 MR. HOLEN: Highway Two (2).

8 MR. CAMIEL: And when you say west out of town does that head toward;  
9  
10 you are heading toward the Poplar River?

11 MR. HOLEN: Yes.

12 MR. CAMIEL: When you were heading west out of town on Highway Two  
13  
14 did you see the Nees pickup truck anywhere?

15 MR. HOLEN: Yes I did. It was right in front of me.

16 MR. CAMIEL: How do you know it was the Nees pickup truck?

17 MR. HOLEN: Well, I have seen it since it was brand new, you know, I  
18  
19 knew the pickup.

20 MR. CAMIEL: How far back were ... You were behind it?

21 MR. HOLEN: I was behind it.

22 MR. CAMIEL: Do you know how far back you were?  
23  
24  
25



1 MR. HOLEN: Well, when she turned off, I was probably closer than the  
2 windows behind you.

3 MR. CAMIEL: So, you are indicating the windows on the side of the  
4 courtroom?

5 MR. HOLEN: Straight ahead of me.

6 MR. CAMIEL: In terms of distance do you know how far you were?

7 MR. HOLEN: One hundred (100) feet. That is closer than that, but it was  
8 pretty close.  
9

10 MR. CAMIEL: All right. Any cars between you and the Nees pickup  
11 truck?  
12

13 MR. HOLEN: No.

14 MR. CAMIEL: And you are both traveling the same direction?

15 MR. HOLEN: The same direction.

16 MR. CAMIEL: West on Highway Two?

17 MR. HOLEN: Yes.

18 MR. CAMIEL: Could you tell from ... Could you see in the back window  
19 of the pickup truck?  
20

21 MR. HOLEN: Yes I could.

22 MR. CAMIEL: Was there anything that blocked your ability to see from  
23 back where you were into the cab of the truck?  
24  
25

1 MR. HOLEN: No.

2 MR. CAMIEL: Could you tell whether or not there was just a driver or  
3 whether there were other folks in the truck?

4 MR. HOLEN: You could see the silhouettes of their heads. There was four  
5 people sitting on the seat and there was a small person with a visor sitting on the  
6 passenger side on someone's lap.  
7

8 MR. CAMIEL: So, the cab was filled up with silhouettes of people?

9 MR. HOLEN: It was full.  
10

11 MR. CAMIEL: As you were following the Nees pickup truck again,  
12 westbound out of town, did it keep going straight westbound, or did it turn at some  
13 point?  
14

15 MR. HOLEN: It turned at the ... Well the closest approach to ... There is  
16 two approaches. There is one right at the football field and there is another one  
17 just a little bit west and it turned in ... The closest one to the boat ramp and it  
18 turned in south.  
19

20 MR. CAMIEL: So, when you say it turned and went south, would that be  
21 making a left turn or a right turn from the direction you are going?  
22

23 MR. HOLEN: It would be a left.

24 MR. CAMIEL: And where does that left turn go to?

25 MR. HOLEN: Train bridge.

1 MR. CAMIEL: And, based on your later understanding, is that the train  
2 bridge area where Kim Nees body was ultimately discovered?

3 MR. HOLEN: Yes.

4 MR. CAMIEL: And, you saw the Nees pickup truck take a left into the area  
5  
6 towards the train bridge?

7 MR. HOLEN: Yes.

8 MR. CAMIEL: Did you also turn left or did you keep going?

9 MR. HOLEN: I kept going.

10 MR. CAMIEL: So, you kept going westbound?

11 MR. HOLEN: Yes.

12 MR. CAMIEL: And then what did you do?

13 MR. HOLEN: There was a place, well nowadays it is called the Four Mile  
14 Square, but at that time, well the Four Mile Square is all paved now; at that time  
15 there was a place, there was a junk yard, it was called Saby's. Everybody used to  
16 turn around there and then ... I just pulled in, we turned around and we went back  
17 into Poplar.  
18  
19  
20

21 MR. CAMIEL: So, the 'we' is you and Gretchen Youpee?

22 MR. HOLEN: Yeah, Gretchen.

23 MR. CAMIEL: So, you turn around and then you are going east on  
24 Highway Two?  
25

1 MR. HOLEN: Yes.

2 MR. CAMIEL: And, did you come back by the area, the road or the turn off  
3 where the Nees pickup truck had turned in?

4 MR. HOLEN: Yes I did.

5 MR. CAMIEL: When you came back by were you able to see the Nees  
6 pickup truck?  
7

8 MR. HOLEN: Yes.

9 MR. CAMIEL: What did you see?  
10

11 MR. HOLEN: It was just down into, it is kind of a little park; it is a little  
12 park area. You can either go to the boat ramps or there is a couple places you  
13 could go. But, it was just parked down there and it was talking to a car. I mean the  
14 pickup was parked and there was a car with the headlights on facing; the car lights  
15 were facing the highway.  
16

17 MR. CAMIEL: So, the Nees pickup truck, was it facing toward Highway  
18 Two that you were on, or away from Highway Two?  
19

20 MR. HOLEN: It was facing south.

21 MR. CAMIEL: Away?  
22

23 MR. HOLEN: Away from me.

24 MR. CAMIEL: So, you have got a back end view; a taillight view?  
25

1 MR. HOLEN: Yeah. The taillights were on the pickup and the headlights  
2 were from the car. It was talking ... The taillights were higher than the car lights  
3 and it was just ... They were stopped. That is all.

4 MR. CAMIEL: So, the two vehicles, were they driver door to driver door?

5  
6 MR. HOLEN: Driver door to driver door.

7 MR. CAMIEL: Did you recognize the other vehicle?

8 MR. HOLEN: No.

9 MR. CAMIEL: But, you are sure that this was the Nees vehicle?

10  
11 MR. HOLEN: Yes.

12 MR. CAMIEL: After you ... Did you turn into the park at that point or did  
13 you continue?

14 MR. HOLEN: I kept on going. I just drove in to town.

15 MR. CAMIEL: And did you go home?

16 MR. HOLEN: No. After awhile I guess, yeah.

17 MR. CAMIEL: When did you first learn that Kim Nees had been murdered  
18  
19 that evening?

20  
21 MR. HOLEN: The next day.

22 MR. CAMIEL: How did you learn?

23 MR. HOLEN: Well, everybody was talking about it. I think my brother Jim  
24 told me.  
25

1 MR. CAMIEL: Okay. Jim Holen?

2 MR. HOLEN: Yeah.

3 MR. CAMIEL: Now, did you also learn where the Nees pickup truck was  
4 found?

5 MR. HOLEN: Yes.

6 MR. CAMIEL: Where was your understanding that it was found?

7 MR. HOLEN: Down by the train bridge.

8 MR. CAMIEL: And did you learn where Kim Nees body had been  
9 recovered?  
10  
11

12 MR. HOLEN: Yes.

13 MR. CAMIEL: Where was that?

14 MR. HOLEN: In the water.

15 MR. CAMIEL: Down by the train bridge?

16 MR. HOLEN: Yes.

17 MR. CAMIEL: After you found out that Kim Nees had been murdered and  
18 that her vehicle was found in the area where you had seen it, did you ever talk to  
19 the police about what you had seen?  
20  
21

22 MR. HOLEN: It was a few days, two or three days later, I was at Conoco in  
23 Poplar and I, Bobby Atkinson and Stevie Grayhawk. And Steve, I told him about  
24 it and Steve said he was ...  
25

1 MR. CAMIEL: Hang on; let me break it up a little bit. Who is Bobby  
2 Atkinson?

3 MR. HOLEN: Sissy Atkinson's brother.

4 MR. CAMIEL: And, was he in law enforcement at the time?

5 MR. HOLEN: Yes.

6 MR. CAMIEL: Was he a Poplar police officer?

7 MR. HOLEN: Yes.

8 MR. CAMIEL: And you mentioned Steve Grayhawk?

9 MR. HOLEN: Yes.

10 MR. CAMIEL: And, was he in law enforcement?

11 MR. HOLEN: Yes.

12 MR. CAMIEL: And, is Steve Grayhawk, the man that you saw at the  
13 Conoco, related to Maude Grayhawk?

14 MR. HOLEN: It is her father.

15 MR. CAMIEL: Her father? So, you said you were at the Conoco and how  
16 did it come to pass that you talked to Steve Grayhawk?

17 MR. HOLEN: Yes.

18 MR. CAMIEL: How did that happen?

19 MR. HOLEN: He asked ... He just walked up and asked if I heard anything;  
20 yeah if I had heard anything. I told him the story and he said ...  
21  
22  
23  
24  
25

1 MR. LIGHT: Your Honor, I am going to object to anything that Steve  
2 Grayhawk said. That is hearsay.

3 COURT: Sustained.

4 MR. CAMIEL: Did you tell him what you had seen?

5 MR. HOLEN: Yes.

6 MR. CAMIEL: Did you receive an indication of whether there was going to  
7 be any additional, whether Steve Grayhawk was going to do any additional follow  
8 up with you?  
9

10 MR. LIGHT: Objection. Calls for hearsay.

11 COURT: Sustained.

12 MR. CAMIEL: How long did you talk to Steve Grayhawk at the Conoco?

13 MR. HOLEN: It wasn't very long.

14 MR. CAMIEL: Did you expect after that brief conversation with him that  
15 you were going to hear from the police again?  
16

17 MR. HOLEN: Kind of, yeah.

18 MR. CAMIEL: Did you ever hear from Steve Grayhawk again?

19 MR. HOLEN: No.

20 MR. CAMIEL: Did any police officer ever follow up and contact you about  
21 what you had seen?  
22

23 MR. HOLEN: No.  
24  
25



1 MR. CAMIEL: Now, do you know when you first ... Well after ... Did you  
2 tell anybody else about what you had seen?

3 MR. HOLEN: Well, it come up lots of times.

4 MR. CAMIEL: Who did you tell?  
5

6 MR. HOLEN: Oh, my brother Jim; oh I mean numerous people in town.

7 MR. CAMIEL: All right. But did any police ever come to talk to you?  
8

9 MR. HOLEN: No.

10 MR. CAMIEL: At some point and time, were you contacted by some  
11 investigators from Centurion Ministries?

12 MR. HOLEN: Yes.

13 MR. CAMIEL: How did that come about? Do you know how they found  
14 their way to you?  
15

16 MR. HOLEN: Tom Kern.

17 MR. CAMIEL: Had you told Tom Kern what you had seen?  
18

19 MR. HOLEN: Yes.

20 MR. CAMIEL: And so through Tom Kern, Centurion Ministries contacted  
21 you?

22 MR. HOLEN: Yes.

23 MR. CAMIEL: Do you know when that first was that they came to contact  
24 you?  
25

1 MR. HOLEN: It is quite awhile ago now. Six or eight years. I mean it is a  
2 while

3 MR. CAMIEL: Do you recall giving a statement to Centurion Ministries on  
4 March 1<sup>st</sup> of 2002?

5  
6 MR. HOLEN: Yes.

7 MR. CAMIEL: And that was a sworn statement?

8 MR. HOLEN: Yes.

9  
10 MR. CAMIEL: And, in that statement did you describe what you had seen  
11 on the night of the Kim Nees murder?

12 MR. HOLEN: Yes.

13  
14 MR. CAMIEL: Did you also go and testify at Deer Lodge in front of the  
15 parole board?

16 MR. HOLEN: Yes I did.

17 MR. CAMIEL: And, was that testimony given under oath?

18 MR. HOLEN: Yes.

19  
20 MR. CAMIEL: Do you know where Gretchen Youpee is now?

21 MR. HOLEN: Yes.

22 MR. CAMIEL: Where is she?

23 MR. HOLEN: She is at the nursing home in Wolf Point, Montana.

24  
25 MR. CAMIEL: Do you know what her condition is there?

1 MR. HOLEN: It is; I really don't know. It is MS is what it is.

2 MR. CAMIEL: Now, going back to the night that you were out and  
3 indicated that you saw the Nees pickup truck, is there any doubt in your mind that  
4 it was, in fact the Nees pickup truck that you saw?  
5

6 MR. HOLEN: No.

7 MR. CAMIEL: Is there any doubt in your mind that there were four, or I  
8 think you said five individuals in the cab of the truck?  
9

10 MR. HOLEN: No.

11 MR. CAMIEL: How about the time?

12 MR. LIGHT: Your Honor, I am going to object to this. This has been asked  
13 and answered and it is argumentative as far ...  
14

15 COURT: Sustained as to asked and answered.

16 MR. CAMIEL: Did you use the bar closing time as a gauge in terms of your  
17 estimate of time?  
18

19 MR. HOLEN: Yes I did.

20 MR. CAMIEL: Nothing further.

21 COURT: Okay. Cross?

22 (CROSS EXAMINATION OF RICHARD HOLEN)  
23  
24  
25

1 MR. LIGHT: Good afternoon. Sir, isn't it true that shortly after the Kim  
2 Nees homicide you were aware of the rumors and gossips that at gang, or group of  
3 girls had committed the murder?

4 MR. HOLEN: Oh sure, yeah.

5 MR. LIGHT: Okay. In fact, it has been the same names, same girls  
6 suspected for twenty-eight (28), twenty (20) years, correct.

7 MR. HOLEN: Yes.

8 MR. LIGHT: Counsel asked you, do you recall writing out this statement,  
9 this five page statement for Centurion Ministries correct?  
10

11 MR. HOLEN: Yes.

12 MR. LIGHT: And, I assume, that when you filled that that they asked you  
13 to put down everything you recalled about that evening, correct?  
14

15 MR. HOLEN: Yes.

16 MR. LIGHT: And so, back in March first of 2002, you put down everything  
17 you recalled about that incident, correct?  
18

19 MR. HOLEN: Yeah, I guess so; yeah.

20 MR. LIGHT: And, counsel also asked you about testifying in front of the  
21 parole board, correct?  
22

23 MR. HOLEN: Yes.  
24  
25

1 MR. LIGHT: Now, if I recall your testimony today correctly, you stated that  
2 you saw the Kim Nees pickup truck after two-thirty (2:30) on June 16, 1979?

3 MR. HOLEN: Yes I did.

4 MR. LIGHT: You were not able to identify that Kim Nees was in that truck,  
5 is that correct?  
6

7 MR. HOLEN: The silhouette looked like her, but I would say it was her,  
8 yes.  
9

10 MR. LIGHT: Now, you would agree with me that in your statement written  
11 on March 1, 2002, you do not indicate that it was Kim Nees driving the pickup  
12 truck, only that you recognized the truck as being the Nees pickup truck, isn't that  
13 correct?  
14

15 MR. HOLEN: The one I wrote the statement, I will say that I was trying to  
16 get in there that it was Kim Nees in the pickup.

17 MR. LIGHT: I am asking you, and I am going to hand you a copy of your  
18 statement. In that statement on March 1, 2002, did you indicate in that statement  
19 that Kim Nees was driving the pickup truck?  
20

21 MR. HOLEN: I would have to read the whole thing.

22 MR. LIGHT: Well, please take a look at it.

23 MR. HOLEN: Okay.  
24

25 COURT: It sounds like an excellent opportunity for a break.

1 MR. LIGHT: Thank you Your Honor. I concur.

2 COURT: We will take a brief recess.

3 (RECESS)

4 CLERK: All rise.

5 COURT: Please be seated folks. Okay. Mr. Light.

6 MR. LIGHT: Thank you Your Honor. So Mr. Holen, you had an  
7 opportunity to look at your March 1, 2002 statement. Isn't it a fact that in this  
8 statement you did not say anything about seeing Kim Nees driving the pickup on  
9 June ...?  
10  
11

12 COURT: Mr. Light, I am going to ask you to stay back from the witnesses.  
13 I know prosecutors like to wander pretty close.

14 MR. LIGHT: We do. In your statement you said nothing to the fact that  
15 you saw Kim Nees driving the vehicle that morning, did you?  
16

17 MR. HOLEN: No.

18 MR. LIGHT: And, am I correct on direct that you couldn't tell whether the  
19 four to five people in the pickup were boys or girls correct?  
20

21 COURT: Who's phone? I just about had \$5 bucks for charity.

22 MR. LIGHT: Is that correct?

23 MR. HOLEN: Pardon me?  
24  
25

1 MR. LIGHT: If I understand your direct examination, you couldn't tell  
2 whether the four to five people in the vehicle were boys or girls could you?

3 MR. HOLEN: I don't know ... I didn't look at it that ... What I have always  
4 said and what I have always told ...

5  
6 MR. LIGHT: Sir, I hate to interrupt you, I am not asking you what you have  
7 always said. I am asking you on direct examination, did you indicate when asked  
8 questions, whether they were boys or girls?

9  
10 MR. HOLEN: No.

11 MR. LIGHT: And, isn't it true that in your statement again of March 1,  
12 2002 you only indicated you saw people in the vehicle, correct?

13  
14 MR. HOLEN: There was five.

15 MR. LIGHT: Okay. Isn't it also true sir that in this March 1, 2002  
16 statement, you never mentioned seeing another vehicle parked next the Nees  
17 pickup did you?

18  
19 MR. HOLEN: I see that. No I didn't.

20 MR. LIGHT: In fact, you mentioned simply just turning around and then  
21 your next statement talks about Conoco station, isn't it?

22  
23 MR. HOLEN: I guess so, yeah.  
24  
25

1 MR. LIGHT: Don't you agree with me that would have been important to  
2 put in this statement to Centurion Ministries about what you saw on that morning,  
3 wouldn't it?

4 MR. HOLEN: You know, it was so long ago and then when you think about  
5 it more, you know sometimes a little something else comes back. I stand by what I  
6 just said a minute ago, that the pickup was talking to a car.

7 MR. LIGHT: So, you indicated, correct me I am wrong, that when you  
8 turned around and headed back that is when you saw the Nees pickup and it was  
9 approximately one hundred (100) yards down the road into the park, is that  
10 correct?  
11  
12

13 MR. HOLEN: I don't know if it is even that far. I mean it is just ... You  
14 pull off the highway and then there is a road going to the boat ramp and it was just  
15 on the other side of that. As we speak, like nowadays, that road is kind of gone. I  
16 mean the brush is growed up. It is different down there now.  
17

18 MR. LIGHT: How fast would you have been driving on that highway at  
19 approximately two-thirty in the morning on June 16, 1979?  
20

21 MR. HOLEN: Oh I think I was idling around pretty slow, I don't know,  
22 thirty-five (35) or forty (40) miles an hour.  
23

24 MR. LIGHT: And, on June 15<sup>th</sup> you said you were a rancher. What time did  
25 you get off work that day?



1 MR. HOLEN: I don't know.

2 MR. LIGHT: What time did you first make it to one of the bars that you  
3 talked about on direct?

4 MR. HOLEN: It would be after dark, you know, late evening. Ten (10:00)  
5 o'clock I suppose; something like that.  
6

7 MR. LIGHT: And, isn't it true that you drank a lot that night, that morning?

8 MR. HOLEN: Sure.

9 MR. LIGHT: Okay. And, it was approximately two-thirty or after two-  
10 thirty that you indicated you saw the Nees vehicle parked approximately one  
11 hundred (100) yards down the road correct?  
12

13 MR. HOLEN: Yes.

14 MR. LIGHT: Okay. So, it is two-thirty in the morning. It would be dark,  
15 correct?  
16

17 MR. HOLEN: Yep.

18 MR. LIGHT: You are driving on the highway, correct? You have been  
19 drinking, correct?  
20

21 MR. HOLEN: Yes.

22 MR. LIGHT: And, you suddenly look over and have a few seconds and  
23 determine that you see Kim Nees in the vehicle talking to another vehicle correct?  
24

25 MR. HOLEN: Well as you ... Have you ever been to Poplar?

1 MR. LIGHT: Sir, I am just asking you. Is that what took place?

2 MR. HOLEN: No it isn't. But, from the bridge all the way to town, you can  
3 look there; it is wide open to watch. I can see the outfit sitting for ... As soon as  
4 you come through the bridge you can see the taillights for let's see, over, I don't  
5 know how far it is, at least an eighth of a mile and then you are to it and then you  
6 go on in to town.  
7

8 MR. LIGHT: Okay. Let's take it step by step because I don't think I got an  
9 answer.  
10

11 MR. HOLEN: Sure.

12 MR. LIGHT: This took place after two-thirty in the morning and it was  
13 dark, correct?  
14

15 MR. HOLEN: Yes.

16 MR. LIGHT: You had been drinking for quite awhile, correct?  
17

18 MR. HOLEN: Yeah.

19 MR. LIGHT: You were intoxicated.  
20

21 MR. HOLEN: Well, I don't think so. No, because I was fine at the time.  
22 No.  
23

24 MR. LIGHT: You were driving your vehicle and you looked over for a few  
25 seconds, correct?

1 MR. HOLEN: No, it was more than that. I kind of was driving by and kind  
2 of looking.

3 MR. LIGHT: And, even though you say you were able to see Kim in the  
4 back of a pickup, through a pickup truck talking to the other vehicle with all these  
5 circumstances we are talking about, you weren't able to identify the other vehicle  
6 at all were you?  
7

8 MR. HOLEN: No. The other vehicle, I was never close to it. When I went,  
9 it must have been behind me to pull in and talk.  
10

11 MR. LIGHT: Sir, my question was, were you able to identify the vehicle?

12 MR. HOLEN: No.

13 MR. LIGHT: Okay. Thank you.

14 COURT: Wait a minute I need to clear something up. I don't remember  
15 you ever testifying to say you saw Kim Nees visiting with somebody in the car.  
16 You just said you saw the pickup talking to ...  
17

18 MR. HOLEN: That is what I was kind of wondering about. Yeah. They  
19 were pulled up alongside each other. I don't know who was talking there.  
20

21 MR. LIGHT: Now, you indicated sir that you learned about the Kim Nees  
22 homicide the next day. Would that be correct?

23 MR. HOLEN: Yes.  
24  
25

1 MR. LIGHT: And, do you recall at approximately what time the next day  
2 on June 16<sup>th</sup> you would have heard about the Kim Nees homicide?

3 MR. HOLEN: I think I went out to the house at ... I lived in Poplar at that  
4 time in a trailer house right across the street from the Tasty Freeze. I got out there,  
5 I don't know nine-thirty or ten and my brother come out and told everybody. We  
6 was out in the yard. I remember my dad was there. We had trucks and tractors  
7 and stuff in the yard and we were doing something there and then Jim come out  
8 and told us.  
9

10  
11 MR. LIGHT: So, Jim came out and told you about it, right?

12 MR. HOLEN: Well, everybody that was standing there, you know.

13 MR. LIGHT: Okay. But, that is your testimony?  
14

15 MR. HOLEN: Yeah.

16 MR. LIGHT: Okay, thank you. And, it was at that point that you learned  
17 that this took place down by the train bridge, correct?

18 MR. HOLEN: I think, yeah, yeah; he said that is where they found her and  
19 stuff, yeah.  
20

21 MR. LIGHT: And, you are aware at that time that you had, according to  
22 your testimony, had seen Kim Nees with some other people with another vehicle  
23 down there near the train bridge, correct?  
24  
25

1 MR. HOLEN: You know, nothing ... When I seen the girl that night,  
2 nothing meant anything at that time. But the next day ... I didn't know when she  
3 was supposed to have been down there or when it happened or anything, I don't  
4 know.

5  
6 MR. LIGHT: You knew that Kim Nees had been murdered, correct?

7 MR. HOLEN: Yeah.

8 MR. LIGHT: And you knew that you had seen her the night before in the  
9 same location where she was found, isn't that correct?  
10

11 MR. HOLEN: Yes.

12 MR. LIGHT: But, you did not go to the police department at that time, did  
13 you?

14 MR. HOLEN: For what?

15 MR. LIGHT: So you don't think it is significant that you were maybe one  
16 of the last ones ...  
17

18 MR. HOLEN: I did not know the circumstances or anything, and it was ...  
19

20 MR. LIGHT: That's okay sir. I think we get the point. Now, isn't it true  
21 that on June 17, 1979, the day after Kim Nees was murdered, that you were  
22 interviewed by the sheriff's department?

23 MR. HOLEN: Not that I remember, no.

24 MR. LIGHT: You don't remember it, or you weren't?  
25

1 MR. HOLEN: I don't think I was.

2 MR. LIGHT: So, if there is an interview log dated June 17, 1979, that  
3 indicates ...

4 MR. CAMIEL: Your Honor I am going to object in the form of the  
5 question. He can ask him if he remembers being interviewed, but talking about  
6 matters that aren't into evidence whether there is or isn't a log.  
7

8 MR. LIGHT: Well, this is cross examination Your Honor.

9 COURT: Yeah, I know, but it has got to be in evidence. I am going to  
10 sustain for now.  
11

12 MR. LIGHT: Well, we will have to make him subject to recall then. Okay.  
13 Thank you Your Honor. Now, you indicated that two to three days later you ran  
14 into Steven Grayhawk, isn't that correct?  
15

16 MR. HOLEN: Yes I did.

17 MR. LIGHT: Okay. Are you aware that he denies ever talking to you on  
18 that day?  
19

20 MR. HOLEN: Well, that is the truth, I did talk to him.

21 MR. LIGHT: That is not what I have asked you. Are you aware that he  
22 denies it?  
23

24 MR. HOLEN: No. You just now told me that. I did not know that.  
25

1 MR. LIGHT: And, during the time that you lived in that area, are you aware  
2 that the Nees homicide trial, excuse, homicide, was investigated by the sheriff's  
3 department and not the police department?

4 MR. HOLEN: Sure.

5 MR. LIGHT: And, isn't it true that officer Grayhawk was with the police  
6 department?  
7

8 MR. HOLEN: Tribal police.

9 MR. LIGHT: Okay. And, after you talked to, allegedly talked to, officer  
10 Grayhawk and he never got back to you, you never went to the police and followed  
11 up on it did you?  
12

13 MR. HOLEN: No. Isn't that their job?

14 MR. LIGHT: Your Honor, I am going to ask that that be stricken as  
15 nonresponsive.  
16

17 COURT: Fair enough.

18 MR. LIGHT: Now, you indicated in your written statement that we have  
19 seen and I showed it to you during break, again, dated March 1, 2002, that it  
20 always bothered you that Barry Beach confessed to killing Kim Nees, isn't that  
21 correct?  
22

23 MR. HOLEN: I don't remember that part.

24 MR. LIGHT: You don't remember that part in here?  
25

1 MR. HOLEN: No.

2 MR. LIGHT: Would you like to take another look at it?

3 MR. HOLEN: Well, I mean if you got it wrote down I will take your word  
4 for it.

5  
6 MR. LIGHT: And, in fact, do you recall testifying at the clemency board  
7 that had always bothered you?

8 MR. HOLEN: I always thought it was very strange, yeah.

9  
10 MR. LIGHT: Okay. But, despite the fact that it always bothered you, again,  
11 you never went to any type of law enforcement to report what you had seen, isn't  
12 that correct?

13 MR. HOLEN: Well, you know, what was it, three years after then they had  
14 him locked up; what for? When I was asked about it I have always told the story  
15 and it has never changed. Here we are you know.

16  
17 MR. LIGHT: Well, you were aware that when Barry Beach was going to  
18 trial in 1984, correct?

19  
20 MR. HOLEN: Yeah, I guess I did.

21 MR. LIGHT: Well that was a pretty big deal in that county wasn't it? And  
22 again, knowing the information ... You were aware that he was being prosecuted  
23 for the death of Kim Nees right? Yet knowing that that was going to trial, again, at  
24 that time you never went to law enforcement, did you?  
25



1 MR. HOLEN: No.

2 MR. LIGHT: And, you were aware that Mr. Beach was convicted of the  
3 homicide of Kim Nees and was basically sentenced to life, correct?

4 MR. HOLEN: Yeah.

5 MR. LIGHT: And, knowing that information that you had with Kim Nees  
6 being down at the location where she was murdered with other people, you never  
7 went to law enforcement did you?  
8

9 MR. HOLEN: Truthfully, I didn't even know that it meant anything by  
10 seeing her until somebody asked me.  
11

12 MR. LIGHT: Now, back in 1979 you knew Roosevelt County Sheriff John  
13 Grainger, correct?  
14

15 MR. HOLEN: Sure. I knew him.

16 MR. LIGHT: Weren't you married to one of his cousins?  
17

18 MR. HOLEN: Yes.

19 MR. LIGHT: And, wasn't he a friend of yours?  
20

21 MR. HOLEN: I am not a friend of John Grainger's, no.

22 MR. LIGHT: Were you back then?  
23

24 MR. HOLEN: No.  
25

1 MR. LIGHT: Okay. After Barry Beach was convicted and sentenced to  
2 prison basically for the rest of his life did you ever go to Sheriff Grainger who is  
3 ...

4 MR. HOLEN: Dean Mahlun was the sheriff in 1979, wasn't he? Or Don  
5 Carpenter was the sheriff.  
6

7 MR. LIGHT: Okay. Well, at anytime did you go to former sheriff Grainger  
8 and talk to him about what you knew about this case?  
9

10 MR. HOLEN: No.

11 MR. LIGHT: Now sir, despite the fact that you have indicated one of the  
12 first questions I asked you is that you were aware of these rumors and gossips in  
13 Roosevelt County that this crime was committed by this gang of girls. But, you are  
14 telling us that despite the fact that you saw Kim Nees with some girls on June 16,  
15 1979, you never went to law enforcement with that information, correct?  
16

17 MR. HOLEN: I seen them at Conoco.

18 COURT: Wait a minute. Let's back up here. Who did you see at Conoco?  
19

20 MR. HOLEN: Steven Grayhawk and Bobby Atkinson were there.

21 COURT: Did you ever testify that the people you saw in the pickup were  
22 girls?  
23

24 MR. HOLEN: I can't remember if I did in Deer Lodge or not. I have  
25 always said they looked like girls to me. What I have always said is it looked to

1 me like there was a guy sitting by the door and there was a small person sitting on  
2 the passenger side with a visor on and that was the only one that looked like a guy  
3 in the pickup is what I have always said.

4 MR. LIGHT: So, it could have been Barry Beach in the truck for all you  
5 know?  
6

7 MR. HOLEN: Yeah.

8 MR. LIGHT: And, you still never went to law enforcement, correct?

9 MR. HOLEN: Like I said, I didn't; no I didn't.  
10

11 MR. LIGHT: Can I have just a second Your Honor to go over this. Mr.  
12 Holen, do you recall giving your testimony at the clemency hearing?

13 MR. HOLEN: Sure.

14 MR. LIGHT: Do you recall at that time when asked a question about the  
15 five people that you indicated they were girls?  
16

17 MR. HOLEN: I think I did yes.

18 MR. LIGHT: And again, that wasn't in your statement and that is not what  
19 you are testifying today is it?  
20

21 MR. HOLEN: I was trying to go by the statement, but I will say it was girls,  
22 yeah.  
23  
24  
25

1 MR. LIGHT: But again, you didn't say that in 2002. And the Judge just  
2 asked you and you indicated it wasn't girls. Which one was it? Was it boys or was  
3 it girls?

4 MR. HOLEN: There was a guy sitting by the door and it was girls.

5 MR. LIGHT: There was a guy sitting by the door?  
6

7 MR. HOLEN: The guy was sitting by the passenger side door and he had a  
8 girl on his lap that looked to me like they was ... Their hair was all long and stuff.  
9 I would say that Kim Nees was also driving.  
10

11 MR. LIGHT: That is all I have. That is enough Your Honor.

12 (REDIRECT EXAMINATION OF RICHARD HOLEN)

13 MR. CAMIEL: Mr. Holen when you were at the Conoco station, that was a  
14 couple days after the murder?  
15

16 MR. HOLEN: Two or three, yeah. It was real close. It wasn't very long.

17 MR. CAMIEL: And Steve Grayhawk was on duty in uniform?

18 MR. HOLEN: Yes.  
19

20 MR. CAMIEL: And Bobby Atkinson, also on duty?

21 MR. HOLEN: Yes.  
22

23 MR. CAMIEL: And, were they going around asking people if they had seen  
24 anything?  
25

1 MR. HOLEN: Bobby was a little ways back. I don't even remember if I  
2 talked to him, but I know I talked to Stevie Grayhawk. Bobby was in, I think, a  
3 blue car, and Stevie was in a tribal outfit.

4 MR. CAMIEL: Okay.

5 MR. HOLEN: I can't ... Something like that.

6 MR. CAMIEL: Were they going around asking people if they had seen  
7 anything?  
8

9 MR. HOLEN: They were both at the station. I don't know what they were  
10 doing.  
11

12 MR. CAMIEL: Did Steve Grayhawk come up to you and ask if you had  
13 seen anything?  
14

15 MR. HOLEN: He walked up to me and asked me.

16 MR. CAMIEL: If you had seen anything?

17 MR. HOLEN: Right.

18 MR. CAMIEL: And what did you tell him?

19 MR. HOLEN: I told him just what I had told you.  
20

21 MR. CAMIEL: You told him you had seen the Nees pickup truck?  
22

23 MR. HOLEN: Yes.

24 MR. CAMIEL: And you told him where?

25 MR. HOLEN: Yes.

1 MR. CAMIEL: And you told him that there was a cab full of people?

2 MR. HOLEN: Yes.

3 MR. CAMIEL: Did you tell him where you saw it turn off?

4 MR. HOLEN: I don't even know if it went that far. He said he was gong to  
5  
6 get back to me, jumped in his car and left.

7 MR. CAMIEL: Okay. And then, you never heard back from him again?

8 MR. HOLEN: Never.

9 MR. CAMIEL: And this is the Steve Grayhawk that is Maude Grayhawk's  
10  
11 father?

12 MR. HOLEN: Father.

13 MR. CAMIEL: Thank you.

14 COURT: Re-cross?

15  
16 (REXCROSS EXAMINATION OF RICHARD HOLEN)

17 MR. LIGHT: Just a couple questions and I will be done Your Honor. So,  
18  
19 you indicated several times during cross examination that you didn't think this  
20  
21 information was important at the time, but you certainly thought it was important  
22  
23 with Mr. Grayhawk when you asked him, when he asked you what you knew, you  
24  
25 told him at that time, didn't you? So you must of thought it was important?

MR. HOLEN: Well, why didn't they come back?

1 MR. LIGHT: Isn't the question why you didn't take it a step further and go  
2 to law enforcement, sir?

3 MR. HOLEN: Well, I suppose it would be, but I mean I ...

4 MR. LIGHT: Now today you have said that it was girls in the car. Do you  
5 recall being interviewed on the Dateline show?  
6

7 MR. HOLEN: Yeah.

8 MR. LIGHT: Do you remember that show was broadcast across the  
9 country?  
10

11 MR. HOLEN: Yes.

12 MR. LIGHT: Did you watch it?

13 MR. HOLEN: Yeah.

14 MR. LIGHT: At some point on that show you told Keith Morrison, the  
15 Dateline correspondent, that you had seen these people in the vehicle; in the pickup  
16 truck, correct?  
17

18 MR. HOLEN: Yes.

19 MR. LIGHT: And do you recall him asking you can you tell us are they  
20 boys, are they girls, do you recall that?  
21

22 MR. HOLEN: I think I said girls, didn't I?

23 MR. LIGHT: You said you couldn't tell sir.

24 MR. HOLEN: Okay.  
25

1 MR. LIGHT: So again, that is what you told Keith Morrison, correct?

2 MR. HOLEN: Sure.

3 MR. LIGHT: And that is different from what is in your statement and  
4 different from today, correct?

5  
6 MR. HOLEN: As we sit here I can still see the silhouettes. I mean, I was  
7 close. I was really close to it.

8 MR. LIGHT: But, you have to agree you have changed your statement over  
9 time, haven't you?

10  
11 MR. HOLEN: Well if you call that, it's not much.

12 MR. LIGHT: Whether it's boys or girls is not much sir.

13 MR. HOLEN: I would say its girls.

14  
15 MR. LIGHT: Information that you have about a possible homicide is not  
16 much?

17 MR. HOLEN: My story has always been the same.

18 COURT: Is this gentleman under subpoena?

19  
20 MR. CAMIEL: Yes.

21 COURT: May he be released?

22 MR. CAMIEL: We have no objection.

23  
24 COURT: How about the State? I understood you perhaps may want him  
25 back. What do you think now?



1 MR. LIGHT: Can we have just a second to discuss it?

2 COURT: Yeah.

3 MR. LIGHT: I think we are okay Your Honor. We can release him.

4 COURT: All right. You are excused and free to go.

5 MR. HOLEN: Thank you.

6 COURT: Thank you very much. All right. Next witness.

7 MR. CAMIEL: Your Honor, before we call our next witness I would ask  
8 the Court if we could deal with some legal issues involving the next witnesses.  
9

10 COURT: Sure.

11 MR. CAMIEL: The next three witnesses that we would be calling are  
12 Vonnie Brown, J.D. Atkinson and Carl Four Star. Now, as a starting point, Vonnie  
13 Brown and J.D. Atkinson are deceased. They gave their testimony under oath,  
14 subject to cross examination, at the clemency board hearing. We will be seeking to  
15 introduce the transcripts of their testimony given at that hearing. We believe that it  
16 qualifies pursuant to the rule as former testimony. They were sworn in. They were  
17 subject to cross examination. The subject matter was exactly the same as it is here.  
18 The Attorney General's office was present and had the opportunity and did  
19 conduct cross examination of both of the witnesses. I should say all three of the  
20 witnesses, because Carl Four Star was also present. With regard to the deceased  
21 witnesses, Vonnie Brown and J.D. Atkinson, they would be offered as statements  
22  
23  
24  
25

1 against interest for Sissy Atkinson. Now, Sissy Atkinson is not unavailable and we  
2 are not arguing that she is unavailable. She is under subpoena and she is here as I  
3 understand it; she is here outside the courtroom. We would ask the Court to allow  
4 us to call, or put on the testimony of Vonnie Brown and J.D. Atkinson as  
5 statements against interest or pursuant to the catch-all exception. And, if the State  
6 wants to call Sissy Atkinson to cross examine her or to have her deny or admit the  
7 statements, we are able to do that. The whole purpose of the idea of unavailability  
8 or availability has to do with whether the witness is available to be asked about the  
9 statement. The State will have the opportunity to do that as we have subpoenaed  
10 her and we have her here. We believe that the statements that Vonnie Brown and  
11 J.D. Atkinson attribute to Sissy Atkinson are clearly against Sissy Atkinson's  
12 interest. With regard to Vonnie Brown, she indicates that she visited Sissy  
13 Atkinson in Great Falls in 2004. During the visit Sissy Atkinson asked her if she  
14 wanted to know who was involved in the Kim Nees homicide and she said that she  
15 and Maude attacked Kim Nees, kicking her and pulling her hair. Vonnie Brown  
16 came forward in 2007 with a sworn statement and then testified at the clemency  
17 board hearing. Now certainly, a statement that she and Sissy Atkinson and Maude  
18 Grayhawk were involved in the killing of Kim Nees and kicked her and pulled her  
19 hair during the course of that homicide is directly against Sissy Atkinson's interest.  
20  
21 I don't think there could be any question about that. The only question is whether  
22  
23  
24  
25

1 the Court will accept the testimony of Vonnie Brown through her former testimony  
2 as substantive evidence, which we believe the Court should. Similarly, J.D.  
3 Atkinson is the brother of Sissy Atkinson. He is also deceased. He testified at the  
4 parole board hearing under the same set of circumstances that Vonnie Brown did.  
5 He indicates that he also visited his sister in Great Falls in 2003 or 2004 and during  
6 the course of the visit with her she indicated that she was partying down by the  
7 river; a fight broke out. She was present. One girl had a wrench and was chasing  
8 Kim Nees around the truck and she admitted that she was present when all of this  
9 occurred. Her admission that she was down there when this occurred is a  
10 statement against her interest as it puts her, even if she didn't directly say she  
11 killed her or struck a blow, with the people who did at the time that they did and  
12 exposes her to potential accomplice liability. Again, Sissy Atkinson is present and  
13 if the State wants to call her to examine her about these statements they are able to  
14 do that. We have made her available. But, we ought to be able to put on the  
15 statement as substantive evidence. We believe there is sufficient guarantees of  
16 trustworthiness because Sissy Atkinson was making these statements to different  
17 people at different times, but essentially saying close to the same thing, that she  
18 was down there when Kim Nees was killed. In one statement she said she  
19 participated in the killing and the other she said she was there when it took place.  
20  
21  
22  
23  
24  
25

1 COURT: Why wouldn't these be used as impeachment instead of trying to  
2 get them in as separate evidence?

3 MR. CAMIEL: The Court can allow a statement like ...

4 COURT: That isn't an answer to my question.

5 MR. CAMIEL: I understand.

6 COURT: Why wouldn't you be using this as impeachment?

7 MR. CAMIEL: We are asking the Court to accept it as direct substantive  
8 evidence. We believe that it is substantive evidence because there are  
9 circumstantial guarantees of trust- worthiness in the making of these statements.  
10 These are third party confessions essentially, and the Supreme Court has indicated  
11 that a defendant has a right to put on a defense and present this kind of a statement  
12 if there are circumstantial guarantees of trustworthiness. That means ...

13 COURT: Something doesn't jive here. You had the opportunity to bring a  
14 witness, ask her the direct questions, use the testimony of other folks as  
15 impeachment, why are you trying to sort of go around the back door and get this  
16 evidence in another way?

17 MR. CAMIEL: We are trying to present the evidence as substantive  
18 evidence rather than presenting it as impeachment as we believe that we are  
19 allowed to do. The State is not prejudiced in any manner because they have the  
20 ability to call the witness. We have brought the witness here. She is available so  
21  
22  
23  
24  
25

1 they can't claim that there is no opportunity to cross examine the witness on these  
2 statements. And, if they wish to do that they can.

3 COURT: That is a pretty unusual approach. Anything else?

4 MR. CAMIEL: The third witness that I mentioned is Carl Four Star. He  
5 testified at the clemency board hearing. Mr. Four Star is not deceased; he has just  
6 decided that he is not going to honor the subpoena. He submitted an affidavit  
7 again by Mr. Toavs regarding our efforts to get Mr. Four Star here. He was  
8 properly subpoenaed. He received the witness fee and travel expenses to get him  
9 here and he indicated, he contacted Mr. Toavs and indicated that he was going to  
10 disregard the subpoena. He was fearful of his safety. He indicated that after he  
11 testified at the parole board hearing he was beaten up by a couple members of the  
12 Atkinson family. He was fearful that he couldn't be protected if he came here and  
13 testified, and he told us, he told Mr. Toavs during a phone call last week when we  
14 were trying to convince him to obey the subpoena that he would rather take a  
15 contempt than come to Court and risk his safety. We have done everything in our  
16 power having properly served him, provided him with ...

17 COURT: Where is this guy located?

18 MR. CAMIEL: He is in the Wolf Point area.

19 COURT: Why can't I just sent the sheriff and drag his little butt down here?

20 MR. CAMIEL: I don't have an answer.  
21  
22  
23  
24  
25

1 COURT: If he has got a subpoena that is what I am going to order done. I  
2 want this guy found. He is under subpoena. I want him brought here. Okay?  
3 Jason, I want you to send up the appropriate commands up there if there is  
4 anybody left in the sheriff's office, I want this subpoena ... If he is under subpoena  
5 I want him brought here. I want it ASAP, no later than Wednesday. Okay? All  
6 right.  
7

8 MR. CAMIEL: Well, that certainly takes care of Mr. Four Star, but with  
9 regard to the other two ...  
10

11 COURT: Well, I heard argument yet. Okay go ahead.

12 MR. LIGHT: Well Your Honor, thank you on Mr. Four Star. You stole  
13 your argument from me. Is that he is not unavailable, but there is other means that  
14 we are certainly aware of that we have done when people say they are not going to  
15 show up. So therefore, we will wait for Mr. Four Star. I am not sure what is going  
16 on either Your Honor. I have been practicing for twenty-five (25) years and I have  
17 never seen it done the way they want to do it. Rule 804, which is the hearsay for;  
18 as far as statement against interest and the use of former testimony talks about the  
19 declarant is unavailable. She is sitting in the next room over there and they want to  
20 bypass that. He talks about we can call him. This is our chance where we don't  
21 have a burden. We are simply responding. All the burden, the extraordinarily high  
22 burden, is on them. So, how they want to do it this way is absolutely bizarre Your  
23  
24  
25

1 Honor, and I think it is important to note Your Honor that when they talk about  
2 these deceased people who have testified, and I am not saying the Court shouldn't  
3 at some point admit it if we get the right procedure, but yeah, they were subject to  
4 cross examination, but this was a board of pardons hearing. If the Court has read  
5 any of that, evidence was wide open. There was double hearsay, there was triple  
6 hearsay, there were facts assumed. There was so much to say that it was an  
7 effective opportunity for either side to really cross examine when there were no  
8 rules of evidence, and I understand that because the board just wanted to hear  
9 information. I get it. But, to say that that is the former testimony, that is the cross  
10 examination that we have to rely on in this absolutely important, important,  
11 hearing I think bothers me and I would say if the Court does allow it then the Court  
12 should understand that when the Court is listening to that type of testimony from  
13 the board hearing, that one of the decisions he has to make is a new jury would  
14 only be considering admissible, reliable, evidence. And, a lot of what you will  
15 hear if, in fact, they get into the deceased statements from the Board of Pardons,  
16 would not be admissible and would not be reliable so we are a little bit bothered by  
17 that Your Honor. And, there were also exhibits that were offered, you know. So,  
18 if they are going to want to put it in, they should put in the direct, the cross, the  
19 exhibits and everything. But, we are mostly puzzled by the fact that they just want  
20 to ... And when they say they want to put on the evidence, what do you mean?  
21  
22  
23  
24  
25

1 Those people are dead. Are they going to read it? Are we going to sit here and  
2 they are going read the testimony to the record? If that is going to happen, why not  
3 just give it to the Court for the Court's review? Why do we have to have someone  
4 read it into the evidence without calling Sissy; without asking her first? I mean, I  
5 think this procedure is very unique. I have never seen it in all the time I have been  
6 practicing. I am not sure it has ever been done this way before Your Honor and I  
7 think it is unfair to the State Your Honor and I do think, although I certainly  
8 understand the importance and the importance obligation that defense counsel has  
9 or Mr. Beach's counsel, we also have some obligation and a right to fairness as  
10 well Your Honor.  
11  
12

13 COURT: Yes.

14 MR. CAMIEL: Well Your Honor, first, with regard to the issue of this  
15 being former testimony, one of the benefits of this being a Judge proceeding and  
16 not a jury trial is the Court is able to distinguish between admissible and if there is  
17 something, is something inadmissible, although I didn't hear counsel point to any  
18 specific thing that they said was inadmissible. But, they can certainly do that. If  
19 we were to read the testimony in Court, they can enter objection and note to the  
20 Court what they object to at the appropriate time and then the Court can determine  
21 whether or not it is admissible. But, in all other respects, that hearing before the  
22 board, I think if the Court looks at the testimony involved, the exact same issues,  
23  
24  
25



1 the same cross examination was conducted. The same motives for cross  
2 examination by the State were in play. So, I don't believe it is a well-founded  
3 objection to say that it was a clemency hearing and so somehow it shouldn't  
4 qualify as former testimony. Now, with regard to the order of proof that we are  
5 suggesting, what we are telling the Court is we don't believe that we are required  
6 to put Sissy Atkinson on first and call her in order to get her statements in because  
7 we believe that under either the Supreme Court precedent under the due process  
8 clause or under the catch all exception, if the Court finds there is sufficient  
9 guarantees of trustworthiness with regard to the statements, the Court accepts it as  
10 substantive evidence and there is no requirement that we call the ...

13 COURT: Yeah, but isn't that all got to do with unavailability?

14 MR. CAMIEL: Under 803-24, 803-24 which is the catch-all exception,  
15 availability is immaterial and that is the way we are offering this. And so, the fact  
16 that she is here means that the State can call her if they want. I didn't hear the  
17 State claim any prejudice by the order of proof that we have suggested.  
18

19 COURT: Let's take a brief recess I want to do a little research.  
20

21 (RECESS)

22 CLERK: All rise.

23 COURT: Please be seated. All right. Mr. Camiel, why don't you articulate  
24 what you see as the circumstantial guarantees of trustworthiness.  
25

1 MR. CAMIEL: Your Honor, in this case the evidence is going to show that

2 ...

3 COURT: No, just in these two.

4 MR. CAMIEL: Right. Sissy Atkinson made.... J.D. Atkinson is her  
5 brother. He visits her in Great Falls where he indicates that she makes these  
6 incriminating statements to him. They are spontaneous statements that she makes  
7 to him. He talks to her on more than one occasion. She has got no reason to lie to  
8 her own brother in making these kinds of statements. While she was in Great Falls  
9 she also visited with Vonnie Brown and made similar statements to her. Again the  
10 statements were spontaneous. They were to somebody who was visiting as a  
11 friend. The circumstances of her making the same kinds of statements to two  
12 different people at two different times, both of them she is in a friendly  
13 relationship, either brother or friend, I think suggests to the Court that the Court  
14 can find there is circumstantial guarantees of trustworthiness. There is simply no  
15 evidence that she would say something to these people that wasn't true where it is  
16 a statement against interest. The circumstances of the statements both times are  
17 visits to her own home. The fact that she made these statements on multiple  
18 occasions I think, in and of itself, cross corroborate each other.

19 COURT: All right. Well the Montana Supreme Court has made it fairly  
20 clear that this kind of testimony is admissible if the District Court determines that  
21  
22  
23  
24  
25

1 the circumstantial guarantees of trustworthiness are in place. With regard to the  
2 brother, clearly he is not a disinterested person. But, the statements against interest  
3 would qualify for the circumstantial guarantees of trustworthiness. With regard to  
4 the other lady, the best I understand is not only she is a disinterested person, but it  
5 is a statement against interest, both of which would qualify them as circumstantial  
6 guarantees of trustworthiness. Given that, although it is a fairly unusual approach,  
7 I will grant the request. But now we have to talk about what kind of limitations.  
8 Are we just going to allow in the whole testimony? Are we going to only allow in  
9 the statements that are truly against interest? The State obviously has some  
10 concerns about other aspects of the testimony, cross examination, etc. So, let's talk  
11 about exactly what we are going to admit.

12 MR. TOAVS: Perhaps one suggestion that I would have Your Honor is if  
13 there are particular portions of the transcript that the State is opposed to that maybe  
14 one efficient way to do that would be for them to identify ...

15 COURT: Are you going to read the transcript or you just going to ask the  
16 Court to take judicial notice of it? What's the scoop?

17 MR. TOAVS: We had asked in our trial brief Your Honor, that we be  
18 allowed to read the transcript because that way we would have a complete record,  
19 that you don't have to go searching for other collateral items in order to submit.  
20 And, it seems to me that reading the transcript would be a way of doing this and  
21  
22  
23  
24  
25

1 address the State's concerns that maybe some of it is objectionable and not  
2 admissible. But, we have not had the opportunity to understand whether those  
3 concerns apply to these two statements in the first place and secondly if they do  
4 apply, what portions of the transcripts would be objected to.  
5

6 COURT: Well, I am not inclined they have to sit around ... This is not a  
7 jury trial. We don't have to read that stuff to me. I can read it on my own. What  
8 is the State's take on this?  
9

10 MR. LIGHT: Well Your Honor, I guess we don't have a problem with if  
11 they want to admit the direct of these people, the cross examination of these people  
12 and any and all exhibits that were admitted through them for the Court to take  
13 judicial notice. We don't think they should be read Your Honor. We think that is  
14 a waste of time to be quite frank Your Honor, and that the Court can view these  
15 and again with the understanding that we have no problem with the Court  
16 understanding it may not be admissible and you can certainly make that decision as  
17 you review these Your Honor.  
18

19 COURT: All right. I want petitioner then to present to the Court in a packet  
20 form, the testimony, the cross, and the exhibits for these two individuals. The  
21 Court will consider it to be evidence presented at this trial, subject to potential  
22 rules on objectionable materials that the Court may make.  
23  
24  
25

1 All right. Now the third individual. Let's talk about him. Just give me one  
2 more time what the third individual is all about.

3 MR. CAMIEL: Your Honor, the third individual is Mr. Four Star and the  
4 Court has ordered that he be ...

5  
6 COURT: Oh yeah. I have done an arrest warrant and they are going after  
7 him. Okay. So, next witness.

8 MR. CAMIEL: If we could have just a second Your Honor.

9  
10 MR. TOAVS: Your Honor, given the Court's rulings and given that we  
11 need to wait for Mr. Four Star to arrive, at this point, Your Honor, we request that  
12 we be allowed to put on the three witnesses that I mentioned to you when we first  
13 began this hearing and those are, first of all, Bobby Atkinson, secondly Richard  
14 Leo, and third of all, Paul Kidd. In terms of these witnesses Your Honor, we  
15 indicated that we would take these up one at a time when we got to that point.  
16 Your Honor, we believe that the evidence that you have taken so far, although we  
17 haven't heard from Carl Four Star, establishes the first four elements of the Clark  
18 test and we would now call Bobby Atkinson to testify about a matter that is not  
19 new evidence under the Clark test, but the significance of that, and the reason that  
20 we are getting into that today is that his testimony, while not new, the significance  
21 of it did not become apparent until the new evidence concerning Maude  
22 Grayhawk's involvement in the murder was known. Bobby Atkinson will testify  
23  
24  
25

1 that he was the acting chief of police for the city of Poplar at the time of the  
2 homicide and that members from the Roosevelt County Sheriff's department  
3 requested his permission to store certain evidence in the Judge's chambers. The  
4 police station is one building in Poplar. The night of the homicide, after it was  
5 collected and that he had secured the door of the room to this, the door to this room  
6 with double locks and had posted a sign on the door saying do not enter evidence is  
7 in here; if you need to use the restroom, which happened to be located inside,  
8 please use your own or go across the street to use the restroom. And that the next  
9 morning he found that his subordinate officer Steve Grayhawk, who is the father of  
10 Maude; Maude's father had forcibly kicked in the door to the room and gained  
11 access to it overnight while the deputies were gone. It is true that our  
12 understanding is that Bobby Atkinson revealed this information to the prosecutor  
13 during the trial on the third day, second or third day, and that there was a bench  
14 conference concerning the evidence; somebody had gained access to the evidence  
15 room. According to the trial transcript Your Honor, the identity of the person who  
16 accessed the evidence room overnight was not discussed on the record. We don't  
17 have the information whether that information was given by the prosecutor to the  
18 defense attorney outside of the presence of the court reporter, but, on the record,  
19 there is no reference to the identity of the person who had kicked in the door to the  
20 evidence room and so we would call Bobby Atkinson to testify about what he  
21  
22  
23  
24  
25

1 personally observed and what he personally did to secure the evidence and how he  
2 had learned that his subordinate officer, Steve Grayhawk, is the one who had  
3 accessed the evidence room.

4 COURT: All right. Let's just take them one at a time. Go ahead.

5 MS. PLUBELL: Well Your Honor, Bobby Atkinson appears nowhere, not  
6 in the original petition and not in the amended petition. He also has been sitting  
7 here for the entire hearing because he wasn't a witness. So, I don't even know  
8 how we are supposed to defend against this. This is information that happened in  
9 1984. It was brought to Timer Moses' attention; it was brought to the Judge's  
10 attention. Mr. Beach himself could state what officer it was, assuming that people  
11 didn't know that. I mean, this is not new evidence. It is not new evidence at all. It  
12 can't meet that part of the Clark test, not to mention that we didn't even get notice  
13 of it. Had we gotten notice then there are things that we would have done.

14 COURT: Like what?

15 MS. PLUBELL: Well, like perhaps get an affidavit from Marc Racicot.  
16 Perhaps we would have found it necessary to subpoena Steve Grayhawk.

17 COURT: So, you are basically claiming surprise?

18 MS. PLUBELL: Well, first we are claiming it is not new evidence.

19 COURT: Well, what they are articulating is, is the identity of the person  
20 accessing ...  
21  
22  
23  
24  
25

1 MS. PLUBELL: There is no proof of that. They are relying on ... They are  
2 just speculating that that is what the record shows.

3 COURT: Do you have anything to show contrary?

4 MS. PLUBELL: No I don't and I have no reason to do that because I didn't  
5 even know they were bringing this up. This is the very first we have heard this,  
6 that they intended to do this at this hearing.  
7

8 COURT: Today?

9 MS. PLUBELL: Yes.

10 COURT: Mr. Toavs?

11 MR. TOAVS: Your Honor, Bobby Atkinson testified at the clemency  
12 hearing and we are not contending that it is new evidence, but it is evidence that  
13 the significance of which we believe is given by the declaration that Maude  
14 Grayhawk made concerning her involvement in the murder. This is her father who  
15 broke into the evidence room that night.  
16  
17

18 COURT: I am aware of that.

19 MR. TOAVS: Okay. So, first of all he testified at the clemency hearing and  
20 now we don't find him on our list of new witnesses in the petition because he is not  
21 a person that is going to ... We don't contend it is new evidence. We don't have  
22 any evidence whether, outside the presence of the court order, whether Mr. Racicot  
23 did or did not disclose the name. In fact, we have no reason to believe that he did  
24  
25



1 not, but the significance of the identity of the person who entered the room was not  
2 apparent until the new evidence was discovered. And the second thing Your  
3 Honor, is that we are offering Mr. Atkinsons ...

4 COURT: Just a minute please. You are saying it is not new evidence.  
5 What is it if it is not new evidence?  
6

7 MR. TOAVS: Well, Your Honor ...

8 COURT: Isn't that the whole purpose of this hearing is new evidence? That  
9 is what the Supreme Court said on remand.  
10

11 MR. TOAVS: I think where we are at this point and time with this witness  
12 Your Honor, is under the fifth Clark factor which requires the Court to view what  
13 impact would the new evidence have on a new trial with a new jury.  
14

15 COURT: But, this isn't something about well, you know, can we take new  
16 evidence if we add things to it and give that to a new jury. It is we take just this  
17 evidence.  
18

19 MR. TOAVS: Well Your Honor, our understanding of the Montana  
20 Supreme Court decision is that the District Court is to evaluate what effect the new  
21 evidence would have, looking prospectively at a new trial. We have argued, and I  
22 don't want to repeat myself Your Honor, but we have argued that in evaluating  
23 what impact would the new evidence have on a new jury at a new trial, you would  
24 do a couple of things. First of all, you would envision a new trial without any  
25

1 constitutional error. You would envision a new trial where the defense has the  
2 opportunity to bring in evidence that, for example, Mr. Atkinson's testimony, the  
3 significance of which wasn't known at the time of the trial, but would be presented  
4 in a subsequent trial.

5  
6 COURT: Is that new trial in your perspective a truly *denovo* trial or it is  
7 limited to the basis of the evidence that was presented in the petition?

8 MR. TOAVS: It is a *denovo* trial Your Honor because ...

9  
10 COURT: Totally *denovo*?

11 MR. TOAVS: I believe so Your Honor because you have to determine  
12 whether a jury acting reasonably; whether there is a reasonable probability that  
13 they would reach a different outcome.

14  
15 COURT: Yeah, but that statement is tied in with; based on the new evidence  
16 presented. And, you are saying this is not new evidence. You can't bifurcate those  
17 two things and say you know its new evidence, it's based on new evidence, and  
18 then you evaluate it with a new jury and then say, oh by the way, you will give  
19 other things to the new jury too.

20  
21 MR. TOAVS: Well, in evaluating what the new trial would like, you would  
22 start with what does the prosecution's case consist of. Then you would look at  
23 what is the defense case ...  
24  
25

1 COURT: No, you evaluate it based on the new evidence. The new evidence  
2 presented in the petition. That is what the Supreme Court was saying. I find the  
3 petitioner's argument fascinating and interesting, but I think you are going beyond  
4 the scope of what is allowed by this Court when we look at new evidence, and then  
5 you take that new evidence and prospectively look at what a jury might do with  
6 that new evidence; not that new evidence and something else because that is so  
7 speculative.  
8

9 MR. TOAVS: Well, there certainly ... The Supreme Court recognized that  
10 application of the fifth Clark factor is going to be the most difficult task for any  
11 District Court sitting in a hearing like this. From our perspective Your Honor,  
12 when you envision what the new jury might do, it is only fair to consider that the  
13 new jury would not, would, hear the types of evidence that we have to present.  
14  
15

16 COURT: So, you are saying it would go beyond the new evidence, that the  
17 Supreme Court asked me to look at? The new evidence presented in the petition?  
18

19 MR. TOAVS: Well, we think it goes to the fifth Clark factor. What would a  
20 jury do at a new trial and that is part of what, you know, that is the difficult part of  
21 what the District Court has to grapple within this case Your Honor.  
22

23 COURT: Nice dance. Nice dance. All right. Let's hear from the State.

24 MS. PLUBELL: Your Honor, it is just not new evidence and if it is not new  
25 evidence, it doesn't come in. They have admitted it's not new evidence. It would

1 be patently unfair to the State to allow in evidence that is not new. And, if that is  
2 going to be the standard, then I don't know why everybody doesn't open up their  
3 trials and say, 'well, I got this little bit of new evidence and then when I do my trial  
4 I am going to do a super, good, better job this time with all this other evidence'.

5  
6 COURT: And, are you representing to the Court that this testimony of Mr.  
7 Atkinson is not even in the amended petition?

8 MS. PLUBELL: No.

9  
10 COURT: Yes you are representing it.

11 MS. PLUBELL: Yes, I am sorry Your Honor. I am a little tired.

12 COURT: Me too. Conclusion ... As a result, we remand Beach's petition to  
13 the District Court to conduct an evidentiary hearing "on the newly discovered  
14 evidence alleged in Beach's petition". That is it. No, you may not bring Mr.  
15 Atkinson. Next witness that you are proposing.

16  
17 MR. CAMIEL: Well Your Honor, respecting the Court's ruling with regard  
18 to Mr. Atkinson, we have made the same at the beginning of the hearing today we  
19 made the same argument with regard to Dr. Leo.

20  
21 COURT: Is Dr. Leo..... you would acknowledge and represent to the Court  
22 that it's not new evidence as presented in the petition?

23  
24 MR. CAMIEL: It is not in the petition.

25  
COURT: Is it in the amended petition?

1 MR. CAMIEL: He is not named in the amended petition because the type of  
2 evidence that he would present we anticipated, and we ... We anticipated the  
3 argument that we were going to make to the Court which is that at a new trial, and  
4 I don't want to repeat Mr. Toavs' argument. The Court has heard it.  
5

6 COURT: No, I understand. It is a fascinating argument and I don't mean  
7 the term dance disrespectfully. I think that you all are doing an exceptional job of  
8 trying to articulate for the Court a reasonable legal position. I just happen to not  
9 agree with it.  
10

11 MR. CAMIEL: I understand and I wanted to further explain and this may  
12 get into, maybe it's premature, but get into the arguments that we are making about  
13 the amended petition. When we filed the original petition on January 18 of 2008  
14 we filed it on that date because, as we argued to the Supreme Court, we believed  
15 that the one year time limit applied to Mr. Beach's new evidence and we had to get  
16 it filed within a year of discovering any of the new evidence that we had  
17 discovered. Now, ultimately the Supreme Court said that one year didn't apply to  
18 him because his conviction was way back in 1983 and there was a different time  
19 limit back then. But, that is why we believed we were required to follow at that  
20 time. After we filed the original petition ...  
21  
22

23 COURT: Wait a minute. You are telling me that as experienced legal  
24 counsel you weren't aware that that new statute didn't apply to this old conviction?  
25

1 MR. CAMIEL: We were ...

2 COURT: That is what the Supreme Court said. It's applied to your  
3 application, not a one year.

4 MR. CAMIEL: We were concerned that we were going to be held to the  
5 one year and because of that concern, we filed when we did. Now the Supreme  
6 Court had the case from the time that we filed for fourteen months. During that  
7 fourteen month period, other witnesses came forward and we learned of additional  
8 evidence and those are the witnesses that we named in the Proposed Amended  
9 Petition. We didn't know of those witnesses when we originally filed the petition  
10 on January 18<sup>th</sup> of 2008. So, those are people who came up later, and because we  
11 had already filed the petition, our only avenue was to seek to amend the petition  
12 pursuant to the statute that allows the one-time amendment to the petition. And so  
13 we went through the argument with the Court back in October and submitted the  
14 Proposed Amended Petition naming those additional witnesses. We didn't know  
15 of the witnesses before then and I don't know if the Court wants us to get into, at  
16 this point, arguing about the diligence or the specifics.

17 COURT: Have we resolved the matter of Mr. Leo and Mr. Kidd? I mean,  
18 are you acknowledging that both of those are not new evidence?  
19

20 MR. CAMIEL: I am acknowledging that they are not new in the sense that  
21 we didn't name them in the petition and it is our belief that at a new trial, for  
22  
23  
24  
25

1 example, we believe that Dr. Leo's testimony would be admissible at a new trial.

2 If this Court were to grant Mr. Beach a new trial, vacate the conviction, then a new  
3 trial is wide open and the State, if they have any new evidence, would get to  
4 present it against Mr. Beach and Mr. Beach would get to present whatever  
5 evidence ...  
6

7 COURT: Well, my ruling isn't prohibiting that. I mean, I allowed them in  
8 this hearing because of the remand, but if I declare that there is a need for a new  
9 trial, it is open game, right?  
10

11 MR. CAMIEL: That is true, but what we believed, based on our reading of  
12 the Supreme Court decision, that this Court was required to do was to first look at  
13 the original petition and go through the first four Clark factors. Was it discovered  
14 since trial? Could it have been discovered sooner? Is it merely impeaching? And  
15 whether it is cumulative and whether it is material; those first four factors. And  
16 then, when the Court got to the fifth factor, the Court had to expand its analysis  
17 and had to go beyond just the new evidence and then do the prospective viewing of  
18 what a new trial would look like.  
19  
20

21 COURT: Based on that new evidence. We are going to be in respectful  
22 disagreement about that.  
23

24 MR. CAMIEL: We are Your Honor, and I appreciate that. So, we can't  
25 argue that Mr. Kidd is new evidence, but we would argue that a new jury would

1 hear that and so the Court would then have to consider, is there a reasonable  
2 probability of a different outcome at a new trial if you combine the new evidence  
3 with other evidence that would be presented at the trial.

4 COURT: Well, you know, I am going to be fascinated to see what they say  
5 about my ruling, but I am sticking by it. You know, it is one of the few times you  
6 can rely on precise language and hope that it means something.

8 MR. CAMIEL: I understand Your Honor.

9 MS. PLUBELL: Just a point of clarification. Is that with respect to both  
10 ...?  
11

12 COURT: All three.

13 MS. PLUBELL: And, just for the record, with respect to Mr. Kidd, well  
14 with respect to the whole confession issue, that is also *res judicata* because every  
15 Court has considered the voluntariness and whether or not the confession was  
16 false. Number two, with respect to Mr. Kidd, that also can't meet the factor of  
17 Clark about being merely cumulative, or impeachment evidence because the sole  
18 purpose of calling him would have been to impeach the officers from Louisiana,  
19 not on the main confession, but about a statement he made later where he said it  
20 was only the Montana homicide that I was involved in.  
21

22 COURT: All right. Well, I will let the record reflect those arguments, but I  
23 am sticking by my ruling.  
24  
25



1 MS. PLUBELL: Thank you Your Honor.

2 COURT: So, now I guess we have moved on to whether we are going to  
3 have the amended petition, witnesses and exhibits, right?

4 MR. CAMIEL: That would be our next proposal Your Honor. We have the  
5 amended petition witnesses available and would argue that we be allowed to  
6 amend.  
7

8 COURT: Do you have ... Is there any other witnesses, any other evidence  
9 from the petition presented to the Supreme Court on which the remand was based?  
10

11 MR. CAMIEL: We have two. There are two witnesses we attempted to  
12 present Don O'Connell and the Court indicated it wasn't going to allow us to  
13 present that testimony because the Court didn't believe that it qualified as non-  
14 hearsay evidence. We had argued that it was state of mind and the Court told us it  
15 disagreed with us.  
16

17 COURT: Right.

18 MR. CAMIEL: The other evidence that we have is another witness who is  
19 deceased. Unfortunately, four witnesses died since the parole hearing. Roberta  
20 Ryan. She testified at the parole hearing. Her testimony was not hearsay in any  
21 sense. It was an eye witness observation of her. She owned a bar in Poplar called  
22 the Bum Steer. On the night that Kim Nees was killed she observed certain young  
23 women come into her bar between midnight and closing time and those women  
24  
25

1 included Sissy Atkinson, Maude Grayhawk and others who were all ... She was  
2 chasing them out of the bar all the way up to closing time. And, the evidence  
3 would indicate that they were out and about that night at the time and in the area at  
4 the time that Kim Nees was murdered.

5  
6 COURT: Now, this is a witness, or evidence, that is based on the initial  
7 petition, correct?

8 MR. CAMIEL: Yes.

9  
10 COURT: And, is this the sort of evidence that we would be taking the trial  
11 testimony, or the testimony and the cross examination and the exhibits like I did  
12 with the others?

13 MR. CAMIEL: Exactly.

14 COURT: The State's position on this particular individual?

15  
16 MS. PLUBELL: With the provision Your Honor, that with respect to  
17 Roberta Ryan, of course we don't think that it is new and the difficulty is is that  
18 there are things that we could question her about that we can't now because she is  
19 deceased. But, we don't mind if the Court considers her testimony from the  
20 clemency hearing. We just don't believe it is new and the cross, the whole thing,  
21 the direct and cross.  
22

23 COURT: Well, what we will do then is, I believe we will recess for today.  
24 We will take up tomorrow morning and I want to hear more from the State about  
25

1 his 'not new' with regard to this latest witness through previous testimony. And  
2 then we will sort of launch into a full scale review of the amended petition and  
3 arguments about why that meets the Clark factors. And also, I have some  
4 confidence that the Roosevelt County Sheriff will have that one gentleman here  
5 tomorrow probably.  
6

7 MS. PLUBELL: Your Honor, just a point of clarification since everyone is  
8 going to a lot of trouble to get Mr. Four Star here. Of course, our belief is that they  
9 must call Sissy before they get in anything through Mr. Four Star because, once  
10 again, he is claiming that he heard Sissy make statements.  
11

12 COURT: Yes.

13 MR. CAMIEL: Well, Mr. Four Star is the same type of witness as Vonnie  
14 Brown and J.D. Atkinson; Mr. Four Star, but in a different scenario. He was a co-  
15 worker of Sissy Atkinson and has testified that he heard her make statements  
16 indicating that she was involved in the Kim Nees' murder; that is was too bad  
17 about Barry Beach, that he is innocent; that she committed the perfect crime. The  
18 circumstances under which she made that kind of a statement, she made it at a  
19 work place. It was a spontaneous statement. She made it to somebody who was  
20 standing next to her.  
21

22 COURT: A disinterested person?  
23  
24  
25

1 MR. CAMIEL: Yes. She was talking to a fellow that was standing next to  
2 and Mr. Four Star overheard the statement and was impacted by that statement.

3 COURT: Well, I think that based on previous decision, I need to be  
4 consistent, but also I think that the case law clearly allows for this sort of evidence  
5 and the Court is going to find that the circumstantial guarantees of trustworthiness  
6 for this particular Four Star individual are that it was a disinterested person and a  
7 statement against interest. Now, for some reason, if we find out that the statements  
8 are not against interest then the Court might reevaluate, but for now that is my  
9 ruling. All right we will adjourn. We will reconvene tomorrow morning at eight-  
10 thirty (8:30).  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**CERTIFICATE**

1 STATE OF MONTANA )  
2 : SS.  
3 County of Fergus )

4 I, Deidre Dietrich, the official Court Reporter within and for the 10<sup>th</sup> 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.  
8  
9  
10  
11  
12  
13  
14

15 \_\_\_\_\_  
16 Deidre Dietrich  
17 Official Court Reporter  
18  
19  
20  
21  
22  
23  
24  
25