

## On Burden of Proof

The prosecution always retains the burden of proving Graham was at the scene of the crime at the time of the crime and all Graham needs to do is raise a reasonable doubt.

Vol 3 of 10 – S. Dakota Attorney General Marty Jackley’s opening statement in Graham’s trial

Page 53 “approximately December 10<sup>th</sup>” “they arrive at Thelma Rios’ empty apartment near Rapid City.” “the next day, there is a place in Rapid City called WKLDOC” .

Page 54 – “Anna Mae Aquash is brought to WKLDOC for further discussion of what to do with the informant.”

S. Dakota Attorney General Marty Jackley continues his misstatements in his closing arguments of at Graham’s trial.

Vol 9 of 10 Page 87 – “Ladies and Gentlemen, I talked to you about the felony murder kidnapping. With respect to the premeditated murder in count two, the state again has to prove that a material act occurred in Pennington County. That’s WKLDOC, that’s Thelma Rios, that this happened on or about or near the time frame of Dec. 12 through Dec 14<sup>th</sup>. The state has proven that beyond a reasonable doubt.”

Several prosecution witnesses were called for the purpose of establishing a time line to fit the date Dec. 12, 1975 as the alleged date of Aquash’s death.

All the witnesses to the alleged kidnapping, including Arlo Looking Cloud, Angie Janis, George Palfy, Troy Lynn Yellow Wood, all testified Graham’s involvement ended on Nov 27-28, 1975. This testimony was uncontroverted and came in through the testimony of state witnesses.

Graham’s very legitimate defense, he was not at the place , when or where, the crime was committed.

Vol. 7 of 10 – cross examination of state witness Arlo Looking Cloud Page 24 .

Q The trip you took with John , talk about that trip and that trip alone. That trip took 2 days , correct?

A Yes, sir.

Q And that trip happened Nov. 27 or 28 of 1975, correct?

A Yes, sir.

Q And you can remember that with certainty and you have testified to it on a number of occasions because it correlated to your son’s birthday right?

A Yes, sir.

If it’s established that Graham was not in a position that he could have committed this crime, or could not have been there on or around Dec. 12-14, 1975 is an absolute defense.

Graham argues there is definitely no evidence of any events occurring between the time he left Denver with Anna Mae, Theda Clarke and Arlo Looking Cloud in late Nov 1975 and the time the state alleges Aquash was killed on or around Dec 10 to 12.

Vol 4 of 10 cross exam of state witness George Palfy

P. 235 actual testimony

Q Do you remember what date it was about?

A I do not remember.

Q Do you know what month it was?

A November.

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Q so you are sure whatever happened on this occasion, it was November?

A Yes

Vol 4 of 10 cross exam of state witness Angie Janis

Page 100 actual testimony – Graham trial

Q Were you asked, and I don't know if I asked you, but do you recall about what date this all happened? Your answer, No, I think it was November, but I don't know the date. And the question, is it possible it was even into December? Your answer – No, I don't think so.

A Okay

Q Was that your testimony on that occasion

A Yes

Q And previously when you were asked by Mr. Ecoffey back on July 20, 1994, he told you that he thought Anna Mae had been at Troy Lynn's a full two weeks. Do you remember that?

A No

Q Do you remember telling him that you disputed the time frame and that you think that this happened around Thanksgiving? Do you recall that now?

A Yes

Page 109 Direct exam of state witness Troy Lynn Yellow Wood

Q Can you give me the best estimate or reference point, like to a holiday or something that you can when this happened?

A It was November, I don't know the exact date or anything, it was around Thanksgiving.

The prosecution's time line of the crime taking place on or about December 12-14, 1975 is disputed by their own witnesses.

Cross exam of state witness Angie Janis – she disputed the time frame, happening late November, not December (JT – Vol 4 of 10, Page 100 Line 7-16 – Line 23-25)

Direct exam of state witness Troy Lynn Yellow Wood – it was November, around Thanksgiving (JT Vol 4 of 10, P 108 Line 24-25 – Page 109 line 1-4)

Cross exam of state witness George Palfy – said it occurred in November (JT Vol 4 of 10 Page 261 Line 24-25 – Page 262 Line 10-12)

Cross exam of state witness Arlo Looking Cloud – trip took two days, happened Nov 27 or 28, 1975, it correlated with son's birthday. (JT Vol 7 of 10 Page 24 Line 8-18)

Vol 4 of 10 Direct exam of state witness Troy Lynn Yellow Wood

Page 125 actual testimony

Q Did you see John Graham again?

A I did.

Q Back in Denver?

A Yes.

Q Did you ask any of them what happened?

A No

Q Why wouldn't you?

A Because I just assumed that they took her over there and left her there. It was a really short length of time, you know, that all this happened. It wasn't very long.

Vol 4 of 10 Cross exam of state witness Troy Lynn Yellow Wood

Page 147 actual testimony

Q You didn't do any follow up after that did you?

A I didn't because I got a call from another person in S. Dakota who said that Anna Mae was in Oglala.

Q She was safe in Oglala?

A That's what this person said, yes.

Q Okay, and so you heard from somebody you know is S. Dakota that after Ms. Aquash left your house, whenever that was, some time at a later date, she was still doing okay in Oglala?

A That's what this person told me, yes.

Transcript from Arlo Looking Cloud's trial (2004)

Pg 257 – Direct exam of Troy Lynn Yellow Wood

Q Do you remember when the next time it was you saw John Graham?

A I don't know the exact date, but I was soon after that time. I don't know the exact time, but it was soon, like within a week or something like that I would say.

Q Did you ever ask Mr. Graham what had happened?

A No.

Q Why not?

A Because I had heard, or I had talked with somebody in S. Dakota and they said that Anna Mae was in Oglala, so I didn't think there was any concern.

In the related trial of Richard Marshall (2010)

Page 94 Direct exam of Troy Lynn Yellow Wood

Line 5 A Sometime shortly after you know, I couldn't say how many days, but a short period of time, maybe two days or three days, John Boy was back.

Line 13 Q So are you saying when he and Arlo Looking Cloud and Theda and Anna Mae left in the Pinto he was gone for three days, is that what you are saying?

A Uh-huh

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Q You have no recollection of her being tied up, is that fair to say?

A Yes

All the witnesses that testified, George Palfy, Troy Lynn Yellow Wood, Angie Janis and Arlo Looking Cloud all put this event happening at the end of November. George was positive about it, Angie was positive about it. Arlo said the one thing he could say that he could connect this to was his son's birthday. The

only wiggle room on that was Troy Lynn. She said Anna Mae came on November 24<sup>th</sup> and she stayed a week plus or minus a day.

This is important because it establishes this trip that Graham took with Anna Mae, happened at the end of November and not in December 1975.

There is a two week gap the prosecution has never provided any evidence on the two weeks they cannot explain between the end of November to mid December, they have no explanation for events or where Anna Mae was or what she was doing in that time frame.

There is absolutely no evidence of any kind that places Graham anywhere in S. Dakota on or around December 12-14, 1975 let alone at a crime scene.

Vol 9 of 10 S. Dakota's Attorney General Marty Jackley closing argument

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

It is error for the prosecutor to make statements in closing arguments that are unsupported by evidence, to mistake evidence, or to misquote state witness testimony.

Candy Hamilton was the only state witness to testify as to what happened at the WKLD house in Rapid City.

In determining the severity of the prosecutor's misstatement, you must compare it with the witness's actual testimony.

Vol 5 of 12 – Cross exam of state witness Candy Hamilton

Page 47 actual testimony

Line 7 Q You went upstairs and came down for coffee, correct?

A Yes

Line 13 Q You hear other people, you see Anna Mae?

A Yes

Line 18 Q and you know my client by look at that point?

A Yes

Line 20 Q You would have recognized him if you saw him there?

A Yes

Vol 5 of 10 Cross exam of state witness Candy Hamilton

Page 51 actual testimony

Line 6 Q You indicated you heard voices in this other room?

A Right

Line 9 Q You never heard anybody use the word snitch or informant or anything like that coming through the door?

A I couldn't hear distinct words. It was just voices.

Q Just discussion?

A Yes.

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Line 7 Q the use of the term interrogation on Page 1,069, that was during an interview conducted in June of 200, the Serle Chapman interview?

A That would have been about right because it was when I was in Vermillion.

Line 12 Q More than 20 years after the incident?

A Yes

Line 18 Q And you didn't say that you saw Anna Mae Aquash being interrogated?

A No

Line 21 Q You did not see Anna Mae being interrogated, did you?

A No, I didn't.

The jury would have been alarmed to learn in the first autopsy of Anna Mae Aquash, supervised by FBI agent David Price, the coroner found that she died from freezing to death and not from the gunshot wound to her head, as a second autopsy determined was the real reason.

The first autopsy also determined that the date of death to be about 7-10 days prior to the discovery of Aquash's body on Feb. 24, 1976. The reliability of this estimate, from a coroner who didn't take into account the bullet in the victim's head, is doubtful. However, it does corroborate the testimony of Candy Hamilton, a prosecution witness who testified that she was in contact with Aquash long after she'd supposedly been killed, and a Feb. 18, 1976 FBI memo in which one of Agent Price's informants reports that he saw Aquash on Feb. 12, 1976. These two "sightings" of the victim occurred about two

months after the prosecution said she was killed and disconnect the alleged kidnapping from the murder.

8/12/08

Memorandum in support of motion to compel discovery

Feb. 18, 1976, FBI agent David Price prepared a memorandum in which he reported that Anna Mae Pictou Aquash was in Allen, S. Dakota on Feb. 12, 1976. This is two months after the government now alleges she was killed.

The witness providing information to Agent Price gave specific information as to the car Aquash was in and the clothes she was wearing. Graham Doc 04092

On Jul 7, 2008 and Jul 18, 2008 Graham requested in writing a non redacted version of this report so that he could locate, interview and subpoena the witness

On Jul 28, 2008 the government responded that the redacted area of the report contained the number of an FBI informant, and they would not provide the informant's identity to Graham.

Sept. 2008 Judge V. Duffy made a ruling to keep "secret" the one witness who could help Graham's defense.

The name of a witness who saw Aquash alive after the government asserts she was dead is material, exculpatory and subject to disclosure. If the informant's testimony will be material to the determination of the case, the informant's identity should be disclosed. The government and the FBI should not be allowed to hide the identity of a witness who claims to have seen Aquash alive months after she was allegedly killed. This witness's identity should be disclosed so Graham can fully investigate his defense. Being prevented from fully investigating and defending himself is denying Graham due process.