UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff,

vs.

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

Defendants.

CR 08-50079

UNITED STATES' RESPONSE TO DEFENDANT MARSHALL'S MOTION FOR PRE-TRIAL HEARING; MOTION IN LIMINE #2

COMES NOW the United States of America, through its attorneys, United States Attorney Marty J. Jackley, and Assistant United States Attorney Robert A. Mandel, and respectfully responds to defendant Marshall's Motion for Pre-trial Hearing; Motion in Limine #2 and states as follows:

1. The defendant seeks to challenge admission of a statement made by him to cooperating witness Sierra where in response to various issues, primarily including that a woman named "Choach" claimed that she had seen Annie Mae Aquash tied up at the home of Marshall, Marshall responded by saying that "Choach got it right." It is his claim that admission of this statement is being offered only pursuant to Fed. R. Evid. 801(d)(2)(B) and is

inadmissible under that rule. The United States resists this motion in its entirety.

2. At the outset, the United States takes the position that while this statement may be admissible under more than one rule, it only needs be admissible under one. This statement is clearly admissible as a statement against interest under Fed. R. Evid. 804(b)(3) which provides:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, ...that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

The defendant's statement falls within this rule and on that basis alone is admissible.

3. It is suggested that the defendant's reliance on Rule 801(d)(2)(B) is misplaced. That would apply if the statements made by the confidential witness speaking to Marshall were being offered other than by the in court testimony of that witness. They are not. *See, United States v. Handy*, 668 F.2d 407 (8th Cir. 1982). If the statements are offered by the United States at trial, the cooperating witness will testify as to those statements and to those that the defendant made. They may also be presented by playing a recording of them. The statements made by the defendant are specifically not hearsay as defined by Rule 801(d)(2)(A) which provides that "A statement is not hearsay if–...The statement is offered against a party and is (A) the party's own statement,..." This statement clearly falls within that category. Candidly, it was also an

admission that the defendant adopted, but it is the position of the United States that this question is not even properly before the court at this time.

4. The defendant also challenges the credibility of the cooperating witness and denies having made any such statement to Sierra. That is a matter to be resolved by the jury that hears the evidence in this case and is improper to raise in this context. Accordingly, defendant Marshall's motion should be in all respects denied.

Respectfully submitted this 28th day of January, 2009.

/s/ Robert A. Mandel

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of January, 2009, I served by electronic transmission, a true and correct copy of the foregoing Government's Response to Defendant Marshall's Motion for Pre-trial Hearing; Motion in Limine #s on:

Dana Hanna
Attorney at Law

John Murphy
Attorney at law

/s/ Robert A. Mandel

Robert A. Mandel